BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR &
THE UNITED STATES FISH AND WILDLIFE SERVICE

In the Matter of the Petition
To Rescind the Failure Criteria for
The Sea Otter Management Zone
and the Decision To Terminate the
Sea Otter Translocation Program
and Management Zone
as Contrary to The
Authorizing Legislation.

Petition of Pacific Legal Foundation and the California Sea Urchin Commission to Rescind the Failure Criteria for the Sea Otter Management Zone and Decision to Terminate the Sea Otter Translocation Program and Management Zone as Contrary to the Authorizing Legislation, Pub. L. No. 99-625

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Table of Contents

Table of Authorities

Cases

Statutes

Regulation

Other Authorities

Introduction

The Secretary of the Interior listed the Southern sea otter (*Enhydra lutris nereis)* as threatened under the Endangered Species Act (ESA) in 1977, in large part due to real and potential harm caused by historical fur harvesting and oil spills.[1] A decade later, a stalling otter population prompted the United States Fish and Wildlife Service (the "Service") to recommend translocating an experimental otter population to San Nicolas Island, a location "sufficiently distant from the existing range so that a catastrophic oil spill will not likely contact both . . . population[s]."[2] Local fishing interests objected, justifiably concerned about losing access to "lucrative fishing" due to "conflicts between sea otters and fishing activities, oil and gas exploration and development, and other resource-related activities."[3] Congress had a difficult choice to make; it attempted to resolve the dispute by authorizing the Service to translocate the sea otters[4] but with the following critical proviso.[5] The Service could translocate the sea otters if, but only if, the agency established a "management zone" around the translocated population where fishermen would be exempt from the take prohibitions in the ESA and the Marine Mammal Protection Act (the "MMPA").[6]

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[1] 52 Fed. Reg. 29,754, 29,754 (Aug. 11, 1987).

[2] *Id.*

[3] *Id.* at 29,759, 29,770 (citing H.R. Rep. No. 99-124, 99th Cong., 1st Sess. 3, 16-17 (1985); 131 Cong. Rec. H6468 (July 29, 1985)).

[4] Congressional authorization was necessary because, although the Endangered Species Act authorized such a population, the Marine Mammal Protection Act—which also applies to the sea otter—didn't.

[5] Pub. L. No. 99-625, § 1(c)(2) (1986).

[6] *Id.*

The Service created an experimental population in 1987 but did not want to be bound by Congress's desire to balance sea otter protection with the valid counter-interests of fishermen in the management zone. Instead, the Service asserted new, unfettered authority to terminate the management zone fishing protections if it deemed the translocation program a failure.[7] The Service wanted to have its cake and eat it too, at the fishermen's expense. Fishermen relied on the management zone protections for decades while the Service took various positions on relocation.[8] Finally, in 2012, the Service proclaimed the translocation program a failure and terminated the fishermen's protections.[9] In doing so, the Service converted this compromise between environmental and fishing interests into an oppressive regulatory regime.

Petitioners sued, challenging the termination of the management zone fishing protections as inconsistent with the Service's authorizing legislation.[10] On appeal following an adverse judgment in the district court, the Ninth Circuit analyzed "whether the Service's decision to terminate the program exceeded" the agency's statutory authority, using the now-abrogated two-step *Chevron* framework.[11] The Ninth Circuit determined that the statute "does not speak . . . of termination at all" and proceeded to step two of *Chevron*.[12] The court then held that

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7 52 Fed. Reg. at 29,784.

8 77 Fed. Reg. 75,266, 75,266 (Dec. 19, 2012).

9 *Id.*

10 *See* Cal. Sea Urchin Comm'n v. Jacobson, No. 2:13-cv-05517 (C.D. Cal. Mar. 3, 2014).

11 Cal. Sea Urchin Comm'n v. Bean, 883 F.3d 1173, 1182 (9th Cir. 2018).

12 *Id.* at 1183.

"it is reasonable to interpret the statute as implicitly giving the Service authority to terminate the program when it determines that the purposes of the statute would no longer be served[.]"[13] The Ninth Circuit's miscalculation allowed the Service's injustices to continue, forcing Petitioners to pursue other remedies.

Petitioners' opportunity came in 2021, when they submitted a delisting petition to the Service showing that the Southern sea otter met the recovery criteria outlined in the 2003 recovery plan.[14] The Service gave an initial positive finding that "substantial scientific or commercial information indicates that delisting the southern sea otter may be warranted."[15] The Service ultimately declined the petition, citing the Southern sea otter's limited range, vulnerability to oil spills, shark bites, and limited genetic diversity.[16]

That brings Petitioners to today. The Service's fabricated escape clause from Public Law 99–625's fishermen protections and its final rule terminating those protections remain bad policy and contrary to the Service's authorizing legislation. Congress left the Service discretion to accept or deny the compromise that it brokered,[17] but it gave the Service no discretion, explicit or implicit, to alter or abandon that compromise once it had been accepted. As a result, both the 1987

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[13] *Id.*

[14] 68 Fed. Reg. 16,305 (Apr. 3, 2003).

[15] 87 Fed. Reg. 51,635, 51,639 (Aug. 23, 2022).

[16] 88 Fed. Reg. 64,870 (Sep. 20, 2023).

[17] *See* Pub. L. No 99-625, § 1(b) ("The Secretary *may* develop . . . a plan for the relocation and management of . . . California sea otters from the existing range of the parent population to another location.") (emphasis added). This language gives the Secretary, and by extension the Service, the discretion to decline translocating the otters at all. Had the Service declined to move forward, no management zone or fishermen protections would have been necessary.

regulation's termination criteria and the Service's 2012 decision to terminate the management zone protections are contrary to the Service's authorizing statute and are illegal.

Therefore, Pacific Legal Foundation (PLF) and the California Sea Urchin Commission petition the Service under the Administrative Procedure Act (APA)[18] to reinstate the management zone fishing protections by rescinding both the relevant portions of the 1987 regulation and the agency's 2012 decision. Specifically, Petitioners ask the Service to re-implement the exemptions from the ESA and MMPA take prohibitions within the management zone, but do not request re-implementation of removal procedures.[19] This petition is filed under 5 U.S.C. § 553(e) and is submitted in response to the harm that the Service's illegal actions pose to Petitioners and the public.

Interest of Petitioners

PLF is the nation's oldest nonprofit legal organization that fights to protect private property rights and other constitutional liberties in courts nationwide, particularly when wrongheaded environmental regulation threatens these legal

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[18] 5 U.S.C. § 553(e).

[19] The Service originally stopped relocating otters in 2001, concluding "under section 7 [of the ESA] that [relocation efforts] would likely jeopardize the sea otters' continued existence." 66 Fed. Reg. 6649, 6652 (Jan. 22, 2001); 16 U.S.C. § 1536(a)(2). The Service's decision is legally questionable since the enacting legislation creates a non-discretionary duty to remove the otters and never requires continued section 7 compliance. *See* Pub. L. No. 99-625. Section 7's applicability is limited to "actions in which there is discretionary Federal involvement." 50 C.F.R. § 402.03 (2009); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (The "no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred."). In any event, Petitioners do not request re-implementation of removal procedures and thus the question of jeopardy is irrelevant to this petition.

principles. PLF attorneys have served as counsel of record in many ESA cases.[20] PLF has also written extensively on the ESA.[21] The California Sea Urchin Commission is a California state entity, created to promote sustainable sea urchin harvest, educate consumers and the public about sea urchins, and balance sea urchin harvest with environmental protection.

Petitioners seek relief now because the elimination of the management zone protections has harmed local fishermen and California's fishing industry. Sea otters primarily and voraciously consume sea urchins, eating between 23% and 33% of their body weight per day and eliminating sea urchin populations over time.[22] The Service itself has recognized that sea otters "will eliminate fisheries for sea urchins," based on "proportional prey consumption by sea otters in southern California" and "past interactions between sea otters and shellfish fisheries along the central coast."[23] Regulations resulting from the sea otter's listing also interfere with sustainable harvest by exposing urchin divers to the threat of significant criminal and civil penalties should their activities disturb an otter. For this reason,

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[20] *See* Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 586 U.S. 9 (2018); Skipper v. U.S. Fish & Wildlife Serv., 796 F. Supp. 3d 996 (S.D. Ala. 2025); Kan. Nat. Res. Coal. v. U.S. Fish & Wildlife Serv., 780 F. Supp. 3d 650 (W.D. Tex. 2025).

[21] *See* Mitchell Scacchi, *Intrastate Species Under the Endangered Species Act* (Pacific Legal Found., 2025), bit.ly/48wzwj3; Chales Yates, *Government should stop redefining 'take' in Endangered Species Act enforcement* (Pacific Legal Found., 2025), https://bit.ly/46jqZie.

[22] Fish & Wildlife Serv., *The Sea Otter (Enhydra lutris): Behavior, Ecology, and Natural History* pp. 22, 26 (Sep. 1990), *available at* https://downloads.regulations.gov/FWS-R8-ES-2023-0132-0018/content.pdf; *The Diet of a Sea Otter: What Sea Otters Eat and Why It Matters*, SEA OTTER FOUND. AND TRUST (Jan. 21, 2025), *available at* https://seaotterfoundationtrust.org/the-diet-of-a-sea-otter-what-sea-otters-eat-and-why-it-matters.

[23] U.S. Fish & Wildlife Serv., 2 *Revised Draft Supplemental Environmental Impact Statement* App. G at 33–34. (Aug. 2011), *available at* https://downloads.regulations.gov/FWS-R8-FHC-2011-0046-0002/content.pdf.

the Commission supports solutions that promote the sea otter's recovery while protecting the interests of fishermen from unfair regulatory burdens and California's sea urchin stock from unmanaged predation.

Background

Much of the Southern sea otter's history is explained in the Introduction. Below, Petitioners provide a timeline summarizing the almost fifty-year history of the management zone.

1. Jan. 14, 1977: The Secretary of the Interior listed the Southern sea otter as threatened under the Endangered Species Act (ESA).[24]
2. May 1984: The Service published a five-year review encouraging the creation of a separate experimental otter population.[25]
3. Nov. 7, 1986: Congress allowed the creation of an experimental, translocated otter population, with the proviso that the Service must establish a management zone.[26]
4. Aug. 11, 1987: The Service created an experimental population in 1987 and manufactured a new authority to terminate Public Law 99-625's mandatory fishing protections if it deemed the translocation program a failure.[27]
5. Jan. 22, 2001: The Service ceased translocating otters.[28]

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[24] 42 Fed. Reg. 2965.

[25] 52 Fed. Reg. 29,754 ("The status of [the] southern sea otters was reviewed in the Service's 5-year review (May 1984).").

[26] Pub. L. No. 99-625.

[27] 52 Fed. Reg. 29,754, 29,784.

[28] 66 Fed. Reg. 6649, 6652.

6. Apr. 3, 2003: The Service updated its otter recovery plan.[29]

7. Dec. 19, 2012: The Service proclaimed the translocation program a failure and terminated the fishermen's protections.[30]

8. Jul. 31, 2013: Petitioners filed their original complaint alleging that the termination of the fishermen's protections was unlawful.[31]

9. Apr. 24, 2014: Petitioners submitted a Rulemaking Petition to Rescind both the Failure Criteria for the Sea Otter Management Zone and the Decision to Terminate the Sea Otter Translocation Program and Management Zone.[32]

10. Mar. 1, 2018: The Ninth Circuit upheld the Service's decision to terminate the translocation program and the management zone, as well as the agency's denial of Petitioners' initial rulemaking petition.[33]

11. Mar. 10, 2021: The Service received PLF's petition to delist the Southern sea otter.[34]

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[29] 68 Fed. Reg. 16,305.

[30] 77 Fed. Reg. 75,266.

[31] *See* Complaint, Cal. Sea Urchin Comm'n v. Jacobson, No. 2:13-cv-05517 (filed Jul. 31, 2013).

[32] Petition of the California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara to Rescind the Failure Criteria for the Sea Otter Management Zone, 52 Fed. Reg. 29,754, and Decision to Terminate the Sea Otter Translocation Program and Management Zone, 77 Fed. Reg. 75,266, as Contrary to the Authorizing Legislation, Pub. L. No. 99-625 (Dep't of Interior Apr. 24, 2014).

[33] *Bean*, 883 F.3d at 1173.

[34] 88 Fed. Reg. at 64,879.

12. Sep. 20, 2023: The Service declined to delist the Southern sea otter despite the otter having met all criteria for delisting as set forth in the 2003 otter recovery plan.[35]

The prompt rescission of the 1987 regulation's failure criteria and the 2012 decision terminating the sea otter management zone is necessary because the termination criteria and termination decision are illegal and threaten Southern California's fishing industry

Because of the Service's illegal actions, fishermen in Southern California are exposed to criminal prosecution if they inadvertently harm a sea otter. Their plight is inconsistent with congressional intent. This harm is ongoing and requires prompt action by the Service. Furthermore, the Service's illegal actions endanger the future of Southern California's fisheries. Sea otters are voracious eaters that reduce the shellfisheries in Southern California below commercial viability.

I. The Service's Decision to End the Fishermen's Protections Now Merits No Judicial Deference.

The Service's interpretation in prior litigation rested on a now-outdated deference doctrine. *Bean*, the Ninth Circuit opinion upholding the Service's interpretation, relied in all respects on *Chevron* deference. Under *Chevron*, a court reviewing an agency's statutory interpretation "first asks whether Congress has spoken to the precise question at issue. If so, that's the end of the matter."[36] If the

[35] 88 Fed. Reg. at 64,880.

[36] *Bean*, 883 F.3d at 1182 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984)).

statutory text is ambiguous, the court "asks whether the agency's interpretation of the statute is permissible."[37] In *Bean*, the Service argued that its preferred interpretation of Public Law 99-625 was compelled at step one of *Chevron* because: (1) the plan is styled as experimental; and (2) the statute provides broad discretion to prescribe the specifics of the plan, showing that Congress gave the Service "clear statutory authority to terminate the program."[38] The Ninth Circuit was not persuaded by these arguments and held the statute "does not either expressly require the Service to operate the translocation program in perpetuity or expressly grant authority to the Service to terminate the program."[39]

So, because of perceived statutory ambiguity, the Ninth Circuit upheld the Service's reading at step two on dubious grounds. First, the Ninth Circuit held that "repeated references to the ESA" in the statute, such as a clause instructing the Service to explain the zone's impact on the species' status, grant the Service termination authority to "act in harmony with the goals of the ESA."[40] Second, the Ninth Circuit held the statute's focus on the translocated otters gave the Service authority to terminate the management zone protections if it created a separate "threat to the . . . parent population."[41] These tenuous holdings, relying on inferences from external sources to invalidate congressional mandate, were insufficient even with *Chevron* deference and nonsensical without it.

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[37] *Id.* (citation modified).

[38] *Id.* at 1183.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1183–84.

Unfortunately for the Service, *Chevron* deference has been discontinued. In *Loper Bright*, the Supreme Court dismissed *Chevron* deference as "fundamentally misguided" and "unworkable."[42] In its place, courts must follow the Administrative Procedure Act (APA) standard.[43] Under the APA, courts exercise independent judgment in determining whether agencies acted within their statutory authority and do not defer to agencies' interpretations even when a statute is ambiguous.[44] Specifically, the APA mandates reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[45] After *Loper Bright*, the Service's termination of the management zone, and its expansion of the authority granted by Public Law 99-625, deserve no deference. Therefore, to be upheld today, the Service's interpretation must be grounded in the statute's text, structure, and history.

The Service may reinstate the protections to fishermen notwithstanding the Ninth Circuit's decision in *Bean*.[46] In *Lopez v. Garland*, the Ninth Circuit observed that, since *Loper Bright* the Ninth Circuit has been unwilling to "reconsider [its] precedent" based on *Chevron* deference *unless* an agency prompts the court to do so by "promulgat[ing] a new interpretation of the statute."[47] This exception-within-

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[42] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 407 (2024).

[43] *Id.* at 395.

[44] *Id.* at 374.

[45] 5 U.S.C. § 706.

[46] *Bean*, 883 F.3d at 1173.

[47] Lopez v. Garland, 116 F.4th 1032, 1045 (9th Cir. 2024).

exception under *Loper Bright* gives agencies discretion to trigger judicial reopening of issues decided by prior *Chevron*-based appellate rulings, like *Bean*. As the dissent in *Lopez* observed, "if the [agency] doesn't like the position to which this court deferred, the [agency] can simply change positions" and allow the judiciary to "adopt our own, independent interpretation of the statute."[48] The Service's rule reinstating the fishermen's protections (a decision which, as the following section shows, would represent the best reading of Public Law 99-625), would invalidate *Bean*'s precedential value and deserve to be judicially evaluated on its own. This is true despite the Supreme Court declining to "call into question prior cases that relied on the *Chevron* framework," as the Service would publish the rule after *Loper Bright*.[49]

II. The Service's current interpretation improperly reads its enacting statute.

The Service now must follow the APA standard, look to the enacting legislation's text and history, and alter its interpretation. The statute evidences a carefully crafted congressional compromise, balancing environmental conservation and commercial interests. Congress conveyed its intent through the statute's unambiguous mandatory language. The statute demands the plan "be developed by regulation" that "shall include" a management zone surrounding the new population.[50] This zone is designed "to (i) facilitate the management of sea otters and the containment of the experimental population . . . and (ii) to prevent, to the

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[48] Lopez v. Bondi, 151 F.4th 1196, 1210–11 (9th Cir. 2025) (Bumatay, J., dissenting).

[49] *Id.* at 1208–09 (citing *Loper Bright*, 603 U.S. at 412). Petitioners agree with Judge Bumatay that the Supreme Court meant this language to apply only to its own precedent, but the Service's rulemaking that is requested by Petitioners would be proper regardless.

[50] Pub. L. No. 99-625, § 1(b).

maximum extent feasible, conflict with other fishery resources within the management zone."[51] To that end, the Service "shall" treat any otter found within the management zone as a "member of the experimental population" and "use all feasible non-lethal means and measures" to capture and remove them.[52]

The statute also specifies 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 1972."[53] This take exemption protected fishermen and others pursuing their livelihoods in Southern California's waters. Finally, under the appropriately titled "Implementation of Plan" provision, the statute provides that, if the Service decides to establish the new sea otter population, it "shall implement" the regulation, including the management zone protections.[54] The Service has discretion in translocating the otters, but no discretion to later selectively eliminate the management zone fishing protections.

Congress created a straightforward statute designed to balance sea otter recovery against its consequences for Southern California's fishing industry. With this clear statutory text, Congress spoke on what must happen if the Service established a new sea otter population. The statute's mandatory language imposes unambiguous obligations on the Service to implement the management zone

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[51] *Id.* § 1(b)(4)(B).

[52] *Id.*

[53] *Id.* § 1(c)(2).

[54] *Id.* § 1(d).

protections if it establishes a sea otter population in Southern California. The statute does not terminate this obligation at any time. By introducing sea otters to San Nicolas Island, the statute bound the Service to implement the statutory protections for the management zone. By contending otherwise, the Service's (and the Ninth Circuit's) interpretation undermines the statute's purpose, permitting the government to enjoy the compromise's benefits while relieving itself of its obligations.

Moreover, courts must interpret statutes alongside subsequent legislation to ensure that the statutes make sense together.[55] Later congressional decisions expressly relied on management zone protections. In 1994, Congress amended the Marine Mammal Protection Act to relax restrictions on incidental take during commercial fishing operations.[56] However, Congress excluded sea otters from this reform because it intended the management zone protections to continue governing incidental take of the otters.[57] Terminating the management zone protections, after Congress expressly relied upon them in amending the Marine Mammal Protection Act, thwarts congressional intent.

Nor is the Service's reinterpretation likely to negatively affect the Southern sea otter population. Data outlined in the Petitioners' new delisting petition explain that both the overall and San Nicolas island populations have continued to grow, far

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[55] *See* Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000).

[56] *See* 16 U.S.C. § 1387.

[57] *See id.* § 1387(a)(4); *see also* H. Rep. No. 103-439 (Mar. 21, 1994) ("Taking of California [Southern] sea otters is regulated under Public Law 99-625.").

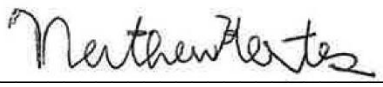
exceeding the Service's previous recovery thresholds. In addition, threats to the otter, such as oil spills, have receded. Finally, prior concerns about otters being harmed by their forcible removal from the management zone, which the Service found may jeopardize the sea otter, are inapplicable to the present petition. Petitioners are not asking for the full reinstatement of the management program, or for the resumption of sea otter removal procedures, but are only asking the Service to reinstate the incidental take protections that Public Law 99-625—and only that law—can provide.

Conclusion

Petitioners request that the Service rescind the failure criteria in 52 Fed. Reg. 29,754 and the 2012 decision in 77 Fed. Reg. 75,266. Petitioners also request that the Service reinstate the incidental take protections for fishermen within the management zone.

Dated: April 24, 2026.

Respectfully submitted,



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