Jack W. Fiander
Towtnuk Law Offices, Ltd.
Sacred Ground Legal Services, Inc.
1703 Creekside Loop, Ste. 110
Yakima, WA 98902-4875
(509) 969-4436
E-mail towtnuklaw@msn.com

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

UNITED STATES OF AMERICA, Plaintiff, v. **ANDREW NOEL,** Defendant.	Case No. 07-5656-JKA-3 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT NOEL'S MOTION IN LIMINE OR IN THE ALTERNATIVE TO SUPPRESS EVIDENCE**

Based upon the Government's response brief, the following appears to be apparent:

Custodial Interrogation

As to the first evidentiary issue raised in defendant's motion *in limine*, the Government does not intend to present testimony regarding statements made by the defendants subsequent to their being detained by the U.S. Coast Guard. However, according to the Government, there may be a factual question as to when the defendants became detained (Govt. Memorandum, pp. 1-2, ¶ A) (Docket Entry No. 74). If the Government intends to use any statements at trial, this may require that an evidentiary hearing be held prior to trial to determine at what point in time the defendants became detained.

Hearsay

The Government will not present hearsay testimony unless an exception under the Federal Rules of Evidence applies (Govt. Memorandum, p. 2, ¶ B, C). Therefore, issues 2 through 5 raised in defendant Noel's motion *in limine* are resolved.

Ceremonial Practices

The Government does not intend to present testimony on the customary traditional ceremonial whaling practices of Makah Indians unless presented through a duly qualified expert witness (Govt. Memorandum, p. 7, ¶ F). Therefore, item number 8 raised in defendant's motion *in limine* is resolved.

The sole issues remaining unresolved issues in the defendant's motion *in limine*, then, are whether the Government may present testimony regarding alleged noncompliance with the defendant with the Makah Tribe Gray Whale Management Plan (item 6) and whether the Government should be limited in its presentation of evidence as to examination of the whale by a tribal biologist, since the defendants did not have a similar opportunity to have someone inspect the animal (item 7).

Makah Tribe Management Plan

As to item 6, in this case, the defendant is not indicted for violation of the Lacey Act, 16 U.S.C. 3372, which "incorporates by reference" state and tribal fish and wildlife laws. The defendant is indicted for violation of the Whaling Convention Act and the Marine Mammal Protection Act, each of which has elements which must be proved which are not the same as the elements which must be proved in a tribal prosecution for violation of any of the many terms contained in the tribe's management plan. Since this is not a Lacey Act prosecution for violation of a state or tribal wildlife law, the status under tribal law of the Tribe's management plan is not relevant. In a Lacey Act prosecution, proof that a defendant violated a valid tribal law is relevant, since the Act incorporates such law by reference. However, in this prosecution, the Government needs merely to prove the elements of the federal statutes charged, it does not need to prove that the defendant was in violation of a state or tribal law. In prosecutions unique to the Lacey Act, the Government may meet its burden of proving the conservation necessity of a state

law if there is a similar tribal law. *See generally*, *United States v. Williams*, 898 F. 2d 727 (9th Cir. 1990). However, that rule has not been extended to relieve the Government of its conservation burden in prosecutions under other federal statutes other than the Lacey Act. Consequently, whether or not the defendant complied with or violated a Makah tribal management plan is not relevant to whether the defendant violated two non-Lacey Act federal statutes.[1]

A further reason why the management plan evidence should be precluded is that it simply was not in effect on the date of the offense. Viewed *objectively*, the plain language of the Makah Tribe Gray Whale Management Plan, the tribal resolutions adopting it, and the Cooperative Agreement with NMFS, is that it was effective for the period 1998-2002. Had the intent been to permanently adopt it into tribal law, there was no reason to "reaffirm"or re-enact it subsequent to the facts of this case, as it would already have been in effect. Similarly, the plain language of the Makah tribe constitution is that, for a tribal law or ordinance to be effective as a matter of tribal law, it must be subjected to review and approval of the Secretary of Interior. That this did not occur is conveniently ignored in the Government's response brief. According to the rules of construction applicable to criminal prosecutions, given two possible interpretations, the court should adopt the interpretation most favorable to the accused.

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[1] In *United States v. Williams*, 898 F. 2d 727 (9th Cir. 1990), the court held that the Government had to meet its burden of proving conservation necessity before applying a state fish or game law to a tribal member through the Lacey Act. However, the court held that this burden could be met by the Government proving that the defendant's tribe had a tribal law similar to the state law he is accused of having violated. Specifically, in Williams, the tribal member defendant was charged with a violation of the Lacey Act, which incorporates by reference state fish and game laws and makes them a violation of federal law. The state law the defendant was accused of having violated was selling, possessing or transporting protected game animals. The defendant's tribe had a law which prohibited trafficking in game killed pursuant to treaty rights. Williams was based, and built, upon a previous case arising under the Lacey Act, *United States v. Sohappy*, 770 F. 2d 816 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986).

Scientific/Biological Examination of Whale

As to item 7, the Court should put reasonable limitations, or sideboards, upon the extent to which the Government may present scientific evidence arising from the examination of the gray whale by the biologist the Government may call as a witness or whose report it may seek to introduce, since the defendants had no similar opportunity to have someone examine it to rebut such evidence.

Whales are wild animals. According to established common law principles, until proven otherwise, *ferae naturae* are the property of the person who first reduces them to his or her possession. In this case, the government took the animal from the defendants and *de facto* without due process forfeited it. According to the statutory requirement, government enforcement officers may seize whales which they have probable cause to believe were illegally taken, but they may not take it upon themselves to dispose of them absent an order of forfeiture obtained from a court of competent jurisdiction. 16 U.S.C. 916g (Whaling Convention Act forfeiture provisions); 16 U.S.C. 1377 (Marine Mammal Protection Act forfeiture provisions). Before letting it sink, the government had the animal examined by a biologist. The defendants did not have this opportunity. Essentially, the government (1) disposed of the animal without the statutorily required forfeiture order (16 U.S.C. 1377 (e) (1) allows for this process to be expedited); and (2) destroyed this evidence.

Defendant Noel proposes as to this issue that evidence or testimony arising from the examination be precluded or that the following limitations be placed upon the presentation of any testimony or written reports based on such examination by the government's biologist witness:

1. The witness should not be allowed to use the words "illegal" or "unauthorized" to describe defendant's conduct. If biologist Johathan Scordino's report dated September 11, 2007 is offered as evidence, the word "illegally" should be redacted. If this witness' report dated November 15,

2007 is offered or admitted, the first sentence of the report and any other references to "unauthorized" should be redacted.

2. The witness should be precluded from testifying as to whether defendant's acted "humane" or "humanely" and from testifying as to whether the animal "suffered" and the terms should be redacted from any reports. Whether conduct was humane or involved suffering is neither germane nor relevant (Fed. R. Evid. 401, 401) to the offenses charged and, to the extent such description conceivably has any minimal relevance, it is outweighed by the potential to unduly prejudice the jury against the defendant. Fed. R. Evid. 403.

3. As with item 6, the biologist should be precluded from expressing any opinion on validity, compliance or noncompliance with the Management Plan.

DATED this 16th day of January, 2008.

Respectfully submitted,

/ S / *Jack W. Fiander*

Jack W. Fiander, WSBA 13116

Certificate of Service

The foregoing was filed and served electronically upon counsel on the above date as follows:

James D. Oesterle
Carl Blackstone
700 Stewart Street, Ste. 5220
Seattle, WA 98121
Jim.oesterle@usdoj.gov

/S/ *Jack W. Fiander*

Jack W. Fiander