UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	Criminal No. 13-071 (RHK/LIB)
	)	
v. Plaintiff,	)	
	)	**DEFENDANT'S OBJECTIONS TO**
BRIAN HOLTHUSEN,	)	**THE MAGISTRATE JUDGE'S**
	)	**REPORT AND RECOMMENDATION**
Defendant.	)	

Defendant, Brian Holthusen, through his attorney, Shannon Elkins, respectfully objects to the recommendations of United States Magistrate Leo Brisbois that this Court deny Mr. Holthusen's motions to dismiss the indictment for (1) its violation of the 1837 Treaty with the Red Lake Band of Chippewa, and (2) selective prosecution. Additionally, Mr. Holthusen joins in the arguments filed on behalf of the Red Lake and Leech Lake defendants in the "Operation Squarehook" cases regarding these motions. Mr. Holthusen also objects to the recommendation that his motion to suppress statements be denied because Mr. Holthusen's statements were procured through custodial interrogation without a valid advice of rights process.

Brian Holthusen is an enrolled member of the Red Lake Band of Chippewa Indians and lives on the Red Lake Indian Reservation in the state of Minnesota. Mr. Holthusen is charged by indictment with one count of knowingly engaging in conduct that involved the sale and purchase of fish caught on reservation waters with a market value in excess of $350.00 in violation of United States law. Specifically, Mr. Holthusen is accused of violating 25 C.F.R. §§ 242.2 and 242.4, which attempt to regulate who may fish from the

waters of the Red Lake Indian Reservation and what they may do with the fish they catch. At the motions hearing on July 2, 2013, Mr. Holthusen requested that the Court dismiss the indictment on the grounds that the federal regulation for which he is being prosecuted violates his treaty-guaranteed usufructory right to fish. Arguments were reserved and a memorandum in support of the motion was filed on July 29, 2013. Additionally, a motion to dismiss the indictment due to selective prosecution or for additional discovery was filed on June 20, 2013.

MOTION TO DISMISS: TREATY VIOLATION

Mr. Holthusen's conduct is protected by treaties between his tribe and the federal government. Congress has not acted to abrogate these rights. His motion should be granted and the charges against him dismissed.

The government asserts that a violation of 25 C.F.R. §§ 242.2 or 242.4 gives the federal government jurisdiction to prosecute Mr. Holthusen pursuant to 16 U.S.C. § 3372(a)(1). Otherwise known as the Lacey Act, 16 U.S.C. § 3372 makes it:

> unlawful for any person to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.

In violation of said laws, the government alleges that Mr. Holthusen illegally sold walleye fish to non-Indians. Thus, the government argues that by violating 25 C.F.R. §§ 242.2 and 242.4, Mr. Holthusen violated the Lacey Act and is subject to felony prosecution.

I. As A Member Of The Red Lake Chippewa Tribe, Mr. Holthusen Retains The Treaty-Guaranteed Right To Take Fish On Tribal Lands.

The usufructory rights of hunting, fishing, and the gathering of wild rice have long been central to the way of life of the Anishinabe (also known as Ojibwe or Chippewa) people. So important, in fact, that when ceding territory to the U.S. government, this right was closely guarded and specifically retained within the language of the treaties themselves:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States.[1]

The guaranteed rights referred to in this 1837 Treaty were as much a part of the aboriginal Indian title over land as the right to possession that those treaties ceded. *Mitchel v. United States*, 34 U.S. 711 (1835); *see also Johnson v. M'Intosh*, 21 U.S. 543 (1823). These severable usufructory rights cannot be lawfully taken from the Ojibwe unless such rights are clearly relinquished by treaty or extinguished by Congress. *See United States v. Dion*, 476 U.S. 734, 738 (1986).

Such extinguishment shall "not be lightly imputed to the Congress," nor can it be found absent "plain and unambiguous" congressional intent. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985); *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968). Indeed all interpretive actions with regard to Indian law, whether applied to statutes, treaties or executive orders, must be made construing such documents liberally

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[1] Treaty With The Chippewa, 1837 art. V, July 29, 1837, 7 Stat. 536. *See also* Treaty with the Chippewa, 1842 art. II, Oct. 4, 1842, 7 Stat. 591; Treaty With the Chippewa, 1854 art. XI, Sept. 30, 1854, 10 Stat. 1109.

in favor of the Indians, with ambiguities to be resolved in their favor. *See, e.g. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985). This so-called "Indian canon" is most often held to displace competing canons in matters of interpretation, including the strong presumptions against repeal by implication and exemption from taxation, the equal footing doctrine, and even the *Chevron* deference afforded to agencies in interpreting their own governing statutes. *Id.* at 766; *Choate*, 224 U.S. at 675; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001).

Through a series of treaties made during the course of the 19th century, including the aforementioned Treaties of 1837, 1842 and 1854, the Ojibwe tribes ceded the possessory, timber and mining rights to the majority of the territory they held in what later became the state of Minnesota. As the Supreme Court has held, though, the tribes retained their usufructory rights to hunt, fish and gather wild rice from the lands ceded. *Mille Lacs*, 526 U.S.172.

In *Mille Lacs*, the State of Minnesota brought three arguments to support the claim that the Ojibwe's treaty-held fishing rights in ceded lands had been extinguished; none prevailed. *Id.* The first centered on later ambiguous treaty language purporting to "fully and entirely relinquish...all right, title, and interest of whatsoever nature." *Id.* at 195 (citing Treaty with the Chippewa, 1855 art. I, 10 Stat. 1166). The second focused on an Executive

Order, which carried with it a strong presumption of legality, that attempted to revoke the Ojibwe's usufructory rights and order their removal from ceded lands. *Id.* at 189-95. The final argument hinged on the legislation enacted by Congress admitting Minnesota to the Union, and attempted to prevail on the equal footing doctrine. *Id.* at 203. Of these three arguments, none sufficed to abrogate the Ojibwe's usufructory rights in the face of the Indian canons to give effect to agreements in terms "as the Indians themselves would have understood them" and resolve any ambiguity in favor of the Indians. *Id.*

Furthermore, there exists no claim that these rights, held by the tribes with regard to lands ceded by treaty, apply with any less force on the lands reserved in those same treaties; rather, Indians are presumed to possess the exclusive right to control fishing, hunting and gathering on reservation lands. *Menominee Tribe*, 391 U.S. at 406; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326 (1983).

The Report and Recommendation notes two federal cases decided in the District of Minnesota in support of it's theory that agency regulations may regulate the exercise of usufructuary rights guaranteed by Indian treaties. The cases, *Gotchnik I* and *II*, address Mr. Gotchnik's use of a snowmobile and motorized boat in the Boundary Waters Canoe Area Wilderness of Minnesota and whether the prohibition of their use was an infringement upon Mr. Gotchnik's usufructuary right to hunt within the ceded territories. *See United States v. Gotchnik*, Nos. 5-94MG-05, 5-94MG-08 (RLE), 1995 WL 312012 (D. Minn. Mar. 28, 1995);

United States v. Gotchnik, Nos. 98-cr-262, 98-cr-302 (ADM/RLE), 57 F.Supp.2d 798 (D. Minn. 1999).

In *Gotchnik II*, the Court determined that the underlying agency regulation was a "permissible nondiscriminatory conservation measure." 57 F.Supp.2d at 803. Comparing the agency regulation to state regulations upheld by the Supreme Court, the District Court held that such restrictions could be made in the interest of conservation without abrogating treaty rights. *Id*.

The *Gotchnik* cases, however, are clearly distinguishable from Mr. Holthusen's case. The federal code at issue here, clearly attempts to regulate fishing on the Red Lake Indian Reservation, not the lakes and lands in State jurisdiction or federally protected wilderness area. Thus, the federal code's attempt to regulate Indian fishing on Indian land and abrogate Mr. Holthusen's rights without specific Congressional intent, is clearly a violation of the 1854 Treaty.

Additionally, unlike the regulations in the *Gotchnik* cases, 25 CFR §§ 242.2 and 242.4 have has nothing to do with conservation. Rather, 25 CFR § 242.2 provides an exclusive monopoly on commercial fishing to the Red Lake Fisheries Association, "a corporation organized and incorporated under the laws of Minnesota." And the purpose of 25 CFR § 242.4 is to regulate to whom the enrolled members of the Red Lake Band of Chippewa Indians may sell their caught fish, not how many fish may be caught and sold. Hence, the

Report and Recommendation's conservation argument, vis-a-vis the *Gotchnik* cases fails to note these important distinctions.

As pointed out by the Supreme Court, sweeping generalizations and broad applications of statutory interpretation must "give way to more individualized treatment of *particular treaties* and *specific federal statutes*", mandated by the significant variation in agreements made as a result of the unique positions each region found itself in with relation to Indian affairs, not only geographically but also temporally and politically. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (emphasis added). Thus, it is to be expected that District and Circuit Courts considering cases regarding the treaty rights of tribes in states such as California, Washington and Alaska may apply the same canons of construction and interpretation, yet reach wildly different results than would be appropriate to the same disputes in other jurisdictions. *See, e.g. United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991) (involving "customary trade" commercial fishing rights held by Alaskan peoples); *United States v. Skinna*, 931 F.2d 530 (9th Cir. 1991) (declaring Indian rights to have been extinguished by the Alaska Native Claims Settlement Act); *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985) (upholding application of the Lacey Act against tribal members based on treaty language guaranteeing the right to fish at all "usual and accustomed places," to be held "in common with citizens of the territory"). Because these cases addressed different treaties and different treaty provisions, their value as precedent in this case is minimal. The Report and Recommendation's reliance on them is unfounded.

II. Congress Has Not Acted To Abrogate The Right To Fish Guaranteed By The 1837 Treaty With The Chippewa.

As a federal statute of general applicability, 16 U.S.C. § 3372(a)(1) applies to all persons and property throughout the United States and as such is presumed to apply with equal force to Indian tribes, on reservation or off. *See United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980). However, several well-known exceptions to this rule are in force, one of which arises when such a statute would adversely affect those rights held by treaty. *See United States v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989). The law governing the intersection of statutes of general applicability and treaty rights is therefore different. Where a federal statute of general applicability is pitted against the treaty rights of an Indian tribe, a clear expression of congressional intent to extinguish those rights is necessary before such statute may be held to apply to members of the tribe. *Dion*, 476 U.S. 739.

In cases dealing with conservation statutes similar to the Lacey Act, no such congressional intent has been found where the government could not present evidence to meet the consideration-and-choice test. *See United States v. Bresette*, 761 F. Supp. 658, 663 (D. Minn. 1991) (holding that the Migratory Bird Treaty Act's proscription of the sale of migratory bird feathers was an impermissible regulation of Chippewa treaty rights); *cf. Dion*, 476 U.S. 734. As a District of Minnesota case decided in the wake of *Dion*, *Bresette* provides a pertinent example of a federal conservation statute of general applicability, the exercise of which would have resulted in the abrogation of treaty-guaranteed usufructory

rights. In dismissing the case, Judge Magnuson found that the Ojibwe retained the right to take the protected birds for their feathers and make a living off the sale of those feathers. Judge Magnuson held that absent any clear intent from Congress within the Migratory Species Act to abrogate that right, it remained with the Ojibwe. *Bresette*, 761 F. Supp. at 664.

Like the Migratory Species Act at issue in *Bresette*, the Lacey Act contains no explicit language or provision that serves to abrogate the treaty-reserved rights of the Ojibwe on the Red Lake Indian Reservation. While the inclusion of "Indian tribal law" under the Lacey Act may at first glance appear to reflect that Congress meant for the Lacey Act to apply to tribal members, further consideration reveals that tribal laws may be violated by any person and are not necessarily targeted at tribal members; therefore, no inference can be made that the inclusion of such a phrase denotes plainly and unambiguously the specific intent to abrogate treaty vested tribal rights and to oversee the regulation of those rights as applied to the members of their own bands. *See United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989) (holding a member of a neighboring reservation responsible for obtaining a tribal or state permit for fishing in tribal waters). In fact, within the definitions of the Lacey Act is a disclaimer providing that nothing within the act shall be construed as:

> repealing, superceding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute or executive order pertaining to any Indian tribe, band or community.

16 U.S.C. § 3378(c)(2). In attempting to control how members of the Red Lake Band of

Chippewa exercise their treaty-guaranteed usufructory rights to fish, hunt and make a modest living off the fruits of their labors, the Lacey Act would abrogate those rights while lacking any congressional authorization to do so.

III. The Federal Regulations Are Not An Act of Congress And Cannot Abrogate Treaty-Guaranteed Rights.

Mr. Holthusen challenges the abrogation of this treaty-guaranteed right to fish on the Red Lake Indian Reservation and submits that the federal code and the generalized language of the Lacey Act cannot usurp his rights. The Report And Recommendation relies on *Eberhardt*, and Ninth Circuit analysis of The Lacey Act's application to legislation created by the Department of Interior to manage tribal resources under 25 C.F.R. §§ 2 and 9.

In *Eberhardt*, the court decided that the Department of Interior had the right, granted by Congress, to enact regulations "to protect and conserve the fishery resource for the benefit of Indians, not as power to abrogate reserved tribal rights." 789 F.2d at 1360. In its analysis, the Ninth Circuit relies on Congress' delegation of powers to the Department of Interior in the 1830s as support for its "sufficient authority to promulgate the Indian fishing regulations" at issue in California. 789 F.2d at 1359-60. The court held that the Interior could "invoke the general trust statutes only as constituting authority to enact regulations to protect and conserve the fishery resource for the benefit of Indians." 789 F.2d at 1360. Thus, the Ninth Circuit created a "conservation test" to be applied to federal legislation regulating treaty-guaranteed rights and suggested that Congress need not expressly or clearly abrogate a treaty right if Indians are prosecuted for the benefit of other Indians. *See Eberhardt*, 789 F.2d

1354; *Anderson v. Evans*, 371 F.3d 475, 497-98 (9th Cir. 2004) (applying the test developed under *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980)). So long as the need for conservation is assessed, the Ninth Circuit suggests that any treaty may be ignored.

This analysis, however, declines to assess the impact of the abrogation of treaty rights and is directly at odds with the Supreme Court's analysis in *Dion* and the Lacey Act's disclaimer in 16 U.S.C. § 3378(c)(2). The Supreme Court's decision in *Dion*, published approximately one month after *Eberhardt*, states:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. 'Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights ....' We do not construe statutes as abrogating treaty rights in a 'backhanded way,' in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' Indian treaty rights are too fundamental to be easily cast aside.

Dion, 476 U.S. at 738 (citing *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S.404, 412 (1968); *Pigeon River Co. V. Cox Ltd.*, 291 U.S. 138 (1934)).

Furthermore, the *Eberhardt* court declined to reach the question of whether the regulations were arbitrary, capricious, an abuse of agency discretion, or otherwise contrary to law. 789 F.2d at 1362 (citing 5 U.S.C. § 706(2)(A)). As addressed above, the Interior's attempt to abrogate treaty-guaranteed rights for the purpose of conservation for the tribe is an abuse of agency discretion and contrary to law. The Interior does not have the authority

to abrogate treaty-guaranteed rights. The Ninth Circuit was simply wrong and its precedence should not be followed.

MOTION TO DISMISS OR FOR ADDITIONAL DISCOVERY: SELECTIVE PROSECUTION

Mr. Holthusen is one of ten people charged in federal court with violations of the Lacey Act through allegedly unlawful walleye fishing. Those ten defendants are charged in four separate, but very similar Indictments, all filed on April 9, 2013, and all deriving from the government's well-publicized "Operation Squarehook." Criminal numbers 13-68, 13-70, 13-71, 13-72.[2] According to the information known to counsel at this time, at least eight of the ten federal defendants are Native American, and are enrolled members of an Indian tribe in the state of Minnesota. Mr. Holthusen is an enrolled member of the Red Lake Band of Chippewa Indians.

In contrast, according to media reports regarding Operation Squarehook and materials provided by the DNR to the public, at least 21 "non-tribal" participants in the illegal fishing operations are being charged in state court.[3] While the predominately Native American federal defendants face serious felony charges under the Lacey Act, it appears that the state court prosecutions involve misdemeanors or gross misdemeanors.

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[2] Attached to the instant motion are materials from the websites of both the United States Attorney's Office and the DNR detailing some of the Operation Squarehook prosecutions.

[3] Two media reports regarding Operation Squarehook, issued in response to the government's own publicizing of these cases, are attached as a sampling for the Court's review.

Long ago, the Supreme Court observed that the administration of laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances" constitutes a denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). In order to support a claim that a defendant has been subject to the sort of impermissible selective prosecution contemplated by *Yick Wo* and its progeny, a defendant must show two things: a defendant must show that people similarly situated to him or her were not prosecuted and must show that the decision to prosecute was motivated by a discriminatory purpose, such as race or religion. *See e.g. United States v. Armstrong,* 517 U.S. 456, 465-66 (1996); *United States v. Hirsch*, 360 F.3d 860, 864 (8th Cir. 2004). A defendant is entitled to discovery if he presents evidence that tends "to show the existence of both elements." *Armstrong*, 517 U.S. at 468.

In *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987), the Eleventh Circuit held that evidence that a government voter fraud investigation targeted counties where blacks were in the majority was sufficient to satisfy the threshold showing of racial animus. Similarly, here, the Department of Natural Resources and the United States Fish and Wildlife Services exclusively targeted lakes on Indian Reservations and then publicly announced that Native Americans were facing federal prosecution. Additionally, despite the fact that all 31 defendants allegedly committed felony violations of the Lacey Act for selling or receiving fish in violation of federal law, the Native American defendants face felony prosecution in

federal court while many of their white counterparts face misdemeanor or gross misdemeanor prosecution in state court.

By proving that Native American reservations were targeted, Mr. Holthusen has made a credible showing of discriminatory intent. By providing the press releases discovered by counsel, Mr. Holthusen has also made a credible showing of the discriminatory effect of the prosecutions on Native Americans. Thus, this prima facie showing of both prongs of a selective prosecution claim entitles Mr. Holthusen to additional discovery. *See United States v. Perry*, 152 F.3d 900, 903 (8th Cir. 1998); *Armstrong,* 517 U.S. at 468-469. If it is merely a coincidence that Native Americans who have violated the same laws as their white counterparts are being prosecuted and punished more harshly, then there is no reason that Mr. Holthusen should not receive the information.

In our technological age, providing an identical discovery disk to each Native American defendant does not impose a high cost or burden on the government in consideration of a selective prosecution claim. A defendant cannot discover or produce evidence to meet an unreasonably high burden when the information needed is held exclusively by the government. A defendant cannot produce for the Court, what the government refuses to turn over. Additional discovery is needed.

MOTION TO SUPPRESS STATEMENTS

Mr. Holthusen objects to the recommendation against granting his motion to suppress statements attributed to him on July 24, 2011. The facts establish that Mr. Holthusen was in

law enforcement custody at the time of his interrogation and no effort was made to advise him of his constitutional rights per *Miranda*.

I. FACTUAL SUMMARY[4]

On July 24, 2011, Mr. Holthusen was at his home when he heard several cars speeding down the driveway. When he looked out the window he could see a large cloud of dust from the dirt drive filling the air. Startled, Mr. Holthusen opened the door of his home and stepped outside to see what was going on. Four vehicles were speeding down the drive carrying six federal agents and officers.

Once the vehicles stopped, Red Lake Conservation Officer Pier approached Mr. Holthusen near the front porch of the residence. Officer Pier then introduced Mr. Holthusen to U.S. Fish and Wildlife Agents R. Armstrong and C. Tabor who were approaching the porch. Agents Armstrong and Tabor were wearing their badges and firearms, as were the others who had arrived. Mr. Holthusen could see that all of the agents were armed. Two of the federal agents stood by their vehicle in the drive way and a third federal agent marked up and stood on the corner by the road. Officer Pier returned to his vehicle.

Agents Armstrong and Tabor told Mr. Holthusen that they wanted to talk to him and wanted to know who else was in his home. (Holthusen Recorded Statement 10:13, hereinafter "RS") They confronted Mr. Holthusen with illegally fishing and selling walleye

[4] This factual summary relies on evidence offered at the July 2, 2013 motions hearing.

and asked him about his fishing partner. (RS 11:20) Agent Tabor explained "we're not here to arrest you, we're just here to talk to you." (RS 12:04)

The Interrogation of Mr. Holthusen

As Agent Tabor began asking Mr. Holthusen questions, he failed to provide him with a *Miranda* warning. He told Mr. Holthusen that there had been a large undercover investigation with a number of covert officers throughout northern Minnesota and that his name and Tom Sumner's name had come up in their investigation. (RS 12:14)

Approximately twenty minutes into the interrogation Mr. Holthusen asks for clarification on what will happen to him. Despite Agent Tabor's comment that they were just there to talk to him, Mr. Holthusen didn't know if he was going to be arrested or not.

Holthusen: What's going to happen here?

Tabor: Well we don't know yet Brian, I mean to some extent that, you know, that kind of depends on you... You probably have some idea of how this works, I mean uh... um, the more, the more you help us out the more you help yourself. Um... I know it's an uncomfortable position that we are putting you in right now, but uh... um, it is what it is. Ya know?

Holthusen: Yeah, yeah, I know. Yeah. I don't like to snitch on anybody else either ya know or whatever. Ya know what I mean?

Tabor: Well... I.. I.. I respect that. I respect that, I do. Ya know, do you have any kids?

Holthusen: Yeah

Tabor: You know, you gotta have a girlfriend. I mean... there's people in your life that you know you want to take care of. Well... ya know sometimes we've gotta make tough decisions and

> sometimes you know you gotta make a decision ya know where you gotta do what's right for yourself and the people you care about.

(RS 20:09 - 21:30). Despite his question, Mr. Holthusen still believed that he had to talk to the agents or he would be taken away.

Later, still concerned about what will be happening, Mr. Holthusen explains that the agents scared him with their unannounced arrival at his home.

> Holthusen: You guys kinda freaked me out there, I didn't know what was going on?
>
> Tabor: Oh, all the trucks rolling in? ... Yeah.
>
> Holthusen: Yeah
>
> Tabor: Well...It probably would me too.

(RS 27:51 - 28:04) And again, looking for some assurance that he is not and will not be arrested, Mr. Holthusen explains that he was "freaked out" by the agents/officers.

> Holthusen: What's going to happen with this when we're all done?
>
> Tabor: I'd really like to be able to give you a, a definitive answer to give you a peace of mind right now. I appreciate how you're, how you're handling yourself here today.
>
> Holthusen: I was a little freaked out.
>
> Tabor: Well... I don't blame you, I would be too...

(RS 1:01:25 - 1:01:45) Knowing that their arrival and presence at Mr. Holthusen's home had shaken Mr. Holthusen, Agent Tabor does not assure him that he is not under arrest or that he doesn't have to talk to him. Agent Tabor merely agrees that it would have shaken him too.

The Affidavit

At the conclusion of the interrogation, Agent Tabor asked Mr. Holthusen to sign an affidavit that he and Agent Armstrong drafted. Agent Tabor told him to initial any scratch outs, draw lines and put his initials in specific places. (RS 1:06:43)

After an hour and thirteen minutes, the agents/officers left Mr. Holthusen's home. Mr. Holthusen believed that he would be arrested if he didn't answer the agents/officers' questions. When it came to signing the affidavit, Mr. Holthusen indicated that he didn't think he had a choice.

When the agents/officers left, Mr. Holthusen immediately called Tom Sumner to inform him that he talked to the police because he didn't have a choice. Mr. Holthusen said that he had to answer their questions or he would go to jail. He told Mr. Sumner that they were on their way to his house next.

II. LEGAL ANALYSIS

A. Mr. Holthusen Was In-Custody For *Miranda* Purposes And His Statement Must Be Suppressed.

Pursuant to *Miranda*, "an individual must be advised of the right to be free from compulsory self-incrimination, and the right to the assistance of an attorney, any time a person is taken into custody for questioning." *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990) *citing Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A person is "in

custody" for *Miranda* purposes if the person is either under "formal arrest or under *any other circumstances* where the suspect is deprived of his freedom of action in *any* significant way." *Griffin*, 922 F.2d at 1347 (emphasis in original).

Although the Report and Recommendation also looks at the totality of the circumstances, it focuses on the "objective circumstance of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned" when it relies on *United States v. LeBrun*, 363 F.3d 715, 720 (8th Cir. 2004). A court, however, is to examine the extent of the physical or psychological restraints placed on the suspect during interrogation "in light of whether a 'reasonable person in the suspect's position would have understood his situation' to be one of custody." *Griffin*, 922 F.2d at 1347. The "reasonable person" test is to be applied objectively: if, under the circumstance of a particular case, the suspect believes his freedom has been curtailed to the same extent an arrest would have curtailed it, and if the suspect's belief is reasonable, then the suspect is in custody. *Id*. at 1347.

Mr. Holthusen agrees that the ultimate determination of custody can only be reached upon considering the totality of the circumstances, but the "reasonable person" component cannot be ignored. *United States v. Axsom*, 289 F.3d 496, 500 (8th Cir. 2002). The relevant factors to be considered in making a determination of custody include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed

> unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of questioning.

Griffin, 922 F.2d at 1349. When balancing these factors, "a particularly strong showing with respect to one factor may compensate for a deficiency with respect to other factors." *Id*. (citing *South Dakota v. Long*, 465 F.2d 65, 70 (8th Cir. 1972)).

Taking into account the *Griffin* factors, Mr. Holthusen was in custody for purposes of *Miranda* and a reasonable person in his position would have understood his situation to be one of custody.

1) Mr. Holthusen Was Not Informed That The Questioning Was Voluntary, That He Was Free To Leave Or Request The Officers To Do So.

The Report and Recommendation recognizes that Mr. Holthusen was never told that the questioning was voluntary, that he was free to leave or that he could request that the agents/officers leave. The Report and Recommendation, however, is satisfied that Mr. Holthusen was told that he was not under arrest and that those words alone, favor a finding of noncustody.

This failure to explain the voluntary nature of the interrogation, however, was intentional and the officers used intimidation to get Mr. Holthusen's statement. The four trucks that sped into Mr. Holthusen's drive-way kicked-up a cloud of dust and carried six

armed agents/officers that strategically parked and exited their vehicles to watch Mr. Holthusen and his property. Agent Tabor's statement, "we're not here to arrest you, we're just here to talk to you" wasn't enough. (RS 12:05) The circumstances indicated to Mr. Holthusen that the officers wanted to speak with him and that he had to speak with them. Mr. Holthusen repeatedly asked Agent Tabor about what was going to happen to him and he told Agent Tabor twice, that they had freaked him out. Yet despite his voiced concerns, Agent Tabor did nothing to quell Mr. Holthusen's fears. Rather, Agent Tabor acquiesced in Mr. Holthusen's fear and directly benefitted from his fear by obtaining his statement.

2) Mr. Holthusen Did Not Possess Unrestrained Freedom Of Movement During Questioning.

During the hour long interview, Mr. Holthusen was allowed to go into his house to get a cigarette once. No other reasons or issues surrounding movement arose during the interview. As Mr. Holthusen testified, it was exceptionally hot outside but he stayed outside with the agents because he didn't think that he had a choice. Two armed agents were questioning Mr. Holthusen while three other armed agents stood in his driveway.

Despite the Report and Recommendation's finding that retrieving a cigarette from his home is indicative of Mr. Holthusen's "unrestrained freedom of movement," the surrounding scene suggests otherwise. Unlike cases where officers are actively executing a search warrant around a suspect who is being interviewed by one or two officers, Mr. Holthusen was

surrounded by officers. Their only purpose in being there was to obtain Mr. Holthusen's statement. Mr. Holthusen knew that. The officers were there to watch Mr. Holthusen and his house.

3) Mr. Holthusen Did Not Initiate Contact With Authorities Or Voluntarily Acquiesce To Official Requests To Respond To Questions.

Mr. Holthusen did not initiate contact with the agents/officers and was "freaked out" upon their arrival. He was confronted with being named in a large scale operation involving the illegal fishing and sale of walleye in Minnesota. Mr. Holthusen was asked to explain the circumstances surrounding his involvement. He was not asked to voluntarily come down to the police station for questioning and the six agents/officers' unannounced arrival at his home was not welcomed. Mr. Holthusen did not voluntarily acquiesce to questioning. He answered questions because he believed that he had no other choice. Mr. Holthusen's attempt to appear friendly and cooperative by answering the questions was to avoid formal arrest. The officers/agents intimidated Mr. Holthusen into answering their questions throughout the interview.

4) Strong Arm Tactics Or Deceptive Stratagems Were Employed During Questioning And The Atmosphere Was Police Dominated.

Despite the Report and Recommendation's finding that the investigators did not engage in strong-arm tactics or deceptive stratagems, the sheer number of armed agents and trucks present in Mr. Holthusen's drive-way were designed to intimidate him. The agents sped into Mr. Holthusen's drive-way to surprise him. They exited their vehicles to surround

him. The atmosphere was intentionally police dominated. Six agents/officers arrived at Mr. Holthusen's home when only one agent was necessary to obtain a voluntary statement. The other five officers/agents were simply present to intimidate Mr. Holthusen in order to obtain his statement and to circumvent *Miranda*.

Considering the totality of the circumstances, a reasonable person in Mr. Holthusen's position would have understood his situation to be one of custody and would not have felt free to leave. Thus, for *Miranda* purposes, Mr. Holthusen was temporarily under arrest and should have been advised of his constitutional rights against compulsory self-incrimination and the right to the assistance of an attorney. Failing to advise Mr. Holthusen of these rights, Agent Tabor violated the Fifth Amendment and its progeny and Mr. Holthusen's statements must be suppressed.

B. Mr. Holthusen's Affidavit Is "The Fruit Of The Poisonous Tree" And Must Be Suppressed.

Evidence need not be considered "fruit of the poisonous tree" simply because it wouldn't have come to light but for illegal police action. Instead, the proper test is:

> whether ... the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun v. United States, 371 U.S. 471, 488 (1963). Thus, if a confession is obtained due to an illegality, the Court must consider whether the affidavit was obtained due to distinguishable circumstances.

In making a determination as to whether evidence has been purged of the primary taint, a court should consider: the "temporal proximity of the arrest and the confession; the presence of intervening circumstances; and particularly, the proximity and flagrancy of the official misconduct." *Id*. at 602. *See also United States v. Vega-Rico*, 417 F.3d 976, 979 (8th Cir.2005); *United States v. Hernandez-Hernandez*, 384 F.3d 562, 565 (8th Cir. 2004). The burden of persuasion is on the government to show the purgation of the primary taint. *Brown*, 422 U.S. at 633.

The affidavit, in Mr. Holthusen's case, was written by Agents Tabor and Armstrong and given to Mr. Holthusen to sign at the conclusion of the hour-long interrogation where Mr. Holthusen was intentionally intimidated and denied is *Miranda* rights. Like his statement, Mr. Holthusen was coerced into signing the affidavit that was written by the agents and included the language and information that the agents wanted. The affidavit is the product of a custodial, non-Mirandized interrogation where Mr. Holthusen was intimidated and misled. As the fruit of the illegal interrogation, the affidavit must be suppressed.

C. Mr. Holthusen Did Not Voluntarily Sign The Affidavit And The Written Statement Must Be Suppressed.

Confessions and other evidence coerced from a defendant are not admissible at trial. *See Chavez v. Martinez*, 538 U.S. 760, 770 (2003). To determine if a defendant's statements were involuntary, a court must ask whether, under the totality of the circumstances, law enforcement officials obtained the evidence by overbearing the will of the accused. *See*

Haynes v. Washington, 373 U.S. 503, 513-14 (1963); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The test for involuntariness is whether a person's will was overborne or whether the confession was a product of rational intellect and free will. *See Townsend v. Sain*, 372 U.S. 293, 307 (1963).

In the case at hand, it was clear that when he gave his statement and signed the affidavit, Mr. Holthusen was intimidated by law enforcement officials. He was concerned about what was going to happen to him and twice explained to the agents/officers that he was "freaked out." If the agents/officers did not think it was important to inform Mr. Holthusen of his *Miranda* rights, they should have told him at a minimum, that he was free to leave, that his statement was voluntary, that he did not need to talk to law enforcement if he did not want to, that he could ask them to leave, or that he could refuse to sign the affidavit.

The affidavit was not signed voluntarily. It was not a product of Mr. Holthusen's rational intellect and free will. The affidavit was a continuation of Mr. Holthusen's illegally obtained statement. For these reasons, the affidavit must be suppressed.

CONCLUSION

For the above reasons, Mr. Holthusen requests that the Court dismiss the indictment for violating his treaty-guaranteed rights, grant Mr. Holthusen's motion for additional discovery regarding his selective prosecution claim and order the suppression of his statement that was taken in violation of his Fifth and Sixth Amendment rights.

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Respectfully submitted,

s/ Shannon Elkins

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