IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR 1:18-00739-001 MV

KEVIN VIGIL,

Defendant.

DEFENDANT'S RESPONSE TO UNITED STATES' MOTION FOR PRE-TRIAL DETERMINATION OF INDIAN COUNTRY LAND STATUS

COMES NOW the defendant, Kevin Vigil, by and through his counsel, Gordon Devon M. Fooks and Aric G. Elsenheimer, and requests that this Court determine as a matter of law that it lacks subject matter jurisdiction and order dismissal of the indictment against Mr. Vigil for the reasons set forth below.

FACTUAL BACKGROUND

The events underlying this case are alleged to have occurred on non-Indian land at 1326B Camino Raphael, in Espanola, New Mexico. There is no dispute that this tract of land is within the exterior boundaries of Ohkay Owingeh Pueblo.

By the Pueblo Lands Act of June 7, 1924, the United States granted patent number 1076758, Exhibit ("Ex.") A hereto, to the land at issue in this case to

Antonio David Salazar and Ramona B. de Salazar. The patent states that it "shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." As shown by Ex. B, C, D, and E, the property has remained in non-Indian ownership and under the jurisdiction of Rio Arriba County since the patent was issued.

LEGAL ARGUMENT

A. *This Court Must Presume that It Lacks Jurisdiction.*

Federal courts have power to hear only cases within the judicial power of the United States—as set forth in the Constitution or laws passed by Congress. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). "The requirement that jurisdiction be established as a threshold matter is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884)). The necessity that courts ensure that they have subject matter jurisdiction in a given case "is not a mere nicety of legal metaphysics," but essential to the rule of law in "a free society .... The courts, no less than the political branches of government, must respect the limits of their authority." *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010) (quoting *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*,

487 U.S. 72, 77 (1988)). *See also Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018, 1022 (10th Cir. 2012) (same).

A federal court must presume that it does not have subject matter jurisdiction; where jurisdiction has been challenged, the party seeking to invoke it has the burden to establish the contrary by a preponderance of the evidence. *Vaden v. Discover Bank*, 556 U.S. 49, 69-70 (2009); *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944, 947 (10th Cir. 2014) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994)). That party must affirmatively allege the facts supporting jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Bustillos*, 31 F.3d at 933. A challenge to the court's jurisdiction may be raised at any time. Fed. R. Crim. P. 12(b)(2) ("A motion that the court lacks jurisdiction may be made at any time while the case is pending."). When jurisdiction has not been proved, courts are without power to proceed and must dismiss the cause. *Steel Co.*, 523 U.S. at 94.

B. *Congress Provided in the Pueblo Lands Act for the Issuance of Patents to Non-Indians holding claims found to be valid and for the Extinguishment of Pueblo title and the Relinquishment of Federal Claims to those lands.*

In the Indian Pueblo Land Act Amendments of 2005, Congress provided for federal criminal jurisdiction over offenses committed within the exterior

boundaries of a grant from a prior sovereign "except as otherwise provided by Congress." As the Tenth Circuit explained in *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006), the New Mexico pueblos acquired title to their lands by a grant from the King of Spain. *Id.* at 1249. In the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), Mexico ceded to the United States a large land mass which included the lands in the territory of New Mexico on which the Pueblo Indians resided. *Id.* at 929. The treaty "provided that Mexican property rights in the ceded lands 'shall be inviolably respected.'" *Sanchez v. Taylor*, 377 F.2d 733, 735 (10th Cir. 1967) (quoting 9 Stat. 922, 929).

The land tract on which the alleged offense in this case occurred was patented to non-Indians Antonio David Salazar and Ramona B. de Salazar under the provisions of the Pueblo Land Act ("PLA"), 43 Stat. 636 (1924). Ex. A. The PLA established the Pueblo Lands Board and authorized it to ascertain the exterior boundaries of the pueblos, to determine land status, and to settle conflicting land claims by New Mexico Pueblo members and non-Indian citizens. *Id.* at 36; § 2, 43 Stat. 636; *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240, 244 (1985). The Board was instructed to award compensation to Pueblos for losses suffered due to failure of the United States to protect their rights, § 6, 43 Stat. at 638, and to report on possible purchases for the Pueblos of some lands

validly held by non-Indians. § 8, 43 Stat. at 639. The PLA provided for judicial determination of the area and value of lands where non-Indian claims based on Spanish or Mexican grants were superior to Indian claims. § 14, 43 Stat. at 641. If non-Indian claims to land that had been occupied and improved in good faith were not upheld, the court was to make findings as to the value of the improvements and the Secretary of the Interior was to submit a report to Congress with recommendations concerning compensation. § 15, 43 Stat. at 641.

As directed by Congress, the Pueblo Lands Board issued patents to non-Indians whose adverse claims were found valid; "[t]he Pueblos' rights to such land were extinguished." *Arrieta*, 436 F.3d at 1249-50 (citing PLA, § 4; 43 Stat. at 637, *Mountain States Tel. & Tel.*, 472 U.S. at 244)(explaining that § 4 of the PLA set forth the conditions that "sufficed to extinguish a Pueblo's title."). The United States relinquished its claims to those lands. § 13, 43 Stat. at 640.

It is the prerogative of Congress to determine "what land is Indian country subject to federal jurisdiction." *Hydro Resources*, 608 F.3d at 1151 (citing *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)). " . . . [T]he questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *United*

States v. Sandoval, 231 U.S. 28, 46 (1913) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

"[T]he exclusive right of the United States to extinguish Indian title has never been doubted." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 343-44 (1941). Congressional intent to extinguish Indian title must be "plain and unambiguous." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941). The 1924 PLA unambiguously removed the land tract at issue here from federal control. Congress clearly extinguished all rights of the Pueblo to that tract, relinquished all federal claims, and removed that tract from federal trust responsibility and protection.

The Enabling Act of New Mexico of June 20, 1910, 36 Stat. 557, supports the conclusion that the extinguishment of Pueblo title removed land such as the tract at issue here from federal jurisdiction and control. It states in Section 2:

> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; ...*

Id. at 558-59 (emphasis added).

C. *Congress Exempted the Land at issue in this case from Federal Criminal Jurisdiction when It Extinguished all Right, Title, and Interest of the Pueblo and Relinquished all Claims of the United States.*

As a result of the Pueblo Lands Board determination, the Salazars were found entitled to a patent to the tract of land on which the incident in this case took place. Ex. A. That patent declares that it effects "a relinquishment by the United States of America and the Indians of said Pueblo." *Id.* The supplemental plat containing the tract of land conveyed to the Salazars, Ex. F, states that it "represents the survey of certain tracts of land within the San Juan Pueblo Grant to which the Indian title has been extinguished according to the findings of the Pueblo Lands Board . . . " Thus, although the offense in this case took place "within the exterior boundaries of [a] grant from a prior sovereign," this Court lacks jurisdiction under the 2005 amendments to the PLA because Congress "otherwise provided" with respect to federal criminal jurisdiction by extinguishing pueblo title and relinquishing United States claim to non-Indian land. § 13, 43 Stat. at 640.

When Congress enacted the PLA in 1924, it would have been fully aware that its extinguishment of Pueblo title and relinquishment of all federal interest terminated federal criminal jurisdiction. As the Supreme Court recognized in *Solem v. Bartlett*, 465 U.S. 463 (1984), there was no question that, prior to 1948, the extinguishment of Indian title terminated Indian country status.

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest . . . See *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877); *Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920). Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.

Id. at 468 (citing 18 U.S.C. § 1151).

In *Bates*, the Court explained that Indian country status turns solely on Indian title to the land. "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer." *Bates*, 95 U.S. at 208. In *Ash Sheep Co.*, the Court upheld a judgment against the Sheep Company, which had pastured 5,000 sheep on Montana lands that the Court determined retained "Indian land" status in light of the trusteeship that the government maintained of the lands for the benefit of the Crow Tribe. *Id.* at 166.

Cases decided around the time the PLA was enacted consistently held that Indian country status turned on whether Indian title to the land in question had been extinguished. In *United States v. Soldana*, 246 U.S. 530 (1918), for example, defendants were charged with introducing liquor within the exterior boundaries of

the Crow Reservation upon the station platform of the Chicago, Burlington & Quincy Railway Company. The decision turned on whether the act of Congress granting the right of way for the station platform extinguished Indian title. "If the Indian title to the soil on which the platform stands was extinguished by that grant, the platform was not within Indian country." *Id.* at 531. Because the Court determined that "it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right of way," defendants were held to have been properly indicted for introducing intoxicating liquors into Indian country. *Id.* at 532-33.

Employing the same rationale, the Court reached the opposite result in *Clairmont v. United States*, 225 U.S. 551 (1912), which also involved charges against a train passenger for introducing liquor into the Indian Territory. The Court found that the grant of the railway company right of way extinguished Indian title to that strip of land. "Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title, and that in accordance with the repeated rulings of this court, it was not Indian country. The District Court, therefore, had no jurisdiction of the offense charged, and the judgment must be reversed." *Id.* at 560.

The Tenth Circuit has determined in recent years that federal criminal jurisdiction turns on whether Congress has extinguished Indian rights to land where an offense was committed. In *Hackford v. Utah*, 845 F.3d 1325 (10th Cir.), *cert. denied*, 138 S.Ct. 206 (2017), the Court decided that traffic offenses allegedly committed by an Indian driver did not take place on tribal land. In 1910, Congress had expressly provided for extinguishment of Indian interest in the land where the offenses occurred and had set it aside for use as a reservoir. *Id.* at 1329. The land was thereby removed from the reservation and no longer had Indian Country status. *Id.* The Court pointed to the Court's explanation in *Nebraska v. Parker*, – U.S. –, 136 S.Ct. 1072, 1079 (2016), that Congress's passage of a statute that provides for surrender of tribal land claims, along with compensation, "creates 'an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.'" *Hackford*, 845 F.3d at 1329 (internal quotations omitted). Because the traffic offenses in *Hackford* did not occur on tribal land, the State of Utah properly had criminal jurisdiction. *Id.* at 1330.

In *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013), the Court reached the opposite conclusion, *i.e.*, the land where the crimes in question occurred was "Indian country" because one step required to extinguish Indian title had not been completed. In a 1945 law, Congress had set forth provisions for extinguishment of

federal restrictions on what had been Indian land. *Id.* at 1172. Congress had required approval of the Secretary of the Interior in order to effectuate a conveyance to the Housing Authority that would have removed its Indian status. *Id.* That requirement was not satisfied with respect to the tract of land where Magnan's crimes occurred. For that reason, it was not conveyed to the Housing Authority and remained "Indian country" at the time of the crimes. *Id.* at 1176 & n.8. Consequently, the United States had exclusive criminal jurisdiction. *Id.*

The PLA and the issuance of a patent under the PLA plainly extinguished pueblo title to the land at issue in this case. By extinguishing pueblo title, Congress exempted the land from federal criminal jurisdiction. This Court can only conclude that Congress thus "otherwise provided" with respect to criminal jurisdiction within the meaning of 25 U.S.C.A. § 331 Note, subsection (a). This Court must enforce the plain statutory language and conclude that it lacks jurisdiction in this case.

Where statutory language is clear, it is controlling. "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (citation and internal quotation marks omitted). Arguments about policy, statutory purposes, and legislative history cannot

overcome clear statutory language. *Trump v. Hawaii*, 138 S.Ct. 2392, 2408 (2018); *Sandoz Inc. v. Amgen Inc.*, 137 S.Ct. 1664, (2017) (citing *McFarland v. Scott*, 512 U.S. 849, 865 (1994)).

WHEREFORE, Defendant Kevin Vigil respectfully requests that this Court dismiss the indictment against him for lack of subject matter jurisdiction.

Respectfully submitted,

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