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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 TRIAL MEMORANDUM

I. Anticipated Evidentiary Issues

A. Objections to Proffered Expert Testimony

In ECF No. 19, the government gave notice that it plans to call Ms. Heidi Newsome as an expert. In ECF No. 27, the government supplemented its notice. In relevant part the first notice said:

> Newsome loaded GPS data on the tracks left by the vehicle driven by the Defendant into a Geographic Information System to determine the impacted area. She then estimated the costs to repair the damaged habitat to its original condition and reported that information in a two-page memorandum that has previously been provided in discovery. . . . A map of the track formed by the Defendant's off-road use of a vehicle was created using global positioning systems. The track was then examined in Geographic Information Systems to determine the extent of the damage. Newsome will offer an opinion about the tasks necessary and the costs required for rehabilitation measures . . .

The second notice said, " . . . the government may call Ms. Newsome to testify regarding the existence of trails and tracks on the Fitzner-Eberhart Arid Lands

Ecological Reserve (ALE) and on habitat management projects occurring on the ALE." Mr. Wheeler objects to admission of Ms. Newsome's proffered testimony for the following reasons.

1. Testimony About the "Tasks Necessary and the Costs Required for Rehabilitation Measures" is Irrelevant

In Count One, Mr. Wheeler is charged with unlawfully entering the Arid Lands Reserve and "disturb[ing] and injur[ing] natural growth" therein. In Count Two, he is charged with "us[ing] a motorized vehicle on lands not on designated routes of travel." Neither alleged offense requires proof of "tasks" or "costs" of rehabilitation. The evidence should be excluded under Fed. R. Evid. 401, 403 and 702(a).

There are some statutes in which the dollar loss to the government is an element of an offense, *e.g.,* 18 U.S.C. § 1361 (damaging government property valued at $1,000 or more is a felony, and if less than that, a misdemeanor). When a statute establishes threshold loss levels as an element of an offense, the amount of loss is a jury question. *United States v. Catone*, 769 F.3d 866, 873 (4th Cir. 2014); *Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013). In those instances, evidence concerning the amount of loss is relevant.

In contrast, the statute charged in the indictment contains no loss threshold element. The tasks and costs of "rehabilitation" are irrelevant to any element of the offenses charged. Evidence is relevant, under Rule 401, F. R. Evid., if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." The tasks and costs of rehabilitation are not "of consequence in determining the action" and therefore should be excluded under Rules 401 and 403.

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Rule 702 F. R. Evid. permits expert testimony only if it "will help the trier of fact to understand the evidence or to determine a fact in issue." Because the tasks and cost of rehabilitation are not facts in issue, the evidence should be excluded. ". . . '[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (internal quotation marks and citation omitted)." *United States v. 87.98 Acres*, 530 F.3d 899, 904 (9th Cir. 2008).

2. Testimony About "the Existence of Trails and Tracks on the Fitzner-Eberhart Arid Lands Ecological Reserve (ALE) and on Habitat Management Projects occurring on the ALE" Should be Excluded Under the Same Rules.

Neither the supplemental notice, ECF No. 27, nor the supplemental discovery, attached as Exhibit 2, suggests a basis for admission of the proposed testimony. Habitat management projects, whatever they may be, are irrelevant under Rule 401. They do not prove a fact in issue. The existence of trails and tracks within the ALE, although potentially relevant, are matters of fact and not matters of expert opinion under Rule 702.

3. Ms. Newsome's Testimony Should be Excluded Under Rule 16 Fed. R. Crim. P.

Rule 16(a)(1)(G) obligates the government to provide the defense with a summary that "describe[s] the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." The government has not met its obligation. The discovery provided in support of ECF No. 19, a two-page report, attached as Exhibit 1, affords not a glimpse into the "bases and reasons" for the witness' opinions on the tasks and costs of rehabilitation. The single page supplemental report, attached as Exhibit 2, neither states any opinions to be offered or bases or reasons for them. Exclusion is appropriate

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where the government has failed in its Rule 16 obligation. *United States v. Grace*, 526 F.3d 499 (9th Cir. 2008) (*en banc)*; *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011). *Accord, United States v. Holmes,* 670 F.3d 586, 599 (4th Cir. 2012) (upholding exclusion of defense expert for failure to furnish "the bases and reasons for his proposed testimony . . . "); United States v. McLean, 715 F.3d 129, 143 (4th Cir. 2013) ("Because McLean's Rule 16 disclosure did not describe Marmur's opinions 'beyond stating the conclusion he had reached and did not give the reasons for those opinions as required under Rule 16(b)(1)(C),' the disclosure did not satisfy the rule. [Citation omitted.]"; *United States v. Day*, 524 F.3d 1361, 1371 (D.C. Cir. 2008).

Here, as in *Grace*, the court set a discovery schedule. ECF No. 10. The deadline for disclosure has passed and the government has failed in its duty under Rule 16 and that order.

4. Materials Upon Which Ms. Newsome Relied Have Not Been Produced by the Government, in Violation of Fed. R. Crim. P. 16(a)(1)(E)(i) and (ii)

According to ECF No. 19, "Newsome loaded GPS data on the tracks left by the vehicle driven by the Defendant into a Geographic Information System to determine the impacted area. . . . A map of the track formed by the Defendant's off-road use of a vehicle was created using global positioning systems." ECF No. 19, at 2. The government has not furnished the "GPS data" used by Ms. Newsome, nor any information about the "Geographic Information System," or even the referenced "map." All should have been provided under Fed. R. Crim. P. 16 and the discovery order, ECF No. 10.

Rule 16(a)(1)(E) requires the government to produce items "material to preparing the defense," and items "the government intends to use" in its case-

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in-chief. "Materiality is a low threshold . . ." *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013). The information referred to in the notice is clearly material to preparing to cross examine Ms. Newsome and to challenging the admissibility of her testimony under the *Daubert* standard. We also will object to admission of the GPS data and the map, or testimony about them from any other witness, for the same reasons.

5. The Proffered Expert Testimony Should be Excluded Because the Notice Does Not Establish that Ms. Newsome's Testimony Complies with Fed. R. Evid. 702 and Daubert

An expert's testimony is admissible, under Rule 702, only if "(b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Neither the expert notices nor the reports furnished by the government tell anything about what principles and methodologies were used, their reliability, or whether Ms. Newsome reliably applied them. Nor can the defense question her opinions, for lack of the data she used and a summary of the "reasons and bases" for her opinions. The government has failed to show a foundation for its proffered expert opinions.

B. Mr. Wheeler Requests the Court Exclude Testimony About the Unrelated Investigation in which Officers were Engaged on the Date of the Alleged Offenses

During the suppression hearing, government counsel elicited testimony showing that on the date of the alleged offenses, the several officers present were investigating another incident. Officer Bare testified:

> I was investigating a waste case on an elk that had been shot, and the antlers removed, from -- I do believe two days prior to that it was reported.

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Transcript, at 9. On cross examination, he acknowledged that this matter had "nothing to do with Mr. Wheeler or the events of this date." Transcript, at 30.

Because the waste case is unrelated to Mr. Wheeler, we seek to exclude it, because of the potential for jury confusion, speculation and potential prejudice from its hearing testimony about other acts committed by other people. It should suffice for the officers to testify that they were in the area as part of their duties or were there for a matter not connected with the case the jury is hearing. Obviating potentially prejudicial background to the investigation testimony was the approach suggested in *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013).

C. Admissibility of Government Publications – Rules 902(5) and 803(8) and 801(d)(2)(D), F. R. Evid.

Mr. Wheeler will offer in evidence several government documents under Rules 902(5) and 803(8), Fed. R. Evid. "A book, pamphlet, or other publication purporting to be issued by a public authority" is self-authenticating. Rule 902(5), Fed. R. Evid. The rule applies to publications taken from the internet as well as to hard copy publications. *Williams v. Long*, 585 F. Supp. 2d 679 (D. Md. 2008); *Estate of Gonzales v. Hickman*, 2007 U.S. Dist. LEXIS 84050 (CD Cal. 2007); *Paralyzed Veterans of America v. McPherson*, 2008 U.S. Dist. LEXIS 69542 (ND Cal. 2008).

"Rule 902(5) is most often construed to cover the governmental bodies listed in Fed. R. Evid. 902(1) . . . As such, these entities would be regarded as 'public authorities: (1) the United States, (2) any State, . . .or (6) a . . . department, officer or agency of any of the preceding bodies.' 5 Weinstein and Berger, *supra*, §902.07[2], at 902-30 & n.4 (citing Fed. R. Evid. 902(1)." *Williams v. Long*, 585 F. Supp. 2d at 686. Government publications fall with the hearsay exception of Rule 803(8), Fed. R. Evid. *Id.*, at 690. They also are

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admissible as representative admissions under Rule 801(d)(2)(D). *United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989); *United States v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002).

II. Issues Related to Construction of the Charged Statutes and Regulations

A. Count One

In ECF No. 22, we set out our position with regard to Count One of the Indictment and Mr. Wheeler's right to enter the ALE as guaranteed by the Treaty of 1855. Count One alleges that Mr. Wheeler "without permission under law to do so, did knowingly enter lands within the National Wildlife Refuge System . . . and did knowingly disturb and injure natural growth on" it. It is our position that a member of the Yakama Nation has a legal right to enter the ALE, despite its closure to the public generally. As a matter of law, we will move for a judgment of acquittal when we have established that Mr. Wheeler is a Yakama and the ALE is land upon which the Treaty reserved access to the Yakamas.

Beyond that issue of law, the statute is a trespass law, and has been so construed by the Department of the Interior. 50 C.F.R. § 26.21, issued under authority of the charged statute, is titled as a "general trespass provision." There are few federal appellate decisions on trespass prosecutions, and none we found under this statute. For our proposed jury instruction, we have relied upon the analysis of the Court of Appeals for the District of Columbia in decisions on the District's unlawful entry statute.[1]

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[1] "District of Columbia law made it a misdemeanor for a person to, 'without lawful authority, . . . enter, or attempt to enter, any public or private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person

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> . . . the cases interpreting the unlawful-entry statute are clear and consistent that such a defense is available precisely because a person with a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" by the statute. *Smith*, 281 A.2d at 439; *see also McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967) (dismissing concern about unintentional violations of the statute, because "one who enters for a good purpose and with a bona fide belief of his right to enter is not guilty of unlawful entry"); *Bowman*, 212 A.2d 610, 611-12 (D.C. 1965) ("[O]ne who enters . . . for a good purpose and with bona fide belief of his right to enter . . . would not be guilty of an unlawful entry . . . .").

Wesby v. District of Columbia, 765 F.3d 13, 21 (D.C. Cir. 2014).

Wesby relied upon a number of earlier decisions which established two key propositions. First, when "fairly raised by the evidence," the government must disprove it beyond a reasonable doubt. *Ortberg v. United States,* 81 A.3d 303 (D.C. 2013); *Darab v. United States*, 623 A.2d 127, 136 (D.C.1993); and *Smith v. United States,* 281 A.2d 438, 439 (D.C. 1971). Second, to fairly raise the defense, the accused must have "some justification some reasonable basis." *Ortberg*, at n.12. Our proof will be that Mr. Wheeler is well versed in the Treaty of 1855 and reasonably believed that it provided the lawful authority for him to enter the ALE.

B. Count Two - *To What Does the Verb "Knowing" Apply in this Context?*

Count Two alleges that Mr. Wheeler "did knowingly use a motorized vehicle on lands not on designated routes of travel" within the ALE. A question presented is whether, to prove a violation, the government must prove that Mr. Wheeler knew he was "on lands not on designated routes of

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lawfully in charge thereof.' D.C. Code § 22-3302 (2008)." *Wesby v. District of Columbia*, 765 F.3d 13, 19 (D.C. Cir. 2014).

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travel" or whether knowingly only applies to use of a vehicle. We believe the regulation should be construed to apply the "knowingly" requirement to the "not on designated" element of the offense.

As a matter of statutory construction:

> . . . courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element. *United States v. X-Citement Video, Inc*., 513 U.S. 64, 79, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (Stevens, J., concurring). For example, in *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), this Court interpreted a federal food stamp statute that said, "'[w]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]'" is subject to imprisonment. *Id*., at 420, n. 1, 105 S. Ct. 2084, 85 L. Ed. 2d 434. The question was whether the word "knowingly" applied to the phrase "in any manner not authorized by [law]." *Id*., at 423, 105 S. Ct. 2084, 85 L. Ed. 2d 434. The Court held that it did, *id*., at 433, 105 S. Ct. 2084, 85 L. Ed. 2d 434, despite the legal cliche "ignorance of the law is no excuse."

Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009). If there is ambiguity in the way the regulation may be read, "it was incumbent on that agency to draw the line 'in language that the common world will understand.' *McBoyle v. United States*, 283 U.S. 25, 27, 75 L. Ed. 816, 51 S. Ct. 340 (1931)." *United States v. Apex Oil Co.,* 132 F.3d 1287, 1291 (9th Cir. 1997).

There is scant legislative history on the 1998 amendment to §668dd, which created two categories of offenses, one for "knowing violations" and another for all other violations. The legislative change appears rooted in a House Bill 2863. Congressman Don Young of Alaska decried prosecutions in circumstances in which a person knowingly was hunting but did not know he was in a baited field, and could be convicted without knowledge of the latter circumstance. His bill's object was ". . . to provide an opportunity for a

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defendant to place evidence before the court that he or she did not, in fact, know of the alleged bait and that he or she could not have reasonably known of its presence." House Report 105-42, Migratory Bird Treaty Reform Act of 1998. It appears that the "knowing" requirement in the course of conference proceedings became included as a general provision in § 668dd, as part of the 1998 amendment. Thus, it appears that the "knowing" requirement was intended to apply to both the act (driving) and the circumstance (lands not designated).

Dated: December 30, 2014

Respectfully submitted:

/s/ Irwin H. Schwartz

IRWIN H. SCHWARTZ
Attorney for Delbert Loren Wheeler

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: December 30, 2014

/s/ Irwin H. Schwartz
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