UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	CR08-30009 (KES)
Plaintiff,	)	
v.	)	**GOVERNMENT'S SUPPLEMENTAL**
	)	**RESPONSE TO DEFENSE**
ROBERT L. ERICKSON,	)	**MOTION TO SUPPRESS**
	)	
Defendant.	)	
	)	

The United States, by and through Assistant United States Attorneys Randolph J. Seiler and Eric Kelderman, files this opposition and resistance to the Defendant's Motion to Suppress and the Supplement to Motion to Suppress.

The main argument made in the Defendant's Supplement to Motion to Suppress is that the evidence gathered and observations made by tribal officers must be suppressed because those officers were not commissioned Rosebud Sioux Tribe police officers. The Defendant's Motion to Suppress, the Memorandum in Support thereof, and the Supplement do not cite United States Constitution, and do not specifically address suppression in the context of the Fourth Amendment. "The exclusionary rule is a 'blunt instrument' and '[f]or that reason courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude.'" United States v. Hornbeck, 118 F.3d 615, 618 (8th Cir. 1997) (quoting United States v. Burke, 517 F.2d 377, 386 (2d Cir. 1975); citing United States v. Freeman, 897 F.2d 346, 348 (8th Cir. 1990)). Just as in Hornbeck, the defendant's "argument is based solely upon alleged violations of tribal law," and "[h]e does not argue that the search and seizure violated the Constitution or other federal law." Id. As explained below, because no constitutional violation

is alleged, the motion to suppress should be denied. Id.

Assuming the Defendant is correct and the officers are not commissioned by the Rosebud Sioux Tribe, suppression is not warranted. The Eighth Circuit has held that "[f]ederal, not tribal or state, law governs the admissibility of [] evidence." Hornbeck, 118 F.3d at 617. In Hornbeck, addressing the issue of whether evidence seized pursuant to an invalid tribal search warrant should be suppressed, the Eighth Circuit concluded that a search and seizure must be analyzed as if they had been made by federal officers. Id. The court analogized the situation to one involving searches and seizures by state law enforcement, noting the precedent governing those situations: "The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers." Id. (quoting Preston v. United States, 376 U.S. 364, 366 (1964)); see also United States v. Bell, 54 F.3d 502, 504 (8th Cir. 1995) ("[W]e do not think Fourth Amendment analysis requires reference to an arrest's legality under state law . . . . An arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause."); United States v. Moore, 956 F.2d 843, 847 (8th Cir. 1992) ("[E]vidence seized by state officers in conformity with the Fourth Amendment will not be suppressed in a federal prosecution because state law was violated."). The court concluded that, because the motion to suppress was based on alleged tribal law violations, and no constitutional violation was shown in those alleged violations, the defendant's motion to suppress properly was denied. Id. at 618.

In a case even more similar to the instant case, United States v. Becerra-Garcia, 397 F.3d 1167 (9th Cir. 2004), the Ninth Circuit Court of Appeals addressed a defendant's motion to suppress, which was based on an alleged violation of a tribal law provision. In that case, Tribal

Rangers on the Tohono O'odham Indian Reservation were vested with authority to patrol the reservation and report suspicious activity to tribal police officers or federal agents. However, the Tribal Rangers did not have authority under tribal law to perform vehicle stops, although vehicles that stopped voluntarily for the Tribal Rangers could be detained until the arrival of officers with arrest authority. Tribal Rangers also could arrest people, but only at the direction of tribal police or federal authorities. Becerra-Garcia, 397 F.3d at 1169-70. Two Tribal Rangers stopped the defendant's van, and the defendant got out and walked toward the rangers, leaving the van door open. When asked for identification, the defendant motioned toward the van, and one of the rangers followed him to it, where he saw through the open door over twenty undocumented aliens inside. The rangers called the tribal police department and were instructed to detain the defendant, which they did until federal and tribal authorities arrived. Id. at 1170.

Becerra-Garcia moved to suppress the evidence of the illegal aliens inside his van. In analyzing the defendant's argument, the Ninth Circuit observed, "[a]t issue in this appeal is the intersection of a tribal policy and the Fourth Amendment in the contest of a motion to suppress evidence. . . ." Id. The court first noted that "the rangers' authority under tribal law is not the linchpin for determining the admissibility of the evidence obtained as a result of the stop." Id. at 1173. The court noted the "general rule . . . is that evidence will only be excluded in federal court when it violates federal protections, such as those contained in the Fourth Amendment, and not in cases where it is tainted solely under state law." Id. (quoting United States v. Cormier, 220 F.3d 1103, 1111 (9th Cir. 2000). Citing the Eighth Circuit's Hornbeck decision, the court stated that it had extended this principle to the area of tribal law and had held that admissibility of evidence in federal court is determined without regard to tribal law. Id. The court concluded that the "weight

of authority establishes that the test of whether a search or seizure violates the Fourth Amendment 'is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.'" Id. at 1174 (quoting Elkins v. United States, 364 U.S. 206, 224 (1960)). After holding that "the legality of the seizure does not depend on the rangers' authority under tribal law," the court turned its analysis to the question of whether, under Fourth Amendment standards, the stop at issue was reasonable. Id. at 1174.[1]

Similarly, in the instant case, the issue of whether the officers were commissioned by the Rosebud Sioux Tribe does not affect the admissibility of the evidence. Instead, the suppression issue turns on whether the officers' actions violated the United States Constitution. Aside from a brief reference to a lack of probable cause in the Defendant's initial motion and memorandum in support, no constitutional violation is alleged. In sum, the officers' status or authority within the Rosebud Sioux Tribe has no bearing on the suppression issue. Accordingly, the Defendant's motion to suppress evidence based on alleged non-compliance with a Rosebud Sioux tribal ordinance should be denied.

Based on the foregoing, as well as the argument and authorities cited in the Government's Response to Defense Motion to Suppress, the Government requests the motion to suppress be denied.

[1]Thereafter, applying a Fourth Amendment analysis, the court ultimately affirmed the denial of the defendant's motion to suppress, concluding the search was reasonable. United States v.Becerra-Garcia, 397 F.3d 1167, 1174-75 (9th Cir. 2005).

DATED this 18th day of March, 2008.

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CERTIFICATE OF SERVICE

The undersigned attorney for the United States of America hereby certifies that on the 18th day of March, 2008, the foregoing was electronically transmitted by the clerk's office or mailed first-class, postage prepaid, hand-delivered, or faxed by the undersigned this date to the parties listed below:

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