Viva! International v. Adidas: Preemption in the Realm of Endangered Species Protection

Amanda Pearson[*]

TABLE OF CONTENTS

[*] Amanda Pearson is a second year law student at UC Davis School of Law. She received her undergraduate degree from UC Santa Barbara. She will work as a summer associate at Downey Brand in Sacramento during Summer 2008 and expects to enter practice in northern California upon graduation.

INTRODUCTION

The Supremacy Clause of the Constitution makes federal law "the supreme Law of the Land," state law to the contrary notwithstanding.[1] Thus, when state and federal laws clash, the decision is, in theory, a simple one: the federal law wins. Disputes often arise, however, over whether and to what extent state and federal laws actually conflict. Although courts have not always consistently defined the types of preemption, they fall into two broad initial categories: express preemption and implied preemption.[2] Express preemption applies when Congress has explicitly stated that a federal law will preempt any state laws dealing with the same field of issues.[3] Implied preemption arises when Congress did not make preemption explicit, but the state and federal laws cannot coexist. There are three types of implied preemption. Field preemption occurs when the regulatory scheme designed by Congress "'[leaves] no room' for supplementary state regulation."[4] Conflict preemption arises when an actor cannot simultaneously comply with both the state and federal laws,[5] for example, when one law requires what the other forbids. Finally, obstacle preemption, the subject of this Note, is found when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[6]

In 2007, the California Supreme Court considered the case of *VIVA! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, which turned primarily on whether Federal Regulation under the Endangered Species Act preempted a provision of the California Penal Code. Accused of selling shoes made of kangaroo leather in violation of section 653(o) of the California Penal Code, the sports retailer Adidas argued that this provision was invalid due to obstacle preemption. The California Supreme Court rejected this argument, finding no federal policy against state regulation of kangaroos and kangaroo products. This Article will first examine this case and the rationale behind the California Supreme Court's decision. Then, it will discuss issues regarding preemption by the Endangered Species Act which the court did not specifically address. It will then explore what is necessary for preemption to take effect when the kind of state law and federal policy at issue in the *Viva!* case meet. Finally, it will attempt to make a brief predictive analysis of how

---

[1] U.S. CONST. art. VI.

[2] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[3] VIVA! Int'l Voice For Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569, 571-72 (Cal. 2007).

[4] Hillsborough County v. Automated Med. Labs, 471 U.S. 707, 713 (1985) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[5] *Hillsborough County*, 471 U.S. at 713.

[6] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

courts will handle possible preemption challenges to a new provision of the same law that is set to take effect in 2010.

I. STATE AND FEDERAL REGULATION OF KANGAROOS

The California Legislature enacted California Penal Code section 653(o) in 1970 to prevent the extinction of species the legislature deemed threatened.[7] It included prohibitions on the import and sale of certain animals and animal products.[8] In 1971, section 653(o) was expanded to prohibit importation, possession with intent to sell, or sale of "the dead body, or any part or product thereof" of certain additional species, including any kangaroo.[9] In December of 1974, the United States Fish and Wildlife Service ("USFWS") listed three species of kangaroo as "threatened" under the Endangered Species Act of 1973 ("ESA").[10] Shortly thereafter, that agency enacted a ban on the importation of the species and any products derived from it.[11] In 1981, USFWS rescinded the ban and, in 1995, the agency removed the three kangaroo species from the federal endangered species list.[12] Throughout this process and thereafter, California continued to prohibit the importation, possession, and sale of kangaroo parts.[13]

II. *VIVA! INTERNATIONAL VOICE FOR ANIMALS V. ADIDAS*

A. Background

Adidas is a retailer that makes and sells, among other items, athletic shoes made from kangaroo leather.[14] Viva! International Voice for Animals ("Viva") is "an international nonprofit organization devoted to protecting animals."[15] In 2004 Viva sued Adidas under Business & Professions Code section 17200 for engaging in an unlawful business practice by selling kangaroo leather shoes in violation of California Penal Code section 653(o).[16] Adidas did not dispute that it had been selling the shoes in California. Instead, it argued that federal law preempts section 653(o). The trial court and Court of Appeal agreed with Adidas and granted it summary judgment based on the preemption argument,

---

[7] *Viva!*, 162 P.3d at 572 (citing People v. K. Sakai Co., 128 Cal. Rptr. 536 (Ct. App. 1976)).

[8] CAL. PENAL CODE § 653(o) (West 2007).

[9] *Id.*; *Viva!*, 162 P.3d at 572.

[10] *Viva!*, 162 P.3d at 579.

[11] *Id.*

[12] *Id.* at 579-80.

[13] *See id.* at 580.

[14] *Id.* at 570.

[15] *Id.*

[16] *Id.*

although the Court of Appeal found the question to be a close one.[17] The California Supreme Court overturned the summary judgment, finding that section 653(o) does not pose any obstacle to federal policy, but allowed Adidas to go forward with other claims in the Court of Appeal on remand.[18]

B. The Presumption Against Preemption of State Laws in Areas Traditionally Regulated by the States

A strong presumption against preemption applies in areas of traditional state regulation, and state law will not be displaced unless it is clear and manifest that Congress intended to supplant it.[19] The effect of this presumption is to help protect state interests in regulating areas traditionally within state control. Courts will presume that Congress intends to leave state law unaffected unless there is clear evidence to the contrary.[20] However, as the California Supreme Court noted in *Viva! International*, when the state law implicates foreign relations issues the analysis changes somewhat, although how it does is not exactly clear.[21]

In making its determination, the California Supreme Court noted the United States Supreme Court's analysis in *Crosby v. National Foreign Trade Council*.[22] In *Crosby*, the Court addressed a preemption question concerning a challenge to a Massachusetts law restricting the ability of the state and its agencies to purchase goods and services from companies doing business in Burma. While it did not decide how far the presumption against preemption would extend in the context of foreign affairs the Court left open the possibility that the presumption should be weakened in such circumstances.[23] In light of this case, the California Supreme Court decided to take a conservative approach in *Viva! International* and applied no presumption, instead focusing on the relationship between the state and federal laws.[24] In doing so, the California Supreme Court emphasized that the California statute did in fact address an area within the historic police powers of the state. As a result, in a hypothetical appeal, the Supreme Court could treat the presumption issue in one of two very different ways. The higher court could find that while the California Supreme Court applied no presumption, some degree of presumption is proper in these cases and accordingly, section 653(o) is not preempted. Alternatively, the higher court could find that despite the California Supreme Court's claim to the contrary, its

---

[17] *Id.*

[18] *Id.* at 583.

[19] *Id.* at 573.

[20] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992).

[21] *Id.*

[22] *Id.*; Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[23] *Viva!*, 162 P.3d at 573.

[24] *Id.* at 574.

discussion of "historic police powers" shows that it did apply some degree of presumption in a context where none was proper, and, as a result, was mistaken in concluding that section 653(o) is not preempted.

The California Supreme Court did find that wildlife management is historically within the traditional police powers of the states.[25] This point does not seem to be very controversial. In support of this proposition, the court cited numerous authorities dating back to the nineteenth century.[26] Adidas appears to have accepted this proposition, arguing in its brief that the presumption against federal preemption in a field traditionally occupied by the states was "properly and sensitively" applied by the Court of Appeal.[27]

How far this traditional police power should extend beyond the borders of the state invoking it is questionable. A person might reasonably argue that if the police power is supposed to address issues of local concern, use of that power is only legitimate if it regulates things found within the state. Under this argument, a state has no business attempting to regulate animals that are only naturally found outside the state's borders. There is a two-part response to this argument. First, there is a growing recognition that disturbance of ecosystems in one part of the world "may have a profound effect upon the health and welfare of people in other distant parts."[28] In return, of course, it might be argued that in that case such a "profound effect" should be demonstrated before a state acts to prevent it. Second, one could argue that the state is regulating only local activity. Section 653(o) does not purport to regulate any activity that takes place outside the state. It has nothing to say about what happens to kangaroos outside of California; it simply says that people *in California* may not import or sell kangaroo parts.[29] The idea is that it is properly within the scope of a state's police power to regulate internal behavior because of its external effects. The California Supreme Court addressed both of these points when it found that regulations aimed at protecting out-of-state wildlife may fall within the traditional state power to manage wildlife.[30]

---

[25] *Id.* at 573 n.4.

[26] *Id.*

[27] Answer Brief on the Merits at 13-14, Viva! Int'l Voice For Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569 (2007) (No. S140064), 2006 WL 2618807 [hereinafter Answer Brief on the Merits].

[28] People v. K. Sakai Co., 128 Cal. Rptr. 536, 539 (Ct. App. 1976).

[29] *See* Cresenzi Bird Importers, Inc. v. New York, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987) ("The State has an interest in cleansing its markets of commerce which the Legislature finds to be unethical. Moreover, a state may constitutionally conserve wildlife elsewhere by refusing to accept *local* complicity in its destruction. The states' authority to establish *local* prohibitions with respect to out-of-state wildlife has, since the late nineteenth-century, been recognized by the courts. It is now well settled that the commerce clause does not prevent states from prohibiting sales *within their borders* as a means of protecting out-of-state wildlife.") (emphasis added) (citation omitted).

[30] *Viva!*, 162 P.3d at 572-73. It should be noted that one of the cases the California Supreme Court cited for this finding, *Maine v. Taylor*, 477 U.S. 131 (1986), can most likely be distinguished

C. Preemption Under the Endangered Species Act of 1973

In deciding that the text of the ESA would guide its analysis on the preemption issue, the California Supreme Court emphasized the importance of that law's background and its express preemption clause.[31] The court found that the drafters of the ESA envisioned a "joint cooperative state-federal approach to wildlife preservation."[32] The ESA itself declares that encouraging states to develop and maintain their own conservation programs was key to "better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants."[33] The committee responsible for the bill thought that "[w]hile the Federal government should protect such species where States have failed to meet minimum standards, it should not preempt efficient programs."[34] Congress appeared to contemplate a scheme similar to the one governing minimum wages across the country. Congress would set a regulatory "floor," but states would be free to do more, as long as doing so would not otherwise conflict with federal law.

The court found that the express preemption clause of the ESA plays a "central role" even in a discussion of implied preemption, because "an express definition of the preemptive reach of a statute 'implies' — *i.e.*, supports a reasonable inference — that Congress did not intend to pre-empt other matters . . . ."[35] The rationale is that since the ESA specifies which state laws are preempted, it is reasonable to infer that Congress intended that the scope of preemption should reach no further.[36] The result under this approach is that — absent evidence to the contrary — we may infer that whatever is not expressly preempted is permitted.

The preemption clause of the ESA can be broken down into three sub-clauses. First, it provides that any state law that deals with importation or exportation of "endangered" or "threatened" species is preempted to the extent that it permits what is prohibited by the ESA or prohibits "what is authorized pursuant to an

---

on this point. In that case, a ban on importing bait fish was intended to prevent parasite infestations and the "crowding out" of local species of fish. Even though the method used by Maine (banning the import or sale of baitfish) is very similar to the method used by California (banning the import or sale of kangaroo products), Maine is distinguishable because it dealt with a regulation designed to protect species found *in* the state, not a regulation designed to protect an out-of-state species.

[31] *Viva!*, 162 P.3d at 575-77.

[32] *Id.* at 575.

[33] Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(5) (2006).

[34] *Cresenzi Bird Importers*, 658 F. Supp. at 1444 (quoting S. REP. NO. 93-307 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2991).

[35] *Viva!*, 162 P.3d at 577 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)). This does not mean that if a state law is not expressly preempted in a federal preemption clause, implied preemption of that law can *never* be found. It only means that inferring that it was not the intent of Congress to preempt that law is reasonable.

[36] *Id.* at 578.

exemption or permit provided for" in the ESA.[37] Second, it expressly states that it does not void state laws "intended to conserve migratory, resident, or introduced fish or wildlife, or to prohibit sale of such fish or wildlife."[38] Third, it provides that state laws respecting the taking of listed species may be more restrictive than those found in the ESA or used to implement the ESA, but they may not be less restrictive.[39]

Although none of the sub-clauses apply here (because kangaroos are not migratory, resident, introduced, nor listed as endangered or threatened) the court found they nevertheless reflect the cooperative scheme envisioned by the Act.[40] Adidas argued that since none of the sub-clauses apply section 653(o) must be preempted: because section 653(o) cannot fall within any of the categories of state law that section 6(f) of the Act protects from preemption, section 6(f) does not apply at all.[41] The California Supreme Court accepted the argument that section 6(f) does not specifically shield state laws dealing with unlisted species from preemption, but found this fact detrimental to, not supportive of, Adidas' case. "[W]ith respect to unlisted species, section 6(f) leaves undisturbed the states' broad traditional regulatory authority."[42] That is because section 6(f) does not purport to prohibit state laws that deal only with unlisted species. Since the kangaroo species in question are no longer listed, the fact that the ESA prohibits conflicting regulations of listed species does not prohibit state laws dealing with those kangaroos. While Adidas read section 6(f) as preempting all state actions except those it expressly allows, the court read the same section as implicitly allowing all state actions it did not prohibit. The court's reading is preferable, given fundamental federalism principles. As a Constitutional matter, powers not removed from the states or delegated to the Federal government are left to the states.[43] The ESA did not remove general control over unlisted species from the states, nor did it give that control to the federal government. Thus the court inferred that the power states retain over unlisted species "is at least as great or greater that over federally endangered or threatened species."[44]

D. The Carrot and Stick Argument

The court's analysis of the express preemption clause of the ESA did not settle the question of preemption. Section 653(o) could still be preempted if it was found to stand as an obstacle to the objectives and purpose of Congress.

---

[37] Endangered Species Act of 1973 § 6(f), 16 U.S.C. § 1535(f).

[38] *Id.*

[39] *Id.*

[40] *Viva!*,.162 P.3d at 576.

[41] Answer Brief on the Merits, *supra* note 27, at 27.

[42] *Viva!*, 162 P.3d at 576.

[43] U.S. CONST. amend. X.

[44] *Viva!*, 162 P.3d at 576.

Adidas tried to argue "preemption by nonregulation" to support a finding of a conflicting federal policy. The United States Supreme Court has recognized preemption by nonregulation, but only where the decision not to regulate on a federal level indicates that the states are also prohibited from regulating.[45] Adidas did not try to argue that federal laws prohibit all state regulation of kangaroos. Instead it argued that when the USFWS deregulated kangaroos, it did so to reward Australia for implementing better kangaroo management practices, and that the agency continues to refrain from such regulation in order to encourage Australia to continue those practices.[46] Thus, according to Adidas' argument, the California prohibition is an obstacle to federal policy because it impairs the federal government's ability to use the promise of access to United States markets to induce Australia to conserve kangaroos.[47]

The California Supreme Court rejected this argument. It found no "authoritative" policy against state regulation of kangaroos at the time of delisting, nor did it find that there is currently such a policy.[48] In sole support of its argument that there was a "clearly expressed" federal policy, Adidas cited *Defenders of Wildlife v. Watt*, a 1981 case challenging the rescission of the federal ban on kangaroo products.[49] Although the court did not specifically address this case, some points concerning it should be mentioned. First, the language Adidas quoted from the case is not as clearly expressive as Adidas might have preferred. In its brief, Adidas quoted the following: "The *potential* revocation of the [federal] import ban was an important aspect of the negotiations and was utilized by the United States as the *possible* reward for the imposition of more rigorous restrictions by the Australians."[50] This equivocal language provides, at best, weak support for Adidas' contention. Second, in a well-known administrative law case, *Chevron v. Natural Resources Defense Council*, the United States Supreme Court disapproved of the idea that a policy first announced by a court rather than by Congress through an agency or statute in interpreting that statute should be binding.[51] Adidas might have argued that

---

[45] *Id.* at 578.

[46] Answer Brief on the Merits, *supra* note 27, at 20-22.

[47] This will be referred to as the "Carrot and Stick" argument. The "stick" is the import ban, and the "carrot" is the promise to repeal it upon initiating satisfactory management practices. *See Viva!*, 162 P.3d at 578.

[48] *Id.* at 581.

[49] Answer Brief on the Merits, *supra* note 27, at 22.

[50] *Id.* (quoting Defenders of Wildlife, Inc. v. Watt, 12 ENVTL. L. REP. 20210, 1981 U.S. Dist. LEXIS 18548 (D.D.C. 1981)).

[51] Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864 (1984). In Chevron, the Court stated:

> Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. . . .

the court it quoted was only reiterating a policy that the USFWS had stated, but it still would have needed to support this contention. Moreover, even if this were true, it does not address how courts should apply the policy or whether it should be extended to state bans as well as the federal ban. Third, with respect to Adidas' argument that revocation of a federal ban was intended as an incentive, the language it quotes does not mention also prohibiting bans at the state level. Nor are state bans implicated by necessity. A promise to revoke a federal ban on importation is not necessarily a promise to ensure that kangaroo products may be freely sold across the United States. Furthermore, California's ban on kangaroo products predated the federal ban. USFWS was surely aware of California's prohibition when it revoked the federal prohibition, and surely would have said something about existing or potential state bans if it intended to develop a sweeping policy of ensuring that all state markets would be open to kangaroo products. Finally, the California Supreme Court looked to the rationale behind delisting (not just removing the ban on products) and found that USFWS decided to delist the species because they had recovered, not to reward Australia with a "carrot."[52] Kangaroos were simply no longer in danger of becoming extinct, and so the United States government no longer needed to take protective measures for their benefit. If Adidas' carrot and stick argument is correct, it seems strange that USFWS based the decision to deregulate kangaroos on ecological considerations (recovery of the species) distinct from the "carrot" Adidas argued for (to reward Australia for helping the species recover).[53]

Ultimately, the California Supreme Court did not conclude that a "carrot and stick" policy could never preempt state law. But for such a policy to have preemptive effect, two thresholds must be met. First, the policy must represent the purposes and objectives of Congress. Second, if the policy is expressed through an agency, that agency must be exerting its authority to make rules with the force of law.[54] While the California court did not discuss these thresholds in detail, it concluded that Adidas had not shown that there was, in fact, a carrot and stick policy with preemptive effect in place at the time.

> [O]ur labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product.

[52] *Viva!*, 162 P.3d at 581.

[53] *See id.* at 581-82.

[54] U.S. CONST. art. VI; *see also* New York v. FERC 535 U.S. 1, 18 (2002); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986). The Supremacy Clause refers to "the Laws of the United States" as controlling state law, and the two cases state that agency regulations may only preempt if they are passed pursuant to authority granted to the agency by Congress. Thus we can conclude that for an agency regulation to preempt state law the regulation must amount to a "Law of the United States" (and not, for example, simply be a non-binding internal agency guidance regulation) and Congress must have granted the agency the power to issue such regulations.

III. PREEMPTION IS LESS CLEAR WHEN "THE PURPOSES AND OBJECTIVES OF CONGRESS" ARE EXPRESSED THROUGH AGENCY DECISIONS

The California Supreme Court did not offer any specific test for demonstrating that a state law is impeding the purposes and objectives of Congress. Nor is it clear how we establish exactly what the purposes and objective of Congress are when Congress is speaking indirectly through an agency. Both factors are important in determining when obstacle preemption should take effect.

In dealing with obstacle preemption, the court considers whether the state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[55] Thus, it may be questioned whether a policy stated only by an agency is sufficient. Although it did not, Adidas might have argued that because Congress delegated the power to list and delist species to the agency, the agency's policy is congressional policy. Such an argument would not have been effective, however. It may be congressional policy to allow USFWS to decide whether kangaroos are endangered or not, but it would take a great stretch of the imagination to twist that congressional policy into one of encouraging kangaroo management practices in Australia by removing a ban on the import of kangaroo products. It is one thing to say that Congress may take actions which preempt state laws; it is another to suggest that the Secretary of the Interior may choose a policy that does the same. If a line is not drawn somewhere between congressional and executive policy, then any federal agency (of which there is no shortage) could, by setting a policy, preempt state law. For example, if the Department of Transportation stated that highway speed limits should be set at eighty miles per hour or higher to reduce road rage, under this analysis, states would not be able to set their highway speed limits any lower than eighty miles per hour, without facing obstacle preemption.

Many of the cases Adidas cited in support of a preemption finding are distinguishable, even if we take them just as Adidas presented them. In *Crosby*, the Supreme Court found the Massachusetts law was preempted by a congressional act that chose a slightly different approach to the exact same problem (sanctioning Burma).[56] In contrast, Congress has passed no law specifically seeking to reward (or sanction) Australia for its kangaroo management practices. In *American Insurance Association v. Garamendi*[57] the federal government had entered into an agreement (presumably a binding one) intended to address the problem of life insurance policies confiscated by the Nazis in World War II.[58] Adidas does not argue that the federal government has

---

[55] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 n.6 (2000).

[56] Answer Brief on the Merits, *supra* note 27, at 15; *Crosby*, 530 U.S. at 366.

[57] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

[58] Answer Brief on the Merits, *supra* note 27, at 16.

entered such an agreement with Australia regarding kangaroo management. *Fouke Co. v. Mandel*[59] dealt with a state law very similar to section 653(o) which was overturned because it conflicted with the Interim Convention on Conservation of North Pacific Fur Seals, to which the federal government was a party.[60] In each of these cases, there was a *currently existing* federal policy concerning the subject matter manifested in a congressional act or an intergovernmental agreement. In contrast to these quite obvious and authoritative implementations of federal policy, Adidas did not cite a single current federal law or international agreement as evidence of the policy it claimed. Instead it offered a twenty-five year old court decision suggesting that USFWS had lifted the federal ban on kangaroo products as a reward for improved Australian kangaroo management practices. Adidas simply did not or could not establish that kangaroo conservation is a matter of ongoing congressional policy that California may not obstruct.

IV. FEDERAL AGENCIES HAVE THE POWER TO PREEMPT STATE LAW, BUT IN RELATIVELY LIMITED CIRCUMSTANCES

When Congress vests in an agency the power to make rules with the force of law, those rules may preempt state legislation in the same manner as laws issued by Congress.[61] Like Congress, an agency's authority to issue such rules is limited by the scope of power granted to it. The Supreme Court of the United States has said that a grant of authority to make rules with the force of law can generally be shown when Congress has provided the agency with "relatively formal" administrative procedures.[62] In the administrative world, this generally means "notice and comment" type rule-making.[63] The "notice" in notice and comment rulemaking must provide relevant information that adequately ventilates the issues so that the comments can address those issues properly.[64]

A logical assumption is that if the effect of rescinding the ban on kangaroo products was going to be that no states would be permitted to ban kangaroo products, this should have been addressed in the notice and comment procedure. If this effect was not addressed, then it cannot be a proper outcome of the rule because the notice and comment procedures used to promulgate the rule would have been inadequate. As noted above, Adidas' only support for its argument concerning the effect of repealing the federal ban on kangaroo products was an

---

[59] Fouke Co. v. Mandel, 386 F. Supp. 1341 (D. Md. 1974).

[60] Answer Brief on the Merits, *supra* note 27, at 19.

[61] New York v. FERC, 535 U.S. 1, 18 (2002); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986).

[62] United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[63] *See id.*

[64] *See* Natural Res. Def. Council v. EPA, 279 F.3d 1180 (9th Cir. 2002); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977).

earlier court decision. Adidas did not offer any evidence that the USFWS contemplated this effect in the notice and comment process. We can safely assume that if the agency had mentioned such an effect in a notice on the proposed repeal of the ban, Adidas would have mentioned this in its briefs. From all of these factors, we can conclude that the repeal of the ban is not a "rule with the force of law" or, alternatively, that if it is such a rule, it cannot have the effect that Adidas claims because the rulemaking procedures were arguably inadequate to support such an effect. It is interesting to note, however, that even if the rule could have preemptive effect, Adidas is not necessarily right that the rule should preempt section 653(o). It is possible for Congress to intend that there be no federal ban on a product, while also intending that states be left to decide for themselves whether or not to impose such a ban.

V. THE ABSENCE OF A FEDERAL BAN DOES NOT NECESSARILY MEAN STATES ARE PRECLUDED FROM ENACTING BANS OF THEIR OWN

Notwithstanding the above, one can accept the position that rescinding the ban on kangaroo products was intended to serve as a "carrot" to reward Australia's management practices without concluding that this prevents all states from imposing such a ban. Federal regulations impose a default ban on imports of products made from any endangered species.[65] USFWS can override this default ban by making a "special rule" that creates certain exemptions for a particular species.[66] That agency passed such a rule allowing imports after it was satisfied that Australia had adequate management plans in place.[67] Given this condition, Adidas's carrot and stick argument appears perfectly reasonable. USFWS would allow imports as a concession under the ESA when Australia improved the way it managed kangaroo populations. But this special rule was explicitly rescinded when the kangaroo species were delisted.[68] Thus, even if the rule expressed a "carrot and stick" policy that should have preempted section 653(o), that rule is no longer in effect.[69] Given the cooperative nature of the ESA, and because California's ban on kangaroo products predated the federal listing of the species, only the special rule could have preempted 653(o).[70] If we accept this contention, then 653(o) is *not* preempted today because the special

---

[65] 50 C.F.R. §§ 17.21(b), 17.31(a) (2007).

[66] *See id.* § 17.3(c).

[67] 60 Fed. Reg. 12,888 (Mar. 9, 1995).

[68] 60 Fed. Reg. 12,904 (Mar. 9, 1995).

[69] Or, as the California Supreme Court put it: because kangaroos are no longer listed and because the special rule was rescinded, "so long as kangaroo populations remain healthy, Fish and Wildlife possesses neither carrots nor sticks . . . ." *Viva!*, 162 P.3d at 581.

[70] In the California Supreme Court, Adidas did not argue that the ESA would preempt 653(o) without the existence of a "carrot and stick" policy. *See generally* Answer Brief on the Merits, *supra* note 27.

rule was rescinded in 1995 and nothing has taken its place. As a result, kangaroo products are simply no longer banned at the federal level and there is no effect on the states.

Moreover, lack of a federal ban is no guarantee to producers that every market in the United States will accept the producers' goods. On the contrary, the absence of such a ban merely indicates that the federal government is not interested in excluding kangaroo products. This is not the same as mandating that all states allow producers to sell such products. If it were, no state would be able to ban a product that the federal government once banned and later unbanned. This surely cannot be correct. If Congress removed all federal restrictions on gun ownership, would we conclude that no states could enact and enforce their own gun restrictions? If Congress removed heroin from federal drug schedules, would we conclude that states were powerless to regulate heroin within their borders? These examples may be extreme in that guns and heroin are arguably more of a threat to public welfare than kangaroo products, and, accordingly, there is an extremely compelling interest in permitting states to regulate such products. But this public welfare argument is more suited to a Commerce Clause challenge than to a preemption challenge.[71]

VI. FUTURE IMPLICATIONS

Kangaroos are not the only species covered in California Penal Code section 653(o). The statute names other species as well. In 2010, section 653(o) will be amended to make it unlawful to import, possess with intent to sell, or sell parts and products of alligators.[72] Currently, American producers enjoy a reasonably healthy market for alligator products in the United States.[73] It would not be at all surprising if producers of alligator products challenge this law under preemption or the Commerce Clause.

Immediately apparent differences in federal regulations relating to alligators (which the ESA protects) indicate that a preemption challenge to the California ban on alligator products may succeed where the challenge to the ban on kangaroo products failed. The special rule allowing kangaroo imports under the ESA is no longer in effect, but alligators have their own special rule, and it expressly permits what the new section 653(o) purports to ban.[74] For example, section (2)(ii) of the special rule states that "[a]ny person . may deliver,

---

[71] Generally, one of the things a state must show to overcome a challenge under the Commerce Clause is that it has a compelling interest in the regulation that is being challenged. *See* Maine v. Taylor, 477 U.S. 131 (1986).

[72] CAL. PENAL CODE § 653(o) (West 2007).

[73] One online retailer claims to sell 150,000 pounds of alligator meat a year. All American Gator Products, http://www.allamericangator.com/meat/gator_meat.htm (last visited March 25, 2008).

[74] 50 C.F.R. § 17.42(a) (2007).

receive, carry, transport, ship, sell, offer to sell, purchase, or offer to purchase such alligator in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity in accordance with the laws and regulations of the State of taking . . . ." This rule is clear. Any person may do the things listed in the section, and under preemption doctrines, states would not be able to prevent the conduct. This section, however, is subject to certain conditions that temper its effect. Alligators can only be sold or otherwise transferred if doing so is in accordance with the laws and regulations of the State in which the sale or transfer occurs.[75] Thus, the sale and transfer of alligator products in California still must comply with California law. Because California will ban the sale of alligator products in 2010, the ban on sales should survive preemption review. The ban on importation and possession, however, may not. "Carrying" is expressly permitted in the special rule, without limitations like the one for sale and transfer. If "carrying" in the special rule is analogous to "possession," it is reasonable to expect that at least part of the new amendment to section 653(o) will be struck down if a preemption challenge is raised. It should be noted, however, that section 653(o) also contains a severance clause. Thus, even if part of it is found to be preempted by federal law, the other parts will not be affected.

CONCLUSION

The Endangered Species Act is expressly cooperative rather than expressly preemptive. It is likely that the special rule permitting imports of kangaroo products upon implementation of satisfactory management programs in Australia was only a temporary concession under the ESA and did not purport to limit the ability of the states to ban imports. Even if the "carrot and stick" argument was accurate at one time, neither the carrot nor the stick is currently in existence because the species is no longer listed and the special rule no longer exists. If there had been a clearly existing "carrot" Adidas probably would have had more success challenging section 653(o).

In addition, one should bear in mind that this case only dealt with obstacle preemption. There is no guarantee that laws similar to section 653(o) will survive preemption review because preemption review depends in large part on what the federal law says. Today, federal law is not concerned with kangaroos, but still regulates other species - each of which may have its own special rules which could affect what states are permitted to do within their own borders.

---

[75] *Id.* § 17.42(a)(2)(ii)(B) (2007).

***