One Sea Lion's Worth—Evaluating the Role of Values in Section 120

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In 1994, the Marine Mammal Protection Act (MMPA) was amended to include a provision that would allow the lethal take of pinnipeds that were causing 'significant negative impact' to salmonid species listed by the Endangered Species Act. Implicit in Section 120 and its placement in the MMPA implementation are competing values in the desire to protect entire salmonid populations at the cost of individual pinnipeds. This article uses the most recent application of Section 120 at Bonneville Dam on the Columbia River to explore the role of interest group values on the interpretation of Section 120, which in turn affected the application of the statute. By analyzing the underlying values of interest groups, this article explores how values affect the various proposed 'solutions' to the Bonneville Dam situation, and suggests reform that will limit the value judgments of the Section 120 process.

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I.
INTRODUCTION

When it comes to the preservation of America's wildlife, there may be no greater protections than those afforded by the Endangered Species Act of 1973 (ESA) and the Marine Mammal Protection Act of 1972 (MMPA). Both acts seek to protect biodiversity by reducing lethal take, habitat destruction, and other direct human impacts on wildlife populations. But humans also have indirect impacts on wildlife, including the creation of peculiar situations where one protected species threatens the survival of another protected species.

A prominent illustration of such a situation occurred in the 1980s, when MMPA-protected California sea lions began to prey on the small steelhead run at Seattle's Ballard Locks. Unable to deter the sea lions from decimating the fish population, wildlife managers simultaneously found their hands tied by the no-take

provisions of the MMPA.[1] Faced with the startling prospect of "predation by a protected species . . . threatening the existence of another species,"[2] Congress added Section 120 to the MMPA in order to allow lethal removal of "individually identifiable pinnipeds[3] which are having a significant negative impact on the decline or recovery of salmonid fishery stocks."[4]

The amendment was not without its critics; environmental groups such as the Humane Society of the United States viewed the amendment as the first step towards a government-authorized cull of marine mammals,[5] an ironic addition to a statute whose goal was to protect the nation's marine mammal populations. Despite these concerns, Section 120's authorization of lethal take of pinnipeds to protect at-risk salmonid populations has not resulted in a 'cull' of marine mammals. Since its 1994 enactment, Section 120 lethal take authority has only been petitioned for and authorized twice, most recently at the Bonneville Dam on the Columbia River where California sea lions prey on ESA-listed salmonid populations.[6] The first use of Section 120 did not even involve any lethal take, as intervention by then-Vice President Al Gore[7] resulted in mercy for the three targeted sea lions, which were shipped via Fed-Ex to Florida's Sea World.[8]

Although the fears of mass mammal kills have not materialized, Section 120 still demands close scrutiny over whether its goal of protecting salmonid populations at the expense of indi-

1. U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-93-204, PROTECTED SPECIES 5–6 (1993), *available at* http://archive.gao.gov/d49t13/150105.pdf.

2. *Id.* at 1.

3. Pinnipeds, or the "flipper-footed[,] refers to the marine mammals that have front and hind flippers." They are made up of three families: seals, sea lions, and walruses. *The Pinnipeds: Seals, Sea Lions, and Walruses*, THE MARINE MAMMAL CENTER, http://www.marinemammalcenter.org/education/marine-mammal-information/pinnipeds (last visited Oct. 24, 2010).

4. 16 U.S.C. § 1389 (2006).

5. Toni Frohoff, *Fish Declines Pinned on Pinnipeds*, 2 WILDLIFE TRACKS (Humane Soc'y of the U.S. and HSUS Wildlife Land Trust, D.C.) 12 (1996) ("Plans recently announced by the U.S. Government . . . reflect a nation- and world-wide movement towards culling marine mammals and signify any increasing threat to marine mammal populations worldwide.").

6. Letter from James H. Lecky, Dir., Office of Protected Res., Nat'l Marine Fisheries Serv., to Roy Elicker, Dir., Or. Dep't of Fish and Wildlife (Mar. 17, 2008), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec-120-LOA-OR.pdf [hereinafter Elicker Letter].

7. Jane Hadley, *Hondo's Gone, as is Lion's Share of Steelhead Loss*, SEATTLE POST-INTELLIGENCER, May 27, 1999, at A1.

8. William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 15 PACE ENVTL. L. REV. 1, 30 (1997).

vidual pinnipeds is a legitimate aim of the MMPA. Most significant is the issue of how conflicting values have affected the interpretation and implementation of Section 120, which is all the more problematic given the statute's mandate for interest group participation.[9] These parties each have their own values, which in turn affect what they view the statute to require. In some cases, parties seeking to protect salmonid populations have advocated for the taking of as many pinnipeds as possible to reduce predation. Such drastic measures are not viewed as a solution in of itself for protecting at-risk salmonid species, but as only one necessary step out of many in a comprehensive management strategy to recover salmonids.[10]

Competing with those who wish to protect salmonids are groups seeking to protect the interests of the sea lions. These groups have viewed Section 120 as scapegoating pinnipeds for human actions.[11] For example, in challenging the lethal take authority at Bonneville Dam, environmental groups argued that the negative effects of pinniped predation on salmonid populations are negligible when compared to direct human impacts, such as fishing and damming of the river.[12] If pinniped predation is pushing salmonid populations to the brink of extinction, it is only because human actions have so reduced the available fish that predation effects are greater than they otherwise would be.[13] Furthermore, pinnipeds are likely at the dams precisely because

9. 16 U.S.C. § 1389(c)(2) (2006).

10. *See* Dirk Kempthorne et al., *Recommendations of the Governors of Idaho, Montana, Oregon and Washington for the Protection and Restoration of Fish in the Columbia River Basin*, NW. POWER AND CONSERVATION COUNCIL, 6 (July 2000), http://www.nwcouncil.org/library/2000/4governors.pdf.

11. *See* Frohoff, *supra* note 5, at 2.

12. *See, e.g.*, Press Release, Kurt Beardslee, Wild Fish Conservancy Position on the Lethal Removal of Sea Lion from the Lower Columbia River (Mar. 24, 2008), *available at* http://wildfishconservancy.org/Sea%20Lion.pdf ("If the take by sea lions (ranging from .4 to 4.2%) is inhibiting recovery, then how can NOAA consider permitting an 'incidental harvest mortality impact' of 12% in 2008, and continue to allow 19% take by the hydroelectric dam operators?"); Nina M. Young et al., *At Point Blank Range: The Genesis and Implementation of Lethal Removal Provisions under the Marine Mammal Protection Act*, 5 OCEAN & COASTAL L.J. 2, 19-20 (2000) ("This tension between the fishing industry and pinniped predation is exacerbated by other factors that have degraded anadromous fish habitat and caused fish populations to plummet, including hydropower projects that bar fish passage and land uses which pollute spawning habitat.").

13. PINNIPED-FISHERY INTERACTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE MARINE MAMMAL PROTECTION ACT, SECTION 120, app. B (2007), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec_120_TF_Rpt_AppB.pdf [hereinafter Minority Opinion].

of the dams' existence—the bottleneck that results from the fish trying to get up the ladders creates a unique opportunity for sea lions to prey on the salmonids, further reducing their population.[14] In short, pinniped predation would not need to be reduced—or might not exist at all—if not for humans, resulting in Section 120 unfairly punishing pinnipeds for what humans have done.

This article thus analyzes the process of Section 120 and the role of interest group values on its implementation. Part I examines the development and statutory requirements of Section 120 in the context of the section's first use at the Ballard Locks. Part II takes an in-depth look at the recent application of Section 120 at Bonneville Dam, the first time pinnipeds were lethally taken under the section. This look will focus in part on the different decisions made by the involved interest groups and government regulatory bodies. Finally, Part III analyzes how the underlying values of interest groups affected the implementation of Section 120 as discussed in Part II, particularly when the goals of Section 120 itself conflicts. It then suggests reform that will limit the value judgments that may be at odds with the overall goals and purpose of the MMPA.

II.
A SEA LION NAMED HERSCHEL—THE ORIGIN OF SECTION 120

A. *Setting the Stage—The Battle at the Ballard Locks*

The battle against the sea lions started innocently enough when in the early 1980s, a California sea lion named Herschel settled himself at Washington's Ballard Locks and began feeding on steelhead trout migrating through the dam.[15] His arrival was viewed with amusement, but amusement quickly turned to alarm when in a few years, sea lion numbers expanded to over forty

14. *See* Declaration of Dr. Andrew Trites in Support of Plaintiffs' Motion for a Stay Pending Appeal, Humane Soc'y of the U.S. v. Gutierrez, 625 F. Supp. 2d 1052 (D. Or. 2008) (No. 08-0357); William W. Kinsey, *Zalaphus (Sea Lion) and Oncorhynchus (Salmon/Steelhead): Protected Predator versus Protected Prey*, 22 NAT. RESOURCES & ENV'T 36 (2007) ("[W]here the returning fish gather to pass through a constricted area, such as a fish ladder at a dam. In such areas, the fish have limited room to move or escape, and predation is easy.").

15. MARK FRAKER, MARINE MAMMAL COMM'N, CALIFORNIA SEA LIONS AND STEELHEAD TROUT AT THE CHITTENDEN LOCKS, SEATTLE, WASHINGTON ii (1994).

individuals consuming more than half of the steelhead run.[16] Recognizing the problem, wildlife managers attempted to deter the sea lions from consuming the remaining steelhead,[17] but often ended up on the losing side. Deterrence methods were varied and for the most part, equally ineffectual. Aversive conditioning with tainted steelhead resulted in little more than the sea lions "quickly learn[ing] to reject the proffer of dead fish from people in yellow suits,"[18] while ten-inch mesh 'sea lion barriers' not only trapped sea lions but the steelhead as well, giving the sea lions another human-made opportunity to exploit the trapped fish[19] at a cost of $250,000.[20] Altogether, conservative estimates of these deterrence efforts show their cost surpassed one million dollars,[21] with little to show for it.

When deterrence failed as sea lions quickly learned to adapt, managers turned to capture and relocation. This also failed, as "due to [their] pronounced homing ability and site fidelity,"[22] the sea lions would return and avoid recapture. One of these sea lions, in fact, earned the nickname 'Rapid Rudy' because of his quick returns.[23] Even distant releases were insufficient—three of six sea lions transported to California returned in a matter of months, while a fourth "compromised by taking up residence in the Columbia River."[24]

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16. Young, *supra* note 12, at 5–6 ("NMFS and WDFW estimated that between 1986 and 1992, California sea lions consumed forty-two to sixty-five percent of the wild winter steelhead run. By 1994, the winter steelhead population had dropped to an all time low of seventy spawners (down from 2,500 spawners in the mid 1980s.").

17. Although the MMPA's take moratorium includes prohibition of 'harassment,' NMFS was able to act under an exception that allowed for "the nonlethal removal of nuisance animals." 16 U.S.C. § 1379(h)(1)(c) (2006).

18. Rodgers, *supra* note 8, at 28.

19. *Id.*

20. Laura L. Manning, *Marine Mammals and Fisheries Conflicts: A Philosophical Dispute*, 12 OCEAN & SHORELINE MGMT. 217, 225 (1989).

21. Young, *supra* note 12, at 8.

22. WASH. DEP'T OF FISH AND WILDLIFE, OR. DEP'T OF FISH AND WILDLIFE, IDAHO DEP'T OF FISH AND GAME, REQUEST FOR MMPA SECTION 120 PINNIPED REMOVAL AUTHORITY 8 (2006), *available at* http://www.dfw.state.or.us/fish/Sea Lion/docs/section120_app.pdf ("During this three-year delay in removing selected individual sea lions, predation by California sea lions continued at the Ballard Locks; the Lake Washington winter steelhead run continued to decline, eventually reaching non-viable levels") [hereinafter States' Request for Removal].

23. Rodgers, *supra* note 8, at 28–29.

24. *Id.*

B. *The Passage of Section 120*

In frustration, the National Marine Fisheries Service (NMFS) looked to lethal procedures, only to conclude "that the MMPA's provisions [did] not authorize the use of lethal measures . . . to resolve the Ballard Locks predation situation."[25] While the MMPA did allow lethal takings to protect public health and welfare,[26] such takings were limited to removing sick or diseased animals from public beaches.[27] Thus, NMFS concluded that interpreting the public health and welfare provision to permit lethal removal of the sea lions at Ballard Locks would fall outside Congressional intent.[28] NMFS also looked into another MMPA provision that would allow lethal taking of nuisance animals,[29] but such provisions would not take effect until the species reached its optimum sustainable population,[30] a magical number that the California sea lion population had not yet reached at the time. In addition, NMFS found that even if the sea lion population "had reached optimum sustainable levels, obtaining a waiver to allow for lethal takings is not automatic and would not be accomplished without a potentially lengthy and contentious process of obtaining public comments on the waiver proposal."[31]

This would change with Section 120, passed as part of the 1994 Amendments to the MMPA. When the MMPA was originally passed in 1972, it "marked a transition in federal wildlife law,"[32] breaking from past environmental laws that focused primarily on regulating hunting and reinforcing state law to instead look at populations and ecosystems as a whole.[33] The MMPA's stated goal is to prevent marine mammal populations from "diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are part."[34]

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25. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 1, at 2.
26. 16 U.S.C. § 1379(h)(1)(B) (2006).
27. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 1, at 7.
28. FRAKER, *supra* note 15, at 22.
29. 16 U.S.C. § 1379(a)(3)(A) (2006).
30. The "optimum sustainable population" (OSP) is defined by the MMPA as "the number of animals which will result in the maximum productivity of the population or species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." 16 U.S.C. § 1362(8) (2006).
31. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 1, at 8.
32. DAVID D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 896 (2002).
33. *Id.* at 897.
34. 16 U.S.C. § 1361(2) (2006).

Congress justified this goal in stating that marine mammals are "resources of great international significance, esthetic, and recreational, as well as economic"[35] value.

The MMPA accomplishes this goal by placing a moratorium on the taking of marine mammals and any trade in marine mammal products unless a take permit is issued.[36] The Secretary of Commerce or the Secretary of the Interior may issue take permits for reasons of scientific research, public display, photography, enhancing survival or recovery of the species, or incidental take in the course of commercial fishing.[37] Section 120 thus creates an additional take exception for individually identifiable pinnipeds not listed as MMPA-depleted or under the ESA[38] that are causing significant impact to the recovery or decline of certain salmonid species. Like the existing take provisions of the MMPA, Section 120 purports to have strict requirements for when a pinniped can be taken, but often fails to explain what those requirements entail.[39]

The Section 120 process begins when states apply for authorization of "lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks."[40] Neither "individually identifiable pinniped" and "significant negative impact" are clearly defined by the statute, although their definitions have a great effect on not only which pinnipeds should be taken, but whether any pinnipeds should be taken at all.[41] Despite this stat-

35. *Id.* § 1361(6).

36. *Id.* § 1371(a).

37. *Id.* § 1371(a)(1-2).

38. *Id.* § 1389(e) ("The Secretary shall not approve the intentional lethal taking of any pinniped from a species or stock that is listed as a threatened species or endangered species under the [ESA]; depleted under this Act; or a strategic stock.").

39. Thirteen years after Section 120 was passed, NMFS was still requesting the Pinniped-Fishery Interaction Task Force to recommend criteria "to assist NMFS in the interpretation of 'significant negative impact.'" PINNIPED-FISHERY INTERACTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE MARINE MAMMAL PROTECTION ACT, SECTION 120 5 (2007), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec_120_TF_Rpt_Final.pdf [hereinafter PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT].

40. 16 U.S.C. § 1389(b).

41. One interpretation would likely focus on the fact that predation is not evenly distributed among all sea lions. Certain individuals consume a disproportionate share of salmonids; at Ballard Locks, for example, sea lion Number 38 accounted for 40 percent of observed fish predation while "Numbers 19 and 25 together took another 40 percent." FRAKER, *supra* note 15, at 19. Thus, only a few sea lions that were causing a significant amount of harm should be taken. At the other extreme is the argument that the presence of any sea lion at Ballard Locks or Bonneville Dam

utory shortcoming, the Secretary has only fifteen days from receiving the application to determine if the state's application has "sufficient evidence to warrant establishing a Pinniped-Fishery Interaction Task Force."[42] The Task Force is made up of "designated employees of the Department of Commerce, scientists who are knowledgeable about the pinniped interaction that the application addresses,"[43] and interest groups such as conservation groups, fishing community organizations, Indian Treaty tribes, and the states.

The inclusion of interest groups is a departure from other take provisions in the MMPA, which require that the Secretary consult the Marine Mammal Commission (MMC) when granting take permits.[44] The MMC's role is similar to that of the Pinniped-Fishery Interaction Task Force, as the Secretary cannot issue take permits until it has consulted with the MMC.[45] Should the Secretary refuse to follow the MMC's recommendations on the take permit, the Secretary is required to give a detailed explanation, thus emphasizing the role of science in the decision-making process.[46]

In creating the MMC, Congress's goal was to create an independent advisory body insulated from political influences to provide scientific—and presumably unbiased—advice to the Secretary.[47] To this end, the MMC is comprised of three members appointed by the President "from a list of individuals knowledgeable in the fields of marine ecology and resource management, and who are not in a position to profit from the taking of marine mammals."[48] The list itself is generated by the heads of four scientific organizations: the Council on Environ-

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would attract others. Herschel's presence has been credited with attracting other sea lions to the Locks, who would then observe his predation patterns and mimic it. *Id.* at 17. In that case, all sea lions should be taken because each would have a significant effect, even if individually, the sea lion himself was not an efficient hunter.

42. 16 U.S.C. § 1389(c).

43. *Id.*

44. *Id.* § 1402(b).

45. *Id.* § 1371(a)(1) ("[P]ermits . . . may be issued if the taking or importation proposed to be made is first reviewed by the Marine Mammal Commission.").

46. GOBLE & FREYFOGLE, *supra* note 32, at 900; *see also* 16 U.S.C. § 1402(d) (2006) ("Any recommendations made by the Commission to the Secretary and other Federal officials . . . which are not followed or adopted shall be referred to the Commission together with a detailed explanation of the reasons why those recommendations were not followed or adopted.").

47. GOBLE & FREYFOGLE, *supra* note 32, at 899.

48. 16 U.S.C. § 1401(b)(1) (2006).

mental Quality, the Smithsonian Institution, the National Science Foundation, and the National Academy of Sciences.[49]

However, Section 120 replaces the MMC with the Pinniped-Fishery Interaction Task Force. Unlike the MMC, which is comprised of members who will not profit from the taking of sea lions, the Pinniped-Fishery Interaction Task Force is statutorily mandated to include interest groups that compete directly with pinnipeds for the increasingly limited salmonid resources[50] as well as the states that requested the permit in the first place.[51] The Task Force is somewhat limited in its actions because it is required to look at four factors when determining whether a lethal take permit should be granted. First, the Task Force must examine pinniped population trends and feeding habits, location of pinniped interactions with the affected salmonids, how and when those interactions occur, and the number of pinnipeds involved.[52] Second, the Task Force will look at past efforts to nonlethally deter the pinnipeds, focusing on whether the applicant has taken all reasonable nonlethal steps without success.[53] Third, the Task Force looks at the extent to which the pinnipeds are causing undue injury or imbalance with other species in the ecosystem.[54] Finally, the Task Force examines to what extent the pinnipeds are a threat to public safety.[55] With this information, the Task Force has sixty days to make a recommendation to the Secretary about whether to approve or deny the application.[56] If approval is recommended, the Task Force must include "a description of the specific pinniped individual or individuals, the proposed location, time, and method of such taking, criteria for evaluating the success of the action, and the duration of the intentional lethal taking authority . . . and nonlethal alternatives."[57]

Within thirty days of receiving the Task Force's recommendations, the Secretary is required to approve or deny the application.[58] Despite this statute-imposed timeline, the thirty day requirement is not realistic because of NOAA's responsibilities

49. *Id.*
50. 16 U.S.C. § 1389(c)(2) (2006).
51. *Id.*
52. *Id.* § 1389(d)(1).
53. *Id.* § 1389(d)(2).
54. *Id.* § 1389(d)(3).
55. *Id.* § 1389(d)(4).
56. *Id.* § 1389(c)(3).
57. *Id.*
58. *Id.* § 1389(c)(4).

under other environmental statutes.[59] But once the recommendation is finally made and implementation begins, the Task Force will evaluate the effectiveness of the lethal taking. Should the implementation prove ineffective, the Task Force recommends additional actions; alternatively if the implementation is deemed effective, the Task Force is disbanded.[60]

Despite these procedural protections, the passage of Section 120 was not without its critics. The statute is seen as scapegoating the pinnipeds for human behavior, shifting blame under the guise of public policy and sound science.[61] But the argument for Section 120 is a compelling one, especially when the statute is being used to protect an ESA-listed species. From a legal perspective, the fact that the salmonid species are often protected by the ESA favors Section 120. Courts have long held that the ESA is to be given priority, with the Supreme Court going so far as to state that agencies must "afford *first* priority to the declared national policy of saving endangered species."[62] By virtue of their numbers, the sea lions are simply less of a priority than the fish, although their relatively lower economic value is no doubt a factor as well. Section 120 also has a compelling biological argument behind it, pitting the fate of an entire species against the welfare of a few individual offenders[63] that are part of "abundant populations of certain seals and sea lions."[64] Thus, Section 120's apparent focus on the protection of salmonids may be a contrary addition to the MMPA given that statute's interest in preserving marine mammal populations. Such tensions between the goals of Section 120 and the MMPA would soon play out as the government prepared to implement Section 120 for the first time.

59. For example, the Secretary must also follow the environmental assessment process of the National Environmental Protection Act (NEPA). *Task Force Recommends Lethal Removal of California Sea Lions*, THE COLUMBIA BASIN FISH & WILDLIFE NEWS BULLETIN (Nov. 2, 2007), http://www.cbbulletin.com/Free/244818.aspx.

60. 16 U.S.C. § 1389(c)(5).

61. Rodgers, *supra* note 8, at 22–23.

62. TVA v. Hill, 437 U.S. 153, 185 (1978) (emphasis added).

63. Young, *supra* note 12, at 16.

64. NAT'L OCEANIC & ATMOSPHERIC ADMIN., MARINE MAMMAL PROTECTION ACT SECTION 120 FACT SHEET 1-2 (n.d.), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec120_FS.pdf [hereinafter SECTION 120 FACT SHEET].

C. *Section 120's First Application—The Ballard Locks Revisited*

Armed with this new provision, Washington quickly targeted the three biggest offenders at the Ballard Locks, filing an application for Section 120 soon after the passage of the 1994 Amendments.[65] The Pinniped-Fishery Interaction Task Force was subsequently convened and began meeting in September 1994, submitting its recommendations to the Secretary by the end of the year.[66] In its initial recommendations, the Task Force focused on capture and temporary removal of identifiable predatory sea lions and only authorized lethal removal when "the overall sea lion predation rate exceeds ten percent of the available steelhead in any consecutive seven-day period."[67] Until that point was reached, the Task Force required that "NMFS undertake all practicable attempts to temporarily remove all predatory sea lions to holding areas."[68] This requirement was born in part out of a question about whether lethal take would work, and temporary removal provided an "opportunity to test the efficacy of removing—by nonlethal means—a larger number of animals than could occur by killing them."[69] Even with such provisions, a minority report by seven of the twenty-one members argued against any lethal removal, arguing that the "deliberations placed too much emphasis on sea lion predation and not enough on the other factors affecting steelhead throughout their life cycle, namely poor fisheries management, habitat degradation, and poor lock construction and operation."[70] Lethal removal of the

65. It should be noted that the steelhead population at Ballard Locks was not protected under the ESA. Section 120 authority was allowed because Section 120 allowed for lethal take of salmonids that "migrate through the Ballard Locks at Seattle, Washington" even if such populations are not endangered or threatened. 16 U.S.C. § 1389(b)(1)(c). This exception was likely needed because of doubt over whether the steelhead had "the biological significance that would justify listing and protection under the Endangered Species Act." Rodgers, *supra* note 8, at 23. However, genetic studies by the Washington Department of Wildlife "suggest[ ] that the steelhead . . . represent a rather distinctive group with little evidence of introgression from Chambers Creek hatchery winter steelhead. FRAKER, *supra* note 15, at APPENDIX B3.

66. Humane Soc'y of the U.S. v. Dep't of Commerce, No. 96-623, slip op. at 3-4 (D.D.C. Apr. 14, 1999).

67. *Id.* at 5.

68. Young, *supra* note 12, at 8.

69. *Id.*

70. *Id.* at 10.

sea lions would thus be ineffective, and the sea lions would have died in vain.[71]

To carry the recommendations out, one of the biggest offenders—a sea lion named Hondo, accused of eating as much as 60 percent of the entire steelhead run[72]—was captured in the spring of 1995.[73] Hondo was held for two months, during which he gained 120 pounds[74] while the returning steelhead run increased from 70 to 126.[75] Upon reconvening in September 1995, the Task Force modified its recommendations and NMFS issued a new letter of authorization in March of 1996 that removed the predation rate trigger entirely "on the theory that any steelhead mortality represent[ed] a threat to the recovery process."[76] Despite this grant of authority, lethal removal was never used. Hondo, Big Frank, and Bob were shipped off to Sea World, where a wave-generating machine awaited their arrival.[77] Meanwhile, steelhead numbers had already declined to the point that recovery was impossible,[78] making it impossible to tell whether the removal had any beneficial effect on the remaining population.

III.
HISTORY REPEATS—THE BONNEVILLE DAM CASE STUDY

A. *The States' Application for Lethal Removal*

The conflict between the competing interests wrapped within Section 120 became all the more apparent in its second implementation at Bonneville Dam in 2006—a decade after its first and last application. In this case, the states of Washington, Oregon, and Idaho applied for lethal take authority of California sea lions at Bonneville Dam, located on the Columbia River.[79] The

71. *Id.* at 11.
72. Rodgers, *supra* note 8, at 25.
73. *Id.* at 30.
74. *Id.*
75. Young, *supra* note 12, at 12.
76. Humane Soc'y of the United States v. Dep't of Commerce, No. 96-623, slip op. at 6–7 (D.D.C. Apr. 14, 1999).
77. Rodgers, *supra* note 8, at 30. Unfortunately for Hondo, his stay would not be a long one; nine months after his exile to Sea World, Hondo died of a massive infection. Hadley, *supra* note 7, at A1.
78. States' Request for Removal, *supra* note 22, at 3 ("During this three-year delay in removing selected individual sea lions, predation by California sea lions continued at the Ballard Locks; the Lake Washington winter steelhead run continued to decline, eventually reaching non-viable levels.").
79. *Id.* at 1.

Columbia River is "one of the most highly developed river basins in the world, [possessing] the largest interconnected hydroelectric system in the world."[80] The dams of the Columbia River served an important role in the development of the region,[81] but have at the same time had negative impacts on threatened and endangered salmonid populations. To address these negative impacts, in 2000 the governors of Idaho, Montana, Oregon, and Washington made recommendations for the protection and restoration of fish in the Columbia River Basin, which included "recommend[ing] congressional approval of NMFS's proposal to acquire additional authority to take seals and sea lions that persistently impact listed salmonid species."[82] Six years later, the states requested Section 120 pinniped removal authority "for the intentional lethal removal of California sea lions . . . in the Columbia River which are having a significant negative impact on the recovery of Pacific salmon and steelhead . . . listed as threatened and endangered under the Endangered Species Act of 1973."[83]

Similar to the Ballard Locks, the Bonneville Dam acts as a barrier for the passing salmonids, which when congregated at the base of the dam are especially susceptible to pinniped predation.[84] As a result, California sea lions, Stellar sea lions, and harbor seals were observed taking anywhere from 0.4 to 4.2 percent of the spring salmonid runs since counts began in 2002.[85]

Of these three pinniped species, only California sea lions were targeted by the states' application.[86] This is likely for two reasons. First, California sea lions have the most significant presence at the dams, numbering from a low of 30 individuals in 2002 to a high of 104 in 2003.[87] In comparison, the observed number

80. Laurence Michael Bogert, *The Four Governors' Recommendations for Anadromous Fish Restoration in the Pacific Northwest: What's So Funny 'Bout Peace, Love, and Understanding?*, 38 IDAHO L. REV. 529, 534 (2002) (citation omitted).

81. *Id.*

82. Dirk Kempthorne et. al., *supra* note 10, at 6.

83. States' Request for Removal, *supra* note 22, at 1.

84. Declaration of Garth Griffin in Support of Federal Defendants' Opposition to Motion for Stay Pending Appeal, *Humane Soc'y of the U.S.*, 625 F. Supp. 2d 1052 (No. CV 08-357).

85. ROBERT STANSELL ET AL., U.S. ARMY CORPS OF ENGINEERS, 2009 FIELD REPORT: EVALUATION OF PINNIPED PREDATION ON ADULT SALMONIDS AND OTHER FISH IN THE BONNEVILLE DAM TAILRACE 10 tbl.1 (2009), *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2009/2009_Pinniped_Report.pdf [hereinafter 2009 FIELD REPORT].

86. *See* States' Request for Removal, *supra* note 22, at 1.

87. 2009 FIELD REPORT, *supra* note 85, at 16 tbl.5.

of harbor seals has never risen above three individuals.[88] While Stellar sea lions have a more significant presence than harbor seals, with numbers steadily increasing to twenty-six in 2009, Stellar sea lions cannot be taken under Section 120 because they are listed both under the ESA and as a MMPA-depleted species.[89]

Second, California sea lions have a disparate impact on the salmonid populations, as they are responsible for the vast majority of observed salmonid catches.[90] In contrast, Stellar sea lions typically focus on white sturgeon, although as of late Stellar sea lions have been consuming greater numbers of salmonids than before.[91] In addition to the different prey preferences, California sea lions have adapted particularly well to the non-lethal deterrents used against them, while Stellar sea lions are far more likely to be deterred. For example, when wildlife managers began to specifically target Stellar sea lions in 2007, observed Stellar sea lion predation dropped dramatically, bringing down the number of sturgeon catches from seventy-eight in the week prior to non-lethal deterrence to ten during the first week of harassment.[92] Deterrence of sea lions, in contrast, is ineffective in the long run. Even successful techniques would lose their effectiveness as California sea lions can adapt quickly to either tolerate deterrent measures or avoid them altogether.[93] California sea lions there-

88. *Id.*

89. *See* 16 U.S.C. § 1389(e) (2006). The Stellar sea lion is MMPA-depleted, its western distinct population segment (DPS) is endangered, and its eastern DPS is threatened. *NOAA Fisheries, Stellar Sea Lion (Eumetopias jubatus)*, NOAA FISHERIES SERV., http://www.nmfs.noaa.gov/pr/species/mammals/pinnipeds/stellersealion.htm (last visited Nov. 24, 2009).

90. For example, in 2009 California sea lions were observed catching 2,680 salmonids, compared with Stellar sea lions taking 300. 2009 FIELD REPORT, *supra* note 85, at 10 tbl.2.

91. ROBERT STANSELL ET AL., U.S. ARMY CORPS OF ENGINEERS, STATUS REPORT–PINNIPED PREDATION AND DETERRENT ACTIVITIES AT BONNEVILLE DAM, 2009 2 (2009), *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2009/update20090522.pdf [hereinafter MAY 22 STATUS REPORT].

92. NAT'L MARINE FISHERIES SERV. NW. REGION, FINAL ENVIRONMENTAL ASSESSMENT, REDUCING THE IMPACT ON AT-RISK SALMON AND STEELHEAD BY CALIFORNIA SEA LIONS IN THE AREA DOWNSTREAM OF BONNEVILLE DAM ON THE COLUMBIA RIVER, OREGON AND WASHINGTON 3-15 (2008), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec-120-Final-EA.pdf [hereinafter Final Environmental Assessment].

93. *Id.* at 3–14. For a more detailed look at deterrence efforts (and failures) at the Ballard Locks, see Rodgers, *supra* note 8, at 28–30. One deterrence effort that was "rejected outright [was] the alternative of introducing sea lion predators, such as killer whales, sharks, and polar bears, into the Ballard Locks area of urban Seattle." This was due not only to the legal and logistical problems of bringing large predators to Seattle, but public safety issues and the possibility that if the predators "did stay,

fore have the largest impact on the salmonids not only because of their numbers and prey presence, but because they are significantly less likely to be deterred by non-lethal management techniques.

These two factors made it simple for the states to frame the issue as protecting entire salmonid populations at relatively little expense to the overall abundant California sea lion population. Eight ESA-listed salmonid populations were being affected by the California sea lions,[94] who, in stark contrast to their prey, were increasing in numbers. When the application was first submitted in 2006, the California sea lion population was estimated at approximately 237,000 animals—with some estimates closer to 300,000—and a population growth rate of 5.4 to 6.1 percent.[95] With such high populations, the California sea lion's "Potential Biological Removal (PBR) level, which is the sustainable level of human-caused mortality allowed under the MMPA and subsequent regulations, [wa]s 8,333 animals per year."[96] As the maximum number of California sea lions observed at the dam barely exceeded one hundred,[97] taking every California sea lion at Bonneville Dam would have no legal impact on the species as a whole. It was therefore easy for the states to justify lethal take of California sea lions on a biological basis.

In submitting their application for Section 120 authority, the states first had to show that the California sea lions were having a significant negative impact on the recovery of ESA-listed salmonids. Thus, the states argued that there was significant impact because predation was "a new, growing, and unmanageable source of mortality, while other sources of in-river mortality are actively managed and are stable or decreasing (e.g., through harvest reductions, fish passage and habitat improvements, and hatchery reform)."[98] In addition, the states noted in their application that "the hydromodification of the river has altered the

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they would likely also prey on steelhead thereby exacerbating the predation problem." *Id.* at 26.

94. Of the eight ESA-listed salmonids potentially impacted by California sea lions, seven are listed as threatened while the last is endangered. *See* States' Request for Removal, *supra* note 22, at 12 tbl.3.

95. *See id.* at 4.

96. *Id.*

97. One hundred and four California sea lions were observed in 2003, although numbers have not exceeded past 100 since. In subsequent years, the number of observed individuals tended to decrease, with the exception of an increase in 2008. 2009 FIELD REPORT, *supra* note 85, at 16 tbl.5.

98. States' Request for Removal, *supra* note 22, at 14.

natural predator-prey relationship to artificially favor predatory California sea lions."[99] The application was careful to stress that the States were *not* contending "that California sea lion predation is more significant than other sources of mortality to Columbia River ESA-listed salmonids, but simply that it is significant and that it must be dealt with as are other sources of mortality."[100] Thus, addressing predation by California sea lions was only one component in a comprehensive strategy to improve salmonid recovery[101] without resorting to removal of the dams.[102]

In addition to citing these predation effects to show that the California sea lions were causing a "substantial negative impact," the states also offered a creative new interpretation of "individually identifiable" that would serve their goal of removing as many pinnipeds as possible to protect salmonid populations. Instead of defining the term as related to the unique characteristics and brands of the sea lions, the state argued that "[a]ll California sea lions above Navigation Marker 85 forage for salmonids and as such are 'identifiable' . . . in the sense that it is not possible to confuse them with individuals that don't eat salmonids."[103] According to this definition, it was "not necessary to uniquely identify individual animals."[104] However, this definition does not comport with the plain meaning of the term "individually identifiable," particularly when the typical definition of the word "individual" is one person, or single.[105] Such a statutory requirement would seem to require that each sea lion is itself distinguishable from another sea lion, a requirement that the states seemed to ignore in their application for lethal take. It was, however, a definition that would reduce predation to the fullest extent possible, in line with the states' preference for salmonids over sea lions.

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99. *Id.*

100. *Id.*

101. *See id.* at 14–15.

102. Bogert, *supra* note 80, at 533.

103. States' Request for Removal, *supra* note 22, at 6.

104. *Id.*

105. For example, the American Heritage Dictionary defines 'individual' as "adj. 1a. Of or relating to a single person. b. By or for one person. 2. Existing singly; separate. 3. Distinguished by particular attributes; distinctive. n. 1. A human or organism considered by itself. 2. A particular person." While the third adjective definition could justify the state's reading, every other definition points towards looking at each sea lion as a single entity. AM. HERITAGE DICTIONARY 434 (4th ed. 2001).

B. *Competing Definitions—The Pinniped-Fishery Interaction Task Force vs. the Marine Mammal Commission*

1. The Pinniped-Fishery Interaction Task Force's Findings and Recommendations

a. Determining Significant Negative Impact—Applying Section 120's Four Requirements to Bonneville Dam

In late January of 2007, the Secretary determined that there was sufficient evidence in the application to warrant convening a Pinniped-Fishery Interaction Task Force.[106] The eighteen-member Task Force was established nearly eight months later in September of 2007.[107] Of these members, three were scientists knowledgeable about pinniped-fishery interaction, while the remaining fifteen members were made up of representatives of three conservation organizations, two fishing organizations, five Indian treaty tribes, the Department of Commerce, the Marine Mammal Commission, the applying states, and the Army Corps of Engineers.[108]

The Task Force ultimately recommended approving the states' application for lethal take, with seventeen of the eighteen members having "*inferred*"[109] that the California sea lions were having a significant negative impact on the recovery of listed salmonids. The only holdout was the Humane Society representative, who "question[ed] the strength of the impact of sea lion predation on the salmonids decline or recovery."[110] The Task Force justified its decision based on the four statutorily required considerations: (1) population trends, feeding habits, and behavioral patterns of the California sea lion; (2) past deterrence efforts; (3) extent to which the California sea lions were causing 'imbalance' with the overall ecosystem; and (4) the threat to public safety caused by California sea lion behavior.[111]

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106. Marine Mammals; Pinniped Removal Authority, 72 Fed. Reg. 4,239 (Jan. 30, 2007).

107. Marine Mammals; Pinniped Removal Authority, 72 Fed. Reg. 44,833 (Aug. 9, 2007).

108. PINNIPED-FISHERY INTERACTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE MARINE MAMMAL PROTECTION ACT, SECTION 120 TASK FORCE PROTOCOLS 1-5 (2007), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec_120_TF_Rpt_AppA.pdf.

109. PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at10 (emphasis added).

110. *Id.* at 6.

111. *Id.* at 4.

In determining whether the first factor of population trends and feeding habits favored lethal take, the Task Force compared the California sea lion population to that of the affected salmonid populations.[112] The Task Force found that there was not only a flourishing California sea lion population, but that there were as many as 1,000 sea lions in the 145 miles between the mouth of the Columbia River to Bonneville Dam.[113] In stark contrast, most of the salmonid populations were not meeting the viability targets established by recovery planning documents, putting them at continued high risk of extinction.[114] When looking at interactions between the two species, the Task Force determined that "[California sea lions] were observed to have preyed upon an estimated minimum 3,000-4,000 salmonids each year . . . near Bonneville Dam from 2003-2007, representing 1-4% of ESA listed stocks."[115]

The Task Force's second consideration was past efforts to deter the California sea lion from preying on salmonids, with a focus on deterrence techniques used by the states at Bonneville Dam.[116] Despite the variety of deterrence techniques utilized by the states and Army Corps, deterrence continued to fail at decreasing California sea lion presence or predation.[117]

The Task Force's third consideration was the extent of injury to the ecosystem as a whole. The Task Force found that California sea lions also preyed on other fish species, with lamprey being of particular concern to tribal representatives that depended on lamprey for religious, ceremonial, and subsistence activities.[118] The Task Force also noted concern over predation of White sturgeon,[119] but found that Stellar sea lions were responsible for the majority of such predation.[120]

Finally, the Task Force's fourth consideration was the on-going threat to human safety posed by California sea lions. The Task Force found that California sea lions were increasingly aggressive towards fishermen, and were reportedly biting anglers, pulling

112. *Id.* at 7.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 8.
117. *Id.*
118. *Id.*
119. *Id.*
120. Stellar sea lions are estimated to be responsible for over 95% of observed sturgeon predation. Final Environmental Assessment, *supra* note 92, at P-3.

anglers overboard, and capsizing small vessels.[121] Combined with the other three considerations, the majority of the Task Force found that California sea lions were "having a significant negative impact on the recovery of Columbia Basin threatened and endangered salmonids."[122]

However, while the application of such factors to the Bonneville Dam situation seemed straightforward enough, the question became whether the Task Force's findings on these four factors were sufficient to indicate that California sea lions were having a "significant negative impact" on salmonid populations. In the thirteen years since Section 120 was passed, there was still no interpretation for "significant negative impact." In fact, NMFS requested that the Task Force come up with "[c]riteria to assist NMFS in the interpretation of 'significant negative impact and the extent to which pinnipeds are causing undue injury or impact to, or imbalance with listed species."[123] Thus, the Task Force proposed four main criteria to guide NMFS in determining significant negative impact: timing of pinniped presence in relation to salmonid migration; historic and present predation levels; likelihood of persistence of predation over time; and whether predation was comparable to other forms of salmonid mortality that were already being managed.[124]

In applying these four new criteria, the Task Force found that first, California sea lions were present when listed salmonids were migrating as "[t]he peak abundance of [California sea lions] below the Bonneville Dam coincide[d] directly with the passage of ESA listed salmonids at Bonneville Dam."[125] The second criterion of predation increasing beyond historic levels was also fulfilled because predation was "a recent phenomenon."[126] The third criterion of whether predation would persist without intervention was found because "the problem has continued to increase each year and is expected to continue."[127] The Task Force did not explain what it meant by 'problem,' an odd omission considering how the numbers of individual California sea lions at

121. PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at 9.

122. *Id.* at 6.

123. *Id.* at 10.

124. *Id.* at 10–11.

125. *Id.* at 10.

126. *Id.* at 10.

127. *Id.* at 11.

Bonneville Dam had been decreasing since 2003.[128] total numbers of salmonids consumed had increased each year, the percentage of consumed salmonids fluctuated between .4 and 4.2 percent,[129] largely as a function of the total size of the salmonid run.[130] Regardless, the Task Force found that this third criterion was fulfilled with little explanation.

Finally, the Task Force found that the last major criterion—whether "the level of ESA listed salmonid [was] comparable to other forms of in-river mortality that currently are being managed–was fulfilled because "[a]ll other forms of known mortality are being managed under various management plans and recovery programs."[131] However, the Task Force made no effort to actually compare California sea lion predation to mortality by dams or fishing. Instead, the Task Force's finding mirrored the states' argument that substantial negative effect existed because other forms of mortality were being managed while pinniped predation was not.[132]

Countering the majority's findings, the Humane Society representative's minority opinion argued that the pinnipeds caused no substantial negative impact to begin with because there were so many other causes of mortality.[133] Unlike the majority opinion, the minority opinion did compare predation levels to other sources of salmonid mortality, arguing that the tribal harvest rates of 6 to 10 percent and direct and latent mortality due to dams of 30 to 35 percent were considerably higher than the maximum 4 percent predation rate.[134] The minority opinion thus questioned the decision to consider "the current predation level [as] a significant negative impact when other *higher* levels of extraction are permissible."[135]

The minority opinion instead offered its own definition of "significant negative impact," which would considerably narrow Section 120's scope. The minority definition would only allow lethal

128. In 2008, sea lions numbers increased from seventy-one to eighty-two. However, this data came after the Task Force Report; at the time the Task Force Report was made, sea lion populations had been decreasing. 2009 FIELD REPORT, *supra* note 85, at 16 tbl.5.

129. *Id.* at 10 tbl.1.

130. *See, e.g.*, MAY 22 STATUS REPORT, *supra* note 91, at 2–3.

131. PINNIPED-FISHERY INTERACTION TASK FORCE-FINAL REPORT, *supra* note 39, at 11.

132. States' Request for Removal, *supra* note 22, at 14.

133. MINORITY OPINION, *supra* note 13.

134. *Id.*

135. *Id.*

take when each individually identifiable sea lion, by itself, had a substantial negative impact on the salmonid population.[136] Such a definition may stem from the fact that only a few sea lions could be responsible for the vast majority of the predation, seen before at the Ballard Locks when Hondo was estimated to have consumed a startling 60 percent of the steelhead run by himself.[137] This definition would not, however, allow the taking of sea lions that only had a small contributory effect to the overall problem. Despite the minority opinion's concerns, the Task Force majority concluded that there was significant negative impact and recommended two lethal options.[138]

b. The Task Force's Lethal Take Recommendations

Upon determining that the California sea lions were having a significant negative impact on the salmonid population, the Task Force's goal was to not only immediate reduce California sea lion predation on salmonids, but to prevent the recruitment of sea lions that did not yet know about the available prey at Bonneville Dam.[139] To this end, the Task Force recommended two solutions that both gave the states lethal take authority. The first lethal option, preferred by ten members and acceptable to seventeen of the eighteen members, would permit removal of the minimum number of California sea lions necessary to reduce California sea lion recruits to the area below Bonneville Dam.[140] The quantitative goal of this option was to reduce sea lion predation to a rolling three-year average of 1 percent within six years.[141] To meet this goal, the Task Force included an appendix of 151 California sea lions that could be taken under this option.[142] This list included 39 California sea lions that were never

136. *Id.* As an example, the Minority Opinion offered a situation when the individual sea lion had developed such "a novel foraging habit that [it] is having a significant negative impact on endangered or threatened fish, such that if they can be eliminated, their removal will appreciably assist recovery." *Id.*

137. Rodgers, *supra* note 8, at 25.

138. PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at 6.

139. *Id.* at 9.

140. *Id.* at 12.

141. *Id.* This one percent goal was chosen more or less at random, as the Task Force admitted that there was no "available analysis to provide a quantitative level of predation that would not have a significant impact on salmonid recovery." *Id.*

142. PINNIPED-FISHERY INTERACTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE MARINE MAMMAL PROTECTION ACT, SECTION 120 APPENDIX D tbl.3.3 (2007), *available at* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec_120_TF_Rpt_AppD.pdf [hereinafter APPENDIX D]

observed eating any salmonid, 19 of which were in the area for only one day in the entire observed time period.[143] In creating this list, the Task Force seemed disinterested in whether the individual in question had any actual impact on salmonid populations and instead created a presumption that any sea lion that was simply in the area would have a significant negative impact that warranted lethal taking.

In addition to those individuals listed in the appendix, this lethal option also allowed the taking of any identifiable sea lion observed to have caught a salmon.[144] However, the Task Force explicitly went on to ignore the statutory requirement of "individually identifiable pinnipeds" by stating that in very restrictive cases, the states could engage in "immediate lethal take of those sea lions without a requirement of individual identification."[145] Such takes would be described as "spontaneous lethal takes."[146] Such restrictive circumstances include the lethal taking of *any* California sea lion above marker 85 when the predicted run of the Upriver Spring Chinook is estimated at 82,000 individuals or less, regardless of whether any predation is observed.[147]

The Task Force's second lethal option, preferred by seven members and acceptable to fifteen of the eighteen members, built on this "spontaneous lethal takes" idea. The second option again did away with the "individually identifiable" requirement by seeking to reduce California sea lion presence to zero above navigation marker 85.[148] This option would create a California Sea Lion Exclusion Zone (CSLEZ), in which there would be zero tolerance for California sea lion presence, regardless of whether they had eaten a single salmonid.[149]

2. The Marine Mammal Commission's Comments on the Task Force's Report

Interestingly, the Bonneville Dam Task Force did not get the final word on the states' application. Although the Marine Mam-

143. *Id.*

144. PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at 12

145. *Id.* (emphasis added).

146. *Id.*

147. *Id.* at 12–13. Navigation Marker 85 is located at river mile 139, while the Bonneville Dam tailrace begins at river mile 146. 2009 FIELD REPORT, *supra* note 85, at 6.

148. *Id.* at 13.

149. *Id.*

mal Commission (MMC) itself was cut out of the Section 120 process, NMFS still requested that the MMC examine the Task Force Report and offer its own comments.[150] Overall, the MMC agreed with the Task Force's decision to recommend lethal take of California sea lions at Bonneville Dam.[151] However, despite having a representative on the Task Force, the MMC found that much of the information and reasoning that led to the conclusions of the Task Force Report were not readily apparent.[152] Thus, the MMC offered a number of recommendations on the Task Force Report in a letter to the NMFS, including its own interpretations of what Section 120's statutory language required.

The MMC first looked at the "substantial negative impact" requirement and found that the non-quantitative criteria found by the Task Force were insufficient to support authorization of Section 120 authority.[153] It instead recommended that NMFS clearly articulate a quantitative standard for finding that the California sea lions were having a significant negative impact.[154] In addition to this quantitative standard, the MMC recommended that NMFS identify a level of predation that would no longer be significant, and use that level as a goal for any authorized removal program.[155] While the Task Force had wanted predation levels of zero, which were eventually increased to 1 percent in the first lethal take option and .5 percent in the second lethal option, MMC observed that these numbers were "selected largely because they seemed 'about right' and might be achievable."[156] Thus, the MMC found that neither number had any supporting analysis. These numbers also deviated significantly from the prior use of lethal take at Ballard Locks, where NMFS implemented "a requirement that lethal removal not occur unless sea lion predation over any seven-day period exceeded 10 percent of

150. Letter from Timothy J. Ragen, Ph.D., Exec. Dir, Marine Mammal Comm'n, to Robert Lohn, Nw. Reg'l Adm'r, Nat'l Marine Fisheries Serv. (Nov. 23, 2007), *available at* http://www.mmc.gov/letters/pdf/2007/Lohn_nmfs_112307.pdf [hereinafter MMC Letter]. This was not the first time NMFS had requested that the MMC look at the Task Force Report, as they had been consulted for the Ballard Locks report as well. Final Environmental Assessment, *supra* note 92, at 2-5.

151. MMC Letter, *supra* note 150, at 3.

152. *Id.* ("In many cases, however, that information remains buried in background documents that obscures its relevance and undermine its usefulness to decision-makers and the public.").

153. *Id.* at 5.

154. *Id.*

155. *Id.*

156. *Id.* at 6.

the available fish."[157] While the MMC acknowledged that NMFS should not be 'locked in' by this previous measure of significance, it recommended that NMFS "address[ ] this issue head-on . . . so that the justification for any change in approach is apparent."[158]

In addition, the MMC seemed to reject the states' and Task Force's rationale that because human-caused mortality was regulated, sea lion predation was substantial in of itself.[159] The MMC instead would have required that additional evidence be provided, including "that [NMFS] describe both the estimated level of removals by pinnipeds as well as other authorized levels of incidental and directed take."[160] Such additional evidence would include NMFS's rationale for concluding that other takings of salmonids would not jeopardize their continued existence, which was available through prior biological opinions under the ESA.[161] In justifying this recommendation, the MMC found that "[n]o-jeopardy findings [under the ESA] are approximately equivalent to a finding under section 120 of the MMPA that the authorized level of taking will not have a significant impact on the decline or recovery of the listed salmonid stocks."[162] Because the two statutes were analogous, the MMC found that if NMFS did not consider those levels of allowed take to be jeopardizing the continued existence of the salmonids, "the Service will *need* to explain why the impacts of pinnipeds [we]re thought to be greater" when those permitted actions "exceed[ed] the number of removals of salmonids attributable to pinnipeds."[163] This seems to follow the arguments of the minority opinion, which had argued that sea lion predation is insignificant compared to take by humans.

The MMC also took significant issue with the 'individually identifiable' definition used by the states and the Task Force, which attributed collective negative impact by the pinnipeds "to all pinnipeds, whether or not they have been identified as indi-

157. *Id.*

158. *Id.* at 6–7.

159. *Id.* at 5–6.

160. *Id.* at 5. *See also id.* at 1 (recommending that in justifying its decision, NMFS provide supporting documentation on "the extent of mortality attributable to each source, including fishing and other forms of human-related take.").

161. *Id.* at 5.

162. *Id.*

163. *Id.* (emphasis added).

viduals contributing to the problem."[164] The MMC completely rejected this view, stating that "it is clear that Congress established a high evidentiary burden on the States to identify and target *individual* animals that are contributing to the predation problem,"[165] pointing to Section 120's requirement of "a description of the specific pinniped individuals."[166] While the MMC conceded that there may be situations where all pinnipeds were having a significant negative impact on salmonids, this situation was not occurring at Bonneville Dam where "more than 50 percent of individual sea lions appear to take two or fewer salmon each season, and a few individuals account for the majority of fish caught."[167] At the same time, the MMC did not adopt the minority opinion's view that take would be justified only if the individual sea lion was itself having a substantial negative impact on the salmonid populations as a whole.[168] The MMC found this standard insufficient because it would only be applicable in the most extreme circumstances, and would thus undermine Section 120's intent.[169]

Having rejected both views of the Task Force, the MMC instead created their own standard for determining when pinnipeds could be lethally removed for having significant negative impact. The MMC articulated a two-part test.[170] First, NMFS would look at whether the overall sea lion impact was having a significant negative impact on the fish. If this overall impact was found, NMFS would next have to determine if the individual pinniped was significantly contributing to that overall impact. As part of this two-part test, criteria would be "needed to differentiate those pinnipeds that should be subject to lethal removal from those that should not,"[171] thus stressing the individually identifiable requirement.

Using this standard, the MMC gave its support for the first lethal take option but rejected the "spontaneous lethal take" provision, questioning how the majority of the Task Force could recommend, "with little supporting rationale,"[172] that the at-

164. *Id.* at 4.
165. *Id.* (emphasis added).
166. 16 U.S.C. § 1389(c)(3)(A) (2006).
167. MMC Letter, *supra* note 150, at 4 (citation omitted).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 7.
172. *Id.* at 2.

tempted predation of one salmonid was ever an appropriate measure of significance. The MMC also completely rejected the second lethal option as being "inconsistent with the statutory requirements absent any affirmative showing that all such sea lions prey on salmonids in that area to a degree that can be considered significant."[173]

C. *Synthesizing the Competing Definitions*

1. NMFS's Findings and Permit Terms

Faced with the competing recommendations of the Task Force, the minority opinion, and the MMC, NMFS had to decide which of the interests motivating the different recommendations were to be protected. NMFS ultimately adopted the MMC's two-part test for significant negative impact because "[t]he application of this two-step test is reasonable in light of the state's ambiguity and the specific facts and circumstances surrounding the proposal to lethally remove pinnipeds at Bonneville Dam."[174] However, NMFS did not apply the test in accordance with the other MMC recommendations.

First, in looking at whether the California sea lions had overall significant negative impact on the salmonids, NMFS failed to come up with a numeric level of salmonid predation that would be significant under Section 120.[175] Instead, NMFS's goal was to reduce predation to 1 percent of fish passing through the dam while explicitly stating that this independent limit did not mean that predation "less than one percent would no longer be significant."[176] In justifying this goal, NMFS failed to follow MMC's recommendation to compare pinniped predation with human-caused mortality of salmonids beyond stating simply that "[t]he mortality rate for listed salmonids is comparable to mortality rates from other sources that have led to corrective action under the ESA."[177] This claim is arguably questionable, considering that NMFS would later observe that even when regulated, harvest rates alone averaged 8 percent of the salmonid popula-

173. *Id.* at 7.

174. Marine Mammals; Pinniped Removal Authority; Partial Approval of Application, 73 Fed. Reg. 15,484 (Mar. 24, 2008) ("The subordinate clause 'which are having a significant negative impact' modifies the plural noun 'pinnipeds,' supporting the proposition that our inquiry is whether pinnipeds (plural) are having the described impact, not whether a specific individual is having the described impact.").

175. *Id.* at 15,486.

176. *Id.*

177. *Id.* at 15,485.

tion,[178] while the highest sea lion predation was observed at 4.2 percent. Instead, NMFS followed the states' and Task Force's contention that sea lions were a new threat which was not managed, while fishing and dams were managed. Like the states, NMFS chose to emphasize that they were not treating a reduction in sea lion predation rates as a solution that would itself recover depressed runs, but as one of many solutions.[179]

Second, in determining how to identify whether an individual pinniped was contributing to the overall significant negative impact, NMFS's standard was far more sweeping than what the MMC's test seemed to call for. NMFS's criteria focused on whether the individual pinniped exhibited signs that it was "not a naive animal that can be driven away from the area through non-lethal means."[180] To determine this lack of naiveté on the part of the pinniped, the three factors NMFS established were if the individual pinniped had (1) eaten one salmonid in the area, (2) been in the area for at least five days, and (3) remained in the area despite being subjected to non-lethal deterrence.[181] These criteria would have allowed for the taking of individual sea lions such as C265 and C643, as well as B127, C645, and C669. While the first two sea lions had taken 102 and 81 salmonids respectively, the latter three had each been observed only taking one salmonid each.[182] This seems to contradict NMFS's own goal "to remove only" the "greatest contributors to the problem."[183]

After purportedly applying the MMC's test to determine that there was an overall substantial negative impact, NMFS proposed "to partially approve the States' Section 120 application for lethal removal of California sea lions at Bonneville Dam."[184] NMFS thus adopted a modified version of the Task Force's first lethal recommendation,[185] allowing only the lethal removal of in-

178. Final Environmental Assessment, *supra* note 92, at P-6.

179. *Id.* at P-3. NMFS also failed to address why lethal take would be allowed at Ballard Locks when lethal take was only triggered when at Ballard Locks, lethal take was only triggered when sea lion predation exceeded ten percent, a significantly higher trigger than at Bonneville Dam. *See* MMC Letter, *supra* note 1500, at 6.

180. Marine Mammals; Pinniped Removal Authority; Partial Approval of Application, 73 Fed. Reg. at 15,486.

181. *Id.*

182. APPENDIX D, *supra* note 142.

183. Final Environmental Assessment, *supra* note 92, at P-7.

184. *Id.* at 1-7.

185. *Id.* at 2-12.

dividually identifiable predatory sea lions.[186] This alternative did not, however, adopt the states and Task Force's definition of individually identifiable, instead requiring "natural or applied features that allows [the individual] to be individually distinguished from other California sea lions."[187] Lethal take would be limited to around 1 percent of the PBR, or approximately 85 individuals although the states were not expected to take more than 30 sea lions under this alternative.[188] This alternative was expected to decrease the expected number of salmonids consumed by pinnipeds by a minimum of 848 to a maximum of 5,983 Chinook, based on an estimate of 30 sea lions removed.[189]

Having adopted the modified task force's first lethal take recommendation, NMFS partially approved the states' application in March 2008, creating a list of sea lions that were authorized for immediate lethal removal.[190] The list was essentially adopted from the state's appendix, with the three criteria applied. As a result, this final list would contain some rather peculiar individuals, including fourteen sea lions observed eating less than ten salmonids.[191]

2. The Courts Weigh in—Humane Society v. Gutierrez

In response to NMFS's partial approve of the states' application, the Humane Society filed suit to challenge the decision.[192] After obtaining an emergency stay from the Ninth Circuit with respect to lethal removal, the Humane Society, NMFS, and states agreed to a joint stipulation that would not permit lethal removal of the sea lions before March 2009,[193] although non-lethal removal of sea lions would continue.[194] The joint stipulation also

186. Marine Mammals; Pinniped Removal Authority; Partial Approval of Application, 73 Fed. Reg. at 15,487.

187. Final Environmental Assessment, *supra* note 92, at 2-12.

188. *Id.* at 2-14.

189. *Id.* at 2-19 tbl.2.3-1.

190. Elicker Letter, *supra* note 6.

191. APPENDIX D, *supra* note 142. Sea lions B99 and B49, who had been observed eating two fish each, were not included on the list as they had only been in the area for four and three days respectively. One might argue that these two individuals are more efficient at eating salmonids than C645, who did fulfill NMFS's three requirements by eating one fish over the course of eighteen days. C645 would be euthanized on May 13, 2009. MAY 22 STATUS REPORT, *supra* note 91, at 4 tbl.1.

192. Joint Stipulation at 1, Humane Soc'y of the U.S. v. Gutierrez, 625 F. Supp. 2d 1052 (D. Or. 2008) (No. 08-0357).

193. *Id.* at 2.

194. In 2008, eleven California sea lions were effectively removed through non-lethal means. 2009 FIELD REPORT, *supra* note 85, at 21.

required an expedited briefing and resolution of the merits of the case in the District Court and Court of Appeals in an effort to have the case decided before a 2009 deadline.[195]

In accordance with the expedited schedule, the district court for Oregon granted summary judgment to NMFS and the states on the Humane Society's claims for violations of the MMPA.[196] The court's ruling on whether Section 120 was incorrectly applied depended primarily on section 706 of the Administrative Procedure Act (APA), looking at whether NMFS's actions could be found to be "'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.'"[197] As a result, the court did not look at the validity of the competing definitions forwarded by the Pinniped-Fishery Interaction Task Force, the minority opinion, and the MMC as much as defer to NMFS's findings. This deference was justified on the grounds that the application of Section 120 was an area in which NMFS had expertise, having been tasked by Congress to apply and enforce the law.[198]

On the issue of whether there was significant and negative impact, the court applied a *Chevron*[199] deference test, finding that because Congress had not spoken clearly and unambiguously on the matter, NMFS's definition of significance was entitled to deference.[200] As long as the definition was "based on a permissible construction of the statute,"[201] NMFS's definition was entitled to *Chevron* deference even if other permissible constructions of the statutory language existed. The court also found that the application of this definition to the Bonneville Dam situation comported with the statute's requirements, thus deferring to the agency's scientific and technical expertise.[202]

The Humane Society, however, made several arguments that NMFS's decision was still arbitrary and capricious. First, the Humane Society cited the MMC's recommendations, focusing on the MMC's recommendation that NMFS adopt a "quantitative

195. Joint Stipulation at 3-4, *Humane Soc'y of the U.S.*, 625 F. Supp. 2d 1052 (No. 08-0357).

196. Humane Soc'y of the U.S. v. Gutierrez, 625 F. Supp. 2d 1052, 1066 (D. Or. 2008).

197. *Id.* at 1058 (quoting 5 U.S.C. § 706(2)(A) (2006)).

198. *Id.*

199. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

200. *Humane Soc'y*, 625 F. Supp. 2d at 1063.

201. *Id.* (quoting *Chevron*, 467 U.S. at 843).

202. *Id.*

standard to evaluate whether individually identifiable pinnipeds are having a significant negative impact on salmonid stocks."[203] The court rejected this argument, finding that NMFS's view was reasonable despite MMC's contrary views because "[w]hen specialists have conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts."[204] In deferring to NMFS's expertise, the court emphasized NMFS's prior experience at the Ballard Locks.[205] Based on this one prior application of Section 120, NMFS was entitled to deference in deciding to use a more qualitative standard.[206] This experience, combined with the lack of a requirement for a quantitative standard in Section 120, meant that NMFS's decision to use a qualitative standard was not arbitrary or capricious.[207]

The Humane Society's second argument in regard to NMFS's application of Section 120 was that NMFS had acted in an arbitrary and capricious manner by not looking at the other reasons for salmonid decline. Echoing its representative's Pinniped-Fishery Task Force minority opinion, the Humane Society claimed:

> [T]hat Congress 'recognize[d] that a variety of factors may be contributing to the declines of these stocks' and intended that the current levels of protections afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline in salmonid stocks.[208]

The court rejected this argument, finding that under Section 120's clear and unambiguous statutory language, NMFS had no such obligation to consider other reasons for the decline of salmonid stocks because no such requirement could be found in the section.[209] This clear and unambiguous finding was justified solely on the grounds that because Section 120 did not require that NMFS examine other reasons for decline, it was clear and

203. *Id.* at 1062-1063.

204. *Id.* at 1063 (quoting *Chevron*, 490 U.S. at 378).

205. *Id.*

206. *Id.* ("The Ballard Locks section 120 authorization relied on a more quantitative standard of ten percent, and the sea lions effectively wiped out the steelhead population. Thus, based on the record and past experiences, NMFS concluded a more qualitative standard was necessary.").

207. *Id.*

208. *Id.* at 1059 (citation omitted).

209. *Id.* at 1065.

unambiguous.[210] Thus, legislative history could not be relied on to find that NMFS needed to look at other reasons for decline.[211]

Furthermore, the fact that NMFS had previously found that fishermen's take and dam kills were insignificant under NEPA and ESA, while finding the significantly lower predation significant under the MMPA, was not relevant.[212] Although the MMC had previously recommended that NMFS explain the different significance findings under the three statutes,[213] the Court found that "NMFS was not obligated to discuss and explain previous decisions under NEPA and the ESA"[214] because "[t]he statutes' different foci necessarily require different inquiries and analyses."[215] Even if these different foci were not significant enough to render the different opinions inconsistent with one another, the court also found that there were practical differences between the different kinds of salmonid mortality. Mortality by fishermen and dams were both regulated by the government, whereas "pinniped predation is growing, and the States have not been able to control or regulate it."[216]

Based on these findings, the court ultimately found that NMFS's application of Section 120 was not arbitrary and capricious. Its grant of summary judgment to NMFS and the States[217] cleared the way for the permit's lethal take provisions to be applied. While the Humane Society moved for a stay of the lethal take pending appeal, the Ninth Circuit Court of Appeals denied the motion on the grounds that the Humane Society had "not met the burden of demonstrating a likelihood of success on the merits[, thus failing] to meet the threshold for a stay pending appeal."[218] Like the District Court's decision, this conclusion was based on the narrow and deferential standard of review under the APA, where deference to the agency was required unless the

210. Furthermore, the court found that even if NMFS did have to consider other reasons for decline, Section 120 was meant only to "address[ ] a relatively narrow interaction between two species— pinnipeds and salmonids." *Id.* Thus, a significance finding under Section 120 would not necessarily mean there should be a significance finding under NEPA or the ESA, as the inquiry and analyses were necessarily distinct.

211. *Id.*

212. *Id.* at 1064.

213. MMC Letter, *supra* note 150, at 5; *see also supra* Part II.B.

214. *Humane Soc'y of the U.S.*, 625 F. Supp. 2d at 1064.

215. *Id.*

216. *Id.*

217. *Id.*at 1066.

218. Humane Soc'y of the U.S. v. Gutierrez, 558 F.3d 896, 897 (9th Cir. 2009).

agency was acting in an arbitrary and capricious manner.[219] With the legal barriers cleared, the states quickly began to take action against the California sea lions at Bonneville Dam in March 2009. Of the fourteen sea lions that were removed in 2009, ten would be euthanized.[220]

IV.
ANALYSIS: SECTION 120'S PLACE IN THE MARINE MAMMAL PROTECTION ACT

A. *Statutory Ambiguity and the Competing Values of the MMPA*

As the Pinniped-Fishery Interaction Task Force report astutely noticed, Section 120 and the Bonneville Dam pose a complex problem for "[a]t the heart of this issue is the interaction between multiple species which are highly valued by many diverse groups. The care for these species is rooted in deeply held values that spring from religious, cultural, moral, economic and aesthetic perspectives."[221] These various views are not limited to Section 120, but pervade throughout the MMPA as well. Three key perspectives are usually cited as motivating the MMPA: conservationist, animal rights, and utilitarian interests.[222] Whether spoken or not, these values contribute to the different views of when Section 120 should apply because they affect what goals the law should pursue. Such goals not only affect how an argument is framed in the political arena, but what type of evidence is needed to fulfill a burden of persuasion or even what that evidence may *mean*.[223] This issue of framing is especially prevalent in the debate surrounding Section 120, where the most primarily invoked perspectives are conservation and animal rights create a

219. *Id.* at 896.

220. MAY 22 STATUS REPORT, *supra* note 91, at 4 tbl.1.

221. PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at 15.

222. GOBLE & FREYFOGLE, *supra* note 32, at 897.

223. *See* Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resource Regulation*, 26 PUB. LAND & RESOURCES L. REV. 1, 17–18 (2005). Of course, the idea of a statute embodying competing goals is not limited to Section 120 or the MMPA, as laws regarding the protection or use of natural resources often have multiple goals. In such a case, "modern statutes [should] embody a commitment to give the environment more weight than it traditionally had been given when in conflict with extractive or development interests." *Id.* at 21. But in a case such as the use of Section 120 at Bonneville Dam, where two sets of environmental goals pull in different directions, determining a 'correct' solution to the issue can be all the more difficult.

question of how to balance the interests of entire salmonid populations with those of individual pinnipeds.

In invoking a conservationist perspective to justify the use of Section 120 at Bonneville Dam, the states have focused on the need to "restore a balance . . . between the abundant [pinniped] populations and the endangered and threatened salmon and steelhead populations."[224] Whereas the conservation view would normally look at the ecological role of marine mammals in the environment,[225] this ecological viewpoint focuses more on the 'unnatural' presence of the pinnipeds in the Columbia River. It is, however, a viewpoint that is supported by the statute, which itself looks at the balance between salmonids and pinnipeds[226] to justify the taking of individual pinnipeds to protect the ecosystem as a whole.

This focus on balance is arguably misplaced given the ecology field's increasing tendency to move away from the idea that nature has a perfect equilibrium that must be protected.[227] The idealization of balance is even more odd given the significant changes to the Columbia River environment through hydromodification, as well as the decrease in salmonid populations from overfishing.[228] Instead of looking at the Columbia River as a changing environment due to development and hydromodification, the focus on balance seeks to recreate predator-prey relationships that existed prior to the construction of dams. Despite the recent pushback on the image of ecosystems as being comprised of static, unchanging relationships between species that must be maintained, both the statute and the states have focused on the idea of balance to justify lethal take of pinnipeds to protect another species.[229] For the states, this would require that all pinnipeds, the unnatural newcomers to the re-

224. States' Request for Removal, *supra* note 22, at 3.

225. GOBLE & FREYFOGLE, *supra* note 32, at 898.

226. 16 U.S.C. § 1389(d)(3) (2006) ("[T]he extent to which such pinnipeds are causing undue injury or impact to, or *imbalance* with, other species in the ecosystem.") (emphasis added).

227. HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 7 (5th ed. 2002) ("In the 1960s and 1970s, a major inspiration for environmental law was the image of humankind upsetting the 'balance of nature,' with potentially disastrous results. Ecology began to move away from that image many years ago. Law has only recently followed.").

228. *See, e.g.*, Beardslee, *supra* note 12.

229. *See* States' Request for Removal, *supra* note 22, at 3; 16 U.S.C. § 1389(d)(3).

gion, be removed in order to preserve the prior 'natural' order.[230] Thus, in order to support this goal of balance, an interpretation of the statute would necessarily be broad in order to remove as many pinnipeds as possible, regardless of whether they are having any impact on the salmonid population.[231] By virtue of their presence in an area that they until recently had not frequented, the 'balance' of nature is disrupted.

Countering this conservation-inspired perspective is the animal rights perspective, which seeks to protect animal interests separate from any human interest in the particular animal.[232] As applied to Section 120, the animal rights perspective would seek to protect the rights and interests of the individual pinniped. The affordance of rights to animals is especially strong with species as relatable to humans as the California sea lion.[233] For example, when the Secretary opened up its initial Section 120 Environmental Assessment to public comments, the vast majority of the comments were against the killing of individual sea lions because it was "morally wrong, ill conceived, will not reduce sea lion predation on at-risk salmon and steelhead stocks, and will only provide a 'feel good' option to much larger, but politically unpalatable solutions, like dam removal or the elimination of fisheries."[234] With such strong sentiment towards California sea lions, the taking of pinnipeds under this perspective would be limited to only when absolutely necessary. Thus, under this animal rights perspective, the interest of the individual pinniped would require a narrow reading of Section 120 so that individuals would not be unnecessarily sacrificed.

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230. *See* States' Request for Removal, *supra* note 22, at 14 (arguing that California sea lion predation has significant negative impact because "it is a new, growing, and unmanageable source of mortality").

231. *See, e.g.*, *id.* at 6 (offering a broad interpretation of "individually identifiable").

232. *See, e.g.*, David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 748 (1995); Manning, *supra* note 20, at 218–19 (discussing a protectionist view that views "wildlife as fellow traveling populations on the earth with rights similar to those of man . . . . Reasons for such extreme protection include protecting endangered populations from further decline and extinction, but also the ethical view that it is morally wrong to take an animal's life.").

233. Schmahmann, *supra* note 232, at 750–51 ("Some animal rights theorists contend that at least some animals have the capacity for reasoning, language, and self-consciousness and therefore can and should be holders of legal rights.").

234. Final Environmental Assessment, *supra* note 92, at P-1; *see also* Young, *supra* note 12, at 20 ("[M]arine mammals continue to evoke emotional responses from the public.").

Implicit in this debate, however, is the utilitarian perspective. Indeed, Section 120 explicitly states that the Secretary may authorize lethal take of "individually identifiable pinnipeds which are having a significant negative impact on . . . salmonid *fishery* stocks."[235] The very text of the statute thus emphasizes that the salmonids the statute is concerned with are of human interest, as they are part of an existing fishery stock. Although rarely invoked by supporters of Section 120, there is an undeniably significant interest in protecting fish over pinnipeds because fish have utilitarian value to humans. Salmonids in particular have value beyond their economic worth to fishing interests,[236] as salmon play a significant cultural role for Native Americans living alongside the Columbia River. The need to protect fish thus arguably arises not simply out of an interest in the individual fish, but from the use value of fish to people. Pinnipeds, on the other hand, have some existence value for some people but very little actual economic value to most. Section 120 portrays that result as the utility of the salmonid populations for human consumption is likely a key motivator in passing Section 120 to begin with, and an important reason for participation by fishermen and Native American tribes in the Pinniped-Fishery Interaction Task Force. In order to preserve the maximum number of salmonid for humans, rather than for pinnipeds, Section 120 would be read more broadly to ensure that competition for this limited resource is reduced.

B. *The Effect of Different Goals on Statutory Interpretation*

The effect of differing goals is apparent not only in how Section 120 would be implemented, but in interpreting the very words of the statute. One of the most apparent places for this effect is in the very different approaches parties have taken to the 'individually identifiable' and 'significant negative impact' requirements.

At first glance, the term "individually identifiable pinnipeds"[237] may seem to clearly and unambiguously refer to a single pinniped. While this term is not used elsewhere in the MMPA, nor any major environmental statute, the term 'individual' has

235. 16 U.S.C. § 1389(b)(1) (emphasis added).

236. *See* Young, *supra* note 12, at 1 ("[S]eals and sea lions [are] considered 'nuisance' animals because of their predation on steelhead and salmon, species prized by commercial and recreational fishermen . . . .").

237. 16 U.S.C. § 1389(b)(1).

been found to mean a single marine mammal in the context of the MMPA.[238] In *Natural Resources Defense Council, Inc. v. Evans*, the court found that "[i]n expressing concern about harassment to 'a marine mammal,' Congress was concerned about harassment to individual animals."[239] In determining that harassment could include harm to "single individuals," the Court equated "a marine mammal" to "individual marine mammal,"[240] thus reading "individual" under its common reading of "single." As applied to Section 120, it would follow that pinnipeds subject to lethal removal for would at the very least have to be differentiated from those that would not.[241]

However, as defined by the states in their application for Section 120, "individually identifiable" would apply to all pinnipeds within a certain location.[242] This broad interpretation was justified on the grounds that the pinnipeds were "'identifiable' . . . in the sense that it is not possible to confuse them with individuals that don't eat salmonids."[243] The states explicitly acknowledged reading out the "*individually* identifiable" requirement when it stated that it was "not necessary to uniquely identify individual animals."[244] As disingenuous as this definition may seem, it was adopted by the majority of the Pinniped-Fishery Interaction Task Force through the "spontaneous lethal takes" and California Sea Lion Exclusion Zone (CSLEZ) concepts. Both of these concepts would allow for the lethal take of California sea lions without identifying individual pinnipeds, instead creating a general group where every California sea lion in a particular area is presumed to have a significant negative impact.

Such an interpretation would serve the conservation-esque perspective that would set the goal of Section 120 as achieving 'balance' in the Columbia River. This interpretation would remove the unnatural presence of the California sea lions from Bonneville Dam by forwarding a broad definition of 'individually identifiable,' which in turn would allow the removal of more California sea lions than a narrower definition would. Such an interpretation would also serve the unspoken utilitarian perspective.

238. Natural Res. Def. Council, Inc. v. Evans, 364 F. Supp. 2d 1083, 1109 (N.D. Cal. 2003).
239. *Id.*
240. *Id.*
241. *See* MMC Letter, *supra* note 150, at 7.
242. States' Request for Removal, *supra* note 22, at 6.
243. *Id.*
244. *Id.*

If the goal is to preserve as many fish as possible, then as many of the competitors for this resource would need to be eliminated. By reducing the number of California sea lions, predation is necessarily reduced as well and more fish are available for human consumption.

Whether this interpretation is contrary to statutory requirements may depend on what one views Congress's goal to be when it passed Section 120. Section 120, standing alone, would seem focused primarily on protecting threatened or endangered salmonid fishery stocks. However, Section 120 could also be read in the broader framework of the MMPA, which was passed in part because "the public interest in protecting the world's oceans and the sea creatures that depend upon the oceanic environment to survive is also of the highest importance."[245] Its place in the MMPA, a statute geared towards protecting marine mammals, also seems to indicate that the existing protections for pinnipeds should not be taken lightly, even when salmonids are at danger. Legislative history gives support to the idea that the many requirements of Section 120 should serve as restrictions on when and how many pinnipeds can be taken in furtherance of the goal of protecting salmonids. The House Merchant Marine and Fisheries Committee itself explicitly stated during the passage of Section 120 that because "a variety of factors may be contributing to the declines of [salmonid] stocks . . . the current levels of protection afforded to seals and sea lions under the [MMPA] should not be lifted without first giving careful consideration to other reasons for the decline."[246] Taking these goals into account, as well as the specific language of the statute itself, Section 120 could, and likely *should*, be read to require that pinnipeds cannot be taken under Section 120 unless they are individually identifiable, as in individually distinguishable from one pinniped to another. However, this concurrent goal of maintaining protections for pinnipeds except in limited circumstances is lost when the focus is on protecting salmonid populations or seeking the return to an equilibrium balance.

On the other hand, focusing on the goals of the MMPA could be used to significantly narrow the application of Section 120 to extreme situations. For example, the Humane Society has taken

245. Natural Res. Def. Council, Inc. v. Evans, 364 F. Supp. 2d 1083, 1090 (N.D. Cal. 2003); *see also* Manning, *supra* note 20, at 223 (noting that under the MMPA, "[a]lmost absolute priority is given to marine mammals.").

246. H.R. Rep. No. 103-439 (1994).

a very narrow view of the "significant negative impact." Reflecting the animal rights perspective, the Humane Society's representative in the Task Force asserted that "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."[247] As this interpretation would require that each individual pinniped alone have a significant negative impact on the salmonid population, this construction takes "the opposite extreme"[248] viewpoint to the states' and Task Force majority's broad views of the "individually identifiable" requirement. Such conflicting interpretations are likely informed by the very different goals and values of the interest groups involved in this conflict, making the Bonneville Dam situation a difficult problem to resolve.

C. *The Role of Interest Groups in the Application of Section 120*

It is impossible to remove value judgments from any political process. Section 120 does attempt to reduce such value judgments by requiring the inclusion of scientists in the Pinniped-Fishery Interaction Task Force[249] and science in the statutorily-mandated considerations.[250] However, while the use of science has been viewed as value-free, it too is rife with political judgments and personal views.[251] Such values become all the more apparent in a statute like Section 120, which not only mandates the inclusion of science but interest groups that have already developed their own goals. As a result, "[t]here can be a strong feedback loop; once management judgments are made, they can strongly influence the collection and interpretation of scientific data, which in turn can tend to entrench the original management decisions."[252]

In a statute where even the most seemingly clear and unambiguous requirements can be subject to great debate, there is more room for those involved in the application process—primarily

247. MINORITY OPINION, *supra* note 13.
248. MMC Letter, *supra* note 150, at 4.
249. 16 U.S.C. § 1389(c)(2).
250. *See* 16 U.S.C. § 1389(d); *see also* Rodgers, *supra* note 8, at 23.
251. *See* Doremus & Tarlock, *supra* note 223, at 11 ("Scientific judgments interpreting such limited and equivocal data reflect the educated intuition of the scientists making them, but are also nearly inextricably bound up with those scientists' views about the appropriate degree of risk of ecological versus economic harm.").
252. *Id.* at 12.

parties in the Task Force—to insert their values in how Section 120's requirements should be defined. While the Task Force's recommendations are not binding on NMFS, their reading of the statute can have weight with the courts in subsequent lawsuits over NMFS decisions.[253] As a result, the use of Section 120 may wildly differ depending on who is involved in applying the law, and the values that drive them. Although Section 120 has only been applied twice since its enactment in 1994, the results of those two incidents show a potential for wild deviations in the application of Section 120 depending on the composition of the Task Force.

In general, the use of a Task Force to begin with is subject to the basic problems of having interest groups make policy decisions rather than the agency themselves. The Task Force could therefore be analogized to the negotiated rulemaking process, an additional process of agency rulemaking that allows interested parties chosen by an agency-appointed convener to come together and make a recommendation on an issue to the agency.[254] While negotiated rulemaking was initially praised, critics now argue that "negotiated rulemaking subtly subverts the basic, underlying concepts of American administrative law—an agency's pursuit of the public interest through law and reasoned decision making. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law."[255]

The argument for negotiated rulemakings is that by allowing the interest groups to come up with a decision, the rulemaking process faces less challenges later on if the most interested parties already agree on the rule.[256] The eventual rule is therefore more legitimate, which creates a higher rate of compliance while discouraging litigation. At the same time, negotiated rulemakings create a situation where interest groups are creating policy rather than the expert agency itself, resulting in "proposed rule[s] with which the parties are happy but which bear[ ] scant resem-

253. *See, e.g.*, Humane Soc'y of the U.S. v. Dep't of Commerce, No. 96-623, slip op. at 22 (D.D.C. Apr. 14, 1999) (relying in part on the Pinniped-Fishery Interaction Task Force's findings to determine that NMFS fulfilled Section 120's requirements).

254. 5 U.S.C. §§ 561–570 (2006).

255. William Funk, *Bargaining Towards the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997).

256. *See* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 56 (1987).

blance to what was contemplated by the statute."[257] This problem of deviating from creating policy that reflects the public interest is exacerbated in the Section 120 context because of the lack of a unanimity requirement. In negotiated rulemakings, decisions by interest groups must be unanimous unless otherwise agreed upon by the parties.[258] Thus, any recommendation made to the agency is made by all the interest groups involved in the rulemaking process, forcing a deliberation that takes into account all concerns of participants.

By contrast, the Pinniped-Fishery Interaction Task Force does not need to reach a unanimous consensus.[259] This may allow stronger interest groups to take control of the proceedings with no need to listen to the concerns of minority interests. Without the unanimous consensus requirement, there is also no requirement to compromise on issues that may be significant, such as whether the group's decisions are compliant with the statute's policy and history. While on one hand, the group's decision should not be curtailed by a requirement of unanimity as fundamental differences between interest groups may bring the entire process to a halt. For example, the Humane Society representative posed significant questions of why significantly higher forms of salmonid mortality was permitted while at the same time finding pinniped predation significant in this instance.[260] Such issues were never addressed by either the Task Force majority or NMFS, despite being echoed by the MMC[261] and the public.[262]

The problem of majority interests overshadowing minority concerns is itself aggravated by the potential capture of the Task Force by particular interest groups just as Regional Fishery Management Councils under the Magnuson Fishery Conservation

257. *Id.* at 96.

258. 5 U.S.C. § 562(2) (2006).

259. *See, e.g.*, PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39. On the other hand, it has been argued that a unanimity requirement would be less accurate than a finding by a supermajority. According to Professor Adrian Vermeule, this is because:

> [M]ajority rule induces the members to reveal their private information with less distortion than under unanimity. The reason is that if a unanimous vote is necessary to depart from the status quo, then members biased in favor of change have strong incentives to overclaim or otherwise manipulate their information. By contrast, majority rule minimizes the net incentives for distortion by panel members with different biases for and against change.

Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2248 (2009).

260. *See* MINORITY OPINION, *supra* note 13.

261. MMC Letter, *supra* note 150, at 1.

262. Final Environmental Assessment, *supra* note 92, at P-6.

and Management Act have been captured by industry participants.[263] The Regional Fishery Management Councils are responsible for managing fisheries in their region's federal waters by developing fishery management plans.[264] Despite some "vague and bromidic"[265] National Standards by which each plan must comply, these plans often ignore the statute's requirements to allocate fishing privileges in a way that must be "equitable to all . . . fishermen"[266] by favoring recreational fishermen at the expense of commercial fishermen.[267] These plans have also thus far failed to achieve the Magnuson Act's purpose of preventing overfishing, as increasing numbers of fisheries collapse.[268] But while the Secretary of Commerce has the ultimate authority to promulgate these plans, the Secretary is bound by statute "to grant maximum deference to the industry-dominated councils."[269] As a result, these plans are difficult to challenge in courts because of judicial deference to the expertise of the Secretary, despite the fact that the Secretary is required to defer to the councils which themselves may not require deference by the courts as they do not have the legislative power to promulgate rules on their own.[270]

The Pinniped-Fishery Interaction Task Force parallels the problems of the Magnuson Act, with the Task Force creating solutions that may not comport with statutory law but earning deference in the courts through judicial deference to NMFS's expertise. The situation under the MMPA is not likely as extreme as that found in the Magnuson Act; even in the Bonneville Dam situation, NMFS did not adopt the Task Force's recommendations entirely. However, NMFS did adopt several questionable aspects of the Task Force's recommendations, particularly in looking at whether there was significant impact, and also failed to address criticisms of the Task Force report by the MMC. In addition, the stark contrast between the Ballard Locks Task

263. *See* Robert J. McManus, *America's Saltwater Fisheries: So Few Fish, So Many Fishermen*, 9 NAT. RESOURCES & ENV'T. L. 13, 14 (1995); Doremus & Tarlock, *supra* note 223, at 25.

264. 16 U.S.C. § 1852 (2006).

265. McManus, *supra* note 263, at 14.

266. 16 U.S.C. § 1851(a)(4)(A) (2006).

267. McManus, *supra* note 263, at 15–16.

268. Examples of such collapse include the New England fisheries of haddock, yellowtail flounder, and cod, as well as west coast fisheries of Chinook and Coho salmon. *Id.* at 16.

269. *Id.*

270. McManus, *supra* note 263, at 15–16.

Force report and the Bonneville Dam's report may illustrate the capture of the Task Force. Whereas the Ballard Locks Task Force was unwilling to allow lethal take, despite pinniped predation of up to 60 percent of the salmonid runs, the Bonneville Dam Task Force was willing to take any sea lion in the area to prevent a 4 percent predation rate. Arguably the Bonneville Dam Task Force was motivated by the eventual collapse of the salmonid population at Ballard Locks, but the difference between the two solutions is extreme, and a disconcerting sign of the direction future Task Forces will take. Indeed, when the Pinniped-Fishery Interaction Task Force was reconvened in November 2010 to determine the effectiveness of the lethal take program, fifteen of the sixteen members recommended increased lethal takes, expanding killing methods, and making it easier to place individual California sea lions on the lethal take list.[271]

One possible solution to these concerns of the suppression of minority interests and interest group capture may be to bring the MMC back into the fold, rather than allowing the Task Force to substitute for the MMC. The MMC's role should be a formal aspect of Section 120, requiring that NMFS not only consult with the MMC on the Task Force recommendations, but to respond to concerns that the MMC may have on the Task Force report. In short, the MMC would be given the same role as it has played in other MMPA waiver situations, where:

> [T]he Commission is restricted to a consultative role . . . . Secretaries [must] respond within 120 days to any recommendations made by the Commission; if the Secretary does not adopt the recommendation, he is required to send the commission "a detailed explanation of the reasons why those recommendations were not followed or adopted.[272]

Formally bringing the MMC back into the process of Section 120 will not remove the influence of interest groups in the Section 120 process. After all, the MMC itself could be considered an interest group, even if its members are selected through a process meant to create an independent advisory board.[273] How-

271. Scott Learn, *Task Force Recommends Killing More Sea Lions at Bonneville Dam to Protect Endangered Species*, THE OREGONIAN, Nov. 10, 2010, http://www.oregonlive.com/environment/index.ssf/2010/11/task_force_recommends_killing.html.

272. GOBLE & FREYFOGLE, *supra* note 32, at 899 (citing 16 U.S.C. § 1402 (2006)).

273. *See id.*; 16 U.S.C. § 1401 (2006). On the other hand, increasing the importance of the MMC could result in a similar situation to the Regional Fishery Management Councils, where the importance of the Councils resulted in a push to get industry participants onto the Councils. *See* McManus, *supra* note 263. The MMC

ever, adding this requirement could bring an additional level of review that takes into account the competing goals of Section 120: preventing predation of vulnerable salmonid populations while ensuring strong protections for pinnipeds. Generally, outside review by a committee is viewed as being more effective, particularly when they have "the ability to interact with the decision makers and other interested persons."[274] The MMC has experience interacting with the Secretary due to their other MMPA duties, and would also have had experience repeatedly examining decisions that in turn allow the MMC "to become better educated . . . about the system over time."[275]

The Bonneville Dam situation exemplifies why such a role is necessary both in the decision making process and the legal realm as well. Although the MMC made several key recommendations, the District Court found that NMFS was free to ignore them with no legal repercussions because MMC had no formal role in the Section 120 process.[276] By increasing the role of the MMC in Section 120 decisions, NMFS will need to address these concerns and engage in further deliberation on whether lethal removal truly works, rather than allowing majority interests to sweep aside the lives of the California sea lions. While this will not remove value judgments, it will at the very least force NMFS to acknowledge the values that underlie its decisions, and to engage in deliberation in justifying such decisions under the statute.

This potential role that the MMC could play was recently highlighted by the Ninth Circuit's review of the Bonneville Dam decision, which relied on the MMC's recommendations in unanimously reversing the District Court's findings on NMFS's application of Section 120.[277] The court found that NMFS had failed to adequately explain the basis of its decision, starting with the failure to explain why California sea lions had a "significant negative impact" on salmonid populations when other activities

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may be at less risk of such capture due to the requirement that the appointees be selected from a list unanimously adopted by the heads of four agencies such as the Smithsonian and National Science Foundation, but then many of these are also political appointees.

274. Doremus & Tarlock, *supra* note 223, at 32.

275. *Id.* at 33. In contrast to the long-standing MMC, the Pinniped-Fishery Interaction Task Force is created ad hoc for each application of Section 120. 16 U.S.C. § 1389(c) (2006).

276. *See, e.g.*, Humane Soc'y of the U.S. v. Gutierrez, 625 F. Supp. 2d 1052, 1062–63 (D. Or. 2008).

277. Humane Soc'y of the U.S. v. Locke, 626 F.3d 1040 (9th Cir. 2010).

causing similar or greater mortality did not.[278] In response to NMFS's argument that it is not obligated to address such inconsistencies,[279] the court found that this was no mere inconsistency but one that had "occupied the center of this controversy from the start. The issue surfaced prominently in the task force proceedings, and has been raised repeatedly and forcefully by the [MMC]."[280] Thus, NMFS was required to at least explain the seemingly incompatible findings. The court also faulted NMFS's finding that there would be significant negative impact when predation was greater than 1 percent.[281] Again relying on the MMC findings,[282] which had repeatedly criticized the 1 percent predation target without any further analysis to support, the court found that the explanation was incomplete. Thus, the agency's action was arbitrary and capricious, and the court vacated NMFS's action, requiring that NMFS either articulate a reasoned explanation for the removal program or adopt a new solution that was reasonably explained.[283]

The Ninth Circuit's decision thus demonstrates the significant weight that the MMC's recommendations have even in its informal consultative capacity. However, although the MMC's recommendations have played an important role in temporarily ending the lethal take program at Bonneville Dam, its role is still informal and dependent on NMFS initiating consultation. Without a legally mandated requirement that such a consultation be made, NMFS could simply choose not to consult at all, cutting out the MMC and removing one of the few remaining layers of review in this emotionally charged debate.

V.
CONCLUSION

At this point, it is difficult to determine whether pinniped removal at Bonneville Dam has benefited salmonid populations. On one hand, the 2010 salmon run is expected to number more than twice as many fish as in 2009, with close to 500,000 fish ex-

278. *Id.* at 1048.
279. *Id.* at 1051.
280. *Id.*
281. *Id.* at 1052.
282. *See id.* at 1052–53.
283. *Id.* at 1053.

pected to swim up the Columbia River.[284] How much of that recovery can be attributed to the lethal and non-lethal removal of twenty-five California sea lions between 2008 and 2009 is wholly debatable. While the removal program has focused on individuals who are more likely to be repeat offenders, with the twenty-five removed sea lions "account[ing] for 22% of all the salmonid catch events attributed to specific individuals,"[285] their removal failed to reduce overall salmonid consumption.[286]

Removal has not reduced total annual salmonid take by pinnipeds. In fact, "[t]he 2009 salmonid consumption estimate was higher than in any other year,"[287] although the estimated percentage of the run consumed was only the fourth lowest due to a large spring run. This was likely due to the fact that although "fewer California sea lions are present . . . they caught more salmon per individual."[288] California sea lion levels had decreased to 54 in 2009, the lowest number of individuals observed since counts began in 2002.[289] These 54 individuals were observed taking 4,014 salmonids in 2009, an average of 74.3 salmonids.[290] This 74.3 average represented a significant increase from 2008, where 82 individuals took 4,294 salmonids, a salmonid consumption average of 52.4. Thus, while the number of California sea lions had decreased by nearly thirty individuals, their average individual effect was much greater.

It could be argued that consumption would have been much higher without removal of the twenty-five individuals,[291] and so a steep decline in individual sea lions at the Dam, along with reduced salmonid predation, could be expected in spring 2010.[292] But the predicted steep decline in sea lion numbers has not arisen as there was instead a sharp increase of California sea lions present at Bonneville in 2010.[293] Furthermore, two-thirds

284. Editorial, *An Upstream Battle over Chinook Salmon*, L.A. TIMES, Mar. 12, 2010, at A26, *available at* http://articles.latimes.com/2010/mar/12/opinion/la-ed-salmon12-2010mar12.

285. 2009 FIELD REPORT, *supra* note 85, at 23.

286. *Id.*

287. *Id.* at 22.

288. *Id.* at 23.

289. *Id.*

290. *Id.* at 22 tbl.8.

291. *Id.* at 23.

292. *Id.* at 24.

293. California sea lion numbers increased from fifty-four in 2009 to eighty-nine in 2010, the highest number observed since 2005. ROBERT J. STANSELL ET AL., EVALUATION OF PINNIPED PREDATION ON ADULT SALMONIDS AND OTHER FISH IN

of observed individuals were newcomers as compared to previous years where only one-third of present individuals were newcomers.[294] Considering how one of the Task Force's original goals of removing the California sea lions was to prevent recruitment of new sea lions,[295] this sudden reversal in trend should raise concerns of the unexpected consequences of lethal removal.

Any expectations for decreased California sea lion impact are further complicated by the fact that Stellar sea lion numbers nearly tripled between 2009 and 2010,[296] thereby increasing the impact of Stellar sea lions on the salmonid populations.[297] In 2009, 26 Stellar sea lions took an estimated 475 salmonids, an increase of nearly three hundred from the previous year.[298] While total California sea lion consumption was down from previous years, the increased Stellar sea lion consumption pushed the overall pinniped consumption to higher than before. These numbers may be even greater because surface observation of Stellar sea lions is likely significantly underestimating predation levels, as individuals "were often observed swallowing steelhead whole, suggesting that they could consume steelhead and jack Chinook entirely below the surface."[299] In addition to these higher takes, Stellar sea lions are proving to be less susceptible to hazing techniques,[300] thus making it more difficult to deter individuals from taking the salmonids. Finally, Stellar sea lions have been reported to be using their size advantage to steal salmonids

THE BONNEVILLE DAM TAILRACE, 2008-2010 17 tbl.7 (2010) *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2010/2008-2010_Pinniped_Report.pdf [hereinafter 2008-2010 REPORT].

294. ROBERT STANSELL & KARRIE GIBBONS, U.S. ARMY CORPS OF ENGINEERS, STATUS REPORT - PINNIPED PREDATION AND DETERRENT ACTIVITIES AT BONNEVILLE DAM 2 (2010), *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2010/update20100528.pdf ("Typically, we see 2/3rds repeat animals, and 1/3[rd] new, but this year we . . . are seeing the reverse.").

295. *See* PINNIPED-FISHERY INTERACTION TASK FORCE FINAL REPORT, *supra* note 39, at 9.

296. Stellar sea lion numbers increased from twenty-six in 2009 to seventy-five in 2010. 2008-2010 REPORT, *supra* note 293, at 17 tbl.17.

297. 2009 FIELD REPORT, *supra* note 85, at 24.

298. *Id.* at 22 tbl.8.

299. *Id.* at 10.

300. SEAN TACKLEY ET AL., U.S. ARMY CORPS OF ENGINEERS, 2008 FIELD REPORT: EVALUATION OF PINNIPED PREDATION ON ADULT SALMONIDS AND OTHER FISHES IN THE BONNEVILLE DAM TAILRACE 11 (2008), *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2008_Pinniped_Report.pdf.

from California sea lions.[301] The increase in clepto-paratism may be "inflat[ing] the number of salmonids observed caught by California sea lions, but not necessarily consumed in whole."[302] Indeed, in 2010, Stellar sea lions were estimated to steal fish from California sea lions 801 times.[303] Taking such numbers into consideration, Stellar sea lions consumed at least 986 salmonids in 2010, a dramatic increase from the observed 475 salmonids in 2009.[304]

It is therefore entirely possible that as the California sea lions decrease, a niche is opened that the Stellar sea lions will replace, particularly as there is less competition with their non-protected counterparts. In March 2010, as many as thirty-one Stellar sea lions were seen at Bonneville Dam on any given day, as compared to the twenty-six Stellar sea lions seen in all of 2009.[305] If such a trend continues, the effect of removing the California sea lions will be diminished as a protected species replaces them. As Section 120 cannot be used to remove the Stellar sea lions, states may very well find themselves in the same exact position as before, with no more statutory tools to use.

As the situation currently stands, it is possible that none of the goals forwarded by the parties will be fulfilled. For parties seeking to protect salmonids, whether to 'restore balance' or preserve this limited resource for human consumption, it is very possible that removal of California sea lions would have little impact on the salmonid population.[306] Pinniped consumption in general may simply have little impact on the salmonid populations to begin with, as percentages of salmonids consumed are more a func-

301. 2009 FIELD REPORT, *supra* note 85, at 24–25. ("Stellar sea lions were observed to take 183 salmonid prey from California sea lions in 2009, a 45% increase from last year (126), requiring the 'victims' to find more fish.").

302. *Id.* at 25.

303. 2008-2010 REPORT, *supra* note 293, at 29 tbl.15.

304. *Id.*

305. ROBERT STANSELL & KARRIE GIBBONS, U.S. ARMY CORPS OF ENGINEERS, STATUS REPORT–PINNIPED PREDATION AND DETERRENT ACTIVITIES AT BONNEVILLE DAM 1 (2010) (emphasis added), *available at* http://www.nwd-wc.usace.army.mil/tmt/documents/fish/2010/update20100319.pdf; 2009 FIELD REPORT, *supra* note 85, at 23.

306. Notably, when the Pinniped-Fishery Interaction Task Force was reconvened to analyze the status of the removal program, MMC member Daryl Bonnes "agreed with other task force members that the Section 120 removal program 'is likely to fail in the long run.'" *Sea Lion Removal: Some Task Force Members Suggest Loosening Criteria to Trap More Animals*, THE COLUMBIA BASIN FISH & WILDLIFE NEWS BULLETIN (Oct. 29, 2010), http://www.cbbulletin.com/401033.aspx. Despite this, they agreed that the removal program should continue. *Id.*

tion of the salmonid population rather than total take by pinnipeds.[307] On the other hand, for parties seeking to protect California sea lions, the lethal take of sea lions will likely increase if NMFS can provide adequate explanations for the Ninth Circuit's queries, allowing the Pinniped-Fishery Interaction Task Force's recommendations to go forward. In such a case, the only goal that will be fulfilled are the deaths of several California sea lions, with no one the happier for it.

307. MAY 22 STATUS REPORT, *supra* note 91, at 2–3. Of course, this has not stopped some from trying to further reduce protections to pinnipeds in order to protect salmonids. In 2007, "The Endangered Salmon Predation Prevent Act" was introduced by Washington representative Brian Baird, which would create an expedited process to lethally remove California sea lions on the Columbia River. Blair E. McCrory, *2007 Legislative Review*, 14 ANIMAL L. 265, 275, 278 (2008).