

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR 16-30164-RAL

Plaintiff,

vs.

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

MARWAN SADEKNI,

Defendant.

Comes now, the government, by and through its attorney of record Carrie G. Sanderson, Assistant United States Attorney, and submits this Response to the Defendant's Motion to Dismiss (Document 25) and Brief Supporting Motion to Dismiss (Document 26), filed January 10, 2017. The Government resists the defendant's motion in all respects.

STATEMENT OF FACTS

1. The United States Bureau of Indian Affairs (BIA) contracts with Soliant Company to provide doctors to high needs areas. Marwan Sadekni (non-Indian), the Defendant, is a medical doctor who contracted through Soliant Company and was stationed for several weeks in 2014 and 2015 at the Indian Health Services (I.H.S.) hospital in Rosebud, South Dakota. Michelle Knepper (non-Indian) is a physician assistant who works as an independent contractor through AdvancePractice.com. AdvancePractice.com also contracts with the BIA to staff medical providers at the I.H.S. Hospital in Rosebud. Defendant and

Knepper were schedule to work together during shifts in January and February of 2015.

2. On or about January 23, 2015, Deefndant and Knepper were on shift together in the emergency room. At some point, Knepper placed a lab order that upset Defendant. Deefndant began yelling a Knepper. He grabbed Knepper by the shirt collar and pulled her toward him. He then “yanked” Knepper by the neck and shook her. Knepper reported the event to I.H.S. security and alerted the I.H.S. medical director. Knepper also filed a complaint with the BIA.

3. On February 25, 2015, Defendant and Knepper were again scheduled to work together. At approximately 9 PM, Defendant accused Knepper of ordering a CT scan for a patient without his permission. Defendant became upset over the issue. Later in the evening, Knepper went into an office to arrange a transport for one of Defendant’s patients from I.H.S. to another hospital. Defendant entered the office and became upset with Knepper for arranging the transport. He began swearing at Knepper. Defendant pounded on the desk. He then shoved Knepper against the wall, slammed his hand down on the phone. Knepper alleges that Defendant grabbed her by the neck and began to choke her. Knepper pushed Deefndant away with her elbow and ran out of the office. Both hospital security and the Todd County Sheriff were contacted regarding the incident. Shortly thereafter, the Federal Bureau of Investigations took over the investigation into both incidents.

4. On November 9, 2016, a federal indictment was filed, charging Defendant with two counts of Assault by Striking, Beating and Wounding. The Government claimed jurisdiction to prosecute Defendant under 18 U.S.C. 7 (3), as the I.H.S. hospital qualifies as a needful building.

5. An initial appearance and arraignment was held on December 14, 2016, where Defendant pled not guilty to the charges. On January 10, 2017, Defendant, by and through his counsel, filed a motion to dismiss and corresponding brief, claiming lack of jurisdiction.

6. On January 13, 2017, United States Magistrate Judge Mark A. Moreno requested the government provide information corresponding to the following questions:

- i. Whether the United States reserved criminal jurisdiction upon the State of South Dakota's entry into the Union.
- ii. Whether the United States acquired property, and in particular, the Indian Health Service Hospital in Rosebud, South Dakota, for a purpose enumerated in the United States Constitution with the State of South Dakota's consent and did so before February 1, 1940.
- iii. Whether the United States acquired property and thereafter, but before February 1, 1940, received a cession of jurisdiction from the State of South Dakota.
- iv. Whether the United States acquired property, to wit, the Indian Health Service Hospital in Rosebud and/or received the State of

South Dakota's consent or cession of jurisdiction after February 1, 1940, and filed the necessary acceptance of the same.

7. The Government subsequently requested, and was provided, the lease agreement (Lease) between the U.S. Department of the Interior, Bureau of Indian Affairs, on behalf of the Rosebud Sioux Tribe, and the Indian Health Services, concerning the land where the I.H.S. hospital and faculty housing is located. The Lease is included as an attachment to this document.

Additional facts will be set forth during the argument section of this brief and at the hearing on Defendant's Motion to Dismiss.

ARGUMENT AND AUTHORITIES

The United States has jurisdiction over Defendant because, at the time of the criminal activity, he was in a "needful building" located within the "special maritime and territorial jurisdiction of the United States," as provided for in 18 U.S.C. § 7(3) (hereinafter Section 7(3)).

Section 7(3) defines "special maritime and territorial jurisdiction of the United States," to include:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3). The generally accepted jurisdictional test for Section 7(3) was delineated in *U.S. v. Erdos*. 474 F.2d 157, 159 (4th Cir. 1973). According to *Erdos*, Section 7(3) creates two "special" jurisdictional categories: 1) Lands

reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction¹; and 2) places acquired for the use of the United States, with federal jurisdiction granted by the consent of the state legislature. *Id.* at 160.

The test for the first jurisdictional category is two part: Does the United States Government exercise practical usage and dominion over the building, and does the United States Government have exclusive or concurrent jurisdiction? *Id.* at 159. *United States v. Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977). The second category relies on the affirmative consent for jurisdiction from the United States and the state legislature. *Erdos*, 474 F.2d at 159; *United States v. Curtis*, 856 F.2d 187 (4th Cir. 1988); *United States v. King*, 781 F. Supp. 315, 316 (D.N.J. 1991).

The government has found no case law where a Federal court analyzed Section 7(3) under a fact pattern as presented in the case at hand.² The jurisdictional question here involves property held in trust and located within a

¹ There is general concurrence that, “the third phrase, separated from the first two by a comma and the disjunctive ‘or,’ that limits jurisdiction to places acquired (within the United States presumably) by the consent of state legislatures. ... [T]he third phrase is independent of and does not modify the first two[.]” *Erdos*, 474 F.2d at 160. *See also United States v. Bin Laden*, 92 F.Supp.2d 189, 213–14 (S.D.N.Y. 2000). However, the circuits are split on if the *Erdos* first jurisdictional category applies to extraterritorial land or land within the territorial jurisdiction of the United States. *See United States v. Gatlin*, 216 F.3d 207, 216 (2nd Cir. 2000) (Congress intended § 7(3) “to apply only to lands within the territorial boundaries of the United States.”); *Bin Laden*, 92 F.Supp.2d at 213–14 (concluding that concurrent territorial jurisdiction over embassy property would violate international law); *Curtis*, 856 F.2d at 187 (finding that it was never intended, for the practical usage and dominion test be applied to places owned by the United States and within the territorial jurisdiction of the United States).

² Generally, the courts have addressed cases involving extraterritorial jurisdiction in foreign countries and buildings and/or property located on state land but used by the federal government.

federally recognized Indian reservation, and subsequently leased to the United States Government. Therefore, we look to the analysis of the text, structure and legislative history of Section 7(3) to aid in the application of the jurisdictional statute. *United States v. Bin Laden*, 92 F.Supp.2d 189, 206 n. 32.

A. The I.H.S. Hospital fits within the first *Erdos* Jurisdictional Category.

Section 7(3) applies to Americans, regardless of Indian status, in all territory, wherever situated, that is acquired for the use of the United States and under the exclusive or concurrent jurisdiction of the federal government. *United States v. Corey*, 232 F.3d 1166, 1172 (9th Cir. 2000).

1. I.H.S. hospital was acquired for the use of the United States.

The I.H.S. hospital³ is located in Rosebud, Todd County, South Dakota, which is within the exterior boundaries of the federally recognized Rosebud Indian Reservation. *See Lease*. The land is trust land, held by the United States on behalf of Rosebud Sioux Tribe. *See Id.* On August 1, 1988,⁴ a representative of the Secretary of the Department of Interior, acting for and on behalf of the Rosebud Sioux Tribe, entered into a lease agreement with the United States I.H.S., for the purpose of building and operating the I.H.S. “comprehensive health care facility and associated Living Quarters” on the land. *Id.* In the Lease, the BIA specifically asserted jurisdiction over the leased premises. *Id.* The lease

³The legal description for the leased property is as follows: NE1/4 of Section 22, Township 38 North, Range 30 West, 6th P.M., Todd County, South Dakota and subject to any prior valid existing right of way less 5 acres described as W1/2SW1/4SW1/4NE1/4

⁴ In reference to the Honorable Judge Moreno’s questions “ii” and “iii”, the United States acquired the land for the establishment of the I.H.S. hospital in 1988. As such, questions “ii” and “iii” are not applicable to this analysis.

agreement incorporated Rosebud Sioux Tribe Resolution No. 2008-1000, which approved the lease and building of the I.H.S. facility. *Id.* The I.H.S. hospital was built and is currently run as a health care facility and living quarters for employees. The lease was renewed for an additional 20 years in 2008. *Id.*

It is clear from the lease agreement and management of the I.H.S. hospital that the United States government exercised dominion and control over the I.H.S. facility. Additionally, the Defendant concedes that leasehold interests are sufficient to meet the first prong of the *Erdos* test. See Document 26, page 2.

2. United States Government has, at a minimum, concurrent jurisdiction over the crimes occurring at the I.H.S. hospital.

The focus of the jurisdictional analysis should be on the United States' jurisdiction over Sadekni due the geographical location of the I.H.S. hospital and the government's control of and legislative authority over the trust land and building.

The government agrees the state has criminal jurisdiction over non-Indians for crimes committed against non-Indians within the borders of a federally recognized Indian reservation. *U.S. v. Langford*, 641 F. 3d 1195, 197 (10th Cir. 2011)(Federal court did not have authority over victimless crimes committed by non-Indians in Indian country); *United States v. Norquay*, 905 F.2d 1157, 1162 (8th Cir. 1990)(recognizing *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1881), which holds congress did not assume jurisdiction over crimes committed within Indian country by non-Indians against other non-

Indians in 18 U.S.C. § 1152 and therefore the states have jurisdiction over these offenses). However, the criminal jurisdiction of the state is neither exclusive nor unlimited. *Rosebud Sioux Tribe v. State of S.D.*, 900 F.2d 1164 (8th Cir. 1990).

Section 7(3) grants the United States jurisdiction over those territories in which the United States government enjoys regulatory authority and it does not limit jurisdictional authority to the states. *United States v. Holmes*, 699 F. Supp. 2d 818, 830 (E.D. Va. 2010), aff'd, 670 F.3d 586 (4th Cir. 2012) (citing *Corey*, 232 F.3d at 1177-79). According to the *Corey* court, “[t]he jurisdiction in question is not that of the federal courts. The provision instead refers to ‘legislative jurisdiction.’” *Corey*, 232 F.3d at 1177. “Under [the *Erdos*] test, the court considers whether the United States enjoys such control over the area that the law should constructively regard it as United States territory.” *United States v. Holmes*, 699 F. Supp. 2d 818, 830 (E.D. Va. 2010), aff'd, 670 F.3d 586 (4th Cir. 2012)(citation removed).

The United States has legislative jurisdiction and regulatory authority over the I.H.S. hospital. I.H.S. is a service created by the United States government for the purpose of assisting in Indian health care. I.H.S. receives yearly lump-sum appropriations from Congress and expends the funds under authority of the Snyder Act, 42 Stat. 208, as amended, 25 U.S.C. § 13, and the Indian Health Care Improvement Act, 90 Stat. 1400, as amended, 25 U.S.C. § 1601 *et seq.* The Snyder Act, amongst other things, authorizes I.H.S. to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance

of the Indians,” for the “relief of distress and conservation of health.” 25 U.S.C. § 13. Through such appropriations and their corresponding rules, Congress is controlling, funding and regulating the use of hospitals such as the I.H.S. facility in Rosebud. Additionally, the Lease with I.H.S. grants the United States broad legislative authority by providing that the BIA has jurisdiction over the leased premises. See Lease, pg 1.

The legislative history of Section 7(3) supports the assertion of concurrent jurisdiction under Section 7(3). The court discussed the legislative history of 18 U.S.C. § 7 at length in *Bin Laden*. 92 F. Supp. 2d at 205-215 (focusing on extraterritoriality). Particularly on point for the analysis at hand, was the court’s review of The House Report concerning the 1940 revision of Section 7(3), the Act of June 11, 1940, c. 323, 54 Stat. 304. *Bin Laden* quotes the House Report, noting “[s]pecifically, ‘[t]he most significant effect of th[e] bill is to grant Federal courts concurrent criminal jurisdiction on reservations where the United States does not have exclusive jurisdiction.’” *Id.* at 211.

Concurrent jurisdiction is also supported by the trust status of the land in question. The United States holds legal title to the trust land at issue and has regulatory authority to approve any sale, gift or exchange of the trust land. 25 C.F.R. § 152.23 (2014). South Dakota has routinely recognized the United States authority over trust land and “South Dakota’s Constitution expressly acknowledges the supremacy of the federal government in matters pertaining to Indian lands,” *Estate of Ducheneaux v. Ducheneaux*, 2015 S.D. 11, ¶ 10, 861

N.W.2d 519, 522. See also S.D. Const. ar. XXII§ 2 (“Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. ...”). Additionally, the United States government respects the Indian tribes' political claims over the lands within their possession, even though the territory is part of the United States. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17, 8 L.Ed. 25 (1831) (describing the tribes as “domestic dependent nations” that had an “unquestionable” right to lands within their possession yet whose territory was nonetheless under the sovereignty of the United States). This shared jurisdictional scheme accommodates the needs of the concurrent authorities over the Indian territory, resembling in some respects the agreements worked out by the United States and foreign territories.

Specifically, the government's ownership of the trust land and the regulatory authority over the I.H.S. hospital's funding, management, upkeep and operation creates Federal government jurisdiction within the I.H.S. building and on the facility grounds. It is clear that I.H.S. hospital constitutes land “reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction.” *Erdos*, 474 F.2d at 160. Accordingly, § 7(3) does form jurisdiction for the Government to prosecute Defendant in federal court on charges of striking, beating and wounding that took place in the I.H.S. hospital, a needful building.

B. The United States does not require consent from the State of South Dakota to exercise authority over the I.H.S. facility.

The state consent requirement derived from the second enumerated *Erdos* jurisdictional category is not applicable to the case at hand. Defendant argues that Section 7(3) only applies to places acquired by the United States *with the consent of the legislature of the state* in which the place is located when the land is acquired for the erection of certain enumerated public facilities, including needful buildings. However, this requirement ignores the first jurisdictional category. Additionally, the consent requirement disregards the shared jurisdictional scheme between the United States, the Rosebud Sioux Tribe and the State of South Dakota. An analysis of Section 7(3) must take into account the complex nature of jurisdiction within Indian country.

Federally recognized Indian tribes are quasi-sovereign political entities. *United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (“federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as a ‘separate people’ with their own political institutions ...”) (citation omitted). However, “[l]ong-standing precedents of the United States Supreme Court hold that state courts have exclusive jurisdiction over crimes committed in Indian country involving only non-Indians or “victimless” crimes. *State v. Vandermay*, 478 N.W.2d 289, 290 (S.D. 1991)(citations omitted). Conversely, land being held in trust by the United States on behalf of and for Indians and Indian tribes is

under the regulatory authority of the United States, not the state in which the land is located. *See Ducheneaux*, 2015 S.D. 11, ¶ 10 (discussing restrictions on state regulatory authority over tribal reservations and members). As such, the application of state consent requirement must be analyzed with mind toward tribal sovereignty and the supremacy clause.⁵

After review of the Executive Orders from the Governors of the State of South Dakota, and after consultation with representatives from the South Dakota Secretary of State's Office, the Todd County Register of Deeds, and General Counsel Office for the I.H.S., the government was unable to identify whether State of South Dakota provide consent or cession of jurisdiction over the I.H.S. facility after February 1, 1940, and filed the necessary acceptance of the same. Yet, this is not fatal to the jurisdictional analysis. The courts who have required consent within the states under Section 7(3) addressed land held by the state. *See Curtis*, 856 F.2d at 187; *King*, 781 F. Supp. at 317. That is not the case here and same analysis should not be applied

Here, the land is held in by the BIA on behalf of the Rosebud Sioux Tribe. The regulatory authority over the land comes from the BIA and the federal government. 25 C.F.R. § 152.23 (2014). At no point during the history of the state does the State of South Dakota have possessory interests or exercise

⁵ The South Dakota Supreme Court and the Eight Circuit have reviewed the history of land within the Rosebud Indian Reservation in South Dakota and the respective federal and state regulatory authority. *See generally Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589, 97 S. Ct. 1361, 1364–65, 51 L. Ed. 2d 660 (1977), *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir.1990), *Estate of Ducheneaux v. Ducheneaux*, 2015 S.D. 11, ¶ 10, 861 N.W.2d 519, 522.

jurisdiction over the land where the I.H.S. hospital is located. *Ducheneaux*, 861 N.W.2d at 521-24 (South Dakota Constitution expressly acknowledged the supremacy of the federal government in matters pertaining to Indian lands, and federal law expressly withheld from states jurisdiction to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of Indian property held in trust by the United States). It is impractical and a usurpation of power under the supremacy clause to require United States government to record consent from the Governor of South Dakota to exercise its rightful jurisdiction over trust land. Therefore, as stated above, the first enumerated *Erdos* jurisdictional category applies to the I.H.S. facility.

CONCLUSION

There is no basis for dismissing this matter for want of jurisdiction, and for the reasons set forth in the Government's Response, the Defendant's Motion to Dismiss should be denied.

Dated this 17th day of January, 2017.

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