

# District Court trumps state on seals

by Alyssa Ramos  
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*A rope to keep humans from getting too close to harbor seals at the Children's Pool has been erected for pupping season, which ends next May.*

United States District Court Judge William Q. Hayes signed an order last Thursday that overrides a state court decision banning a guideline rope meant to protect a seal colony at La Jolla's Children's Pool during their annual pupping season.

In a Dec. 18 electronic ruling, Hayes sided with Bryan Pease, attorney for the Animal Rescue and Protection League's (APRL) SealWatch. Pease has battled for the seals' rope barrier in federal and state courts over the past year.

“The injury plaintiffs seek to avoid through an order requiring the ... city of San Diego to comply with its own resolutions is serious and irreparable, including physical harm to the public and the marine mammals,” Hayes wrote. “The court will grant plaintiffs' application for a temporary restraining order requiring the ... city of San Diego to follow two resolutions of its city council by placing a guideline pupping season rope at the Children's Pool beach in order to maintain the status quo until the issues presented in this case can be fully addressed.”

La Jolla's harbor seal colony has been the center of an ongoing controversy, mainly between some locals who want to use the area for swimming and diving and animal groups who say they want to preserve the natural rookery, which is home to about 200 harbor seals. The seals' birthing season begins around Dec. 15 and runs through May 30, according to government officials. Seal advocates claim pregnant mothers and nursing pups need protection from the public by a guideline rope provided throughout pupping season, representatives said.

In 2004, swimmer Valerie O'Sullivan sued the city of San Diego after a group including O'Sullivan swam from La Jolla Cove to the calmer waters of the Children's Pool, created in 1931 when Ellen Browning Scripps paid for a cement breakwater. The pierlike cement structure extends into the Pacific, calming the area for swimming, according to Scripps' trust.

Over the years, the harbor seal colony residing at the Children's Pool has grown in size and is among a handful of natural seal rookeries. When O'Sullivan and the swimming party landed at the Children's Pool, they allegedly frightened the seals, a violation of the federal Marine Mammal Protection Act (MMPA), court documents said.

Officials cited the swimmers for violating the Marine Mammal Protection Act, according to published sources. So O'Sullivan sued the city, claiming the city breached its fiduciary duties. O'Sullivan said the Children's Pool was not meant for a seal sanctuary, and she claimed that allowing the seals to establish a colony was a breach of the 1931 Scripps Trust, according to court documents.

O'Sullivan won her state court case. Judge William Pate ordered the city to dredge the Children's Pool and restore it to its 1941 condition.

Pease, who filed several federal lawsuits last year over seemingly similar issues, said this is a big win for La Jolla's harbor seals.

#### FEDERAL COURT TIMELINE

- On Dec. 11, 2007, Pease filed a federal lawsuit on behalf of APRL – in U.S. district court – against the city and state, asking for the rope's issuance. Pease lost. But he said he focused on the MMPA, not the rope.
- On Dec. 18, 2007, Pease and APRL moved for a temporary restraining order regarding the barrier rope, but the district court denied the request in a Feb. 4, 2008 ruling.
- But on Feb. 27, 2008, the district court issued an order “abstaining from exercising subject matter,” court documents stated. Furthermore, the federal court said, the (federal) MMPA “does not preempt the state law at issue in this action.” So Pease immediately filed an appeal in the U.S. Court of Appeals for the Ninth Circuit.
- On March 10, 2008, the court of appeals granted an “emergency motion for injunctive relief pending disposition of the appeal staying ‘application of state law or any state court order to prevent placement of a guideline rope in the La Jolla Children's Pool Beach.’” Then the Court of Appeals for the Ninth Circuit dismissed APRL's lawsuit June 17, 2008, saying the court lacked federal jurisdiction, documents stated.

So Pease said he filed another federal lawsuit for the 2008-09 pupping season with official letters that National Oceanic and Atmospheric Administration (NOAA) officials sent to the city requesting the rope. Pease focused on the city council's previous motions

allowing a pupping season rope barrier.

- Pease requested a barrier rope and a restraining order in an October 2008 APRL lawsuit against the city of San Diego and NOAA agents and the National Marine Fisheries Service (NMFS), Pease said.

At this stage, Hayes said the record supports that federal interest is substantial enough to support the question of federal jurisdiction. At this point, the MMPA “does not provide for citizens to enforce the statute but expressly preempts state laws which conflict with the provisions of the act,” Hayes wrote.

All issues regarding marine mammals revert to federal law, Hayes said.

“Consistent with his conclusion ... filed on August 26, 2005 by Superior Court Judge William C. Pate which the city is obligated to follow specifically states that ‘nothing contained in this order shall be construed as requiring the city to violate any law, rule or regulation of any federal, state or county government,’” Hayes wrote. “At this stage in the proceedings, the state law claim for writ of mandate ... involves a dispute or controversy respecting the validity, construction, or effect of federal law.”

Hayes granted Pease’s application for a temporary restraining order in the Dec. 18 electronic ruling, “...requiring the city of San Diego to follow two resolutions of its City Council by placing a guideline pupping season rope at the Children’s Pool beach in La Jolla, California.”

City crews installed the rope barrier, which will remain throughout May 20, 2009, according to Pease.

Although Hayes said all parties plan to return to his courtroom Feb. 13, 2009, when he will hear Pease’s request for a preliminary injunction, Pease said the date has been extended to March 2009.

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