

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

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|---------------------------|---|----------------------------|
| UNITED STATES OF AMERICA, | * | CR 13-10015 (01) |
| | * | |
| Plaintiff, | * | |
| | * | |
| -vs- | * | BRIEF IN SUPPORT OF MOTION |
| | * | TO DISMISS INDICTMENT |
| DAVID RED THUNDER, | * | |
| | * | |
| Defendant. | * | |

* * * * *

Defendant, David Red Thunder, hereby submits the following Brief in Support of Motion to Dismiss Indictment pursuant to Rule 12 (b)(3)(B) of the Federal Rules of Criminal Procedure because it fails to state an offense.

FACTS

On March 6, 2013, the United States indicted Red Thunder for conspiracy to commit theft from an Indian Tribal Organization, theft from an Indian Tribal Organization, and aiding and abetting in violation of 18 U.S.C. §§ 371, 1163, and 2. The Indictment alleges that the Sisseton-Wahpeton Housing Authority is an Indian tribal organization whose purpose is to provide housing services and assistance to eligible members of the Sisseton-Wahpeton Oyate Tribe. (See Docket 2, Indictment at ¶ 1). According to the Indictment, the Lake Traverse District is a subdivision of the Tribe. (See Indictment, ¶ 2). The Indictment also alleges that the Lake Traverse Economic Development Corporation (LTEDC) is a for-profit business entity established by the District to promote economic development in the District. (*Id.* at ¶ 3). The Lake Traverse Aid Incorporation (LTAI) is a non-profit entity established by the Lake Traverse Economic Development Corporation to further promote economic development in the Lake Traverse District. (*Id.* at ¶ 4). Defendants were on the board of directors of both entities. (*Id.* ¶ 5).

The Indictment alleges that Red Thunder and co-defendants knowingly converted to their own use over \$1,000.00 of the moneys, funds, credits, goods, assets and other property belonging to the Sisseton-Wahpeton Oyate Sioux Tribe, an Indian tribal organization. (See *Id.* at ¶ B). Specifically, it alleges that the Lake Traverse District and the LTEDC acquired three trailer homes to be given to three District members in need of new housing. (*Id.* at ¶ D.1). According to the Indictment, Defendants then, on behalf of the LTAI, submitted a voucher to the Sisseton-Wahpeton Housing Authority requesting reimbursement from the Tribe's Homebuyers Program in the amount of \$15,700.00 because LTAI paid for the transport and set up of the three trailer homes. (*Id.* at ¶ D.3). The Sisseton-Wahpeton Housing Authority issued a check in that amount to LTAI, which was deposited into its checking account. (*Id.* at ¶¶ D.4-D.5). LTAI later wrote checks to Defendants, which Defendants cashed. (*Id.* at ¶ D.5). The United States alleges that this conduct amounts to embezzlement, theft, or conversion of the property of an Indian tribal organization, in violation of § 1163.

STANDARD OF REVIEW

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that “[t]he indictment . . . shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” It “shall state the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.” Fed. R. Crim. P. 7(c)(1). Federal Rule of Criminal Procedure 12(b) provides that a defendant may seek dismissal of an indictment that fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B). On a pretrial motion to dismiss an indictment pursuant to Rule 12(b), the court must accept all factual allegations in the indictment as true. *United States v. Sampson*, 371 U.S. 75, 78-79, 83 (1962). But to be sufficient, an indictment must contain the elements of the offense charged. *United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001). If an indictment omits “an essential element of substance” it is insufficient, although use of a particular word or phrase in the indictment is not required. *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1988). Although no particular words or phrases are necessarily required, “[i]t is well-established in [the Eighth] Circuit that citation of the statute, without more, does not cure the omission of an essential element of the charge because bare citation of the

statute is of scant help in deciding whether the grand jury considered the missing element in charging the Defendant.” *United States v. Olson*, 262 F.3d 795, 799 (8th Cir. 2001).

ARGUMENT

The Indictment alleges that Defendants, by cashing checks from LTAI, embezzled, stole, knowingly converted to their use, or willfully misapplied the funds of an Indian tribal organization in violation of 18 U.S.C. § 1164. But the Indictment does not allege that LTAI is an Indian tribal organization within the meaning of the statute or that the Sisseton-Wahpeton Tribal Housing Authority, which the Indictment does allege is an Indian tribal organization, wrongfully paid LTAI. Consequently, the Indictment is facially deficient and must be dismissed.

I. The “embezzled, stolen, converted, or misapplied” funds did not belong to an Indian tribal organization.

Under 18 U.S.C. § 1163, “[w]hoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization . . .” has committed a federal crime. The United States has alleged that Defendants converted the funds of the Sisseton-Wahpeton Housing Authority, an Indian tribal organization, or the Sisseton-Wahpeton Oyate Sioux Tribe. But this argument ignores the plain meaning of the statute because the funds did not “belong to” either the Sisseton-Wahpeton Housing Authority or the Sisseton-Wahpeton Oyate Sioux Tribe at the time that the Defendants allegedly converted them.

“It is well established that [the Eighth Circuit Court of Appeals] commence[s] any statutory interpretation with the statute’s plain language.” *United States v. Cacioppo*, 460 F.3d 1012, 1016 (8th Cir. 2006); *see also In re M & S Grading, Inc.*, 457 F.3d 898,901 (8th Cir. 2006) (“[A] federal court’s analysis of a statute must begin with the plain language.”) If the statutory language is plain, the court concludes its analysis and gives the term its ordinary meaning. *See United States v. McCall*, 439 F3d 967, 971 (8th Cir. 2006) (“When a statute’s plain language is this clear, it is controlling, without regard to contrary hints in the legislative history and without the need to refer to the canons of *noscitur a sociis* and *ejusdem generis*.”); *see also United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241

(1989) (“Where . . . the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” (Quotation omitted.)).

“Belonging to” is not defined in the statute. But because the statutory language is plain, its ordinary meaning should apply. To belong is “to be the property of a person or thing,” *Merriam-Webster’s Dictionary* (2013 ed.), or “to be the property or concern of” *Webster’s II New College Dictionary* (1995 ed.). The Indictment alleges that the “Sisseton-Wahpeton Housing Authority issued a check in the approximate amount of \$15,700.00 payable to the LTAI as reimbursement . . .” (see Indictment at ¶ C.4, Docket 2). LTAI subsequently deposited the check into its bank account and shortly thereafter “checks were written to and cashed by Defendants.” (*Id.* at ¶ C.5).¹ The United States alleges that these actions amounted to a violation of 18 U.S.C. § 1163. In other words, by cashing the check issued by LTAI to Defendants, the United States alleges that Defendants embezzled, stole, and converted to their own use funds belonging to the Sisseton-Wahpeton Housing Authority, an Indian tribal organization.

“A check is a bill of exchange, drawn on a bank, and payable on demand.” *W.B. Farms v. Fremont Nat. Bank & Trust Co.*, 756 F.2d 663, 666 (8th Cir. 1985). Checks are “three-cornered transactions” with three parties: “the person who signs the check, then delivering it to someone else in payment for goods or services, is known as the drawer . . . the drawee of the check is the bank to which it is directed, in which, presumably, the drawer has an account. The third party to the transaction is the payee, the person to whose order the check is made payable[.]” *Id.* But “[c]hecks are not instant assignments of the drawer’s funds to the payee.” *Id.* Rather, a check is just an order of the drawer to pay the holder and does not effectuate payment until it has been presented to and honored by the drawee bank. See *In re Taylor*, 332 B.R. 609, 611 (W.D. Mo. 2005). Once a check has been honored by the drawee bank, it is no longer the property of the drawer. *Id.* See also *In re Pyatt*, 486 F.3d 423, 427 (8th Cir. 2007) (holding that once checks had been honored by the bank, they were no longer property of the debtor’s bankruptcy estate).

¹The United States has made no allegation that LTAI is an Indian tribal organization within the meaning of 18 U.S.C. § 1163.

Here, the Sisseton-Wahpeton Housing Authority is the drawer and LTAI is the payee. (See Exhibit A, Check from Sisseton-Wahpeton Housing Authority to Lake Traverse Aid, Inc., Bates No. 00085). Once the drawee honored the check, the funds it represented ceased belonging to the Sisseton-Wahpeton Housing Authority and became the property of LTAI. The United States has made no allegation that LTAI is an Indian tribal organization within the meaning of § 1163. Consequently, Defendants' actions could not have violated 18 U.S.C. § 1163 because the funds did not "belong to" an Indian tribal organization at the time of the alleged offense. Therefore, the Indictment fails to state an offense and should be dismissed.

II. LTAI is not an "Indian tribal organization" under 18 U.S.C. § 1163.

The Indictment does not allege that LTAI is an Indian tribal organization within the meaning of 18 U.S.C. § 1163. But even if it did, the United States could not establish that LTAI falls under the statute's definition. LTAI was established by the Lake Traverse District and is not controlled by the Sisseton-Wahpeton Oyate Sioux Tribe. The Indictment, therefore, fails to state an offense.

The statute defines the term "Indian tribal organization" to mean "any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group, which is organized under any of such laws." *Id.* Thus, whether an entity is an "Indian tribal organization" is an element of the offense. See *United States v. White Horse*, 807 F.2d 1426, 1429-30 (8th Cir. 1986) (holding whether the Cheyenne River Sioux Tribe Telephone Authority was an "Indian tribal organization" within the meaning of 18 U.S.C. § 1163 was "a fact essential to conviction such that a conviction could only stand if the jury concluded that this fact was proven beyond a reasonable doubt"). See also *United States v. Zephier*, 916 F.2d 1368, 1376 (8th Cir. 1990) (noting that "[u]nder the circumstances of this case, however, the definition of Indian tribal organization plays critical importance"). It does not appear that the United States is alleging that any of the entities mentioned in the indictment are a "tribe, band, or community of Indians." Consequently, the court must evaluate whether LTAI is a "corporation, association, or group" "organized under the laws of the United States relating to Indian affairs." See *Zephier*, 916 F.2d at 1375. There are two considerations for this

inquiry: “(1) whether the tribes possesses de facto control over [LTAI], and (2) whether [LTAI] deliberately complied with or conformed to the laws for Indian affairs.” *Id.* In this case, only the first factor, the degree of tribal control, is relevant to the inquiry. See *United States v. Pemberton*, 121 F.3d 1157, 1170 (8th Cir. 1997) (reasoning that “the only factor relevant for the jury’s consideration in the case of a corporation chartered under tribal authority is the degree of control over the corporation possessed by the tribe”).

The Indictment alleges that the Lake Traverse District is a “subdivision” of the Sisseton-Whapeton Oyate Sioux Tribe. (See Indictment, ¶ 2, Docket 2). But the Lake Traverse District is a local government, authorized to “manage its own affairs” under the tribal constitution, not subject to the authority of the Tribe. See Sisseton-Wahpeton Oyate Tribal Constitution, Art. IV, Sec. 4 (“Each District shall manage its own affairs not inconsistent with the Tribe’s Constitution”). Each District is its own form of local government. The Tribe has also treated it as a distinct and separate entity from the Tribe. (See Exhibit B, Tribal Council Resolution No. SWO-06-086). The Districts have established their own councils and are accountable to District members for all District affairs. (*Id.*) They have their own elections to elect their District officers. (*Id.*) They have the power to sue and be sued, establish their own budgets, and have the power to levy taxes to set rates or charges within the Districts. (*Id.*) Moreover, the Districts own and operate their own economic development projects and some districts have established separate district organization to manage those projects. (*Id.*) The Tribe does not even include the Districts as a part of their federal financial reporting, out of recognition for the Districts’ statuses as separate, local governments. (*Id.*) Consequently, the Sisseton-Wahpeton Oyate Sioux Tribe does not exercise any control over the Lake Traverse District and its activities as a local sovereign. As part of these sovereign activities, the Lake Traverse District established LTEDC, which in turn established LTAI, as a non-profit entity to further promote economic development in the Lake Traverse District. Thus, the Tribe possesses no control over LTAI and it cannot be considered an “Indian tribal organization” under 18 U.S.C. § 1163 and Eighth Circuit precedent. Because whether LTAI is an “Indian tribal organization” is an essential element of the offense, the Indictment is subject to dismissal under Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure.

CONCLUSION

The United States alleges that Red Thunder and the other Defendants violated 18 U.S.C. ¶ 1163, which provides a penalty of up to five years imprisonment for embezzling, stealing, converting, or willfully misapplying funds or other property belonging to an Indian tribal organization. More specifically, the Indictment alleges that the Sisseton-Wahpeton Housing Authority, an Indian tribal organization, wrote a check reimbursing LTAI for its expenses in transporting and setting up three trailer homes in the Lake Traverse District. LTAI then deposited the check in its own account and issued checks to Defendants, who allegedly used those funds for their own purposes. The Indictment fails to state an offense for two reasons. First, at the time of the relevant alleged conduct, the funds were not the property of the Sisseton-Wahpeton Housing Authority or the Sisseton-Wahpeton Tribe, the only entities that the United States alleges are Indian tribal organizations within the meaning of the statute. Second, even if the Indictment contained an allegation that LTAI is an Indian tribal organization, it should be dismissed because LTAI is not an Indian tribal organization within the meaning of the statute. LTAI was established by the Lake Traverse District and is not under the control of the Sisseton-Wahpeton Tribe, as required by the Eighth Circuit's interpretation of 18 U.S.C. § 1163. Therefore, Red Thunder respectfully request that his Motion to Dismiss the Indictment be granted to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure and that the charges against him be dismissed.

DATED this 10th day of July, 2013.

DELANEY, NIELSEN & SANNES, P.C.

/s/ Thomas L. Sannes

By: _____
THOMAS L. SANNES
Attorney for David Red Thunder
P. O. Box 615
Webster, SD 57274
(605) 345-3321

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 10th day of July, 2013, the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS INDICTMENT was electronically transmitted by the Clerk's Office or mailed first class mail, postage prepaid, hand delivered or faxed by the undersigned this date to the parties listed below:

United States of America
Ann Henrickson, Assistant United States Attorney
P. O. Box 2638
Sioux Falls, SD 57101

/s/ Thomas L. Sannes

THOMAS L. SANNES

SISSETON-WAHPETON HOUSING AUTHORITY

605 LYDIA GOODSSELL ST.
AGENCY VILLAGE, SD 57262
PH. 605-698-3901

DACOTAH BANK
SISSETON / NEW EFFINGTON
SISSETON, SD 57282-0209 605-698-3978
78-17/814

093140

DATE

AMOUNT

5/11/2011

\$15,700.00

PAY

Fifteen Thousand Seven Hundred Dollars And 00 Cents

TO THE
ORDER
OF:

LAKE TRAVERSE AID INC.
LAKE TRAVERSE DISTRICT
P.O. BOX 509
AGENCY VILLAGE SD 57262

TWO SIGNATURES REQUIRED

[Handwritten Signature]
[Handwritten Signature]
AUTHORIZED SIGNATURE

⑈093140⑈ ⑆091400172⑆ 002 7588⑈

093140

SISSETON-WAHPETON HOUSING AUTHORITY

93140

LAKE TRAVERSE

LAKE TRAVERSE AID INC.

000016680

5/11/2011

000041885

COLETTE DRUM

5/11/2011

\$5,050.00

\$5,050.00

\$5,050.00

000041886

SHARON FLUTE

5/11/2011

\$5,000.00

\$5,000.00

\$5,000.00

000041887

DENISE FUENTES

5/11/2011

\$5,650.00

\$5,650.00

\$5,650.00

\$15,700.00

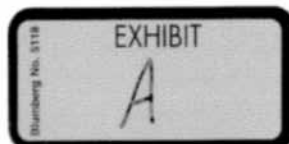
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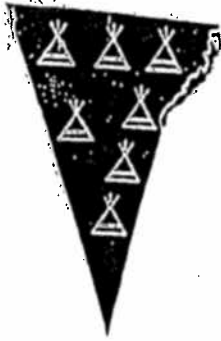
\$15,700.00

SISSETON-WAHPETON HOUSING AUTHORITY

093140

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Sisseton-Wahpeton Oyate

LAKE TRAVERSE RESERVATION
P.O. Box 509
100 Veterans Memorial Drive
Agency Village, South Dakota 57262-0509
Phone: (605) 698-3911

TRIBAL COUNCIL RESOLUTION NO. SWO-06-086

District are Local Governments and Not a Part of the Tribe's Financial Report Entity

WHEREAS, The Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation is organized under a Constitution and By-Laws adopted by the members of the Tribe on August 1-2, 1966, and approved by the Commissioner of Indian Affairs August 25, 1966, and last amended effective December 19, 2002; and,

WHEREAS, The Constitution and By-Laws Article VII, Section 1, that the Tribe shall be governed by the Tribal Council, and that the Tribal council shall have the power to: (a) represent the Tribe in all negotiations with federal, state and local governments; and, (i) to adopt resolutions regulating the procedures of the Tribal Council, its officials and committees in the conduct of the Tribal Affairs; and,

WHEREAS, The Tribe, through its members, has definitively exercised its authority, through its Constitution, to establish the Districts as local governments; and,

WHEREAS, The Tribe possesses the inherent sovereign authority to establish the Districts as local governments, which is recognized in the Tribe's 1867 Treaty with the United States; and,

WHEREAS, The Single Audit Act, 31 U.S.C. 75-01; specifies that Indian Tribes are defined and treated the same as States; the term "State" is defined to specifically include "any Indian Tribe" and the local government is "any unit of local government" within a State or Indian Tribe; and,

WHEREAS, The Tribe has the lawful authority to establish local governments pursuant to its inherent sovereign and constitutional authority, its treaty-recognized sovereignty, and Federal law, specifically the Single Audit Act; and,

WHEREAS, The seven Districts were established within the Tribe's original Constitution, adopted in 1946, and have remained a Constitutionally-recognized political entity ever since. As a matter of local government, each District is empowered by the Constitution to "manage its own affairs"; and,

District are Local Governments and Not a Part of the Tribe's Financial Report Entity

WHEREAS, The Districts have established their own District Councils. The District Councils are accountable to the District members for all District affairs. The Districts hold their own elections to elect their District officers. The Districts have the power to sue and be sued. The Districts have the power to establish their own budget. Each District has the power to levy taxes to set rates or charges within its district. The Districts own and manage property. The Districts own and operate their own economic development projects and some Districts have established separate District organizations, such as a corporation, to manage these economic development projects. The Districts operate their own local government programs, such as housing and elderly care assistance. The Districts have the power to issue bonded debt, as long as this power is exercised consistent with its Constitutional power to manage its own affairs; and,

WHEREAS, By virtue of the Tribe's receipt of Federal funding, as well as the requirements imposed by the Indian Self-Determination Act, 25 U.S.C. § 450, the Tribe's independent auditor determines, pursuant to the Single Audit Act whether the Tribe's financial statements are presented fairly in all material respects in conformity with generally accepted accounting principles; and,

WHEREAS, Under the Single Audit Act, the Tribe's audit "shall cover the entire operations of the Auditee," but cannot include the local governments of the Districts, which have their own primary government; and,

WHEREAS, Under generally accepted accounting principles, the Tribal government is separate from its local governments for purposes of defining the financial reporting entity and local governments are not a mere organization that can be included within the financial reporting entity of the State or Tribe. The Districts are not component units.

NOW, THEREFORE BE IT RESOLVED, by the Sisseton Wahpeton Oyate Tribal Council of the Lake Traverse Reservation hereby finds and confirms that as a matter of fact and Tribal and Federal law, the Districts are local governments. The District's legal standing as local governments of the Tribe extends back decades and there is no meaningful legal difference between the relationship involving a State and its Counties and the Tribe and its Districts; and,

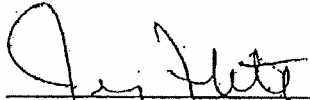
FINALLY, BE IT RESOLVED, by the Sisseton Wahpeton Oyate Tribal Council of the Lake Traverse Reservation hereby determines and confirms that the Districts, as local governments, must not be included within the financial reporting entity of the Tribe's primary government.




CERTIFICATION

We, the undersigned duly elected Chairman and Secretary of the Sisseton-Wahpeton Oyate Tribal Council, do hereby certify that the above resolution was duly adopted by the Sisseton-Wahpeton Oyate Tribal Council, which is composed of 10 members, (representing a total of 15 Tribal council weighted votes) of whom 8 constituting a quorum, were present at a Tribal Council meeting, duly noticed, called, convened and held at the TiWakan Tio Tipi, Agency Village, South Dakota October 26, 2006, by a vote of 12 for, 0 opposed, 1 abstained from vote, 1 absent from vote, 1 not voting, and that said Resolution has not been rescinded or amended in any way.

Dated this 30th day of October, 2006.


Jerry Flute, Tribal Chairman
Sisseton-Wahpeton Oyate

ATTEST:


Michael Peters, Tribal Secretary
Sisseton-Wahpeton Oyate

cc: Legal Counsel
Vice-Chairman
CPA

