

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR 14-50013

Plaintiff,

DEFENDANT’S MEMORANDUM  
IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF ORDER  
DENYING MOTION TO DISMISS  
DEFENDANT’S INDICTMENT

vs.

JUSTIN JANIS,

Defendant.

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The Defendant, Justin Janis, by and through his attorney, Assistant Federal Public Defender Stephen D. Demik, respectfully submits this memorandum of law, as follows, in support of his motion for reconsideration by the Court of its order of August 14, 2014,<sup>1</sup> denying Defendant’s June 13, 2014, motion to dismiss the indictment in this case.<sup>2</sup>

**BACKGROUND AND UNCONTESTED FACTS**

Janis moves to dismiss the indictment against him which alleges that on or about November 27, 2013, he willfully assaulted Anne Mousseau, an officer of the Oglala Sioux Tribe Department of Public Safety, while Officer Mousseau was engaged in the performance of her official duties.<sup>3</sup> The indictment cites 18 U.S.C. § 2804 but makes no distinction between federal or tribal law enforcement duties being engaged in by Officer Mousseau.<sup>4</sup>

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<sup>1</sup> Docket No. 43.

<sup>2</sup> Docket No. 27.

<sup>3</sup> *Id.*

<sup>4</sup> Docket Nos. 1, 2.

Janis asserted in his motion that since Officer Mousseau was only engaged in enforcement of tribal public intoxication law, not any federal law, nor assisting any federal officer in the enforcement of federal law, Officer Mousseau was not performing a federal function as required by *United States v. Oakie*, 12 F.3d 1436, 1440 (8th Cir. 1993)(tribal law enforcement officer is entitled to the protection of 18 U.S.C. 111 “when performing the federal functions he or she has been deputized to perform.”) when she arrested Janis. Therefore, Officer Mousseau was not entitled to the protection of section 111, and the indictment in this case should be dismissed because it fails to state an offense cognizable under 18 U.S.C. § 111.

The Court denied Janis’s motion to dismiss,<sup>5</sup> concluding that Officer Mousseau, though undertaking to enforce purely tribal law, was entitled to section 111 protection because the Oglala Sioux Tribe had entered into a 638 Contract for law enforcement purposes with the United States Bureau of Indian Affairs pursuant to 18 U.S.C. § 2804 (Pub. Law. 93-638), and Officer Mousseau possessed a Special Law Enforcement Certification (SLEC) from the BIA.

The following facts relevant to Janis’s motion to dismiss are uncontested:

1. Office Mousseau is employed as a law enforcement officer by the Oglala Sioux Tribe Department of Public Safety (OSTDPS).
2. The Oglala Sioux Tribe has for several years entered into a 638 Contract with the Bureau of Indian Affairs providing for certain law enforcement activities on the

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<sup>5</sup> Docket No. 43.

Pine Ridge Reservation and funding for tribal law enforcement. A 638 Contract between the tribe and the BIA was in force at the time Officer Mousseau encountered and arrested Janis on November 27, 2013.

3. Although not employed by the federal government, Officer Mousseau possesses a SLEC from the Bureau of Indian Affairs issued under the authority of 25 CFR § 12.21(a).
4. When Officer Mousseau investigated and subsequently arrested Janis she was engaged only in enforcing the Tribe's public intoxication law. Officer Mousseau told Janis on several occasions she was at his residence only to investigate a tribal liquor violation/intoxicated person violation, (LV/IP), a purely tribal offense.
5. Officer Mousseau, in fact, subsequently arrested Janis that night for a LV/IP offense.

### **ARGUMENT**

Janis does not contest the validity of the 638 Contract between the Tribe and the BIA. Nor does he challenge Officer Mousseau's SLEC. Janis's sole contention is that at the time he was arrested by OSTDPS Officer Mousseau, Officer Mousseau was not performing any federal function she was deputized to perform.<sup>6</sup> She was, rather, (by her own admissions) engaged solely in the enforcement of tribal LV/IP laws. What has been overlooked is that even under 25 U.S.C.

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<sup>6</sup> *See Oakie*, 12 F.3d at 1440.

§ 2804, a federal officer as described in 18 U.S.C. § 1114 (“any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) . . . engaged in or on account of the performance of official duties. . .”) is not authorized to enforce tribal laws unless the Tribe has specifically consented to the federal officer doing so.

The Court in its order denying Janis’s motion to dismiss cited to and quoted from section 2804(a)(1).<sup>7</sup> The Court, however, overlooks that portion of the quoted provision providing that before there may be federal enforcement of a tribal law the Tribe must authorize the BIA to enforce its laws.<sup>8</sup> Mr. Janis does not contest the conclusion that, if Officer Mousseau were acting in a qualified federal capacity in her dealings with Janis, she would be considered a federal employee pursuant to 25 U.S.C. § 2804f (“While acting under authority granted by the Secretary . . . a person who is not otherwise a Federal employee shall be considered to be— (1) an

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<sup>7</sup> Docket No. 43, p. 2.

<sup>8</sup> See 18 U.S.C. § 2082(c)(1) (“. . .the responsibilities of the Office of Justice Services in Indian country shall include— (1) the enforcement of Federal law and, *with the consent of the Indian tribe*, tribal law”) (emphasis added); see also 18 U.S.C. § 2803(2) (“The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to— (2) execute or serve warrants, summonses, or other orders relating to a crime committed in Indian country and issued under the laws of— . . . (B) an Indian tribe *if authorized by the Indian tribe;*”) (emphasis added); see also 18 U.S.C. §2803(5) (The Secretary may authorize employees to “. . . make inquiries of any person, and administer to, or take from, any person an oath, affirmation, or affidavit, concerning any matter relevant to the enforcement or carrying out in Indian country of a law of either the United States *or an Indian tribe that has authorized the employee to enforce or carry out tribal laws;*”) (emphasis added).

employee of the Department of the Interior only for purposes of— . . . sections 111 and 1114 of title 18”).

Nowhere in the record of this case has there been any showing that the Oglala Sioux Tribe has authorized the BIA to enforce tribal laws. The best source for this authorization would seemingly be the Tribe’s 638 Contract with the BIA. The government has pointed to no provision in that contract, however, wherein the Oglala Sioux Tribe consents to federal enforcement of its tribal laws or authorizes the Bureau of Indian Affairs to enforce OST laws as unambiguously contemplated by 18 U.S.C. §§ 2802, 2803. Nor has Janis’s review of the contract revealed such a provision.

The Oglala Sioux Tribe need not first enter into a 638 Contract with the United States before the Tribe may enforce its own tribal laws. The existence of a 638 Contract, therefore, is irrelevant to Officer Mousseau’s enforcement of the Tribe’s own liquor and intoxicated persons laws. Officer Mousseau’s possession of a SLEC is also irrelevant unless it is established the Tribe has authorized federal enforcement of tribal law.<sup>9</sup> Officer Mousseau, as a law enforcement employee of OSTDPS, was entitled to enforce tribal law on the reservation, irrespective of any federal connection or function. This is all that she was doing when she arrested Janis for LV/IP on November 27, 2013.

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<sup>9</sup>At the very least, to cloak Officer Mousseau with the protection of section 111 for her actions involving Janis the United States should be required to proof the Oglala Sioux Tribe has authorized federal enforcement of its LV/IP laws.

Officer Mousseau was performing no federal function for which she had been deputized. She was enforcing no federal law. She was assisting no other federal law enforcement officer in that officer's federal duties. Her SLEC was not implicated in her arrest of Janis or her enforcement of the Tribe's LV/IP laws. In sum, Officer Mousseau was simply acting in the capacity for which she had been hired by the Oglala Sioux Tribe Department of Public Safety— for the enforcement of the tribe's laws. She is not, therefore, entitled to protection under 18 U.S.C. § 111 for her encounter with Janis because she was not under any authority granted by the Secretary of the Interior under 18 U.S.C. § 2804(a).<sup>10</sup>

### CONCLUSION

For these reasons, Janis respectfully requests that the Court reconsider its order of August 14, 2014, denying his motion to dismiss the indictment in this case and grant that motion because Officer Mousseau was not acting under any grant or federal authority or performing any federal function for which she had been deputized when she arrested Janis on November 13, 2014, for the tribal offense of a liquor law violation and being an intoxicated person.

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<sup>10</sup> See § 2804f.

Dated this 22nd day of August, 2014.

Respectfully submitted,

NEIL FULTON  
Federal Public Defender  
By:

/s/ Stephen D. Demik

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Defendant's Memorandum in Support of

Motion for Reconsideration of Order Denying Motion to Dismiss Indictment

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