No. 14-55580

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; CALIFORNIA LOBSTER AND TRAP FISHERMEN'S ASSOCIATION; COMMERCIAL FISHERMEN OF SANTA BARBARA,

Plaintiffs - Appellants,

v.

RACHEL JACOBSON, in her official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, Department of Interior; DANIEL M. ASHE, in his official capacity as Director of the United States Fish & Wildlife Service; UNITED STATES FISH & WILDLIFE SERVICE,

Defendants - Appellees,

and

FRIENDS OF THE SEA OTTER; HUMANE SOCIETY OF THE UNITED STATES; DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; THE OTTER PROJECT; ENVIRONMENTAL DEFENSE CENTER; LOS ANGELES WATERKEEPER,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable Dolly M. Gee, District Judge

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants state that they are not publicly held corporations, do not issue stocks, and do not have parent corporations.

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STATEMENT OF SUBJECT MATTER JURISDICTION

This appeal arises from the district court's judgment dismissing Appellants' complaint as time-barred. Excerpts of Record (ER) at 4-16. The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (judicial review of federal agency action). The district court's entry of judgment on March 27, 2014, dismissing the complaint, is a final judgment under Rule 54(a) of the Federal Rules of Civil Procedure. Appellants filed a Notice of Appeal on April 11, 2014, ER at 1, within sixty days of the district court's entry of judgment. The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

STATEMENT OF ISSUES

A lawsuit under the Administrative Procedure Act is timely if brought within six years after the right of action first accrues. 28 U.S.C. § 2401(a); *see Wind River Mining Corp. v. United States*, 946 F.2d 710, 712-13 (9th Cir. 1991). Is such a lawsuit nevertheless time-barred if the grounds advanced for challenging the agency action could also have been advanced against older agency actions, a direct challenge to which would now be time-barred?

STATUTORY PROVISIONS

5 U.S.C. § 706 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
>
> 28 U.S.C. § 2401(a) states:
>
> (a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT OF THE CASE

A. Introduction

Appellants California Sea Urchin Commission, California Abalone Association, California Lobster and Trap Fishermen's Association, and Commercial Fishermen of Santa Barbara (fishermen) are a state government entity and membership organizations representing fishermen. They are organized to promote a sustainable fishery in which their members can pursue their livelihoods, which are threatened by the U.S. Fish and Wildlife Service's (Service) December 19, 2012, decision to terminate Southern California's sea otter management zone. The fishermen, in this action, seek to prevent the Service from violating a compromise struck by Congress, which recognized that otter expansion has costs. It threatens an ecosystem and industry and, unless the protections that Congress specifically required are maintained,

people who are merely pursuing their lawful occupation could face criminal punishment for guiltless acts.

The Service's adoption of this final rule was a final agency action that exceeded its statutory authority in violation of the Administrative Procedure Act (APA). The statute of limitations for this claim is six years. Less than eight months after the rule became final, the fisherman challenged the rule as exceeding the Service's statutory jurisdiction. Because the complaint was filed less than six years after the rule became final, the dismissal should be overruled.

B. Background

1. Public Law 99-625

On November 7, 1986, Congress enacted Public Law 99-625, 100 Stat. 3500, to allow the Service to return sea otters to Southern California, while avoiding some of the negative effects to the fishery and fishermen. Specifically, Congress authorized the Service to develop a relocation and management plan for the sea otter that must include a "translocation zone" where the relocated population would reside and a "management zone" surrounding it. *Id*. § 1(b)(3)-(4). The Service was required to use all feasible non-lethal means to capture and remove otters from the management zone in order "to prevent, to the maximum extent feasible, conflict with other fishery resources." *Id*. § 1(b)(4)(B)(i)-(ii). Most importantly to the fishermen, Congress expressly exempted otherwise lawful activities in the management zone, including

fishing, from the criminal provisions of the Endangered Species Act and the Marine Mammal Protection Act. *Id*. § 1(c)(2). If the Service elected to exercise the discretionary authority to create a translocation plan, Congress provided that the Service *shall implement* the plan, including the conditions that Congress imposed on the Service's authority. *Id*. § 1(d).

2. The Establishment and Termination of the Management Zone

The Service exercised this authority on August 11, 1987, in a regulation that established both zones and exempted otherwise lawful activities from the prohibitions of the Endangered Species Act and Marine Mammal Protection Act. *See* 52 Fed. Reg. 29,754. The regulation further provided that the program would generally be considered a failure if certain criteria were met and, if they were, the Service might terminate the program. *Id*. at 29,784.

The Service relocated otters to San Nicolas Island from 1987 through 1990. ER at 31 ¶ 37. Although it initially complied with its obligation to remove otters from the management zone, the Service ceased doing so in 1993 when it concluded there were no non-lethal means available. *Id.* at 31 ¶ 39. However, it continued to respect the exemption from Endangered Species Act and Marine Mammal Protection Act liability. *Id.* at 32 ¶ 44.

In 2009, The Otter Project and Environmental Defense Center sued the Service, claiming that it had a mandatory duty to consider whether the failure criteria were met

and, if they were, terminate the exemption. ER at 32 ¶ 48. As a result of that lawsuit, the Service proposed to terminate the plan and the management zone on August 26, 2011. 76 Fed. Reg. 53,381. The Service finalized this proposed rule on December 19, 2012, terminating the plan, its obligation to remove sea otters from the management zone if non-lethal means become available, and exposing fishermen to criminal prosecution under the Endangered Species and Marine Mammal Protection Acts. 77 Fed. Reg. 75,266.

C. Procedural History

The fishermen filed this APA challenge to the 2012 Rule on July 31, 2013, asserting that it exceeds the Service's authority under Public Law No. 99-625, which gives the Service no authority to terminate the protections in the management zone. *See* ER at 21. The Service moved to dismiss the case on statute of limitations grounds. *See* ER at 17. On March 3, 2014, the district court granted the motion to dismiss, but gave 21 days to file an amended complaint. *See* ER at 15-16. Once the time to amend had passed, the court entered judgment dismissing the complaint. ER at 4. This appeal followed. ER at 1.

STANDARD OF REVIEW

A district court's dismissal on statute of limitations grounds is reviewed by this Court de novo. *See Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1127 (9th Cir.

2006). Dismissal under Federal Rule of Civil Procedure 12(b)(6) is only appropriate if the complaint fails to state a claim upon which relief can be granted.

SUMMARY OF ARGUMENT

To determine whether a party has stated a claim under the APA, the court must resolve two questions. First, does the party challenge a "final agency action" on one of the grounds enumerated in the APA? 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (defining a final agency action as the culmination of an agency decision "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow' " (citation omitted); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010). Second, was the claim brought within six years of the challenged agency action becoming final? 28 U.S.C. § 2401(a). Here, the answer to both questions is yes. The fishermen challenged a final agency action—the 2012 Rule—as exceeding the Service's statutory authority less than eight months after it was adopted. Therefore, the dismissal should be overruled.

The court below dismissed this claim because, if the fishermen are right, the Service may have previously exceeded its statutory authority in adopting the 1987 Regulation. ER at 5-16. It construed this Court's decision in *Wind River Mining Corp. v. United States* to foreclose judicial review in such circumstances except when the challenged final agency action is the denial of a petition or the enforcement of an

illegal regulation. ER at 13-15; 946 F.2d 710 (9th Cir. 1991). This interpretation is contrary to this Court's precedent, the text of the APA, and the presumption that agency action is subject to judicial review. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1374 (2012) (presumption of judicial review); *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 904-05 (9th Cir. 2012) (holding that a challenge to a rule that incorporated a twenty-year-old regulatory definition, on the grounds that both exceed the agency's authority, was not barred by the statute of limitations).

ARGUMENT

I

APPELLANTS' CHALLENGE TO THE 2012 RULE TERMINATING THE MANAGEMENT ZONE IS TIMELY

A straightforward application of the Administrative Procedure Act and the statute of limitations provision demonstrates that this claim was timely. Where the final agency action is a rule-making, the statute of limitations period starts to run when the final rule is adopted and published in the Federal Register. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1363 (9th Cir. 1990).

Here, the fishermen challenge a rule that exceeds the Service's authority under Public Law No. 99-625, by terminating protections for Southern California's fisheries and fishermen. ER at 21-22 ¶ 1. The fishermen allege that this violation occurred in 2012 when the Service terminated the management zone, purporting to relieve itself

of its obligations and removing the fishermen's exemption from criminal prosecution. *Id.* ("In December of last year, the Service violated this Congressionally authorized compromise by ending the management zone."). The fishermen requested the invalidation of the 2012 rule and a return to the status quo ante. *Id*. ("Plaintiffs seek a declaration that the Service's termination of the otter management zone is illegal, and an injunction requiring the Service to continue to observe and abide by the Congressionally mandated compromise."). The rule they challenge was adopted and published in the Federal Register on December 19, 2012. 77 Fed. Reg. 75,266. Appellants filed their complaint on July 31, 2013, less than eight months later. ER at 21. Therefore, the dismissal of their action was improper.

In dismissing the complaint, the court below construed this case as a challenge to the 1987 Regulation and not the 2012 Rule. The complaint does not challenge the 1987 Regulation. That regulation is only relevant in that it is the Service's purported authorization for the 2012 Rule. *See* ER at 37 ¶ 71. Rather, the relevant final agency action was the termination decision itself. *Id.* at 21-22 ¶ 1. As the fishermen contend that Public Law 99-625 forbids the Service from terminating the exemption from the Endangered Species and Marine Mammal Protection Acts, it is the 2012 Rule—which terminated these protections—that they challenge as exceeding the Service's authority.

II

SHINY ROCK AND *WIND RIVER* DO NOT SUPPORT DISMISSAL

Rather than asking whether the fishermen filed their APA challenge to a final agency action in time, the court below addressed two unrelated arguments. First, it held that the statute of limitations can run against a party before she is injured and established standing to challenge a final agency action. ER at 11. That legal proposition is correct under *Shiny Rock Mining Corp. v. United States*, but it has no relevance here because the fishermen do not ask that the statute of limitations be waived for their claim. *See* 906 F.2d at 1365. As explained above, the fishermen filed a timely APA challenge to the 2012 Rule.

Second, the Service and the court below construe this Court's decision in *Wind River Mining Corp. v. United States* to narrow the types of final agency actions that are reviewable under the APA to the specific examples enumerated in that decision, *i.e.* enforcement actions and petition denials. ER at 13-15. That interpretation of *Wind River* is inconsistent with *Center for Biological Diversity v. Salazar*, in which this Court recognized that a final rule could be challenged as exceeding an agency's authority despite its reliance on an earlier rule that could not be directly challenged. 695 F.3d at 904-05. Additionally, this interpretation is inconsistent with *Wind River*'s reasoning, the text of the APA, and the presumption of reviewability under the APA.

See 28 U.S.C. § 2401(a); *Sackett*, 132 S. Ct. at 1374 (presumption of judicial review under the APA); *Wind River*, 946 F.2d at 715 (adopting the reasoning of *Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978)).

A. The Fishermen Do Not Ask the Court To Waive the Statute of Limitations Period

This Court has held that a statute of limitations could run against a plaintiff even if it was not injured, and therefore did not have standing to sue, until more than six years after the agency action became final. *Shiny Rock*, 906 F.2d at 1365. In *Shiny Rock*, a mining company filed a procedural challenge to a 1964 order which withdrew federal lands from mineral extraction. *Id*. at 1363-64; *see also* 825 F.2d 216 (9th Cir. 1987). The company filed its challenge more than 15 years after the order became final and the government moved to dismiss the challenge as too late. 906 F.2d at 1363-64. The mining company, which had only recently acquired the property, replied that the statute of limitations period shouldn't begin to run until the plaintiff is injured and acquires standing. *Id*. at 1364-66. Reasoning that the mining company's argument would render statutes of limitations meaningless, this Court held that the statute of limitations period runs from when the agency action becomes final and is published in the Federal Register. *Id*. at 1365-66.

The fishermen do not challenge *Shiny Rock*. Nor is their case controlled by it because they do not ask this Court to waive the statute of limitations period. Unlike

that case, the fishermen filed their complaint within six years of when the challenged agency action became final. *Compare id*. at 1363-64 *with* ER at 21-22 ¶ 1. As the court below recognized, they were not injured until the 2012 Rule was adopted. ER at 11. But they do not argue that the statute of limitations should run from any point other than when the challenged final agency action—the 2012 rule—became final.

Furthermore, *Shiny Rock* demonstrates why the fishermen's claim is timely. In addition to the direct challenge to the 20-year-old regulation, the mining company also challenged a more recent final agency action that had relied on the regulation. 825 F.2d at 218-20. In the first appeal, this Court resolved the claims against the recent final agency action—the denial of the mining claim application—on the merits. *Id*. at 218-19. It remanded a procedural challenge to the 20-year-old rule. *Id*. at 219-20. The final agency action for the remanded claim was the adoption of the 20-year-old rule because that was the only alleged APA violation in the claim. *Id*. It was this second claim that failed on statute of limitations grounds. 906 F.2d at 1364.

This challenge is analogous to the claim that this Court resolved on the merits, not the one that was time-barred. *Shiny Rock* would only be relevant if the fishermen did not allege that the 2012 Rule violates the APA. It would apply, for example, if they challenged the 1987 Regulation as exceeding the Service's authority, seeking its rescission. Or it would apply if they challenged the 2012 Rule solely on the grounds that the 1987 Regulation was procedurally defective, because the only agency action

that would violate the APA in such a claim would be the adoption of the 1987 Regulation. *See Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999) (rejecting, on statute of limitations grounds, a challenge to the application of an older regulation solely because the regulation's adoption was procedurally defective). But *Shiny Rock*'s statute of limitations analysis does not require dismissal here, where the fishermen have filed a timely challenge to an agency action as exceeding an agency's authority.

B. *Wind River* Does Not Limit the Types of Final Agency Actions Which May Be Challenged Under the APA

No decision from this Court supports the Service's theory that *Wind River* restricts the final agency actions that can be challenged under the APA. To the contrary, this interpretation is directly contradicted by this Court's recent decision in *Center for Biological Diversity*. 695 F.3d at 904-05. In that case, an environmental group brought a timely APA challenge to a 2008 regulation that incorporated a 1983 regulatory definition. *Id.* The group alleged that the 2008 regulation exceeded the agency's authority on a theory that would mean that the 1983 definition also exceeded the agency's authority. *Id.* The Service argued that the case should be dismissed because the period for challenging the 1983 definition directly had run. *Id.* This Court rejected that argument, the same one made here, because "[a]lthough Plaintiffs cannot challenge facially the 1983 regulatory definition, they can challenge the

Service's alleged application of that definition in [the 2008 regulations]." *Id*. at 904. Notably, the challenged 2008 regulation, like the 2012 Rule at issue here, did not fall within either of *Wind River*'s exceptions. *See id.*

Though this Court decided, in a separate section of the opinion, that the Service had not faithfully applied the 1983 definition in the 2008 action, that fact played no role in the Court's decision to reject the statute of limitations defense. This Court made that clear when it explained that, in light of its rejection of the statute of limitations defense, it "must determine whether the Service applied the 1983 regulation definition [in which case the plaintiffs would win on the merits], as opposed to some other permissible definition, in promulgating the contested 2008 incidental take regulations [in which case the Service would win on the merits]." *Id*. at 904-05.

Additionally, the Service's interpretation of *Wind River* is inconsistent with the Court's reasoning in that case, the text of the APA, and the presumption of judicial review under the APA.

1. *Wind River* Does Not Support the Service's Effort To Restrict the Types of Final Agency Actions Reviewable Under the APA

In *Wind River*, a mining company challenged a 10-year-old rule precluding ore extraction on federal lands. 946 F.2d at 711-12. The Court acknowledged that a direct challenge to the ten-year-old rule was barred by the statute of limitations. *Id*.

at 714. But, noting that *Wind River*'s claim was that the earlier rule exceeded the agency's statutory authority, this Court recognized that subsequent final agency actions that applied the rule would also exceed the agency's statutory authority. *Id*. at 715. The Court held "that a substantive challenge to an agency's decision alleging lack of agency authority *may* be brought within six years of the agency's application of that decision to the specific challenger." *Id*. at 716 (emphasis added). Importantly, this Court rejected the statute of limitations argument in that case. *See id*. It did not hold, nor did it have any opportunity to consider, whether final agency actions that exceed an agency's statutory authority, where an agency has previously exceeded that authority, cannot be challenged except in this circumstance.

The fishermen's interpretation is reinforced by *Oppenheim v. Campbell*, the case on which *Wind River* was explicitly based. 571 F.2d 660. In that case, the D.C. Circuit dismissed a challenge to an old final agency action as time-barred but not a second claim challenging a more recent final agency action. *Id*. at 663. As the court explained:

> Appellee's cause of action under the APA is entirely distinct from the cause of action we have found to be barred by the statute of limitations. Appellee could have brought the first without reference to the second. The two also seek different relief: the first seeks to set aside recent arbitrary agency action, the latter seeks to recover compensation from the United States for wrongs suffered long ago.

Id.

The fishermen's challenge to the 2012 Rule is similarly distinct from any challenge that could have been brought against the 1987 Regulation. First, the 2012 Rule can be challenged without reference to the 1987 Regulation. The fishermen do not contend that the 2012 Rule violates the APA *because* the 1987 Regulation does so. *See Cedars-Sinai*, 177 F.3d at 1129 (challenging an agency decision for relying on an earlier, *procedurally* defective regulation). The statute of limitations would bar such an action because it would not allege any violation of the APA in the adoption of the 2012 rule. *See id*. Here, however, they argue that the Service violated the APA in adopting the 2012 Rule because, by terminating Public Law 99-625's protections, it exceeded its statutory authority. That may mean that the 1987 Regulation *also* exceeded the Service's authority, but that is not necessary for the fishermen to succeed in their challenge to the 2012 Rule.

Second, the fishermen's claim seeks different relief than a challenge to the 1987 Regulation. The fishermen seek to have the 2012 Rule declared null and void and the statutory protections for them and their fishery restored. A challenge to the 1987 Regulation would have sought to have at least some part of that regulation rescinded.

2. The District Court's Interpretation of *Wind River* Is Inconsistent with the Text of the APA

The Court below construed *Wind River* to foreclose review of final agency actions where an agency has exceeded its statutory authority relying on an earlier agency action, except in the particular examples given by the *Wind River* court; *i.e.* the denial of a petition to rescind and an enforcement proceeding. ER at 13-15. This interpretation unnecessarily divorces *Wind River* from the APA's language. An agency can be challenged for exceeding its statutory authority in a challenge from a petition denial or an enforcement proceeding *because* each is a final agency action, challenged on grounds that they violate the APA by exceeding the agency's statutory authority, and were brought within six years of the date that they became final. 5 U.S.C. § 704; 28 U.S.C. § 2401(a). This Court has never expressly said so, but the Fifth Circuit, which follows *Wind River*, has. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287-88 (5th Cir. 1997) ("Although the *Wind River* Court never said so explicitly, the court treated the agency's denial of that petition as a 'final agency action' sufficient to create a new cause of action under the APA.").

Although addressing the statute of limitations under a different statute, this Court's *Oregon Trollers Association v. Gutierrez* illustrates why dismissal was improper here. 452 F.3d 1104 (9th Cir. 2006). That case concerned the application

of the Magnuson Act's 30-day statute of limitations period to a challenge to a fishery management plan on the grounds that it and the older regulation on which it relied violated the statute. *Id*. at 1112. The federal government moved to dismiss, arguing that the challenge should have been brought within the time for directly challenging the regulation. *Id*. This Court rejected that argument because the Magnuson Act does not only allow challenges to regulations, but to "actions." *Id*. at 1113. Because the claim had been filed within 30 days of the adoption of the 2005 plan, this Court explained, "as a straightforward textual matter, a petition filed within 30 days of the publication of an action may challenge both the action and the regulation under which the action is taken." *Id*.

Like the Magnuson Act, the APA allows challenges to final agency actions, not just regulations. 5 U.S.C. § 702. The 2012 Rule was a final agency action subject to challenge as exceeding the Service's statutory authority. If the interpretation given to *Wind River* by the Service and the court below were correct, this Court did not faithfully apply the statute of limitations provision in that case but created an exception to the provision out of whole cloth. Neither *Wind River* nor any of the cases on which it relied suggest that this is what the Court was doing.

Defendants' argument would limit judicial review under the APA, contrary to congressional intent. When Congress wants to create the result that defendants seek, it does so expressly. For example, Congress provided, in the Surface Mining Control

and Reclamation Act, that any challenges to the substance of a regulation must be filed within 60 days after the regulation becomes final. 30 U.S.C. § 1276(a)(1); *see Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995). After that time, the substance of the regulation can be challenged "solely on grounds arising after the sixtieth day." 30 U.S.C. § 1276(a)(1); *Nat'l Min. Ass'n*, 70 F.3d at 1350. Congress did not limit review under the APA in this manner. *See* 28 U.S.C. § 2401.

3. The District Court's Interpretation Is Also Inconsistent with the Presumption That Agency Actions Are Subject to Judicial Review Under the APA

Finally, the Service's interpretation of *Wind River* contradicts the presumption that agency actions are judicially reviewable. *Sackett*, 132 S. Ct. at 1374. The Supreme Court has explained that this presumption is based on the legislative history of the APA, which "manifests a congressional intention that it cover a broad spectrum of administrative actions" and that its "'"generous review provisions" must be given a "hospitable" interpretation.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). Construing *Wind River* to restrict the types of final agency actions that can be challenged as exceeding an agency's authority would not be an hospitable interpretation of the APA.

The interpretation would also threaten to shield entirely from judicial review some agency decisions.[1] Here, the Service merely asserted the authority to violate Public Law 99-625 in the 1987 Regulation. The Service did not actually exercise that authority until it adopted the 2012 Rule. Therefore, *no one* was injured or had standing to challenge the 1987 Regulation on the grounds that it exceeded the Service's authority.

Additionally, the 1987 Regulation was not the culmination of the Service's decision to exceed its authority. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186-88 (4th Cir. 1999) (an agency action is final once there is "no obvious factual contingency" that puts the APA violation seriously in doubt). There were numerous factual contingencies that would have made a claim that Public Law 99-625 would be violated purely speculative, including: (a) the failure criteria might never be satisfied; and (b) if the failure criteria were applied and satisfied, the Service might decide not to terminate the protections anyway. *See* 52 Fed. Reg. 29,754. In light of these contingencies, any injury or APA violation would have been purely speculative during the time for challenging the 1987 Regulation. As a result, the Service's theory would mean that the decision to violate Public Law 99-625 could

[1] Subsequent to the dismissal, the Service has, contrary to *Wind River*, taken the position that the fishermen may not challenge the 1987 Regulation and the 2012 Rule by filing a petition to rescind. *See* Request for Judicial Notice, Exhibit A. If the Service's theory is correct, its decision to violate Public Law 99-625 can never be challenged.

never have been challenged. By merely asserting an authority the agency doesn't have, which no one could challenge, it would immunize its subsequent decisions to exercise that authority from judicial review.

CONCLUSION

On December 19, 2012, the Service finalized a rule terminating the sea otter management zone and exposing fishermen to potential criminal liability for pursuing their livelihoods. Less than eight months later, Appellants filed this action challenging that rule as inconsistent with Public Law No. 99-625. Since this action was filed within six years of the publication of the rule in the Federal Register, it cannot be dismissed on statute of limitations grounds and the decision below should be reversed.

DATED: September 19, 2014.

Respectfully submitted,

DAMIEN M. SCHIFF
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Counsel for Plaintiffs - Appellants

STATEMENT OF RELATED CASES

Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This opening brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   X It contains 4,781 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), or

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2. This opening brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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DATED: September 19, 2014.

/s/ Jonathan Wood
Attorney for Plaintiffs - Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jonathan Wood
JONATHAN WOOD

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EXCERPTS OF RECORD

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DATED: September 19, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Four copies of the Excerpts of Record were also sent to the Court via Federal Express for overnight delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Also, I certify that I mailed a hard copy of the foregoing, via first-class U.S. Mail, upon the following:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

California Sea Urchin Commission, et al.

PLAINTIFF(S),

v.

Rachel Jacobson, et al.,

DEFENDANT(S).

CASE NUMBER:

2:13-cv-05517-DMG-CW

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that California Sea Urchin Commission, et al., hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

☒ Order (specify):
ECF No. 53 (3/03/14)

☒ Judgment (specify):
ECF No. 54 (3/27/14)

☐ Other (specify):

Imposed or Filed on _____. Entered on the docket in this action on _____.

A copy of said judgment or order is attached hereto.

April 11, 2014
Date

/s/ Jonathan Wood
Signature

☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 13-05517 DMG (CWx)**	Date	March 27, 2014
Title	***California Sea Urchin Commission, et al. v. Rachel Jacobson, et al.***	Page	1 of 1

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

VALENCIA VALLERY	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER DISMISSING ACTION

On March 3, 2014, the Court granted Defendants' Motion to Dismiss. [Doc. # 53.] In its Order, the Court notified Plaintiffs that this action would be dismissed if they failed to file an amended complaint by March 24, 2014. Plaintiffs have not filed a first amended complaint and the time to do so has now passed. Therefore, this action is **DISMISSED** with prejudice.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 13-05517 DMG (CWx)**	Date	March 3, 2014
Title	***California Sea Urchin Commission, et al. v. Rachel Jacobson, et al.***	Page	1 of 12

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

VALENCIA VALLERY	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [DOC. # 47]

This matter is before the Court on Defendants' Motion to Dismiss. [Doc. # 47.] The motion was originally set for hearing on December 6, 2013. On December 3, 2013, the Court deemed the matter suitable for decision without oral argument and took it under submission. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. For the reasons set forth below, Defendants' Motion to Dismiss is **GRANTED**.

I.
PROCEDURAL BACKGROUND

On July 31, 2013, Plaintiffs California Sea Urchin Commission ("CSUC"), California Abalone Association, California Lobster and Trap Fishermen's Association, and Commercial Fishermen of Santa Barbara filed a Complaint in this Court against Defendants Rachel Jacobson, in her official capacity as Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Daniel M. Ashe, in his official capacity as Director of the United States Fish and Wildlife Service ("FWS"); and the FWS. [Doc. # 1.] Plaintiffs' sole claim is that Defendants violated their statutory authority under Public Law No. 99-625, 100 Stat. 3,500 (1986) ("P.L. 99-625") (codified at 16 U.S.C. § 1536) by terminating FWS' sea otter translocation program ("the Program") authorized by P.L. 99-625, pursuant to termination authority in a 1987 FWS regulation implementing the Program, 50 C.F.R. § 17.84(d)(8) ("1987 Final Rule").[1] (Compl. ¶ 72.)

On August 12, 2013, Friends of the Sea Otter, Humane Society of the United States, Defenders of Wildlife, Center for Biological Diversity, The Otter Project, Environmental

[1] 50 C.F.R. § 17.84(d)(8) was reserved by Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program, 77 FR 75266 (Dec. 19, 2012).

Defense Center ("EDC"), and Los Angeles Waterkeeper (collectively, "Intervenors") filed motions to intervene as Defendants in the action. [Doc. ## 13, 26.] On October 2, 2013, the Court granted the Intervenors' motions. [Doc. # 44.] On October 23, 2013, Defendants filed the instant Motion to Dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted or, in the alternative, for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).[2] [Doc. # 47.] On November 14, 2013, Plaintiffs filed an opposition [Doc. # 50], and Defendants filed a reply on November 22, 2013 [Doc. # 51].

II.
FACTUAL BACKGROUND

In an effort to address both otter conservation and fishery protection, Congress enacted P.L. 99-625 in 1986. (Compl. ¶ 27.) The statute authorized FWS to develop and implement a "plan for the relocation and management of a population of California sea otters." P.L. 99-625; (Compl. ¶ 27.)

In 1987, FWS exercised its authority under P.L. 99-625 by promulgating a regulation, the 1987 Final Rule, implementing a sea otter relocation program ("the Program"). (*Id*. ¶¶ 32-33; Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program 52 Fed. Reg. 29754 (FWS Aug. 11, 1987).) The 1987 Final Rule included five termination criteria as a means to "determin[e] whether or not the [Program] will achieve its intended purposes or have to be terminated. . . ." 52 Fed. Reg. 29,754, 29784. The 1987 Final Rule further provided that FWS would terminate the Program if any one of the five

[2] Defendants alternatively move to dismiss under Rule 12(b)(1) on the grounds that the Court has no jurisdiction to hear an Administrative Procedure Act challenge once the statute of limitations has run. (Motion to Dismiss at 13-14.) In *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997), the Ninth Circuit held that "[b]ecause the statute of limitations codified at 28 U.S.C. § 2401(a) makes no mention of jurisdiction but erects only a procedural bar, . . . [the statute] is not jurisdictional." *Id.* at 770 (citation omitted). Defendants assert that in light of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 129 S. Ct. 750, 169 L. Ed. 2d 591 (2008), Section 2401(a) is jurisdictional. *Id.* at 139 (holding that the statute of limitations in 28 U.S.C. § 2501 is jurisdictional). The Ninth Circuit has questioned the continued validity of the holding in *Cedars-Sinai* that 28 U.S.C. § 2401(a) is not jurisdictional. *See Aloe Vera of Am. Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009). Recently, however, the Ninth Circuit has noted that *Aloe Vera* made this observation "without the benefit of the Supreme Court's most recent decisions clarifying the distinction between jurisdiction and non-jurisdictional rules." *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1038 n. 2 (9th Cir. 2013). This suggests that *Cedars-Sinai* continues to be good law. As such, this Court is bound to follow the binding precedent in *Cedars-Sinai*. *See Sequoia Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1217, 1235 (E.D. Cal. 2012) (rejecting defendant's argument that Section 2401(a) is jurisdictional after *John R. Sand & Gravel*). Accordingly, the Court concludes that Section 2401(a) is not jurisdictional and addresses Defendants' Motion to Dismiss under Rule 12(b)(6).

termination criteria was met. 52 Fed. Reg. 29754 cmt. 3 ("five factors . . . must be evaluated during any consideration of delisting").[3]

In 1993, FWS stopped implementing the translocation policy due to concerns over the effectiveness of the Program and its impacts on the otters. (Compl. ¶ 39.) Over the course of several years, FWS prepared and revised environmental impact statements analyzing the effects of terminating the Program. (*Id*. ¶ 47.) In 2009, Intervenor environmental groups, the Otter Project and EDC, sued FWS for unreasonable delay in deciding whether to maintain or terminate the Program. (*Id*. ¶ 48.) *See The Otter Project v. Salazar*, 712 F. Supp. 2d 999 (N.D. Cal. 2010). Plaintiffs CSUC and California Abalone Association intervened as defendants in that case. (Compl. ¶ 48.) The parties, including the Intervenors, reached a settlement agreement that required FWS to issue a final decision as to whether to terminate the Program by December 2012. (*Id*.) On December 19, 2012, FWS promulgated a rule terminating the Program based on FWS' application of the 1987 Final Rule's termination criteria. Endangered and Threatened Wildlife and Plants; Establishment of an Experimental Population of Southern Sea Otters, 77 Fed. Reg. 75266, 75266, 75267 (FWS Dec. 19, 2012) (explicitly removing "regulations that govern the southern sea otter translation program" and stating that "[o]ur conclusion that the southern sea otter translocation program has failed is based on an in-depth evaluation of the translocation program. . . . We have determined that the translocation program meets failure criterion 2.")

In this suit, Plaintiffs allege that P.L. 99-625 "does not provide the [FWS] any authority to terminate the [Program]" and the "only authority that the [FWS] relied on . . . was [its] own termination criteria, which are the [FWS's] invention, not Congress'." (Compl. ¶¶ 69, 71.) Plaintiffs now seek declaratory and injunctive relief against Defendants that the 2012 Final Rule was in excess of FWS' authority under P.L. 99-625, which they allege only provided FWS the

[3] The 1987 Final Rule provides five criteria by which to judge the relocation program's success and states that "[i]f, based on any one of these criteria, the Service concludes . . . that the translocation has failed to produce a viable, contained experimental population, this rulemaking will be amended to terminate the experimental population." 52 Fed. Reg. 29,754, 29,784. The following is a summary of the five criteria for a "determination of a failed translocation": (i) if, after the first year, no translocated otters remain in the translocation zone and the reasons for emigration or mortality cannot be identified or remedied; (ii) if, within three years, fewer than 25 otters remain and the reason for emigration or mortality cannot be identified or remedied; (iii) if, after two years, the experimental population is declining a significant rate and the translocated otters are not showing signs of "successful reproduction"; (iv) if otters are "dispersing from the translocation zone and becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished"; (v) if the "health and well-being of the experimental population should become threatened to the point that the colony's continued survival is unlikely . . . ." 52 Fed. Reg. 29,754, 29,784.

authority to *implement* a sea otter relocation program—not the authority to *terminate* it. (*Id.* ¶ 72.)

III.
LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. Legal conclusions, in contrast, are not entitled to the assumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)).

"A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). "[A] complaint cannot be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Von Saher*, 592 F.3d at 969 (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995) (internal quotation marks omitted)). Where the statute of limitations is not jurisdictional, the defendant bears the burden of proof to show untimeliness. *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).

IV.
DISCUSSION

The Administrative Procedure Act ("APA") provides for judicial review of agency actions. 5 U.S.C. § 702; *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). Only final agency actions are reviewable. 5 U.S.C. § 704. A rulemaking is considered final when it is published in the federal register. *Shiny Rock Min. Corp.*, 906 F.2d at 1363, 1366.

Defendants seek to dismiss Plaintiffs' Complaint on the grounds that Plaintiffs' claim is a facial challenge to the 1987 Final Rule because that Rule asserted FWS's authority to terminate the Program under P.L. 99-625, and therefore their challenge is untimely. Plaintiffs agree that

the 1987 Final Rule asserted FWS' authority to terminate the Program, but argue that FWS did not exercise that authority until its recent final agency action in 2012, which is the source of their injury, and thus their suit is timely.

A. Statute of Limitations

The parties agree that the applicable statute of limitations provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a); *see also Hells Canyon Pres. Council v. United States Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (six-year statute of limitations applies to claims under the APA). The limitations period in 28 U.S.C. § 2401(a) commences on the date of the final agency action. *See Envtl. Prot. Info. Ctr. (EPIC) v. Pac. Lumber Co.*, 266 F.Supp.2d 1101, 1121 (N.D. Cal. 2003).

A plaintiff bringing a "policy-based facial challenge" to a final rulemaking under the APA must file suit "within six years of the decision." *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). Facial challenges to agency actions must be raised within six years of promulgation because "[t]he grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." *Id.* at 715. In contrast, when "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse *application of the decision to the particular challenger*." *Id.*

B. Plaintiffs' Challenge to FWS's Authority to Terminate the Program Cannot Be Deemed Timely Merely Because FWS Exercised this Authority in the 2012 Final Rule

Plaintiffs agree the 2012 Final Rule "relied on the assertion of authority and termination criteria contained in the 1987" regulation. (Opp'n at 2.) They argue that their claim is timely, however, because the 2012 Final Rule terminated the program and caused Plaintiffs' injury. For the reasons below, this is insufficient to render Plaintiffs' challenge to FWS's termination authority—asserted in 1987—timely.

First, Plaintiffs' reliance on *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012), for the blanket proposition that "[a]ny subsequent final agency action" that relied on an old agency action may be challenged, is misplaced. (Opp'n at 9.) As is the case here, in *Center for Biological Diversity* there were two agency rules at issue: a 1983 Final Rule that defined the term "small numbers," and a 2008 Final Rule that applied the 1983 "small numbers"

definition. Defendants argued that any facial challenge to the 1983 defintion of "small numbers" was time-barred. The Ninth Circuit agreed, stating "[a]lthough Plaintiffs cannot challenge facially the 1983 regulatory definition, they can challenge the Service's alleged application of the definition [in the newer rule] as exceeding the agency's statutory authority." *Id*. at 904 (citing *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1018-19 (9th Cir. 2005); *Wind River Mining Corp.*, 946 F.2d at 715).[4] To determine whether plaintiffs' challenge to the "small numbers" definition in the more recent regulation was time-barred, the Court asked whether the claim was a facial challenge to the old definition or a challenge to how that old defiition was applied in the more recent regulation. *Id*.

Similarly, in *Strahan v. Linnon*, 967 F. Supp. 581, 607 (D. Mass. 1997), *aff'd*, 187 F.3d 623 (1st Cir. 1998), plaintiffs challenged recent "biological opinions," which the Court concluded were final agency actions. *Id.* at 598-99. In doing so, plaintiffs brought a facial challenge to an old regulation, which was applied in the recent biological opinions. *Id.* at 607. The Court found the challenge untimely, relying on the Ninth Circuit's *Wind River* decision, because it was a policy–based facial challenge to the old regulation. *Id.* (citing *Wind River Mining Corp.*, 946 F.2d at 715).

In short, Plaintiffs are incorrect that the mere reliance on an old rule in a new rule re-opens the limitations period for challenging the authority asserted in the original rule. Rather, the question before this Court is whether Plaintiffs are asserting a facial challenge to FWS's authority to terminate the Program, which FWS asserted in the 1987 Final Rule, or are challenging the *application* of that authority in the 2012 Final Rule as a violation of P.L. 99-625.

In *Wind River*, the Ninth Circuit discussed subsequent agency actions based on older regulations, and noted that when "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse *application* of the decision to the particular challenger." 946 F.2d at 715. This assumes a second agency action—that *applies* the old rule to the particular challenger. If *any* subsequent agency action automatically could renew the limitations period, then *Wind River*'s exception would be unnecessary.

Moreover, to accept Plaintiffs' argument that the door is re-opened to an otherwise time-barred challenge whenever there is a more recent agency action invoking that previous final rule

[4] Contrary to Plaintiffs' characterization of *Center for Biological Diversity*, the Ninth Circuit concluded that plaintiffs' challenge to the definition of "small numbers" was not time-barred because the 2008 Final Rule *applied* a different definition of "small numbers" than the 1983 Final Rule's definition. *Id*. at 905. The Ninth Circuit therefore did not permit a facial challenge to the "small numbers" definition announced in the 1987 regulation.

(Opp'n at 9) would render the statute of limitations meaningless. Any regulatory enactment would be subject to endless challenges if it were cited as the authority for a newer agency action. "[A]llowing suit whenever a regulation was administered by a federal agency 'would virtually nullify the statute of limitations for challenges to agency orders.'" *Cedars-Sinai*, 177 F.3d at 1129 (quoting *Shiny Rock Min. Corp.*, 906 F.2d at 1365).

Plaintiffs' argument that their challenge is timely because FWS did not exercise its termination authority until 2012, and therefore Plaintiffs were not injured until 2012, also fails. (Opp'n at 8.) Defendants respond that the "timing of Plaintiffs' injury does not determine when a statute of limitations begins to run." (Reply at 2 (citing *Garcia v. Brockway*, 526 F.3d 456, 465 (9th Cir. 2008)).) Defendants are correct. The Ninth Circuit has specifically declined to accept "the suggestion that [injury] is a prerequisite to the running of the limitations period." *Shiny Rock Mining Corp.*, 906 F.2d at 1365-66.

Finally, Plaintiffs' reliance on *Environmental Protection Information Center (EPIC) v. Pacific Lumber Company*, 266 F. Supp. 2d 1101 (N.D. Cal. 2003), for the proposition that the 2012 Final Rule re-opened the 1987 Final Rule, is also without merit. In *EPIC*, the Court held that a subsequent regulation had re-opened a prior regulation and therefore the challenge was timely. It explained, "the EPA's call for comments reopened the underlying rule for review. If an agency *explicitly invited comments on the precise question for which petitioners now seek review*, even when the agency did not specifically propose to change the rule in that manner, the rule is deemed reopened." *Id.* at 1123 (internal quotation marks and citations omitted). Here, the precise question on which Plaintiffs seek review is whether the FWS has the statutory authority to terminate the Program. In 2011, FWS published its notice of proposed rulemaking to terminate the Program. (Compl. ¶ 49.) But Plaintiffs do not argue that the 2011 notice sought comments on FWS' authority to terminate the program, as opposed to comments on whether the program should be terminated under the previously promulgated termination criteria. Plaintiffs fail to plead any facts to suggest that the FWS called for comments on the precise question at issue. Therefore, the record does not support a conclusion that the 2012 Final Rule re-opened the 1987 Final Rule.

Accordingly, Plaintiffs' challenge cannot be deemed timely simply because the 2012 Final Rule relied on the 1987 Final Rule's termination authority. To determine whether Plaintiffs' suit is timely, the Court must decide whether Plaintiffs' challenge is a facial challenge to FWS's authority to rescind the Program asserted in the 1987 Final Rule, in which case it is untimely, or a challenge to the application of the 1987 Final Rule's termination authority in the 2012 Final Rule, making it timely. *See Center for Biological Diversity*, 695 F.3d at 904.

C. Plaintiffs' Suit is a Facial Challenge to the FWS's Authority to Terminate the Program and Is Untimely

Center for Biological Diversity illustrates the difference between a facial challenge to a prior regulation and an as-applied challenge to the application of that prior regulation in a new regulation. In *Center for Biological Diversity*, the Ninth Circuit concluded that the plaintiff's challenge to the definition of "small numbers" in the 2008 Final Rule was not time-barred because the 2008 Final Rule applied a *different* definition of "small numbers" than the definition announced in the 1983 Final Rule. *Id*. at 905. It was therefore not a facial challenge to the "small numbers" definition in the 1983 regulation, but a challenge to the alleged *misapplication* of that older regulation. In addition, the plaintiffs argued that the 1983 "small numbers" language required the Service, in promulgating the 2008 regulation, to "quantify in absolute terms the number of mammals that would be taken by the covered activities," and argued the Service failed to do so. Plaintiffs thereby challenged the *application* of the 1983 Final Rule's "small numbers" definition in the 2008 Final Rule and their suit was not time-barred.

Equally instructive is *EPIC*, 266 F. Supp. 2d 1101, where the plaintiff sought to enjoin recent pollution discharges under the Clean Water Act, and included in its suit a claim that a 1976 regulation was invalid. The plaintiffs argued the challenge was an as-applied challenge to the old regulation, but the Court concluded that the challenge was a facial challenge because plaintiff was "directly challenging the legal validity of the regulation," posing "pure questions of law." *Id.* at 1121; *see also I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188, 112 S. Ct. 551, 555, 116 L. Ed. 2d 546 (1991) (noting that a facial challenge is one where the claim is that the regulation is "invalid because it is without statutory authority," whereas an as-applied challenge asserts that the regulation is invalid as applied in particular cases).

Plaintiffs' Complaint rests on the sole argument that FWS lacks the authority to terminate the Program. (*See* Compl. ¶ 34 ("Notwithstanding the absence of authority from [P.L. 99-625], [FWS] included within the plan criteria for termination of the program."); *id.* ¶ 69 ("Although [P.L. 99-625] provides the [FWS] discretion in whether to commence a translocation program, [it] provides no authority to the [FWS] to cease such program once it has been initiated."); *id.* ¶ 71 ("The only authority that the [FWS] relied on to support its rulemaking was the [FWS] own termination criteria, which are the [FWS's] invention, not Congress.'" (internal citations omitted)); *id.* ¶ 72 ("[P.L. 99-625] does not provide the [FWS] any authority to terminate the [Program]. . . .").) Nowhere does the Complaint suggest that FWS misapplied the 1987 Final Rule's termination criteria in the 2012 Final Rule or even discuss the particular facts, circumstances, or reasoning of the 2012 decision. Moreover, Plaintiffs seek "a declaration that the [FWS] is without authority to terminate the [Program] and "a permanent mandatory

injunction requiring the [FWS] to enforce the [Program]." (Compl. at 17.) They do not make any arguments or seek any remedy challenging the application of FWS' termination authority in the 2012 Final Rule.

The Court concludes that Plaintiffs assert a purely facial challenge to the 1987 Final Rule. Plaintiffs claim that FWS had no authority whatsoever to terminate the Program, and thus are "directly challenging the legal validity of the regulation." *EPIC*, 266 F. Supp. 2d at 1121; *see also Oksner v. Blakey*, No. 07-2273, 2007 WL 3238659, at *6 (N.D. Cal. Oct. 31, 2007), *aff'd*, 347 F. App'x 290 (9th Cir. 2009) (challenge to legal validity of regulation is a time-barred facial challenge). Plaintiffs "may not escape the applicable statute of limitations by trying to couch its facial challenge as an as applied claim." *EPIC*, 266 F. Supp. at 1121.

Therefore, Plaintiffs' facial challenge to the 1987 Final Rule is time-barred unless an exception to the statute of limitations applies.

D. The *Wind River* Exception Does Not Apply

Under *Wind River*, Plaintiffs may challenge "the substance of an agency decision as exceeding constitutional or statutory authority . . . later than six years following the decision by filing a complaint for review of *the adverse application of the decision to the particular challenger*." *Wind River Min. Corp.*, 946 F.2d at 715. *Wind River* carved out this exception to the statute of limitations for plaintiffs to whom the decision had been applied, reasoning:

> Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large. For example . . . no one was likely to have discovered that the BLM's 1979 designation . . . was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when Wind River staked its mining claims. The government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.

Id. at 715.

Wind River's exception for suits by individuals against whom an old regulation is applied in a subsequent agency action is inapplicable here. First, there is no indication that the 2012 Final Rule was applied "in particular" to Plaintiffs. *See id.*. Second, Plaintiffs do not assert that they were unaware of the 1987 Final Rule until recently. Nor could they, as the record would belie such a contention. According to the Complaint, the "fishing community" was active in the

promulgation of the 1987 Final Rule. (Compl. ¶¶ 26, 34.) And this is not a case where Plaintiffs "could have had no idea" of the 1987 Final Rule's assertion of termination authorty until recently. *See N. Cnty. Cmty. Alliance*, 573 F.3d at 743; *see also San Luis Food Producers v. United States*, 772 F. Supp. 2d 1210, 1228-29 (E.D. Cal. 2011), *aff'd*, 709 F.3d 798 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 439 (2013) (the agency's "shift in policy began as early as 1987, and should have been evident by the mid-1990s," and thus plaintiff's 2009 suit was time-barred).

Moreover, Courts interpreting *Wind River* note that its exception to the statute of limitations has been applied in only two instances: (1) when an agency applies a regulation to a particular plaintiff in an enforcement proceeding, or (2) when an agency denies a plaintiff's petition to amend or rescind the regulation. *See Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990); *Commonwealth Edison Co. v. Nuclear Regulatory Comm'n*, 830 F.2d 610, 613 n.2 (7th Cir. 1987); *EPIC*, 266 F. Supp. 2d at 1120 (citing *National Labor Relations Bd. v. Federal Labor Relations Auth.*, 834 F.2d 191, 195–96 (D.C. Cir. 1987); *Coal. for Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089, 1106-07 (E.D. Cal. 2011). Plaintiffs do not assert that they have been the object of an enforcement proceeding by FWS, and Plaintiffs admit that they have not petitioned FWS to rescind or amend the 2012 Final Rule. (Opp'n at 6-7.)

Plaintiffs argue instead that their challenge is analogous to a challenge to the denial of a petition to rescind or amend a final rule, reasoning that both involve a subsequent agency action to a prior rule. (Opp'n at 6.) The Ninth Circuit in *Northwest Environmental Advocates* held that a challenge to a 1973 regulation promulgated by the Environmental Protection Agency (EPA) was not time-barred because the EPA's denial of plaintiff's petition to rescind the regulation in 2003 was an "adverse application of the [regulation] within the meaning of *Wind River*." 537 F.3d at 1019 (quoting *Wind River*, 946 F.2d at 714-716). The Ninth Circuit reasoned that the subsequent agency action was an adverse application to the particular challenger, as in *Wind River*, which, as noted above, is not the case here.

The Court declines to extend *Wind River*. Although Plaintiffs may have to file a petition to rescind the 2012 Final Rule and wait for it to be denied before re-filing their suit in federal court, that is not a reason to diverge from Ninth Circuit precedent and extend *Wind River*. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) ("Because 28 U.S.C § 2401 is a condition of the waiver of sovereign immunity, courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended."). The Court must strictly construe Section 2401(a).

Finally, Plaintiffs argue that if "the Service's argument was correct, an agency could immunize its actions from judicial review by asserting some authority in a regulation and then

waiting more than six years to exercise it." (Opp'n at 8.) This argument fails for several reasons. First, Plaintiffs could have challenged FWS' assertion of the authority within six years of the promulgation of the regulation. As Defendants point out, the rule was a final agency action under the APA and thus subject to judicial review. *See* 5 U.S.C. § 704. Plaintiffs offer no reason why the rule was not subject to review within the limitations period. Second, a party could challenge the rule more than six years later upon adverse application of the rule to it, under *Wind River*. Finally, as Plaintiffs recognize, a plaintiff could petition for rescission of the rule and then seek judicial review of the denial of the petition. *See* 5 U.S.C. §§ 553, 704. Even though this Court concludes that Plaintiffs' facial challenge to the 1987 Final Rule is untimely, Plaintiffs' claim is not "immunize[d] from judicial review."

For the reasons stated above, the Court determines that Plaintiffs' suit is a facial challenge to the 1987 Final Rule and is thus time-barred under Section 2401(a). Accordingly, Defendants' motion to dismiss is **GRANTED**.

B. Leave to Amend is Warranted

"Courts are free to grant a party leave to amend whenever 'justice so requires,' and requests for leave should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted) (quoting Fed. R. Civ. P. 15(a)(2) and *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). Leave to amend is not warranted, however, where "there is no set of facts that can be proved under the amendment that would constitute a valid claim." *Clarke v. Upton*, 703 F. Supp. 2d 1037, 1043 (E.D. Cal. 2010) (citing *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). The Court will grant leave to amend as it is unclear that Plaintiffs can allege no set of facts for an as-applied challenge or application of doctrines such as waiver, equitable tolling, or estoppel. *See Cedars Sinai*, 125 F.3d at 710 (holding Section 2401(a) erects only a procedural bar, thus permitting parties to assert traditional exceptions to the statute of limitations). Accordingly, Plaintiffs' Complaint is **DISMISSED** with leave to amend.

V. CONCLUSION

In light of the foregoing, the Court orders the following:

(1) The Motion to Dismiss is **GRANTED** with leave to amend;

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

(2) Plaintiffs shall file any amended complaint by no later than 21 days from the date of this order. **Failure to file an amended complaint will result in dismissal of the action**; and

(3) Defendants and Intervenors shall file a response within 21 days after service of an amended pleading.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; CALIFORNIA LOBSTER AND TRAP FISHERMEN'S ASSOCIATION; COMMERCIAL FISHERMAN OF SANTA BARBARA, Plaintiffs v. RACHEL JACOBSON, in her official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, U.S. Department of the Interior; DANIEL M. ASHE, in his official capacity as Director of the United States Fish & Wildlife Service; and the UNITED STATES FISH & WILDLIFE SERVICE, Defendants.	CASE NO. 2:13-cv-5517-DMG-CW **FEDERAL DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, PURSUANT TO FED. R. CIV. P. 12(b)(6), OR LACK OF SUBJECT-MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)** Date: Friday, Dec. 6, 2013 Time: 9:30 a.m. Ctrm: 7 The Honorable Dolly M. Gee

NOTICE:

TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE, under Local Rule 7, that on December 6, 2013, at 9:30 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Dolly M. Gee, United States District Judge, at the United States Courthouse, 312 North Spring Street, Los Angeles, CA 90012-4701, Federal Defendants, Rachel Jacobsen, in her official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, United States Department of the Interior; Daniel M. Ashe, in his official capacity as Director of the United States Fish & Wildlife Service; and the United States Fish & Wildlife Service; will argue their motion, set forth below, to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), or alternatively for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 12, 2013.

MOTION:

Federal Defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or alternatively for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), because Plaintiffs single claim is barred by the six-year statute of limitations in 28 U.S.C. § 2401(a). This motion is based on the accompanying memorandum of points and authorities, the other filings in this case, and the oral arguments at hearing.

WHEREFORE, Federal Defendants pray that this Court grant the Motion to Dismiss, and thereby dismiss Plaintiffs' First Amended Complaint.

Dated: October 23, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; CALIFORNIA LOBSTER AND TRAP FISHERMEN'S ASSOCIATION; and COMMERCIAL FISHERMEN OF SANTA BARBARA,

Plaintiffs,

v.

RACHEL JACOBSON, in her official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, Department of Interior; DEPARTMENT OF INTERIOR; DANIEL M. ASHE, in his official capacity as Director of the United States Fish & Wildlife Service; and UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

No. CV 13-05517-DMG (CWx)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action for declaratory and injunctive relief against Defendants Rachel Jacobson, *et al.* (collectively "Service"), to protect their livelihoods from the devastation of the California sea otter. At the turn of the twentieth century, the otter was on the brink of extinction, due to habitat loss and hunting. But, following a century of federal and state hunting bans, the otter has

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made significant progress toward recovery. With the otter's recovery, however, comes the possibility for significant harm to various Southern California fisheries which the otter, through range expansion, may ravage. In 1986, Congress struck a balance between otter and fishery protection by authorizing the Service to try to expand the otter's range to San Nicolas Island, but to keep the rest of the California Bight as an otter-free management zone. Pub. L. No. 99-625, 100 Stat. 3500 (1986). In December of last year, the Service violated this Congressionally authorized compromise by ending the management zone. For the reasons set forth below, Plaintiffs seek a declaration that the Service's termination of the otter management zone is illegal, and an injunction requiring the Service to continue to observe and abide by the Congressionally mandated compromise. Pursuant to Local Rule 8-1, the grounds for the Court's jurisdiction over Plaintiffs' cause of action are 28 U.S.C. § 1331 (federal question jurisdiction); § 1346(a)(2) (civil action against the United States); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

PARTIES

Plaintiffs

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

3. Since its creation, the Commission has been gravely concerned with the negative impacts of otter predation upon shellfish. Within the last decade, the vast majority of sea urchin harvest in California has occurred in the otter management

zone. The Channel Islands sea urchin resource alone is responsible for 68% of California's harvest.

4. Sea urchin is a favorite of the otter. *See* U.S. Fish & Wildlife Service, Final Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters 87 (Nov. 2012) (SEIS) ("Sea urchins are favored prey for sea otters . . . ."). When an otter moves into a new area, it generally will devour the urchin population before selecting other prey. A significant body of research has established that, once the otter moves into sea urchin territory, the commercial urchin resource will collapse owing to the otter's voracious predation. *See, e.g.*, U.S. Fish & Wildlife Service, Final Environmental Impact Statement for Translocation of Southern Sea Otters App. B at 2 (May 1987) (EIS) ("[T]he prevailing view among scientists is that sea otters limit populations of . . . sea urchins . . . to such low levels that commercial and recreational fisheries for [the] species are reduced or eliminated."), *available at* http://www.fws.gov/ventura/species_information/so_sea_otter (last visited July 19, 2013).

5. Consequently, the Commission has a strong interest in protecting the otter management regime that Congress authorized through Public Law 99-625. The Commission submitted extensive comments to the Service on its draft environmental impact statements and proposal to terminate the translocation program, including the management zone. *See* SEIS App. G at 83. In those comments, the Commission objected strongly to the Service's proposal, highlighting the profoundly negative impacts that unregulated otter range expansion into the management zone would have on Southern California's marine ecology and economy.

6. Plaintiff California Abalone Association is a non-profit California corporation. Formed in 1971, the Association's mission is to restore and steward a market abalone fishery in California that utilizes modern management concepts, protect and enhance the resource, and guarantee a sustainable resource for the

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future. The Association's many dozens of members held commercial abalone diving permits in 1997, the year the State of California enacted the abalone fishing moratorium. *Cf.* Cal. Fish & Game Code §§ 5521, 5521.5. Although the abalone resource is improving, otter predation related to the species' expansion into the management zone will prevent the resource from reaching a minimum viable population, which is required for the moratorium to be lifted and for the resource to be sustainable. *Cf. id.* § 5522(d).

7. Plaintiff California Lobster and Trap Fishermen's Association is a non-profit association that advocates for a sustainable lobster resource and the fishermen and communities that depend on the resource. The organization is gravely concerned about unregulated otter expansion and the loss of the incidental take exemption, due to otter consumption of lobster and the risks that traps will unintentionally "take" the otter. The termination of the otter management program therefore directly threatens the Association's and its members interests.

8. Plaintiff Commercial Fishermen of Santa Barbara is a non-profit corporation organized to integrate regional efforts of fishing communities with the aim of improving the economic and biological sustainability of fisheries. The organization aims to maintain California's fishing heritage, to improve fisheries management where needed, and to contribute to the improvement of ocean health. The organization is gravely concerned about unregulated otter expansion, both due to otter depletion of shellfish and other fisheries, as well as the legal risks of fishery harvest causing illegal "take" of otter. The termination of the otter management program therefore directly threatens the organization's and its members interests.

Defendants

9. Defendant Rachel Jacobson is sued in her official capacity as Acting Assistant Secretary for Fish and Wildlife and Parks, Department of Interior. On information and belief, Plaintiffs assert that Secretary Jacobson's predecessor was delegated authority by the Secretary of the Department of Interior to approve the

decision to terminate the otter management zone, and that her predecessor exercised that authority.

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

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

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

VENUE

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

BACKGROUND

The California Sea Otter

14. The California sea otter (also known as the southern sea otter) is one of three subspecies of otter. Unlike most marine mammals, the otter lacks blubber. Consequently, the otter must keep warm by maintaining a very high metabolism, consuming from 23% to 33% of its body weight per day. SEIS at 48. The otter also relies on its dense pelage (some 650,000 follicles per square inch, U.S. Fish & Wildlife Service, Final Revised Recovery Plan for the Southern Sea Otter 5 (2003), *available at* http://www.fws.gov/ventura/species_information/so_sea_otter/ssorecplan.pdf (last visited July 26, 2013)) as a blubber substitute to keep warm. SEIS at 48.

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15. Otter pelage has attracted fur hunters for centuries, and that hunting greatly reduced the population. To prevent extinction, otter hunting bans were enacted in the early 1900s. *See* Fur Seal Treaty of 1911, 37 Stat. 1542, 1543 (July 7, 1911); EIS App. H at 1 (citing Cal. Fish & Game Code § 4700). Since then, the otter has made a significant comeback. *See* 42 Fed. Reg. 2965, 2966 (Jan. 14, 1977) ("[T]here also seems no doubt that the Southern Sea Otter has made a comeback from a formerly much more dangerous status."); SEIS at 51 ("[T]he geographic range of the southern sea otter has expanded considerably since 1938 . . . ."); Revised Recovery Plan at 1 ("[T]he southern sea otter is regarded as a subspecies with a moderate level of threat but a high potential for recovery."). In fact, the most recent estimate reveals that the otter's population is approximately 88% of that needed for recovery. *See* SEIS App. G at 10.

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

California Sea Otter Regulation and Recovery Efforts

17. In 1972, Congress enacted the Marine Mammal Protection Act. 86 Stat. 1027 (Oct. 21, 1972), 16 U.S.C. § 1361, *et seq*. The Act imposes a moratorium on the "take" of all marine mammals, including the otter, within the jurisdiction of the United States. *See id.* § 1371(a). The Act defines "take" as "to harass, hunt,

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capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13).

18. In 1973, Congress passed the Endangered Species Act. Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973), 16 U.S.C. § 1531, *et seq.* Like the Marine Mammal Protection Act, the Endangered Species Act forbids the "take" of protected species. *See id.* § 1538(a). Its scope, however, is broader. For example, the Endangered Species Act applies to any "species," *id.* § 1532(16), of plant or wildlife that is determined to be "endangered," *id.* § 1532(6), or "threatened," *id.* § 1532(20), with extinction, *see id.* § 1533(a).

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

20. With its listing under the Endangered Species Act, the otter automatically was deemed a "depleted stock" under the Marine Mammal Protection Act. 16 U.S.C. § 1362(1)(C).

21. In 1982, the Service published a recovery plan for the otter. *See* 52 Fed. Reg. 29,784, 29,785 (Aug. 11, 1987) (discussing the plan). The plan envisioned the establishment of at least one additional "experimental population" of otter to facilitate the otter's recovery. *Id.* (At least five prior attempts at translocation, of varying success, had been essayed. *See* EIS App. B at B-6 to B-7; *id.* App. I at 9.) The Endangered Species Act authorizes the Service to establish an experimental population if it would "further the conservation of such species." 16 U.S.C. § 1539(j)(2)(A).

22. The 1982 recovery plan "identified the translocation of southern sea otters as an effective and reasonable recovery action," but also acknowledged "that

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a translocated southern sea otter colony could impact shellfish fisheries that had developed in areas formerly occupied by southern sea otters." 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012).

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

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

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

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

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

27. On November 7, 1986, Congress enacted Public Law 99-625, 100 Stat. 3500 (placed in the United States Code as a note to 16 U.S.C. § 1536), to balance the otter's recovery needs with the interests of fishermen. *See* H.R. Rep. No. 99-124, at 14, 17 (May 15, 1985). The Act authorized the Service to develop and implement "a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location." Pub. L. No. § 1(b). The plan would have to include two zones: a "translocation zone" where the experimental population would reside, and a "management zone," which would surround the former. *Id.* § 1(b)(3)-(4).

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

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

30. To harmonize the otter's Marine Mammal Protection Act and Endangered Species Act regulation, the Public Law provided: (i) any otter found within the management zone would be deemed a member of the experimental population, *id.* § 1(b)(4); (ii) take of otter within the management zone incidental to "an otherwise lawful activity" would not constitute a violation of either the Endangered Species Act or the Marine Mammal Protection Act, *id.* § 1(c)(2); and (iii) take of otter by the Service or its agents in the course of implementing and enforcing the plan would not constitute a violation of either the Endangered Species Act or the Marine Mammal Protection Act, *id.* § 1(f). (The California Legislature

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enacted similar legislation tracking the provisions of Public Law 99-625. *See* Cal. Fish & Game Code § 8664.2.)

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

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

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

34. Notwithstanding the absence of authority from the Public Law, the Service included within the plan criteria for termination of the program. 52 Fed. Reg. at 29,784. *See* 50 C.F.R. § 17.84(d)(8) (1988). The Service developed these criteria in response to public comment on the proposed program. SEIS App. C at 25.

35. In 1994, Congress passed several significant amendments to the Marine Mammal Protection Act. Among these amendments were new, permanent authorizations for allowing take of marine mammals incidental to commercial fishing. *See, as codified*, 16 U.S.C. §§ 1374(h), 1387(a). Congress also enacted a

special permitting regime for take of marine mammals that are protected under the Endangered Species Act. *See id.* § 1371(a)(5)(E).

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

The Otter Translocation Program

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

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

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

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

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

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

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

44. Nevertheless, the Service continued to observe the Public Law 99-625 take exemption for "otherwise lawful activity" within the management zone. *See* SEIS App. B at 38-39.

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

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

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

48. In 2009, The Otter Project and the Environmental Defense Center sued the Service, contending that the agency had unreasonably delayed deciding whether the otter translocation had failed and whether to maintain a "no otter" management zone. *The Otter Project v. Salazar*, No. 5:09-CV-4610-JW (N.D. Cal.). The Commission and the California Abalone Association, among other parties, intervened as defendants. The lawsuit was settled with the parties agreeing that Service would produce a revised analysis of the impacts of program modification or termination by December, 2012. *See id.* Doc. No. 66.

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Proposal to Terminate the Program

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

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

51. Plaintiff Sea Urchin Commission reiterated the misgivings of the Marine Mammal Commission. In 2006, the latter expressed concern over unregulated otter expansion, observing that it "'is likely that the southward movement of sea otters will seriously affect all shellfish fisheries in California.'" *Id.* at 30 (quoting Letter to Ms. Diana K. Noda, Field Supervisor, United States Fish & Wildlife Service, Ventura, from Marine Mammal Commission, David Cottingham, Executive Director, Jan. 3, 2006). The Marine Mammal Commission explained that "the abandonment of the sea otter range management could, over the long term, lead to the elimination of virtually all of the shellfish fisheries along the West Coast." *Id.* at 36.

52. Plaintiff Sea Urchin Commission also detailed the severe economic dislocation that termination would cause. The sea urchin industry is California's fifth largest fishery, approximately $40 million in value. *Id.* at 36. The Commission

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estimated that termination would lead to the closure of over half of the state's sea urchin processors and the disappearance of over 300 employees. That would result in a loss of nearly $7 million in wages alone to the local economy. *Id.* at 37.

The Service's Termination Decision

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

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

The Impacts of the Service's Termination Decision

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

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

57. The Service expects that termination of the program will lead to a population approaching 300 otters residing within the management zone within a

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decade. SEIS at 100. Consequently, sustainable shellfish and other marine fisheries in Southern California will be severely compromised if not destroyed.

SPECIFIC ALLEGATIONS THAT SUPPORT INJUNCTIVE RELIEF

58. All preceding paragraphs are realleged and incorporated herein by reference.

59. If an injunction does not issue requiring the Service to enforce the management zone provisions of Public Law 99-625, Plaintiffs and their members will be irreparably harmed. They will be unable to protect their livelihoods adequately from otter predation.

60. Plaintiffs and their members have no plain, speedy, and adequate remedy at law.

61. Plaintiffs' action is ripe and timely.

62. If not enjoined by this Court, the Service will continue to allow unregulated otter expansion into Southern California, and will prosecute the take of otter incidental to commercial fishing within the management zone, in derogation of Plaintiffs' and their members' rights.

SPECIFIC ALLEGATIONS THAT SUPPORT DECLARATORY RELIEF

63. All preceding paragraphs are realleged and incorporated herein by reference.

64. An actual and substantial controversy exists between Plaintiffs and the Service over the Service's authority, under Public Law 99-625 and the Administrative Procedure Act, to terminate the translocation program, to cease to enforce the management zone, and to forbid incidental take of otter within the management zone.

65. This case is justiciable because the Service's failure to comply with these laws is the direct result of final agency action that has caused and will

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continue to cause immediate and concrete injury to Plaintiffs and their members, by allowing unregulated otter expansion into Southern California fisheries, and by causing them to refrain from pursuing their livelihoods for fear of prosecution for take of otter. Plaintiffs and their members have a substantial and direct interest in knowing whether the Service's termination of the translocation program, including its management zone and incidental take authorization therein, is legal.

66. Therefore, declaratory relief is appropriate to resolve this controversy.

CLAIM FOR RELIEF

Ultra Vires Final Agency Action

(5 U.S.C. § 706)

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

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

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

70. Nevertheless, the Service's December 19, 2012, rulemaking purports to terminate the translocation program, as well as any obligation to enforce the management zone. *See* 77 Fed. Reg. at 75,289-90. Further, the rulemaking purports

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to remove the incidental take permission for the Marine Mammal Protection Act and the Endangered Species Act. *Id.*

71. The only authority that the Service relied on to support its rulemaking was the Service's own termination criteria, *see id.* at 75,287-89, which are the Service's invention, not Congress', *see id.* at 75,278 ("Public Law 99-625 did not address the prospect of the program's failure."). *See also* SEIS App. C at 25 ("The statute did not address the possibility of the program's failure.").

72. Because Public Law 99-625 does not provide the Service any authority to terminate the translocation program or to make illegal the incidental take of otter within the programs's management zone, the Service's rulemaking, purporting to do the same, is arbitrary, capricious, not in accordance with law, and in excess of statutory jurisdiction and authority. *See* 5 U.S.C. § 706(2)(A), (C).

PRAYER FOR RELIEF

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

1. For a declaration that the Service is without authority to terminate the translocation program;

2. For a declaration that the Service's purported termination of the translocation program is null and void;

3. For a permanent mandatory injunction requiring the Service to enforce the management zone;

4. For a permanent prohibitory injunction preventing the Service from holding illegal the take of otter within the management zone that is incidental to otherwise lawful activity;

5. For an award of Plaintiffs' costs of litigation, including, but not limited to, reasonable attorney's fees and expert witness fees, and fees and costs pursuant to 28 U.S.C. § 2412, or other applicable authority; and

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6. For such other relief as the Court may deem just and proper.

DATED: July 29, 2013.

Respectfully submitted,

DAMIEN M. SCHIFF
JONATHAN WOOD

By _____
DAMIEN M. SCHIFF

Attorneys for Plaintiffs

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(CWx),APPEAL,CLOSED,DISCOVERY,MANADR

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:13-cv-05517-DMG-CW

California Sea Urchin Commission et al v. Rachel Jacobson et al
Assigned to: Judge Dolly M. Gee
Referred to: Magistrate Judge Carla Woehrle
Case in other court: 9th CCA, 14-55580
Cause: 05:551 Administrative Procedure Act

Date Filed: 07/31/2013
Date Terminated: 03/27/2014
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
07/31/2013	1	COMPLAINT against Defendants. Case assigned to Judge Dolly M. Gee for all further proceedings. Discovery referred to Magistrate Judge Carla Woehrle. (Filing fee $ 400 PAID), filed by plaintiffs(car) (Additional attachment(s) added on 8/7/2013: # 1 Notice of Assignment) (mg). (Entered: 08/01/2013)
07/31/2013	2	CORPORATE DISCLOSURE STATEMENT AND NOTICE of Interested Parties filed by Plaintiffs.(car) (mg). (Entered: 08/01/2013)
07/31/2013	3	60 DAY Summons Issued re Complaint 1 as to Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. (car) (Entered: 08/02/2013)
07/31/2013	4	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed.(car) (Entered: 08/02/2013)
08/06/2013	5	CLERKS E-MAIL RE LOCAL RULE 3-2 TO COUNSEL on 8/6/13 addressed to dms@pacificlegal.org. COURT REQUIRES YOUR IMMEDIATE RESPONSE. Pursuant to Local Rule 3-2, you are required to e-mail, within 24 hours of filing, a Filed stamped copy of your complaint and other civil case initiating documents, in PDF format to the Court. To date, we have not received the PDF images of your filing. Please do so within 24 hours or this matter will be referred to the Judge for further proceedings. (mg) (Entered: 08/06/2013)
08/07/2013	6	PDF DOCUMENTS RECEIVED RE LOCAL RULE 3-2. The following PDF Documents were received by the Court on 8/7/13: Initiating Documents. (mg) (Entered: 08/07/2013)
08/07/2013	7	PDF DOCUMENTS ATTACHED TO DOCKET RE LOCAL RULE 3-2. The following PDF Documents were attached to the Court docket on 8/7/13: Initiating Documents. (mg) (Entered: 08/07/2013)
08/07/2013	8	Amended Civil Cover Sheet filed by Plaintiffs California Abalone Association,

		California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara (Wood, Jonathan) (Entered: 08/07/2013)
08/07/2013	9	NOTICE of Appearance filed by attorney Daniel Joseph Pollak on behalf of Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service (Pollak, Daniel) (Entered: 08/07/2013)
08/12/2013	10	INITIAL STANDING ORDER upon filing of the complaint by Judge Dolly M. Gee. (ms) (Entered: 08/12/2013)
08/12/2013	13	NOTICE OF MOTION AND MOTION to Intervene filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. Motion set for hearing on 9/13/2013 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Proposed Order, # 2 Proposed Answer)(gk) (Entered: 08/15/2013)
08/12/2013	14	MEMORANDUM of Points and Authorities in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	15	DECLARATION of Jennifer Covert in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	16	DECLARATION of James Michael Curland in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	17	DECLARATION of Kimberly Delfino in Support of Motion to Intervene 13 filed by Movants Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	18	DECLARATION of James A. Estes, Ph.D. in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	19	DECLARATION of Miyoko Sakashita in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	20	DECLARATION of Cindy Tucey in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	21	DECLARATION of Reid T. Woodward in Support of Motion to Intervene 13

		filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	22	DECLARATION of Sharon B. Young in Support of Motion to Intervene 13 filed by Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (gk) (Entered: 08/15/2013)
08/12/2013	26	NOTICE AND MOTION to Intervene filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. Motion set for hearing on 9/13/2013 at 09:30 AM before Judge Dolly M. Gee. Lodged Proposed Order and Proposed Answer. (gk) (Entered: 08/16/2013)
08/12/2013	27	MEMORANDUM of Points and Authorities in Support of Motion to Intervene 26 filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. (gk) (Entered: 08/16/2013)
08/12/2013	28	DECLARATION of Owen Bailey in Support of Motion to Intervene 26 filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. (gk) (Entered: 08/16/2013)
08/12/2013	29	DECLARATION of Elizabeth Karin Crosson in Support of Motion to Intervene 26 filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. (gk) (Entered: 08/16/2013)
08/12/2013	30	DECLARATION of Brian P. Segee in Support of Motion to Intervene 26 filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. (gk) (Entered: 08/16/2013)
08/12/2013	31	DECLARATION of Steven Joseph Shimek in Support of Motion to Intervene 26 filed by Proposed Intervenor-Defendants The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper. (gk) (Entered: 08/16/2013)
08/13/2013	11	PROOF OF SERVICE Executed by Plaintiff California Lobster and Trap Fishermen's Association, California Abalone Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara, upon Defendant All Defendants. Service of the Summons and Complaint were executed upon the United States Attorneys Office by delivering a copy to Civil Process Clerk. Executed upon the Attorney Generals Office of the United States by delivering a copy to Ronald Owens. Executed upon the officer agency or corporation by unspecified means. Service was executed in compliance with Federal Rules of Civil Procedure. Due diligence declaration NOT attached. Registered or certified mail return receipt attached. Original Summons NOT returned. (Schiff, Damien) (Entered: 08/13/2013)
08/13/2013	12	OF SERVICE filed by Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara, re Initial Order upon Filing of Complaint 10 served on 08/13/2013. (Schiff, Damien) (Entered: 08/13/2013)
08/15/2013	23	NOTICE OF PRO HAC VICE APPLICATION AND FILING FEE DUE on

		Pro Hac Vice Application mailed to Tyler G. Welti for Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (Attachments: # 1 G-64 Application, # 2 G-64 Proposed Order) (gk) (Entered: 08/15/2013)
08/15/2013	24	NOTICE OF PRO HAC VICE APPLICATION AND FILING FEE DUE on Pro Hac Vice Application mailed to Donald C. Baur for Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (Attachments: # 1 G-64 Application, # 2 G-64 Proposed Order) (gk) (Entered: 08/15/2013)
08/15/2013	25	NOTICE OF PRO HAC VICE APPLICATION AND FILING FEE DUE on Pro Hac Vice Application mailed to Georgia V. Hancock for Proposed Intervenor-Defendants Friends Of The Sea Otter, the Humane Society of the United States, Defenders of Wildlife, and the Center for Biological Diversity. (Attachments: # 1 G-64 Application, # 2 G-64 Proposed Order) (gk) (Entered: 08/15/2013)
08/22/2013	32	OPPOSITION re: MOTION to Intervene 13 , MOTION to Intervene 26 filed by Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara. (Wood, Jonathan) (Entered: 08/22/2013)
08/22/2013	33	RESPONSE filed by Pro Hac Vice attorney Tyler Welti on behalf of Movants Center for Biological Diversity, Defenders of Wildlife, Friends Of The Sea Otter, Humane Society of the United States. RE: Notice of Filing Fee Due. PHV fee N/A. Attorney was admitted to this Court on 8/21/13, is active and in good standing. (lt) (Entered: 08/22/2013)
08/22/2013	34	RESPONSE filed by Pro Hac Vice attorney on behalf of Movants Center for Biological Diversity, Defenders of Wildlife, Friends Of The Sea Otter, Humane Society of the United States. RE: Notice of Filing Fee Due. PHV fee N/A. Attorney Georgia Hancock will not be appearing in this case. (lt) (Entered: 08/22/2013)
08/29/2013	35	REPLY support MOTION to Intervene 13 filed by Movants Center for Biological Diversity, Defenders of Wildlife, Friends Of The Sea Otter, Humane Society of the United States. (Torgun, George) (Entered: 08/29/2013)
08/30/2013	36	REPLY in support MOTION to Intervene 26 filed by Movants Environmental Defense Center, Los Angeles Waterkeeper, The Otter Project. (Segee, Brian) (Entered: 08/30/2013)
09/10/2013	37	SCHEDULING NOTICE by Judge Dolly M. Gee: The Court finds that the Motion to Intervene by Friends of the Sea Otter, et al. 13 , and the Motion to Intervene filed by The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper 26 currently scheduled for hearing on 9/13/2013, are appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. L.R. 7-15. Accordingly, the motions are taken UNDER SUBMISSION and the hearing is vacated. The Court's order will issue. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ms) TEXT ONLY ENTRY (Entered: 09/10/2013)

09/13/2013	38	APPLICATION for attorney Donald C. Baur to Appear Pro Hac Vice (PHV FEE NOT PAID.) filed by Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends Of The Sea Otter, Humane Society of the United States. (Treece, Andrea) (Entered: 09/13/2013)
09/16/2013	39	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: APPLICATION for attorney Donald C. Baur to Appear Pro Hac Vice (PHV FEE NOT PAID.) 38 . The following error(s) was found: Other error(s) with document(s) are specified below. Other error(s) with document(s): Local counsel does not maintain an office within the District. See LR 83-2.1.3.4; Fee not paid. See LR 83-2.1.3.3(c). In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lt) (Entered: 09/16/2013)
09/20/2013	40	NOTICE of Appearance filed by attorney Tyler Welti on behalf of Movant Friends Of The Sea Otter (Welti, Tyler) (Entered: 09/20/2013)
09/20/2013	41	NOTICE of Appearance filed by attorney Charles H Samel on behalf of Movant Friends Of The Sea Otter (Samel, Charles) (Entered: 09/20/2013)
09/25/2013	42	Amendment to APPLICATION for attorney Donald C. Baur to Appear Pro Hac Vice (PHV FEE NOT PAID.) 38 filed by Movant Friends Of The Sea Otter. (Samel, Charles) (Entered: 09/25/2013)
10/01/2013	43	NOTICE OF MOTION AND MOTION to Stay Case pending Lapse in Governmental Appropriations *Unopposed Motion* filed by Federal Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. Motion set for hearing on 11/15/2013 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Proposed Order)(Pollak, Daniel) (Entered: 10/01/2013)
10/02/2013	44	MINUTES OF IN CHAMBERS - ORDER GRANTING MOTIONS TO INTERVENE by Judge Dolly M. Gee: The Motions to Intervene 26 , 13 are GRANTED. Proposed Intervenors shall file joint briefs in compliance with Local Rule 11-6 on all matters submitted to the Court. Court Reporter: Not Reported. (gk) (Entered: 10/02/2013)
10/02/2013	45	ORDER IMPOSING STAY OF ACTION by Judge Dolly M. Gee: Upon the Federal Defendants' Unopposed Motion for Stay of Proceedings in Light of Lapse of Appropriations 43 , IT IS HEREBY ORDERED that the proceedings in this case are stayed until Congress has restored appropriations to the Department of Justice. Counsel for Federal Defendants will promptly notify the Court and the other parties when such appropriations are restored. At that time, the Court will extend the deadline for Federal Defendants' and Intervenors' responses to Plaintiffs' Complaint for a period of time commensurate with the duration of the lapse in appropriations. (gk) (Entered: 10/02/2013)
10/17/2013	46	NOTICE re Resumption of Federal Appropriations & Stay filed by Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. (Pollak, Daniel) (Entered: 10/17/2013)

10/23/2013	47	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Federal Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. Motion set for hearing on 12/6/2013 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Memorandum Points and Authorities, # 2 Proposed Order)(Pollak, Daniel) (Entered: 10/23/2013)
10/31/2013	48	NOTICE of Errata filed by Federal Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. (Attachments: # 1 Supplement Attachment A, # 2 Supplement Attachment B)(Pollak, Daniel) (Entered: 10/31/2013)
10/31/2013	49	ORDER by Judge Dolly M. Gee: granting 38 Application to Appear Pro Hac Vice by Attorney Donald Baur on behalf of Friends of the Sea Otter, designating Charles Samel as local counsel. (ak) (Entered: 10/31/2013)
11/14/2013	50	OPPOSITION opposition re: MOTION to Dismiss Case 47 filed by Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara. (Wood, Jonathan) (Entered: 11/14/2013)
11/22/2013	51	REPLY in Support MOTION to Dismiss Case 47 filed by Defendants Daniel M. Ashe, Department of Interior, Rachel Jacobson, United States Fish & Wildlife Service. (Pollak, Daniel) (Entered: 11/22/2013)
12/03/2013	52	SCHEDULING NOTICE by Judge Dolly M. Gee: The Court finds that Federal Defendants MOTION to Dismiss Complaint 47 currently scheduled for hearing on December 6, 2013, is appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. L.R. 7-15. Accordingly, this motion is taken UNDER SUBMISSION and the hearing is vacated. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (vv) TEXT ONLY ENTRY (Entered: 12/03/2013)
03/03/2014	53	MINUTES (IN CHAMBERS): ORDER by Judge Dolly M. Gee: granting 47 Motion to Dismiss Case. Plaintiffs shall file any amended complaint by no later than 21 days from the date of this order. Failure to file an amended complaint will result in dismissal of the action; and Defendants and Intervenors shall file a response within 21 days after service of an amended pleading. (rne) (Entered: 03/03/2014)
03/27/2014	54	MINUTES (IN CHAMBERS) ORDER DISMISSING ACTION by Judge Dolly M. Gee. Plaintiffs have not filed a first amended complaint and the time to do so has now passed. Therefore, this action is DISMISSED with prejudice. Case Terminated. Made JS-6. (im) (Entered: 03/28/2014)
04/11/2014	55	NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara. Appeal of Order Dismissing Case 54 , Order on Motion to Dismiss Case, 53 (Appeal fee of $505 receipt number 0973-13652820 paid.) (Attachments: # 1 Representation Statement, # 2 Exhibit - Order Granting Motion to Dismiss, # 3 Exhibit - Judgment)(Wood, Jonathan) (Entered: 04/11/2014)
04/11/2014	57	NOTIFICATION by Circuit Court of Appellate Docket Number 14-55580, 9th

		CCA regarding Notice of Appeal to 9th Circuit Court of Appeals 55 as to Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara. (mat) (Entered: 04/17/2014)
04/15/2014	56	NOTICE of No Transcript filed by Plaintiffs California Abalone Association, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, Commercial Fishermen of Santa Barbara. (Wood, Jonathan) (Entered: 04/15/2014)
04/24/2014	58	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 55 filed by California Abalone Association, Commercial Fishermen of Santa Barbara, California Lobster and Trap Fishermen's Association, California Sea Urchin Commission, CCA # 14-55580. This case is NOT SELECTED for inclusion in the Mediation Program. Counsel may contact Roxane Ashe, Circuit Mediator, at 415-355-7911, or roxane_ashe@ca9.uscourts.gov to discuss services available through the court's mediation program, to request a settlement assessment conference, or to request a stay of the appeal for settlement purposes. Order received in this district on 4/24/14. [See document for more details] (mat) (Entered: 04/29/2014)
06/04/2014	59	NOTICE OF MOTION AND MOTION of Tyler Welti to Withdraw as Attorney filed by intervenor Friends Of The Sea Otter. (Welti, Tyler) (Entered: 06/04/2014)

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