ANDREA A. TREECE, CA Bar No. 237639
atreece@earthjustice.org
IRENE V. GUTIERREZ, CA Bar No. 252927
igutierrez@earthjustice.org
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Telephone: (415) 217-2000
Facsimile: (415) 217-2040

Attorneys for Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends of the Sea Otter, and Humane Society of the United States

BRIAN SEGEE, CA Bar No. 200795
bsegee@environmentaldefensecenter.org
Environmental Defense Center
111 W. Topa Topa Street
Ojai, CA 93023
Telephone: (805) 640-1832
Facsimile: (805) 648-8043

Attorney for Intervenor-Defendants Environmental Defense Center, Los Angeles Waterkeeper, and The Otter Project

(Additional counsel listed on last page.)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, *et al.*,

Plaintiffs,

v.

MICHAEL BEAN, *et al.*,

Defendants,

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Intervenor-Defendants.

Case No. 2:14-cv-8499-JFW (CWx)

INTERVENOR-DEFENDANTS' REPLY TO MOTION FOR SUMMARY JUDGMENT

Date: September 21, 2015
Time: 1:30 p.m.
Judge: Hon. John F. Walter
Place: Room 16, Spring Street Courthouse

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INTRODUCTION

Plaintiffs assert for the first time in their Reply and Opposition that this case solely concerns the continuation of the exemption for incidental take provided in Public 99-625. Pls. Reply at 1. Having conceded that the U.S. Fish and Wildlife Service ("Service") does not have any obligation to remove sea otters from the former management zone, Plaintiffs now argue that Public Law 99-625 obligates the Service to implement one aspect of the program to allow unlimited incidental take – i.e. harassment, injury, and death – of sea otters in the former management zone south of Point Conception. Fundamentally, Plaintiffs seek to alter the 1987 regulation establishing the program to require the Service to perpetually allow unlimited and unregulated incidental take of otters even in the absence of any possible countervailing conservation benefit from the reintroduction program. Like the positions articulated in Plaintiffs' administrative petition and opening brief, this newly articulated position is fundamentally inconsistent with the plain language, purpose, overall regulatory scheme, and legislative history of Public Law 99-625 and the Endangered Species Act ("ESA").

Plaintiffs' interpretation of Public Law 99-625 produces a cascade of contradictions. By their analysis, the long-term legacy of a law enacted to facilitate a recovery action for the California sea otter would be a permanent exemption from fundamental ESA protections for otters. A statute meant to balance the perceived need for an experimental translocation program with possible impacts on fishing interests would instead impose a permanent duty upon the Service to allow unlimited incidental harm and death to otters even though the experimental program did not yield the anticipated benefits to otter conservation, and was in fact terminated because

it turned out to be detrimental to the otter's recovery. And a statute that entrusts to the Service's discretion the initial decision to develop and implement an indisputably experimental program would somehow remove any discretion to discontinue the program when subsequent information revealed that the experiment had not only failed to promote recovery, but had become a serious obstacle to it.

The exceptions that Plaintiffs now seek to cast in stone were not stand-alone provisions, they were part and parcel of a well-intentioned recovery program that failed and has now been terminated under failure criteria that were well within the Service's authority to develop and implement. The exceptions, like the program of they were a part, have now expired. Nothing in the legal framework of Public Law 99-625 allows the Service to continue implementing a single component of the program, especially one that clearly and directly threatens sea otters, when the other components that brought about the perceived need for the incidental take exemption have failed and been discontinued. Plaintiffs fail to identify any support in the text of Public Law 99-625 or its legislative history that could justify a result so squarely at odds with its intent and the overall ESA regulatory scheme into which it fits.

The Service reasonably interpreted its authority under Public Law 99-625 and the ESA to avoid these absurd results by developing criteria to determine the success or failure of the experimental translocation and management program and terminating the program when it became clear that it was harming the otter's likelihood of recovery. For the reasons set forth below and in Intervenors' opening brief, Plaintiffs' motion for summary judgment should be denied.

ARGUMENT

The Service acted squarely within its authority when it denied Plaintiffs' petition requesting the rescission of the Service's decision to terminate the translocation and management program and the removal of failure criteria from the regulation governing that program. Contrary to Plaintiffs' unsupported interpretation, the Service did exactly what the plain language of Public Law 99-625 authorized it to do in developing and applying failure criteria as a means to protect otters affected by the program. The legislative history of Public Law 99-625 further demonstrates that Congress enacted Public Law 99-625 to facilitate the implementation of an otter recovery program and intended to give the Service authority to end it if it failed to promote recovery. Finally, Public Law 99-625 did not exempt the Service from its ongoing obligation to ensure that the implementation of the translocation and management program, including its incidental take exemption, would not jeopardize the survival and recovery of the very species that the law was meant to protect.

I. Public Law 99-625 Provides the Service with Clear and Ample Authority to Terminate the Translocation Program.

As set forth in Section II below, Public Law 99-625 was enacted with the goal of promoting California sea otter recovery and enabling the Service to set up the necessary infrastructure to achieve that goal (and terminate the program if it failed), which is evident from the unambiguous language of the law itself. Contrary to Plaintiffs' argument, the Court should end its inquiry at the first step of the analysis required by *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But even if there is any ambiguity in the statutory language, the Service's interpretation is a "permissible construction of the statute," when considered

in light of the purposes of Public Law 99-625 and the ESA, and should be upheld under the second step of the *Chevron* analysis. *Chevron*, 467 U.S. at 843.

A. The Plain Language of Public Law 99-625 Does Not Impose a Mandatory Obligation to Continue to Implement the Program or its Incidental Take Exemption.

Plaintiffs argue that the plain language of Public Law 99-625 creates a mandatory obligation to continue to implement the incidental take exemption element of the program, even if the overall translocation program and experimental population are no longer in operation. Pls. Reply at 6-10. As evident from the plain language of the statute, Public Law 99-625 does no such thing.

Public Law 99-625 provides the Service with discretion to set up a translocation program, but does not mandate establishment of such a program or of the management zone: "[t]he Secretary *may develop* and implement, in accordance with this section, a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location." Pub. L. No. 99-625, § 1(b), AR 2031 (emphasis added). There is nothing in the law creating a mandatory obligation to establish the program, or to independently establish any feature of the program, like the incidental take exemption.

Moreover, the statute requires that any program the Service develops specify how otters affected by it will be protected and the relationship of the plan's implementation to the status of the species under the ESA. Pub. L. No. 99-625, § 1(b)(2), (6). As discussed further below, the failure criteria were an essential element to implementing those aspects of the program. Even if one were to accept Plaintiffs' dubious argument that the use of the phrase "shall implement" in Section 1(d) was meant to compel the Service to implement the program in general

(as opposed to specifying the time at which the Service could initiate implementation), the program necessarily included failure criteria. *Cf.* Int. Op. Br. at 12. Developing and applying those failure criteria was part of implementing the program.

Nor is there anything in Public Law 99-625 requiring – or even authorizing – the Service to operate particular aspects of the translocation and management program in isolation from other aspects of the program. As noted above, if the Service chooses to set up a translocation program, Public Law 99-625 directs the Service to include a number of items in the plan for the program: the designation of the experimental population, including the number of sea otters to be relocated, the manner in which they will be relocated, specification of the translocation zone where otters will be relocated, specification of a management zone surrounding the translocation zone which will be used to contain the otters, measures to contain the experimental population, and a description of relationship between the implementation of the plan and the status of the species under the ESA. Pub. L. No. 99-625, § 1(b); AR 2031-32. Establishment of a management zone and the accompanying incidental take exemption for members of the experimental population are but one of the features that a translocation program should contain. Pub. L. No. 99-625, §§ 1(b), (c); AR 2031-32. There is nothing in Public Law 99-625 which requires operation of the management zone and incidental take exemption independently of other features of the translocation program. Accordingly, there is nothing in the law which requires continuation of the management zone or incidental take exemption once the translocation program has ended.

Plaintiffs' argument that one part of a statutorily prescribed program must be continued, but not others, runs contrary to well-accepted canons of statutory

interpretation. A statute must be read as a whole, and one part of a statute cannot be interpreted separate from other interdependent parts. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 33 (2000) (internal citations omitted); *see also King v. Burwell*, 135 S.Ct. 2480, 2495-96 (2015) (authorization for health insurance exchanges must be interpreted with a view to Affordable Care Act as a whole). Thus, there is no support in the plain language of Public Law 99-625 for Plaintiffs' argument that the management zone and incidental take exemption must be continued once the translocation program has ended.

Further, based on the plain language of the statute, the provisions of Public Law 99-625, including the take exemption, only apply to members of the "experimental population." Pub. L. No. 99-625, §§ 1(b), (c); AR 2031-32. Today, a significant number of the otters found in the former management zone are migrating otters that move there seasonally from the northern parent population. AR 5825, 5830. The plain language of Public Law 99-625 indicates that the incidental take exemption was meant to address the movement of members of the experimental population into the management zone, not members of the parent population. Pub. L. No. 99-625, § 1(c); AR 2032. For example, it states that the Service may not include in the management zone the existing range of the parent population or adjacent range where expansion is necessary for the species recovery, indicating that the statute is not intended to limit natural expansion of the parent population. Pub. L. No. § 1(b)(4). This provision further states that the purpose of the management zone is to facilitate containment of members of the experimental population within the translocation zone and "to prevent,

to the maximum extent feasible, conflict with other fishery resources within the management zone *by the experimental population*." *Id.* Plaintiffs' request to apply the incidental take exemption to all otters taken in the management zone after the translocation plan has been discontinued is an unreasonable construction of the plain language and intent of Public Law 99-625.

B. Congress' Purpose in Enacting Public Law 99-625 Was Not to Protect Fishing Interests at the Expense of Otter Recovery.

1. The Legislative History and Other Contemporaneous Sources Confirm the Service's Authority to End the Program.

The second step of *Chevron* also favors the Service's and Intervenors' position because the Service's termination of the translocation program is consistent with the purposes of Public Law 99-625 and the ESA. *Chevron*, 467 U.S. at 843-44.

Under *Chevron*, an agency's interpretation of an ambiguous or silent statute must be upheld as reasonable if it "account[s] for both the specific context in which language is used and the broader context of the statute as a whole." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (internal quotations and citations omitted). As set forth in greater detail below, the ESA provides the broader statutory context for implementing Public Law 99-625, and interpretations of the Service's authority under Public Law 99-625 must therefore be consistent with the ESA. *King*, 135 S.Ct. at 2489; *Food & Drug Admin.*, 529 U.S. at 132-33. The Service's decision to terminate the translocation program when it became apparent that it was not furthering sea otter recovery is consistent with the recovery goals of the ESA. Likewise, the Service's decision to end the translocation program and the incidental take exemption accompanying that program is also consistent with the goals of the ESA, as it would undermine the conservation mandate of the ESA to continue

allowing such exemptions without the heavy counterbalancing interest of an active, successful translocation program.

Plaintiffs argue that Public Law 99-625 was intended to balance conservation interests in establishing a new otter population and the impacts on fisheries abutting the new otter population. Pls. Reply at 10–13. As detailed below, the motivation to enact Public Law 99-625 was to promote sea otter recovery. Even the statements from Senator Chafee and Senator Cranston cited by Plaintiffs in their Motion and Reply confirm that otter recovery was the fundamental purpose of the law. *See* Pls. Reply at 11; 132 Cong. Rec. S17320-23 (Oct. 18, 1986), attached as Attachment 1 to Pls. Statement of Uncontroverted Facts, ECF 40-5. At the outset of his statements, Senator Chafee expressed his support for the bill because "it will help ensure the continued existence of the threatened California sea otter." *Id.* He further noted that"[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 of their current range." *Id.* Likewise, Senator Cranston expressed concern about the vulnerable sea otter population and noted "[t]he legislation we have before us would facilitate the effort to bring about the recovery of this threatened species." *Id.*

Even the statements within the legislative history about balancing conservation and industry interests are limited to the period during which the translocation program was in place. As noted by Senator Chafee, Public Law 99-625 provides a "framework that appears likely to resolve the conflicts among the parties affected by the translocation of sea otters sufficiently to allow establishment of a second otter population with little further delay." *Id.* As part of this framework, both Senators

Chafee and Cranston noted that "[a]n outer 'management zone' would be established to minimize the potential conflicts between fisheries and other resource uses and the translocated population." *Id.* Currently, with no translocation program in place, there is no need to balance conservation and industry interests by allowing the incidental take exemption to remain in place.

There is no basis in the text of Public Law 99-625 or its legislative history to do as Plaintiffs suggest and continue the incidental take exemption without the translocation program in place. To the contrary, the text of the statute and its legislative history support the Service's view that Public Law 99-625 was intended to foster otter recovery. Plaintiffs cannot demonstrate how continuing an exemption for killing, harming, or harassing sea otters can possibly further sea otter recovery.

2. The Administration of Other 10(j) Programs Shows that the Service's Position Is a Permissible Construction of the Statute.

The sea otter translocation program was modeled on Section 10(j) of the ESA, which allows the Service to establish "experimental populations" of threatened or endangered species outside of the current range of that species, if it "determines that such release will further the conservation of such species." 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. §§ 17.80-17.86. Thus, Section 10(j) provides a useful guide to understanding how experimental population programs are administered, and confirms that the Service acted within its authority in administering the sea otter translocation program.

As set forth in the Final Rule establishing the translocation program, Public Law 99-625 was modeled on Section 10(j) of the ESA and was intended to provide "special legislative authority, similar to section 10(j) of the ESA…for the

establishment, containment, and management of an experimental population of California sea otters." AR 3014. The drafters of Public Law 99-625 stated on multiple occasions that the process for establishing the experimental sea otter population was drawn from the process provided in Section 10(j) of the ESA. AR 1301, 1304, 1321, 2023. Public Law 99-625 was necessary to resolve a conflict between the ESA and Marine Mammal Protection Act ("MMPA") arising from the MMPA's stringent prohibitions on take of marine mammals, which had previously prevented the Service from translocating otters in order to establish an experimental population of sea otters under the ESA. AR 1321, 2023, 5210. With Public Law 99-625 in place, the Service finally had the authority it needed to establish an experimental population of sea otters. *Id.*

Contrary to Plaintiffs' arguments, the Service did not exceed its authority by developing failure criteria for the translocation program and terminating the program when such criteria had been met. *See* Pls. Reply at 16-17. Under ESA Section 10(j), which serves as the model for the translocation program, the Service is required to provide "[a] process for periodic review and evaluation of the success or failure of the release and effect of the release on the conservation and recovery of the species." 50 C.F.R. § 17.81(c)(4). Recent rulemakings establishing other experimental populations have required such processes for periodic evaluation of the experimental population. *See, e.g.*, 80 Fed. Reg. 2512, 2526 (January 16, 2015)(requiring periodic evaluation of Mexican Gray Wolf experimental population); 79 Fed. Reg. 26175, 26179 (May 7, 2014)(providing for evaluation of wood bison reintroduction); 79 Fed. Reg. 40004, 40007 (July 11, 2014)(experimental population program for Chinook salmon must undergo periodic evaluation). Thus, as with other experimental populations, the

Service was well within its authority to establish failure criteria for the sea otter translocation program and a process for evaluating the success of the program.

Where appropriate, the Service will modify an experimental population program according to the results of the required periodic evaluation included in the rule establishing the experimental population. For example, as a result of periodic evaluations following the 1998 rule establishing an experimental population of the Mexican gray wolf, the Service decided to modify the parameters for releasing wolves and managing dispersing wolves to "enhance the growth, stability, and success of the experimental population." 80 Fed. Reg. at 2518-19. Here, the Service reasonably relied on the model authority provided by Section 10(j) and explicitly cited by drafters of Public Law 99-625 in developing failure criteria and deciding to terminate the translocation program based on its review of those criteria.

Further, there is no support for Plaintiffs' position that the incidental take exemption can remain in place without the presence of an experimental population or the regulations accompanying management of an experimental population. To be sure, Section 10(j) provides a way for Service to balance conservation and industry interests by allowing for incidental take of a species where its habitat is adjacent to areas used for commercial purposes like livestock grazing. *See Wyoming Farm Bureau Fed. v. Babbitt*, 199 F.3d 1224, 1232 (10th Cir. 2000)(citing H.R. Rep. No. 97-567, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2808, 2817); *Defenders of Wildlife v. U.S. Fish and Wildlife*, 797 F. Supp. 2d 949, 960 (D. Ariz. 2011). Consistent with this end, the Service has provided incidental take exemptions for various experimental populations, akin to the one provided through Public Law 99-625. *See, e.g.*, 50 C.F.R. § 17.84. However, these incidental take exemptions are only

allowed where there is an existing experimental population and are not allowed outside of the experimental population area. *Id.; see also* 79 Fed Reg. at 40011 (ordinary ESA protections apply to Chinook salmon outside of experimental population area); 78 Fed. Reg. 79622-01, 79627 (Dec. 31, 2013)(incidental take exemption for Chinook salmon does not apply outside of experimental population area); 80 Fed. Reg. at 2559 (setting forth take restrictions for Mexican gray wolf).

Moreover, when take of a protected species is allowed, the parameters for such take are highly regulated – for example, the incidental take provisions for the Mexican wolf specify the types of conflicts which justify an incidental take (i.e., in defense of human life, when a wolf is harming a domestic animal), and provide a permitting process for intentional takes. 80 Fed. Reg. at 2559-62. There is no precedent under the ESA for what the Plaintiffs seek here – unfettered continuation of an incidental take exemption for fisheries when there is no experimental population in place, and no other regulations in place for managing industry conflicts with that population. Other Section 10(j) programs confirm that the Service acted in accordance with the ESA by establishing failure criteria and then applying those criteria to terminate the translocation program, including the incidental take exemption.

3. The Avoidance Canon and Non-Delegation Doctrine Do Not Support Plaintiffs' Position.

The "avoidance canon" provides that "if a serious doubt of constitutionality is raised by one possible construction of a statute, [the court] must ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013)(citations omitted). Further, while the canon favors interpretations avoiding constitutional

questions, it does not "license a court to usurp the policy-making and legislative functions of duly-elected representatives." *Id.* at 1134.

Plaintiffs fail to establish that there is any constitutional question requiring the application of the avoidance canon. *See* Pls. Reply at pp. 13-14. Plaintiffs' non-delegation argument that Congress failed to delegate power to the Service to terminate the translocation program may be an attempt to raise such a constitutional question. Pls. Reply at 14. However, even if the non-delegation doctrine did apply in this instance, it does not support Plaintiffs' position. In a delegation challenge, the "constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Assns*, 531 U.S. 457, 472 (2001). The Court will look to whether Congress has provided an "intelligible principle" to guide exercise of the agency's authority, and where such a principle is lacking, the agency will be found to have exceeded its authority. *Id.* As stated by the Supreme Court, the absence of delegated authority has been found in only two statutory instances: "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'." *Id.* at 474.

This is not one of those rare instances where the Service lacked authority or guidance to take action here. As set forth in Intervenors' opening brief and throughout this brief, the Service's authority to establish and then end the translocation program (including the program's incidental take exemption) is confirmed by the plain language of Public Law 99-625, the legislative history and other contemporaneous documents, the Service's broad authority under the ESA to

conserve the species, and its application of that authority to other experimental population programs.

II. Public Law 99-625 Was Enacted to Facilitate Otter Recovery and Must Be Interpreted in a Manner Consistent with the Endangered Species Act.

Public Law 99-625 was passed to advance the ESA imperative to promote sea otter recovery by authorizing the establishment of an experimental otter population. Under Plaintiffs' strained interpretation, a statute meant to promote recovery would obligate the Service to continue partially implementing a program that it found to be counter-productive to otter recovery and to allow the unlimited incidental injury and killing of sea otters – even those arriving naturally from the mainland population – in the now-defunct management zone. Plaintiffs contend that a statute aimed to "balance" otter conservation with fishing interests means that the Service must allow fishermen to take an unlimited number of otters even if it jeopardizes the very survival and recovery of the species. There is no basis for reading such a sweeping permanent exemption from the ESA into the limited exceptions applicable to a now-discontinued program.

Plaintiffs attempt to defend this absurd result with several arguments. First, they assert that Public Law 99-625 exempts implementation of the management program and all incidental take from the ESA. Pls. Reply at 19. Second, they argue that there is no inconsistency between continuing to implement a blanket exemption on incidental take in the management zone and the Service's duty to avoid jeopardizing the Southern sea otter on the grounds that implementing the program is a non-discretionary duty. Pls. Reply at 19. Third, Plaintiffs assert that there is no conflict between the Service's duty to avoid jeopardy and implementing the incidental

take exemption because the statute only requires the Service to remove otters if they can find feasible, non-lethal way to do so. Pls. Reply at 18. Finally, Plaintiffs argue that continuing the incidental take exemption is consistent with the ESA because the text of the ESA does not require the Service to prohibit take of threatened species. Pls. Reply at 18-19. As explained below, these arguments find no basis in the law or logic. The court should reject these arguments and the absurd result to which they lead and uphold the Service's rational interpretation of Public Law 99-625.

A. The Plain Language of Public Law 99-625 Demonstrates that the Program Is Subject to the Endangered Species Act.

Plaintiffs now assert that Public Law 99-625 exempts the implementation of the translocation and management plan from the Endangered Species Act altogether. Pls. Reply at 16, 18. This argument fails because it contradicts basic principles of statutory construction requiring statutory language to be read in the context of the overall statutory scheme, and in a way that avoids absurd results. *Food & Drug Admin.*, 529 U.S. at 132-33 (2000) (statutory provision must be read in context, not in isolation); *Ma v. Ashcroft*, 361 F. 3d 553, 558 (9th Cir. 2004) ("[S]tatutory interpretations which would produce absurd results are to be avoided.").

In reality, the two provisions of Public Law 99-625 upon which Plaintiffs base their argument, sections 1(c) and 1(f), make it crystal clear that the ESA does apply to the program. Section 1(c), titled "Status of Members of the Experimental Population," describes how otters in the experimental population are to be treated "for purposes of the Act" – the Act being defined as the Endangered Species Act. Pub. L. No. 99-625, § 1(a)(1) (defining "the Act"), 1(c)(1) and (2). The first subsection describes how members of the experimental otter population are to be considered

during ESA Section 7 consultations on the effects of agency actions undertaken within the translocation zone. Pub. L. No. 99-625, § 1(c)(1). The second subsection specifies that ESA Section 9 applies to members of the experimental population except that the incidental taking of such members within the management zone will not be considered a violation of the ESA take prohibition (16 U.S.C. § 1538) or the Marine Mammal Protection Act. Pub. L. No. 99-625, § 1(c)(2). Far from suggesting a blanket exemption from the ESA, this section states explicitly that ESA requirements continue to apply except as specifically carved out in the specified limited situations. If the program were wholly exempt from the ESA, Public Law 99-625 would not need to specify how otters subject to the program were to be treated "for purposes of the [ESA]."

Section 1(f) similarly lends no support to Plaintiffs' argument that the program "is expressly exempt" from the ESA. Pls. Reply at 16. Rather, that Section merely specifies that "[f]or purposes of implementing the plan," no agency action "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 [ESA] or the Marine Mammal Protection Act of 1972." The plain language of this provision includes three significant qualifiers. First, it applies only to actions by the Service and its authorized agents – not to third parties. Second, it covers only actions taken to "relocat[e] or manage[]" individual sea otters. Third, the limited exemptions provided therein apply only *"for purposes of implementing the plan."* In other words, the exemption only applies to actions necessary to relocate individual otters to the experimental population or to remove individual otters from the management zone while the Service is "*implementing the*

plan." If the Service is not relocating or removing an otter during the implementation of the plan, the take exemption provided does not apply.

Critically, there is nothing in this limited provision that exempts the Service from its overall ESA obligation to ensure that the survival and recovery of the California sea otter would not be impaired by the implementation of the experimental program. Plaintiffs' attempt to read such an exemption into the statute goes well beyond its plain language. Such a reading is not permissible. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The inclusion of such specific adjustments to ESA requirements in Public Law 99-625 hardly supports the Plaintiffs' argument that Public Law 99-625 waives ESA requirements altogether. To the contrary, those provisions demonstrate that Congress expected the Service to apply ESA requirements to the translocation and management program and California sea otters in the region, and provided limited exceptions for specific instances where different requirements were to be applied. Congress did not need to provide the Service explicit authorization to develop failure criteria or to terminate the program altogether because that authority is inherent in the overall regulatory scheme of the ESA, where Congress had already delegated to the Service the authority necessary to conserve the California sea otter. The Service reasonably relied on its fully applicable ESA authority to fill any gaps in the language of Public Law 99-625 by developing criteria to determine the success or failure of the program and applying those criteria to meet its ESA obligations. Because the Service reasonably interpreted the statute to fill the gaps left to it by Congress, the Court must defer to that interpretation. *Chevron*, 467 U.S. at 843-45 (ambiguity in statute

interpreted as implicit delegation from Congress and agency's reasonable interpretation to fill the gap merits deference); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (courts must defer to agency's reasonable interpretation of statute).

Plain language elsewhere in Public Law 99-625 also directly refutes Plaintiffs' notion that implementation of the translocation and management plan is exempt from the ESA. Section 1(b) specifically requires the translocation and management plan to include "[a] description of the relationship of the implementation of the plan to the status of the species under the [ESA] and to determinations of the Secretary under section 7 of the [ESA]." Pub. L. No. 99-625, § 1(b)(6). This begs the question, if Congress had intended for the ESA not to apply to the implementation of the translocation and management plan, why would it require the Service to describe how the plan's implementation related to ESA requirements?

In the absence of any "clear and manifest" intention to exempt the Service's decision to initially implement or whether to continue implementing the translocation and management plan from overarching ESA requirements, the court must assume that those ESA requirements remain applicable. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("The intention of the legislature to repeal must be 'clear and manifest.'"); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978) (finding that implicit repeal of ESA requirements "would surely do violence to the 'cardinal rule' that repeals by implication are not favored") (internal citations omitted). If Congress had intended to exempt the program from all ESA requirements as Plaintiffs contend, it

could have simply stated that the ESA would not govern the implementation of the translocation and management plan or the incidental taking of otters involved in the program. Indeed, Congress did act with such specificity when it subsequently amended the Marine Mammal Protection Act to state that the provision regarding incidental take authorizations for commercial fisheries "shall not govern the incidental taking of California sea otters and shall not be deemed to amend or repeal the Act of November 7, 1986 (Public Law 99-625; 100 Stat. 3500)." 16 U.S.C. § 1371(a)(5)(E)(vi). In contrast, Congress did not include similarly broad language in Public Law 99-625 exempting the translocation and management plan or the Service's decision to implement or continue implementing it from the ESA.

Plaintiffs' argument that the provision stating that the Service "shall implement" the translocation and management program imposed a non-discretionary duty to implement all or part of the program in perpetuity fails for the same reasons. *See also* Int. Op. Br. at 11-13. Nothing in that provision or in Public Law 99-625 suggests that the initial discretionary decision to develop and implement the program was exempt from the ESA; nor does the plain language of this provision suggest that once the Service decided to implement an explicitly experimental program, it was obliged to implement it in perpetuity.

Moreover, and quite significantly, nothing in Public Law 99-625 may be read to free the Service from its duty to promote the survival and recovery of the entire species, and to ensure that its actions do not impair the otter's likelihood of survival

and recovery.[1] *See* 16 U.S.C. § 1536(a)(2); *see also* AR 2024 (statement of Sen. Cranston on H.R. 4531: "[s]pecifications 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."), AR 3001 (final rule establishing program, stating that translocation and management program "is not intended to replace the Recovery Plan as the primary long-term management plan."). As discussed further below, Plaintiffs' interpretation leads to the absurd result that a statute meant to facilitate otter recovery strips the California sea otter of key ESA protections and allows unlimited numbers of otters to be harmed or killed, even if that take impairs the ability of the entire species to survive and recover. A program meant to ensure the species' recovery would be converted into a gamble whereby the unsuccessful outcome of the program could forever hinder the species' ability to expand into its historic range and recover. That is not what the plain language of the statute says, nor what Congress intended. *See King v. Burwell*, 135 S.Ct. at 2489-92, 2494-96 (rejecting plain language interpretation that was fundamentally inconsistent with statute's purpose and context).

B. Plaintiffs' Interpretation Is Contrary to Congressional Intent to Facilitate Otter Recovery and Balance Translocation Impacts.

Because the ESA provides the overarching regulatory scheme for conserving the California sea otter and implementing Public Law 99-625, Public Law 99-625

[1] This is an ongoing obligation under the ESA. ESA regulations require the Service to reinitiate consultation on the effects of an action it has authorized or carries out when, among other things, "new information reveals effects of the action that may affect listed species…in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). In this case, new information revealed that the translocation and management program was having unexpected negative effects on otter recovery.

must be read in a way that is consistent with the ESA's requirements. *King*, 135 S.Ct. at 2489, 2494-96; *Food & Drug Admin.*, 529 U.S. at 132-33. Furthermore, that statute must be read in a manner consistent with its ultimate purpose of promoting sea otter recovery under the ESA.

As explained in Intervenors' opening brief, Int. Op. Br. at 19-20 and 22-23, and in Section I above, Public Law 99-625 was enacted as a means to facilitate sea otter recovery under the ESA. The statute exists because the Service needed specific authority to implement recommendations from its ESA recovery plan in order to fulfill its obligation under the ESA to promote the conservation of the California sea otter. *See, e.g.*, AR 1304, 1572-74 (describing need for translocation), 1579 (describing need for clear legal authority), 2024 (describing "unique" circumstances and need to facilitate translocation program to promote otter recovery); 3000-01 (explaining that Public Law 99-625 was enacted to authorize translocation, which was thought to be essential to otter recovery); 5808 (goal of program was recovery and delisting of species). The translocation and management program, including the provision exempting fishermen from incidental take liability, would not have existed but for the overarching duty and purpose to promote the recovery of this species.

Plaintiffs' assertion that the overarching purpose of Public Law 99-625 was to balance conservation of otters with fishermen's interests misses the mark. At the most basic level, it ignores the key fact that this deal was struck only because it was necessary to facilitate the establishment of an experimental otter population, which was thought to be necessary to achieve otter conservation. *See, e.g.*, AR 0038, 0041, 0046-47, 1571, 2024, 3000-01. The balancing of interests in Public Law 99-625 is thus incidental to the overriding recovery purpose of the program it authorized.

Indeed, the criteria the Service developed in order to determine whether the program had succeed or failed provided the key fulcrum for determining whether benefits and impacts of the program were being balanced. As discussed in the Intervenors' opening brief, once the Service determined that continued implementation of the program was affirmatively harmful to the driving purpose of fostering otter recovery, the subsidiary balancing of interests struck in order to facilitate that recovery program became irrelevant. Int. Op. Br. at 19-21.

Moreover, Plaintiffs have failed to demonstrate how their suggested solution of simply leaving the incidental take exemption in place while abandoning the rest of the translocation and management program "balances" otter conservation with fishermen's interests. Active efforts to support the experimental population ended long ago and the Service determined that the experiment had failed. AR 5810 (translocation ended in 1991 and efforts to capture otters ended in 1993); 5628-37 (program failed based on recovery criterion and failed to meet three out of five other criteria); 5807 (same); 5808 and 5811 (continued implementation found to violate ESA "no jeopardy" requirement). The 2003 ESA recovery plan for the California (also called "southern") sea otter, which governs long-term management of the species, found: "There is little doubt that the southern sea otter population would be best served by elimination of the 'no-otter zone.' This now appears essential for natural range expansion, and thus recovery, of the southern sea otter." AR 3214; *see also* AR 3078-80, 3087, 3213. The predicted benefits to otters have not materialized and are no longer being pursued through this program, yet Plaintiffs wish to indefinitely receive the benefit of unlimited incidental take protection.

Such a result violates the intent of Public Law 99-625. By Plaintiffs' own characterization, Public Law 99-625 was supposed to balance the effects of the translocation program with the need to establish an experimental population of otters. Pls. Reply at 10. It was not meant to draw a permanent line in the ocean to either exclude otters or to perpetually strip ESA protections from any otters, including those from the natural parent population, that cross that line. Plaintiffs argue that once the Service decided to implement the management zone and its incidental take exemption, it was bound to keep them in place in perpetuity, regardless of its effects on the California sea otter. Pls. Reply at 13, 16. The logical consequence of Plaintiffs' argument is that even if not a single translocated otter had survived on San Nicolas Island and the California sea otter as a species never benefitted from the translocation program, Plaintiffs would forever be permitted to take unlimited numbers of otters within the so-called management zone, even if the otters reached the zone naturally. This is plainly not what Congress had in mind when it passed Public Law 99-625 to facilitate implementation of the Service's 1982 Recovery Plan recommendation.

That result is also patently inconsistent with the ESA as a whole. Under the ESA, the Service is responsible for affirmatively promoting the otter's recovery and for ensuring that no actions that it authorizes or carries out, including continued implementation of the incidental take exemption in the management zone, is likely to impair the otter's chances of survival or recovery. 16 U.S.C. § 1536(a)(2). The Service has determined that preventing otters from expanding south into their historic range would likely jeopardize its continued existence. Specifically, the agency determined that "expansion of the southern sea otter's distribution is essential to the survival and recovery of the species" and artificially restricting their range to the area

north of Point Conception would thwart that necessary expansion. AR 5811; *see also* AR 5808. Allowing Plaintiffs to incidentally take an unlimited number of otters within the so-called management zone could similarly constrain otter expansion and put the species at risk.

This is also one of the reasons why the court should reject Plaintiffs' argument that allowing unlimited incidental take of California sea otters is somehow consistent with the ESA because the ESA does not require the Service to prohibit take of threatened species. The ESA allows the Service to issue "such regulations as [it] deems necessary and appropriate for the conservation of such species," including regulations prohibiting the take of threatened species. 16 U.S.C. § 1533(d). In point of fact, the Service has by regulation applied the ESA take prohibition to threatened species in general. *See* 50 C.F.R. § 17.31. Even if the Service could lift the take prohibition, it would be obligated to ensure that doing so did not put the California sea otter at risk of jeopardy. There is no way to ensure against jeopardy by allowing unlimited incidental take of California sea otters. Populations and species are, of course, comprised of individuals. The Service has recognized that the take of individual animals can cumulatively impair the survival and recovery of the species as a whole. This is precisely why incidental take authorizations granted pursuant to ESA Section 7 consultations may only be issued if the Service determines that the take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and must include specific, numeric limits on take that, when met, trigger renewed consultation. *Az. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1249-50 (9th Cir. 2001); *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007). And it is why incidental take authorizations granted pursuant to the ESA's experimental population

provision are limited and closely linked to the active implementation and success of the experimental program. *See* Section I, above.

In sum, Plaintiffs' interpretation turns Public Law 99-625 on its head, taking a statute born from the Service's obligation under the ESA to bring the California sea otter to recovery and turning it into one that permanently strips the same species of crucial ESA protections and provides fishermen a perpetual license to harm and kill any otters that swim into their historical range south of Point Conception, without regard to the damage such take could do to the species' ability to recover. Under Plaintiffs' interpretation, the California sea otter would be notable as a species that was left far worse off as a result of efforts to promote its recovery. Such an absurd result may not be upheld.

CONCLUSION

Plaintiffs have not provided any statutory or other grounds to support their contention that Public Law 99-625 requires the Service to continue the translocation and management program, in whole or in part, in perpetuity. Intervenors and the Service have established throughout their briefing that the Service had authority to establish failure criteria for the program and terminate the program when those criteria were triggered. For the reasons set forth in their papers, Intervenors' and the Service's motions for summary judgment should be granted, and Plaintiffs' motion should be denied.

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Respectfully submitted,

DATED: August 28, 2015

/s/ Andrea A. Treece
ANDREA A. TREECE

Counsel for Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends of the Sea Otter, and Humane Society of the United States

/s/ Brian Segee
BRIAN SEGEE

Counsel for Intervenor-Defendants Environmental Defense Center, Los Angeles Waterkeeper, and The Otter Project

Additional counsel:

DONALD C. BAUR (*Pro Hac Vice*)
dbaur@perkinscoie.com
CHARLES H. SAMEL, CA Bar #182019
csamel@perkinscoie.com
Perkins Coie, LLP
700 13th Street, N.W., 6th Floor
Washington, DC 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

DONALD B. MOONEY, CA Bar #153721
dbmooneylaw@gmail.com
Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, California 95616
Telephone: (530) 758-2377
Facsimile: (530) 758-7169

Attorneys for Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends of the Sea Otter, and Humane Society of the United States

LINDA KROP, CA Bar No. 118773
lkrop@environmentaldefensecenter.org
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
Telephone: (805) 963-1622
Facsimile: (805) 962-3152

Attorney for Intervenor-Defendants Environmental Defense Center, Los Angeles Waterkeeper, and The Otter Project

ANDREA A. TREECE, CA Bar No. 237639
atreece@earthjustice.org
IRENE V. GUTIERREZ, CA Bar No. 252927
igutierrez@earthjustice.org
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Telephone: (415) 217-2000
Facsimile: (415) 217-2040

Attorneys for Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends of the Sea Otter, and Humane Society of the United States

BRIAN SEGEE, CA Bar No. 200795
bsegee@environmentaldefensecenter.org
Environmental Defense Center
111 W. Topa Topa Street
Ojai, CA 93023
Telephone: (805) 640-1832
Facsimile: (805) 648-8043

Attorney for Intervenor-Defendants Environmental Defense Center, Los Angeles Waterkeeper, and The Otter Project

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Plaintiffs,

v.

MICHAEL BEAN, et al.,

Defendants,

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Intervenor-Defendants.

Case No. 2:14-cv-8499-JFW (CWx)

INTERVENOR-DEFENDANTS' RESPONSE TO PLAINTIFFS' COMBINED STATEMENT OF FACTS

Date: September 21, 2015
Time: 1:30 p.m.
Judge: Hon. John F. Walter
Place: Room 16, Spring Street Courthouse

All parties have acknowledged that this case should be resolved on the basis of the administrative record. *See* ECF No. 43-2, ECF No. 44-1. Further, Plaintiffs have not filed any Statement of Genuine Disputes of Material Fact and have not asserted any additional facts in their Combined Statement of Facts beyond those already asserted in their moving papers. *See* ECF No. 44-1, ECF No. 40-2. Intervenor-Defendants have previously responded to Plaintiffs' Proposed Statement of Uncontroverted Facts and Conclusions of Law by filing their Statement of Genuine Disputes of Material Fact with their cross-motion for summary judgment, as well as their own Statement of Uncontroverted Facts. *See* ECF No. 42-2 and 42-3. Intervenor-Defendants therefore submit that all the facts necessary for resolution of this matter are already before the Court, and will not be filing a Combined Statement of Facts with their Reply.

Respectfully submitted,

DATED: August 28, 2015

/s/ Andrea A. Treece
ANDREA A. TREECE

Counsel for Intervenor-Defendants Center for Biological Diversity, Defenders of Wildlife, Friends of the Sea Otter, and Humane Society of the United States

/s/ Brian Segee
BRIAN SEGEE

Counsel for Intervenor-Defendants Environmental Defense Center, Los Angeles Waterkeeper, and The Otter Project