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' REPLY TO DEFENDANT'S RESPONSE TO THE UNITED STATES' MOTION FOR PRETRIAL DETERMINATION OF INDIAN COUNTRY LAND STATUS

The United States of America by and through its undersigned attorneys respectfully submits this Reply to Defendant's Response (Doc. 71) to the United States' Opposed Motion for Pretrial Determination of Indian Country Land Status (Doc. 60). Defendant does not deny that the land where the crime occurred "is within the exterior boundaries of Ohkay Owingeh Pueblo." (Doc. 71 at 1). As laid out below, it follows that the government has federal criminal jurisdiction over the offense under the 2005 Amendments to the Pueblo Lands Act.

FACTUAL BACKGROUND

The parties are in agreement about the relevant facts. Specifically, the home where the alleged crimes occurred is located on a private claim within the boundaries of the Ohkay Owingeh Pueblo. Defendant correctly points out that title to the land came to be privately held by non-Indians pursuant to the Pueblo Land Act of 1924 (the "1924 PLA"). The purpose of the 1924 PLA was to resolve competing claims by the Pueblos and non-Indians to Pueblo lands. *See United States v. Arrieta*, 436 F.3d 1246, 1249-50 (10th Cir. 2006) (discussing the history of

the PLA). To accomplish this purpose, the PLA created the Pueblo Lands Board ("Board") and endowed it with the power to issue patents quieting title to land in favor of non-Indians who met certain adverse possession requirements. *Id.* As a result of the Board's activities, pockets of privately owned land, such as the home at issue in this case, exist within Pueblo boundaries. *Id.*

The land at issue here – 1326B Camino Raphael, in Espanola, Rio Arriba County, New Mexico, mainly in Section 25, Township 21N, Range 8E, NMPM – was transferred to Antonio David Salazar and Ramona B. de Salazar, via a patent issued by the United States executive branch, on July 12, 1935. (Doc. 71-1 at 1).

ARGUMENT

Under the plain language of the 2005 amendments to the PLA, all land within the exterior boundaries of the Ohkay Owingeh Pueblo, including the residence identified above, constitutes "Indian Country." There is no exception for lands held privately by non-Indians.

The amendments provide, in relevant part, that the United States has jurisdiction over the offenses at issue in this case as long as those offenses were "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." *See* Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005). The United States has presented evidence and Defendant does not dispute that the home where the alleged crimes occurred is located within the Ohkay Owingeh Pueblo, San Juan Land Grant. The boundaries of the Pueblo were confirmed by Congress in 1858. *See* 11 Stat. 374, 374 (1859).

Despite these facts, Defendant argues that the home where the crime occurred is not Indian Country. Defendant points out that the 2005 amendments to the PLA qualified federal

jurisdiction over Pueblo lands with the phrase "except as otherwise provided by Congress." 119 Pub. L. No. 109-133, 119 Stat. 2573. According to Defendant, this phrase excludes from the grant of federal jurisdiction those lands formerly belonging to the Pueblos that were transferred to private ownership as a result of the 1924 Pueblo Lands Act. (Doc. 71 at 7).

This argument is without merit. The 1924 PLA does not address or otherwise purport to limit federal criminal jurisdiction over Pueblo lands. The PLA is focused on the narrow issue of quieting title to lands lying within the exterior boundaries of Pueblo lands. For this reason, PLA cannot be read to evince a congressional intent to extinguish federal jurisdiction over lands existing with the Pueblo boundaries.

In any event, contrary to Defendant's claim, the PLA did not itself extinguish title to Pueblo lands or to the parcel at issue in this case. The 1924 PLA makes no reference to 1326B Camino Raphael, in Espanola, Rio Arriba County, New Mexico, mainly in Section 25, Township 21N, Range 8E, NMPM. The 1924 PLA merely established a Pueblo Lands Board to "investigate, determine and report" the ownership status of lands lying within the exterior boundaries of the Pueblo. 43 Stat. 636. It was the Executive, not Congress, that subsequently issued the land patent quieting title to the land in favor of Antonio David Salazar and Ramona B. de Salazar. (Doc. 71-1 at 1.) As the plain language of the 2005 amendments to the PLA indicate, only an act of *Congress*, can form the basis for an exception to federal jurisdiction. An act of the Pueblo Lands Board or the executive branch does not suffice. *See St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000) ("It is a general rule of statutory construction that if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded.").

The cases Defendant cites do not support a contrary conclusion. Defendant cites four Supreme Court cases[1] for the proposition that "Indian country status turns solely on Indian title to the land." (Doc. 71 at 8-9). None of these cases involve the unique history of federal jurisdiction over Pueblo lands. Moreover, these cases all predate the 1924 PLA and the 2005 amendments to the PLA. Finally, and most critically, these cases predate the 1948 enactment of 18 U.S.C. § 1151, which significantly changed and superseded the prior understanding of Indian Country. To the extent that these cases held that Indian jurisdiction ceased without Indian title, they are no longer good law. *See Solem v. Bartlett,* 465 U.S. 463, 468 (1984) (noting that in 1948 Congress "uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries"); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010) (explaining that § 1151 abrogated the understanding of Indian Country articulated in *Clairmont* and other earlier cases). The modern understanding of Indian Country has focused more on avoiding checkerboard jurisdiction, than tracking Indian title. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962); *United States v. Antonio*, No. CR 16-1106 JB, 2017 U.S. Dist. LEXIS 85436, at *83 n.11 (D.N.M. June 5, 2017) ("[C]heckerboard jurisdiction within Indian country is both impractical and in tension with 18 U.S.C. § 1151(a)'s language and purpose.").

The Tenth Circuit cases Defendant cites – *Hackford v. Utah*, 845 F.3d 1325 (10th Cir. 2017) and *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013) – are similarly inapposite.

[1] *Bates v. Clark*, 95 U.S. 204 (1877); *Clairmont v. United States*, 225 U.S. 551, 32 S. Ct. 787 (1912); *United States v. Soldana*, 246 U.S. 530, 38 S. Ct. 357 (1918); *Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S. Ct. 241 (1920).

Hackford and *Magnan* are fact-bound decisions that address whether particular land retained its Indian Country status as an Allotment or part of a reservation. Neither case speaks to the 1924 PLA, the 2005 amendments to the PLA, or to jurisdiction over Pueblo lands.

In this case, the plain and straightforward language of the 2005 amendments to the PLA answer the question of whether the Court has jurisdiction. Even if Defendant is correct that the 1924 PLA divested particular tracts of Indian Country status, the 2005 Amendments to the PLA were intended to change that status, and establish federal jurisdiction over the totality of lands within the exterior boundaries of a Pueblo.

The Senate committee report discussing the 2005 Amendments to the PLA explains that Congress was motivated to pass the 2005 amendments by concerns over "the potential for a void in criminal jurisdiction on Pueblo lands" that resulted from a federal district court decision in the District of New Mexico. S. Rep. No. 108-406 (2004). That decision, *United States v. Gutierrez*, No. Cr. 00-M-375 LH (December 1, 2000),[2] involved jurisdictional facts similar to those here. In *Gutierrez*, an offense occurred on privately held land which, prior to the 1924 PLA, had been owned by the Pueblo of Santa Clara. On a motion to dismiss for lack of subject matter jurisdiction, defendant made the same argument presented here: that the land in question was could not be Indian Country because the land in question was privately held. The district court agreed. *Gutierrez*, No. Cr. 00-M-375 LH; Exhibit 5.

Concerned that this decision would result in a jurisdictional gap, Congress amended the PLA to clarify that federal criminal jurisdiction extends over all Pueblo lands as they existed prior to any divestment occasioned by the 1924 PLA. The purpose of the law was to avoid

[2] The decision is attached to this reply as Government's Exhibit 5.

lawless enclaves within Pueblo Lands. Accepting Defendant's argument would create exactly such a gap, in direct contravention of Congressional intent.

The State of New Mexico has previously determined that it lacks criminal jurisdiction over crimes committed by Indians on lands like those at issue in this case. *See State v. Romero,* 142 P.3d 887, 896 (N.M. 2006) (holding that the state lacks criminal jurisdiction over Indian defendants on all lands within original exterior boundaries of Pueblo grants, including lands now privately held). Consequently, a ruling in Defendant's favor would create a category of land over which neither state nor federal government may exercise criminal jurisdiction for Indian-related crimes. This is precisely the scenario that the 2005 Amendments to the PLA were intended to avoid.

Defendant asks the Court to ignore this legislative history in favor of the plain language of the statute. Defendant does not, however, cite and the government is not aware of any case law adopting Defendant's senseless reading of the 2005 amendments to the PLA. To the contrary, in *Antonio*, Judge Browning rejected similar arguments. *Antonio*, 2017 U.S. Dist. LEXIS at *83 (holding that the 2005 amendments to the PLA conferred federal jurisdiction over private land within the Pueblo of Sandia).[3] As Judge Browning correctly concluded, this Court should not interpret a statute in a manner that thwarts clearly expressed Congressional intent. *United States v. White*, 782 F.3d 1118, 1132 (10th Cir. 2015) ("[W]hen interpreting a statute, we attempt to give effect to Congressional intent.").

[3] The *Antonio* case is currently pending appeal in the Tenth Circuit. *See United States v. Antonio*, Case No. 18-2118 (10th Cir.). One of the issues raised in the appeal is the validity of the interpretation of the 2005 Amendments to the PLA that defendant advances here.

WHEREFORE, the United States moves the Court for a pre-trial ruling, finding that the residence in which the charged crimes occurred, is located within the exterior boundaries of the Ohkay Owingeh Pueblo, a grant for a prior sovereign that was confirmed by Congress in 1858, and, therefore, is Indian Country.

Respectfully submitted,

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I HEREBY CERTIFY that on June 5, 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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