

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA</p> <p>Plaintiff,</p> <p>vs.</p> <p>DONALD KILLS WARRIOR,</p> <p>Defendant.</p>	<p>CR 19-50163 & 22-50066</p> <p>DEFENDANT’S OBJECTIONS TO REPORT AND RECOMMENDATION RE: DEFENDANT’S MOTION TO DISMISS</p>
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Defendant Donald Kills Warrior, pursuant to FRCP 59(b)(2), files his objections to the Magistrate Court’s Report and Recommendations (DCD 40 and 93) in which it recommends denying his Motion to Dismiss (DCD 36 and 89). In response to the Report and Recommendations, Mr. Kills Warrior states as follows:

1. On Page 5 of the Report and Recommendations, the court cites to *United States v. Wheeler*, 435 U.S. 313, 314- 16 (1978), for the proposition that “in Wheeler a member of the Navajo Tribe was convicted in tribal court of violating a provision of the Navajo Tribal Code; he was later charged in federal court with violating a federal statute based on the same underlying conduct.” Defendant asserts that the *Wheeler* decision is not applicable to the case at hand, as that case is primarily concerned with lesser-included offenses and not the issue raised herein, the double jeopardy clause.
2. On Page 5 of the Report and Recommendations, the court states, “The issue for this court is whether the tribe's authority to prosecute tribal members on tribal land

came from its inherent authority or from authority delegated to it by the federal government.” On Page 9 of the Report and Recommendation, the court held that Kills Warrior’s prior tribal prosecution did not bar his subsequent federal prosecution for the same conduct because the Tribe’s prosecution stemmed from its inherent authority to prosecute tribal members for infractions of its criminal code, and, thus, his tribal prosecution was done by a separate sovereign from the United States.

Kills Warrior objects to this conclusion because both federal district courts and decisions from the Eighth Circuit Court of Appeals have established that the Oglala Sioux Tribe’s government, including the Oglala Sioux Tribal Court, fall within the auspices of, and are creations of, the Indian Reorganization Act of 1936 and 25 U.S.C. § 476. *See Barta v. Oglala Sioux Tribe*, 259 F. 2d. 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d. 89 (8th Cir. 1956) (“We conclude from the original precept of tribal sovereignty and the fact power fo the O.S.T. to impose the tax or license in question has been implemented by the I.R.A., that power still exists.”); *Oglala Sioux Tribe of the Pine Ridge Res. v. Barta*, 146 F. Supp. 917 (D.S.D. 1956); *Oglala Sioux Tribe of the Pine Ridge Res. v. Iron Crow*, 129 F. Supp. 24 (D.S.D. 1955) (“The government of the O.S.T. is organized under the provisions of the I.R.A.”). *See also New Holy v. United States Department of Interior*, CIV 19-5066-JLV-2017.

Kills Warrior maintains that all tribal powers exercised by the Oglala Sioux Tribe, including the court system operated by the Tribe and under which he was initially prosecuted, stem from the federal statutory scheme created by the United States government. The constitution and the laws of the Oglala Sioux Tribe were not adopted under rules established by tribal custom or practice, but rather under authority granted to the Tribe by the United States Congress through the Indian Reorganization Act and other federal statutes. All criminal prosecutions handled in the Oglala Sioux Tribe's court system are authorized by federal statutes which delegated these responsibilities to the Tribe.

3. On page 7 of the Report and Recommendations, the court states, "The issue in Janis was whether the O.S.T.P.P.S. officers were "federal officers" under 18 U.S.C. § 111 when these officers are enforcing tribal laws." Defendant asserts that his position is not whether individual tribal entities are acting pursuant to sovereign or delegated authority. His position is that the entire government of the Oglala Sioux Tribe, including its judiciary, is acting under authority delegated to it by the United States government through the Department of the Interior and the Bureau of Indian Affairs.
4. On pages 5 and 6 of the Report and Recommendations, the court summarizes the holding and rationale set forth in *Wheeler, supra*. In *Wheeler*, the Court held that Indian tribes were self-governing political communities prior to the arrival of

Europeans, and, as such, had inherent authority to make laws and punish infractions thereof. *United States v. Wheeler*, 435 U.S. 313, 314- 16 (1978) . The Court in *Wheeler* went on to state that these tribe’ "sovereign power to punish tribal offenders has never been given up” and that the exercise of criminal jurisdiction over tribal members in tribal courts is part of the “continued exercise of retained tribal sovereignty." *Id.* at 323- 324.

Kills Warrior maintains that the United Supreme Court’s analysis is *Wheeler* is based on a profound misunderstanding of reality. Tribal governments, as they exist today, came in to being after passage of the Indian Reorganization Act in 1936. They did not exist before then, nor were their tribal courts, criminal codes or constitutions. The tribal court in which Kills Warrior was prosecuted bears no resemblance to any tribal institution that existed prior to the arrival of the Europeans in the fifteenth and sixteenth centuries. The tribal government, including the tribal court, of the Oglala Sioux Tribe is a facsimile of federal templates imposed on tribes by the United State government.

Moreover, it is a fiction for the Court in *Wheeler* to assert that there has been a continuous or unbroken chain of tribal sovereignty from pre-European times to the present, which extends to tribal sovereignty over criminal prosecutions. There have been innumerable decades where tribes and tribal members have had no recognized sovereignty or authority to do anything. Tribes

and their members have been hunted (literally), herded on to reservations, denied the vote, denied citizenship, denied self-governance, denied the ability to exclude others, denied the ability to exercise their religion and traditions, denied the ability to educate their children, and denied the ability to exercise any meaningful authority over themselves or others unless they were pre-authorized to do so by the United States government.

The entire notion of inherent sovereignty is a falsehood, as it presumes that Tribes had, and continue to have, the ability to legally and enforceably act independent of the authority delegated by the federal government. Unlike states, the United States Constitution did not carve out spheres of authority reserved for Tribes. The lack of sovereign authority over judicial matters is consistently reinforced through the statutory scheme, including legislation such as the Major Crimes Act which vest the federal government with exclusive jurisdiction over certain crimes, and which prevent tribes from refusing the transport of tribal inmates to federal detention centers to facilitate federal prosecutions.

5. Kills Warrior also objects to the court's reliance on *Wheeler* and *Denezpi v. United States*, 142 U.S. 1839, 1845 (2022), because neither the Navajo Tribe (*Wheeler*) nor the Ute Mountain Ute Tribe (*Denezpi*) follow or are subject to the Indian Reorganization Act. Not all tribes are subject to the same legislation. The Oglala Sioux Tribe is a creation of statute and a product of the United States government.

All authority exercised to the Tribe was delegated to it by the federal government.

There is no dual sovereignty issue as there is only one source of power: the federal government.

Dated May 9, 2023.

MURPHY LAW OFFICE, P.C.

/s/ John R. Murphy

John R. Murphy
Attorney for Defendant
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below, by electronically delivering the same at his/her/their last known address(es), to wit:

HEATHER SAZAMA, ASSISTANT US ATTORNEY

Dated May 9, 2023.

/s/ John R. Murphy

John R. Murphy