

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR 14-50013

Plaintiff,

UNITED STATES' OBJECTION
TO DEFENDANT'S MOTION TO
DISMISS THE INDICTMENT

vs.

JUSTIN JANIS,

Defendant.

The United States of America, by and through Assistant United States Attorney Kathryn N. Rich, submits this brief in response to the Defendant's Motion to Dismiss the Indictment. For the reasons submitted below, the United States objects to the motion and requests the Court deny the defendant's motion.

DISCUSSION

A. Sufficiency of the Indictment

In considering a motion to dismiss, the Court must consider the facts as alleged in the indictment. *United States v. Birbragher*, 603 F.3d 478, 480-81 (8th Cir. 2010) (citing *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). “[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *United States v. Morris*, 18 F.3d 562, 568 (8th Cir. 1994) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)).

“An indictment normally will be deemed sufficient ‘unless no reasonable construction can be said to charge the offense.’” *Id.* (quoting *United States v. Peterson*, 867 F.2d 1110, 1114 (8th Cir. 1989)).

In this case, the Indictment sufficiently charges the defendant with violating 18 U.S.C. § 111, which provides, in relevant part, that “[w]hoever . . . forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . where such acts involve physical contact with the victim of that assault” shall be punished according to the provisions of federal law. 18 U.S.C. § 111(a)(1). Section 1114 provides the designation of those entitled to the scope of protection under § 111, to include “any officer or employee of the United States or of any agency in any branch of the United States Government . . . while such officer or employee is engaged in or on account of the performance of official duties.” 18 U.S.C. § 1114. As more fully explained below, such officers or employees of the United States includes tribal officers, although they are not considered federal employees for other purposes, when such officers are performing their job duties pursuant to a contract between the Bureau of Indian Affairs (“BIA”) and a tribe to perform “any activity the Secretary may authorize under section 2803.” 25 U.S.C. § 2804(a), (f)(1).

The Indictment alleges that the defendant forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with Officer Ann Mousseau. It

charges that Officer Mousseau is a law enforcement officer employed by the Oglala Sioux Tribe Department of Public Safety pursuant to a contract between the BIA and the Tribe, granting authority under 25 U.S.C. § 2804 to perform law enforcement functions. And the indictment charges that the defendant's act involved physical contact with Officer Mousseau, while she was engaged in the performance of her official duties. Doc. 2. The Indictment "contains the elements of the offense charged and fairly informs [the] defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Morris*, 18 F.3d at 568. Because it meets these threshold requirements, the Indictment should not be dismissed, and the defendant's motion should be denied.

B. Federal Officer

The defendant's argument turns on whether Officer Ann Mousseau, the victim of the crime alleged in the Indictment, was a federal officer for purposes of § 111, because he alleges she was not acting as a federal officer at the time of the assault but rather as a tribal officer enforcing tribal law. Doc. 27 at 3. Whether Officer Mousseau qualifies as a federal officer requires examination of the legal framework related to tribal officers qualifying as federal officers under § 111. The defendant does not dispute that the Oglala Sioux Tribe has a 638 contract with the BIA, nor that at the time of the assault, Officer Mousseau had a Special Law Enforcement Commission Card ("SLEC"), issued by the BIA to tribal law enforcement officers. Doc. 27 at 3.

1. 638 Contract

The Secretary of the United States Department of the Interior (“Secretary”), “through the Bureau of Indian Affairs, is charged with providing or assisting in the provision of law enforcement services on Indian lands.” *United States v. Roy*, 408 F.3d 484, 490 (8th Cir. 2005) (citing 25 U.S.C. § 2802(a)). In 1975, the Indian Self-Determination Act was passed. *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993). Prior to the passing of that Act, the United States Department of Interior, Bureau of Indian Affairs was the primary provider of law enforcement on the Pine Ridge Indian Reservation. *Id.* “That year, acting pursuant to the Indian Self-Determination Act of 1975, BIA entered into a contract under which the Oglala Sioux Tribe Public Safety Commission (‘OSTPSC’) agreed ‘to provide the entire gamut of law Enforcement Services’ on the Reservation, including the arrest of ‘violators of Tribal Penal Code provisions, Federal and State law.’” *Id.* (citing 25 U.S.C. § 450f). Under the Indian Self-Determination Act, “the BIA was compelled, if requested by a tribe, to enter into contracts to provide, inter alia, law enforcement services in Indian country.” *United States v. Danley*, No. CR 11-30029, 2011 WL 6935341, at *1 (D.S.D. Dec. 30, 2011) (citing 25 U.S.C. § 450f(a)(1)(B)).

Then, in 1990, Congress passed the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2809, “to clarify and strengthen the authority of the law enforcement personnel and functions within the [BIA].” *Schrader*, 10 F.3d at 1351 (citing 25 U.S.C. §§ 2801-2809; S. Rep. No. 167, 101st Cong., 2d Sess. 4

(1990), reprinted in 1990 U.S.C.C.A.N. 712, 712). Under this Act, “the Secretary may contract with a tribe to assist BIA in enforcing tribal laws and, in connection with such a contract, may authorize a tribal law enforcement officer ‘to perform any activity the Secretary may authorize under § 2803.’” *Id.* (quoting 25 U.S.C. § 2804(a)). Such agreements are known as “638 contracts.” *Roy*, 408 F.3d at 490. The Act “provides that a tribal officer, ‘while acting under the authority granted by the Secretary under [25 U.S.C. § 2804(a)] . . . who is not otherwise a Federal employee shall be considered to be an employee of the Department of the Interior only for the purposes of . . . sections 111 and 1114 of Title 18.” *Danley*, 2011 WL 6935341, at *2 (quoting 25 U.S.C. § 2804(f)(1)(B)). Section 2804(a) authorizes the Secretary to enter into “memoranda of agreement for the use . . . of the personnel or facilities of a Federal, tribal, State, or other government agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws.” 25 U.S.C. § 2804(a)(1). These law enforcement officers are authorized “to perform any activity the Secretary may authorize under section 2803.” 25 U.S.C. § 2804(a)(2). “Section 2803 sets forth various ‘law enforcement’ activities the Secretary may charge BIA with performing, including performing any “law enforcement related duty.” *Danley*, 2011 WL 6935341, at *2 (quoting 25 U.S.C. § 2803(7)). “Thus, ‘federal employee’ includes law enforcement officers performing any law enforcement related duty in Indian country.” *Id.*

In addition to using BIA employees to provide law enforcement, “[t]he Secretary may enter into an agreement for the use . . . of the personnel or facilities of a Federal, tribal, State, or other government agency’ to assist in the provision of law enforcement services in Indian Country.” *Roy*, 408 F.3d at 489 (quoting 25 U.S.C. § 2804(a)). “[T]he Indian Self-Determination Act . . . requires the federal government, at the request of a tribe, to provide funding for certain tribal services traditionally the direct responsibility of the federal government.” *United States v. Lambert*, 498 F.3d 963, 965 (9th Cir. 2007) (quoting 25 U.S.C. § 450f).

The Secretary may authorize officers of a particular agency contemplated by the 638 agreement “to perform any activity the Secretary may authorize under section 2803.” *Schrader*, 10 F.3d at 1350. “When acting under such authority, ‘a person who is not otherwise a Federal employee shall be considered to be an employee of the Department of the Interior only for purposes of . . . sections 111 and 1114 of Title 18.” *Schrader*, 10 F.3d at 1350 (quoting 25 U.S.C. § 2804(f)). Stated another way, “under 25 U.S.C. § 2804(f), such persons, though not otherwise federal employees, are employees of the Department of the Interior for purposes of § 111 of Title 18 when acting under authority granted by the Secretary under 25 U.S.C. § 2804(a).” *United States v. Young*, 85 F.3d 334, 334 (8th Cir. 1996) (emphasis added). “Thus, ‘federal employee’ includes law enforcement officers performing any *law enforcement*

related duty in Indian country.” *Danley*, 2011 WL 6935341, at *2 (quoting 25 U.S.C. § 2803) (emphasis added).

The issue of whether tribal officers working pursuant to a 638 contract between the BIA and their tribal employer, like Officer Mousseau, are federal officers for purposes of § 111 even when enforcing tribal laws has been well-settled in the Eighth Circuit for over twenty years, and reiterated numerous times since then. *See Roy*, 408 F.3d at 490-91 & n.3 (affirming conviction under § 111 for assault of city police officer responding to tribal violation pursuant to contract with BIA “sign[ing] over to the Flandreau City Police Department to provide law enforcement services on the Flandreau Reservation.”); *Bettelyoun*, 16 F.3d at 852-53 (affirming conviction under § 111 for assault of Oglala Sioux tribal officers enforcing tribal law, after noting distinction between threshold legal questions related to contract between tribe and BIA and manner of BIA designation of officers under the contract); *Schrader*, 10 F.3d at 1351 (concluding Oglala Sioux tribal officers responding to disturbance call “were federal officers for purposes of § 111”).

In *Schrader*, the court concluded that two tribal officers were considered federal officers under § 111 when they responded to a disturbance call and encountered the defendants. *Schrader*, 10 F.3d at 1350. The court agreed the two were federal officers because “they were engaged in law enforcement activities and were acting pursuant to a 638 contract that delegated BIA’s tribal law enforcement duties to OSTPSC.” *Id.*

When a 638 contract meets the definition of a § 2804(a) agreement, and when tribal officers designated under that contract enforce laws that BIA officers would otherwise enforce, § 2804(f) expressly provides that those tribal officers are afforded the same protection under 18 U.S.C. § 111 that Congress has afforded BIA employees. This is so regardless of whether the officer is enforcing a tribal, state, or federal law, so long as he is engaged in the performance of his official duties rather than “a personal frolic of his own.”

Schrader, 10 F.3d at 1350-51 (quoting *United States v. Heliczer*, 373 F.2d 241, 245 (2nd Cir. 1967)).

In *Roy*, the court similarly concluded that a Flandreau City Police Officer, who was acting as a member of the Flandreau Santee Sioux Tribal Police Department, and who also was authorized pursuant to the Flandreau Santee Sioux Tribe’s 638 contract with the BIA to exercise the BIA’s law enforcement functions under § 2804(a), was a federal officer for purposes of § 111. *Roy*, 408 F.3d at 487, 490. The officer in that case responded to a tribal law violation disturbance call on the Flandreau Santee Sioux Reservation. *Id.* The Secretary and the Flandreau Santee Sioux Tribe had entered a 638 contract for the provision of law enforcement services on the Reservation. *Id.* at 490. The court held that the 638 contract was sufficient to authorize Flandreau City Police officers to exercise the BIA’s law enforcement functions under 25 U.S.C. § 2804(a). The Court further held that, “to constitute a proper delegation, the contract need only be ‘an agreement for the use . . . of the personnel or facilities of a Federal, tribal, State, or other government agency’ to aid in law enforcement in Indian Country and authorize that agency to perform some law

enforcement activity that the Secretary could authorize the Bureau to perform under § 2803.” *Id.*

Furthermore, the Eighth Circuit Court of Appeals has stated the purpose of § 111 is to protect both federal officers and federal functions. *Roy*, 408 F.3d at 490-91. In *Roy*, the defendant argued that the Flandreau City officer could not qualify as a federal officer because he had not completed the training required of officers who exercise the Bureau’s law enforcement authority. *Id.* Although the defendant had not cited the specific source of this contention, the Eighth Circuit assumed it arose from 25 C.F.R. § 12.35, which provides that “[l]aw enforcement personnel of any program funded by the Bureau of Indian Affairs must not perform law enforcement duties until they have successfully completed a basic law enforcement training course prescribed by the Director.” *Id.* Despite the city officer’s concession that he had not yet attended “the BIA class” at the time of the incident, the Eighth Circuit held that a failure to complete the training course did not prohibit him from qualifying for federal officer status. *Id.* The court observed that the regulation did not so provide, and that such a holding would be inconsistent with the purpose behind 18 U.S.C. § 111: “to protect *both* federal officer and federal functions.” *Id.* at 490-91 (quoting *Schrader*, 10 F.3d at 1351). The Court concluded that the officer undoubtedly was “performing a federal function—the provision of law enforcement services on Indian land—at the time of the incident, and thus he was entitled to federal officer status as a threshold matter.” *Id.* at 491; *see*

Young, 85 F.3d at 335 (holding tribal police officer involved in altercation with defendant was federal officer and affirming defendant's conviction under § 111); *Bettleyoun*, 16 F.3d at 852-53 (rejecting claim that tribal officers enforcing tribal laws could not be federal officers and holding that district court properly instructed jury after making threshold legal determinations regarding law enforcement contract); *cf. United States v. Schiradelly*, 617 F.3d 979, 981 & n.1 (8th Cir. 2010) (per curiam) (affirming sentence of defendant convicted under § 111 for assaulting tribal officer employed through a contract with the BIA).

The defendant lists several violations outlined in 25 U.S.C. § 2803 for which tribal officers acting under acting pursuant to 638 contracts are authorized to make arrests. This list, however, ignores § 2803(7), which further explains the authority such tribal officers are authorized to perform. 25 § 2803(7) ("The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to . . . perform any other law enforcement related duty."). The defendant's claim also contradicts Eighth Circuit law: "the Secretary may contract with a tribe to assist BIA in *enforcing tribal laws* and, in connection with such a contract, may authorize a tribal law enforcement officer 'to perform any activity the Secretary may authorize under § 2803.' *Schrader*, 10 F.3d at 1350 (emphasis added) (quoting 25 U.S.C. § 2804(a)).

The defendant cites *United States v. Medearis*, 775 F. Supp. 2d 1110 (D.S.D. 2011), as support for the argument that Officer Mousseau was not acting as a federal officer under § 111 but instead as a tribal officer. In *Medearis*, a tribal agent obtained a telephonic search warrant from a tribal judge, which did not comply with all requirements of Fed. R. Crim. P. 41. Because the tribal agent “became a special agent after completing training at a federal law enforcement training center, and [was] employed as a law enforcement officer by the Tribe under a ‘638 contract’ between the Tribe and the [BIA],” the defendant argued “that the telephonic search warrant [the agent] obtained needed to comply with the requirements of the Federal Rules of Criminal Procedure, specifically Rule 41.” *Id.* at 1118. The court began its discussion regarding the federal officer issue by noting “[t]ribal officers are deemed federal officers for certain purposes when either cross-deputized or employed through a contract with the BIA.” *Id.* (citing *Schiradelly*, 617 F.3d at 981). The court observed

When acting under such authority, “a person *who is not otherwise a Federal employee* shall be considered to be an employee of the Department of the Interior *only for purposes* of . . . sections 111 [Assault, Resisting, or Impeding Certain Officers] and 1114 [homicide against federal officers] of Title 18,” eligibility for certain benefits under 5 U.S.C. §§ 8191 *et seq.*, or state or local employees assigned to a federal agency under 5 U.S.C. § 3374. *Id.* (quoting 25 U.S.C. § 2804(f)) (emphasis added).

Id. (quoting *Schrader*, 10 F.3d at 1350). The court then went on to note that, “[b]ecause none of the specific purposes for deeming a tribal officer to be a

federal officer apply in this case,” the tribal agent was not deemed a federal officer when he sought and obtained a tribal search warrant from a tribal judge. *Id.* at 1119. Thus, the court ruled, the procedural requirements of Rule 41 did not apply in that case. *Id.*

The defendant’s reliance on *Medearis* is misplaced, as the *Medearis* court specifically drew a distinction between tribal officers enforcing tribal law for purposes of § 111, for which the status of a federal officer specifically is afforded them, and tribal officers performing other functions, for which such status does not necessarily apply. Thus, the tribal agent in *Medearis* was a “person who is not otherwise a Federal employee” under § 2804(f), which provides that such people not otherwise federal employees are considered “employee[s] of the Department of the Interior *only* for purposes of,” *inter alia*, “sections 111 and 1114 of Title 18.” 25 U.S.C. § 2804(f)(1)(B) (emphasis added).

In the present case, the evidence at trial will show that Officer Ann Mousseau is a federally trained law enforcement officer. On the date of the incident alleged in the Indictment, she was engaged in law enforcement activity as a member of the Oglala Sioux Tribe Department of Public Safety, performing her duties in Indian country. While acting within the scope of her law enforcement duties related to a tribal law violation—disorderly conduct and liquor violation—Officer Mousseau encountered the defendant, and the conduct underlying the Indictment ensued. The evidence also will show the contract

between the Oglala Sioux Tribe and the BIA provided for such law enforcement services to enforce the Oglala Sioux Tribal Law and Order Code. Under the holding in *Roy*, Officer Mousseau's duties on that date clearly served a federal function. While on official duty, responding to a call for a potential tribal liquor violation, Officer Mousseau was assaulted by the defendant. Because she was acting within the scope of her duties, responding to a call related to violation of tribal law, pursuant to the 638 contract between the BIA and the Oglala Sioux Tribe and while in possession of a valid SLEC card, Officer Mousseau was acting as a federal officer for purposes of § 111.

1. SLEC Card

In addition to "638 contracts" and law enforcement under such contracts, the BIA also may issue a Special Law Enforcement Commission ("SLEC") card to tribal law enforcement officers. With an SLEC card, an officer is designated, as shown in Exhibit 1 attached to this response, as a Deputy Special Officer of the Bureau of Indian Affairs. "A tribal officer who receives an SLEC card can enforce applicable federal statu[t]es in Indian country." *United States v. Antoine*, No. CR 08-30004, Docket 77 at 10 (citing *Johnson v. United States*, No. CV 06-1023, 2007 WL 2688556, at *2 (D.S.D. Sept. 11, 2007)). Such officers also are "federal officers" for purposes of § 111. *United States v. Oakie*, 12 F.3d 1436 (8th Cir. 1993). Indeed, the Eighth Circuit has observed that the government need not prove the federal officer issue by demonstrating the officer was performing duties pursuant to a § 2804(a) contract. Even

without evidence of such a contract in place, “a tribal officer who has been designated as a Deputy Special Officer of the BIA is a federal officer within the meaning of § 111 when performing the federal duties he or she had been deputized to perform, typically, the enforcement of certain federal criminal laws on the Tribe’s reservation.” *United States v. Bettleyoun*, 16 F.3d 850, 853 n.2 (8th Cir. 1994). Officer Mousseau had a valid SLEC on the date of the incident charged in the Indictment, which the defendant does not dispute. Doc. 27 at 3.

Again, the evidence at trial will show that Officer Mousseau was engaged in the performance of her official law enforcement duties, enforcing tribal law, when she responded to the matter involving the defendant. Such activity is within the scope of her deputization as a Deputy Special Officer of the Bureau of Indian Affairs.

In the end, whether an officer’s position, such as Officer Mousseau’s with the Oglala Sioux Tribe Department of Public Safety, qualifies for status as a federal officer is a “threshold legal question’ for the court.” *Roy*, 408 F.3d at 489 (quoting *Bettleyoun*, 16 F.3d at 853). Whether Officer Mousseau herself was such an officer, as well as whether she was engaged in her official duties at the time of the incident alleged in the Indictment, are questions for the jury. *Id.* The United States submits that the evidence will show that both legally and factually, Officer Mousseau was an Officer for the Oglala Sioux Tribe Department of Public Safety, pursuant to a contract between the Tribe and the BIA, who was engaged in her official capacity when the incident in question

occurred. Thus, Officer Mousseau should be classified as a federal officer for purposes 18 U.S.C. § 111.

CONCLUSION

The Indictment in this case contains the essential elements of the offense charged, fairly informs the defendant of the charge against him, and enables him to plead an acquittal or conviction as a bar to future prosecutions for the same offense. Additionally, Officer Mousseau was employed under a 638 contract and had a valid SLEC card at the time of the assault, and thus was a federal officer for purposes of 18 U.S.C. § 111. Accordingly, the United States respectfully requests the Court deny the defense motion to dismiss the Indictment.

Dated this 1st day of July, 2014.

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