IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION, Plaintiff/Appellant, v. THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, Defendants/Appellees.	)	Case No. 09-5050

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
No. 4:01-CV-00516-JHP-FHM
HONORABLE JAMES H. PAYNE, DISTRICT JUDGE

UNOPPOSED MOTION OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE COUNCIL FOR ENERGY RESOURCE TRIBES, AND THE ROSEBUD SIOUX TRIBE, FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the National Congress of American Indians, the Council of Energy Resource Tribes, and the Rosebud Sioux Tribe respectfully request that the Court grant leave to file the attached *Amicus Curiae* Brief in Support of the Appellant's Combined Petition for Panel Rehearing and Rehearing *En Banc*. The Appellant, Osage Nation, has

consented to the motion and Appellees, officials of the Oklahoma Tax Commission, have indicated that they do not object to filing of this *amicus curiae* brief.

STATEMENT OF INTEREST

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including the relevance and legal interpretation of treaties, statutes and executive orders setting aside or establishing reservations as permanent homelands for Indian tribes. NCAI's members represent a cross-section of tribal governments. Great variations exist among them, including with respect to their lands, economic bases, populations and histories.

The Council of Energy Resource Tribes ("CERT") is the leading non-profit coalition representing major energy-producing Indian tribes and nations throughout the United States and Canada. CERT is comprised of 54 federally-recognized U.S. Indian tribes and four First Nation treaty tribes of Canada that have joined forces since 1975 to promote reform of the federal-Indian relationship with respect to minerals, mining, taxation, and tribal jurisdiction over environmental regulation on Indian lands.

The Rosebud Sioux Tribe is a federally recognized Indian tribe which governs the Rosebud Sioux reservation, a 922,759 acre reservation located in

South Dakota. The Tribe is headquartered in the town of Rosebud and is charged with preserving the lands and territory of the Tribe and providing for the health and safety of their 29,000 members.

REASON *AMICUS CURIAE* BRIEF IS DESIRABLE AND RELEVANT TO THE DISPOSITION OF THE CASE

The question of diminishment or disestablishment of Indian reservations is one of exceptional importance for tribal and state governments across the country, as well as for the federal government. Deviations from the careful balance of tribal, state and federal interests considered by the Congress through legislation, and in turn, interpreted by the federal courts, can create an unintended sea change in this area of the law.

The question of whether an Indian reservation has been diminished or disestablished necessarily involves issues of taxation authority (such as the one addressed in this case); but also affects criminal jurisdiction and law enforcement, regulatory authority (e.g. environmental protection, land use, and zoning); child welfare and social services; treaty-secured hunting and fishing rights; land restoration and cultural resources protection (e.g. protections under Native American Graves Protection and Repatriation Act); and access to federal programs and funding for Indian housing, education, and economic development. In fact, almost every federal service and program available to an Indian tribe stands to be negatively affected by a finding of diminishment or disestablishment of the boundaries of Indian reservations.

Amicus curiae are deeply concerned with the panel's dramatic departure from well-established Tenth Circuit and U.S. Supreme Court jurisprudence regarding statutory interpretation and the plain language rule. The panel correctly identified that the "pivotal issue in this case is whether the [Osage] Nation's reservation has been disestablished," but completely misapprehends and misapplies the analytical framework adopted by the U.S. Supreme Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), for determining whether Congress intended to diminish or disestablish an Indian reservation. Opinion at 3. The panel decision has sharply departed from plain language statutory analysis and has elevated to determinative a few scraps of legislative history and modern population demographics in a manner that undermines the statute itself. Not only is this anathema to fundamental principles of statutory construction but it conflicts with Supreme Court and Tenth Circuit precedent. *En banc* review is therefore necessary to ensure consistency and uniformity.

As referenced within the attached amicus brief, the panel's expansive view of the *Solem* test has already been cited by various parties challenging reservation status in on-going litigation within the Eighth Circuit and the Second Circuit. Without reconsideration, the panel's decision will become authority for other federal courts to ignore the specific statutory language and Congressional purpose of an allotment or surplus land act, and to simply rely on modern demographics and subsequent events to determine reservation status, further undermining uniformity.

Amicus curiae believe that the panel's misapprehension of the analytical framework adopted in *Solem* arises from the limited record in this case and a lack of genuine historical context for understanding the nature and scope of the allotment and assimilation policies adopted, and then rejected, by the United States. If rehearing or rehearing *en banc* is granted, and supplemental briefing is permitted, *amicus curiae* are uniquely situated to provide the necessary historical context for these policies and to assist the Court in sorting through a complex, and oftentimes convoluted, area of federal law.

Respectfully Submitted,

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CORPORATE DISCLOSURE STATEMENT

As required by Rule 26.1 of the Federal Rules of Appellate Procedure, the National Congress of American Indians and the Council of Energy Resource Tribes state that they are each an incorporated organization with no parent corporation and no publicly held corporation owns any of its stock.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: __/s/ *John E. Echohawk*_____
John E. Echohawk
Attorney for *Amicus Curiae*

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT'S COMBINED PETITION FOR PANEL REHEARING/REHEARING *EN BANC*, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Antivirus Corporate Edition program version 10.0.1.1000, Virus Definition File Dated: 4/8/2010, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: */s/ John E. Echohawk*
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National Congress of American Indians
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Rosebud Sioux Tribe

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S COMBINED PETITION FOR PANEL REHEARING/REHEARING EN BANC was furnished through ECF electronic service to the following on the 9th day of April, 2010:

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AMICUS CURIAE BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE COUNCIL OF ENERGY RESOURCE TRIBES, AND THE ROSEBUD SIOUX TRIBE

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April 9, 2010

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae hereby adopt and incorporate the Statement of Interest in the attached Motion of the National Congress of American Indians, the Council of Energy Resource Tribes, and the Rosebud Sioux Tribe, for Leave to File Their Amicus Brief in Support of Appellant's Combined Petition for Panel Rehearing and Rehearing *En Banc*.

REASONS FOR GRANTING THE PETITION FOR REHEARING

The Appellants' petition clearly provides a compelling basis for rehearing/rehearing *en banc* based on the Panel's decision which deals with a question of exceptional importance for Indian tribes nationwide. *Amicus curiae* fully support the arguments set forth in the petition and submit this brief to assist the Court in its understanding of an area of federal Indian law which involves a convoluted history, including, at times, conflicting policies initiated by the United States government to deal with the "Indian problem." The Court should carefully consider that any deviation from the careful balance of important tribal, state, and federal interests considered by the Congress through legislation, and in turn, interpreted by the federal courts, which could create an unintended sea change in this area of the law.

Amicus curiae strongly urge this Court to reconsider the panel's interpretation and application of the analytical framework established by the Supreme Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), for deciding questions of diminishment or disestablishment of Indian reservations. First, the Court should

reconsider the panel decision because it sharply departs from a plain language statutory analysis and instead elevates scraps of legislative history and recent demographic evidence in a manner that undermines the statute itself. The analysis is not only contrary to principles of statutory construction but conflicts with Supreme Court and Tenth Circuit precedent favoring continuing status of Indian reservations.

1. The Court should grant rehearing or rehearing *en banc* to reconsider the diminishment or disestablishment of Indian reservations a question of exceptional importance for tribal and state governments across the country, as well as for the federal government.

The question of whether an Indian reservation has been diminished or disestablished necessarily involves issues of taxation authority such as the one addressed in this case. But the question—and its resolution—also implicates nearly every other aspect of governance for Indian tribes: criminal jurisdiction and law enforcement, regulatory authority (e.g. environmental protection, land use and zoning); child welfare and social services; treaty-secured hunting and fishing rights; land restoration and cultural resources protection (e.g. protections under the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§3001(15)(A), 3002); and access to federal programs and funding for Indian housing, education, and economic development. In fact, almost every federal service and program available to an Indian tribe stands to be negatively affected by a finding of diminishment or dis*e*stablishment of the boundaries of their reservation.

This point is demonstrated by a sampling of cases involving diminishment or disestablishment. The existence or disestablishment of Indian reservations has already been raised in state and federal litigation in the context of state and federal criminal jurisdiction, *U.S. v. Celestine*, 215 U.S. 278 (1909), *Seymour v. Super. of Washington State Penitentiary*, 368 U.S. 351 (1962), *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965), *Yellowbear v. Wyo. Attorney General*, 636 F.Supp. 2d 1254 (D. Wyo., 2009), *Murphy v. Sirmons*, 497 F.Supp.2d 1257 (E.D.Okla. 2007), *State v. Romero*, 140 N.M. 299 (2006), hunting and fishing rights, *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Mattz v. Arnett*, 412 U.S. 481 (1973), *State v. Reber*, 171 P.3d 406 (Utah, 2007), child welfare and social services, *DeCoteau v. District County Court*, 420 U.S. 425 (1975),cultural and historic preservation, *Oglala Sioux Tribe v. United States Army Corps of Engineers*, 570 F.3d 327 (D.D.C. 2009), environmental regulation, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), *HRI v. EPA*, 198 F.3d 1224 (10th Cir. 2000), and the ability of Indian tribes to raise government revenue through gaming, *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009) or through tribal taxation, *Pittsburg & Midway Coal Mining Co., v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990). But other federal government programs and funding are implicated as well. For example, human remains ownership provisions of the Native American Graves Protection and Repatriation Act rely on reservation status. 25 U.S.C. §§3001(15)(A), 3002. In another example, Bureau of Indian Affairs loan guarantees for Indian small businesses within reservations would be threatened by

a change in the law of reservation disestablishment and diminishment. 25 U.S.C. §§1481-1499, 25 CFR 103.4(a).

By granting rehearing, the Court creates an opportunity for Indian tribes, as well as for the United States, to provide a more robust discussion of the possible unforeseen implications and unintended consequences of the Panel's decision only briefly summarized here.

2. The Court should grant rehearing or rehearing *en banc* to reconsider and reverse the panel decision which ignores the plain language of the Osage Allotment Act and threatens uniformity with Supreme Court and Tenth Circuit precedent.

Amicus curiae are deeply concerned with the panel's dramatic departure from well-established Tenth Circuit and U.S. Supreme Court jurisprudence regarding statutory interpretation and the plain language rule. The panel correctly identified that the "pivotal issue in this case is whether the [Osage] Nation's reservation has been disestablished," but completely misapprehends and misapplies the analytical framework adopted by the U.S. Supreme Court in *Solem v. Bartlett*, 465 U.S. 463 (1984). Opinion at 3. The Panel's decision has already being cited in at least two other Circuits as authority for going beyond the plain language of a statute, and to more heavily weigh legislative history and demographic evidence to discern Congressional intent.[1]

[1] A copy of the Rule 28(j) letters with reference to Petition for Rehearing and Petition for Rehearing En Banc filed in *Yankton Sioux Tribe v. Podhradsky*, Nos. 08-1 441 and 08-1 488, U.S. Court of Appeals for the Tenth Circuit, and *Oneida Indian Nation v. Madison County and Oneida County*, Nos. 05-6408, 06-5168, and 06-5515, U.S. Court of Appeals for the Second Circuit, are appended to this brief.

a. The panel decision's application of the three-tier *Solem* test to the Osage Allotment Act conflicts with Supreme Court and Tenth Circuit plain language rules of statutory construction.

Amicus curiae are in full accord with the appellant that the Panel decision is "unprecedented" when neither the U.S. Supreme Court, nor the Tenth Circuit, have ever held that an Indian reservation has been "disestablished or diminished without at least some affirmative expression of congressional intent to diminish in the language of the statute itself." Petition at 2, 4-7. Initially, the Panel correctly identifies and discusses the applicable Supreme Court precedent:

> It is well established that Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred. *See e.g. Solem v. Bartlett*, 465 U.S. 463, 470, 472 (1984). Congress's intent to terminate must be clearly expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and there is a presumption in favor of the continued existence of a reservation, *Solem*, 465 U.S. at 472.

Opinion at 7.

But then, as the Panel sets forward the three-tier *Solem* test,[2] it creates a mistaken presumption for the application of the test. The Panel relies on a statement in *Solem* that "the effect of any given surplus land act depends on the

[2] The first tier of evidence is the statutory language ("The most probative evidence of congressional intent is the statutory language used to open the Indian lands.") *Solem* at 470. The second tier of evidence of congressional intent is events surrounding the passage of a surplus land acts, including negotiations with tribes on the topic, legislative reports, and widely-held understandings at the time. *Solem* at 471. The third tier of evidence used only to lesser extent, are events that occurred after the passage of a surplus land act, including later acts by Congress, treatment by the Bureau of Indian Affairs, and as one final additional clue subsequent demographic history. *Solem* at 471-72. The Court is Solem further explained that the third tier will not be determinative where the act and its legislative history fail to provide substantial and compelling evidence of an intent to diminish. *Solem* at 472.

language of the act and the circumstances underlying its passage," 465 U.S. at 469, to develop a new proposition that "the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage." Opinion at 8 (emphasis added).[3] This mistaken presumption—that in interpreting statutes passed by Congress allotting Indian lands courts must consider both the language and the legislative history—runs afoul of the plain language rule for statutory construction. *See Caminetti v. United States,* 242 U.S. 470 (1917) ("[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms"); *BedRoc Ltd. v. United States,* 541 U.S. 176. 183 (2004) ["The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."(citations omitted)]

In *Carcieri v. Salazar,* 555 U.S. ___, 129 S.Ct. 1058 (2009), the Supreme Court made it clear that the plain language rule applies to statutes dealing with Indian tribes and their lands. In *Carcieri,* the Supreme Court was confronted with interpreting provisions of the Indian Reorganization Act, 25 U.S.C. §§ 461-494a,

[3] In footnote 10 of the *Solem* opinion, the Supreme Court fully explains the extremes of certain language in surplus land acts and its effect. 465 U.S. at 469, n.10. The Supreme Court attempts to strike an appropriate balance for courts to consider when interpreting such language when it is present in the act. Nowhere in *Solem* does the Supreme Court endorse the view that absent such express statutory language of termination or diminishment courts are required to consider the surrounding circumstances.

for acquiring and restoring lands to Indian tribes lost through the allotment process. The Supreme Court specifically held that the federal courts are bound by the plain language rule and are required to "first determine whether the statutory text is plain and unambiguous," and if so, courts are to apply the statute according to its terms. 129 S.Ct. at 1063-64; *see also Russell v. United States*, 551 F3d. 1174, 1180 (10th Cir. 2008) ("[to ascertain] congressional intent, we begin by examining the statute's plain language, and if the statutory language is clear, our analysis ordinarily ends"). Where statutory language speaks for itself, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Carcieri*, 129 S.Ct. at 1066-67. *See generally*, Antonin Scalia, A Matter of Interpretation, pp. 29-37 (Princeton University Press, 1997).

Here, the Panel was absolutely clear that "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language." Opinion at 11. Nor can anything in the statute be construed to imply that the reservation be disestablished. In fact, the implication is that Congress expected that the Osage reservation would continue and possibly be incorporated within a future state. *See* Osage Allotment Act, 34 Stat. 539, Section 6 (June 28, 1906) ("the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State <u>in which said reservation may be hereinafter incorporated</u>….")(emphasis added).

The Osage Nation wisely negotiated for an allotment scheme which would not designate any portion of their reservation for opening to non-Indian settlement and therefore maintained the continued status of their reservation. "[T]he remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands." Osage Allotment Act, 34 Stat. 539, Section 2 (June 28, 1906).

The expansion of all three factors of the *Solem* test to determine Congressional intent within the unambiguous Osage Allotment Act disrupts the settled expectations of Osage leaders who negotiated with the federal government for a reservation completely allotted to tribal members and unopened to non-Indians. The fact that intervening events such as inheritances or sales have allowed a particular parcel to be owned by a non-Indian does not change the reservation boundaries secured by the Osage Nation. Only Congress can diminish a reservation. *U.S. v. Celestine*, 215 U.S. 278, 285 (1909), *Seymour v. Super. of Washington State Penitentiary*, 368 U.S. 351, 359 (1962), *Mattz v. Arnett*, 412 U.S. 481, 505 (1973), *Solem v. Bartlett*, 465 U.S. 470 (1984). And there is nothing on the face of the Act that supports that Congress intended to do so here.

The plain and unambiguous text allows for no finding of disestablishment but rather acknowledges the Osage reservation would and did survive incorporation into a future state. The plain language must be applied. No part of the text raises any ambiguity about the continued status of the Osage reservation.

Based on Supreme Court and Tenth Circuit precedent, this should have been the end of the inquiry.

b. The panel decision's application of the three-tiered *Solem* test also directly conflicts with Supreme Court and Tenth Circuit law of reservation diminishment and disestablishment which carefully considers the historical context of allotment and surplus land acts.

The Panel's failure to properly distinguish between an allotment act devoid of language of opening and cession and the surplus land acts with such language, the latter having been the subject of judicial analysis under the three part test set forth in *Solem v. Bartlett*, perhaps contributed to the formulation of the mistaken presumption. As more fully discussed by Appellants, each and every finding of diminishment or disestablishment by the Supreme Court included a finding of "plain" or "express" language of such Congressional intent within the statute. Petition at 4-5.

As noted by the Supreme Court in *Hagen v. Utah:* "It is settled law that some surplus land Acts diminished reservations, and other surplus land Acts did not. The effect of any given surplus land Act depends on the language of the Act…." *Hagen v. Utah*, 510 U.S. 399, 410 (1994) (emphasis added). To better understand surplus land acts—and their relationship to allotment acts under the now extinct federal policies of allotment and assimilation—requires consideration of the overall historical and legal context of this period. The accomplishment of such a task is beyond the space limitations of this brief. However, an abbreviated discussion is warranted.

"Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d. 1010, 1015-16 (8th Cir. 1999) *citing Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972). It is generally known that allotment as a federal policy to deal with the "Indian problem" was discussed and utilized in advance of the adoption of the General Allotment Act of 1887 ('GAA"), 24 Stat. 388 (Feb. 8, 1887). *See* Cohen's Handbook of Federal Indian Law, 2005 Edition, Nell Jessup Newton ed., at 1041. Under pressure from westward-bound homesteaders, railroads, mining interests, etc., Congress enacted the GAA to expedite the allotment process and to apply it to Indian tribes and their reservations nationwide, with limited exceptions (including the Osage Nation). The principle provisions of the General Allotment Act provided for the allotment of commonly held tribal lands to individual Indians, 160 acres to each family head or 80 acres to each single person over eighteen years of age. The United States would hold each allotment in trust for a period of twenty-five years during which time the lands could not be alienated or encumbered.

Initially, the Executive Branch was charged with the responsibility of allotment under the provisions of the GAA. But Congress became impatient and began to adopt special legislation aimed at individual reservations. *Report of the Board of Indian Commissioners*, 1889, p. 153. Thus, the actual allotment of land on some reservations was primarily accomplished through specific legislation, with each allotment or surplus land act employing its own statutory language, the

product of a unique set of tribal lobbying and legislative compromise. *See* Cohen's Handbook at 1041.

By 1934 when allotment was officially ended by the Indian Reorganization Act, 118 Indian reservations had been allotted, 44 of which had been opened to homestead entry by non-Indians under the public land laws. AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 309 (Comm. Print 1977). Additional research would help provide a more complete picture of the intended effect of these various laws allotting Indian lands and, in certain instances, selling surplus lands to non-Indians or returning the surplus lands to the public domain. For the immediate purpose of this brief, suffice it to say that over 86 million acres of tribal lands were separated from Indian ownership between 1887 and 1934.

On November 28,1934, pursuant to Executive Order, the National Resources Board submitted its 11 Part report of National Planning and Public Works in relation to Natural Resources and Including Land Use and Water Resources. It included the "Report on Land Planning, Part X, Indian Land Tenure, Economic Status and Population Trends." Within the Report, the Board describes the principal methods for dispossessing tribes of their communal lands:

> *"Ceded" Surpluses After Allotment.*— A practice consistently pursued was to separate all land from the reservation which was left over after a tribe was allotted in severalty, usually by remunerating the members thereof at $1.25 an acre. . .. At least 38,000,000 acres of Indian land were disposed of in this way.

> *Surplus Lands Opened to Settlement.*— A similar practice was to throw open surpluses left over after allotment, to settlement by whites, and remunerate the tribes as the lands were entered by homesteaders. At least 22,000,000 acres of Indian land have thus been lost.
>
> *Alienation Through Fee Patents*. – The grant of fee patents at the end of the trust period and the removal of sales restrictions account for the loss of about 23,000,000 acres. Indians who retained their land after coming into full control over it were rare exceptions. The granting of fee patents has been practically synonymous with outright alienation.

National Resources Board Report, Part X at 6.

A fuller discussion of these various methods and the finer distinctions between the various types of legislation allotting Indian lands would aid the Court in maintaining the balance of interests sought by the Congress, and by the Supreme Court in *Solem.* The important point here, overlooked by the panel, is that allotment alone is completely consistent with continued reservation status. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973).

c. The panel decision's elevation to a determinative factor the third tier of the *Solem* test—subsequent demographic evidence—conflicts with Supreme Court and Tenth Circuit precedent.

Finally, *amicus curiae* are well aware of the recent trend in the federal courts to weigh current demographics more heavily in their pursuit of discerning Congressional intent in relation to Indian tribes and their reservations. *See* Charlene Koski, *The Legacy of Solem v. Bartlett: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 Wash.L.Rev. 723 (Nov. 2009). The Panel's heavy reliance on modern

demographic evidence to discern Congressional intent is wholly inappropriate in this case.

As the Supreme Court remarked in *Solem*: "The most probative evidence of congressional intent is the statutory language used to open Indian lands." 465 U.S. at 470. Inferences about surplus land acts and allotment acts drawn from subsequent congressional enactments must obviously be "of secondary importance to our decision [and moreover], as independent evidence of a congressional intention to diminish, such evidence is suspect." *Id*. at 475 n.18. Moreover, "When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* at 472.

The law in this Circuit is even more explicit that demographic evidence should only be used to support or confirm what the plain language of a surplus land act indicates. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393, 1396 (10th Cir. 1990)("[s]ubsequent events and demographic history can support or confirm other evidence but cannot stand on their own"]. To the degree that the Supreme Court found demographic evidence as "one additional clue," or perhaps as a "necessary expedient," the Court cautioned that resort to demographic evidence is "an unorthodox and potentially unreliable method of statutory interpretation." *Id.* at 471-72 and note 13. The panel's reliance on the lowest and

most unreliable tier of evidence in the *Solem* test a determinative factor in the face of a statute with no express language of cession or opening is a dramatic departure from settled law and threatens to encourage states to bring litigation to undermine the status of Indian reservations nationwide.

CONCLUSION

Based on the foregoing, the Court should grant rehearing and rehearing *en banc* to reconsider and reverse the panel decision to restore the plain language meaning of the Osage Allotment Act which does not disestablish the Osage reservation. Without reconsideration, the panel's decision will become authority for other federal courts to ignore the specific language and Congressional purpose of an allotment or surplus land act, and to simply rely on modern demographics and subsequent events to determine reservation status.

Respectfully Submitted,

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing MOTION FOR LEAVE TO FILE AMICUS BRIEF & PROPOSED BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Antivirus Corporate Edition program version 10.0.1.1000, Virus Definition File Dated: 4/8/2010, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: */s/ John E. Echohawk*
John E. Echohawk
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AMICUS BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE COUNCIL OF ENERGY RESOURCE TRIBES, AND THE ROSEBUD SIOUX TRIBE was furnished through ECF electronic service to the following on the 9th day of April, 2010:

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Appendix A

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March 9, 2010

Michael E. Gans, Clerk
United States Court of Appeals for the Eighth Circuit
500 Federal Building
316 N. Robert St., No. 525
St. Paul, MN 55101

Re: *Rule 28(j) Letter with reference to State Appellants' Petition for Rehearing and Petition for Rehearing En Banc, Yankton Sioux Tribe v. Podhradsky, Nos. 08-1441 and 08-1488*

Dear Clerk Gans:

The purpose of this letter is to bring to the Court's attention the March 5, 2010, decision of the United States Court of Appeals for the Tenth Circuit in *Osage Nation v. Irby*, No. 09-5050 (10th Cir., March 5, 2010) (Exhibit A).

Osage illustrates the view of the Tenth Circuit that the analytical approach of the State's Petition as to the disestablishment issue is correct and that, following that approach, disestablishment should be found. *Osage* further illustrates lack of support for the Panel opinion's view that former allotted lands in a comparable area constitute discrete "reservation" areas if they reached fee status after 1948.

Disestablishment

Osage at 8-9 finds that "[s]tatutory language is the most probative evidence of intent to disestablish" a reservation, and, of that language, the "operative" language is the most important. "[E]xpress termination language" includes cession language, *Id.* at 9-10, just as was used in the case before this Court. *See* Petition, at 5, 13-14. *Osage* at 10 further finds that "Sum-certain payments indicate an intent to terminate a reservation." This is a sum-certain case. Petition at 5.

Osage at 13 indicates that the tenor of the negotiations may be important. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 353 (1998) found, in the negotiations before this Court, a tribal concurrence that that "cession of the surplus lands dissolved tribal governance of the 1858 reservation." *See* State Appellants' Brief at 71-72.

Osage at 17 found that a "state's unquestioned exercise of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment." That pattern existed in the former Yankton reservation area until interrupted by this litigation. Petition at 13, Map E.

Osage found disestablishment *without* "cession and sum certain" language. The case here, *with* such language, is far stronger.

Fee Lands as Reservation

Osage at 19 records a decline in land in tribal ownership through 2008 but implicitly rejects any reliance on a theory that surrender of allotted status after 1948 makes a difference; it thus supports State's Petition at 7-10. *See also, South Dakota*, 522 U.S. at 357.

Respectfully submitted,

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

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cc via U.S. Mail: Kenneth W. Cotton
Eric John Antoine

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the State's Rule 28(j) Letter with reference to State Appellants' Petition for Rehearing and Petition for Rehearing En Banc with attachments was served through the Court's electronic mail system on March 9, 2010, on the following persons:

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Appendix B

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March 12, 2010

VIA E-MAIL AND FIRST-CLASS MAIL

United States Court of Appeals, Second Circuit
Office of the Clerk
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civilcases@ca2.uscourts.gov

Attn: Erin Murphy, Civil Team

RE: Oneida Indian Nation v. Madison County and Oneida County
Docket No. 05-6408-cv(L), 06-5168-cv(CON), 06-5515-cv(CON)
Argument Date: November 6, 2007 (Cabranes, Sack, Hall)

Dear Ms. Murphy:

We write on behalf of Madison and Oneida Counties pursuant to Rule 28(j). We enclose a copy of the Tenth Circuit's decision in *Osage Nation v. Constance Irby, et al.*, Case No. 09-5050, filed March 5, 2010 ("Decision"). The Decision centers on the "pivotal issue" of "whether the Osage Nation's reservation has been disestablished," and this relates to the present appeal on the pending question whether the Oneida reservation in New York has been disestablished.

The Decision first considers whether the statutory language of the 1906 Osage Allotment Act disestablished the Osage reservation and concludes that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." (Decision at 11.) The Decision then turns to the circumstances surrounding passage of the Act (Decision at 11-16) and the post-enactment history (Decision at 17-19) and ultimately "conclude[s] that the Osage reservation has been disestablished by Congress." (Decision at 20.)

In this appeal, Madison County and Oneida County have argued that the historical record shows a reservation was not created by the Treaty of Canandaigua and, even if it was, the Treaty of Buffalo Creek disestablished any such reservation. (Brief and Special Appendix for Defendants-Counterclaimants-Appellants dated January 17, 2007, at 93 *et seq.*) The Tenth Circuit's Decision supports the Counties' argument that even if the operative language of the

Treaty of Buffalo Creek does not unambiguously suggest diminishment or disestablishment of the Oneida reservation, the Court may find disestablishment or diminishment in the circumstances surrounding the enactment of the Treaty and the post-enactment history.

On March 9, 2010, the Osage Nation filed, and the Tenth Circuit granted, a motion to extend the time to file a petition for rehearing until April 2, 2010.

We respectfully request that the Decision and this letter be made available to the panel.

Respectfully submitted,

David M. Schraver

David M. Schraver

DMS:smf
Enc.

cc Via first-class mail to:
Michael R. Smith, Esq. (Counsel for the Oneida Indian Nation)
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Kathryn E. Kovacs, Esq. (Counsel for the United States)
Peter D. Carmen, Esq. (Counsel for the Oneida Indian Nation)

FILED
United States Court of Appeals
Tenth Circuit

March 5, 2010

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

OSAGE NATION,

Plaintiff - Appellant,

v.

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.

OKLAHOMA FARM BUREAU; OKLAHOMA CATTLEMEN'S ASSOCIATION; OSAGE COUNTY FARM BUREAU; OSAGE COUNTY CATTLEMEN'S ASSOCIATION; OKLAHOMA ASSOCIATION OF ELECTRIC COOPERATIVES; OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION; OKLAHOMA MUNICIPAL LEAGUE; OKLAHOMA RURAL WATER ASSOCIATION; OKLAHOMA WILDLIFE MANAGEMENT ASSOCIATION; ENVIRONMENTAL FEDERATION OF OKLAHOMA; PUBLIC SERVICE COMPANY OF OKLAHOMA; OKLAHOMA STATE CHAMBER OF

No. 09-5050

COMMERCE AND INDUSTRY,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:01-CV-00516-JHP-FHM)

Thomas P. Schlosser of Morisset, Schlosser & Jozwiak, Seattle, Washington (and Gary S. Pitchlynn, O. Joseph Williams and Stephanie Moser Goins of Pitchlynn & Williams, P.L.L.C., Norman Oklahoma, with him on the briefs), for Plaintiff - Appellant.

Lynn H. Slade, (William C. Scott and Joan D. Marsan of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico; Kathryn L. Bass, Chief Deputy General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, on the brief), for Defendants - Appellees.

Steven W. Bugg and Jeff L. Todd of McAfee & Taft A Professional Corporation, Oklahoma City, Oklahoma, for Amici Curiae.

Before **TACHA**, **EBEL**, and **KELLY**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant the Osage Nation ("the Nation") appeals from the grant of summary judgment for Defendants-Appellees. The Nation sought (1) a declaratory judgment that the Nation's reservation, which comprises all of Osage County, Oklahoma, has not been disestablished and remains Indian country within the meaning of 18 U.S.C. § 1151; (2) a declaratory judgment that Nation members

who are employed and reside within the reservation's geographical boundaries are exempt from paying state income tax; and (3) injunctive relief prohibiting Defendants from collecting income tax from such tribal members. 1 Aplt. App. at 24.

The pivotal issue in this case is whether the Nation's reservation has been disestablished, not Oklahoma's tax policies. The district court held that the Osage reservation had been disestablished; that tribal members who work and live on non-trust/non-restricted land in Osage County are not exempt from state income tax; and that "[t]he Osage have not sought to reestablish their claimed reservation or to challenge [Oklahoma's] taxation until recently," and Oklahoma's longstanding reliance counsels against now establishing Osage County as a reservation. 2 Aplt. App. at 389-407. The district court also denied the Nation's Rule 59 motion. 2 Aplt. App. at 416. On appeal, the Nation argues that its reservation has never been disestablished and is coterminous with Osage County; that tribal members who work and live in Osage County are exempt from state income tax; and that the district court should not have applied equitable considerations to this case. Our jurisdiction arises under 28 U.S.C. § 1291, and because we agree that the Osage reservation has been disestablished, we affirm.

Background

In 1872, Congress established a reservation for the Osage Nation in present

day Oklahoma. See Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in the Indian Territory). In 1887, due to increased demand for land by white settlers and a desire to assimilate tribal nations, Congress passed the Indian General Allotment Act. See Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381). The Osage reservation was expressly exempted from this Act. 25 U.S.C. § 339. In 1907, Oklahoma became a state, and the Osage reservation was incorporated into the new state as Osage County as provided for in the Oklahoma Enabling Act. See Act of June 16, 1906, ch. 3335, 34 Stat. 267, §§ 2, 21; see also Okla. Const., art. XVII, § 8 ("The Osage Indian Reservation with its present boundaries is hereby constituted one county to be know as Osage County."). Osage County, the largest county in Oklahoma, covers about 2,250 square miles (about 3% of Oklahoma's total land area).

Contemporaneous to passing the Oklahoma Enabling Act, Congress enacted the Osage Allotment Act. See Act of June 28, 1906, ch. 3572, 34 Stat. 539. The 1906 Osage Allotment Act severed the mineral estate from the surface estate of the reservation and placed it in trust for the tribe. Id. at §§ 2-3. The Act included several provisions regarding tribal government and tribal membership and granted the Osage tribal council general tribal authority. See Logan v. Andrus, 640 F.2d 269, 270 (10th Cir. 1981) (noting that nothing in the Osage Allotment Act

"limited the authority of the officers therein named to mineral administration or any other specific function"). The Act also allotted most of the Osage surface land in severalty to tribal members. Osage Allotment Act at § 2.

In 2004, Congress passed a statute clarifying the 1906 Act and authorizing the Osage Nation to determine its membership and government structure. Pub. L. No. 108-431, 118 Stat. 2609 (2004) (An Act to Reaffirm the Inherent Sovereign Rights of the Osage Tribe to Determine Its Membership and Form of Government). This Act refers to the Osage as "based in Pawhuska, Oklahoma," id. at § 1, but does not specifically refer to an Osage reservation in the text of the statute, and does not address the reservation status of Osage land.

In 1999, a tribal member who was employed by the Tribe on trust land and lived within the boundaries of the Osage County on fee land protested the State's assessment of income tax on her. Osage Nation v. Oklahoma ex rel. Okla. Tax Comm'n, 260 F. App'x 13, 15 (10th Cir. 2007). The Oklahoma Tax Commission determined that she did not live in Indian country within the meaning of 18 U.S.C. § 1151, and that her income was taxable. Id. After the Commission's decision, the Osage Nation filed the instant suit seeking declaratory and injunctive relief. Id. at 15-16. Specifically, the Nation seeks a declaratory judgment: "(1) that the Nation's reservation boundaries have not been extinguished, disestablished, terminated, or diminished and is and remains the Indian country of the Nation; and (2) that the Nation's members who both earn

income and reside within the geographical boundaries of the Nation's reservation are not subject to or required to pay taxes to the State . . . on [] income." 1 Aplt. App. at 24. The Nation further seeks injunctive relief prohibiting "Defendants . . . from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who both earn income and reside within the geographical boundaries of the Nation's reservation." 1 Aplt. App. at 24.

The state of Oklahoma and the Oklahoma Tax Commission filed a motion to dismiss, arguing that the Nation's suit was barred by the Eleventh Amendment. Osage Nation, 260 F. App'x at 16. The Nation amended the complaint to include the individual members of the Tax Commission as defendants. Id. All of the defendants again moved to dismiss based on Eleventh Amendment immunity, and the district court denied the motion. Id. On appeal, we reversed the district court's decision to allow the suit to proceed against the State of Oklahoma and the Oklahoma Tax Commission. We determined that the suit could proceed against the individual members of the Tax Commission under the Ex parte Young exception to Eleventh Amendment immunity. Id. at 22.

On remand, the remaining defendants moved to dismiss, and the district court converted their motion to one for summary judgment. 1 Aplt. App. at 204. The district court determined that "the Osage reservation ceased to exist more than a century ago," 2 Aplt. App. at 389, and that tribal members that work and live on private fee lands in Osage County are not exempt from state income tax, 2

Aplt. App. at 397-02. Applying City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214 (2005), the district court also held that federal equity practice precludes the Nation from advancing its claims after Oklahoma has governed Osage County for over a hundred years. 2 Aplt. App. 405-07.

Discussion

It is well established that Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred. See, e.g., Solem v. Bartlett, 465 U.S. 463, 470, 472 (1984). Congress's intent to terminate must be clearly expressed, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998), and there is a presumption in favor of the continued existence of a reservation, Solem, 465 U.S. at 472. Courts may not "'ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims.'" Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1393 (10th Cir. 1990) (quoting Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985)).

We have noted that "the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment]." Yazzie, 909 F.2d at 1393 (listing cases). While determining congressional intent is a matter of statutory construction, which typically involves a de novo review, to the extent that statutory

construction turns on an historical record, it involves a mixed question of law and fact. Id. "Where a mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." Id. at 1393-94 (internal quotation marks and citation omitted).

We apply the three-part test summarized in Solem to determine whether a reservation has been diminished or disestablished. Congress's intent at the time of the relevant statute governs our analysis. The Supreme Court has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation. Aplee. Br. at 18. In ascertaining Congress's intent, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage. Solem, 465 U.S. at 469. The "operative" language of the statute carries more weight than incidental language embedded in secondary provisions of the statute. Id. at 472-76. The Court will infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of [the] act "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." Id. at 471. In addition to (1) explicit statutory language and (2) surrounding circumstances, the Court looks to (3) "subsequent events, including congressional action and the demographic history of the opened lands, for clues to whether Congress expected the reservation boundaries to be

diminished." Yazzie, 909 F.2d at 1395. Such latter events will not govern if "an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands . . . ." Solem, 465 U.S. at 472. Thus, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." Yazzie, 909 F.2d at 1396.

With these standards in mind, we turn to whether the 1906 Osage Allotment Act disestablished the Osage reservation.

A. Statutory Language

Statutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." Solem, 465 U.S. at 470. Examples of express termination language include: "'the Smith River reservation is hereby discontinued,'" Mattz v. Arnett, 412 U.S. 481, 505 n.22 (1973) (discussing 15 Stat. 221 (1868)); "'the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain,'" id. (discussing 27 Stat. 63 (1892)); "'the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished,'" Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 618

(1977) (discussing 33 Stat. 218 (1904)); "'the . . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest,'" DeCoteau v. District County Court, 420 U.S. 445, 455-56 (1975) (discussing Agreement of 1889, ratified by 26 Stat. 1035 (1891)). An act's language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation—e.g., making reservation lands "'subject to settlement, entry, and purchase.'" Mattz, 412 U.S. at 495, 497; Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356 (1962). Likewise, language authorizing the Secretary of the Interior to "sell and dispose" of reservation land is insufficient to terminate a reservation. Solem, 465 U.S. at 472-73.

The manner in which a statute compensates a tribe for opened land is also instructive. Some statutes provide that the tribe will be paid a sum-certain amount as compensation for all of the unallotted land. Others provide payment to the tribe as the lands are sold. Sum-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate. Compare DeCoteau, 420 U.S. 425 (holding that the reservation was terminated where there was express language regarding termination, a sum-certain payment, and tribal consent to the agreement) with Mattz, 412 U.S. 481 (holding that the reservation was not terminated where there was no express language regarding termination nor a sum-certain payment).

Explicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." Solem, 465 U.S. at 470-71.

The Solem court found additional factors weighing in favor of continued reservation status: (a) authorization for the Secretary of the Interior to set aside lands for tribal purposes; (b) permission for tribal members to obtain individual allotments before the land was officially opened to non-Indian settlers; and (c) reservation of the mineral resources for the tribe as a whole. 465 U.S. at 474. All three of these factors are present in the Osage Allotment Act. Unlike other allotment acts, the Act did not directly open the reservation to non-Indian settlement. With the exception of certain parcels of trust land reserved for the Osage Nation, the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement. As the Act did not open any land for settlement by non-Osage, there is no sum-certain or any other payment arrangement in the Act. And neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language. Thus, the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.

B. Circumstances Surrounding Passage of the Act

If the statute is ambiguous, we turn to the circumstances surrounding the

passage of the act, in particular the manner in which the transaction was negotiated and its legislative history, for evidence of a contemporaneous understanding that the affected reservation would be diminished or disestablished as a result of the proposed legislation. Solem, 465 U.S. at 471. The Court sometimes considers whether there was tribal consent. Compare DeCoteau, 420 U.S. at 448 (the reservation was found to have been terminated, and the Court found importance in the fact that the tribe consented to the agreement) with Rosebud Sioux, 430 U.S. at 587 (the reservation was disestablished although there was no tribal consent).

The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. See Francis Paul Prucha, The Great Father 737-57 (1984) (Aplee. Supp. Add. 104-24). In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations. See H.R. Rep. No. 59-496, at 9, 11 (1906) (Aplee. Supp. Add. at 28, 30). While the Osage were excepted from the Dawes Commission process, the Osage felt pressure having observed the Commission's activities with respect to other tribes, and "[f]or

several years, the Osage . . .ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe." S. Rep. No. 59-4210, at 1 (1906) (Aplee. Supp. Add. at 42). In 1905, the Osage approached Congress to begin negotiating a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." 1 Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before the H. Subcomm. of the Comm. on Indian Affairs, 58th Cong. 8 (1905) ("Division Hearings") (Aplt. Add. at 9). The Osage were "very anxious to bring about the allotment at the earliest possible time." 40 Cong. Rec. 3581 (1906) (Statement of Sen. Dillingham) (Aplee. Supp. Add. at 51). Congress and the Osage recognized that allotment may result in loss of much of the tribal land. See, e.g., W. David Baird, The Osage People 68 (1972) (2 Aplt. App. at 237) ("James Bigheart and Black Dog, for example, noted that, like Indians of other tribes, the Osage may very well lose their allotments after dissolution of the reserve."). The Osage also recognized that the allotment process would terminate reservation status. 1 Division Hearings, at 6 (Aplt. Add. at 12) (statement of Black Dog, Osage Representative) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations.").

The Osage themselves presented an allotment act to Congress in February 1906, and by June of that year, Congress passed the Osage Allotment Act. Baird at 70 (2 Aplt. App. at 238). A primary concern during the negotiations was a desire to ensure that some tribal members were not unfairly enriched at the expense of other tribal members. These concerns were addressed by allotting land in several rounds, severing the mineral estate and placing it in trust for the tribe, and providing for a form of tribal government. See, e.g., 1 Division Hearings, at 11-14, 55-56 (Aplt. Add. at 17-20, 54-55); Osage Allotment Act at §§ 2, 3, & 9. The Osage tried to prevent their land from becoming alienable through certificates of competency, but Congress rejected this approach. See 2 Division Hearings, at 4 (Aplt. Add. at 59). They also attempted to prevent a large portion of their lands, the surplus lands, from being taxed; this was also rejected by Congress. S. Rep. No. 59-4210, at 8 (Aplee. Supp. Add. at 49).

The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act, and uncontested facts in the record provide further evidence of a contemporaneous understanding that the reservation had been dissolved. Historian Lawrence Kelly concludes that "[t]reatises and articles in professional journals that have considered the history of the former Osage Reservation have acknowledged that, after the Osage Allotment Act and Oklahoma's admission to the Union in accordance with the Oklahoma Enabling

Act, the Osage Reservation no longer existed and that area became Osage County, a subdivision of the State of Oklahoma." Kelly Aff., ¶ 10 (2 Aplt. App. 244). Historian Francis Prucha has thoroughly discussed the United States' persistent efforts to end tribal control in the Indian Territory, which eventually became part of Oklahoma. Prucha at 738-57 (Aplee. Supp. Add. at 105-24). He notes, "The Indians of Oklahoma were an anomaly in Indian-white relations. . . . There are no Indian reservations in Oklahoma . . . . [T]he reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." Prucha at 757 (Aplee. Supp. Add. at 124). Another historian, Berlin Chapman, states that while Congress had established many reservations before Oklahoma's statehood, "[t]he last of these reservations to be dissolved by allotments was that owned and occupied by the Osage[], embracing about 1,470,059 acres, now comprising Osage county." Berlin B. Chapman, Dissolution of the Osage Reservation, 20 Chrons. Okla. 244, 244 (1942) (1 Aplt. App. at 98). Historian W. David Baird concurs, stating "[w]ith their land allotted and their reserve an Oklahoma county. . . [the Osage] no longer existed as an independent people." Kelly Aff., ¶ 10 (2 Aplt. App. at 244) (quoting Baird at 72).

Instead of presenting evidence regarding widely held understanding of the Osage Allotment Act at the time it was passed, the Osage Nation primarily presents evidence of continued existence of their reservation contemporaneous to this litigation including: (1) the legislative history of the 2004 Osage Act, which

refers to the Osage as a "federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma," H.R. Rep. No. 108-502, at 1 (2004); (2) the Assistant Secretary for Indian Affairs' certification of an Osage Tribe Liquor Control Ordinance in 2005, Aplt. Add. at 95-100; (3) a 2005 National Indian Gaming Commission opinion letter concluding that certain parcels of fee land in Osage County are part of the tribe's reservation, 1 Aplt. App. at 166-72; (4) a 1997 gubernatorial proclamation declaring October 25, 1997 as "Osage Day," 1 Aplt. App. at 174; (5) the 2005 compact between the Osage Nation and the state of Oklahoma authorizing the Nation to conduct gaming on its "Indian lands" which has resulted in the operation of casinos on fee lands in Osage County, Aplt. Add. at 101-03; (6) the Osage Nation's compacts with the state regarding sharing of revenue from gaming activity and cigarette sales, Atkinson Aff. (2 Aplt. App. at 411-12); Mashunkashey Aff. (2 Aplt. App. at 414-15); (7) a "reservation" sign on a state highway, 1 Aplt. App. at 141; and (8) a map by the Dept. of the Interior and the U.S. Geological Survey depicting the boundaries of an Osage reservation as Osage County, 1 Aplt. App. at 182. Such evidence is too far removed temporally from the 1906 Act to shed much light on 1906 Congressional intent. See, e.g., Hagen v. Utah, 510 U.S. 399, 420 (1994) (subsequent legislative record "is less illuminating than the contemporaneous evidence" because it does not contain "'deliberate expressions of informal conclusions about congressional intent [at the time of enactment]"').

C. Post-enactment History

The final factor used to determine Congressional intent to disestablish is subsequent events. Actions by Congress, the Bureau of Indian Affairs (BIA), and local authorities with regard to the unallotted open lands, "particularly in the years immediately following the opening, ha[ve] some evidentiary value." Solem, 465 U.S. at 471. Express recognition of the continued existence of specific reservations by Congress in subsequent statutes, of course, supports the continued existence of a reservation. See e.g., Seymour, 368 U.S. at 356 (citing statues enacted 50 years after allotment); Mattz, 412 U.S. at 505. In contrast, a state's unquestioned exertion of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment. Rosebud Sioux, 430 U.S. at 604-05 ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use . . . demonstrates the parties' understanding of the meaning of the Act."). The Court has also explicitly focused on population demographics, noting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." Solem, 465 U.S. at 471 (acknowledging that this was an "unorthodox and potentially unreliable method of statutory interpretation," 465 U.S. at 472 n.13, but admitting a desire that the result be in some general conformance with the modern day balance of the area

demographics, id. at 472 n.12).

The uncontested facts support disestablishment under this prong of the Solem test. After enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a "former reservation" under state jurisdiction. For example, an annual report from the Superintendent to the Commissioner of Indian Affairs notes that his office "has experienced no difficulty maintaining order . . . . This duty, of course, falls to the County and State Officials." 2 Aplt. App. at 259 (1916 report); see also 2 Aplt. App. at 263 (1919 report) (same); 2 Aplt. App. at 268 (1920 report) ("Osage County, formerly Osage Indian Reservation, is organized under the constitution of the State of Oklahoma and the duty of maintaining order and enforcing the law is primarily in the hands of the County officials."); 2 Aplt. App. at 272 (1921 report) (same); 2 Aplt. App. at 276 (1922 report) (same). Such "'jurisdictional history' . . . demonstrates a practical acknowledgment that the Reservation was diminished." Hagen, 510 U.S. at 421. Compare Solem, 465 U.S. at 480 (not finding diminishment where "tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908") with Hagen, 510 U.S. at 421 (finding diminishment where "[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened").

In addition, uncontested population demographics demonstrate a dramatic

shift in the population of Osage County immediately following the passage of the Osage Allotment Act. From the 1907 Special Census following the founding of Oklahoma to the 1910 Census, Osage County's population grew by a third. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307-08); 2 Aplt. App. at 319-29 (census data for 1907, 1910, 1920, and 1930). By 1910, Osage Indians represented roughly six percent of the Osage County population. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307-08). From 1910 to 1920, the county's population grew by 82%, but the Indian population in the county (not limited to Osage Indians) dropped to roughly 3 percent. Glimpse Aff., ¶ 10 (2 Aplt. App. at 308). As of the 2000 Census, Osage County was 84% non-Indian, Osage Indians accounting for 3.5% of the county's population. Glimpse Aff., ¶ 14 (2 Aplt. App. at 309); 2 Aplt. App. at 331 (2000 population demographics map for Osage County).

Land ownership also dramatically shifted from tribal members to nonmembers through certificates of competency. By 1957, 1.1 million of the 1.4 million-acre county was alienated from trust/restricted status, Baird at 83 (2 Aplt. App. at 239), and as of 1972, just 231,070 acres remained in restricted ownership. 1 Aplt. App. at 89. As of 2008, the United States holds about 0.04% of the total land in Osage County in trust for the Osage Nation. Harwell Aff., ¶¶ 3-6 (2 Aplt. App. at 291-92). Like in Hagen, we think "[t]his 'jurisdictional history,' as well as the current population situation in [Osage County], demonstrates a practical acknowledgment that the Reservation was diminished." Hagen, 510 U.S. at 421.

We conclude that the Osage reservation has been disestablished by Congress.[1] As a result, we need not reach whether tribal members who reside and earn income on fee lands located within the geographic boundaries of a reservation are exempt from state income tax. We also need not address the district court's application of laches to this case, although we note that the Nation concedes that Oklahoma has had a "long-standing practice of asserting jurisdiction" in Osage County. 2 Aplt. App. at 356. "[T]he longstanding assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations" that "merit heavy weight." City of Sherrill, 544 U.S. at 215-16 (internal quotation marks and citations omitted) (applying laches, acquiescence, and impossibility to preclude the Oneida Indian Nation's requested relief).

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[1] In reaching this conclusion, we have also carefully considered the other arguments raised by the Nation including: (1) that tribal, federal, and state sovereign authorities currently co-exist within the reservation's boundaries, Aplt. Br. at 19, 33-34; (2) that the district court improperly relied on judicial statements involving other tribes and reservations in Oklahoma, Aplt. Br. at 24; (3) that the district court improperly relied on "modern academic commentary of historians and demographers, post hoc commentary which has little probative value" and "is not subject to the legal standards applied by the Supreme Court," Aplt. Reply Br. at 11-12, Aplt. Br. at 24; (4) that the district court placed undue reliance on modern-day demographics, Aplt. Br. at 41-42; and (5) that the Defendants' 2000 census data is misleading and underrepresents the Osage, Aplt. Reply Br. at 16-17. To the extent these arguments are not subsumed by our analysis, we are not persuaded.

AFFIRMED.

The motion to withdraw as attorney filed by Kathryn L. Bass is GRANTED.