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

Case No. **CV 13-05517 DMG (CWx)** Date March 3, 2014

Title ***California Sea Urchin Commission, et al. v. Rachel Jacobson, et al.*** Page 1 of 12

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

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

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

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

I.
PROCEDURAL BACKGROUND

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

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

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

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

II.
FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

III.
LEGAL STANDARD

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

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

IV.
DISCUSSION

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

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

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

A. Statute of Limitations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The *Wind River* Exception Does Not Apply

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

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

Id. at 715.

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

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

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

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

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

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

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

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

B. Leave to Amend is Warranted

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

V. CONCLUSION

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

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

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

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

IT IS SO ORDERED.