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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. [redacted], Defendant.	Case No. 2:17-cr-[redacted] **MOTION FOR PRETRIAL RULING THAT DEFENDANT NEED NOT EXHAUST ADMIN. REMEDIES TO DISPUTE BOUNDARY AT TRIAL**

Defendant [redacted] through his attorney, moves the court for a pretrial ruling that defendant need not exhaust administrative remedies, before he can assert at trial, uncertainty as to each of the following:

1) a government land boundary, and hence,

2) whether the situs of fossils was within the boundary, and hence,

3) whether the fossils belonged to the government.

1.
FACTS AND ARGUMENT WHICH DEFENDANT SEEKS TO OFFER AT TRIAL

The Indictment alleges that defendant [redacted] removed fossils from government land. At issue is whether the location from which fossils are alleged taken, was within

government land. The defense contends that bearing trees (on which marks were left during the 1916 original government survey, for later retracing the location) indicate a position some 66 feet west of where the government concludes in its 2014 resurvey.[1] Details of this argument are set forth in defendant's supplemental memorandum as to detention, filed July 8, 2017 as docket entry 55.

2.

THE IMPORTANCE OF PRETRIAL DETERMINATION

The prosecution contends per an August 16, 2017 email to defense counsel, that to challenge the B.L.M.'s determination of the boundary, defendant must first exhaust administrative remedies under 43 Code of Fed. Reg. sections 4.450-1 to -4, by completing a formal "protest and appeal" process, in which defendant lodges a formal protest of the 2014 resurvey with the Utah Bureau of Land Management (B.L.M.) office, and then appeals a denial of the protest to the Interior Board of Land Appeals (I.B.L.A.) in Arlington, Virginia.

Therefore, this raises the question of whether in a criminal case charging removal and theft from federal land, of vertebrate fossil paleontological resources, must the defendant first exhaust administrative remedies under 43 C.F.R. sec. 450-1 et seq., before the defendant can argue at trial that the federal boundary is uncertain such that the government failed to prove beyond a reasonable doubt that the location from which items

[1] A resurvey is "the reestablishment or restoration of land boundaries and subdivisions by the rerunning and remarking of the lines that were represented in the field note record and on the plat of the previous official survey." Glossary of BLM Surveying and Mapping Terms (1980).

were taken was within federal land. To avoid surprise at trial, defendant seeks a pretrial ruling on whether he must exhaust administrative remedies before proceeding to trial in this case, to preserve this central component of his defense.

3.
EXHAUSTION SHOULD NOT BE REQUIRED,
BECAUSE HARSH IN A CRIMINAL CASE

As the U.S. Supreme Court observed in a military draft case:

> "We cannot agree that application of the exhaustion doctrine would be proper in this case. [¶] First of all, it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts, but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review."

McKart v. United States, 395 U.S. 185, 197 (1969) (defendant who failed to exhaust administrative remedies as to military draft, then charged with criminal violation).

In the case at bar, the government seeks to impose criminal sanctions against defendant, as in McKart. However, McKart involved a prior administrative order, and the case at bar involves not an order, but a resurvey where the B.L.M. reaches a conclusion as to its boundary. But assuming for sake of argument that the B.L.M. resurvey conclusions are the equivalent of an order, then as in McKart, the government

attempts to impose criminal sanctions while depriving defendant of judicial review of the government's boundary determination. Hence, under McKart this should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon defendant [redacted].[2] It is difficult to see, how imposing an exhaustion rule to a boundary question, is of more importance than matters of national defense associated with the military draft.

"Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." U.S. v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987) (in context of immigration). In the case at bar, defendant contends that the determination made by the BLM in its resurvey, could indeed play a critical rule in the subsequent imposition of criminal sanctions. Therefore as to Mendoza-Lopez, there must be a meaningful review of these administrative proceedings. And for reasons show below, this review should be allowed to occur by the jury, in this criminal case.

[2] As a commentator has observed: "Finally, the exhaustion requirement is not applied rigorously when its application would deprive a criminal defendant of his defense… Application of the exhaustion doctrine in cases like McKart would serve to deprive one of his criminal defense because of his failure to assert a right in an earlier administrative proceeding. Thus, such cases are clearly different from the ordinary exhaustion case in which the doctrine merely serves to delay the judicial assertion of a right." Exhaustion of Federal Administrative Remedies in Cases under Section 1981 of the Civil Rights Act, 1974 Duke Law Journ. 412 at n.18.

4.

EXHAUSTION SHOULD NOT BE REQUIRED,
BECAUSE REGULATION NOT CLEAR IN ITS APPLICATION

While some cases discuss boundaries in the context of theft of government property,[3] none were found which raise a challenge to the government's prior conclusions as to the boundary location.

Title 43 Code of Fed. Reg. section 4.450-1 provides:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land …, may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

(emphasis supplied). Here, Defendant [redacted] claims no title to nor interest in the situs of the case at bar. Therefore, 4.450-1 does not apply to our facts.

Title 43 C.F.R. sec. 4.450-2 provides:

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[3] See, e.g,, U.S. v. Derington, 229 F.3d 1243 (9th Cir. 2000) (as to theft of government property through logging of trees found removed from Forest Service lands, acknowledgement that conviction requires proof that property belonged to United States, and concluding that trees were within boundary, though defendant did not challenge government's prior boundary determination); U.S. v. Waite, 12 Fed.Appx. 593 (9th Cir. 2001) (charged with illegally logging a National Forest area, and finding that sufficient evidence supported jury's finding that wood taken from government property).

> Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

(emphasis added). Here, it is unclear whether the resurvey was a proceeding before the B.L.M. But assuming for the sake of argument, that (1) the 2014 resurvey was a "proceeding before the Bureau", and (2) defendant's claim of uncertainty is an "objection" to this "proceeding", then this proceeding should still remain subject to meaningful review, per Mendoza-Lopez, supra.

Granted, if defendant did present an objection, both the B.L.M. and I.B.L.A. might declare that defendant lacks standing, because he does not claim an ownership interest in the property. Therefore, seeking prior administrative review might be futile, and might deprive defendant of meaningful review there, while at the same time the government would deprive defendant of meaningful review before this court.

But the fact that defendant claims no interest in this land, highlights the point that this criminal case will not adjudicate title to land, but merely adjudicate whether the government can prove ownership of items alleged taken. This is akin to trials for criminal trespass, and for receipt of stolen property, where jury acquittals do not adjudicate title to property in the defendant.

5.
EXHAUSTION SHOULD NOT BE REQUIRED,
BECAUSE IT WOULD ALTER THE BURDEN OF PROOF

Boundary cases before the Interior Board of Land Appeals (I.B.L.A.) assume that one challenging the B.L.M.'s determination of its own boundary, bears the burden of proof:

> In order to overturn a dependent resurvey prior to the official filing of the survey plat, a party challenging the resurvey on appeal bears the burden of establishing, by a preponderance of the evidence, that the resurvey was not executed in conformity with the policy guidance in the 2009 Survey Manual, or otherwise is not an accurate retracement and reestablishment of the lines and corners of the original survey.

Pueblo of San Felipe, 190 IBLA 17, 36 (2017).[4] Thus, if preservation of defendant

[4] Though the Pueblo case speaks of challenging a resurvey before the plat is officially filed, the IBLA regularly hears challenges made thereafter. See, e.g.,, Groth, 99 IBLA 104, 109 (1987)(interior citations omitted):

> Absent notification of the proposed action, a strict interpretation of 43 CFR 4.450-2 to preclude an affected landowner from objecting to a resurvey seems patently unfair. Moreover, in survey cases this Board has not followed a practice that an objection filed with BLM after the filing of a plat of resurvey constitutes an untimely protest which must automatically result in dismissal thereof. To the contrary, in numerous cases BLM has adjudicated such objections and the Board has entertained appeals from those decisions.
>
> Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely

[redacted]'s defense, means he must engage with the IBLA, then the burden of proof might be shifted to the defendant. However, this is a theoretical outcome, since apparently no criminal cases have been heard by the IBLA, thus arguing against this outcome.

In any event, shifting the burden of proof to a defendant, is contrary to the long-held practice of the U.S. Courts, that the burden remains on the government:

> Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. … Mr. Justice Frankfurter stated that it is the duty of the Government to establish guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of due process. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

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protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to this Board.

In re Winship, 397 U.S. 358, 362 (1970) (internal quotation marks and punctuation omitted). "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Schlup v. Delo, 513 U.S. 298, 325 (1995) (internal citation and quotation marks removed).

Hence, in criminal cases—including boundary matters—the courts impose a high burden of proof on the government. See, e.g., U.S. v. Gabrion, 517 F.3d 839 871 (6th Cir. 2008) ("Whether the government proved that Gabrion murdered Timmerman on a parcel of national forest land over which the federal government has criminal jurisdiction is an element of the offense, which the government must prove to the jury beyond a reasonable doubt.")

"While the court may determine, as a matter of law, the existence of federal jurisdiction over a geographic area, whether the locus of the offense is within that area is an essential element that must be resolved by the trier of fact." U.S. v. Prentiss, 206 F.3d 960, 967 (10th Cir. 2000) (panel opinion replaced by en banc opinion). "As a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site." U.S. v. Roberts, 185 F.3d 1125, 1139 (10th Cir. 1999).[5]

[5] Some cases treat "jurisdictional facts" which do not bear on guilt (mens rea or actus reus) as non-elements of the offense to be decided by the judge by a preponderance. However, the case at bar does not involve issues of territorial jurisdiction (whether the court has power to hear this

6.
REQUIRING EXHAUSTION WOULD VIOLATE THE RIGHT TO A SPEEDY TRIAL

Defendant [redacted] is in custody, and it would require months to present a formal objection to the government resurvey, and then perfect, participate in, and await the result of an appeal to the IBLA.[6] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …" U.S. Const. Amend. VI. Requiring exhaustion of remedies, in order to preserve his defense as to the boundary, would deprive Defendant [redacted] of this essential right.

To give the B.L.M. regulations a broad reading, in a manner to apply them to this criminal case, would be akin to allowing the Department of Justice to create and enforce a regulation declaring that before a defendant can challenge the officer's testimony in a report, he must file an administrative challenge in which he bears the burden of proof, and must appeal an adverse ruling to a body within the Department of Justice. The Congress has delegated authority to the BLM to work with land and its title, but not to administratively adjudicate issues as to criminal cases. And the U.S. Constitution commands a speedy trial.

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matter), or venue (whether this is the wrong court), but rather, a substantive question (of whether fossils originated on government land, such that alleged theft was of government property).

[6] Thereafter, the IBLA decision would apparently be reviewable by the U.S. District Court of Utah. See Pennaco Energy v. B.L.M., 377 F.3d 1147, 1150 (10th Cir. 2004).

7.
EXHAUSTION SHOULD NOT BE REQUIRED,
BECAUSE ARGUABLY DEFENDANT
DOES NOT CHALLENGE THE RESURVEY

One way of viewing defendant's argument, is that by questioning whether the boundary is certain, this does not rise to challenging the plat of the 2014 resurvey, but merely points out that the lines on this plat are interpreted with reference to field notes of the original survey.

8.
CONCLUSION

For the reasons set forth herein, the Defendant respectfully moves the court for a pretrial determination that defendant need not exhaust administrative remedies prior to raising at the trial the uncertainty of the BLM boundary.

However, in the event that this court determines that exhaustion is required, then defendant seeks leave to exhaust administrative remedies prior to the trial in this matter.

Dated this 19 day of October 2017.

s/ Mark J. Gregersen
MARK J. GREGERSEN
Attorney for Defendant [redacted]

Certificate of Service

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification to the following:

[redacted]

Dated this 19 day of October 2017.

s/ Mark J. Gregersen