

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DYLAN JOSIAH BLUE BIRD,

Defendant.

3:22-cr-30114-RAL

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
DISMISS

Defendant Dylan Blue Bird, by and through his attorney, Assistant Federal Public Defender Derek D. Friese, submits this Memorandum in Support of Defendant's Motion to Dismiss. Mr. Blue Bird argues that the Rosebud Sioux Tribe Law Enforcement officers, are not "federal officers" as a matter of law under 18 U.S.C § 111 outside the boundaries of the Rosebud Sioux Reservation. Based on the succeeding argument, Mr. Blue Bird asks that the Court consider this motion prior to trial as a matter of law under Rule 12(b),¹ and grant Defendant's Motion to Dismiss.

STATEMENT OF FACTS

On September 30, 2022, Officer Jay Romero of the Rosebud Sioux Tribe Law Enforcement Services (RSTLES) was patrolling eastbound on U.S. Highway 18 on the Rosebud Sioux Reservation in the Mission, South Dakota area. Officer Romero reported that he observed a vehicle "passing by [him] in a no passing zone at a high

¹ Fed. R. Crim. P. 12(b).

rate of speed.”² Officer Romero activated his emergency lights and sirens to conduct a traffic stop. The vehicle sped away and Officer Romero gave chase. In Officer Romero’s written report, he details it as a long chase through the reservation at speeds exceeding 100 miles per hour. Officer Romero noted that he observed metal and paper objects being thrown from the vehicle. Several other Officers, including Officer Richard Kumley, joined in on the chase. The chase surpassed the exterior boundary of the reservation to the east. Officer Romero noted that near the junction of U.S. Highway 18 and U.S. Highway 53, off the reservation and nearing Winner, South Dakota, the vehicle turned around and proceeded back westbound. There, the vehicle traveled in the opposing lane of travel. Officer Romero, Officer Kumley, Officer Jalen Bernie, and Officer Reymond Peters each reported that the suspect vehicle ran Officer Kumley off the road, head-on, without physical contact.

Thereafter, Officers deployed spikes and the vehicle was eventually stopped. The suspect was identified as Dylan Blue Bird. Mr. Blue Bird was arrested on several tribal charges, including Aggravated Assault, and was cited for state traffic violations. Thereafter, the United States charged Mr. Blue Bird with Assault on a Federal Officer under 18 U.S.C § 111. For jurisdictional purposes, the government cites a 25 U.S.C § 2804 agreement between the Rosebud Sioux Tribe and the United States Department of Interior, Bureau of Indian Affairs, to define Officer Kumley as a federal officer.³

² Primary Report by Jay Romero, 10.1.2022, pp. 39-40.

³ Doc. 1.

ARGUMENT

I. The Court Should Consider This Motion Pursuant to Rule 12(b)

In a prosecution under 18 U.S.C § 111, the Court should determine whether Officer Kumley was a “federal officer” as a matter of law.⁴ If Officer Kumley was a “federal officer” for purposes of the statute, the jury is tasked with the factual determination of whether Officer Kumley “was engaged in the performance of his official duties”⁵ at the time of the alleged assault.⁶ This motion raises only an issue of law.⁷ As such, the Court should entertain and dispose of this matter prior to trial under Rule 12.

II. Tribal Officers as Federal Officers Under 18 U.S.C § 111

The Bureau of Indian Affairs (BIA) of the Department of the Interior has historically provided law enforcement services on Indian lands.⁸ In 1975, Congress

⁴ *United States v. Janis*, 810 F.3d 595, 598-99 (8th Cir. 2016). *United States v. Roy*, 408 F.3d 484, 490 (8th Cir. 2005) (“[o]ur first task, like that of the district court, is to determine whether the 638 contract, taking into account the manner in which it delegates the Bureau’s law enforcement authority, is sufficient to authorize officers of the Flandreau City Police Department to exercise the Bureau’s law enforcement functions under 25 U.S.C. § 2804(a)”) (citing *United States v. Bettelyoun*, 16 F.3d 850, 853 (8th Cir. 1994)).

⁵ Doc. 1.

⁶ *Janis*, 810 F.3d at 598-99.

⁷ *Roy*, 408 F.3d at 489 (“[w]hether an officer in Van Roekel’s position, i.e., an officer of the Flandreau City and Flandreau Santee Sioux Tribal Police Department, qualifies as a federal officer is a ‘threshold legal question’ for the court”) (quoting *Bettelyoun*, 16 F.3d at 853).

⁸ *United States v. Danley*, No. CR 11-10029, 2011 WL 6935341, at *1 (D.S.D. Dec. 30, 2011) (referencing 1921 “Snyder Act,” which required BIA to fund tribal police and stating BIA has been “primary provider of law enforcement services in Indian Country”); *Roy*, 408 F.3d at 490 (stating BIA “is charged with providing or assisting

enacted the Indian Self-Determination and Education Assistance Act (ISDEAA).⁹ Pursuant to the ISDEAA, Indian tribes have customarily entered into agreements with the BIA, under which a tribe agrees to provide various law enforcement services on a reservation.¹⁰ Such agreements are referred to as “638 contracts” because of the associated public law number from the ISDEAA.¹¹ While acting under the authority of a 638 contract, a tribal officer may be considered an employee of the Department of the Interior for certain purposes.¹² Similarly, irrespective of any 638 contract, a tribal officer may be specially deputized to perform federal functions. Such officers also have the status of “federal officer” under 18 U.S.C § 111 and 18 U.S.C § 1114, “when performing the federal functions for which they were deputized.”¹³

in the provision of law enforcement services on Indian lands”) (citing 25 U.S.C. § 2802(a)).

⁹ *Danley*, 2011 WL 6935341, at *1.

¹⁰ *See United States v. Medearis*, 775 F. Supp. 2d 1110, 1118 (D.S.D. 2011) (stating that a 638 contract is an agreement where tribes agree to provide law enforcement “on a reservation”).

¹¹ *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993).

¹² *Medearis*, 775 F. Supp. 2d at 1119.

¹³ *Id.* *See also United States v. Janis*, 40 F. Supp. 3d 1133, 1134 (D.S.D. 2014) *aff’d*, 810 F.3d 595 (8th Cir. 2016) (stating an officer may be a federal officer in the absence of a 638 contract when deputized directly through BIA); *Bettelyoun*, 16 F.3d at 853, n. 2 (“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. Oakie*, 12 F.3d 1436, 1440 (8th Cir. 1993) (stating “BIA Deputy Special Officers are authorized to investigate any violation of federal law in Indian country, such as firearms violations, liquor violations, and assaults”).

In 1990, Congress passed the Indian Law Enforcement Reform Act (ILERA), “to clarify and strengthen the authority of the law enforcement personnel and functions within the [BIA].”¹⁴ The ILERA specifically authorizes the BIA to enforce the Major Crimes Act¹⁵ and violations of federal law within Indian Country.¹⁶ The ILERA provides that “[w]hile acting under authority granted by the Secretary [of the Interior],” a person who is not otherwise a federal employee shall be considered a federal officer for purposes of 18 U.S.C § 111 and 18 U.S.C § 1114.¹⁷ Therefore, in a prosecution for assaulting a federal officer, tribal officers may be protected as victims if they are either acting pursuant to the terms of a 638 contract or agreement under 25 U.S.C. §. 2804, or are performing federal law enforcement functions the BIA specially deputized them to carry out. Here, the government invokes 25 U.S.C § 2804 as providing federal jurisdiction in establishing Officer Kumley as a federal officer.¹⁸

A. Legal Distinction Between Federal Law & Tribal Law

District Courts have recognized the distinction between federal law enforcement functions and enforcement of tribal law when analyzing the nature of a

¹⁴ *Schrader*, 10 F.3d at 1350.

¹⁵ 18 U.S.C. § 1153.

¹⁶ *Danley*, 2011 WL 6935341, at *1. *See also* 25 U.S.C. §§ 2802-2804.

¹⁷ 25 U.S.C § 2804(f).

¹⁸ Doc. 1.

tribal officer's authority,¹⁹ protected status,²⁰ and liabilities²¹ under a 25 U.S.C. § 2804 agreement or 638 contract. Whether a tribal officer is enforcing federal, state, or tribal law may be determinative of legal issues relating to officer actions.²² This case involves a tribal officer attempting to enforce tribal traffic laws off the reservation and a prosecution pursuant to the jurisdiction afforded in 18 U.S.C. §111 and 25 U.S.C. §. 2804.

¹⁹ *Medearis*, 775 F. Supp. 2d at 1119. (stating “[officer] was acting as a tribal officer, not as a federal officer, when obtaining and executing search warrants issued in writing and by telephone from the tribal judge and when conducting his investigation. [Officer]’s investigation was not in federal character” when finding no violation of Rule 41 of the Federal Rules of Criminal Procedure).

²⁰ *See United States v. Cleveland*, 356 F. Supp. 3d 1215, 1219 (D.N.M. 2018) (holding that “unless additional evidence reveals that the Navajo Nation waived its inherent criminal jurisdiction or authorized the BIA to enforce Tribal law, officers without Special Law Enforcement Commissions (“SLEC”), like [the tribal officer in issue], are not federal employees for 18 U.S.C. § 1114’s purposes,” where defendant moved to dismiss indictment for murdering a tribal officer charged as murder of a federal officer under 18 U.S.C. § 1114).

²¹ *See Eyck v. United States*, 463 F. Supp. 3d 969, 989 (D.S.D. 2020) (concluding “[b]ecause [tribal officer] was acting under color of federal law, and because there are no alternative remedies under state law to deter an individual in [tribal officer]’s position from violating constitutional rights of others, Plaintiffs may proceed in litigate their *Bivens* claim against [tribal officer]”); *Boney v. Valline*, 597 F. Supp. 2d 1167, 1177 (D. Nev. 2009) (holding “the Court’s denial of a *Bivens*-type remedy is limited to a tribal officer who violates a tribal member’s rights on tribal lands in the course of enforcing tribal law”); *Roemen v. United States*, 463 F. Supp. 3d 990, 1010 (D.S.D. 2020) (observing tribal officer was “acting under color of federal law,” and allowing plaintiff to litigate *Bivens* claim).

²² *See Archambault v. United States*, No. 3:22-CV-03002-RAL, 2022 WL 17818657, at *9 (D.S.D. Nov. 18, 2022) (stating that, in evaluating a *Bivens* claim against United States and tribal officers for an incident occurring on tribal land, “this Court would likely first have to decide whether the Officers were acting under color of federal law, tribal law, or both”).

In the District of South Dakota and the Eighth Circuit, defendants have unsuccessfully argued the distinction of tribal officers acting under 638 contracts, but merely enforcing tribal laws on a reservation, forestalls federal officer status under 18 U.S.C. § 111.²³ The Eighth Circuit has continually held that tribal officers acting under 638 contracts are protected as victims under 18 U.S.C. § 111,²⁴ even when enforcing solely tribal laws on the reservation.²⁵

However, no Eighth Circuit opinion has directly addressed the present issue. This case poses the question of how a contract under 18 U.S.C. § 111 and 25 U.S.C. § 2804(f) protects tribal officers off the reservation when an officer is attempting to enforce tribal law. Mr. Blue Bird argues that protection under 18 U.S.C. § 111, when based on a 638 contract or ILERA agreement, does not extend beyond the boundaries of the tribe's reservation. This is based upon a reading of the pertinent statutes. Mr. Blue Bird asks the Court to find that, as a matter of law, a tribal officer is not protected as a legal victim under 18 U.S.C. § 111 when acting off the reservation pursuant to tribal law.

²³ See *Janis*, 810 F.3d at 597 (appellant arguing district court erred in denying a motion to dismiss because no evidence showed, and the court incorrectly found, that the Oglala Sioux Tribe ever authorized the BIA to enforce tribal law under 25 U.S.C. § 2804(a)).

²⁴ See *Bettelyoun*, 16 F.3d at 852; *United States v. Young*, 85 F.3d 334, 335 (8th Cir. 1996); *Janis*, 810 F.3d at 597.

²⁵ *Janis*, 810 F.3d at 597-98.

B. 638 Contracts or 25 U.S.C. § 2804 Agreements Are Land-Specific

Unlike a prosecution under 18 U.S.C. § 1153, this case is not charged in relation to the status of the land (i.e. Indian Country) but, rather, the status of the victim is the jurisdictional hook.²⁶ However, because of the plain language of 25 U.S.C. §§ 2802-2804, the federal status of the victim is limited by the exterior borders of the Rosebud Sioux Reservation. Agreements under the ILERA for law enforcement services apply “in Indian country.”²⁷ A 638 contract or 25 U.S.C. § 2804 agreement does not cloak an officer with unlimited victim status for purposes of § 111 prosecutions.²⁸ In cases detailing language of 638 contracts, the contracts seem to extend only to tribal land.²⁹ Mr. Blue Bird argues that the government’s assertion of jurisdiction is too expansive for the contracting authority expressed

²⁶ See *Laroche v. United States*, No. CIV. 13-3019-RAL, 2014 WL 1218906, at *4 (D.S.D. Mar. 24, 2014) (stating federal jurisdictional basis for 18 U.S.C. § 111 prosecution is the status of the victim).

²⁷ See 25 U.S.C § 2804(a)(1) (specifying ILERA contracts are authorized “in Indian country”); U.S.C § 2804(f) (specifying that protection under 18 U.S.C. § 111 attaches when a tribal officer is “acting under authority granted by the Secretary under subsection (a)”); See also 25 U.S.C § 2802(a) (charging Secretary of the Interior, acting through the BIA, “for providing, or for assisting in the provision of, law enforcement services *in Indian country*”) (emphasis added); 25 U.S.C § 2803 (conferring authority to execute warrants related to crime or make arrests “*in Indian country*”) (emphasis added).

²⁸ See U.S.C § 2804(f) (limiting protection under 18 U.S.C. § 111 to a tribal officer “acting under authority granted by the Secretary under subsection (a)”). See also *United States v. Cleveland*, 356 F. Supp. 3d 1215, 1219 (D.N.M. 2018) (holding tribal officer not necessarily protected as victim in murder charge invoking jurisdiction via 25 U.S.C. § 2804(f)).

²⁹ See, e.g., *U.S. v. Roy*, 408 F.3d at 490 (quoting Flandreau Santee Sioux Tribe 638 contract to “provide law enforcement services on all lands held by the Tribe”); *Janis*, 810 F. 3d at 597-98 (quoting 638 contract as “to provide for the protection of lives and property for persons visiting or residing within the Pine Ridge Indian Reservation”).

under 25 U.S.C. § 2802, and protected under 18 U.S.C. § 111 via 25 U.S.C. § 2804.

Pursuant to those limitations, such agreements or contracts between the BIA and tribes routinely only fund or authorize law enforcement within Indian Country.

RSTLES officers, as a class, acting under a 638 contract or 25 U.S.C. § 2804 agreement, only derive their status as a federal officer when within the lands of the Rosebud Sioux Reservation.

CONCLUSION

Based on the foregoing analysis, Mr. Blue Bird asserts that Officer Kumley does not retain federal officer status off the reservation for purposes of prosecution under 18 U.S.C. § 111. Mr. Blue Bird asserts this issue is a matter of law.

Therefore, Mr. Blue Bird asks this Court to grant his motion to dismiss the indictment under Rule 12(b).

Dated this 28th day of February, 2023

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