UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 14-8499-JFW (CWx)** Date: September 18, 2015

Title: California Sea Urchin Commission, et al. -*v*- Michael Bean, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [filed 6/17/15; Docket No. 40];**

ORDER GRANTING INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [filed 7/10/15; Docket No. 42]; and

ORDER GRANTING FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT [filed 7/10/15; Docket NO. 43]

On June 17, 2015, Plaintiffs The California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara (collectively, "Plaintiffs") filed a Motion for Summary Judgment. On July 10, 2015, Intervenor-Defendants The Center for Biological Diversity, Environmental Defense Center, Defenders of Wildlife, Friends of the Sea Otter, the Humane Society of the United States, Los Angeles Waterkeeper, and The Otter Project (collectively, "Intervenor Defendants") filed a Motion for Summary Judgment.[1] On July 10, 2015, Defendants Michael Bean, Acting Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of Interior, Dan Ashe, Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service (collectively, "Federal Defendants") filed a Cross-Motion for Summary Judgment. On August 5, 2015, Plaintiffs filed their Combined Reply and Opposition to Cross-Motions for Summary Judgment. On August 28, 2015, the Federal Defendants and the Intervenor

[1] The Intervenor Defendants' and Federal Defendants' Motions for Summary Judgment also served as their Opposition to Plaintiffs' Motion for Summary Judgment.

Initials of Deputy Clerk sr

Defendants filed Replies in Support of their Cross-Motions for Summary Judgment.[2] . Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's September 21, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background[3]

The southern sea otter, also called the California sea otter, is listed as a "threatened" species under the Endangered Species Act ("ESA"), due to its vulnerability to extinction from oil spills, environmental contamination, disease, shooting, and entanglement in fishing gear.[4] *See* 42 Fed. Reg. 2,968 (Jan. 14, 1977); 69 Fed. Reg. 5,861, 5,863 (Feb. 6, 2004). As a threatened species, the sea otter is protected by prohibitions on "taking" found in Section 9 of the ESA, which is defined 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. §§ 1538(a)(1)(B) and 1532(19). Section 7(a)(2) of the ESA provides that each federal agency must, in consultation with either the U.S. Fish and Wildlife Service (the "Service") or the National Marine Fisheries Service, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of a threatened or endangered species.[5] 16 U.S.C. § 1536(a)(2). The sea otter is also protected under the Marine Mammal Protection Act ("MMPA"), which, among other things, imposes a moratorium on the taking of marine mammals. 16 U.S.C. § 1362(13).

The Service's 1982 Southern Sea Otter Recovery Plan, developed pursuant to ESA Section 4(f), recommended the establishment of a translocated population of sea otters remote from the main population, to help assure that the entire species would not be wiped out by a single

---

[2] On May 26, 2015 , this case was transferred to this Court pursuant to General Order 14-03, Section II(E). On June 8, 2015, this Court filed its Amended Scheduling and Case Management Order (Docket Nos. 38 and 39), and the Court adopted the briefing schedule previously set by Judge Gee in her April 16, 2015 Order Re Amended Schedule (Docket No. 30).

[3] Although the Court provides a brief factual and procedural history of this case and the plight of the southern sea otters, a more detailed discussion of the facts can be found in *The Otter Project v. Salazar*, 712 F.Supp. 2d 999 (N.D. Cal. 2010), and the March 3, 2014 Order Granting Defendants' Motion to Dismiss in *California Sea Urchin v. Jacobson*, Case No. CV 13-5517 DMG (CWx).

[4] The ESA was enacted by Congress "to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

[5] Depending on the species in question, the "Secretary" referred to in the ESA may be the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has jurisdiction over the southern sea otter, and the Service is the agency within the Department of the Interior with delegated responsibility for administering the ESA.

catastrophic oil spill. AR 1:0038. However, additional legislative authority was needed to accomplish this objective, in part because implementing such a program would likely run afoul of MMPA take prohibitions. *See* 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012). In response, Congress passed Public Law No. 99-625, 100 Stat. 3500 (1986) ("P.L. 99-625"), expressly authorizing the Service to develop and implement such a program. In order to reduce the potential conflicts between translocated sea otters and activities such as fishing and military activities, P.L. 99-625 provided that such a program should include a "translocation zone" and a "management zone." *Id*., § 1(b). Within the "translocation zone" surrounding the new sea otter colony, standard MMPA and ESA take prohibitions would apply to all activities (except for defense related activities carried out by the military). *Id*., § 1(c)(1). Surrounding the translocation zone would be a "management zone," in which the Service was to "use all feasible non-lethal means and measures to capture any sea otter" and "return it to either the translocation zone or to the range of the parent population." P.L. 99-625, § 1(b)(4). The taking of sea otters within the management zone that was incidental to otherwise lawful activities ("incidental take") would be exempt from the ESA and MMPA take prohibitions. *Id*., § 1(c)(2).

The Service exercised its discretion and implemented a translocation program, and issued regulations which identified San Nicolas Island as the site of the translocated population. 52 Fed. Reg. 29,754 (Aug. 11, 1987) (codified at 50 C.F.R. § 17.84(d)) ("1987 Final Rule"). All U.S. waters south of Point Conception to the U.S.-Mexico border were designated as the management zone. 52 Fed. Reg. at 29,782. The 1987 Final Rule included scientific criteria under which the program would be evaluated and discontinued if it was determined to have failed. *Id.* at 29,784.

The translocation program was plagued with difficulties, including unexpectedly high levels of deaths and disappearances of translocated otters, and slow growth of the new colony. 66 Fed. Reg. 6,649, 6,650 (Jan. 22, 2001); 53 Fed. Reg. 37,577 (Sept. 27, 1988); *see also* AR 37:5625-37. As a result, in 1991, the Service halted translocation efforts, and, in 1993, suspended the capture and removal of sea otters from the management zone. *See* 77 Fed. Reg. at 75,269. In 1998, large numbers of sea otters, as many as 100 at a time, began moving seasonally into and out of the management zone. *Id.* In 2000, the Service issued a biological opinion under ESA Section 7, concluding that resumed containment of the sea otters would harm the parent population by restricting needed range expansion and disrupting its social structure. AR 26:3488-3537. The biological opinion concluded that resumption of containment was likely to jeopardize the species, in violation of ESA Section 7. *Id*. In 2003, the Service issued a revised sea otter recovery plan which provided for the discontinuation of the entire translocation program. AR 25:3078-88. In 2010, environmental organizations filed suit under the Administrative Procedure Act ("APA"), alleging that the Service had unreasonably delayed making a formal determination as to whether the sea otter translocation program had failed under the failure criteria established by the 1987 Final Rule.[6] *See The Otter Project v. Salazar*, 712 F.Supp. 2d 999 (N.D. Cal. 2010). Several commercial fishing organizations intervened in *The Otter Project* action, including the plaintiffs herein, California Sea Urchin Commission and California Abalone Association. After the Court held that the Service had, by including a failure criteria in the 1987 Final Rule, evidenced an "intention to bind themselves to make a determination based on those criteria" (*Id.*, p. 1006), the parties entered into a Consent Decree. Pursuant to the Consent Decree, the Service agreed to issue a formal decision applying

[6] There was no challenge to the failure criteria itself, only to the delay in applying it.

the failure criteria from the 1987 Final Rule, and if the failure criteria were met, the Service would initiate rulemaking to terminate the translocation program. In 2012, the Service applied the failure criteria, terminated the otter translocation program, and rescinded the 1987 Final Rule. 77 Fed. Reg. at 75,287 ("2012 Termination Decision").

Plaintiffs disagreed with the 2012 Termination Decision, and, on July 31, 2013, filed suit claiming that the Service lacked any statutory authority under P.L. 99-625 to issue the 1987 Final Rule and its failure criteria under which it had terminated the translocation program. *See Cal. Sea Urchin Commission v. Jacobsen*, Case No. CV 13-5517 DMG (CWx). On March 3, 2014, Judge Gee dismissed that suit as time-barred. On April 24, 2014, Plaintiffs filed a Notice of Appeal, and that appeal is pending before the Ninth Circuit.

On April 24, 2014, Plaintiffs petitioned the Service under the APA, requesting rescission of both the 1987 Final Rule's failure criteria and the 2012 Termination Decision. AR 42:5849-5850. Specifically, the Petition "formally request[s] that the Service rescind the failure criteria in 52 Fed. Reg. 29,754 and the 2012 decision, 77 Fed. Reg. 75,266, providing for the termination of the sea otter management zones and the protections for fishermen and Southern California's fishery that Congress provided in Pub. L. No. 99-625." On July 28, 2014, the Service denied the Petition. AR 69:5925. On November 3, 2014, Plaintiffs filed this action, which challenges that denial of Plaintiffs' Petition.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the

Initials of Deputy Clerk sr

benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

A. Standard of Review

The Court must determine the validity of the Service's decision according to APA section 706, which provides that agency action must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (holding that review of an agency's denial of a petition for rulemaking is "'extremely limited and highly deferential'")(*quoting Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)). Generally, an agency action is considered "arbitrary and capricious" if the agency has:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Center for Biological Diversity v. U.S. Fish & Wildlife Service, — F.3d —, 2015 WL 5451484, *7 (9th Cir. Sept. 17, 2015) (internal citations omitted). Courts defer to an agency's interpretation of a statute when Congress has delegated authority to the agency "generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001).

The Court's analysis of whether the Service's interpretation of its authority under P.L. 99-625 was reasonable is guided by the two-part test set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the Court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Id.* at 842–43. Second, if the Court finds that the "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As the Supreme Court has recognized, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (quoted in *Chevron,* 467 U.S. at 843). Even where that delegation of authority is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. If the agency's statutory interpretation is reasonable, the court must defer to it. *See INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999).

B. Article III Standing.

Before addressing the Federal Defendants' and Intervenor Defendants' arguments that Plaintiffs' claims fail on the merits, the Court must resolve the Federal Defendants' claim that Plaintiffs lack standing.

1. The Legal Standard for Article III Standing.

To establish standing, Plaintiffs must demonstrate: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654-55 (9th Cir. 2011) ("To invoke the jurisdiction of the federal courts, a plaintiff must demonstrate that it has Article III standing – *i.e*., that it has suffered an injury-in-fact that is both 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical'; that the injury is 'fairly . . . traceable to the challenged action of the defendant'; and that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision' on the plaintiff's claims for relief); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling").

Article III standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490 (1975). Hence, "a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent." *U.S. v. AVX Corp*., 962 F.2d 108, 116 n. 7 (1st Cir.1992).

The inquiry into Article III standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth*, 422 U.S. at 498 (1975). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III." *Id*.

Beyond the "irreducible constitutional minimum of standing" (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), the Supreme Court recognizes other prudential limitations on the class of persons who may invoke the courts' decisional remedial powers, including the requirement that a party must assert its own legal interest as the real party in interest.[7] *Warth*, 422 U.S. at 499. To obtain relief in federal court, a party must meet both the constitutional and prudential requirements for standing. *Morrow v. Microsoft Corp.,* 499 F.3d 1332, 1339 (Fed. Cir. 2007); *see also In the Matter of Village Rathskeller, Inc.*, 147 B.R. 665, 668 (S.D.N.Y. 1992) (holding that "[t]he concept of standing subsumes a blend of constitutional requirements and prudential considerations").

---

[7] These prudential limitations are self-imposed rules of judicial restraint, and principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably failing outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches. *See In re Newcare Health Corp*. 244 B.R. 167, 170 (1st Cir. BAP 2000).

2. Plaintiffs Lack Standing.

In their Complaint, Plaintiffs seek the restoration of the sea otter containment measures in the management zone claiming injury due to the sea otters' consumption of large amounts of shellfish that Plaintiffs harvested after the Service ceased removing sea otters from the management zone. *See* Complaint, ¶¶ 3, 6, 7, 56, and 62. However, in their Reply, Plaintiffs take a much different position:

> This case is ultimately about whether individuals who work and recreate in Southern California's waters can be fined and even imprisoned for accidentally harming, harassing, or getting too near a southern sea otter. **That's all**. Ruling for the Plaintiffs (fishermen) wouldn't require the Defendants (Service) to resume moving otters into Southern California or capturing any that wander into the management zone. Instead, it would only require them to restore an exemption from criminal prosecution under the Endangered Species and Marine Mammal Protection Acts for individuals who incidentally "take" an otter within that zone while engaged in otherwise lawful activities.

Plaintiffs' Reply [Docket No. 44], p. 1 (emphasis added); *see also id.*, p. 17 (stating that Plaintiffs' action "wouldn't require the Service to resume capturing and removing otters that wander into the management zone" and only concerns the incidental take exemptions). Therefore, Plaintiffs concede that any alleged injuries that might result from the diminution of the shellfish stocks caused by the sea otters' consumption of shellfish will not be redressed by their lawsuit. Accordingly, in the absence of such injury, Plaintiffs lack standing.

In addition, Plaintiffs have failed to demonstrate that the absence of incidental take exemptions is "causing them to refrain from pursuing their livelihoods for fear of prosecution for take of otter." Complaint, ¶ 68. *See, e.g., Lujan*, 504 U.S. at 561 (holding that at the summary judgment stage, "the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true") (citation and quotations omitted). Standing based on a fear of prosecution requires a "'genuine threat of imminent prosecution' and not merely an 'imaginary or speculative fear of prosecution.'" *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772-73 (9th Cir. 2006) (*quoting San Diego Cnty Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996)). A court evaluating such a claim must ascertain that "the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir.2000) (citation omitted). In this case, Plaintiffs have failed to allege, let alone offered any evidence to demonstrate, any of these elements. *See, e.g., In re Delta Smelt Consol. Cases*, 663 F. Supp. 2d 922, 931 (E.D. Cal. 2009) ("Given that there is no threat of imminent Section 9 enforcement in this case, there is no causal connection between Plaintiffs' injury and the conduct complained of, namely Section 9's application to the coordinated operation of the project."), *aff'd sub nom. San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

Because Plaintiffs have failed to demonstrate the required injury in fact to establish Article III standing, their action must be dismissed. Therefore, Plaintiffs' Motion for Summary Judgment is

denied, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are granted.[8]

C. Plaintiffs' Claim Fails on the Merits

Even assuming that Plaintiffs have standing and filed a valid petition, they cannot prevail on the merits of their claim.

1. The Service's Interpretation of P.L. 99-625 is Supported by the Statute's Plain Language.

In their Complaint, Plaintiffs allege that "[a]lthough Public Law 99-625 provides the Service discretion in whether to commence a translocation program, the Public Law provides no authority to the Service to cease such program once it has been initiated." *See* Complaint, ¶ 72. However, Plaintiffs fail to appreciate that P.L. 99-625 uses purely discretionary language authorizing the program, stating that the Service "may develop and implement, in accordance with this section, a plan for the relocation and management of a population of California sea otters." P.L. 99-625, § 1(b).

Accordingly, it is undisputed that it was within the Service's discretion to determine whether such a program would ever be developed. In addition, Congress granted similar discretion with respect to implementation of a translocation program by including language in P.L. 99-625 stating that the Service "may . . . implement" such a program. Because implementing the program is discretionary, the Service had the discretion to both commence and cease implementation of the program. *See Trout Unlimited v. Lohn*, 559 F.3d 946 fn. 12 (9th Cir. 2009) ("The use of 'may' establishes that any action taken pursuant to this authority is discretionary").

The Service interpreted its authority under P.L. 99-625 in a manner fully consistent with the text of the statute when it adopted the 1987 Final Rule, which included criteria under which the Service could cease the implementation of the program. *See, e.g.,* A.R. 40:5839 (Letter from the Service to the U.S. Navy) ("Public Law 99-625 authorized but did not require the Secretary of the Interior to develop and implement the translocation plan"); *see also* A.R. 30:4193 (Revised Draft Supplemental Environmental Impact Statement (Aug. 2011)) ("Public Law 99-625 authorized translocation program but did not mandate that [the Service] undertake such a program"); A.R.

---

[8] Alternatively, even if Plaintiffs had standing, summary judgment would be appropriate because their Petition is facially invalid for several reasons. In the Petition, Plaintiffs requested the Service to "rescind" the "failure criteria" in the 1987 Final Rule, and also to "rescind" the 2012 Termination decision that terminated the management zone. AR 42:5849-5850. The APA allows petitions for "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). However, Plaintiffs' Petition does not fit any of these categories. In addition, it would be improper for the Service to grant a request to repeal portions of the 1987 Final Rule, which no longer exists because it was repealed in 2012. Moreover, the APA does not provide for partial repeal of a rule. Finally, Plaintiffs' Petition is defective because it fails to meet the requirement that a petition "provide the text of a proposed rule or amendment." 43 C.F.R. § 14.2. Thus, Plaintiffs' Petition was not valid under the APA, and the Service correctly rejected it. AR 69:5925.

30:4139 ("[T]he statute allowed the Secretary to establish the program by regulation," and "[t]he rule promulgated by the Secretary to implement Public Law 99-625 includes criteria for evaluating whether the translocation program should be declared a failure"). The discretion to terminate the translocation program necessarily includes termination of its component parts, such as the translocation and management zones. *See* A.R. 40:5839 ("The translocation and management zones are component parts of the translocation plan implemented by the Secretary and were designated by regulation when the translocation program was put in place").

Accordingly, the Court concludes that the plain language of the statute gave the Service discretion to determine whether a sea otter translocation program would ever be developed. There is nothing in the statute that would suggest that the development of a sea otter program was mandatory or that, if the Service decided to embark on such a program, it would exist indefinitely.

2. The Service's Interpretation is a Permissible Construction of P.L. 99-625.

Even if there was any ambiguity in the statute, the Court concludes that the Service's interpretation represents a "permissible construction." *Chevron*, 467 U.S. at 843 (holding that when an issue is not settled by the plain language of a statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute"). As discussed above, although the Service had discretion to commence the sea otter translocation project, there is no language in P.L. 99-625 that either prohibits termination or directs the Service to continue the program indefinitely or for any specific length of time. In addition, the statute labeled the translocated sea otter population "experimental," implying that the program's success is uncertain and its continuation provisional. *See* P.L. 99-625 § 1(a)(3) and 1(c).

Moreover, courts routinely hold that where a statute confers discretion as to whether to commence a program, the agency retains discretion to cease implementing such a program if doing so is consistent with the original Congressional goals. *See, e.g., Pennsylvania v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974) (holding that an agency "has the discretion, or indeed the obligation, to suspend the [housing subsidy] programs' operation when [they have] adequate reason to believe that they are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs"); *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005) (holding that "this Court agrees with the agency's reasonable interpretation of the word 'may' in §1406, and holds that Congress intended to authorize the BOP to operate a boot camp program but did not intend to require the operation of such a program"); *United State v. McLean,* 2005 WL 2371990, at *1 (D. Or. Sept 27, 2005) (holding that BOP had not exceeded its authority by terminating a federal boot camp program and rejected the argument that the agency's "termination of the Program effectuated a repeal of the statute or otherwise exceeded its statutory authority"); *Herrera v. Riley*, 886 F. Supp. 45 (D.D.C. 1995) (holding that even if the statute that authorized the start of the Migrant Student Record Transfer System had "charged the Secretary [of Education] with an enforceable obligation to ensure continuity in records transfers, . . . the court would have to reject the proposition that such an obligation would provide a basis for this court to order the Secretary to continue a program which Congress has clearly committed to the Secretary's own discretion"). In this case, it would be contrary to the original Congressional goals of P.L. 99-625 of taking action necessary to prevent the extinction of the California sea otter to read the statute as withholding the discretion to cease that action if it was found to undermine sea otter recovery.

In addition, the Court concludes that the Service's interpretation of P.L. 99-625 is also reasonable in light of the statute's legislative history. *Heppner v. Alyska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981) ("When the meaning of statutory language is unclear, one must look to the legislative history"). The co-sponsor of the legislation, Representative John Breaux, expressly stated that "[i]f the Service determines that the translocation is not successful, it should, through the informal rulemaking process, repeal the rule authorizing the translocation." AR 19:1322 (131 Cong. Rec. 20,988 and 20,992 (1985)). Representative Breaux also stated that if "the rule is repealed, the limiting provisions of the act," such as the ESA exemptions in the management zone, "would no longer apply." *Id.* There can be little doubt that the inclusion of failure criteria was in accord with Congress's overarching policy goal, which was to help the Service to implement "[t]he central component of the [1982 Sea Otter Recovery Plan]," which was to establish "one or more populations of sea otters to reduce the likelihood that a single, catastrophic oil spill would jeopardize the species." A.R. 19:1301 and 1308 (H.R. 99-124, at 11 and 18 (1985)); *see also* A.R. 19:1322 (Statement of Rep. Breaux, 131 Cong. Rec. H6468 (daily ed., July 29, 1985)). As a result, based on statements by the sponsors and the purpose of the statute generally, the Court concludes that it was clearly anticipated that the Service would be allowed to specify failure criteria and retain discretion to end the program if it was not successful.

The flexibility and discretion that Congress granted to the Service to develop the translocation program is fully consistent with Section 10(j) of the ESA, which authorizes the Service to establish experimental populations of listed species. *See* 16 U.S.C. § 1539(j). The goal of Section 10(j) of the ESA is "to provide the Secretary flexibility and discretion in managing the reintroduction of endangered species." *See Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000); *see also United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998) ("Congress' specific purpose in enacting section 10(j) was to give greater flexibility to the Secretary"). The Service initially proposed translocating sea otters in 1984 under the authority of Section 10(j) of the ESA, but the take prohibitions of the MMPA were an impediment to the Service's experimental translocation plan that P.L. 99-625 was intended to resolve. *See* A.R. 19:1320 (Statement of Rep. Breaux, 131 Cong. Rec. H6468 (daily ed., July 29, 1985); *see also* AR 19:1304 (H.R. Rep. 99-124, at 14 (1985)). In enacting P.L. 99-625, Congress specifically stated that it "intended to allow the Fish and Wildlife Service to use the process they have begun under section 10(j) of the Act." *Id.* Thus, the text of P.L. 99-625 was explicitly modeled on Section 10(j) of the ESA: "In essence, it sets up a special procedure, similar to section 10(j) of the Act, that authorizes the Secretary to develop a plan for the relocation and management of an experimental population of California sea otters." *Id.*

The House Report further states that the sea otter translocation regulations should use existing Section 10(j) regulations "for guidance in evaluating the possible effect of the translocation on the parent population." AR 19:1306 (H.R. Rep. 99-124, at 16 (1985)). Those Section 10(j) regulations, in turn, specifically state that regulations establishing an experimental population should contain "[a] process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species." 49 Fed. Reg. 33,885, 33,893 (Aug. 27, 1984). Therefore, it is clear Congress intended that such an "experimental" population should be continually monitored and evaluated, and that it should not be blindly implemented if it was a failure or was undermining the original conservation goals.

Plaintiffs argue that the statute contains mandatory language that requires the Service to

"implement the statutory protections for the management zone."[9] Plaintiffs' Motion for Summary Judgment, p. 9. However, the management zone provisions are merely features that the Service "shall include" only if the Service chooses to implement the program at all. P.L. 99-625, §1(b). Plaintiffs argue that the words "shall implement" in Section 1(d) of the statute should be interpreted to mean that the Service must, once implementation begins, continue to implement the program. However, when read in context, the words "shall implement" pertain to the timing for commencing implementation. Thus, the Service is required to implement – or "shall implement" – the program only "after" certain ESA consultations on prospective actions that may affect the experimental population. *See Id.*, §§ 1(a)(5) and 1(d). Nothing in the cited language supports Plaintiffs' position that the Service was powerless to terminate the translocation program once it commenced, irrespective of its failure or its actual harm to sea otters.

Moreover, Plaintiffs' interpretation of P.L. 99-625 would lead to an absurd result. Plaintiffs argue that P.L. 99-625 does not allow the Service to cease implementing the sea otter translocation program. However, if Plaintiffs' interpretation was correct, it would mean that P.L. 99-625 would override the Service's mandatory duty under the ESA to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" (16 U.S.C. § 1536(a)(2)), because the Service would be required to continue with the sea otter translocation program without regard to its impact on the species. Such an absurd result is totally inconsistent with the ESA, the 2003 Recovery Plan for the sea otter, and the purpose of P.L. 99-625, which was to facilitate the conservation and recovery of the species. *See, e.g., United States v. Tatoyan*, 474 F.3d 1174, 1181 (9th Cir. 2007) (a fundamental principle of statutory construction is that "[s]tatutes should be read to avoid . . . absurd results"); *see also Tenn. Valley Authority*, 437 U.S. at 194 (holding that, in enacting the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities" and the ESA gives endangered "species priority over the 'primary missions' of federal agencies"). Furthermore, Plaintiffs' argument that P.L. 99-625 represented a "compromise between the Service, conservation groups, and industries affected by sea otter expansion," and, thus, termination of the translocation program "would not further Congress' goal of preventing conflict between the otter and other fishery

---

[9] In their Motion for Summary Judgment, Plaintiffs argue for the first time that the Court must adopt their interpretation of P.L. 99-625 to avoid a violation of the nondelegation doctrine. However, despite Plaintiffs' argument to the contrary, the Service's termination of the translocation program was not the byproduct of "unconstrained discretion." Instead, the 2012 Termination Decision was the result of the Service's valid exercise of the authority conferred to it by Congress through P.L. 99-625 to implement a translocation program by regulation, and, thus, meets the "extremely lenient" "intelligible principle" standard required for a statute to avoid violating the nondelegation doctrine. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (holding that in applying the "intelligible principle" standard to congressional delegations of authority, the Supreme Court "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"). In addition, "the Supreme Court has not since 1935 invalidated a statute on delegation grounds." 33 Fed. Prac. & Proc. Judicial Review § 8365 (1st ed.); *see also Whitman v. Am Trucking Associations*, 531 U.S. 457, 474-75 (2001). Thus, "[t]he vitality of the nondelegation doctrine is questionable." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 fn. 3 (9th Cir. 1995).

resources" is unpersuasive. *See* Plaintiffs' Motion for Summary Judgment, pp. 12-13. Plaintiffs' argument clearly conflicts with the plain language of P.L. 99-625, which Plaintiffs' have conceded vested with the Service the discretion whether to develop and implement a translocation program at all, and had the Secretary chosen not to develop the program, those conflicts would continue to exist. In addition, the paramount consideration of P.L. 99-625 was to promote the recovery of the sea otter, and mitigation of risks to fishery resources was an important but secondary consideration. *See, e.g.,* 132 Cong. Rec. 33,806 and 33,808 (1986) ("I believe we must go forward with this legislation. We owe it to the California sea otter. Translocation of the California sea otter . . . is an important step toward the protection and restoration of the Southern sea otter within its historic range").

Accordingly, Plaintiffs have failed to demonstrate that the Service lacked the authority to terminate the translocation program as provided in the 2012 Termination Decision. Therefore, Plaintiffs' Motion for Summary Judgment is denied, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are granted.

IV. Conclusion

For all the foregoing reasons, Plaintiffs' Motion for Summary Judgment is **DENIED**, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are **GRANTED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before September 23, 2015. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than September 23, 2015.

IT IS SO ORDERED.

Initials of Deputy Clerk sr