

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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA  
Nos. 13-CR-0068; 13-CR-0070  
(Hon. John R. Tunheim)

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**REPLY BRIEF FOR THE UNITED STATES OF AMERICA**

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## ARGUMENT

The defendants have been indicted for violating the Lacey Act by knowingly transporting and selling fish that were taken illegally for commercial purposes by gill net within the Leech Lake Indian Reservation in northern Minnesota in violation of the laws of the Leech Lake Band of Chippewa Indians (“the Band”). As demonstrated in the opening brief, the district court erred in dismissing the indictments based on the court’s mistaken view that the defendants have individual treaty rights to fish with gill nets for commercial purposes. Contrary to the district court’s analysis, the fishing rights at issue are collective rights retained by the Band as whole, they are not individual rights. The Band has enacted laws limiting how individual members may exercise those retained rights. The defendants are alleged to have violated those tribal laws. Predicating Lacey Act prosecutions on violations of those tribal laws does not abrogate any rights that the individual tribal members may hold. Rather, federal enforcement supplements 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.

Thus, despite what the defendants would have this Court believe, this case does not involve a dispute about the Band's fishing rights. The United States agrees that the Band has fishing rights. The United States agrees that the Band's right to regulate fishing is exclusive. The United States also does not dispute that an 1837 Treaty recognized the Chippewa's usufructuary rights to the off-reservation lands ceded to the United States under that treaty (lands not at issue here). But the fact that the Band has on- and off-reservation fishing rights and has the right to regulate fishing on its reservation exclusive of the authority of the State of Minnesota does not give these individual defendants the right to violate federal law. The defendants do not have the right to harvest fish from the Leech Lake Reservation in violation of tribal law. Nor do the defendants have the right to transport and sell contraband fish taken in violation of tribal law on the black market within the jurisdiction of the United States. The defendants' contrary position that they may not be subjected to federal penalties under the Lacey Act for transporting and selling fish that were taken in violation of tribal law is

not only counterintuitive, it is legally erroneous. The district court erred in accepting the defendants' position over the magistrate judge's recommendations and in dismissing the indictments. This Court should reinstate the indictments and remand these cases for trial.

**A. 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.**

In the opening brief, the United States established that the fishing rights at issue are collective rights, and not individual rights. U.S. Op. Br. at 13-16. The defendants do not dispute this proposition, at least implicitly recognizing that the fishing rights at issue are subject to tribal regulation and tribal limitation. Here, the Band, through its tribal government, has limited how its individual 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.<sup>1</sup> See Leech Lake Conservation Code

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<sup>1</sup> In order to resolve disputes with the State of Minnesota over the Band's fishing rights, the parties in *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971), agreed that the Band would regulate on-reservation fishing by tribal members. See

(LLCC) §§ 22.01(2) & 23.01. The defendants are alleged to have violated these prohibitions and requirements. Thus, individual defendants have no independent fishing rights to assert as a defense to these Lacey Act prosecutions – whether the tribal right is based in treaty or otherwise<sup>2</sup> – because the Band, as holder of the right, has limited the exercise of that tribal right to preclude fishing in the manner the defendants are accused of having done here. *See* U.S. Op. Br. at 15-16. The defendants never meaningfully address the government’s argument on this point.

The defendants largely rely on *United States v. Dion*, 476 U.S. 734 (1986). There, the Supreme Court held that Congress, in enacting the Eagle Protection Act, abrogated any treaty right the defendant had to hunt bald eagles. *See Dion*, 476 U.S. at 745-46. However, this case is not about abrogation. The Band itself has limited its members’ fishing

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Appendix to Brief of Appellees at 15a. The Band enacted the Leech Lake Conservation Code for that very purpose.

<sup>2</sup> The defendants now agree (at 17) that the Band does not derive its exclusive right to regulate on-reservation fishing from the 1837 Treaty relied on by the district court. Rather, the Band’s exclusive fishing rights stem from the establishment of the reservation for its members’ exclusive use and the inherent right of all sovereign entities to control the resources within their borders. U.S. Op. Br. at 4-5. In any event, the source of the right is unlikely to be dispositive here where the parties agree that the Band’s fishing rights at issue are exclusive.

rights and prohibited the conduct that provides the basis for the predicate Lacey Act offense. The defendants may not like the result, but that does not mean the Band's fishing rights have been abrogated.

If anything, *Dion* supports the United States' position here. In *Dion*, the defendant argued that, even if the Eagle Protection Act abrogated his tribe's treaty right, the court of appeals correctly had dismissed the Endangered Species Act charges against him because that statute, unlike the Eagle Protection Act, did not abrogate his tribe's treaty rights. *Id.* at 745. The Supreme Court unanimously disagreed. *Id.* at 745-46. The Supreme Court held that the tribal treaty shield once removed by valid statute or regulation cannot be asserted by a defendant for any purpose. *Id.* Accordingly, while the defendants apparently view *Dion* as supporting their position, in truth *Dion* refutes it. *Dion* instead supports the view that the defendants have no individual fishing rights to assert as a defense here where the Band has defined the tribal right to fish to exclude the defendants' conduct.

Seeking to elude the effect of the Band's regulation, the defendants contend (at 20 n.5) that "there is no question that the rights afforded to the defendants include the right to fish with gill nets." As

mentioned, however, the rights at issue are collective rights that belong to the tribal community as a whole, not to these individual defendants. The rights thus are subject to tribal regulations and tribal limitation. Here, to preserve its resources for all its members and others in the community, the Band, through regulation, limits how its members may exercise or invoke the Band's fishing rights. The Band prohibits the taking of fish with gill nets except for personal uses. LLCC §§ 22.01(2) & 23.01. The fact that the Band could have allowed more permissive exercise of its fishing rights by permitting its members to use gill nets for commercial purposes is immaterial here. The defendants are accused of acting outside the limits of the rights the Band allows its individual members to exercise and assert. These defendants thus most definitely have not been afforded "the right to fish with gill nets."

**B. The Lacey Act supplements tribal rights.**

The defendants next contend (at 22) that "the government cannot plausibly claim that the Lacey Act *sub silentio* diminished the fishing rights of the Leech Lake Band." The government does not make such a claim. The United States agrees that the Lacey Act does not diminish the Band's fishing rights, as the Lacey Act plainly states. *See* 16 U.S.C.

§ 3378(c)(2) (“Nothing 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.”). The Lacey Act instead supplements the Band’s fishing rights by providing an additional enforcement mechanism for conduct that the Band’s fishing regulations prohibit. Federal enforcement of the Lacey Act thus 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 tribal law.

The defendants’ assertions (at 20) that they merely “sought to make a modest living by selling the fish they harvested” and that “[t]heir activities... are part of the traditional way of life of the Chippewa people” are not viable assertions in light of the proscription of tribal law. Tribal law required the defendants to obtain tribal licenses before commercially fishing and prohibited the defendants from taking fish using gill nets except for personal uses. LLCC §§ 22.01(2), 23.01. The defendants did not follow the law. Under tribal law, the defendants’ alleged acts are the acts of poachers, not innocent fisherman engaged in

traditional activities. The defendants' alleged conduct harms the tribal members who follow the law and hampers those law-abiding tribal members in their own exercise of tribal fishing rights.<sup>3</sup>

In fact, the defendants' alleged conduct illustrates how federal enforcement aides in combating unlawful fish and wildlife trafficking and why the Lacey Act "helps support the web of federal, state and Indian tribal law protecting wildlife." *United States v. Sohappy*, 770 F.2d 816, 819 (9th Cir. 1985). Those persons attempting to profit from the unlawful harvest of fish or wildlife often do not respect territorial boundaries. They will attempt to access commercial markets wherever potential buyers for their illicit products may be found. By making it a federal criminal offense to "import, export, transport, sell, receive, acquire, or purchase" contraband fish or wildlife or plants within the jurisdiction of the United States, the Lacey Act has assisted American states in protecting their own natural resources since 1900, and has long assisted foreign nations as well. *See* S. Rep. 97-123, 2 (1981) ("The Lacey Act] was viewed [in 1900], and should be viewed now, not as

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<sup>3</sup> As mentioned in the opening brief, the situation at Red Lake in the late 1980s and 1990s provides an example of the devastating impacts unlawful commercial fishing may wreak. *See* U.S. Op. Br. at 15 n.9.

increasing the federal role in managing wildlife, but as federal tool to aid the states in enforcing their own laws concerning wildlife.”); *see also* 33 Cong. Rec. 4,871 (1900); H.R. Rep. No. 56-474 (1900). By amending the Lacey Act in 1981 to include violations of Indian tribal law as a predicate offense, Congress placed tribal conservation laws and tribal natural resources on equal footing with the laws and resources of other governments. *See id.* at 4 (adding violations of Indian tribal law as predicate Lacey Act offense in recognition “of the resource management responsibilities of Indian tribes”); *see also* H.R. Rep. No. 276, 97th Cong., 1st Sess., 13 (1981). Thus, the Lacey Act supplements the tribal right to fish by helping to ensure that fish remain in the reservation lakes so that the tribe may exercise its exclusive fishing rights.

**C. The United States is enforcing the Lacey Act, and not the Leech Lake Conservation Code.**

The defendants premise much their argument on the false notion that the United States through these prosecutions is attempting to enforce the Leech Lake Conservation Code. The United States is not enforcing the Leech Lake Code, at least not directly. The United States is enforcing the Lacey Act. The Leech Lake Code prohibits commercial fishing by gill net without a tribally-issued license. *See* LLCC §§

22.01(2), 23.01. The Lacey Act, however, prohibits different conduct. The prohibited acts in the Lacey Act are the “import, export, transport, s[ale], recei[pt], acqui[sition], or purchase” of contraband fish or wildlife or plants within the jurisdiction of the United States. 16 U.S.C. § 3372(a)(1). The Code violation is only a predicate offense that determines what constitutes contraband that cannot knowingly be “import[ed], export[ed], transport[ed], s[old], receive[d], acquire[d], or purchase[d].” These prosecutions seek to punish the defendants for *transporting* and *selling* the contraband fish within the jurisdiction of the United States, not merely for taking the fish in violation of the Leech Lake Code.<sup>4</sup> *See Sohappy*, 770 F.2d at 821 (“[T]he Lacey Act did not merely incorporate tribal law, but created new offenses by

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<sup>4</sup> The defendants are wrong (at 34) that “the federal government has no dog in this fight.” As explained in the opening brief and not rebutted by the defendants, the fish that the defendants stand accused of transporting and selling was illegally harvested – it was contraband. *See* U.S. Op. Br. at 17 (citing *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1136 (9th Cir. 2005)). The Lacey Act prohibits the sale and transport of contraband fish within the jurisdiction of the United States. *See* 16 U.S.C. §3372(a)(1). The United States has an interest in stopping the transport and sale of contraband within its territorial borders – whether the contraband is narcotics, weapons, or illicit fish or wildlife. The defendants’ attempt to diminish the significance of their alleged offenses and the federal government’s interest in halting the trade in illegal fish and wildlife is unavailing.

prohibiting *trafficking* in fish obtained in violation of tribal law.”) (original emphasis). It thus is inaccurate for the defendants to suggest to this Court that, through these Lacey Act prosecutions, the United States is attempting to enforce the Leech Lake Code.

The defendants’ position essentially reduces to the notion that only the Band may prosecute them for their unlawful conduct in taking fish in violation of the Band’s laws. However, the United States is not prosecuting the defendants merely for taking fish in violation of the Band’s laws. The United States is prosecuting the defendants for engaging in the separate, subsequent unlawful acts of transporting and selling the unlawfully-taken fish within the jurisdiction of the United States. That alleged conduct violates federal law. The defendants’ alleged conduct thus transgresses the laws of multiple sovereigns, including the United States, and the United States has the right to prosecute the defendants for the offenses committed against it.

For this reason, the defendants’ attempt (at 27-31) to distinguish *Sohappy* on the ground that the rights at issue were not exclusive rights is unpersuasive. Even given the exclusivity of the Band’s fishing rights, by prosecuting the defendants for transporting and selling the

contraband fish within the jurisdiction of the United States, the United States is not regulating tribal fishing or directly enforcing tribal law. The Band still determines who may fish and by what method. The United States is vindicating its own sovereign interest in halting the illicit trade in contraband fish within its territorial borders. As cases such as *Sohappy* correctly recognize, the United States may properly protect its interests through Lacey Act prosecutions, notwithstanding a tribe's separate interest in regulating fishing and prosecuting the offenders for violating the predicate law. *See Sohappy*, 770 F.2d at 818-20; *see also United States v. Big Eagle*, 881 F.2d 529, 540 (8th Cir. 1989); *United States v. Stone*, 112 F.3d 971, 973-74 (8th Cir. 1997).

The defendants also err in asserting (at 24-26) that their alleged conduct was “purely intramural.” The Ninth Circuit’s decision in *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979), offers the defendants no support. There, an Indian defendant stood accused of hunting on an Indian reservation in violation of a federal statute, 18 U.S.C. § 1165, which prohibits unlawful entry onto Indian land when done for the purpose of hunting or fishing. 600 F.2d at 1284. The question before the Ninth Circuit concerned whether the Indian defendant could be

prosecuted under § 1165. *Id.* at 1285 (citing *Ex Parte Crow Dog*, 109 U.S. 556 (1883)). The court answered that question in the negative because it viewed § 1165 as essentially a trespass statute and the court found no indication that Congress had intended §1165 to apply to Indians entering onto their own reservation. *Id.* at 1285-87. The Ninth Circuit thus held that the defendant could only be tried in tribal court for the underlying hunting violation. *Id.* at 1287-88.

Here, unlike in *Jackson*, the defendants' alleged conduct involves off-reservation activities and non-tribal interests in addition to the underlying conduct of taking fish in violation of Indian tribal law. The defendants stand accused of transporting the unlawfully-taken fish off the Leech Lake Reservation and selling the illicit fish throughout Minnesota. And the defendants stand accused of violating the Lacey Act, a federal statute enacted "to curb trafficking in illegally acquired wildlife in order to help the web of federal, state and Indian tribal law protecting wildlife." *Sohappy*, 770 F.2d at 819. The Lacey Act is "designed to preserve fishing opportunities for Indians *and* non-Indians" and "reflects a concern for the general public welfare." *Id.* at 819, 821 (distinguishing the Lacey Act from the trespassing statute at

issue in *Jackson*). Thus, unlike in *Jackson*, the alleged offenses here occurred both on- and off-reservation and implicate both tribal interests and those of the public at-large.

Moreover, unlike the statute at issue in *Jackson*, Congress intended the Lacey Act to apply to Indian defendants unlawfully taking fish or wildlife in violation of Indian tribal law. Congress made the Lacey Act's prohibitions applicable to "any person," 16 U.S.C. § 3372(a)(1), including "any individual . . . subject to the jurisdiction of the United States," *id.* § 3371(e). Congress also made violations of Indian tribal law a predicate Lacey Act offense, *id.* § 3372(a)(1), to the extent the Indian tribal law is applicable in "Indian country," including within Indian reservations, *id.* § 3371(c) (referencing 18 U.S.C. § 1151). Congress' purpose in amending the Lacey Act in 1981 was to allow the federal government to provide more adequate support for the full range of laws that protect wildlife. *See Big Eagle*, 881 F.2d at 540; *Sohappy*, 770 F.2d at 821. "Indians who traffic in illegal wildlife harm the Lacey Act's goal of wildlife preservation just as much as non-Indian traffickers." *Sohappy*, 770 F.2d at 821. There is nothing in the Lacey Act or its legislative history suggesting that the Act's prohibitions do

not apply to Indian tribal members who unlawfully take fish in violation of tribal law and then transport and sell that illicit fish within the jurisdiction of the United States. *Id.* Accordingly, as this Court has stated, “the Lacey Act, by its terms and definitions, applies to Indian people,” *Big Eagle*, 881 F.2d at 540 n.1, including the defendants.

**D. The *Herbst* Agreement does not allow the defendants to escape prosecution for violating the Lacey Act.**

Finally, the defendants’ reliance (at 35-41) on the *Herbst* Agreement is misplaced and adds nothing new to the analysis. First, the portions of the *Herbst* Agreement identified by the defendants address the relationship between state law and tribal law, and the applicability of those laws to tribal members and non-members. *See* Def. Br. at 36-37 (citing *Herbst* Agreement at 7, 15-16, Appendix to Brief of Appellees at 15a, 23a-24a). Those portions of the *Herbst* Agreement do not address the role of the federal government or of federal law. The *Herbst* Agreement thus is unhelpful here.

Moreover, as mentioned, the United States agrees, consistent with the *Herbst* decision and subsequent agreement, that the Leech Lake Band possesses the authority to regulate fishing, hunting and ricing on its reservation exclusive of the authority of the State of Minnesota. *See*

*Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1006 (D. Minn. 1971). However, as explained above, the fact that the Band has the right to regulate on-reservation fishing exclusive of the authority of the State of Minnesota is immaterial here. This case is not about the State's authority to regulate tribal fishing. The State is not attempting to regulate fishing through these cases. Rather, the Band's regulations define the predicate offense under the Lacey Act. As discussed above, the United States is enforcing the Lacey Act here. That the Lacey Act relies on violations of a predicate law, including violations of Indian tribal law, to define what fish it is unlawful to transport and sell within the jurisdiction of the United States does not mean that the United States is enforcing the predicate law. This Court should reject the defendants' arguments.

### **CONCLUSION**

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

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

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## CERTIFICATE OF SERVICE

I hereby certify that on July 21, 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.

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