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The Brief and Unexpected Preemption of Hawai'i's Humpback Whale Laws: The Authority of the States to Protect Endangered Marine Mammals Under the ESA and the MMPA

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Editors' Summary: Humpback whales are endangered marine mammals, protected by the Marine Mammal Protection Act (MMPA) and the ESA. Hawai'i's seasonal thrill craft ban in humpback habitat provides additional protection. In 2004, a federal court ruled that the state's seasonal ban was preempted by the MMPA and the ESA. Below, Koalani Kaulukukui discusses the interplay of these two statutes, concluding that when a marine mammal is listed under the ESA, the more protective MMPA or ESA provision applies. Humpbacks must be given protections of the more stringent ESA, allowing Hawai'i to protect humpbacks to a greater extent than federal law.

I. Introduction

In the midst of the winter humpback whale season, March 2006, a group of Hawai'i schoolchildren, escorted by their teachers and the crew of the Pacific Whale Foundation's whale watch vessel *Ocean Spirit*, traveled from west Maui's Mā'alaea Harbor toward the island of Kaho'olawe at about 15 miles per hour. As everyone on board searched for humpbacks in the distance, a mother whale and her calf unexpectedly surfaced directly in front of the boat; without time to stop or change course, the *Ocean Spirit* struck the baby whale. According to one witness, "all you saw was blood over the water," and National Oceanic and Atmospheric Administration (NOAA) staff later confirmed that the calf had sustained head and pectoral fin injuries.¹ By the time the 2005 to 2006 winter whale season ended and the whales left Hawai'i to return to their northern feeding grounds along the U.S. west coast and Alaska, there were a record number of five reported whale strikes.² This is not a problem that is local to Hawai'i—"[w]orldwide, it is estimated

that 20 percent to 25 percent of whales found dead were struck by ships."³

Humpback whales are federally protected under both the Marine Mammal Protection Act (MMPA)⁴ of 1972 and the Endangered Species Act (ESA)⁵ of 1973 as endangered marine mammals. Each year between November and April, an estimated 5,000 to 7,000 humpback whales use the waters of Hawai'i as their breeding grounds, producing an estimated 1,000 calves each season.⁶ Data from the 1970s show that female whales, or cows, and their calves prefer to spend the winter months in the shallow waters off the leeward coasts of the Hawaiian Islands, while their male "escorts" generally remain nearby in deeper water.⁷ The adult whales stay underwater for about 20 minutes at a time, while baby whales require air every two to six minutes and make frequent trips to the surface.⁸ Although whale-watching boats such as the *Ocean Spirit* present a certain amount of danger due to unpredictable whale breaches, they maintain

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1. Christie Wilson, *Humpback Calf Struck by Whale Watch Boat*, HONOLULU ADVERTISER, Mar. 11, 2006, at A1.
2. Christie Wilson, *Safety of Whales Feared*, HONOLULU ADVERTISER, Mar. 27, 2006, at A1; Telephone Interview with Jeffrey Walters, State Co-Manager, Hawaiian Islands Humpback Whale National Marine Sanctuary (Apr. 7, 2006) [hereinafter Walters Interview] (also noting that the increased number of whale strikes could be a result of increased reporting or an increased whale population, and not necessarily an increase in strikes).

3. Timothy Hurley, *Whale Collisions Growing Danger*, HONOLULU ADVERTISER, Mar. 20, 2005, at A1.

4. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-409.

5. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

6. Walters Interview, *supra* note 2.

7. MARK J. FERRARI & DEBORAH A. GLOCKNER-FERRARI, MARINE MAMMAL COMMISSION REPORT NO. MMC-83/06, INDIVIDUAL IDENTIFICATION, BEHAVIOR, REPRODUCTION, AND DISTRIBUTION OF HUMPBACK WHALES, MEGAPTERA NOVAEANGLIAE, IN HAWAII, U.S. 13 (1985) [hereinafter FERRARI REPORT]; U.S. DEP'T OF COMMERCE AND STATE OF HAWAII HAWAIIAN ISLANDS HUMPBACK WHALE NATIONAL MARINE SANCTUARY FINAL ENVIRONMENTAL IMPACT STATEMENT/MANAGEMENT PLAN, A FEDERAL/STATE PARTNERSHIP FOR THE PROTECTION OF HUMPBACK WHALES AND THEIR HABITAT 50 (1997) [hereinafter SANCTUARY EIS].

8. FERRARI REPORT, *supra* note 7, at 8.

relatively slow speeds and are constantly on the lookout for whales.

Beginning in the 1980s, commercial “thrill craft”⁹ businesses opened for operation in Hawai‘i, providing tourists and residents access to high-speed ocean sports, such as jet skiing and parasailing.¹⁰ With Jet Ski speeds reaching up to 50 miles per hour and parasail vessels requiring speeds fast enough to lift and keep parasailers aloft, the impacts of these increasing water activities on humpbacks became apparent—both scientific research and observations by coastal residents indicated that the calf/cow pairs were moving away from the protected bays to deeper areas.¹¹ To address the problems of humpback decline in near-shore waters and accidents with thrill craft near Maui,¹² in 1991, the Hawai‘i State Legislature enacted Act 313, which banned commercial thrill craft and parasail vessels¹³ in prime breeding habitat off west and south Maui during whale season.¹⁴ Although the seasonal ban was immediately challenged in the 1990s, state and federal courts upheld the law for 13 years.¹⁵

In 2004, commercial parasail operators *UFO Chuting of Hawai‘i Inc.*, and Kaanapali Tours challenged the state’s seasonal ban using a new argument—that the federal MMPA preempted the state law—in the case of *UFO Chuting of Hawai‘i, Inc. v. Young (UFO Chuting I)*.¹⁶ On July 9, 2004, the U.S. District Court for the District of Hawai‘i Judge Susan Oki Mollway agreed with the plaintiffs’ argument and declared the law facially unconstitutional.¹⁷ For years, the seasonal ban had provided additional protection to humpbacks in prime breeding habitat, however, following the unexpected ruling by the *UFO*

Chuting I court, the island-state lost its authority to protect humpbacks. Further, the state’s authority to protect other listed marine mammals, such as Hawaiian monk seals, was questioned.¹⁸

While the court’s ruling was on appeal to the U.S. Court of Appeals for the Ninth Circuit, Hawai‘i’s congressional delegation persuaded the U.S. Congress to pass legislation that firmly established the state’s authority to enact laws protecting humpbacks in Hawaiian waters.¹⁹ Based on this congressional fix, the Ninth Circuit remanded the case to the Hawai‘i District Court, which then vacated the July 9, 2004, decision and upheld the seasonal ban as constitutional.²⁰ Despite a return to the status quo, *UFO Chuting I* still raises important questions that need to be addressed regarding the role of the states in regulating the endangered marine mammals found within their territories. Part II of this Article discusses the legal regimes that regulate endangered marine mammals, focusing specifically on the regulation of humpback whales in Hawaiian waters and Hawai‘i’s role in complementing federal legislation. Part III provides an overview of the *UFO Chuting* cases, including the grounds for preemption relied upon by the district court and the later reversal of its opinion after congressional intervention.

Part IV discusses the interplay of the ESA and the MMPA in the regulation of endangered marine mammals, including a discussion of the preemption provisions of both statutes and the ESA conflict provision. Part IV concludes that, when a marine mammal is listed under the ESA, the ESA conflict provision should apply to ensure that the more protective provision of the MMPA and the ESA prevails in the event of a conflict. As applied to the facts of *UFO Chuting I*, this would mean that humpback whales, as endangered marine mammals, must be given the protection of the more stringent ESA, thus allowing coastal states like Hawai‘i to protect listed marine mammals to a greater extent than federal law. Part V discusses the implications of the *UFO Chuting I* decision for Hawai‘i and other coastal states, as well as some policy reasons for allowing more protective state endangered species laws to stand. This Article concludes that pursuant to congressional intent, which requires absolute protection of endangered species,²¹ the most protective laws must apply to protect endangered marine mammals, whether enacted by the states or federal agencies.

9. Hawaii Revised Statutes state:

The term [thrill craft] includes, but is not limited to, a jet ski, waverunner, wet bike, surf jet, miniature speed boat, hovercraft, and every description of vessel which uses an internal combustion engine powering a water jet pump as its primary source of motive propulsion, and is designed to be operated by a person or persons sitting, standing, or kneeling on, or being towed behind the vessel.

HAW. REV. STAT. §200-23 (2006).

10. FERRARI REPORT, *supra* note 7, at 13.

11. See *infra* Part II.E. See also FERRARI REPORT, *supra* note 7, at 13; Edwin Tanji, *Marchers at Kealia Want the Whales Back—and the Jet Skis Gone*, HONOLULU ADVERTISER, Feb. 7, 1988, at A27.

12. See H.B. 2994, Act 313, §1(1), (2), 15th Leg., Reg. Sess. (Haw. 1990) (preamble states that “[t]he operation of thrill craft, parasailing vessels, and high-speed motorized vessels during certain times of the year poses an unacceptable risk of harm to endangered sea creatures such as migratory humpback whales and sea turtles[.]” in addition to having “resulted in the severe injury and death of recreational swimmers, not to mention a number of ‘close calls’”).

13. “‘Parasailing’ means the activity in which an individual is transported or carried aloft by a parachute, sail, or other material attached to a towline which is towed by a vessel.” HAW. REV. STAT. §200-23 (2006).

14. H.B. 2994, Act 313, 15th Leg., Reg. Sess. (Haw. 1990). Seasonal ban currently codified at HAW. REV. STAT. §§200-37(I), 38(c) (2006). Commercial water sledding and commercial high-speed boating are also subject to the seasonal ban. *Id.* The area subject to the ban is within the Hawaiian Islands Humpback Whale National Marine Sanctuary. See *infra* Part II.C.

15. Various lawsuits were filed challenging different portions of the law in state and federal court. See *Kaneohe Bay Cruises v. Hirata*, 861 P.2d 1 (Haw. 1993) (Hawai‘i Supreme Court upheld the portion of Act 313 that banned thrill craft in Kāne‘ohe Bay on the island of O‘ahu during weekends and holidays). See also *Maui Firm Sues Over Ocean Use Ban*, STAR-BULLETIN, Oct. 6, 1990, at B1.

16. 327 F. Supp. 2d 1220 (D. Haw. 2004) [hereinafter *UFO Chuting I*].

17. *Id.* at 1230.

18. Walters Interview, *supra* note 2; Telephone Interview with Gary Moniz, Chief Enforcement Officer, Dep’t of Land and Natural Resources, Div. of Conservation and Resource Enforcement (Nov. 5, 2004) [hereinafter Moniz Interview].

19. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, §213, 118 Stat. 2809, 2884 (2004) [hereinafter Appropriations Bill]. The appropriations rider does not contain an express sunset date, and a Senate staff official characterized it as “permanent.” E-mail from Amy Fraenkel, Democratic Counsel, Comm. on Commerce, Science & Transp., U.S. Senate, to Koalani Kaulukukui (Dec. 6, 2004) (on file with the author). See also *National Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1445, 25 ELR 20910 (9th Cir. 1993) (stating “Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly”).

20. *UFO Chuting of Hawai‘i, Inc. v. Young*, 380 F. Supp. 2d 1166, 1174-75 (D. Haw. 2005) [hereinafter *UFO Chuting II*].

21. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 8 ELR 20513 (1978) (where the U.S. Supreme Court ordered that the construction of a dam be halted, even though millions of dollars had been spent and the dam was near completion, because the opening of the dam would have resulted in the complete loss of habitat to a listed endangered species).

II. The Legal Landscape of Endangered Marine Mammal Regulation: The Case of Humpback Whales in Hawai'i

Although humpback whales²² live in all of the world's oceans,²³ the geographically distinct North Pacific population resides mainly in the jurisdictional waters of the United States.²⁴ North Pacific humpbacks spend the summer months feeding on tiny fish and krill in the waters off Alaska, California, Oregon, and Washington.²⁵ In the winter months, from November to April, the majority of the North Pacific population migrate to Hawaiian waters, the only U.S. state with waters warm enough to provide a suitable breeding, calving, and nursing habitat.²⁶ This group, known as the Hawai'i stock, concentrate in the junction between Maui, Moloka'i, Lāna'i, and Kaho'olawe.²⁷ Scientific studies show that females conceive in Hawaiian waters one winter, and then return the following year to give birth at the same location.²⁸ Early studies have also revealed that calf/cow pairs prefer to stay closer to shore within the 100-fathom isobath, while the males are generally found in deeper waters.²⁹

Prior to widespread commercial whaling throughout the 19th century, it is believed that over 120,000 humpback whales roamed the world's oceans.³⁰ Due to their valuable baleens, by the 1900s, the North Pacific humpback population was estimated to have dropped to about 15,000 animals.³¹ By the mid-1960s only an estimated 1,000 remained.³² The international community took action to halt this rapid population decline in 1966 through an International Whaling Commission ban on the commercial harvest of humpback whales in the North Pacific.³³ As is discussed in detail below, the United States implemented its own regu-

lation of endangered species in 1969³⁴ and marine mammals in 1970,³⁵ which included humpback whales.

By 1979, the North Pacific population of humpback whales was estimated at 850, with a maximum estimate of 590 humpbacks migrating annually to Hawai'i.³⁶ Studies of the Hawai'i stock that were conducted in the late 1990s resulted in population estimates ranging from 550 to 2,100 individuals.³⁷ Currently, Hawai'i stock population estimates are as high as 5,000 to 7,000 animals.³⁸ Although the population estimates are rough and varied, there is a general consensus that the population trend is increasing.³⁹ In 2001, researchers determined that the annual population increase rate is about 7%, which "suggests that the wintering humpback whale population will double in size approximately every 13 years."⁴⁰

In Hawai'i, tiger sharks are the humpback's main natural predator, but generally only very young, old, or weak individual whales are targeted.⁴¹ Human activities appear to pose a greater threat to humpbacks. For example, humpbacks have displayed susceptibility to infectious agents, which can be introduced by cruise and military vessel holding tanks and sewage from municipal outfalls.⁴² In addition, collisions with vessels⁴³ and entanglement in fixed fishing gear, gill nets, and traps are increasingly common.⁴⁴ In the nine years between 1975 and 1984, officials documented only two collisions between whales and boats in Hawai'i, but, as mentioned above, in the 2005 to 2006 winter season alone, five collisions were reported.⁴⁵

As explained in detail below, Congress has enacted several regulatory regimes to address the human impacts on endangered marine mammals such as humpback whales. The ESA, which replaced the Endangered Species Conservation Act (ESCA) of 1969, protects all species that are listed as threatened or endangered by federal officials. The MMPA addresses all marine mammal species, whether endangered or not. Other federal legislation and rules recognize the special situation of Hawai'i as the only whale nursery in the United States and provide specific protections for the Hawai'i stock, including the Hawaiian Islands National Marine Sanctuary Act (HINMSA) of 1992 and the 100-yard rule. Within the confines of these federal laws, federal agencies such as NOAA and the National Marine Fisheries Service (NMFS) have worked closely with the state of Hawai'i to provide maximum protection to humpback whales in their winter breeding grounds.⁴⁶

22. *Megaptera novaeangliae*.

23. OFFICE OF PROTECTED RESOURCES, NATIONAL MARINE FISHERIES SERVICE (NMFS), NOAA, U.S. DEP'T OF COMMERCE, FINAL RECOVERY PLAN FOR THE HUMPBACK WHALE, *MEGAPTERA NOVAE-ANGLIAE* 5 (1991) [hereinafter RECOVERY PLAN], available at http://www.nmfs.noaa.gov/pr/pdfs/recovery/whale_humpback.pdf.

24. Studies show that there are three stocks within the North Pacific population, "consisting of relatively distinct breeding groups with only occasional interchange of individuals." JOSEPH MOBLEY JR. ET AL., ABUNDANCE OF HUMPBACK WHALES IN HAWAIIAN WATERS: RESULTS OF 1993-2000 AERIAL SURVEYS 2 (2001) (prepared for the Hawaiian Islands Humpback Whale National Marine Sanctuary and the State of Hawai'i Department of Land and Natural Resources) [hereinafter MOBLEY REPORT]. These include

[a]n eastern stock that feeds in the waters off northern California and winters in island regions off the coast of the Mexican Baja Peninsula; a central stock that feeds in the waters off southeastern Alaska and winters in the main Hawaiian Islands; and a western stock that winters in the Ogasawara and Ryukyu Islands near Japan (feeding grounds unknown).

Id. The North Atlantic humpback population also enters U.S. jurisdictional waters at the Gulf of Maine. SANCTUARY EIS, *supra* note 7, at 35.

25. SANCTUARY EIS, *supra* note 7, at 36-39.

26. RECOVERY PLAN, *supra* note 23, at 9.

27. SANCTUARY EIS, *supra* note 7, at 409.

28. *Id.* at 404.

29. FERRARI REPORT, *supra* note 7, at 13.

30. RECOVERY PLAN, *supra* note 23, at 1.

31. SANCTUARY EIS, *supra* note 7, at 407; MOBLEY REPORT, *supra* note 24, at 2.

32. MOBLEY REPORT, *supra* note 24, at 2.

33. SANCTUARY EIS, *supra* note 7, at 56.

34. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 [hereinafter ESCA].

35. 16 U.S.C. §§1361-1421h.

36. Humpback Whale Harassment in the Hawaiian Islands Area, Notice of Interpretation, 44 Fed. Reg. 1113 (Jan. 4, 1979).

37. SANCTUARY EIS, *supra* note 7, at 407.

38. Walters Interview, *supra* note 2.

39. *Id.* See also SANCTUARY EIS, *supra* note 7, at 50-51.

40. MOBLEY REPORT, *supra* note 24, at 9.

41. SANCTUARY EIS, *supra* note 7, at 406.

42. *Id.* at 56.

43. *Id.* at 51.

44. Entanglements are not as common in Hawai'i as they are in humpback summer habitat. *Id.*

45. Christie Wilson, *Safety of Whales Feared*, HONOLULU ADVERTISER, Mar. 27, 2006, at A1.

46. Telephone Interview with Chris Yates, Marine Mammal Branch Chief, Pacific Islands Regional Office, NOAA (Apr. 13, 2006) [hereinafter Yates Interview].

A. *The ESCA and the ESA*

Mindful of the decline of many species around the nation and globally, in 1969 Congress enacted the ESCA,⁴⁷ which banned the importation of any species determined by the Secretary of the U.S. Department of the Interior to be “threatened with worldwide extinction.”⁴⁸ In 1973, the protections provided under the ESCA were expanded and superseded by the ESA.⁴⁹ Five years after its enactment, the ESA became known as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁵⁰ The purpose of the ESA is to halt the impending extinction of certain plant and animal species⁵¹ that are listed by the Secretary of the Interior⁵² as “endangered”⁵³ or “threatened.”⁵⁴ To achieve that goal, the ESA provides for the protection of both the species itself and its habitat through comprehensive management methods. Critical habitat must be designated,⁵⁵ and recovery plans must be developed and implemented.⁵⁶

Section 9 of the ESA also calls for a broad prohibition on the “take”⁵⁷ of endangered species,⁵⁸ which can result in civil and criminal penalties.⁵⁹ The definition of take includes the death of listed species, direct physical harm, and harassment.⁶⁰ Under §7, federal agencies must consult with the Secretary of the Interior or the Secretary of the U.S. Department of Commerce (Secretary)⁶¹ to ensure that federal actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of . . . critical habitat.”⁶² The U.S. Supreme Court has interpreted this ESA mandate to mean that, “beyond doubt . . . Congress intended endangered species to be afforded the highest of priorities.”⁶³

The ESA also requires in §6 that the conservation of endangered species and their habitats be attained through fed-

eral-state cooperation: the Secretary must “cooperate to the maximum extent practicable with the States.”⁶⁴ This cooperation can occur through agreements for the state “administration and management of any area established for the conservation of [listed] species,”⁶⁵ or through cooperative agreements to establish and maintain programs for the conservation of the endangered species itself.⁶⁶ In addition, the ESA preempts state laws to a very limited extent—the states are only precluded from regulating interstate and/or international commerce in listed species when the ESA or certain permits granted under the ESA allow for exportation or importation.⁶⁷ All other state laws “respecting the taking of an endangered species may be more restrictive” than the ESA.⁶⁸

The Secretary of the Interior listed humpback whales as an endangered species under the ESCA in 1970⁶⁹ and under the ESA in 1973.⁷⁰ In November 1991, NOAA completed the Final Recovery Plan for the Humpback Whale, as required by §4(f) of the ESA.⁷¹ The recovery plan recognizes that “states may have a direct bearing on the accomplishment of recovery objectives.”⁷² For example, state cooperation is necessary in “reviewing relevant local laws and making changes where appropriate to enhance habitats.”⁷³ Notably, despite the requirements of §4(c),⁷⁴ the Secretary has not yet designated critical habitat for humpbacks, although the recovery plan notes that the first objective for humpback recovery is to identify essential habitat, particularly in the Hawaiian breeding grounds.⁷⁵

B. *The MMPA*

Congress enacted the MMPA⁷⁶ based on a finding that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities[.]” and that “such species and populations should not be permitted to diminish . . . below their optimum sustainable level.”⁷⁷ The MMPA applies to all marine mammals and classifies species and/or population stock as either “depleted,” meaning below their optimum sustainable population level or listed under the ESA,⁷⁸ or “non-depleted,” meaning all other species. As listed endangered species, humpbacks are considered depleted under the MMPA.

Through the MMPA, Congress imposed a moratorium on the taking and importation of marine mammals and marine mammal products into the United States.⁷⁹ The definition of

47. ESCA, Pub. L. No. 91-135, 83 Stat. 275 (1969).

48. *Id.* §2, 83 Stat. at 275.

49. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

50. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 8 ELR 20513 (1978).

51. 16 U.S.C. §1531.

52. *Id.* §1533. In 1970, certain responsibilities were transferred from the Secretary of the Interior to the Secretary of Commerce, including those relating to the protection of marine mammals. *Id.* §1532(15). The Secretary of the Interior must list marine mammals upon recommendation by the Secretary of Commerce. *Id.* §1533(a)(2)(A).

53. “[A]ny species which is in danger of extinction throughout all or a significant portion of its range,” and does not include certain insects. *Id.* §1532(6).

54. “[A]ny species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §1532(20).

55. *Id.* §1533(c).

56. *Id.* §1533(f).

57. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* §1532(19).

58. *Id.* §1538(a)(1)(B).

59. *Id.* §1540.

60. *Id.* §1532(19).

61. The Secretary of Commerce has the duty and authority to protect marine mammals, thus, further reference to “Secretary” is to the Secretary of Commerce. *See supra* note 52.

62. 16 U.S.C. §1536(a)(2).

63. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 8 ELR 20513 (1978).

64. 16 U.S.C. §1535(a).

65. *Id.* §1535(b).

66. *Id.* §1535(c).

67. *Id.* §1535(f).

68. *Id.*

69. *Conservation of Endangered Species and Other Fish or Wildlife*, 35 Fed. Reg. 8491, 8495 (June 2, 1970).

70. *Endangered and Threatened Wildlife*, 50 C.F.R. §17.11 (2006).

71. 16 U.S.C. §1533(f). *RECOVERY PLAN*, *supra* note 23.

72. *RECOVERY PLAN*, *supra* note 23, at 43.

73. *Id.*

74. 16 U.S.C. §1533(c).

75. *RECOVERY PLAN*, *supra* note 23, at 34.

76. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-409.

77. *Id.* §1361(1), (2).

78. *Id.* §1362(1).

79. *Id.* §1371(a).

“take,” like the ESA definition, encompasses both physical harm and harassment of marine mammals.⁸⁰ Authority is vested in the Secretary or the Secretary of the Interior⁸¹ to issue permits for the incidental take of marine mammals under certain circumstances.⁸² Under §1371(a)(2), for example, permits may be issued to take all marine mammals incidentally in the course of commercial fishing operations, including depleted species.⁸³ Permits may also be issued for scientific⁸⁴ and noncommercial operations,⁸⁵ and exemptions are allowed for Alaskan natives to take non-depleted species in a non-wasteful manner for subsistence or handicraft purposes.⁸⁶

The MMPA authorizes the Secretary to transfer marine mammal management authority to the states if certain criteria are met.⁸⁷ Unlike the ESA, however, if authority is not transferred, the MMPA preemption provisions preclude states from enacting any law relating to marine mammals, whether they are based on takings or commerce law or are more or less protective.⁸⁸

C. The HINMSA

The National Marine Sanctuaries Act (NMSA)⁸⁹ was enacted in 1972 as a means to conserve and manage marine environments of “special national significance,” and to “protect, . . . restore, [] and enhance natural habitats, populations, and ecological processes[.]”⁹⁰ Congress found that “[t]he marine areas surrounding the main Hawaiian Islands, which are essential breeding, calving, and nursing areas for the endangered humpback whale, are subject to damage and loss of their ecological integrity from a variety of disturbances.”⁹¹ Through the HINMSA of 1992, Congress designated prime habitat in the four-island area between Maui, Lāna‘i, Moloka‘i, and Kaho‘olawe, and smaller portions off the coasts of Kaua‘i, O‘ahu, and Hawai‘i Island, as the Hawaiian Islands Humpback Whale National Marine Sanctuary (Sanctuary).⁹² The Sanctuary’s goal is “to protect and preserve humpback whales and their habitat within the Ha-

waiian Islands marine environment[.]”⁹³ in joint management with state and federal agencies.⁹⁴ Federal-state cooperation is ensured through an Intergovernmental Compact Agreement, signed in 1997 by NOAA Undersecretary D. James Baker and Gov. Benjamin Cayetano, (D-Haw.) recognizing that “NOAA and the State will collaborate in the management of the Sanctuary and its resources[.]”⁹⁵

D. The 100-Yard Rule

In 1979, the NMFS published guidelines that provided special measures to “protect the humpback whale population during its critical breeding and calving period in the Hawaiian Islands area.”⁹⁶ The guidelines interpreted both the ESA and the MMPA and defined when an ocean vessel’s approach toward a humpback in Hawaiian waters amounted to illegal “taking by harassment.”⁹⁷ Waters off west Maui and Lāna‘i, where breeding, calving, and nursing occurred, were designated as “calf/cow waters,” and approach by boats and humans was limited to 300 yards.⁹⁸ In all other areas, boats and humans could approach within 100 yards.⁹⁹

By 1986, the NMFS realized that these guidelines were ineffective in deterring vessels from approaching humpbacks,¹⁰⁰ and a proposed rule was issued to provide a stronger enforcement mechanism.¹⁰¹ The new rule prohibited vessels and people from approaching within 100 yards of humpbacks in Hawaiian waters; however, the calf/cow distinction was eliminated.¹⁰² During the public comment period, agencies such as the Marine Mammal Commission “viewed this approach as relaxing the protective standards established by the guidelines[.]”¹⁰³ and upon further research, the NMFS found an “apparent displacement of cow/calf pairs from nearshore habitat.”¹⁰⁴ The NMFS reinstated the calf/cow distinction in an interim rule promulgated in 1987. The interim rule provided greater protection in the calf/cow waters, where approach was limited by boats and humans to 300 yards. Outside of calf/cow waters, it was unlawful to come closer than 100 yards to a humpback.¹⁰⁵

80. “The term ‘take’ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* §1362(13).

81. Under the MMPA, the Secretary, as the head of NOAA, is responsible for all cetaceans and pinnipeds, other than walruses. Humpback whales are cetaceans, and thus are protected by the Secretary. The Secretary of the Interior is responsible for walruses, sea otters, polar bears, manatees, and dugongs. *Id.* §1362(12)(A)(i).

82. *Id.* §1362(a)(3)(A).

83. *Id.* §1371(a)(2); *see also id.* §1371(a)(5)(E) (persons using vessels of the United States or vessels with valid fishing permits under §204(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §1824(b)) may engage in the incidental take of marine mammals that are listed as depleted by virtue of their listing under the ESA; if the Secretary makes certain findings, he or she is required to allow the incidental take to occur, after providing public notice and an opportunity for comment).

84. *Id.* §1371(a)(1).

85. *Id.* §1371(a)(5)(E).

86. *Id.* §1371(b).

87. *Id.* §1379(b); Transfer of Marine Mammal Management Authority to the States, 50 C.F.R. pt. 403 (2006).

88. 16 U.S.C. §1379(a).

89. *Id.* §§1431-1445.

90. *Id.* §1431(b)(1)-(3).

91. Oceans Act of 1992, Pub. L. No. 102-587, tit. II, subtit. C, §2302(8), 106 Stat. 5039, 5056.

92. *Id.* §§2302-2308, 106 Stat. 5039.

93. *Id.* §2304(a), 106 Stat. 5039, 5057.

94. *Id.* §2306.

95. Available in the U.S. DEP’T OF COMMERCE, NOAA, NATIONAL OCEAN SERVICE, NATIONAL MARINE SANCTUARY PROGRAM, HAWAIIAN ISLANDS HUMPBAC WHALE NATIONAL MARINE SANCTUARY MANAGEMENT PLAN (2002) [hereinafter *MANAGEMENT PLAN*].

96. Humpback Whale Harassment in the Hawaiian Islands Area, Notice of Interpretation, 44 Fed. Reg. 1113, 1114 (Jan. 4, 1979).

97. *Id.* at 1113.

98. *Id.* at 1114.

99. *Id.*

100. Approaching Humpback Whales in Hawaiian Waters, Interim Rule, 52 Fed. Reg. 44912, 44912 (Nov. 23, 1987) (“Since guidelines do not have the same legal standing as regulations, [the NMFS] has had difficulty prosecuting violators.”).

101. Proposed Regulations Governing Approaching Humpback Whales in Hawaiian Waters, 51 Fed. Reg. 42271, 42271 (Nov. 24, 1986).

102. *Id.* According to the NMFS, the calf/cow distinction was eliminated “because more recent studies on the distribution of whales indicate that persistent and distinct calving areas probably do not exist.” *Id.* (citations omitted).

103. Approaching Humpback Whales in Hawaiian Waters, Interim Rule, 52 Fed. Reg. 44912, 44912 (Nov. 23, 1987).

104. *Id.*

105. *Id.*; Approaching Humpback Whales in Hawaii, 50 C.F.R. §222.31 (1993).

The calf/cow distinction was law for seven years before Congress expressly abolished it through the MMPA Amendments of 1994.¹⁰⁶ It is unclear what prompted Congress to do so, but considering the strong pull of the commercial boating industry in Hawai'i that is apparent in the following section, lobbying by commercial boat operators is a likely reason.¹⁰⁷ In January of 1995, the NMFS repealed the interim rule under the direction of Congress, replacing it with the current "100-yard rule," which allows vessels and people to approach humpback whales in all Hawaiian waters up to 100 yards, with aircraft restricted to 1,000 feet.¹⁰⁸

E. State Seasonal Thrill Craft Ban

A boom in commercial boating activities such as Jet Skis and parasailing began in Hawai'i in the 1980s, and by the end of the decade the effects on humpback whales were apparent. Research conducted by Mark Ferrari and Deborah Glockner-Ferrari showed that between 1977 and 1979, about 80% of all calf/cow pairs stayed in shallow coastal areas within the 10-fathom curve, protected from predators.¹⁰⁹ After the first Maui Jet Ski rental shop opened in 1981, the percentage of calf/cow pairs in shallow waters dropped to 36%; after parasailing and other commercial watercraft began operations in 1983, the number dropped to 17%.¹¹⁰

By the end of the 1980s, citizens of the state participated in protest demonstrations, marches, and lawsuits in an attempt to pressure the state to protect humpback whales and their habitat.¹¹¹ The NMFS also recommended that the state implement a seasonal ban on commercial thrill craft in near-shore areas off Maui, O'ahu, and Kailua-Kona, each year from December 15 to May 15.¹¹² After discussions with commercial thrill craft and parasail operators, however, the NMFS later changed its recommendation to a shorter, limited-area ban that would be effective from only January 6 to May 15 in areas off O'ahu, and from January 6 to March 15 in areas off west Maui.¹¹³ Despite the new advice from the NMFS, in early December 1989, the state Department of

Transportation (DOT)¹¹⁴ amended the state Ocean Recreation Management Plan to ban thrill craft, using the original NMFS recommendations.¹¹⁵

Commercial thrill craft and parasail operators quickly filed suit, and in January 1990, a Maui Circuit Court struck down the ban on the basis that the state DOT did not give proper consideration to the NMFS' changed recommendation and other public comments urging a shorter ban.¹¹⁶ In 1991, after holding five public hearings,¹¹⁷ the Hawai'i State Legislature enacted Act 313, later codified in relevant part at Hawai'i Revised Statutes (Haw. Rev. Stat.) §§200-37(I) and 200-38.¹¹⁸ The new law revived the longer ban, but limited the banned areas—from December 15 to May 15, thrill craft and parasailing would be banned "in the waters of west and south Maui from Pu'u Ola'i to Hawea Point."¹¹⁹ Although the statute was immediately disputed in state and federal courts by thrill craft and parasail operators, including UFO Chuting of Hawai'i, Inc.,¹²⁰ the statute was upheld until the 2004 *UFO Chuting I* decision.

III. The Preemption and Reinstatement of Hawai'i's Seasonal Ban: An Overview of *UFO Chuting I*

In December 2003, UFO Chuting of Hawai'i, Inc., and K.M.B.S., Inc., d.b.a. Kaanapali Tours, both owners and operators of parasail businesses in west Maui,¹²¹ brought an action for declaratory and injunctive relief in the Hawai'i District Court pursuant to 42 U.S.C. §1983,¹²² against state defendants Peter Young, in his capacity as Chair of the Board of Land and Natural Resources (BLNR), and Stephen Thompson, in his capacity as Acting Administrator of the Department of Land and Natural Resources (DLNR) Division of Boating and Ocean Recreation (DOBOR).¹²³ Both companies held licenses issued by DOBOR, which allowed them to operate commercial vessels, including parasailing

106. MMPA Amendments of 1994, Pub. L. No. 103-238, §17. Interestingly, the rule was codified as a note to 16 U.S.C. §1538. See *infra* note 147.

107. See *infra* Part II.E.

108. Approaching Humpback Whales in Hawaiian Waters, Final Rule, 60 Fed. Reg. 3775 (Jan. 19, 1995); Approaching Humpback Whales in Hawaii, 50 C.F.R. §224.103 (2004).

109. FERRARI REPORT, *supra* note 7, at 13.

110. *Id.*

111. See, e.g., Edwin Tanji, *Marchers at Kealia Want the Whales Back—and the Jet Skis Gone*, HONOLULU ADVERTISER, Feb. 7, 1988, at A3; Ken Miller, *Concern Rises on Maui Over Whales' Sanctuary*, STAR-BULLETIN, Feb. 8, 1988, at A3; Ken Miller, *Maui Whales Spawn a Controversy Ashore*, STAR-BULLETIN, Mar. 7, 1988, at A2; and Lucy Young, *State Proposes Tighter Ocean-Use Rules for Whale Season*, STAR-BULLETIN, Feb. 28, 1989, at A3.

112. See Lucy Young, *State Proposes Tighter Ocean-Use Rules for Whale Season*, STAR-BULLETIN, Feb. 28, 1989, at A3. It is unclear why the NMFS did not implement its own seasonal ban, and rather, encouraged the state to instead. Perhaps the NMFS was acting on the policy set forth at ESA §2(c)(2), 16 U.S.C. §1531(c)(2), "that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Id.*

113. Lucy Young, *Maui Resident Gives Stern Warning on Thrill Craft*, STAR-BULLETIN, Nov. 3, 1989, at A3.

114. The legislature transferred authority to regulate boating from the state Department of Transportation (DOT) to the state Department of Land and Natural Resources (DLNR), Division of Boating and Ocean Recreation (DOBOR) in 1991. H.B. 917, Act 272, 16th Leg., Reg. Sess. (Haw. 1991).

115. *Jet Ski, Parasail Ban Becomes Law*, STAR-BULLETIN, Dec. 9, 1989, at A1. The state DOT was acting on instructions from the Hawai'i State Legislature, which in 1987 and 1988 directed the agency to address the impact of commercial boating and thrill craft on Hawai'i's humpback population. *Kaneohe Bay Cruises v. Hirata*, 861 P.2d 1, 4 (Haw. 1993) (citing S.B. 456, Act 247, 14th Leg., Reg. Sess. (Haw. 1987), and S.B. 1165, Act 342, 15th Leg., Reg. Sess. (Haw. 1989)).

116. Edwin Tanji, *Maui Judge Overrules State's Ban on Thrillcraft*, HONOLULU ADVERTISER, Jan. 19, 1990, A3.

117. *Kaneohe Bay Cruises*, 861 P.2d at 5.

118. H.B. 2994, Act 313, 15th Leg., Reg. Sess. (Haw. 1990). Act 313 was originally codified at Haw. Rev. Stat. §267. In 1991, after the legislature transferred boating authority from the DOT to DOBOR, Haw. Rev. Stat. §267 was moved to Haw. Rev. Stat. §200. H.B. 917, Act 272, 16th Leg., Reg. Sess. (Haw. 1991).

119. Haw. Rev. Stat. §§200-37(I), -38(c) (2006). This area coincides with the Sanctuary.

120. See *supra* note 15.

121. *UFO Chuting I*, 327 F. Supp. 2d 1220, 1221 (D. Haw. 2004).

122. 42 U.S.C. §1983 allows citizens to bring claims against state employees who have performed an administrative function in violation of the U.S. Constitution.

123. First Amended Complaint for Declaratory Judgment and Injunctive Relief, *UFO Chuting of Hawai'i, Inc. v. Young*, Civil No. 03-00651 SOM/BMK (D. Haw. Mar. 4, 2004).

vessels, within Hawaiian waters.¹²⁴ Pursuant to Hawai‘i Administrative Rules (HAR) §13-256-112, however, which implements Haw. Rev. Stat. §§200-37(I) and 200-38, the permits prohibited parasailing off west and south Maui between December 15 and May 15.¹²⁵

The plaintiffs’ First Amended Complaint alleged that Haw. Rev. Stat. §200-38 and HAR §13-256-112 were “preempted by the federal laws that guaranty [sic] Plaintiffs’ unrestricted access to the navigable waters described in their federal licenses and establishes [sic] their right to operate within the Hawaiian Islands Humpback Whale National Marine Sanctuary so long as they do not approach closer than 100 yards to any humpback whale.”¹²⁶ A specific claim of preemption under the MMPA was added in the plaintiffs’ Second Amended Complaint.¹²⁷ In a July 9, 2004, ruling, Judge Mollway agreed with the latter argument and found that the MMPA preempted Hawai‘i law on two independent grounds, express preemption and conflict preemption.¹²⁸ The court accordingly granted the plaintiffs’ motion for summary judgment, declaring that Haw. Rev. Stat. §200-37(I), and all rules and regulations deriving from it, were unconstitutional.¹²⁹

A. Seasonal Ban Is Expressly Preempted

The district court in *UFO Chuting I* first determined that “[t]he MMPA expressly preempts states laws relating to the taking of marine mammals and therefore preempts the Hawaii seasonal parasailing ban.”¹³⁰ The court noted that because the dates of the thrill craft ban coincided with the humpback breeding season, “the law was specifically tailored to protect whales, not humans[.]”¹³¹ Thus, the court rejected the state’s argument that “the parasailing restriction does not relate to the harassment of whales . . .”¹³²

The court also rejected the state’s arguments attacking the validity of the MMPA preemption provision. First, the state argued that “preempting state laws that afford added protection to marine mammals eviscerates the purpose of the MMPA.”¹³³ The court disagreed, however, and found that the plain language of the MMPA “unambiguously preempts any state law relating to the taking of a marine mammal . . . [.]”¹³⁴ thus precluding the need to consider legislative history. Even if the legislative history were considered, according to the court, it would be “clear that the MMPA was intended to preempt state laws relating to the taking of marine mammals. . . .”¹³⁵

Second, the state argued that reading the ESA “construction with MMPA” provision¹³⁶ (conflict provision) with the ESA preemption provision¹³⁷ required a finding that the ESA impliedly repealed the preemption provision of the MMPA.¹³⁸ The court rejected this argument and found that “[n]othing in the [conflict provision] suggests that Congress was referring to the preemptive power or to the scope of enforcement authority of the two statutes when it referred to conflicts between the MMPA and ESA.”¹³⁹ Because the ESA preemption provision “concerns only provisions within the ESA[,]” there could be no conflict between the MMPA and ESA preemption provisions.¹⁴⁰ Thus, not only were there no grounds for finding the MMPA provision to be implicitly repealed, the court found that the conflict provision did not apply at all in determining the MMPA’s preemptive effect with respect to endangered marine mammals.¹⁴¹ That Congress reenacted the MMPA preemption provision in the 1994 MMPA Amendments provided the court with additional support.¹⁴² Having rejected all of the state’s arguments to the contrary, the court found that because Hawai‘i’s seasonal ban relates to the taking of marine mammals, i.e., humpback whales, the state law was expressly preempted under the plain meaning of the MMPA preemption provision.¹⁴³

B. Seasonal Ban Actually Conflicts With the 100-Yard Rule

The second ground for preemption found by the court was that the regulation actually conflicted with the “100-yard rule.”¹⁴⁴ According to the court, because the federal rule provides a substantive right to approach within 100 yards of a humpback whale,¹⁴⁵ “any state law prohibiting parasailing more than 100 yards from a whale is in actual conflict with the federal authorization to approach within 100 yards and is preempted.”¹⁴⁶ In a footnote, the court recognized the confusing history of the 100-yard rule in that, although the 100-yard rule was enacted under the 1994 MMPA Amendments, it was codified as a note to the ESA.¹⁴⁷ The court did not perceive a problem even if the 100-yard rule was a part of the ESA, however, because, according to the court, “[a]lthough the ESA, unlike the MMPA, allows states to supplement federal environmental regulations, even under the ESA a state may not prohibit what is expressly autho-

124. *UFO Chuting I*, 327 F. Supp. 2d at 1221.

125. *Id.*

126. First Amended Complaint, *supra* note 123, at 1.

127. Second Amended Complaint for Declaratory Judgment and Injunctive Relief, at 12, *UFO Chuting of Hawai‘i, Inc. v. Young*, Civil No. 03-00651 SOM/BMK (D. Haw. May 3, 2004).

128. *UFO Chuting I*, 327 F. Supp. 2d at 1230.

129. *Id.*

130. *Id.* at 1222.

131. *Id.* at 1223.

132. *Id.*

133. *Id.* at 1224.

134. *Id.* at 1225.

135. *Id.* In so finding, the court quoted a congressional House Report, stating that, “[t]he MMPA seeks to establish a ‘unified integrated system of management for the benefit of animals,’ . . . through federal-state cooperation, not independent state regulation.” *Id.* (quot-

ing H.R. REP. NO. 92-707 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4161).

136. 16 U.S.C. §1543.

137. *Id.* §1535(f).

138. *UFO Chuting I*, 327 F. Supp. 2d at 1227.

139. *Id.*; *infra* Part IV.D.1. will expand on this argument and explain how the state’s argument shifted the court’s focus to the preemption provisions themselves, rather than the conflict provision, resulting in the court’s finding of express preemption.

140. *UFO Chuting I*, 327 F. Supp. 2d at 1227.

141. *Id.*

142. *Id.* at 1228.

143. *Id.* at 1230.

144. *Id.* at 1221.

145. *Id.* at 1229 (citing Pub. L. No. 103-238, 1994 Stat. 1636).

146. *Id.* at 1230.

147. *Id.* at 1230, n.7 (The 100-yard rule “was not included as an enumerated statutory section in the United States Code. It was merely attached as a note to 16 U.S.C. §1538.”).

rized by the ESA.”¹⁴⁸ Thus, the court found that the state law was in actual conflict with, and thus preempted by, both the MMPA and the ESA.¹⁴⁹

C. Congressional Intervention and the Aftermath of UFO Chuting I

The major effect of the court’s ruling was to invalidate the jurisdiction of the state to enforce laws pertaining to the harassment of humpback whales.¹⁵⁰ It also cast doubt on the state’s authority to enforce laws protecting other listed marine mammals, such as monk seals.¹⁵¹ Prior to the court’s decision, state enforcement officers relied on state laws to prevent the harassment of marine mammals because they lacked authority to enforce federal laws directly.¹⁵² After *UFO Chuting I*, however, that authority was no longer clear, and the state Attorney General’s office instructed state enforcement officers not to respond to complaints of marine mammal harassment unless there was a threat to human health and safety.¹⁵³ In the interim, the state appealed Judge Mollway’s ruling to the Ninth Circuit, and while that appeal was pending, Sen. Rosalyn Baker (D-Haw.) requested that the Hawai’i congressional delegation assess the matter.¹⁵⁴ In early December 2004, Congress enacted the Fiscal Year 2005 Omnibus Appropriations Bill (Appropriations Bill), which contains language proposed by Sen. Daniel Inouye (D-Haw.) authorizing Hawai’i’s seasonal thrill craft and parasailing ban.¹⁵⁵ Specifically, §213 of the Appropriations Bill 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.¹⁵⁶

On December 13, 2004, the district court granted a stay of its July 9 ruling that invalidated the seasonal ban.¹⁵⁷ In light of the “altered legal landscape” created by §213,¹⁵⁸ the Ninth Circuit remanded the case back to the Hawai’i District Court, which found that “Section 213’s express au-

thorization of State of Hawaii laws and regulations protective of humpback whales alters the preemptive effect of the MMPA.”¹⁵⁹

On July 7, 2005, the court found that §213, as a valid constitutional enactment,¹⁶⁰ “renders Hawaii’s seasonal parasailing ban no longer preempted by federal law.”¹⁶¹ The court stated that §213 directly addresses both the express and conflict preemption found in *UFO Chuting I*, in that it: (1) “expressly authorizes Hawaii to pass laws and regulations relating to the conservation and management of humpback whales[.]” and (2) “expressly allows the State of Hawaii to enact regulations that are more restrictive than federal law, thus curing any direct conflict.”¹⁶² *UFO Chuting I* was thereafter vacated, and the court announced that “Haw. Rev. Stat. §200-37(i), as well as all rules and regulations derived from that statute, are no longer preempted by, or in conflict with, the [MMPA].”¹⁶³

IV. Absolute Protection or Herd Management: The Interplay Between the MMPA and the ESA

Although *UFO Chuting I* was vacated by the district court, the decision still raises serious questions as to the interplay of the MMPA and the ESA, and the role of all states, not just Hawai’i, in protecting endangered marine mammals. As discussed below, it was well-established before *UFO Chuting I* that the MMPA preempts state laws concerning marine mammals¹⁶⁴; however, the courts have consistently applied the ESA to allow states to provide maximum protection of the *endangered species* living within their jurisdictions.¹⁶⁵ Although the ESA contains an ESA/MMPA conflict provision,¹⁶⁶ the *UFO Chuting I* court did not apply it and struck down the laws of an island state that protected the wildlife in its waters not only under the MMPA, but arguably under the ESA as well.¹⁶⁷ The district court’s result was arguably in line with MMPA jurisprudence relating to marine mammals, but the holding on its face seems to conflict with the congressional intent to provide absolute protection to endangered species. This section examines the outcome in *UFO Chuting I* by first summarizing preemption in general, and second, discussing the ESA and the MMPA preemption provisions. Third, the conflict provision is analyzed by looking at the reasoning of the *UFO Chuting I*

148. *Id.* at 1230, n.9 (citing 16 U.S.C. §1535(f) (the ESA preemption provision)).

149. *Id.* at 1230.

150. Moniz Interview, *supra* note 18; Walters Interview, *supra* note 2; Yates Interview, *supra* note 46.

151. Moniz Interview, *supra* note 18 (the Division of Conservation and Resource Enforcement was advised not to enforce any marine mammal laws).

152. *Id.* The NOAA/DLNR Joint Enforcement Agreement, which would deputize state enforcement agents to enforce federal law, expired several years ago, and negotiations of a new agreement are currently pending. *Id.*; Yates Interview, *supra* note 46.

153. Walters Interview, *supra* note 2; Moniz Interview, *supra* note 18.

154. Gary T. Kubota, *Debate Goes on Over Thrillcraft Effect on Whales*, STAR-BULLETIN, Oct. 31, 2004, at A1.

155. Appropriations Bill, Pub. L. No. 108-447, §213, 118 Stat. 2809, 2884 (2004).

156. *Id.*; *UFO Chuting II*, 380 F. Supp. 2d 1166, 1168 (D. Haw. 2005).

157. Order Granting Defendants’ Motion for a Stay by Judge Susan O. Mollway, *UFO Chuting of Hawai’i, Inc. v. Young*, Civil No. 03-00651 SOM/BMK (D. Haw. Dec. 13, 2004).

158. *UFO Chuting II*, 380 F. Supp. 2d at 1168.

159. *Id.*

160. The court found that the Appropriations Bill §213 was constitutional because: (1) §213 does not impermissibly direct certain findings in pending litigation, rather, it changes substantive law by altering the preemptive effect of all federal laws relating to the conservation of marine mammals, *id.* at 1171; and (2) there is a rational basis for distinguishing between Hawai’i and other coastal states because of “Hawaii’s sui generis relationship with its surrounding waters” *Id.* at 1173.

161. *Id.* at 1168.

162. *Id.* at 1169.

163. *Id.* at 1167. In a related opinion issued on May 5, 2005, the district court dismissed the plaintiff’s claims under the dormant Commerce Clause because the plaintiff did “not present[] sufficient evidence to raise a question of fact as to whether the state law imposes clearly excessive burdens on interstate commerce.” *UFO Chuting II*, 380 F. Supp. 2d at 1164.

164. *See infra* Part IV.B.

165. *See infra* Part IV.C.

166. 16 U.S.C. §1543.

167. *See supra* Part III.A.; *UFO Chuting I*, 327 F. Supp. 2d 1220, 1230 n.9 (D. Haw. 2004).

court in not applying the provision, and then suggesting that the conflict provision should apply whenever there would be differing results under the MMPA and the ESA relating to endangered marine mammal protection. Fourth, the suggested interpretation is applied to the facts of *UFO Chuting I* in an attempt to show that, under this construction of the law, more protective state regulations should be allowed to meet the congressional goal of absolute endangered species protection.

A. Federal Preemption Generally

The Supremacy Clause of the U.S. Constitution states that federal laws are the “supreme law of the land.”¹⁶⁸ “[W]hether a particular federal enactment preempts state law is always purely a question of Congressional intent.”¹⁶⁹ It is therefore within the discretion of Congress whether a certain subject matter is to be regulated solely by the federal government or concurrently with the states.¹⁷⁰ If congressional intent is to dominate a particular field, then any attempt by the states to legislate in that area will be deemed unconstitutional.¹⁷¹ The intent of Congress to preempt can be determined in three ways: (1) explicit preemption by an express provision of the applicable federal law; (2) implicit preemption by evincing an intent to dominate the regulation of a particular field; or (3) implicit preemption by actual conflict between state and federal law.¹⁷² Statutory provisions constitute direct statements of congressional intent; legislative history provides strong evidence of congressional intent.¹⁷³

B. MMPA Preemption Provision: Effective Herd Management Reserved to Federal Regulation

Congress expressly reserved the regulation of marine mammals to the federal government through the MMPA. The MMPA preemption provision, 16 U.S.C. §1379(a), states: “No state may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species to the State under subsection (b)(1).”¹⁷⁴ Only a few courts have interpreted the strong language of the MMPA preemption provision, and as the following cases illustrate, courts have generally have found the provision to evince a clear congressional intent to broadly preempt all state marine mammal laws. Thus, most state laws that regulate either the taking of or commerce in marine mammals, even where state law attempts to provide greater protection to marine mammals, have generally been found unconstitutional.¹⁷⁵

In 1974, the U.S. District Court for the District of Maryland in *Fouke Co. v. Mandel*¹⁷⁶ found that the moratorium the MMPA imposes does not amount to a complete ban on the taking or importation of marine mammals; instead, balanced management was intended.¹⁷⁷ There, the court invalidated a Maryland statute that prohibited the importation of sealskins into the state.¹⁷⁸ The court found that “Congress intended not only to permit taking and importation when the same did not run counter to the preservation of marine mammal species and stocks, but also to permit such actions when it furthered efficient and effective *herd management*.”¹⁷⁹ Thus, according to the court, non-depleted species were not granted the higher level of protection given to depleted species, and takings could be allowed pursuant to a permit issued by the Secretary.¹⁸⁰

Because the language of the MMPA preemption provision expressly refers only to takings law, the state defendant in *Fouke* argued that Congress intended to preempt only state takings laws and not state importation laws.¹⁸¹ Although the court agreed that the express language of the MMPA preemption provision addresses only takings laws, it nevertheless found “that the absence of a specific congressional intent . . . to preempt state law does not alter the fact that . . . importation was, by the very nature of the enactment of the MMPA, necessarily preempted for federal control.”¹⁸² The court thus held that because Congress intended to control the balance of marine mammal management, it expressly preempted the *entire* field of marine mammal regulation, and the state statute prohibiting importation of seals was unconstitutional.¹⁸³

In the 1979 case *People of Togiak v. United States*,¹⁸⁴ the U.S. Court of Appeals for the D.C. Circuit similarly found that an Alaska law that severely restricted the taking of walrus by Alaskan natives was preempted by the MMPA.¹⁸⁵ In that case, the Secretary of the Interior had adopted regulations that purported to “rescind and supercede” the MMPA provision that allowed Alaskan natives to take walrus under certain circumstances.¹⁸⁶ By the same regulation, the

state walrus sanctuary. Under the facts of that case, two Alaskan Natives were criminally charged with entering the walrus sanctuary and shooting a walrus. *Id.* at 156. Their defense rested on the grounds that the MMPA preempted the state law regulating walrus within Round Island. *Id.* The Alaska Supreme Court found that it would be a taking in violation of the Fifth Amendment if Congress prohibited Alaska from restricting people on its state-owned land, and because “[s]tatutes should be construed in a manner which avoids a substantial risk of unconstitutionality,” found that the MMPA does not “preclude the State from restricting access to or from prohibiting the discharge of firearms on Round Island.” *Id.* at 158.

176. 386 F. Supp. 1341 (D. Md. 1974).

177. *Id.* at 1358.

178. *Id.*

179. *Id.* (emphasis added) (the court based its finding on the House Committee on Merchant Marine and Fisheries Conference Committee Report, stating that there are “cases in which animal species or stocks may be benefited by removing excess numbers.” H. REP. NO. 92-707, at 3 (1972), reprinted in 1972 U.S.C.C.A.N. 4157, 4157).

180. *Id.*

181. *Id.* at 1359.

182. *Id.* at 1360.

183. *Id.*

184. 470 F. Supp. 423 (D.D.C. 1979).

185. *Id.* at 429.

186. *Id.*

168. U.S. CONST. art. VI, §2.

169. H.J. Justin & Sons, Inc. v. Brown, 519 F. Supp. 1383, 1385, 12 ELR 20179 (E.D. Cal. 1981).

170. *Id.*

171. *Id.*

172. Young v. Coloma-Agaran, 340 F.3d 1053, 1055 (9th Cir. 2003).

173. Watt v. Alaska, 451 U.S. 259, 266, 11 ELR 20378 (1981).

174. 16 U.S.C. §1379(a).

175. But see State v. Arnariak, 941 P.2d 154 (Alaska 1997). Where the Alaska Supreme Court reversed a state district court and a state court of appeals and found that the MMPA does not preempt a state law that prohibits access to and discharging firearms in, Round Island, a

Secretary “transferred authority”¹⁸⁷ to the state of Alaska to regulate the Pacific walrus.¹⁸⁸ The state, in turn, prohibited the take of walrus by Alaskan natives, including plaintiffs People of Togiak.¹⁸⁹ In finding for the plaintiffs, the court noted that the MMPA sought to balance two major competing policy considerations—the protection of marine mammals from depletion and Alaskan native subsistence traditions.¹⁹⁰ Once that balance was reached through allowing limited Alaskan native takes for subsistence purposes, Congress intentionally preempted the field “so as to eliminate inconsistent state regulation while permitting regulation which complements the statute’s design.”¹⁹¹ The court further supported its holding by stating that Native American affairs are traditionally a federal responsibility, and “[e]ven in the other area affected by the statute, the regulation of wildlife, there is significant federal jurisdiction and responsibility.”¹⁹² Thus, “the [c]ourt conclude[d] that the [MMPA] permits Alaskan Natives to hunt non-depleted walrus in a non-wasteful manner for the purposes specified in 16 U.S.C. §1371(b).”¹⁹³

As these cases show, courts have generally found that through the MMPA, Congress has reserved to itself the regulation and management of marine mammals, thus preempting state marine mammal laws relating to both takings and commerce, even if they provide more protection to the animals than federal law.

C. ESA Preemption Provision: Absolute Protection Through Federal and State Regulation

Whereas the MMPA has been construed to preempt state laws regulating both takings and importation of marine mammals, the ESA expressly provides different levels of preemption for takings laws and commerce laws. The ESA preemption provision, 16 U.S.C. §1535(f), states:

Any State law or regulation which applies *with respect to the importation or exportation* of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this [Act] or by any regulation which implements this [Act], or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this [Act] or in any regulation which implements this [Act]. This [Act] shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife.

Any State law or regulation *respecting the taking* of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this [Act] or in any regulation which implements

this [Act] but not less restrictive than the prohibitions so defined.¹⁹⁴

Thus, commerce laws cannot be stricter than ESA exemptions or permits, but takings laws can be. Most ESA preemption cases have addressed only commerce laws, and the courts tend to recognize that “[t]he [ESA preemption] provision evinced a clear Congressional intent to preempt state wildlife conservation laws only to a *very limited extent*.”¹⁹⁵

In the 1981 case *H.J. Justin & Sons, Inc. v. Brown*,¹⁹⁶ the U.S. District Court for the Eastern District of California stated that Congress was “making a distinction between state ‘taking’ laws and state laws regulating interstate commerce in endangered species.”¹⁹⁷ In that case, the court was addressing the preemption of a California law that prohibited the importation of certain endangered species.¹⁹⁸ According to the court, Congress envisioned that state takings laws “could be more restrictive than federal law regardless of the terms of a federal permit or exemption, whereas state regulation of interstate commerce could be more restrictive only if there was no federal permit or exemption.”¹⁹⁹ Because no federal permit or exemption allowed the importation of the endangered animals covered by the California law, the state law was upheld and the plaintiff’s suit was dismissed.²⁰⁰

The same California importation law was again challenged in the 1983 case, *Man Hing Ivory & Imports, Inc. v. Deukmejian*,²⁰¹ after being amended to include a ban on the importation of African elephants and African elephant parts.²⁰² In *Man Hing*, the Ninth Circuit quoted a portion of the ESA legislative history in which Congress made

it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation[,] or interstate commerce[.]²⁰³

The court noted that when African elephants were listed under the ESA in 1978, the Secretary also adopted regulations

194. 16 U.S.C. §1535(f) (emphases added).

195. *Cresenzi Bird Importers v. New York*, 658 F. Supp. 1441, 1444, 17 ELR 20996 (S.D.N.Y. 1987) (emphasis added) (holding that the New York Wild Bird Statute was not preempted by the ESA, even though plaintiffs were issued licenses to import wild birds pursuant to the ESA). The court construed the “exemptions or permits” section of ESA’s preemption provision very strictly and found that “Congress expressed an intent to give permits issued pursuant to §1539(d) a preemptive effect. Since it did not similarly indicate that a license granted under §1538(d) would supersede more restrictive state laws, plaintiff’s federal licenses cannot be considered preemptive of New York’s law.” *Id.*

196. 519 F. Supp. 1383, 12 ELR 20179 (E.D. Cal. 1981).

197. *Id.* at 1388 (discussing the presidential administration’s proposed ESA preemption language, which was later adopted and codified as 16 U.S.C. §1535(f)).

198. CAL. PENAL CODE §§6530, r (1981). *Justin & Sons*, 519 F. Supp. at 1384.

199. *Justin & Sons*, 519 F. Supp. at 1388.

200. *Id.* at 1392.

201. 702 F.2d 760, 13 ELR 20477 (9th Cir. 1983).

202. *Id.* at 762.

203. *Id.* at 763 (citing H.R. REP. NO. 412, 93d Cong. (1973) (emphasis omitted)).

187. Prior to this case, there were no procedures to transfer authority; this case prompted a major change to the MMPA “transfer of management authority” section, 16 U.S.C. §1379. H.R. REP. NO. 97-228 (1981), reprinted in 1981 U.S.C.C.A.N. 1458.

188. 470 F. Supp. at 429.

189. *Id.* at 426.

190. *Id.* at 426-27.

191. *Id.* at 429.

192. *Id.* at 428 (internal citations omitted).

193. *Id.* at 429.

that permitted certain trade in elephant products.²⁰⁴ Thus, the ESA and its implementing regulations “preempts California’s statutory prohibition on trade in African elephant products by a trader who has secured all necessary federal permits.”²⁰⁵ Based on *Man Hing*, the Ninth Circuit also reversed in part the district court’s decision in *Justin & Sons*, and again held that the portion of the California law banning importation of African elephant parts was preempted.²⁰⁶

In a final example, the U.S. District Court for the District of Connecticut stated in the 1988 case, *Pinto v. Connecticut Department of Environmental Protection*²⁰⁷ that “[t]he plain meaning of [the ESA] preemption provision is that the ESA only displaces those state laws regulating ‘the importation or exportation of, or interstate or foreign commerce in’ endangered species.”²⁰⁸ There, the plaintiffs sought declaratory relief that a Connecticut law requiring a permit to possess a Siberian tiger was preempted by the ESA.²⁰⁹ The court found that, because the state law at issue dealt with the possession of animals solely within the state, “the question of pre-emption under the ESA d[id] not arise,” and the ESA claim was dismissed.²¹⁰

Thus, according to the courts that have construed the ESA preemption provision, although some state commerce laws can be preempted by the ESA, more restrictive state takings laws cannot be preempted even if they are in conflict with provisions of the ESA.

D. The ESA/MMPA Conflict Provision

As the above analysis indicates, the ESA and MMPA preemption provisions have established different federal-state schemes in the protection of marine mammals and endangered species. States are totally preempted from regulating marine mammals unless authority is properly transferred, but are given broad authority to regulate endangered species. A problem arises, however, when marine mammals reach the point of imminent extinction and are subsequently listed as endangered or threatened, like humpback whales. Then, the listed marine mammals come under the jurisdiction of the ESA as well as the MMPA. Congress recognized that because the MMPA and the ESA apply to endangered marine mammals concurrently, yet have differing goals and methods to achieve those goals, the statutes would sometimes provide conflicting results when applied to listed marine mammals.²¹¹ To address potential conflicts while still maintaining the scheme of concurrent ESA/MMPA jurisdiction, Congress reconciled the ESA and the MMPA through the conflict provision, set forth in the ESA, which states, “[e]xcept as otherwise provided in this chapter, no provision of this chapter shall take precedence over any more restric-

tive conflicting provision of the [MMPA].”²¹² This provision is explained in detail below.

Despite the express conflict provision, the *UFO Chuting I* court found no conflict between “the ESA’s provision allowing more protective state laws and the [MMPA]’s provision preempting state laws relating to the taking of marine mammals.”²¹³ No other court has conclusively interpreted the conflict provision, and this holding raises the question of how the conflict provision should be interpreted. As explained below, it is likely that the *UFO Chuting I* court reached the conclusion that there was no conflict because it was incorrectly focused on interpreting the preemption provisions, rather than the conflict provision. Had the focus been on the conflict provision, it is possible that the court would have reached a different conclusion.

1. *UFO Chuting I*: Focus on the ESA Preemption Provision

The *UFO Chuting I* court considered the conflict provision from the angle argued by the state—that the ESA implicitly repealed the preemption provision of the MMPA.²¹⁴ This argument unfortunately shifted the court’s focus from the conflict provision itself to the construction and interplay of the two preemption provisions. Construing the preemption provisions separately, the court first noted that the ESA preemption provision expressly applies only to provisions of the ESA and does not mention the MMPA, thus “[g]iven the lack of effect on the MMPA, nothing in the ESA can be said to supersede the MMPA’s preemptive effect.”²¹⁵ In other words, the court found that no conflict existed at all, since the ESA preemption provision did not affect the MMPA preemption provision. The court next noted that “[r]epeals by implications are not favored in the absence of a clearly expressed congressional intent[,]”²¹⁶ and because Congress reiterated and reestablished the MMPA’s preemptive effect through the 1981 and 1994 MMPA Amendments, the MMPA preemption provision necessarily “remains in full force and effect in the face of the ESA.”²¹⁷ Thus, in focusing on the preemption provisions and implicit repeal, the court was precluded from interpreting the conflict provision itself, a distinction that may have resulted in a different reasoning and holding, as described below.

2. Focus on the Conflict Provision

The argument that the conflict provision applies whenever the MMPA and the ESA would produce different results with respect to a listed marine mammal shifts the focus from the ESA and MMPA preemption provisions to the conflict provision itself, allowing a court to construe the language of the conflict provision directly. Looking at the issue from this angle, a court could find that a plain language reading of the conflict provision would require the court, when addressing a question regarding a listed marine mammal, to apply either the MMPA or ESA provision that provides the *most pro-*

204. *Id.* at 764.

205. *Id.* at 765.

206. *Id.* at 760; see also *Fouke Co. v. Brown*, 463 F. Supp. 1142, 9 ELR 20113 (D. Cal. 1979) (finding the same California endangered species importation law “unconstitutional and unenforceable as applied to American alligator (alligator mississippiensis) hides” because ESA regulations allowed for import of certain alligator products).

207. 1988 U.S. Dist. LEXIS 4375, at *31 (D. Conn. 1988).

208. *Id.* (citing 16 U.S.C. §1535(f)).

209. *Id.* at **8-9.

210. *Id.* at *31.

211. 16 U.S.C. §1543.

212. *Id.*

213. *UFO Chuting I*, 327 F. Supp. 2d 1220, 1227 (D. Haw. 2004).

214. See *supra* Part III.A.; *id.* at 1227.

215. 327 F. Supp. 2d at 1227.

216. *Id.*

217. *Id.* at 1228-29.

tection to the animal. How a court could logically reach this conclusion is explained below.

□ *More Restrictive Interpreted as More Protective.* Because the conflict provision refers to the application of the “more restrictive” provision, the above interpretation first requires a finding that “more restrictive” means “more protective,” an issue that was squarely addressed in *UFO Chuting I*. There, *UFO Chuting* argued that the conflict provision language requiring the application of the “more restrictive conflicting provision”²¹⁸ meant either the provision “whose preemptive force restricts states more” or the provision “that can be enforced by a more limited group.”²¹⁹ According to the plaintiffs, because the MMPA’s preemption provision restricted the states more than the ESA, and/or because the MMPA does not have a citizen suit provision, the MMPA was necessarily “more restrictive.”²²⁰ The court rejected this argument, however, and found that “[i]n passing the ESA, Congress sought to strengthen environmental protection laws[,] and necessarily envisioned that “[m]ore restrictive laws provide more environmental protection.”²²¹ Because the overriding goal of the ESA is to protect listed species, this interpretation is reasonable, as any other construction would likely result in less protection of listed species, contrary to congressional intent.²²² Further, the ESA preemption provision similarly uses the language “more restrictive,” which has consistently been interpreted as providing greater species protection.²²³

□ *The More Protective MMPA or ESA Provision Should Apply.* The above construction of the conflict provision also requires a finding that the more restrictive provision of either statute, not just the MMPA, should apply. This issue was also addressed by *UFO Chuting I*, which recognized that the conflict provision expressly states “no provision of the ESA will take precedence over a more restrictive provision of the MMPA, [but it] does not state that a less restrictive provision of the MMPA must give way to a more restrictive provision of the ESA.”²²⁴ In resolving this ambiguity, the court first considered the legislative history of the ESA, which states that “when there is a conflict between the ESA and the MMPA, ‘the stricter of the two will prevail.’”²²⁵ Similarly, in *Strahan v. Cox*,²²⁶ the U.S. Court of Appeals for the First Circuit stated that the conflict provision “pre-

vents anyone from arguing that the less restrictive requirements of one statute supersede the more restrictive requirements of the other.”²²⁷ Guided by these statements, the *UFO Chuting I* court found that the conflict provision is likely meant to be a two-way street that allows the application of whichever law provides the most protection to listed species.²²⁸ This construction is reasonable because, again, it provides the most protection to listed species, as required by Congress. Thus, focusing on the interpretation of the conflict provision rather than on the preemption provisions themselves, a court could reasonably find that Congress intended the most protective provision of either the MMPA or the ESA to apply to listed marine mammals.

E. The Conflict Provision Should Apply to Uphold the State Law Restricting the Take of Listed Marine Mammals Under the Facts of UFO Chuting I

Interpreting the conflict provision to mean that the court should apply the MMPA or ESA provision that provides the most protection to listed marine mammals would necessarily require the court to: (1) analyze the question under both the MMPA and the ESA to determine which provision is more restrictive; and then (2) apply the more restrictive law. The *UFO Chuting I* court found that under step one of this analysis, the result would be the same under either the ESA or the MMPA because both were in actual conflict with Hawai‘i’s seasonal ban.²²⁹ As discussed above, however, the court’s brief analysis of the ESA preemption provision overlooked the important distinction between commerce and takings laws.²³⁰ The ESA allows the states to supplement federal legislation by enacting laws that are more restrictive than federal law, thus, actual conflict cannot be a basis to preempt state takings laws under the ESA.²³¹ Under the strict MMPA preemption provision, the state law would certainly be expressly preempted.²³² Thus, under step one, because the “more restrictive laws provide more environmental protection,”²³³ and the Hawai‘i seasonal ban provides more protection to humpback whales,²³⁴ the ESA preemption provision must be the more restrictive one. Moving to step two, a court facing a preemption claim under the facts of *UFO Chuting I* would then apply the ESA, and the seasonal ban would necessarily be upheld as a permissible state endangered species takings law.

F. ESA Legislative History Expressly States That the Conflict Provision Applies to Preemption Cases

Interestingly, in *UFO Chuting I*, the state brought to the court’s attention a section of the ESA legislative history that gives preemption as an example of a potential conflict between the MMPA and ESA, and supports the above stated interpretation:

218. 16 U.S.C. §1543.

219. *UFO Chuting I*, 327 F. Supp. 2d at 1226.

220. *Id.*

221. *Id.* at 1227.

222. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 8 ELR 20513 (1978).

223. *See, e.g., Cresenzi Bird Importers v. New York*, 658 F. Supp. 1441, 1445, 17 ELR 20996 (S.D.N.Y. 1987).

224. *UFO Chuting I*, 327 F. Supp. 2d at 1226, n.4.

225. *Id.* (quoting H.R. CONF. REP. 93-740 (1973), reprinted in 1973 U.S.C.A.N. 3001, 3007).

226. 127 F.3d 155, 160, 28 ELR 20114 (1st Cir. 1997). The U.S. Court of Appeals for the First Circuit attempted to construe the ESA with the MMPA. The question before the court was whether the district court erred in ordering an injunction based on the MMPA, after finding that a violation of the ESA had occurred. The district court had determined that it lacked jurisdiction under the MMPA directly, because the plaintiff was attempting to obtain an injunction against a state official and the MMPA does not allow for a citizen suits against state officials.

227. *Id.* at 161, quoted in *UFO Chuting I*, 327 F. Supp. 2d at 1226, n.4.

228. *UFO Chuting I*, 327 F. Supp. 2d at 1226, n.4.

229. *Id.* at 1230, n.9.

230. *See supra* Part IV.D.1.

231. *See supra* Part IV.C.; 16 U.S.C. §1535(f).

232. *See supra* Part IV.B.; 16 U.S.C. §1379(a).

233. *UFO Chuting I*, 327 F. Supp. 2d at 1227.

234. *Id.* at 1230.

The Senate bill contained a section which stated that, whenever a conflict between the [ESA] and the recent [MMPA] might occur, the stricter of the two will prevail. This would allow, for example, state regulation of the taking of marine mammals, once these were declared endangered or threatened, without the state having a fully approved marine mammal program, as it would otherwise be required to do under the [MMPA]. The House accepted the Senate provisions.²³⁵

After quoting this passage, the *UFO Chuting I* court stated that, "[r]ead in isolation, this single paragraph of legislative history does indeed indicate that Congress intended to allow state regulation that would otherwise be preempted by the MMPA[.]"²³⁶ But because the court was focused on the preemption provisions themselves, as explained above, the court found that it could not construe that passage in isolation and was instead required to look at the legislative history of the MMPA and the ESA as a whole. Without this slant, however, the plain language of this portion of legislative history directly supports the finding that the ESA preemption provision applies to allow the states to enact laws protecting listed marine mammals.

V. Practical Effects on the States and Policy Reasons for State Regulation of Listed Marine Mammals

Although *UFO Chuting I* was narrow in that it applied only to Hawai'i laws relating to humpback whales, its implications are much broader for all 50 states, in that the decision and reasoning behind it questioned the role of the states in an area where federal and state officials had generally cooperated to ensure species survival and recovery. It is true that there are numerous reasons for the federal government to be involved with endangered species protection. Endangered species, as representatives of dwindling biological diversity, are an important part of our American heritage and are significant to all U.S. citizens. The federal government can better engage in widespread wildlife research, set nationally uniform standards, and are generally more sheltered from political pressures within the states.²³⁷ The states, however, also play an important role because they often have a closer daily connection to the preservation of marine mammals. This section briefly discusses the major impact of *UFO Chuting I* on Hawai'i and possible impacts on other states. It then summarizes two of the many policy reasons for coastal states to participate in the protection of their endangered species.

A. Effects and Implications of *UFO Chuting I* on the 50 States

Just days before December 15, 2004, the date Hawai'i's seasonal ban would have gone into effect had it not been struck down earlier that year, the *UFO Chuting I* court issued a stay of its original ruling, and the plaintiffs never had a chance to take advantage of their victory—no commercial parasail or

thrill craft activity occurred in humpback habitat.²³⁸ Nevertheless, the state of Hawai'i was impacted because state enforcements officers were prevented from enforcing laws relating to listed marine mammals between July and December of 2004.²³⁹ Previously, jurisdiction had been based on state laws because the state lacks a federal-state joint enforcement agreement with NOAA, and the state's enforcement officers were not deputized to enforce federal law.²⁴⁰ With only six or seven enforcement agents in the NOAA Office for Law Enforcement patrolling the entire Pacific region, there simply were not enough officials authorized to protect marine mammals.²⁴¹ This enforcement ban was not limited to humpbacks, but also applied to endangered Hawaiian monk seals.²⁴²

The reasoning applied in *UFO Chuting I* could affect other states as well because endangered marine mammals live throughout the coastal United States, not just in Hawai'i. Just to name a few: Florida is home to manatees and Northern Right whales; Washington state waters contain Humpback, Sei, and Fin whales; California's coast provides habitat to Guadalupe fur seals and Northern Elephant seals; and in Alaska, whales include Blue, Bowhead, Fin, Humpback, Gray, Northern Right, Sei, and Sperm. The states have wide ranging protections for these endangered species that are tailored to the unique circumstances of their waters and shores. Precluding the enforcement of these state laws could have serious consequences on the recovery of the species.²⁴³

B. Policy Reasons for Allowing State Protections of Listed Marine Mammals

There are many reasons for the states to be involved with the recovery of the endangered species living within their waters, including the following two described below.

1. Unique Local Wildlife Conditions

In the realm of wildlife law, the peculiarities of each individual state make it prudent to involve the states in regulation. As we saw with humpback whales, for example, Hawai'i provides the only breeding and nursing grounds in the United States. Mothers prefer to keep their calves close to shore, where they are protected from tiger sharks. Unfortunately for the whales, they also prefer the west coast of Maui, where hundreds of thousands of tourists also flock in the winter months. This creates a conflict between people wanting to use the ocean for sports like parasailing and jet skiing, and the humpbacks, which require shallow, protected areas to raise their young. The state of Hawai'i is in a better position to balance these conflicting uses, through

235. H.R. CONF. REP. NO. 93-740 (1973), reprinted in 1973 U.S.C.C.A.N. 3001, 3007, quoted in *UFO Chuting I*, 327 F. Supp. 2d at 1227.

236. *UFO Chuting I*, 327 F. Supp. 2d at 1227-28.

237. John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 222-23 (1997).

238. Telephone Interview, William Wynhoff, Deputy Attorney Gen., State of Hawai'i Attorney General's Office (Apr. 6, 2006).

239. Moniz Interview, *supra* note 18.

240. Moniz Interview, *supra* note 18; Walters Interview, *supra* note 2.

241. Moniz Interview, *supra* note 18; Walters Interview, *supra* note 2.

242. Moniz Interview, *supra* note 18.

243. Many other coastal states have joint enforcement agreements with NOAA and, therefore, have authority to enforce federal law. See, e.g., Theresa Dawson, *DLNR Seeks New Ways to Protect Dolphins, Whales After Judge Tosses Out Old Rules*, ENVIRONMENT HAWAII, Oct. 2004, at <http://www.environment-hawaii.org>; Yates Interview, *supra* note 46.

Careful regulation, because important state interests are involved. Tourism is Hawai'i's main industry, with people coming from all over the world to engage both in water sports and whale watching. Other interests must also be addressed, including the profitability of local commercial boating and thrill craft operators and the whale watch industry. There are many difficult decisions to make, and placing the authority to make them in the hands of the states allows for results that will be tailored to the state for balanced regulation. Although the federal government does have the authority to enact laws such as a seasonal ban, it is less likely to, as was actually the case in Hawai'i, because such laws are so state-specific.²⁴⁴

2. State Technical and Personnel Resources

States should also have a greater role in species protection because they can often supplement the federal agencies with more personnel and technical equipment. For example, in Hawai'i, the state DLNR Division of Conservation and Resource Enforcement (DOCARE) often steps in to help enforce marine mammal protection laws because of the minimal federal enforcement presence in Hawai'i. It is true that DOCARE "is understaffed and underfunded."²⁴⁵ Nonetheless, DOCARE officers are able to respond quickly and are often the first on the scene to care for marine mammals and to begin necessary investigations.²⁴⁶ The states can also provide technical support with staff and equipment that may be

difficult for federal agencies to supply in each state. Of course, the states do not have unlimited resources, which can also be problematic in providing adequate protections, but supplemental resources can only help in species recovery.

VI. Conclusion

To best protect endangered species, the states and the federal government need to work cooperatively; in addition to federal regulations, the states must be empowered to protect the species living within their waters and on their lands. In this way, endangered species can receive maximum protection, as envisioned by Congress, on their way to recovery. Although for many years, Hawai'i played a major role alongside the federal agencies in protecting its listed marine mammals, the *UFO Chuting I* court swung the pendulum toward a greater federal role,²⁴⁷ in direct contradiction to the mandates of the ESA. In the 2005 to 2006 winter season, a record five humpback strikes were reported. No commercial parasailing or thrill craft permits were issued for the whale season following the 2004 *UFO Chuting I* decision, so there is no link between the decision and increased strikes. The numbers do drive home the point, however, that these animals are in need of protection, whether it is the federal government or the states that provide it. The ultimate goal of the ESA is to bring back endangered species, like the humpback whale, from the brink of extinction. In the end, therefore, it is not about who makes the laws, rather, it is about what is best for the whale.

244. Yates Interview, *supra* note 46.

245. MANAGEMENT AUDIT OF THE DIVISION OF CONSERVATION AND RESOURCES ENFORCEMENT AT 23, REPORT TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF HAWAII, REPORT NO. 06-01 (2006).

246. Walters Interview, *supra* note 2.

247. Cf. Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 699 (2003) ("In recent years, the pendulum has swung away from environmental regulation by the federal government towards a greater role for the states").