No. 14-55580

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA SEA URCHIN COMMISSION, *et al.*,

Plaintiffs-Appellants

v.

MICHAEL BEAN, in his official capacity as
Acting Assistant Secretary for Fish & Wildlife & Parks,
Department of the Interior, *et al.*,

Defendants-Appellees

and

FRIENDS OF THE SEA OTTER, *et al.*,

Defendants-Intervenors-Appellees

On Appeal from the United States District Court
for the Central District of California
No. 2:13-cv-05517 (Hon. Dolly M. Gee, District Judge)

ANSWERING BRIEF OF FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants California Sea Urchin Commission, California Abalone Association, California Lobster and Trap Fishermen's Association, and Commercial Fishermen of Santa Barbara (collectively, "the Fishermen") allege that the district court had jurisdiction under 28 U.S.C. § 1331. But because their complaint was filed beyond the six-year statute of limitations imposed by 28 U.S.C. § 2401(a), the district court lacked jurisdiction over their lawsuit. ER 15.

This Court has jurisdiction over the appeal seeking review of the district court's order awarding judgment in favor of Defendants-Appellees Michael Bean, Acting Assistant Secretary for Fish & Wildlife & Parks[1]; Daniel M. Ashe, Director of the U.S. Fish & Wildlife Service; and the U.S. Fish and Wildlife Service. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Southern sea otters are designated as a threatened species under the Endangered Species Act. In 1986, Congress authorized the U.S.

[1] Pursuant to Fed. R. App. P. 43(c)(2), Michael Bean is automatically substituted for Rachel Jacobson as Acting Assistant Secretary for Fish & Wildlife & Parks, Department of the Interior.

Fish and Wildlife Service ("the Service") to develop and implement a program to relocate a population of sea otters from their existing range to another location to ensure that, in the event of a large-scale oil spill, one colony of sea otters would remain unaffected. One year later, the Service established an otter translocation program. In its final rule establishing the program, the Service also codified a set of criteria for determining whether the program had failed. The otter translocation program was not successful, and in 2012, the Service invoked the failure criteria to terminate the program.

The Fishermen brought suit in 2013. They raise a single claim: that Congress's 1986 statute did not provide the Service with authority to terminate the otter translocation program. The question on appeal is whether the Fishermen's facial challenge is time-barred because it was filed more than six years after the Service promulgated the 1987 Rule establishing the failure criteria.

STATEMENT OF FACTS

A. The Protection of Sea Otters Under Federal Statutes

Sea otters once ranged along the North Pacific rim from the northern Japanese islands to mid-Baja California in Mexico. Unlike most marine animals, sea otters do not have blubber to provide

insulation from the cold. Instead, otters depend on their dense, water-resistant fur for insulation. ER 25 (Compl. ¶ 14); U.S. Fish & Wildlife Serv., Final Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters, at 48 ("Final SEIS") (Nov. 2012).[2] This fur made sea otters a target for traders who, in the 18th and 19th centuries, hunted otters to the brink of extinction. ER 26 (Compl. ¶ 15); Final SEIS 9. With the extirpation of sea otters from much of their historic range, the fur trade collapsed.

Following the adoption in 1911 of an international treaty protecting fur seals, sea otters started to make a slow recovery. ER 26 (Compl. ¶ 15); Fur Seal Treaty of 1911, 37 Stat. 1542; *see* Final SEIS 50. The southern sea otter population in California increased from about fifty animals in 1914 to an estimated 1,000 animals in the 1970s. *See* Final SEIS 9; Determination That the Southern Sea Otter Is A Threatened Species, 42 Fed. Reg. 2965, 2966 (Jan. 14, 1977). However, the risk of a major oil spill from tankers traversing the coast of California poses a "serious potential threat" to the survival and recovery

[2] *Available at* http://www.fws.gov/ventura/endangered/species/info/sso.html (last accessed Nov. 22, 2013) (follow link on right-hand side to "Termination of the Southern Sea Otter Translocation Program").

of the otter. 42 Fed. Reg. at 2966–67; *see* ER 27 (Compl. ¶ 19). Oil contamination can destroy the insulating properties of sea otter fur, leading to hypothermia and death. *See* Final SEIS 48.

1. Endangered Species Act

The vulnerability of the sea otter population to an oil spill contributed to the Service's decision in 1977 to list sea otters as a threatened species for purposes of the Endangered Species Act ("the Act"). 16 U.S.C. §§ 1531–1544; *see* 42 Fed. Reg. at 2967; ER 27 (Compl. ¶ 19). Section 7 of the Act provides that each federal agency must, in consultation with the Secretary of the Interior (or for some species, the Secretary of Commerce), ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any species listed as endangered or threatened, or to result in the destruction or adverse modification of any designated critical habitat of the species. 16 U.S.C. § 1536(a)(2). The Act and its implementing regulations detail a consultation process for determining the biological impacts of proposed activity. *Id.* § 1536; 50 C.F.R. Part 402. A "biological opinion," produced after formal consultation, contains the agency's findings regarding the proposed action's likelihood of jeopardizing the species or adversely modifying its critical habitat. *Id.*

Section 9 of the Act prohibits any person from "taking" a species, which is defined to include harassing, harming, pursuing, trapping, or capturing a species. 16 U.S.C. §§ 1532(19); 1533(d); 50 C.F.R. § 17.31(a). Once a species is listed as threatened or endangered, Section 4 of the Act generally requires the agency to develop a recovery plan that incorporates management actions necessary for the conservation and survival of the species. 16 U.S.C. § 1533(f). Section 10(j) of the Act provides the Service with flexibility to designate an "experimental" population, including a new or translocated population, if it would "further the conservation of such species." *Id.* § 1539(j)(2)(A). Such a designation relaxes the requirements of the Act that would otherwise apply to the reintroduced population. *Id.* § 1539(j).

2. Marine Mammal Protection Act

When the sea otter was listed as a threatened species under the Act, it was also deemed a "depleted stock" under the Marine Mammal Protection Act, or MMPA. 16 U.S.C. § 1362(1)(C); *see* ER 27 (Compl. ¶ 20). The MMPA provides that marine mammals "should not be permitted to diminish below their optimum sustainable population." 16 U.S.C. § 1361(2). The statute imposes a moratorium on the taking or importation of marine mammals. The MMPA defines "take" to mean "to

harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* §§ 1362(13), 1371.

B. Public Law 99-625

In its 1982 recovery plan for the sea otter, the Service proposed to establish a second colony of otters sufficiently distant from the parent population to limit the effects of an oil spill on the overall otter population. *See* ER 27–28 (Compl. ¶ 22); 52 Fed. Reg. 29784, 29785 (Aug. 11, 1987) (discussing the plan); 77 Fed. Reg. 75266, 75268 (Dec. 19, 2012) (same). In 1984, the Service proposed establishing a translocation program under its Section 10(j) authority. *See* 77 Fed. Reg. at 75268. The Service concluded, however, that it lacked sufficient authority to implement such a program because the MMPA did not provide the Service with flexibility to develop an experimental population of relocated sea otters. *See* 77 Fed. Reg. at 75268; ER 28 (Compl. ¶ 25).

Congress addressed the Service's perceived lack of authority to carry out a translocation program by passing Public Law 99-625, 100 Stat. 3500 (Nov. 7, 1986). The law provides that the "Secretary [of the Department of the Interior] *may develop and implement*, in accordance with this section, 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. 99-625, 100. Stat. 3500 § 1(b) (emphasis added); *see Appalachian Power Co. v. Envtl. Protection Agency*, 135 F.3d 791, 807 (D.C. Cir. 1998) ("when a statute uses the permissive 'may' rather than the mandatory 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency" (internal quotation marks omitted)); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (discussing judicial review of agency actions committed to agency discretion by law).

Public Law 99-625 provides that if the Secretary exercises his discretion to develop a translocation plan, the plan must specify (1) the number of sea otters proposed to be relocated; (2) the manner in which the sea otters will be captured, translocated, released, monitored, and protected; (3) the translocation zone in which the experimental population will be placed; (4) a management zone surrounding the translocation zone; (5) measures, including a funding mechanism, to isolate and contain the experimental population; and (6) a description of the relationship of the implementation of the plan to the status of the species under the Act. 100 Stat. 3500, § 1(b)(1)–(6). The purpose of the otter-free "management zone" is twofold: (1) to facilitate the

containment of the experimental population within the translocation zone; and (2) to "prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population." *Id.* § 1(b)(4).

The concern about conflict with other fishery resources stems in part from otters' predation on shellfish. Sea otters must maintain a high level of internal heat production to compensate for their lack of blubber. Consequently, they have high energetic requirements, consuming an amount of food each day equivalent to 23 to 33 percent of their body weight. Final SEIS 48; ER 25 (Compl. ¶ 14). Sea otters' preferred prey include sea urchin, spiny lobsters, and crabs. Final SEIS 104. This predation plays an important role in the marine ecosystem — for example, by limiting sea urchin populations, otters can prevent sea urchin from overgrazing on kelp. *See* Final SEIS 57, 87–90. Among other ecological functions, kelp forests provide habitat for numerous fish and invertebrate species. *Id.* (describing otter-urchin-kelp interactions). But sea otter predation also presents a conflict for commercial fisheries because an increase in otter predation may lead to a decrease in fishery harvest. Final SEIS 106; *see* ER 22–24 (Compl.

¶¶ 2–8). Another form of conflict arises when fishing methods, such as gill netting, have the potential to take sea otters. Final SEIS 124.

Public Law 99-625 addresses the concern that the activities of fishermen in the management zone might result in the unlawful "take" of otters. The statute provides that the "take" of otters within the management zone incidental to "an otherwise lawful activity" does not constitute a violation of either the Act or the MMPA. 100 Stat. 3500, § 1(c)(2), (f). The law also provides that the take of otter by the Service or its agents in the course of implementing and enforcing the translocation program does not constitute a violation of the Act or the MMPA. *Id.* § 1(f).

Congress was aware of the possibility that the translocation program may not be successful. In the House proceedings leading up to passage of the law, Representative Breaux noted:

> If the Service determines that the translocation is not successful, it should, through the informal rulemaking process, repeal the rule authorizing the translocation. . . . After the rule is repealed, the limiting provisions of the act would no longer apply. Thus, section 7 and section 9 of the [Endangered Species Act] would apply to otters within the management zone.

131 Cong. Rec. H6465 (daily ed. July 29, 1985).

C. Sea Otter Translocation Program

In response to Congress's authorizing legislation, on August 15, 1986, the Service issued a proposed rule to establish a sea otter translocation program. The Service concurrently issued a Draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act. The proposed rule identified four coastal zones as having the highest potential for successful translocations: northern Washington, southern Oregon, northern California, and San Nicolas-Santa Barbara Islands in southern California. *See* 52 Fed. Reg. 29754, 29754–55 (Aug. 11, 1987). The fishing industry participated in the rulemaking process. ER 28 (Compl. ¶ 26); ER 12–13 ("[P]laintiffs 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."); *see also* Administrative Record in *Cal. Ocean Resource Preservation v. Cal. Fish & Game Comm'n*, C.D. Cal. Civ. No. 87-5747-AHS (comment letter from California Abalone Association, a Plaintiff in this case, to the Service, discussing the failure criteria in the draft EIS); 131 Cong. Reg. H6465 (statement of Rep. Breaux) (noting that the law "represents a consensus among the various entities involved," including "the State, commercial

and recreational fishing interests, the oil and gas industry, and involved environmental organizations").

After review of public comments, the Service published a Final EIS and draft final rule on May 8, 1987, and the final rule followed on August 11, 1987. 52 Fed. Reg. at 29754. The rule ("1987 Rule") identified San Nicolas Island as the translocation zone for a colony of sea otters. 52 Fed. Reg. at 29765; *codified at* 50 C.F.R. § 17.84(d). Based on an assessment of the existing population, the Service would capture a specified number of otters and tag them with miniature transponders to enable identification and tracking. No more than 250 animals would be moved from the existing population to the translocation zone, where they would be monitored. 52 Fed. Reg. at 29765–68 (Description of Action).

The Service believed that dispersal from the translocation zone would be minimal because San Nicolas Island had abundant prey in surrounding waters and is separated by long distances of deep open from other shallow waters where food is available. 52 Fed. Reg. at 29768. The plan also provided that any sea otters found in the designated "management zone" surrounding the translocation zone would be captured and removed. 52 Fed. Reg. at 29770.

The 1987 Rule also provided a set of conditions for terminating the program if it was deemed to have failed. The rule provided five criteria for determining failure, including: "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." 52 Red. Reg. at 29784; 50 C.F.R. § 17.84(d)(8). The rule stated that if, based on any one of these criteria, the Service concluded (after consultation with the Marine Mammal Commission and the relevant state agency) that the translocation had failed to produce a viable, contained experimental population, the Service would terminate the experimental population and all otters remaining within the translocation zone would be captured and returned to the range of the parent population. *Id.*

The Criteria for a Failed Translocation were initially included only in the preamble of the draft rule, but in response to public comment, the Service incorporated the Failure Criteria into the final regulation itself. 52 Fed. Reg. at 29764; 50 C.F.R. § 17.84(d)(8); *see* ER 30 (Compl. ¶ 34).

D. Implementation and Eventual Termination of the Translocation Program

The Service started implementing the translocation plan with the transfer of 140 otters to San Nicolas Island between August 1987 and March 1990. *See* 77 Fed. Reg. at 75269; ER 31 (Compl. ¶ 37). The program encountered difficulties from the start. Some otters died as a result of translocation, many swam back to the parent population, and some moved into the management zone. 77 Fed. Reg. at 75269. Because of unexpected mortalities and high emigration encountered during the first year, the Service amended its regulations for the translocation program in 1988. 53 Fed. Reg. 37577 (Sept. 27, 1988). The changes were intended to minimize sea otter stress, to improve the survival of translocated animals, and to minimize dispersal of sea otters from the translocation zone. Final SEIS 14.

Despite modifications to the program, problems with low survival and high dispersal rates persisted. By early 1991, only 14 otters remained in the translocation zone. *Id.* In light of these problems, the Service stopped translocating otters to San Nicolas Island. *Id.* In addition to issues with otter survival and dispersal, other concerns called into question the continued existence of the program. First,

between 1995 and 1998, the range-wide population of southern sea otters declined by approximately ten percent. Final SEIS 15. Second, at around the same time, large numbers of otters from the parent population started to move seasonally into and out of the management zone. *Id; see* ER 31 (Compl. ¶ 40). Biologists expressed concern about the potential negative effects of removing otters from the management zone back to the parent population because of the disruption to the social structure of the otters. Final SEIS 15.

In 1998, the Service announced its intent to evaluate the status of the translocation program under the regulatory failure criteria. 77 Fed. Reg. at 75269–70. In March 1999, the Service distributed a draft evaluation recommending that the plan be declared a failure based on criterion two: fewer than twenty-five otters remained in the translocation zone after three years from the initial translocation, and the causes of otter emigration from and mortality in the translocation zone were unknown. *Id.* at 75269.

The Service issued a biological opinion in 2000 concluding that resumption of otter containment in the management zone would likely jeopardize the continued existence of the otter. *Id.* In 2001, the Service issued a formal policy statement explaining that it was suspending the

containment component of the translocation program because "containment under the present circumstances could lead to extinction of the species." 66 Fed. Reg. 6649, 6651–52 (Jan. 22, 2001). In 2003, the Service issued a new, revised sea otter recovery plan that abandoned the translocation recommendation of the 1982 recovery plan. The 2003 plan concluded that "given changed circumstances such as the recent observed decline in abundance and the shift in the distribution of otters to include the range designated as an otter-free zone, it is in the best interest of recovery of the southern sea otter population to declare the experimental translocation of sea otters to San Nicolas Island a failure and to discontinue the maintenance of the otter-free-zone in southern California." U.S. Fish & Wildlife Service, Final Revised Recovery Plan for the Southern Sea Otter, at 28 (Feb. 24, 2003).[3]

In 2005, the Service issued a draft Supplemental Environmental Impact Statement in which it identified the preferred action as terminating the translocation program, allowing otters to remain at

[3] *Available at* http://www.fws.gov/ventura/endangered/species/info/sso.html (last visited Nov. 22, 2014) (follow link on right-hand side to "recovery plan for the southern sea otter").

San Nicolas Island, and refraining from moving otters in the management zone. *See* 70 Fed. Reg. 58737 (Oct. 7, 2005).

The Service did not act on the identified course of action, and in 2010, several environmental groups brought suit in federal district court, claiming that the Service unreasonably delayed a formal determination on whether the otter translocation program had failed according to the 1987 regulatory criteria. *Otter Project v. Salazar*, 712 F. Supp. 2d 999 (N.D. Cal. 2010). Several organizations representing commercial fishing interests intervened as defendants, including two of the Plaintiffs-Appellants in this case — the California Sea Urchin Commission and the California Abalone Association. *Id.* at 1002–03.

The Service moved to dismiss that action, arguing that the agency was authorized, but not legally required, to apply the failure criteria and issue a formal failure determination. *Id.* at 1003. The district court denied the motion, finding that the rulemaking history, including the decision to move the failure criteria from the preamble into the body of the regulation and the Service's discussion of the importance of the criteria to the program, "indicates [the Service's] intention to bind [itself] to make a determination based on those criteria." *Id.* at 1006. The parties subsequently entered a settlement agreement in which the

environmental groups agreed to dismiss their suit and the Service agreed to issue a formal decision applying the failure criteria from the 1987 Rule, and if the criteria were met, to initiate rulemaking to terminate the translocation program. Stipulated Settlement Agreement and Order of Dismissal ¶¶ 1–4, *Sea Otter Project v. Salazar*, N.D. Cal. Civil No. 09-04610 (Dkt. 67) (Nov. 23, 2010). Intervenors in that case, including the two Plaintiffs in this case, were parties to the settlement agreement. *Id.* ¶¶ 2, 8–9.

On August 26, 2011, the Service published a proposed rule to amend 50 C.F.R. part 17.84 to remove both the reference to Public Law 99-625 and the regulation promulgated in 1987 when the Service exercised its discretion to establish the translocation program. Proposed Rule: Termination of the Southern Sea Otter Translocation Program, 76 Fed. Reg. 53381 (Aug. 26, 2011). The Federal Register notice included an extensive analysis of the failure criteria from the 1987 Rule and the overall recovery purpose of the program, and concluded that the translocation program had failed. *Id.* at 53384–88. On December 19, 2012, the Service issued its final rule terminating the translocation program and removing the program's implementing regulation. 77 Fed. Reg. at 75266.

E. The Fishermen's Lawsuit

On July 31, 2013, the Fishermen filed the present lawsuit. Their complaint contains one claim: that the Service lacks the statutory authority to terminate the program. According to the Fishermen, Public Law 99-625 "provides no authority to the Service to cease such [translocation] program once it has been initiated." ER 36 (Compl. ¶ 67–72). They argue that the Service's termination of the program is therefore arbitrary, capricious, and in excess of statutory authority and seek "a declaration that the Service is without authority to terminate the translocation program." *See* 5 U.S.C. § 706(2)(A), (C); ER 37 (Compl. ¶ 72, Prayer for Relief ¶ 1).

Several wildlife and conservation groups intervened on the side of Federal Defendants. *See* ER 40 (Dist. Dkt. 13, motions to intervene); ER 43 (Dist. Dkt. 44, granting motions to intervene). Federal Defendants moved to dismiss the case under Fed. R. Civ. P. 12(b)(6), arguing that the Fishermen's facial challenge to the 1987 Rule became time-barred six years after the regulation was published in the Federal Register. *See* ER 17–19, 44 (Dist. Dkt. 47).

The district court granted Federal Defendants' motion to dismiss. ER 4–16 (Dist. Dkt. 54) (Mar. 27, 2014). The court reasoned that the

Fishermen's "Complaint rests on the sole argument that [the Service] lacks the authority to terminate the Program." ER 12. As a direct challenge to the legal validity of the regulation, it should have been brought no later than six years following the publication of the regulation in 1987. ER 13. In its decision, the district court granted the Fishermen leave to amend their complaint to allege a set of facts for an as-applied challenge to the Service's termination of the program or to support doctrines such as waiver, equitable tolling, or estoppel. ER 15.

The Fishermen chose not to amend their Complaint, and instead took an appeal. ER 1 (Apr. 11, 2014).

F. The Fishermen Petition the Service to Rescind Its 2012 Decision

In addition to appealing the district court's dismissal of their suit as time-barred, the Fishermen filed a petition with the Service requesting "rescission" of the failure-criteria portion of the 1987 Rule. *See* Decl. of Jonathan Wood in Support of Appellants' Request for Judicial Notice, Ex. A, Dkt. 10-2. The petition also requested rescission

of the Service's 2012 decision to terminate the otter translocation program. *Id.* The Service denied the petition. *Id.*[4]

On November 3, 2014, three of the four Plaintiffs in this case — California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara — filed a new complaint in federal district court. *California Sea Urchin Comm'n v. Bean*, No. 2:14-cv-8499 (C.D. Cal. filed Nov. 3, 2014), Dist. Dkt. 1 (Complaint). They seek, among other relief, a declaration that the Service's denial of their 2014 petition was unlawful. *Id.* (Complaint ¶¶ 70–74; Prayer for Relief ¶¶ 1–3).

SUMMARY OF ARGUMENT

In 1987, the Service published a final rule asserting its authority under Public Law 99-625 to implement an otter translocation program

[4] The Fishermen filed a motion for judicial notice concurrently with their primary brief in this appeal, asking the Court to take notice of the Service's response to their petition. Dkt. 10. The Service's letter is a publicly-available document and the federal appellees do not dispute the authenticity or the accuracy of the reproduction of the letter. On that superficial level, the letter qualifies for judicial notice. *See* Fed. R. Evid. 201(b). However, neither the Fishermen's petition nor the Service's response is relevant to the sole question on appeal of whether the Fishermen's case is time-barred as a facial challenge to the 1987 Rule. *See also* Federal Appellees' Response to Appellants' Mot. for Judicial Notice, Dkt. 14.

and to terminate the program if certain criteria were met indicating that the program had failed. In 2012, the Service invoked this authority to terminate the program. The Fishermen do not challenge the substance of the 2012 decision. They do not allege that the Service provided inadequate reasoning to support its exercise of discretion in terminating the program. Nor do they assert that the Service's action constituted an adverse enforcement action against the Fishermen.

Rather, the Fishermen's sole claim is that the Service lacked authority to terminate the program. Their challenge is brought against the Service's underlying authority as asserted in the 1987 Rule. This facial challenge asserting that the 1987 Rule is invalid in all its applications was an argument that existed at the time the rule was promulgated in 1987, yet the Fishermen waited more than twenty-five years to bring this claim. The district court correctly dismissed the Fishermen's case as time-barred.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* the dismissal of a cause of action as time-barred. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may

be granted if it is "obvious on the face of the complaint that the claim is time-barred." *Vaughan v. Grijalva*, 927 F.2d 476, 480 (9th Cir. 1991). When ruling on a motion to dismiss, the Court may "'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.'" *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899–900 (9th Cir. 2007).

II. The Fishermen's Facial Challenge to the 1987 Rule is Time-Barred

Absent a waiver, sovereign immunity shields the federal government and its agencies from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). A "waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The Administrative Procedure Act (APA) is a limited waiver of sovereign immunity. *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."). Actions brought under the APA are subject

to a six-year statute of limitations pursuant to 28 U.S.C. § 2401(a), which states that, with the exception of circumstances not present here, "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." *See Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 930 (9th Cir. 2010).

The Fishermen's Complaint raises a single claim: Public Law 99-625 authorizes the Service to exercise its discretion to implement an otter translocation program but does not give the Service authority to terminate the program. On the face of the Complaint, the Fishermen do not challenge any specific aspect of the Service's 2012 decision, such as the finding that the cause of the disappearance of translocated otters from San Nicolas Island could not be identified or remedied. Rather, the Fishermen attack the Service's underlying authority to set conditions under which the translocation program could be deemed a failure and terminated. This challenge to the 1987 Rule is barred by the APA's statute of limitations.

A. The argument that the Service lacks authority to terminate the program is a facial challenge to the 1987 Rule.

The Fishermen's claim that Public Law 99-625 "provides no authority to the Service to cease such program once it has been initiated" is in essence a claim that the 1987 Rule is invalid on its face. ER 36 (Compl. ¶ 69). The Complaint does not allege that the 1987 Rule is arbitrary or capricious as applied to the Fishermen, but that it is inherently invalid "in all its applications." *See American Hospital Ass'n v. NLRB*, 499 U.S. 606, 619 (1991); *cf. Guggenheim v. City of Goleta*, 582 F.3d 996, 1013–14 (9th Cir. 2009) ("Unlike an as-applied challenge, . . . [a] facial challenge alleges that the statute or regulation is unconstitutional in the abstract: that 'no set of circumstances exists under which the [a]ct would be valid.'" (citations omitted)).

The Fishermen contend that the Complaint "does not challenge the 1987 Regulation," which is "only relevant in that it is the Service's purported authorization for the 2012 Rule." Br. at 9. Their argument cannot be squared with the statements in their Complaint or with the case law distinguishing between facial challenges that existed at the time of a rule's promulgation, on the one hand, and challenges to the later application of a rule to a specific factual circumstance, on the other

hand. Although the Fishermen's lawsuit is presented as a challenge to the 2012 decision, it is in actuality a challenge to the 1987 Rule. *See* ER 12 (district court opinion characterizing this as a "facial challenge to a prior regulation" rather than an "as-applied challenge to the application of the prior regulation in a new regulation").

A facial challenge to a rule claims that the rule is invalid in all its applications. For example, a challenge to an agency's authority to charge an amenity fee for park visitors is a facial challenge because it seeks to strike down the regulation as invalid "as applied to more than [the plaintiffs] and their particular circumstances." *Scherer v. U.S. Forest Service*, 653 F.3d 1241, 1242–43 (10th Cir. 2011); *see also Public Lands Council v. Babbitt*, 167 F.3d 1287, 1292 (10th Cir. 1999) (facial challenge to Bureau of Land Management regulations on livestock grazing on public lands). A lawsuit claiming that an agency acted unlawfully in adopting rules for categories of timber harvest has also been treated as a facial challenge. *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947, 949 (7th Cir. 2000); *accord Sierra Club v. Bosworth*, 510 F.3d 1016, 1023–24 (9th Cir. 2007) (reviewing Forest Service adoption of categorical exclusion for fuels reduction projects).

In contrast, there are two paradigmatic examples of as-applied challenges. First, when an agency applies a regulation to a defendant in an enforcement proceeding, the defendant may challenge the validity of the regulation even if the regulation itself was promulgated long ago. *E.g.*, *National Labor Relations Bd. v. Federal Labor Relations Auth.,* 834 F.2d 191, 195–96 (D.C. Cir. 1987); *see also Munsell v. Dep't of Agriculture*, 509 F.3d 572, 584–85 (D.C. Cir. 2007) (noting that plaintiff had framed its claim as an as-applied challenge to a USDA directive but failed to show USDA enforcement action against any of plaintiffs' members). Second, a party may petition the agency to amend or rescind the regulation and then seek judicial review of the agency's denial on substantive grounds. *E.g.*, *Public Citizen v. Nuclear Regulatory Comm'n,* 901 F.2d 147, 152 (D.C. Cir. 1990); *National Labor Relations Bd.,* 834 F.2d at 196; *see also Wind River Mining Corp. v. United States,* 946 F.2d 710, 715 (9th Cir. 1991) (adopting D.C. Circuit analysis for as-applied challenges).

The Fishermen's challenge does not fall into either category of as-applied challenges. The Complaint does not allege that the Service rejected a permit application, took an adverse enforcement action, or denied a rulemaking petition. Nor do the Fishermen argue, for example,

that the Service provided inadequate support for its determination that fewer than twenty-five sea otters remained in the translocation zone within three years from the initial transplant, 77 Fed. Reg. at 75287–88, or that the Service acted arbitrarily in choosing to terminate the program altogether rather than implement a modified translocation program with a smaller otter-free management zone, *id.* at 75266.

Despite the Fishermen's attempt to couch this as a challenge to the 2012 decision, the sole claim in the Complaint plainly challenges the facial validity of the 1987 Rule: "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 program's management zone, the Service's rulemaking, purporting to do the same," is in excess of statutory authority. ER 37 (Compl. ¶ 72) (citing 5 U.S.C. § 706(2)(A), (C)). This claim is reiterated throughout the Complaint and in the prayer for relief. *See, e.g.*, ER 36–37 (Prayer for Relief ¶ 1 (seeking "a declaration that the Service is without authority to terminate the translocation program); Compl. ¶ 69 (stating that "the Public Law provides no authority to the Service to cease such program once it has been initiated"); Compl. ¶ 71 ("The only authority that the Service relied on to support its rulemaking was the Service's own

termination criteria . . . which are the Service's invention, not Congress' . . . .")). The argument is one that existed at the time the rule was promulgated in 1987. *See* ER 30 (Compl. ¶ 34 ("Notwithstanding the absence of authority from the Public Law, the Service included within the plan criteria for termination of the program.")).

Under the Fishermen's interpretation of Public Law 99-625, there is no set of circumstances under which the Service could lawfully terminate a translocation program. This is akin to a general challenge to the validity of a Medicare rule in *Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999). This Court held that a cause of action challenging a Medicare rule began to accrue on the issuance of the rule, and not when the agency denied the plaintiff hospital's claims for payment. *Id.* The rule for when the clock begins to run "is necessary so that regulations are not indefinitely subject to challenge in court." *Id.* Accepting the Fishermen's argument and "allowing suit whenever a regulation was administered by a federal agency 'would virtually nullify the statute of limitations for challenges to agency orders.'" *Id.*; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988).

The Service' rule asserting its authority to terminate the program was published in 1987. *See Shiny Rock Mining Corp. v. United States (Shiny Rock II)*, 906 F.2d 1362, 1364 (9th Cir. 1990) ("'Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.'"). The Complaint acknowledges that commercial fishing interests were aware of and participated actively in the rulemaking process. *Supra* p. 10. This is an instance where "[t]he grounds for such challenges" were "apparent to any interested citizen within a six-year period following promulgation" of the rule. *Wind River*, 946 F.2d at 715. The Fishermen waited more than twenty-five years to challenge the 1987 Rule, and their challenge is time-barred.

B. The circumstances present in *Shiny Rock* and *Wind River* where the Court allowed a later challenge to a case do not exist here.

The Fishermen contend that their challenge to the 2012 decision is timely because under this Court's reasoning in *Shiny Rock*, plaintiffs can challenge a later agency action relying on an earlier regulation. *Shiny Rock II*, 906 F.2d at 1362; Br. 12–13. *Shiny Rock* does not provide support for the Fishermen's position.

The plaintiff mining company in *Shiny Rock* sought a judgment that a public land order withdrawing land from mineral leasing deprived the company of its property without just compensation. 906 F.2d at 1363; *see also Shiny Rock Mining Corp. v. United States (Shiny Rock I)*, 825 F.2d 216, 217 (9th Cir. 1987). The land order was issued in 1964, but the company argued that its claim did not accrue until 1983, when the agency rejected the company's mining patent application. *Shiny Rock II*, 906 F.2d at 1363, 1365. This Court rejected the company's argument because Federal Register publication of the land withdrawal triggered the statute of limitations period. *Id.* at 1366. Similarly, here, the Service's 1987 publication of the translocation plan and failure criteria started the clock for the Fishermen's challenge to the validity of the failure criteria.

The Fishermen fail to distinguish *Shiny Rock*. They argue that in *Shiny Rock*, the Court considered the merits of the plaintiff's claims that its mining claim application was improperly denied. Br. 12. But unlike the Fishermen's challenge here to the facial validity of the 1987 Rule, in *Shiny Rock*, the company challenged not just the regulation itself but also the agency's application of the regulation to its permit request. The agency rule at issue in the first *Shiny Rock* appeal

provides that a permit application is void *ab initio* if it stakes a mining claim on lands that are marked in agency records as unavailable for leasing. *Shiny Rock I*, 825 F.2d at 219. The mining company argued that the notation rule, invoked to reject its mining application, deprived it of its property right to locate mining claims on public lands. *Id.* at 218. The Court affirmed the application of the notation rule but remanded to the district court the company's underlying challenge to the land withdrawal order. *Id.* at 220.

Unlike *Shiny Rock*, which challenged an agency rule as applied to the company's specific mining claim, the instant suit does not challenge a Service rule as applied to the Fishermen. Rather, the Fishermen's suit challenges the underlying authority of the Service as expressed in its 1987 Rule. The Fishermen's claim is more analogous to the claim in *Shiny Rock II* that the land withdrawal order was defective. Just as the mining company's claim accrued upon publication of the land withdrawal order, here, the Fishermen's claim that the Service lacks authority to terminate the translocation program accrued in 1987, when the Service published its rule listing the failure criteria.

The Fishermen also claim that the district court's decision is inconsistent with this Court's decision in *Wind River*. *See* Br. 14–19.

Wind River is readily distinguished from this case. In *Wind River*, the agency published a rule in 1979 establishing wilderness study areas on federal lands. 946 F.2d at 711. In 1987, the plaintiff mining company filed a plan of operation with the agency which, if approved, would allow the company to conduct ore-extraction activities. *Id.* at 712. The agency rejected the company's application because the land had been previously designated as a wilderness area.

Wind River held that "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's *application of that decision to the specific challenger*." 946 F.2d at 715–16 (emphasis added). In rejecting the government's statute-of-limitations defense, the Court explained that "no one was likely to have discovered that the [agency's] 1979 designation of this particular [Wilderness Study Area] 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." *Id.* at 715.

Neither of the factors considered in *Wind River* is present here. First, this case does not concern the validity of a regulation as applied to a specific landowner or party. Rather, the Fishermen attack the

underlying authority of the Service to terminate the translocation program in its entirety. As this Court noted in *Wind River*, "a policy-based facial challenge to the government's decision . . . must be brought within six years of the decision" because the "grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." 946 F.2d at 715.

Second, the Fishermen do not contend that "no one was likely to have discovered" the 1987 Rule — on the contrary, their Complaint asserts that commercial fishing interests were active participants in the rulemaking. *See* 946 F.2d at 715; *supra* p.10. The allegedly unlawful nature of the Service's promulgation of the failure criteria should have been apparent to interested citizens within the six-year period following publication of the 1987 Rule.

The other cases cited by the Fishermen are similarly unpersuasive. *Center for Biological Diversity v. Salazar*, Br. 13–14, illustrates the difference between a facial challenge to a prior regulation and a challenge to the application of that prior regulation to a specific set of circumstances in a new decision. 695 F.3d 893 (9th Cir. 2012). In that case, the Court agreed that the plaintiffs "cannot challenge facially the 1983 regulatory definition" of what constitutes the incidental take

of "small numbers" of protected marine mammals. *Id.* at 899. However, the plaintiffs' as-applied claims were timely. The plaintiffs challenged the agency's application of a "significantly redrafted" interpretation of the 1983 regulation and not the 1983 definition itself. *Id.* at 905. Additionally, the plaintiffs argued that the agency's "small numbers" determination in the context of incidental take of polar bears from oil company activities in the Chukchi Sea "ignore[d] expected impacts from oil and gas support operations and onshore activities." *Id.* at 908.

In contrast, the Fishermen here mount a challenge to the Service's termination criteria and not the Service's later interpretation or application of those criteria. *See* ER 37 (Compl. ¶ 71). The Fishermen do not allege that the Service made an arbitrary and capricious determination in applying the failure criteria to the facts and terminating the translocation program. Rather, the Fishermen attack the failure criteria and termination authority as being *ultra vires*.

The reasoning in *Northwest Environmental Advocates v. EPA* is similarly inapplicable here. 537 F.3d 1006 (9th Cir. 2008). In that case, the plaintiffs sought judicial review of the denial of their rulemaking petition. *Id.* at 1013. Although the regulation at issue was promulgated in in 1973, plaintiff's petition to rescind that rule was denied in 2003,

and plaintiffs' suit, brought three months later, was timely. *Id.* at 1013–14. The Court considered that case to be indistinguishable from *Wind River*. In the instant case, the Fishermen are not challenging the denial of a petition, though they have brought a separate lawsuit doing just that. *See supra* pp. 19–20.

Dunn-McCampbell Royalty Interest, Inc. v. National Park Service, Br. 17, confirms that a facial challenge is time-barred. 112 F.3d 1283 (5th Cir. 1997). The Fifth Circuit noted that the plaintiff "arguably might challenge a Park Service denial of a proposed plan of operations" or allege that the Park Service took action to block the companies' access to their mineral estate. *Id.* at 1288. Such claims might have been timely, but the plaintiff's general assertion that the Park Service lacked authority to issue regulations on the use of federal land to access private land for oil and gas activities was time-barred. *Id.* at 1285, 1287.

The remainder of the cases cited by the Fishermen similarly fail to support their argument. Br. 17–20; *see Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1113 (9th Cir. 2006) (permitting challenge to the agency's application of management measures because judicial review was available under a statutory provision not at issue here); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th

Cir. 1999) (holding that an APA challenge to a road project is time-barred because it was filed more than six years after the Record of Decision finalizing the siting decision, but allowing a challenge to the agency's more recent decision not to prepare a supplemental environmental impact statement).

III. Dismissal of the case is not at odds with principles of judicial review under the APA.

The Fishermen contend that the Service's interpretation of *Wind River* "contradicts the presumption that agency actions are judicially reviewable." Br. 19. This argument is a non-starter. At any point during the twenty-five-year period that the 1987 Rule was in existence, the Fishermen could have petitioned to have the Rule rescinded and then sought judicial review if such petition had been denied. *Cf. Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 595 ("a statute of limitations is not tolled by litigative timidity" (internal quotation marks omitted)).

Enforcement of the statute of limitations respects the APA's limited waiver of sovereign immunity. The district court's decision does not "shield entirely from judicial review some agency decisions," Br. 20, because interested parties, including commercial fishermen, were free to bring a challenge to the 1987 Rule within the six-year limitations

period. The Fishermen counter that no one was injured by the 1987 Rule. But this Court has specifically declined to accept "the suggestion that standing to sue is a prerequisite to the running of the limitations period." *Shiny Rock*, 906 F.2d at 1365–66; *see also Penfold*, 857 F.2d at 1316.

In any event, the Fishermen err in suggesting that application of the statute of limitations effectively shields the Service's 2012 action from judicial review. In granting the Service's motion to dismiss, the district court invited the Fishermen to amend their complaint to bring an as-applied challenge or to seek application of doctrines such as equitable tolling or estoppel. ER 15. The Fishermen chose not to do so and cannot now complain that they were denied a full hearing below.

* * *

In the 1987 Rule, the Service asserted its authority to terminate the translocation program at any point based on specified criteria. The time period for bringing a facial challenge to the termination authority commenced when the Rule was published, signaling the consummation of the agency's decisionmaking process. *Hells Canyon Preservation Council*, 593 F.3d at 931. Just as the Court in *Hells Canyon* rejected the plaintiffs' attempt to frame their claim as a challenge to the agency's

later "reinterpretation" or application of an earlier decision, *id.* at 931–32, this Court should reject the Fishermen's attempt to make an end-run around the limitations period for challenging the Service's authority asserted in the 1987 Rule.

The 1987 Rule was adopted following years of debate and multiple rounds of public comment on draft environmental impact statements. *See supra* pp. 10–11. The fishing industry was an active participant in the rulemaking process, and one of the Plaintiffs submitted comments in support of strengthening the failure criteria. ER 28 (Compl. ¶ 26); *see supra* pp. 10–11. Unlike cases where a party was unaware of an agency regulation at the time of its promulgation and later contests the specific application of the regulation, in this case, the Fishermen mount a facial challenge to the Service's termination authority, which was codified after a rulemaking process in which the fishing industry participated. "The government's interest in finality outweighs a late-comer's desire to protest the agency's action," particularly where, as here, the grounds for the protest should have been apparent to the Fishermen at the time the rule was published. *Wind River*, 946 F.2d at 715.

The argument the Fishermen raise now — that the Service has discretion to implement the program but lacks discretion to terminate it

— is not a fact-dependent, as-applied challenge. Their claim is identical to the claim they could have raised during the six years following issuance of the 1987 Rule or in a petition to rescind the Rule at any point during the twenty-five years the Rule was in place. The Fishermen waited until 2013 to challenge the authority asserted in the 1987 Rule, and the district court correctly determined that their facial challenge is time-barred.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Attorneys for the Federal Defendants-Appellees are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,928 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

s/ Vivian H.W. Wang

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Vivian H.W. Wang