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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

NO. 32,136

5 **ERNIE BEGAYE,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY**

8 **Grant L. Foutz, District Judge**

9 Gary K. King, Attorney General

10 James W. Grayson, Assistant Attorney General

11 Santa Fe, NM

12 for Appellant

13 Robert E. Tangora, L.L.C.

14 Robert E. Tangora

15 Santa Fe, NM

16 for Appellee

17 **MEMORANDUM OPINION**

18 **WECHSLER, Judge.**

1 {1} The State of New Mexico charged Defendant Ernie Begaye with eleven counts
2 of first degree criminal sexual penetration of a minor under the age of thirteen and
3 fourteen counts of criminal sexual contact of a minor with respect to three separate
4 minors. The acts that were the subject of the criminal information occurred in Parcel
5 Three of Fort Wingate in McKinley County, New Mexico. The district court
6 dismissed the criminal information for lack of subject matter jurisdiction because the
7 acts occurred in “Indian country” as defined by 18 U.S.C. Section 1151 (1949).
8 Indian country is not subject to state jurisdiction. *See State v. Dick*, 1999-NMCA-062,
9 ¶¶ 1, 28, 127 N.M. 382, 981 P.2d 796 (holding that the state did not have jurisdiction
10 to prosecute when the defendant was stopped in Indian country). The State appeals,
11 arguing that Parcel Three of Fort Wingate (Parcel Three) is not located within Indian
12 country and is subject to the jurisdiction of the state court.

13 {2} At issue in this appeal is subsection (b) of 18 U.S.C. Section 1151. It includes
14 within the definition of Indian country “all dependent Indian communities within the
15 borders of the United States whether within the original or subsequently acquired
16 territory thereof, and whether within or without the limits of a state[.]” 18 U.S.C.
17 Section 1151(b). The United States Supreme Court has interpreted subsection (b) to
18 require that the land in question (1) “must have been set aside by the Federal
19 Government for the use of the Indians as Indian land;”(set aside requirement) and (2)

1 “must be under federal superintendence.” *Alaska v. Native Vill. of Venetie Tribal*
2 *Gov’t*, 522 U.S. 520, 527 (1998). The parties contest only the set aside requirement.

3 {3} The State acknowledges that this Court in *Dick*, 1999-NMCA-062, ¶ 28, held
4 that Parcel Three of Fort Wingate met the set aside requirement and is located in
5 Indian country. It asks this Court to instead adopt the reasoning of *United States v.*
6 *M.C.*, 311 F. Supp. 2d 1281 (D.N.M. 2004), in which the United States District Court
7 for the District of New Mexico held that Parcel Three did not meet the set aside
8 requirement and thus is not within Indian country. *Id.* at 1297.

9 {4} This Court has recently decided *State v. Steven B.*, 2013-NMCA-___, ___ P.3d ___
10 (No. 31,322, Apr. 1, 2013), involving another appeal by the State in which it raised
11 the same arguments as it does in this appeal. This Court held, following *Dick*, that
12 Parcel Three meets the set aside requirement and falls within Indian country. *Steven*
13 *B.*, 2013-NMCA-___, ¶ 16. *Steven B.* controls this appeal.

14 {5} The acts charged occurred within Indian country. The State does not have
15 jurisdiction in this case. We affirm the district court’s dismissal.

16 {6} **IT IS SO ORDERED.**

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18

JAMES J. WECHSLER, Judge

1 **WE CONCUR:**

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3 **MICHAEL D. BUSTAMANTE, Judge**

4

5 **MICHAEL E. VIGIL, Judge**