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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LA JOLLA FRIENDS OF THE SEALS, a)
nonprofit organization; and JAMES H. N.)
HUDNALL, JR., an individual,)
)
Plaintiffs,)

v.)

NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION)
NATIONAL MARINE FISHERIES)
SERVICE (“NMFS”), an agency of the U.S.)
Dept. of Commerce; CARLOS M.)
GUTIERREZ, Secretary of Commerce;)
JAMES W. BALSIGER, Acting Director of)
NMFS; RODNEY MCINNIS, Acting)
Regional Administrator of NMFS; JAMES)
LECKY, Director of Office of Protected)
Resources at NMFS; CITY OF SAN DIEGO;)
and DOES 1 TO 100,)
)
Defendants.)

Civil Case No.: 08 CV 1847 WQH POR
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
REQUIRING THE CITY TO FOLLOW
TWO RESOLUTIONS OF ITS CITY
COUNCIL BY PLACING A GUIDELINE
PUPPING SEASON ROPE**

1 **INTRODUCTION**

2 Plaintiffs’ original application for a temporary restraining order, filed October 10, 2008,
3 was both to prevent the imminent destruction of the harbor seal rookery as well as to require the
4 City to follow two resolutions of its City Council and place a guideline pupping season rope as
5 requested by NMFS. (Doc. 3). Because the rope is not required to be placed until December 15,
6 and the matter was set for preliminary injunction hearing on November 25, the parties omitted
7 the rope issue from the stipulated temporary restraining order entered on October 22, 2008.
8 (Doc. 11).

9 However, the parties then stipulated to continue the November 25 hearing in order to
10 pursue settlement. (Doc. 25). The Court set the next hearing for February 13, 2008. (Doc. 26).
11 There was still a possibility that the City would place the rope by the December 15 deadline
12 without being compelled to by this Court, but in case that did not occur, the parties stipulated
13 that the joint motion to continue the November 25 hearing was without prejudice to Plaintiffs’
14 ability to seek such relief if necessary. (Doc. 25 at 2). It is now apparent the City will not be
15 placing the rope this year without an order from this Court, and a letter received today from the
16 City Attorney’s office confirms this. *See* Pease Dec. ¶ 3.

17 Plaintiffs therefore respectfully request an order requiring the City to place the pupping
18 season rope in accordance with two resolutions of its City Council, at least until the matter will
19 be heard on February 13. *See* Cmplt. Ex. B and C at 3-7. The U.S. Government has already
20 agreed that the Marine Mammal Protection Act preempts the state court order preventing
21 placement of the rope. *See* Cmplt. Ex. G at 14. Plaintiffs have a state law claim for mandamus
22 against the City that raises a substantial question of federal law and thus may be brought in
23 federal court, even when the federal law in question does not itself contain a private right of
24 action. *See Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005).

25 Without the rope, Plaintiffs will suffer irreparable harm in the form of seeing pregnant
26 and nursing seals harassed out of the rookery by unwitting tourists who have no idea there is a
27

1 recommended distance that they stay back from the seals. Last year before the Ninth Circuit
2 granted an emergency motion allowing the rope, two seal pups were separated from their
3 mothers and had to be rescued by SeaWorld. *See* Cmplt. Ex. E at 10. Additionally, the public
4 interest favors enforcing resolutions of the duly elected City Council.

5 **ARGUMENT**

6 **I. Procedural and factual background**

7 On March 21, 2006, NMFS Special Agent in Charge Don Masters wrote a letter to San
8 Diego Mayor Jerry Sanders in which he noted that Children’s Pool Beach (“CPB”) “receives an
9 estimated 80,000 visitors per month which increases the potential for seal/human interaction.”
10 *See* Cmplt. Ex. A at 1. Agent Masters noted that other beaches where seals rest and give birth
11 are temporarily closed in the winter during seal pupping season, and urged the City to at least put
12 up a guideline rope barrier at CPB, writing:

13 The rope barrier will provide a clear message for those that have a sincere desire to
14 respect the marine mammals present on the beach, and therefore will provide some level
15 of heightened protection for the adult and newborn seals. The rope barrier will also aid in
16 informing humans when they are more likely to be found in violation of the MMPA and
17 potentially cited. This option has been supported by Susan Davis, Member of the U.S.
18 Congress (House of Representatives).

19 On April 19, 2006, the San Diego City Council enacted Resolution R-301368 requiring
20 that “the rope barrier at the Children’s Pool beach will be reinstated for the remainder of this
21 year’s pupping season and will be placed at the beach from January 1 through May 1 every year
22 from this point forward. *See* Cmplt. Ex. B at 3. On January 8, 2007, the City Council enacted
23 Resolution 302160, calling for the placement of the rope to be extended two weeks on either end,
24 so that it would be placed on December 15 and removed on May 15. *See* Cmplt. Ex. C at 5.

25 On November 30, 2007, Agent Masters wrote a letter to Deputy City Attorney Nina Fain,
26 again stating CPB should be closed for pupping season, but noting that the rope barrier is
27 appreciated and “has been a needed step in the right direction.” *See* Cmplt. Ex. D at 8. On
28 January 4, 2008, a state court judge declared that a 1931 state law suddenly prevents such a rope.

1 On that basis, the City failed to follow the two resolutions passed by its City Council requiring
2 the rope. *See* Cmplt. ¶21. Two seal pups were then separated from their mothers as a result of
3 humans getting too close, and NMFS authorized SeaWorld San Diego to rescue the two pups.
4 *See* Cmplt. Ex. E at 10.

5 The Animal Protection and Rescue League (“APRL”) filed an action in federal court last
6 year arguing that the MMPA preempts enforcement of the state court’s order against the City.
7 The Ninth Circuit granted an emergency motion on March 10, 2008 allowing the rope up on that
8 basis, and the City installed the rope the next day. *See* Cmplt. Ex. F at 12. A City Hearing
9 Officer approved the rope for the remainder of seal pupping season, until May 30, 2008, based
10 on the Ninth Circuit’s stay of the state court injunction.

11 In APRL’s lawsuit, amicus U.S. Government agreed that the MMPA preempts state law
12 insofar as it disallows a pupping season rope. *See* Cmplt. Ex. G at 14. The Government also
13 argued that because the MMPA does not contain a private right of action, federal jurisdiction to
14 hear APRL’s claim was lacking. However, unlike the present case, the *APRL* case did *not*
15 involve federal defendants. The Ninth Circuit dismissed the case in an unpublished decision on
16 the sole ground that the MMPA does not contain a private right of action other than to challenge
17 the granting or denial of a permit. *See* Cmplt. Ex H at 18.

18 In *Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005), a
19 unanimous Supreme Court ruled that a private cause of action is not always required to have a
20 substantial question of federal law sufficient to confer federal subject matter jurisdiction on a
21 claim arising from state law. *Id* at 318. *Grable* was not cited in any of the pleadings or oral
22 argument in *Animal Protection and Rescue League v. State of California*. *See* Cmplt. ¶26.
23 Plaintiffs in the present case were not parties to the *APRL* case and are not bound by the
24 unpublished decision in that case, which may have turned out differently had *Grable* been
25 considered.

1 **II. The rope issue requires resolution of a substantial federal question**

2 Plaintiffs have a state law claim to a writ of mandate under Cal. Code Civ. Proc. §1085(a)
3 compelling Defendant City to follow its own City Council’s ordinance and place the pupping
4 season rope. A federal court also has jurisdiction to hear the claim because there is a substantial
5 question of federal law that must be resolved, in this case whether the MMPA preempts
6 enforcement of a state law disallowing such a rope. This question was substantial enough that
7 the Ninth Circuit Court of Appeals granted an emergency motion on this basis, and the U.S.
8 Government agrees that such preemption exists.

9 The Marine Mammal Protection Act expressly preempts state law:

10 No State may enforce, or attempt to enforce, any State law or regulation **relating**
11 **to the taking** of any species (which term for purposes of this section includes any
12 population stock) of marine mammal within the State unless the Secretary has
13 transferred authority for the conservation and management of that species
(hereinafter referred to in this section as ‘management authority’) to the State
under subsection (b)(1).

14 USC § 1379(a) [Emphasis added]. The U.S. Supreme Court has held that the words
15 “relating to...express a broad pre-emptive purpose”:

16 The ordinary meaning of these words is a broad one – “to stand in some relation;
17 to have bearing or concern; to pertain; refer; to bring into association with or
18 connection with,” Black’s Law Dictionary 1158 (5th ed. 1979) -- and the words
19 thus express a broad pre-emptive purpose. *Morales v. Trans World Airlines, Inc.*,
504 U.S. 374, 382 (1992).

20 The Supremacy Clause of the U.S. Constitution, USCS Const. Art. VI, Cl 2, states:

21 This Constitution, and the Laws of the United States which shall be made in
22 Pursuance thereof; and all Treaties made, or which shall be made, under the
23 Authority of the United States, shall be the supreme Law of the Land; and the
24 Judges in every State shall be bound thereby, any Thing in the Constitution or
Laws of any State to the Contrary notwithstanding.

25 *See Gonzales v. Raich* (2005) 545 U.S. 1, 29 (“The Supremacy Clause unambiguously
26 provides that if there is any conflict between federal and state law, federal law shall prevail.”)

1 “It is well-established that the federal courts have jurisdiction under 28 USC § 1331 over a
2 preemption claim seeking injunctive and declaratory relief. See, e g, *Verizon Md, Inc v Pub Serv*
3 *Comm’n of Md*, 535 US 635, 641-43, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002).” *In re NSA*
4 *Telcoms. Records Litig.*, 2007 U.S. Dist. LEXIS 53456 at 45.

5 Federal courts are not bound by state court interpretations of federal law. *See United*
6 *States v Montana* , 134 F.2d 194 (9th Cir. 1943), *cert den* (1943) 319 US 772. (“The reliance on
7 the decision of the Montana Supreme Court does not seem fruitful. Its interpretation of the
8 federal statute, is, of course, not binding on the federal courts [citations].”); *Grantham v.*
9 *Avondale Indus.*, 964 F.2d 471, 473 (5th Cir. 1992) (“It is beyond cavil that we are not bound by
10 a state court’s interpretation of federal law regardless of whether our jurisdiction is based on
11 diversity of citizenship or a federal question.”); *Pauk v. Board of Trustees of City University of*
12 *New York*, 654 F.2d 856, 866 n. 6 (2d Cir. 1981) (a state court decision cannot preclude a federal
13 court’s more authoritative decision on matters of federal law).

14 In determining the interaction between state and federal law, the United States Supreme
15 Court has held that if the state court excluded railroad employees from the worker’s
16 compensation act as a matter of construction of the state statute, federal courts were bound by
17 that construction, but if the state court’s ruling was based on an erroneous interpretation of the
18 effect of federal law on the state statute, federal courts were not bound by that erroneous
19 interpretation. *Tipton v Atchison, T. & S. F. R. Co.*, 298 US 141, 151-152 (1936).

20 Therefore, to the extent that the state court’s prior ruling disallowing the rope constitutes
21 a determination that such a ruling does not violate federal law, this Court is not bound by such an
22 interpretation.

23 The U.S. Government has taken the following position with respect to the guideline
24 pupping season rope that is supposed to be placed on December 15:

25 The harassment of seals by the general public, of course, constitutes an
26 unauthorized taking. *See* 16 U.S.C. § 1362(13). And NOAA has advised the City
27 to install a guideline rope during the pupping season to minimize these takings. In
light of these circumstances, to the extent the state law prohibits the City from

1 adopting this measure, it relates to the taking of seals.

2 Moreover, the conclusion that the MMPA preempts this aspect of the state
3 law is consistent with the statute's underlying objectives. After all, the
4 unauthorized taking of marine mammals is something the MMPA is intended to
5 prevent. *See* H.R. Rep. No. 92-707 (1972), *as reprinted in* 1972 U.S.C.C.A.N.
6 4144. And while installing a guideline rope during the seal pupping season is
7 consistent with this objective, prohibiting a local government from taking such a
8 measure on its own property is not; indeed, such an interpretation of the state law
9 frustrates the MMPA's prohibition on the unauthorized taking of marine mammals,
10 as well as NOAA's efforts to enforce the statute.

11 Furthermore, section 109(h) is inapposite to the installation of a guideline
12 rope. The state law's prohibition against installation of a guideline rope does not
13 itself require or result in the taking of a marine mammal by government officials,
14 and the purpose of this prohibition is not to protect marine mammals, to protect the
15 public health or welfare, or to remove nuisance animals. The MMPA thus
16 expressly preempts the state law to the extent it prohibits the City from installing a
17 guideline rope during the pupping season.

18 *See* Cmplt. Ex. G at 14. Federal Defendants in the present case continue to agree that
19 "the MMPA expressly preempts state law to the extent state law prohibits the City from
20 installing a guideline rope during the seal pupping season to prevent members of the public from
21 harassing the seals." *See* Federal Defendants' Opposition to TRO at 7 (Doc. 19 at 11). The City
22 has not opposed Plaintiffs' TRO request at all and in fact agreed with it in its entirety, including
23 the original request for the guideline rope. (Doc. 18).

24 Under the newly decided *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008)
25 166 Cal. App. 4th 1349, public trust doctrine does not just include tidelands and navigable
26 waters, but it also includes wildlife. Plaintiffs have standing under state law to challenge the
27 failure of the state or its political subdivisions and agencies to protect the wildlife. *Center for*
28 *Biological Diversity*, 166 Cal. App. 4th 1349, 1354 ("Wildlife...is considered to be a public trust
resource of all the people of the state, and private parties have the right to bring an action to
enforce the public trust.")

The undisputed preemptive force of the MMPA over the state court's ruling against the

1 pupping season rope creates a substantial question of federal law that makes jurisdiction in this
2 Court proper. *See Grable & Sons*, 545 U.S. 308, 312 (“this Court having recognized for nearly
3 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that
4 implicate significant federal issues. [Citations]. The doctrine captures the commonsense notion
5 that a federal court ought to be able to hear claims recognized under state law that nonetheless
6 turn on substantial questions of federal law, and thus justify resort to the experience, solicitude,
7 and hope of uniformity that a federal forum offers on federal issues. [Citations].”

8 **III. The balance of hardships tips in favor of maintaining the status quo and allowing**
9 **the two City Council resolutions to continue to be enforced**

10 Plaintiffs will suffer grave and irreparable injury if Defendant City is not required to
11 follow the mandate of the San Diego City Council in placing a pupping season rope this year
12 starting in December. Plaintiffs therefore respectfully request a temporary restraining order,
13 preliminary injunction, and permanent injunction requiring the City to erect a pupping season
14 rope on December 15 of this year as required by its City Council, state law notwithstanding, due
15 to the supremacy of federal law.

16 There is no harm to defendants in requiring the rope, and the public interest favors
17 enforcing resolutions enacted by the City Council for the public benefit, as underscored by
18 polling data and newspaper editorials on this issue. *See* Pease Dec. ¶¶ 5-7. The rope is a
19 guideline only and is not illegal to cross, so it does not affect the rights of those who wish to use
20 Children’s Pool for swimming. It is simply a very effective tool at preventing unintentional
21 disturbance of pregnant and nursing seals by the 80,000 to 100,000 visitors per month who come
22 to watch the seals and would otherwise get too close, causing separation and injury of pups.

23 **CONCLUSION**

24 The City filed a non-opposition to Plaintiffs’ original request for a TRO, which included
25 a request for placement of the rope. (Doc. 18). Federal Defendants filed an opposition to the
26 TRO for themselves only, taking no position on whether the City should be bound. (Doc. 19).

1 In issuing the TRO that is currently in effect to prevent imminent destruction of the harbor seal
2 rookery, this Court found “serious questions going to the merits are raised and the balance of
3 hardships tips sharply in favor of the moving party.” (Doc. 11 at 2). The same factors are now
4 present with respect to the pupping season rope. Plaintiffs therefore respectfully request a TRO
5 against the City requiring it to place the rope on December 15 as mandated by the City Council.
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7 Dated: December 2, 2008

8 By: /s/ Bryan W. Pease
9 Bryan W. Pease
10 Attorney for Plaintiffs
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