

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Criminal No. 13-071(3) (RHK/LIB)

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	<b>GOVERNMENT'S</b>
	)	<b>RESPONSE TO</b>
v.	)	<b>DEFENDANT'S</b>
	)	<b>OBJECTIONS TO THE</b>
(3) BRIAN W. HOLTHUSEN,	)	<b>REPORT AND</b>
	)	<b>RECOMMENDATIONS</b>
Defendant.	)	

The United States of America, by and through its attorneys, John R. Marti, Acting United States Attorney for the District of Minnesota, and Thomas Calhoun-Lopez, Assistant United States Attorney, hereby submits its response to Defendant Brian W. Holthusen's (Defendant) objection to the United States Magistrate Court's Report and Recommendations of September 23, 2013.

**1. Defendant's Motion to Dismiss the Indictment for Violation of Treaty Rights.**

The Defendant has objected to the Magistrate Court's recommendation that his motion to dismiss the indictment for violation of treaty rights be denied. The United States opposes this objection.

The Defendant in his objections continues to attempt to cast this issue as a question of which should prevail: treaty rights or federal criminal statutes. However this presentation of the question proceeds on a fundamental misapprehension of the application of the Lacy Act in this case.

Provisions in the Code of Federal Regulations have been established to protect and

conserve fish stocks in Red Lake. 25 C.F.R. § 242. Among these provisions is prohibition on commercial fishing except by enrolled tribal members through the Red Lake Fisheries Association. *Id.* at §§ 242.2 and 242.4. These regulations are valid and long-standing.

The Defendant's attempt, therefore, to reframe the issue as one of treaty rights fails. Treaty rights are not at play here. The Defendant has taken fish for commercial purpose in violation of United States Regulation. By subsequently transporting and selling those fish, he has violated the Lacey Act. Treaty rights do not give him license to violate the Lacey Act because while he has a right to fish for his own sustenance, no treaty right entitled him to violate the conservation provision limiting commercial fishing on Red Lake to the Red Lake Fisheries Association, or to otherwise violate federal law.

The Magistrate Court's Report and Recommendation accurately and ably summarizes the issue before the Court: The Lacey Act is a federal statute of general applicability. Courts including the Eighth Circuit have consistently held that it applies to Indians, and that it does not injure or infringe upon treaty rights. United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989); United States v. Sohapp, 770 F.2d 816 (9th Cir. 1985); United States v. Stone, 112 F.3d 971 (8th Cir. 1997).

The Defendant's reliance upon Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) is misplaced. As the Magistrate Court's Report and Recommendation notes, Mille Lacs rules only on the question of whether the state of Minnesota can regulate hunting on Tribal lands. Report and Recommendation at 16, citing Mille Lacs at 204. This case does not involve state regulation at all. Mille Lacs is

therefore of no moment.

The United States has the authority to establish federal regulations concerning commercial fishing on Red Lake. Once that is established, the fact that a person who takes fish in violation of that valid regulation and then transports or sells the illegally taken fish has also violated the Lacey Act is self-evident in the statute: it is unlawful for any person to . . . sell, receive, acquire, or purchase any fish . . . taken, possessed, transported or sold in violation of any . . . regulation of the United States.” 16 U.S.C. § 3372(a)(1).

Because the Defendant’s treaty rights are not implicated in his prosecution, the Magistrate Court’s recommendation should be adopted.

**2. Defendant’s Motion to Dismiss Indictment for Selective Prosecution.**

The Defendant has objected to the Magistrate Court’s recommendation that his motion to dismiss the indictment, or conduct additional discovery, based on selective prosecution be denied. The United States opposes this objection.

As the Report and Recommendation makes clear, the Defendant has not met his heavy burden: (1) he has not identified any similarly situated people, much less shown that he was treated differently from them; and (2) he has failed to demonstrate that any such differentiation was the result of a discriminatory improper motive. Report and Recommendation at 21 – 25, citing United States v. Hirsch, 360 F.3d 860, 864 (8th Cir. 2004).

The Defendant continues to beg the question by arguing that because 21 people were charged by the state, and eight of ten defendants in this and related cases are Tribal members, the Court must infer both that these individuals facing state prosecution are

similarly situated, and that there is a discriminatory purpose at play. These logical leaps are not supported by the evidence.

The reason the Defendant cannot meet his burden is because neither prong is present here. No similarly situated people are being treated differently. The Defendant has not pointed to anyone who has violated the Lacey Act who is not facing federal prosecution. As the Report and Recommendation notes, federal prosecution is dependent upon certain factors, among them that fish were taken, possessed, transported or sold in violation of Tribal law. Report and Recommendation at 22, citing 16 U.S.C. § 3372(a)(1).

Even if he had identified similarly situated people, and then shown that he is being treated differently from them, he still can point to no discriminatory purpose. Here again, he cannot find such improper purpose because it does not exist in this case.

The Defendant relies upon United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) for the proposition that an investigation that “targeted counties where blacks were in the majority was sufficient to satisfy the threshold of racial animus.” Def. Obj. at 13. However in Gordon, the Eleventh Circuit found fault with the District Court’s ruling precisely because there was evidence of a discriminatory purpose in the Alabama prosecution. The Eleventh Circuit pointed to “a statement made by a Department of Justice spokesperson . . . that the investigations were part of a ‘new policy . . . brought on by the arrogance on the part of blacks in these counties.’” Gordon, 817 F.2d at 1540. The court also found that “members of the rival white political organization assisted law enforcement officials in their investigation of . . . the principal political organization representing blacks, of which Gordon was the leader,” and found “a pattern of Government

activity” in which “the Government targeted only those counties where blacks were a majority, specifically targeting those areas where blacks since 1980 had come to control some part of the county government.” Id.

Rather than supporting the Defendant’s bid to dismiss his indictment in this case, Gordon shows why it is meritless. Speculative allegations would not have been sufficient in the Gordon case. The Eleventh Circuit’s ruling relied on evidence of both prongs of the test—exactly the evidence that is lacking here.

By the same token, United States v. Perry, 152 F.3d 900 (8th Cir. 1998), another case upon which the Defendant relies (Def. Obj. at 14) similarly shows why his claim fails. In Perry, the defendant, who is African American, argued that the fact that he was prosecuted while two white co-conspirators were not should have entitled him to an evidentiary hearing. 152 F.3d at 903. The Eighth Circuit held that was not enough, noting that the Government was “well within its discretion” based on the circumstances of the case. Id. Here again, speculation and citation of demographics are not sufficient—more is required.

As in Perry, the Defendant has failed to show either prong of his test, both of which are required to dismiss the indictment or warrant further discovery on the matter. The Magistrate Court’s Report and Recommendation should therefore be adopted.

### **3. Defendant’s Motion to Suppress His Statements.**

The Defendant has objected to the Magistrate Court’s recommendation that his motion to dismiss the indictment for violation of treaty rights be denied. The United States opposes this objection.

The Magistrate Court's report and recommendation accurately summarizes the facts in this case, and correctly applies the law to those facts. The inescapable conclusion is that the Defendant was not in custody when he made his statements at his home, and that he made his statements voluntarily. Report and Recommendations at 32 – 39.

The Report and Recommendations ably summarizes the myriad reasons why the Defendant was not in custody when he was interviewed at his girlfriend's home. He was informed early in the interview that he would not be arrested (id. at 32); at no point was his freedom of movement restrained (id. at 33); the Defendant voluntarily acquiesced to questioning, telling the agents that it was "cool" with him (id. at 34); there were no strong-arm tactics or deceptive strategies (id.); the questioning, which was on the porch of the Defendant's girlfriend's home and in her presence, was not police-dominated (id. at 35); and he was not arrested at the conclusion of the interview (id. at 36).

The Defendant relies primarily upon his assertion that he was "freaked out" and claims a subjective belief that he felt himself compelled to answer questions. These assertions are not borne out by the record, which demonstrates that the Defendant, having been assured that he would not be arrested, appeared "friendly and cooperative." Report and Recommendation at 34.

The Defendant's assertion that his confession was coerced is likewise not supported by anything in the record. To the contrary, it is clear he made his statements voluntarily.

His statements are therefore admissible.

Dated: September 27, 2013

Respectfully Submitted,

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s/ Thomas Calhoun-Lopez  
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