

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UFO CHUTING OF HAWAII, INC.,)	Civ. No. 03-00651 SOM/BMK
a Hawaii corporation and)	
K.M.B.S., INC., a Hawaii)	
Corporation, d.b.a. Kaanapali)	ORDER GRANTING PLAINTIFFS'
Tours,)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING DEFENDANTS'
Plaintiffs,)	MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
PETER T. YOUNG, in his)	
capacity as Chair of the)	
Board of Land and Natural)	
Resources, State of Hawaii;)	
STEPHEN THOMPSON, in his)	
capacity as Acting)	
Administrator, Division of)	
Boating and Ocean Recreation,)	
Department of Land and)	
Natural Resources, State of)	
Hawaii,)	
)	
Defendants.)	
)	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Plaintiffs UFO Chuting of Hawaii, Inc., and K.M.B.S., Inc. (collectively, "UFO"), are parasail operators who challenge the validity of a Hawaii law that bans parasailing in the navigable waters surrounding the west and south shores of Maui from December 15 to May 15. UFO argues that the state law is preempted by federal law and therefore violates the Supremacy Clause. UFO and the State of Hawaii have filed cross-motions for summary judgment. The court agrees with UFO that the State's

seasonal parasailing ban is expressly preempted by the Marine Mammal Protection Act ("MMPA") and actually conflicts with federal law.¹

II. BACKGROUND FACTS.

UFO operates a parasailing business along the navigable waters between Lahaina and Kaanapali on the coast of Maui. The navigable waters between Lahaina and Kaanapali are within the Hawaiian Islands Humpback Whale National Marine Sanctuary. UFO's two vessels have been inspected and licensed by the Coast Guard to carry up to twelve passengers in coastwise trade. UFO also holds permits issued by the State Division of Boating and Ocean Recreation, Department of Land and Natural Resources ("DOBOR"), authorizing the use of its vessels for parasailing between Lahaina and Kaanapali from May 16 to December 14, 2003. From December 15, 2003, to May 15, 2004, the permits issued by DOBOR forbid parasailing and certain other forms of recreational activity, but allow the use of the vessels for other purposes. The DOBOR restriction was adopted pursuant to Haw. Rev. Stat. § 200-37(I), which states, "Between December 15 and May 15 of each year, no person shall engage in parasailing . . . or operate

¹ As this ruling is dispositive of the entire case except the prayer for a permanent injunction, discussed later in this order, the court does not address other arguments or claims raised by UFO.

Because parasailing is authorized, 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.⁹

The court recognizes the Hawaii Legislature's laudable goal in passing the seasonal parasailing ban. Clearly, the State was seeking to increase protections for an endangered species in Hawaiian waters. Unfortunately, the State employed an unconstitutional method of achieving its goal. There is no evidence in the record that the federal government has

feet of the whale sanctuary). No party here argues that a parasail should be deemed an aircraft and therefore prohibited from coming within 1000 feet of the whale sanctuary. But see United States v. Red Frame Parasail, 160 F. Supp. 2d 1048, 1055 (D. Ariz. 2001) (holding that a parasail is considered an "aircraft" under the provisions of the Airborne Hunting Act).

⁹ Though section 17 amended the MMPA, it was placed as a note to 16 U.S.C. § 1538, see Pub. L. No. 103-238, 1994 Stat. 1636, which is part of the ESA, not the MMPA. Even if the provision allowing an approach within 100 yards is part of both the ESA and the MMPA, the analysis above does not change. See 15 C.F.R. § 922.184(a)(1) (deeming the prohibition on approaching within 100 yards as deriving from the MMPA and the ESA). Though the ESA, unlike the MMPA, allows states to supplement federal environmental regulations, even under the ESA a state may not prohibit what is expressly authorized by the ESA. 16 U.S.C. § 1535(f). Therefore, once Congress says that one can lawfully approach no closer than 100 yards from a whale, a state cannot pass, even under the ESA, a regulation proscribing such activity. While 15 C.F.R. § 922.183(a) says that "All activities are also subject to all prohibitions, restrictions, and conditions validly imposed by any other Federal, State, or county authority of competent jurisdiction," the parasailing regulation is not validly imposed because it conflicts with substantive federal law.

transferred authority to the State with respect to how far from humpback whales boats must stay. The seasonal parasailing ban imposed by state law therefore actually conflicts with federal law and is preempted.

V. CONCLUSION.

UFO's motion for summary judgment is granted, and the State's motion for summary judgment is denied. Section 200-37(I) of Hawaii Revised Statutes and all rules and regulations derived from that statute are declared unconstitutional.¹⁰

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 9, 2004.

SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

¹⁰ The only issue remaining in this case is the request in UFO's pleadings for a permanent injunction. A permanent injunction may be a foregone conclusion based on the present order, but UFO has not yet moved for a permanent injunction. Therefore, the court does not issue an injunction at this time, and the case file remains open.