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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

vs.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES
SERVICE (“NMFS”), an agency of the U.S.
Dept. of Commerce; CARLOS M.
GÚTIERREZ, Secretary of Commerce;
JAMES W. BALSIGER, Acting Director of
NMFS; RODNEY MCINNIS, Acting
Regional Administrator of NMFS; JAMES
LECKY, Director of Office of Protected
Resources at NMFS; City of San Diego; and
Does 1 to 100,

Defendants.

CASE NO. 08cv1847 WQH (POR)
ORDER

HAYES, Judge:

The matter before the Court is the exercise of jurisdiction to proceed on the merits of Plaintiffs’ state law claim against the Defendant City of San Diego.

PROCEDURAL BACKGROUND

On October 9, 2008, Plaintiffs filed a Complaint against the Defendant City of San Diego, and Defendants National Oceanic and Atmospheric Administration National Fisheries Service (NOAA) and other federal officials (“Federal Defendants”). The Complaint asserted jurisdiction over this action pursuant to 28 U.S.C. § 1331 and alleged the following two claims

1 for relief: 1) writ of mandate against Defendant City of San Diego requiring resolution of a
2 substantial question of federal law; and 2) judicial review of agency action under 5 USC § 702
3 against the Federal Defendants to prevent NOAA from ceding its authority to the City to
4 interpret and apply the Marine Mammal Protection Act (“MMPA”).

5 On October 10, 2008, Plaintiffs filed an application for a temporary restraining order
6 and a preliminary injunction. (Doc. # 3 at 2).

7 On October 22, 2008, this Court held a hearing with all parties present in order to set
8 a briefing schedule and hearing date on Plaintiffs’ application for temporary restraining order
9 and preliminary injunction. The Court set a hearing date on Plaintiffs’ pending motion for a
10 preliminary injunction. Plaintiffs requested that the Court immediately enter a temporary
11 restraining order to enjoin the Defendant City of San Diego from dispersing the harbor seals
12 at the Children’s Pool beach. Defendant City of San Diego represented to this Court at this
13 hearing that Plaintiffs were likely to succeed on the merits of their claim that a permit under
14 the MMPA is required before the seals can be dispersed, and that the City of San Diego was
15 likely to be required by the state court to immediately remove the seals constituting irreparable
16 injury. Counsel for the Defendant City of San Diego stated at the hearing that “Plaintiff is
17 likely to succeed in Plaintiff’s argument that the City would need a permit ... it is the City’s
18 position that there is no opposition to the request for a temporary restraining order.”
19 (Transcript page 16). Counsel for the Defendant City of San Diego stated at the hearing “we
20 don’t see how there is any irreparable harm to any of the parties if there is a temporary
21 restraining order preserving the status quo because it’s just a matter of giving the court an
22 opportunity to look into the merits; whereas, if the seals were immediately removed, there
23 would be irreparable harm. And we know that based on the declaration from the biologist
24 from NOAA about how these seals at this particular juncture, the pregnant ones would likely
25 have miscarriages.” (Transcript at page 7-8). Defendant City of San Diego stated that the “part
26 of the request that deals with the rope area . . . is premature.” (Transcript page 12).

27 In an order filed on October 22, 2008, the Court found that “serious questions going to
28 the merits are raised and the balance of hardships tips sharply in favor of the moving party.”

1 (Doc. #11 at 2). This Court entered an order “to preserve the status quo and prevent
2 irreparable harm before a preliminary injunction hearing may be held.” *Id.* The Court ordered
3 “that Defendant City of San Diego, its agents, servants, employees, and representatives, and
4 all persons acting in concert or participating with them, are hereby enjoined and restrained
5 through the hearing date of November 25, 2008 from engaging in, committing, or performing,
6 directly or indirectly, any and all of the following acts: harassing or dispersing the colony of
7 harbor seals at Children’s Pool Beach in La Jolla, California.” *Id.*

8 On November 4, 2008, the Defendant City of San Diego filed a “Statement of Non-
9 Opposition to Plaintiffs’ Motion for a Preliminary Injunction.” (Doc. # 18). Defendant City
10 of San Diego stated: “Based upon the [Marine Mammal Protection Act’s] text and legislative
11 history, the Plaintiffs are likely to succeed on the merits.” (Doc. # 18 at 4). Defendant City
12 of San Diego further stated that there “is sufficient evidence of a threat of irreparable injury
13 sufficient to authorize a preliminary injunction to preserve the status quo.” (Doc. # 18 at 5).

14 On November 13, 2008, all parties filed a “Joint motion to continue the hearing date of
15 November 25, 2008 on the Plaintiffs’ motion for temporary restraining order/preliminary
16 injunction.” (Doc. # 25). The parties stated that “the purpose of the continuance is to allow the
17 parties to explore the possibility of settlement of this matter . . . Plaintiffs and the City are in
18 agreement that this Court’s temporary restraining order of October 22, 2008 should remain in
19 effect.” (Doc. # 25 at 2). Based upon the joint request of all parties, Plaintiffs’ motion for
20 preliminary injunction and the Federal Defendants’ motion to dismiss were reset to February
21 13, 2009.

22 On December 2, 2008, Plaintiffs filed an application for a temporary restraining order
23 to require the Defendant City of San Diego to enforce its existing resolutions and install a
24 pupping season guideline rope at the Children’s Pool Beach by December 15 to prevent
25 nursing seal pups from being separated from their mothers and to protect the public from being
26 bitten by a seal protecting her young. (Doc. # 27). Defendant City of San Diego represented
27 to the Court that Plaintiffs were likely to prevail on the merits of the claim against the City and
28 agreed that a temporary restraining order was necessary in order to avoid irreparable injury.

1 On December 18, 2008, this Court granted Plaintiffs’ unopposed motion for a temporary
2 restraining order. (Doc. # 34). In order to avoid serious and irreparable injury, including
3 physical harm to the public and marine mammals, this Court granted a temporary restraining
4 order “requiring the Defendant City of San Diego to follow its two resolutions of its City
5 Council by placing a guideline pupping season rope at the Children’s Pool beach in order to
6 maintain the status quo until the issues presented in this case can be fully addressed in the
7 Plaintiffs’ motion for preliminary injunction.” (Doc. # 34 at 15). The Court specifically found
8 jurisdiction “at this stage in the proceedings” for this limited relief reserving the issue of
9 jurisdiction to resolve the merits of the cause of action. *Id.*

10 On April 28, 2009, this Court granted the motion to dismiss filed by Federal
11 Defendants. (Doc. # 53). The Court found no grounds for the exercise of federal jurisdiction
12 over the second claim for relief against the Federal Defendants. The Court examined relevant
13 provisions of the MMPA and found that the “[n]o provision of the MMPA sets substantive
14 priorities or otherwise circumscribes the power of the Secretary to determine how and when
15 to enforce the [MMPA].” (*Id.* at 8). The Court concluded that under the facts alleged in the
16 Complaint, no provision of the MMPA or the Administrative Procedures Act authorized an
17 action by Plaintiffs against the Federal Defendants “requiring a MMPA permit to be issued
18 prior to NMFS allowing the disturbance of seals at the Children’s Pool Beach.” (*Id.* at 3). The
19 Court concluded that it had no jurisdiction to proceed against the Federal Defendants and
20 dismissed the second claim for relief. The Court further ordered Plaintiffs and Defendant City
21 of San Diego “to file briefs addressing the jurisdiction of this Court to proceed on the merits
22 of the first claim for relief.” (*Id.* at 14).

23 APPLICABLE STANDARD

24 “A federal court is presumed to lack jurisdiction in a particular case unless the contrary
25 affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*,
26 873 F.2d 1221, 1225 (9th Cir. 1989). Rule 12(h)(3) of the Federal Rules of Civil Procedure
27 provides: “If the court determines at any time that it lacks subject-matter jurisdiction, the court
28 must dismiss the action.” Fed. R. Civ. P. 12(h)(3). In determining the presence or absence of

1 federal jurisdiction, the court applies the “‘well-pleaded complaint rule,’ which provides that
2 federal jurisdiction exists only when a federal question is presented on the face of the
3 plaintiff’s properly pleaded complaint.” *State of California v. Dynege, Inc.*, 375 F.3d 831, 838
4 (9th Cir. 2003) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). When
5 assessing subject matter jurisdiction, the court assumes the truth of all allegations in the
6 complaint. *See Castaneda v. United States*, 546 F.3d 682, 684 n.1 (9th Cir. 2008). Subject
7 matter jurisdiction must exist at the time the action is commenced and must be disclosed in the
8 complaint. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858
9 F.2d 1376, 1380 (9th Cir. 1988). “If jurisdiction is lacking at the outset, the district court has
10 ‘no power to do anything with the case except dismiss.’” *Id.* (quoting 15 C. Wright, A. Miller
11 & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986)).

12 **CONTENTIONS OF THE PARTIES**

13 Plaintiffs assert that this Court determined “in its December 18, 2008 order, it has
14 jurisdiction to hear Plaintiffs’ claim for a writ of mandate under Cal. Code Civ. Proc. §
15 1085(a).” (Doc. # 62 at 2). Plaintiffs assert that it is “official City policy to protect the seals”
16 and that the state court order that the City must violate its own resolutions by directly and
17 intentionally chasing away the seals from the Children’s Pool is preempted by the MMPA
18 because it relates to the taking of marine mammals. (*Id.*). Plaintiffs contend that the state law
19 claim for mandamus and injunctive relief against the City of San Diego raises a substantial
20 question of federal law, namely whether a state court order not to follow those resolutions is
21 preempted by the MMPA. Plaintiffs assert that “the preemption of Judge Hoffman’s order by
22 the MMPA is a substantial question of federal law.” (Doc. # 62 at 4).

23 Defendant City of San Diego agrees with Plaintiffs that this Court has federal
24 jurisdiction to resolve Plaintiff’s state law claim. Defendant City of San Diego contends that
25 the “federal interest in marine mammal conservation presented in this case remains sufficiently
26 substantial to support the exercise of federal court jurisdiction.” (Doc. # 71 at 9).

27 **ANALYSIS**

28 Section 1331 provides: “The district courts shall have original jurisdiction of all civil

1 actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. §
2 1331. “The Court has consistently interpreted jurisdictional statutes with an ‘arising under’
3 qualification, like 28 U.S.C. § 1331 [] as ‘giv[ing] the lower federal courts jurisdiction to hear,
4 originally or by removal from a state court, only those cases which a well-pleaded complaint
5 establishes either that [1] federal law creates the cause of action or that [2] the plaintiff’s right
6 to relief necessarily depends on resolution of a substantial question of federal law.’” *Williston*
7 *Basin Interstate Pipeline Company v. An Exclusive Gas Storage Leasehold and Easement in*
8 *the Cloverly Subterranean Geological Formation*, 524 F.3d 1090, 1100 (9th Cir. 2008)
9 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S.Ct.
10 2841 (1983)). A state law claim invokes 28 U.S.C. § 1331 jurisdiction only when a federal
11 court determines that the “claim necessarily raise[s] a stated federal issue, actually disputed
12 and substantial, which a federal forum may entertain without disturbing any congressionally
13 approved balance of federal and state judicial responsibilities.” *Grable & Sons Metal*
14 *Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314, 125 S.Ct. 2363
15 (2005).

16 Defendant City of San Diego has consistently taken the position, unusual for a
17 defendant in a federal action, that Plaintiffs are likely to prevail on the merits of the case and
18 this Court should enter affirmative preliminary relief requested by the Plaintiffs. The Court
19 was obligated to consider the serious claims of irreparable injury made by all parties to the
20 litigation, and entered orders in this case to preserve the status quo in order to examine
21 Plaintiffs’ allegations in support of the exercise of federal jurisdiction. The Court is now
22 obligated to examine the asserted basis for federal jurisdiction over Plaintiffs’ state law claim.
23 *See United Investors Life Insurance Company v. Waddell & Reed, Inc.* 360 F.3d 960, 967 (9th
24 Cir. 2004). Subject matter jurisdiction cannot be established by consent of the parties and a
25 lack of subject matter jurisdiction is a non-waivable defect. *Gibson v. Chrysler Corporation*,
26 261 F.3d 927, 948 (9th Cir. 2001).

27 Plaintiffs seek a federal forum over a state law claim for writ of mandamus against the
28 Defendant City of San Diego on the basis that there is a substantial question of federal law

1 pursuant to 28 U.S.C. 1331 as set forth in *Grable*. Plaintiffs' state law claim alleges the
2 following facts relevant to the exercise of federal jurisdiction:

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

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

18 On April 19, 2006, the San Diego City Council enacted Resolution R-301368
19 requiring that the rope barrier at the Children's Pool beach will be reinstated for
20 the remainder of this year's pupping season and will be placed at the beach from
21 January 1 through May 1 every year from this point forward. . . .

22 On January 8, 2007 the San Diego City Council enacted Resolution 302160
23 calling for the placement of the rope to be extended two weeks on either end. .
24 ..

25 On November 30, 2007, Agent Masters wrote a letter to Deputy City Attorney
26 Nina Fain, again stating that CPB should be closed for pupping season, but
27 noting that the rope barrier is appreciated and 'has been a needed step in the
28 right direction;'. . .

On January 4, 2008, a state court judge declared that a 1931 state law suddenly
prevents such a rope. On that basis, the City failed to follow two resolutions
passed by its City Council requiring the rope. . . .

Plaintiffs clearly have a state law claim to a writ of mandate under Cal. Code
Civ. Proc. § 1085(a) compelling Defendant City to follow its own City Council's
ordinance and erect a rope. A federal court also has jurisdiction to hear the
claim because there is a substantial question of federal law that must be
resolved, namely whether the federal MMPA preempts enforcement of a state
law disallowing such a rope.

(Doc. #1 at 5-6). The Complaint seeks a judgment from this Court requiring the Defendant
City of San Diego to carry out the City Council ordinance and erect a pupping season rope.

In order for a state law claim to provide a basis for federal jurisdiction, the state law
claim must "turn on substantial questions of federal law," and "really and substantially
involv[e] a dispute or controversy respecting the validity, construction or effect of [federal
law]." 545 U.S. at 312-313. In *Grable*, the Supreme Court determined it had federal

1 jurisdiction over a state claim where “the meaning of the federal statute” was an essential
2 element of a state quiet title action, “and the meaning of the federal statute [wa]s actually in
3 dispute.” *Id.* at 315. In this case, a review of the facts alleged in the Complaint shows that
4 Plaintiffs’ state law claim does not require the Court to resolve a substantial issue of federal
5 law, and that there is no disputed issue of federal law between Plaintiffs and Defendant City
6 of San Diego. The allegation in the Complaint that federal officials informed the Defendant
7 City of San Diego that they view “the rope as a needed step in the right direction” in order to
8 “inform[] humans when they are more likely to be found in violation of the MMPA and
9 potentially cited” (Doc. # 1 at 5) does not support any inference that “the federal MMPA
10 preempts enforcement of a state law disallowing such a rope.” (Doc. # 1 at 6). The Court
11 concludes resolution of the state law claim does not require the determination of a “real[] and
12 substantial[] dispute or controversy respecting the validity, construction or effect” of the
13 MMPA. *Grable*, 545 U.S. at 312-313.

14 The Court further concludes that allowing Plaintiffs’ state law claim to go forward in
15 federal court would undermine “Congress’s intended division of labor between state and
16 federal courts.” *Grable*, 545 U.S. at 319. “Although the absence of a private federal right of
17 action is no longer dispositive after *Grable*, it remains relevant to [the] assessment of the
18 ‘sensitive judgments about congressional intent’ that § 1331 requires.” *Shanks v. Dressel*, 540
19 F.3d 1082, 1093 (9th Cir. 2008) quoting *Grable*, 545 U.S. at 318. In *Shanks*, the Court of
20 Appeals explained that “[t]he absence of a private right of action [] is a ‘missing welcome mat,
21 required in the circumstances,’ because acceptance of [plaintiff’s] argument would result in
22 federal jurisdiction whenever a plaintiff sues on a state law claim that refers to a concept
23 defined by federal law.” 540 F.3d at 1093-1094 quoting *Grable*, 545 U.S. at 318; *see also*,
24 *Potter v. Hughes*, 546 F.3d 1051, 1064 (9th Cir. 2008) (“The absence of a federal private right
25 of action undercuts the existence of subject matter jurisdiction under § 1331.”).

26 In this case, Congress provided a specific and limited private right of action under the
27 MMPA which all parties agree has no application to any facts alleged in the Complaint.
28 Section 104(d)(6) of the Marine Mammal Protection Act provides that “[a]ny applicant for a

1 permit, or any party opposed to such permit, may obtain judicial review of the terms and
2 conditions of any permit issued by the Secretary under this section or of his refusal to issue
3 such a permit.” 16 U.S.C. § 1374(d)(6). This case does not involve the grant or denial of an
4 application and the MMPA does not otherwise provide a private right of action. *See*
5 *Didrickson v. United States Department of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992); *see*
6 *also, Cetacean Community v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004) (“[T]he MMPA
7 contains no explicit provision granting standing to enforce its duties.”). Agency action under
8 the MMPA is committed to the discretion of the Secretary of Commerce and the Complaint
9 fails to allege any enforceable agency action. *See* (Doc. # 53 at 7).


10 The Complaint alleges that a federal official “urged the City to at least put up a
11 guideline rope at CPB;” and that the City Council enacted resolutions requiring a rope barrier.
12 The Complaint alleges “a state court judge declared that a 1931 state law suddenly prevents
13 such a rope. On that basis, the City failed to follow two resolutions passed by its City Council
14 requiring the rope.” (Doc #1 at 5). City Council resolutions reflect the policies of the City of
15 San Diego. The state court judgment reflects state law concerns. There are no facts alleged
16 in the Complaint which would support the exercise of federal jurisdiction to intervene in the
17 conflict alleged between the parties in this action and the state court over state and local
18 interests. The facts alleged in support of the state law claim do not limit the ability of the
19 federal officials to enforce the MMPA or the ability of the City officials to comply with the
20 provisions of the MMPA.

21 This Court concludes that the facts alleged in the state law claim do not support the
22 exercise of federal subject matter jurisdiction. The repeated consent of the Defendant City of
23 San Diego cannot create federal subject matter jurisdiction in this case. *See Insurance Corp.*
24 *of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2009
25 (1982) (“[N]o action of the parties can confer subject-matter jurisdiction upon a federal court.
26 Thus, consent of the parties is irrelevant.”). The Court concludes that federal jurisdiction is
27 lacking and this Court is required to dismiss. Fed. R. Civ. P. 12(h)(3); *see Morongo Band of*
28 *Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir.

1 1988).

2 IT IS HEREBY ORDERED that the orders filed on October 22, 2008 and December
3 18, 2008 are vacated; all pending motions are denied as moot; and this action is DISMISSED.

4 DATED: June 29, 2009

5 
6 **WILLIAM Q. HAYES**
7 United States District Judge

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