UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CURTIS TEMPLE, Defendant.	5:17-CR-50062-JLV REPORT AND RECOMMENDATION

Pending is Defendant's Motion to Dismiss the Indictment (Doc. 18). Both parties have submitted briefs, and a Stipulation as to Ownership was filed on March 19, 2018. Based on a careful consideration of all the evidence, and counsel's written arguments, the Court respectfully makes the following:

RECOMMENDATION

It is respectfully recommended that Defendant's Motion to Dismiss the Indictment be granted.

JURISDICTION

Defendant is charged in an Indictment with Destruction of Government Property, in violation of 18 U.S.C. § 1361. The pending Motion was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Chief Judge Jeffrey L. Viken's Standing Order dated March 9, 2015.

BACKGROUND

Defendant Curtis Temple is an enrolled member of the Oglala Sioux Tribe ("OST") and a cattle rancher on the Pine Ridge Indian Reservation in South Dakota. Temple v. Her Many Horses, 163 F. Supp. 3d 602, 610 (D.S.D. 2016). Mr. Temple previously obtained grazing permits and leased Range Units 169 and P501, located within the boundaries of the Pine Ridge Indian Reservation, from the OST government.[1] This prosecution arises out of a dispute over the grazing rights to Range Units 169 and P501. See id.

Range Unit 169 is composed of six tracts of land all held in trust by the United States. (Doc. 33). Of these tracts, Tract 10211 is owned in full by the Oglala Sioux Tribe; Tract 2800 is fractionated among a number of Indian landowners and the Oglala Sioux Tribe;[2] the Oglala Sioux Tribe and Mr. Temple each own 50% undivided interests in Tract 3463-B; an Indian landowner and Mr. Temple each own 50% undivided interests in Tract 3463-C; an Indian landowner and Mr. Temple each own 50% undivided interests in

[1] "*Range unit* means rangelands consolidated to form a unit of land for the management and administration of grazing under a permit. A range unit may consist of a combination of tribal, individually-owned Indian, and/or government land." 25 C.F.R. § 166.4. "*Indian land* means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status." Id. "*Individually-owned Indian land* means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status." Id. "*Tribal land* means the surface estate or land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians, and land that is held by a tribe, band, community, group, or pueblo of Indians, subject to federal restrictions against alienation or encumbrance, and includes such lands reserved for BIA administrative purposes when it is not immediately needed for such purposes." Id. By contrast, "*Government land* means any tract, or interest therein, in which the surface estate is owned by the United States and administered by the BIA, not including tribal land which has been reserved for administrative purposes." Id. (emphasis added).

[2] "*Fractionated tract* means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein." 25 C.F.R. § 166.4. "*Undivided interest* means a fractional share in the surface estate of Indian land, where the surface estate is owned in common with other Indian landowners or fee owners." Id.

Tract 3463-D; Tract 3464 is fractionated among a number of Indian landowners and the Oglala Sioux Tribe; (Doc. 33-1–33-6, 33-8). Tract G10272 is government land located within Range Unit 169, but is ineligible for lease. (Doc. 33). The government does not allege that Mr. Temple's livestock grazed Tract G10272.

Range Unit P501 is composed of thirty-one tracts of land. (Doc. 33). Mr. Temple owns an 83.33% undivided interest in Tract 3483, with the remaining 16.67% owned by an Indian landowner. (Doc. 33-15). Mr. Temple owns Tract 3463-A in full, and the land was taken out of trust in April 2017. (Doc. 33). Mr. Temple and the Oglala Sioux Tribe each own 50% undivided interests in Tract 3466-B and C. (Doc. 33). Tracts 3481 and 3470 are owned partly in fee by a non-Indian landowner, and partly held in trust, with remaining ownership fractionated among a number of Indian landowners. (Doc. 33-16, 33-24). The remaining tracts are held in trust and either owned in full by the Oglala Sioux Tribe, or are fractionated between Indian landowners and the Tribe. (Doc. 33-7, 33-9–33-33).

The Oglala Sioux Tribe offered Range Units 169 and P501 for public competitive bidding. The OST Allocation Committee awarded Donald "Duke" Buffington grazing permits for Range Units 169 and P501 for the five-year period beginning November 1, 2012 and ending October 31, 2017. (Doc. 23-1). Mr. Buffington's grazing permits were signed on March 25, 2013. Id.

On April 22, 2015, the Bureau of Indian Affairs ("BIA") conducted a compliance inspection and observed 36 cows and one bull belonging to

Mr. Temple grazing in trespass on Range Unit 169, and 202 cows, two bulls, and 10 horses belonging to Mr. Temple on Range Unit P501. Temple, 163 F. Supp. 3d at 611. The BIA sent Mr. Temple a letter pertaining to each range unit and commenced an administrative enforcement action. The letter stated:

> This letter will serve as your authorization to remove the livestock. You have three (3) days to remove the livestock or show why these livestock are not trespassing [on] this trust property. In the event these livestock are not removed or other arrangements have been made, it will be necessary to assess the penalties as provided [in] 25 C.F.R. § 166.00 *et al.* [sic], and take such other action as may be necessary, including the impoundment and sale of the unauthorized livestock to prevent continued trespass and to protect Indian Lands.

Id. The BIA conducted a second compliance inspection on May 4, 2015, and observed 12 cattle and 4 horses grazing in trespass on Range Unit 169, and 161 cows, one bull, and 10 horses grazing in trespass on Range Unit P501. Id. The BIA sent Mr. Temple letters pertaining to each range unit, warning him that he was now liable for penalties calculated under 25 C.F.R. § 166.800–819, and his cattle were subject to be impounded. Id.

Mr. Temple did not remove his livestock from the range units, and the BIA impounded approximately 121 head of Mr. Temple's cattle on August 19, 2015. Id. at 612. In subsequent compliance inspections, the BIA observed various numbers of Mr. Temple's livestock continuing to graze on portions of Range Units 169 and P501 in which he did not have any ownership interest. Id. at 612–14. Mr. Temple filed civil actions in the Oglala Sioux Tribal Court and in this district court requesting equitable relief and monetary damages. Id. at 614.

On April 18, 2017, a federal grand jury returned an indictment charging Mr. Temple with destruction of government property in violation of 18 U.S.C. § 1361. (Doc. 2). The indictment reads as follows:

> On or about between March 25, 2013, until the date of this indictment, near Red Shirt Table, in the District of South Dakota, the defendant, Curtis Temple, did willfully injure and commit a depredation against property of the United States and of any department thereof, specifically real property maintained by the United States Department of the Interior, Bureau of Indian Affairs, Red Shirt Table Range Units 169 and P-501, by overgrazing and overstocking said land and vegetation, or attempted to do so, resulting in damage in excess of $1,000, all in violation of 18 U.S.C. § 1361.

(Id.). The government submitted a damages calculation alleging that, because Mr. Temple's livestock grazed in trespass on the range units, Range Unit P501 lost 204.09 Animal Unit Months ("AUMs")[3] and Range Unit 169 lost 108.29 AUMs. (Doc. 23-2). The government alleges the loss in AUMs on both range units resulted in a total annual income loss of $4,931.29. (Doc. 23 at p. 3). The government does not specify who or what entity lost that income. (Id.).

DISCUSSION

In his Motion to Dismiss the Indictment, Mr. Temple first argues that 18 U.S.C. § 1152 bars this prosecution because the offense falls under the "Indian against Indian" exception to federal jurisdiction. Next, Mr. Temple argues that the United States does not own Indian trust land; therefore, the indictment fails to state one of the essential elements of 18 U.S.C. § 1361. (Doc. 18).

[3] "*Animal Unit Month* (AUM) means the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

The government responds that 18 U.S.C. § 1152 does not bar this prosecution because Mr. Temple is charged with a crime of general federal applicability; therefore, the jurisdiction exception does not apply. The government additionally responds that the indictment sufficiently states an offense because United States holds legal title to, and manages, Indian trust land. Therefore, the government argues that the United States owns trust land in satisfaction of 18 U.S.C. § 1361.

I. Statutory Background

The crime of destruction of government property under 18 U.S.C. § 1361 has three essential elements: (1) proof of injury or actual damage to the property; (2) proof that the defendant knew he was violating the law when he injured the property; and (3) proof that the property involved was owned by the government. See United States v. Bangert, 645 F.2d 1297, 1305 (8th Cir. 1981) (citing United States v. Briddle, 443 F.2d 443 (8th Cir. 1971); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971)).

Section 1361 is specifically titled "Government Property or Contracts" and is located within Chapter 65 of Title 18, entitled Malicious Mischief.[4] The penalties provision in Section 1361 provides that, if the damage or attempted damage to government property exceeds $1,000, the defendant shall be subject to a "fine under this title or imprisonment for not more than ten years, or

[4] The other sections within Chapter 65 are entitled Communications Lines, Stations or Systems; Buildings or Property Within Special Maritime and Territorial Jurisdiction; Interference with Foreign Commerce by Violence; Tampering with Consumer Products; Destruction of an Energy Facility; Interference with the Operation of a Satellite; Harming Animals Used in Law Enforcement; and Destruction of Veterans' Memorials. 18 U.S.C. §§ 1362–1369.

both." The maximum penalty of ten years makes the offense a Class C felony, subjecting the defendant to a fine of up to $250,000. 18 U.S.C. §§ 3559, 3571(b)(3).

A. Statutes Penalizing Livestock Trespass

Prosecutions under Section 1361 typically involve vandalism or sabotage of government property.[5] The government does not reference, and this court has not found, a single prosecution under Section 1361 for damages relating to overgrazing or other damages caused by livestock; neither has this court found any Section 1361 charges for damaging Indian trust land.[6]

Mr. Temple's conduct appears to fall within other civil and criminal statutes specifically aimed at overgrazing. For example, 18 U.S.C. § 1857, entitled Fences Destroyed; Livestock Entering, prohibits:

> driv[ing] any cattle, horses, hogs or other livestock upon [any lands of the United States reserved or purchased for any public use] for

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[5] See, e.g., United States v. Bernal, 533 Fed. Appx. 795 (9th Cir. 2013) (defendant spray-painted pictographs on federal government land); United States v. Wisecarver, 644 F.3d 764 (8th Cir. 2011) (defendant fired gun at federal government vehicle); United States v. McLain, No. CR 08-138-BLG-RFC, 2011 WL 611875 (D. Mont. Feb. 11, 2011) (defendant built mile-long ATV trail in Gallatin National Forest); United States v. Komisaruk, 885 F.2d 490 (9th Cir. 1989) (defendant vandalized U.S. Air Force computer system); United States v. Bangert, 645 F.2d 1297 (8th Cir. 1981) (defendants burned American flag owned by U.S. government); United States v. McCalvin, 608 F.2d 1167 (8th Cir. 1979) (defendant kicked and broke government-owned camera and tripod); United States v. Donner, 497 F.2d 184 (7th Cir. 1974) (defendants destroyed selective service files); United States v. Yaple, 450 F.2d 308 (9th Cir. 1971) (defendants firebombed selective service headquarters); United States v. Tijerina, 446 F.2d 675 (10th Cir. 1971) (defendants burned Forest Service sign in national forest); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969) (defendants poured blood on selective service records); Edwards v. United States, 36 F.2d 732 (8th Cir. 1966) (defendants removed medicine cabinet, bowl, and lead pipe from vacant home owned by Veterans Administration); Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (9th Cir. 1959) (defendants cut down and stole trees from United States public land).

[6] The court has found two cases—United States v. Wisecarver, 644 F.3d 764 (8th Cir. 2011) and Brunette v. United States, 378 F.2d 18 (9th Cir. 1967)—charging violations of Section 1361 for crimes committed within Indian country. Both cases involved intentional damage to government vehicles, not land.

> the purposes of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or [permitting such livestock] to enter through any such inclosure upon any such lands of the United States, where such [livestock] may or can destroy the grass or trees or other property of the United States on the said lands.

The penalty provision of Section 1857 provides that anyone violating the statute shall be imprisoned not more than one year.

Section 1857 does not apply to livestock trespass or grazing on Indian trust land, however, because "Indian lands are not included in the term 'public lands[.]" Bennett Cty., S.D. v. United States, 394 F.2d 8, 11 (8th Cir. 1968) (citing, e.g., Missouri-Kansas-Texas Ry. Co. v. United States, 235 U.S. 37 (1914)); see also U.S. Fish & Wildlife Service Secretarial Order No. 3206 ("Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws."); King v. McAndrews, 111 F. 860 (8th Cir. 1901) ("[L]ands within the limits of an Indian reservation are excluded from disposal as the public lands are usually disposed of[.]"). Rather, 25 U.S.C. § 179 imposes a civil penalty for driving livestock to feed on Indian lands, and states:

> Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock.

The Oglala Sioux Tribal Code also imposes its own criminal penalties for livestock trespass:

> Any Indian who shall . . . willfully and knowingly allow livestock to occupy or graze on the cultivated or other lands, shall be deemed guilty of an offense and upon conviction thereof, shall be punished

> by a fine not to exceed five dollars ($5.00), with costs; in addition to any award of damages for the benefit of the injured party.

Oglala Sioux Tribal Code, Ch. 9 § 101. Further, the Range Control Stipulations and Additional Terms and Conditions attached to the standard BIA Grazing Permit Form specify that 25 C.F.R. § 166, discussed below, and OST Ordinance No. 11-05 govern the administration of grazing permits obtained through the Oglala Sioux Tribe. (Doc. 23-1).

II. Whether 18 U.S.C. § 1361 Applies to Indian Land as a Federal Statute of General Applicability

The Indian Country Crimes Act, 18 U.S.C. § 1152, made the general laws of the United States applicable to Indian country. United States v. Wadena, 152 F.3d 831, 840 (8th Cir. 1998). The Indian Major Crimes Act, 18 U.S.C. § 1153, provides the federal courts with exclusive jurisdiction over enumerated crimes. The Indian Country Crimes Act exempts from federal jurisdiction any crime by one Indian against another Indian that is not enumerated in the Major Crimes Act. However, the Indian Country Crimes Act does not encompass federal statutes of general applicability, that is, "those in which the situs of the offense is not an element of the crime." Wadena, 152 F.3d at 841. "[F]ederal courts may enforce general federal criminal laws against *all* persons, including Indians within Indian country." Id. (emphasis in original). In other words, federal courts have jurisdiction over violations of generally applicable statutes committed by one Indian against another Indian in Indian country. Section 1361 is a statute of general applicability because the situs of the offense is not an essential element. See id.

This general rule of applicability is subject to limitations, however. E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., 986 F.2d 246, 248 (8th Cir. 1993). Because Indian tribes possess "the inherent powers of a limited sovereignty which has never been extinguished . . . they remain a separate people, with the power of regulating their internal and social relations." Id. (internal quotations omitted). "Inherent in the tribe's quasi-sovereignty is the tribe's power to make their own substantive law in internal matters and to enforce that law in their own forums." Id. (internal quotation omitted). Accordingly, in the interest of preserving a "tribe's specific right of self-government," a federal statute of general applicability "does not apply when the interest sought to be affected is a specific right reserved to the Indians." Id. at 248, 249 (citing United States v. Winnebago Tribe of Neb., 542 F.2d 1002, 1005 (8th Cir. 1976). Areas left to tribal self-government "have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." United States v. White, 508 F.2d 453, 455 (8th Cir. 1974) (footnotes omitted).

"Although the specific Indian right involved usually is based on a treaty, such rights may also be based upon statutes, executive agreements, and federal common law." Fond du Lac, 986 F.3d at 248 (citing United States v. Dion, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("Tribe's authority to tax non-Indians who conduct

business on the reservation . . . is an inherent power necessary to tribal self-government and territorial management."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (Indian tribes have the right to regulate their internal and social relations, to make their own substantive law in internal matters, and to enforce that law in their own forums)). Specific rights reserved to Indians will not be deemed abrogated or limited by a statute of general applicability "absent a clear and plain congressional intent" through express declaration in the statute, legislative history, or surrounding circumstances. Fond du Lac, 986 F.2d at 248 (internal quotation marks omitted).

A. The American Indian Agricultural Resource Management Act

The American Indian Agricultural Resource Management Act ("AIARMA"), 25 U.S.C. §§ 3701–3746, outlines the tribal rights relevant to this case. AIARMA sets out guidelines for tribal management of grazing regulations and permits. AIARMA's stated purposes include promoting Indian self-determination by strengthening tribal authority over the management of Indian lands, and "enabl[ing] Indian farmers and ranchers to maximize the potential benefits available to them through their land." 25 U.S.C. §§ 3702, 3711.

Section 3711(a) of AIARMA directs the Secretary of the Interior to provide for the management of Indian agricultural lands, including assisting Indian landowners "in leasing their agricultural lands for a reasonable annual return, consistent with prudent management and conservation practices, and community goals as expressed in the tribal management plans and appropriate tribal ordinances." Id. § 3711(a)(6). Section 3712 requires the Secretary to

defer to tribal law when conducting land management activities, and waives federal regulations and administrative policies if such regulations conflict with tribal law or AIARMA. Id. § 3712(a)–(c).

These general grazing regulations, including the procedures and requirements for obtaining grazing permits on Indian land and penalties for permit violations and trespassing, are contained in 25 C.F.R. §§ 166.1–1001. To implement AIARMA's stated purposes, the grazing regulations contemplate that the permit allocation process will be carried out by the BIA pursuant to "an appropriate tribal resolution establishing a general policy for permitting of Indian agricultural lands," 25 C.F.R. § 166.100, and will be subject to "tribal laws regulating activities on Indian agricultural land, including tribal laws relating to land use." 25 C.F.R. § 166.103. The BIA Grazing Permit Form also states that 25 C.F.R. § 166 controls administration of grazing permits. (Doc. 23-1).

Consistent with Congress's stated purposes, "the grazing regulations provide for significant control and involvement by the tribe and individual landowners in the management of Indian lands." O'Bryan v. United States, 93 Fed. Cl. 57, 63 (Fed. Cl. 2010) (holding that grazing permits allocated by Oglala Sioux Tribe are contracts between permit holders and Indian landowners, not United States). The regulations require permit holders to pay grazing fees "directly to the Indian landowners or to [the BIA] on behalf of the Indian landowners," and instruct that the Indian landowners are the ones "primarily responsible for granting permits on their Indian land, with the assistance and

approval of the BIA." 25 C.F.R. §§ 166.413, 166.216. Furthermore, the regulations provide for BIA enforcement against livestock trespass, and state that the BIA will take action to recover possession on behalf of the Indian landowner if necessary. 25 C.F.R. §§ 162.256; 166.806, 812.

The grazing regulations additionally (1) require that the BIA consult with Indian landowners when establishing range units, id. § 166.302; (2) provide that the tribe determines "the class of livestock and livestock ownership requirements for livestock that may be grazed on range units," id. § 166.309; and (3) allow Indian landowners to negotiate permits and advertise for bids. Id. § 166.220; see French v. Acting Great Plains Reg'l Dir., BIA, 63 IBIA 304, 2016 WL 4718910, at *314 (Aug. 31, 2016) (stating that a party must negotiate with Indian landowners to obtain an agricultural lease).

Consistent with the grazing regulations, the Oglala Sioux Tribe promulgated an extensive code regulating grazing on tribal land. See generally Oglala Sioux Tribal Code, Ch. 35. The OST Allocation Committee is responsible for allocating grazing privileges on behalf of the Tribe. Id. § 1. Among other responsibilities, the Tribe sets annual grazing rates, collects tribal taxes and fees on the range units, determines applicant eligibility, and receives appeals from Allocation Committee decisions. See generally id. The Superintendent of the Pine Ridge Agency of the BIA approves grazing permits. Id. However, the BIA's role is limited to that of a trustee. O'Bryan, 93 Fed. Cl. at 64. "Because the authority for the issuance of the permits rests in the first instance with the Indian landowners, the permits are properly regarded as contracts with the

landowners[,]" not with the BIA or the United States. Id. at 63; see also United States v. Algoma Lumber Co., 305 U.S. 415, 420–21 (1939).[7]

B. This Court Does Not Have Jurisdiction

As stated previously, statutes of general federal applicability do not apply to areas left to tribal self-government. United States v. White, 508 F.2d 453, 455 (8th Cir. 1974) (footnotes omitted). The language in AIARMA indicates that Congress intended to encourage tribal self-governance in the area of range management. See Fond du Lac, 986 F.2d at 248 (stating that Indian rights exempt from federal laws of general applicability may be based upon statutes). As detailed in the preceding section, both AIARMA and the federal grazing regulations allow the Oglala Sioux Tribe to exercise significant control over its rangeland. The federal statutes and regulations defer to tribal laws when the two conflict. 25 U.S.C. § 3712(a)–(c). Permit fees are paid to the individual Indian landowners, or the BIA on behalf of the landowner. 25 C.F.R. § 166.413. In sum, Congress's directive indicates that range management is an internal tribal matter primarily left to the regulation of the tribe itself. See Santa Clara Pueblo, 436 U.S. at 55–56 (Indian tribes have the right to regulate

[7] The government acknowledges that the Tribe controls allocation of grazing permits. Mr. Temple filed an Emergency Motion to Clarify and/or Modify Stay in his pending civil lawsuit against the BIA, Temple v. Her Many Horses, 15-CV-5062, requesting clarification that the BIA may not bar Mr. Temple from bidding on OST grazing units. (15-CV-5062 Doc. 132). In its response, the government stated that the BIA simply "helps administer the bidding process and manages the Range Units. The BIA cannot make the Oglala Sioux Tribe give Temple an allocation, a preference, or a permit. Whether Temple may qualify for allocation, Indian preference, or other preference is based on the Tribe's interpretation of its own grazing ordinances and other Tribal laws. The BIA would not and cannot lease or permit a Range Unit over the objection of the Tribe or the landowners." (15-CV-5062 Doc. 134 at p. 6).

their internal and social relations, to make their own substantive law in internal matters, and to enforce that law in their own forums).

Two civil cases addressing trespass on Indian lands provide additional guidance. In United States v. Plainbull, 957 F.2d 742 (9th Cir. 1992), two Crow Tribe members grazed livestock on tribal range units, held in trust by the United States, without valid grazing permits and without having paid grazing fees. In United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996), the United States brought an action for trespass and ejectment on its own and on behalf of a Navajo tribal member, against another Navajo tribal member. "A plain reading of Tsosie and Plainbull reveals that in both cases the underlying dispute involved an internal tribal matter and the United States was filing an action on behalf of either a tribal member or the tribe itself." United States v. American Horse, 352 F. Supp. 2d 984, 989 (D.N.D. 2005).

For these reasons, the court concludes Congress intended to grant tribes the right to regulate range management as an internal tribal matter. Because Congress granted the Oglala Sioux Tribe this specific right, the court concludes that 18 U.S.C. § 1361, as a statute of general applicability, does not apply to Indian-against-Indian grazing violations. The application of Section 1361 in this context would infringe on the tribe's right to regulate range management and enforce trespass violations in the tribal forum. See Temple v. Her Many Horses, 163 F. Supp. 3d 602, 615–16 (D.S.D. 2016) ("The resolution of Mr. Temple's grazing permit allegations requires interpreting provisions of the Oglala Sioux Tribal Constitution and Oglala Sioux tribal ordinances . . . [and]

hinge on issues of tribal law and governance[.]"). Therefore, the court finds that 18 U.S.C. § 1361 does not apply to grazing violations on Indian land; because this offense involves a crime by an Indian against Indian land, the court does not have jurisdiction. However, even if Section 1361 does apply, the court nevertheless finds that the indictment fails to state an offense and must be dismissed.

III. The Indictment Fails to State an Offense

Mr. Temple argues that the indictment fails to contain the essential elements of the offense charged. Specifically, Mr. Temple claims the United States does not own Indian trust land and therefore the ownership element of Section 1361 is not satisfied.

"An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution." United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993). "An indictment is normally sufficient if its language tracks the statutory language." United States v. Sewell, 513 F.3d 820, 821 (8th Cir.2008).

18 U.S.C. § 1361 has three essential elements: (1) proof of injury or actual damage to the property; (2) proof that the defendant knew he was violating the law when he injured the property; and (3) proof that the property involved was owned by the government. United States v. Bangert, 645 F.2d

1297, 1305 (8th Cir. 1981). Mr. Temple argues that the United States does not own Indian land in the manner contemplated by Section 1361.

In response, the government defines "property" as "something that is or may be owned or possessed: [. . .] the exclusive right to possess, enjoy, and dispose of a thing[.]" (Doc. 23 at p. 5) (quoting G. & C. Merriam Co., Websters 3d Int'l Dictionary, 1818 (1976)). The government argues that because neither the Oglala Sioux Tribe nor any individual Indian can alienate the land in question without explicit permission from the Department of the Interior, the United States has "the exclusive right to possess, enjoy, and dispose" of the land.

The government additionally cites the Eighth Circuit's definition of government property in United States v. McCalvin, 608 F.2d 1167 (8th Cir. 1979), where the defendant was charged with violating Section 1361 for kicking and damaging a camera and tripod. There, the defendant challenged the government's ownership of the damaged items; the Eighth Circuit found that "the United States exercised dominion and control over the camera and tripod and that they had been subject to the practical usage of Government agents for a period of time of at least two years." Id. at 1170. The government states that, like the camera and tripod in McCalvin, the "BIA exercises dominion and control over the units 169 and P501 (property of the United States) and has done so for an extensive period of time." (Doc. 23 p. 5) (parenthetical in original). Based on this definition, the government concludes that the United States owns Indian trust land.

A. History of Land Transactions between Oglala Sioux Tribe and United States

An overview of the treaties and acts of Congress impacting the Oglala Sioux Tribe is pertinent to the discussion of Indian land ownership. The United States Supreme Court initially defined Indian tribes as "domestic dependent nations" whose relationship with the federal government "resemble[d] that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). The so-called "guardian-ward" relationship imposed a duty of protection on the federal government to care for the tribes and manage their affairs, and shaped Congress's treaties with the tribes. See id.

1. Treaty of 1851

The Treaty of 1851 constituted an agreement between various Indian tribes, including the Sioux, to cease hostilities among one another and against the United States. Bennett Cty., S.D. v. United States, 394 F.2d 8, 10 (8th Cir. 1968). The Treaty established tribal boundaries "and made the tribes responsible for any depredations committed within their respective territories." Id.

2. Treaty of 1868

The Treaty of 1868 established the "Great Reservation" for the Sioux, which included most of what is now Western South Dakota, and part of what is now North Dakota. 15 Stat. 635; see generally United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). Article II of the Treaty guaranteed that the land would be "set apart for the absolute and undisturbed use and occupation" of the Indians mentioned in the treaty, and that no non-Indians would be

permitted to "pass over, settle upon, or reside on the reservation." 15 Stat. 635 Art. II. In return for government benefits, the Sioux relinquished all claims or rights in lands outside the "Great Reservation." Bennett Cty., 394 F.2d at 10.

3. Act of 1889

The Act of 1889 diminished the "Great Reservation" and divided it into six smaller reservations, including the Pine Ridge Indian Reservation. Bennett Cty., 394 F.2d at 10. The Act of 1889 also authorized the Secretary of the Interior to allot portions of the reservation to individual Indians. United States v. Rickert, 188 U.S. 432, 435 (1903). The Act directed the United States to hold the allotted parcels in trust for twenty-five years, after which the Indian allottees were free to alienate their land. Id. at 435–36. Congress intended that individual allottees would become self-sufficient through agriculture, eventually obtain legal title to their allotments, and no longer depend on reservations for their subsistence. See generally Mattz v. Arnett, 412 U.S. 481, 496–497 (1973). Executive orders extended the trust period until 1934, when Congress enacted the Indian Reorganization Act. Oglala Sioux Tribe v. Hallett, 708 F.2d 326, 330 (8th Cir. 1983).

4. Indian Reorganization Act of 1934

In 1934, Congress passed the Indian Reorganization Act with the intent to encourage Indian tribes to assume a greater degree of self-government. Morton v. Mancari, 417 U.S. 535, 542 (1974). The Oglala Sioux Tribe adopted this legislation. Hallett, 708 F.2d at 330. The 1934 Act terminated further allotment of Indian reservation land to individual Indians and extended

"existing periods of trust placed upon any Indian lands" until further action by Congress to the contrary. 25 U.S.C. §§ 461–462. Section 483 of the 1934 Act provided an exception to the restraint on alienation by expressly authorizing the Secretary of the Interior "to issue patents in fee, to remove restrictions against alienation, and to approve conveyances." 25 U.S.C. § 5134.

B. The Doctrine of "Indian Title"

Even before the signing of the Treaty of 1851, the United States Supreme Court recognized the doctrine of Indian, or aboriginal, title. See, e.g., Cherokee Nation, 30 U.S. at 17; Mitchel v. United States, 34 U.S. 711, 746 (1835). The Court accepted that Indian nations held "aboriginal title" to lands they historically inhabited, which constituted the "unquestioned right" of the Indians to the exclusive possession of their lands. Cherokee Nation, 30 U.S. at 17. The "doctrine of discovery" provided that the United States held fee title to these lands. Oneida Cty., N.Y. v. Oneida Indian Nation, 470 U.S. 226, 234 (1985); Bennett Cty., 394 F.2d at 11 (stating that United States holds "naked fee" to Indian lands). Nevertheless, the Court has recognized that Indian title is "as sacred as the fee simple of the whites." Mitchel, 34 U.S. at 746. Moreover, Indians have a federal common-law right to enforce their land rights. Oneida Indian Nation, 470 U.S. at 235–36 (listing cases citing tribal power to enforce Indian title rights); Bennett Cty., 394 F.2d at 11 (recognizing that United States cannot take Indian land without paying just compensation).

Although the Treaties of 1851 and 1868 and Acts of 1889 and 1934 diminished the Sioux reservations, the Indian title in the remaining land was

not disturbed. See, e.g., Bennett Cty., 394 F.2d at 12–13; Ex parte Van Moore, 221 F. 954, 969–70 (D.S.D. 1915). "[T]he Treaty of 1851 was a recognition of Indian title." Bennett Cty., 394 F.2d at 13. Neither did the Treaty of 1889 eliminate Indian title: "instead of [the Indians'] title to the land in question, [their] right of occupation, [their] right of possession, being in any manner disturbed or changed or extinguished by the act of March 2, 1889, that which had been theretofore preserved to [them] was by that act confirmed." Van Moore, 221 F. at 969.

The allotment policy likewise did not disrupt Indian title to reservation land. See United States v. Pelican, 232 U.S. 442, 450 (1914). "[U]nder and by virtue of the provisions of the treaty of 1868, the act of Congress of 1889, and the acts of the officers of the United States in the administration of the law, there was an expressed purpose and intent to preserve the title, right to the possession, and occupancy of the individual Indian to the premises upon which he resided." Van Moore, 221 F. at 970. "[T]he government of the United States never secured any right, title, or interest in and to the premises described as the [individual allotments], except to hold the same in trust for [Indians] as [their] allotment[s]." Id.

By taking Indian land into trust and imposing restraints on alienation, Congress intended to safeguard the tribes' right to their lands against intruding settlers. Leavenworth, L. & G.R. Co. v. United States, 92 U.S. 733, 742 (1875). "Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their [land] . . . With the ultimate fee vested

in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion[.]" Id. "The entire beneficial ownership of such lands was in the Indians. Nothing but the naked legal title in trust for them was in the United States." King v. McAndrews, 111 F. 860, 870 (8th Cir. 1901). "For all practical purposes, [the tribes] owned [the land]; as the actual right of possession, the only thing [the tribes] deemed of value, was secured to them by treaty[.]" Leavenworth, 92 U.S. at 742–43; see United States v. Algoma Lumber Co., 305 U.S. 415, 421 (1939) ("The United States acquired no beneficial ownership in the tribal lands or their proceeds, and however we may define the nature of the legal interest acquired by the government as the implement of its control, substantial ownership remained with the tribe as it existed before the treaty.").

C. Ownership of Indian Land

The indictment charges Mr. Temple with committing a depredation against "property maintained by the [BIA]." (Doc. 2). The indictment does not track the statutory language; moreover, Section 1361 requires proof that the property involved is owned by the government, rather than simply maintained by the government. See Bangert, 645 F.2d at 1305. Range Units 169 and P501 are composed of Indian land, that is, "any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status." 25 C.F.R. § 166.4; Doc. 33. Range Unit 169 contains a tract of government land, that is, land "owned by the United States and administered by the BIA," but that tract was not eligible to be leased, and the government

does not allege that Mr. Temple's livestock grazed that particular tract. 25 C.F.R. § 166.4; Doc. 33.

The government compares the federal fiduciary responsibility over Indian lands to United States ownership of a camera, and argues that the United States owns Indian trust land because the "BIA exercises dominion and control over the units 169 and P501 (property of the United States) and has done so for an extensive period of time." (Doc. 23 p. 5) (citing McCalvin, 608 F.2d at 1170). However, the court finds no authority holding that the United States owns Indian land in the manner contemplated by Section 1361. See footnote 3, supra; see also O'Bryan v. United States, 93 Fed. Cl. 57, 64 (Fed. Cl. 2010) (stating that BIA's role is limited to trustee).[8]

Although the United States holds legal title to Indian trust land, the "entire beneficial ownership of such lands [is] in the Indians." King, 111 F. at 870; see, e.g., 25 U.S.C. § 3711 *et seq.* (using phrase "Indian landowner" to describe Indian land occupants); 25 C.F.R. § 664.1 (differentiating between tribal land, which is land "held in trust by the United States for a tribe," and government land, which is land "owned by the United States and administered by the BIA, not including tribal land which has been reserved for

[8] In Mr. Temple's civil case, the government argues that "[t]he BIA would not and cannot lease or permit a Range Unit over the objection of the Tribe or *the landowners*," and merely "helps administer the bidding process and manages the Range Units." (15-CV-5062 Doc. 134 at p. 6) (emphasis added); see footnote 7, supra. The government further states that the BIA "was not involved in the Allocation Committee's decision [to reject Mr. Temple's bid] and does not have knowledge of why the OST Allocation Committee denied Temple's bid[.]" (Id.). These facts are inconsistent with the government's argument in this case that the United States owns the land in question.

administrative purposes."). The alleged overgrazing in this case occurred entirely on Indian trust land, not on government-owned land. (Doc. 33).

Based on the above analysis of the relevant caselaw and history, the court concludes that Indian trust land "maintained by the [BIA]" is not property "owned by the government." See Bangert, 645 F.2d at 1305. The court "cannot, therefore, see how these [Indian] lands, which have been depredated upon, can be held to be 'lands of the United States[.]'" Reese, 27 F.Cas. at 746 (W.D. Ark. 1879). The indictment thus fails to allege that the defendant committed a depredation of government-owned property. Because the indictment does not contain all the essential elements of the offense charged, it should be dismissed.

CONCLUSION

For the aforementioned reasons, it is respectfully recommended that Defendant's Motion to Dismiss the Indictment (Doc. 18) be granted.

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require de novo review by the District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED this 6th day of April, 2018.

BY THE COURT:

DANETA WOLLMANN
United States Magistrate Judge