

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cr. No. 18-739 MV
	)	
KEVIN VIGIL,	)	
	)	
Defendant.	)	

UNITED STATES' MOTION FOR PRE-TRIAL DETERMINATION  
OF INDIAN COUNTRY LAND STATUS

The United States respectfully requests that the Court hold a hearing and make a pre-trial determination finding the land on which the alleged crimes occurred is Indian Country for the purposes of federal criminal jurisdiction. Specifically, the location is:

1326B Camino Raphael, in Española, Rio Arriba County, New Mexico, mainly in Section 25, Township 21N, Range 8E, NMPM, within the San Juan Land Grant.

This location has been determined to fall within the exterior boundaries of the Ohkay Owingeh Pueblo, a federally recognized Indian Tribe. Accordingly, this location is "Indian Country" as that term is defined by federal law pursuant to 18 U.S.C. §§ 1151 and 1152. Defendant has been contacted and opposes this motion.

BACKGROUND

On March 13, 2018, a federal grand jury returned an indictment charging Defendant Kevin Vigil with two counts of aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 1152, 2241(c) and 2246(2)(A). (Doc. 25.) The alleged crimes occurred at 1326B Camino Raphael (also known as Calle Raphael), in Española, Rio Arriba County, New Mexico.

A map showing the location of the residence is attached to this motion as **Government's Exhibit 1**.

On April 11, 2018, Ohkay Owingeh's Natural Resource Director certified that this residence "is located within the exterior boundaries of Ohkay Owingeh" Pueblo. *See Government's Exhibit 2*. In preparation for trial, the Ohkay Owingeh planning and zoning office provided Bureau of Indian Affairs ("BIA") maps showing the location of Camino Raphael in relation to the Pueblo boundaries. These maps are attached to this motion as **Government's Exhibit 3**. As illustrated by the BIA maps, the road in question falls within the exterior boundaries of the Pueblo.

#### ARGUMENT

The United States requests the court rule on jurisdiction pre-trial and instruct the jury the above location is "Indian Country" as a matter of law. Generally, the United States must prove all elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). However, jurisdictional issues are matters of law to be decided by the court, rather than the jury. *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999). In accordance with this rule, a trial court decides if a particular area is legally Indian Country, but "leaves to the jury the factual determination of whether the alleged crime occurred at the site." *Id.*; *see also United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997) ("[G]iven a particular piece of land, it is for the court, not the jury, to determine whether that land is in Indian country."); *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991) ("Determinations of whether the site of an offense is Indian country have been held to be for the court alone."). Put another way, the Court is permitted to determine whether "a particular tract of land or geographic area is Indian Country, and then

instructs the jury to determine whether the alleged offense occurred there.” *Roberts*, 185 F.3d at 1139. At trial, the burden remains on the United States to establish the crimes occurred at the location alleged. *Id.*

The Tenth Circuit Pattern Criminal Jury Instructions embrace this approach. *See, e.g., 10th Cir. Pattern Jury Instructions*, 2.52, 2.53, 2.54 (2018) (“You are instructed that the alleged [offense] occurred within the [territorial][special maritime] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.”).

As contemplated by *Roberts* and the Tenth Circuit Pattern Criminal Jury Instructions, the United States seeks a pre-trial determination by the Court that the tract of land on which the charged crimes occurred is Indian Country. Deciding this jurisdictional issue pre-trial avoids forcing the United States to mix proof of a purely legal matter, such as land status, together with the evidence it presents at trial to prove Defendant’s guilt to the trier-of-fact. Discussion of land title and what falls within and outside the Ohkay Owingeh Pueblo can only serve to waste the jury’s time on a matter that it is not responsible for determining or, worse, lead to confusion of the issues that are for the jury’s consideration. Addressing the legal question of land status before trial similarly will streamline the presentation of the United States’ case. Finally, land status should be determined in advance to avoid integrating a jurisdictional question into the trial after jeopardy has attached. The United States is prepared to present the following evidence confirming the status of the land.

**1. The Ohkay Owingeh Pueblo is a federally recognized tribe.**

Federal recognition of an Indian tribe is a question of law to be resolved by the court. *United States v. Alvarez*, 831 F.3d 1115, 1121 (9th Cir. 2016). To determine this issue, a judge may take judicial notice of the federal recognition of an Indian tribe by the Bureau of Indian Affairs (BIA). *Id.* The BIA maintains the “best source to identify federally acknowledged Indian tribes.” *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). The BIA lists the Ohkay Owingeh Pueblo as a federally recognized tribe. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 83 FR 4235, attached as **Government’s Exhibit 4**. The United States requests the Court take judicial notice of this fact.

**2. The location of the alleged crime falls within the exterior boundaries of the Ohkay Owingeh Pueblo.**

The land status documents attached to this motion establish that the residence where the alleged crime occurred – 1326B Camino Raphael, in Española, Rio Arriba County, New Mexico, mainly in Section 25, Township 21N, Range 8E, NMPM, within the San Juan Land Grant – falls within the exterior boundaries of the Ohkay Owingeh Pueblo.

**3. All land within the exterior boundaries of the Pueblo – including the residence identified above – constitutes “Indian Country.”**

Indian Country includes “all land within the limits of any Indian reservation” as well as “all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof.” 18 U.S.C. § 1151. In *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1 (1913), the Supreme Court considered the status of the Pueblo Indian lands. After reviewing the history of the Pueblo Indians, the Supreme Court observed that

the Pueblo people are “Indians in race, customs, and domestic government” and have been “regarded and treated by the United States as requiring special consideration and protection, like other Indian communities.” *Id.* at 39. The Supreme Court recognized the Pueblos as “dependent Indian communities.” *Id.* at 45-46; *see also United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006) (“[T]he Court held in *Sandoval* that the Pueblo are a dependent Indian community entitled to the aid and protection of the federal government and subject to congressional control.”).

In 2005, Congress amended the Pueblo Lands Act in order to clarify and confirm the scope of criminal jurisdiction on Pueblo lands. *See* Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005). The amendment provides, in relevant part, that the United States “has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4)” that is “committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico.” *Id.*

Under the plain language of this amendment, all lands within the boundaries of the Pueblos, whether or not privately owned by non-Indians, constitute Indian Country for the purposes of federal criminal jurisdiction. *United States v. Antonio*, No. CR 16-1106 JB, 2017 U.S. Dist. LEXIS 85436, at \*69-70 (D.N.M. June 5, 2017); *see also Arrieta*, 436 F.3d at 1251 (noting that the 2005 amendment to the Pueblo Lands Act is consistent with the conclusion that a county road running through Pojoaque Pueblo was Indian Country). Any contrary application of federal jurisdiction would be incongruent with congressional intent. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (If “the existence or

nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depend[ed] upon the ownership of particular parcels of land, law enforcement officers operating in the area [would] find it necessary to search tract books in order to determine . . . criminal jurisdiction over each particular offense. . . . Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151.”).

As evidenced by the attached certification and maps, the residence where the alleged offenses occurred is located within the exterior boundaries of Ohkay Owingeh Pueblo and is, therefore, Indian Country. The only issue for the jury to decide at trial related to land status should be whether the United States has proved Defendant committed the crimes he is charged with in the identified home.

WHEREFORE, the United States moves the Court for a pre-trial hearing and ruling, finding that the residence in which the charged crimes occurred, is located within the exterior boundaries of the Ohkay Owingeh Pueblo and, therefore, is Indian Country.

Respectfully submitted,

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Electronically filed on April 24, 2019  
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I HEREBY CERTIFY that on April 24, 2019,  
I filed the foregoing electronically through the  
CM/ECF System, which caused counsel for the  
defendant to be served by electronic means, as  
more fully reflected on the Notice of Electronic  
Filing.

/s/

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