May 5, 2005

Ms. Harriet Allen
Manager
Threatened and Endangered Species Section
Washington Department of Fish and Wildlife
600 Capitol Way, N.W.
Olympia, Washington 98501-1091

Dear Ms. Allen:

This letter is a follow-up to the comments previously submitted by Defenders of Wildlife, Friends of the Sea Otter, The Humane Society of the United States, and the Sea Otter Defense Initiative on the Draft "Washington State Recovery Plan for the Sea Otter." Since that time the Ninth Circuit has ruled on a case, *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), that has implications on Washington's Final Recovery Plan, specifically with regard to Native take of sea otters. The purpose of this letter is to request that the Washington Department of Fish and Wildlife issue a clarification regarding Native take that makes the Plan consistent with controlling law.

As a matter of background, our comments on the Draft Recovery Plan expressed the opinion that it did not adequately address Native take. In particular, we noted that it is not necessary to address the question of whether the Marine Mammal Protection Act (MMPA) abrogates any treaty rights, since no treaties exist allowing for the take of sea otters. As such, the MMPA take prohibition would apply to all tribal take of sea otters. Regarding the Makah Tribe, we noted their treaty expressly covers the take of fish, whales and seals, not sea otters. Unfortunately, however, our concerns were set aside and the same Native take issues remained, erroneously, in the Final Recovery Plan. "Washington State Recovery Plan for the Sea Otter," Washington Department of Fish and Wildlife, § 6.1, 7.1, 9.6, Appendix B (Dec. 2004). In the Final Plan, WDFW states: "The MMPA does not abrogate treaty rights. Any program developed by USFWS and respective tribes for sea otters would accommodate the Federal trust responsibility, treaty rights and requirements of the MMPA." Final Recovery Plan, Section 9.6. This statement is no longer accurate as a result of the *Anderson* decision.

The Ninth Circuit has recently held Native treaty rights must comport with the conservation purpose of the MMPA in order to be valid. *Anderson*, 371 F.3d at 497.

Specifically with regard to the Makah treaty, the Ninth Circuit held that the MMPA does indeed abrogate the treaty right to whale.

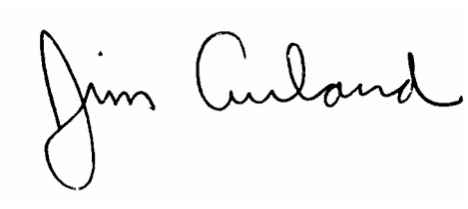
It is also incorrect to make a blanket proclamation that "[t]reaty rights to hunt and fish are guaranteed to Native Americans." Recovery Plan Appendix B. With regards to the MMPA, treaty rights to hunt and fish are guaranteed only to the extent that they comply with the MMPA's conservation purpose. *Anderson*, 371 F.3d at 497. Indeed, "[i]f the MMPA's conservation purpose were forced to yield to the Makah Tribe's treaty rights [to hunt whales], other tribes could also claim the right to hunt marine mammals without complying with the MMPA." *Id.* at 499.

Similarly, WDFW's comment in the Final Recovery Plan that "[o]ther tribes reserved 'hunting' rights in their treaties" is not without limitation. Recovery Plan Appendix B. If such a hunting right was absolute, "[t]hese less specific 'hunting and fishing' rights might be urged to cover a hunt for marine mammals." *Anderson*, 371 F.3d at 499. In other words, general fishing and hunting rights cannot cover marine mammals, like the sea otter, without express mention of the species in the treaty. Even when take of a species, such as whales, is expressly authorized by treaty, such take must comply with the MMPA's conservation purpose. *Id.* at 497. For example, in Appendix B, it states that the Makah have a "right of taking fish and of whaling or sealing." Recovery Plan Appendix B. Sea otters do not fall into the fish, whale or seal category. As noted, generic "hunting" and "fishing" rights are not enough to provide support for the take of marine mammals like the sea otter without express mention of the species in the treaty.

With regards to the comment in the Recovery Plan that four Washington tribes located on the north coast of Washington "all have off-reservation treaty rights that extend into the marine waters and cover marine mammals," Recovery Plan § 6.1, such a statement is unnecessarily misleading. Again, the fact is that there are no existing treaties within the sea otter range that would authorize the take of sea otters. To the extent such treaty rights exist, they are abrogated by the MMPA. As a result of the *Anderson* decision, the Makah tribe has now subjected its interest in whaling to the MMPA. Because the MMPA does not allow Native take outside of Alaska, the Makah have filed for a waiver of the take moratorium pursuant to section 101(a)(3)(A) to hunt for gray whales. Thus, by the Makah's own action, it is clear that the MMPA moratorium and take prohibition would apply to sea otters, regardless of any treaty provisions. Moreover, in the case of sea otters, because the Washington State population is below its optimum sustainable population level, no waiver of the moratorium would be available. The Final Plan needs to recognize this requirement.

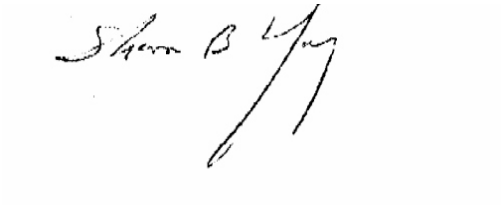
We appreciate the hard work and effort that went into the Final Recovery Plan, and while in general we are very pleased with the Plan and look forward to its implementation, we did want reiterate our comments regarding Native take in light of the Ninth Circuit's recent opinion. We request that WDFW issue a statement correcting the discussion of Native take in the Final Plan. Please feel free to contact any of us in regards to these comments.

Sincerely,



Jim Curland, Marine Program Associate
Defenders of Wildlife

D'Anne Albers, Executive Director
Friends of the Sea Otter



Sharon Young,
The Humane Society of the United States

Cindy Lowry, Director

CC: Matt Hogan, Acting Director, U.S. Fish and Wildlife Service
David Cottingham, Executive Director, Marine Mammal Commission