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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

VIVA! INTERNATIONAL VOICE FOR ANIMALS et al., Plaintiffs and Appellants, v. ADIDAS PROMOTIONAL RETAIL OPERATIONS, INC. et al., Defendants and Respondents.	A106960 (San Francisco County Super. Ct. No. 420214)

Penal Code section 653o (section 653o) bans the import of products made from certain animals, including kangaroos into California. Defendants import and sell in California markets athletic shoes made from kangaroo leather. Plaintiffs sued defendants for injunctive and declaratory relief, claiming that defendants import the kangaroo leather in violation of section 653o—and thus are committing an unlawful business practice (Bus. & Prof. Code, § 17200 et seq.).

Defendants moved for summary judgment, arguing that section 653o is preempted by federal law under the doctrine of conflict preemption. The trial court agreed and granted the motion. We conclude that section 653o is preempted when applied to the facts of this case. The statute as applied to defendants in this case conflicts with federal law and with substantial federal objectives of persuading Australian federal and state governments to impose kangaroo population management programs, in exchange for allowing the importation of kangaroo products. Accordingly, we affirm.

I. FACTS

The material facts are undisputed.[1]

Defendants Adidas Promotional Retail Operations, Inc., Sport Chalet, and Offside Soccer are California retailers that sell athletic shoes made from kangaroo leather imported from Australia. Specifically, defendants sell athletic shoes made from the hides of three kangaroo species: the red kangaroo (*Macropus rufus*), the eastern gray kangaroo (*Macropus giganteus*), and the western gray kangaroo (*Macropus fuliginosus*). Kangaroos are indigenous to Australia, and are not native to California.[2]

Plaintiff Viva! International Voice for Animals is an international nonprofit organization devoted to protecting animals, including those killed for food.[3] Its national headquarters is in Yolo County. Plaintiff Jerold Friedman is a resident of Los Angeles County. Plaintiffs sued defendants for engaging in an unlawful business practice by importing and selling athletic shoes made from kangaroo leather. Plaintiffs alleged the importation and sale of defendants' shoes violated section 653o.

Section 653o was enacted in 1970, and expanded to include kangaroos in 1971.[4] Subdivision (a) of section 653o provides, as here pertinent, that:

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[1] The vast majority of the facts we discuss, including historical information gleaned from the Federal Register, were before the trial court as evidence in the summary judgment proceedings. We have included some additional, commonly known background information that we have obtained from Web sites.

[2] "Kangaroo" is the common name for the indigenous Australian animal whose scientific name is "Macropod." There are over 50 species of kangaroo. (See generally <*http://www.dfat.gov.au/facts/kangaroos.html*> (as of Nov. 21, 2005) (Kangaroo Facts Web site).) (See Kangaroo Facts Web site, p. 1.) While the parties agreed below that *all* kangaroo species are native to Australia, the Web site we have just cited, maintained by the Australian Government, states "Kangaroos are native to the Australian continent and to parts of Papua New Guinea. Most species are only found in Australia." (Kangaroo Facts Web site, p. 1.)

[3] "Viva" stands for "Vegetarians International Voice for Animals."

[4] (Stats. 1970, ch. 1557, § 1, p. 3186; Stats. 1971, ch. 1283, § 1, pp. 2511-2512.)

"It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any alligator, crocodile, polar bear, leopard, ocelot, tiger, cheetah, jaguar, sable antelope, wolf (Canis lupus), zebra, whale, cobra, python, sea turtle, colobus monkey, *kangaroo,* vicuna, sea otter, free-roaming feral horse, dolphin or porpoise (Delphinidae), Spanish lynx, or elephant." (Italics added.)

Each side filed successive summary judgment motions. First, plaintiffs moved for summary judgment on the ground that defendants were violating section 653o and therefore committing an unlawful business practice subject to injunction. After briefing and oral argument, the trial court denied plaintiffs' motion on the ground that section 653o is preempted by federal law under the doctrine of conflict preemption.

Defendants then moved for a defense summary judgment on three primary grounds: (1) as a matter of statutory interpretation, section 653o did not apply here because it is limited to species currently listed as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.), and the three kangaroo species are not currently listed; (2) given the history of federal involvement with Australian state and federal governments regarding kangaroo population management, section 653o was preempted on the theory of conflict preemption; and (3) section 653o violated the Commerce Clause.

Defendants supported their conflict preemption argument with the following undisputed facts regarding the historical role of the federal government in Australian kangaroo management practices. Many of these facts come from a historical overview entered in the Federal Register, and included in the record below. (Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Removal of Three Kangaroos From the List of Endangered and Threatened Wildlife, 60 Fed.Reg. 12887 et seq. (Mar. 9, 1995) (60 Fed.Reg.).) (See footnote 1, *ante*.)

A commercial market developed in Australia for kangaroo hides and meat.[5] By the early 1970's the kangaroo population had dropped to the point that the Australian government instituted protective measures such as a ban on exports and species-specific quotas on the killing of kangaroos for commercial use.

Congress enacted ESA in 1973. Congress made several findings, including that various species of fish, wildlife and plants in the United States had been rendered extinct or threatened with extinction. (16 U.S.C. § 1531(a)(1), (2).) Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to" numerous listed international treaties, conventions, and agreements. (16 U.S.C. § 1531(a)(4).)

Congress also affirmatively stated that the purposes of ESA were "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the [international] treaties and conventions set forth in [section 1531(a)(4)]." (16 U.S.C. § 1531(b).)

On December 30, 1974, the United States Fish and Wildlife Service (Fish & Wildlife) listed the red, eastern gray, and western gray kangaroo as threatened species under ESA (16 U.S.C. § 1531 et seq.). Such a listing prohibits importation of the species, subject to ESA exemptions or permits. (16 U.S.C. §§ 1538(a)(1)(A), 1539.) Fish & Wildlife formally banned commercial importation of the three kangaroo species, as well

[5] Defendants' brief states, without record citation, that kangaroos are grass eaters and compete with livestock for available food: "Thus, Australians have traditionally seen kangaroos as a pest and a threat to their livelihood." An Australian Government Web site states that kangaroos are herbivores and prolific breeders, and that "The Australian rangeland environment is fragile and easily degraded." (Kangaroo Facts Web site, pp. 1-2.)

as their body parts and products made from the bodies of the species. (60 Fed.Reg. 12888.)

Fish & Wildlife accompanied the listing with a special rule that would allow commercial importation into the United States after development of adequate management plans by the four Australian states that commercially harvest the three kangaroo species.[6] (60 Fed.Reg. 12888.) However, the import ban was to continue "until the Australian states could assure the United States that they had effective management plans for the kangaroos, and that taking would not be detrimental to the survival of kangaroos." (60 Fed.Reg. 12905.)

The kangaroo population began to recover in the 1980's. In April 1981, Fish & Wildlife accepted the kangaroo management plans of the four Australian states and lifted the import ban "after kangaroo management plans and population survey techniques had been strengthened." (60 Fed.Reg. 12888.)

In May 1981, Fish & Wildlife issued a final rule lifting the ban on commercial importation into the United States of products made from the red, eastern gray, and western gray kangaroo.

In April 1983, Fish & Wildlife posted two notices in the Federal Register in which it proposed delisting the three kangaroo species and continuing commercial importation of kangaroo products and body parts. In August 1983, Fish & Wildlife published a final rule allowing the continuation of commercial importation. (60 Fed.Reg. 12888.)

On April 24, 1984, Fish & Wildlife received new data from the Australian government showing that the severe drought of the summer of 1982-1983 had significantly depleted the populations of the three kangaroo species. As a result, Fish & Wildlife withdrew its proposal to delist the three species. (60 Fed.Reg. 12888.)

Fish & Wildlife noted that after the drought broke in the winter of 1983, the three species resumed breeding—"but the ability of kangaroo populations to recover from the

[6] The four states are New South Wales, Queensland, Southern Australia, and Western Australia. (60 Fed.Reg. 12888.)

major 1982-[198]3 population fluctuation was unknown." Fish & Wildlife "further noted that the delisting action could be reconsidered after [Fish & Wildlife] had a better understanding of how kangaroo populations recover from drought events." (60 Fed.Reg. 12888.)

In December 1989, Greenpeace USA and other groups petitioned Fish & Wildlife to reinstate the ban on importing the three kangaroo species and their body parts and products. The petitioners argued that Australia's kangaroo management "was inherently flawed and that Australian states did not have adequate and effective conservation programs that ensured the protection of the threatened species." (60 Fed.Reg. 12888.)

In response to the petition, Fish & Wildlife sent a team of three representatives to Australia in March 1990 to investigate the population status of the three kangaroo species—including survey methods, numbers, and trends—and to investigate the implementation of management programs. The Fish & Wildlife team spent 12 days meeting with members of the Australian Parliament, scientists, Australian state and federal natural resource managers, representatives of nongovernmental organizations, enforcement personnel, farmers, and ranchers. (60 Fed.Reg. 12888.)

In June 1990, the Fish & Wildlife team presented its report. Fish & Wildlife opened a comment period until November 1990. The Wildlife Legislative Fund of America (Fund) petitioned Fish & Wildlife to remove the three kangaroo species from the ESA list of threatened species. Relying on the team's report, the Fund stressed two grounds to delist the species: (1) by "conservative estimates" the population of the three species totaled almost 14 million; and (2) "the fact that kangaroo conservation programs exist within individual range states . . . ." (60 Fed.Reg. 12888.)

Fish & Wildlife requested further comment through the Fall of 1991. In January 1993, Fish & Wildlife published a proposed rule to delist the three kangaroo species. Fish & Wildlife found that the four Australian states "had developed and implemented adequate and effective conservation programs that ensured the protection of these species." Fish & Wildlife also found that the populations of the species were high, and that "the three species were protected by appropriate legislation, had their populations

regularly monitored by direct and indirect procedures, and were managed by a complex licensing system which regulated the extent of the legal harvest." (60 Fed.Reg. 12888.)

In March 1995, Fish & Wildlife removed the three kangaroo species from the list of endangered or threatened species under ESA. Fish & Wildlife characterized the red, eastern gray, and western gray populations as "abundant." (60 Fed.Reg. 12889.) The delisting was accompanied by a plan of long-term monitoring of the species' populations for five years, and the proviso for emergency relisting if a significant threat arose to the species. (60 Fed.Reg. 12904-12905.) Fish & Wildlife "can . . . invoke emergency listing procedures at any time," including after the expiration of the five-year monitoring period, "in response to a significant threat to the well being [*sic*] of any of the three species." (60 Fed.Reg. 12905.)

Today, the Australian government permits the commercial use of kangaroos and the exportation of kangaroo leather and meat, subject to quotas and other government regulation.[7] The parties agree that, since the three species have been delisted under ESA, their importation into the United States is not prohibited by federal law. (See 16 U.S.C. § 1538(a)(1)(A) [banning importation of listed species].)

The trial court granted defendants' motion for summary judgment. The court rejected defendants' argument that section 653o only applies to endangered species. But the court ruled that federal law preempted section 653o under the doctrine of conflict preemption. The court did not reach defendants' Commerce Clause claim.

II. DISCUSSION

We review the grant of summary judgment *de novo*. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) The primary issues before us are not factual but legal. Plaintiffs contend that (1) the trial court correctly interpreted section 653o to apply to all species of kangaroo, not just endangered ones; (2) the trial court erred by finding federal preemption; and (3) section 653o does not violate the Commerce Clause.

[7] Plaintiffs neither dispute nor confirm defendants' claim that the Australian government's 2003 estimate of the kangaroo population is 57 million.

Statutory Interpretation

We first resolve the issue of statutory interpretation urged by defendants below as a ground for summary judgment. Defendants argue that section 653o does not even apply here. They claim the statute applies only to species listed as "endangered" under ESA.[8] Because the red, eastern gray, and western gray kangaroos are no longer so listed, defendants argue that section 653o is inapplicable and can afford plaintiffs no basis for a claim of unlawful business practices arising from defendants' importation of shoes made from kangaroo leather.

We disagree because by its plain terms, section 653o applies to the products of "any . . . kangaroo . . . ." Nothing in the language of section 653o qualifies "any" by limiting the statute's scope to those kangaroos listed by the federal government as endangered.

"The fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.]" (*O'Kane v. Irvine* (1996) 47 Cal.App.4th 207, 211 (*O'Kane*).) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning. [Citations.]" (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) When the language of a statute is "clear and unambiguous there is no need for construction, and courts should not indulge in it." (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) Where the statutory wording is clear a court "should not add to or alter [it] to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*O'Kane, supra,* 47 Cal.App.4th at p. 211.) Furthermore, statutory language must be viewed in context, ". . . 'keeping in mind the nature and obvious purpose of the statute where they appear.' " (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, quoting *Johnstone v. Richardson* (1951) 103 Cal.App.2d 41, 46.)

[8] For purposes of the ensuing discussion, we use "endangered" and "threatened" interchangeably.

Section 653o is plain and unambiguous. The statute is an outright ban on the importing of the bodies, body parts, or products of certain listed animals—including the kangaroo. Because the statutory language is clear, we need not—and in fact, should not—consult the statute's legislative history. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800; see *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 (*White*).) But defendants try to rely on legislative history to show the Legislature intended the statute to apply to ESA-listed endangered species. We do not so read the history of section 653o.

It is true that much of the legislative history refers to the statute's purpose to protect "endangered" species. However, the Legislature used that term in its broad general sense and not an ESA-specific one. The Legislature determined that the species listed in section 653o were *in fact* endangered, without regard to the federal government's *legal* classification of endangerment.

That is exactly the point made by the author of Senate Bill No. 128, which became section 653o and a companion statute, section 653p. In a written statement, Senator Anthony C. Beilenson said that section 653p in effect duplicated federal law, i.e., the predecessor of ESA,[9] while section 653o "establish[es] . . . our own list of species that may or may not be covered eventually by the Federal Act, but which are now in danger of imminent extinction and are animals from which products are made, and are now being sold in this state." (Emphasis in original.)[10]

Sections 653o and 653p were enacted at the same time. The former refers to "any" listed species, while the latter expressly protects species listed as endangered under

[9] When enacted, section 653p referred to the Endangered Species Conservation Act of 1969. The statute now refers to ESA, which was enacted in 1973.

[10] Senator Beilenson's statement was before the trial court in the proceedings on plaintiffs' summary judgment motion. The statement, submitted by defendants below, is part of the current record on appeal. A statement by a bill's author can be considered evidence of legislative intent. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 977-978, fn. 46 (*Bronco Wine*); see *White, supra,* 21 Cal.4th at p. 572, fn. 3.)

federal law. The distinction between the two statutes is telling and supports our conclusion.[11]

Defendants claim a 1976 decision of the Court of Appeal and a 1983 opinion of the Attorney General support their position that section 653o applies only to endangered species. We disagree for the following reasons.

People v. K. Sakai Co. (1976) 56 Cal.App.3d 531 (*Sakai*) involved section 653o's ban on the importation of whale products, specifically canned whale meat. But *Sakai* decided only that section 653o was a valid exercise of the state's police power and did not constitute a deprivation of property without due process. (*Sakai, supra,* at pp. 535-539.) In upholding the state's police power to protect the environment and certain species of wildlife, the court discussed "endangered" species in generic terms and noted the "tenor" of recent environmental public interest legislation, including ESA. (*Sakai, supra,* at pp. 535-537.) Nothing in the opinion purports to erase the distinction between *factually* endangered species and species *legally* classified as "endangered." Section 653o is not limited to the latter.

66 Ops.Cal.Atty.Gen. 152 (1983) involved the question whether the term "python" in section 653o included "anaconda." It mentions in passing that section 653o was enacted to protect endangered species. (66 Ops.Cal.Atty.Gen., *supra,* at p. 153.) But it also notes "the legislative objective of section 653o is to protect certain threatened creatures . . . ." (66 Ops.Cal.Atty.Gen., *supra,* at p. 153.) Nothing in the Attorney General's opinion supports the argument that section 653o is limited to species listed under federal law. Indeed, the Attorney General points out that *section 653p* "incorporat[es] provisions of federal law . . . ." (66 Ops.Cal.Atty.Gen., *supra,* at p. 153, fn. 1.)

[11] Defendants cite legislative history purporting to show that section 653o was intended to be limited to animals listed as endangered under federal law. This legislative history references federal law in the context of section 653p—not section 653o.

We conclude the trial court correctly interpreted section 653o, which unambiguously applies to "any" of the listed wildlife—and is not limited to federally listed endangered species.

Conflict Preemption

Section 653o applies here. The next question is whether the statute is preempted by federal law.

1.

The doctrine of federal preemption is grounded in the Supremacy Clause of the United States Constitution. (U.S. Const., art. VI, cl. 2; see *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372 (*Crosby*); *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949 (*Jevne*).) There are three types of federal preemption: express, implied, and conflict. (*Crosby, supra,* at pp. 372-373; *Jevne, supra,* at pp. 949-950; see *Bronco Wine, supra,* 33 Cal.4th at p. 955.)

Express preemption exists when Congress shows its intent to preempt state law by explicit statutory language. Implied preemption exists when Congress has enacted a statutory or regulatory scheme so pervasive that Congress shows its intent to occupy the field. (*Crosby, supra,* 530 U.S. at p. 372; *Jevne, supra,* 35 Cal.4th at p. 949.)

Conflict preemption exists when state law actually conflicts with federal law. Courts find conflict preemption under two circumstances: (1) when it is impossible for a private party to comply with both federal and state law; or (2) " 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Citation.]' " (*Crosby, supra,* 530 U.S. at pp. 372-373, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67 (*Hines*); see *Jevne, supra,* 35 Cal.4th at pp. 949-950.)

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ." (*Crosby, supra,* 530 U.S. at p. 373.) This examination encompasses the entire scheme of the federal law and whether state law would frustrate its purpose and

operation. (*Hines, supra,* 312 U.S. at p. 67, fn. 20; *Savage v. Jones* (1912) 225 U.S. 501, 533.)

There is a presumption against federal preemption, at least in fields typically occupied by the states. (*Bronco Wine, supra,* 33 Cal.4th at p. 957; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.) The party seeking preemption has the burden of showing a congressional intent to displace state law. (*Bronco Wine, supra,* at p. 956; *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548.)

2.

In arguing against preemption, plaintiffs correctly note that *Sakai, supra,* 56 Cal.App.3d 531 establishes the proposition that "[w]ildlife regulation, including regulation of foreign wildlife, has historically been considered to be a valid exercise of the states' police powers." From this observation plaintiffs move to the preemption provision of ESA, which shows, as plaintiffs argue, that federal law envisions joint federal and state cooperation regarding wildlife conservation: *"Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter.* This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." (16 U.S.C. § 1535, subd. (f) (section 1535(f)).) (Italics added.)

Relying primarily on the first italicized sentence, plaintiffs argue that ESA only preempts state laws that (1) permit importing species listed as endangered or threatened

under ESA; or (2) prohibit importing listed species whose importation is authorized by an ESA permit or exemption to the import ban imposed by listing.

Plaintiffs rely heavily on *Man Hing Ivory and Imports, Inc. v. Deukmejian* (9th Cir. 1983) 702 F.2d 760 (*Man Hing*). In that case, a wholesale importer of African elephant ivory sought a judicial declaration that section 653o was preempted by ESA. (*Man Hing, supra,* at pp. 761-762.) The Ninth Circuit interpreted section 1535(f) as follows: "This general language, by its terms, does not forbid state statutes such as . . . [section] 653o. [Footnote omitted.] Rather, it allows full implementation of section 653o so long as the state statute does not prohibit what the federal statute or its implementing regulations permit. [ESA] itself nowhere authorizes the importation or sale of African elephant product by permit or by exemption. Indeed, it prohibits the sale or import of endangered species unless such import or sale is specifically authorized or exempted. [Citing 16 U.S.C. § 1538(a)]." (*Man Hing, supra,* 702 F.2d at p. 763.)

But the Secretary of the Interior had adopted regulations under ESA permitting limited trade in elephant products under certain conditions, and with a valid permit. (*Man Hing, supra,* 702 F.2d at p. 764.) Accordingly, the Ninth Circuit concluded that section 653o, which *totally* banned the importation of elephant products, was preempted because it ". . . 'prohibit[ed] what is authorized pursuant to an exemption or permit provided for . . . in any regulation which implements this chapter.' [Citation to section 1535(f)]." (*Man Hing, supra,* at p. 764.)

Plaintiffs note that the three species of kangaroo are no longer listed as threatened under ESA. As such, they may be legally imported under federal law, without the specific authorization of an ESA exemption or permit allowing limited trade in the products of a listed species. Thus, argue plaintiffs, ESA does not preempt section 653o—because the state statute does not prohibit what federal law authorizes by an ESA exemption or permit. Plaintiffs rely on *H.J. Justin & Sons, Inc. v. Deukmejian* (9th Cir. 1983) 702 F.2d 758 (*Justin*), which is a companion case of *Man Hing*.

Justin involved a manufacturer of boots made from the hides of African elephants, Indonesian pythons, and the Wallaby kangaroo. The manufacturer wished to import its

boots into California, but the federal district court had held that section 653o was not preempted. (*Justin, supra*, 702 F.2d at p. 759.)

Following *Man Hing*, the Ninth Circuit reversed with regard to the import of African elephant products because the manufacturer had a valid ESA import permit. But with regard to the products of Indonesian pythons and Wallaby kangaroos, the court affirmed: "Since the Secretary has not listed either the Indonesian python or the Wallaby kangaroo as 'endangered' or 'threatened' species, section [1535](f) of [ESA] has no application to state regulations restricting or prohibiting trade in those species. [Citations.]" (*Justin, supra*, 702 F.2d at pp. 759-760.)

Plaintiffs claim that because the three kangaroo species are currently delisted, federal law does not preempt section 653o—and the State of California is free to impose its own prohibition on the import of kangaroo leather which, since delisting, federal law no longer bans.

Plaintiffs' position is not unreasonable and finds support in numerous cases allowing state regulation of species not listed under ESA. (See, e.g., Annot., Validity and Construction of Statute Prohibiting Sale Within State of Skin or Body of Specified Wild Animals or of the Animal Itself (1972) 44 A.L.R.3d 1008; *Palladio, Inc. v. Diamond* (S.D.N.Y. 1970) 321 F.Supp. 630, affd. per curiam (2d Cir. 1971) 440 F.2d 1319.)

But by focusing on the first sentence of section 1535(f), plaintiffs give insufficient attention to the second prong of conflict preemption: whether, under the circumstances of a particular case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Crosby, supra*, 530 U.S. at pp. 372-373.) Plaintiffs fail to give adequate weight to the over 20-year history of congressional cooperation with the federal and state governments of Australia regarding management of kangaroo populations—a cooperation that has as its backdrop the powerful policies of ESA to encourage international species conservation. (See 5 Grad, Treatise on Environmental Law (2002) § 12.04, subds. [7](j) & [7](n); Anderson, *The Evolution of the Endangered Species Act* in Private Property and the Endangered Species Act (Shogren edit., 1998) pp. 8, 18.)

We have detailed above the lengthy history of our federal government's involvement with the population management of the three species of kangaroo to place it in context with section 653o. In 1970, three years before the enactment of ESA, California enacted section 653o and imposed an outright ban on importing kangaroo products. However, in 1974, a year after the enactment of ESA, our federal government began its intensive historical involvement with the state and federal governments of Australia. Fish & Wildlife listed many species of kangaroos as threatened and banned imports, subject to Australia developing kangaroo management programs. The proverbial carrot and stick policy was put in place.

As noted, in 1981 Fish & Wildlife accepted the Australian management plans for the three kangaroo species and lifted the import ban. In rejecting a challenge to the lifting of the ban, the United States District Court for the District of Columbia noted that Fish & Wildlife "ha[s] no control over the species or its natural habitat. [Its] ability to protect the kangaroo is limited to encouraging the Australian States to implement programs designed to ensure the species' well-being. The only leverage [Fish & Wildlife] could utilize involved imposing the import ban, with the understanding that the ban would be lifted once the programs were implemented. . . . [¶] Because lifting the import ban was essential in order to encourage the Australian States to implement measures deemed necessary by [Fish & Wildlife], and because those measures were in fact adopted by the States, . . . the lifting of the ban fulfilled the conservation objectives of . . . ESA." (*Defenders of Wildlife, Inc. v. Watt* (D.D.C. May 28, 1981) 12 E.L.R. 20210.)

Under the circumstances of this particular case, and the lengthy history we have recounted, the fact that the three kangaroo species are currently delisted is not controlling. Fish & Wildlife worked intensively with Australian authorities to achieve its goals of adequate population management of the three kangaroo species from 1974 to 1995. Fish & Wildlife then spent from 1995 to 2000 monitoring the kangaroo

populations.[12] As a result of Fish & Wildlife's activities, Australia has imposed kangaroo management programs that resulted in the conservation and population growth of the three species and other species—in exchange for which this country now allows the import of some kangaroo products. What impetus would Australia have to conserve kangaroos if section 653o could prevent the importation of kangaroo products into California, a primary Pacific Rim state for Australia? With the removal of the carrot, the stick would be rendered useless, and our national ESA policy regarding kangaroo conservation rendered meaningless.

Fish & Wildlife has the power to restart the active regulatory mode at any time under existing relisting procedures. There is no evidence that Fish & Wildlife is no longer concerned with kangaroo population management. We take judicial notice that one species of Australian kangaroo and six species of Australian wallaby[13] remain on the endangered species list. (<http://ecos.fws.gov/tess__public/TESSSpeciesReport.html> (as of Nov. 21, 2005).)

Moreover, the record indicates that Fish & Wildlife has maintained the status of the red, western gray, and eastern gray as "being monitored" as of December 3, 2003.

We find conflict preemption on the ground that state prohibition of the import of kangaroo products interferes with the federal objectives of achieving—and maintaining—Australian kangaroo management procedures. In return for effective conservation and management of the three species, those species were delisted to allow unrestricted importation of their products into the United States. This policy of allowing importation as a reward and in return for effective conservation measures has not been discontinued.

We must also caution that federal law here implicates our national government's interaction with a sovereign foreign power. In *Crosby*, the United States Supreme Court held that a Massachusetts statute barring state agencies from doing business with

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[12] The record suggests that kangaroo populations are vulnerable to climate change. (60 Fed.Reg. 12888.)

[13] Kangaroos and wallabies share the same genus, *macropus*.

Myanmar (formerly Burma) was preempted for conflicting with federal statutory objectives. (*Crosby, supra,* 530 U.S. at pp. 366-368.) The federal statutes imposed a more flexible, comprehensive strategy toward the government of Myanmar, in order to fulfill congressional objectives to give the president diplomatic means to encourage Myanmar to improve human rights and the development of democracy. (*Id.* at pp. 368-377.) The federal policy was a measured, "middle path" approach to Myanmar—a "carrot," if you will, as opposed to the "stick" of the outright ban imposed by the Massachusetts statute. (*Id.* at pp. 377-382.)

Similarly, in *American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396 (*Garamendi*), the Supreme Court invoked conflict preemption to hold that the California Holocaust Victim Insurance Relief Act (HVIRA) was preempted by a federal executive agreement with Germany regarding Holocaust-era insurance claims. (*Garamendi, supra,* at pp. 401, 405-408, 420-425.) The Supreme Court held that HVIRA "interferes with the National Government's conduct of foreign relations." (*Garamendi, supra,* at p. 401.)

ESA has a strong international component. As noted, Congress pledged the United States' conservation efforts pursuant to numerous international treaties, conventions, and agreements. The treaties include migratory and endangered bird treaties with Canada, Mexico, and Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). (16 U.S.C. § 1531(a)(4)(A), (B), (C), (F).) ESA calls for extensive international cooperation (16 U.S.C. § 1537), specifically calls for the implementation of CITES (16 U.S.C. §§ 1532(4), 1537(a)), and generally makes violations of CITES unlawful. (16 U.S.C. § 1538(c)(1).)

We find that, under the historical and international circumstances of this case, section 653o is preempted by ESA and by general federal objectives of kangaroo conservation under the doctrine of conflict preemption.[14] ESA and the applicable

[14] In light of this conclusion, we need not reach the question which the trial court likewise did not reach—whether section 653o violates the Commerce Clause. We also

regulations set forth a comprehensive national policy for the protection of endangered species such as the three kangaroo species involved in this case. Application of section 653o would stand as an obstacle to the accomplishment and execution of the objectives of Congress if applied to the defendants.

III. DISPOSITION

The summary judgment is affirmed. Each party shall recover its own costs on appeal.

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Marchiano, P.J.

We concur:

_____
Stein, J.

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Margulies, J.

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need not reach other issues raised by defendants, including the applicability of Proposition 64, pending before the Supreme Court in *Californians for Disability Rights v. Mervyn's* (2005) 126 Cal.App.4th 386, review granted April 27, 2005, S131798 and *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828, review granted April 27, 2005, S132433.

The request for judicial notice filed July 29, 2005 is denied as moot.

Trial Court: San Francisco County Superior Court

Trial Judges: Honorable A. James Robertson II and Honorable Ronald E. Quidachay

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