

Nos. 13-3800, 13-3801, 13-3802, 13-3803

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MICHAEL D. BROWN; JERRY A. REYES; MARC L. LYONS;
FREDERICK W. TIBBETS,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Nos. 13-CR-0068; 13-CR-0070
(Hon. John R. Tunheim)

OPENING BRIEF FOR THE UNITED STATES OF AMERICA

ANDREW LUGER
*U.S. Attorney
District of Minnesota*

ROBERT G. DREHER
*Acting Assistant Attorney General
Environment & Natural Res. Division*

THOMAS CALHOUN-LOPEZ
*Assistant U.S. Attorney
District of Minnesota*

J. DAVID GUNTER II
ALLEN M. BRABENDER
*Attorneys, U.S. Dep't of Justice
Environment & Natural Res. Division
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
Telephone: (202) 514-5316
allen.brabender@usdoj.gov*

SUMMARY OF THE CASE

In March 2010, state and federal officials began “Operation Squarehook,” an investigation focusing on the illegal commercialization and wanton waste of game fish in northern Minnesota. The defendants are four of the individuals indicted as a result of that investigation, and they are also enrolled members of Indian bands that constitute the Minnesota Chippewa Tribe. The Lacey Act, 16 U.S.C. §§ 3371, *et seq.*, makes it a federal criminal offense for any person to knowingly transport and sell fish taken in violation of Indian tribal law. The indictments allege that the defendants knowingly transported and sold fish knowing that the fish were taken illegally for commercial purposes by gill net from lakes within the Leech Lake Indian Reservation in violation of the laws of the Leech Lake Band of Chippewa (Ojibwe) Indians, one of the component bands of the Minnesota Chippewa Tribe.

Although the predicate offenses for the federal violations were violations of Indian tribal laws, the district court dismissed the indictments, concluding that an 1837 Treaty with the Chippewa that pertains to off-reservation lands prohibited federal penalties even for admitted violations of Indian tribal laws. The United States appeals.

The Court should provide 15 minutes per side for oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

The district court entered final judgment, as described in two separate opinions, on November 25, 2013. (No. 13-68, DCD 90; No. 13-70, DCD 188). The United States filed timely notices of appeal on December 23, 2013. (No. 13-68, DCD 95; No. 13-70, DCD 200); Fed. R. App. P.

4(b)(1)(B)(i). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In a prosecution under the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*, for illegal transportation and sale of game fish taken in violation of Indian tribal law, may individual Indian defendants invoke the on-reservation fishing rights retained by the Chippewa as a defense to the prosecution?

Most Apposite Authority: *United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989); *United States v. Stone*, 112 F.3d 971 (8th Cir. 1997); *United States v. Sohapp*y, 770 F.2d 816 (9th Cir. 1985); F. Cohen, FEDERAL INDIAN LAW, ch. 18 (2012 ed.).

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Lacey Act

The Lacey Act, ch. 553, 31 Stat. 187, is one of the Nation’s oldest environmental laws, enacted by Congress in 1900 to curb trafficking in wildlife illegally taken from their state or nation of origin. In 1981, Congress amended the Lacey Act to strengthen the law’s effectiveness as an enforcement tool, including by adding violations of Indian tribal law as predicate offenses for subsequent Lacey Act prosecutions. *See* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073. Congress included this amendment in recognition “of the resource management responsibilities of Indian tribes” and to assist tribes in the enforcement of tribal natural resource laws. S. Rep. 97-123, 4 (1981).

The Lacey Act, as amended and as relevant here, states that “[i]t is unlawful for any person – ”

to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.

16 U.S.C. § 3372(a)(1). A Lacey Act violation thus has two elements.

First, there must be a predicate offense, such as a “law, treaty, or regulation of the United States” or an “Indian tribal law,” establishing

that it is illegal to “take or possess” fish or wildlife or plants.¹ *Id.* Where such a law is violated, it is a separate federal offense for “any person” to knowingly “import, export, transport, sell, receive, acquire, or purchase” the illicit fish or wildlife or plants. *Id.* For Lacey Act purposes, “[t]he term ‘person’ includes any individual . . . subject to the jurisdiction of the United States.” *Id.* § 3371(e); *see also Big Eagle*, 881 F.2d at 540 n.1 (“The Lacey Act, by its terms and definitions, applies to Indian people.”). “Any person” who knowingly violates the Lacey Act is subject to criminal prosecution and penalties. 16 U.S.C. § 3373(d).

B. Tribal Fishing Rights On The Leech Lake Indian Reservation.

The indictments allege that the Lacey Act offenses occurred within the boundaries of the Leech Lake Indian Reservation. (No. 13-68, DCD 1, at p.2; No. 13-70, DCD 1, at p.2). The United States holds title to Reservation lands in trust for the benefit of the Leech Lake Band of Chippewa (Ojibwe) Indians. *See United States v. Mottaz*, 476 U.S. 834 (1986). The Leech Lake Reservation was established by the

¹ A different Lacey Act provision makes it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce – any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.” 16 U.S.C. § 3372(a)(2)(A).

1855 Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and was augmented by subsequent treaties and Executive orders.² *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998). The Leech Lake Reservation is located in north-central Minnesota in the counties of Beltrami, Cass, Hubbard, and Itasca. *Id.* The Chippewa National Forest and numerous lakes, or portions of lakes, are within the Reservation, including Case Lake, Lake Winnibigoshish, Six Mile Lake and the eponymous Leech Lake.³

“Indians enjoy exclusive hunting, fishing, and gathering rights on reservation lands.” *See* F. Cohen, *FEDERAL INDIAN LAW*, at § 18.03[1] (2012 ed.). “Exclusive on-reservation hunting, fishing, and gathering rights are implied from the establishment of a reservation for the exclusive use of a tribe.” *Id.* (citing *Menominee Tribe v. United States*, 391 U.S. 404, 406-07 (1968) and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326, 343-44 (1983)); *see also White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137 (8th Cir. 1982)

² *See* <http://www.llojibwe.org/drm/subnav/llbohstory.html> (history of establishment and changes to the Leach Lake Indian Reservation) (last visited March 3, 2014).

³ *See id.* For more information: http://en.wikipedia.org/wiki/Leech_Lake, and http://en.wikipedia.org/wiki/Leech_Lake_Indian_Reservation (last visited March 3, 2014).

(“The Band’s right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty.”). “Tribes retain the powers of self-government on their reservations when those powers have not been limited by treaties or [A]cts of Congress.” Cohen, *FEDERAL INDIAN LAW*, at § 18.03[2]. “By virtue of their retained rights, tribes holding on-reservation hunting, fishing, and gathering rights also retain the power to regulate their members in the exercise of those rights.” *Id.* (citing, *inter alia*, *New Mexico*, 462 U.S. at 330). The Leech Lake Band thus has exclusive fishing rights on the Reservation and the sovereign authority to regulate the Band’s members’ use of those retained rights.

C. Tribal Fishing Rights Under the 1837 Treaty.

In addition to treaties that established the Leech Lake Reservation, *Supra* at n.2, “[i]n 1837, the United States entered into a Treaty with several Bands of Chippewa Indians.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999). Under the terms of the 1837 Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States in exchange for money and goods. *Id.* at 175-76; *see also* 1837 Treaty, 7 Stat. 536 (July 29, 1837). Article V of the Treaty reserves to the Indians their usufructuary

rights over lands ceded to the United States under the 1837 Treaty.

Article V states:

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

1837 Treaty, 7 Stat. 536, art. 5. The off-reservation usufructuary rights reserved by the Chippewa under the 1837 Treaty have not been extinguished. *See Mille Lacs Band*, 526 U.S. at 176. However, the rights attach to lands that are not at issue in this case. *See* 1837 Treaty, 7 Stat. 536, Art. I (description of lands ceded). The lands ceded under the 1837 Treaty are in east-central Minnesota and in Wisconsin.⁴ *Id.* In contrast, the Leech Lake Reservation is in north-central Minnesota.

II. FACTUAL BACKGROUND

Leech Lake and other nearby lakes are popular sport fishing spots for tribal members and nonmembers alike. *Supra* at n.3. The Leech Lake Band operates a commercial fishery on Reservation lakes. *Id.* To conserve and protect lake resources for members and non-members, the Band requires its members to obtain a special permit before taking fish

⁴ http://www.llojibwe.org/drm/maps/swlc_WebView.jpg (map of land cessation treaty boundaries in Minnesota) (last visited March 3, 2014).

for commercial purposes. Leech Lake Conservation Code (“LLCC”) § 23.01. The Band, among other things, also prohibits taking fish by gill net for commercial purposes. LLCC § 22.01(2). The Band has deputized state conservation officers to enforce tribal laws. *Supra* at n.2.

In 2010, the Minnesota Department of Natural Resources (“DNR”) began an investigation, “Operation Squarehook,” into the illegal trade in game fish within Minnesota.⁵ The DNR coordinated its investigation with, among others, the U.S. Fish and Wildlife Service and, as the investigation began to involve tribal members, the Leech Lake Band. *Supra* at n.5. The investigation found that thousands of game fish, mostly walleye, were being removed using gill nets from Minnesota lakes, including Leech Lake, Case Lake, Lake Winnibigoshish, and Six Mile Lake, in violation of tribal law. Those fish then were transported throughout Minnesota and were sold and purchased on the black market in violation of state and federal law. In the course of the operation, the DNR and its cooperating agencies used undercover officers to purchase walleye from the suspected poachers.

⁵http://www.dnr.state.mn.us/enforcement/op_squarehook_faq.html (last visited March 3, 2014)

The investigation has resulted in state charges against 21 individuals and federal indictments against 10 others. *Supra* at n.5. The defendants in this appeal are four of the federally-indicted individuals, and they are also enrolled members of Indian bands that constitute the Minnesota Chippewa Tribe.⁶ The indictments charge each defendant with knowingly transporting and selling walleye, a game fish, that the defendants knew was taken illegally by gill net, for commercial purposes, within the boundaries of the Leech Lake Reservation in violation of tribal law, specifically LLCC §§ 22.01(2) & 23.01. (No. 13-68, DCD 1, at p.2-3; No. 13-70, DCD 1, at p.3).

III. PROCEEDINGS BELOW

The defendants moved to dismiss the indictments alleging that the usufructuary rights reserved in the 1837 Treaty made them immune from prosecution under the Lacey Act. The indictments were referred to a magistrate judge, who considered the motions to dismiss. After a hearing, the magistrate judge issued Reports and

⁶ Defendants Michael Brown, Jerry Reyes, and Marc Lyons, are members of the Leech Lake Band. (No. 13-68, DCD 1, at p.2; No. 13-70, DCD 1, at p.2). Defendant Frederick Tibbets is a member of the White Earth Band. (No. 13-70, DCD 1, at p.2). The Leech Lake Band and White Earth Band are part of the federally-recognized Minnesota Chippewa Tribe. *See* 78 Fed Reg. 26,384 (May 6, 2013).

Recommendations recommending that the district court deny the motions. (No. 13-68, DCD 71, at p.39; No. 13-70, DCD 147, at p.20, DCD 148, at p.28-29, DCD 149, at p.27-28).⁷ Without addressing whether the lands that comprised the Leech Lake Reservation were ceded under the 1837 Treaty, the magistrate judge noted that the Chippewa generally have a right to fish on land ceded by the 1837 Treaty. (No. 13-68, DCD 71, at p. 5). But the magistrate judge also found that the Lacey Act was a statute of general applicability and that the 1837 Treaty did not exempt Indians from the Act. (No. 13-68, DCD 71, at p.3-4, 7). For each defendant, the magistrate judge applied the court's reasoning in *United States v. Sohappay*, 770 F.2d 816 (9th Cir. 1985), to conclude that the Lacey Act would allow federal prosecution for trafficking in illicit fish taken in violation of Indian tribal law. (No. 13-68, DCD 71, at p.6-7).

The district court viewed the cases differently from the magistrate judge. Relying on *United States v. Dion*, 476 U.S. 734 (1986), the district court concluded that it must first determine the scope of the rights granted in the 1837 Treaty, and then analyze whether Congress had

⁷ Because the magistrate judge and district court used identical reasoning for each defendant, from this point on, the brief will cite solely to the record in the lead case, *United States v. Brown*, No. 13-68.

abrogated those rights by statute. (No. 13-68, DCD 90, at p.9). In undertaking the two-step abrogation analysis that it thought *Dion* required, the district court first concluded that the 1837 Treaty granted an “exclusive” right to hunt and fish on reserved lands, and that this right is held by, and can be asserted by, individual tribal members. (*Id.* at 13). Because he found “no indication in the text of the Lacey Act that Congress intended to abrogate individual Chippewa members’ fishing rights,” (*id.* at 19), the district court concluded that the 1837 Treaty provides individual tribal members immunity from federal prosecution, (*id.* at 22). The district court reasoned that the Lacey Act’s provisions authorizing federal enforcement of “Indian tribal law” apply only “in situations that would not offend treaty rights.” (*Id.* at 21). Like the magistrate judge, the district court did not endeavor to determine whether the lands that comprised the Reservation were ceded under the 1837 Treaty. The court dismissed the indictments. (*Id.* at 22).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the indictments. The court’s error resulted from its misunderstanding of the basis and nature of the fishing rights at issue and of the Lacey Act. While the Leech Lake Band

retains the exclusive right to fish, hunt, and gather on its reservation, that right does not stem from the 1837 Treaty, but from the inherent right of all sovereign entities to control the resources within their borders. Contrary to the district court's analysis, the fishing rights retained by the Leech Lake Band belong to the Band collectively, not to the defendants individually. To allow the rights to be enjoyed by the entire community, the Band has enacted laws limiting how individual members may exercise those retained rights. The defendants are alleged to have violated those tribal laws. Federal enforcement of those laws through the Lacey Act does not abrogate any rights that the individual Indians may hold – whether by treaty or otherwise. Rather, federal enforcement supports tribal laws and protects tribal resources by authorizing federal penalties for those who profit, or attempt to profit, from such violations. The defendants do not have a right to act in violation of tribal law. The defendants thus cannot raise the Band's collective right as a defense to a Lacey Act prosecution.

ARGUMENT

The district court erred in granting the defendants' motions to dismiss. This Court "review[s] *de novo* the district court's decision to

grant [a] motion to dismiss” in a criminal case. *United States v. Keeney*, 241 F.3d 1040, 1043 (8th Cir. 2001). Upon *de novo* review, this Court should reverse the district court and remand these cases for trial.

The district court’s conclusion that the United States cannot prosecute Indian defendants under the Lacey Act for knowingly transporting and selling fish taken in violation of Indian tribal law is counterintuitive and erroneous. The district court reached its conclusion based on the following faulty chain of logic: (1) The 1837 Treaty applies to the lands at issue here; (2) that treaty grants usufructuary rights to the individual defendants; and (3) the Lacey Act cannot apply to the defendants unless Congress abrogated their treaty-based usufructuary rights. As explained below, that chain of logic reveals the district court’s misunderstandings of the basis and nature of the fishing rights at issue here and of the Lacey Act and cannot withstand scrutiny. Accordingly, the district court’s judgment dismissing the indictments should be reversed and these cases should be remanded for trial.

A. The 1837 Treaty is inapplicable.

The district court first erred in finding that the 1837 Treaty gives the defendants the right to take fish from the Leech Lake Reservation

for commercial sale. Article V of the 1837 Treaty, the Treaty provision relied on by the district court and defendants, reserves to the Chippewa their usufructuary rights over lands ceded to the United States under that 1837 Treaty. *See* 1837 Treaty, 7 Stat. 536, Art. I (description of lands ceded). Those off-reservation lands are southeastward of the Leech Lake Reservation, and not where the conduct alleged in the indictments occurred. This error may not be dispositive here because Leech Lake Band also has on-reservation fishing rights that are inherent in its sovereignty. *See* Cohen, FEDERAL INDIAN LAW, at § 18.03[1]. However, this basic and fundamental error shows that the district court's analysis and conclusion rests on a shaky foundation.

B. Where the Leech Lake Band has restricted its members' exercise of tribal fishing rights, the rights cannot be asserted as a defense in this proceeding.

The district court next erred in concluding that the “fishing rights are held individually” by the defendants notwithstanding tribal regulation of those rights. The right to hunt, fish, and gather on the Leech Lake Reservation arises inherently from the Leech Lake Band's

sovereignty.⁸ See *White Earth Band*, 683 F.2d at 1137 (“The Band’s right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty.”). While individual Indians enjoy a “personal right” that they may assert in court proceedings, the right they enjoy is “the right of an individual of the community” – part of the “tribal right to hunt or fish.” *United States v. Fox*, 573 F.3d 1050, 1053-54 (10th Cir. 2009). The rights at issue thus are subject to tribal regulation and limitation. See Cohen, FEDERAL INDIAN LAW, at §§ 18.03[2](a), 18.04[3](a); see also *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961).

Here, to preserve its resources for all its members and others in the community, the Leech Lake Band, through regulation, limits how its members may exercise or invoke the Band’s fishing rights. The Band, among other restrictions, prohibits the taking of fish with gill nets except for personal uses and requires those wishing to take fish for commercial purposes to obtain a special permit. LLCC §§ 22.01(2) & 23.01. These regulations serve a conservation purpose. Wide-scale

⁸ Even if the district court were correct that the rights at issue were treaty rights, “[t]he very great majority of Indian treaties create tribal, not individual, rights.” See *Hebah v. United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970) (citing *Blackfeather v. United States*, 190 U.S. 368, 377 (1903)). As in the “very great majority” of cases, the United States entered into the 1837 Treaty with the Chippewa Tribe as a whole.

commercial netting has the potential to wreak terrible damage on stocks of game fish like walleye in Reservation lakes.⁹ It also depletes other fish stocks, as less profitable, less desirable fish typically are killed in the nets, then removed and simply left to rot on the beach.

Supra at n.5. Thus, for all tribal members to use and benefit from their communal rights, the Leech Lake Band, through its tribal government, has enacted regulations prohibiting netting and requiring permits for commercial fishing. The Band thus has limited how its individual members may exercise or invoke the Band's fishing rights.

The fact that the Band could have allowed more permissive exercise of its fishing rights is immaterial. The defendants are accused of acting outside the limits of the rights the Band allows its individual members to exercise and assert. The defendants thus cannot assert the

⁹ The dire state of Red Lake fish stocks in the late 1980s and 1990s provides an example of the devastating environmental and economic damage that wide-scale and/or unlawful commercial netting can cause. See, e.g., <http://www.redlakednr.org/Fisheries.html> (last visited March 3, 2014); http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwebapps8.dnr.state.mn.us%2Fmfv_pdf%2Farticles%2F2022_Tale_of_Two_Lakes_A.pdf&ei=ebQUU7uOG8Wf0QHclYDADA&usg=AFQjCNFqDxgpmveYudZY87xItNrsj2YX9w (last visited March 3, 2014).

Band's rights as a defense to these Lacey Act prosecutions. *Cf. Dion*, 476 U.S. at 745-46 (tribal shield once removed by valid statute or regulation cannot be asserted by individual defendant for any purpose).

C. The Lacey Act does not conflict with tribal rights.

Finally, the district court erred by concluding that the Lacey Act conflicts with tribal rights. As noted, the magistrate judge applied the Ninth Circuit's reasoning in *Sohappy* to conclude that the Lacey Act, as a law of general applicability, applied to the defendants. (No. 13-68, DCD 71, at p.4. n.5, 6-7) (discussing *Sohappy*, 770 F.2d at 817-18)). The district court overruled the magistrate judge and applied *Dion* instead, because the court thought the Lacey Act conflicted with the usufructuary rights the court thought the 1837 Treaty provided to each individual defendant. (No. 13-68, DCD 90, at p.9-10, 19) (discussing *Dion*, 476 U.S. at 737-40)). The district court was mistaken.

Where, as here, a tribe has enacted regulations to conserve its natural resources, federal enforcement of tribal conservation laws through a Lacey Act prosecution does not conflict with the tribal rights. The defendants do not have a right to violate tribal law. "Tribal wildlife laws are per se valid against tribe members." *United States v. Williams*,

898 F.2d 727, 729 (9th Cir. 1990). Thus, a Lacey Act prosecution of tribal members that is predicated on violations of tribal natural resource laws does not conflict with tribal rights.

Put differently, once fish, wildlife, or plants are taken in violation of foreign, federal, state, or Indian tribal law, those unlawfully-taken fish, wildlife, or plants become, in essence, contraband. *See United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1136 (9th Cir. 2005); *see also Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1207 (N.D. Cal. 2009) (“contraband and other property that it is illegal to possess” includes property that becomes illegal to possess because of extrinsic circumstances”) (citations and quotations omitted)). However, the Lacey Act does not dictate what constitutes contraband. It is the laws of the nation, state, or tribe from whose territory or jurisdiction the fish, wildlife, or plants were unlawfully taken or possessed that determines what constitutes contraband. Here, it is the Leech Lake Band’s laws that determine when fish taken from waters within the Reservation is unlawful contraband. The Lacey Act merely prohibits the sale and transport of this fish within the jurisdiction of the United States. *See* 16 U.S.C. § 3372(a)(1). The Lacey Act thus does not conflict

with tribal rights. The Act protects those rights by offering federal penalties for violations. *See Sohappy*, 770 F.2d at 819-20.

For these reasons, the district court's invocation of a *Dion*-type abrogation analysis was inappropriate. The Lacey Act explicitly disclaims any notion that it abrogates tribal rights. It states that “[n]othing in this chapter shall be construed as . . . repealing, superseding, 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.” *See* 16 U.S.C. § 3378(c)(2). The Lacey Act thus, by its plain language, does not prohibit any activity reserved or retained by Indian tribes or abrogate tribal rights. *Id.* The Act only prohibits the illicit trafficking in fish or wildlife or plants taken in violation of some other predicate law, including Indian tribal law. Congress intended the Lacey Act to supplement tribal rights by providing an additional enforcement mechanism for conduct that a tribe's own government already has proscribed. Congress provided this additional mechanism in recognition that tribal governments, like state or foreign governments, manage and regulate their natural resources. S. Rep. 97-123, 4 (1981). The United States

supports this management by seeking to deter or prevent access to the Nation's commercial markets that might drive violations of those natural resource laws. Including violations of Indian tribal laws as predicate offenses does not offend tribal fishing rights or tribal sovereignty – it places tribal conservation laws and tribal natural resources on equal footing with the laws and natural resources of the state and foreign governments that Congress enacted the Lacey Act to protect. Where the defendants' alleged conduct is beyond the scope of the fishing rights that the Leech Lake Band grants to its individual members, the defendants have no individual rights to assert in defense to a federal prosecution (or, for that matter, in defense of a tribal prosecution). The Lacey Act thus does not abrogate tribal rights.

As the magistrate judge concluded, the Ninth Circuit's decision in *Sohappy* provides the correct mode of analysis. (No. 13-68, DCD 71, at p.4. n.5, 6-7). *Sohappy* considered the same Lacey Act provision at issue here, prohibiting the transportation and sale of fish taken outside the seasons prescribed by Indian tribal law. 770 F.2d at 817. The defendants in *Sohappy* admittedly had violated tribal law, so the question before the court was whether the United States could enforce

that tribal law through the Lacey Act, or whether defendants were subject to the exclusive jurisdiction of the tribe. *Id.* at 818. The Ninth Circuit found the Lacey Act prosecutions were proper. The court held that rather than impairing tribal rights, federal enforcement “supports the tribal laws by authorizing federal penalties for violations.” *Id.* at 819-20. Because the Lacey Act was a mechanism for federal enforcement of tribal law, the Act did not conflict with tribal rights.

This conclusion and mode of analysis is consistent with this Court’s decision in *United States v. Stone*. That case did not involve the Lacey Act, but rather a defendant who was prosecuted for hunting on tribal land in violation of the Airborne Hunting Act. *See Stone*, 112 F.3d at 973. Noting that the pertinent tribal law also prohibited taking or pursuing game using an airplane, this Court recognized, “as in *Sohappy*,” that federal penalties for violation of tribal laws supports rather than conflicts with tribal authority over the tribe’s treaty-protected natural resources. *Id.* at 974 & n.7.

The district court distinguished *Sohappy* and *Stone* on the ground that the Band’s rights here are “exclusive” as opposed to rights that are held “in common” with non-Indians. (No. 13-68, DCD 90, at p.11 n.6).

This distinction, however, is immaterial. Where the rights are exclusive, a tribe's exercise of its fishing rights generally is beyond a state's jurisdiction. *See* Cohen, FEDERAL INDIAN LAW, at § 18.03[2][b] (citing *New Mexico*, 462 U.S. at 332 n.15). This case, however, is not about Minnesota's ability to regulate the exercise of the Band's fishing rights. *See Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1006 (D. Minn. 1971) ("The Court declares that Plaintiff Indians have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws. Defendants are enjoined from enforcing such laws."). Even given the exclusivity of the Band's collective right to fish, where the Band itself has limited its members' exercise of that right, there is no conflict between the Band's rights and the Lacey Act. Instead, the Lacey Act merely allows federal penalties for activity that goes beyond the scope of the right as defined by tribal law. The exclusivity of the right does not provide a defense to these defendants where it is alleged that they exceeded the bounds of their rights under tribal law.

Having an exclusive right to fish does not mean the Band has an exclusive right to prosecute conduct that violates not only its laws, but

the laws of the sovereign United States as well. The Band, of course, has the right to prosecute tribal members for violating its laws in its tribal courts, *see United States v. Lara*, 541 U.S. 193 (2004), just as state and foreign governments in Lacey Act cases retain the right to prosecute violations of their laws. But when the defendants transported and sold the contraband fish they are alleged to have taken in violation of tribal law, the defendants also violated the laws of the United States. The defendants' alleged conduct thus transgresses the laws of multiple sovereigns and each sovereign has the inherent authority to prosecute for the offenses committed against it. *Cf. Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that the double jeopardy clause does not forbid successive prosecutions by separate sovereigns).

In sum, “[t]he Lacey Act, by its terms and definitions, applies to” these defendants. *Big Eagle*, 881 F.2d at 540 n.1. Federal enforcement of the Lacey Act supports tribal laws and conserves tribal resources by authorizing federal penalties for those attempting to access the United States’ commercial markets to profit from fish taken in violation of Indian tribal law. The defendants have no right to act in violation of tribal laws. The district court erred in dismissing the indictments.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand these cases for trial.

Respectfully submitted,

ANDREW LUGER
*U.S. Attorney
District of Minnesota*

THOMAS CALHOUN-
LOPEZ
*Assistant U.S. Attorney
District of Minnesota*

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DJ # 198-14099

/s/ Allen M. Brabender
ROBERT G. DREHER
*Acting Assistant Attorney General
Environment & Natural Res. Division*

J. DAVID GUNTER II
ALLEN M. BRABENDER
*Attorneys, U.S. Dep't of Justice
Environment & Natural Res. Division
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
Telephone: (202) 514-5316
allen.brabender@usdoj.gov*

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4,609 words. I used Microsoft Word 2007.

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/s/ Allen M. Brabender
ALLEN M. BRABENDER
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Telephone: (202) 514-5316
allen.brabender@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Allen M. Brabender
ALLEN M. BRABENDER
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
Telephone: (202) 514-5316
allen.brabender@usdoj.gov