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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al., Plaintiffs, v. MICHAEL BEAN, et al., Defendants, CENTER FOR BIOLOGICAL DIVERSITY, et al., Intervenor-Defendants.	Case No. 2:14-cv-8499-JFW (CWx) INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Date: September 21, 2015 Time: 1:30 p.m. Judge: Hon. John F. Walter Place: Room 16, Spring Street Courthouse

Pursuant to Federal Rule of Civil Procedure 56 and the applicable local rules, Intervenor-Defendants the Center for Biological Diversity, Environmental Defense Center, Defenders of Wildlife, Friends of the Sea Otter, Humane Society of the United States, Los Angeles Waterkeeper, and The Otter Project hereby move for summary judgment in their favor. As set forth in the accompanying Memorandum in support of this motion for summary judgment and the Intervenor-Defendants' statements of facts, there is no genuine dispute of material fact, and Intervenor-Defendants are entitled to judgment in their favor as a matter of law.

Respectfully submitted,

DATED: July 10, 2015

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, *et al.*, Plaintiffs, v. MICHAEL BEAN, *et al.*, Defendants, CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Intervenor-Defendants.	Case No. 2:14-cv-8499-JFW (CWx) INTERVENOR-DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Date: September 21, 2014 Time: 1:30 p.m. Judge: Hon. John F. Walter Place: Room 16, Spring Street Courthouse

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INTRODUCTION

The U.S. Fish and Wildlife Service ("Service") acted entirely within its statutory discretion and obligations when it decided to terminate a program to translocate southern sea otters from the central California coast and exclude them from their historic range in southern California (hereinafter "translocation program") and denied Plaintiffs' petition to rescind that decision and reinstate the failed program. Plaintiffs' contention that the Service lacked authority to terminate this program is based on an untenable interpretation of Public Law 99-625 that would require the Service to continue the translocation program, which was conceived and authorized in order to promote sea otter recovery, even after the Service determined that the same program had become a grave threat to the sea otter's recovery.

The strained interpretation of the law advanced here by the Plaintiffs finds no support in the plain language of the statute. Reading the text of Public Law 99-625 in the overall regulatory scheme of the Endangered Species Act ("ESA") within which it is embedded makes clear that such an absurd result is not only contrary to Congressional intent, but would violate the Service's overriding duty to ensure that none of its actions jeopardize the sea otter's survival and recovery. Moreover, the legislative history of Public Law 99-625 and the rulemaking process underlying the translocation program further confirm that Congress and even the fishing industry shared the Service's view that Public Law 99-625 authorized it to terminate the program if it failed to achieve its central goal of promoting otter recovery. The Service thus acted reasonably in developing criteria to evaluate the success of the program and terminating it when it failed.

1 Finally, Plaintiffs' request relief, that the Court order the Service to reinstate a
2 failed program that would significantly impair sea otter recovery, would violate the
3 ESA and thus cannot be granted. Because the Service had clear authority to terminate
4 the translocation program and Plaintiffs request relief that is not lawfully available,
5 the Court should deny Plaintiffs' Motion for Summary Judgment and uphold the
6 Service's decisions.

7 **BACKGROUND**

8 The southern sea otter is the smallest marine mammal in North America, with
9 an historic range stretching along the entire California coastline and into Baja
10 California, Mexico. Intervenor-Defendants' Statement of Uncontroverted Facts ¶22
11 (hereinafter "Int. Statement of Facts"). The southern sea otter was intensively hunted
12 throughout the 18th and 19th centuries for its fur, and by the early 20th century was
13 believed to be extinct. *Id.* ¶23. In 1938, a small population was found along the Big
14 Sur coastline; following this discovery, the population slowly expanded its range and
15 numbers. *Id.* ¶24. The southern sea otter now occupies nearshore waters along the
16 mainland coastline of California from San Mateo County to Santa Barbara County.
17 *See e.g.*, http://www.fws.gov/ventura/endangered/species/info/sso.html.

18 Despite this expansion, the southern sea otter continues to be imperiled. In
19 1977, the Service listed the species as threatened under the federal Endangered
20 Species Act, 16 U.S.C. §§ 1531–44, due to its small population size, limited
21 distribution, and continued vulnerability to offshore oil and gas exploration and
22 transportation. Pls. Statement of Uncontroverted Facts ¶1.

23 In 1982, the Service issued a recovery plan for the southern sea otter pursuant to
24 section 4(f) of the ESA. 16 U.S.C. § 1533(f); Int. Statement of Facts ¶25. Recovery

1 plans serve as the basic road map of actions necessary to stop and reverse the decline
2 of listed species, and thus to achieve the ESA's ultimate goal of recovering a species
3 to the point that the protections of the statute are no longer necessary. To this end,
4 section 4(f) directs that the Service "shall develop and implement" such plans,
5 requires each plan to include, among other things, a "description of such site-specific
6 management actions as may be necessary to achieve the plan's goals for the
7 conservation [*i.e.* recovery] and survival of the species." 16 U.S.C. § 1533(f)(1)(B)(i).

8 In the 1982 Sea Otter Recovery Plan ("Recovery Plan"), the Service determined
9 that establishing a second breeding colony of sea otters was necessary to protect the
10 species from extinction and promote the species' recovery by protecting it from the
11 risk of being "decimated" by an oil spill or other environmental catastrophes. Int.
12 Statement of Facts ¶26. In order to establish a new population that would be safe
13 from oil spills, the Service determined it would have to translocate otters from the
14 parent population along the central California coast to others areas within the otter's
15 historic range. *Id.* ¶27.

16 To implement the Translocation Program called for by the Recovery Plan, in
17 June 1984, the Service initiated a rulemaking process under the Administrative
18 Procedure Act ("APA"), 5 U.S.C. §§ 551-59, and concurrent analysis under the
19 National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70h. Int. Statement
20 of Facts ¶28. The Service's proposal to establish a new colony at San Nicolas Island
21 raised concerns among the fishing industry, which feared that the presence of otters
22 would constrain their ability to fish for urchins and other invertebrate prey. *See, e.g.*,
23 *id.* ¶29. The Service developed the "zonal management" concept as an element of the
24 translocation program in order to resolve potential conflicts with the fishing industry –

"the zones are expected to assure adequate protection to the experimental population while minimizing possible conflicts between translocated otters and fisheries and other resource users…". *Id.* ¶30.

In the course of developing the translocation plan, the Service identified a potential conflict between its authority under ESA Section 10(j), 16 U.S.C. § 1539(j), which authorizes the establishment of experimental populations of threatened and endangered species, and the prohibition in the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361–1423h, on taking marine mammals for any purpose other scientific research. Int. Statement of Facts ¶31. In order to resolve that conflict and provide clear authority for the Service's actions, Congress enacted Public Law No. 99-625 on November 7, 1986 as a stand-alone provision in ESA Section 7, 16 U.S.C. § 1536(a). *Id.* ¶32. Public Law 99-625 authorized, but did not require, the Service to undertake the Translocation Program. Pub. L. No. 99-625, § 1(b) (1986) ("The Secretary *may* develop and implement, in accordance with this section, a plan for the relocation and management of a population of California sea otters.") (emphasis added).[1] If the Service chose to undertake the program, Congress provided for the implementation of a "management" zone surrounding the translocation zone from which otters would be excluded. *Id.*, § 1(b)(4)(A)–(B); Int. Statement of Facts ¶34.

In August 1986, the Service issued a proposed rule and NEPA draft Environmental Impact Statement ("DEIS") identifying San Nicolas Island, off the

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[1] Pub. Law 99-625 was based on two identical bills: Congress passed H.R. 1027 in 1985 and H.R. 4531 in 1986. Int. Statement of Facts ¶33.

1 southern California coast, as the preferred translocation site. Int. Statement of Facts
2 ¶35. In their comments on the DEIS, both wildlife conservation and fishing industry
3 groups expressed concern that the Translocation Program could fail, and requested the
4 inclusion of specific regulatory criteria to guide the Service in determining whether
5 the program had succeeded or failed. *Id.* ¶36. The Service responded by developing
6 "failure criteria" and including them in the Proposed Rule. *Id.* ¶37.

7 The Service added five "Criteria for a Failed Translocation" ("failure criteria")
8 in the final regulation to implement the translocation plan. *Id.* ¶38. As stated by the
9 Service in its Final Rule, it agreed to add these criteria to the regulation because they
10 "are critical to determining whether or not the experimental population will achieve its
11 intended purposes or have to be terminated, which would involve evaluation and
12 informal rulemaking procedures." *Id.* ¶39. If any one of the failure criteria were met,
13 then "[t]he translocation would generally be considered to have failed," and after
14 consultation with the State of California and the Marine Mammal Commission, the
15 Rule would "be amended to terminate the experimental population." *Id.* ¶40.

16 Based on its authority under the ESA and Public Law 99-625, the Service
17 finalized its rulemaking and NEPA process in August 1987, designating the waters
18 around San Nicolas Island as the translocation zone and the waters and islands south
19 of Point Conception as the "no-otter" management zone. *Id.* ¶41.

20 Between August 1987 and March 1990, the Service translocated 140 otters to
21 San Nicolas Island. *Id.* ¶42. It quickly became apparent that the translocation
22 program was not working as intended. Starting in its first year, the Service saw
23 "unexpected mortalities and high emigration" of sea otters involved in the
24 translocation program. *Id.* ¶43. By March 1991, only fourteen individual otters

1 remained within the translocation zone. *Id.* ¶44. Later that year, the Service stopped
2 translocating otters to San Nicolas Island "due to high rates of dispersal and poor
3 survival." *Id.* ¶45. The Service became "concerned that sea otters were dying as a
4 result of [its] containment efforts," and "suspended all sea otter capture activities" in
5 1993. *Id.* ¶46. These adverse impacts on sea otters led the Service to complete a new
6 ESA section 7 consultation on the sea otter translocation and management rule that
7 concluded that "containment of southern sea otters was not consistent with the
8 requirement of the ESA to avoid jeopardy of the species," because it was causing high
9 levels of mortality and impairing the southern sea otter's ability to recover. *Id.* ¶47.
10 In 2003, the Service revisited its Sea Otter Recovery Plan. In light of new
11 information, the Service concluded that allowing the species to expand into its natural
12 range in Southern California was an essential action to further recovery, and the
13 translocation and management program and associated no-otter zone was one of the
14 primary threats to the species. *Id.* ¶48, (2003 Final Revised Recovery Plan) ("[I]t is in
15 the best interest of the southern sea otter population to declare the experimental
16 translocation of sea otters to San Nicolas Island a failure and to discontinue the
17 maintenance of the otter-free zone in southern California.").
18 In the meantime, the Service initiated a new NEPA process to finally apply the
19 failure criteria and terminate the no-otter zone in 2001. *Id.* ¶49. The Service issued a
20 draft Environmental Impact Statement ("EIS") for this termination decision in 2005,
21 which identified termination of the no-otter zone as its preferred action. *Id.* ¶¶ 49-50.
22 However, it failed to timely prepare a final Supplemental EIS or make a final decision
23 to apply the failure criteria and end the no-otter zone.
24

1 Due to these long delays, in 2009, The Otter Project and the Environmental
2 Defense Center filed suit, alleging that the Service had violated the APA, 5 U.S.C. §
3 706(1), by unreasonably delaying its final decision as to whether the translocation had
4 failed. Complaint for Declaratory and Injunctive Relief, *The Otter Project et al. v.*
5 *Salazar et al*., No. C09-04610-JW (N.D. Cal. Sep. 30, 2009), ECF No. 1. In
6 November 2010, The Otter Project and Environmental Defense Center reached a legal
7 settlement with the Service, requiring it to finally apply the failure criteria and make a
8 final decision on whether the translocation and management program had failed by
9 December 2012. Stipulated Settlement Agreement and Order of Dismissal, *The Otter*
10 *Project*, No. C09-04610-JW (N.D. Cal. Nov. 23, 2010), ECF No. 67; *see also*
11 Stipulation to Amend Stipulated Settlement Agreement and Order, *The Otter Project*,
12 No. C09-04610-JW (N.D. Cal. Nov. 14, 2012), ECF No. 70. Plaintiff California Sea
13 Urchin Commission ("CSUC") was an intervening defendant in that litigation and a
14 signatory to the settlement. Stipulated Settlement Agreement and Order of Dismissal,
15 *The Otter Project*, No. C09-04610-JW (N.D. Cal. Nov. 23, 2010), ECF No. 67
16 In accordance with the 2010 Settlement Agreement in *The Otter Project*, and
17 following a NEPA public process including opportunity for public comment and
18 several public hearings, the Service in 2012 decided to terminate the translocation
19 program. Pls. Statement of Uncontroverted Facts ¶ 10. Two decades of analysis had
20 shown that the program failed to establish viable new populations of sea otters,
21 resulted in the death or disappearance of many translocated otters, violated the ESA
22 by putting the species at jeopardy by preventing its recovery, and violated Public Law
23 99-625 because the containment of the sea otters could not be achieved in a non-lethal
24

manner and because maintenance of the zone precluded otter recovery. *See* Int. Statement of Facts ¶51.

On July 31, 2013, CSUC and other fishing industry groups filed a lawsuit challenging the Service's termination decision, arguing that the agency had exceeded its statutory authority under Public Law 99-625. Complaint for Declaratory and Injunctive Relief, *CSUC et al. v. Jacobson et al.*, No. CV13-05517-DMG (C.D. Cal. Jul. 31, 2013), ECF No. 1 ("*CSUC I*"). The Court granted the Service's motion to dismiss the suit on the grounds that Plaintiffs had made an untimely facial challenge to the 1987 regulations implementing the translocation program. Order Granting Defendants' Motion to Dismiss, *CSUC I*, No. CV13-05517-DMG (C.D. Cal. Mar. 3, 2014), ECF No. 53. Plaintiffs failed to amend their complaint, and the lawsuit was dismissed. Order Dismissing Action, *CSUC I*, No. CV13-05517-DMG (C.D. Cal. Mar. 27, 2014), ECF No. 54.

Plaintiffs in *CSUC I* appealed the dismissal of their lawsuit. Notice of Appeal, *CSUC I*, No. CV13-05517-DMG (C.D. Cal. Apr. 11, 2014), ECF No. 55. They also petitioned the Service to rescind its 2012 decision to terminate the translocation program and to rescind portions of the 1987 regulations implementing Public Law 99-625. *See* Complaint for Declaratory and Injunctive Relief at ¶¶ 58-60, Exhibits 1, 2, *CSUC et al. v. Bean et al.*, No. 2:14-cv-8499 (Nov. 3, 2014), ECF No. 1. The Service denied that petition. *Id.*

On November 3, 2014, Plaintiffs from *CSUC I* brought the present lawsuit, which makes substantially the same allegations as the first lawsuit, and challenges the Service's denial of their petition and the Service's authority to terminate the translocation program. *Id*. at ¶¶ 61-74.

ARGUMENT

I. Standard of Review on Summary Judgment

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 365 (9th Cir. 1998). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The Court must determine the validity of the Service's decision according to Administrative Procedure Act section 706, which provides that agency action must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The deferential APA standard requires only that agencies "articulate a … 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). While the court's inquiry into the facts must be "searching and careful," the court is "not empowered to substitute its judgment for that of the agency." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Courts must uphold a decision of "less than ideal clarity if the agency's path may reasonably be discerned." *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1035 (9th Cir. 2010) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009)).

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II. The Service Had Clear Authority Under Public Law 99-625 and the Endangered Species Act to Develop Failure Criteria and Terminate the Translocation Program

3 The Court's analysis of whether the Service's interpretation of its authority
4 under Public Law 99-625 was reasonable is governed by the two-part test set forth in
5 *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837
6 (1984). First, the Court must determine "whether Congress has directly spoken to the
7 precise question at issue. If the intent of Congress is clear, that is the end of the
8 matter." *Id.* at 842–43. Second, if the Court finds that the "the statute is silent or
9 ambiguous with respect to the specific issue, the question for the court is whether the
10 agency's answer is based on a permissible construction of the statute." *Id.* at 843. As
11 the Supreme Court has long recognized, "t]he power of an administrative agency to
12 administer a congressionally created ... program necessarily requires the formulation
13 of policy and the making of rules to fill any gap left, implicitly or explicitly, by
14 Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (quoted in *Chevron*, 467 U.S. at
15 843). Even where that delegation of authority is implicit, "a court may not substitute
16 its own construction of a statutory provision for a reasonable interpretation made by
17 the administrator of an agency." *Chevron*, 467 U.S. at 844. *See also King v. Burwell*,
18 No. 14-114, 2015 WL 2473448 (S. Ct. June 25, 2015) (statute's ambiguity generally
19 may be interpreted as an implicit delegation from Congress to the agency to fill
20 statutory gaps). So long as the agency's statutory interpretation is reasonable, the
21 court must defer to it. *See INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999); *Auer v.*
22 *Robbins*, 519 U.S. 452, 457 (1997).
23 As discussed below, the Service's interpretation of its authority under Public
24 Law 99-625 was consistent with the plain meaning of that statute and of the ESA as a

whole. Even if Public Law 99-625 were ambiguous as to the Service's authority to terminate the translocation program, the Service's interpretation was eminently reasonable in light of the statute's purpose and legislative history.

A. The Service's Authority to Terminate the Translocation Program Is Clear Based on the Plain Meaning of Public Law 99-625

To determine whether Congress specifically addressed the Service's authority to develop failure criteria and terminate the translocation program, the Court must look at both the language of Public Law 99-625 itself and its place in the overall statutory scheme. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Plaintiffs' "plain language" argument appears to be that the use of the word "shall" in two subsections of Public Law 99-625 constituted a command to implement the translocation program in perpetuity without regard to whether implementation would be consistent with the Service's overarching obligation to avoid jeopardy to the sea otter and promote the species' recovery under the ESA. ECF No. 40-1 at 8-9. This argument is manifestly incorrect.

To begin with, Public Law 99-625 granted the Service discretionary authority to implement the translocation program but did not command it to do so. Section 1(b) states that the Service "may develop and implement" the program and provides a non-exhaustive list of elements that the plan must include if the Service decides to pursue at all. Pub. L. No. 99-625, §1(b). The law left the decision whether to implement the program at all to the Service's discretion. Furthermore, the Service's decision to implement that plan at all was (and is) subject to its overarching duty to ensure that its action would not cause jeopardy to the sea otter. 16 U.S.C. § 1536(a)(2). Indeed, the

1 Service was only able to proceed with implementing the plan after it had completed an
2 ESA section 7 consultation that found, based on what the Service knew in 1987, that
3 the program was not likely to jeopardize the sea otter. Int. Statement of Facts ¶52.
4 In the event that the Service decided to develop a plan, the statute specified that
5 it "shall include" the management zone. Pub. L. No. 99-625, § 1(b)(4). This
6 subsection also specified that the plan "shall include" a specification of how sea otters
7 subject to relocation and management will be protected. *Id.*, § 1(b)(2). As discussed
8 in Section II.B. below, protection of species under the ESA necessarily entails
9 ensuring that the survival and recovery of listed species are not jeopardized by federal
10 actions. 16 U.S.C. § 1536(a)(2).
11 The other "shall" upon which Plaintiffs rest their case appears in Section 1(d).
12 This subsection, read as a whole, clearly refers to the timing of when the Service was
13 authorized to begin implementing a translocation program rather than a command that
14 the program must remain in place forever if the Service chose to implement it in the
15 first place. The section specifies that the Service "shall implement the plan … after
16 the Secretary provides an opinion under section 7(b) … or … if no consultation under
17 [ESA] section 7(a)(2) or (3) regarding any prospective action is initiated or requested
18 by April 1, 1986, at any time after that date." Pub. L. No. 99-625, § 1(d)(1)-(2). The
19 statute places clear constraints on when the Service could begin implementing the
20 program but no such constraints on when the Service could end it.
21 As explained below, Congress did not need to include instructions regarding the
22 potential termination of the program in Public Law 99-625. This statute was enacted
23 as a "note" to the ESA, which ultimately governs the translocation program and sea
24 otter conservation in general. And the most fundamental duty imposed upon the

1 Service by the ESA is the requirement that the Service use its authority to promote
2 the sea otter's conservation and ensure that any program it carries out is not likely to
3 impair the sea otter's likelihood of survival and recovery. 16 U.S.C. § 1536(a)(1)-(2).

4 **B. Even if the Language of Public Law 99-625 Were Ambiguous, the Service's Interpretation of Its Authority Is Reasonable**

5
6 **1. The Service's Interpretation Is Reasonable Based on the Purpose and Overall Statutory Scheme of Public Law 99-625 and the Endangered Species Act**

7 Plaintiffs urge a reading of Public Law 99-625 that would require perpetual
8 implementation of the translocation program even though the Service has determined
9 that continuing the program would be likely to jeopardize the continued existence of
10 the southern sea otter by impeding its survival and recovery. This is an entirely
11 implausible reading of the statute that defies common sense. Even if Plaintiffs could
12 advance a strong plain language argument here, the Court may not uphold a reading of
13 the statute that is inconsistent with its overall regulatory scheme and thwarts its very
14 purpose. *King*, 2015 WL 2473448 at *8. The Service's interpretation of its authority,
15 by contrast, is wholly consistent with the language, purpose, and overall statutory
16 scheme of Public Law 99-625 and the ESA. The Service's decision to terminate the
17 program using that authority should be upheld.

18 As a stand-alone amendment to the ESA, Public Law 99-625 must be read in
19 the context of the ESA's purposes and constraints in a way that fits Public Law 99-
20 625 into the ESA's overall regulatory scheme. *Food & Drug Admin.*, 529 U.S. at 133
21 (statute must be read in a way that harmonizes with the overall regulatory scheme) ;
22 *King*, 2015 WL 2473448 at *8 (statutory language must be read in context of its
23 statute's overall operation and purpose). The bedrock purpose of the ESA is to ensure
24

1 not only the survival of threatened and endangered species but also their recovery to
2 the point where they no longer need to be listed. 16 U.S.C. § 1531(b) (purposes of the
3 ESA include providing a program for the conservation of listed species); § 1532(3)
4 (defining "conservation" as the "use of all methods and procedures which are
5 necessary to bring any endangered species or threatened species to the point at which
6 measures provided pursuant to this chapter are no longer necessary.").
7 A key part of ESA protection is section 7's requirement that all federal agencies
8 ensure that any actions they authorize, fund, or carry out are not likely to jeopardize
9 any listed species' continued existence or destroy or adversely modify designated
10 critical habitat. *Id.* § 1536(a)(2). The Ninth Circuit has made clear that actions that
11 appreciably reduce a species' likelihood of recovery are considered to jeopardize its
12 continued existence. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F. 3d
13 1224, 1237–38 (9th Cir. 2007), *as amended on other grounds by* 524 F.3d 917 (9th
14 Cir. 2007) (requiring agency to consider both survival and recovery in determining
15 whether project is likely to jeopardize species); *see also* 50 C.F.R. § 402.02 (defining
16 "jeopardize" as action that would reduce "the survival and recovery of a listed
17 species" by "reducing the reproduction, numbers, or distribution of that species."). As
18 the agency directly tasked with overseeing the conservation of the southern sea otter
19 and ensuring against jeopardy while carrying out the translocation program, the
20 Service had (and still has) an ongoing obligation to ensure that its actions promote the
21 southern sea otters' recovery. 16 U.S.C. §§ 1532(15), 1536(a)(2); Int. Statement of
22 Facts ¶53 (explaining that Service is responsible for conservation and management of
23 the southern sea otter). The ESA also specifies that its determinations of whether an
24 action is likely to jeopardize a species' continued existence must be based on "the best

1 scientific and commercial information available" at the time the determination is
2 made. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). In this case, the Service had
3 dual obligations as both the wildlife conservation agency tasked with determining
4 whether the translocation program was likely to jeopardize the sea otter and the
5 agency carrying out the program.

6 Consistent with those obligations, the Service prepared a biological opinion
7 under ESA section 7 analyzing the likely effects of the translocation program on the
8 southern sea otter's survival and recovery before it implemented the program. Int.
9 Statement of Facts ¶52. Based on the Service's knowledge at the time, it predicted
10 that the action would promote rather than jeopardize the sea otter's recovery. *Id.*
11 However, as the program was implemented, new scientific information became
12 available demonstrating that implementation of the translocation and management
13 zones was not only failing to promote the otter's recovery but had in fact become a
14 grave threat to it. *See id.* ¶¶43-51.

15 Having determined that continuing to carry out the translocation program was
16 likely to jeopardize the sea otter's continued existence, the Service was *obligated*
17 under the ESA to terminate it. Plaintiffs mistakenly point to Public Law 99-625's
18 statement that "[f]or purposes of implementing the plan, no act by the Service" may
19 be treated as a violation of the ESA as evidence that the Service was no longer
20 obligated to avoid jeopardy to the southern sea otter. Pls. Summ. J. Br. at 10, ECF
21 No. 40-1 (citing Pub. L. No. 99-625, § 1(f)). The statute's language makes clear,
22 however, that this exemption only applies to actions "necessary to effect the relocation
23 or management of any sea otter under the plan" while the Service is implementing the
24 translocation plan. Pub. L. No. 99-625, § 1(f). Manifestly, it does not exempt the

1 Service from its continued obligation to ensure that the implementation of the
2 translocation program as a whole is not likely to jeopardize the sea otter.
3 In essence, Plaintiffs imply that Congress intended Public Law 99-625 to repeal
4 by implication the Service's ESA section 7 obligation to insure its actions do not
5 jeopardize the sea otter's survival and recovery. However, the law strongly disfavors
6 repeals by implication. "In the absence of some affirmative showing of an intention to
7 repeal, the only permissible justification for a repeal by implication is when the earlier
8 and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974);
9 *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978) ("*TVA*")
10 (summarizing Supreme Court's jurisprudence on the "cardinal rule" of statutory
11 construction that repeals by implication are disfavored). "[W]hen two statutes are
12 capable of co-existence, it is the duty of the courts, absent a clearly expressed
13 congressional intention to the contrary, to regard each as effective." *Mancari*, 417
14 U.S. at 551. "The intention of the legislature to repeal must be 'clear and manifest.'"
15 *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Public Law 99-625 contains
16 no such "clear and manifest" intent to repeal ESA section 7 protections for the sea
17 otter. Quite the opposite, the law specifies the need for continued protection of otters
18 involved in the translocation program and the Service's obligation to determine how
19 the implementation of the plan would relate to future determinations of the sea otter's
20 status and future Section 7 determinations regarding the effects of federal actions on
21 the species as a whole. Pub. L. No. 99-625, § 1(b)(2), (b)(6).
22 Moreover, it would be absurd to interpret a law meant to authorize a program
23 designed to facilitate otter recovery in a way that somehow prevented the Service
24 from having to ensure that the same program did not then impair the otter's chances of

1 recovery. "Statutory interpretations which would produce absurd results are to be
2 avoided." *Ma v. Ashcroft*, 361 F. 3d 553, 558 (9th Cir. 2004). To avoid such absurd
3 results, courts must interpret a statute "as a symmetrical and coherent regulatory
4 scheme … and fit, if possible, all parts into an harmonious whole." *Food & Drug*
5 *Admin.*, 529 U.S. at 133 (internal citations omitted.) In contrast to Plaintiffs' absurd
6 interpretation, the Service's interpretation produces the rational result that, when it
7 determined that the translocation program was jeopardizing the sea otter, contrary to
8 the ESA's purpose and statutory scheme, it had a ready procedure and the authority to
9 terminate it.

10 The ESA's governing regulatory scheme also undermines Plaintiffs' suggestion
11 that the Service's interpretation is "unreasonable because it would frustrate Congress'
12 purpose of facilitating sea otter recovery while preventing conflict with other fishery
13 resources" and "would allow the Service to sacrifice [fishery] resources to promote
14 the otter's expansion." ECF No. 40-1 at 12. In fact, the ESA not only allows the
15 Service to weigh species' conservation against economic interests, it requires that the
16 Service give conservation of listed species priority over those competing interests. In
17 the seminal ESA case *Tennessee Valley Authority v. Hill*, the Supreme Court
18 concluded "beyond doubt" that "[t]he plain intent of Congress in enacting this statute
19 was to halt and reverse the trend toward species extinction, whatever the cost," and
20 that "Congress intended endangered species to be afforded the highest of priorities."
21 437 U.S. at 174, 184; *see also Babbitt v. Sweet Home Chapter of Communities for a*
22 *Great Oregon*, 515 U.S. 687, 698–99 (1995) (quoting *TVA* with approval). As the
23 Supreme Court noted in *TVA*, the ESA reflects "an explicit congressional decision to
24 require agencies to afford first priority to the declared national policy of saving

1 endangered species … [and] a conscious decision by Congress to give endangered
2 species priority over the 'primary missions' of federal agencies." 437 U.S. at 185.
3 *See also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1400–01 (9th Cir. 1995)
4 (discussing "mounting concern" of Congress over the decline of endangered species).
5 Recognizing the Service's expertise in determining conservation needs of the
6 southern sea otter and the ultimate goal of recovering the species, Congress left it up
7 to the Service to develop procedures for evaluating the translocation program's
8 success and duration. In light of the ESA's overall statutory scheme, the Service's
9 development of failure criteria and other regulations providing for the termination of
10 the translocation program was a wholly reasonable way to fill the gap left by the
11 language of Public Law 99-625 and ensure that the program the statute authorized
12 would be carried out in a manner consistent with the Service's duties under the ESA
13 as a whole. As such, the Court should uphold the Service's interpretation. *Chevron*,
14 467 U.S. at 844.

15 **2. The Service's Interpretation of its Authority Is Reasonable in Light of the Legislative History of Public Law 99-625**
16

17 The legislative history of Public Law 99-625 further bolsters the Service's
18 interpretation of its authority. The Supreme Court's instruction that "considerable
19 weight should be accorded to an executive department's construction of a statutory
20 scheme it is entrusted to administer, and [to] the principle of deference to
21 administrative interpretations" is particularly applicable in this case, where
22 development of the statute at issue and the program it authorized overlapped with one
23 another, and involved a great deal of discussion among the Service, Congress, and the
24 public. *Chevron*, 467 U.S. at 844; *see also Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

1 As explained below, the administrative record shows that Congress, the Service, the
2 commercial fishing industry, and the public shared a clear understanding of the
3 purpose of the program and the need to terminate it if it failed.
4 The legislative history of Public Law 99-625 demonstrates two key points.
5 First, it confirms that the driving purpose of the legislation was to facilitate recovery
6 of the southern sea otter. The co-author of the bill that authorized the translocation
7 program, Congressman John Breaux (D-LA), explained that "the amendment is
8 intended to facilitate recovery of the California sea otter." Int. Statement of Facts ¶54.
9 *See also id.* ¶55, Statement of Senator Chafee: "I support [this bill] because it will
10 help ensure the continued existence of the threatened California sea otter." The
11 Congressional Record also states that the translocation of otters along with continued
12 protection and vitality of the present population was a necessary component to bring
13 about recovery under the ESA. *Id.* ¶56.
14 The goal of implementing zonal management and keeping sea otters out of the
15 "management zone" was entirely contingent upon the Service carrying out the
16 translocation program and successfully establishing an experimental population. *Id.*
17 ¶57. In fact, testimony in the Congressional Record confirms that "the translocation
18 plan … is not intended to replace the recovery plan as the primary long-term
19 management document" for southern sea otters and that long-term management of the
20 species, including future translocation, was to be decided based on the Sea Otter
21 Recovery Plan. *Id.* ¶58. In other words, the very existence of the translocation
22 program – and the management zone that was one element of that program – was
23 conditioned from the beginning on achieving recovery goals for the southern sea otter.
24 As soon as the Service determined that the translocation program was not only failing

to promote the otter's recovery but actually thwarting it, the justification for continuing any part of the translocation program, including the management zone, evaporated.

Second, Congress intended for the Service to develop criteria for assessing the success of the translocation program, and fully expected the Service to terminate the program if it failed to meet those criteria. Congressman Breaux articulated these very points when he testified in support of the bill:

> Much of the discussion of management of the sea otter within the translocation zone assumes the successful translocation of an experimental population of sea otters. The Service should specify in the section 5(b) plan what would constitute a successful translocation. . . . If the Service determines that the translocation is not successful, it should, through the informal rulemaking process, repeal the rule authorizing the translocation.

Id. ¶59. This statement demonstrates that Congress considered the possibility that the translocation program might fail to achieve its objective and that such failure would logically lead to the program's termination. The statement also supports the Service's reasonable decision to fill the gap left in the language of Public Law 99-625 by developing criteria by which to determine whether the program had failed to meet its objectives and a process for terminating it. That decision simply ensured that the Service used the authority the law provided in a way that fulfilled congressional intent to promote otter recovery.

In contrast, Plaintiffs provide no credible evidence in the legislative history or elsewhere to indicate that Congress intended to compel the Service to continue the translocation program even if it failed to achieve its goal of promoting otter recovery or if it was demonstrated to be inconsistent with broader ESA obligations. By the time Congress passed Public Law 99-625, the

voting members had heard clear statements from its co-sponsors and had had ample opportunities to review the Service's draft plan and hear testimony from the agency regarding its purpose and expected operation. *Id.* ¶60. In its Final EIS for the translocation program, the Service noted that it had prepared its final plan and implementing regulations in anticipation of the passage of Public Law 99-625 and had modified the plan and regulations to make sure they complied with the amended law. *Id.* ¶61. The Service's interpretation of its authority rested on a reasonable reading of the law and expressions of Congressional intent. It would be entirely unreasonable to assume based on this record that Congress intended to implicitly repeal key ESA protections for the southern sea otter. *See Mancari*, 417 U.S. at 550; *TVA*, 437 U.S. at 189–90. Plaintiffs' argument thus fails.

3. The Service's Interpretation of its Statutory Authority Is Reasonable in Light of the Rulemaking Process that Led to the Translocation Program

The Service's interpretation of Public Law 99-625 finds further support in the public comments it solicited as it developed the draft translocation plan and implementing regulations. Throughout the rulemaking process setting up the Translocation Program, the Service consistently expressed its understanding that the purpose of the program was to promote the sea otter's recovery and that the program would have to be terminated if it failed to fulfill that purpose. Deference must be given to the Service's reasonable interpretation of its statutorily-delegated powers in implementing the Translocation Program. *Chevron*, 467 U.S. at 843-44; *see also Rust*, 500 U.S. at 184.

1 The Service's rulemaking documents show that translocation was primarily
2 intended as a method of promoting sea otter recovery. The Service developed the
3 1982 Recovery Plan to identify the means to "restore the southern sea otter to non-
4 threatened status," as required by the ESA. Int. Statement of Facts ¶62. The
5 translocation program was developed pursuant to the Recovery Plan, as set forth in the
6 Recovery Plan itself:

7 > Sea otter translocation, if properly designed and implemented, should
8 > provide the necessary foundation for ultimately obtaining the Recovery Plan's objective and restoring the southern sea otter to a non-threatened status ….

9 *Id.* ¶63.

10 Throughout the multi-year process of developing the rule implementing the
11 translocation program, the Service repeatedly affirmed that it understood that the main
12 goal of the program Congress had authorized was to promote otter recovery. *See, e.g.*,
13 *id.* ¶64; *id.* ¶65 (DEIS)("[a] primary objective of the proposed translocation is to bring
14 the California sea otter closer to recovery and eventual delisting."); *see also id.* ¶66
15 (Final Environmental Impact Statement for Proposed Translocation of Southern Sea
16 Otters ["FEIS"]) ("[t[he translocation plan is designed primarily to move the southern
17 sea otter toward recovery pursuant to the ESA and to provide an opportunity to
18 increase our understanding of optimum sustainable population size (OSP) of sea otters
19 in order to make sound judgments in the future.").

20 The Service's Translocation Plan, developed as Congress considered and then
21 passed Public Law 99-625 authorizing the Service to carry out translocation, also
22 explicitly affirmed that the program being authorized was intended to promote otter
23 recovery:

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> Ultimately, the purpose of translocating sea otters is to satisfy certain legislative goals. These goals are 1) to recover the southern sea otter from its present 'threatened' status under the Endangered Species Act, and 2) to gain a better understanding of the characteristics of a sea otter population and the marine ecosystem when the sea otter population is within the range of its Optimum Sustainable Population (OSP) as defined by the [MMPA].

5 *Id.* ¶67.

6 Encouraged by the same commercial fishing interests that now challenge the
7 Service's authority, the Service explicitly considered that the program might fail, and
8 recognized the need to develop "failure" criteria to determine when program
9 termination would be appropriate: "[i]n addition to defining when the experimental
10 population would be considered established, criteria are also needed to describe the
11 circumstances in which the Service would consider the translocation to be a failure."
12 *Id.* ¶68. The Service specified that if any of the failure criteria were met, the Service
13 could conclude, after consultation with the affected State, "that the translocation has
14 failed to produce a viable, contained experimental population" and "the rulemaking
15 will be amended to terminate the experimental population." *Id.* ¶69.

16 The administrative record contains no evidence that the public was unaware of
17 the Service's understanding of its authority to terminate the program or objected to it.
18 In fact, Plaintiff California Abalone Association stated in its comments on the draft
19 translocation plan that it was "pleased to see an attempt at criteria for failed
20 translocation. If [the Service] can't prevent dispersal or can't successfully contain
21 otters, that should be grounds for failure …. [T]ranslocation must guarantee some end:
22 zonal management, delisting, OSP, or it's an academic exercise." *Id.* ¶70; *see also id.*
23 ¶71 (Comment from California Wetfish Producers, expressing similar support for the
24 development of failure criteria). In fact, the Service developed the failure criteria and

1 promulgated them in regulation in response to public comments. *Id.* ¶37. When the
2 court examined that rulemaking process in *The Otter Project*, it concluded that the
3 Service was not only authorized but in fact required to make a determination based on
4 the failure criteria regarding whether the program should be terminated. 712 F. Supp.
5 2d 999, 1006 (N.D. Cal. 2010).
6 In sum, both the legislative history of Public Law 99-625 and the rulemaking
7 process that produced the criteria for terminating the translocation program
8 demonstrate a clear and commonly held understanding that the Service had full
9 authority to develop failure criteria and terminate the program if those criteria were
10 not met. The Service's interpretation of Public Law 99-625 is reasonable as it is fully
11 consistent with its statutory obligations and the expressed intent of Congress.
12 *Chevron*, 467 U.S. at 843-44; *see also Rust*, 500 U.S. at 184; *INS v. Aguirre–Aguirre*,
13 526 U.S. at 424. Therefore, the Service's interpretation must receive deference and its
14 decision to terminate the translocation program based on that interpretation must be
15 upheld.
16 **III. The Court May Not Grant Plaintiffs' Requested Relief Because it Would Violate the Endangered Species Act**
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18 Plaintiffs ask the Court to order the Service to rescind its termination decision
19 and reinstate the translocation program. Complaint ¶¶58-60, Prayer for Relief, ECF
20 No. 1. However, even if Plaintiffs' claims had any merit, which they do not, this
21 Court may not override the Service's determination that continuing the translocation
22 was likely to jeopardize the sea otter's continued existence by ordering the Service to
23 take action contrary to its mandate. The relief Plaintiffs request is not available
24

because it would require the Court to order the Service to take actions that would violate the Service's duties under the ESA and other applicable laws.

Courts give great deference to an agency "acting within its expertise to make a scientific determination." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2010) (citing *Balt. Gas & Elec. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)) (a court must be "at its most deferential" when an agency is "making predictions, within its area of expertise, at the frontiers of science"); *Env. Def. Ctr. v. EPA*, 344 F.3d 832, 869 (9th Cir. 2003) (deference given to agency determinations "based on an evaluation of complex scientific data within the agency's technical expertise"). Additionally, as explained by the Ninth Circuit, where the administrative record "is voluminous, and contains a great mass of data and expert evaluation," the Court should give "substantial deference" to the agency's judgment. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1177-78 (9th Cir. 2004). In deciding to terminate the Translocation Program, the Service gave careful consideration to scientific data gathered over more than a decade, and used its scientific expertise to conclude that continuing the program would be detrimental to otter recovery. *See* Int. Statement of Facts ¶¶43-51. This is the very type of scientific judgment to which courts must provide deference.

In addition to providing deference to agencies on matters within their scientific expertise, courts provide agencies with deference on policy matters committed to agency discretion. *Chevron*, 467 U.S. at 864–66; *see also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches"). Here, Congress provided

1 the Service with discretion to determine how to promote the sea otter's recovery and
2 whether to implement the Translocation Program. Pub. L. No. 99-625, § 1(b); 16
3 U.S.C. §§ 1533(f), 1536(a)(1) -(2); Int. Statement of Facts ¶ 53. In carrying out its
4 duties, the Service properly recognized that the ESA expressly requires it to weigh any
5 competing interests in favor of the species. *See TVA,* 437 U.S. at 194. The Service
6 properly applied its expertise and legal authority in determining that continuing the
7 Translocation Program posed the likelihood of jeopardizing the continued existence of
8 the sea otter and had to be terminated. Given that the Service has acted reasonably
9 and within the legal limits of the ESA, the Court is constrained from substituting its
10 judgment for that of the Service and ordering the Service to reverse course.

11 Likewise, the Court cannot order the Service to take an illegal action that would
12 violate the requirements of the ESA or other applicable provisions of law. Here, as in
13 *Tennessee Valley Authority*, the Service is constrained by the requirements of the ESA
14 to avoid jeopardy and promote species recovery, and the Court cannot issue an order
15 requiring the Service to violate its mandate: "Congress has spoken in the plainest of
16 words, making it abundantly clear that the balance has been struck in favor of
17 affording endangered species the highest of priorities." 437 U.S. at 194. *See also*
18 *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001) (court
19 cannot "ignore the judgment of Congress, deliberately expressed in legislation"); *Am.*
20 *Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1286 (9th Cir.
21 1982) ("courts cannot enforce an arbitrator's award if it requires the performance of
22 an illegal act").

23 Reinstating a translocation program that has proved detrimental to the sea
24 otter's survival recovery would be contrary to the Service's obligations under the ESA

to avoid action that would jeopardize the continued existence of the southern sea otter. Therefore, the Court should not order the Service to restore the Translocation Program.

CONCLUSION

For these reasons, Intervenor-Defendants respectfully request that the Court uphold the Service's decision to terminate the translocation program by granting their motion for summary judgment and denying Plaintiffs' motion for summary judgment.

Respectfully submitted,

DATED: July 10, 2015

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