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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 **CALIFORNIA SEA URCHIN**  
**COMMISSION, et al.,**

12 Plaintiffs,

13 v.

14 **MICHAEL BEAN, et al.,**

15 Defendants.

16 **CENTER FOR BIOLOGICAL**  
17 **DIVERSITY, et al.,**

18 Intervenor-Defendants.  
19

No. 2:14-cv-08499-JFW-CW

**PLAINTIFFS'**  
**MOTION FOR**  
**SUMMARY JUDGMENT**

Date: September 21, 2015  
Time: 1:30 p.m.  
Courtroom 16  
Hon. John F. Walter, Judge

21 Pursuant to Federal Rule of Civil Procedure 56, The California Sea Urchin  
22 Commission, California Abalone Association, and Commercial Fishermen of Santa  
23 Barbara (the fishermen) move for summary judgment on their claim that the U.S.  
24 Fish and Wildlife Service illegally denied their petition seeking the rescission of a  
25 2012 decision, 77 Fed. Reg. 75,266, and aspects of a 1987 regulation, 52 Fed. Reg.  
26 29,754, that conflict with a federal statute, Pub. L. No. 99-625. As the  
27 accompanying Statement of Uncontroverted Facts and Conclusions of Law and  
28

///  
28

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1 Memorandum of Points and Authorities explain, there is no genuine dispute of  
2 material fact and the fishermen are entitled to judgment as a matter of law.

3 DATED: June 17, 2015.

4 Respectfully submitted,  
5 M. REED HOPPER  
6 JONATHAN WOOD

7 By           /s/ Jonathan Wood            
8 JONATHAN WOOD

9 Attorneys for Plaintiffs  
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No. 2:14-cv-08499-JFW-CW

**MEMORANDUM**  
**OF POINTS AND**  
**AUTHORITIES IN**  
**SUPPORT OF PLAINTIFFS'**  
**MOTION FOR**  
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**INTRODUCTION**

1  
2 Congress passed Public Law No. 99-625, 100 Stat. 3500 (1986), to promote  
3 recovery of the California sea otter while mitigating the negative consequences that  
4 otter expansion could have on Southern California’s fishery and fishermen. *See* Pub.  
5 L. No. 99-625; *see also* 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012), *reproduced at*  
6 AR5809. This statute gave the U.S. Fish and Wildlife Service authority to establish  
7 a new population of otters on San Nicolas Island, while mandating that it also  
8 establish a management zone around the population to protect the fishery from  
9 predation and fishermen from criminal punishment for accidentally harming otters  
10 while pursuing their trade. Pub. L. No. 99-625. Congress gave the Service *no*  
11 authority to terminate these protections.

12 Nonetheless, the Service has asserted the authority to terminate them and done  
13 so. Pl.’s Proposed Statement of Uncontroverted Facts and Conclusions of Law ¶¶ 7,  
14 10-11 (hereinafter “Statement of Uncontroverted Facts”); *see* 77 Fed. Reg. at 75,266-  
15 97; 52 Fed. Reg. 29,754 (Aug. 11, 1987). Both actions violate the statute. Not only  
16 does the text provide no support for such authority—in fact, it forecloses it—but  
17 interpreting it to do so would conflict with the statute’s purpose and the doctrine of  
18 constitutional avoidance. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1133-34 (9th  
19 Cir. 2013) (doctrine of constitutional avoidance); 132 Cong. Rec. S17322-23  
20 (Oct. 18, 1986), *reproduced at* Statement of Uncontroverted Facts Attachment 1;  
21 H.R. Rep. No. 99-124 at 14 (Oct. 18, 1986), *reproduced at* AR1304 (the purpose of  
22 the statute is to “provide assurances to the state, the commercial and recreational  
23 fishing industries, and the oil and gas community”). Consequently, this Court should  
24 order Defendants to grant Plaintiffs California Sea Urchin Commission, California  
25 Abalone Association, and Commercial Fishermen of Santa Barbara’s (collectively  
26 the fishermen) petition and restore the management zone. 5 U.S.C. § 553(e); 5  
27 U.S.C. § 706(2)(C).

28 ///

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## BACKGROUND

The southern sea otter—also known as the California sea otter—has been listed as a threatened species under the Endangered Species Act since 1977. Statement of Uncontroverted Facts ¶ 1. Historically, the chief threat to this species was commercial fur harvesting. *Id.* ¶ 2. However, hunting of the animal was outlawed under both state and federal law by 1913. *Id.* At the time of listing, the species was at risk because its small population size and range made it vulnerable to catastrophic oil spills. *Id.* The animals can also accidentally become ensnared in nets and traps used by commercial fishermen. *Id.* Under both the Endangered Species Act’s and the Marine Mammal Protection Act’s broad prohibitions against “take”<sup>1</sup> of protected species, a fishermen who accidently catches an otter could face substantial civil and criminal penalties, including imprisonment. *Id.* ¶ 1; 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a).

In the early 1980s, the Service decided the best way to mitigate the risks posed by oil spills was to establish at least one new colony of sea otters sufficiently far away from the existing population that one spill could not affect both. Statement of Uncontroverted Facts ¶ 3. Because the Marine Mammal Protection Act barred the Service from capturing and moving otters for this purpose, the plan required legislation to authorize it. *Id.* This plan proved controversial because otter expansion could have significant deleterious effects on local fisheries and the people whose livelihoods depend upon them. *See id.* The otter is a voracious predator that, owing to its lack of blubber, must consume up to a third of its body weight per day to keep warm. *See id.* ¶ 4. If not controlled, this expansion could decimate Southern California’s shellfishery. *See id.* ¶ 5; AR1720 (“Unless action is taken to control

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<sup>1</sup> The Endangered Species Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Incidentally causing any of these impacts to a listed species is a violation that could subject an individual to civil and criminal punishment. 16 U.S.C. § 1540.



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1 | population growth and continued range expansion, the shellfisheries of the entire  
 2 | Southern California Bight, estimated at \$7.9 million per year for commercial  
 3 | fisheries, could be at risk.”). It could also subject fishermen to criminal punishment  
 4 | for accidentally getting too near or bothering an otter while fishing. 16 U.S.C.  
 5 | § 1538(a); 16 U.S.C. § 1371(a).

6 | To balance the otter’s recovery and these threats to the fishery, Congress  
 7 | passed Public Law No. 99-625, codifying a compromise between the Service, the  
 8 | state, conservation groups, fishermen, and other affected interests. Statement of  
 9 | Uncontroverted Facts ¶ 6. That statute promoted otter conservation by authorizing  
 10 | the Service to relocate California sea otters outside their then existing range. *See id.*;  
 11 | 77 Fed. Reg. at 75,268. But, to protect the fishery, it also requires the Service to  
 12 | establish a “management zone” around the relocated otters. Statement of  
 13 | Uncontroverted Facts ¶ 6. The statute directs the Service to remove otters that enter  
 14 | this zone using all feasible nonlethal means and exempts otherwise lawful activities  
 15 | that incidentally harm an otter from the Endangered Species and Marine Mammal  
 16 | Protection Acts’ “take” prohibitions. Statement of Uncontroverted Facts ¶ 6; Pub.  
 17 | L. No. 99-625.

18 | Pursuant to this statute, the Service adopted a regulation in 1987 providing for  
 19 | the relocation of otters to San Nicolas Island and establishing the management zone  
 20 | from Point Conception to the Mexican border. Statement of Uncontroverted Facts  
 21 | ¶ 7; *see* 52 Fed. Reg. at 29,765-70. The regulation also asserted the authority to  
 22 | declare the program a failure and annul the statutory protections governing the  
 23 | management zone. Statement of Uncontroverted Facts ¶ 7; *see* 52 Fed. Reg. at  
 24 | 29,772. It also contained criteria to govern the exercise of that authority. Statement  
 25 | of Uncontroverted Facts ¶ 7. These criteria were (1) whether, after a year or more,  
 26 | no otters remained on San Nicolas Island and the Service could not determine why;  
 27 | (2) whether, three years into the program, fewer than 25 otters remained and the  
 28 | Service could not determine why; (3) whether, two years after the Service stopped

1 moving otters to San Nicolas Island, the population was declining at a significant  
 2 rate or not reproducing; (4) whether dispersal of otters into the management zone is  
 3 sufficient to demonstrate that containment is impossible; and (5) whether the  
 4 colony's continued survival was unlikely because of a threat such as a military action  
 5 for national security. *Id.*; see 52 Fed. Reg. 29,772. If, according to these criteria, the  
 6 plan had failed, and the causes of that failure could not be determined, the otters  
 7 would be removed from San Nicolas Island and returned to their existing range and  
 8 the management zone's protections would be annulled. See Statement of  
 9 Uncontroverted Facts ¶ 7; 52 Fed. Reg. 29,772.

10 Between 1987 and 1990, 140 otters were released on San Nicolas Island.  
 11 Statement of Uncontroverted Facts ¶ 8. Many of these animals swam back to the  
 12 parent population, moved to the management zone, or died as a result of the stress  
 13 of having been moved. See *id.* In 1991, the Service stopped moving otters to  
 14 San Nicolas Island. See *id.* Consequently, the population on San Nicolas Island was  
 15 initially smaller than expected.

16 From 1987 to 1993, the Service captured otters that wandered into the  
 17 management zone and returned them to the parent population. *Id.* ¶ 9 However,  
 18 concluding that there were no nonlethal means to capture otters found in the  
 19 management zone, the Service suspended these activities in 1994. See *id.*

20 Twenty-five years later, the Service adopted a final rule terminating the  
 21 program and relieving itself of its obligations under the statute. Statement of  
 22 Uncontroverted Facts ¶ 10; see 77 Fed. Reg. at 75,266-97. The population on  
 23 San Nicolas Island is approximately 50 adult sea otters and their pups. Statement of  
 24 Uncontroverted Facts ¶ 10. It is healthy and growing at an average of 7% per year,  
 25 but currently too small to provide for repopulation, should the parent population be  
 26 affected by a catastrophic oil spill. *Id.*

27 This termination decision relied upon the assertion of authority and  
 28 termination criteria contained in the 1987 regulation. 77 Fed. Reg. at 75,287-89. It

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1 | was based on the fact that the newly established population did not reach 25 otters  
 2 | within the first three years—nearly 25 years ago—because of the difficulties of  
 3 | containment and translocation. Statement of Uncontroverted Facts ¶ 10; *see* 77 Fed.  
 4 | Reg. at 75,288. The Service gave no consideration to the healthy and growing  
 5 | population of otters on San Nicolas Island today. Statement of Uncontroverted Facts  
 6 | ¶ 10; 77 Fed. Reg. at 75,278. The termination decision eliminated all of the statute’s  
 7 | protections for the management zone, including the fishermen’s exemption from  
 8 | criminal prosecution for take. Statement of Uncontroverted Facts ¶ 11; *see* 77 Fed.  
 9 | Reg. at 75,293.

10 | Concerned about this consequence of the Service’s decision, the fishermen  
 11 | filed a lawsuit challenging the termination decision as inconsistent with the statute.  
 12 | *See Cal. Sea Urchin Comm’n v. Jacobson*, No. 2:13-cv-05517 (E.D. Cal. dismissed  
 13 | Mar. 3, 2014). That challenge was dismissed on statute of limitations grounds and  
 14 | is now on appeal to the Ninth Circuit.

15 | The fishermen also filed a petition under the Administrative Procedure Act  
 16 | seeking the restoration of the management zone. Statement of Uncontroverted Facts  
 17 | ¶ 12. In particular, it asked the Service to rescind the termination decision and  
 18 | amend the 1987 regulation to remove the failure criteria. *See id.* On July 28, 2014,  
 19 | the Service denied the petition, concluding that the failure criteria—along with the  
 20 | entire 1987 regulation—has already been rescinded by the termination decision, the  
 21 | termination decision is not the proper subject of a petition, and rejecting the  
 22 | fishermen’s legal argument. Statement of Uncontroverted Facts ¶¶ 13-16.

## 23 | ARGUMENT

### 24 | I

#### 25 | STANDARD OF REVIEW

26 | Summary judgment is appropriate when there is no genuine dispute as to any  
 27 | material fact and a party can show that it is entitled to judgment as a matter of law.  
 28 | Fed. R. Civ. P. 56. The fishermen’s Administrative Procedure Act claim must be

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1 | decided on the basis of the administrative record compiled by the Service.  
2 | *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir.  
3 | 1994). Consequently, there are no facts in dispute and summary judgment is  
4 | appropriate. *See id.* at 1472.

5 | Under the Administrative Procedure Act, challenges to an agency’s fact  
6 | finding or exercise of judgment are reviewed deferentially, and can be held unlawful  
7 | if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
8 | law.” 5 U.S.C. § 706(2)(A); *See Nw. Ecosystem Alliance v. U.S. Fish & Wildlife*  
9 | *Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (discussing judicial review under the  
10 | arbitrary and capricious standard). The Court interprets statutes de novo, however,  
11 | with deference given to an agency’s reasonable interpretation of ambiguous statutory  
12 | provisions entrusted to its implementation under *Chevron, U.S.A., Inc. v. Natural*  
13 | *Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 5 U.S.C. § 706(2)(C);  
14 | *Natural Resources Defense Council v. U.S. E.P.A.*, 779 F.3d 1119, 1125-26 (9th Cir.  
15 | 2015).

16 | **II**

17 | **THE ADMINISTRATIVE PROCEDURE ACT**  
18 | **AUTHORIZES THE PETITION FOR THE**  
19 | **RESTORATION OF THE MANAGEMENT ZONE**

20 | The Administrative Procedure Act guarantees the right to petition for the  
21 | issuance, amendment, or repeal of any rule. 5 U.S.C. § 553(e). For these purposes,  
22 | “rule” is defined very broadly. It includes “the whole or a part of an agency  
23 | statement of general or particular applicability and future effect designed to  
24 | implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). The  
25 | fishermen’s petition easily fits within this statutory right and the Service’s denial on  
26 | that basis should be reversed.

27 | The fishermen’s request for the rescission of the termination decision is a valid  
28 | petition for the repeal of a rule. *See* 5 U.S.C. § 553(e); AR5843-50. The termination  
decision implements and prescribes law and policy. Most obviously, it declares the

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1 | translocation program a failure and terminates the management zone. *See* Statement  
2 | of Uncontroverted Facts ¶ 10; 77 Fed. Reg. at 75,287-89. It rescinded a regulation,  
3 | significantly changing the law that applies to the regulated public. *See* 5 U.S.C.  
4 | § 551(4); *see also Weight Watchers Int’l, Inc. v. F.T.C.*, 47 F.3d 990, 991-92 (9th  
5 | Cir. 1995) (challenge to denial of petition to cease enforcing a regulation). In  
6 | particular, it subjects anyone who accidentally harms a sea otter in the former  
7 | management zone to civil and criminal penalties under the Marine Mammal  
8 | Protection and Endangered Species Acts. *See* Statement of Uncontroverted Facts  
9 | ¶ 11; 77 Fed. Reg. at 75,287-89. Unsurprisingly, given this, the Service itself  
10 | identified the termination decision as a “final rule.” AR5807; 77 Fed. Reg. at  
11 | 75,266.

12 |         Similarly, the fishermen’s petition seeking to amend the 1987 regulation is a  
13 | valid petition to amend a “rule.” *See* Statement of Uncontroverted Facts ¶ 12. The  
14 | Service didn’t conclude otherwise but asserts that there is nothing to amend in light  
15 | of the termination decision’s repeal of the 1987 regulation. *See* Statement of  
16 | Uncontroverted Facts ¶ 14. This argument is mere sophistry. If, as the fishermen  
17 | contend, the termination decision itself violates the statute, it is invalid and must be  
18 | rescinded, including its repeal of the 1987 regulations’ protections for the  
19 | management zone. The Service’s contrary conclusion is due solely to its decision  
20 | to consider the request to amend the regulation before the request to rescind the  
21 | termination decision. *See id.* If the order is reversed, the regulation continues in  
22 | force and the regulation can be amended as requested by the fishermen. *See*  
23 | Statement of Uncontroverted Facts ¶ 12. Consequently, the fishermen properly  
24 | petitioned for the repeal of the termination decision and amendment of the 1987  
25 | regulation.

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III

**PUBLIC LAW NO. 99-625 UNAMBIGUOUSLY DENIES THE SERVICE ANY AUTHORITY TO TERMINATE THE MANAGEMENT ZONE**

When interpreting a statute, the Court’s chief responsibility is to discern Congress’ intent in enacting it. *See United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999). The primary focus of that search must be the plain meaning of the language in question. *See United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005). If the statute’s language is plain and unambiguous, that meaning will control. *See United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005); *see also Chevron*, 467 U.S. at 842 (courts must first ask “whether Congress has directly spoken to the precise question at issue”). Before declaring statutory language ambiguous, the Court must also look to the language’s context and canons of statutory interpretation. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

**A. Public Law No. 99-625 Provides No Authority for the Service To Terminate the Management Zone’s Protections for Fishermen**

Public Law No. 99-625 is a straightforward statute designed to balance sea otter recovery against its consequences for Southern California’s fishery and fishermen. It permits the Service to develop a plan for the relocation and management of a population of otters from their existing range to another location. Pub. L. No. 99-625, § 1(b). Any such plan “shall” specify a “management zone” surrounding this new population. *Id.* § 1(b)(4). The purpose of this zone is “to (i) facilitate the management of sea otters and the containment of the experimental population . . . and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone . . . .” *Id.* To effectuate this purpose, the statute provides that “any incidental taking of [an otter] during the course of an otherwise lawful activity within the management zone[] may not be treated as a violation of the [Endangered Species] Act or the Marine Mammal Protection Act of

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1 | 1972.” *Id.* § 1(c)(2). This exemption was designed to protect fishermen and others  
 2 | who pursue their livelihoods in Southern California’s waters. *See* 132 Cong. Rec.  
 3 | S17321-22 (Oct. 18, 1986), *reproduced at* Statement of Uncontroverted Facts  
 4 | Attachment 1.

5 |         If the Service opts to exercise this authority, the statute provides that it “shall”  
 6 | implement the plan, including the management zone’s protections. Pub. L. No. 99-  
 7 | 625, § 1(d). Consequently, this case ultimately comes down to whether the statute’s  
 8 | command that the Service “shall” implement the plan and its protections for the  
 9 | fishermen gives the Service discretion not to do so.

10 |         “Shall” is not ambiguous. *See Nat’l Ass’n of Home Builders v. Defenders of*  
 11 | *Wildlife*, 551 U.S. 644, 661-62 (2007) (“By its terms, the statutory language [‘shall’]  
 12 | is mandatory . . .”). It imposes a mandatory, discretionless obligation. *Lopez v.*  
 13 | *Davis*, 531 U.S. 230, 241 (2001) (Congress’ “use of a mandatory ‘shall’ . . .  
 14 | impose[s] discretionless obligations.”); *Association of Civilian Technicians v. FLRA*,  
 15 | 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a  
 16 | command that admits of no discretion on the part of the person instructed to carry out  
 17 | the directive.”). Thus, the statute bound the Service to implement the statutory  
 18 | protections for the management zone if it chose to exercise its discretion to move  
 19 | otters into Southern California. *See* Pub. L. No. 99-625, § 1(d); *see also id.* § 1(b)(4)  
 20 | (the management zone’s protection “shall” be included in the plan). The statute does  
 21 | not provide for this obligation to expire at any time. Pub. L. No. 99-625. The  
 22 | Service accepted the authority granted to it by moving otters to San Nicolas Island.  
 23 | *See* Statement of Uncontroverted Facts ¶ 7; 77 Fed. Reg. at 75,269. As a  
 24 | consequence, the statute imposes a discretionless obligation to implement the  
 25 | management zone’s protections.

26 |         Nothing in the statutory text permits the Service to disclaim its statutory  
 27 | obligation. And its rationale for doing so is belied by the statute. In the Federal  
 28 | Register notice for the termination decision, the Service explained that it was taking

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1 | this step because it determined that continuing these protections would likely  
 2 | jeopardize the sea otter’s recovery. *See* 77 Fed. Reg. at 75,273; *see also* 16 U.S.C.  
 3 | § 1536(a)(2) (“Each Federal agency shall . . . insure that any action authorized,  
 4 | funded, or carried out by such agency . . . is not likely to jeopardize” an endangered  
 5 | or threatened species.). However, this is no basis to avoid the Service’s obligations  
 6 | under Public Law No. 99-625 because the statute expressly provides that “no act”  
 7 | by the Service to implement the plan can be treated as a violation of “any provision”  
 8 | of the Endangered Species Act or the Marine Mammal Protection Act. Pub. L.  
 9 | No. 99-625, § 1(f). Consequently, the Service’s assertion of authority to terminate  
 10 | these protections and subsequent termination of them is unlawful.

11 | **B. Interpreting the Statute To Allow the Service To**  
 12 | **Terminate the Management Zone’s Protections**  
 13 | **Would Raise a Serious Constitutional Question**

13 | Even if Public Law No. 99-625’s text were otherwise amenable to the  
 14 | Service’s interpretation, the doctrine of constitutional avoidance would nonetheless  
 15 | foreclose it. Under this doctrine, an interpretation of a statute which raises  
 16 | constitutional concerns must be rejected if there is a plausible interpretation that  
 17 | could avoid them. *See Rodriguez*, 715 F.3d at 1133-34.

18 | The Service’s interpretation raises constitutional concern under the  
 19 | nondelegation doctrine. *See* C. Boyden Gray, *The Nondelegation Canon’s Neglected*  
 20 | *History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619, 621-26 (2015)  
 21 | (describing cases applying the avoidance canon to statutes that raise nondelegation  
 22 | concerns). This doctrine forbids Congress from delegating authority to agencies  
 23 | without providing an intelligible principle to guide its exercise. *See J.W. Hampton,*  
 24 | *Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

25 | Violations of the nondelegation doctrine have been exceedingly rare because  
 26 | the standard—“intelligible principle”—is extremely lenient and likely satisfied so  
 27 | long as Congress provides *some* criteria to guide an agency’s hand. *See Whitman v.*  
 28 | *Am. Trucking Associations*, 531 U.S. 457, 474 (2001). If Public Law No. 99-625



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1 | authorizes the Service to terminate the management zone’s protections, it provides  
2 | *no* criteria to guide the Service’s decision to do so. Instead, such authority would be  
3 | subject to the Service’s unconstrained discretion. Consequently, this would be the  
4 | rare exception that would violate the doctrine. *See Panama Refining Co. v. Ryan*,  
5 | 293 U.S. 388, 414-16 (1935) (statute providing *no* guidance for the President’s  
6 | exercise of discretion violates nondelegation doctrine); *see also Clinton v. City of*  
7 | *New York*, 524 U.S. 417, 464-65 (1998) (Scalia, J., concurring) (the nondelegation  
8 | doctrine applies to executive decisions to terminate or set aside statutory provisions).  
9 | Since, as explained below, this power would conflict with Congress’ express purpose  
10 | of providing certainty to everyone affected by otter relocation—including the  
11 | fishermen—context further reinforces this conclusion. *Cf. In re Nat’l Sec. Agency*  
12 | *Telecomms. Records Litig.*, 671 F.3d 881, 897 (9th Cir. 2011) (a vague intelligible  
13 | principle can be made concrete by context and history).

14 |         The only principles that purportedly constrain the Service’s termination  
15 | authority are of the Service’s own making. Statement of Uncontroverted Fact ¶ 7;  
16 | 52 Fed. Reg. at 29,772. However, an agency can’t cure an unconstitutional  
17 | delegation through self-imposed limits. *See Whitman*, 531 U.S. at 473. As the  
18 | Supreme Court has explained, the agency’s exercise of its unconstrained authority  
19 | to prescribe those limits *itself* violates the nondelegation doctrine. *See id.*

20 |         This constitutional concern can be avoided by adopting the fishermen’s  
21 | interpretation of the statute. Under it, the Service has no authority to terminate the  
22 | management zone’s protections. Therefore, the need for an intelligible principle  
23 | doesn’t arise.

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IV

**THE STATUTE CAN'T  
REASONABLY BE INTERPRETED TO  
AUTHORIZE THE SERVICE TO TERMINATE  
THE MANAGEMENT ZONE'S PROTECTIONS**

When confronted with ambiguous statutory text entrusted to an administrative agency to implement, courts presume that Congress empowered the agency to resolve that ambiguity. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014). However, even under this deferential framework, the agency's interpretation must be reasonable. *See id.* at 2442. An agency interpretation that is inconsistent with the structure of a statute or its purpose is not reasonable and unworthy of deference. *See id.*

Although this Court needn't reach the issue because the statute isn't ambiguous, the Service's interpretation is also unreasonable because it would frustrate Congress' purpose of facilitating sea otter recovery while preventing conflict with other fishery resources. Pub. L. No. 99-625, § 1(b)(4). Since the statute provides no criteria for terminating these protections, the Service's interpretation would mean that it could terminate the management zone for any reason or no reason whatsoever. Obviously, this would not further Congress' goal of preventing conflict between the otter and other fishery resources but would allow the Service to sacrifice those other resources to promote the otter's expansion. *See 77 Fed. Reg. at 75,276-87* (discussing the effects of otter predation on Southern California's fishery due to population expansion without the management zone).

Legislative history reinforces this conclusion. It shows that Congress was deeply concerned about the threat that sea otter expansion poses to the fishery. *See 132 Cong. Rec. S17321-22* (statement of Sen. Chafee), *reproduced at* Statement of Uncontroverted Facts Attachment 1. Public Law No. 99-625 was a consensus effort by the Service, conservation groups, and fishermen to promote the otter's recovery while mitigating the risk to those whose livelihoods depend on Southern California's

1 | waters. *See* 132 Cong. Rec. S17322 (statement of Sen. Cranston). These risks are  
 2 | not the least bit mitigated under the Service’s interpretation.

3 |       The sea otter provisions in Public Law No. 99-625 were originally proposed  
 4 | in H.R. 1027, the Endangered Species Authorization for Fiscal Years 1986, 1987,  
 5 | and 1988. *See* AR0390-AR0414. The legislative history for that bill also reflects  
 6 | a purpose contrary to the Service’s interpretation. It shows that legislation was  
 7 | required in order to cement a compromise between the Service, conservation groups,  
 8 | and industries affected by sea otter expansion. *See* AR0400. The House Report for  
 9 | the Committee on Merchant Marine and Fisheries for H.R. 1027 specifically notes  
 10 | the severe consequences for fishermen that could result without the statute’s  
 11 | protections. AR0405 (“[T]he mere presence of otters in an area can result in  
 12 | restrictions on fisheries . . .”). The statute was “intended to avoid such conflicts by  
 13 | providing for the containment and management of sea otters and by clearly  
 14 | specifying in the plan those areas in which the provisions of Sections 7 and 9 of the  
 15 | ESA will apply.” AR0405-AR0406. This was to be a “comprehensive” resolution  
 16 | of these potential conflicts. AR0406.

17 |       A key part of that comprehensive resolution was the exemption from criminal  
 18 | liability for fishermen. *See* AR0408. Representative Breaux described the  
 19 | provisions as “provid[ing] . . . *assurances* to the State, commercial, and recreational  
 20 | fishing interests, . . . and involved environmental organizations regarding the  
 21 | relationship to, and effect of, the translocation to their respective activities and  
 22 | areas of concern.” AR0417 (emphasis added).<sup>2</sup> Consequently, he explained,

23 | \_\_\_\_\_  
 24 | <sup>2</sup> The only legislative history supporting the Service’s interpretation is  
 25 | Representative Breaux’s statement that the Service should specify factors to  
 26 | determine whether the translocation is successful and, if not, repeal the regulation  
 27 | and return the otters to the parent population. AR0419. This lone congressman’s  
 28 | statement can’t supplant the clear statutory text or create ambiguity where there isn’t  
 any. *See Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d  
 301, 304 (9th Cir. 1995) (“[L]egislative history—no matter how clear—can’t  
 override statutory text. Where the statute’s language ‘can be construed in a

(continued...)

1 “[c]onsiderable significance is attached to the specification of the translocation and  
 2 management zones.” AR0418. At heart, the purpose of the provisions was to  
 3 “strike[] a balance between providing assurances to affected interests and  
 4 maintaining sufficient protections and management flexibility to meet the recovery  
 5 needs of the California sea otter.” AR0419. The Committee Report confirms that  
 6 providing certainty to fishermen and others threatened by sea otter expansion was  
 7 a key purpose of the provisions. *See* AR1301 (“[T]he Committee believes the need  
 8 exists to make special provisions for the translocation of sea otters to provide a  
 9 greater degree of certainty to the parties concerned.”).

10 The Service’s interpretation of the statute as granting unconstrained authority  
 11 to terminate protections of central importance to this compromise legislation would  
 12 conflict with these purposes. Under it, the fishermen received no assurances or  
 13 certainty that they would be protected from criminal prosecution as otters expand  
 14 into their fishery. Instead, that liability could be imposed on them by the agency at  
 15 any time, for any reason. Therefore, the Service’s interpretation is unreasonable and  
 16 not deserving of deference. *See Utility Air Regulatory Group*, 134 S. Ct. at 2444 (an  
 17 unreasonable interpretation is not entitled to deference).

## 18 CONCLUSION

19 Nothing in Public Law No. 99-625 grants the Service authority to terminate  
 20 the management zone’s protections for fishermen. As a consequence, its assertion  
 21 of such authority raises a significant constitutional question—the lack of criteria or  
 22

23 \_\_\_\_\_  
 24 <sup>2</sup> (...continued)

24 consistent and workable fashion,’ we must put aside contrary legislative history.”  
 25 (quoting *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986))). Nor  
 26 is a remark of a single legislator—even a bill’s sponsor—controlling or entitled to  
 27 much weight. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447  
 28 U.S. 102, 118 (1980). Representative Breaux’s statement is particularly unhelpful  
 because it doesn’t identify how the statute authorizes the Service to terminate the  
 management zone. *See* AR0419. Nor does it attempt to square this with the  
 acknowledged purpose of the statute—to provide certainty to all interested parties  
 that the deal they struck would bind everyone, including the Service. *See id.*

1 principles to guide its exercise would render the statute unconstitutional under the  
2 nondelegation doctrine. To avoid this result, the Court should interpret the statute  
3 according to its plain text. When Congress provided that the Service “shall”  
4 implement the management zone’s protections, it meant it. The Service’s violation  
5 of this command is unlawful and the fishermen’s petition seeking to compel the  
6 Service to conform its conduct to the statute must be granted.

7 DATED: June 17, 2015.

8 Respectfully submitted,

9 M. REED HOPPER  
10 JONATHAN WOOD

11 By           /s/ Jonathan Wood            
12 JONATHAN WOOD

13 Attorneys for Plaintiffs  
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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 **CALIFORNIA SEA URCHIN**  
**COMMISSION, et al.,**

12 Plaintiffs,

13 v.

14 **MICHAEL BEAN, et al.,**

15 Defendants.

16 **CENTER FOR BIOLOGICAL**  
**DIVERSITY, et al.,**

17 Intervenor-Defendants.  
18  
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No. 2:14-cv-08499-JFW-CW

**[PROPOSED]**  
**STATEMENT OF**  
**UNCONTROVERTED**  
**FACTS AND**  
**CONCLUSIONS OF LAW**

Date: September 21, 2015  
Time: 1:30 p.m.  
Courtroom 16  
Hon. John F. Walter, Judge

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Pursuant to Local Rule 54-1, California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara (the fishermen) submit this Statement of Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment.

**STATEMENT OF UNCONTROVERTED FACTS**

Statement	Source
1. The Southern sea otter was listed as a threatened species under the Endangered Species Act in 1977.	1. 42 Fed. Reg. 2,968 (Jan. 14, 1977).
2. This species’ population was reduced by commercial fur harvesting, which was outlawed by both the state and federal governments in 1912 and 1913, respectively. Its small population size and range also makes it vulnerable to catastrophic oil spills. Southern sea otters can also become ensnared in nets and traps used by commercial fishermen.	2. AR3000; AR3000; AR3000.

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Statement	Source
<p>3. In the 1980s, the Service proposed to establish an additional, separate colony of sea otters that could be used to repopulate the species in the event of a catastrophic oil spill. Congressional authorization was necessary because the Marine Mammal Protection Act forbade the Service from capturing otters for this purpose.</p>	<p>3. AR3000; 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012); 132 Cong. Rec. S17321 (Oct. 18, 1986) (statement by Sen. Chafee).<sup>1</sup></p>
<p>4. Sea otters must consume up to a third of their body weight to maintain warmth. Their diet includes shellfish and sea urchin.</p>	<p>4. AR5228; AR5245; AR5228; AR5245.</p>
<p>5. Uncontrolled otter expansion threatens Southern California’s shellfisheries, including an estimated \$7.9 million in commercial fishing.</p>	<p>5. AR1720.</p>
<p>6. On November 7, 1986, Congress enacted Public Law No. 99-625, 100 Stat. 3500, authorizing the U.S. Fish and Wildlife Service to establish a program to translocate California sea otters to establish a new experimental population.</p>	<p>6. AR5809.</p>

<sup>1</sup> Because legislative history from 1986 is not readily available online, a courtesy copy of the Senate debate is provided in Attachment 1.



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Statement	Source
7. On August 11, 1987, the Service exercised this authority by adopting a regulation establishing the experimental population on San Nicolas Island, creating a management zone from Point Conception to the Mexican border, exempting fishermen and others from criminal liability for inadvertently harming sea otters in the management zone, and identifying criteria against which the Service would judge the project’s success.	7. AR5809-10.
8. From 1987 to 1990, the Service translocated 140 otters to San Nicolas Island. Many swam back to the parent population, moved to the management zone, or died due to stress.	8. AR5810; AR5810.
9. From 1987 to 1993, the Service captured otters that wandered into the management zone. However, the Service concluded in 1993 that there were no nonlethal means to continue doing so and stopped removing otters from the management zone.	9. AR5810; AR5810.

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Statement	Source
10. On December 19, 2012, the Service published a final decision declaring the translocation program a failure and terminating it.	10. AR5807-38.
11. The termination decision ended the management zone and removed the exemption from criminal prosecution for those that inadvertently harm sea otters in that area.	11. AR5830-31.
12. On April 24, 2014, the fishermen submitted a petition under the Administrative Procedure Act requesting the rescission of the termination decision and the failure criteria identified in the 1987 regulation, in effect requesting the reinstatement of the management zone.	12. AR5843-50; <i>see</i> Affidavit of David J. Goldenberg, attached hereto as Exhibit 1, and Affidavit of Michael Harrington, attached hereto as Exhibit 2.
13. On July 28, 2014, the Service denied the fishermen’s petition for three reasons.	13. AR5925.
14. The first reason given was that the failure criteria had already been rescinded as a consequence of the termination decision.	14. AR5925.

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Statement	Source
15. The second reason given was that the termination decision is not a “rule,” and thus not a proper subject of a petition under the Administrative Procedure Act.	15. AR5925.
16. The final reason given was that the Service rejected the fishermen’s legal argument why Public Law No. 99-625 compelled the requested rescissions and restoration of the management zone.	16. AR5925.

**CONCLUSIONS OF LAW**

Conclusion	Source
17. The termination decision is a “rule,” and thus the proper subject of a petition under the Administrative Procedure Act.	17. 5 U.S.C. § 551(4); 5 U.S.C. § 553(e).
18. Public Law No. 99-625 gives the Service no authority to terminate the management zone or its statutory protections for Southern California fisheries and fishermen.	18. An Act to Improve the Operation of Certain Fish and Wildlife Programs, Pub. L. No. 99-625, 100 Stat. 3500 (1986).
19. The termination decision conflicts with Public Law No. 99-625 and must therefore be rescinded as requested in the fishermen’s petition.	19. 5 U.S.C. § 706(2)(C).

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Conclusion	Source
20. In light of the termination decision’s illegality, the amendment of the 1987 regulation is a proper subject of a petition.	20. 5 U.S.C. § 551(4); 5 U.S.C. § 553(e).
21. The regulation’s failure criteria conflict with Public Law No. 99-625, are invalid, and must therefore be rescinded as requested in the fishermen’s petition.	21. 5 U.S.C. § 706(2)(C).

DATED: June 17, 2015.

Respectfully submitted,

M. REED HOPPER  
 JONATHAN WOOD

By           /s/ Jonathan Wood            
 JONATHAN WOOD

Attorneys for Plaintiffs

**EXHIBIT 1**

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 **CALIFORNIA SEA URCHIN**  
**COMMISSION, et al.,**

12 Plaintiffs,

13 v.

14 **MICHAEL BEAN, et al.,**

15 Defendants.  
16

17 **CENTER FOR BIOLOGICAL**  
**DIVERSITY, et al.,**

18 Intervenor-Defendants.  
19

No. 2:14-cv-08499-JFW-CW

**AFFIDAVIT OF**  
**DAVID J. GOLDENBERG**  
**IN SUPPORT OF**  
**PLAINTIFFS' MOTION**  
**FOR SUMMARY**  
**JUDGMENT**

Date: September 21, 2015  
Time: 1:30 p.m.  
Courtroom 16  
Hon. John F. Walter, Judge

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1 I, David J. Goldenberg, declare that:

2 1. I am the Executive Director of the California Sea Urchin Commission.  
3 My business address and phone number are P.O. Box 2077, Folsom, California  
4 95763-2077 and (916) 933-7054.

5 2. I have personal knowledge of the following facts and, if called as a  
6 witness, would testify to these facts under oath.

7 3. The California Sea Urchin Commission was organized by the state of  
8 California, to represent the interests of California's nearly 300 licensed sea urchin  
9 divers.

10 4. The Commission's mission is to ensure a reliable, sustainable supply  
11 of quality sea urchin products to consumers and enhance the performance of  
12 California's sea urchin industry.

13 5. The Commission is led by five elected commissioners and one  
14 commissioner appointed by the Secretary of Agriculture. It also has six alternate  
15 commissioners, one of which is appointed by the Secretary of Agriculture. There are  
16 also several non-voting representatives on the Commission, representing government  
17 entities with responsibilities relating to California's sea urchin fishery.

18 6. The Commission's efforts to promote the sea urchin fishery and its  
19 sustainable use have included a diver-based assessment program, promoting  
20 scientific research regarding the fishery, developing management programs for the  
21 fishery, advocating for those programs, leading public information and educational  
22 programs, and establishing quality standards for sea urchin harvest.

23 7. The Commission represents divers who operate in the former  
24 management zone terminated by the U.S. Fish and Wildlife's Decision to declare the  
25 sea otter translocation program a failure.

26 8. Sea otters prey on urchin and, over time, will reduce Southern  
27 California's fishery.

28 ///

1 9. As sea otters expand into the fishery, urchin divers will be at risk of  
2 violating the Endangered Species and Marine Mammal Protection Acts' take  
3 prohibition if they get too close to them, absent the management zone's protections.

4 10. The termination of the management zone also impairs the Commission's  
5 interests in the sustainability of the urchin fishery.

6 I declare under penalty of perjury that the foregoing is true and correct to the  
7 best of my knowledge, information, and belief.

8 Executed at Folsom, California, on June 11, 2015.

9  
10  
11   
12 DAVID J. GOLDENBERG

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 **CALIFORNIA SEA URCHIN**  
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17 **CENTER FOR BIOLOGICAL**  
**DIVERSITY, et al.,**

18 Intervenor-Defendants.  
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No. 2:14-cv-08499-JFW-CW

**AFFIDAVIT OF**  
**MICHAEL HARRINGTON**  
**IN SUPPORT OF**  
**PLAINTIFFS' MOTION**  
**FOR SUMMARY**  
**JUDGMENT**

Date: September 21, 2015  
Time: 1:30 p.m.  
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Hon. John F. Walter, Judge

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PACIFIC LEGAL FOUNDATION  
930 G Street  
Sacramento, CA 95814  
(916) 419-7111 FAX (916) 419-7747

1 I, Michael Harrington, declare that:

2 1. I have personal knowledge of the following facts and, if called as a  
3 witness, would testify to these facts under oath.

4 2. I have been a fisherman for over forty years. I began fishing for  
5 abalone in 1967 and continued doing so until 1997. I have also fished for sea urchin  
6 since 1969.

7 3. I am the Treasurer of the California Abalone Association.

8 4. The Association is a non-profit corporation that represents individuals  
9 who have engaged in abalone fishing or related businesses. Its mission is to restore  
10 and steward California's abalone fishery, using modern management concepts, to  
11 protect and enhance the abalone population. Through restoration and stewardship,  
12 the Association seeks to guarantee a sustainable fishing industry for the future.

13 5. The Association was formed in 1971 to promote abalone fishing and to  
14 advocate equitable and sound legislation to preserve and enhance the abalone fishing  
15 industry and its fishery.

16 6. It was involved in negotiating the compromise that led to the adoption  
17 of Public Law No. 99-625 and participated in the legislative process that enacted it.

18 7. This compromise legislation was and is extremely important to the  
19 Association and its members because, without the exemption for incidental take of  
20 the sea otter, the Association's members would be at risk of criminal prosecution for  
21 accidentally getting too near or bothering otters while fishing.

22 8. In 1997, Southern California's abalone fishery was closed due to  
23 concerns about the fishery's health.

24 9. To promote the recovery of the population so that fishing could resume,  
25 the Association and its members have worked closely with the National Park Service  
26 to install monitoring sites and equipment to study the health of the abalone fishery.  
27 This work led to a 2006 survey of the abalone fishery around San Miguel Island, the  
28 largest abalone survey ever performed in Southern California.

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1 10. The Association has met with state and federal regulatory agencies  
2 numerous times to discuss the moratorium and find ways to grow the fishery.

3 11. Over the last ten years, it has worked with state agencies to develop a  
4 plan that would allow abalone fishing to resume, subject to reasonable regulations.

5 12. To enhance these efforts, the Association has engaged in education  
6 campaigns to spread awareness of fishery issues amongst its members.

7 13. Absent the protections of the management zone, otter expansion into the  
8 fishery threatens to undermine the Association and the state's efforts to restore the  
9 abalone population. Because the abalone is prey for the otter, otter expansion would  
10 keep the abalone population too small to allow for sustainable fishing.

11 14. The Association has also promoted awareness of the termination of the  
12 management zone amongst its members and educated them and others interested in  
13 the fishery about the consequences that otter expansion could have on the efforts to  
14 restore and reopen California's abalone fishery.

15 15. I am also the Treasurer of the Commercial Fishermen of Santa Barbara  
16 (CFSB).

17 16. CFSB is a non-profit organization aimed at improving the economic and  
18 biological sustainability of Southern California's fishery by integrating regional  
19 efforts. It connects fishermen with each other and fishery scientists to develop a  
20 reasonable, collaborative management approach for the fishery. The ultimate goal  
21 of the organization is to maintain California's rich fishing heritage while promoting  
22 innovative, practical, and cooperative regional management.

23 17. CFSB represents the interests of the approximately 200 fishermen in the  
24 Santa Barbara harbor and has approximately 35 voting members. The voting  
25 members are individuals who earn a substantial portion of the livelihoods through  
26 commercial fishing.

27 18. CFSB is developing monitoring protocols and stock assessments for the  
28 fishery, to monitor its health and sustainability.

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1 19. In 2013, CFSB has commissioned studies of the economic impact that  
2 the fishery contributes to the Santa Barbara County economy. That study concluded  
3 that Santa Barbara's fishing industry is the 11th largest in California and contributes  
4 \$10.9 million to the local economy.

5 20. CFSB and its members have appeared at numerous meetings with state  
6 and local regulatory agencies to discuss the importance of Public Law No. 99-625  
7 and its protections for the management zone to the long-term health of the  
8 commercial fishery.

9 21. As sea otters expand into the fishery, CFSB's members will be at risk  
10 of violating the Endangered Species and Marine Mammal Protection Acts' take  
11 prohibition if they get too close to an otter or bother one while fishing.  
12 Consequently, the legality of the decision to terminate the management zone is of  
13 chief importance to the agency and its members.

14 22. On April 24, 2014, the California Sea Urchin Commission, California  
15 Abalone Association, and CFSB petitioned the U.S. Fish and Wildlife Service to  
16 restore the management zone in order to protect their interests and Southern  
17 California's fishermen.

18 23. As a sea urchin fishermen, the termination decision threatens me with  
19 criminal punishment for incidental take of sea otters. Under Public Law No. 99-625,  
20 my activities are exempt.

21 I declare under penalty of perjury that the foregoing is true and correct to the  
22 best of my knowledge, information, and belief.

23 Executed at Buellton, California, on June 15, 2015.

24  
25  
26   
27 MICHAEL HARRINGTON  
28

# **Attachment 1**

01SS FORM 51 (Rev. 11-82)

CONGRESSIONAL RECORD  
PROCEEDINGS AND DEBATES OF THE 99TH CONGRESS

SENATE

BILL	DATE	PAGE(S)
H. R. 4531	OCT 18 '86 (145)	S17320-23

ACTION:

**Wetlands Loan Act Extension:** Senate concurred in the amendments of the House to the Senate amendment to H.R. 4531, to extend the Wetlands Loan Act, to extend the authorization of funds.

Page S17320

and management of a population of California sea otters from the existing range of the parent population to another location. The plan, which must be developed by regulation and administered by the Service in cooperation with the appropriate State agency, shall include the following:

- (1) The number, age, and sex 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 specification of a zone (hereinafter referred to as the "translocation zone") to which the experimental population will be relocated. The zone must have appropriate characteristics for furthering the conservation of the species.
- (4) The specification of a zone (hereinafter referred to as the "management zone") that—
  - (A) surrounds the translocation zone; and
  - (B) does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.

The purpose of the management zone is to (i) facilitate the management of sea otters and the containment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

- (5) Measures, including an adequate funding mechanism, to isolate and contain the experimental population.
- (6) A description of the relationship of the implementation of the plan to the status of the species under the Act and to determinations of the Secretary under section 7 of the Act.

(c) STATUS OF MEMBERS OF THE EXPERIMENTAL POPULATION.—(1) Any member of the experimental population shall be treated while within the translocation zone as a threatened species for purposes of the Act, except that—

- (A) section 7 of the Act shall only apply to agency actions that—
  - (i) are undertaken within the translocation zone,
  - (ii) are not defense-related agency actions, and
  - (iii) are initiated after the date of the enactment of this section; and
- (B) with respect to defense-related actions within the translocation zone, members of the experimental population shall be treated as members of a species that is proposed to be listed under section 4 of the Act.

For purposes of this paragraph, the term "defense-related agency action" means an agency action proposed to be carried out directly by a military department.

- (2) For purposes of section 7 of the Act, any member of the experimental population shall be treated while within the management zone as a member of a species that is proposed to be listed under section 4 of the Act. Section 9 of the Act applies to members of the experimental population; except that any incidental taking of such a member during the course of an otherwise lawful activity within the management zone, may not be treated as a violation of the Act or the Marine Mammal Protection Act of 1972.

### EXTENSION OF WETLANDS LOAN ACT

Mr. DOLE. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 4531.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

*Resolved*, That the House agree to the amendment of the Senate to the bill (H.R. 4531) entitled "An Act to extend the Wetlands Loan Act, and for other purposes", with the following amendments:

On page 2, after line 5 of the Senate hand-engrossed amendment, insert:

Strike out all after line 2 on page 1 of the House bill, over to and including line 8 on page 2, and insert:

#### SECTION 1. TRANSLOCATION OF CALIFORNIA SEA OTTERS.

(a) DEFINITIONS.—For purposes of this section—

(1) The term "Act" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(2) The term "agency action" has the meaning given that term in section 7(a)(2) of the Act.

(3) The term "experimental population" means the population of sea otters provided for under a plan developed under subsection (b).

(4) The phrase "parent population" means the population of sea otters existing in California on the date on which proposed regulations setting forth a proposed plan under subsection (b) are issued.

(5) The phrase "prospective action" refers to any prospective agency action that—

(A) may affect either the experimental population or the parent population; and

(B) has evolved to the point where meaningful consultation under section 7(a)(2) or (3) of the Act can take place.

(6) The term "Secretary" means the Secretary of the Interior.

(7) The term "Service" means the United States Fish and Wildlife Service.

(b) PLAN SPECIFICATIONS.—The Secretary may develop and implement, in accordance with this section, plan for the relocation



October 18, 1986

S 17321

(d) **IMPLEMENTATION OF PLAN.**—The Secretary shall implement the plan developed under subsection (b)—

(1) after the Secretary provides an opinion under section 7(b) of the Act regarding each prospective action for which consultation was initiated by a Federal agency or requested by a prospective permit or license applicant before April 1, 1986; or

(2) if no consultation under section 7(a)(2) or (3) regarding any prospective action is initiated or requested by April 1, 1986, at any time after that date.

(e) **CONSULTATION AND EFFECT OF OPINION.**—A Federal agency shall promptly consult with the Secretary, under section 7(a)(3) of the Act, at the request of, and in cooperation with, any permit or license applicant regarding any prospective action. The time limitations applicable to consultations under section 7(a)(2) of the Act apply to consultations under the preceding sentence. In applying section 7(b)(3)(B) with respect to an opinion on a prospective action that is provided after consultation under section 7(a)(3), that opinion shall be treated as the opinion issued after consultation under section 7(a)(2) unless the Secretary finds, after notice and opportunity for comment in accordance with section 553 of title 5, United States Code, that a significant change has been made with respect to the action or that a significant change has occurred regarding the information used during the initial consultation. The interested party may petition the Secretary to make a finding under the preceding sentence. The Secretary may implement any reasonable and prudent alternatives specified in any opinion referred to in this subsection through appropriate agreements with any such Federal agency, prospective permit or license applicant, or other interested party.

(f) **CONSTRUCTION.**—For purposes of implementing the plan, no act by the Service, an authorized State agency, or an authorized agent of the Service or such an agency with respect to a sea otter that is necessary to effect the relocation or management of any sea otter under the plan may be treated as a violation of any provision of the Act or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).

Amend the title so as to read: "An Act to improve the operation of certain fish and wildlife programs."

Mr. CHAFEE. Mr. President, the House of Representatives has added a provision to H.R. 4531 that I support because it will help ensure the continued existence of the threatened California sea otter.

The sea otter once was found throughout much of the northern Pacific Ocean. This marine mammal ranged from the northern Japanese archipelago to Punta Abreojos, Mexico. However, the species' numbers were greatly reduced by the unrestricted harvests of commercial hunters during the 19th century. By the turn of the century only remnant sea otter populations existed in Russia, Alaska, British Columbia, and California. Since the International Fur Seal Treaty of 1911, sea otter numbers have increased in Alaska to the point where the species now occupies most of its former range.

The California sea otter assisted by this legislation expanded from approximately 50 animals near Point Sur in 1938 to an estimated 1,800 animals by the mid-1970's. The sea otter has

been protected under State law in California since 1913 and under the Federal Marine Mammal Protection Act and Endangered Species since 1972 and 1977, respectively. The listing of the California sea otter in 1977 as a threatened species under the Endangered Species Act and as a depleted species under the Marine Mammal Protection Act was based, in part, on the species' restricted range and the risk posed to it by a catastrophic oil spill. In addition, we now know that gill netting is a more immediate threat to the sea otters' continued existence.

Unfortunately, the California sea otter population has declined in size since the mid-1970's despite improved Federal protection under the Endangered Species Act and Marine Mammal Protection Act. Consequently, there is a pressing need to take additional action to improve the prospects of protecting this highly vulnerable wildlife species in perpetuity.

A key component in our efforts to ensure that sea otters will survive threats from oil and gas activities and gill netting is the establishment of at least one additional population outside their current range off the California coast. People have been talking for years about the translocation of California sea otters and the related management of that population. Little progress has been made toward that objective, however, because of intense conflicts among the various interests and government agencies.

Mr. President, H.R. 4531, as amended by the House, provides a framework that appears likely to resolve the conflicts among the parties affected by translocation of sea otters sufficiently to allow establishment of a second otter population with little further delay. Most of the interests concerned were involved in drafting this legislation framework. As a result, the sea otter provision in the House bill represents a consensus approach for proceeding with the proposed translocation.

The California sea otter provision of H.R. 4531 is a freestanding provision based on concepts similar to the Endangered Species Act. The impetus for this provision stems partly from a possible conflict between the goals of section 10(j) of the Endangered Species Act and the prohibitions on taking of the Marine Mammal Protection Act. Section 10(j) provides for the establishment of "experimental populations" to enhance the prospects of recovering threatened and endangered species. However, the takings of otters that would be necessary to translocate these animals and to contain otters within the translocation zone, might be prohibited under Marine Mammal Protection Act.

That act allows taking of depleted species such as the California sea otter only for purposes of scientific research. The legislation before us today specifies that the Marine Mammal Protection Act's prohibitions on

taking are not to apply to those actions that are necessary to translocate, contain or protect those otters that are part of the experimental population. The House has made it clear that this provision is not intended to establish precedents for either species-specific amendments or for how other experimental populations should be achieved, and I agree with this narrow statement of intent.

The bill contains a number of other key elements. First, this legislation also sets forth a procedure whereby the Secretary of the Interior is authorized to develop a plan for the relocation, protection and management of a second population of California sea otters.

Second, the legislation requires designation of two concentric zones. An inner "translocation zone" must provide the habitat necessary for furthering the conservation of the sea otter and a buffer zone to protect the population from activities occurring elsewhere. An outer "management zone" would be established to minimize the potential conflicts between fisheries and other resource uses and the translocated population. Otters are to be kept out of the management zone by means of nonlethal taking.

Third, the bill addresses the status of the experimental sea otter population under the Endangered Species Act. The applicability of the consultation and taking requirements of this act as well as the prohibitions on taking under the Marine Mammal Protection Act differ with respect to the two zones. Within the inner translocation zone, nondense-related Federal agency actions are subject to the full requirements of section 7 of the Endangered Species Act. Defense-related agency actions—that is, those proposed to be carried out directly by a military department—which occur within the translocation zone, as well as all agency actions which occur within the management zone, are subject to the informal conferral procedure of section 7(a)(4).

Sections 4(d) and (9) of the Endangered Species Act and the ban on taking under the Marine Mammal Protection Act apply to all agency actions within the translocation zone, except those activities that are related to defense. Within the management zone, the taking prohibitions of the two acts apply only to intentional, directed takings and not to otherwise lawful activities which result incidentally in takings of members of the experimental sea otter population. As a freestanding provision, the framework established for the protection and management of the translocated sea otter population would continue in effect even if the species recovers to the point where it can be taken off the Endangered Species Act list.

Fourth, the sea otter legislation allows those interests affected by the sea otter translocation to obtain early

consultation on the consequences of their activities under procedures similar to those of section 7(a)(3) of the Endangered Species Act. Requests to initiate such consultation must be made before March 1, 1987. This deadline is intended to ensure that consultation requests, which are found to contain sufficient information by the Fish and Wildlife Service, will be completed prior to translocation of the otters. The early consultation procedure should provide increased certainty for all parties involved in the translocation.

Mr. President, the circumstances surrounding the California sea otter are unique. Establishment of a second population of these marine mammals is critical to the species' continued existence. The translocation effort currently is jeopardized by potential conflicts between the provisions of the Endangered Species Act and the Marine Mammal Protection Act. And there is a long and complicated history of conflicts among the interests affected by a translocation of California sea otters. Because of these special circumstances, I believe we must go forward with this legislation. We owe it to the California sea otter. Translocation of the California sea otter, as provided by H.R. 4531, also is an important step toward the protection and restoration of the Southern sea otter within its historic range. What we do here today, hopefully, will show the way for additional efforts on behalf of the southern sea otter in the years ahead.

TRANSLOCATION OF SEA OTTERS

Mr. CRANSTON. Mr. President, H.R. 4531, the wetlands loan extension bill, contains provisions concerning the California sea otter that are of great interest in my State. For this and other reasons, I support its passage.

Almost 10 years ago, the U.S. Fish and Wildlife Service listed the California sea otter, *Ehydria lutris nereis*, as a threatened species under the Endangered Species Act. The decision to list it as threatened was based upon concerns over the population's small size and limited geographic distribution, and the risk of a major oil spill from tanker traffic in the vicinity of its range.

But the status of the sea otter has not improved since its listing in 1977. In fact, due to additional threats such as the incidental take of otters in coastal gillnet fisheries and the oil spill risk associated with offshore oil and gas exploration and development, the California sea otter is more vulnerable than it was in 1977. Prior to commercial exploitation in the 19th century, an estimated 18,000 otters were found in California. By 1914, the population had been reduced to about 50. This small remnant population was given protection under State and Federal law and was estimated to number 1,800 animals by the mid-1970's. Recent estimated put the population

closer to between 1,300 and 1,400 adults. Clearly, there is need to act now to protect this important, but highly vulnerable, species.

The legislation that we have before us would facilitate the effort to bring about the recovery of this threatened species. As indicated in the Endangered Species Act recovery plan for the California sea otter, one of the goals that must be achieved to bring about the restoration of this population is the establishment of one or more sea otter colonies at sufficient distance from the existing range to ensure that only a small proportion of the population could be adversely impacted by any environmental catastrophe. The importance of this step is highlighted by recent near-misses in the vicinity of the sea otter range.

In April 1984, the tanker *Sealift Pacific*, carrying over 6 million gallons of diesel fuel—twice the estimated volume released during the 1969 Santa Barbara oil platform blowout—lost power and drifted to within only 1½ miles of shore in the midst of the California Sea Otter Refuge. Had her anchor not held, she would have broken up on the rocks. No Coast Guard vessel or commercial tug could have reached her in time to prevent disaster. In November 1984, the tanker *Puerto Rico*, crippled by three explosions, broke in two, spilling over 1 million gallons of oil into the ocean off San Francisco. Oil spill trajectory projections were 180° off; spilled oil moved 20 miles overnight and washed ashore as much as 140 miles north of the spill site. Had the oil gone as far south—as originally predicted—as it went north, it would have soiled the northern portion of the sea otter range. In February 1986, oil from the leaking tanker barge *Apex Houston*—en route from San Francisco to Los Angeles—killed thousands of seabirds from Marin to San Luis Obispo counties—but, fortunately, in this case, remained far out to sea, thus sparing the otters' near shore habitat.

The provisions of this legislation would clarify the legal authorities that apply to translocations. It would enable the Fish and Wildlife Service to establish a procedure that would address the concerns of organizations and agencies interested in and affected by sea otter recovery efforts. In fact, most of the concerned interest groups have had a hand in drafting this language. It represents a consensus approach for proceeding with the proposed translocation.

The bill contains several key elements. First, it requires the Fish and Wildlife Service to develop a plan for the establishment of the translocated population. The purpose of this plan is to provide both a blueprint for carrying out the translocation and a description of the protections that will apply to the population. In addition, the plan is to discuss, in general terms, the factors that would be taken into account in determining the relation-

ship between a successful translocation and the status of the California sea otter under the Endangered Species Act, including how the establishment of a successful colony would be considered in future biological opinions under section 7(a)(2) of the act. In this regard, the translocation plan is viewed as a planning device for the translocation itself. Specifications with respect to long-term management of the overall California sea otter population, including recovery goals and the need for future translocations, are to be addressed in the Endangered Species Act recovery plan.

Second, through the translocation plan, the Service would be required to establish two zones in the vicinity of the translocation population. The translocation zone is the area within which the otters would be relocated. It must include those habitat features that are essential to the conservation of the sea otter and a buffer zone to protect the population from activities occurring elsewhere. In assessing these factors, the Fish and Wildlife Service must accommodate, among other important biological needs, the feeding behavior of the sea otter. As recent drownings in gillnets along the parent population range indicate, sea otters forage in depths up to at least 20 fathoms. In order to protect sea otters during foraging activities, the State of California has found it necessary to establish a 20-fathom closure in portions of the sea otter range.

A management zone also would have to be designated. The purpose of this zone would be to minimize the potential for conflict between fisheries and other resource uses and the translocated population. It is to be managed, by means of nonlethal taking, as an otter-free zone. In order to carry out this directive, the Service is expected to conduct research to refine the most effective and humane methods for containing sea otters.

Third, the bill provides an opportunity for affected parties to seek early consultation under section 7(a)(3) of the Endangered Species Act. Early consultation requests must be initiated by the action agency by a date certain in order to assure that, should they be deemed to contain sufficient information by the Fish and Wildlife Service, the consultation would be completed prior to the date otters are to be translocated. It is anticipated that this opportunity would be used to inject as much certainty into the translocation decisionmaking process as possible.

Fourth, the bill defines the applicability of certain provisions of the Endangered Species Act and Marine Mammal Protection Act to the translocated population. The full protections of section 7 of the Endangered Species Act apply within the translocated zone to nondefense-related agency action. Defense-related activities that occur within the translocated zone, as well as agency actions that

take place within the management zone that could affect the translocated colony, would be subject to the informal conferral procedure of section 7(a)(4).

With respect to the taking of sea otters, section 4(d) and (9) of the Endangered Species Act and related taking prohibitions of the Marine Mammal Protection Act would apply to activities occurring within the translocation zone. Within the management zone, the taking prohibitions of the two acts would apply only to international takes and not to incidental takes resulting from otherwise lawful activities.

The sea otter management/protection directives set forth in H.R. 4531 would have continued applicability should the species recover to the point where it can be delisted.

In August of this year, the Fish and Wildlife Service published a draft environmental impact statement for the translocation of California sea otters. This action was, in part, in response to the Senate's direction to the Fish and Wildlife Service to, in fact, proceed with the preparation of the environmental impact statement. The proposed action calls for translocating otters to San Nicolas Island offshore southern California and considers several alternative locations. In addition, alternative legal authorities for conducting the translocation are set forth, including an approach that meets the basic requirements of this legislation.

The Fish and Wildlife Service should be able to proceed through the final steps of the decisionmaking process pursuant to the requirements of the bill that we have before us.

Finally, the significance of this translocation for future resource management decisions in California needs to be emphasized. As recommended by the Marine Mammal Commission in 1980 and adopted by the Fish and Wildlife Service in the recovery plan, an ultimate management objective for the California sea otter is to establish a "zonal management" scheme. This approach would involve the restoration and protection of the southern sea otter to additional sites within its historic range and the designation of areas where otters would not be allowed.

The translocation that the Fish and Wildlife Service has proposed is an important step in this direction. In addition to establishing zones where otters would and would not be maintained, the proposed action calls for important research to be conducted on the relationship between sea otters and nearshore ecosystems. This information is likely to be crucial to eventual determinations under the Marine Mammal Protection Act of the optimum sustainable population level for the California sea otter. This determination should, in turn, make it possible for the Service, in cooperation with other interested parties, to chart

a course for sea otter protection and management that will satisfy the goals of the Endangered Species Act and the Marine Mammal Protection Act while reducing the potential for conflict between sea otter protection actions and other resource uses.

In the interest of protecting the California sea otter and making progress toward balancing the utilization of the resources of the California coast, I urge adoption of this legislation.

Mr. DOLE. Mr. President, I move that the Senate concur in the House amendments.

The motion was agreed to.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the motions were agreed to.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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UNITED STATES DISTRICT COURT  
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.

No. 2:14-cv-08499-JFW-CW

**[PROPOSED] ORDER**

Hon. John F. Walter, Judge  
Courtroom 16

Plaintiffs California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara have moved this Court for an order granting them summary judgment and an order requiring Defendants Michael Bean, Department of Interior, Daniel M. Ashe, and U.S. Fish and Wildlife Service to grant their petition to rescind the final rule terminating the California sea otter management zone, 77 Fed. Reg. 75,266 (Dec. 19, 2012), and amend the regulation governing that program, 52 Fed. Reg. 29,754 (Aug. 11, 1987). Having established that there is no triable issue of material fact and that Plaintiffs are entitled to the

1 requested relief as a matter of law, their request for declaratory and injunctive relief  
2 is hereby granted.

3           Additionally, Plaintiffs' request for the costs of litigation and reasonable  
4 attorneys' fees in the amount of \_\_\_\_\_ is granted.

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7 DATED: \_\_\_\_\_.

\_\_\_\_\_  
Honorable John F. Walter  
U.S. District Court Judge

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CALIFORNIA SEA URCHIN  
COMMISSION, et al.,**

Plaintiffs,

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**MICHAEL BEAN, et al.,**

Defendants.

**CENTER FOR BIOLOGICAL  
DIVERSITY, et al.,**

Intervenor-Defendants.

No. 2:14-cv-08499-JFW-CW

**[PROPOSED] JUDGMENT**

Hon. John F. Walter, Judge  
Courtroom 16

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. It is ordered and adjudged that judgment is entered in favor of the plaintiffs. The Court finds that Defendants violated the Administrative Procedure Act by denying Plaintiffs petition requesting that Defendants restore the California sea otter management zone in compliance with Public Law No. 99-625.

DATED: \_\_\_\_\_.

\_\_\_\_\_  
Honorable John F. Walter  
U.S. District Court Judge