

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ENTERED
ON DOCKET
MAY 03 2002
BY DEPUTY *CMS*

CMS FILED _____ LODGED _____
RECEIVED
MAY - 3 2002
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILL ANDERSON, *et al.*,
Plaintiffs,
v.
DONALD EVANS, *et al.*,
Defendants,
and
MAKAH INDIAN TRIBE,
Intervenor-Defendant.

Case No. C02-0081FDB

ORDER GRANTING PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER & SETTING
HEARING ON MOTION FOR
PRELIMINARY INJUNCTION

The Court having considered "Plaintiffs' Motion for Temporary Restraining Order," the "Makah Indian Tribe's Memorandum in Opposition to Plaintiffs' Motion For A Temporary Restraining Order," and the "Federal Defendants' Motion for Summary Judgment," which includes a discussion of the propriety of injunctive relief, concludes that it must grant Plaintiffs' motion.

The Makah Tribe has given notice that a tribal member will likely seek a whaling permit from the Makah Tribal Council as early as Thursday, May 2, 2002 and that the Council is likely to issue the 10-day permit on the same day, allowing whaling to begin immediately.

ms

1 To obtain injunctive relief,

2 In this circuit, the moving party may meet its burden by demonstrating either (1) a
3 combination of probable success on the merits, and the possibility of irreparable
4 injury, or (2) that serious questions are raised and the balance of hardships tips
5 sharply in its favor.

6 *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201
7 (9th Cir. 1980). "When the public interest is involved, it must be a necessary factor in the district
8 court's considerations of whether to grant preliminary injunctive relief." *Caribbean Marine*
9 *Service, Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

10 The Plaintiffs seek, primarily, to prevent harm to the small, resident whale population, and
11 to prevent risk of harm to those living and recreating in the areas where the whaling may take place.

12 The Federal Defendants argue that it is in the public interest to protect the Makah's
13 aboriginal whaling rights and that hunting five or fewer gray whales cannot be said to be irreparable
14 harm. The Intervenor Makah Tribe contends similarly.

15 In *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000), the Ninth Circuit contemplated
16 time for meaningful review of the Defendants' National Environmental Policy Act (NEPA) process
17 and their new Environmental Assessment (EA). In remanding the case for a new EA regarding the
18 Makah's whaling proposal, the Ninth Circuit said: "Time here is not of the essence. ... a modest
19 delay occasioned by the need to respect NEPA's commands will cause no harm." *Id.* 214 F.3d
20 at 1146. This Court must review the parties' submissions concerning the new EA of the Makah's
21 whaling proposal to ensure that there has been "an objective evaluation free of the previous taint."
22 *Id.* A delay of a few weeks in order to accomplish the review before the whaling proposal is
23 implemented is reasonable and necessary.

24 Plaintiffs have made a sufficient showing that serious questions are raised and that the
25 balance of hardships tips in their favor. There is a public interest in determining that an EA
26 adequately addresses all of the ways the whale hunting proposal could adversely affect the human

1 environment, particularly where Plaintiffs contend that the hunt has been expanded to allow hunting
2 within the Strait of Juan de Fuca and to allow hunting at any time of the year. As Plaintiffs are
3 primarily nonprofit groups along with several individuals seeking to enforce environmental laws,
4 the Court will require only nominal security. *See People Ex Rel. Van De Kamp v. Tahoe Regional*
5 *Plan*, 766 F.2d 1319, 1325 (9th Cir. 1985)(The court has discretion to dispense with the security
6 requirement, or to request mere nominal security."); and *see Friends of the Earth v. Brinegar*, 518
7 F.2d 322, 323 (9th Cir. 1975)(requiring only nominal appeal bond in a NEPA case; substantial bonds
8 would seriously undermine the mechanisms in NEPA for private enforcement).

9 NOW THEREFORE,

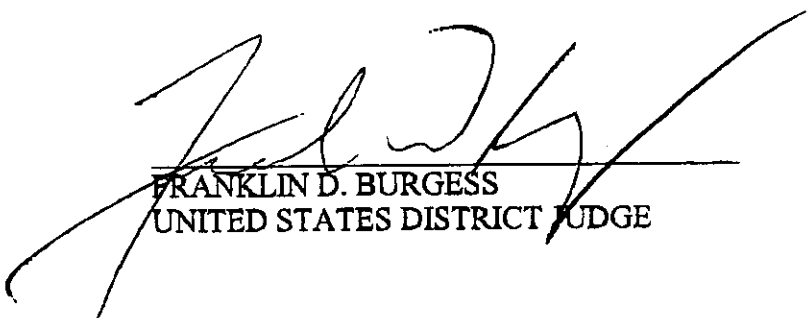
10 IT IS ORDERED:

- 11 1. Plaintiffs' Motion for Temporary Restraining Order (Doc. # 30) is GRANTED, and a
12 HEARING on Plaintiffs' Motion for Preliminary Injunction is scheduled for
13 **Wednesday, May 15, 2002 at 9:00 a.m.;**
- 14 2. Defendants the National Marine Fisheries Service (NMFS) and the National Oceanic
15 and Atmospheric Administration (NOAA) are temporarily restrained and enjoined
16 from supporting, permitting, or in any manner assisting or facilitating the Makah
17 Tribe's whaling activities until further order of this Court;
- 18 3. Defendants NMFS and NOAA are ordered to suspend immediately implementation
19 of their Cooperative Agreement with the Makah Tribe and the gray whale quota they
20 have issued to the Makah Tribe until further order of this Court;
- 21 4. Intervenor-defendant the Makah Tribe is hereby temporarily restrained and enjoined
22 from conducting any whaling activities pursuant to the Makah Tribe's Cooperative
23 Agreement with NMFS and NOAA or pursuant to the gray whale quota issued to the
24 Makah Tribe by NMFS and NOAA, including issuing any whaling permits to
25 members of the Makah Tribe, until further order of this Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

5. Plaintiff shall provide a nominal bond in the amount of \$100.

DATED this 3 day of May, 2002.



FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE