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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 CALIFORNIA SEA URCHIN
COMMISSION; CALIFORNIA ABALONE
12 ASSOCIATION; CALIFORNIA LOBSTER
AND TRAP FISHERMEN'S
13 ASSOCIATION; and COMMERCIAL
FISHERMEN OF SANTA BARBARA,
14

15 Plaintiffs,

16 v.

17 RACHEL JACOBSON, in her official
capacity as Acting Assistant Secretary for
Fish & Wildlife & Parks, Department of
18 Interior; DEPARTMENT OF INTERIOR;
DANIEL M. ASHE, in his official capacity
19 as Director of the United States Fish &
Wildlife Service; and UNITED STATES
20 FISH & WILDLIFE SERVICE,

21 Defendants.
22

No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

23 INTRODUCTION

24 1. Plaintiffs bring this action for declaratory and injunctive relief against
25 Defendants Rachel Jacobson, *et al.* (collectively "Service"), to protect their
26 livelihoods from the devastation of the California sea otter. At the turn of the
27 twentieth century, the otter was on the brink of extinction, due to habitat loss and
28 hunting. But, following a century of federal and state hunting bans, the otter has

1 made significant progress toward recovery. With the otter's recovery, however,
2 comes the possibility for significant harm to various Southern California fisheries
3 which the otter, through range expansion, may ravage. In 1986, Congress struck a
4 balance between otter and fishery protection by authorizing the Service to try to
5 expand the otter's range to San Nicolas Island, but to keep the rest of the California
6 Bight as an otter-free management zone. Pub.L. No. 99-625, 100 Stat. 3500 (1986).
7 In December of last year, the Service violated this Congressionally authorized
8 compromise by ending the management zone. For the reasons set forth below,
9 Plaintiffs seek a declaration that the Service's termination of the otter management
10 zone is illegal, and an injunction requiring the Service to continue to observe and
11 abide by the Congressionally mandated compromise. Pursuant to Local Rule 8-1,
12 the grounds for the Court's jurisdiction over Plaintiffs' cause of action are 28 U.S.C.
13 § 1331 (federal question jurisdiction); § 1346(a)(2) (civil action against the United
14 States); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive
15 relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the
16 Administrative Procedure Act).

17 PARTIES

18 Plaintiffs

19 2. Plaintiff California Sea Urchin Commission is an entity of state
20 government, created by the California Legislature in 2004. Cal. Food & Agric.
21 Code § 79040. The Commission's purpose is to promote legislation that protects
22 sustainable sea urchin harvest, to make consumers and the general public aware of
23 the high nutritional value of sea urchin, and to balance sea urchin harvest with
24 environmental protection. *See id.* § 79002. The Commission has the power to sue
25 and be sued. *Id.* § 79052.

26 3. Since its creation, the Commission has been gravely concerned with the
27 negative impacts of otter predation upon shellfish. Within the last decade, the vast
28 majority of sea urchin harvest in California has occurred in the otter management

1 zone. The Channel Islands sea urchin resource alone is responsible for 68% of
2 California's harvest.

3 4. Sea urchin is a favorite of the otter. *See* U.S. Fish & Wildlife Service,
4 Final Supplemental Environmental Impact Statement: Translocation of Southern
5 Sea Otters 87 (Nov. 2012) (SEIS) ("Sea urchins are favored prey for sea
6 otters"). When an otter moves into a new area, it generally will devour the
7 urchin population before selecting other prey. A significant body of research has
8 established that, once the otter moves into sea urchin territory, the commercial
9 urchin resource will collapse owing to the otter's voracious predation. *See, e.g.,*
10 U.S. Fish & Wildlife Service, Final Environmental Impact Statement
11 for Translocation of Southern Sea Otters App. B at 2 (May 1987) (EIS)
12 ("[T]he prevailing view among scientists is that sea otters limit populations
13 of . . . sea urchins . . . to such low levels that commercial and recreational
14 fisheries for [the] species are reduced or eliminated."), *available at*
15 http://www.fws.gov/ventura/species_information/so_sea_otter (last visited July 19,
16 2013).

17 5. Consequently, the Commission has a strong interest in protecting the
18 otter management regime that Congress authorized through Public Law 99-625. The
19 Commission submitted extensive comments to the Service on its draft environmental
20 impact statements and proposal to terminate the translocation program, including the
21 management zone. *See* SEIS App. G at 83. In those comments, the Commission
22 objected strongly to the Service's proposal, highlighting the profoundly negative
23 impacts that unregulated otter range expansion into the management zone would
24 have on Southern California's marine ecology and economy.

25 6. Plaintiff California Abalone Association is a non-profit California
26 corporation. Formed in 1971, the Association's mission is to restore and steward
27 a market abalone fishery in California that utilizes modern management concepts,
28 protect and enhance the resource, and guarantee a sustainable resource for the

1 future. The Association's many dozens of members held commercial abalone diving
2 permits in 1997, the year the State of California enacted the abalone fishing
3 moratorium. *Cf.* Cal. Fish & Game Code §§ 5521, 5521.5. Although the abalone
4 resource is improving, otter predation related to the species' expansion into the
5 management zone will prevent the resource from reaching a minimum viable
6 population, which is required for the moratorium to be lifted and for the resource to
7 be sustainable. *Cf. id.* § 5522(d).

8 7. Plaintiff California Lobster and Trap Fishermen's Association is a non-
9 profit association that advocates for a sustainable lobster resource and the fishermen
10 and communities that depend on the resource. The organization is gravely
11 concerned about unregulated otter expansion and the loss of the incidental take
12 exemption, due to otter consumption of lobster and the risks that traps will
13 unintentionally "take" the otter. The termination of the otter management program
14 therefore directly threatens the Association's and its members interests.

15 8. Plaintiff Commercial Fishermen of Santa Barbara is a non-profit
16 corporation organized to integrate regional efforts of fishing communities with the
17 aim of improving the economic and biological sustainability of fisheries. The
18 organization aims to maintain California's fishing heritage, to improve fisheries
19 management where needed, and to contribute to the improvement of ocean health.
20 The organization is gravely concerned about unregulated otter expansion, both due
21 to otter depletion of shellfish and other fisheries, as well as the legal risks of fishery
22 harvest causing illegal "take" of otter. The termination of the otter management
23 program therefore directly threatens the organization's and its members interests.

24 **Defendants**

25 9. Defendant Rachel Jacobson is sued in her official capacity as Acting
26 Assistant Secretary for Fish and Wildlife and Parks, Department of Interior. On
27 information and belief, Plaintiffs assert that Secretary Jacobson's predecessor was
28 delegated authority by the Secretary of the Department of Interior to approve the

1 decision to terminate the otter management zone, and that her predecessor exercised
2 that authority.

3 10. Defendant Department of Interior is the federal agency designated by
4 Public Law 99-625 to create the otter management zone. *See* Pub. L. No. 99-625,
5 § 1(a)(6).

6 11. Defendant Daniel M. Ashe is sued in his official capacity as Director
7 of the United States Fish and Wildlife Service. Director Ashe has primary
8 responsibility for the Service's proposal to terminate the otter management program.

9 12. Defendant United States Fish and Wildlife Service is the federal agency
10 principally responsible for maintaining the otter management zone. *See* Pub. L. No.
11 99-625, § 1(a)(7).

12 VENUE

13 13. Venue in this district is predicated upon 5 U.S.C. § 703 and 28 U.S.C.
14 § 1391(e)(1), in that a substantial part of the events or omissions giving rise to the
15 claim occurred in this District, and several Plaintiffs reside in the district. Venue is
16 proper in the Western Division of this District pursuant to 28 U.S.C. § 84(c)(2).

17 BACKGROUND

18 *The California Sea Otter*

19 14. The California sea otter (also known as the southern sea otter) is one
20 of three subspecies of otter. Unlike most marine mammals, the otter lacks blubber.
21 Consequently, the otter must keep warm by maintaining a very high metabolism,
22 consuming from 23% to 33% of its body weight per day. SEIS at 48. The otter also
23 relies on its dense pelage (some 650,000 follicles per square inch, U.S. Fish &
24 Wildlife Service, Final Revised Recovery Plan for the Southern Sea Otter 5
25 (2003), *available at* [http://www.fws.gov/ventura/species_information/so_sea_otter/](http://www.fws.gov/ventura/species_information/so_sea_otter/ssorecplan.pdf)
26 [ssorecplan.pdf](http://www.fws.gov/ventura/species_information/so_sea_otter/ssorecplan.pdf) (last visited July 26, 2013)) as a blubber substitute to keep warm.
27 SEIS at 48.

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1 15. Otter pelage has attracted fur hunters for centuries, and that hunting
2 greatly reduced the population. To prevent extinction, otter hunting bans were
3 enacted in the early 1900s. *See* Fur Seal Treaty of 1911, 37 Stat. 1542, 1543 (July 7,
4 1911); EIS App. H at 1 (citing Cal. Fish & Game Code § 4700). Since then, the
5 otter has made a significant comeback. *See* 42 Fed. Reg. 2965, 2966 (Jan. 14, 1977)
6 (“[T]here also seems no doubt that the Southern Sea Otter has made a comeback
7 from a formerly much more dangerous status.”); SEIS at 51 (“[T]he geographic
8 range of the southern sea otter has expanded considerably since 1938”);
9 Revised Recovery Plan at 1 (“[T]he southern sea otter is regarded as a subspecies
10 with a moderate level of threat but a high potential for recovery.”). In fact, the most
11 recent estimate reveals that the otter’s population is approximately 88% of that
12 needed for recovery. *See* SEIS App. G at 10.

13 16. The otter’s voracity, however, can have significant impacts on various
14 prey species, such as abalone, sea urchin, and lobster. *See* SEIS at 31. Naturally,
15 the otter’s progress towards recovery exacerbates these impacts. “Numerous reports
16 exist of sea urchin, crab, and clam populations declining once sea otters enter an
17 area.” SEIS App. B at B-23. *See also* EIS App. A at A-8 (“Sea otters are known to
18 reduce and effectively limit populations . . . such as abalone, clams, and sea
19 urchins”). Decades ago, the Service acknowledged that, without “action
20 . . . taken to control [otter] population growth and continued range expansion, the
21 shellfisheries of the entire Southern California Bight . . . could be at risk.” EIS at
22 IV-82.

23 *California Sea Otter Regulation and Recovery Efforts*

24 17. In 1972, Congress enacted the Marine Mammal Protection Act. 86
25 Stat. 1027 (Oct. 21, 1972), 16 U.S.C. § 1361, *et seq.* The Act imposes a moratorium
26 on the “take” of all marine mammals, including the otter, within the jurisdiction of
27 the United States. *See id.* § 1371(a). The Act defines “take” as “to harass, hunt,
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1 capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.*
2 § 1362(13).

3 18. In 1973, Congress passed the Endangered Species Act. Pub. L. 93-205,
4 87 Stat. 884 (Dec. 28, 1973), 16 U.S.C. § 1531, *et seq.* Like the Marine Mammal
5 Protection Act, the Endangered Species Act forbids the “take” of protected species.
6 *See id.* § 1538(a). Its scope, however, is broader. For example, the Endangered
7 Species Act applies to any “species,” *id.* § 1532(16), of plant or wildlife that is
8 determined to be “endangered,” *id.* § 1532(6), or “threatened,” *id.* § 1532(20), with
9 extinction, *see id.* § 1533(a).

10 19. In 1977, the Service listed the otter as a “threatened species.” 42 Fed.
11 Reg. 2965 (Jan. 14, 1977). The main threats that the Service identified to justify the
12 listing were habitat loss and hunting-related population decline, as well as the risks
13 posed by a Southern California oil spill. *See id.* at 2966-67. Today, however, the
14 Service believes that the two most important causes of otter death are white shark
15 attacks and infectious disease. SEIS at 54.

16 20. With its listing under the Endangered Species Act, the otter
17 automatically was deemed a “depleted stock” under the Marine Mammal Protection
18 Act. 16 U.S.C. § 1362(1)(C).

19 21. In 1982, the Service published a recovery plan for the otter. *See* 52
20 Fed. Reg. 29,784, 29,785 (Aug. 11, 1987) (discussing the plan). The plan
21 envisioned the establishment of at least one additional “experimental population”
22 of otter to facilitate the otter’s recovery. *Id.* (At least five prior attempts at
23 translocation, of varying success, had been essayed. *See* EIS App. B at B-6 to B-7;
24 *id.* App. I at 9.) The Endangered Species Act authorizes the Service to establish an
25 experimental population if it would “further the conservation of such species.” 16
26 U.S.C. § 1539(j)(2)(A).

27 22. The 1982 recovery plan “identified the translocation of southern sea
28 otters as an effective and reasonable recovery action,” but also acknowledged “that

1 a translocated southern sea otter colony could impact shellfish fisheries that had
2 developed in areas formerly occupied by southern sea otters.” 77 Fed. Reg. 75,266,
3 75,268 (Dec. 19, 2012).

4 23. In 1983, the Marine Mammal Commission (which administers certain
5 provisions of the Marine Mammal Protection Act) recommended that the Service
6 develop a plan to translocate a California sea otter population. EIS at II-2 to II-3.

7 24. In 1984, the Service identified four potential locations for an
8 experimental otter population, one of which was San Nicolas Island, a Channel
9 Island off the coast of Southern California. 52 Fed. Reg. at 29,785.

10 25. The Service’s plan to establish an experimental population, however,
11 had two significant obstacles. First, the Service feared that it could not establish and
12 maintain such a population consistent with the Marine Mammal Protection Act. *See*
13 *id.*; EIS at 1; SEIS at 9. An uncodified provision of the Endangered Species Act
14 provides that the Act must cede to the Marine Mammal Protection Act where the
15 latter is more protective than the former. Pub. L. No. 93-205, § 17, 87 Stat. at 903.
16 *See* 42 Fed. Reg. at 2967-68. The Service determined that, whereas the Endangered
17 Species Act authorized the Service to take otters in establishing *and* maintaining an
18 experimental population, the Marine Mammal Protection Act did not provide the
19 authority necessary to maintain the population. *See id.* at 2968; EIS at 1.

20 26. Second, the fishing community was greatly opposed to expanding the
21 otter’s range, reasonably fearing that the otter would destroy shellfish and other
22 marine resources. *See, e.g.*, EIS at 14 (observing that, “[o]ver time, the entire
23 commercial and sport shellfishery might be lost” if natural expansion of the otter’s
24 range were to occur). The fishing community also feared serious legal liability with
25 an expansion of the otter’s range; at the time, the Marine Mammal Protection Act
26 did not generally provide for permits to take marine mammals from a depleted stock
27 incidental to commercial fishing. *See* 16 U.S.C. § 1371(a)(3)(B) (1982).

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1 *Public Law 99-625: Balancing Sea Otter Recovery with Fisheries Protection*

2 27. On November 7, 1986, Congress enacted Public Law 99-625, 100 Stat.
3 3500 (placed in the United States Code as a note to 16 U.S.C. § 1536), to balance
4 the otter's recovery needs with the interests of fishermen. See H.R. Rep. No. 99-
5 124, at 14, 17 (May 15, 1985). The Act authorized the Service to develop and
6 implement "a plan for the relocation and management of a population of California
7 sea otters from the existing range of the parent population to another location." Pub.
8 L. No. § 1(b). The plan would have to include two zones: a "translocation zone"
9 where the experimental population would reside, and a "management zone," which
10 would surround the former. *Id.* § 1(b)(3)-(4).

11 28. The dual purpose of the "management zone" was to make containment
12 of the experimental population within the translocation zone easier, and "to prevent,
13 to the maximum extent feasible, conflict with other fishery resources within the
14 management zone by the experimental population." *Id.* § 1(b)(4)(B)(i)-(ii).

15 29. To achieve these purposes, Public Law 99-625 directed the Service to
16 "use all feasible non-lethal means and measures to capture any sea otter found
17 within the management zone and return it to either the translocation zone or to the
18 range of the parent population." *Id.* § 1(b)(4)(B)(ii).

19 30. To harmonize the otter's Marine Mammal Protection Act and
20 Endangered Species Act regulation, the Public Law provided: (i) any otter found
21 within the management zone would be deemed a member of the experimental
22 population, *id.* § 1(b)(4); (ii) take of otter within the management zone incidental to
23 "an otherwise lawful activity" would not constitute a violation of either the
24 Endangered Species Act or the Marine Mammal Protection Act, *id.* § 1(c)(2); and
25 (iii) take of otter by the Service or its agents in the course of implementing and
26 enforcing the plan would not constitute a violation of either the Endangered Species
27 Act or the Marine Mammal Protection Act, *id.* § 1(f). (The California Legislature

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1 enacted similar legislation tracking the provisions of Public Law 99-625. *See* Cal.
2 Fish & Game Code § 8664.2.)

3 31. Public Law 99-625 provided an express procedure for how the Service
4 “shall implement the plan.” *See* Pub. L. No. 99-625, § 1(d). The Public Law
5 provided no authorization, much less procedure, for the Service to cease to
6 implement the plan.

7 32. Shortly after the Public Law’s passage, the Service exercised its new
8 authority to establish the otter translocation program. *See* 52 Fed. Reg. 29,754
9 (Aug. 11, 1987). The Service had previously determined, under the Endangered
10 Species Act, that the translocation program would not jeopardize the species’
11 continued existence. *See* EIS App. I at 22. *Cf.* 16 U.S.C. § 1536(a)(2).

12 33. The plan authorized San Nicolas Island as the home for the
13 experimental population, and defined the island, along with its near-shore waters,
14 as the translocation zone. The rest of the California Bight, south of Point
15 Conception to the Mexican border, the Service designated as the otter-free
16 management zone. *See* 52 Fed. Reg. at 29,769. The Service acknowledged that
17 “maintenance of this management zone free of otters is the principal mitigation
18 feature of the proposal for fisheries and other environmental and socioeconomic
19 impacts.” 52 Fed. Reg. at 29,787.

20 34. Notwithstanding the absence of authority from the Public Law, the
21 Service included within the plan criteria for termination of the program. 52 Fed.
22 Reg. at 29,784. *See* 50 C.F.R. § 17.84(d)(8) (1988). The Service developed these
23 criteria in response to public comment on the proposed program. SEIS App. C at
24 25.

25 35. In 1994, Congress passed several significant amendments to the Marine
26 Mammal Protection Act. Among these amendments were new, permanent
27 authorizations for allowing take of marine mammals incidental to commercial
28 fishing. *See, as codified*, 16 U.S.C. §§ 1374(h), 1387(a). Congress also enacted a

1 special permitting regime for take of marine mammals that are protected under the
2 Endangered Species Act. *See id.* § 1371(a)(5)(E).

3 36. Because Public Law 99-625 already had established a special take
4 regime, Congress expressly exempted the California sea otter from these new take
5 provisions. *See id.* §§ 1371(a)(5)(E)(vi), 1387(a)(4).

6 *The Otter Translocation Program*

7 37. The Service translocated otters to San Nicolas Island from 1987
8 through 1990. SEIS at 1-2.

9 38. During that time, the Service released 140 otters at San Nicolas Island.
10 The fate of half is known: three died within a few days of translocation, 36 returned
11 to the parent population, 18 were captured or found dead within the management
12 zone, and 13 remained on the island. *See* SEIS App. C at 8. Most of the otters
13 unaccounted for probably returned to the parent population. *Id.* As of 2011, 48
14 adult sea otters remained on the island, all offspring of the original translocated
15 population. *Id.* at 13.

16 39. In 1993, the Service, concerned over the effectiveness of the program's
17 containment component, as well as its impacts on the otter, ceased to remove otters
18 from the management zone. *See* SEIS App. C at 11.

19 40. By 1998, large numbers of otters from the parent range had moved into
20 the management zone. SEIS at 79. Since then, "otters have seasonally moved into
21 and out of the management zone." *Id.* The Service today believes that it is likely
22 that the otter has established a permanent breeding colony within the management
23 zone. *Id.* at 47. *See* SEIS App. C at 28-29.

24 41. In July, 2000, the Service determined, under the Endangered Species
25 Act, that "continuing the containment program and restricting the southern sea otter
26 to the area north of Point Conception . . . is likely to jeopardize [the otter's]
27 continued existence." SEIS App. B at 37. *Cf.* 16 U.S.C. § 1536(b)(2).

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1 42. The same month, the Service published a Notice of Intent to modify or
2 terminate the translocation program. 65 Fed. Reg. 46,172 (July 27, 2000).

3 43. Shortly thereafter, the Service published a policy statement notifying
4 the public that it would no longer capture and remove otters found within the
5 management zone until the agency had reevaluated the translocation program. *See*
6 66 Fed. Reg. 6649 (Jan. 22, 2001).

7 44. Nevertheless, the Service continued to observe the Public Law 99-625
8 take exemption for “otherwise lawful activity” within the management zone. *See*
9 SEIS App. B at 38-39.

10 45. In April, 2001, the Service published a Scoping Report in anticipation
11 of completing a final evaluation of the translocation program. *See* SEIS App. E.

12 46. In April, 2003, the Service published a revised recovery plan,
13 which recommended that the Service stop maintaining the management
14 zone. Recovery Plan at 28.

15 47. Over the course of the next several years, the Service prepared and
16 revised a supplemental environmental impact statement discussing various
17 modifications, as well as possible termination, of the program. *See* 70 Fed. Reg.
18 58,737 (Oct. 7, 2005).

19 48. In 2009, The Otter Project and the Environmental Defense Center sued
20 the Service, contending that the agency had unreasonably delayed deciding whether
21 the otter translocation had failed and whether to maintain a “no otter” management
22 zone. *The Otter Project v. Salazar*, No. 5:09-CV-4610-JW (N.D. Cal.). The
23 Commission and the California Abalone Association, among other parties,
24 intervened as defendants. The lawsuit was settled with the parties agreeing that
25 Service would produce a revised analysis of the impacts of program modification
26 or termination by December, 2012. *See id.* Doc. No. 66.

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Proposal to Terminate the Program

49. On August 26, 2011, the Service published its notice of proposed rulemaking to terminate the program. 76 Fed. Reg. 53,381.

50. The California shellfish industry vigorously objected to the Service's proposal. For example, Plaintiff Sea Urchin Commission protested that allowing the otter an unregulated expansion into Southern California waters would be disastrous for California's shellfish industry. Quoting prominent otter experts, the Commission explained that, "[u]nless the sea otter is eventually contained, the State's Pismo clam, sea urchin, abalone, certain crab, and possibly lobster fisheries will be precluded." Letter of California Sea Urchin Commission to U.S. Fish & Wildlife Service, Oct. 24, 2011, at 28-29. The Commission also noted that, "'where sea otters have moved into . . . pristine areas . . . there has been a reduction of over 90% in numbers of shellfish,'" and that, "'[w]ithin their established range, otter foraging clearly precludes commercial fisheries for abalone and sea urchins.'" *Id.* (citations omitted).

51. Plaintiff Sea Urchin Commission reiterated the misgivings of the Marine Mammal Commission. In 2006, the latter expressed concern over unregulated otter expansion, observing that it "'is likely that the southward movement of sea otters will seriously affect all shellfish fisheries in California.'" *Id.* at 30 (quoting Letter to Ms. Diana K. Noda, Field Supervisor, United States Fish & Wildlife Service, Ventura, from Marine Mammal Commission, David Cottingham, Executive Director, Jan. 3, 2006). The Marine Mammal Commission explained that "the abandonment of the sea otter range management could, over the long term, lead to the elimination of virtually all of the shellfish fisheries along the West Coast." *Id.* at 36.

52. Plaintiff Sea Urchin Commission also detailed the severe economic dislocation that termination would cause. The sea urchin industry is California's fifth largest fishery, approximately \$40 million in value. *Id.* at 36. The Commission

1 estimated that termination would lead to the closure of over half of the state's sea
2 urchin processors and the disappearance of over 300 employees. That would result
3 in a loss of nearly \$7 million in wages alone to the local economy. *Id.* at 37.

4 *The Service's Termination Decision*

5 53. Notwithstanding these and other critiques, on December 19, 2012, the
6 Service published its final decision to terminate the translocation program and to
7 remove the take exemptions within the management zone. 77 Fed. Reg. 75,266.

8 54. The Service reviewed each of the criteria it had established in enacting
9 the translocation program. *See id.* at 75,287-89. Of the five criteria, the Service
10 determined that only Criterion 2 had been met. *See id.* at 75,289. That Criterion
11 provides that the program would be considered to have failed if, "within three years
12 from the initial transplant, fewer than 25 otters remain in the translocation zone and
13 the reason for emigration or mortality cannot be identified and/or remedied." 50
14 C.F.R. § 17.84(d)(8)(ii) (2012). *See* 52 Fed. Reg. at 29,784; EIS App. B at B-22 to
15 B-23. The Service's termination decision explains that Criterion 2 has been met
16 because (a) within 3 years of the initial transplant, only 17 otters remained on
17 San Nicolas Island, and (b) emigration was the primary reason that fewer than 25
18 otters remained. *See* 77 Fed. Reg. at 75,288. *See also* SEIS App. C at 26-27.

19 *The Impacts of the Service's Termination Decision*

20 55. The Service acknowledges that, with the program's termination,
21 "incidental take of southern sea otters in commercial fisheries cannot be authorized
22 under the [Marine Mammal Protection Act]." 77 Fed. Reg. at 75,290.

23 56. The Service concedes that termination of the program will lead to a
24 "considerable reduction in the abundance of invertebrate prey species to depths of
25 25 m (82 ft)." SEIS at 86.

26 57. The Service expects that termination of the program will lead to a
27 population approaching 300 otters residing within the management zone within a

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1 decade. SEIS at 100. Consequently, sustainable shellfish and other marine fisheries
2 in Southern California will be severely compromised if not destroyed.

3 **SPECIFIC ALLEGATIONS**
4 **THAT SUPPORT INJUNCTIVE RELIEF**

5 58. All preceding paragraphs are realleged and incorporated herein by
6 reference.

7 59. If an injunction does not issue requiring the Service to enforce the
8 management zone provisions of Public Law 99-625, Plaintiffs and their members
9 will be irreparably harmed. They will be unable to protect their livelihoods
10 adequately from otter predation.

11 60. Plaintiffs and their members have no plain, speedy, and adequate
12 remedy at law.

13 61. Plaintiffs' action is ripe and timely.

14 62. If not enjoined by this Court, the Service will continue to allow
15 unregulated otter expansion into Southern California, and will prosecute the take of
16 otter incidental to commercial fishing within the management zone, in derogation
17 of Plaintiffs' and their members' rights.

18 **SPECIFIC ALLEGATIONS THAT**
19 **SUPPORT DECLARATORY RELIEF**

20 63. All preceding paragraphs are realleged and incorporated herein by
21 reference.

22 64. An actual and substantial controversy exists between Plaintiffs and the
23 Service over the Service's authority, under Public Law 99-625 and the
24 Administrative Procedure Act, to terminate the translocation program, to cease to
25 enforce the management zone, and to forbid incidental take of otter within the
26 management zone.

27 65. This case is justiciable because the Service's failure to comply with
28 these laws is the direct result of final agency action that has caused and will

1 continue to cause immediate and concrete injury to Plaintiffs and their members, by
2 allowing unregulated otter expansion into Southern California fisheries, and by
3 causing them to refrain from pursuing their livelihoods for fear of prosecution for
4 take of otter. Plaintiffs and their members have a substantial and direct interest in
5 knowing whether the Service's termination of the translocation program, including
6 its management zone and incidental take authorization therein, is legal.

7 66. Therefore, declaratory relief is appropriate to resolve this controversy.

8 CLAIM FOR RELIEF

9 *Ultra Vires* Final Agency Action

10 (5 U.S.C. § 706)

11 67. Under the Administrative Procedure Act, an agency action is invalid
12 if, among other things, it is arbitrary, capricious, not in accordance with law, or in
13 excess of statutory jurisdiction or authority. 5 U.S.C. § 706(2)(A), (C).

14 68. Through Public Law 99-625, Congress authorized the Service to
15 establish an otter translocation program. Congress, however, mandated that any
16 such program contain a management zone. Pub. L. No. 99-625, § 1(b)(4). Congress
17 further mandated that the Service use all available non-lethal means to ensure that
18 the management zone remains otter-free. *Id.* Finally, Congress mandated that take
19 of otter incidental to otherwise lawful activity (such as commercial fishing) be
20 allowed within the management zone. *Id.* § 1(c)(2).

21 69. Although Public Law 99-625 provides the Service discretion in whether
22 to commence a translocation program, the Public Law provides no authority to the
23 Service to cease such program once it has been initiated. *See id.* § 1(d) ("The
24 Secretary shall implement the plan . . .").

25 70. Nevertheless, the Service's December 19, 2012, rulemaking purports
26 to terminate the translocation program, as well as any obligation to enforce the
27 management zone. *See* 77 Fed. Reg. at 75,289-90. Further, the rulemaking purports

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1 to remove the incidental take permission for the Marine Mammal Protection Act and
2 the Endangered Species Act. *Id.*

3 71. The only authority that the Service relied on to support its rulemaking
4 was the Service's own termination criteria, *see id.* at 75,287-89, which are the
5 Service's invention, not Congress', *see id.* at 75,278 ("Public Law 99-625 did not
6 address the prospect of the program's failure."). *See also* SEIS App. C at 25 ("The
7 statute did not address the possibility of the program's failure.").

8 72. Because Public Law 99-625 does not provide the Service any authority
9 to terminate the translocation program or to make illegal the incidental take of otter
10 within the programs's management zone, the Service's rulemaking, purporting to
11 do the same, is arbitrary, capricious, not in accordance with law, and in excess of
12 statutory jurisdiction and authority. *See* 5 U.S.C. § 706(2)(A), (C).

13 PRAYER FOR RELIEF

14 Wherefore, Plaintiffs pray for judgment against the Service as follows:

15 1. For a declaration that the Service is without authority to terminate the
16 translocation program;

17 2. For a declaration that the Service's purported termination of the
18 translocation program is null and void;

19 3. For a permanent mandatory injunction requiring the Service to enforce
20 the management zone;

21 4. For a permanent prohibitory injunction preventing the Service from
22 holding illegal the take of otter within the management zone that is incidental to
23 otherwise lawful activity;

24 5. For an award of Plaintiffs' costs of litigation, including, but not limited
25 to, reasonable attorney's fees and expert witness fees, and fees and costs pursuant
26 to 28 U.S.C. § 2412, or other applicable authority; and

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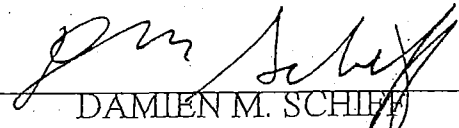
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1 6. For such other relief as the Court may deem just and proper.

2 DATED: July 29, 2013.

3 Respectfully submitted,

4 DAMIEN M. SCHIFF
5 JONATHAN WOOD

6 By 
7 DAMIEN M. SCHIFF

8 Attorneys for Plaintiffs
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