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December 13, 2018

VIA FAX and EMAIL
Thomas Montgomery
Department Head
Office of County Counsel, County of San Diego
1600 Pacific Highway, Room 355
San Diego, CA 92101
FAX: (619) 531-6005

Re: San Diego County Ordinance Section 33.104.1
Prohibiting Public Recreational Shooting on Federal BLM Lands
Prelitigation Demand

Dear Mr. Montgomery:

On November 13, 2018, the County of San Diego ("County") enacted an ordinance, adding Section 33.104.1 ("Ordinance"), prohibiting recreational shooting by the public on federal BLM lands where it is legally permitted by the federal government. The Ordinance attempts to criminalize lawful activity for the use and enjoyment of federal public lands. On behalf of our client, the California Rifle & Pistol Association ("CRPA"), Incorporated, we previously identified the legal implications and policy reasons why such an ordinance was impermissible and subject to challenge. (See correspondence http://michellawyers.com/wp-content/uploads/2018/12/Combined-Letters-re-BLM.pdf as well as testimony provided at the November 13, 2018 Board of Supervisors ("Supervisors") meeting http://sdcounty.granicus.com/MediaPlayer.php?view_id=9&clip_id=2106).

Irrespective of policy issues weighing against the passage of the Ordinance, the Ordinance falls under the Supremacy Clause of the United States Constitution and is therefore invalid. The County ignored precedent in this area and was advised by county counsel that the Ordinance was constitutional. Indeed, the Department of the Interior has now advised the County that the federal government does not approve of the Ordinance, nor is it supportive of the County dictating how federal land are utilized.

Simply, the Ordinance is preempted by federal law and the County has acted outside of the scope of its authority. Accordingly, if the Ordinance is not repealed immediately, we intend to file a lawsuit on behalf of the interested parties seeking declaratory relief invalidating the Ordinance and

enjoining its enforcement. If successful, we will seek attorney's fees and costs of litigation in invalidating the Ordinance.

Actions of the Board of Supervisors are Ultra Vires

While there is some precedent for giving states limited latitude in regulating environmental conditions on federal land, states and local governments ***do not*** have the right to determine the acceptable uses on federal lands. (*Norton v. SUWA*, 542 U.S. 55 (2004) (ruling that environmentalist could not seek to regulate off-roading on BLM lands, because Congress had not directed that action). Indeed, counties and local municipalities ***cannot*** prohibit certain uses on federal lands (see *Elliot v. Oregon International Mining Co*., (Or. App. 1982) 654 P.2d 663; *Ventura v. Gulf Oil Corp*., (9th Cir. 1979) 601 F.2d 1080; *Brubaker v. Board of County Commissioners of El Paso County*, (Colo. 1982) 652 P.2d 1050). Nor can a County regulate federal land use in such a way that is inconsistent with federal law. (*City and Cty. of Denver v. Bergland* (D. Colo. 1981) 517 F.Supp.155).

The County has provided no legal authority that permits state or local government the assumption of administration or primacy for determining recreational uses on federal lands. In past administrative hearings, BLM has admitted that the Secretary of the Interior may not adopt the kind of approach contemplated by the County and BLM's MOU, by ceding BLM's own authority to local government. (See Mining Claims Under the General Mining Laws; Surface Management, 65 FR 69998-01, 2000 WL 1726390).

If the Supervisors were concerned about the threat of wildfires around the proposed BLM lands closure areas, the County already has an Ordinance (Section 33.101.5) entitled "No Shooting—Periods of High Fire Hazard." The current ordinance addresses potential fire threats allegedly involving recreational shooting during extreme and high-risk conditions, as declared by the California Department of Forestry. The BLM also has federal authority to temporarily close lands to certain activities if there are concerns such as a high-risk fire danger.

Federal Purpose and Preemption

The Supremacy Clause of the United States Constitution states that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const. art VI, cl 2). State and local agencies are also prohibited from regulating land owned or leased by federal government under the Property Clause, which provides that Congress has the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (U.S. Const. art IV section 3) Consequently, federal statutes and regulations—as well as the policies and objectives that they encompass—preempt conflicting state laws. (See e.g., *Hillsborough County v. Automated Med Labs* (1985) 471 U.S. 707, 712) (The Supremacy Clause invalidates local laws that "interfere with or are contrary to federal law.") (quoting *Gibbons v. Ogden*, 9 Wheat., 1, 211, 6 L.Ed. 23 (1924) (Marshall, C.J.)).

The Supreme Court has found preemption "where . . . state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79 (internal quotations and citations omitted)). This is true whether the state or local law is an ordinance, policy, or other action. (See, e.g., *Toll v. Moreno*, (1982) 458 U.S. 1, 17 (state university's policy violated Supremacy Clause); *Bernhardt v. Los Angeles County*, (9th Cir. 2003) 339 F.3d 920, 926 (suggesting County policy could violate the Supremacy Clause).

The Property Clause provides Congress with plenary power over federal public lands. (U.S. Const. art. IV, § 3, cl. 2). Accordingly, when Congress exercises its authority over federal public lands, federal statutes and regulations, orders, and decisions issued pursuant to those statutes and regulations—and the policies and objectives encompassed within those statutes and regulations—preempt any conflicting state or local laws, regulations, policies, or objectives. (See, e.g., *Wyoming v. United States* (10th Cir. 2002) 279 F.3d 1214, 1234) (federal management and regulation of federal wildlife refuges preempts state management and regulation . . . to the extent the two actually conflict").

For the foregoing reasons, the federal government need not comply with zoning regulations on land owned or leased by the federal government. As applied here, because recreational shooting is a federal function, limitations by a county would burden or interfere with a lawful federal function.

Employing its power under the Property Clause, Congress enacted the Federal Land and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 et seq., delegating to the BLM the specific task of managing the public lands within its jurisdiction, including the lands upon what are known as Donohue Flats and Pink Gate. Through the powers granted by this enactment, BLM has promulgated regulations and issued RMPs to govern the management and use of these public lands within their jurisdiction, including recreational shooting privileges.

BLM land has stated federal purposes. One of the most significant purposes on BLM land is recreational shooting. The County attempts to remove this federal purpose under the guise of "fire protection." It is unprecedented for a county to attempt to apply its zoning authority to federal lands. Congress sets the authorized use of federal lands and the BLM implements that authorized purpose. "The states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands. (See *Ventura County v. Gulf Oil Corp*., 601 F.2d 1080 (1979).) The federal government authorized a specific use of federal lands and the County cannot prohibit that use. Indeed, federal preemption prohibits local land use regulations when applied to the federal government. (*U.S. v. Gardner,*107 F.3d 1314 (9th Cir 1997).)

Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. (*Klepp v. New Mexico*, (1976) 426 U.S. 529, 543) (See also *Wyoming v. United States*, (10th. Cir. 2002) 279 F.3d 1214, 1227).

Because the Ordinance is clearly preempted by federal law, it is therefore unenforceable. Our clients are therefore entitled to seek a declaration that the Ordinance is void and an order than it be stricken from the County Municipal Code.

The City is Liable for Attorney's Fees and Costs of Suit Should CRPA be Forced to File Suit to Have the Ordinance Declared Null and Void

Provided CRPA is forced to seek a judicial declaration that the Ordinance is null and void and stricken from the Municipal Code, our clients will be entitled to seek and recover their reasonable attorney's fees and cost of the suit. (See Code Civ. Proc., § 1021.5, and see *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 220-221 [where writ relief confers a significant benefit on a large class of persons, an award of attorney's fees is appropriate].) In light of the indisputable application of the preemption doctrine, and the lack of support from the federal government for this Ordinance, we trust that legal action will not be required, and the County will act swiftly to fully repeal the Ordinance.

Please let us know within 30 days of the date of this letter what steps the County is taking to repeal the Ordinance. If we do not learn within that time period that significant, demonstrable steps are being taken to repeal the Ordinance, we intend to file suit.

Sincerely,
Michel & Associates, P.C.

Tiffany D. Cheuvront

TDC/cc

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