Magistrate Judge J. Kelley Arnold

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. FRANKIE GONZALES, et al. Defendants.	NO. CR07-5656-JKA-03 GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT NOEL'S MOTION TO DISMISS COUNT TWO [Oral Argument: January 29, 2008]

The United States of America, by and through Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and James D. Oesterle, Assistant United States Attorney for said District, submits this memorandum opposing Defendant Andrew Noel's motion to dismiss count two of the indictment charging him and his four co-defendants with "taking" a gray whale in violation of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1371 et seq.

A. Relevant Background

The government alleges that on September 8, 2007, Defendant Noel and his co-defendants hunted a gray whale in coastal waters of the United States near Neah Bay in the northwest corner of Washington State. The defendants located and pursued a gray whale, struck it with harpoons, shot it numerous times with high-powered rifles, and tethered buoys to the whale to slow its progress and prevent its escape. The whale ultimately died several hours after being struck and shot. Neither the defendants, nor the

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

Makah Tribe of which they were all members, had obtained a waiver of the MMPA prohibition on taking marine mammals.

The Marine Mammal Protection Act is the primary federal statute intended to protect marine mammal species and their habitats in an effort to maintain sustainable populations. 16 U.S.C. § 1361. It imposes a complete moratorium on the taking of any marine mammal, including the gray whale (*Eschrictius robustus*). 16 U.S.C. § 1371(a). According to the Act, "[t]he term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). The Act prescribes both civil and criminal penalties. Criminal penalties apply to any person who "knowingly" violates any provision of the Act. 16 U.S.C. 1375(b).

The Act includes some specific exceptions to the moratorium. Sections 1371(a)(1) through (a)(4) of the Act grant to the Secretary of the Interior broad powers to allow the taking of marine mammals for certain enumerated purposes.[1] The exception which is the subject of this motion is found at 16 U.S.C. § 1371(b), and provides as follows:

> Exemptions for Alaskan natives
>
> Except as provided in [16 U.S.C. § 1379], the provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking--
>
> (1) is for subsistence purposes; or
>
> (2) is done for purposes of creating and selling authentic native articles of handicraft and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching,

[1] The MMPA grants to the Secretary broad regulatory and enforcement powers over the MMPA's implementation. Under 16 U.S.C. § 1373, the Secretary is authorized to prescribe "such regulations with respect to the taking and importing of animals from each species of marine mammal . . . as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies of the MMPA

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

sewing, lacing, beading, drawing, and painting; and

(3) in each case, is not accomplished in a wasteful manner.

> Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. ...

The above cited exemption allows Alaskan Natives to take marine mammals without regard to the moratorium, provided the (1) species is not depleted, (2) takings are not wasteful, and (3) takings are conducted only for subsistence purposes or for creating and selling authentic native articles of handicraft and clothing. Citing the MMPA exemption for Alaskan Natives, Defendant Noel argues that exempting one aboriginal group (Alaskan Natives), while denying an exemption for another (Makah Tribe), violates his constitutional right to equal protection.[2]

B. Equal Protection Analysis

The initial inquiry this court must address is determining the level of scrutiny to apply. Without citation or analysis, Defendant Noel concludes strict scrutiny must be applied. There is no support for this conclusion.

Statutes alleged to violate the constitutional guarantee of equal protection are generally subject to one of three levels of judicial scrutiny: strict scrutiny, intermediate scrutiny, or rational basis review. *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004). Strict scrutiny is appropriate when the classification is made on "suspect" grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. *Hoffman v.*

---

[2] The Inupiat and Siberian Yupik Eskimos living in the coastal villages in northern and western Alaska hunt the bowhead whale (Balaena mysticetus) for subsistence purposes. 71 Fed. Reg. 61460 (October 18, 2006). Bowhead whale subsistence harvests are authorized by NOAA Fisheries annually under the authority of the International Convention for the Regulation of Whaling. The actual quota is determined by the International Whaling Commission following review of the status of the western Arctic (Bering-Chukchi-Beaufort) population of bowhead whale and other scientific information. NOAA Fisheries co-manages the bowhead quota with the Alaska Eskimo Whaling Commission for the subsistence harvest.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

United States, 767 F.2d 1431, 1434-35 (9th cir. 1985). Intermediate scrutiny is applied when laws discriminate based on certain other suspect classifications, such as gender. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24, 73 L. Ed 2d 1090, 102 S. Ct. 3331 (1982). Finally, the rational basis test is applied to determine the legitimacy of a classification where no suspect class is involved and no fundamental right is burdened. *Olagues v. Russoneillo*, 770 F.2d 791, 802 (9th Cir. 1985).

The Ninth Circuit has applied the rational basis review standard in a directly analogous case. The court in *United States v. Nuesca*, 945 F.2d 254 (9th Cir. 1991) considered whether a similar challenge to application of an Alaskan Native exemption under the Endangered Species Act was subject to strict scrutiny or rational basis review. Concluding that the classification was not based on race, but rather food supply and culture, the court applied the rational basis review standard. The same result should be reached in this case. The classification in this case is based on current subsistence needs and the absence of a specific treaty right for Alaskan Natives to practice traditional subsistence hunting.[3] It is not based on any "suspect" grounds.

Rational basis review is highly deferential. *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000). Classifications not involving fundamental rights or suspect classes must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.." *Heller v. Doe*, 509 U.S. 312, 319-20, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). When defending a statute under rational basis review, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification"; rather, "the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." *Id*. at 320 (internal quotations and citations omitted). As noted by the Supreme Court in

[3] The Alaskan Natives exemption was included in the original MMPA enacted in 1972. The Makah Tribe was not engaging in any whaling activities in 1972 and had not for nearly fifty years. In the face of rapidly declining stocks of Eastern gray whales, the Makah Tribe suspended all whaling activities in the 1920s. The Tribe did not revive its interest in whaling activities until the mid-1990s after successful conservation efforts led to removal of the Eastern gray whale from the endangered species list.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

Nordlinger v. Hahn, 505 U.S. 1, 11-12, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992), under rational basis review:

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

The rational relationship between the MMPA exemption for Alaskan Natives and the absence of a blanket exemption for all indigenous groups with established treaty rights for subsistence hunting and fishing is best defined by reviewing the history of the Alaskan Native exemption.

1. History of Alaskan Native Exemption

The government's treatment of Alaska native hunting and fishing rights, together with the congressional response to that treatment, including the Alaskan Native exemption in the MMPA and related environmental/conservation statutes, provides a rational explanation for why Alaskan Natives are treated differently than the Makah Tribe and other Tribe's holding subsistence hunting and fishing rights granted under treaties with the United States. The different treatment does not extend special privileges. Rather, the exception places Alaskan Natives on equal footing with other aboriginal groups.

The Alaska Native Claims Settlement Act of 1971 (ANCSA) settled Alaska native aboriginal land claims and hunting and fishing rights. 43 U.S.C. § 1603(b). Unlike many of the Treaties entered into by other aboriginal groups, including the Makah Treaty, ANCSA expressly extinguished Alaska native claims to land or hunting and fishing rights based on aboriginal use and occupancy. *Id*. Unlike the Makah Treaty of 1855, ANCSA did not provide for native hunting and fishing rights in any way. Congress merely expressed an expectation that the State of Alaska and the Secretary of the Interior would

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

protect traditional native hunting and fishing practices.[4]

Congress itself has acted to protect Alaskan Natives' traditional hunting and fishing practices. The MMPA exemption is just one of several congressionally mandated efforts to "protect Native subsistence needs and requirements." Most of those efforts afford federal protection to specific subsistence rights through exemptions from federal laws, or international treaties governing migratory birds or marine mammals. As noted above, the MMPA exempts from the moratorium on taking marine mammals any Alaskan native "who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean," if the taking is for "subsistence purposes" or for "creating and selling" handicrafts and clothing. 16 U.S.C. § 1371(b). This exemption is exercised by the Alaska Eskimo Whaling Commission which annually obtains subsistence bowhead whaling quotas under the International Whaling Convention. The quota process was the same one exercised by the Makah Tribe preceding their successful 1999 hunt.

In addition to the MMPA exemption, the Endangered Species Act (ESA) presumptively exempts subsistence uses by natives and "any non-native permanent resident of an Alaskan native village" from its coverage. 16 U.S.C. § 1539(e)(1). The 1978 Fish and Wildlife Improvement Act authorized the Secretary "to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs." 16 U.S.C. § 712(1). Similarly, the Fur Seal Act Amendments of 1983 authorized the continued taking of fur seals by Alaskan natives, provided the seals are taken for subsistence purposes. 16 U.S.C. § 1152(a).

The Alaskan Natives exemption under the MMPA represents a carefully balanced resolution of two competing policy considerations. As stated in the MMPA, one purpose

---

[4] While the Senate and the House could not agree on the means, the Conference Report expressed the conviction that "Native peoples' interest in and use of subsistence resources" could be safeguarded by the Secretary's "exercise of his existing withdrawal authority" to "protect Native subsistence needs and requirements," and stated that "[t]he Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."H.R. Rep. 92-746, at 37 (1971)(Conf. Rep.)

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

of the legislation is to protect and encourage development of marine mammals to ensure they continue being a significant functioning element of the ecosystem. 16 U.S.C. § 1361. On the other hand, the federal government has accepted responsibility for protecting traditional hunting practices not otherwise recognized in a Treaty. In the case of the MMPA, Congress struck a balance by exempting subsistence hunting by Alaskan Natives provided it is not done in a wasteful manner, is restricted to non-depleted species, and accomplishes a specific limited purpose.

The same balance was struck in the above cited statutes.. A review of relevant statutes dealing with marine mammals suggests there are none that do not or did not exempt Alaskan Natives from general prohibitions or moratoriums on hunting. This void should be viewed as evidence of a congressional intent to recognize the unique relationship between Alaskan Natives, subsistence hunting, and the lack of written treaty rights otherwise protecting subsistence needs.

In the case of the Makah Tribe, the United States entered into a Treaty recognizing:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States.

12 Stat. 939, 940 (Jan. 31, 1855). This language, as interpreted by the Ninth Circuit in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), strikes the same balance reached by Congress through application of the exemption for Alaskan Natives.

The Ninth Circuit reached the same conclusion in *United States v. Nuesca*, 945 F.2d 254, 257-58 (9th Cir. 1991). The defendants in *Nuesca* were native Hawaiians. They were convicted of violating the Endangered Species Act for taking green sea turtles and a Hawaiian monk seal. Citing the ESA exemption for Alaskan Natives when taking threatened or endangered species for subsistence purposes, the defendants in Nuesca argued that exempting one aboriginal group (Alaskan Natives), while denying an exemption for another (Hawaiians), violated their constitutional right to equal protection.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

Id.

The court in *Nuesca* denied the defendant's equal protection challenge. According to the court, Congress had sufficient reasons to create exemptions in certain laws for the benefit of Alaskan Natives. 945 F.2d at 257 (. . . "Congress has ample reasons to create exceptions to certain laws for the benefit of native Alaskans, and to refrain from creating exceptions for other groups.") Applying the rational basis test, the court concluded that the classification at issue - Alaskan Natives versus native Hawaiians - bore some fair relationship to a legitimate public purpose. *Id*.

The constitutional analysis followed by the court in *Nuesca* applies in this case. As noted above, Congress created exemptions in a number of environmental/conservation statutes for Alaskan Natives to address their established subsistence needs. These exemptions were a response to prior congressional action, namely the ANSCA, that failed to recognize and protect traditional subsistence hunting and fishing. They were also created in an apparent effort to place Alaskan Natives on equal footing with other indigenous groups afforded similar protections in treaties executed with the United States. The Makah Treaty of 1855 is an example of such an agreement.

The legislative decision to grant Alaskan Natives a qualified exemption to the MMPA prohibition on taking marine mammals and not extend the same qualified exemption to other aboriginal groups passes the rational basis test. The differential treatment between the Makah Tribe and Alaskan natives is justified given the Tribe's express treaty rights and the corresponding lack of similar rights having been extended to Alaskan natives. A legitimate governmental purpose, restoring subsistence hunting rights, is served.

//

//

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970

C. Conclusion

For the reasons stated, the government respectfully requests that the Court deny Defendant's motion to dismiss count two of the indictment.

DATED this 11th day of January, 2008.

Respectfully Submitted,

JEFFREY C. SULLIVAN
United States Attorney

s/ James D. Oesterle
JAMES D. OESTERLE
Assistant United States Attorney
WSBA# 16399
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Telephone: (206) 553-5040
Facsimile: (206) 553-2502
E-Mail: jim.oesterle@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendants. I hereby certify that I have served the attorneys of record for the defendants that are non CM/ECF participants via United States Mail and/or Telefax.

s/Anna Chang
ANNA CHANG
Paralegal
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101
Telephone: (206) 553-2274
Facsimile: (206) 553-2502
E-mail: Anna.Chang@usdoj.gov

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101-1271
(206) 553-7970