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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 **CALIFORNIA SEA URCHIN**
12 **COMMISSION; CALIFORNIA**
13 **ABALONE ASSOCIATION; and**
14 **COMMERCIAL FISHERMEN OF**
15 **SANTA BARBARA,**

16 Plaintiffs,

17 v.

18 **MICHAEL BEAN, in his official capacity as**
19 **Acting Assistant Secretary for Fish &**
20 **Wildlife & Parks, Department of Interior;**
21 **DEPARTMENT OF INTERIOR;**
22 **DANIEL M. ASHE, in his official capacity as**
23 **Director of the United States Fish & Wildlife**
24 **Service; and UNITED STATES FISH &**
25 **WILDLIFE SERVICE,**

26 Defendants.
27
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No. 2:14-cv-8499

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

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2 1. Plaintiffs California Sea Urchin Commission; California
3 Abalone Association; and Commercial Fishermen of Santa Barbara bring this action
4 for declaratory and injunctive relief against Defendants Michael Bean, *et al.*
5 (collectively “Service”), to protect their livelihoods from the devastation caused by
6 the California sea otter. At the turn of the twentieth century, the otter was on the
7 brink of extinction, due to habitat loss and hunting. But following a century of
8 federal and state hunting bans, the otter has made significant progress toward
9 recovery. With that recovery, however, comes the possibility for significant harm
10 to various Southern California fisheries which the otter, through range expansion,
11 may ravage. In 1986, Congress struck a balance between otter and fishery protection
12 by authorizing the Service to try to expand the otter’s range to San Nicolas Island,
13 but to keep the rest of the California Bight as an otter-free management zone. Pub.
14 L. No. 99-625, 100 Stat. 3500 (1986). In December of last year, the Service violated
15 this congressionally authorized compromise by ending the management zone. On
16 April 24, 2014, Plaintiffs submitted a petition pursuant to the Administrative
17 Procedure Act requesting that the Service’s termination decision, as well as the
18 regulation purporting to authorize it, be rescinded as violative of Public Law 99-625.
19 For the reasons set forth below, Plaintiffs seek a declaration that the Service’s denial
20 of that petition is illegal, and an injunction requiring the Service to grant the petition.
21 Pursuant to Local Rule 8-1, the grounds for the Court’s jurisdiction over Plaintiffs’
22 cause of action are 28 U.S.C. § 1331 (federal question jurisdiction); § 1346(a)(2)
23 (civil action against the United States); § 2201 (authorizing declaratory relief);
24 § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial
25 review of agency action under the Administrative Procedure Act).

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PARTIES

Plaintiffs

2. Plaintiff California Sea Urchin Commission is an entity of state government, created by the California Legislature in 2004. Cal. Food & Agric. Code § 79040. The Commission’s purpose is to promote legislation that protects sustainable sea urchin harvest, to make consumers and the general public aware of the high nutritional value of sea urchin, and to balance sea urchin harvest with environmental protection. *See id.* § 79002. The Commission has the power to sue and be sued. *Id.* § 79052.

3. Since its creation, the Commission has been gravely concerned with the negative impacts of otter predation upon shellfish. Within the last decade, the vast majority of sea urchin harvest in California has occurred in the otter management zone. The Channel Islands sea urchin resource alone is responsible for 68% of the state’s harvest.

4. Sea urchin is a favorite of the otter. *See* U.S. Fish & Wildlife Service, Final Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters 87 (Nov. 2012) (SEIS) (“Sea urchins are favored prey for sea otters . . .”). When an otter moves into a new area, it generally will devour the urchin population before selecting other prey. A significant body of research has established that, once the otter moves into sea urchin territory, the commercial urchin resource will collapse owing to the otter’s voracious predation. *See, e.g.*, U.S. Fish & Wildlife Service, Final Environmental Impact Statement for Translocation of Southern Sea Otters App. B at 2 (May 1987) (EIS) (“[T]he prevailing view among scientists is that sea otters limit populations of . . . sea urchins, to such low levels that commercial and recreational fisheries for [the] species are reduced or eliminated.”).

5. Consequently, the Commission has a strong interest in protecting the otter management regime that Congress authorized through Public Law 99-625. The Commission submitted extensive comments to the Service on its draft environmental

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1 impact statements and proposal to terminate the translocation program, including the
2 management zone. *See* SEIS App. G at 83. In those comments, the Commission
3 objected strongly to the Service’s proposal, highlighting the profoundly negative
4 impacts that unregulated otter range expansion into the management zone would
5 have on Southern California’s marine ecology and economy.

6 6. Plaintiff California Abalone Association is a nonprofit California
7 corporation. Formed in 1971, the Association’s mission is to restore and steward a
8 market abalone fishery in California that utilizes modern management concepts, to
9 protect and enhance the resource, and to guarantee a sustainable resource for the
10 future. The Association’s many dozens of members held commercial abalone diving
11 permits in 1997, the year the State of California enacted an abalone fishing
12 moratorium. *Cf.* Cal. Fish & Game Code §§ 5521, 5521.5. Although the abalone
13 resource is improving, otter predation related to its expansion into the management
14 zone will prevent the abalone from reaching a minimum viable population, which is
15 required for the moratorium to be lifted and for the abalone to be sustainable. *Cf. id.*
16 § 5522(d).

17 7. Plaintiff Commercial Fishermen of Santa Barbara is a nonprofit
18 corporation organized to integrate regional efforts of fishing communities, to
19 improve the economic and biological sustainability of fisheries. The organization
20 seeks to maintain California’s fishing heritage, improve fisheries management, and
21 contribute to the improvement of ocean health. The organization is gravely
22 concerned about unregulated otter expansion, because of the otter’s depletion of
23 shellfish and other fisheries, as well as the legal risks of fishery harvest causing
24 illegal “take” of otter.

25 **Defendants**

26 8. Defendant Michael Bean is sued in his official capacity as Acting
27 Assistant Secretary for Fish and Wildlife and Parks, Department of Interior. On
28 information and belief, Plaintiffs assert that Secretary Bean was delegated authority

1 by the Secretary of the Department of Interior to approve the decision to terminate
2 the otter management zone, and that he exercised that authority.

3 9. Defendant Department of Interior is the federal agency designated by
4 Public Law 99-625 to create the otter management zone. *See* Pub. L. No. 99-625,
5 § 1(a)(6).

6 10. Defendant Daniel M. Ashe is sued in his official capacity as Director
7 of the United States Fish and Wildlife Service. Director Ashe has primary
8 responsibility for the Service's proposal to terminate the otter management program.

9 11. Defendant United States Fish and Wildlife Service is the federal agency
10 principally responsible for maintaining the otter management zone. *See* Pub. L. No.
11 99-625, § 1(a)(7).

12 VENUE

13 12. Venue in this district is predicated upon 5 U.S.C. § 703 and 28 U.S.C.
14 § 1391(e)(1), in that a substantial part of the events or omissions giving rise to the
15 claim occurred in this District, and several Plaintiffs reside in the district. Venue is
16 proper in the Western Division of this District pursuant to 28 U.S.C. § 84(c)(2).

17 BACKGROUND

18 The California Sea Otter

19 13. The California sea otter (also known as the southern sea otter) is one of
20 three subspecies of otter. Unlike most marine mammals, the otter lacks blubber.
21 Consequently, the otter must keep warm by maintaining a very high metabolism,
22 consuming from 23% to 33% of its body weight per day. SEIS at 48. The otter also
23 relies on its dense pelage (some 650,000 follicles per square inch, U.S. Fish &
24 Wildlife Service, Final Revised Recovery Plan for the Southern Sea Otter 5 (2003))
25 as a blubber substitute to keep warm. SEIS at 48.

26 14. Otter pelage has attracted fur hunters for centuries, and that hunting
27 greatly reduced the population. To prevent extinction, otter hunting bans were
28 enacted in the early 1900s. *See* Fur Seal Treaty of 1911, 37 Stat. 1542, 1543 (July 7,

1 | 1911); EIS App. H at 1 (citing Cal. Fish & Game Code § 4700). Since then, the otter
2 | has made a significant comeback. *See* 42 Fed. Reg. 2965, 2966 (Jan. 14, 1977)
3 | (“[T]here also seems no doubt that the Southern Sea Otter has made a comeback
4 | from a formerly much more dangerous status.”); SEIS at 51 (“[T]he geographic
5 | range of the southern sea otter has expanded considerably since 1938”); Revised
6 | Recovery Plan at 1 (“[T]he southern sea otter is regarded as a subspecies with a
7 | moderate level of threat but a high potential for recovery.”). In fact, a recent
8 | estimate reveals that the otter’s population is approximately 88% of that needed for
9 | recovery. *See* SEIS App. G at 10.

10 | 15. The otter’s voracity, however, can have significant impacts on various
11 | prey species, such as abalone, sea urchin, and lobster. *See* SEIS at 31. Naturally, the
12 | otter’s progress toward recovery exacerbates these impacts. “Numerous reports exist
13 | of sea urchin, crab, and clam populations declining once sea otters enter an area.”
14 | SEIS App. B at B-23. *See also* EIS App. A at A-8 (“Sea otters are known to reduce
15 | and effectively limit populations . . . such as abalone, clams, and sea urchins”).
16 | Decades ago, the Service acknowledged that, without “action . . . taken to control
17 | [otter] population growth and continued range expansion, the shellfisheries of the
18 | entire Southern California Bight . . . could be at risk.” EIS at IV-82.

19 | **California Sea Otter Regulation and Recovery Efforts**

20 | 16. In 1972, Congress enacted the Marine Mammal Protection Act. 86 Stat.
21 | 1027 (Oct. 21, 1972), 16 U.S.C. § 1361, *et seq.* The Act imposes a moratorium on
22 | the “take” of all marine mammals, including the otter, within the jurisdiction of the
23 | United States. *See id.* § 1371(a). The Act defines “take” as “to harass, hunt, capture,
24 | or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.*
25 | § 1362(13).

26 | 17. In 1973, Congress passed the Endangered Species Act. Pub. L.
27 | No. 93-205, 87 Stat. 884 (Dec. 28, 1973), 16 U.S.C. § 1531, *et seq.* Like the Marine
28 | Mammal Protection Act, the Endangered Species Act forbids the “take” of protected

1 species. *See id.* § 1538(a). Its scope, however, is broader. For example, the
2 Endangered Species Act applies to any “species,” *id.* § 1532(16), of plant or wildlife
3 that is determined to be “endangered,” *id.* § 1532(6), or “threatened,” *id.* § 1532(20),
4 with extinction, *see id.* § 1533(a).

5 18. In 1977, the Service listed the otter as a “threatened” species. 42 Fed.
6 Reg. 2965 (Jan. 14, 1977). The main threats that the Service identified to justify the
7 listing were habitat loss and hunting-related population decline, as well as the risks
8 posed by a Southern California oil spill. *See id.* at 2966-67. Today, however, the
9 Service believes that the two most important causes of otter death are white shark
10 attacks and infectious disease. SEIS at 54.

11 19. With its listing under the Endangered Species Act, the otter
12 automatically was deemed a “depleted stock” under the Marine Mammal Protection
13 Act. 16 U.S.C. § 1362(1)(C).

14 20. In 1982, the Service published a recovery plan for the otter. *See* 52 Fed.
15 Reg. 29,784, 29,785 (Aug. 11, 1987) (discussing the plan). The plan sought to
16 establish at least one additional “experimental population” of otter by translocating
17 otters to an unoccupied area. *Id.* (At least five prior attempts at translocation, of
18 varying success, had been essayed. *See* EIS App. B at B-6 to B-7; *id.* App. I at 9.)
19 The Endangered Species Act authorizes the Service to establish such an experimental
20 population if it would “further the conservation of such species.” 16 U.S.C.
21 § 1539(j)(2)(A).

22 21. The 1982 recovery plan “identified the translocation of southern sea
23 otters as an effective and reasonable recovery action,” but also acknowledged “that
24 a translocated southern sea otter colony could impact shellfish fisheries that had
25 developed in areas formerly occupied by southern sea otters.” 77 Fed. Reg. 75,266,
26 75,268 (Dec. 19, 2012).

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1 22. In 1983, the Marine Mammal Commission (which administers certain
2 provisions of the Marine Mammal Protection Act) recommended that the Service
3 develop a plan to translocate a California sea otter population. EIS at II-2 to II-3.

4 23. In 1984, the Service identified four potential locations for an
5 experimental otter population, one of which was San Nicolas Island, a Channel
6 Island off the coast of Southern California. 52 Fed. Reg. at 29,785.

7 24. The Service’s plan to establish an experimental population, however,
8 had two significant obstacles. First, the Service feared that it could not establish and
9 maintain such a population consistent with the Marine Mammal Protection Act. *See*
10 *id.*; EIS at 1; SEIS at 9. An uncodified provision of the Endangered Species Act
11 provides that the Act must cede to the Marine Mammal Protection Act where the
12 latter is more protective than the former. Pub. L. No. 93-205, § 17, 87 Stat. at 903.
13 *See* 42 Fed. Reg. at 2967-68. The Service determined that, whereas the Endangered
14 Species Act authorized the Service to take otters in establishing and maintaining an
15 experimental population, the Marine Mammal Protection Act did not provide the
16 authority necessary to maintain the population. *See id.* at 2968; EIS at 1.

17 25. Second, the fishing community was greatly opposed to expanding the
18 otter’s range, reasonably fearing that the otter would destroy shellfish and other
19 marine resources. *See, e.g.*, EIS at 14 (observing that, “[o]ver time, the entire
20 commercial and sport shellfishery might be lost” if natural expansion of the otter’s
21 range were to occur). The fishing community also feared serious legal liability with
22 an expansion of the otter’s range; at the time, the Marine Mammal Protection Act did
23 not generally provide for permits to take marine mammals from a depleted stock
24 incidental to commercial fishing. *See* 16 U.S.C. § 1371(a)(3)(B) (1982).

25 **Public Law 99-625: Balancing Sea Otter Recovery with Fisheries Protection**

26 26. On November 7, 1986, Congress enacted Public Law 99-625, 100 Stat.
27 3500 (placed in the United States Code as a note to 16 U.S.C. § 1536), to balance the
28 otter’s recovery needs with the interests of fishermen. *See* H.R. Rep. No. 99-124, at

1 14, 17 (May 15, 1985). The Act authorized the Service to develop and implement
2 “a plan for the relocation and management of a population of California sea otters
3 from the existing range of the parent population to another location.” Pub. L. No.
4 § 1(b). The plan would have to include two zones: a “translocation zone” where the
5 experimental population would reside, and a “management zone,” which would
6 surround the former. *Id.* § 1(b)(3)-(4).

7 27. The dual purpose of the “management zone” was to make containment
8 of the experimental population within the translocation zone easier, and “to prevent,
9 to the maximum extent feasible, conflict with other fishery resources within the
10 management zone by the experimental population.” *Id.* § 1(b)(4)(B)(i)-(ii).

11 28. To achieve these purposes, Public Law 99-625 directed the Service to
12 “use all feasible non-lethal means and measures to capture any sea otter found within
13 the management zone and return it to either the translocation zone or to the range of
14 the parent population.” *Id.* § 1(b)(4)(B)(ii).

15 29. To harmonize the otter’s Marine Mammal Protection Act and
16 Endangered Species Act regulation, the Public Law provided: (i) any otter found
17 within the management zone would be deemed a member of the experimental
18 population, *id.* § 1(b)(4); (ii) take of otter within the management zone incidental to
19 “an otherwise lawful activity” would not constitute a violation of either the
20 Endangered Species Act or the Marine Mammal Protection Act, *id.* § 1(c)(B)(2); and
21 (iii) take of otter by the Service or its agents in the course of implementing and
22 enforcing the plan would not constitute a violation of either the Endangered Species
23 Act or the Marine Mammal Protection Act, *id.* § 1(f). (The California Legislature
24 enacted similar legislation tracking the provisions of Public Law 99-625. *See* Cal.
25 Fish & Game Code § 8664.2, repealed, Cal. Stat. 2014, ch. 71, § 56.)

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1 30. Public Law 99-625 provided an express procedure for how the Service
2 “shall implement the plan.” *See* Pub. L. No. 99-625, § 1(d). The Public Law
3 provided no authorization, much less procedure, for the Service to cease to
4 implement the plan.

5 31. Shortly after the Public Law’s passage, the Service exercised its new
6 authority to establish the otter translocation program. *See* 52 Fed. Reg. 29,754
7 (Aug. 11, 1987). The Service had previously determined, under the Endangered
8 Species Act, that the translocation program would not jeopardize the species’
9 continued existence. *See* EIS App. I at 22. *Cf.* 16 U.S.C. § 1536(a)(2).

10 32. The plan authorized San Nicolas Island as the home for the
11 experimental population, and defined the island, along with its near-shore waters, as
12 the translocation zone. The rest of the California Bight, south of Point Conception
13 to the Mexican border, the Service designated as the otter-free management zone.
14 *See* 52 Fed. Reg. at 29,769. The Service acknowledged that “maintenance of this
15 management zone free of otters is the principal mitigation feature of the proposal for
16 fisheries and other environmental and socioeconomic impacts.” 52 Fed. Reg. at
17 29,787.

18 33. Notwithstanding the absence of authority from the Public Law, the
19 Service included within the plan criteria for termination of the program. 52 Fed.
20 Reg. at 29,784. The Service developed these criteria in response to public comment
21 on the proposed program. SEIS App. C at 25.

22 34. In 1994, Congress passed several significant amendments to the Marine
23 Mammal Protection Act. Among these amendments were new, permanent
24 authorizations for allowing take of marine mammals incidental to commercial
25 fishing. *See, as codified*, 16 U.S.C. §§ 1374(h), 1387(a). Congress also enacted a
26 special permitting regime for take of marine mammals that are protected under the
27 Endangered Species Act. *See id.* § 1371(a)(5)(E).

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1 35. Because Public Law 99-625 already had established a special take
2 regime, Congress expressly exempted the California sea otter from these new take
3 provisions. *See id.* §§ 1371(a)(5)(E)(vi), 1387(a)(4).

4 **The Otter Translocation Program**

5 36. The Service translocated otters to San Nicolas Island from 1987 through
6 1990. SEIS at 1-2.

7 37. During that time, the Service released 140 otters at San Nicolas Island.
8 The fate of half is known: three died within a few days of translocation, 36 returned
9 to the parent population, 18 were captured or found dead within the management
10 zone, and 13 remained on the island. *See* SEIS App. C at 8. Most of the otters
11 unaccounted for probably returned to the parent population. *Id.* As of 2011, 48 adult
12 sea otters remained on the island, all offspring of the original translocated
13 population. *Id.* at 13.

14 38. In 1993, the Service, concerned over the effectiveness of the program's
15 containment component, as well as its impacts on the otter, ceased to remove otters
16 from the management zone. *See* SEIS App. C at 11.

17 39. By 1998, large numbers of otters from the parent range had moved into
18 the management zone. SEIS at 79. Since then, "otters have seasonally moved into
19 and out of the management zone." *Id.* The Service today believes that it is likely
20 that the otter has established a permanent breeding colony within the management
21 zone. *Id.* at 47. *See* SEIS App. C at 28-29.

22 40. In July, 2000, the Service determined, under the Endangered Species
23 Act, that "continuing the containment program and restricting the southern sea otter
24 to the area north of Point Conception . . . is likely to jeopardize [the otter's]
25 continued existence." SEIS App. B at 37. *Cf.* 16 U.S.C. § 1536(b)(2).

26 41. The same month, the Service published a Notice of Intent to modify or
27 terminate the translocation program. 65 Fed. Reg. 46,172 (July 27, 2000).

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1 42. Shortly thereafter, the Service published a policy statement notifying
2 the public that it would no longer capture and remove otters found within the
3 management zone until the agency had reevaluated the translocation program. *See*
4 66 Fed. Reg. 6649 (Jan. 22, 2001).

5 43. Nevertheless, the Service continued to observe the Public Law 99-625
6 take exemption for “otherwise lawful activity” within the management zone. *See*
7 SEIS App. B at 38-39.

8 44. In April, 2001, the Service published a Scoping Report in anticipation
9 of completing a final evaluation of the translocation program. *See* SEIS App. E.

10 45. In April, 2003, the Service published a revised recovery plan, which
11 recommended that the Service stop maintaining the management zone. Recovery
12 Plan at 28.

13 46. Over the course of the next several years, the Service prepared and
14 revised a supplemental environmental impact statement discussing various
15 modifications, as well as possible termination, of the program. *See* 70 Fed. Reg.
16 58,737 (Oct. 7, 2005).

17 47. In 2009, The Otter Project and the Environmental Defense Center sued
18 the Service, contending that the agency had unreasonably delayed deciding whether
19 the otter translocation had failed and whether to maintain a “no otter” management
20 zone. *The Otter Project v. Salazar*, No. 5:09-CV-04610-JW (N.D. Cal.). The
21 Commission and the California Abalone Association, among other parties,
22 intervened as defendants. The lawsuit was settled with the parties agreeing that the
23 Service would produce a revised analysis of the impacts of program modification or
24 termination by December, 2012. *See id.* Doc. No. 66.

25 **Proposal to Terminate the Program**

26 48. On August 26, 2011, the Service published its notice of proposed
27 rulemaking to terminate the program. 76 Fed. Reg. 53,381.

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1 49. The California shellfish industry vigorously objected to the Service’s
2 proposal. For example, Plaintiff Sea Urchin Commission protested that allowing the
3 otter an unregulated expansion into Southern California waters would be disastrous
4 for California’s shellfish industry. Quoting prominent otter experts, the Commission
5 explained that, “[u]nless the sea otter is eventually contained, the State’s Pismo clam,
6 sea urchin, abalone, certain crab, and possibly lobster fisheries will be precluded.”
7 Letter of California Sea Urchin Commission to U.S. Fish & Wildlife Service,
8 Oct. 24, 2011, at 28-29. The Commission also noted that, ““where sea otters have
9 moved into . . . pristine areas . . . there has been a reduction of over 90% in numbers
10 of shellfish,”” and that, “[w]ithin their established range, otter foraging clearly
11 precludes commercial fisheries for abalone and sea urchins.”” *Id.* (citations omitted).

12 50. Plaintiff Sea Urchin Commission reiterated the misgivings of the
13 Marine Mammal Commission. In 2006, the latter expressed concern over
14 unregulated otter expansion, observing that it ““is likely that the southward
15 movement of sea otters will seriously affect all shellfish fisheries in California.”” *Id.*
16 at 30 (quoting Letter to Ms. Diana K. Noda, Field Supervisor, United States Fish &
17 Wildlife Service, Ventura, from Marine Mammal Commission, David Cottingham,
18 Executive Director, Jan. 3, 2006). The Marine Mammal Commission explained that
19 ““the abandonment of the sea otter range management could, over the long term, lead
20 to the elimination of virtually all of the shellfish fisheries along the West Coast.””
21 *Id.* at 30 (quoting Jan. 3, 2006, letter).

22 51. Plaintiff Sea Urchin Commission also detailed the severe economic
23 dislocation that termination would cause. The sea urchin industry is California’s
24 fifth largest fishery, approximately \$40 million in value. *Id.* at 36. The Commission
25 estimated that termination would lead to the closure of over half of the state’s sea
26 urchin processors and the disappearance of over 300 employees. That would result
27 in a loss of nearly \$7 million in wages alone to the local economy. *Id.* at 37.

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The Service's Termination Decision

52. Notwithstanding these and other critiques, on December 19, 2012, the Service published its final decision to terminate the translocation program and to remove the take exemptions within the management zone. 77 Fed. Reg. 75,266.

53. The Service reviewed each of the criteria it had established in enacting the translocation program. *See id.* at 75,287-89. Of the five criteria, the Service determined that only Criterion 2 had been met. *See id.* at 75,289. That Criterion provides that the program would be considered to have failed if, “within three years from the initial transplant, fewer than 25 otters remain in the translocation zone and the reason for emigration or mortality cannot be identified and/or remedied.” 50 C.F.R. § 17.84(d)(8)(ii) (2012). *See* 52 Fed. Reg. at 29,784; EIS App. B at B-22 to B-23. The Service’s termination decision explains that Criterion 2 has been met because (a) within 3 years of the initial transplant, only 17 otters remained on San Nicolas Island, and (b) emigration was the primary reason that fewer than 25 otters remained. *See* 77 Fed. Reg. at 75,288. *See also* SEIS App. C at 26-27.

The Impacts of the Service's Termination Decision

54. The Service acknowledges that, with the program’s termination, “incidental take of southern sea otters in commercial fisheries cannot be authorized under the [Marine Mammal Protection Act].” 77 Fed. Reg. at 75,290.

55. The Service concedes that termination of the program will lead to a “considerable reduction in the abundance of invertebrate prey species to depths of 25 m (82 ft).” SEIS at 86.

56. The Service expects that termination of the program will lead to a population approaching 300 otters residing within the management zone within a decade. SEIS at 100. Consequently, sustainable shellfish and other marine fisheries in Southern California will be severely compromised if not destroyed.

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CLAIM FOR RELIEF
Ultra Vires Final Agency Action
(5 U.S.C. § 706)

70. Under the Administrative Procedure Act, an agency action is invalid if, among other things, it is arbitrary, capricious, not in accordance with law, or in excess of statutory jurisdiction or authority. 5 U.S.C. § 706(2)(A), (C).

71. Through Public Law 99-625, Congress authorized the Service to establish an otter translocation program. Congress, however, mandated that any such program contain a management zone. Pub. L. No. 99-625, § 1(b)(4). Congress further mandated that the Service use all available nonlethal means to ensure that the management zone remains otter-free. *Id.* Finally, Congress mandated that take of otter incidental to otherwise lawful activity (such as commercial fishing) be allowed within the management zone. *Id.* § 1(c)(B)(2).

72. Although Public Law 99-625 provides the Service discretion in whether to commence a translocation program, the Public Law provides no authority to the Service to cease such program once it has been initiated. *See id.* § 1(d) (“The Secretary shall implement the plan . . .”).

73. Nevertheless, the Service’s December 19, 2012, rulemaking purports to terminate the translocation program, as well as any obligation to enforce the management zone. *See* 77 Fed. Reg. at 75,289-90. Further, the rulemaking purports to remove the incidental take permission for the Marine Mammal Protection Act and the Endangered Species Act. *Id.*

74. Plaintiffs’ petition explained that Public Law 99-625 does not provide the Service any authority to terminate the translocation program or to make illegal the incidental take of otter within the programs’s management zone. Therefore, the Service’s rulemaking, purporting to do the same, had to be rescinded. The Service’s decision to deny Plaintiffs’ petition is, therefore, arbitrary, capricious, not in

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1 accordance with law, and in excess of statutory jurisdiction and authority. *See* 5
2 U.S.C. § 706(2)(A), (C).

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiffs pray for judgment against the Service as follows:

- 5 1. For a declaration that the Service must grant Plaintiffs' petition;
6 2. For a declaration that the Service's denial of Plaintiffs' petition is
7 illegal;
8 3. For a permanent mandatory injunction requiring the Service to grant
9 Plaintiffs' petition;
10 4. For an award of Plaintiffs' costs of litigation, including, but not limited
11 to, reasonable attorney's fees and expert witness fees, and fees and costs pursuant to
12 28 U.S.C. § 2412, or other applicable authority; and
13 5. For such other relief as the Court may deem just and proper.

14 DATED: November 3, 2014.

15 Respectfully submitted,

16 DAMIEN M. SCHIFF
17 JONATHAN WOOD

18 By /s/ Jonathan Wood
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