Law Offices of Irwin H. Schwartz
710 Cherry Street
Seattle, WA 98104
206 623-5084

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELBERT LOREN WHEELER,

Defendant.

No. CR-14-6042-SAB

DEFENDANT WHEELER'S RESPONSE TO MOTION *IN LIMINE* (ECF NO. 20)

I. Introduction

A. Anticipated Proofs

Delbert Wheeler is an enrolled member of the Yakama Nation, and he is a full-blooded Yakama. He hunted on the ALE as an exercise of his rights under the Treaty of 1855. He shot and took elk, for food for himself and other members of the tribe, and for ceremonial purposes. He entered the ALE after making requests to the Fish and Wildlife Service (FWS) and receiving no response. He entered the ALE after observing personally non-Native Americans come out of the ALE in motorized vehicles with elk carcasses.

B. Ripeness and Timing

Counts One and Two allege all the required elements of the statutes under which Mr. Wheeler has been charged. As stated at Friday's hearing, we believe that the Court may not entertain a defense motion to dismiss, based on the Treaty, because it requires proof of facts outside the indictment.

In *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996), the court of appeals reversed a motion to dismiss for lack of venue, which had been ordered based on evidence presented at a pretrial hearing.

> . . . "[a] defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence." *United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087, 47 L. Ed. 2d 97, 96 S. Ct. 878 (1976). "A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence. . . . The Court should not consider evidence not appearing on the face of the indictment." *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir.), *cert. denied*, 414 U.S. 1004, 38 L. Ed. 2d 240, 94 S. Ct. 361 (1973).
>
> The district court thus erred in considering the documentation provided by the defendants. By basing its decision on evidence that should only have been presented at trial, the district court in effect granted summary judgment for the defendants. This it may not do. *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of the evidence.").

See also, United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002) ("The indictment either states an offense or it doesn't. There is no reason to conduct an evidentiary hearing.")

C. Summary of Argument

The indictment's allegations place in issue Mr. Wheeler's right to enter the ALE for the purpose of hunting. (Section II, at 3.) The Treaty of 1855 between the United States and the Yakama Nation reserved fishing and hunting rights to its members on the land which they ceded to the United States. (Section III, at 4.) The Treaty must be interpreted in a manner favorable to the Native Americans and the rights reserved by them may only be abrogated by Congressional action. (Section IV, at 5.) The area in which Mr. Wheeler was hunting is a part of the ceded land in which the Yakamas have a right to hunt. (Section V, at 7.) In construing the Treaty of 1855, and similar treaties, the Supreme Court and the Court of Appeals for the Ninth

1 Circuit have held that the Treaty rights include the right to enter "closed"
2 property for the purpose of taking fish and game. (Section VI, at 9.)
3 The ALE is home to a large elk herd. The herd is about three times its
4 optimum size, to avoid environmental damage. To reduce the size of the herd,
5 the FWS has permitted elk to be taken by neighboring non-Native landowners,
6 while the Yakamas may not. Multiple times, the FWS has recognized the
7 Yakama Treaty rights and proposed allowing them to hunt on the ALE, but no
8 hunt has been authorized. (Section VII, at 11.)
9
10 **II. The Government's Motion**

11 In its response to Mr. Wheeler's motion to suppress, the government
12 stated, "Although the government does not concede that the Defendant's
13 hunting activities were lawful, the elk taken by the Defendant were never
14 seized, and his taking of the elk has never been charged and is not an
15 element of the offenses charged in this case." ECF No. 18, at 9. In its motion
16 *in limine*, ECF No. 20, at 3, it similarly asserts, "Hunting, whether lawful or not,
17 is not a defense to charges against the Defendant." To the contrary, the
18 indictment does place in issue Mr. Wheeler's right to be on the ALE.

19 Count One of the indictment charges more than the government's
20 motion recited. It alleges that Mr. Wheeler "*without permission under law* to
21 do so, *did knowingly enter* [the] FitznerlEberhardt Arid Lands Ecological
22 Reserve, and did knowingly disturb and injure natural growth . . ." (Emphasis
23 added.) ECF No. 1. His "permission under law" to enter the ALE is provided
24 by Article III of the Treaty of 1855.

25 There is no difference between the FWS' closure of the ALE to Mr.
26 Wheeler and the closure of lands to tribal fishermen prohibited in *United*
27 *States v. Winans* and *United States v. Washington*, discussed in Section VI.
28

The second part of the statute charged in Count One makes it unlawful to "disturb" or "injure" any property of the United States, "including natural growth." The terms "disturb" or "injure" are not defined. 16 U.S.C. § 666ee. There is no quantified threshold level for disturbance or injury. Stepping on a single blade of grass could be sufficient to create criminal liability. As applied to a person with a Treaty right to go on the land and hunt, that statute is as impermissible a barrier as the property rights claimed in *Winans.*

III. The Treaty of 1855 Guaranteed the Yakamas the Right to Continue Hunting and Fishing in Ceded Lands

In 1855, Gov. Isaac Stevens negotiated a treaty with the Yakamas and other inland tribes of Washington and Oregon Territories. The Treaty was ratified by the Senate in 1859. 12 Stat. 951. *See*, *King Mt. Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). Article III guaranteed the tribes:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article III was a critical provision of the Treaty. As the Supreme Court observed, the tribes were "vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations, *id*., at 355, and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658. 667 (1979). The Supreme Court adopted, at note 11, the trial court's finding:

> "At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

> to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas [sic] relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty."
> *Id*., at 381 (record citations omitted).

In *United States v. Winans*, 198 U.S. 371, 380 (1905), the Supreme Court observed "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."

The rights reserved to the Tribes in the Treaty may be asserted by its members. *United States v. Dion*, 476 U.S. 734, at 739, n.4 (1986), and cases cited therein.

IV. The Treaty Properly is Construed In Favor of Tribal Rights, and May Abrogated Only by Express Congressional Action

"Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights. *Confederated Tribes of Chehalis*, 96 F.3d at 340. 'Any ambiguities in construction must be resolved in favor of the Indians.' *Id*. (citation omitted). 'These rules of construction' are rooted in the unique trust relationship between the United States and the Indians.' *Id*. (quoting *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985))." *United States v. Washington*, 157 F.3d 630, 649 (9th Cir 1998).

Congress has the power to abrogate a treaty right, but the executive branch does not.

> Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. *United States v. Dion*, 476 U.S. 734, 738-740, 90 L. Ed. 2d 767, 106 S. Ct. 2216 (1986); *see also Washington v. Washington State Commercial Passenger Fishing Vessel Assn*., *supra*, at 690; *Menominee Tribe v. United States*, 391 U.S. 404, 413, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968). There must be "clear evidence that Congress actually considered the

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

> conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."

Minn. v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999). "While the power to abrogate those rights exists (see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-567) 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968).

Absent Congressional authorization, an executive order of the President of the United States is ineffective in abrogating Treaty rights. *Minn. v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999). There, President Taylor issued an 1850 executive order revoking the hunting and fishing rights of the Chippewas. The Court affirmed the appellate decision that Congress did not authorize abrogation of the Treaty rights and that the executive order was ineffective.

Congress authorized acquisition of the land at issue during the Second World War, under Title II of the Second War Powers Act of 1942, Pub. L. 77-507 (56 Stat. 176) (Mar. 27, 1942). Nothing in the plain language of that statute evinces any intent to abrogate Indian hunting rights, and they are not discussed in the legislative history. S. Rep. No. 989 and H.R. Rep. 1735, 77th Cong., 2nd Sess. 4.

The federal government acknowledged the continuing force of tribal rights when the Hanford National Monument was created by President Clinton. His Presidential Proclamation, No. 7319, June 9, 2000, said, "Nothing in this proclamation shall enlarge or diminish the rights of any Indian tribe." http://www.gpo.gov/fdsys/search/searchresults.action?st=Proclamation+7319

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. The Federal Government Has Acknowledged that the Area in which Mr. Wheeler Hunted was a Traditional Hunting Area for the Yakamas and Other Tribes, and Has Acknowledged Their Tribal Hunting Rights within the National Monument

"The ALE Reserve is situated on lands ceded to the U.S. government by the Fourteen Confederated Tribes and Bands of the Yakama Nation in the Treaty of 1855." *A History of the Fitzner/Eberhardt Arid Lands Reserve*, Pacific Northwest National Laboratory (2003). In its "Final Comprehensive Conservation Plan and Environmental Impact Statement" for the Hanford National Monument,[1] at 368, the FWS acknowledged, "Ancestors of the present day Colville, Nez Perce, Umatilla, Wanapum and Yakama Tribes fished for salmon; hunted deer, elk, sheep and rabbit; and collected and gathered roots, seeds and berries [citation omitted]."

It acknowledged, "Treaty reserved tribal fishing rights have been recognized as being effective within the Hanford Reach. The tribes also have an interest in continuing/renewing traditional uses, such as gathering of foods and medicines, hunting, and pasturing horses and cattle on Monument lands." *Id.*, at 440. The FWS recognized its "obligation" to "fulfill[ ] treaty rights." *Id.,* at 383, note 101. More specifically, it declared, "With respect to tribal hunting and access, all treaty rights will be honored." *Id.*, at 765. As discussed below, it has not made good on its promise nor met its obligation to fulfill treaty rights.

---

[1] The report was announced at 73 Fed. Reg. 72519 (Nov. 28, 2008), but the report itself was not published therein. It is more than 1,000 pages long. The report is available on line at: http://digitalmedia.fws.gov/cdm/ref/collection/document/id/427 References to the report in this memorandum are to the .pdf pagination.

1 Article III of the Treaty of 1855 guaranteed the Yakamas the right to hunt
2 "upon open and unclaimed land." The meaning of that phrase was construed
3 in *United States v. Hicks*, 587 F.Supp. 1162, 1165 (W.D.Wash. 1984).

4 The construction of "open and unclaimed lands" that best accommodates Indian hunting as settlement occurs and matures
5 is that "open and unclaimed lands" include public lands put to uses consistent with an Indian hunting privilege. Lands cease to
6 be "open and unclaimed" when they are put to uses incompatible with hunting. This broad construction of "open and unclaimed
7 lands" contemplates hunting among multiple uses with which it is compatible yet precludes it where it is not compatible.

8
9 In *Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262
10 F. Supp. 871(D. Or.1966), *aff'd sub nom Holcomb v. Confederated Tribes of*
11 *the Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967), the court
12 upheld tribal hunting rights in a national forest. The court addressed the
13 meaning of open and unclaimed lands in the context of the promises made
14 during treaty negotiations.

15 Governor Stevens explained:

16 "You will be allowed to pasture your animals on land not claimed or occupied by settlers * * * and to kill
17 game on land not occupied by whites; all this outside the reservation."

18 Later in the negotiations, Governor Stevens said to Chief Looking
19 Glass,

20 "Looking Glass knows that * * * he can kill game * * * when he pleases * * * on any of the lands not
21 occupied by settlers."

22 The minutes of the Treaty Council leave no doubt that both parties thought the Indians were getting the right to hunt on lands near
23 the reservation not actually occupied by white settlers. Provisions in treaties with Indians must be construed as the Indians
24 understood them at the time of the agreement.

25 To construe "unclaimed lands" to exclude land not occupied by white settlers would violate the solemn promise made to the
26 Indians more than a century ago.

27 262 F. Supp. 871, 873.

28

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

1 Applying the *Hicks* standard, the Court must consider whether hunting
2 is compatible with the federal government's use of the land. That point is
3 readily determined by looking to the position of the FWS. It has concluded
4 that elk hunting in the area is "compatible," and more, that it is desirable for
5 environmental reasons.

6 On December 1, 2011, the FWS called for comments on proposed elk
7 hunting in the ALE. http://www.fws.gov/pacific/news/news.cfm?id=214437
8 4922

9 > The U.S. Fish and Wildlife Service is seeking public comments
10 > through December 30, 2011, on an Elk Population Control Hunt
> Plan. The plan proposes a highly regulated hunt on the
11 > Fitzner-Eberhart Arid Lands Ecology Reserve (ALE) of the
> Hanford Reach National Monument's Rattlesnake Unit. This
12 > proposed hunt is a means of reducing the elk population in
> cooperation with Washington Department of Fish and Wildlife and
13 > the Yakama Nation.
>
14 > The goal of this proposed plan is to reduce the total number of elk
> in the Rattlesnake Hills Elk Herd to reduce depredation impacts
15 > to adjacent private lands and to prevent potential damage to
> resources on the Monument.

16 This was not a new view of the FWS. At least as early as 1998, FWS and
17 Department of Energy personnel recommended hunting in the ALE, to reduce
18 the elk herd. (Exhibit 1.)

19

20 **VI. The Right to Take Animals under the Treaty Creates a Right to Reach Them by Traversing Otherwise Closed Property**

21 Article III of the Treaty of 1855, set out above at 4, guaranteed the
22 Yakamas the right to fish and hunt where they always had done. The United
23 States Supreme Court held that the right to fish also gave the Tribes the right
24 to enter closed property to do so. The same principal extends logically and by
25 precedent to hunting, and to property owned by the government.

26

27 In *United States v. Winans*, 198 U.S. 371 (1905), a case involving the
28

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

Yakamas fishing rights, property owners on the Columbia River asserted that they had "power to exclude the Indians from the river by reason of such ownership." At 379. The Court ruled for the Yakamas, holding, at 381 - 382:

> The contingency of the future ownership of the lands, therefore, was foreseen and provided for -- in other words, the Indians were given a right in the land -- the right of crossing it to the river -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees . . .
>
> * * *
>
> The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to the other laws of the land.

Later, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979), the Court observed, "But even more significant than the language in *Winans* is its actual disposition. The Court not only upheld the Indians' right of access to respondent's private property but also ordered the Circuit Court on remand to devise some 'adjustment and accommodation' that would protect them from total exclusion from the fishery."

In *United States v. Washington,* 157 F.3d 630, 646 (9th Cir. 1998), the court of appeals applied *Winans* to Indians' right to harvest shellfish. Construing the Supreme Court's holdings, it said:

> [T]he Supreme Court has made clear that the Tribes' fishing rights in their usual and accustomed places are not diminished by private ownership of those lands. In fact, the Court noted that the Treaties "imposed a servitude upon every piece of land as though described therein." *Id.*

The Treaty, it held at 654, gave tribe members the right to cross private land, when they had no other access to the shellfish beds, and even gave them a right to harvest in areas cultivated by commercial growers.

Antoine v. Washington, 420 U.S. 194, 195-196 (1975), addressed

hunting rights, after a state court conviction of two Native Americans for "hunting and possession of deer during closed season," on lands ceded to the government by the Colville Tribes. The Court held the Native Americans had "exclusive, absolute, and unrestricted rights to hunt and fish that had been part of the Indians' larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application to them" of Washington hunting laws. *Id.*, at 197. Once the rights were reserved to the Tribes by Congress, they could be abrogated only by Congressional action. *Id.*, at 207. Absent Congressional action, the government may not close the ALE to Yakama hunters.

VII. The FWS' Failure to Permit Yakama Hunting of the Hanford Elk Herd, While Allowing Non-Natives to Take the Animals is Impermissibly Discriminatory

A restriction on hunting or fishing Treaty rights may only be imposed if necessary for conservation of the species. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, n.14 (1968), but the restriction may not discriminate against Indians. Id., at 398. Barring Yakama hunting for their traditional prey, on their traditional hunting grounds is not necessary for conservation of the species, and the bar is discriminatory.

There are three times more elk on the land at issue than is "optimum" for conservation, according to the FWS. Exhibit 1. To reduce the size of the herd, the FWS and Washington State Department of Fish and Wildlife have permitted landowners with property adjoining the ALE to hunt Hanford Elk. According to the FWS, this practice began in 1986. http://www.fws.gov/refuge/Hanford_Reach/Wildlife_Habitat/Elk.html, Exhibit 2, at 2.

As the Court heard from Officer Bare at the suppression hearing,

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

hunters shooting at elk on adjoining lands are permitted to follow wounded animals on to the ALE. Yet, there is no published federal regulation which authorizes that practice. Those with Treaty rights to the elk, the government seems to say, may not enter the ALE to kill elk, but those who own property adjoining the ALE may. That is impermissible discrimination.

VIII. Conclusion

Although the United States Attorney does not concede that members of the Yakama Nation have a right to hunt elk on the ALE, the FWS as the land's manager has conceded it. The presidential proclamation creating the Hanford National Monument explicitly recognized that the land's designation as such did not alter tribal rights within it. The FWS similarly has acknowl-edged that elk hunting in the ALE is a "compatible use" of the land. Yet the government asserts that whether or not Yakama members have a right to hunt there, they are barred from entering the land.

The bar to Yakama entry must fail under the fishing rights cases, because the Treaty creates a "servitude" allowing their entry to otherwise closed lands, to exercise their Treaty rights. While the FWS may impose reasonable regulations governing entry, it may not prohibit entry for a Treaty-authorized purpose, particularly while allowing surrounding landowners to do so.

The indictment alleges that Mr. Wheeler "without permission under law to do so, did knowingly enter" the ALE. The Treaty provides that lawful permission. Therefore, the motion *in limine* should be denied.

Dated: November 17, 2014

LAW OFFICES OF
IRWIN H. SCHWARTZ
710 CHERRY STREET
SEATTLE, WA 98104
206 623-5084

1
2 Respectfully submitted:
3 /s/ Irwin H. Schwartz
4
5 IRWIN H. SCHWARTZ
Attorney for Delbert Loren Wheeler
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Certificate of Service

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all counsel of record.

Timothy John Ohms
U.S. Attorney's Office, Eastern District of Washington

Dated: November 7, 2014

/s/ Irwin H. Schwartz

Irwin H. Schwartz