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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **DOUGLAS VANCE CROOKED ARM,** **Defendant.**	**CR 13 - 18 - BLG - RFC** **UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

Defendant Douglas Vance Crooked Arm has filed a motion to dismiss all counts of the indictment, claiming he is exempted from the

Migratory Bird Treaty Act (MBTA) by Crow treaty rights. See generally Dkt. 24. For the reasons below, the motion should be denied.

STANDARD OF REVIEW

A motion to dismiss challenges the sufficiency of an indictment to charge an offense. *United States v. Sampson*, 371 U.S. 75, 78-79 (1962). An indictment need only be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009), sets forth the standard for determining when this standard is met: "An indictment is sufficient if it contains 'the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy.'" *Id.*, quoting *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir.1995). The test for sufficiency of the indictment is "not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir.2000).

An indictment that tracks the offense in the words of the statute is sufficient if those words fully, directly, and expressly set forth all the

elements necessary to constitute the offense intended to be proved. *See Hamling v. United States*, 418 U.S. 87, 117-18 (1974); *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir.1981). "An indictment is sufficient if it contains the elements of the charged crime and adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." *United States v. Buckley*, 689 F.2d 893, 896 (9th Cir. 1982).

In determining the sufficiency of the indictment, the court does not examine whether the government can prove its case. *Id*. at 897. The court must take the allegations of the indictment as true. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n. 16 (1952). An indictment need not allege the government's theory of the case or supporting evidence, but must only state the essential facts necessary to apprise the defendant of the crime charged. *Id*.

The court "should not consider evidence not appearing on the face of the indictment." *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996). The court may decide questions of law raised in a motion to dismiss, but must reject arguments that are based upon factual

disputes. *United States v. Shriver*, 989 F.2d 898, 906 (7th Cir.1992). Federal Rule of Criminal Procedure 12(b)(2) permits a party to raise "any defense, objection, or request that the court can determine without a trial of the general issue." *Id*. A pretrial motion is generally "capable of determination" before trial if it involves questions of law rather than fact. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.1986). It is well-established that "[a] motion to dismiss is not a proper way to raise a defense." *United States v. Snyder*, 428 F.2d 520, 522 (9th Cir.1970).

ARGUMENT

1. No Crow treaty right invalidates the MBTA.

Defendant argues that the indictment should be dismissed because treaties between the Crow Indians and the United States give him the right to hunt, kill, and sell migratory birds (including eagles, hawks, and magpies) on the Crow Indian Reservation, despite the prohibitions of the MBTA. Dkt 24 at 3-4, 8. Defendant is wrong for at least three reasons: First, there is no Crow treaty provision authorizing the sale of, or commerce in, eagles or hawks or magpies (or their parts).

Second, even if a Crow treaty authorized the taking or sale of eagles, such treaty has been explicitly abrogated by Congress. Third, even if a Crow treaty empowered registered members of the Crow Tribe to kill and sell eagles, hawks, and magpies on the Crow Reservation, whether Crooked Arm qualifies for that exemption is a fact-bound inquiry the Court cannot consider in a Fed. R. Crim. P. 12(b)(3)(B) motion to dismiss.

A. Defendant presents no evidence of a crow treaty entitling him to sell eagles, hawks, or magpies.

Defendant says he is entitled to kill and sell migratory birds by dint of rights preserved in treaties between the Crow Indians and the United States. Dkt 60 at 2-3. The problem with this assertion is that defendant presents no actual evidence of a Crow treaty authorizing him to kill and sell eagles, hawks, or other migratory birds.

In interpreting the provisions of Indian treaties, courts must construe provisions as the Indians would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). This understanding is illustrated by the history of the treaties, the negotiations that preceded

them, and by the practical construction given the treaties by the parties. *Skokomish Indian Tribe v. France*, 320 F.2d 205, 207-08 (9th Cir. 1963), quoting *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943).

Defendant cites *United States v. Bresette*, 761 F.Supp. 658 (D.Minn.,1991) for the proposition that, where the terms of an Indian treaty and the MBTA conflict, the treaty rights prevail unless Congress has abrogated the treaty rights. Dkt 24 at 7. In *Bresette*, however, the court was presented with a completely different set of treaty rights (the Chippewa treaties of 1837, 1842, and 1854), and a completely different set of rights "as the Indians would have understood them":

> ...the three treaties include commercial activity within the reservation of usufructuary rights. As was found in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 653 F.Supp. 1420, 1424 (W.D.Wisc.1987), the Chippewa were part of the national and international market economy at the time of the treaties.

Id. at 662 (emphasis added).

A whole series of Wisconsin district court cases had delved into the nature and extent of the Chippewa Indians' rights under the treaties of 1837, 1842, and 1854. *See Lac Courte Oreilles Band of Lake*

Superior Chippewa Indians v. Voigt, 700 F.2d 341, 348 (7th Cir.1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 760 F.2d 177, 182 (7th Cir.1985); and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 653 F.Supp. 1420, 1424 (W.D.Wisc.1987). The court in *Bresette* relied upon these cases in determining that the "commercial activity" occurring on the reservation at the time of the treaties included the taking and trade of "'ducks, geese, songbirds, various types of grouse, turkeys, hawks, eagles, owls, and partridges.'" *Bresette*, 761 F.Supp. at 662 (quoting *Lac Court*, 653 F.Supp. at 1427).

By contrast, in the instant case, nothing in the three treaties between the Crow Indians and the United States reserved the right to kill and sell eagles, hawks, or magpies. The 1825 treaty (7 Stat. 266) between the Crow and the United States does not guarantee commerce in hunted goods as an ongoing usufructuary right. In fact, the 1825 treaty says nothing whatsoever about hunting. The treaty also does not preserve any right to engage in the purchase or sale of any hunted goods. In Article 4, the treaty states:

> That the Crow tribe may be accommodated with such articles of merchandise, &c. as their necessities may demand, the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations . . . .

7 Stat. 226 (emphasis added). That is as close as the treaty comes to addressing commerce, and all it guarantees is provision of necessities to the Crow Indians by the United States, admission of traders, and for commerce — subject to regulations.

The Crow could not understand this treaty to grant them an unfettered right to kill and commerce in eagles, hawks, and magpies. To the contrary, in looking at this treaty, the Crow could only figure that their commercial interactions with outsiders would be subject to regulations imposed by the United States. The MBTA, which prohibits the sale of eagles, hawks, and magpies, is just such a regulation. *See Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968) (applying state conservation laws to Indian fishing where not incompatible with treaty provisions); *U.S. v. Gotchnik*, 57 F.Supp.2d 798, 803 fn 2 (D.Minn.,1999) (recognizing extension of *Puyallup* principle to Federal regulation of the exercise of treaty rights). The treaty did not preserve the right to commerce in migratory birds killed

on the Crow Reservation — there is no language establishing, recognizing, or preserving rights of trade or barter, in contrast to the Chippewa treaty that, in *Bresette*, preserved the right to "commercial activity."

The 1851 treaty (11 Stat. 749) discusses hunting only in the paragraph immediately preceding Article 6: "...the aforesaid Indian nations do not ... sur-render the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." *Id.* Article II of the 1868 treaty "set apart" a "district of country" "for the absolute and undisturbed use and occupation" of the Crow Indians, and Article IV granted the right to hunt on the unoccupied lands of the United States. Treaty With the Crow Indians (May 7, 1868), 15 Stat. 649.

Identical treaty terms were analyzed by the Ninth Circuit in *U.S. v. Top Sky*, 547 F.2d 486 (9th Circuit, 1976). In *Top Sky*, the Fort Bridger Treaty reserved to the Shoshone and Bannock Indian tribes the right "to hunt on the unoccupied lands of the United States." *Id.* at 487. Like Crooked Arm, the defendant in *Top Sky* argued that "the reserved hunting right includes the right to hunt and to sell eagles."

Id. The court denied defendant's motion to dismiss, finding no historical evidence that disclosed "a pattern of sale of eagle parts." *Id*. To the contrary, the court found that commerce in eagle parts was inimical to the Indians' religious veneration of the eagle. *Id*. at 488. *See also U.S. v. Dion*, 752 F.2d 1261, 1264 (8th Cir. 1985) (Yankton Sioux not entitled to kill and sell eagles — "no expectation of a treaty right to sell eagles existed, since there was no historical evidence of a practice of selling eagle parts and since such a practice was deplored as a matter of tribal custom and religion.").

This Court has previously addressed this identical question (i.e., whether Crow treaty rights override the MBTA), and held that "even if these treaties grant Crow tribal members the right to hunt hawks, it is a different question whether the treaties grant Defendants the right to sell them." *United States v. William Esley Hugs, Sr.*, CR 11-55-B-RFC, Dkt. 79 at 6. Following the precedent of *Dion* and *Top Sky*, the Court found that, in lieu of historical evidence that the Crow commercialized eagle and hawk parts, such a right could not be read into the treaties. *Id*. Defendant presents no such historical evidence as of the time the

Crow treaties were executed, and no case law establishes such a usufructuary right. *Id*. Indeed, killing and commercializing eagles and hawks is actually inimical and offensive to Crow religion and culture, just as it was for the Sioux in *Dion* and the Shoshone and Bannock Tribes in *Top Sky*. *U.S. v. Hugs*, 109 F.3d 1375, 1379 (9th Cir. 1997) (Crow Indians stating an eagle is a "sacred object for personal use in religious ceremonies or practices....").

Defendant's cite *U.S. v. Fiddler*, 2011 WL 2149510 (D. Nev.,2011), an unpublished district court case from Nevada, where the court determined that a usufructuary treaty right was not overridden by the MBTA. *Id*. at *5. But, as this Court has previously found, "*Fiddler* dealt with a member of the Cheyenne River Sioux Tribe and a different treaty, [so] it is unclear whether the sources cited within *Fiddler* are evidence that Crow Indians traded in migratory bird parts." *United States v. William Esley Hugs, Sr.*, CR 11-55-B-RFC, Dkt. 79 at 7. Indeed, *Fiddler* is inapposite because the Cheyenne River Sioux treaties contained no verbiage explicitly subjecting tribal commerce to federal regulations, as is the case with the Crow treaties.

Here, the Crow Indians could not reasonably understand any of their three treaties with the United States to guarantee them the right to kill or sell eagles, hawks, or migratory birds in contravention of the MBTA.

B. Any Crow treaty authorizing the taking or sale of eagles has been abrogated by Congress.

The Supreme Court has held that, in passing and amending the Eagle Protection Act (now known as the Bald & Golden Eagle Protection Act [BGEPA]), Congress abrogated the rights of Indians to take eagles. *Dion*, 476 U.S. at 743-44 (1986). Thus, even if the Crow treaties guaranteed the right of defendants to kill and sell eagles (they did not), such right would have no ongoing viability.

Moreover, in *Dion*, the Supreme Court held that the abrogation of Indian rights to kill eagles went beyond the BGEPA. Dion argued that he was immune from prosecution under the Endangered Species Act because of his treaty right to kill bald eagles. *Id*. at 745. But Congress divested Dion of his treaty right to kill eagles in the BGEPA, so that selfsame treaty right could not serve as a defense to prosecution under the Endangered Species Act. *Id*. The BGEPA and the Endangered

Species Act, "in relevant part, prohibit exactly the same conduct, and for the same reasons." *Id*. at 746.

The same thing is true here of the MBTA, in that the MBTA prohibits the killing and sale of eagles in exactly the same way as the BGEPA, and for the same reasons. Thus, Congress divested the Crow Indians of their right to kill and traffic in eagles in the BGEPA, and those treaty rights cannot be resurrected as a defense to prosecution under the MBTA.[1]

> It would not promote sensible law to hold that while Dion possesses no rights derived from the 1858 treaty that bar his prosecution under the Eagle Protection Act for killing bald eagles, he nonetheless possesses a right to hunt bald eagles, derived from that same treaty, that bars his Endangered Species Act prosecution for the same conduct. Even if Congress did not address Indian treaty rights in the Endangered Species Act sufficiently expressly to effect a valid abrogation, therefore, respondent can assert no treaty defense to a prosecution under that Act for a taking already explicitly prohibited under the Eagle Protection Act.

Id. The MBTA need not explicitly abrogate Crow treaty rights to kill

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[1] Counts I, II, and IV all allege violations of (or agreements to violate) the MBTA, and all are based or partly based on sales or offers to sell eagles and eagle parts.

and sell eagles (even if such treaty rights existed), because the same treaty right was already abrogated via the BGEPA.

C. The MBTA subsistence exception for Native Alaskans creates no exemptions by implication for other Native Americans.

Defendant argues that, because the MBTA creates an exception for "indigenous inhabitants of Alaska," then Congress must have intended "to exclude all Native Americans from the scope of the statute." Dkt. 24 at 7, citing 16 U.S.C. § 712. There are several critical problems with this argument.

First, the MBTA does not create an exception that allows Native Alaskans to hunt or sell eagles, hawks, or magpies. Section 712 authorizes the Secretary of Interior to adopt regulations that allow Native Alaskans to take migratory birds "for their own nutritional and other essential needs... during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds." This statute is implemented by 50 C.F.R. § 92.6, which states — above all — "You may not sell, offer for sale, purchase, or offer to purchase migratory birds, their parts, or their eggs taken under this part." Thus, the exception for Native Alaskan subsistence does not contain or imply

any exemption from the MBTA's prohibitions against commercializing migratory birds.

Second, 50 C.F.R. § 92.22 lists every species of bird that can lawfully be harvested for subsistence purposes in Alaska. "All bird species not listed are closed to harvesting and egg gathering." *Id.* The list consists of species that are commonly associated with bird hunting (e.g., geese, ducks, teal, etc.) and egg gathering (various gulls, plovers, swans, etc.). Eagles, hawks, and magpies are found nowhere in the list, and thus are not species that can be lawfully taken for subsistence purposes. Thus, the exception for Native Alaskan subsistence does not contain or imply any exemption from the MBTA's provisions protecting eagles, hawks, and magpies.

Third, the black letter of the MBTA creates no exemption for Native Americans outside Alaska. The MBTA is a federal statute of general applicability that makes certain actions criminal wherever committed. "Such laws are applicable to the Indian unless there exists some treaty right which exempts the Indian from the operation of the particular statutes in question." *U.S. v. Burns*, 529 F.2d 114, 117 (9th

Cir. 1975). Here, the subsistence exception for Alaskan Natives accords with all four treaties (Mexico, Japan, Russia, and Canada) that are the foundation for the MBTA. *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941-42 (9th Cir. 1987). The MBTA contains no comparable black letter exemption for Crow subsistence. But as this Court previously noted, the Crow treaties may well convey a comparable right to hunt migratory game birds for subsistence. The issue here is different, i.e., whether the Crow have ongoing treaty-based rights to sell and offer to sell eagles, hawks, and magpies, and their parts. As set forth above, the Crow treaties never authorized such sales in violation of federal law.

D. Eligibility to claim Crow treaty rights, and the extent of those rights, are fact-bound questions, beyond a Rule 12(b)(3)(B) motion to dismiss.

As noted above, in analyzing a motion to dismiss the indictment, the court does not examine whether the government can prove its case, but must take the allegations of the indictment as true. *Buckley*, 689 F.2d at 897; *Boyce Motor Lines*, 342 U.S. at 343. The court "should not consider evidence not appearing on the face of the indictment," and

must reject arguments that are based upon factual disputes. *Jensen*, 93 F.3d at 669; *Shriver*, 989 F.2d at 906; *Shortt Accountancy Corp.*, 785 F.2d at 1452.

Here, Crooked Arm's arguments for dismissal are all predicated on facts that do not appear on the face of the indictment, and that the Court cannot consider in this pre-trial motion to dismiss. *See*, e.g., Dkt. 24 at 8 ("Vance Crooked Arm has standing to assert rights under the 1851 and 1868 Fort Laramie Treaties. He is a member of the Crow Nation and a descendant of the individuals to whom the United States made promises"). To grant the motion, the Court would have to look beyond the four corners of the indictment and make the factual determinations that (e.g.), Crooked Arm is an enrolled member of the Crow Tribe that has standing to assert Tribal treaty rights, that the birds were killed on the Crow Reservation, or that the birds were killed, sold, or offered for sale by members of the Crow Tribe.

Moreover, because none of the Crow treaties explicitly sanction the taking or commercialization of migratory birds or their parts (and in fact suggest that all such commerce would be subject to regulation),

the only way those rights could be read into the treaties would be by historical evidence of such hunting and commercialization at the time of the treaties. 547 F.2d 486. Again, whether the Crow hunted, killed, and sold eagles, hawks, and migratory birds at the time of the treaties is a fact-bound question, which cannot be addressed in these briefs. Defendant is asserting facts that he believes constitute a defense to the crimes charged; The Court cannot make such determinations in a motion to dismiss, and the motion should be denied. *Snyder*, 428 F.2d at 522.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that defendant's motion to dismiss the indictment be denied.

DATED this 23rd day of April, 2013.

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/s/Mark S. Smith
Assistant U. S. Attorney
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. CR 12, I hereby certify that the foregoing document is proportionately spaced, has a typeface of 14 points or more, and the body of the brief contains 3,360 words.

DATED this 23rd day of April, 2013.

/s/ Mark S. Smith
Assistant U.S. Attorney
Attorney for Plaintiff