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‘Otters win, again.’ Supreme Court shuts down challenge from California fishing industry

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Furry sea otters will remain free to roam into their historic home waters of Southern California without being forcibly removed, thanks to a long-fought legal victory for advocates of endangered wildlife and despite a national effort by conservative groups who saw the issue as a test case.

That environmental win came Monday when the U.S. Supreme Court declined a petition brought by sea urchin fishermen to reconsider a Ninth Circuit Court of Appeal decision and reinstate a No Otter Zone that stretched from Point Conception south to the border of Mexico.

The case drew the attention of conservative policy groups across the nation and 17 states that saw it as an opportunity for newly appointed Supreme Court Justice Brett Kavanaugh “to make his mark by reining in federal bureaucrats,” with an opportunity to reconsider a legal principle that upholds federal agencies’ ability to interpret laws and enforce regulations without judicial oversight.

Instead, “Otters win, again,” said Steve Shimek, a biologist who created and directs the Otter Project in Monterey.

He said bringing back the No Otter Zone would have prevented the recovery of the sea otter population, which was nearly decimation by the fur trade.

Once thought to be extinct, sea otters have steadily rebounded from a small group of fewer than 50 found in Bixby Creek in Big Sur in the 1930s to more than 3,000 in 2017.

The sea otters’ original range, before they were hunted for their thick pelts, stretched from what is now known as Baja, up the Pacific Coast around Alaska and across the Bering Sea to Asia.

So why was a threatened species that’s protected under the Endangered Species Act and the Marine Mammal Protection Act banned from its native habitat in Southern California to begin with?

The No Otter Zone was created as part of a failed conservation program, Shimek said.

Fearful that a single oil spill could wipe out the entire population of sea otters on the Central Coast, the U.S. Fish and Wildlife Service in the mid-1980s sought to create a secondary population of otters in the Channel Islands. The plan was to relocate a group to a small area around San Nicolas Island.

That was a big concern for fishermen who suspected it would be bad for business to move natural predators of abalone and sea urchins into the middle of their fishery.

They found allies in the U.S. Navy and the oil industry, which would be burdened by an endangered species spreading into Southern California, Shimek said.

Eventually, to go forward with the conservation program, Fish and Wildlife agreed on a compromise — and, through an act of Congress, the program and the No Otter Zone began in 1987. The program dictated that Fish and Wildlife Services would trap and remove otters found in the zone, and it would end if it failed to reach five benchmarks chosen by the agency, according to court filings.

According to Shimek, the relocation of otters to San Nicolas Island failed.

The No Otter Zone, in effect from 1987 through 2012, dictated that Fish and Wildlife Services would remove any otters found between Point Conception and the border of Mexico. Otters have slowly repopulated the area, which is part of the small mammal's original habitat.

Courtesy of The Otter Project

Of the 140 sea otters moved to San Nicolas Island, all but 11 disappeared, died or swam back to the Central Coast. By 2011, the population grew to 48 adults and five pups, according to the Environmental Defense Center and the Otter Project.

Meanwhile, 24 otters were trapped in the exclusion zone, according to Tribune archives. Some died in captivity, and the relocation program ended in 1993.

Still, the No Otter Zone stayed on the books, and sea otters that found themselves on the wrong side of an invisible border were not entitled to full protection under the Endangered Species Act and the Marine Mammal protection Act.

That changed when the Otter Project and the Environmental Defense Center sued Fish and Wildlife in late 2009. The No Otter Zone officially ended in January 2013 as a result of a settlement between the two sides.

Fishermen and others saw it a different way. They argued that the agency successfully created a new population of sea otters in Southern California and that the species has reached its recovery goal, but the agency was no longer honoring the fishery protections.

So they sued. A few months after the settlement, the California Sea Urchin Commission, California Abalone Association, California Lobster and Trap Fisherman's Association and Commercial Fishermen of Santa Barbara sued Fish and Wildlife for ending the No Otter Zone.

A judge threw out the lawsuit, which the fishermen appealed to the Ninth Circuit Court of Appeals in 2014.

They lost again, and appealed that decision to the U.S. Supreme Court, arguing that the appellate court had expanded the use of something called the Chevron deference.

That's why conservative organizations such as the Buckeye Institute for Public Policy Solutions, the Cato Institute and the Landmark Legal Foundation got involved. The Chevron difference is a legal doctrine, that the Pacific Legal Foundation calls "the chief culprit undermining the constitution's separation of powers."

They argue that Fish and Wildlife was allowed to "upend a compromise that Congress solidified by statute."

The U.S. Supreme Court conferenced on Friday and announced their decision to deny the petition on Monday.

As for the sea otters, it turns out that re-populating Southern California will take time. Otters, which biologists see as crucial to the health of kelp forests, are slowly moving south and have been seen as far as the Mexico border but their numbers south of Point Conception pale in comparison to those of the Central Coast.