

Magistrate Judge J. Kelley Arnold

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW NOEL, *et al.*,

Defendants.

No. CR07-5656JKA-3

**DEFENDANT NOEL'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COUNT ONE**

INTRODUCTION

Defendant moved the Court to dismiss Count One of the Indictment on grounds that he cannot be charged with Conspiracy where it cannot be known before the fact whether the offense he allegedly conspired to commit is applicable. To such argument, the Government responded by arguing that Anderson v. Evans established the applicability of the law to him and, consequently, defendant conspired to violate the law.

ARGUMENT

The applicable test in this circuit is that a federal law of general applicability applies to Indian tribes and tribal members unless (a) it infringes upon internal intramural

REPLY MEMORANDUM RE MOTION
TO DISMISS COUNT ONE - 1

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1 relations between the tribe and its members; (b) the legislative history of the statute demonstrates
 2 a Congressional intent that the law not apply to Indians; or (c) the application of the law would
 3 abrogate rights guaranteed by treaty. Lumber Industry Pension Fund v. Warm Springs Forest
 4 Products, 939 F. 2d 683 (9th Cir. 1991); Donovan v. Couer d'Alene Tribal Farm, 751 1113 (9th
 5 Cir. 1985).

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 7 Not only are general federal laws not *always* applicable to Indian tribes and their
 8 members in this Circuit, where the government seeks to apply a criminal statute to the conduct of
 9 a Treaty Indian exercising *treaty hunting or fishing rights*, the applicable “conservation
 10 necessity” test requires that the Government, must prove beyond a reasonable doubt that the
 11 harvest of that particular species of animal at the time it was taken in that particular vicinity had a
 12 harmful impact upon the conservation, or viability, of its species. Specifically, the Government
 13 must be able to establish beyond a reasonable doubt that the conservation statute it seeks to apply
 14 to the Treaty Indian is both “reasonable” and “necessary” for conservation. *See generally, State*
 15 *v. Miller*, 102 Wash. 2d 678 (1984). A conservation regulation is “necessary” only if it is
 16 demonstrated that its application is required for the perpetuation of the species in a given area.
 17 *Id.* *See also, State v. Buchanan*, 138 Wash. 2d 186 (1999). In *Miller*, the Washington State
 18 Supreme Court, relying extensively upon a U.S. Supreme Court decision, Washington
 19 Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), held that the appropriate test is:

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 23 “Conservation” as used in Supreme Court decisions and herein is
 24 limited to those measures which are reasonable and necessary to
 25 the perpetuation of a run or species of fish... “reasonable” means
 26 that a specifically identified conservation measure is appropriate to
 27 its purpose; and “necessary” means means that such purpose in
 28 addition to being reasonable must be essential to conservation.

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Consequently, it can be seen that, in this Circuit, there are *specific rules* governing the applicability of federal laws to tribal members. The elements of Conspiracy include an agreement to commit an act that constitutes an offense against the laws of the United States. Since such applicability cannot be determined by a Treaty Indian *before* the fact, how can there be a conspiracy to commit an unlawful act? In their opinion, they would ordinarily be thinking that the only conspiracy or agreement they were engaging in was a conspiracy to exercise their treaty rights.

With particular reference to the Government's response that Anderson v. Evans has already established the applicability of the Marine Mammal Protection Act to the defendants notwithstanding their Treaty, that still does not address Count 1 (A) (Conspiracy to violate the Whaling Convention Act). There is no similar ruling establishing that the Whaling Convention Act may lawfully be applied to a tribal defendant under facts similar to those involved in this case. Where a defendant must guess as to whether his conduct runs afoul of a statute which may or may not be applicable to him as a matter of law, that would have a chilling effect on the exercise of any rights and raises serious due process concerns as to whether the defendant could have reasonable notice of whether his conduct was prohibited.

CONCLUSION

For the foregoing reasons, the motion should be granted.

Respectfully submitted, this 17th day of January, 2008,

/s/ Jack W. Fiander

REPLY MEMORANDUM RE MOTION
TO DISMISS COUNT ONE - 3

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6 Certificate of Service

7 The foregoing was filed electronically with the Clerk of Court and served on counsel on the
8 above date as follows:

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REPLY MEMORANDUM RE MOTION
TO DISMISS COUNT ONE - 4

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