Bernard F. King III, SBN 232518
LAW OFFICES OF BERNARD F. KING III, APC
4747 Executive Drive, Suite 700
San Diego, California 92121
Telephone: (858) 737-3046
Facsimile: (858) 746-4045
E-mail: bking@bernardkinglaw.com

Attorney for Petitioner Friends of the Children's Pool

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

FRIENDS OF THE CHILDREN'S POOL, a nonprofit public benefit corporation,

Petitioner,

v.

CITY OF SAN DIEGO, CALIFORNIA COASTAL COMMISSION, and DOES 1 through 50,

Respondents.

Case No.: 30-2015-00778153-CU-WM-CJC

PETITIONER'S REPLY TO THE CITY'S AND THE COASTAL COMMISSION'S OPPOSITION TO MOTION FOR WRIT OF MANDATE

[IMAGED]

Judge: Hon. Frederick Horn
Dept: C-31
Date: March 2, 2016
Time: 1:30 p.m.

I. INTRODUCTION

Petitioner FOCP submits this reply to the opposition briefs of both the Commission and the City. Their opposition arguments should be rejected for the following reasons:

(1) The City and the Commission do not dispute that the seasonal beach closure "relates to" to the harassment of seals, but they fail to describe any ambiguity in the preemption statute. When the statute is plain and unambiguous the court must apply the statute according to its terms;

(2) The ERISA cases cited by the Commission do not support its argument that the MMPA does not preempt state laws protecting marine mammals from harassment;

(3) The City's argument that MMPA preemption will result in an unconstitutional taking is both incorrect and speculative because the City has not yet applied to the Secretary of Commerce for management authority to enforce the seasonal beach closure under 16 U.S.C. § 1379(b)(1);

(4) The City and the Commission disregard the decision in *UFO Chuting I*, and ignore Congress' implicit (if not affirmative) adoption of the District Court's interpretation;

(5) The City and the Commission's reliance on *State v. Arnariak* is unpersuasive;

(6) The seasonal beach closure is not consistent with the MMPA;

(7) The federal Coastal Zone Management Act ("CZMA") does not abrogate the broad scope of express preemption under the MMPA; and

(8) Section 30211 does not reflect a general coastal access policy that is subject to balancing, but instead prohibits development which interferes with public access to the sea where specifically acquired by Legislative authorization, as was the case with the Children's Pool.

II. THE MMPA PREEMPTS THE SEASONAL BEACH CLOSURE

1. MMPA's Preemption Statute Is Unambiguous

When the statutory text is plain and unambiguous, the court "must apply the statute according to its terms." (*Carcieri v. Salazar* (2009) 555 U.S. 379, 129 S. Ct. 1058, 1063-1064.) MMPA's preemption clause prohibits the enforcement of any state law or regulation "relating to" the taking, i.e. harassment of seals. (16 U.S.C. § 1379(a).) The United States Supreme Court interprets the words "relating to" to "express a broad pre-emptive purpose." (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 383.) The Commission and the City do not deny, and in fact admit that the seasonal beach closure "relates to" the harassment of seals.

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

(See e.g. Commission Oppo at p. 9, ln 20-23 [the beach closure "inhibits seal harassment by preventing disturbance to the seals' breeding, nursing and behavioral patterns."]; City Oppo at p. 4, ln 11-17.) The plain language of the statute is clear and Congress is presumed to mean what it said. (*Connecticut Nat. Bank v. Germain* (1992) 503 U.S. 249, 253-254.)

The Commission and the City cite the general presumption against preemption of a state's historic police power as a reason to ignore the unambiguous language of of section 1379(a). (Commission Oppo at p 10, ln 21-28; City Oppo at p. 5, ln 16-18.) Here, however, the MMPA preemption statute demonstrates with sufficient clarity Congress' intent to preempt "any State law or regulation relating to the taking of marine mammals." (16 U.S.C. § 1379(a).) The plain language reflects a clear purpose to preempt **all laws** relating to the taking of marine mammals, regardless of whether the laws involve land use regulations or other historic police powers of the states. Accordingly, section 1379(a) preempts the seasonal beach closure.

2. The ERISA Cases Cited by The Commission Do Not Support Its Argument That Preemption Under Section 1379(a) Does Not Extend to Laws Protecting Marine Mammals from Harassment

Despite the plain language of section 1379(a) and without pointing to any ambiguity in the statute, the Commission argues the MMPA "manifests no clear intention to preempt state laws protecting marine mammals from harassment." (Commission Oppo at p. 12, ln 7-8.) In support of this interpretation, the Commission cites two ERISA cases where the Supreme Court confronted the scope of a statute expressly preempting any law "relating to" the regulation of ERISA plans. (See, e.g. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, (1995) 514 U.S. 645, ("Travelers"); *Construction Division Of Labor Standards v. Dillingham Construction,* (1997) 519 U.S. 316, ("Dillingham").) *Travelers* addressed whether a state surcharge on hospital bills, and the resulting indirect cost to insurance companies, was preempted because it "related to" the regulation of ERISA plans. (*Travelers, supra,* 514 U.S. 645, 654-656.) The Supreme Court held the statute did not "relate to" the regulation of ERISA plans merely because of "indirect" economic effects on insurers. (*Id.* at p. 661.) Similarly, *Dillingham* considered whether statutes governing apprenticeship

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

programs and apprentice wages on public works projects were preempted under ERISA. The Supreme Court observed that areas of traditional state regulation were not immune from preemption. (*Dillingham, supra,* 519 U.S. 316, 330 ["That the States traditionally regulated these areas would not alone immunize their efforts; ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation."].) However, it declined to find preemption because the law's indirect effects on benefit plans were not sufficiently "related to" the regulation of ERISA plans. (*Ibid.*)

In contrast to the laws at issue in *Travelers* and *Dillingham*, there is no dispute here that the seasonal beach closure "relates to" to the harassment of seals. Indeed, both the City and the Commission admit it was passed to protect seals from harassment during their pupping season. This is not a remote, indirect connection. This was the explicit, primary purpose of the law. Furthermore, preemption applies to "**any** State law or regulation" that relates to the taking of marine mammals. Like ERISA, the MMPA expresses a clear Congressional intent to preempt all laws "relating to" to the field, i.e. the taking of marine mammals, regardless of whether the law purports to protect marine mammals from harassment. The statute expressly preempts any law, including land use regulations, that "relates to" the harassment of seals. There is no ambiguity here. The seasonal beach closure thus falls squarely within the field expressly preempted by Congress in section 1379(a).

3. The City's Argument That MMPA Preemption Results In an Unconstitutional Taking Is Incorrect and Premature

Citing the general rule that ambiguous statutes should be interpreted to avoid an unconstitutional result, the City argues that if "the MMPA were construed to mandate unfettered access to state owned property, that would render the MMPA provision unconstitutional." (City Oppo. at p. 7, ln 27-28.) Even if this involved a statutory ambiguity (and it does not), the City's argument is unavailing.

First, the statute *expressly allows* states to enforce laws like the seasonal beach closure, provided that the Secretary has transferred management authority pursuant to section 1379(b)(1). In this case, neither the City nor any state agency has applied to the Secretary for a

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

transfer of management authority of harbor seals at the Children's Pool. It is premature to speculate about a potential taking before the City has even attempted to secure the requisite permission. As the Supreme Court has made clear, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* (1985) 473 U. S. 172, 190.) The City cannot claim preemption will result in an unconstitutional taking before it has even applied for management authority under the MMPA.

Second, the preemption statute does not "mandate unfettered access" to the City's property, nor does it take away the City's "right to exclude." On its face, the statute only preempts laws and regulations relating to the taking of marine mammals. "It is accepted that Congress has the authority, in exercising its Article I powers, to preempt state law." (*California v. ARC America Corp*. (1989) 490 U.S. 93, 100.) The MMPA does not deprive the City of its rights as a trustee of public trust lands nor does it prevent the City from enforcing beach closures for reasons unrelated to the harassment of seals.

Third, the Supreme Court has never applied the law of regulatory takings to federal preemption of state and local laws. Even if the law of regulatory takings did apply in this case, it is well established that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." (*Armstrong v. United States* (1960) 364 U. S. 40, 48.) Rather, determining when a law violates the Taking Clause requires an examination into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. (*Penn Central Transportation Co. v. New York City* (1978) 438 U. S. 104, 124.) In this case, the land is public tidelands held by the City in trust for the public. "'[O]wnership' of public tidelands and submerged lands, …is not of a proprietary nature." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.) Upholding the preemption statute will cause no investment loss, no diminution in market value, and no loss of the City's proprietary interests. The City will simply

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

continue to hold the Children's Pool in trust for the public. This issue is a red herring and poses no serious obstacle to MMPA preemption.

4. UFO Chuting I Squarely Addressed the Scope of MMPA Preemption and Congress Implicitly Adopted the Ruling

The Commission and the City not only ignore the plain, unambiguous meaning of the statute, but they conspicuously disregard both (1) the Federal Court's interpretation of the preemption statute in *UFO Chuting of Hawaii, Inc. v. Young*, (D. Hawaii 2004) 327 F. Supp. 2d 1220 ("UFO Chuting I"), and (2) Congress' subsequent legislation which implicitly (if not affirmatively) adopted *UFO Chuting I's* interpretation of MMPA preemption.

UFO Chuting I held that the MMPA's express preemption statute was unambiguous and preempted all state laws relating to the taking of marine mammals, including laws purporting to provide additional protection for marine mammals. (*UFO Chuting I,* 327 F. Supp 2d 1220.) While it is true the original judgment in *UFO Chuting I* was superseded by an amendment to the MMPA, the District Court's interpretation of the MMPA remains persuasive authority. Moreover, Congress' reaction to the decision strongly suggests that it agreed with the District Court's interpretation. As described in *UFO Chuting of Hawaii, Inc. v. Young*, (D. Hawaii 2005) 380 F. Supp. 2d 1166 ("UFO Chuting II"), after the state appealed the District Court's ruling in *UFO Chuting I*, Congress passed the Fiscal Year 2005 Omnibus Appropriations Bill ("Omnibus Appropriations Bill"), H.R. 4818, Public Law 108-447, 118 Stat. 2809. Section 213 of the Omnibus Appropriations Bill ("section 213") states:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

(*UFO Chuting II, supra,* 380 F.Supp.2d 1166, 1167-68.)

Thus, after *UFO Chuting I* declared Hawaii's laws preempted by the MMPA, Congress responded by granting Hawaii a specific exemption from MMPA preemption by enacting Section 213. In the words of the District Court, "section 213 exempts Hawaii from 16 U.S.C. § 1379(a), *which otherwise preempts state laws and regulations 'relating to the taking' of*

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

marine mammals." (*UFO Chuting II, supra,* 380 F.Supp.2d 1166, 1171-72.) (emphasis added) By granting Hawaii an exception to MMPA preemption, while leaving section 1379(a) unchanged, Congress implicitly affirmed the preemption ruling in *UFO Chuting I*. (*Gross v. FBL Financial Services, Inc.* (2009) 129 S. Ct. 2343, 2349 ["When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* (1982) 456 U.S. 353, 384-387 [Congress affirms a judicial interpretation of a statute when it is aware of the interpretation, and amends or reenacts other parts of the law without changing the statutes interpreted].)

Additionally, statutes are construed so as to avoid rendering any provision superfluous. (*United States v. Menasche* (1955) 348 U.S. 528, 538-539.) If MMPA preemption is not construed broadly to prohibit all state laws relating to the taking of marine mammals, the exemption granted to Hawaii in Section 213 is meaningless. Instead, Section 213 should be construed as a narrow, statutory exception to the broad scope of MMPA preemption described in *UFO Chuting I.*

Finally, the Commission and the City attempt to distinguish *UFO Chuting I* on the basis that it involved an actual conflict between state and federal law. However, the District Court was clear that the state law would have been expressly preempted regardless of any additional conflict with a specific federal law. Even ignoring express preemption, there are at least two additional conflicts between state and federal law in this case. First, as discussed more fully below in Section 5, the seasonal beach closure conflicts with the MMPA's purpose of replacing diverse state marine mammal laws with a uniform, comprehensive federal system. Second, the MMPA does not prohibit a person from sharing a beach with seals as long as the person does not "harass" the seals. Unlike the humpback whales in *UFO Chuting I*, there is no minimum distance people must keep between themselves and seals. Nevertheless, the seasonal beach closure prohibits people from using the beach regardless of whether they actually harass seals in violation of the MMPA. Thus, the seasonal beach closure suffers the same type of conflict discussed in *UFO Chuting I*, i.e. it prohibits conduct which would otherwise be legal under the MMPA.

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

5. Respondents' Reliance on State v. Arnariak is Unpersuasive

The Commission and the City rely on *State v. Arnariak*, (1997) 941 P.2d 154 ("Arnariak"), as authority for avoiding the plain, unambiguous language of the MMPA's preemption statute. *Arnariak* involved a remote, uninhabited island that Alaska designated as a walrus sanctuary in 1960, prior to the MMPA's passage in 1972. Defendant was charged with unlawfully accessing the island without a permit and discharging a firearm in violation of Alaskan law. The *Arnariak* court rejected a claim that section 1379(a) preempted the state regulations for three reasons: (1) the purpose of the MMPA purportedly supports state laws protecting marine mammals, (2) the legislative history of the MMPA purportedly supports state laws protecting marine mammals, and (3) the presumption that statutes like the MMPA should be construed to avoid an unconstitutional taking of Alaska's property. In a thorough and well-reasoned dissent, Justice Shortell persuasively argued that the majority got it wrong.

> To conclude that preempting Alaska's walrus sanctuary regulations would be contrary to Congress's intent, the court assumes that the overriding purpose of the MMPA is to protect marine mammals. Certainly, marine mammal protection is the "major objective" of the act. However, protection was not Congress's exclusive objective. Instead, the MMPA's structure and legislative history indicate that several objectives concerned Congress when it enacted the MMPA. ……¶ No portion of the act or its legislative history suggests that Congress intended to permit Alaska to enforce regulations that would upset this balance, even if those regulations provided strong protections for marine mammals.

(*Arniak, supra,* 941 P.2d at p. 160-162 [J. Shortell dissent].) (internal citations omitted)

Justice Shortell further pointed out that "a narrow interpretation of the MMPA's preemption clause would thwart specific provisions included in § 1379(b)(1) of the MMPA to ensure that no state law would frustrate any of the multiple objectives addressed in the act."

> Section 1379(b)(1) sets forth several criteria that a state must meet before gaining authority to enforce its laws relating to the taking of walruses. Of those criteria, the very first requires states to have developed "a program for the conservation and management of [walruses] that … is consistent with the purposes, policies, and goals of this chapter." Under the court's ruling, a state such as Alaska that has not attained management authority for walruses could nevertheless enforce regulations that do not conform to all of the MMPA's purposes, policies, and goals so long as those regulations protect walruses. Congress surely could not have intended to allow Alaska to make such an end run around the requirements of § 1379(b)(1).

(*Arniak, supra,* 941 P.2d at p. 160-162 [J. Shortell dissent].) (internal citations omitted)

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

In other words, the MMPA does not prohibit the enforcement of state and local laws to protect marine mammals, it simply conditions that regulatory jurisdiction upon a transfer of management authority approved by the Secretary. If the City, the Commission or any other state agency wants to enforce its own laws relating to the taking of marine mammals it only needs to satisfy the minimum requirements for a transfer of management authority under section 1379(b).[1] On the other hand, permitting the Commission and the City to avoid the cooperation requirements of section 1379(b)(1) would be utterly inconsistent with Congress' intent in passing the MMPA.

The Commission and the City both rely on a portion of an early House committee report on the MMPA, which states that "[i]t is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries." (Commission Oppo at p. 11, ln 16-19; *Arniak, supra,* 941 P.2d at 157.) While this excerpt relates to section 109 of the **House bill**, Congress did not enact the House's version of section 109. (*Id.* at p. 162.) Instead, a House and Senate conference committee modified the House's version of section 109 to conform to amendments proposed by the Senate. (*Id.* at p. 162, citing [Conf. Rep. No. 92-1488 (1971), reprinted in 1972 U.S.C.C.A.N. 4187, 4188].) A more appropriate gauge of Congressional intent exists in the conference committee's report as it pertains to the amended version of section 109.

> The House bill preempted State law, but allowed cooperative agreements with the States in harmony with the purposes of the Act. The Senate amendment allowed the Secretary to review State laws and to accept those that are consistent with the policy and purpose of the Act. The conference substitute clarifies the Senate version to assure that the Secretary's determination will control as to whether or not the State laws are in compliance. Once granted authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research. ¶ Thus, rather than supporting the court's interpretation of § 1379(a), this portion of the legislative history is consistent with the view that Congress intended to preempt state laws that are inconsistent with the multiple policies and objectives of the act.

(*Arniak, supra,* 941 P.2d at p. 162 [J. Shortell dissent].)

[1] Alternatively, state and local entities can enter cooperative agreements to enforce the MMPA together with the NMFS and other federal agencies. (16 U.S.C. § 1379(k).) As a third option, the Secretary can designate state and local officials to enforce the MMPA. (16 U.S.C. § 1377(b).)

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

As noted above, Justice Shortell's arguments were eventually vindicated when the *Arnariak* decision was soundly rejected by the court in *UFO Chuting I*. When Congress later exempted Hawaii from MMPA preemption, it otherwise affirmed *UFO Chuting I*'s interpretation of section 1379(a) and made no effort to modify the statute. Accordingly, the *Arnariak* decision does not reflect the intent of Congress and should not be relied on.

6. The Seasonal Beach Closure Is Inconsistent with The MMPA

The Commission and the City claim the seasonal beach closure is consistent with the MMPA. This is demonstrably false. First, as noted above, the seasonal beach closure directly conflicts with the express preemption provision at section 1379(a). Second, the seasonal beach closure directly conflicts with the MMPA's objective of achieving a uniform system of regulations. The MMPA was designed to substitute for diverse state marine mammal regulations a uniform, comprehensive federal system. (*Togiak v. United States* (1979) 470 F.Supp. 423, 430 fn. 13.) Unilateral and uncoordinated state regulations like the seasonal beach closure upset the MMPA's balance of interests, frustrate the incentives for state agencies to cooperate with the NMFS, and undermine the objectives Congress intended to achieve. This is precisely the type of conflict Congress sought to preempt.

7. Nothing in The CZMA Is Inconsistent with MMPA Preemption

The commission argues that because the Coastal Act has been approved under the Coastal Zone Management Act ("CZMA"), preemption under the MMPA should no longer apply. The Commission cites to no provision of the CZMA which would supersede any part of the MMPA. The Commission cites to no case law where the CZMA was invoked to overrule MMPA preemption. Instead, the Commission claims that because the statutes regarding the protection of "marine resources" were approved under the CZMA, Congress intended that MMPA preemption should no longer apply. However, it is axiomatic that statutes should be read in harmony with each other when possible and that the more specific statute applies over more general provisions. Here, the MMPA specifically applies to marine mammals whereas the general term "marine resources" could apply to just about anything having to do with the

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046

marine environment, e.g. fish, birds, recreational access, views, habitats, etc. Accordingly, the more specific provisions of the MMPA apply.

III. THE COASTAL ACT PREEMPTS THE SEASONAL BEACH CLOSURE

The City and the Commission both argue Public Resources Code section 30211 does not prohibit development (like the seasonal beach closure) that interferes with coastal access specifically acquired by legislative authorization. Instead, they claim that section 30211 merely establishes a "policy" in favor of public access, and that this policy must be balanced against other policies like marine resource protection. However, section 30211 is fundamentally different from the statutes setting forth general Coastal Act "policies" which must be balanced. Public Resources Code section 30200 notes the Coastal Act describes policies to be considered "except as may be otherwise specifically provided." (Pub. Res. Code, § 30200, subd. (a).) In contrast to the other statutes outlining general policies, the language of section 30211 specifically directs that "development shall not interfere with public access to the sea where acquired by... legislative authorization." (Pub. Res. Code, § 30211.) It makes sense that when the Legislature specifically grants coastal access, as it did with the Children's Pool beach, it would prohibit other agencies from overruling its decision by approving development which interferes with the specific access granted. Under the interpretation advocated by the Commission and the City, public access acquired from the Legislature could be eliminated anytime the Commission decided other policies outweighed access. Section 30211 should be construed to prohibit development like the seasonal beach closure from interfering with coastal access granted by the Legislature.

IV. CONCLUSION

For the foregoing reasons, the Court should grant FOCP's petition for writ of mandate.

DATED: February 9, 2016

Respectfully submitted,

By: B. King

BERNARD F. KING III
Attorney for Petitioner Friends of the Children's Pool

LAW OFFICES OF
BERNARD F. KING III
4747 Executive Drive
Suite 700
San Diego, CA 92121
(858) 737-3046