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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKY S. WAHCHUMWAH (1) and
VICTORIA M. JIM (2),

Defendants.

NO. CR-09-2035-EFS-1
CR-09-2035-EFS-2

**ORDER RULING PRETRIAL MOTIONS,
CONTINUING TRIAL, AND
EXCLUDING SPEEDY TRIAL ACT
TIME**

A pretrial conference occurred in the above-captioned matter on May 29, 2009. The Government was represented Timothy J. Ohms. Defendants Ricky S. Wahchumwah and Victoria M. Jim were present and represented by their attorneys John Adam Moore and Thomas Andrew Zeilman, respectively. The Court heard Defendant Wahchumwah's Motion to Dismiss (Ct. Rec. 52), Motion to Suppress (Ct. Rec. 53), Motion for Extension of Time to File Additional Motions (Ct. Rec. 46), Motion to Produce ER 404(b) Evidence (Ct. Rec. 47), Motion to Produce Grand Jury Transcripts (Ct. Rec. 48), Motion to Have the Case Declared Complex (Ct. Rec. 51), and Motion to Continue (Ct. Rec. 55). All of these motions were joined by Defendant Jim. (Ct. Recs. 68-74.) After reviewing the submitted material and applicable authority and hearing from counsel, the Court is fully

1 informed. This Order memorializes and supplements the Court's oral
2 rulings.

3 **I. Defendants' Motion to Dismiss Pursuant to the Religious Freedom**
4 **Restoration Act (RFRA)**

5 In March 2009, Defendants Wahchumwah and Jim were charged with one
6 count of Conspiracy in violation of 18 U.S.C. § 371 and four counts of
7 Taking, Transporting, Possessing, Offering, and Selling Eagles in
8 violation of 16 U.S.C. § 668(a) (The Bald and Golden Eagle Protection Act
9 (EPA)). On April 21, 2009, a Superseding Indictment was filed which
10 additionally charged Defendants with Selling and Acquiring Wildlife in
11 violation of 16 U.S.C. § 3372(a)(1) (The Lacey Act). Defendants seek to
12 dismiss all counts because the EPA permitting process violates their
13 religious rights as recognized by the RFRA. The Government responds that
14 Defendants have not established that the RFRA applies to their commercial
15 activities.

16 In order to trigger analysis under the RFRA, a defendant must first
17 establish that his actions constituted the free exercise of religion.
18 *See United States v. Winddancer*, 435 F. Supp. 2d 687, 694 (M.D. Tenn.
19 2006); *United States v. Lundquist*, 932 F. Supp. 1237, 1240 (D. Ore 1996).
20 The Court finds that RFRA is not triggered here the commercialization of
21 eagle parts is not part of any Indian religion. The Government has
22 therefore not burdened Defendants' free exercise of religion. *See United*
23 *States v. Hugs*, 109 F.3d 1375, 1377-78 (9th Cir. 1997) (holding that a
24 defendant cannot assert religious infringement for purely commercial
25 activities); *United States v. Top Sky*, 547 F.2d 486, 488 (9th Cir. 1976)
26 (noting that prosecution for commercial activities does not burden free

1 exercise of religion). Furthermore, the fact that Defendant Jim has a
2 temporary permit to possess specific eagle parts for religious practices
3 is irrelevant. The indictment's allegations pertain to selling eagles
4 and their parts - a commercial activity. As such, the Court finds that
5 the RFRA does not apply to Defendants' alleged commercial activities.
6 Accordingly, Defendants' motion to dismiss pursuant to the RFRA is
7 denied.

8 **II. Defendants' Request for A *Franks* Hearing**

9 Defendants request that an evidentiary hearing be held so that the
10 Court is fully informed when considering their suppression motion, which
11 involves a contention that Special Agent (SA) Romero's affidavit in
12 support of the search warrant omitted material information, negating
13 probable cause. The Government opposes the motion and urges the Court
14 to look at the totality of the circumstances.

15 The U.S. Supreme Court held that:

16 where the defendant makes a *substantial preliminary showing*
17 that a false statement knowingly and intentionally, or with
18 reckless disregard for the truth, was included by the affiant
19 in the warrant affidavit, and if the allegedly false statement
20 is necessary to the finding of probable cause, the Fourth
21 Amendment requires that a hearing be held at the defendant's
22 request. In the event that at the hearing the allegation of
23 perjury or reckless disregard is established by the defendant
24 by a preponderance of the evidence, and, with the affidavit's
25 false material set to one side, the affidavit's remaining
26 content is insufficient to establish probable cause, the
search warrant must be voided and the fruits of the search
excluded to the same extent as if probable cause as lacking on
the face of the affidavit.

Franks v. Del., 438 U.S. 154, 155-56 (1978) (emphasis added). The Ninth
Circuit has extended *Franks* to material omissions. *United States v.*
DeLeon, 979 F.2d 761, 763 (9th Cir. 1992). Therefore, an evidentiary
hearing may be required to determine whether any statement is 1)

1 material, 2) incorrect, and 3) deliberately made. In order to receive
2 a *Franks* hearing, a defendant must 1) allege a specific falsehood or
3 reckless disregard for the truth exists in the affidavit, 2) support this
4 allegation with an offer of proof, which challenges the veracity of the
5 affiant, and 3) establish that the challenged affidavit is necessary to
6 a probable cause finding. *United States v. Kiser*, 716 F.2d 1268, 1271
7 (9th Cir. 1983). No hearing is necessary, however, if the affidavit
8 continues to provide probable cause after the material misstatement is
9 removed or the material omission is added. *Franks*, 438 U.S. at 171-72.

10 Here, Defendants contend the following material information was
11 omitted by SA Romero: 1) Defendants' vehicle had a flat tire when stopped
12 in 2007, 2) Defendants denied hunting bald eagles during the 2007 stop,
13 3) the deputy did not see a bald eagle within plain view of the passenger
14 compartment during the 2007 stop, 4) the deputy for the 2007 stop noted
15 the investigation was ceased, and 5) Defendant Jim had a temporary permit
16 to possess eagle feathers and parts.

17 It is true that during the 2007 roadside stop that Defendants 1) had
18 a flat tire, 2) denied hunting bald eagles, and 3) were not arrested for
19 shooting the eagles. However, probable cause for the issuance of the
20 search warrant was not based on the 2007 stop alone; rather, it was
21 heavily based upon SA Romero's direct observations and interactions with
22 Defendants. SA Romero purchased eagle parts from Defendants and
23 discussed their eagle selling activities with them.

24 It appears that law enforcement searched for permits for Defendant
25 Jim under only Defendant Wahchumwah's name, although they knew she used
26 a different last name than her husband - Defendant Wahchumwah. Discovery
of the temporary permit, however, would not have changed the situation.

1 Defendant Jim's permit did not allow her to sell eagle parts and
2 feathers; it only permitted Defendant Jim to possess the parts and
3 feathers for religious ceremonies.

4 Accordingly, under the totality of the circumstances, the Court
5 finds that, even assuming the alleged information was omitted or
6 misrepresented and therefore now added, the remaining Affidavit supports
7 a finding of probable cause to search Defendants' residence. As such,
8 Defendants' request for a *Franks* hearing is denied.

9 **III. Defendants' Motions to Suppress Evidence Obtained From**
10 **Undercover Audio and Video Recordings**

11 Defendants seek to suppress visual and audio evidence obtained from
12 SA Romero's October 2009 visit to their home because SA Romero's use of
13 a hidden video and audio recording device violated the Fourth Amendment.
14 Furthermore, Defendants contend that SA Romero's gifting of an otter pelt
15 constitutes outrageous government conduct. In its opposition, the
16 Government argues that the physical evidence and statements should not
17 be suppressed because SA Romero's video and audio recording did not
18 constitute a warrantless search and did not induce criminal activity
19 because Defendants were already engaged in a criminal enterprise.

20 **A. Audio and Video Evidence**

21 The Fourth Amendment protects people rather than places, but "the
22 extent to which the Fourth Amendment protects people may depend upon
23 where those people are." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).
24 To invoke the protections of the Fourth Amendment, a defendant must
25 demonstrate that 1) he had a legitimate expectation of privacy and 2) his
26 expectation was reasonable. *Bond v. United States*, 529 U.S. 334, 365
(2000). The legitimacy of a person's expectation of privacy depend on

1 the nature of the intrusion. *United States v. Nerber*, 222 F.3d 597, 600
2 (9th Cir. 2000). As such, the totality of the circumstances must be
3 considered. *Id.* at 603.

4 Although the recordings occurred on Defendants' property, Defendants
5 did not have a legitimate expectation of privacy because they invited SA
6 Romero into their home, showed him around their operation, and discussed
7 their recent bird hunts. As such, Defendants were lawfully recorded by
8 the video and audio recording device located on SA Romero's person. See
9 *United States v. White*, 401 U.S. 745, 749-53 (1971) (holding that
10 undercover recordings were admissible if the undercover officer could
11 have testified to the events). SA Romero did not install a camera in
12 Defendants' home, nor was the camera present in areas where SA Romero was
13 not. The video and audio recordings only contain information which
14 Defendants freely shared with SA Romero. As such, the video and audio
15 recordings do not offend the Fourth Amendment.

16 **B. Outrageous Government Conduct**

17 Outrageous government conduct is a claim that government conduct in
18 securing an indictment is so shocking to due process values that the
19 indictment must be dismissed. *United States v. Holler*, 411 F.3d 1061,
20 1065 (9th Cir. 2005). This claim requires a showing that the
21 government's conduct violates fundamental fairness and a universal sense
22 of justice. *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).
23 This high standard is met only when the government engineers and directs
24 a criminal enterprise from start to finish, but "is not met when the
25 government merely infiltrates an existing organization, approaches
26 persons it believes to be already engaged in or planning to participate

1 in the conspiracy, or provides valuable and necessary items to the
2 venture." *Id.*

3 The Ninth Circuit has established five (5) factors that, when
4 satisfied, indicate that the challenged governmental conduct was
5 acceptable. These factors are:

6 (1) the defendant was already involved in a continuing series
7 of similar crimes, or the charged criminal enterprise was
8 already in process at the time the government agent became
9 involved; (2) the agent's participation was not necessary to
10 enable the defendants to continue the criminal activity; (3)
the agent used artifice and stratagem to ferret out criminal
activity; (4) the agent infiltrated a criminal organization;
and (5) the agent approached persons already contemplating or
engaged in criminal activity.

11 *United States v. Bonanno*, 852 F.2d 434 (9th Cir. 1988).

12 The Court finds that the five (5) factors are satisfied. First,
13 Defendants were already involved in the alleged criminal enterprise.
14 Second, SA Romero's otter pelt gift and feathers purchase were not
15 necessary to enable Defendants to continue the alleged criminal activity.
16 Third, SA Romero permissibly uncovered Defendants' alleged criminal
17 activity through artifice and stratagem. Fourth, SA Romero infiltrated
18 Defendants' alleged criminal enterprise before gifting the otter pelt.
19 Finally, Defendants were already engaged in the alleged criminal activity
20 when SA Romero first encountered them. Therefore, SA Romero neither
21 engineered nor directed a criminal enterprise; instead, he approached
22 individuals who he reasonably suspected of selling eagles and their
23 parts.

24 Based upon the foregoing, the Court finds that the hidden audio and
25 video recording device did not violate the Fourth Amendment and SA
26 Romero's otter pelt gift did not constitute outrageous government

1 conduct. Accordingly, Defendants' Motion to Suppress Undercover Audio
2 and Video Recordings is denied.

3 **IV. Defendants' Request to Suppress Evidence Obtained Through**
4 **Execution of the March 2009 Search Warrant**

5 Defendants ask the Court to suppress evidence gathered during the
6 March 6, 2009 search because the information contained in SA Romero's
7 affidavit in support of search warrant was stale. Defendants point out
8 that five (5) months had passed between SA Romero's visit and search
9 warrant issuance. The Government opposes suppression and argues that the
10 information contained in the affidavit demonstrated an ongoing criminal
11 enterprise.

12 In assessing the timeliness of a search warrant, the length of the
13 delay and the nature of the unlawful activity are important in
14 determining whether there is a sufficient basis to believe that the items
15 to be seized are still on the premises. *United States v. Gann*, 732 F.2d
16 714, 722 (9th Cir. 1984). In this case, the search warrant documented
17 that Defendants were engaged in an ongoing enterprise to take and sell
18 eagles and their parts. The affidavit describes numerous sales of
19 protected eagles and their parts. These sales began and continued for
20 approximately one (1) year before the search warrant was issued. The
21 scope of the activities includes hunting, preparing, packaging, and
22 stockpiling eagle parts for sale. These activities necessarily unfold
23 over a period of time. Moreover, the magistrate was not left to
24 speculate about Defendants' intent to continue their activity because
25 Defendants announced their intent by telling SA Romero that they would
26 replace the sold parts and would hunt more "black and whites" over the
winter.

1 The Court finds that the information in the search warrant affidavit
2 was not stale because Defendants were allegedly engaged in an ongoing
3 enterprise. Therefore, Defendants' staleness challenge is denied.

4 **V. Defendants' Request to Challenge the Specificity of the March 2009**
5 **Search Warrant.**

6 Defendants argue that the search warrant failed to particularize the
7 feathers and parts that were subject to seizure because it did not
8 mention legally-possessed feathers. As such, Defendants contend that the
9 warrant gave agents unlawful discretion. The Government argues that the
10 warrant accurately described the items to be seized. Additionally, the
11 Government points out that Defendant Jim was unable to identify the
12 feathers she claims that she legally possessed.

13 The Fourth Amendment requires that a warrant describe the items to
14 be seized. This requirement precludes a "general, exploratory rummaging
15 in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467
16 (1971). To satisfy the demand for particularity, a warrant "must
17 describe the objects of the search with reasonable specificity, but need
18 not be elaborately detailed." *United States v. Shoffner*, 826 F.2d 619,
19 630 (7th Cir. 1987). As such, a warrant must explicate the items to be
20 seized only as precisely as the circumstances and nature of the alleged
21 crime permit. *Id.* at 630.

22 In this case, the warrant sufficiently identified the eagles and
23 parts to be seized. It did not allow a dragnet seizure; the warrant
24 directed agents to look for protected birds, feathers, parts, or
25 products. There was no readily available way for the searching agents to
26 distinguish between lawfully obtained birds and their parts and
unlawfully-obtained birds and their parts. In fact, during the search,

1 Defendant Jim was unable to identify the feathers that her permit allowed
2 her to possess for religious purposes. The Court finds the search
3 warrant's itemization was sufficient under the circumstances. As such,
4 Defendants' request challenging the specificity of the March 6, 2009
5 search warrant is denied.

6 **VI. Defendants' Motions to Continue the Trial and Declare the Case**

7 **Complex**

8 Both defense counsel request a trial continuance to conduct
9 additional discovery and prepare for trial because of the case's
10 complexity. Defendants agree that a continuance is needed. (Ct. Recs. 51,
11 55.) The Government does not object to a continuance.

12 The Indictment was filed on March 17, 2009 (Ct. Rec. 19), and the
13 Superseding Indictment was filed on April 21, 2009 (Ct. Rec. 58). Mr.
14 Moore appeared on March 19, 2009; Mr. Zeilman appeared on April 27, 2009.
15 This is defense counsels' first continuance request.

16 The Government provided defense counsel with a copy of fourteen (14)
17 discs relating to this two-year investigation. The Government suspects
18 more discovery materials will be provided.

19 The Court finds, given defense counsels' need for time to
20 investigate the case, research novel questions of law, and prepare for
21 trial, that failing to grant a continuance would result in a miscarriage
22 of justice and would deny defense counsel the reasonable time necessary
23 for effective preparation, taking into account the exercise of due
24 diligence. See 18 U.S.C. § 3161(h)(7)(B)(i), (ii). The Court,
25 therefore, finds the ends of justice served by granting a continuance in
26 this matter outweigh the best interest of the public and Defendants in
a speedy trial. See 18 U.S.C. § 3161(h)(7)(A). As such, to ensure

1 defense counsel are afforded adequate time to prepare for trial, the
2 Court grants the motion, declares the case complex, extends the pretrial
3 motion deadline, and resets the currently-scheduled pretrial conference
4 and trial dates. The Court finds Defendants' continuance requests are
5 knowing, intelligent, and voluntary and the ends of justice served by
6 granting a continuance outweigh the best interest of the public and
7 Defendants in a speedy trial.

8 **VII. Conclusion**

9 For the reasons stated herein and on the record, **IT IS HEREBY**
10 **ORDERED:**

11 1. Defendants' Motions to Dismiss Pursuant to the RFRA (**Ct. Recs.**
12 **52 & 72**) are **DENIED**.

13 2. Defendants Motions to Suppress Evidence Obtained From Undercover
14 Audio and Video Recordings (**Ct. Recs. 53 & 71**) are **DENIED**.

15 3. Defendants' Motions to Extend the Time to File Additional
16 Motions (**Ct. Recs. 46 & 69**) are **GRANTED**.

17 4. Defendants' Motions for Production of ER 404(b) Evidence (**Ct.**
18 **Recs. 47 & 68**) are **GRANTED**.

19 5. Defendants' Motions for Production of Grand Jury Transcripts
20 (**Ct. Recs. 48 and 70**) are **GRANTED IN PART**. The Government has agreed to
21 provide the transcripts two (2) weeks before trial.

22 6. Defendants' Motions for Continuance and Motion to Have Case
23 Declared Complex (**Ct. Recs. 51, 55, 73, & 74**) are **GRANTED**.

24 7. The Court finds, given defense counsels' need for time to
25 investigate the case, research novel questions of law, and prepare for
26 trial, that failing to grant a continuance would result in a miscarriage
of justice and would deny defense counsel the reasonable time necessary

1 for effective preparation, taking into account the exercise of due
2 diligence. See 18 U.S.C. § 3161(h)(7)(B)(i), (ii). The Court,
3 therefore, finds the ends of justice served by granting a continuance in
4 this matter outweigh the best interest of the public and Defendant in a
5 speedy trial. See 18 U.S.C. § 3161(h)(7)(A).

6 8. No later than **June 15, 2009**, counsel shall meet and confer to
7 discuss discovery disclosures. No later than **June 18, 2009**, the parties
8 shall file a joint report that sets forth:

- 9 a. the date(s) exhibit lists will be exchanged;
- 10 b. the date(s) expert reports will be exchanged;
- 11 c. the date the Government will disclose grand jury
12 transcripts; and
- 13 d. the date the Government will disclose its final pretrial
14 witness list, which shall occur no less than one week
15 before the pretrial conference.

16 See Fed. R. Civ. P. 16; *United States v. W.R. Grace*, 526 F.3d 499, 509
17 (9th Cir. 2008). On each applicable disclosure deadline (with the
18 exception of the grand jury transcripts), counsel shall email copies of
19 the expert report(s), exhibit list, and/or the Government's final
20 pretrial witness list to SheaOrders@waed.uscourts.gov and then
21 electronically file a Notice of Compliance with this requirement.

22 8. A **pretrial conference** is **SET** for **August 12, 2009, at 11:00 a.m.**
23 in YAKIMA. A final pretrial conference is set for **October 21, 2009, at**
24 **9:00 a.m.** in YAKIMA.

25 9. All pretrial motions to be heard at the August 12, 2009 pretrial
26 conference must be filed **NO LATER THAN July 20, 2009**. All other pretrial
motions, including motions *in limine* and *Daubert* motions, must be filed

1 **NO LATER THAN September 28, 2009.** Responses and replies to any motions
2 shall be filed and served in accordance with Local Rule 7.1(c) and (d).

3 10. Trial briefs, requested voir dire, and **joint** proposed jury
4 instructions shall be filed and served **NO LATER THAN October 23, 2009.**

5 a. Trial briefs shall not exceed twenty (20) pages without
6 prior court approval. LR 39.1. To obtain court
7 approval, a party must file a motion to file an
8 overlength brief, demonstrating good cause why
9 supplemental briefing is necessary.

10 b. Requested voir dire shall not duplicate information
11 elicited in the Clerk's Office Jury Questionnaire
12 ("COJQ") and the Court's seven-question sheet, which the
13 jurors will answer orally in open court during voir dire,
14 see previously-filed Court's Criminal Jury Trial
15 Procedures Letter. Any questions in addition to those in
16 the COJQ that counsel suggest should be sent pretrial to
17 the entire jury panel must be filed no later than four
18 weeks before trial.

19 c. Jury instructions (1) should address issues that are
20 unique to the case and (2) shall include instructions
21 regarding the elements of each claim or defense **and a**
22 **proposed verdict form.** In addition to the parties' joint
23 proposed jury instructions, the Court will only accept a
24 party's proposed jury instructions on those points/issues
25 upon which the parties could not agree; duplicative
26 individual proposed jury instructions shall not be filed.

1 11. The jury trial is RESET from May 26, 2009, to November 2, 2009,
2 at 9:00 a.m. in Yakima, Washington. Counsel shall meet with the Court
3 in Chambers at 8:15 a.m. on the day of trial. Any motions unaddressed
4 at the pretrial conference shall be heard in open court on the day of
5 trial at 8:30 a.m., at which time Defendants shall be present.

6 a. Pursuant to 18 U.S.C. § 3161(h)(7)(B)(i) and (ii), the Court
7 **DECLARES EXCLUDABLE from Speedy Trial Act calculations** for Defendant
8 Wahchumwah the period from **April 21, 2009**, the date Mr. Moore moved to
9 continue, through **November 2, 2009**, the new trial date, as the period of
10 delay granted for adequate preparation by counsel. This **same reasonable**
11 **period** of delay is excluded for Defendant Jim because she is joined for
12 trial with Defendant Wahchumah, agreed to the continuance, and no motion
13 for severance has been granted. 18 U.S.C. § 3161(h)(6).

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter
15 this order and to provide copies to all counsel.

16 **DATED** this 18th day of June 2009.

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18 S/ Edward F. Shea
19 EDWARD F. SHEA
United States District Judge
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