COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

VALERIE O'SULLIVAN,	)	Case No. D047382
	)	
Plaintiff, Respondent & Cross-Appellant,	)	Superior Court Case No.
	)	GIC 826918
v.	)	
	)	
CITY OF SAN DIEGO,	)	
	)	
Defendant, Appellant & Cross-Respondent.	)	
	)	

On Appeal from a Judgment
Of the Superior Court of California, County of San Diego

Hon. William C. Pate, Judge Presiding

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

INTRODUCTION

The City of San Diego is the trustee of a 1931 tidelands trust governing Children's Pool Beach which is also known as Casa Beach. The California Legislature has set forth as express conditions of this trust that the Children's Pool Beach be used for a public park, bathing pool for children, parkway, highway, playground and recreational purposes. The City's current policy is to permit joint use of Children's Pool Beach by seals and citizens with deference to requirements of the federal Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §1361 *et seq*. That law forbids the taking or harassment of marine mammals.

Valerie O'Sullivan sued the City as a private attorney general under a theory that the City had breached its fiduciary duties imposed by the tidelands trust. At the trial in this case, O'Sullivan's lawyer stated, "The seals are not a threatened species…so there's no harm in getting rid of them." Thus, O'Sullivan's agenda in bringing the lawsuit was to permanently remove the seals at Children's Pool Beach so

it can be used only by humans. O'Sullivan prevailed below in persuading the trial court to order the dredging of Casa Beach.

The City appeals this judgment and also the trial court's award of substantial attorney's fees and costs to O'Sullivan. The City's position in this appeal is that O'Sullivan's lawsuit did not advance the public interest. It is barred because O'Sullivan did not file a pre-suit claim with the City, failed to name an indispensable party to the controversy (the federal government), and the relief requested violates the separation of powers doctrine. Moreover, the City has complied with the explicit terms of the tidelands trust in its joint use policies. The trial court's findings to the contrary are substantially based on improperly admitted evidence at the trial.

STATEMENT OF THE CASE

References in this brief to the Reporter's Transcript shall be by "RT" followed by the page and line number. References to the Appellant's Appendix shall be by "AA" followed by the page number. There are 745 court exhibits identified in the record which the City intends to have transmitted by the Clerk of the Superior Court to this Court after the parties have filed their briefs. This brief makes reference to 55 of the court exhibits. For any court exhibit referred to in this brief, a copy has been included in the Appellant's Appendix and can be located in the appendix by a numbered exhibit tab. All such exhibits shall be referred to as "Ex." followed by the assigned trial court exhibit number and page where the copy of the exhibit appears in Appellant's Appendix. Finally, copies of certain exhibits are attached to this brief for the convenience of the reader.

A. THE UNDERLYING LAWSUIT

In her complaint, O'Sullivan sought injunctive relief requiring the City to do the following: 1) take lawful measures to deter marine mammals from causing and continuing to cause damage to public and private property at Children's Pool; 2) take lawful measures to stop the marine mammals from endangering personal safety and the public health and welfare at Children's Pool; and 3) take lawful measures to abate

the nuisance at Children's Pool. (AA p. 5). In addition to injunctive relief, O'Sullivan sought declaratory relief that the City was in violation of its trust obligations. *Id.*

Before presenting the facts underlying the legal issues presented in this appeal, it is first necessary to discuss the history of Children's Pool Beach and Seal Rock. This review necessitates a discussion of the legislative process that was aborted by O'Sullivan's lawsuit.

B. HISTORY OF LA JOLLA CHILDREN'S POOL BEACH AND SEAL ROCK

Children's Pool Beach is situated in La Jolla, California adjacent to Seal Rock. (See map at Ex. 540, AA p.103.) Harbor seals have been in the vicinity of the trust property since at least the 1930s. (AA p. 51 ¶5.) As previously noted, it is a violation of the federal MMPA to take marine mammals, including harbor seals. (See federal regulations at Attachment A to this brief; Ex. 543, AA p. 1038.) The MMPA is enforced by the National Marine Fisheries Service ("NMFS") of the National Oceanic and Atmospheric Administration ("NOAA"), United States Department of Commerce. The history of Children's Pool Beach and Seal Rock is set forth separately below.

1. CHILDREN'S POOL BEACH

In 1930 Ellen Browning Scripps requested permission from the City of San Diego for the construction of a concrete breakwater to "create a Bathing Zone adjacent to the City of San Diego's La Jolla Park and City streets." (Ex. 546, AA p. 103.) The request was accompanied by a letter from a hydraulic engineer who stated that the purpose of the breakwater was to "create a bathing pool adjacent to the City of San Diego's La Jolla Park and City streets." (Ex. 547, AA p. 51 ¶5.) The City Council, referred to at the time as the "Common Council," adopted a resolution granting permission for the construction of the breakwater. (Ex. 548, AA pp. 1040). The engineers designed the breakwater to include sluiceways (which was later plugged). (See photograph at Ex. 702, p. 2, AA p. 1230.)

In 1931 the California Legislature enacted Stats. 1931 Chap. 937 which provided for a grant of the tidelands at Casa Beach in trust for the following purposes

and express conditions:

> (a) That said lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of such purposes.
>
> (b) The absolute right to fish in the waters of the Pacific ocean over said tidelands or submerged lands, with the right to convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California.

(AA p. 9). The breakwater constructed by Scripps on the west side of this property later became part of the trust. (AA p. 51 ¶4.)

The dedication of Children's Pool Beach took place on June 1, 1931 and has been used by the public ever since. (RT 117:23-118:12; AA p. 52 ¶9.) Ten days after the dedication, the City Council passed a resolution expressing gratitude to Ms. Scripps, "on behalf of the children and citizens generally of the City of San Diego, for the unprecedented tidal bathing pool for the younger generation which has recently been constructed in ocean water on the shores of La Jolla…." (Ex. 19, AA pp. 591-592.)

A photograph at Attachment B to this brief provides an aerial historical view of Children's Pool Beach. (Ex. 722, AA p. 1287.) In 1932 Scripps wrote the City's Water Department to report that a substantial amount of sand had partially filled the swimming hole portion. (Ex. 22, AA p.593.) Scripps asked that measures be taken to make the swimming hole large enough and deep enough for enjoyment at moderately low and low tides. *Id.* By 1998 the shoreline advanced to its current state leaving only a small area for recreational swimming. (Ex. 698, p. 3, AA p. 1140.)

2. SEAL ROCK

The California Legislature at Stats. 1933 Chap. 688 transferred the day-to-day management responsibility of all State owned public trust lands within the Pacific Ocean and the City limits (not already granted, such as Children's Pool Beach) to the City. Consequently, the City is also the trustee of Seal Rock.

In 1992 harbor seals, California sea lions, and occasionally elephant seals were using Seal Rock. (Ex. 581, p. 3, AA p. 1047.) Harbor seals normally get out of the water or "haul-out" on land on a daily basis. *Id.* An extended amount of time is necessary for such haul-outs during the breeding and "pupping" (birth of young) and "molting" (shedding of skin and hair) seasons from February to July. *Id.* A private citizen requested that the City establish a marine mammal ecological preserve at Seal Rock. (*Id.* at p. 2. AA p. 1046.) Seventeen citizens, mostly from La Jolla, joined in this request of the City. (Ex. 582, p. 2, AA p. 1052.)

In February 1993 the City Council adopted a resolution and passed an ordinance establishing the Seal Rock as a marine ecological area reserve for a five-year trial period in order to protect harbor seals and other marine animals from disturbance by swimmers, boaters, and divers. (Ex. 587, p.1, AA p. 1053; Ex. 589, AA pp. 1083-1087.) The resolution noted that California Fish and Game ("F & G") officials considered the harbor seal population depleted and Seal Rock was the only known haul-out site south of Point Magu. (Ex. 587. AA p. 1053). The Council also authorized that a Seal Rock Marine Mammal Reserve Ad Hoc Committee include a NMFS representative in its membership. (Ex. 591, pp. 2-3, AA. pp. 1089-1090.) The Council amended the ordinance in August 1994 to comply with certain conditions imposed or requested by the California Coastal Commission ("CCC") and the F & G. (Ex. 601, AA pp.1091-1096.) The five-year Seal Rock Marine Mammal Reserve expired in September 1999. (Ex. 653, AA p. 1119.)

In December 1999 the City Council adopted an ordinance continuing the Seal Rock Marine Mammal Reserve for another five years subject to issuance of a permit by the CCC. (Ex. 653, AA pp. 1119-1124.) However, the City Council later rejected permit conditions set by the CCC necessary for the reserve to continue. In April 2003 the Council adopted a resolution calling upon the California Marine Life Protection Act Working Group to advise the Council on the appropriate status for the Seal Rock area after its comprehensive review of California marine resources. (Ex. 285, pp. 30-

31; AA pp. 1005-1006.)

C. CHILDREN'S POOL BEACH CLOSURE AND REOPENING

A NMFS biologist, James Lecky, observed in a letter to the City that 1996 and 1997 data showed that more seals were hauling out at Children's Pool Beach than at Seal Rock. (Ex. 203, AA pp .884-885.) For illustrative purposes, see the photograph of the seals at Children's Pool Beach. (Ex. 228, AA p.886.) A report by the Hubbs-Seaworld Research Institute documented that nursing seal pups were observed at both the reserve and Children's Pool Beach during the 1996 and 1997 pupping seasons. (Ex. 245, pp. 2-3, AA pp. 970-971.)

During part of this time frame, lifeguards erected barriers between seals hauled-out on the sand at Children's Pool Beach and the public. (Ex. 611, p. 2, AA p. 1098.) The City Manager explained that these barriers were designed to: 1) protect the public from being bitten by a seal; and 2) protect the seal spectators from incurring a hefty fine for violating the MMPA by causing the seals to change their behavior, such as moving from land to water. *Id.*

On September 4, 1997 the San Diego County Department of Environmental Health ("DEH") ordered the closure of Children's Pool Beach due to high fecal coliform counts and posted signs of the closure. (Ex. 611, p. 1, AA p. 1097.) The DEH issued a press release in January 1998 declaring that the harbor seals were the source of contamination at Children's Pool Beach. (Ex. 160, AA p. 830.) DNA laboratory tests on water samples ruled out humans as the source of pollution and confirmed that fecal matter from the seals was the cause. (*Id.*; AA 52 ¶17.)

On January 28, 1998 the City removed the barriers at Children's Pool Beach between people and seals on an experimental basis in an effort to restore shared use of the beach and the water by seals and people. (Ex. 629, p. 2, AA p. 1101.) City lifeguards posted notices at Children's Pool Beach soliciting the public to voice any concerns about removal of the barricades. (Ex. 183, AA p. 874.) After the barriers were removed, numerous citizens complained about people disturbing the seals. The

DEH changed the status of the beach water quality notification from closure to advisory in 1999, but erroneously failed to remove its closure signs at Children's Pool Beach until 2003. (AA. p. 58 ¶18.)

The City also hired a consultant to determine the costs and impacts of unplugging the four sluiceways in the breakwater so that the increased water flow would reduce the beach, increase water safety, and reduce the number of seals hauling out. (Ex. 629 pp. 2-4; AA pp. 1101-1104.) A consultant concluded that if the sluiceways were opened up, three quarters of the sand (3000 cubic yards) in Children's Pool Beach would have to be removed before the sluiceways could function properly. (*Id.* at 3, AA p. 1102.)

The proposed dredging plan, described as the "La Jolla Children's Pool Beach Management and Water Quality Improvement Project," required the City to obtain permits from various agencies before it could be implemented. Among the permits sought was a permit from NMFS to authorize "incidental harassment" of the seals. (Ex. 255, AA pp. 981-984.) NMFS preliminarily determined that the dredging project would have minimal impact on the seals and in February 1999 it solicited public comments on the project. 64 Fed. Reg. 8548-8549 (February 22, 1999.)

In March 1999 the City Council rejected the City Manager's proposal for opening the seawall's sluiceways and the dredging of Children's Pool Beach. (Manager's Report No. 98-88, Ex. 632, AA pp. 1114-1118.) The Mayor and Council voted 6-3 to not dredge, to not shoo the seals, and instead to put up a barrier to protect the humans from the seals and the seals from the humans. (Ex. 631, p. 55, AA p. 1113.) The Council also referred the matter back to the City's Natural Resource and Culture Committee for an in depth review of all issues, including legal issues. *Id.* The City withdrew its requests for permits to proceed with the dredging project and notified the CCC that, as an interim measure, a barrier (a rope) would be placed on Children's Pool Beach to prevent seal harassment and to protect the public from the pool's contaminated waters. (Ex. 88, AA pp. 799-800.)

The matter was revisited by the Mayor and Council in April 2003. The Mayor and City Council directed the City Manager to return to the Natural Resource and Culture Committee to devise a strategy with the following objectives: "In compliance with Federal Law, to reduce pollution levels in the sand and to return the Children's Pool to recreational use for children, including accessible uses, thus restoring this area to the joint use of seals, divers, fishermen, children and their families." (Ex. 697, p. 5, AA p. 1134.)

In July 2003 the City's staff formed a Technical Advisory Committee ("TAC") to make recommendations. The TAC consisted of members from the NMFS, the CCC, the F & G, the DEH, Hubbs-Sea World Research Institute, the City's Park and Recreation Department, the City's Lifeguard Services, and the City's Development Services Department. (Ex. 285, AA pp. 996.) The TAC considered eight proposals and ranked the top three as follows: 1) dredge the beach but provide floating platforms for the seals to haul-out; 2) close Children's Pool Beach to public use and leave it for the seals; and 3) create a new Children's Pool Beach. (Ex. 698, p. 5-9, AA p. 1142-1146.)

The City Manager reviewed these proposals and recommended that the City dredge Children's Pool Beach with the goal of seasonal joint use for humans and seals. (*Id.* pp. 1-2, AA pp. 1138-1139.) The City Manager estimated the following fiscal impact from implementing the dredging project:

- $250,000 to $500,000 for dredging, including construction documents, permits, environmental review, administration, and construction;
- $3,000 for annual testing;
- $5,000 for annual reworking of the soil;
- $50,000 budgeted yearly for dredging every three to five years; and
- $75,000 for the salary of a limited full time ranger.

The City received numerous letters and postcards, including from children, asking that

the seals be allowed to stay at Children's Pool Beach. *Id.* The Natural Resources and Culture Committee forwarded the City Manager's report to the City Council without a recommendation along with a copy of the citizen correspondence. (Ex. 698, AA pp. 1136-1224.)

In September 2004 the Council reviewed the City Manager's recommendations and adopted a resolution in response. (Ex. 701, AA pp. 1225-1228.) See Attachment C to this brief. The resolution authorized the City Manager to conduct studies and initiate the permit application process necessary for the dredging project, but without making a final decision whether to approve the dredging project. The foundation for funding of the project was outlined in this resolution. The Council directed the City Manager to report back to the Council with the appropriate environmental documents and certification for the Council's approval. The Council also directed further evaluation of the option of opening the sluiceways as an alternative method for sand removal and tidal flushing.

Before the September 2004 Council meeting, the CCC had notified the City that the rope barrier, because it had been in place for years, would require a permit from that agency. (Ex. 98, AA pp. 807-825.) In the resolution enacted in September 2004, the Council instead opted to remove the rope barrier and restore public access to Children's Pool Beach with new signage. The Council directed that the new signs inform the public of the following: public access is permitted; seal harassment violates the MMPA; and bacterial levels are present in the area. See photograph of the new sign at Attachment D. (Ex. 410, AA p. 1101.) NMFS continues to require placement of the MMPA warning signs at Children's Pool Beach. See photograph of one of these signs installed in December 2004 at Attachment E. (Ex. 413, AA p. 1012.)

D. CIVIL DISOBEDIENCE AT CHILDREN'S POOL BEACH

Thousands of citizens, many of whom are transported by bus, view the seals at Children's Pool on a weekly basis. (RT 277:5-11; 486:17-20.) There are over a

million visitors to Children's Pool Beach every year. (Ex. 303, AA p. 1007.) After Children's Pool Beach was reopened, the public has been permitted to sunbathe and swim on the beach. (RT 226:24:27; 553:2-12.)

On June 30, 2005 the City placed a notice at Children's Pool Beach advising the public of the pending proposal to dredge the beach. (RT 592:12-593:4.) The dredging proposal, as well as the events leading to the closure of Children's Pool and its reopening, sparked community activism on the issue and in a few instances civil disobedience by a handful of individuals.

After the rope was removed from the beach, there was a substantial increase in citizen complaints about disturbances at Children's Pool Beach. (RT 617:2-7.) Most of these complaints were about pro-seal activists causing disturbances. (RT 617:15-19.) Seal activists positioned themselves where the rope had been to discourage others from going on the beach. (RT 138:20-26; 260:5:14.) The seal activists created a kelp line in the beach sand, where the rope had been, which was later replaced by a line drawn in the sand. (RT 139:8-21; 141:4-10; 152:8-23; 256:26-257:15; 585:4-586:15.) (See also the photograph at Ex. 228, AA p. 886.) Some of these activists have demanded that the City's lifeguards be arrested for allegedly not enforcing federal regulations protecting the seals. (RT 609:18-610:2.)

Most of the pro-seal activities have been peaceful manifestations of support for the protection of the seals. Citizens hold signs urging that the seals be protected. (RT 554: 3-11.) See, for example, the photograph of seal activists with signs. (Ex. 461, AA p. 1014.) On Memorial Day 2005 the seal activists celebrated the seals at Children's Pool Beach with an event called "Seal-a-Bration." (RT 192:10-24; 207:14-23; 272:16-22.)

One seal activist, Donald Riley, a self-described "Senior Seal Guardian," unsuccessfully sued the NMFS and the City in federal court in 1998 seeking to the have Children's Pool Beach recognized as a refuge for the seal colony. (RT 471:20-472:8; Ex. 229, AA pp. 867-897.) Later Riley refused to leave a lifeguard

observation station at Children's Pool and was arrested. (RT 256:2-19.) On another occasion, Riley heckled a pro-beach activist while she was being interviewed by Tom Brokaw of NBC National News. (RT 340: 9-15.) The City and pro-beach access supporters obtained restraining orders against Riley based on this conduct. (RT 158:22-159:11; 324:19-25; 480:918; 481:22-482:7; 486:6-10.) On another occasion, an animal rights activist was arrested in 2004 for using a stun gun at Children's Pool Beach. (RT 624:24-625:14.)

On March 23, 2003 the Plaintiff, Valerie O'Sullivan, and eight other pro-beach access citizens, who became publicly known as the "La Jolla Nine," participated in a "swim-in" at Children's Pool. (RT 219:26-220:25; 338:15-17.) One of these citizens was arrested and eight were given citations by federal agents for violation of the MMPA. (220:24-25; 223:2-20; 338:18-21.)[1] A photograph captured the arrest in progress. (Ex. 423, AA p. 1013.) A court later dismissed the citation against O'Sullivan. (RT 221:1-2.)

A 24 hour a day camera is in operation at Children's Pool Beach. (RT 194:20-27.) The City's Lifeguard Service, which is bound by the City's joint use policy, takes a neutral stance on whether the beach should be exclusively used by seals or swimmers. (RT 268:28-269:10.) This neutrality extends to enforcement of the law. For example, in 2005 the lifeguards cited two seal activists and one pro-beach access activist for improperly posting signs at Children's Pool Beach. (RT 611:15-612:7.)

E. O'SULLIVAN SUES TO GET RID OF THE SEALS

Following the federal government's unsuccessful prosecution of her for violation of the MMPA, O'Sullivan sued the City. Before filing this lawsuit, O'Sullivan did not file a claim for damages with the City. (AA p. 53 ¶22.)

At the inception of the lawsuit, a non-profit environmental organization,

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1 The Plaintiff's trial brief states, "In particular, plaintiff Valerie O'Sullivan was charged with violation of the MMPA because as she came to shore at one end of the pool a harbor seal at the other end of the pool, 50 yards away, contemporaneously entered the water as if to take a swim." (AA p. 62:12-15.)

Baykeeper, moved to intervene in the lawsuit. (AA pp. 16-39.) Baykeeper asserted it represented citizens who recreate at Casa Beach by watching the seals and its members would be substantially affected by the litigation's outcome because O'Sullivan was seeking to remove the seals. (AA p. 22:20-23:2.) Baykeeper opined, "Clearly the current debate at City Council shows that the City is inclined to attempt to reach a compromise that is inadequate to Baykeeper." (AA p. 26:5-6.) The trial court found that O'Sullivan, as a private attorney general, represented all of the people of California in the litigation, and was persuaded by Plaintiff's counsel to deny Baykeeper's motion for intervention. (RT 2:17-21; 11:9-12:4; AA pp. 48-50.)

The trial court did, however, later find that the State of California was an indispensable party to the litigation. (AA p. 108-110.) O'Sullivan amended her complaint to add the State of California as a party defendant. (AA pp. 111-126.) The State then entered into a stipulation to be bound by the judgment based on its position (not O'Sullivan's) that the uses allowed by the City and those advocated by O'Sullivan are all permissible trust uses. (AA pp. 127-137.)[2] The trial court adopted this stipulation with the acknowledgement that the parties reserved their right to argue their respective positions relative to the trust purposes issue. (Ex. 735, AA pp. 1288-1289.) The State Lands Commission ("SLC"), which by law has sole authority to oversee trust grants, opined that the City is in compliance with the terms of the trust. (Ex. 478, AA. p. 1030.)

Prior to the bench trial, O'Sullivan, through her attorney, lashed out at the City Council in a trial brief:

> The current City Council seems to think, as did city councils of old, that as long as the foot does not drop on its watch, it will consign its problems to another day and another batch of elected officials, so the current electees will look good now and achieve reelection. No problem, even the budget fiasco, which has effectively plagued and bankrupted this town, is more a statement of its attitude than its awful handling of

2 In the stipulation, the State reserved its right to file an amicus curiae brief in any appeal. (AA p. 135:18-20.)

> the problem of Children's Pool. Its conduct respecting its citizens is inexcusable and its unwillingness to tackle the difficult issues in the face of political opposition is notorious. Perhaps legendary.

(AA pp. 76:16-22).

F. CONTESTED ISSUES AT TRIAL

The City's affirmative defenses to O'Sullivan's lawsuit, which are germane to this appeal, consist of the following: 1) O'Sullivan failed to comply with the claim presentation requirements set forth under California law; 2) O'Sullivan failed to state a claim upon which relief could be granted; 3) O'Sullivan's complaint is moot; 4) O'Sullivan's complaint and the remedy sought are preempted by the MMPA; 5) O'Sullivan's remedy would cause the City to perform an illegal or impossible act; 6) the City's conduct was wholly consistent with the 1931 tidelands trust; and 7) the requested relief violates public policy and the separation of powers doctrine. (AA. pp. 10-15).

The City also filed a number of contested and unsuccessful pretrial motions in limine, including a motion to exclude evidence related to the Scripps gift for the construction of the breakwater and another motion to exclude evidence of seal activist activities. (AA. pp. 168-171.) The City argued in these motions that the plain language of the 1931 tidelands trust controlled and the evidence of the Scripps gift and seal activist activities were irrelevant or that such evidence would only serve to confuse the issues or be unduly time consuming.

At the bench trial, the parties submitted evidence, mostly by way of documents, establishing the facts previously recounted in this brief. The following contested evidentiary issues, which are the subject of this appeal, require additional discussion: 1) O'Sullivan's ancient documents evidence regarding Scripps' intent in donating the breakwater; 2) O'Sullivan's evidence of health hazards from pollution at Children's Pool Beach; and 3) the parties' proffered evidence regarding the federal government's position on harassment of the seals at Children's Pool Beach.

1. PLAINTIFF'S ANCIENT DOCUMENTS EVIDENCE

O'Sullivan's lawyer went the to the San Diego Public Library and obtained a packet of documents, including correspondence, reportedly prepared by Hiram Newton Savage, an engineer. These documents are entitled, "ELLEN BROWNING SCRIPPS, BATHING POOL FOR CHILDREN, at La Jolla, California: FEATURE HISTORY, March 1931." (RT 454; Ex. 32, AA pp. 594-798.) O'Sullivan's attorney advised the court, "But I don't think we need testimony that somebody actually relied on it as one would rely on an expert opinion in order to authenticate it." (RT 454:18-21.) The Plaintiff offered these documents into evidence, which were referred to by the parties as the "Savage Report," on the basis they fell within the ancient document exception to the hearsay rule. (RT 453:1-15.)

The City objected to their receipt on the ground that the Plaintiff offered no evidence that anyone having an interest in the matter had relied on the statements in the documents as true. (RT 453:16-23). The trial court overruled the City's objection and received this evidence. (RT 455:9-17; Ex. 32, AA pp. 594-798.)

2. PLAINTIFF'S HEALTH HAZARD EVIDENCE

O'Sullivan neither designated nor called any experts at the trial. The parties stipulated that Children's Pool Beach was closed in September 1997 after water testing showed fecal contamination. (AA p. 52. ¶16.) The parties also stipulated that DNA testing indicated that the contamination was primarily from seal feces. (AA pp. 52-53 ¶17.)

A related issue in dispute, however, was whether the City's preliminary dredging plan, which the Council authorized after O'Sullivan filed her lawsuit, rendered O'Sullivan's lawsuit moot. To support her contention that she was nevertheless entitled to immediate relief by the trial court, O'Sullivan presented the following evidence of health hazards to humans posed by seals or seal feces:

● Testimony by a DEH employee, Clay Clifton, about federal Environmental

Protection Agency ("EPA") epidemiological studies showing a significant correlation with bacterial indicators in water, particularly enterococci, and increased health risks to swimmers. (RT 352:26-4.)

● Exhibit 161: The final report on potential sources of E.coli to Children's Pool Beach prepared by the Biology Department of Virginia Polytechnic Institute and State University. (RT 357:25-359:18; AA pp. 831-868.)

● Opinion testimony by a DEH employee, Clay Clifton, that based on the above report of Virginia Polytechnic Institute, water quality would most likely improve if seals were no longer at Casa Beach. (RT 405:9-14.)

● Exhibit 163: A faxed note of August 11, 1998 from a DEH employee to an employee of the City's Coastal Parks Division regarding a statement by a Center for Disease Control ("CDC") official that tuberculosis and Giardia can be contracted from seal feces. (RT 366:14-367:17; AA. p. 869.)

● Exhibit 165: A two-page summary from a City Coastal Parks Division employee of abstracts, which were provided by the CDC, of professional journal articles regarding diseases that can be contracted from seals and seal feces. (RT 368:7-370:26; AA. pp. 870-871.)

● Exhibit 188: A graph from an unknown author depicting fecal coliform organisms in the water at Children's Pool Beach from 1997-1998. (RT 371:1-374:15; AA. p. 875.)

● Exhibits 190/191: Public information posted on the DEH's website regarding diseases caused by bacteria, viruses, and protozoa. (RT 396:2-22; AA. pp. 876-883.)

The City objected based on improper expert opinion, lack of foundation, and/or hearsay grounds to all of the above testimony and exhibits which the trial court overruled. (RT 352:21-25; 358:9-13; 405:15-18; 367:6-16; 368:17-370:26; 373:28-374:15; 396:16-22.)

3. EVIDENCE REGARDING THE FEDERAL GOVERNMENT'S INVOLVEMENT AT CHILDREN'S POOL

The City refers most cases of marine mammal harassment to the NMFS for prosecution. (Ex. 259, AA p. 995.) In February 2000 James Lesky, an Assistant Regional Administrator with NMFS, NOAA, sent a letter to the La Jolla Friends of Seals. In this letter, Lesky stated that the seals were now using Children's Pool Beach as a natural haul-out and rookery, so the NMFS would have to manage the site as a natural habitat for harbor seals. (Ex. 655, AA pp. 1125-1126.)

The City then worked out a protocol with the NMFS to implement this federal management policy. The protocol implements the NMFS's directive that a dead seal remain undisturbed until the tide claims the body and washes it into the ocean. (Ex. 169, AA pp. 872-873.) When no other seals are present, the protocol authorizes the lifeguards to cover the dead seal with a thin layer of sand and ultimately remove the dead seal if need be. *Id.* The City and the NMFS also reached agreement that the rope barrier facilitated enforcement of the MMPA as a visual reminder to the public to maintain a distance from the seals in order to avoid interfering with their natural activities. (Ex. 94 p. 2, AA pp. 802.)

In February 2003 Lesky wrote the City to advise that the City could not initiate any actions at Children's Pool Beach which would result in a permanent impact to the harbor seals. Lesky also cautioned that the City could not take advantage of a provision in the MMPA allowing local governments to harass seals that are a nuisance because the NMFS determined this provision does not apply to seals on haul-outs and rookeries. He left open the possibility the City could obtain a federal permit to temporarily displace the seals in order to improve water quality by dredging the beach or by some other means. (Ex. 668, AA pp. 1128-1129.)

However, Lesky appeared before the City Council at its September 14, 2004 meeting when the Council was considering the City Manager's dredging proposal for Children's Pool Beach and he pronounced a different NMFS position. Leksy informed the Council that the MMPA authorized the City to move the seals that were causing a public nuisance from Children's Pool Beach through use of harassment

without obtaining a federal permit. Lesky defined "harassment" under the MMPA to be a substantial change in behavior of a marine mammal as a result of a human-caused stimulus.

At the trial O'Sullivan offered into evidence Lesky's four-page typed statement containing this so-called "testimony" before the Council. This statement is neither notarized nor certified by a court reporter to be accurate. The City objected on the basis of hearsay, lack of foundation, and impermissible expert opinion. (RT 529:28-530:1.) The trial court initially ruled it would receive this evidence for the "limited basis of notice to the City" and not for the truth of the statements. (RT 530:18-21; Ex. 129, AA pp. 826-829.)

The City unsuccessfully requested that the trial court take judicial notice of Exhibit 707 consisting of a certified copy of a post hearing brief and proposed findings submitted by the NOAA in the following administrative enforcement action of the MMPA at Children's Pool Beach: *In the Matter of: Lilo Maria Creighton*, Docket No. SW030133, NOAA Case No. SW030133A. (Ex. 707; AA pp. 165:1-4 and AA pp. 1237-1286.) That case was brought against one of the "La Jolla Nine" who allegedly caused 35 seals to flush into the water. In that pleading, the NOAA asserted that the tidelands and beach at Children's Pool Beach are waters and land under the jurisdiction of the United States for purposes of applying the MMPA's prohibitions on taking or harassing marine mammals. (AA pp.1243-1256.) The City also offered this document into evidence at the trial, but the trial court sustained O'Sullivan's objection based on relevancy and lack of foundation grounds. (RT 638:18-20.)

G. THE TRIAL COURT'S JUDGMENT

In the trial court's final statement of decision, the trial court found that the Savage Report provided the most accurate history of the Children's Pool project. (AA p. 217:12-18.) Based upon the history recited in that report, the trial court concluded that the Legislature conveyed to the City an artificial ocean water pool that was intended to be suitable for use of children. (AA pp. 234:9-235:28.) The trial court

found that the Legislature intended that the trust be used exclusively for a public park and children's pool and may not be used as a habitat, animal sanctuary, zoo or seal watching facility. (AA p. 235:26-28).

In finding a breach of trust and the existence of a nuisance, the trial court relied on the Plaintiff's health hazard evidence, including the statements attributed to the CDC (Ex. 163) that seals can transmit diseases to humans and some seals can carry tuberculosis and Giardia . (AA p. 238:6-9). From the plaintiff's health hazard evidence, the trial court found that the evidence was uncontradicted that the beach itself is a repository for seal feces posing a health hazard to persons and "particularly children" and the contamination remains "unabated." *Id.*

The trial court rejected the City's argument that the requested relief was prohibited by the separation of powers doctrine and the MMPA. (AA p. 240:7-11). The trial court noted that the NMFS had advised the City that it could take action to remediate the safety and health situation without violating the MMPA. (AA pp. 240:27-241:6). Furthermore, the trial court criticized the City for not harassing the seals away from the beach as early as 1997 based on the trial court's conclusion that such actions by local governments are authorized by the MMPA. (AA p. 240:18-27.)

At post-trial hearings, O'Sullivan's counsel asserted, and the City conceded, that the effect of the trial court's order was to require removal of the seals from the beach. (RT: 645:5-10; 686:28-687:7; 687:20-22.) The City pointed out that there was still the issue of federal preemption under the MMPA involving removal of the seals; moreover, dredging would require permits from the NMFS and the CCC. (RT 650:27-28; 687:26-688:2.) In response, the trial court opined, "I don't think the federal government is going to jump in and say you have to keep it a dangerous condition on your property." (RT 688:15-17.)

H. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND COSTS

At the trial, witnesses called by O'Sullivan to testify about their inability to access the beach due to the City's policies included, among others, a retired

physician, Dr. John Steel, Anne Cleveland, a swimming instructor, and Donald Perry, all of whom are also La Jolla residents. (RT 115:2-212:7). Steel received a letter in April 2004 from the NMFS's enforcement division notifying him that it had received a complaint of seal harassment at Children's Pool Beach. This letter included a copy of the NMFS's marine mammal viewing guidelines. (RT 167:1-24; Ex. 303, AA 1007-1010.) Steele had previously voiced his opposition to the Council about making Children's Pool part of the Seal Rock Mammal Reserve. (RT 202:17-26.) Perry also received a letter from the NMFS, but was not cited. (RT 320: 18-321:1; 329:14-15.) Cleveland is the oldest person, and one of only two American women, to have swum the English Channel both ways. She was a participant in the "La Jolla Nine" "swim-in" and cited by NMFS. (RT 338:15-21.)

After prevailing at trial, O'Sullivan claimed she was entitled to attorney's fees under Cal. Code Civ. Proc. §1021.5 for vindicating the public interest. (AA pp. 250-370.) Initially the trial court was going to wait for a ruling on the City's appeal before ruling on the motion for fees and costs, but was persuaded by O'Sullivan's counsel to rule on the matter. (RT 695:25-28). The trial court concurred with Plaintiff's counsel that there was no need to defer the question of fees because, "If they overturn this decision they will overturn attorney's fees. There's no harm there." (RT 698:16-17).

The City opposed the fees motion on the basis that the evidence proved that the Plaintiff was motivated by self-interest rather than broadly representing all of the public interest. (AA pp. 371-420.) The City also objected that in the Plaintiff's billing records—consisting of 24 pages in which she demanded 1 million in fees—were too vague. (AA pp. 385; 457-503). The trial court overruled these objections. (AA 535-536.) The trial court found that the lodestar for O'Sullivan's fees was $390,755 and applied a multiplier of 1.2 and awarded fees to O'Sullivan in the amount of $468,906 and costs of $10,941.13. (AA pp. 532-539.) This timely appeal follows.

STATEMENT OF APPEALABILITY

On October 21, 2005 the City filed a notice of appeal of the trial court's

judgment entered on October 4, 2005. (AA pp. 421-456). On January 4, 2006 the City also filed a notice of appeal of the trial court's order awarding attorney's fees and taxing costs which were included in this final judgment by way of interlineation. (AA pp. 532-587). The final judgment is appealable to this Court per Cal. Civ. Proc. Code §904.1(a)(1). The trial court's judgment is automatically stayed while this matter is on appeal.

ARGUMENT

A. THE PLAINTIFF FAILED TO STATE A CLAIM FOR RELIEF BECAUSE SHE DID NOT FILE A PRE-SUIT CLAIM WITH THE CITY

O'Sullivan in her private attorney general complaint alleged that the City's joint use policy at Casa Beach led to the occupation by seals which in turn "damaged public and private property" and also led to pollution constituting a "hazard to personal safety" and endangered the public's health and welfare. Amended Complaint at ¶s 6, 7, and 8. O'Sullivan's complaint not only sought to end the "nuisance" caused by the seals and pollution, but also sought a declaration that the City was "responsible, by way of surcharge or otherwise, for all damages which flow from its breaches." Amended Complaint at ¶14b. O'Sullivan accused the City of knowingly violating both trust obligations and fiduciary duties and sought relief for the damages caused. Amended Complaint at ¶24.

Thus, this is not a case where O'Sullivan sought only injunctive or declarative relief where money is an incident to that relief; rather, this is a case in which O'Sullivan sought the substantial expenditure of public funds to pursue her seal removal agenda and a declaration of entitlement to damages for tortious conduct. O'Sullivan was therefore obligated to comply with Cal. Gov't. Code §905 and §911.2 which require pre-suit notice to the City of a claim "*relating* to a cause of action for …injury to person or to personal property" within six months of accrual of the claim. (Emphasis added.)

The primary function of these statutory notice requirements is to apprise a

governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate avoid litigation by settling meritorious claims; accordingly, exceptions to the notice requirements are given a strict construction. *See J.C. Dalton v. East Bay Mun. Utility Dist.*, 18 Cal. App. 4th 1566 (1993) (*Held*: In class action suit against a municipal utility district, plaintiffs' claim for breach of fiduciary duties regarding retirement benefits was in essence a claim of tortious wrongdoing requiring compliance with the pre-suit notice requirements of Tort Claims Act.) O'Sullivan's admission that she never filed a claim with the City requires reversal of the trial court's judgment because O'Sullivan failed to state a claim upon which relief can be granted.

B. THE PLAINTIFF'S SUIT IS BARRED UNDER THE SEPARATION OF POWERS DOCTRINE

The City renews on appeal its contention that O'Sullivan's entire lawsuit is barred by the separation of powers doctrine. In support of this argument, City again primarily relies upon the holding in *Friends of H Street v. City of Sacramento*, 20 Cal. App. 4th 152 (1993). In that case an unincorporated association of Sacramento residents sued the City of Sacramento seeking injunctive relief to force the City to reduce traffic speed and volume on a street near their real property. The citizens had complained for years about the traffic and the City commissioned a study which recommended that the City take no action. The City Council of Sacramento adopted that recommendation. The trial court found that the relief sought involved legislative functions not subject to judicial review.

The appellate court in *Friends of H Street* affirmed the trial court's decision based on the separation of powers defense. That defense, the appellate court explained, is based upon the fact that a legislative body's primary function is to declare public policy. The assessment of what is in the public interest requires legislative action "after the full investigation and debate which legislative organization and methods permit." *Id.* at 165 quoting *People v. Pacific Health Corp.*, 12 Cal. 2d

156, 161 (1938).

Under the separation of powers doctrine, a court may rule on the constitutionality of legislative actions, but lacks the power to interfere with legislative action at either the state or local level. *Id.* citing *Board of County Supervisors v. Coastal Highway Commission*, 57 Cal. App. 3d 952, 961 (1976). In applying this doctrine, the appellate court in *Friends of H Street* held that the remedies sought by the plaintiffs directly interfered with the City's legislative function and thus were barred by the separation of powers doctrine.

In the case at hand, the trial court expended much judicial labor in its final statement of decision recounting the extensive legislative history and policy discussions that led to the City's current policy of joint use of Casa Beach by the public and the seals. It is therefore surprising that the trial court devoted very little discussion in its order to the related separation of powers doctrine. The trial court appears to have been persuaded by the Plaintiff that immediate court intervention was necessary because the City Commission was slow in embracing and has not formally adopted the dredging proposal advocated by O'Sullivan and other anti-seal citizen activists. This was clearly reversible error:

> Thus, as aptly stated in *Myers v. English* (1858) 9 Cal. 341 (disapproved on other grounds in *Mandel v. Myers* (1981) 29 Cal.3d 531, 551, fn. 9 [174 Cal.Rptr. 841, 629 P.2d 935]), "It is within the legitimate power of the judiciary, to declare the *action* of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of *non-action*. The Legislature being the creative element in the system, its action cannot be quickened by the other departments." (*Myers* v. *English, supra*, 9 Cal. at p. 349, italics in original; *Hutchinson* v. *City of Sacramento, supra*, 17 Cal.App.4th at p. 796.)

(Emphasis supplied). *Id.*

Neither O'Sullivan's camp nor many of the seal proponents are satisfied with the City's joint use policy. O'Sullivan brought her suit against the City out of frustration with the legislative and political process in not removing the seals from

Casa Beach. If the trial court's order is allowed to stand, it will mean that one faction in this raging political battle will have succeeded in displacing an elected political body with a single judge to make the final policy decision on an issue of major public concern. The trial court's order requiring dredging, and other remedial measures, of Casa Beach does great violence to the separation of powers doctrine.

C. THE CITY COMPLIED WITH THE EXPLICIT TERMS OF THE 1931 TIDELANDS TRUST

The trial court found that the legislative intent in enacting the 1931 tidelands trust was that Casa Beach could only be used for a public park and children's pool. The legislative grant establishing the trust provided:

> Section 1. There is hereby granted to the city of San Diego, county of San Diego, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all that portion of the tide and submerged lands bordering upon and situated below the ordinary high water mark of the Pacific ocean . . . to be forever held by said city of San Diego and its successors in trust for the uses and purposes and upon the express conditions following, to wit:
>
> a) That said lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes;
>
> (b) The absolute right to fish in the waters of the Pacific Ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California.

Stats. 1931 Chap. 937. Rather than first look to the terms of the statutory trust, the trial court made findings of legislative intent from the factual history in the Savage Report prepared by an engineer in 1931. This was error.

The statutory language is generally the most reliable indicator of legislative intent. *People v. Johnson*, 28 Cal. 4th 240, 244 (2002). A court should first look to the statutory words themselves, giving them their usual and ordinary meaning and construing them in context. *Id.*citing *People v. Lawrence*, 24 Cal. 4th 219, 230-231

(2000). If the plain language of the statute is clear and unambiguous, the court's inquiry ends, and there is no need to embark on judicial construction. *Id.* citing *White v. Ultramar, Inc.* 21 Cal. 4th 563, 572 (1999) and *People v. Walker*, 85 Cal. App. 4th 969, 973 (2000). Finally, if the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. *Id.* citing *People v. Lawrence*, *supra* at pp. 230-231 and *People v. Dyer*, 95 Cal. App. 4th 448, 453 (2002).

The plain language of the 1931 tidelands trust requires that the area in question be exclusively devoted to the following: 1) a public park; 2) a bathing pool for children; 3) a parkway; 4) a highway; 5) a playground; and 6) recreational purposes. Since there is no ambiguity, the plain language of the statute governs and it is was unnecessary for the trial court to go behind the words of the statute to make a contrary finding of legislative intent based on historical facts. Furthermore, any interpretation of the statute that would limit the purposes of this area to a public park and bathing pool for children would render the remaining specified trust purposes surplusage. "Interpretations that lead to absurd results or render words surplusage are to be avoided." *In re Marriage of Hobdy*, 123 Cal. App. 4th 360, 364 (2004).

The City has chosen to manage the trust so that there is joint use by seals and humans at Casa Beach. The Plaintiff failed to meet her burden of proving that the City abused its discretion in the management of the trust with substantial, competent evidence. *See Higgins v. Santa Monica*, 62 Cal. 2d 24, 29 (1964) and *Nickerson v. County of San Bernardino*, 179 Cal. 518, 522-524 (1918). During the last three years, adults and children have recreated at Children's Pool Beach by swimming. On a weekly basis, literally thousands of citizens have also recreated by coming to view the seals while the seals use the beach as a haul-out and rookery. This joint use policy is clearly within the discretion conferred upon the City because the beach is simultaneously being used for a public park, bathing pool for children, and recreational purposes. An "incidental" use to the seal viewing recreational activities is

the valuable education children receive about marine mammals. It should therefore come as no surprise that so many children have voiced opposition to removal of the seals from Children's Pool Beach. (Ex. 698, AA. pp. 1154-1157;1162; 1166-1168; 1182; 1184; 1193-1194; 1196; and 1198.)

The express provisions of the granting statute fix the uses which a trustee may make of the granted tidelands. *Long Beach v. Morse*, 31 Cal. 2d 254, 262 (1947). A trustee may prefer one trust use over another. *Carstens v. California Coastal Commission*, 182 Cal. App. 3d 277, 289 (1986). When it comes to tidelands, it is recognized that the uses may be flexible to accommodate changing public needs. *Marks v. Whitney*, 6 Cal. 3d 251, 259-260 (1971). The City's joint use policy complies with these legal principles. This is further borne out by the fact that the agency that has expertise and the vested statutory obligation to oversee statutory trust grants, the SLC, has concluded that the City's joint use policy does not violate the 1931 tidelands trust. *See* Cal. Public Res. Code §6301. (Ex. 478, AA. p. 1030.) This opinion should be given great judicial deference, which is an additional reason the trial court should be reversed. *Citicorp North American, Inc .v. Franchise Tax Bd.*, 83 Cal. App. 4th 1403, 1418 (2000) and *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998).

D. THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS REQUIRE REVERSAL OF THE JUDGMENT FOR THE PLAINTIFF

An alternative reason that the trial court's judgment should be reversed is because of the number of evidentiary errors that infected the final judgment. The trial court's statement of decision is based on three pillars of evidence: 1) the Savage Report admitted as an ancient document; 2) the pollution health hazard evidence; and 3) the NMFS MMPA enforcement policy evidence. Recall that the City's evidence of the NMFS's jurisdictional claim over Children's Pool Beach was excluded. The trial court's evidentiary rulings are discussed separately here.

1. THE SAVAGE REPORT

Recall that the trial court made findings of historical fact from the Savage Report which in turn were the basis of its findings of legislative intent regarding the 1931 tidelands trust. It was prejudicial error for the trial court to admit such evidence under the ancient document exception to the hearsay rule which is codified at Cal. Evid. Code §§643 and 1331. Cal. Evid. Code §643, which governs the authenticity of an ancient document, provides:

> A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:
> (a) Is at least 30 years old;
> (b) Is in such condition as to create no suspicion concerning its authenticity;
> (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
> (d) Has been generally acted upon as authentic by persons having an interest in the matter.

Similarly, Cal. Evid. Code §1331, which governs the admissibility of recitals in an ancient document, provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

In the Law Revision Commission Comment to these sections, it is noted, citing 7 Wigmore, Evidence §§2141, 2146 (3 ed. 1940), that the requirement that the document be acted on as genuine is, in substance, a requirement that possession of the property is by those persons who would be entitled to such possession under the document if genuine. O'Sullivan never acted upon the Savage Report as authentic. Furthermore, the Supreme Court of California in *Gwin v. Calegaris*, 139 Cal. 384, 389 (1903) stated that under the ancient document rule only the document is presumed to be genuine: "The rule…does not import any verity to the recitals contained in these documents." *But see Kirkpatrick v. Tapo Oil Co.*, 144 Cal. App. 2d 404 (1956) finding this to be dictum in *Gwin* and holding to the contrary and *Devereaux v. Frazier Mountain Park and Fisheries Company*, 248 Cal. App. 2d 323, 331 (1967) also citing

contrary California case law. For all of these reasons, the trial court should have sustained the City's objection to the Savage Report.

2. THE POLLUTION HEALTH HAZARD EVIDENCE

It was undisputed that the DEH in 1997 posted that the waters at Children's Pool Beach were closed to human contact because water testing revealed fecal contamination. The City also did not contest the evidence that the DEH put Children's Pool Beach on a continuous advisory status because the water did not meet recommended water quality standards. The City did, however, oppose court intervention on the grounds that the controversy had become moot. The City was moving forward with plans to take remedial action to improve the water quality. O'Sullivan was able to overcome this argument by persuading the trial court that there is a health hazard to humans posed by the pollution at Casa Beach, including children, requiring immediate judicial intervention.

The trial court's reliance on the Plaintiff's evidence of health hazards was error because it was improperly admitted. The hearsay rule, codified at Cal. Evid. Code §1200, excludes extrajudicial utterances when offered as assertions to prove the truth of the matter asserted. *People v. Putty*, 251 Cal. App. 2d 991, 996 (1967). If a fact sought to be proved is one within the general knowledge of laymen, expert testimony is not required; otherwise, the fact can be proved only by the opinions of experts. *Truman v. Vargas*, 275 Cal. App. 2d 976, 982 (1969). *See* Cal. Evid. Code §§800 and 801.

Based on these rules of evidence, the trial court should have disallowed the following evidence:

- The testimony by Clay Clifton, a DEH employee, about EPA studies showing a correlation between bacterial indicators in the water and increased health risks to swimmers. What these CDC studies reported was an out of court statement offered by O'Sullivan to prove the truth of the CDC's findings and therefore is clearly hearsay. The content of the CDC studies is outside the general knowledge of laymen rendering

it impermissible expert opinion testimony.

- The final report of Virginia Polytechnic Institute (Ex. 161) regarding E.coli at Chidren's Pool Beach was also hearsay and improper expert opinion testimony. This was a scientific study by experts who the Plaintiff did not call to testify. There was a total lack of foundation.

- Clifton's opinion, based on his review of the Virginia Polytechnic Institute report, that the water quality would improve by removal of the seals was error. It was improper lay opinion testimony because it was not based on the rational perception of the witness, but on hearsay—an expert report prepared by others.

- The faxed note from a DEH employee to a City employee reporting that a CDC official stated that tuberculosis and Giardia can be contracted from seal feces was not only hearsay, but hearsay within hearsay. Such facts could only be proved by the opinion of an expert.

- The two-page summary prepared by a City employee of abstracts of professional journals regarding diseases that can be contracted from seals was hearsay within hearsay and improper presentation of expert testimony through the backdoor. No foundation was laid for such expert opinion testimony that originated in these abstracts of professional journals.

- The graph depicting fecal coliform organisms in the water at Children's Pool Beach from 1997 to 1998 from an unknown person was hearsay and improper expert opinion testimony with no foundation laid for its admission.

- The DEH website information regarding diseases was hearsay and improper expert opinion testimony. The nature of the information in the website pages is all scientific and no foundation was laid for its admission.

3. THE MMPA ENFORCEMENT EVIDENCE

The trial court should have sustained the City's objection to the so-called former "testimony" of James Lesky before City Council on September 14, 2004. Once again O'Sullivan succeeded in presenting impermissible expert opinion

testimony—in this case about the requirements of the MMPA—through the backdoor. Not only was there no foundation for this testimony, but it was clearly hearsay: the statement was given out of court and offered for the truth of the matter stated.

Lesky's statement does not qualify for admission into evidence under the former testimony exception to the hearsay rule because there is no proof it was under oath and it did not take place in another action or was given in a former proceeding or trial of the same action. See Cal. Evid. Code §1290. The City Council considered Lesky's statement for legislative purposes, not for adjudicative purposes. Fatal to O'Sullivan on this issue is there was no proof offered to the trial court that Lesky was unavailable to testify and unavailability is a prerequisite to the use of such testimony. *See* Cal. Evid. Code §§1291 and 1292.

The prejudice to the City was compounded by the fact that the trial court sustained O'Sullivan's objections based on relevancy and lack of foundation grounds to the NOAA's post-hearing brief (Ex. 707) filed in May 2004 in an enforcement action. Because the City asserted as an affirmative defense that the MMPA preempted O'Sullivan's action, it was certainly relevant that while her lawsuit against the City was pending, the federal government was asserting MMPA enforcement jurisdiction over Children's Pool Beach. The City properly sought judicial notice of this document because it constituted an official act of an executive department of the United States. *See* Cal. Evid. Code §452(c). Had the evidence been received, it is unclear how O'Sullivan could have overcome the City's preemption defense in light of Lesky's letter of February 11, 2003 which concluded: "Therefore, the City of San Diego may not initiate any actions that would result in a permanent impact to the harbor seals at CPB." (Ex. 668, AA p. 1128).

E. THE PLAINTIFF'S FAILURE TO NAME AN INDISPENSABLE PARTY, THE UNITED STATES DEPARTMENT OF COMMERCE, AS A DEFENDANT ALSO REQUIRES REVERSAL OF THE JUDGMENT

The MMPA, 16 U.S.C. §1371 *et seq*., places a moratorium on the taking of marine mammals, including harbor seals. It is unlawful for any person to take any marine mammal in waters or on lands under the jurisdiction of the United States or for any person subject to the jurisdiction of the United States to take any marine mammal during the moratorium. *See* 50 C.F.R. §216.11(b) and (c) at Attachment A.

The City contended below that the trial court could not force it to act to remove the seals at Children's Pool Beach because such an action would potentially violate the MMPA and a trust duty cannot compel acts which are impossible or illegal. (AA pp. 157-158). *See Crocker-Citizens Natl Bank v. Younger,* 4 Cal. 3d 202, 211 (1971). The trial court, based on the "testimony" of James Lesky of the NMFS before the City Council, rejected this affirmative defense. The trial court reasoned that the MMPA itself provided a lawful avenue for the City to harass the seals, so the seals could have been removed as early as 1997.

Assuming for the sake of argument that the trial court was correct on this point, the judgment must still be reversed because it is now clear that the NMFS/NOAA/ U.S. Department of Commerce should have been named by O'Sullivan as a party defendant. The City admittedly did not raise this issue before the trial court; nevertheless, an objection to non-joinder of an indispensable party may be raised at any time. *Kraus v. Willow Park Public Golf Course*, 73 Cal. App. 3d 354 (1977). Joinder is governed by Cal. Civ. Code Proc. §389(a) which requires that a party be joined: 1) if in his absence complete relief cannot be accorded, or 2) if he claims an interest relating to the subject and his absence will impair or impede his ability to protect his interest.

The City is now persuaded to make this nonjoinder objection based on a persuasive federal case, *Fla. Marine Contrs. v. Williams*, 378 F. Supp. 2d 1353 (M.D. Fla. 2005) which was rendered approximately two weeks before the trial in this case. In *Fla. Marine Contrs.*, a federal district court held that the federal government has exclusive jurisdiction over the management and conservation of mammals including

over a state's internal waters inhabited by mammals. This decision serves to confirm that the NOAA's position, as set forth in excluded Ex. 707, that it has jurisdiction over Children's Pool Beach is correct. In light of the compelling federal interests impacted by all of O'Sullivan's causes of action seeking removal of the seals, O'Sullivan's failure to name the federal government as a defendant requires reversal.

F. THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES AND COSTS TO THE PLAINTIFF UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1021.5

O'Sullivan, through her counsel, conceded that if the trial court's judgment is reversed on appeal, the award of attorney's fees and costs should be reversed. (RT 691:5-6.) Based on the arguments in this brief, the underlying judgment should be reversed and therefore the award of attorney's fees and costs must also be reversed.

Even if the underlying judgment is not reversed, the award of attorney's fees under Cal. Civ. Proc. Code §1021.5 should still be reversed. Cal. Civ. Proc. Code §1021.5 sets forth three criteria in deciding whether fees should be awarded: 1) the plaintiff's action resulted in the enforcement of an important right affecting the public interest; 2) a significant benefit was conferred on the general public or a large class of persons; and 3) the necessity and financial burden of private enforcement was such to make enforcement appropriate. *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311 (1983).

An appellate court's review of an award of attorney's fees and costs based on Cal. Civ. Proc. Code §1021.5 is *de novo*. Whether the litigation conferred a significant benefit, like the question of whether it vindicated an important right, is a question of law. *Los Angeles Police Protective League v. City of Los Angeles*, 188 Cal. App. 3d 1 (1986). O'Sullivan's litigation did not confer a significant benefit on the general public or a large class of persons. During the pendency of her lawsuit, the public was permitted to swim at Children's Pool Beach. The effect of the court-ordered dredging, assuming the federal government grants a permit to harass the seals to implement it, will result in a significant loss of a public benefit: the recreational opportunity of over a million people, including children, to view seals each year. The

scope of the court-ordered dredging eliminates most of the beach area necessary for the seals to use it as a haul-out and rookery. From the City's viewpoint, the result of the trial court's decision is detrimental to the overall interest of the public.

Having initially lost in the political process, O'Sullivan, after her MMPA citation was dismissed, pressed forward with a lawsuit to pursue *her* view of what is in the best interest of the public: elimination of the seals at Children's Pool Beach. It was unnecessary for O'Sullivan to maintain her lawsuit once the City Council in September 2004 set a plan in motion with the goal of improving water quality that meets federal and state standards. There is no reason that O'Sullivan could not have dismissed without prejudice her lawsuit while the City conducts its review and initiates permitting necessary for dredging.

Fatal to O'Sullivan's fees award is the fact that she did not name an indispensable party, the State of California, in her lawsuit until compelled to do so by the trial court's ruling. In *Schwartz v. City of Rosemead*, 155 Cal. App. 3d 547, 560 (1984) a trial court denied attorney's fees under Cal. Civ. Proc. Code §1021.5 in an environmental action because the plaintiff failed to serve the Attorney General within 10 days as required by then Cal. Civ. Proc. Code §389.6. The plaintiff in *Schwartz* instead served the Attorney General 34 days after the action was filed which led the trial court to conclude that the plaintiff did not make a showing of the necessity and final burden of private enforcement of the action. In affirming, the appellate court noted that early service permits the Attorney General to make an informed decision on whether to intervene.

Cal. Civ. Proc. Code §389.6 has been recodified at Cal. Civ. Proc. Code §388. This law still requires that whenever a party seeks relief other that solely for money damages and alleges facts or issues concerning alleged pollution or adverse environmental effects that could affect the public generally, the party must serve the Attorney General with a copy of the complaint within 10 days of filing. More importantly, O'Sullivan should have named the State as a party defendant and served

it because the SLC was an indispensable party charged by law with the sole responsibility to oversee trust grants. *See* Cal. Public Res. Code §6301. Her failure to do so early in the litigation also requires reversal of the fees and costs award under the logic of the *Schwartz* opinion. And finally, the trial court erred in overruling the City's objection that the fee records were too vague to support the award requested. A cursory review of those records clearly proves that the trial court abused its discretion in awarding fees based on those records.

O'Sullivan's victory in the trial court did not benefit the public, but rather benefited one side in a political controversy over the management of public resources held in trust for the benefit of *all* of the public. Rewarding those who lose in the legislative process with a hefty award of attorney's fees—in this case almost a half a million dollars—for successfully pursing a personal political agenda at the courthouse, rather than at the ballot box, perverts the very purpose of Cal. Code Civil Proc. §1021.5.

CONCLUSION

For the reasons stated, the trial court's judgment and award of attorney's fees and costs should be reversed with directions to the trial court to dismiss the action with prejudice. Alternatively, the case should be remanded for a retrial after O'Sullivan amends her complaint to include the U.S. Department of Commerce as a defendant.

Dated: August 11, 2006

MICHAEL J. AGUIRRE, City Attorney
By

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Attorney for Defendant, Appellant
& Cross-Appellant CITY OF SAN DIEGO

CERTIFICATE OF COMPLIANCE
[CRC 14(c)(1)]

Pursuant to California Rules of Court, Rule 14(c)(1), I certify that this Appellant Opening Brief contains 11,274 words and is printed in a 13-point typeface.

Dated: August 11, 2006

MICHAEL J. AGUIRRE, City Attorney
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