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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,) Case No. CR-07-5656-JKA-3
)
Plaintiff,)
)
v.) **MEMORANDUM OF AUTHORITIES IN**
) **SUPPORT OF DEFENDANT’S MOTION**
WAYNE JOHNSON, et al.,) **TO DISMISS INDICTMENT COUNT**
) **TWO**
)
Defendants.)

INTRODUCTION

Defendant Andrew Noel is charged by indictment, *inter alia*, with violation of the Marine Mammal Protection Act, 16 U.S.C. 1372 (a) (2) and 1375 (b) arising from his attempt to harvest a gray whale near Neah Bay, Washington where the Strait of Juan de Fuca joins the Pacific Ocean.

Defendant has moved the court to dismiss Count Two of the Indictment (Indictment, pg. 4, ¶¶ 12, 13) upon grounds that, as applied to defendant, his indictment for violation of the Marine Mammal Protection infringes upon his fundamental Due Process rights since it treats him differently from similarly situated Native Alaskan Indians for no good reason.

For the reasons stated herein, Count Two of the Indictment, as applied to the defendant, achieves a result which violates fundamental Constitutional due process principles requiring similarly situated persons to be treated alike.

STATEMENT OF FACTS

Defendant is an enrolled member of the Makah Nation which historically and traditionally relied upon the harvest of marine mammals, to meet their subsistence needs. *See, e.g., Moore v. United States*, 157 F. 2d 760, 763-64 (9th Cir. 1946):

The evidence shows that they brought their canoes and the carcasses of the seals to the ocean beach of the sandspit. Thereafter the seals were skinned and their hides treated and thereafter sold to the fur traders. In one season their catch and that of the adjoining Makah Tribe was valued at \$20,000.

As this Court noted in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*, 520 F. 2d 676 (1975), *cert. denied*, 423 U.S. 1086 (1976):

The Makah Indians...were primarily a seafaring people who spent their lives either on the water or close to the shore. Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, *and hunted for whale and seal*....The Makah imported their basic needs such as housing materials and ocean-going canoes used for sea mammal hunting and ocean fishing because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale.

384 F. Supp. at 363, Finding of Fact No. 61 (emphasis added). In the 1860 *Annual Report* of the U.S. Superintendent of Indian Affairs for Washington Territory, Indian Agent M.T. Simmons reported on the habits of the Makah people:

Living as they do on the straits, their characteristic traits, their habits and pursuits are the same as their neighbors, the Clallams. They are bold and experienced pursuers of the whale, and carry on a considerable trade in oil with Victoria and Port Townsend.

Annual Report of the Commissioner of Indian Affairs (1860), pg. 195 (annual report for Washington Territory, July 1, 1860).(Exhibit A).¹

Washington Territory U.S. Superintendent T.J. McKenney reported in 1869 that:

¹The various *Annual Reports* referenced herein are designated as Exhibit A and filed herewith.

1 The lands of the [Makah] reservation are not favorable for farming, and
2 the climate is also uncongenial; The Indians obtain their subsistence
3 chiefly from the sea. Whale and seal are captured in quantities to insure
4 them always against want[.]

5 *Annual Report of the Commissioner of Indian Affairs* (1869), pg. 131 (Report of Wash. Terr.
6 Supt., Aug. 14, 1869). A new Indian Agent was assigned to the Makah Reservation in 1872. He
7 recommended that the Government purchase a schooner for the Makahs rather than continuing to
8 send him useless farming implements. E.M. Gibson reported in his 1873 annual report that:

9 Last summer they killed nine whales, some of them very large ones. This
10 summer they have as yet killed only two. If they had a good schooner it
11 would be of great advantage to them in sealing and whaling, as at they
12 could put their canoes, provisions, and water on board the schooner and go
13 out to sea among the seals and whales, and, leaving the schooner, they, in
14 their canoes, could engage in sealing or whaling all day, and return to the
15 schooner at night to sleep and rest, and renew their supply of water and
16 food; and in case of a storm the schooner would be a safe refuge for them.
17 With a schooner they would be able to remain at sea for many days, or
18 even weeks, at a time, in almost perfect safety, and would undoubtedly be
19 far more successful in their perilous pursuits than they are. I would
20 earnestly recommend an appropriation of \$5,000 for the purpose of
21 procuring a schooner for the use of this tribe.

22 *Annual Report of the Commissioner of Indian Affairs* (1873), pg. 308 (Sept. 1, 1873).

23 In 1972, Congress enacted the Marine Mammal Protection Act, 16 U.S.C. 1361, *et seq.*
24 The Act prohibits the “taking” of marine mammals except pursuant to regulations prescribed by
25 the Secretary of Commerce. The taking of marine mammals by Native Alaskans for subsistence
purposes is exempt from the prohibitions of the Act.

After years of frustration, the defendant and the codefendants in this case, after
consultation with esteemed elders and leaders within their tribe, undertook to harvest a gray
whale to meet the tribe’s subsistence needs. For their conduct, defendants were indicted for the
charges stated in the Indictment.

1 ARGUMENT

2 **1. Application of the Marine Mammal Protection Act to**
3 **the defendant's conduct violates his Constitutional right**
4 **to Due Process by treating similarly situated persons**
5 **differently for no compelling reason that furthers legitimate**
6 **purposes of the MMPA.**

7 Application of the Marine Mammal Protection to the facts of this case violates the
8 defendant's right of due process. Due Process (and the companion principle of Equal Protection)
9 requires that similarly situated persons be treated alike unless the Government has either a
10 rational basis or a compelling governmental interest for making the distinction that furthers the
11 statute's legitimate purpose, and the differential treatment resulted from the least restrictive
12 means of accomplishing that purpose. Where application of legislation impinges upon a
13 fundamental right, the scrutiny is even stricter.

14 Defendant Andrew Noel is a Makah Indian whose tribe has a culture and tradition of
15 harvesting marine mammals for subsistence purposes. These Makah traditions are well
16 documented. In 1853, civilian surveyor George Gibbs was commissioned by the U.S. Surveyor
17 General to explore prospective routes for the Northern Pacific Railroad through the Pacific
18 Northwest. In connection with his exploration of routes, he was to prepare a report regarding the
19 Indian inhabitants of Washington Territory. Gibbs reported among other things that "the
20 Makahs, or Classets, inhabit the coast in the neighborhood of Cape Flattery" and that "they
21 venture well out to sea in their canoes, and even attack and kill the whale, using for this harpoons
22 pointed with shell, and attached by a sinew line to seal-skin floats." G. Gibbs, *Indian Tribes of*
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1 *the Territory of Washington* (report to Captain George McClellan, N.P. Railroad Exploration)
2 (March 4, 1854) (Exhibit B).

3 Perhaps the government employee most familiar with the Makah was James G. Swan,
4 who was a federal employy on the Makah reservation from 1862 to 1866. Contemporaneous
5 with his duties, agent Swan was commissioned by the Smithsonian Institute to document the first
6 ethnography of the Makah Indians. It was published in 1868 (Exhibit C). Regarding their
7 stature, Swan noted of the Makah in 1864 that:

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9 They do excel, however, in the management of canoes, and are
10 more venturesome, hardy, and ardent in their pursuit of whales,
11 and in going long distances from the land for fish, than any of the
12 neighboring tribes. *They are, in fact, to the Indian population what
the inhabitants of Nantucket are to the people of the Atlantic coast,
being the most expert and successful in the whale fishery of all the
coast tribes.*

13 James G. Swan, *The Indians of Cape Flattery*, pg. 4 (1868) (emphasis added). The integral ties
14 of the Makah to the whale are demonstrated by Swan's description of a wedding trade he
15 witnessed during his tenure as agent:

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17 One of these, which I have witnessed, displayed a canoe
borne on the shoulders of eight men, and containing three persons,
18 one in the bow of the craft in the act of throwing a whaling
harpoon at the door of a lodge; one in the centre about to cast a
19 seal-skin buoy; which was attached to the harpoon; and one in the
stern with a paddle as if steering. The ceremonies in this instance
20 represented the manner of taking a whale.

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22 The procession formed on the beach a short distance from
the lodge, and in front of it an Indian, dressed in a blanket which
concealed his head, crept on all fours, occasionally raising his body
to imitate a whale when blowing.

23 Id., pg. 11. Writing of the sports and games he observed the Makahs play, Swan said that a
24 favorite "pastime of the boys is to imitate the killing of a whale," id., pg. 14, using kelp plant.
25 They would keep up this game for hours. Id., pg. 15. Agent Swan ranked, in terms of

1 importance as foods to the Makahs, the whale as first and halibut, second. After harvesting a
2 whale, the portions of the whale deemed choicest were distributed according to the rank of the
3 recipient. At page 39 of his ethnography, Swan describes in detail the tools and implements used
4 by the Makah to harvest whale. Id.

5 Perhaps the most authoritative research on the practices of Makah whalers was the work
6 written by T.T. Waterman, *The Whaling Equipment of Makah Indians*, published in 1920.
7 Waterman states as follows:
8

9 The hunting of whale has for the white observer two distinct aspects.
10 From our point of view the matter of greatest concern would be the
11 arrangement of the tackle within the boat, and the methods of approaching
12 and striking the quarry. From the Indian standpoint, however, the really
13 important matter is the proper observance before and during the hunt of
14 various ceremonial performances for procuring help from the spirits. The
15 Indians, to be sure, see with the very greatest care to all practical matters
16 connected with whaling expeditions, but they seem to look upon the
17 religious performances as much more essential to success. Secrecy in the
18 religious preparations is very commonly observed.

19 Waterman, *op cit.*, pg. 38 (Exhibit D). According to Waterman, the California grey whale,
20 *rachianectes glaucus*, was the kind of whale most commonly taken by the Makah. Id., pg. 42.

21 Only certain select persons to whom knowledge has been passed on may become
22 whalers. Prior to undertaking a whale hunt, a Makah must prepare himself. It is essential that
23 there be whale meat at ceremonial events and funerals and, upon successful completion of a hunt
24 the meat is to be distributed in a particular fashion, with the first meat distributed to tribal elders.

25 The Marine Mammal Protection Act, which defendant Noel is charged by Indictment
with having violated, provides, *inter alia*, that:

(b) Exemptions for Alaskan Natives.

...[T]he provisions of this chapter shall not apply with respect to
the taking of any marine mammal by any Indian, Aleut, or Eskimo

1 who resides in Alaska and who dwells on the coast of the North
2 Pacific Ocean or the Arctic Ocean if such taking—

3 (1) is for subsistence purposes[.]

4 16 U.S.C. 1371 (b) (1). Presumably, the purpose of the Marine Mammal Protection Act is
5 conservation of marine mammals. 16 U.S.C. 1361 (1), (2). However, the Act provides an
6 *exemption* for Indians residing in Alaska hunting for subsistence purposes while a Makah Indian
7 similarly hunting for subsistence purposes is required to obtain a license or permit through a
8 complicated governmental process taking years to complete. *See* 16 U.S.C. 1371.

9 Due process is violated when the Government *grants* a particular class of individuals the
10 right to engage in a certain activity while *denying* other similarly situated individuals the same
11 right. It is difficult to fathom how allowing an Alaskan Indian to hunt migratory gray whales for
12 subsistence purposes while prohibiting a Makah Indian off the coast of Washington from
13 engaging in the same activity on the same population of whales, furthers the purpose of the
14 statute. Gray whales, after all, migrate off the Pacific Coast of the United States from the Baja
15 peninsula to Alaska and are documented to be of no less importance in the culture, tradition and
16 religion of the Makah than they are to Alaskan Indians. What compelling, or even rational,
17 reason exists which furthers the purposes of the MMPA for excluding the Makah—the People Of
18 The Whale—from harvesting a whale for subsistence purposes pursuant to their fundamental
19 rights while allowing a similarly situated Alaskan Indian further up the coast to do so? The
20 resource is sacred to both, yet the statutory scheme of the MMPA allocates a 100% right to one
21 group of Indians to harvest gray whales and 0% to another. This violates fundamental principles
22 of due process.
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24 In *United States v. Nuesca and Kaneholani*, 945 F. 2d 254 (9th Cir. 1991), native
25 Hawaiian defendants made a similar, unsuccessful, argument against their prosecution under the

1 Endangered Species Act. There, the defendants claimed that the exception in section 1539 of the
2 ESA, exempting one aboriginal group, Native Alaskans, while withholding the same immunity
3 from a similarly situated group, violated their constitutional right to equal protection. 945 F. 2d
4 at 257. Applying the “rational basis” test, this Circuit found such claim groundless. Native
5 Hawaiians and Native Alaskans were held not to be “similarly situated” because:

6 Neither Nuesca nor Kaneholani has shown that native Hawaiians,
7 as a group, depend[ed] upon the hunting of endangered and
8 threatened species for subsistence.

9 945 F. 2d at 257. As the appellate panel stated:

10 [T]he district correctly concluded in both cases that *the differential*
11 *treatment between Alaskan and Hawaiian natives is justified by the*
12 *great importance of subsistence hunting to the lives and cultures of*
some native Alaskans, an importance not established with respect
to any significant number of native Hawaiians.

13 Id., at 258 (emphasis added). Their argument that they were similar situated to Native Alaskans
14 was not persuasive, however, since the Kaneholani defendants failed to demonstrate that the
15 taking of these animals represented a traditional aspect of native Hawaiian life:

16 Neither Nuesca nor Kaneholani can...cite evidence that hunting
17 turtles or seals is a traditional aspect of native Hawaiian life.
18 Before the magistrate, Kaneholani could identify only one instance
19 of a seal eaten by natives, and that episode had no relevant time
20 frame.

21 945 F. 2d at 257. The panel applied the “rational basis” test to the defendants and affirmed their
22 convictions.

23 In this case, however, the outcome should be different based upon numerous factors
24 mentioned in Kaneholani: (1) Here, the Makah defendant can also unquestionably demonstrate
25 that the hunting of marine mammals is “a traditional aspect” of Makah life; and, (2) here, the

1 Makah defendant correctly points out that the species he was harvesting was not a threatened or
2 endangered species.²

3 In Kaneholani, the “rational basis” test was applied. However, the appropriate test
4 appears to be the “strict scrutiny” test because the governmental action impinges upon rights
5 properly characterized as fundamental. U.S. Const., Art. VI, Cl. 3.

6 Applying the Strict Scrutiny test, legislation such as the Marine Mammal Protection Act
7 may constitutionally be applied to a defendant only if it is “narrowly tailored” to achieve a
8 “compelling governmental interest” and it is the “least restrictive alternative” to accomplishing
9 the government’s legitimate purpose. The purpose of the Marine Mammal Protection Act is to
10 protect and conserve threatened or declining species of marine animals. This is a legitimate
11 governmental purpose. However, given that the Gray Whale is *not* a threatened or endangered
12 species and that the International Whaling Commission by an international agreement, to which
13 the U.S. is a signatory, authorized the harvest of some 146 gray whales in this region with 4
14 specific authorizations for the Makah, it is questionable whether application of the Act to the
15 defendant serves a “compelling governmental interest.” The purposes of the MMPA are
16 conservation in nature. It is difficult to understand how a compelling governmental interest is
17 furthered by applying the Act to criminally *prohibit* the harvest of a gray whale by a Makah
18 defendant for subsistence needs pursuant to a constitutionally protected treaty right based
19 squarely on demonstrated Makah cultural traditions while the government *exempts* harvest of
20 those *same* whales by an Alaskan Indian.
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23 Clearly, given that the gray whale by all estimates has increased to over 26,000 in the
24 North Pacific region, there are less restrictive means to accomplish the government’s laudable
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² The gray whale was officially removed from the threatened or endangered species list in 1994.

1 conservation goals than applying an absolute exemption for an Alaskan Indian and an absolute
2 ban for a Makah Indian. The government, for example through the International Whaling
3 Convention process, could seek to restrict the number of gray whale harvested by *other* groups.
4 The government could also have subjected *both* groups to a permit system. The government
5 could also have placed overall limits on both groups as to the *number* of whales each could
6 harvest. These, or other measures less restrictive than a ban on Makah traditional whale harvests
7 would have fulfilled the governmental interests without the need to treat Makah Indians
8 differently from similarly situated Alaskan Indians.
9

10 CONCLUSION

11 For the foregoing reasons, Count Two of the Indictment should be dismissed.

12 DATED this day of December, 2007

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