**24.14 Determination of Indian Status for Offenses Committed**

**Within Indian Country (18 U.S.C. § 1153)**

For the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:

First, the defendant has some quantum of Indian blood, whether or not that blood is traceable to a member of a federally recognized tribe; and

Second, the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense.

[I instruct you that [*specify tribe*] is a federally recognized tribe.]

Whether the defendant was a member of, or affiliated with, a federally recognized tribe is determined by considering four factors, in declining order of importance, as follows:

(1) Enrollment in a federally recognized tribe;

(2) Government recognition formally and informally through receipt of assistance reserved only to individuals who are members, or are eligible to become members, of federally recognized tribes;

(3) Enjoyment of the benefits of affiliation with a federally recognized tribe; and

(4) Social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

**Comment**

Indian status is a jurisdictional element under 18 U.S.C. § 1153. *See United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005). “[T]he government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged.” *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc). This rule applies with the same force when the Indian status of the victim is in question under 18 U.S.C. § 1152. *United States v. Reza-Ramos*, 816 F.3d 1110, 1120-21 (9th Cir. 2016). As to the first element, the defendant must have a blood connection to an Indian tribe, but the tribe need not be federally recognized. *Zepeda*, 792 F.3d at 1113. With regard to the second element, the defendant must have a current affiliation with a federally recognized tribe. *Id*. “The federally recognized tribe with which a defendant is currently affiliated need not be, and sometimes is not, the same as the tribe or tribes from which his bloodline derives.” *Id*. at 1110. It is plain error for the court to fail to instruct on each of the two prongs of the Indian status test.  *Reza-Ramos*, 816 F.3d at 1123.

Offenses committed within Indian country are identified in 18 U.S.C. § 1153(a) as follows: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (sexual abuse felonies), incest, a felony assault under § 113, assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under § 661 (embezzlement and theft) committed by any Indian against the person or property of another Indian or other person within Indian country.

For the enumerated offenses prosecuted under 18 U.S.C. § 1153, the court should give

Instruction 24.14, and the jury instruction used for the substantive offense should include two additional elements, as follows:

[Number of element], the [*specify offense*] occurred at a place within the [name of the Indian Country where the offense allegedly occurred], which I instruct you is in Indian Country.

[Number of element], the defendant is an Indian.

Whether the offense occurred at a particular location is a question of fact to be decided

by the jury, with the court determining the jurisdictional question of whether the location is within Indian Country as a question of law. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

The court also must instruct the jury of the “declining order of importance” of the four factors used to determine whether the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. *Zepeda*, 729 F.3d at 1114.

Whether a tribe is federally recognized is a question of law to be determined by the court. *Id*. “[T]he list of federally recognized tribes [at the time of the offense] prepared by the Bureau of Indian Affairs (BIA) is the best evidence of a tribe’s federal recognition.” *Reza-Ramos*, 816 F.3d at 1122. “If the court has found that the tribe of which the government claims the defendant is a member, or with which the defendant is affiliated, is federally recognized, it should inform the jury that the tribe is federally recognized as a matter of law.” *Zepeda*, 792 F.3d at 1114-15.

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