

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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NO. 08-2190

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UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

DIONYSIUS SPENCER FOX,

Defendant/Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
DISTRICT COURT NO. CR-05-772  
JAMES O. BROWNING, UNITED STATES DISTRICT JUDGE

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APPELLEE'S ANSWER BRIEF -- ATTACHMENT IN DIGITAL FORM

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ORAL ARGUMENT IS REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. The Treaty of 1868 recognizes the Navajo Tribe's right to hunt on the Navajo reservation and land contiguous to the reservation. The federal statute that prohibits convicted felons from possessing firearms does not abrogate the Navajo Tribe's right to hunt; it merely prohibits individual Navajos who have committed felony crimes from hunting with firearms. Because the hunting rights belong to the tribe, not to individual members of the tribe, there is no conflict between the felon-in-possession statute and the Treaty of 1868. The district court correctly held that the United States could prosecute defendant/appellant Dionysius Spencer Fox, a Navajo, for being a felon in possession of a firearm.
- II. A convicted felon does not have a right under the Second Amendment to possess a firearm. The Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) did not undermine this premise. The district court did not err, plainly or otherwise, in holding that Fox could be prosecuted for being a felon in possession of a firearm.

STATEMENT OF THE CASE

On April 12, 2005, a federal grand jury returned a one-count indictment against defendant/appellant Dionysius Spencer Fox. Doc. 9.<sup>1</sup> The indictment accused him of being a felon in possession of two firearms: a double barrel, 12 gauge shotgun and a 7 mm rifle, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *Id.*

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<sup>1</sup> Citations to "Doc." refer to the number of the document on the district court clerk's docket sheet. Designated pleadings are in volume I of the record on appeal.

On March 26, 2007, Fox filed a motion to dismiss the indictment or, in the alternative, to present an affirmative defense based on his purported treaty-recognized right to bear arms for the purpose of hunting. Doc. 78. The government opposed Fox's motion. Doc. 83. The court held an evidentiary hearing on the motion on May 25, 2007. Doc. 91. On July 16, 2007, the district court filed a memorandum opinion and order denying Fox's motion. Doc. 97.

On February 28, 2008, Fox pled guilty to the indictment pursuant to a plea agreement. Doc. 113. In the plea agreement, Fox preserved his right to appeal the district court's denial of his motion to dismiss the indictment or present an affirmative defense. Doc. 112 at 2.

On July 24, 2008, the district court sentenced Fox to 180 months in prison followed by three years of supervised release. Doc. 132. The court entered the judgment reflecting this sentence on August 8, 2008. *See id.* Fox timely filed his notice of appeal on August 13, 2008. Doc. 133.

### STATEMENT OF THE FACTS

#### A. The Offense Conduct

On March 21, 2005, an officer with the Navajo Nation's Window Rock Police Department observed Fox unconscious in the driver's seat of a Ford Taurus

parked in the driveway of a house in Navajo, New Mexico.<sup>2</sup> PSR ¶ 9.<sup>3</sup> Fox had a twelve-ounce bottle of beer between his legs. *Id.* The officer woke Fox up, and when Fox got out of the car, he staggered and smelled of alcohol. *See id.* The officer arrested Fox and conducted an inventory search of the car. *See id.* The officer found another, unopened twelve-ounce bottle of beer under the front passenger seat and a machete wrapped in a sweater on the floorboard of the back seat. *Id.* In the trunk, under the board that covered the spare tire, the officer found a double barrel, 12 gauge shotgun and a 7 mm rifle. *Id.*

Law enforcement officers interviewed Fox on March 23, 2005. *Id.* ¶ 10. Fox told the officers that he had borrowed both the shotgun and the rifle from friends. *Id.* An agent from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) examined the firearms and determined that they had been manufactured outside of New Mexico and consequently had traveled in interstate commerce before being found in New Mexico. *Id.* Criminal records revealed that Fox had been convicted of several felonies, including aggravated assault, resisting

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<sup>2</sup> Fox was on the Navajo reservation when he was found. 5/22/07 Tr. at 16.

<sup>3</sup> Citations to "PSR" refer to the sealed presentence report, which is in volume II of the record on appeal.



arrest, escape, and attempted sexual intercourse without consent. *Id.*; *see also id.*

¶¶ 17, 23, 29, 37, 42.

B. The Evidentiary Hearing

Fox testified that he was half Navajo and was raised on the Navajo Reservation by his grandparents. 5/22/07 Tr. at 9.<sup>4</sup> Fox hunted on the reservation as he was growing up. *Id.* at 11-12. Fox believed he had a right to hunt on the reservation even though he was an "ex-convict." *Id.* at 12. Although he knew he was prohibited from possessing a firearm as a felon, he "always thought that if I'm on the reservation, I could just go to the backyard like my stepfather and shoot whatever, a deer, a turkey, and bring it home." *Id.* at 40. Fox believed that the United States government had given the Navajo people the right to hunt on the reservation. *Id.* at 12. Fox had read the 1868 treaty between the United States and the Navajo Nation, which he believed gave him the right to hunt and fish on the Navajo Reservation, which was consistent with what he had been told growing up there. *Id.* at 22. Fox acknowledged that the treaty did not limit hunting to hunting with firearms. *Id.* at 38-39. The treaty was silent on "what you could hunt with or what you cannot hunt with." *Id.* at 52.

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<sup>4</sup> Citations to "5/22/07 Tr." refer to the transcript of the evidentiary hearing on Fox's motion to dismiss the indictment or present an affirmative defense, which is in volume III of the record on appeal.

Fox hunted with guns because "[i]t was so much easier to hunt with a gun." *Id.* at 13. If Fox killed something, he would have someone "do this little ritual thing" so that the animal could "transit to the other side." *Id.* at 14. This was something that he was taught to do while he was growing up. *See id.* at 14. He hunted for sustenance, and also for the religious experience. *Id.* at 24.

Fox told the police officers who arrested him that he had firearms in the trunk of his car for hunting. *Id.* at 16. Fox had borrowed the rifle from his older sister's friend so that he could go hunting. *Id.* at 16-17. Fox told the FBI agent who interviewed him that he was going to take the rifle to his aunt's house in Flagstaff, which is not on the Navajo Reservation. *Id.* at 46. Fox borrowed the shotgun from another friend so that he "could get some turkey . . . in the Chuska Mountains." The friend who lent Fox the shotgun told him that only one of the triggers worked. *Id.* at 18-19. Fox "figured as long as it shot a bullet, then [he] could get a turkey." *Id.* at 19. Fox also had an agreement with this friend that he would try to sell the gun for him. *Id.* Fox testified that he did not know that the barrels of the shotgun had been cut; he "just thought it was an antique." *Id.* at 49.

Frank Ortiz, a Senior Special Agent with ATF, testified that he had inspected both the rifle and the shotgun that were found in the trunk of Fox's car. *See id.* at 57-58. Agent Ortiz testified that the rifle could be used for hunting. *Id.* at 59. The

shotgun, however, had been modified. *Id.* The barrel length of the shotgun was only seventeen inches. *Id.* As originally manufactured, the barrel length would have been nearly a foot longer, or at least twenty-eight inches. *See id.* The shotgun also was cut at the stock, which originally would have been about fifteen inches. *Id.* The stock on the shotgun as it was found was only twelve inches. *Id.* In Agent Ortiz's opinion, the shotgun no longer could be used for shooting birds or animals. *Id.* Its modified length also made it a short-barreled shogun under the National Firearms Act and was illegal. *Id.* at 60. The gun did not qualify as an antique gun under the federal firearms statute. *Id.* at 61.

The district court denied Fox's motion in an order filed on July 16, 2007.

The court held:

Because the Court finds that the Treaty of 1868 concerns the Navajo Indian Tribe's right to hunt, not individual Navajo Indians' right to hunt, and because the Court finds that 18 U.S.C. § 922(g)(1) is a law of general applicability, the Court concludes that Fox may be prosecuted for being a convicted felon in possession of a firearm even though § 922(g)(1) did not abrogate the Treaty of 1868. Because the Court finds that there is no basis in law for concluding that the Navajo Tribe's right to hunt, as recognized in the Treaty of 1868, conflicts with imposing criminal liability on Fox for being a convicted felon in possession of a firearm, the Court will not allow Fox to present at trial the affirmative defense he seeks to assert.

Doc. 97 at 1-2.

### SUMMARY OF ARGUMENT

Fox argues that the district court erred in its determination that the United States could prosecute him for being a felon in possession of a firearm. He argues that the Treaty of 1868 gave him an individual right, as a member of the Navajo Tribe, to hunt, and that implicit in that right is a right to possess a firearm. He says that because the felon-in-possession statute encroaches upon that right, he may not be prosecuted for being a felon in possession of a firearm. But the Treaty of 1868 recognizes the Navajo Tribe's right to hunt on the Navajo reservation and land contiguous to the reservation. The federal statute that prohibits convicted felons from possessing firearms does not abrogate the Navajo Tribe's right to hunt; it merely prohibits individual Navajos who have committed felony crimes from hunting with firearms. Because the hunting rights belong to the tribe, not to individual members of the tribe, there is no conflict between the felon-in-possession statute and the Treaty of 1868. The district court correctly held that the United States could prosecute Fox for being a felon in possession of a firearm.

Fox also argues that the Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) casts doubt on the constitutionality of the felon-in-possession statute. Fox did not make this argument in the district court and consequently he at least forfeited, if not waived, the issue for review. Nonetheless,

the Supreme Court made clear in *Heller* that its decision did not undermine longstanding prohibitions on the possession of firearms by felons. This Court has held that the felon-in-possession statute does not violate the Second Amendment. The district court did not err, plainly or otherwise, in holding that Fox could be prosecuted for being a felon in possession of a firearm.

### ARGUMENT

#### I. THE DISTRICT COURT CORRECTLY HELD THAT FOX COULD BE HELD CRIMINALLY LIABLE FOR BEING A FELON IN POSSESSION OF A FIREARM.

##### A. Standard of Review

This Court reviews the district court's denial of a motion to dismiss an indictment based on the interpretation of governing statutes *de novo*. *See United States v. Friday*, 525 F.3d 938, 948 (2008).

##### B. The District Court Correctly Held That 18 U.S.C. § 922(g) Is a Statute of General Applicability and Is Applicable to Fox.

Fox argues that he cannot be prosecuted for being a felon in possession of a firearm. Although he acknowledges that 18 U.S.C. § 922(g) is a statute of general applicability, Applt's Opening Brf. at 9, he says that the law cannot apply to him because it infringes on his individual right to hunt, a right which derives from his

membership in the Navajo Indian Tribe. *See id.* at 9-28. This Court should reject Fox's arguments and affirm his conviction.

Article IX of the Treaty of 1868<sup>5</sup> between the United States and the Navajo Indian Tribe provides in pertinent part as follows:

In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase . . . .

Treaty of 1868, Art. IX. Article II of the Treaty describes the boundaries of the reservation. Treaty of 1868, Art. II. Article II also declares that the land "included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians . . . ." *Id.* The Supreme Court has held that "Indians enjoy exclusive treaty rights to hunt . . . on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress." *United States v. Dion*, 476 U.S. 734, 738 (1986). Thus, Articles II and IX together establish the right of the Navajo Tribe to hunt on the tribe's reservation

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<sup>5</sup> A copy of the Treaty of 1868 is attached to this brief for the Court's convenience.

and on lands contiguous to the reservation. The Treaty is silent as to what instruments may be used to hunt. *See* Treaty of 1868.

Section 922(g)(1) of Title 18, United States Code is part of the Gun Control Act which became effective in 1968, a hundred years after the treaty between the United States and the Navajos. Pub. L. No. 90-618, § 1, 82 Stat. 1213 (1968). It provides that:

It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1). The Gun Control Act does not state specifically that it applies to Indians, nor does it exempt Indians from its application. *See generally* Pub. L. No. 90-618, 82 Stat. 1213 (1968).

A member of a tribe is not exempt from generally applicable federal laws unless the treaty itself specifically exempts tribal members. *United States v. Gallaher*, 275 F.3d 784, 788-89 (9th Cir. 1991). Fox has acknowledged that the crime to which he pled guilty is a federal law of general applicability. Applt's Opening Brf. at 9. Consequently, because the Treaty of 1868 does not specifically

exempt members of the Navajo Tribe from laws of general applicability, Fox is not exempt from prosecution for being a felon in possession of a firearm. *See Gallaher*, 275 F.3d at 788-89. Instead, like the defendant in *Gallaher*, Fox lost his right as a Navajo Indian to hunt by committing several felony crimes. *See id.* at 789.

Fox argues, however, that the Treaty of 1868 recognized his individual right -- in contrast to his tribe's right -- to hunt on the reservation, and that a subsequent federal statute cannot abrogate that purported right without expressly stating Congress's intent to do so. *See* Applt's Opening Brf. at 9-28. Fox's argument is not persuasive. The Treaty of 1868 and subsequent cases make clear that the right to hunt to which the Treaty refers belongs to the tribe, not to individual tribal members. The Treaty itself provides that the "reservation . . . is . . . set apart for the use . . . of the Navajo *tribe*," and that "the *tribes* . . . retain the right to hunt on any unoccupied lands contiguous to their reservation." Treaty of 1868, Arts. II, IX (emphasis added). And this Court has held that "[t]he right to hunt and fish on reservation land is a long-established *tribal* right," but that "[i]ndividual Indians . . . enjoy a right of user in the *tribe's* hunting and fishing rights." *United States v. Felter*, 752 F.2d 1505, 1509 (10th Cir. 1985). Because nothing in the Gun Control



Act of 1968 interferes with the Navajo Tribe's hunting rights, there is no conflict between the Act and the Treaty of 1868.

The analysis of the Seventh Circuit in *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974) is on point and persuasive. In that case, the defendant argued that "because of his status as an Indian and certain rights granted by treaty to the Menominee Indians[,] . . . the combined effect of 18 U.S.C. App. 1202(a)(1) [-- the predecessor to 18 U.S.C. § 922(g)(1) --] and 18 U.S.C. [§] 924(d) [were] not applicable to him." *Id.* at 1289-90. The court recognized that the Supreme Court had interpreted the treaty on which the defendant relied as "mean[ing] that the Menominee Indians retain[ed] the right to hunt and fish upon the ceded land." *Id.* at 1292. The defendant argued that incidental to this right to hunt was the right to possess firearms, and that therefore he could not be held criminally liable for being a felon in possession of a firearm, nor were his firearms subject to forfeiture under 18 U.S.C. § 924(d). *Id.* The Seventh Circuit rejected this argument. It reasoned:

In this case we deal with federal laws of general applicability which have nothing to do with the regulation of any Menominee Indian treaty right. Any effect on the defendant's right to hunt is merely incidental, and applicable only to him. The treaty right allegedly abridged belongs to the tribe as a whole and not to any one individual. . . . Here the government has not made the exercise of a treaty right illegal, but rather the defendant's own actions have limited him from

participating fully in his tribe's hunting rights. Thus, this case is unlike . . . others where governmental regulations affected the entire tribe's treaty rights.

*Id.*

Fox attempts to distinguish *Three Winchester 30-30 Caliber Lever Action Carbines* by arguing that the Seventh Circuit never considered whether the felon in possession statute abrogated a treaty right. *See* Applt's Opening Brf. at 16-18. But Fox's assertion is belied by the language quoted above. The court squarely held that the treaty right to hunt belonged to the tribe, not to individual members, and that the felon in possession statute did not affect the tribe's treaty right to hunt in any way. *Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d at 1292. The defendant himself, not the federal statute, limited the defendant's ability to exercise his user right to hunt by committing felony crimes. *See id.* This Court should follow this reasoning and affirm Fox's conviction.<sup>6</sup> *See also Gallaher*, 275

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<sup>6</sup> Fox also argues that the Seventh Circuit's decision in *Three Winchester 30-30 Caliber Lever Action Carbines* is unsound because the court inappropriately relied on *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962), and that several cases hold that individual Indians have standing to sue to protect a tribe's hunting and fishing rights. *See* Applt's Opening Brf. at 18-28. But all the cases that Fox cites involve statutes that *generally* abrogate a tribe's hunting or fishing rights. *See, e.g., United States v. Dion*, 476 U.S. 734, 740 (1986) (Eagle Protection Act prohibiting the killing of bald eagles applied to all members of the Yankton Sioux Tribe); *Whitefoot*, 293 F.2d at 663 (dam constructed across river interfered with Yakima Tribe's fishing rights; individual member of tribe was not entitled to compensation for interference with

F.3d at 789 (relying on *Three Winchester 30-30 Caliber Lever Action Carbines*, court concluded that felon in possession statute did not infringe on tribe's right to hunt); *United States v. Mancha*, 50 Fed. Appx 854, 856 (9th Cir. 2002) (unpublished -- "Nothing in the 1855 Treaty precludes application of the felon-in-possession statute to a convicted felon simply because that felon retains membership in the Tribe.").

Fox also argues that the district court's decision is unsound because it is premised on a finding that Fox did not have standing to assert his treaty right to hunt. *See* Applt's Opening Brf. at 26-27; *see also id.* at 18-26. He relies on this Court's decision in *Felter*, 752 F.2d 1505 to support his decision. *Felter*, however, is distinguishable.

In *Felter*, the defendant received a misdemeanor citation for fishing without a tribal permit on the Ute Indian reservation. *See id.* at 1507. The defendant argued that as a mixed-blood Ute, she retained her right to fish on the reservation without a permit. *Id.* This Court agreed with the defendant. It held that the 1954 Act which terminated federal supervision over mixed-blood members of the Ute Indian Tribe did not terminate the hunting and fishing rights of mixed-blood

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her fishing rights). The felon in possession statute applies only to Navajos who choose to commit felony crimes, not to all Navajos, and consequently does not abrogate the Navajo Nation's hunting rights.

members of the tribe because the hunting and fishing rights were "not susceptible to equitable and practicable distribution," and the 1954 Act did not specifically abrogate the rights of mixed-blood members of the Ute Tribe to fish on tribal lands. *See id.* at 1511-12. The Court noted that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 1511 (quoting *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918)). Thus, the government could not prosecute the defendant for fishing without a tribal permit because it failed to prove that she was not exercising a right that she had retained under the 1954 Act. *Id.* at 1512.

This case is different. The government did not prosecute Fox for hunting without a tribal permit; it prosecuted him for being a felon in possession of a firearm. The felon in possession statute was not passed for the benefit of Indian tribes, and it need not be liberally construed in favor of Indians. Fox's user right to hunt on the Navajo reservation has not been affected by a federal statute that seeks to regulate hunting on the reservation; it has been limited by a federal statute of general applicability that applies only to Navajos who choose to commit felony crimes. Although Fox may have standing to challenge a federal statute that

attempts to regulate hunting on the Navajo reservation, this is not that case. The Court should affirm Fox's conviction.

Fox further argues that the right to hunt retained by the Navajo Tribe under the Treaty of 1868 implicitly includes a right to bear arms. Applt's Opening Brf. at 28-32. He relies on the Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *See id.* This Court may assume, without deciding, that the Navajo Tribe's right to hunt under the Treaty of 1868 includes a right to hunt with firearms. Because the right to hunt belongs to the tribe, and because the felon in possession statute only applies to individuals, including Navajos, who choose to commit felony crimes, the felon-in-possession statute does not abrogate the tribe's hunting rights even if the right to hunt includes an implicit right to hunt with firearms. Unlike the law at issue in *Heller*, which generally prohibited residents of the District of Columbia from possessing handguns and required individuals to keep other firearms in their homes nonfunctional, 128 S. Ct. at 2788, the felon in possession statute does not generally prohibit Navajos from using firearms to hunt. Thus, even if the tribe's right to hunt implicitly includes a right to hunt with a firearm, the felon-in-possession statute does not abrogate that right.

C. Fox, as a Convicted Felon, Does Not Have a Constitutional Right to Bear Arms for Hunting.

Fox's final argument is that the Supreme Court's decision in *Heller* suggests that the felon in possession statute is unconstitutional. Because Fox did not make this constitutionally based argument in the district court, this Court reviews the issue for plain error at best. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 735-37 (10th Cir.) (*en banc*) (rejecting argument that an intervening Supreme Court decision which alters well-settled law precludes plain error review), *cert. denied*, 546 U.S. 967 (2005). Indeed, because Fox did not preserve this issue in his conditional plea agreement, he has waived the issue. *See United States v. Wright*, 43 F.3d 491, 494 (10th Cir. 1994) ("defendant who knowingly and voluntarily pleads guilty waives all non-jurisdictional challenges to his conviction"); *United States v. Artez*, 290 Fed. Appx. 203, 208 (10th Cir. 2008) (unpublished -- defendant waived right to challenge conviction for possession of sawed-off shotgun by failing to reserve issue in conditional plea agreement). But even if the Court were to consider this argument, the Court need only address the first prong of the plain error test. The district court did not err in holding that Fox could be prosecuted for being a felon in possession of a firearm.

The Supreme Court in *Heller* said nothing that undermines this and every Circuit's determination that the felon in possession statute does not violate the Second Amendment. The Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." 128 S. Ct. at 2816-17. Thus, this Court's repeated rejection of "the time-worn argument that [a] conviction [under 18 U.S.C. § 922(g)(1)] violates the Second Amendment," *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000), requires the Court to reject the same argument here. *See id.* ("the circuits have consistently upheld the constitutionality of federal weapons regulations like section 922(g) absent evidence that they in any way affect the maintenance of a well regulated militia," and collecting cases). The Court should affirm Fox's conviction.

#### CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

The district court correctly concluded that the United States could prosecute Fox for being a felon in possession of a firearm. The felon-in-possession statute does not abrogate the Navajo Nation's hunting rights, which belong to the tribe, not individual members. Moreover, application of the felon-in-possession statute to Fox does not violate the Second Amendment. The Court should affirm Fox's conviction.

The United States requests oral argument to address any concerns of the panel not adequately addressed in the briefs.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,232 words.

I relied on my word processor to obtain the count. My wordprocessor software is Corel WordPerfect 9.0.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

DATED this 4th day of February, 2009.

*/ Laura Fashing /*

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Assistant United States Attorney

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the Appellee's Answer Brief was served upon Defendant-Appellant, Dionysius Spencer Fox, by e-mailing one copy in Digital Form to his attorney of record, Roger A. Finzel, at his e-mail address of record, roger\_finzel@fd.org, this 4th day of February, 2009.

I ALSO CERTIFY that one copy in Digital Form of Appellee's Answer Brief was e-mailed, and the original and seven photocopies of Appellee's Answer Brief were mailed by First Class Certified Mail to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, this 4th day of February, 2009.

I ALSO CERTIFY that all required privacy redactions have been made and, with the exception of those redactions, if any, the copy of this document submitted to the Court in Digital Form is an exact copy of the written document filed with the Clerk.

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UNITED STATES OF AMERICA  
Native American

Treaty between the United States of America and the Navajo Tribe of Indians;

Concluded June 1,  
**1868**  
;  
Ratification advised July 25,  
**1868**  
;

Proclaimed August 12,  
**1868**  
.

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

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Council

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO  
WHOM THESE PRESENTS SHALL COME, GREETING:

\*1 WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:-

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:-

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ARTICLE I.

From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30' west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III.

\*2 The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV.

The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V.

If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI.

**\*3** In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII.

When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian - each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.



And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX.

**\*4** In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted

by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X.

No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ----- of this treaty.

ARTICLE XI.

The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII.

It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

\*5 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

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4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII.

The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,  
*Lt. Gen'l, Indian Peace Commissioner.*

S. F. TAPPAN,  
*Indian Peace Commissioner.*

BARBONCITO, Chief. his x mark.

ARMIJO. his x mark.

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DELGADO.

MANUELITO. his x mark.

LARGO. his x mark.

HERRERO. his x mark.

CHIQUETO. his x mark.

MUERTO DE HOMBRE. his x mark.

HOMBRO. his x mark.

NARBONO. his x mark.

NARBONO SEGUNDO. his x mark.

GAÑADO MUCHO. his x mark.

*Council.*

RIQUO. his x mark.

JUAN MARTIN. his x mark.

SERGINTO. his x mark.

GRANDE. his x mark.

INOETENITO. his x mark.

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MUCHACHOS MUCHO. his x mark.

CHIQUETO SEGUNDO: his x mark.

CABELLO AMARILLO. his x mark.

FRANCISCO. his x mark.

TORIVIO. his x mark.

DESDENDADO. his x mark.

JUAN. his x mark.

GUERO. his x mark.

GUGADORE. his x mark.

CABASON. his x mark.

BARBON SEGUNDO. his x mark.

CABARES COLORADOS. his x mark.

Attest:

GEO. W. G. GETTY,  
*Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.*

B. S. ROBERTS,  
*Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.*

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J. COOPER McKEE,  
*Bt. Lt. Col. Surgeon U. S. A.*

THEO. H. DODD,  
*U. S. Indian Ag't for Navajos.*

CHAS. McCLURE,  
*Bt. Maj. and C. S. U. S. A.*

JAMES F. WEEDS,  
*Bt. Maj. and Asst. Surg. U. S. A.*

J. C. SUTHERLAND,  
*Interpreter.*

WILLIAM VAUX,  
*Chaplain U. S. A.*

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:-

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, **1868**.

*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, **1868**.

Attest:

GEO. C. GORHAM,  
*Secretary,*

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By W. J. McDONALD,  
*Chief Clerk.*

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.  
[SEAL.]  
By the President:

W. HUNTER,  
*Acting Secretary of State.*

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