

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-5050

OSAGE NATION,

Plaintiff-Appellant,

vs.

CONSTANCE IRBY Secretary – Member of the Oklahoma Tax Commission; THOMAS E.
KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Warden,
Vice-Chairman of the Oklahoma Tax Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**Motion for Leave to File and Brief of *Amicus Curiae* Confederated Tribes of the Colville
Reservation In Support of Plaintiff-Appellant on Rehearing *En Banc***

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Federal Rule of Appellate Procedure, *amicus curiae*, Confederated Tribes of the Colville Reservation (“Colville Tribes”), hereby moves this Honorable Court for an order permitting this party to file a Brief *Amicus Curiae* in support of Plaintiff-Appellant Osage Nation’s Petition for Rehearing. Defendants-Appellees have indicated to the Colville Tribes that they will not oppose this Motion.

INTEREST OF PROPOSED *AMICUS CURIE*

This brief represents the general interests of the Colville Tribes, a federally recognized Indian tribe possessing sovereignty recognized within the text of the Constitution of the United States. U.S. Const. art. I, § 8, cl.3. The Colville Tribes is headquartered on a Reservation in north central Washington State. The Colville Tribes takes the position that pursuant to well-established and deep-rooted principles developed by the Supreme Court of the United States regarding Federal Indian Law, and the frequent misinterpretation and application of those principles by various judicial bodies in what appears to be an ongoing effort to resuscitate long-gone legislative policies such as colonization, assimilation, and termination, the rights and interests of the Colville Tribes, and of all Indian tribes, are substantially diminished when existing precedents are manipulated in ways that abrogate tribal jurisdiction and sovereignty. The Colville Tribes is concerned that the search for principled, consistent and coherent rules in the Indian law field has become increasingly difficult, if not entirely futile. The Tenth Circuit’s panel decision in this case is seriously at odds with the substantive, procedural, and policy-based principles that should govern this particular dispute.

Beyond the general interest to have the precedent established in this case

corrected to reflect existing precedent, the Colville Tribe's particularized interest in this case pertains to the Tenth Circuit's reliance on dicta relating to whether the North Half of the Colville Indian Reservation has been disestablished or diminished. The Tenth Circuit's reliance on this dictum significantly harms the Colville Tribe's rights and occupancy of the North Half of the Colville Reservation.

Therefore, this amicus hereby respectfully moves this Court for leave to file its Amicus Brief as a friend of the Court in support of Plaintiff-Appellant Osage Nation's Petition for Rehearing.

Dated: April 9, 2010

Respectfully submitted,

s/ Thomas W. Christie

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I. BASIS FOR REHEARING

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Colville Tribes submits this *amicus* brief in support of the Osage Nation's petition for panel rehearing or for rehearing *en banc* of this Court's decision in *Osage Nation v. Irby*, Case No. 09-5050.

The Colville Tribes concurs with the Osage Nation's position that the Tenth Circuit panel's application of *Solem v. Bartlett*, 465 U.S. 463 (1984) in finding reservation diminishment in *Osage Nation* decision is incorrect. In the absence of any clear expression of Congressional intent to terminate the boundaries of the Osage Reservation, the *Osage* panel inferred Congressional intent through a very limited number of vague and equivocal statements in the legislative record.

The Colville Tribes, therefore, adopts the following from Osage Nation's Petition for Panel Rehearing and Rehearing *En Banc*: Fed. R. App. P. 35 Statement; Specific Issues For Rehearing or Rehearing *En Banc*; and Argument and Authority in Support of Rehearing.

II. THE 10TH CIRCUIT IMPROPERLY RELIES ON DICTA FROM SEYMOUR V. SUPERINTENDENT CITED IN MATTZ V. ARNETT AS CONTROLLING LAW, THEREFORE THE

PETITION FOR RECONSIDERATION SHOULD BE GRANTED.

Amicus Colville Tribes submits that the 10th Circuit Court of Appeals should rehear this case because the three judge panel improperly relies on dicta relating to the status of the North Half of the Colville Reservation from the Supreme Court's opinion in *Mattz v. Arnett*, 412 U.S. 481, 505 n.22 (1973), citing *Seymour v. Superintendent*, 368 U.S. 351, 354 (1962). (Op at 9.) The 10th Circuit Court of Appeals' reliance on language from *Seymour*, quoted in *Mattz*, discussing the North Half of the Colville Indian Reservation and a statute relating to the North Half, 27 Stat. 63 (1892), appears to be used to fabricate controlling law demonstrating a plain example of express statutory language clearly disestablishing or diminishing an Indian reservation.

However, the *Seymour* case was about events that arose on the South Half of the Colville Reservation, not the North Half and the statute relating to the North Half. The *Seymour* case originated from an alleged crime committed by Seymour, a Colville Indian, on the South Half of the Colville Reservation. At issue was whether the State of Washington had criminal jurisdiction over Seymour if the act occurred on the South Half of the Colville Reservation. In *Seymour*, the Supreme Court correctly noted, "Since the burglary of which petitioner was convicted occurred on land

within the South Half, it is clear that state jurisdiction over the offense charged...must be based upon some federal action”. *Seymour*, 368 U.S. at 354.

Therefore, any discussion of the North Half and statutory language relating to the North Half in *Seymour* is dicta—that case was about a different statute completely, 34 Stat. 80 (1906), and the South Half of the Colville Reservation, not the North Half. Indeed, no binding case law has definitively ruled that the external boundaries of the North Half have been disestablished or diminished.

Any reliance on the *Seymour* case to support reservation de-establishment or diminution is misplaced. The Supreme Court in *Seymour* clearly found that reservations are not disestablished or diminished simply when they have been opened to non-Indian settlement. Indeed, in the very sentence following the 10th Circuit’s recitation of the *Seymour* dicta, the 10th Circuit correctly cites the *Seymour* case for the principle of non-diminishment of reservation status when the reservation is opened to non-Indian settlement. (Op. at 10). Regrettably, the Osage panel ignored that principle in its analysis. (Op. at 15-19).

The 10th Circuit Court of Appeals’ improper reliance on dicta from the *Seymour* case has a significant negative impact on the Colville Tribes’ rights

to use and occupancy of the North Half of the Colville Reservation. Thus, the amicus Confederated Tribes of the Colville Reservation respectfully requests that the 10th Circuit should grant the Osage Nation's petition for rehearing *en banc* to correct this and any other error of law which could have significant impacts on Indian Tribes throughout the United States.

IV. CONCLUSION

The panel decision in *Osage Nation* conflicts with Supreme Court and Tenth Circuit jurisprudence regarding questions of reservation diminishment and disestablishment. Moreover, the panel incorrectly relies on dicta from the *Seymour* to demonstrate disestablishment, when, in fact, the *Seymour* case found that the South Half Colville reservation had not been disestablished, only opened to settlement. The Colville Tribes respectfully requests this Court to grant Osage Nation's petition for rehearing or rehearing *en banc*.

Submitted by:

s/ Thomas W. Christie

Dated: April 9, 2010

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 1,675 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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this brief has been prepared in a proportionally spaced typeface using MS WORD 2003 in Times New Roman 14 point

s/ Thomas W. Christie

Dated: April 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2010, copies of the foregoing Motion for Leave to File and Brief of *Amici Curiae* on Behalf of the Confederated Tribes of the Colville Reservation were served was furnished through ECF electronic service to the following on the 9th day of April, 2010:

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