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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Plaintiffs,

v.

MICHAEL BEAN, et al.,

Defendants.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Intervenor-Defendants.

No. 2:14-cv-08499-JFW-CW

PLAINTIFFS' COMBINED REPLY AND OPPOSITION TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

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

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INTRODUCTION

This case is ultimately about whether individuals who work and recreate in Southern California's waters can be fined and even imprisoned for accidentally harming, harassing, or getting too near a southern sea otter. That's all. Ruling for the Plaintiffs (fishermen) wouldn't require the Defendants (Service) to resume moving otters into Southern California or capturing any that wander into the management zone.[1] Instead, it would only require them to restore an exemption from criminal prosecution under the Endangered Species and Marine Mammal Protection Acts for individuals who incidentally "take"[2] an otter within that zone while engaged in otherwise lawful activities.

The answer to this question has been provided by Congress. By statute, it authorized the Service to move sea otters into Southern California's waters on the condition that it adopt a regulation exempting these activities from prosecution. Pub. L. No. 99-625, 100 Stat. 3500 (1986).[3] The statute gives the Service no authority to terminate this exemption, but instead provides that the Service "shall implement" it. *Id*. § 1(d).

Having accepted and exercised the power given to it, the Service now disclaims any intention of continuing to implement the exemption. 77 Fed. Reg. 75,266 (Dec. 19, 2012), AR5806-38. It claims the power to do so by adopting an interpretation of the statute that conflicts with its text, purpose, and legislative history. Because Public Law No. 99-625 requires the Service to implement the exemption, the fishermen's petition should've been granted. There are no material

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[1] Because there is no feasible, non-lethal means of capturing and removing sea otters within the management zone, the statute doesn't require the Service to do so. Pub. L. No. 99-625, § 1(b)(4) (requiring the Service to use "all feasible non-lethal means" to capture sea otters within the management zone); *see also* 77 Fed. Reg. at 75,269, AR5810.

[2] *See, e.g.*, 16 U.S.C. § 1532(19) (defining "take").

[3] Unless otherwise indicated, all references to "the statute" are to Public Law No. 99-625.

disputes of fact[4] and the fishermen are entitled to judgment as a matter of law. Their motion for summary judgment should be granted and the cross-motions denied.

BACKGROUND

The southern sea otter has been listed as a threatened species under the Endangered Species Act since 1977, based on its small population size and the threat of a catastrophic oil spill. 42 Fed. Reg. 2965 (Jan. 14, 1977). In order to reduce this threat, the Service developed a plan to establish a new, geographically separate colony of sea otters. 77 Fed. Reg. at 75,268, AR5809; 52 Fed. Reg. 29,754 (Aug. 11, 1987), AR3000. Pursuing that plan, however, required congressional authorization.

In 1986, Congress enacted Public Law No. 99-625, authorizing the Service to establish the new colony. 77 Fed. Reg. at 75,268, AR5809. The statute also provides that, if the Service decides to proceed with the plan, it "shall" adopt a regulation to establish a zone[5] around the new colony where specific, mandatory protections for the fishery and individuals will apply. Pub. L. No. 99-625, § 1(b), (c). These protections include that the Service must remove otters that wander into the management zone, provided that it can identify feasible, non-lethal means of doing so, and that anyone who incidentally "takes"[6] an otter while engaged in otherwise lawful activities can't be prosecuted under the Endangered Species and Marine Mammal Protection Acts. *Id*. The statute further states that, if the Service

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[4] All parties agree that there's no dispute about any of the material facts and that this case should be decided on the basis of the administrative record. The fishermen's claims are purely legal and regard the proper interpretation of a statute.

[5] The statute refers to this zone as the "management zone."

[6] The Endangered Species and Marine Mammal Protection Acts prohibit anyone from committing the take of any protected species and define "take" very broadly. The Endangered Species Act, for instance, defines "take" as "to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect" or attempting any of those things. 16 U.S.C. § 1532(19). Incidentally causing any of these impacts to a protected species can subject an individual to substantial civil and criminal penalties, including imprisonment. 16 U.S.C. § 1540.

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decides to exercise this authority, it "shall implement" the regulation—and, therefore, these protections—once it finishes consulting with any agencies or individuals that request it. *Id*. § 1(d).

Pursuant to this statutory grant of authority, the Service adopted a regulation[7] establishing a population of sea otters on San Nicolas Island and a management zone around it from Point Conception to the Mexican border. 52 Fed. Reg. at 29,756-70, AR3002-16. As required by the statute, the regulation exempted incidental take of the sea otter within this zone and required the Service to remove otters that wandered into it. *Id*. However, the Service also included criteria which, if met, could lead the Service to declare the program a failure and terminate the protections required by the statute, but didn't require it to do so. 52 Fed. Reg. at 29,772, AR3018. According to the regulation, if the program was declared a failure, the regulation would be rescinded and any otters on San Nicolas Island would be returned to the existing range. *Id*.

Pursuant to the regulation, the Service moved otters to San Nicolas Island. However, otter mortality and dispersion from the island was greater than expected, and the Service stopped moving otters to it in 1991. 77 Fed. Reg. at 75,269, AR5810. The Service also stopped capturing otters that wandered into the management zone in 1994, when it concluded that there were no nonlethal means to capture and move otters. *Id*. In 2000, the Service confirmed this conclusion, finding that containment couldn't be resumed without jeopardizing the species. AR3520-3526 (concluding that capturing and removing otters from the management zone could jeopardize the species, but saying nothing about the incidental take exemption).

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[7] All references to the "1987 Regulation" are to this regulation, establishing the otter translocation program and management zone. 52 Fed. Reg. at 29,756-70, AR3002-16.

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In 2010, the Service was sued by several environmental organizations, including several of the Intervenor-Defendants (collectively, CBD), claiming that it had unreasonably delayed a formal determination whether the program had failed according to the criteria identified in the regulation. *The Otter Project*, 712 F. Supp. 2d 999 (N.D. Cal. 2010). That lawsuit settled, with the Service agreeing to make that determination. ECF No. 43-2, Ex. A at 28-37 (Fed. Defs. SOF Ex. A). Two of the Plaintiffs were signatories to that agreement. *See id*.

In 2012, the Service issued a final rule[8] declaring the program a failure, repealing the regulation that created the program, and disclaiming any further obligation to implement Public Law No. 99-625, but leaving the otters on San Nicolas Island in place. 77 Fed. Reg. at 75,266-97, AR5807-38. This decision was based on the San Nicolas Island population's failure to reach 25 otters within the first three years—nearly 25 years ago—and gave no consideration to the size or health of the population today. *See* 77 Fed. Reg. at 75,278, 75,288, AR5819, 5829.

The fishermen challenged that decision on the grounds that it conflicts with Public Law No. 99-625. *See Cal. Sea Urchin Comm'n v. Jacobson*, No. 2:13-cv-05517 (E.D. Cal. dismissed Mar. 3, 2014). That challenge was dismissed on statute of limitations grounds and is now on appeal to the Ninth Circuit.

Subsequently, the fishermen filed a petition demanding that the Service restore the incidental take exemption by repealing the 2012 final rule and amending the 1987 regulation. AR5843-50. The Service denied that petition and this lawsuit followed. *See* AR5925.

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[8] The final rule terminating the sea otter translocation program and incidental take exemption will be referred to as the "2012 Rule."

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ARGUMENT

I

THE PETITION COMPLIES WITH THE ADMINISTRATIVE PROCEDURE ACT

The fishermen submitted a petition under the Administrative Procedure Act to repeal one rule and amend another. *See* AR 5843-50; ECF No. 40-1, **6-7 (Pl.'s Summ. J. Mem.). The 1987 Regulation and the 2012 Rule easily satisfy the Administrative Procedure Act's definition of a "rule." *See* 5 U.S.C. §§ 551(4), 553; ECF No. 40-1, **6-7. The fishermen's petition is therefore valid.

The Service claims that the actions requested in the petition are either impossible or wouldn't give the fishermen the result they seek. In particular, it argues that the 1987 Regulation can't be amended because it has been repealed by the 2012 Rule and the 2012 Rule can't be repealed because that would restore the 1987 Regulation. This circular reasoning shouldn't persuade this Court.

The solution to the non-problem identified by the Service is obvious. As requested by the petition, the Service should repeal the 2012 Rule (which would restore the 1987 Regulation) *then* amend the regulation to remove the failure criteria. The Service offers no response to this argument—in fact it doesn't even acknowledge it—despite the fishermen's reliance on it in their motion. *See* ECF No. 40-1, *7. Since the petition seeks the repeal of a rule and amendment of another under the Administrative Procedure Act, the Service's denial of the petition was improper. *See* 5 U.S.C. § 553.

II

PUBLIC LAW NO. 99-625 GIVES THE SERVICE NO AUTHORITY TO STOP IMPLEMENTING THE INCIDENTAL TAKE EXEMPTION

All parties agree that this case turns on the proper interpretation of a statute. Therefore, the appropriate analytical framework is given by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court looks

to the text of the statute, its context, and canons of statutory interpretation to determine whether the statute's meaning is clear. *See United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). If so, that interpretation will control. If not, the Court will defer to the interpretation taken by the agency charged with administering the statute, provided that interpretation is reasonable. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014).

This case should be resolved at the initial step. Public Law No. 99-625 unambiguously commands the Service to implement the incidental take exemption and gives it no authority to disclaim that obligation. However, even if the statute were ambiguous, the Service's interpretation wouldn't be entitled to deference because it unreasonably conflicts with the statute's purpose.

A. The Statute Imposes a Mandatory Obligation To Implement the Incidental Take Exemption

Public Law No. 99-625 is a short and straightforward statute. It authorizes the Service to establish and manage a new population of otters. Pub. L. No. 99-625, § 1(b). But this new grant of authority is conditioned on the Service implementing protections for fisheries and fishermen, most notably an exemption from prosecution under the Endangered Species and Marine Mammal Protection Acts for otherwise lawful activities that accidentally affect a sea otter. *See id.* § 1(b), (c) (identifying the mandatory components of the plan's regulation, including the incidental take exemption). The statute is unambiguous on this point; it provides that, if the Service establishes the program, it "shall implement" the statute's protections. *See id.* § 1(d); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("By its terms, the statutory language ['shall'] is mandatory . . . ."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001); ECF No. 40-1, **9-10 (Pl.'s Summ. J. Mem.).

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Congress doesn't have to expressly state that this mandatory obligation continues in effect if any of the infinite number[9] of failure criteria the Service might have created occurs, assuming it would even be possible for Congress to do so. Just as the narrator in *Green Eggs and Ham*,[10] having said that he does not like green eggs and ham, didn't need to further specify that he does not like them "here" or "there," Congress' broad statement that the Service "shall implement" the program necessarily means that it "shall implement the program if [this happens] or [that happens]."

The statute gives the Service no authority or discretion to disclaim these mandatory obligations. Therefore, the actions requested in the fishermen's petition are required to conform the agency's conduct to the statute. None of Service's or CBD's arguments against this plain meaning can withstand scrutiny.[11]

1. Though Initially Creating the Program Was Discretionary, the Service's Obligation To Implement the Incidental Take Exemption Is Not

The Service argues that the statute makes both the initial decision to adopt the regulation authorized by the statute and whether it will continue to implement its mandatory components discretionary. *See* ECF No. 43-1, **16-17 (Fed. Def.'s Summ. J. Mem.). It bases this argument entirely on Section 1(b) of the statute, which provides that the Service "may develop and implement" the program. Though the fishermen acknowledge that this language makes the initial decision to establish

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[9] As the fishermen have explained, if Public Law No. 99-625 gives the Service authority to terminate the incidental take exemption, nothing in it constrains that authority. *See* ECF No. 40-1, **10-14 (Pl.'s Summ. J. Mem.). This would mean that Congress left the Service absolute discretion to terminate these key protections for any reason or no reason whatsoever.

[10] Dr. Seuss, *Green Eggs and Ham* (1960).

[11] CBD appears to suggest that the court in *The Otter Project* resolved this question. It didn't. That decision makes clear that the court was only considering whether the 1987 Regulation left whether to apply the failure criteria to the Service's discretion. *See The Otter Project*, 712 F. Supp. 2d at 1004-05. It was silent about what the statute requires.

the program discretionary, the Service claims it makes ongoing implementation discretionary as well. *See id.* ("[T]he statute says that the Secretary 'may . . . implement' such a program.").

The Service's argument plainly conflicts with the statute. All parties agree that the Service has exercised the discretion afforded it under the statute to develop and implement the program. *See* 52 Fed. Reg. at 29,756-70, AR3002-16; Pub. L. No. 99-625. Having done so, the mandatory provisions contained in the statute apply. This includes the requirement that the program "shall" include a management zone, where the incidental take exemption applies. *See id.* § 1(b), (c). And it includes—under a subsection appropriately titled "Implementation of Plan"—a requirement that the Service "shall implement" it. *See id.* § 1(d). Surprisingly, the Service doesn't acknowledge or grapple with the operative language in the statute. In fact, the word "shall" doesn't appear once in its brief. *See* ECF No. 43-1 (Fed. Def.'s Summ. J. Mem.).

The Service instead argues for a broad rule that, anytime Congress grants an agency discretion to initially accept the benefits and conditions of a statute's delegation of authority, it also gives the agency discretion to decide whether to comply with those conditions at any point thereafter. The cases that it relies on, however—none of which address this statute nor are binding on this court—provide no support for this broad rule. *See Commonwealth of Pa. v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974); *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005); *United States v. McLean*, No. CR 03-30066-AA, 2005 WL 2371990 (D. Or. Sept. 27, 2005); *Herrera v. Riley*, 886 F. Supp. 45 (D.D.C. 1995). Two provide no support because the statute at issue in those cases *only* used permissive language when discussing the agency's authority. *See Castellini*, 365 F. Supp. 2d at 200-01; *McLean*, 2005 WL 2371990, at *3. Neither consider mandatory language like that Congress used in the statute here. *See* Pub. L. No. 99-625, § 1(d) ("shall implement"). A third directly contradicts the Service's proffered rule. The D.C. Circuit's decision in *Lynn*

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concerned whether an agency could terminate a program created under a statute that contained permissive language. *Lynn*, 501 F.2d at 852-53. Notwithstanding the permissive language, the court considered whether continuation of the program was mandatory. *See id*. at 854 ("The Secretary's argument from the non-mandatory language of the statutes is not conclusive standing alone."). The court ultimately held that it wasn't, but only because—unlike Public Law No. 99-625—there was no mandatory language to require it. *See id.* *Herrera* discusses a statute that uses both "may" and "shall," but is distinguishable because Congress expressly authorized the agency to discontinue the program at issue in that case and authorized measures to be used if the program is terminated. 886 F. Supp. at 49-51. Importantly, the court in *Herrera* did not conclude the agency had discretion to terminate the program at issue in that case simply because it had discretion in deciding to create it in the first place. *See id*.

Finally, the Service's conclusion doesn't logically follow from its premise. Generally, discretion to accept something subject to conditions doesn't imply that ongoing compliance with those conditions is also discretionary. For instance, when the Service issues an individual a permit to do something, subject to agency-imposed conditions, that individual isn't free to accept the permit's benefits and later disclaim compliance with the conditions, notwithstanding that the initial decision to accept the permit was up to her. The same should be true here.

2. The Statute's Mandatory Language Isn't Merely About Timing

CBD argues that Section 1(d)'s requirement that the Service "shall implement" the regulation doesn't create an obligation to implement the regulation. Instead, it argues, the provision merely concerns the timing of when implementation may begin. This argument is belied by the text of the statute.

Section 1(d) provides that the Service "shall implement" the program, after consulting with any federal agency or permit or license applicant who requests

consultation prior to April 1, 1986 or after that date, if no one requests consultation. Contrary to CBD's argument, the mandatory language—"shall"—is directed at implementation, not at the timing that implementation begins. Pub. L. No. 99-625, § 1(d). The statute doesn't, for instance, say that the Service "shall not" implement the program "until" April 1, 1986 or the conclusion of any consultation. Nor does it say that the Service "may" implement the program "once" April 1, 1986 passes or consultations conclude. Yet either of these formulations would hew more closely to CBD's interpretation.

Section 1(d) provides that, after consultations are concluded or April 1, 1986, the Service "shall implement" the program, including the incidental take exemption. No party argues that the Service failed to perform any consultations requested prior to April 1, 1986. Therefore, Section 1(d)'s mandatory, discretionless obligation applies.

B. The Purpose of Public Law No. 99-625 Is To Balance Benefits to the Sea Otter Against Impacts to Southern California's Fishery and Fishermen

The text, structure, and legislative history of Public Law No. 99-625 make clear that Congress' purpose in enacting the statute was to allow the Service to establish a new otter population while also reducing impacts on individuals. This is why the statute both authorizes the Service to create the program ("may develop") and mandates the establishment of a management zone where protections apply ("The plan . . . shall include . . . ."). *See* Pub. L. No. 99-625, § 1(b). The statute leaves no doubt about Congress' purpose in structuring the statute this way. It expressly states that "[t]he purpose of the management zone is to (i) facilitate the management of sea otters . . . and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources." *Id*. Although Congress left many things to the Service's discretion—whether to create the program, where to establish the new otter population, how many otters to move and when—it struck the balance between promoting otter recovery and reducing impacts itself.

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The legislative history further reinforces this purpose. Two senators made statements about the bill that would become Public Law No. 99-625 during deliberations. *See* ECF 40-5 (132 Cong. Rec. S17320-23 (Oct. 18, 1986)). Senator Chafee explained that the bill was necessary because it would resolve conflicts between government agencies, environmental groups, and groups representing the fishermen and others who work and play on Southern California waters. *See id*. at 4 ("Little progress has been made . . . because of intense conflicts among the various interests and government agencies."). The balance struck by the bill was intended to resolve these conflicts. *See id*. ("H.R. 4531 . . . appears likely to resolve the conflicts among the parties affected by translocation of sea otters[.]"). In fact, the varying interests had a hand in negotiating the compromise that Congress enacted. *See id*. ("Most of the interests concerned were involved in drafting this legislation framework. As a result, the . . . bill represents a consensus approach[.]"). This compromise was intended to endure, even if the species recovered to the point that it could be taken off the Endangered Species Act list. *See id*.

Senator Cranston echoed these sentiments. He said that, because "most of the concerned interest groups have had a hand in drafting this language[, i]t represents a consensus approach." *See id*. at 5. He also identified several "key elements" of the bill, including the protections that apply in the management zone. *See id*. at 5-6. He concluded by calling for the Senate to adopt the bill, explaining that it was "[i]n the interest of protecting the California sea otter *and* making progress toward balancing the utilization of the resources of the California coast." *See id*. at 6 (emphasis added).

Both the Service and CBD argue that Congress' purpose in enacting the statute wasn't to strike this balance but instead to promote sea otter expansion regardless of any impacts on anyone. To support this argument, they ignore the text of the statute, selectively quote from the legislative history, and largely rely on a statement of a single congressman on an earlier bill that was ultimately not enacted.

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The statute's requirements that the Service use any feasible, non-lethal means of removing sea otters in the management zone and the incidental take exemption cannot be reconciled with the purpose the Service asserts. *See* Pub. L. No. 99-625, § 1(c), (d). The obvious and explicit reason for imposing these requirements was that Congress was concerned about balancing otter recovery and impacts on affected individuals. *See id*. § 1(b). Neither the Service nor CBD explains any way to reconcile their arguments with this text.

CBD argues that the legislative history supports their argument because Senator Chafee said "I support [this bill] because it will help ensure the continued existence of the threatened California sea otter." *See* ECF 40-5 at 4. However, this statement is consistent with the statute's purpose of balancing sea otter recovery and impacts to individuals. By balancing these competing interests, Congress was pursuing both otter recovery and minimizing adverse impacts. Therefore it isn't surprising that a senator would point to those things in support of the bill. Senator Chafee's statement, in its entirety, makes clear how important balancing these competing interests was to the enactment of the legislation. *See* ECF No. 40-5, at 4-5.

Finally, both the Service and CBD place great weight on a statement by Congressman John Breaux on an earlier bill—which was ultimately not enacted—suggesting that the Service could terminate these protections. *See* AR0417-19. This statement isn't entitled to much weight however, and certainly provides no basis to ignore clear text. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *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."). But, perhaps more importantly, this Court shouldn't find this statement persuasive because it wasn't made during the discussion of the bill that was ultimately enacted. Though it may be impossible to know why,

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Congressman Breaux did not repeat this statement when Congress was considering the bill that became Public Law No. 99-625.

Nor does Congressman Breaux's statement cast doubt on the basic purpose of the statute. In fact, he explained that one of its purposes was to "provide[] . . . assurances to the State, commercial, and recreational fishing interests . . . regarding the relationship to, and effect of, the translocation to their respective activities and areas of concern." AR0417. He went on to explain that the bill "strikes a balance between providing assurances to affected interests and maintaining sufficient protections and management flexibility to meet the recovery needs of the California sea otter." AR0419. The Committee Report prepared for the bill that was ultimately not enacted further demonstrates that balancing these competing goals was Congress' purpose. *See* AR0405-06.

In light of Congress' purpose of balancing sea otter recovery and reducing impacts on individuals, the Service's interpretation of the statute is unreasonable. Since the statute provides no criteria for terminating the protections that the statute mandates, the Service's interpretation would mean that it could have terminated the management zone's protections for any reason or no reason whatsoever. Obviously, this wouldn't further Congress goal of providing assurances that the balance it struck would hold. To the contrary, it would undermine it.[12] Therefore, even if the statute were ambiguous, the Service's interpretation would not be entitled to deference. *See Utility Air Regulatory Group*, 134 S. Ct. at 2439.

C. The Avoidance Canon Reinforces the Plain Language of Public Law No. 99-625

The plain meaning of the statute is reinforced by the avoidance canon. *See Rodriquez v. Robbins*, 715 F.3d 1127, 1133-34 (9th Cir. 2013); ECF No. 40-1, **10-

[12] Tellingly, the result that the Service defends is that a population of otters has been established on San Nicolas Island and none of the statute's protections apply. *See* 77 Fed. Reg. at 75,266-97, AR5807-38. This is precisely the result the statute forbids.

11 (Pl.'s Summ. J. Mem.). Because the statute doesn't expressly grant the Service any authority to terminate the incidental take exemption, it also doesn't provide any intelligible principle to guide the Service's decision to do so. Consequently, interpreting the statute to give the Service authority to terminate the management zone, would run afoul of the nondelegation doctrine.

Congress can't constitutionally delegate power to an administrative agency unless it provides an "intelligible principle" to guide the exercise of that power. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).[13] At a minimum, where—as here—a statute gives no guidance as to how power should be wielded, the nondelegation doctrine is violated. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 414-16 (1935).

The Service argues that, though the statute contains no intelligible principle, context and legislative history provide one—the Service should do whatever will most facilitate the recovery of the California sea otter. *See* ECF No. 43-1, *26 (Fed. Def.'s Summ. J. Mem.). However, this argument conflicts with both the text and purpose of the statute for several reasons.

First, it's based on an isolated statement by a single congressman. Such statements can't supplant clear statutory text or create ambiguity where there isn't any. *See Hearn*, 68 F.3d at 304. Nor are isolated statements by a single legislator—even a bill's sponsor—controlling or entitled to much weight. *See GTE Sylvania, Inc.*, 447 U.S. at 118.

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[13] The Service's suggestion that the nondelegation doctrine has been abandoned is without merit. Although the Supreme Court has not struck down a statute under this doctrine since 1935, it has repeatedly invoked it and the avoidance canon when interpreting statutes that raise nondelegation questions. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); *see also United States v. Richardson*, 754 F.3d 1143, 1145-46 (9th Cir. 2014) (most recent decision addressing the nondelegation doctrine).

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Representative Breaux's statement is particularly unhelpful here since it wasn't made during the debate over the bill that became Public Law No. 99-625, but on another bill that Congress failed to enact. *See* AR1322. Even if isolated statements were usually helpful, there would be no reason to think this one is, since there's no indication the congressmen who enacted Public Law No. 99-625 were aware of its existence.

Representative Breaux's statement also fails to identify how the statute authorizes the Service to stop implementing the management zone nor how such power can be reconciled with the acknowledged purpose of providing certainty to everyone affected. *See* AR0419. Nor can it be the basis for the intelligible principle since the Service's actions—terminating the program but leaving the otter population on San Nicolas Island in place—conflict with that statement. *See* AR1322 ("If the Service determines that the translocation is not successful . . . [t]ranslocated animals should be returned to the parent population.").

Second, Congress' purpose in enacting Public Law No. 99-625 wasn't to pursue otter recovery at all cost, but to balance it with impacts to Southern California's fishery and fishermen. As explained above, both its text and legislative history confirm this. *See* Pub. L. No. 99-625, § 1(b)(4); 132 Cong. Reg. S17321-22 (Oct. 18, 1986). The Service hasn't identified any intelligible principle that could guide its balancing of those competing interests other than complying with the statute's mandate that it "shall implement" the balance struck by Congress.

Third, the Service's purported intelligible principle is belied by the statute's text. If, as the Service contends, Congress directed it to determine how to implement the program in all respects according to what would best facilitate sea otter recovery, it would make no sense for Congress to mandate the management zone's protections. Instead, Congress would have given the Service the option to reject those protections when initially designing the program, if in the best interest of the sea otter. *But see* Pub. L. No. 99-625, § 1(b)-(d).

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Finally, CBD's argument that the intelligible principle can be derived from the Endangered Species Act fails. Implementation of the statute isn't subject to the Endangered Species Act, but is expressly exempt. *See id*. § 1(f) ("[N]o act by the Service . . . with respect to a sea otter that is necessary to effect the relocation or management of any sea otter under the plan may be treated as a violation of any provision of the [Endangered Species] Act . . . ."); *see also id.* § 1(c) (exempting incidental take in the management zone from the Endangered Species Act). CBD's argument places great weight on the Office of the Law Revision Counsel's designation of the statute as a "note" to provisions of the Endangered Species Act in the U.S. Code. *See* ECF 42-1, **12-14 (Intervenor's Summ. J. Mem.). However such decisions by the Law Revision Counsel have no legal effect and can't change the meaning or intent of the statute passed by Congress. *See Mangum v. Action Collection Service, Inc.*, 575 F.3d 935, 939-40 (9th Cir. 2009). Nothing in Public Law No. 99-625 subordinates its requirements to the Endangered Species Act or adopts that statute's "whatever the cost" approach to species protection. On the contrary, the statute provides that implementation of the program is expressly exempt from the Endangered Species Act. *See* Pub. L. No. 99-625, § 1(f); *see also id*. § 1(c). The text and legislative history further demonstrate that Congress was concerned about impacts on affected individuals. *See* Pub. L. No. 99-625, § 1(b)(4); 132 Cong. Reg. S17321-22. An intelligible principle that excludes any consideration of these impacts can't be squared with the statute.

To avoid this nondelegation problem, the Court should interpret the statute's command that the Service "shall implement" the program literally. Pub. L. No. 99-625, § 1(d). Applying the plain meaning of this provision to the text renders it unnecessary to cobble together an intelligible principle from a few isolated comments in the statute's legislative history, legislative history for other unenacted bills, or abstract purposes of the Endangered Species Act. Since there is no authority

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to terminate the incidental take exemption, Congress didn't need to provide an intelligible principle.

III

A LITERAL INTERPRETATION OF PUBLIC LAW NO. 99-625 DOES NOT LEAD TO ABSURD RESULTS

Next the Service and CBD argue that the statute should not be interpreted literally because this would lead to absurd results. It's not clear how or why they think not prosecuting individuals who innocently take a sea otter while engaged in otherwise lawful activities is absurd. The argument appears to be based on an alleged inconsistency with the Endangered Species Act. This argument fails however because the result the fishermen seek is plainly not absurd, nor is it inconsistent with the Endangered Species Act.

To be clear, the result of following the literal meaning of the statute would *only* be that individuals who work and recreate in Southern California's waters could not be fined or imprisoned for incidentally taking a sea otter. *See* Pub. L. No. 99-625, § 1(c). It wouldn't require the Service to resume capturing and removing otters that wander into the management zone. The Service has determined that doing so would jeopardize the species because of the high mortality rate associated with catching and relocating the otters. AR3520-26. This does not suggest any absurdity, however. On its face, the statute only requires the Service to catch and remove otters if there are feasible, non-lethal means of doing so. Pub. L. No. 99-625, § 1(b). Since there aren't any, it doesn't.

Congress' balancing sea otter recovery and impacts to individuals by exempting incidental take in the management zone is not absurd. Absurdity is a high bar. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (interpreting a statute to avoid "patently absurd consequences" is a "narrow exception to our normal rule of statutory construction" (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948)). When a straightforward reading of a

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statute leads to a rational result, even if competing policy goals could have also been rationally balanced differently, "an alteration of meaning is not only unnecessary, but also extrajudicial." *See Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006). Recognizing that otter recovery impacts individuals and attempting to reduce those costs can hardly be called absurd. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational [to ignore the costs of regulation]").

Neither the Service nor CBD say that it would be absurd to not prosecute people who incidentally take a sea otter in the management zone. Instead, they argue that the result would be inconsistent with the Endangered Species Act and, therefore, is absurd. This argument can be easily dismissed because neither has explained how it would be *absurd* for Congress to depart from the Endangered Species Act's approach to protecting species "whatever the cost." *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). But, beyond that, the argument is wrong because there is no inconsistency between a literal interpretation of the statute and the Endangered Species Act. And, even if there were, the inconsistency has to be resolved in favor of the statute, since Congress expressly exempts its implementation from the Endangered Species Act.

There is no conflict between the result the fishermen seek and the Endangered Species Act for several reasons. First, there's no evidence in the record to support the Service's and CBD's arguments. The Service has determined that catching and removing sea otters from the management zone would jeopardize the species. AR3520-26. But this does not indicate any conflict between the two statutes because Public Law No. 99-625 only requires the Service to remove otters from the management zone if there are feasible, non-lethal means of doing so. Pub. L. No. 99-625, § 1(b).

Second, the Endangered Species Act doesn't mandate that take of the California sea otter—whether incidental or intentional—be prohibited. The

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Endangered Species Act only forbids the take of *endangered* species. 16 U.S.C. § 1538. The sea otter is listed as a threatened species, not an endangered one. 42 Fed. Reg. at 2968; *see* 16 U.S.C. § 1532. The Endangered Species Act provides that the Service may forbid the take of threatened species through regulation. 16 U.S.C. § 1533(d). But nothing in the statute would forbid Congress from providing that incidental take of a threatened species like the sea otter shall not trigger civil and criminal penalties. Nor is it absurd for it to do so.[14]

Third, there's no inconsistency between continuing to implement the incidental take exemption and the Service's obligation to avoid jeopardizing the species. In addition to the lack of evidence in the record that the exemption jeopardizes the species, the Service's obligation isn't implicated since it has a nondiscretionary duty to implement the exemption. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 661-62 (Section 7 of the Endangered Species Act doesn't apply to mandatory, discretionless agency actions). In fact, the operative language in the statute—"shall"—is identical to the language at issue in *Nat'l Ass'n of Home Builders*. *See id*.

Finally, even if there were some inconsistency between the result dictated by the statute and the Endangered Species Act, the statute resolves it. It expressly exempts implementation of the program and incidental take in the management zone from the Endangered Species Act. *See* Pub. L. No. 99-625, § 1(c), (f). The arguments against a literal application of the statute effectively read this exemption out of the statute.

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[14] The Service itself exempts take of some threatened species from regulation under the Endangered Species Act. *See* 16 U.S.C. § 1533(d); U.S. Fish & Wildlife Service, *Endangered Species Act Special Rules: Questions and Answers* (Feb. 2014), *available at* http://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet_020714.pdf. When it does, the Service isn't acting absurdly.

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IV

CONGRESS HAS NOT ACQUIESCED IN THE SERVICE'S INTERPRETATION

The Service also argues that the Court should consider its interpretation persuasive because, since the Service adopted the 2012 Rule, Congress has considered legislation related to the sea otter but has not reversed that decision. According to the Service's argument, Congress has therefore acquiesced in its interpretation.

The Supreme Court has made clear that courts should be extremely hesitant to attribute any significance to Congress' failure to act because "[n]on-action by Congress is not often a useful guide[.]" *See Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). Congress' failure to act could mean anything or nothing and implied acquiescence is inconsistent with basic norms of statutory interpretation. *See, e.g.*, *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 268-69 (1965); *United States v. Wise*, 370 U.S. 405, 411 (1962) ("The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here. Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation . . . ." (internal citations omitted)); *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). The Service's argument hinges on the notion that anytime Congress fails to promptly reverse an agency interpretation, it acquiesces in it.

In *Bob Jones*—one of the exceedingly few cases in which the Court has relied on acquiescence—several factors were decisive, including that (a) Congress had considered numerous bills to explicitly reverse the agency's interpretation over more than a decade, but failed to adopt any of them; (b) Congress endorsed the interpretation in legislative history while otherwise amending the statute; and (c) that

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legislative history expressly endorsed judicial decisions embracing the agency's interpretation. *See* 461 U.S. at 600-02.

None of these factors are present here. First, only three years have passed since the Service terminated the management zone's protections. 77 Fed. Reg. at 75,266-97, AR5807-38. Second, the recently proposed legislation regarding the sea otter wouldn't have explicitly reversed the Service's interpretation. Consistent with the Service's argument that the statute's requirements no longer apply, the proposed legislation would have repealed Public Law No. 99-625 and its requirement that the Service implement the incidental take exemption.[15] Though the fishermen don't believe that much can be deduced from Congress' repeated failures to repeal Public Law No. 99-625, if anything they cut against the Service's interpretation rather than suggesting acquiescence. Third, Congress' decision to maintain the status quo makes sense in light of the ongoing litigation to challenge the Service's decision to terminate the exemption. Therefore, Congress failure to act, rather than endorsing the agency's interpretation *sub silentio*, merely preserves the status quo until the courts have an opportunity to rule on the question. Finally, the Service has not pointed to any affirmative step that Congress has taken to endorse its interpretation. Instead it relies *solely* on Congress' failure to act within the last three years.

This case is a prime example why the Supreme Court has been so cautious to read anything into Congress' failure to enact legislation. It's not at all clear from this short window of inaction what views, if any, today's Congress has on the merits of the Service's interpretation of the statute.

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[15] *See* H.R. 1735, 114th Cong. § 313(c) (2015-2016) (repealing Pub. L. No. 99-625); S. 1376, 114th Cong. § 313(c) (2015-2016) (same); S. 1118, 114th Cong. § 304(c) (2015-2016) (same); S. 2289, 113th Cong. § 315(c) (2013-2014) (same); S. 2410, 113th Cong. § 353(c) (2013-2014) (same); H.R. 1960, 113th Cong. § 320(c) (2013-2014) (same).

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V

NEITHER LACHES NOR ESTOPPEL BAR THE FISHERMEN'S CHALLENGE TO THE DENIAL OF THEIR PETITION

The Service asserts that, whatever the merits of the fishermen's argument, their claim shouldn't be heard because of laches and estoppel.[16] It argues that the claim should be barred by laches because 26 years passed between the adoption of the 1987 Regulation and the initial lawsuit challenging the 2012 rule terminating the management zone. It also argues that the claim should be barred by estoppel based on a comment letter that one of the plaintiffs submitted in support of the 1987 Regulation and a 2010 settlement agreement to which two of the plaintiffs were parties. However, these arguments are meritless.

A. Laches Doesn't Bar This Suit

The Service's laches argument fails as a matter of law. The fishermen didn't "sleep on their rights." To the contrary, their claim challenging the denial of their petition accrued on July 28, 2014. *See* AR5925. A scant four months later, they filed this lawsuit, well within the Administrative Procedure Act's six year statute of limitations. ECF No. 1 (Compl.). This fact is fatal to the Service's laches defense. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973-74 (2014) (laches cannot be invoked to bar legal relief when a claim is brought within the statute of limitations enacted by Congress).

Whatever the Service's policy arguments to the contrary, those should be directed to Congress, not this Court. Congress has provided a right to petition for the repeal or amendment of any regulation, without regard to how old that regulation

[16] To be more accurate, the Service argues that the California Abalone Association should be denied relief on these bases. It's the only plaintiff addressed in the lion's share of the Service's laches and estoppel arguments. The Service also argues the California Sea Urchin Commission should be barred by estoppel, but only on the basis that it was a party to the 2012 settlement agreement. The Service makes no argument against the third plaintiff, the Commercial Fishermen of Santa Barbara. Consequently, even if the Service's equitable defenses had merit, they wouldn't justify denying the Commercial Fishermen relief.

is. 5 U.S.C. § 553. And it has provided a right to challenge the denial of a petition, if brought within six years of the denial. *See* 5 U.S.C. § 706; 28 U.S.C. § 2401. The doctrine of laches provides no basis for this Court to second guess Congress' judgment. *See Petrella*, 134 S. Ct. at 1973-74; *cf. id.* at 1968 ("'When Congress fails to enact a statute of limitations, . . . the doctrine of laches is not invading congressional prerogatives. It is merely filling a legislative hole.'" (quoting *Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002))).

B. Estoppel Doesn't Bar This Suit

The fishermen also aren't estopped from challenging the denial of their petition. To support its argument, the Service primarily relies on a settlement agreement which two of the three plaintiffs signed. *See* ECF No. 43-2, Ex. A at **28-38 (Fed. Def.'s SOF, Ex. A). But the settlement agreement—far from precluding the fishermen from challenging the Service's violation of Public Law No. 99-625—expressly preserved that right. *See id*. at 5, ¶ 8 ("No party shall use this Agreement or the terms herein as evidence of what does or does not constitute lawful action involving the Service's implementation of P.L. 99-625 . . . ."); *see also id*. at 6, ¶ 10 ("Nothing in this Stipulated Settlement Agreement and Order of Dismissal shall preclude Plaintiffs or any other party from bringing claims challenging any final determination . . . ."); *id*. at 7, ¶ 15 ("[N]o provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the MMPA, P.L. 99-625 . . . ."). Further, the fishermen had to wait until the Service's action disclaiming implementation of the statute became final before pursuing this claim. *See In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015).[17]

[17] The Service's argument that it has been prejudiced because it "expended its resources" to adopt the 2012 Rule is belied by Congress' decision to require (continued...)

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The Service also asserts that the California Abalone Association should be estopped because its comment on the then-proposed 1987 Regulation embraced the failure criteria, according to the Service's reading. However, the comment letter doesn't support the Service's conclusion nor endorse the legality of the failure criteria. Rather, it says that the program must guarantee "some end: zonal management, delisting, OSP, or it's an academic exercise." AR0679. In other words, the comment explains that ultimately the protections for the management zone should be maintained or the take prohibition should be lifted. It doesn't support the Service's position that it can prosecute fishermen who accidentally take a sea otter in the management zone.

VI

THE PROPER REMEDY IN THIS CASE IS TO DIRECT THE SERVICE TO GRANT THE FISHERMEN'S PETITION ON REMAND

As explained in Section I, the fishermen properly petitioned for the repeal of the 2012 Rule and amendment of the 1987 Regulation. If this Court agrees with the fishermen's interpretation of Public Law No. 99-625, the proper remedy would be to remand the petition back to the agency with clear instructions that it must grant the petition and restore the exemption. In light of Public Law No. 99-625's mandatory language, the only response to the petition that the Service may legally take is to grant it.

CONCLUSION

In enacting Public Law No. 99-625, Congress wanted to pursue recovery of the California sea otter *and* protect those who work and recreate in Southern California waters. To do so, it gave the Service discretion to create a new otter population. But, if it did, Congress commanded the Service to exempt incidental

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[17] (...continued)
challengers to wait until after an agency action becomes final before pursuing their Administrative Procedure Act remedies. *See Murray Energy*, 788 F.3d at 334.

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take of the sea otter from criminal prosecution and provided that it "shall implement" the program, including this exemption. This mandatory language unambiguously forbids the Service from terminating the exemption. The Service's and CBD's arguments to the contrary can't be squared with the text of the statute nor its purposes. Instead, those arguments fail to address the statute's operative language, misconstrue it, or choose to ignore one of Congress' purposes in enacting the statute. Therefore, this Court should grant summary judgment to the fishermen.

DATED: August 5, 2015.

Respectfully submitted,

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