

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR 14-30038

CR 13-30158

Plaintiff,

vs.

GOVERNMENT'S RESPONSE TO  
DEFENDANT'S MOTION TO  
DISMISS

STEVEN NICHOLS,

Defendant.

Comes now the United States of America through its attorney, Tim Maher, Assistant United States Attorney, and files its opposition to the Defendant's Motion to Dismiss filed in CR 14-30038 (new Indictment for one count of Criminal Trespass) and CR 13-30158-RAL (the pending supervised release case), which are Document 24 and Document 44, respectively.

**FACTS**

1. The Defendant is a non-Indian who has been prosecuted and convicted previously in federal court for law violations arising upon the Rosebud Sioux Indian Reservation:

- a. In CR 11-30025, on April 1, 2011, the Defendant pled guilty to the offense of Assault by Striking, Beating and Wounding. He was sentenced in June, 2011 to serve 6 months in prison for assaulting a female tribal member on the Rosebud Sioux Indian Reservation.
- b. In CR 12-30153, on February 27, 2013, the Defendant was convicted of two counts of Criminal Trespass and was sentenced to 30 days in jail on Count 1 and one year of probation on Count 2. As part of that case, he signed a Factual Basis Statement. See **Attachment 1**. The Factual Basis confirmed numerous facts that are relevant to offenses that occurred on September 2, 2012,

January 30, 2013, and subsequent offenses, including:

- i. On June 10, 2011, he was served with a Petition for Exclusion of a Non-Indian, seeking to exclude and bar him from entering the lands of the Rosebud Sioux Indian Reservation, pursuant to tribal law.
  - ii. On September 22, 2011, the Rosebud Sioux Tribal Court entered an Emergency Writ of Exclusion barring him from entering the lands of the Rosebud Reservation.
  - iii. On September 22, 2011, the Rosebud Sioux Tribal Council also voted to exclude the Defendant from the Rosebud Reservation.
  - iv. On September 23, 2011, RSTLES Officer Kenneth Ayers located the Defendant on the Reservation and escorted him off of the Rosebud Reservation to and across the Nebraska state line. The Defendant was served with the exclusionary order by Officer Ayers.
  - v. On September 9, 2012, RSTLES officers learned the Defendant was walking down the street in Mission, South Dakota, within the Rosebud Sioux Indian Reservation. Officers located him and again transported him off of the Rosebud Reservation and across the state line.
  - vi. On January 30, 2013, RSTLES officers learned the Defendant was staying at a residence at or near Mission, South Dakota. They found the Defendant hiding in a crawl space within the residence, and he was arrested on federal charges and transported off of the reservation.
- c. In CR 13-30158, on December 13, 2013, the Defendant was convicted of two counts of Criminal Trespass and was sentenced to 6 months in jail on Count 1 and one year of probation on Count 4. As part of that case, he again signed a Factual Basis Statement. See **Attachment 2**. The Factual Basis confirmed numerous facts that are relevant to offenses that occurred on September 2, 2012, January 30, 2013, and subsequent offenses, including:
- i. The Defendant again admitted that the Rosebud Sioux Tribal Court and Tribal Council excluded him and barred him from their lands in 2011.
  - ii. The Defendant again admitted he had unlawfully entered the

Rosebud Reservation and was convicted of two Criminal Trespass counts in federal court. He also acknowledged that the federal court ordered him to not re-enter or remain on the Rosebud Sioux Indian Reservation.

- iii. On August 17, 2013, the Defendant was in St. Francis at the home of Danielle Young. Around September 6, 2012, a tribal law enforcement officer found him at the St. Francis Indian School. Both locations are near St. Francis, South Dakota, and are within the Rosebud Sioux Indian Reservation.
  - iv. The Defendant acknowledged that he did defy orders to leave that were previously communicated to him.
- d. In the supervised release revocation filed in CR 12-30153, on December 13, 2013, the Defendant admitted he entered the Rosebud Reservation and trespassed on August 17, 2013 and September 6, 2013. The Defendant was found to have violated his supervised release, he received a sentence of 30 days incarceration, and his supervision was terminated.
2. In CR 14-30038, the Defendant is again charged with Criminal Trespass, in violation of 18 U.S.C. §§ 7, 13, 1152 and SDCL § 22-35-6(1).
- Document 11.

3. In CR 13-30158, the Defendant is charged with a Petition to Revoke Probation alleging:

Count 1 – On or about 3/4/2014, on the Rosebud Indian Reservation, Steven Nichols was arrested and charged with Criminal Trespass, in violation of the General Conditions of Probation.

Count 2 – On or about 3/14/2014, Steven Nichols entered the Rosebud Indian Reservation, in violation of Special Condition # 1 of the Special Conditions of Probation.

4. On March 14, 2014, RSTLES Officer Darrin Running Horse was on duty and saw a gold 1998 Pontiac Bonneville driving on BIA Route 5 near the Two Strike Housing community, within Todd County and on the Rosebud Sioux Indian Reservation. Officer Running Horse saw the vehicle was crossing the

center line and that there were children in the car, and at least one of the children was not in child restraints. The car was stopped and the Defendant was identified as the driver. Officer Running Horse knew the Defendant was not supposed to enter the Rosebud Sioux Indian Reservation.

5. The Tribal Officers could not arrest the Defendant, as he is a non-Indian. FBI Special Agent Steve Pettyjohn made arrangements to travel to the Rosebud Sioux Indian Reservation to arrest the Defendant, who had been detained by tribal officers. SA Pettyjohn swore out a criminal complaint and affidavit on March 14, 2014 alleging one count of Criminal Trespass.

**ARGUMENT:  
HIGHWAYS AND BYWAYS ARE STILL PART OF THE  
ROSEBUD SIOUX INDIAN RESERVATION**

**A. Indictment**

18 U.S.C. § 7 defines the special maritime and territorial jurisdiction of the United States, which means crimes occurring on federal lands, or lands subject to federal jurisdiction, like Indian country. See 18 U.S.C. § 1151; see also *United States v. Nazarenius*, 983 F.2d 1480 (8th Cir. 1993). 18 U.S.C. § 13 provides that whoever, within or upon federal lands, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the state, territory, possession or district in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment.



18 U.S.C. § 1152 provides that, except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

“This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local laws of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. 18 U.S.C. § 1152. All crimes committed by non-Indians against Indians are punishable under 18 U.S.C. § 1152. *Duro v. Reina*, 851 F.2d 1136, 1146 n. 10 (9th Cir. 1987). Section 1152 extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian. *Id.* The General Crimes Act (GCA) creates federal criminal jurisdiction over crimes committed by non-Indians against Indians in Indian country, and incorporates the Assimilative Crimes Act (ACA), which provides that when conduct which would violate state law occurs on federal land, the relevant state law is assimilated into federal law unless there is already applicable federal law. *United States v. Billadeau*, 275 F.3d 692 (8th Cir. 2001).

18 U.S.C. § 1151 defines Indian country as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, “notwithstanding the issuance of any patent, and, *including rights-of-way*

*running through the reservation,”* all depending Indian communities within its borders, and all Indian allotments.<sup>1</sup> (emphasis added)

Offenses like child abuse, first degree burglary, second degree burglary, third degree burglary, and criminal trespass are not defined by federal laws. South Dakota law defines a variety of criminal trespass offenses at SDCL §§ 22-35-5 (trespass within a building) and 22-35-6 (entering or refusing to leave property). The Defendant has been charged with a violation of Section 22-35-6(1):

On or about the 14th day of March, 2014, in Todd County, in Indian country, in the District of South Dakota, Steven Nichols, a non-Indian, did knowingly commit the public offense of Entering or Refusing to Leave Property After Notice, in that he did, knowing he was not privileged to do so, enter and remain on the Rosebud Sioux Indian Reservation where notice against trespass was given by actual communication to him, and did defy an order to leave personally communicated to him by an authorized person, in violation of 18 U.S.C. §§ 7, 13, 1152 and SDCL § 22-35-6(1).

The history of the Rosebud Sioux Indian Reservation is set out in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). Certain portions of the Rosebud

---

1 It is worth noting here that, given a particular piece of land, it is for the court, not the jury, to determine whether the land is in Indian country. *United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997). *See United States v. Deon*, 656 F.2d 354, 356-57 (8th Cir.1981) (court may determine as a matter of law that area is in Indian country); *United States v. Cook*, 922 F.2d 1026, 1031-32 (2d Cir. 1991) (determination of whether site of offense is in Indian country is for court alone); *United States v. Sohapp*, 770 F.2d 816, 822 n. 6 (9th Cir.1985) (what constitutes Indian country is matter for judge, not jury); *United States v. Levesque*, 681 F.2d 75, 78-79 (1st Cir. 1982) (error to submit question to jury). In other factual situations, courts have held that the existence of jurisdiction over crimes committed in a particular geographic area is a question for the court. *See e.g., United States v. Hernandez-Fundora*, 58 F.3d 802, 809-10 (2d Cir. 1995) (federal prison); *United States v. Warren*, 984 F.2d 325, 327 (9th Cir.1993) (military base).

Indian Reservation have been diminished or returned to the public domain. See Act of April 23, 1904, 33 Stat. 254; Document 24, Indian Treaties, Volume 1 of SDCL at 154 (Gregory County); Act of March 2, 1907, 34 Stat. 1230, Document 25 at 161 (Tripp and Lyman Counties); and Act of May 30, 1910, 36 Stat. 448, Document 27 at 169 (Mellette County). Only Todd County remains unaffected by these post-1889 enactments. *Kneip*, 430 U.S. at 586. It was originally, and still is, set aside for the Rosebud Sioux Tribe. Hence, all portions of Todd County, deeded lands and trust lands, are presently Indian country under 18 U.S.C. § 1151(a).

Supreme Court decisions clearly indicate and favor federal jurisdiction. "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). The status of the land within Todd County as Indian country has been litigated extensively. The United States District Court for South Dakota had jurisdiction of prosecution for larceny of an automobile committed within boundaries of Todd County, Rosebud Indian Reservation in South Dakota, notwithstanding Indian title to a town site on which larceny allegedly was committed had previously been extinguished. *Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943). "We find no legislation by which Congress has taken away from the Rosebud Sioux any part of the land of Todd County, all of which is within the boundaries of the area which has been recognized as their reservation since 1889." *Beardslee v. United States*, 387 F.2d 280, 286 (8th Cir. 1967). It matters not that any of the present

proceedings involve an alleged crime committed on highways, deeded lands or elsewhere within Todd County. This Court still has jurisdiction under 18 U.S.C. § 1151(a).

The defendant in *Beardslee* claimed the killings occurred in a house on land then owned by non-Indians and rented to a murder victim by these non-Indian owners. Thus, the site was within the reservation's boundaries but on platted land owned by a non-Indian. *Beardslee*, 387 F.2d at 284. Mere ownership by a non-Indian of land that has been established as part of reservation is insufficient to change reservation status, for once Congress has established a reservation, all tracts included within it remain part of reservation until separated therefrom by Congress. *Beardslee*, 387 F.2d at 284-88. See also *Stands*, 105 F.3d at 1565 (concluding that traveling north from the Rosebud Reservation to White River in Mellette County amounts to traveling off the reservation).

In *United States v. Thomas*, the defendant was prosecuted for robbery and for assault with a dangerous weapon, alleged to have been committed by Indians in Indian country (the Pine Ridge Indian Reservation); the case was brought under jurisdictional statutes relating to offenses committed in Indian country or within the special maritime and territorial jurisdiction of the United States. The Eighth Circuit Court of Appeals ruled that the claim that the land was no longer used as part of the reservation did not defeat the fact that the area was still within the boundaries of the reservation. *United States v. Thomas*, 469 F.2d 145, 146-47 (8th Cir. 1972).



The purpose of the section defining Indian country as all land within limits of Indian reservation under jurisdiction of United States notwithstanding issuance of any patent is to remove uncertainty of federal jurisdiction over crimes committed by or against Indians within exterior boundaries of Indian reservation. *Hilderbrand v. Taylor*, 327 F.2d 205 (10th Cir. 1964). A ranch located within boundaries of Indian reservation, though title thereto had been acquired by tax deed from county without express reservation of any federal jurisdiction over the land, was located in "Indian country" and comprised a part of lands reserved for use of the United States and under its exclusive jurisdiction within section 2032 of this title defining "special territorial jurisdiction of the United States." *Guith v. United States*, 230 F.2d 481 (9th Cir. 1956).

State highway rights-of-way running through an Indian reservation remain part of the reservation and within the territorial jurisdiction of the tribal police. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975). *See also United States ex rel. Condon v. Erickson*, 344 F.Supp. 777 (D.C.S.D. 1972) (acts that opened certain portions of the Cheyenne River reservation to white settlement did not diminish the boundaries of that reservation and state of South Dakota had no jurisdiction to convict unemancipated Indian for rape committed within town which was within the original boundaries of the Cheyenne River reservation).

The Rosebud Sioux Tribe has civil authority over the Defendant. It is well-settled that Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on

non-Indian fee lands. *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010). A tribe also retains inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic integrity, or the health or welfare of the tribe. *Id.*; *Montana v. United States*, 450 U.S. 544, 566 (1981). "Indian tribes have inherent sovereignty independent of treaty rights and the authority derived from their power to exclude nonmembers from tribal lands." *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1022 (8th Cir. 1997).

Further, Indian tribes possess an inherent sovereignty except where it has been specifically taken away by act of Congress. *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710, 717-718; *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, South Dakota*, 231 F.2d 89 (8th Cir. 1956). Intrinsic in this sovereignty is the power of the tribe to create and administer a criminal justice system. *Ortiz-Barraza*, 512 F.2d at 1179. Also intrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation. *Id.* A tribe needs no grant of authority from the federal government in order to exercise this power. *Id.*

The Rosebud Sioux Tribal Court and Rosebud Sioux Tribal Council have the power to exclude the Defendant from entering its exterior boundaries. They exercised that power and the Defendant has habitually trespassed within the reservation boundaries. Even a federal magistrate judge indicated to the Defendant that enough is enough and to quit entering the reservation

boundaries. The tribe, however, does not have the power to hold him accountable criminally, other than to through civil enforcement of its exclusion order. The power to hold a non-Indian Defendant accountable in a criminal context lies with the federal courts. Frankly, tribes can exclude people, particularly non-Indians who have beaten their tribal members, because that is their only option.

## **2. Petition to Revoke Probation Is Sufficiently Pled**

The Petition to Revoke Probation is adequately pled to apprise the Defendant of his probation violations. The Defendant is correct that a charge is an allegation and not proof of anything, but the Government is not required to prove that a conviction exists or that an offense was committed beyond a reasonable doubt. Upon finding a violation by a preponderance of the evidence, the [court] has discretion to revoke a defendant's supervision. *United States v. Asalati*, 615 F.3d 1001, 1005 (8th Cir. 2010). To justify probation revocation order, enough evidence is required to satisfy the court, within its judicial discretion, that probationer's conduct has not met conditions of probation. *Schneider v. Housewright*, 668 F.2d 366, 368 (8th Cir. 1981). In a probation revocation proceeding, the government has the burden of persuasion, but such burden does not rise to level of "beyond a reasonable doubt"; all that is required is that the court be satisfied that probation abused opportunity granted him not to be incarcerated. *Id.* At a hearing on a petition for revocation of supervised release, the Government must only prove by a preponderance of the evidence that the defendant violated a condition of supervised release. *United States v.*

*Goodon*, 742 F.3d 373, 376 (8th Cir. 2014). The Government is not required to prove that an actual conviction has resulted based upon the Defendant's conduct.

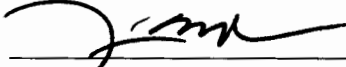
In CR 13-30158, this Court ordered the Defendant to be on probation for one year on Count 4, after his release from his 6 month prison term on Count 1. The Court imposed Special Condition of Supervision # 1: "The defendant shall not enter or remain on the Rosebud Sioux Indian Reservation." The language is simple and straight to the point. The Defendant now argues the language is not fancy enough. As the Court may recall, the Defendant even informed the Court previously that he knew he did not have the right to enter the reservation, wanted to work to overturn his banishment order, but was going to make plans to live elsewhere. Counsel's recollection was that the Defendant informed the Court that he was going to go live in Aberdeen to not run afoul of the exclusion order. He has not lived up to his promise, and now argues that the probation language is not adequate. The Defendant has faced at least 6 prior charges of criminal trespass for entering or remaining upon the Rosebud Sioux Indian Reservation; a Tribal Court has told him to not enter or remain on the Reservation; the Tribal Council has told him to not enter or remain on the Reservation; Tribal Police officers have told him he is not allowed on the Reservation; FBI officers have removed him from the Reservation; a federal magistrate judge has repeatedly counseled him to stay off the Rosebud Reservation; the Defendant is on "super notice" that he has no business entering the Rosebud Reservation.



Therefore, the United States requests that this Court deny the Defendant's Motion to Dismiss in all respects.

Dated this 11th day of July, 2014.

BRENDAN V. JOHNSON  
United States Attorney

  
\_\_\_\_\_  
Tim Maher  
Assistant United States Attorney  
PO Box 7240  
Pierre, SD 57501-7240  
(605) 224-5402

CERTIFICATE OF SERVICE

The undersigned attorney for the United States of America hereby certifies that on the 11th day of July, 2014, the foregoing document 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:

Randy Turner  
Assistant Federal Public Defender  
P.O. Box 1258  
Pierre, SD 57501

BRENDAN V. JOHNSON  
United States Attorney

  
\_\_\_\_\_  
Tim Maher  
Assistant United States Attorney