UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 2:18-cr-88-FtM-38MRM

JACK W. TURTLE

GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

The United States of America, by Maria Chapa Lopez, United States Attorney for the Middle District of Florida, and by and though its undersigned Assistant United States Attorney, hereby responds in opposition to defendant Jack W. Turtle's Motion to Dismiss.

FACTS

1. Defendant Jack W. Turtle is charged in an Information with seven misdemeanor violations of the Lacey Act, in violation of 16 U.S.C. § 3372(a)(1), § 3373(d)(2), and 18 U.S.C. § 2. The Lacey Act violations are predicated on violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G) and 50 C.F.R. § 17.42(a)(2).

2. Defendant Turtle is a member of the Seminole Tribe of Florida, a federally recognized Indian Tribe based in Florida. Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 83 FR 34863, 34866 (July 23, 2018). The Brighton Seminole Indian Reservation is an Indian reservation of the Seminole Tribe of Florida, located in northeast Glades County near the northwest shore of Lake Okeechobee. During the time frame encompassed by the Information, Turtle resided on the Brighton Seminole Indian Reservation.

3. The evidence would show that defendant Turtle admitted to wildlife investigators to taking the alligator eggs, to collecting them on the reservation by himself, and to selling the alligator eggs at his residence on the reservation to an individual who is not a tribal member. The evidence would further show that defendant Turtle collected the alligator eggs for commercial gain by selling 3,996 alligator eggs between June 19, 2015, and July 30, 2016, for a total of $19,980.

4. The defendant makes four arguments in support of his Motion to Dismiss:

a. The laws of the State of Florida and the United States of America, regarding the taking of wildlife within the Defendant's Tribal Lands are not enforceable.

b. The State of Florida and the United States of America do not have any legal authority to regulate the taking of wildlife found on the Seminal Nation.

c. The traditional hunting and gathering rights of the Seminole Nation have never been relinquished by treaty.

d. Laws regulating the collection of wildlife on Seminal Nations Ancestral lands are void ab initio.

Doc. 36 at 1–2. For the reasons set forth below, the Court should deny the defendant's claims.

MEMORANDUM OF LAW

I. Applicable Statutes

The Lacey Act is the nation's oldest wildlife statute, as well as an effective resource in the fight against trafficking in protected wildlife. 16 U.S.C. §§ 3371-3378. Among other things, the Lacey Act imposes civil or criminal sanctions against any individual who knowingly imports, exports, transports, sells, receives, or acquires wildlife that has been taken, possessed, transported, or sold in violation of a United States law (such as the

Endangered Species Act) or a tribal law. *Id.*

Title 16, United States Code, Section 3372 provides in part:

> (a) Offenses other than marking offenses
>
> It is unlawful for any person--
>
> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant 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;

Section 3373 provides in part:

> (d) Criminal penalties
>
> . . . .
>
> (2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b), (d), and (f) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

The Lacey Act prohibits doing something with wildlife that is already illegal. All trafficking offenses require a two-step process: First, the wildlife is illegally taken, possessed, transported, or sold by someone (not necessarily the defendant). Second, it is imported, exported, transported, sold, received, acquired, or purchased by the defendant. The difference between misdemeanor and felony trafficking violations is based on the defendant's mental state, whether commercial conduct was involved, and the value of the wildlife. The prohibition and penalty sections must be read in conjunction in order to understand the elements.

In this case, a violation of 16 U.S.C. § 3372(a)(1) and § 3373(d)(2), requires proof of the following elements:

First: Wildlife was taken or possessed in violation of a wildlife-related federal and state law or regulation;

Second: In the exercise of due care, the defendant should have known the wildlife had been taken or possessed in violation of some law; and

Third: The knowingly defendant sold the wildlife.

The Endangered Species Act (ESA), 16 U.S.C. §§ 1538(a)(1)(G) and 1540(b)(1), prohibits any person subject to the jurisdiction of the United States from violating any regulation pertaining to any threatened or endangered species designated as such by 16 U.S.C. § 1533. The American alligator is listed as threatened. 50 C.F.R. § 17.11(h). It also falls under a special rule found in 50 C.F.R. § 17.42(a). The special rule defines American alligator to include "any skin, part, product, *egg*, or offspring thereof held in captivity or from the wild." 50 C.F.R. § 17.42(a)(1)(i) (emphasis added). The regulations contained in 50 C.F.R. § 17.42 state that "[n]o person may take any American alligator, except . . . [a]ny American alligator specimen may be sold or otherwise transferred only in accordance with the laws and regulations of the State or Tribe in which the taking occurs and the State or Tribe in which the sale or transfer occurs." 50 C.F.R. § 17.42(a)(2)(ii)(B).

Section 9 of the ESA prohibits a person from importing and selling in interstate commerce any listed endangered species unless the person has a permit as provided by Section 10. 16 U.S.C. §§ 1538(a)(1)(A), 1539(a), 50 C.F.R. § 17.21. This prohibition has been extended to threatened species as well. 50 C.F.R. § 17.31; *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 692 n.5 (1995); *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 21 (1st Cir. 2010); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518-

19 (9th Cir. 2010); *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 566 F.3d 794, 804 (9th Cir. 2009); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1075 (9th Cir. 2001); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 814 (9th Cir. 2001); *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 148 F.3d 1231, 1237 (11th Cir. 1998); *Mausolf v. Babbitt*, 125 F.3d 661, 668 (8th Cir. 1997); *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1064 (9th Cir. 1996).

Florida Statutes § 285.09 provides: "It shall be lawful for Indians to take wild game and fish at any time within the boundaries of the reservation, provided that game may be taken only for food for the Indians themselves." Only under this provision is no license required. *See* § 285.10. Otherwise, Florida law, in the interests of conserving the species, requires a permit to "buy, sell, take, possess, transport, or import any American alligator, or any part thereof, or the nests or eggs of any American alligator." Fla. Admin. Code. Ann. R. 68A-25.002(1) (2014). Simple permit requirements are generally presumed non-discriminatory where there is no limitation on hunting methods, limits, etc. Florida has not restricted its permits by methods or limits or any other discriminatory limitations, but instead focuses on the conservation and health and safety of the species. *See generally* Fla. Admin. Code. Ann. §§ 68A-25.001-68A-25.052 (Florida alligator regulations and associated statutes); Harvest of Alligators by Seminoles or Miccosukees, No. AGO 79-102 (1979). Thus, under federal and state regulation, Turtle needed a permit from the state of Florida in order to gather and sell, for commercial purpose, American alligator eggs from the reservation. Violations of these provisions form the underlying basis for the Lacey Act violations.

II. A Brief History of the Seminole Tribe of Florida

The Seminole Tribe of Florida are the descendants of a small number of Indians who eluded capture by the U.S. army in the 19th century. Currently there are more than 2,000 Seminole Tribe members who live on six reservations in the state—located in Hollywood, Big Cypress, Brighton, Immokalee, Ft. Pierce, and Tampa. https://dos.myflorida.com/florida-facts/florida-history/seminole-history. Beginning in the 1700s, due to conflicts with Europeans and other tribes, bands of Creek Indians from Georgia and Alabama migrated to Florida seeking new lands to live in peace. *Id*. Beginning in 1817, conflicts with white settlers escalated into the first of three wars with the United States. The second war was caused after passage of the Indian Removal Act in 1830, when the U.S. government attempted to relocate Seminoles to Oklahoma. *Id*. In 1832, the Payne's Landing Treaty (Treaty with the Seminole, May 9, 1832, 7 Stat. 368, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 344-45 (1904)), took away all Florida land claims from the Tribe, and provided for removal to Indian Territory. Ratification of that treaty in 1834 allowed the Seminoles three years before removal was to take place. http://www.usgwarchives.net/ok/nations/seminole/index.htm.

In 1842, hostilities ended with the agreement that several hundred members of the Tribe could remain in Florida, although no peace treaty was ever signed. By this time most Seminoles had been moved from Florida and relocated to Oklahoma. A Third Seminole War broke out in 1855, when conflicts arose between whites and some Seminoles who remained in Florida. On May 8, 1858, the United States declared an end to conflicts in the third war with the Seminoles. By then, more than 3,000 Seminoles had been moved west of the Mississippi River. There remained approximately 200 to 300

Seminoles in Florida. https://dos.myflorida.com/florida-facts/florida-history/seminole-history.

In the late 1950s, the Seminole Tribe adopted a constitutional form of government. On July 21, 1957, tribal members voted in favor of a Seminole Constitution which established the federally recognized Seminole Tribe of Florida. *Id*.

The Seminole Tribe of Florida does not currently have a criminal court and only adjudicates civil matters. https://www.semtribe.com/Government/TribalCourt/TribalCourt.aspx. If they have a civil or criminal code, it is not accessible to the public via the Seminole Tribe website. https://www.semtribe.com/. The only information the Tribe has published on its official website concerning environment and natural resources revolves around the Tribe's environmental program to protect the Everglades, which is primarily focused on the Clean Water Act. The website has no information regarding wildlife management or tribal hunting and fishing rights.

III. The Lacey Act and the Endangered Species Act Apply to Indians on the Seminole Reservation

There are a number of treaties between the United States and the Seminole Tribe. *See* Treaty with the Florida Tribes of Indians, Sep. 18, 1823, 7 Stat. 224, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 203-07 (1904); Treaty with the Seminole, May 9, 1832, 7 Stat. 368, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 344-45 (1904); Treaty with the Seminole, Mar. 28, 1833, 7 Stat. 423, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 394-95 (1904); Treaty with the Creeks and Seminole, Jan. 4, 1845, 9 Stat. 821, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 550-52 (1904); Treaty with the Creeks, etc., Aug. 7, 1856, 11 Stat. 699, *reprinted in* 2 C. Kappler, *Indian*

Affairs: Laws and Treaties 756-63 (1904); Treaty with the Seminole, Mar. 21, 1866, 14 Stat. 755, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 910-15 (1904). There is also an executive order addressing lands set aside as a reservation for the Seminole Tribe in Florida. Executive Order No. 1379 (June 28, 1911), *reprinted in* 3 C. Kappler, *Indian Affairs: Laws and Treaties* 678-79 (1913). None of these treaties or the executive order explicitly deals with hunting and fishing rights. But, "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty." *United States v. Dion*, 476 U.S. 734, 738 (1986); *accord United States v. Santa Fe P.R. Co.*, 314 U.S. 339, 347 (1941). Also, it appears that none of the treaties specifically granted any rights to the Seminole Tribe of Florida after the Seminole Tribe was required to relinquish its land in Florida and was relocated to areas west of the Mississippi River. *See* Treaty with the Seminole, Mar. 28, 1833, 7 Stat. 423, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 394-95 (1904); Treaty with the Seminole, Mar. 21, 1866, 14 Stat. 755, *reprinted in* 2 C. Kappler, *Indian Affairs: Laws and Treaties* 910-15 (1904).

In *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987), the court concluded that although the Executive Order did not "expressly mention hunting and fishing rights, those rights were included by implication in the setting aside of the lands as an Indian reservation." *Id*. at 1488 (citing *United States v. Dion*, 476 U.S. 734, 106 S. Ct. 2216 (1986). *Billie* held that the Seminole Tribe retained on-reservation hunting and fishing rights unless abrogated by Congress. *Id*. at 1488–89. Tribes whose reservations were "created

by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty." *Dion*, 476 U.S. at 745 n.8.

Even though the Seminole Tribe of Florida has implicit hunting and fishing rights, the tribe must also comply with the ESA. In some cases, federal law applies to the Treaty Indian's conduct because that is necessary to effectuate the conservation purposes of the statute. For example, the ESA and the Bald and Golden Eagle Protection Act (Eagle Protection Act) applied to result in the conviction of Nathan Jim, Jr. *United States v. Nathan Jim*, 888 F. Supp. 1058 (D. Or. 1995). Jim, a member of the federally recognized Confederated Tribes and Bands of the Yakama Nation, claimed the need to shoot 12 eagles in Oregon where eagles were on the decline and on the threatened or endangered species list. *Id*. at 1060. Yet the court found the government had "compelling interest" in preventing the decline of the species and not exempting the tribal member for killing the species. *Id*. at 1065.

Similarly, when a tribal member was convicted of killing an endangered Florida panther on the Seminole Reservation, the court in *Billie* held that "the Endangered Species Act applies to hunting by Indians on the Seminole reservations . . . based on both the character of their hunting rights and on the Act's abrogation of those rights." *Billie*, 667 F. Supp. at 1492. Application of the principle statute was appropriate because of the endangered status of the animal.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id*. at 1488 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180). None of the "extraordinarily narrow exceptions to the Act" waive its applicability to tribal lands. *Id*. As the court noted in *Billie*, "it is

inconceivable that the Seminoles would have demanded, and the United States would have conceded, a right to hunt on the lands in question free from regulation by the federal sovereign" with regard to the hunting of endangered species. *Id*. at 1489.

The *Billie* court recognized that the Supreme Court in *United States v. Dion*, 476 U.S. 734 (1986), reversed the Eighth Circuit's decision on other grounds and thereby left unresolved the question of whether the ESA abrogates Indian treaty rights. *See id.* at 1487–88. Therefore, the *Billie* court considered the issue as one of first impression. *Id*. The court in *Billie* decided not to follow the Eighth Circuit's ruling in *Dion*, and held that the ESA does abrogate tribal reserved rights to hunt.

In *Dion*, the Eighth Circuit held that the ESA did not abrogate the tribal reserved right to hunt on the reservation. *United States v. Dion*, 752 F.2d 1261, 1270 (1985). The Supreme Court reviewed and reversed *Dion* on other grounds but expressly left unresolved the question whether the ESA abrogates Indian hunting rights. *Dion*, 476 U.S. at 740-45. In *Dion*, a member of the Yankton Sioux Tribe shot an endangered species, the bald eagle. *Id*. at 735. The bald eagle was protected by the ESA and also by the Eagle Protection Act. 16 U.S.C. § 668 (1994); 50 C.F.R. § 17.11 (1992). The Court first considered the Eagle Act and concluded that it abrogated any Indian treaty right to hunt bald eagles, except as allowed by permit. *Dion*, 476 U.S. at 745. The Court held that the Eagle Protection Act applied to reservation Indians because Congress had indicated a clear intent to abrogate certain treaty hunting rights. Justice Marshall, writing for a unanimous Court, established an "actual consideration" test. *Id*. at 740. The Court upheld the enforcement of the law against Indian tribes if the United States could present clear evidence that Congress actually considered the conflict between the law and Indian treaty

rights and chose to abrogate the treaty. *Id; see also Minnesota v. Mille Lacs Band,* 526 U.S. 172, 205 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so"). Noting that the legislative history indicated that Congress had considered Indian treaty issues in passing the Eagle Protection Act, the Court determined that Congress intended to abrogate the treaty rights. *Id*. at 740–45. Having concluded that the treaty right was already barred by the Eagle Protection Act, the Court did not specifically address the question of whether the ESA abrogated Indian treaty rights. *Id*. at 746.

In *Billie*, the court addressed the *Dion* "actual consideration" standard and held that the Seminole's hunting rights were not absolute when a species was endangered. "Indian rights to hunt and fish are not absolute. Where conservation measures are necessary to protect endangered wildlife, the Government can intervene on behalf of other federal interests." *Id*. at 1490. The Court, in considering the ESA's plain language and legislative history, also held that Congress intended to abrogate the Seminole's hunting rights through passage of the ESA.

> The Endangered Species Act is such a measure. Its general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives, see supra pt. II(A), demonstrate that Congress considered Indian interests, balanced them against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife.
>
> The Act's legislative history provides additional evidence that Congress intended to subject Indians to its prohibitions.

Id.; *see also* The Endangered Species Act and Indian Treaty Rights: A Fresh Look, 13

Tul. Envtl. L.J. 45 (examining the legislative history of the ESA and concluding that Congress considered Indian treaty rights before passage of the ESA and passed a bill that did not exempt those rights).

As for when treaties are silent on hunting and fishing rights, Doc 38 at 6, the existence and extent of Indian hunting rights varies from tribe to tribe. "As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty." *Dion*, 476 U.S. at 738 (1986) (citing F. Cohen Handbook of Federal Indian Law 449 (1982)). Aboriginal title, along with its component hunting, fishing, and gathering rights, remain in the tribe that originally possessed it unless granted to the United States by treaty, abandoned, or extinguished by statute. *See United States v. Santa Fe P.R. Co.*, 314 U.S. 339, 347 (1941).

Even when the treaty grants a right to hunt/fish, the right to sell the wildlife is a different question. Several courts have found that usufructuary rights do not include sale. *See Dion*, 752 F.2d 1261, 1264 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. 734 (1986); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976); *United States v Vance Crooked Arm*, 2013 WL 1869113, at *3 (D. Mont. 2013). In contrast, the district court in *United States v. Fiddler*, 2011 WL 2149510, at *7 (D. Nev. 2011) found the Sioux's "reserved treaty right [to sell migratory bird feathers] was not abrogated either expressly or implicitly by the MBTA." In analyzing the treaty, the court found "the usufructuary right retained to the Sioux includes the right to trade by sale and barter." *Id*. at *4. In *United States v. Bresette*, 761 F. Supp. 658, 662 (D. Minn. 1991), the district court concluded that the Chippewa retained full usufructuary rights to hunt and sell migratory birds because

there was historical evidence that they "harvested virtually everything on the landscape . . . for their own immediate, personal use and for use as trade goods in commerce," and were "participants in an international market economy."

This case differs from both *Bresette* and *Fiddler* in that in those cases, historical evidence demonstrated that the Tribe at issue would have understood their treaty-based usufructuary rights to include sale and barter. The government is unaware as to any such historical evidence specific to the Seminole Tribe of Florida.

The defendant's reliance on *United States v. State of Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), Doc. 38 at 6, is misplaced. In that case, the United States brought suit *on behalf of* Indian tribes of western Washington to enforce compliance by the State of Washington and its Departments of Game and Fisheries with certain treaties between the federal government and the tribes concerning fishing rights of the Pacific Northwest. The court divided the case into two phases. Phase I was to determine what portion, if any, of annually harvestable fish were guaranteed to the Tribes by the fishing clause. Phase II was to determine whether the fishing clause extended to hatchery fish, and whether it requires Washington to prevent environmental degradation within the Case area. In Phase I, the court held that the treaty phrase "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing" gave the Tribes the right to take up to fifty percent of the harvestable fish in the Case area, subject to the right of non-treaty fishers to do the same. *Id*. at 343. The court ultimately denied the tribes' contention that the state did not have legal authority to regulate the exercise of their off reservation treaty

right fishing. While the court did say that the treaty at issue granted an exclusive right of fishing reserved by the tribes within the area and boundary waters of their reservations, i*d*. at 332, the case involved state regulations that affected treaty fishing rights, not federal criminal statutes, nor endangered species.

The defendant's reliance on *United States v. White*, 508 F.2d 453 (8th Cir. 1974), Doc. 38 at 6, is also misplaced. First, if the defendant is claiming it is a Supreme Court case, *see* Doc 38 at 7, he is mistaken. Second, while the Eighth Circuit in *White* did find that the Eagle Protection Act did not abrogate the hunting rights of the Red Lake Chippewa Indians, *White*, 508 F.2d at 458, the Supreme Court in *Dion* found that Congress implicitly abrogated a treaty right. *Dion*, 476 U.S. at 739–40. And so the Court upheld the application of the Eagle Protection Act, 16 U.S.C. §§ 668-668d, as to a Yankton Sioux Indian, notwithstanding his asserted treaty rights. *Dion*, 476 U.S. at 745–46. The Court noted that, in considering a claim of abrogation, "[w]hat is essential is clear and convincing evidence that Congress considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *Id*. at 739-40. The Court held that Congress did precisely that with respect to treaty rights to hunt eagles when it amended the Eagle Protection Act in 1962. In *Billie* the court said,

> Although the Eighth Circuit reached a contrary conclusion in its consideration of the *Dion* case, it applied the "express reference" test established in its prior decision in *United States v. White*, 508 F.2d 453 (8th Cir. 1974). The en banc court held that, in cases involving criminal violations of the Endangered Species Act, statutory abrogation or treaty rights could be accomplished only by an express reference to treaty rights in the statute or its legislative history. *Dion*, 752 F.2d at 1265–67. The Supreme Court's subsequent opinion in *Dion*, however, establishes that such an exacting standard is unnecessary. *See Dion*, 106 S.Ct. at 2220.

Billie, 667 F. Supp. at 1492 n.3. When Dion argued that his treaty right to hunt and kill bald eagles made him immune from prosecution under the Endangered Species Act, the Court held "that Congress in passing and amending the Eagle Protection Act divested Dion of his treaty right to hunt bald eagles. He therefore has no treaty right to hunt bald eagles that he can assert as a defense to an Endangered Species Act charge." *Dion*, 476 U.S. at 745. The *White* case is further distinguishable because Mr. White shot one eagle. In the present case, the defendant is alleged to have taken a total of 3,996 alligator eggs for commercial purposes.

Several courts have considered whether the Lacey Act applies to on-reservation hunting and fishing conducted in violation of federal, state, or tribal law. In *United States v. Brown*, Crim. Nos. 13-68, 13-70 (JRT/LIB), 2013 WL 6175202 (D. Minn. Nov. 25, 2013), *aff'd,* 777 F.3d 1025 (8th Cir. 2015), the court found that the treaty at issue afforded the tribe exclusive jurisdiction to regulate hunting and fishing. *Id*. at *7 ("Here, where the Treaty language broadly guarantees the privilege of fishing to the Chippewa, this means that the tribe may regulate hunting and fishing by tribe members on the reservation to the exclusion of other jurisdictions, such as the state."). The court held that concurrent federal regulation through the Lacey Act conflicted with the Tribe's exclusive treaty right to regulate tribal hunting and fishing. *Id*. at *9–10. Because of this conflict, the federal government could not prosecute tribal fishers under the Lacey Act based upon violations of tribal law.

In *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), the relevant treaty protected the right of Indians to hunt and fish at all "usual and accustomed places," but

"in common with citizens of the Territory." The Ninth Circuit reasoned that due to this "commonality" clause, "the Indians do not have any treaty reserved right to exclusive jurisdiction over such fishing matters." *Id.* at 820. Because the tribe lacked exclusive jurisdiction, concurrent federal jurisdiction did not conflict with the Treaty and the Lacey Act applied. However, because the United States partially predicated its Lacey Act prosecution on a violation of State law, the Court required the government to subsequently demonstrate that the underlying State law satisfied the requirements of *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), regarding the circumstances under which a State may regulate tribal treaty fishing: when (a) the State regulation is a reasonable and necessary conservation measure; and (b) the application of the regulation to Indians is necessary and in the interests of conservation. *Sohappy*, 770 F.2d at 823–25. The *Sohappy* court said,

> However, the *Puyallup* Court also ruled that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." Id. The "appropriate standards" requirement has been interpreted to mean that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation." *Antoine v. Washington*, 420 U.S. 194, 207, 95 S.Ct. 944, 952, 43 L.Ed.2d 129 (1975) (citations omitted).

Id. at 823. Here, there is no specific treaty–reserved right to Florida Seminole exclusive jurisdiction over its reservations. Secondly, the United States has directly predicated its Lacey Act prosecution on a violation of federal law, the ESA, which lists American alligators as a threatened species. 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), § 1533, 50 C.F.R. § 17.11(h).

Two Interior Solicitor M-Opinions suggest that the test set out in *Puyallup* should apply to Federal statutes as well as State statutes. This would mean that the Lacey Act could abrogate tribal treaty rights so long as the Federal statute at issue satisfied *Puyallup*. *See* Opinion by Office of the Solicitor, Application of Eagle Protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights, M-36936, 88 I.D. 586 (1981) (1981 WL 143192) (noting that the Migratory Bird Treaty Act and Bald Eagle Act--Indian Hunting Rights, Memorandum to Director, Bureau of Sport Fisheries and Wildlife (Apr. 26, 1962) is overruled where it conflicts); Opinion by Office of the Solicitor, Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, M-36926, 87 I.D. 525 (1980) (1980 WL 104188). In this 1980 opinion, the Department of the Interior's Solicitor stated that the ESA "is in complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species." Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, 87 Interior Dec. at 527.

Moreover, the Florida Attorney General issued an advisory opinion specific to the issue at hand. *See* Harvest of Alligators by Seminoles or Miccosukees, No. AGO 79-102 (1979). The opinion first found that "[i]t is important to note that, in transferring certain lands to the United States in trust for the use and benefit of the Seminole and Miccosukee Indians . . . the state specifically reserved criminal and civil jurisdiction over the affected Indian reservations." The opinion concluded that:

> [N]o relevant federal treaty, agreement, or statute [can be found] giving the Seminole Tribe or the Miccosukee Tribe the right to conduct the activities questioned above in spite of state laws proscribing such conduct. Therefore, except as may be provided for in s. 285.10, F. S., and Ch. 372, F. S., or other governing statute or implementing rule of the Game and Fresh Water

> Fish Commission, the Seminole and Miccosukee Indian Tribes lack statutory authority to take and harvest alligators on Indian reservations or to ship alligator hides in interstate commerce and receive finished or refined alligator products in interstate commerce and sell such products on Indian reservations to Indian and non-Indian purchasers.

Id.

Even if the Lacey Act charges against Defendant Turtle are indirectly partially predicated on Florida law, the state law satisfies the requirements of *Puyallup*. Title 50, Code of Federal Regulations, Section 17.42(a)(2), a provision promulgated under the ESA, provides,

> 2) Taking. No person may take any American alligator, except:
>
> . . . .
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> > (ii) Any person may take an American alligator in the wild, or one which was born in captivity or lawfully placed in captivity, and may deliver, receive, carry, transport, ship, sell, offer to sell, purchase, or offer to purchase such alligator in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity in accordance with the laws and regulations of the State of taking subject to the following conditions:
> >
> > . . . .
> >
> > > (B) Any American alligator specimen may be sold or otherwise transferred only in accordance with the laws and regulations of the State or Tribe in which the taking occurs and the State or Tribe in which the sale or transfer occurs.

Florida law provides,

> **285.09. Rights of Miccosukee and Seminole Tribes with respect to hunting, fishing, and frogging**
>
> (1) It is lawful for members of the . . . . Seminole Tribe to take wild game and fish at any time within the boundaries of their respective reservations . .

> . , provided that game may be taken only for food for the Indians themselves.

Thus, a member of the Seminole Tribe may take wild game and fish at any time within the confines of the Seminole Indian Reservation without any permit whatsoever. But the taking of wild game and fish must be for food purposes only. Section 68A-25.002, Fla. Admin. Code, sets forth the general provisions for the taking, possession, and sale of reptiles, and provides:

> (1) In order to assure the optimal utilization of the estimated available alligator resource, the commission may by rule limit the number of participants engaged in the taking of alligators or their eggs from the wild. No person shall buy, sell, take, possess, transport, or import any American alligator, or any part thereof, or the nests or eggs of any American alligator except under permit from the executive director, as otherwise provided by this Title . . . .

Fla. Admin. Code Ann. r. 68A-25.002. The American alligator is classified by the U.S. Fish and Wildlife Service as a threatened species due to similarity of appearance.[1] This listing provides federal protection for alligators but allows state-approved management and control programs. This listing has been adopted by the State of Florida. Alligators in Florida can be legally taken only by individuals with proper licenses and permits. http://myfwc.com/wildlifehabitats/managed/alligator/facts/. "Alligator management programs implemented by FWC [Florida Fish and Wildlife Conservation Commission] emphasize the conservation of alligator populations for their ecological, aesthetic, and economic values while providing for public use and safety." *Id.* The entire premise of the instant prosecution" is not based solely on Florida law. *See* Doc. 38 at 6. The premise is

[1]A species is "threatened" under the Endangered Species Act if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).

based on the ESA as the American alligator is listed as threatened due to similarity of appearance. The Florida law supports the ESA. It also provides a legal way for a person to harvest alligator eggs.

IV. Conclusion

The government's ability to prosecute under the Lacey Act (predicated on the ESA) may be based upon the reasoning in *Billie* and *Sohappy* and on the view that the Lacey Act enforcement is reasonable and necessary in the interests of conservation under *Puyallup Tribe*, *Dion*, and *Minnesota v. Mille Lacs Band.* While the *Sohappy* analysis has been called into question with the Eighth Circuit's recent decision in *Brown*, the tribal rights at issue in *Brown* are fundamentally different from those at issue in the present investigation. As such, *Brown* is distinguishable and should not preclude the government from prosecuting the defendant.

The government respectfully requests the Court to deny the defendant's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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