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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 **CALIFORNIA SEA URCHIN**
COMMISSION, et al.,

12 Plaintiffs,

13 v.

14 **MICHAEL BEAN, et al.,**

15 Defendants.

16 **CENTER FOR BIOLOGICAL**
17 **DIVERSITY, et al.,**

18 Intervenor-Defendants.
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No. 2:14-cv-08499-JFW-CW

**MEMORANDUM
OF POINTS AND
AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR
SUMMARY JUDGMENT**

Date: September 21, 2015
Time: 1:30 p.m.
Courtroom 16
Hon. John F. Walter, Judge

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INTRODUCTION

1
2 Congress passed Public Law No. 99-625, 100 Stat. 3500 (1986), to promote
3 recovery of the California sea otter while mitigating the negative consequences that
4 otter expansion could have on Southern California's fishery and fishermen. *See* Pub.
5 L. No. 99-625; *see also* 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012), *reproduced at*
6 AR5809. This statute gave the U.S. Fish and Wildlife Service authority to establish
7 a new population of otters on San Nicolas Island, while mandating that it also
8 establish a management zone around the population to protect the fishery from
9 predation and fishermen from criminal punishment for accidentally harming otters
10 while pursuing their trade. Pub. L. No. 99-625. Congress gave the Service *no*
11 authority to terminate these protections.

12 Nonetheless, the Service has asserted the authority to terminate them and done
13 so. Pl.'s Proposed Statement of Uncontroverted Facts and Conclusions of Law ¶¶ 7,
14 10-11 (hereinafter "Statement of Uncontroverted Facts"); *see* 77 Fed. Reg. at 75,266-
15 97; 52 Fed. Reg. 29,754 (Aug. 11, 1987). Both actions violate the statute. Not only
16 does the text provide no support for such authority—in fact, it forecloses it—but
17 interpreting it to do so would conflict with the statute's purpose and the doctrine of
18 constitutional avoidance. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1133-34 (9th
19 Cir. 2013) (doctrine of constitutional avoidance); 132 Cong. Rec. S17322-23
20 (Oct. 18, 1986), *reproduced at* Statement of Uncontroverted Facts Attachment 1;
21 H.R. Rep. No. 99-124 at 14 (Oct. 18, 1986), *reproduced at* AR1304 (the purpose of
22 the statute is to "provide assurances to the state, the commercial and recreational
23 fishing industries, and the oil and gas community"). Consequently, this Court should
24 order Defendants to grant Plaintiffs California Sea Urchin Commission, California
25 Abalone Association, and Commercial Fishermen of Santa Barbara's (collectively
26 the fishermen) petition and restore the management zone. 5 U.S.C. § 553(e); 5
27 U.S.C. § 706(2)(C).

28 ///

BACKGROUND

The southern sea otter—also known as the California sea otter—has been listed as a threatened species under the Endangered Species Act since 1977. Statement of Uncontroverted Facts ¶ 1. Historically, the chief threat to this species was commercial fur harvesting. *Id.* ¶ 2. However, hunting of the animal was outlawed under both state and federal law by 1913. *Id.* At the time of listing, the species was at risk because its small population size and range made it vulnerable to catastrophic oil spills. *Id.* The animals can also accidentally become ensnared in nets and traps used by commercial fishermen. *Id.* Under both the Endangered Species Act’s and the Marine Mammal Protection Act’s broad prohibitions against “take”¹ of protected species, a fishermen who accidently catches an otter could face substantial civil and criminal penalties, including imprisonment. *Id.* ¶ 1; 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a).

In the early 1980s, the Service decided the best way to mitigate the risks posed by oil spills was to establish at least one new colony of sea otters sufficiently far away from the existing population that one spill could not affect both. Statement of Uncontroverted Facts ¶ 3. Because the Marine Mammal Protection Act barred the Service from capturing and moving otters for this purpose, the plan required legislation to authorize it. *Id.* This plan proved controversial because otter expansion could have significant deleterious effects on local fisheries and the people whose livelihoods depend upon them. *See id.* The otter is a voracious predator that, owing to its lack of blubber, must consume up to a third of its body weight per day to keep warm. *See id.* ¶ 4. If not controlled, this expansion could decimate Southern California’s shellfishery. *See id.* ¶ 5; AR1720 (“Unless action is taken to control

¹ The Endangered Species Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Incidentally causing any of these impacts to a listed species is a violation that could subject an individual to civil and criminal punishment. 16 U.S.C. § 1540.

1 | population growth and continued range expansion, the shellfisheries of the entire
2 | Southern California Bight, estimated at \$7.9 million per year for commercial
3 | fisheries, could be at risk.”). It could also subject fishermen to criminal punishment
4 | for accidentally getting too near or bothering an otter while fishing. 16 U.S.C.
5 | § 1538(a); 16 U.S.C. § 1371(a).

6 | To balance the otter’s recovery and these threats to the fishery, Congress
7 | passed Public Law No. 99-625, codifying a compromise between the Service, the
8 | state, conservation groups, fishermen, and other affected interests. Statement of
9 | Uncontroverted Facts ¶ 6. That statute promoted otter conservation by authorizing
10 | the Service to relocate California sea otters outside their then existing range. *See id.*;
11 | 77 Fed. Reg. at 75,268. But, to protect the fishery, it also requires the Service to
12 | establish a “management zone” around the relocated otters. Statement of
13 | Uncontroverted Facts ¶ 6. The statute directs the Service to remove otters that enter
14 | this zone using all feasible nonlethal means and exempts otherwise lawful activities
15 | that incidentally harm an otter from the Endangered Species and Marine Mammal
16 | Protection Acts’ “take” prohibitions. Statement of Uncontroverted Facts ¶ 6; Pub.
17 | L. No. 99-625.

18 | Pursuant to this statute, the Service adopted a regulation in 1987 providing for
19 | the relocation of otters to San Nicolas Island and establishing the management zone
20 | from Point Conception to the Mexican border. Statement of Uncontroverted Facts
21 | ¶ 7; *see* 52 Fed. Reg. at 29,765-70. The regulation also asserted the authority to
22 | declare the program a failure and annul the statutory protections governing the
23 | management zone. Statement of Uncontroverted Facts ¶ 7; *see* 52 Fed. Reg. at
24 | 29,772. It also contained criteria to govern the exercise of that authority. Statement
25 | of Uncontroverted Facts ¶ 7. These criteria were (1) whether, after a year or more,
26 | no otters remained on San Nicolas Island and the Service could not determine why;
27 | (2) whether, three years into the program, fewer than 25 otters remained and the
28 | Service could not determine why; (3) whether, two years after the Service stopped

1 moving otters to San Nicolas Island, the population was declining at a significant
2 rate or not reproducing; (4) whether dispersal of otters into the management zone is
3 sufficient to demonstrate that containment is impossible; and (5) whether the
4 colony's continued survival was unlikely because of a threat such as a military action
5 for national security. *Id.*; see 52 Fed. Reg. 29,772. If, according to these criteria, the
6 plan had failed, and the causes of that failure could not be determined, the otters
7 would be removed from San Nicolas Island and returned to their existing range and
8 the management zone's protections would be annulled. See Statement of
9 Uncontroverted Facts ¶ 7; 52 Fed. Reg. 29,772.

10 Between 1987 and 1990, 140 otters were released on San Nicolas Island.
11 Statement of Uncontroverted Facts ¶ 8. Many of these animals swam back to the
12 parent population, moved to the management zone, or died as a result of the stress
13 of having been moved. See *id.* In 1991, the Service stopped moving otters to
14 San Nicolas Island. See *id.* Consequently, the population on San Nicolas Island was
15 initially smaller than expected.

16 From 1987 to 1993, the Service captured otters that wandered into the
17 management zone and returned them to the parent population. *Id.* ¶ 9 However,
18 concluding that there were no nonlethal means to capture otters found in the
19 management zone, the Service suspended these activities in 1994. See *id.*

20 Twenty-five years later, the Service adopted a final rule terminating the
21 program and relieving itself of its obligations under the statute. Statement of
22 Uncontroverted Facts ¶ 10; see 77 Fed. Reg. at 75,266-97. The population on
23 San Nicolas Island is approximately 50 adult sea otters and their pups. Statement of
24 Uncontroverted Facts ¶ 10. It is healthy and growing at an average of 7% per year,
25 but currently too small to provide for repopulation, should the parent population be
26 affected by a catastrophic oil spill. *Id.*

27 This termination decision relied upon the assertion of authority and
28 termination criteria contained in the 1987 regulation. 77 Fed. Reg. at 75,287-89. It

1 | decided on the basis of the administrative record compiled by the Service.
2 | *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir.
3 | 1994). Consequently, there are no facts in dispute and summary judgment is
4 | appropriate. *See id.* at 1472.

5 | Under the Administrative Procedure Act, challenges to an agency’s fact
6 | finding or exercise of judgment are reviewed deferentially, and can be held unlawful
7 | if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
8 | law.” 5 U.S.C. § 706(2)(A); *See Nw. Ecosystem Alliance v. U.S. Fish & Wildlife*
9 | *Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (discussing judicial review under the
10 | arbitrary and capricious standard). The Court interprets statutes de novo, however,
11 | with deference given to an agency’s reasonable interpretation of ambiguous statutory
12 | provisions entrusted to its implementation under *Chevron, U.S.A., Inc. v. Natural*
13 | *Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 5 U.S.C. § 706(2)(C);
14 | *Natural Resources Defense Council v. U.S. E.P.A.*, 779 F.3d 1119, 1125-26 (9th Cir.
15 | 2015).

16 | II

17 | THE ADMINISTRATIVE PROCEDURE ACT 18 | AUTHORIZES THE PETITION FOR THE 19 | RESTORATION OF THE MANAGEMENT ZONE

20 | The Administrative Procedure Act guarantees the right to petition for the
21 | issuance, amendment, or repeal of any rule. 5 U.S.C. § 553(e). For these purposes,
22 | “rule” is defined very broadly. It includes “the whole or a part of an agency
23 | statement of general or particular applicability and future effect designed to
24 | implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). The
25 | fishermen’s petition easily fits within this statutory right and the Service’s denial on
26 | that basis should be reversed.

27 | The fishermen’s request for the rescission of the termination decision is a valid
28 | petition for the repeal of a rule. *See* 5 U.S.C. § 553(e); AR5843-50. The termination
decision implements and prescribes law and policy. Most obviously, it declares the

1 | translocation program a failure and terminates the management zone. *See* Statement
2 | of Uncontroverted Facts ¶ 10; 77 Fed. Reg. at 75,287-89. It rescinded a regulation,
3 | significantly changing the law that applies to the regulated public. *See* 5 U.S.C.
4 | § 551(4); *see also Weight Watchers Int’l, Inc. v. F.T.C.*, 47 F.3d 990, 991-92 (9th
5 | Cir. 1995) (challenge to denial of petition to cease enforcing a regulation). In
6 | particular, it subjects anyone who accidentally harms a sea otter in the former
7 | management zone to civil and criminal penalties under the Marine Mammal
8 | Protection and Endangered Species Acts. *See* Statement of Uncontroverted Facts
9 | ¶ 11; 77 Fed. Reg. at 75,287-89. Unsurprisingly, given this, the Service itself
10 | identified the termination decision as a “final rule.” AR5807; 77 Fed. Reg. at
11 | 75,266.

12 | Similarly, the fishermen’s petition seeking to amend the 1987 regulation is a
13 | valid petition to amend a “rule.” *See* Statement of Uncontroverted Facts ¶ 12. The
14 | Service didn’t conclude otherwise but asserts that there is nothing to amend in light
15 | of the termination decision’s repeal of the 1987 regulation. *See* Statement of
16 | Uncontroverted Facts ¶ 14. This argument is mere sophistry. If, as the fishermen
17 | contend, the termination decision itself violates the statute, it is invalid and must be
18 | rescinded, including its repeal of the 1987 regulations’ protections for the
19 | management zone. The Service’s contrary conclusion is due solely to its decision
20 | to consider the request to amend the regulation before the request to rescind the
21 | termination decision. *See id.* If the order is reversed, the regulation continues in
22 | force and the regulation can be amended as requested by the fishermen. *See*
23 | Statement of Uncontroverted Facts ¶ 12. Consequently, the fishermen properly
24 | petitioned for the repeal of the termination decision and amendment of the 1987
25 | regulation.

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III

**PUBLIC LAW NO. 99-625 UNAMBIGUOUSLY
DENIES THE SERVICE ANY AUTHORITY
TO TERMINATE THE MANAGEMENT ZONE**

When interpreting a statute, the Court’s chief responsibility is to discern Congress’ intent in enacting it. *See United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999). The primary focus of that search must be the plain meaning of the language in question. *See United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005). If the statute’s language is plain and unambiguous, that meaning will control. *See United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005); *see also Chevron*, 467 U.S. at 842 (courts must first ask “whether Congress has directly spoken to the precise question at issue”). Before declaring statutory language ambiguous, the Court must also look to the language’s context and canons of statutory interpretation. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

A. Public Law No. 99-625 Provides No Authority for the Service To Terminate the Management Zone’s Protections for Fishermen

Public Law No. 99-625 is a straightforward statute designed to balance sea otter recovery against its consequences for Southern California’s fishery and fishermen. It permits the Service to develop a plan for the relocation and management of a population of otters from their existing range to another location. Pub. L. No. 99-625, § 1(b). Any such plan “shall” specify a “management zone” surrounding this new population. *Id.* § 1(b)(4). The purpose of this zone is “to (i) facilitate the management of sea otters and the containment of the experimental population . . . and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone” *Id.* To effectuate this purpose, the statute provides that “any incidental taking of [an otter] during the course of an otherwise lawful activity within the management zone[] may not be treated as a violation of the [Endangered Species] Act or the Marine Mammal Protection Act of

1 | 1972.” *Id.* § 1(c)(2). This exemption was designed to protect fishermen and others
2 | who pursue their livelihoods in Southern California’s waters. *See* 132 Cong. Rec.
3 | S17321-22 (Oct. 18, 1986), *reproduced at* Statement of Uncontroverted Facts
4 | Attachment 1.

5 | If the Service opts to exercise this authority, the statute provides that it “shall”
6 | implement the plan, including the management zone’s protections. Pub. L. No. 99-
7 | 625, § 1(d). Consequently, this case ultimately comes down to whether the statute’s
8 | command that the Service “shall” implement the plan and its protections for the
9 | fishermen gives the Service discretion not to do so.

10 | “Shall” is not ambiguous. *See Nat’l Ass’n of Home Builders v. Defenders of*
11 | *Wildlife*, 551 U.S. 644, 661-62 (2007) (“By its terms, the statutory language [‘shall’]
12 | is mandatory . . .”). It imposes a mandatory, discretionless obligation. *Lopez v.*
13 | *Davis*, 531 U.S. 230, 241 (2001) (Congress’ “use of a mandatory ‘shall’ . . .
14 | impose[s] discretionless obligations.”); *Association of Civilian Technicians v. FLRA*,
15 | 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a
16 | command that admits of no discretion on the part of the person instructed to carry out
17 | the directive.”). Thus, the statute bound the Service to implement the statutory
18 | protections for the management zone if it chose to exercise its discretion to move
19 | otters into Southern California. *See* Pub. L. No. 99-625, § 1(d); *see also id.* § 1(b)(4)
20 | (the management zone’s protection “shall” be included in the plan). The statute does
21 | not provide for this obligation to expire at any time. Pub. L. No. 99-625. The
22 | Service accepted the authority granted to it by moving otters to San Nicolas Island.
23 | *See* Statement of Uncontroverted Facts ¶ 7; 77 Fed. Reg. at 75,269. As a
24 | consequence, the statute imposes a discretionless obligation to implement the
25 | management zone’s protections.

26 | Nothing in the statutory text permits the Service to disclaim its statutory
27 | obligation. And its rationale for doing so is belied by the statute. In the Federal
28 | Register notice for the termination decision, the Service explained that it was taking

1 | this step because it determined that continuing these protections would likely
2 | jeopardize the sea otter’s recovery. *See* 77 Fed. Reg. at 75,273; *see also* 16 U.S.C.
3 | § 1536(a)(2) (“Each Federal agency shall . . . insure that any action authorized,
4 | funded, or carried out by such agency . . . is not likely to jeopardize” an endangered
5 | or threatened species.). However, this is no basis to avoid the Service’s obligations
6 | under Public Law No. 99-625 because the statute expressly provides that “no act”
7 | by the Service to implement the plan can be treated as a violation of “any provision”
8 | of the Endangered Species Act or the Marine Mammal Protection Act. Pub. L.
9 | No. 99-625, § 1(f). Consequently, the Service’s assertion of authority to terminate
10 | these protections and subsequent termination of them is unlawful.

11 | **B. Interpreting the Statute To Allow the Service To**
12 | **Terminate the Management Zone’s Protections**
13 | **Would Raise a Serious Constitutional Question**

13 | Even if Public Law No. 99-625’s text were otherwise amenable to the
14 | Service’s interpretation, the doctrine of constitutional avoidance would nonetheless
15 | foreclose it. Under this doctrine, an interpretation of a statute which raises
16 | constitutional concerns must be rejected if there is a plausible interpretation that
17 | could avoid them. *See Rodriguez*, 715 F.3d at 1133-34.

18 | The Service’s interpretation raises constitutional concern under the
19 | nondelegation doctrine. *See* C. Boyden Gray, *The Nondelegation Canon’s Neglected*
20 | *History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619, 621-26 (2015)
21 | (describing cases applying the avoidance canon to statutes that raise nondelegation
22 | concerns). This doctrine forbids Congress from delegating authority to agencies
23 | without providing an intelligible principle to guide its exercise. *See J.W. Hampton,*
24 | *Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

25 | Violations of the nondelegation doctrine have been exceedingly rare because
26 | the standard—“intelligible principle”—is extremely lenient and likely satisfied so
27 | long as Congress provides *some* criteria to guide an agency’s hand. *See Whitman v.*
28 | *Am. Trucking Associations*, 531 U.S. 457, 474 (2001). If Public Law No. 99-625

1 | authorizes the Service to terminate the management zone’s protections, it provides
2 | *no* criteria to guide the Service’s decision to do so. Instead, such authority would be
3 | subject to the Service’s unconstrained discretion. Consequently, this would be the
4 | rare exception that would violate the doctrine. *See Panama Refining Co. v. Ryan*,
5 | 293 U.S. 388, 414-16 (1935) (statute providing *no* guidance for the President’s
6 | exercise of discretion violates nondelegation doctrine); *see also Clinton v. City of*
7 | *New York*, 524 U.S. 417, 464-65 (1998) (Scalia, J., concurring) (the nondelegation
8 | doctrine applies to executive decisions to terminate or set aside statutory provisions).
9 | Since, as explained below, this power would conflict with Congress’ express purpose
10 | of providing certainty to everyone affected by otter relocation—including the
11 | fishermen—context further reinforces this conclusion. *Cf. In re Nat’l Sec. Agency*
12 | *Telecomms. Records Litig.*, 671 F.3d 881, 897 (9th Cir. 2011) (a vague intelligible
13 | principle can be made concrete by context and history).

14 | The only principles that purportedly constrain the Service’s termination
15 | authority are of the Service’s own making. Statement of Uncontroverted Fact ¶ 7;
16 | 52 Fed. Reg. at 29,772. However, an agency can’t cure an unconstitutional
17 | delegation through self-imposed limits. *See Whitman*, 531 U.S. at 473. As the
18 | Supreme Court has explained, the agency’s exercise of its unconstrained authority
19 | to prescribe those limits *itself* violates the nondelegation doctrine. *See id.*

20 | This constitutional concern can be avoided by adopting the fishermen’s
21 | interpretation of the statute. Under it, the Service has no authority to terminate the
22 | management zone’s protections. Therefore, the need for an intelligible principle
23 | doesn’t arise.

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IV

**THE STATUTE CAN'T
REASONABLY BE INTERPRETED TO
AUTHORIZE THE SERVICE TO TERMINATE
THE MANAGEMENT ZONE'S PROTECTIONS**

When confronted with ambiguous statutory text entrusted to an administrative agency to implement, courts presume that Congress empowered the agency to resolve that ambiguity. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014). However, even under this deferential framework, the agency's interpretation must be reasonable. *See id.* at 2442. An agency interpretation that is inconsistent with the structure of a statute or its purpose is not reasonable and unworthy of deference. *See id.*

Although this Court needn't reach the issue because the statute isn't ambiguous, the Service's interpretation is also unreasonable because it would frustrate Congress' purpose of facilitating sea otter recovery while preventing conflict with other fishery resources. Pub. L. No. 99-625, § 1(b)(4). Since the statute provides no criteria for terminating these protections, the Service's interpretation would mean that it could terminate the management zone for any reason or no reason whatsoever. Obviously, this would not further Congress' goal of preventing conflict between the otter and other fishery resources but would allow the Service to sacrifice those other resources to promote the otter's expansion. *See 77 Fed. Reg. at 75,276-87* (discussing the effects of otter predation on Southern California's fishery due to population expansion without the management zone).

Legislative history reinforces this conclusion. It shows that Congress was deeply concerned about the threat that sea otter expansion poses to the fishery. *See 132 Cong. Rec. S17321-22* (statement of Sen. Chafee), *reproduced at* Statement of Uncontroverted Facts Attachment 1. Public Law No. 99-625 was a consensus effort by the Service, conservation groups, and fishermen to promote the otter's recovery while mitigating the risk to those whose livelihoods depend on Southern California's

1 | waters. *See* 132 Cong. Rec. S17322 (statement of Sen. Cranston). These risks are
2 | not the least bit mitigated under the Service’s interpretation.

3 | The sea otter provisions in Public Law No. 99-625 were originally proposed
4 | in H.R. 1027, the Endangered Species Authorization for Fiscal Years 1986, 1987,
5 | and 1988. *See* AR0390-AR0414. The legislative history for that bill also reflects
6 | a purpose contrary to the Service’s interpretation. It shows that legislation was
7 | required in order to cement a compromise between the Service, conservation groups,
8 | and industries affected by sea otter expansion. *See* AR0400. The House Report for
9 | the Committee on Merchant Marine and Fisheries for H.R. 1027 specifically notes
10 | the severe consequences for fishermen that could result without the statute’s
11 | protections. AR0405 (“[T]he mere presence of otters in an area can result in
12 | restrictions on fisheries . . .”). The statute was “intended to avoid such conflicts by
13 | providing for the containment and management of sea otters and by clearly
14 | specifying in the plan those areas in which the provisions of Sections 7 and 9 of the
15 | ESA will apply.” AR0405-AR0406. This was to be a “comprehensive” resolution
16 | of these potential conflicts. AR0406.

17 | A key part of that comprehensive resolution was the exemption from criminal
18 | liability for fishermen. *See* AR0408. Representative Breaux described the
19 | provisions as “provid[ing] . . . *assurances* to the State, commercial, and recreational
20 | fishing interests, . . . and involved environmental organizations regarding the
21 | relationship to, and effect of, the translocation to their respective activities and
22 | areas of concern.” AR0417 (emphasis added).² Consequently, he explained,

23 | _____
24 | ² The only legislative history supporting the Service’s interpretation is
25 | Representative Breaux’s statement that the Service should specify factors to
26 | determine whether the translocation is successful and, if not, repeal the regulation
27 | and return the otters to the parent population. AR0419. This lone congressman’s
28 | statement can’t supplant the clear statutory text or create ambiguity where there isn’t
any. *See Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d
301, 304 (9th Cir. 1995) (“[L]egislative history—no matter how clear—can’t
override statutory text. Where the statute’s language ‘can be construed in a

(continued...)

1 “[c]onsiderable significance is attached to the specification of the translocation and
2 management zones.” AR0418. At heart, the purpose of the provisions was to
3 “strike[] a balance between providing assurances to affected interests and
4 maintaining sufficient protections and management flexibility to meet the recovery
5 needs of the California sea otter.” AR0419. The Committee Report confirms that
6 providing certainty to fishermen and others threatened by sea otter expansion was
7 a key purpose of the provisions. *See* AR1301 (“[T]he Committee believes the need
8 exists to make special provisions for the translocation of sea otters to provide a
9 greater degree of certainty to the parties concerned.”).

10 The Service’s interpretation of the statute as granting unconstrained authority
11 to terminate protections of central importance to this compromise legislation would
12 conflict with these purposes. Under it, the fishermen received no assurances or
13 certainty that they would be protected from criminal prosecution as otters expand
14 into their fishery. Instead, that liability could be imposed on them by the agency at
15 any time, for any reason. Therefore, the Service’s interpretation is unreasonable and
16 not deserving of deference. *See Utility Air Regulatory Group*, 134 S. Ct. at 2444 (an
17 unreasonable interpretation is not entitled to deference).

18 CONCLUSION

19 Nothing in Public Law No. 99-625 grants the Service authority to terminate
20 the management zone’s protections for fishermen. As a consequence, its assertion
21 of such authority raises a significant constitutional question—the lack of criteria or
22

23 _____
24 ² (...continued)
25 consistent and workable fashion,’ we must put aside contrary legislative history.”
26 (quoting *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986))). Nor
27 is a remark of a single legislator—even a bill’s sponsor—controlling or entitled to
28 much weight. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447
U.S. 102, 118 (1980). Representative Breaux’s statement is particularly unhelpful
because it doesn’t identify how the statute authorizes the Service to terminate the
management zone. *See* AR0419. Nor does it attempt to square this with the
acknowledged purpose of the statute—to provide certainty to all interested parties
that the deal they struck would bind everyone, including the Service. *See id.*

1 principles to guide its exercise would render the statute unconstitutional under the
2 nondelegation doctrine. To avoid this result, the Court should interpret the statute
3 according to its plain text. When Congress provided that the Service “shall”
4 implement the management zone’s protections, it meant it. The Service’s violation
5 of this command is unlawful and the fishermen’s petition seeking to compel the
6 Service to conform its conduct to the statute must be granted.

7 DATED: June 17, 2015.

8 Respectfully submitted,

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