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FIVE YEAR LEGAL DEBATE OVER SEA LION LETHAL REMOVAL CONTINUES: FEDS AGAIN DEFEND AUTHORIZATION

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A legal brief filed Wednesday by the federal government insists that NOAA Fisheries "exercised sound scientific judgment in finding that certain individually identifiable California sea lions have a 'significant negative impact on the decline or recovery' of at-risk salmon."

And the agency is entitled under the law to make such judgments as part of the process outlined in the Marine Mammal Protection Act to permit the take – the lethal removal – of marine mammals so identified, according to the federal filing in the U.S. Court of Appeals for the Ninth Circuit.

That conclusion is supported in a joint brief, also filed Wednesday, by the states of Idaho, Oregon and Washington.

The filings come in defense of a 2012 NOAA Fisheries decision under Section 120 that authorizes the states to remove California sea lions know to feed each spring on spawning salmon and steelhead in the waters below the lower Columbia River's Bonneville Dam. The Humane Society of the United States challenged that NOAA Fisheries decision in U.S. District Court.

The decision was upheld at the district court level in February, a decision that is now under appeal. The HSUS challenged the district court decision and in April opened arguments that NOAA Fisheries "ignored" prior appeals court directives in reissuing the sea lion removal authority.

The issue has been debated in federal courts since NOAA Fisheries first authorized lethal removal in March 2008.That decision was based on a 2006 application from the states, consideration the issues by an assembled panel of experts and completion by NOAA of a National Environmental Policy Act environmental assessment.

That initial authorization was immediately challenged in U.S. District Court, which upheld NOAA Fisheries' decision. That court opinion, however, was appealed by HSUS, and the authorization was vacated by the Ninth Circuit in November 2010.

The 2008 NOAA decision authorized the states of Idaho, Oregon and Washington to remove "individually identifiable" California sea lions that are having a "significant negative impact on the decline or recovery of these salmonid populations," two qualifications outlined in Section 120. The 2010 Ninth Circuit opinion said NOAA Fisheries failed to properly explain how its decision satisfied the two Section 120 guidelines.

Below the dam the sea lions -- males that dip into the river during annual journeys up the coast to feed, have access to a variety of fish – prey on fish, including five salmon and steelhead stocks that are listed under the Endangered Species Act. The states say that the predation at the dam, which has become more pronounced since the turn of the century, hinders extensive and expensive efforts to revive salmon. Few California sea lions wandered the 146 river miles

up to the dam prior to 2000, the federal brief says.

The 2010 Ninth Circuit decision said that NOAA Fisheries had "not adequately explained its finding that sea lions are having a 'significant negative impact' on the decline or recovery of listed salmonid populations given earlier factual findings by NMFS that fisheries that cause similar or greater mortality among these populations are not having significant negative impacts," the Ninth Circuit opinion says. HSUS has insisted that sea lion removal decisions are in inconsistent with NOAA Fisheries decisions permitting Columbia mainstem harvests and the operation of the federal hydro system, both of which involve the "incidental take" of listed salmon and steelhead.

"Second, the agency has not adequately explained why a California sea lion predation rate of 1 percent would have a significant negative impact on the decline or recovery of these salmonid populations," the 2010 Ninth Circuit opinion says.

The HSUS claims the 2010 authorization does nothing to correct the flaws cited by the appeals court.

"Plaintiffs filed suit and sought summary judgment because, among other reasons, rather than reconsidering its authorization in light of earlier decisions the agency had ignored completely, NMFS issued essentially the same lethal removal authorization as in 2008," according to the April 22 HSUS brief.

In the latest go-round, federal and state attorneys say that the 2012 authorization properly address the courts concerns.

"In response to this Court's instructions to provide a cogent explanation of the agency's decision on remand, NMFS issued a thorough analysis of the challenged Section 120 authorizations," the June 19 federal brief says.

"The agency's determination is not at odds with its findings regarding the impact of fisheries and hydroelectric power systems. Those prior findings were made under the ESA and NEPA, and HSUS errs in equating determinations made under those statutes with NMFS's Section 120 determination.

"Moreover, in contrast to fishery and hydropower system impacts, sea lion predation is unmanaged, growing, and has a disproportionate impact on distinct populations of adult salmon as they migrate upstream to reproduce," the federal brief says.

The states say it is NOAA Fisheries call to make.

"The key terms in this provision have not been defined by statute or regulation," the states' brief says of the MMPA's Section 120.

"Thus, Congress left it to NMFS to interpret what constitutes a 'significant negative impact' on listed salmonids and how the MMPA statutory standard should be applied," the June 19 brief says. "The evidence in the administrative record, including scientific data and expert conclusions, demonstrates that California sea lion predation at Bonneville Dam has a significant negative impact on the decline and recovery of listed salmonids, thus satisfying the statutory criteria for lethal removal as determined by NMFS.

"Applying the appropriate deferential standard of review, the district court correctly determined

that NMFS's decision was not arbitrary and capricious, the agency had properly interpreted and applied Section 120, and the lethal-removal authorization was in accordance with law

The plaintiffs, led by the HSUS, now have until July 10 if they wish to reply to the federal and state arguments filed in the Ninth Circuit. That would end the briefing, according to the court's latest scheduling note.

Through 2012, state wildlife managers removed a total of 54 California sea lions – 11 of which were sent to zoos and aquaria. Another four sea lions have been removed this spring; two are being housed in Queens Zoo in New York.

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