No. 09-5050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION,
Appellant/Plaintiff,

vs.

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,
Appellees/Defendants.

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

OPENING BRIEF OF APPELLANT

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Oral Argument Is Requested

July 27, 2009

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STATEMENT OF RELATED CASES

On December 26, 2007, the Tenth Circuit issued its unpublished opinion in Case No. 03-5162, *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 260 Fed. Appx. 13 (10th Cir. 2007), which held that the Nation's suit against the Commissioners of the Oklahoma Tax Commission in their official capacities was not barred by the Eleventh Amendment.

JURISDICTIONAL STATEMENT

Plaintiff/Appellant Osage Nation (the "Nation") filed its Second Amended Complaint in the United States District Court for the Northern District of Oklahoma on April 11, 2008, seeking declaratory and injunctive relief against Defendants/Appellees Thomas E. Kemp, Jr., Chairman of the Oklahoma Tax Commission, Jerry Johnson, Vice-Chairman of the Oklahoma Tax Commission, and Connie Irby, Secretary-Member of the Oklahoma Tax Commission (the "Commissioners").

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and § 1362, in that Nation's claims arise under the treaties between the Nation and the United States, the Act of June 5, 1872, Ch. 310, 17 Stat. 228, the Act of May 2, 1890, Ch. 182, § 1, 26 Stat. 81, the Act of June 16, 1906, Ch. 3335, 34 Stat. 267, the Act of June 28, 1906, Ch. 3572, 34 Stat. 539, 18 U.S.C. § 1151, and federal common law relating to Indian affairs.

The district court granted the Commissioners' Motion for Summary Judgment on January 23, 2009. The Nation timely moved for reconsideration on February 6, 2009, which the district court denied by minute order on March 16, 2009. The Nation timely filed notice of appeal on April 13, 2009. The order and judgment appealed in this proceeding are final and dispose of all parties' claims. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err as a matter of law by granting the Commissioners' motion for summary judgment and holding that Congress disestablished the Osage Nation Reservation?

2. Did the district court err as a matter of law by declining to enjoin the Commissioners from taxing income of Osage tribal members who both earn that income and reside within the boundaries of the Osage Reservation?

3. Did the district court err as a matter of law by applying reliance principles to foreclose relief to the Nation?

STATEMENT OF THE CASE

The Nation's suit seeks to halt the illegal state taxation of tribal members' reservation income. It is based on well-established federal law prohibiting states from taxing income of tribal members who both reside and earn that income within "Indian country," as that term is defined in 18 U.S.C. § 1151. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

In 1872, Congress established a reservation for the Nation. In the Oklahoma Enabling Act, Congress used the Nation's reservation boundaries to demarcate the boundaries of modern day Osage County, Oklahoma. Although Congress has never affirmatively disestablished the Nation's reservation, the Commissioners contend that allotment of Osage lands to tribal members and the creation of Osage

County, Oklahoma at statehood imply a congressional intent to terminate the legal status of the Osage Reservation.

The Nation filed its Second Amended Complaint on April 11, 2008, seeking: (1) a judicial declaration that the Nation's Reservation has not been disestablished by Congress and is Indian country and (2) prospective injunctive relief enjoining the Commissioners from continuing to impose and collect taxes on the income of the Nation's members who both earn that income and reside anywhere within the boundaries of the Nation's Reservation. [App. at 19].

The Commissioners filed a motion to dismiss on May 30, 2008, which the district court later converted to a motion for summary judgment (more than four months prior to the end of discovery). [App. at 54; 204]. Before the Nation was able to file its own motion for summary judgment, the district court entered its Order granting the Commissioners summary judgment on January 23, 2009. [App. at 381]. The Nation timely moved for reconsideration [App. at 409], which the Court summarily denied on March 16, 2009. [App. at 416].

STATEMENT OF FACTS AND BACKGROUND

There are currently 572 federally-recognized Indian tribes in the United States. *See* 73 Fed. Reg. 18553. As one of thirty-eight of those federally recognized tribes located within the geographic area of the State of Oklahoma, the Osage Nation maintains a unique history, evidenced by a substantial body of

congressional legislation tailored specifically to address the Osage. This body of Osage-specific legislation and accompanying legislative history concerning Osage membership, government, property and taxation reveals the story of the complex intergovernmental relationship between the Osage Nation, the United States, and the State of Oklahoma through the lens of federal superintendence.

I. Creation of the Osage Indian Reservation in Indian Territory

In 1870, the Osage became one of the few American Indian tribes required to finance the purchase of its own reservation and moving expenses. From 1825 to 1872, the Osage resided upon a reservation in Kansas, where the Nation occupied both trust and reservation lands. Treaty with the Osage, June 2, 1825, 7 Stat. 240. By the Act of July 15, 1870, Congress expressly provided for the disestablishment of the Osage Reservation in Kansas. Act of July 15, 1870, 16 Stat. 335, 362, § 12. [Addendum at 1]. Congress advanced the Secretary of the Interior funds for the cost of removal and resettlement of the Great and Little Osage Indians from their "diminished reservation" in Kansas to "a permanent home" in Indian Territory – present day Oklahoma. *Id.* To pay for the purchase of the new Osage reservation, Congress authorized the Secretary of the Interior to sell the Tribe's Kansas lands and credit the proceeds to the Tribe's trust account. *Id.*

By 1872, Congress had used the proceeds of the sale to purchase land from the Cherokee Nation of Indians for the new Osage reservation in Indian Territory.

Act of June 5, 1872, 17 Stat. 228, 229. Describing the tract of country as "[b]ounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas," Congress declared: "the same is hereby, set apart for and confirmed as their reservation." *Id*. at 229.

II. The Organic Act

The Oklahoma Organic Act (hereinafter, "Organic Act") established a temporary government, referred to as the "Territory of Oklahoma," and defined its boundaries in relation to "all that portion of the United States now known as Indian Territory." Act of May 2, 1890, 26 Stat. 81, § 1.

In 1897, Congress created restricted territorial court civil jurisdiction over "members of the Osage and Kansas tribes of Indians residing on their reservation in Oklahoma Territory." This Act stated:

> And the justices of the peace and the probate courts in and for the Territory of Oklahoma shall not have jurisdiction of any actions in civil cases against members of the Osage and Kansas tribes of Indians ***residing on their reservation*** in Oklahoma Territory, and the District Court shall have exclusive jurisdiction in such actions, and at least two terms of such court shall be held in each year at Pawhuska ***on said reservation*** . . . for the trial of both civil and criminal cases.

Act of June 7, 1897, 30 Stat. 62, 71 (emphasis added).

In 1898 the Oklahoma Territorial Court, discussed the status of the Osage Reservation within Oklahoma Territory:

> [T]he Osage and Kansas (commonly called Kaw) Indian reservations are embraced within the borders of Oklahoma, and the Indian title to the lands within the reservations has never been extinguished. These reservations are set apart exclusively for the use of the Indians, and are not subject to settlement or occupancy of white persons. The Indians still sustain their tribal relations, and are under the charge and control of an Indian agent, and are the subjects of government bounty at every recurring session of congress. It has been repeatedly and uniformly held that an Indian reservation, as meant by the several acts of congress relating to such territory, is Indian country.

Goodson v. United States, 54 P. 423, 425 (Okla. 1898).

In 1902, the Territorial Court explained:

> The organic act made the Osage country a part of Oklahoma Territory,. . . the reservation has never been opened to settlement; the Indian titles have not been divested; the Indians still occupy their tribal relations and government, and are under the control and supervision of an Indian agent. There is no county, township, or local government extended over the reservation, but it is as much "Indian country" as an Indian reservation can be at any other place within the jurisdiction of the United States.

In re Ingram, 69 P. 868, 869 (Okla. 1902).

III. The Enabling Act

The State of Oklahoma was admitted to the Union by the Oklahoma Enabling Act. 34 Stat. 267 (1906) (hereinafter, "Enabling Act").[1] Section 2 of the Enabling Act required apportionment of the Territory into 56 districts one of which

[1] The full text of the Enabling Act and the Osage Act are included in the Addendum at pages 66 and 85, respectively.

was to be coextensive with the Osage Indian Reservation. *Id.* at 268. That requirement was incorporated into the Constitution of the State of Oklahoma, which provides that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." Okla. Const., art. XVII, § 8.

Section 3 of the Enabling Act restricts "the manufacture, sale, barter, giving away . . . of intoxicating liquors within those parts of said State *now known as . . . the Osage Indian Reservation* and within any other parts of said State *which existed as Indian reservations . . . .*" (emphasis added). Section 3 also requires that "the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to . . . *all lands lying within said limits owned or held by any Indian, tribe, or nation . . .*" (emphasis added).

Section 13 of the Enabling Act extended territorial laws throughout the State "as far as applicable." Similarly, Section 20 provided for the transfer of cases pending in Oklahoma district courts to various federal and state courts. Neither of these sections contains language altering the legal status of the Osage Indian Reservation.

IV. Congress Acts To Protect the Wealth in the Osage Reservation through the Osage Act of 1906

On March 16, 1896, the Secretary of the Interior approved an oil lease in the Osage Reservation executed between the Osage Nation of Indians and Edwin B.

Foster. Act of March 3, 1905, 33 Stat. 1048, 1061. Substantial oil and gas discoveries in the Reservation followed in 1904 and 1905. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005) (hereinafter *Cohen*).

As of 1906, the United States held a large trust fund for the Osage Nation, derived substantially from treaty compensation for lands that were relinquished from their Kansas Reservation. The annual income of the tribe in 1906 amounted to nearly $1 million, more than $500 for every man, woman and child in the Tribe. *McCurdy v. United States*, 246 U.S. 263, 265 (1918). Osage individual and tribal wealth created opportunities for nefarious traders to take advantage of individual Osages who lacked financial acumen, prompting legislation to limit trade practices on the Osage Reservation. *Cohen* at 311; Act of Mar. 3, 1901, 31 Stat 1058, 1065-66. In addition, "Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation." *McCurdy*, 246 U.S. at 265.

Congress' attempt to individualize tribal property and protect tribal members from unscrupulous business dealings required special legislation to address the unique situation of the Osage. The Osage Reservation had been expressly exempted from the General Allotment Act (the "Dawes Act") of 1887. Act of February 8, 1887, 24 Stat. 388, 391 § 8. The prospect of allotment was

controversial among tribal members, who had witnessed the effect of allotment on Indians in other Oklahoma tribes. *Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before a Subcomm. of the Comm. on Indian Affairs of the House of Representatives, Vol. I,* 58th Cong. 5-6 (1905) (hereinafter "Osage Act Hearings I"). [Addendum at 7].

With lucrative oil lease revenues in play, the prospect of dividing tribal land amongst individual tribal members created a risk that allotment would enrich a few whose land contained oil and gas at the expense of the Tribe as a whole. Osage Act Hearings I at 11-13; 33-39; 55-56. *Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before a Subcomm. of the Comm. on Indian Affairs of the House of Representatives, Vol. II,* 58th Cong. 3-4, 9-10 (1905) (hereinafter "Osage Act Hearings II"). [Addendum at 56]. This controversy was exacerbated by disputes over the number of non-Indians on the Osage membership roll, and ensuing political discord. Osage Act Hearings I at 6-14; 22-54.

As the tribe's annual income soared to over a million and a quarter dollars, the Secretary of the Interior proceeded to abolish the member-elected Osage tribal council, replacing them with an eight-member business committee, elected according to new procedures established through the direction and control of the Department of the Interior and its officers. *Id.* at 6-12; 46-52. The election of the

business committee was "held with a view" that members of that committee would "look after" drafting of an allotment bill. *Id.* 33-34. A rival faction of Osage members organized a separate delegation to protest any bill opening up the Reservation until a treaty could be negotiated with the tribe beforehand. *Id.* at 5-7; 22-44.

Ultimately, Congress addressed some of these Osage-specific concerns in the final version of the legislation that became the Osage Act:

> By the Act of June 28, 1906 (34 Stat. 539, c. 3572), it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which should thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively . . . .
>
> The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also the remaining lands, after setting aside enough for county use, school-sites and other small reservations. The oil, gas, coal and other mineral rights were reserved to the tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and non-taxable for twenty-five years or until otherwise provided by Congress.

McCurdy v. United States, 246 U.S. 263, 265-66 (1918) (footnote omitted). Thus, the surface was to be held in trust for individual Osage members, while the most valuable part of the Reservation - the subsurface - was reserved to the Osage Nation. 1906 Osage Act, 34 Stat. 539, 540 §§ 2-3; *see also Bell v. Phillips*

Petroleum Co., 641 P.2d 1115 (Okla. 1982) (mineral lessee may use all surface lands necessary for operations and access because such lands were impressed with a servitude).

Thus, the 1906 Osage Act (or Osage Allotment Act) ensured continued federal superintendence over the Osage Reservation. The Act marked the beginning of a complex and frequently modified scheme of federal regulation and administration of tribal and individual property rights relating to the Osage Nation and Osage Reservation, which continues to this day.[2]

Congressional efforts to protect the Osage Tribe from the consequences of its sudden wealth included provisions protecting Osage members' lands from alienation and taxation. Each member's homestead selection was inalienable and not taxable "until otherwise provided by act of Congress." *See United States v. Bd. of Comm'rs of the Osage County*, 216 F. 883 (8th Cir. 1914). Furthermore, second and third selections were not taxable for three years, and inalienable for the life of the allottee, unless the Secretary of the Interior, at the request of an adult member, issued a certificate of competency authorizing the sale of non-homestead selections. *See id.*; 1906 Osage Act, § 2. The trust period for the subsurface mineral estate was extended indefinitely. *Cohen* at 311, n. 864.

[2] *See generally* 25 C.F.R. pt. 91, "Government of Indian Villages, Osage Reservation, Oklahoma"; 25 C.F.R. pt. 214, "Leasing of Osage Reservation Lands, Oklahoma for Mining, Except Oil and Gas"; 25 C.F.R. pt. 226, "Leasing of Osage Reservation Lands for Oil and Gas Mining".

The Osage Act repeatedly references the Reservation in the present and future tense. Section 4 of the Osage Act references the set aside from oil and gas royalties for the support of the Osage Boarding School "and for other schools *on the Osage Indian Reservation* conducted or to be established and conducted for the education of Osage children." (emphasis added). Section 7 requires that leases and deeds for lands in the reservation are subject to approval of the Secretary of the Interior. Section 10 permits the establishment of public highways or roads "*in the Osage Indian Reservation*." (emphasis added). Section 11 allows railroad companies to continue the use and benefit of lands taken or condemned by the railroad company "*in the Osage Reservation*." (emphasis added).

Section 9 of the Osage Act established the structure of the governing body of the Osage tribe, with the election of officers to be held in Pawhuska, Oklahoma Territory. The headquarters of the Nation's government has remained to this day in Pawhuska, Oklahoma.

For many years, federal regulations restricted election of officers of the Osage Tribe. *Id.* at 309; *see generally*, 25 C.F.R. pt. 90 (1990) (derived from 23 Fed. Reg. 1948, Mar. 25, 1958). Consequently, the breadth of authority of the Osage Tribal Council was unclear until *Logan v. Andrus*, in which this Court interpreted the Osage Act to have conferred upon the Osage Tribal Council general

governmental authority over the affairs of the Osage Tribe. 640 F.2d 269, 270-71 (10th Cir. 1981).

V. The Reaffirmation Act

As this Court has held, Congress prescribed the form of tribal government for the Osage Tribe thus limiting the power of the Tribe to determine its own form of government or to expand the voting franchise for the Osage Tribal Council. *Fletcher v. United States*, 116 F.3d 1315, 1326-29 (10th Cir. 1997). In doing so, Congress failed to take account of the natural divergence of the population of Osage members who were heirs and descendants of tribal members on the 1906 Roll from the population of the Osage Nation as a whole. Congress rectified that problem in 2004 by enacting the "Reaffirmation Act," Pub. L. No. 108-431, 118 Stat. 2609 (2004). [Addendum at 93]. That Act, and the legislative history supporting it, also shows Congress' continuing recognition of the reservation.

In the Reaffirmation Act, Congress found that members on the 1906 Roll of the Osage Tribe shared in "the distribution of funds from the Osage mineral estate and an allotment of the surface lands of the *Osage Reservation*" and, further, "clarifie[d] that the term 'legal membership' in section 1 of the [1906 Osage] Act . . . means the persons eligible for allotments of *Osage Reservation* lands and a pro rata share of the Osage mineral estate as provided in that Act, not membership in the Osage Tribe for all purposes." Pub. L. No. 108-431, § 1(a)(2), (b)(1)

(emphasis added). Congressional Reports on this Act affirm that "[t]he Osage Tribe is a federally recognized tribe with a nearly 1.5 million-acre reservation located in northeast Oklahoma." H.R. Rep. No. 108-502, at 1 (2004); S. Rep. No.108-343, at 1 (2004).

The House Report notes that the full Committee Hearing was "held on the Osage Reservation on March 15, 2004." H.R. Rep. No. 108-502 at 2. The Honorable Dale E. Kildee commented: "Thank you, Mr. Chairman. And thank you for scheduling this hearing today in the Osage Reservation." *H.R. 2918, To Reaffirm the Inherent Sovereign Rights of the Osage Tribe To Determine Its Membership and Form of Government: Hearing Before the H. Comm. on Resources*, 108th Cong., 4 (Mar. 15, 2004).

VI. Congress Has Authorized Limited Taxation of Osage Property and Osage Members on the Reservation – But Not State Taxation of Earned Income

The most distinctive feature of the Osage property system is perhaps the recognition of a "headright," a unique restrictive tenancy in common. *Cohen* at 312. An Osage headright is the right to a distribution of Osage tribal income and property. Headrights are permanently based upon the 1906 membership roll. The 1906 Osage Act provides that headright income of Osages with certificates of competency is taxable. *Choteau v. Burnet*, 283 U.S. 691 (1931).

Congress expressly amended the Osage Act to authorize the levy of the Oklahoma gross production tax on oil and gas produced from the Osage mineral estate, "in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma." Act of March 3, 1921, 41 Stat. 1249, 1250 § 5; Act of April 25, 1940, 54 Stat. 168.

The ad valorem tax situation of the Reservation is also complex. Under Section 2 of the 1906 Osage Act, the second and third allotment selections were nontaxable for three years only. Pursuant to the Act of February 27, 1925, 43 Stat. 1008, lands purchased with trust funds were made taxable.

Significantly, Congress has not authorized Oklahoma to assess state taxes on the income of tribal members earned within the Osage Reservation. The State's effort to collect such income taxes is the subject of this litigation.

SUMMARY OF THE ARGUMENT

The Nation's suit is based on well-established federal law prohibiting a state from imposing and collecting tax on income of tribal members who both reside and earn that income in Indian country, as defined by 18 U.S.C. § 1151. Here, the Nation's Indian country includes all land within the Osage Reservation, as established by an Act of Congress in 1872.

Congress has not disestablished or diminished the boundaries of the Osage Indian Reservation. In the Enabling Act, Congress defined the boundaries of

Osage County as coterminous with those of the Osage Reservation. Act of June 16, 1906, § 21, 34 Stat. 267, 277. Through the Osage Act, Congress provided for allotment of tribal reservation lands to tribal members. However, nothing in the text or legislative history of the Osage Act, Enabling Act, or Organic Act unequivocally evidence a clear Congressional intent to disestablish the Osage Indian Reservation. Under Supreme Court precedent, allotment of reservation lands to tribal members and the establishment of county government within a reservation do not terminate reservation status. Here, the district court misapplied Supreme Court precedent and erroneously inferred Congressional intent to disestablish the reservation.

The district court also ignored that Congress, federal agencies, and even the State of Oklahoma have acknowledged the continuous existence of the Reservation. For example, Congress most recently recognized the Reservation in the 2004 Reaffirmation Act. Also, the National Indian Gaming Commission (NIGC) has acknowledged that the Osage Reservation boundaries remain intact. Furthermore, the State of Oklahoma has acquiesced to the reservation's legal status by accepting millions of dollars from the Osage Nation in revenue sharing funds from gaming proceeds on the Nation's fee lands within the Osage Reservation.

The district court ignored and/or misapplied Supreme Court and Tenth Circuit precedent that recognizes the right of tribal members to be exempt from

state income tax when those members reside and earn that income in Indian country. The Commissioners' own regulations apply this principle. Okla. Admin. Code § 710:50-15-2(b)-(c).

Finally, the district court erred by applying laches to foreclose relief to the Nation since the factual record did not support laches and since the district court misapplied Supreme Court precedent regarding the application of laches.

The Nation seeks reversal of the Order granting summary judgment to the Commissioners and remand for entry of declaratory judgment and injunctive relief in favor of the Nation.

STANDARD OF REVIEW

This Court reviews the district court's order granting summary judgment de novo. *McKenzie v. Dovala*, 242 F.3d 967, 969 (10th Cir. 2001). Construction and applicability of a federal statute is a question of law, also reviewed de novo. *Rosette, Inc. v. United States*, 277 F.3d 1222, 1226 (10th Cir. 2002).

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the court must construe the facts and all reasonable inferences in the

light most favorable to the nonmoving party. *Thomas v. Int'l Bus. Machs*, 48 F.3d 478, 484 (10th Cir. 1995).

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT ERRED BY FINDING THAT CONGRESS HAS DISESTABLISHED THE OSAGE INDIAN RESERVATION

Congress has not disestablished the Osage Reservation. None of the Acts relied upon by the district court, *e.g.*, the Osage Act, Enabling Act, or Organic Act, evidence an intent to disestablish the Reservation. Unlike past Supreme Court cases analyzing "reservation diminishment[3]," such as *Yankton Sioux*, *Hagen*, and *Solem*, Congress did not "open" or authorize non-Indian entry onto "surplus lands" of the Osage Reservation.[4] Instead, Congress allotted all of the communally held Osage surface lands solely to individual tribal members, while maintaining

[3] The Commissioners claim the Osage Reservation was "disestablished" rather than "diminished," and the district court's ruling was based on reservation disestablishment. Reservation "diminishment" refers to a shrinkage of the boundaries of a reservation, whereas "disestablishment" refers to elimination of reservation boundaries. The same legal analysis applies to both, and the terms are used interchangeably herein. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998).

[4] There is a well-developed body of Supreme Court cases analyzing questions of reservation diminishment/disestablishment: *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1962).

pervasive and continuous federal control over the administration of the reservation and tribal resources, including the entire subsurface estate.

The district court erroneously inferred Congressional intent to disestablish the Osage Reservation based on: (a) Congressional allotment of Osage lands to tribal members; (b) the fact that Osage County exists coterminous with the boundaries of the reservation; (c) that the State has certain jurisdictional authorities within the Nation's land base. The district court erred, because allotment of tribal lands to individual tribal members does not establish Congressional intent to disestablish reservation boundaries. Nor does the co-existence of tribal, federal, and state sovereign authorities within reservation boundaries diminish or disestablish the reservation. The district court also failed to acknowledge that Congress, the Interior Department, NIGC, and in some situations, the State of Oklahoma, have all recognized (and rely on) the continued existence of the Osage Reservation. *See infra* Part I.D.

In sum, this case lacks the unequivocal, substantial, and compelling evidence required to support a finding that Congress intended to disestablish the reservation. The Court's erroneous finding of reservation disestablishment must be reversed.

A. The Supreme Court Requires A Showing of Clear Congressional Intent To Disestablish A Reservation

A court may not lightly infer diminishment of a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Only Congress can diminish the boundaries of

an Indian Reservation and Congress must "clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." *Id.*

The Supreme Court has developed a "fairly clean analytical structure" to determine whether specific acts of Congress have diminished an Indian reservation. *Hagen v. Utah*, 510 U.S. 399, 410-11 (1994); *Solem*, 465 U.S. at 470. First, the Court looks to the express language of the Act in question. "The most probative evidence of Congressional intent is the statutory language used to open the Indian lands." *Solem*, 465 U.S. at 470. The Supreme Court has found Congressional intent to diminish where the operative portion of an Act contains express language of cession (*i.e.*, "cede, sell, relinquish, and convey"), or references the return of Indian lands to the "public domain" and a provision for a fixed sum payment ("sum certain"). *Yankton Sioux*, 522 U.S. at 344 (1998); *Hagen*, 510 U.S. at 414.[5]

[5] Although the Supreme Court does not require "any particular form of words before finding diminishment," courts have repeatedly declined to find diminishment where the relevant Act lacks the combination of "cession language" and an unconditional promise to pay compensation ("sum certain"). *See Solem*, 465 U.S. at 472, 481 (holding that Act authorizing Secretary to "sell and dispose" of portion of reservation not adequate to establish Congressional intent to diminish); *Mattz v. Arnett*, 412 U.S. 481, 504-506 (1973) (holding that Act allotting portion of reservation to tribal members inadequate to establish Congressional intent to diminish); *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962) (declining to find diminishment where the Act "did no more than open the way for non-Indian settlers to own land on the reservation . . ."); *United States v. Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000) (declining to find diminishment of Nez Perce Reservation by allotment of land to tribal members); *Duncan Energy Co. v.*

Absent statutory language of cession or restoration of lands to the public domain, diminishment may not be found unless the "events surrounding the passage of a surplus land Act . . . unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471 (emphasis added). "When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] 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." *Solem*, 465 U.S. at 472 (emphasis added). Federal courts' reluctance to infer Congressional intent to diminish from the surrounding historical context is also supported by the well-established canons of construction which require ambiguities in statutes to be interpreted against diminishment and in favor of continued reservation status. *Yankton Sioux*, 522 U.S. at 344 (requiring ambiguities to be construed in favor of the Indians). *Cohen* at 119-28.

The third and least probative factor examined by the Court is events that have occurred after passage of the Act in question. *Yankton Sioux*, 522 U.S. at

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Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1297 (8th Cir. 1994) (noting that "where courts have found diminishment of a reservation, the Surplus Land Act itself contained phrases unambiguously expressing congressional intent to diminish the reservation").

344; *Solem*, 465 U.S. at 471-72. The Court examines how Congress, the U.S. Department of the Interior ("Interior"), the Bureau of Indian Affairs, and local authorities have treated the area in question, as well as the demographic history of the area. *Id.* However, this factor standing alone is inadequate to establish diminishment. *Solem*, 465 U.S. at 472. It will "not substitute for failure of the instrument's language or contemporaneous history to evidence an intention to terminate all or some of the reservation." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1223 (10th Cir. 2005). Here, the relevant factors weigh heavily in favor of continued reservation status.

In addition to this framework, there are other subsidiary factors that the Supreme Court has considered to determine whether a reservation has been terminated. For example, subsequent references by Congress to a reservation in the past tense do not necessarily indicate "any clear purpose to terminate the reservation directly or by innuendo." *Mattz*, 412 U.S. at 498-99. This is especially true where Congress and Interior continue to recognize the existing reservation status. *Id*. at 505.

Furthermore, the mere existence of either fee land owned by non-Indians or townships created within reservation boundaries does not alone alter the existence of those boundaries. *Seymour*, 368 U.S. at 359. A reservation does not have to be solely occupied by Indians since Congress often "open[ed] the way for non-Indian

settlers to own land on the reservation . . . .” *Id*. at 356; *see also Mattz*, 412 U.S. at 497.

In *Solem*, the Court considered that the relevant Act contained provisions indicating that unallotted opened lands would remain a part of the reservation, to wit: the Act authorized the Secretary to set aside portions of the opened lands for tribal agency, school and religious purposes; also, the Indians were given permission to obtain allotments before the land was officially opened for non-Indians; in addition, Congress reserved the mineral resources of the opened area for the Tribe. *Solem*, 465 U.S. at 474. Similar statutory provisions exist in the Osage Act, supporting the argument that Congress has not disestablished the Osage Reservation.

B. The Osage Act Does Not Express Clear and Unequivocal Congressional Intent To Disestablish the Osage Reservation

The district court erroneously found a Congressional intent to disestablish the Osage Indian Reservation in the Osage Act. No provision in the Osage Act affirmatively disestablishes the Osage Reservation boundaries or terminates federal authority over the Osage. The Osage Act does not contain clear language of termination or cession found in other reservation diminishment cases such as “cede, sell, relinquish, and convey” or “restore lands to the public domain.” Nor did the district court rely upon the legislative history of the Osage Act or events surrounding passage of the Act to determine if they “unequivocally reveal” a

contemporaneous understanding of reservation diminishment. Instead, the district court improperly based its ruling on passing references in secondary sources and judicial statements involving other tribes and reservations in Oklahoma instead of following the established framework for disestablishment analysis.[6]

1. The Osage Act Is Not A Surplus Lands Act and Does Not Evidence Congressional Intent to Disestablish the Reservation

The Osage Act is unique and distinguishable from the Surplus Lands Acts at issue in *Solem*, *Hagen*, *Yankton Sioux*, and many other "reservation diminishment" cases. Unlike those reservations, Congress did not open the Osage Reservation to non-Indian settlement. With the exception of certain parcels reserved for the Nation, Congress allotted all tribal lands to the Osage people. Osage Act, 34 Stat. 539, 540 § 2. The Osage Act contained no language of cession. The Act provided for no land opened for "the public domain" as in *Hagen*, nor did the Act require payment of a sum certain for lands ceded by the Nation as in *Yankton Sioux*. Here, no statutory basis exists for finding reservation disestablishment. *See United States v.Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000).

To the contrary, the Osage Act reflects Congressional intent to protect the Osage, and maintain federal superintendence of the reservation. Osage Act, §§ 2,

[6] For example, the district court repeatedly cites *Murphy v. Sirmons*, 497 F. Supp.2d 1257 (E.D. Okla. 2007), a case construing statutes specific to the Creek Nation. [App. at 388, 393-95]

3, 7, 8, 9, and 12. Allotted lands remained in trust and could not be leased or sold without federal approval. Osage Act, § 7.[7] Certain reservation lands were retained and set aside for exclusive tribal ownership. Osage Act, § 2; *See* 25 C.F.R. pt. 91. The mineral estate was reserved to the Tribe and remains in trust for the Osage tribe. Osage Act, § 3. Congress' decision to extend the trust in perpetuity in 1978 is dramatic evidence of its intent to continue reservation status and its federal superintendence for the protection of the Osage people.[8]

In *Solem*, the Court also found that additional factors weighed in favor of a finding of continued reservation status: (a) authorization for the Secretary to set aside opened lands for tribal purposes; (b) authority for tribal members to acquire allotments before non-Indians; and (c) reservation of mineral rights to the Tribe. *Solem*, 465 U.S. at 474. Here, *all* of those factors are present and weigh strongly in favor of continued reservation status. *See, e.g.*, Osage Act, §§ 2-4. Another

[7] The district court's conclusion that the Osage Act freed Osage lands from restrictions on alienability is incorrect. Interior retained authority over whether lands could be sold or whether individual Indians would be authorized to sell their lands without subsequent Secretarial approval. *Bell v. Phillips Petroleum Co.*, 641 P.2d 1115, 1117-18 (Okla. 1982) (stating the Osage Act "provided a scheme for allotting Osage Indian lands to tribal members in severalty and for controlling alienation") (emphasis added); *see also* Act of March 3, 1909, 35 Stat. 778 (authorizing the Secretary of Interior to consider applications to sell the surface interests of lands of any Osage member, provided that sales remained subject to the mineral reservation.)

[8] *See*, Act of October 6, 1964, P.L. 88-632, 78 Stat. 1008 (extending the Osage mineral interests reserved in the 1906 Act "until otherwise provided by Act of Congress"); Act of October 21, 1978, P.L. 95-496, § 2, 92 Stat. 1660 (extending the interest "in perpetuity").

critical factor distinguishing the Osage Act from other Acts where diminishment was found, is that Congress did not open Osage lands to non-Indian settlement. Osage Act, § 2. Upon passage of the Osage Act in 1906, the land remained in trust for tribal members and under federal superintendence.

By 1906, when the Osage Act was passed, Congress knew how to clearly disestablish a reservation.[9] *Mattz*, 412 U.S. at 504 (noting that by 1892, "Congress was fully aware of the means by which termination could be effected" but failed to use such language). Most significantly, in July of 1870, Congress demonstrated *to the Osage*, how to terminate a reservation's boundaries when it expressly disestablished the Tribe's Kansas reservation. The 1870 Removal Act included language of cession and sum certain. 16 Stat. 335, 362, § 12. No such language appears in the 1906 Osage Act. The lack of statutory language expressing clear

[9] *See, e.g.*, Act of July 27, 1868, 15 Stat. 198, 221 ("the Smith River reservation is hereby discontinued."); Act of July 1, 1892, 27 Stat. 62, 63 (providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain."). In 1904, just two years prior to the passage of the Enabling Act and Osage Act, Congress terminated the reservations of other tribes in Oklahoma, *e.g.*, "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, 33 Stat. 189, 218. Notably, the specific language terminating the reservation boundaries for the Ponca and Otoe and Missouria tribes is contained in the same act that allots all reservation land to the members of those tribes. *Id*. at 217-18. However, the Osage Act does not contain similar language terminating the reservation boundaries after the allotment of lands to Osage members.

Congressional intent to disestablish the reservation weighs heavily against the district court's ruling.

2. Mere Allotment of Osage Land to Tribal Members Does Not Evidence Congressional Intent to Disestablish the Reservation

The district court erred by basing its finding of reservation disestablishment on the individualization of tribal property rights. Allotment of tribal lands to individual members has never been interpreted as an independent basis to support a finding of Congressional intent to diminish or disestablish. *Mattz*, 412 U.S. at 497, 504 ("allotment [to tribal members] under the 1892 Act is completely consistent with continued reservation status" and "the presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated"); *Seymour*, 368 U.S. at 356 (finding that allotment of Colville Reservation lands did not evidence Congressional intent to diminish); *Webb*, 219 F.3d at 1135 (stating that "the Ninth Circuit and the Supreme Court have held that neither allotment, in and of itself, nor the grant of citizenship to Indians holding allotted lands . . . , revokes the reservation status of such land").

The Supreme Court has declined to find diminishment even where one portion of the reservation is allotted to Indians and the remaining "surplus lands" are explicitly opened for non-Indian settlement. *Solem*, 465 U.S. at 464 (examining whether the opening of 1.6 million acres of reservation to non-Indian

settlement diminished reservation, and finding it did not)*; Seymour*, 368 U.S. at 355-56 (examining whether the opening of "surplus lands" to non-Indians on Colville Reservation diminished reservation, and finding it did not). Here, there is even less evidence of Congressional intent to disestablish the reservation, because the entire reservation was allotted to tribal members and retained under federal superintendence – with no "surplus lands" allocated for non-Indian settlement. Osage Act, § 2.

Since this case does not involve either a Surplus Lands Act that opened the reservation to settlement, or an Act that contains a clear intent to cede or convey tribal lands back to the government, there is no legal precedent for a finding of reservation disestablishment here, and the district court cites none. *See Webb*, 219 F.3d at 1133-34, n. 8 (noting the critical distinction between a reservation that is opened and ceded to the government for non-Indian entry and a reservation that is allotted in severalty to Indians). The Court erred by inferring a Congressional intent to disestablish.

3. **The District Court Found No Legislative History or Documents That Unequivocally Evidence A Contemporaneous Understanding of Congressional Intent to Disestablish**

Where, as here, the relevant Acts do not contain language of cession or restoration of lands to the public domain, diminishment may not be found unless the "events surrounding the passage of a surplus land Act . . . unequivocally reveal

a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471.

The district court failed to cite legislative history that evidences a contemporaneous understanding of reservation diminishment, let alone documents that unequivocally reveal such understanding, instead relying only on passing references in subsequent non-legal academic commentary and judicial statements involving other Indian tribes. *See* App. at 394-97; *Solem*, 465 U.S. at 475 (noting that isolated phrases referencing the reservation as "public domain" or "diminished" were insufficient to evidence Congressional intent); *Webb*, 219 F.3d at 1132 (stating that events that occur after the passage of the relevant Act are "far less probative" of Congressional intent). Evidence relating to the status of other Indian tribes and other reservations is simply not probative of the continued existence of the Osage Reservation, especially considering its widely recognized unique history.[10]

[10] Every edition of Cohen's Handbook of Federal Indian Law has contained a section dealing with the unique federal presence and involvement on the Osage Indian Reservation. *See Cohen* (2005 ed.) at 309-19 ("Specific Native Groups – Oklahoma Tribes – Osage Tribe"); *Cohen* (1982 ed.) at 780-81, 788-97 ("Special Groups – Oklahoma – Tribal Government – Osage Tribe," and "Special Property Laws Applying to Tribes in Oklahoma – Osage Tribe"); *Cohen* (1942 ed.) at 446-55 ("Special Laws Governing Osage Tribe"). It is inappropriate to lump the Osage with other Oklahoma tribes; Osage history is unique and must be evaluated as such.

Nothing in the legislative history of the Osage Act or the Enabling Act provides unequivocal evidence of Congress's intent to disestablish the reservation boundaries and to terminate the legal status of the reservation. Portions of legislative history in the record suggest the opposite. For example, one contemporaneous reference to the Osage Act in a House floor debate explains that "[the Osage Tribe] are still in the hands of the Government for twenty-five years, the same as they are now, except the land is segregated and each individual is given a certificate of his proportionate share." 59 Cong. Rec. 7196, 7200 (May 21, 1906) (statement of Rep. Curtis). [Addendum at 5]. Read as a whole, the legislative history reflects congressional understanding that the Osage Act would not terminate federal superintendence over the Nation and its affairs in the reservation, despite the allotment of their lands to individual tribal members. *See, e.g., United States v. Pelican*, 232 U.S. 442, 451 (holding that Congress retained trust relationship over allotments made to tribal members).

Other evidence suggests a contemporaneous understanding that reservation boundaries remained intact. Section 8 of Article 17 of the 1906 Oklahoma Constitution reads: "The Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." (emphasis added). The current version of the Oklahoma Constitution contains this same language. Shortly after passage of the Osage Act, Congress declared: "That all of Osage

County, Oklahoma, shall hereafter be deemed to be Indian country within the meaning of the Acts of Congress making it unlawful to introduce intoxicating liquors into the Indian country." Act of March 2, 1917, §17, 39 Stat 969, 983.

Absent statutory language of cession or restoration to the pubic domain, a court may not find diminishment without evidence that unequivocally demonstrates Congress and the Tribe's contemporaneous understanding of reservation diminishment when Congress passed the Osage Act. *Solem*, 465 U.S. at 471-72; *Webb*, 219 F.3d at 1134-35. Such evidence does not exist here.

C. The Enabling Act Does Not Express Clear and Unequivocal Congressional Intent To Diminish the Osage Reservation

The Enabling Act does not express clear and unequivocal intent to diminish the Osage Reservation. The Enabling Act was designed to authorize Oklahoma's admission to the Union, not to terminate or disestablish Indian reservations within Oklahoma. In *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 978-79 (10th Cir. 1987), this Court interpreted certain provisions (including §§ 13 and 20) of the Enabling Act in a case involving another Oklahoma tribe to reject the very argument that Commissioners make here. In fact, the Enabling Act recognizes the continued existence of the Osage Reservation, even providing for the election of two delegates from the Reservation to participate in Oklahoma's constitutional convention. 34 Stat. 267, 268, § 2.

The district court refers to Sections 13 and 20 of the Enabling Act as proof of reservation disestablishment. Section 13 merely states that "the laws in force in the Territory of Oklahoma, *as far as applicable*, shall extend over and apply to said State until changed by the legislature thereof." (emphasis added). The language "as far as applicable" reflects Congress' understanding that the laws of the new state could not impair or affect federal law regarding Indians and Indian lands, per Section 1 of the Enabling Act.

Section 20 of the Enabling Act is a general procedural provision regarding the transfer of cases pending in the district courts of Oklahoma Territory and in the U.S. courts for the Indian Territory, some of which could be transferred to the federal courts established in the new state, the other cases to remain and be administered in the state courts. There is nothing in Section 20 regarding jurisdiction over Indians, and, certainly, nothing regarding the Osage and the status of their reservation lands.

The district court also erred by assuming that the grant of statehood and creation of Osage County as a political entity was inconsistent with the continued existence of the reservation. A reservation is not diminished merely by being located within or co-extensive with the boundaries of a county. *Seymour*, 368 U.S. at 358-59 (finding that lands in question were Indian lands even though located

within the townsite of Omak, Washington, which was within the boundaries of the Colville Indian Reservation).

The fact that an Indian reservation exists within or is co-extensive with the boundaries of a state/county jurisdiction is commonplace.[11] If Indian reservations could not co-exist within the boundaries of a state jurisdiction, such as a county, it would be impossible for an Indian reservation to exist anywhere in the United States.

The district court's reasoning also fails to acknowledge the common co-sovereign relationship that exists where reservation, state, and county boundaries overlap. Nothing in federal law prevents the county government and tribal government from co-existing and exercising jurisdiction, either concurrently or, in some instances, exclusively, over individuals, entities, and activities within the same territory. Congress and the Supreme Court have developed an extensive body of laws and judicial doctrines for resolving co-jurisdictional conflicts. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981) (discussing tribal regulation of non-Indian fee land within Indian country)*; see also Cohen* Chapters 6-99

[11] *See, e.g., County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (discussing Nez Perce Indian Reservation encompassing virtually all of Lewis County, Idaho, and the exercise of jurisdiction through an Agreement between the county and the tribe within the reservation lands, which consists of trust lands and fee lands, both held by Indians and non-Indians); *United States v. South Dakota*, 105 F.3d 1552 (8th Cir. 1997) (discussing Rosebud Indian Reservation that, by virtue of various acts of Congress, also consists of Todd County, South Dakota).

(discussing state, tribal, and federal jurisdiction in Indian country). Under the district court's analysis, that jurisprudence would be irrelevant. In sum, the question of jurisdiction and the question of reservation status are two separate questions, which the district court improperly conflated here.[12]

The express text of the Enabling Act also conflicts with the district court's interpretation. The Enabling Act required the people of Oklahoma to "disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian, tribe, or nation . . . until the title to any such public land shall have been extinguished by the United States." Enabling Act, 34 Stat. at 270, § 3. This language confirms that, at the time of statehood, Indian tribes had reservations that remained "unextinguished" and the Enabling Act was not purporting to extinguish those rights. Other provisions of the Enabling Act, in Sections 2, 6, 7 and 21, refer to the Osage Reservation in the present tense as an existing and continuing reservation.

The district court determined that the Enabling Act "subjected the Osage lands to Oklahoma law and courts." [App. at 391]; however, nothing in the sections relied on by the Court or in any other section of the act supports that

[12] The district court repeated this error in its analysis of the Organic Act. The district court inferred an intent to diminish the reservation from the fact that the Organic Act provided the Oklahoma Territory with certain jurisdictional authorities over Indians. The fact that Congress has allocated jurisdictional responsibilities between respective sovereigns does not demonstrate Congressional intent to diminish reservation boundaries.

finding.[13] *See supra* at 32 (discussing Sections 13 and 20). Even though Congress provided for the existence of county government within the boundaries of the Osage Reservation, nothing in the Enabling Act expressly acknowledges Congress' intent to terminate the legal status of the reservation. To the contrary, sections of the Enabling Act clearly recognize and preserve the reservation lands within the newly admitted state. *See id*. at § 21. The district court erred by inferring Congressional intent to disestablish the Osage Indian Reservation from the text of the Enabling Act.

D. Subsequent Treatment By Congress, Interior, and Other Entities Supports A Finding of Continued Reservation Status

The district court failed to find explicit statutory language of cession, failed to find language regarding unconditional compensation, and failed to find a legislative history from the relevant Acts supporting a contemporaneous understanding of reservation disestablishment. Thus, the analysis must end in

[13] In any event, a reservation is not disestablished simply because Congress determines that certain state laws may apply within reservation boundaries. State laws can apply to non-Indians within reservations even though they are inapplicable to tribal members. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (validating state tax on cigarette sales to non-members in Indian country). Even in the situations where Congress has explicitly granted states with authority over Indians in Indian country, such as Public Law 280, that does not disestablish the affected reservations. *See generally Cohen* (2005 ed.) at 544-81 (discussing jurisdictional issues relating to application of PL 280 in Indian country); *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, No. 05-10296-BC, 2008 U.S. Dist. LEXIS 86684 (E.D. Mich. Oct. 22, 2008) (same).

favor of the Nation and a finding of continued reservation status. *Solem*, 465 U.S. at 472; *see also* Section I.E. *infra*. Even so, the subsequent federal-tribal relationship with the Osage supports the Nation's argument of continued reservation existence.

1. Congress Has Consistently Recognized, and Recently Reaffirmed the Continued Existence of the Osage Indian Reservation

The Supreme Court has recognized that Congress' subsequent treatment of an area has "some evidentiary value" in deciphering Congress' original intentions. *Solem*, 465 U.S. at 471. Here, many statutes enacted by Congress after the Enabling Act and the Osage Act continue to refer to the "Osage Reservation" in the present tense, or otherwise reflect Congressional intent to retain federal superintendence over the reservation.[14]

As recently as 2004, Congress referenced the Nation's reservation in legislative language and Congressional reports regarding the Osage Reaffirmation Act, Pub. L. No. 108-431, 118 Stat. 2609. *See, e.g.*, H.R. Rep. 108-502, ("The Osage Tribe is a federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma."); S. Rep. 108-343 ("The tribe is a federally

[14] *See, e.g.*, Act of Nov. 24, 1942, c. 640, § 3, 56 Stat. 1022 (25 U.S.C. § 373c); Act of May 11, 1938, c. 198, § 6, 52 Stat. 347; Act of May 29, 1924, c. 210, 43 Stat. 244 (25 U.S.C. § 398).

recognized tribe with a nearly 1.5 million-acre reservation located in northeast Oklahoma.").

2. Interior and the National Indian Gaming Commission (the "NIGC") Have Recognized the Continuing Existence of the Osage Reservation

On January 11, 2005, the Assistant Secretary for Indian Affairs certified the Osage Tribe Liquor Control Ordinance, and published the ordinance in the Federal Register, 70 Fed. Reg. 3054 (Jan. 19, 2005), pursuant to 18 U.S.C. § 1161. Section 4 of the Nation's ordinance approved by Interior states: "The Osage Tribal Council, as the sole governing body of the Osage Tribe of Indians, hereby affirmatively declares, asserts, and extends the jurisdiction of the Osage Tribe over the Osage Indian Reservation and all Indian country, as defined in 18 U.S.C. § 1151, *within the exterior boundaries of the Osage Indian Reservation, as described in the Act of June 5, 1872 . . . .*". [Addendum at 96].

The Nation exercises its powers of self-government by and through its Constitution. Section 1 of Article II of the Nation's Constitution, ratified by the Osage Nation in 2006, describes the territory of the Nation to include "the Osage Reservation, duly established by the Congress of the United States pursuant to (1) the Treaty between the United States of America and the Great and Little Osage Indians, Sept 29, 1865, 14 Stat. 687; (2) Article 16 of the Treaty between the United States of America and the Cherokee Nation of Indians, July 19, 1866, 14

Stat. 799; and (3) the Act of June 5, 1872, ch. 310, 17 Stat. 228 . . . .” [App. at 26]. Since the ratification of the Osage Constitution, no federal agency has objected to or refused to recognize the authority of the Nation to exercise the sovereign powers outlined under its Constitution.

On July 28, 2005, the NIGC[15] issued an opinion letter concluding that the Nation may conduct gaming on certain parcels of fee land in North Tulsa, Oklahoma, because “they lie within the Tribe’s reservation.” [App. at 166]. The subject parcels of fee land are located within the geographical boundaries of Osage County, Oklahoma. The opinion is based on historical documents and official records from Interior acknowledging that the Osage Reservation boundaries have not been disestablished. [App. at 169-171].

On February 27, 2007, the NIGC approved the Nation’s gaming ordinance authorizing gaming activities to be conducted on the Nation’s Indian lands. “Indian lands” are defined in the IGRA as, among other things, “all lands within the limits of any Indian reservation . . . .” 25 U.S.C. § 2703(4).

NIGC’s determination is significant because: (1) it expressly concludes that no act of Congress has disestablished the Osage Reservation boundaries, and (2) in order for the NIGC to permit gaming in the reservation it necessarily has to also

[15] NIGC is a federal agency within the Department of the Interior, created by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. (“IGRA”), to regulate Indian gaming activity on Indian land. 25 U.S.C. § 2703(4)(A).

find that the Nation maintains powers of governance and authority over all lands within the reservation boundaries in order to lawfully regulate Indian gaming under the IGRA.. In Indian affairs, deference should be given to rule and policy determinations made by Interior and Bureau of Indian Affairs. *Morton v. Ruiz,* 415 U.S. 199, 231 (1974).

3. Oklahoma Has Compacted With the Tribe to Collect Revenues Resulting From Gaming and Tobacco Operations That Occur Within The Osage Reservation

On December 16, 2004, the Nation executed a Tribal-State Gaming Compact with the State which was approved by Interior on February 9, 2005. 70 Fed. Reg. 13535 (Mar. 21, 2005). The Compact authorizes the Nation to conduct games on its Indian lands, as defined by IGRA. [Addendum at 102]. IGRA defines "Indian lands" to include "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4). Since 2005, the Nation has operated casinos and other gaming operations on parcels of fee land within the boundaries of the Osage Reservation, in accordance with the Gaming Compact. From 2005 through January 2009, the Nation has remitted to the State of Oklahoma revenue sharing payments and fees for gaming on fee land totaling $4,235,204.00. [App. at 412].[16]

[16] Besides accepting revenue sharing payments for gaming activity on fee land within the reservation, the State of Oklahoma has never challenged the NIGC's finding of the current status of the Osage reservation. *See, e.g., Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001)(Kansas brought action against the NIGC, seeking declaratory and injunctive relief from an NIGC decision that a tract

Likewise, the Nation and the State recently executed a new tobacco tax compact governing the payment to the State and the taxes imposed by the Nation on the sale of cigarette and tobacco products occurring in the Nation's Indian country. A portion of the payments to the State under the tobacco compact is based on the sales occurring at tribally-licensed retailers situated on fee land within the boundaries of the Osage Reservation. [App. at 415].

By knowingly accepting, contracting for, and using revenue derived from gaming activity and the sale of cigarette and tobacco products on reservation lands (not limited to trust or restricted lands), the State of Oklahoma has acquiesced to the Nation's exercise of governmental authority over all lands within the reservation. Through the documents cited hereinabove, the federal government also has clearly acknowledged, affirmed and acquiesced to the status of the Nation's reservation.[17]

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of land in Kansas under lease to the Miami Tribe of Oklahoma constituted "Indian lands" under IGRA).

[17] Other examples of reservation acknowledgement and acquiescence by the State and Federal governments are in the Nation's District Court briefs, *e.g.*, Reservation sign on state highway [App. at 141]; Oklahoma Governor proclamation of reservation boundaries [App. at 174]; Interior stipulation of reservation boundaries [App. at 176]; Map by Interior and U.S. Dept. Geological Survey depicting reservation [App. at 182]; and Letter from Solicitor to Okla. Water Resources Board advising of current reservation status [App. at 184]. The district court failed to address the legal significance of these acknowledgements.

4. **The Court Placed Undue Reliance on Modern-Day Demographic Statistical Data**

The district court erred by relying on present-day demographic statistical data. [App. at 407]. Although such statistical data may be relevant to the analysis to support other more probative evidence of Congressional intent, the Supreme Court refers to such data as "the least compelling," *Yankton Sioux*, 522 U.S. at 356, "unorthodox" and a "potentially unreliable method of statutory interpretation." *Solem*, 465 U.S. at 472, n.13; *see also, Shawnee Tribe*, 423 F.3d at 1223 (10th Cir. 2005) (a review of the local authorities' approaches to the lands and the demographics are factors that are the "least compelling," [citing *Yankton Sioux*], and "will not substitute for failure of the instrument's language or contemporaneous history to evidence an intention to terminate all or some of the reservation.").

The mere fact that a slowly fluctuating portion of the Reservation's surface lands has been transferred in and out of non-Indian hands over the past one-hundred years is not relevant absent supporting evidence of Congressional intent to disestablish reservation boundaries. *Seymour*, 368 U.S. at 358-59. "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id., quoting United States v. Celestine*, 215 U.S. 278, 285 (1909). Even today, despite non-Indian ownership of surface lands within the Reservation, there remains a substantial

federal presence and involvement over matters on the Osage Reservation. *See Cohen* at 309-19.

E. Ambiguities Must Be Construed In Favor of Continued Reservation Status

To the extent this Court finds that the Acts of Congress relied upon by the district court are ambiguous regarding Congress' intent to disestablish the reservation, that ambiguity must be resolved in favor of continued reservation status. *Yankton Sioux*, 522 U.S. at 344. As discussed above, the Osage Act, Enabling Act, and Organic Act are not ambiguous. None of those Acts provide clear evidence of Congressional intent to disestablish the reservation in obvious contrast to the earlier treatment of the Osage Reservation in Kansas. The district court erred by straining to infer intent to disestablish the reservation even though there is no basis for such inference in the statutory text. Assuming *arguendo* that ambiguities exist in the Acts, the district court erred by construing those ambiguities against the Nation.

Canons of construction applicable in Indian law cases are based on the unique trust relationship between the United States and Indian tribes and the understanding that tribes were subject to unequal bargaining power when agreements were negotiated. *See, e.g.*, *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Courts require "that treaties, agreements, statutes, and executive orders be liberally construed in favor

of the Indians; and all ambiguities are to be resolved in favor of the Indians." *Cohen* at 119. Treaties with Indians must be interpreted as the Tribes would have understood them, and doubtful expressions contained therein must be resolved in the Indians' favor. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Interpretation given to treaties, agreements, and statutes must never be to the prejudice of the Indians. *Id.; Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Tulee v. Washington*, 315 U.S. 681 (1942); *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975).

Indian canons of construction apply to the benefit of Indian interests when there is ambiguity in federal law with respect to Indians, and when there is no clear indication of congressional intent to abrogate Indian sovereignty rights. *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) ("While normal rules of construction would suggest the outcome which the district court adopted, the court overlooked the fact that normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue."). The district court failed to apply these canons to the benefit of the Nation; rather, the Court's review and analysis of the federal statutes, legislative history and case law consistently resulted in an interpretation contrary to the Nation's interest.

II. FEDERAL LAW PROHIBITS THE STATE FROM IMPOSING AND COLLECTING TAX ON THE INCOME OF TRIBAL MEMBERS WHO BOTH RESIDE AND EARN THAT INCOME IN INDIAN COUNTRY

A. Imposition of State Income Tax on Tribal Members in Indian Country Is Categorically Barred Absent Congressional Approval, and thus Judicial Balancing of State Interests Is Inappropriate

The Supreme Court has established a categorical rule prohibiting state taxation of Indian tribes and tribal members within reservation boundaries, absent congressional authorization. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). A State may not impose and collect taxes on the income of tribal members who both earn that income and reside in Indian country. *Chickasaw Nation*, 515 U.S. 450 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973). Indian country, as that term is defined in 18 U.S.C. § 1151, includes all land (even fee land) within an Indian reservation and is not limited to trust and restricted lands. *Chickasaw Nation*, 515 U.S. at 453. Furthermore, the broad definition of Indian country under § 1151 includes both "formal" and "informal" reservations. *Sac & Fox Nation*, 508 U.S. at 123, 125. Thus, the district court's statement that no court has held 18 U.S.C. § 1151 applicable to state taxation of tribal members' income earned on private fee lands is plainly incorrect. The Commissioners do not dispute this principle, and they currently operate under

regulations that recognize and incorporate the definition of Indian county under federal law. *See* Okla. Admin. Code § 710-50-15-2(b)-(c). [App. at 187].

Because this case does not involve taxation of nonmembers in Indian country, the court erring in factoring state interests into the analysis. *See Chickasaw Nation*, 515 U.S. at 458-59; *Sac & Fox Nation*, 508 U.S. at 123; *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 502 U.S. 251, 267 (1992); *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 507-511. Balancing state interests in generating revenue against a tribe's sovereignty interests becomes an appropriate analysis only when questioning the validity of a state tax on nonmembers in Indian country. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110-12 (2005).

In this case, it is undisputed that the Commissioners are currently imposing and collecting taxes on the income of Osage tribal members who either reside or earn that income from sources on fee land within the boundaries of Osage Reservation. [App. at 48-53]. Thus, Supreme Court precedent clearly demonstrates the Commissioners' attempts to impose income tax in this manner are unlawful.

B. The District Court's Taxation Analysis Erroneously Relied On Cases Involving Taxation of Nonmembers Within Indian Country

Despite the binding Supreme Court precedent in *McClanahan*, *Citizen Band Potawatomi*, *Sac & Fox Nation*, and *Chickasaw Nation*—and even the

Commissioners' own regulations—the district court erroneously failed to apply the well-established income tax exemption. Instead, the Court improperly relied on distinguishable cases not applicable to the relief the Nation seeks.

First, the district court cites *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) for the incorrect proposition that Congress must expressly immunize tribal members from state income tax in Indian country. In fact, the reverse is true, as state law generally has no force within the territory of an Indian tribe absent Congressional consent. *Worcester v. Georgia*, 31 U.S. 515, 561-62 (1832). *Atkinson* addressed a different issue; that is, the limitation of a tribe's taxing authority over non-members in Indian country. In contrast, this case addresses the state's limited authority to tax tribal members in Indian country. Thus, *Atkinson* is simply irrelevant here. The district court wrongly relies on *Atkinson* for the proposition that the Nation must find a specific statute or treaty provision in order to seek relief under the principle set out in *McClanahan* and its progeny.

Second, the district court improperly relied on *Washington v. Confederated Tribe of the Colville Indian Reservation*, 447 U.S. 134 (1980), a case pertaining to a state's attempt to impose and collect taxes upon *nonmembers* in Indian country, which is not at issue in this case. [App. at 400]. The district court confuses the legal analysis necessary to determine the permissibility of a state tax imposed upon *nonmembers* in Indian country, with the categorical rule prohibiting the imposition

of state taxes on *members* of an Indian tribe in that tribe's Indian country. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110-12 (2005).

C. The District Court's Taxation Analysis Erroneously Relied On Cases Involving Categories of Taxes Affirmatively Authorized by Congress

The Supreme Court in *McClanahan* established that tribal members are exempt from state income tax, so long as the tribal member both lived in and earned that income from sources within Indian country. 411 U.S. at 179. The principle set out in *McClanahan* is included in the Commissioners' own regulations. Okla. Admin. Code 710:50-15-2. [App. at 187-88].

The Nation's claim rests on well-established exemptions as to state *income* tax. Thus, the district court's reliance on *United States v. Mason*, 412 U.S. 391 (1973) is misplaced since *Mason* involved imposition of Oklahoma's *inheritance tax* on unrestricted interests in an Osage member's estate, which Congress authorized. *Id*. at 392. *Choteau v. Burnet*, 283 U.S. 691 (1931), is also not relevant since the issue in that case involved imposition of income tax upon an Osage member's royalties from oil and gas leases, not the earned income at issue here. *Id*. at 693. Similarly, *McCurdy v. United States*, 246 U.S. 263 (1918), is not applicable in this case since *McCurdy* involved *property* taxes paid to the county.

None of these cases relied upon by the district court address the issue involved in this case, and they do nothing to support the Court's Order.[18]

D. Application of the Well-Established Income Tax Exemption Will Have a *De Minimis* Impact on Osage County Revenues

Finally, the district court misapprehends the facts regarding the effect any tax exemption for Osage members would have on county and local government. Congress has specifically provided for the financial support of county and local government both in the Osage Act and again in the Act of April 25, 1940, which requires that a gross production tax be collected by the State upon the production of oil and gas in all of Osage County. A portion of this tax is specifically reserved for use by the county for construction and maintenance of roads and bridges, as well as the maintenance of schools in the county. Act of April 25, 1940, 54 Stat. 168. In addition, as part of its gaming compact with the State, the Nation agreed to pay to the State a portion of its gaming revenue that is generated within the reservation boundaries, some of which occurs on fee land. From 2005 through January 2009, revenue payments from gaming on fee land within the reservation have exceeded four million dollars to the State. [App. at 412].

Nothing in the record establishes any negative impact to the county and local governments if Osage members in the reservation were determined to be exempt

[18] For example, *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 609 (1943), does not approve an income tax. The district court misquotes it. [App. at 401].

from state income tax. Even without personal income taxes, the Osage do pay their fair share toward the public services described to help support state, county, and local government. In comparison to the millions of dollars the state and county governments receive from the Osage via revenue sharing payments, tobacco tax collection, and from the gross production tax, the impact from individual Osage members' state income tax exemption is *de minimis*.

III. THE DISTRICT COURT ERRED BY APPLYING RELIANCE PRINCIPLES TO FORECLOSE RELIEF TO THE NATION

The district court erred by accepting the Commissioners' unsupported assertions that a ruling in the Nation's favor would undermine the sovereign interests of Osage County in terms of regulating and collecting revenue from its citizens. As discussed above, the co-existence of state and tribal jurisdictions is commonplace and is governed by well-established legal principles. The Court based its determinations on findings that are not supported by evidence in the record.

Due to the preemptive nature of the plenary authority that Congress has over Indian affairs, the State of Oklahoma's unilateral assertion of jurisdiction in the Osage Reservation does not foreclose the Nation's right to challenge that unlawful activity. *See e.g., Indian Country, U.S.A. v. Oklahoma,* 829 F.2d 967, 974 (10th Cir. 1987) ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek

Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands."). Likewise, the clear federal interests involved in the relief sought by the Nation do not dissipate over time.

A. The District Court's Equitable Determinations Rely On Unsupported Assumptions, Not Evidence in the Record

The district court makes several findings in support of its application of equity principles to foreclose the Nation's claim. However, these findings are not based on any fact in the record, nor does the Court cite good authority in support of its conclusion.

There is nothing in the record to support the Court's finding that a ruling in the Nation's favor means the "State's provision of services would be severely threatened." [App. at 405-06]. Further, there is nothing in the record to support the Court's finding that a ruling in the Nation's favor "would have significant practical consequences not only for income taxation, but potentially for civil, criminal and regulatory jurisdiction in Osage County."[19] [App. at 407]. In other parts of the country, tribal governments and local governments co-exist without

[19] Notably, these statements were adopted almost verbatim by the district court from the Commissioners' briefs [App. at 82], despite there being no source in the record or evidence presented to support any of these statements.

chaotic jurisdictional conflicts.[20] Other than the typical self-serving and unsupported predictions of "chaos" alleged by the Commissioners, there is nothing in the record to support any of the district court's findings that serious jurisdictional conflicts would ensue without the possibility of resolution by the State, Nation and the federal governments.

B. The Common Law Principles Cited by the District Court Have No Application to the Claims Raised by the Nation in This Case

The district court relied on cases and principles that have no application here. First, the district court confuses common law governing resolution of disputes to title of property with established principles of federal Indian law determining the intergovernmental jurisdiction over tribal members and nonmembers inside of Indian country. For example, the district court misapprehends the application of *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) to the instant case. The language of the *Coeur d'Alene* decision quoted by the district court was taken from the stage of the litigation when the Coeur d'Alene Tribe was foreclosed from using *Ex Parte Young* to sue Idaho officials, an issue not before the district court. The tribe in *Coeur d'Alene* claimed ownership in submerged lands and the bed of Lake Coeur d'Alene and navigable rivers and streams that form part of the lake's water system. *Id*. at 264-65. Here, the Nation is not claiming ownership or seeking to quiet title in any of the lands in Osage

[20] *See supra* note 11.

County. Rather, the Nation seeks a judicial order clarifying its jurisdictional boundaries, the effect of which may allow the Nation and the State to develop partnerships in enforcement of applicable tribal and state law within the shared geographical boundaries of the Osage Reservation and Osage County.[21]

The district court also misapprehends the application of equitable considerations such as laches as seen in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), to the instant case.[22] The Commissioners did not affirmatively plead laches or any other form of equitable relief in this suit, nor has there been a record established with facts that support such relief. *See* Fed R. Civ. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . laches."). The Commissioners did not file an answer nor have they affirmatively pled any defense. The district court did not cite anything in the record that supports a finding that acquiescence, laches, or impossibility (or any other equitable relief) foreclose the Nation's claims.

[21] *See supra* at 33. For example, the Nation and the State have entered into cross-deputization agreements to address jurisdictional issues in the area of law enforcement in the reservation.

[22] To assert an affirmative defense of laches, a defendant must demonstrate three elements: (1) plaintiff had knowledge of his rights and an ample opportunity to establish them in the proper forum; (2) defendant has relied upon this delay in plaintiff's assertion of its rights; (3) defendant suffered detriment because of the delay. *See Galliher v. Cadwell*, 145 U.S. 368, 372 (1892). The district court's opinion discusses only the second of these three elements.

The record in this case is distinctly different from the facts in *Sherrill*. The Tribe in *Sherrill* attempted to enjoin imposition of property taxes on lands it acquired on the open market, relying on the theory that it had unified fee and aboriginal title to the parcels to assert sovereign dominion over the property, all after not having been present and in possession of those lands for two centuries. 544 U.S. at 202.

A close reading of *Sherrill* reveals critical distinctions not present in this case and that were glossed over by the district court. First, property taxes are not at issue in the instant case, nor is the Nation basing its claim on newly acquired parcels of land purchased on the open market. Rather, the Nation's claim for relief is based on the categorical federal law prohibition against the imposition of state *income* taxation on tribal members within Indian country. Supreme Court caselaw indicates the trigger for the exemption does not depend upon the trust status of the specific parcel or title of property upon which the member resides, but simply whether or not the income is earned within Indian country. *See Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458-59 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 126-28 (1993). Whether a particular parcel is subject to a county's ad valorem property taxes triggers a different analysis not currently before this Court. *See Cass County v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103 (1998).

Second, the tribe's claim in *Sherrill* was rooted in the Nonintercourse Act of 1790, 1 Stat. 137, which prohibits property transactions with tribes absent federal superintendence. Although that act declared such conveyances of title to be void, it was silent as to a remedy for violations. This placed the federal courts in the unenviable position of creating a common law remedy to address the issue. In the instant case, however, it is uncontested that the Nation's Reservation was established in 1872 [App. at 212], and that, since statehood, Congress has enacted numerous laws applying to the Osage and their lands. [App. at 212-18]. Unlike the tribe in *Sherrill*, the Nation advances a claim and seeks a remedy based on the legal status of its reservation, which is not based on whether the Nation has title to particular land within the boundaries of the reservation. The concerns expressed in *Sherrill* regarding the tribe's attempt to assert "sovereign dominion" over newly acquired parcels are not present here.

Finally, unlike in *Sherrill*, it cannot be said that the "justifiable expectations" of non-Indian property owners[23] and the local government in the reservation would

[23] Since all the subsurface estate in the reservation is held in trust for the Nation, all private property owners in the reservation, whether Indian or non-Indian, are on notice that their interests in the surface are servient to federal laws governing the rights of the Osage to their mineral estate. *Bell v. Phillips Petroleum Co.*, 641 P.2d 1115, 1116-17 (Okla. 1982). *See also Appleton v. Kennedy*, 268 F. Supp. 22, 24 (N.D. Okla. 1967) ("The owners of the surface interest….own their land subject to the reservation of minerals in the Osage Tribe of Indians, and the valid rules and regulations promulgated thereunder by the Secretary of the Interior.").

be severely disrupted if the Nation is successful in this action. The tribe in *Sherrill* had been away from the lands in question for centuries; however, it is undisputed that Congress has regularly enacted laws applying to the Osage and their lands in the reservation since 1872, the most recent being the Osage Reaffirmation Act in 2004. This continued recognition by Congress of the Osage and their Reservation has included federal laws that have permitted, in a limited manner, county and local governments to share in revenues derived from Osage reservation lands.[24] Because the State is currently receiving revenue sharing payments from the Nation due to gaming on fee land in the reservation,[25] it will be more disruptive to the State to have the reservation deemed disestablished.

It cannot be said that the Commissioners maintain a long-standing reliance on the collection of Osage members' income tax since, unlike real property, an individual's ability to claim an income tax exemption can fluctuate from year to year. Moreover, the Commissioners' own regulations recognize that members who reside and earn income in a reservation are exempt, so the Commissioners do not have a vested interest in that income anyway. Further, non-Indian individuals in

[24] *See* discussion *supra* Part I.D.3, regarding revenue sharing payments from tribal-state gaming compact, tobacco tax payments, and the gross production tax. These revenue sharing payments to the State, which amount to millions of dollars earned in reliance upon the legality of the Nation's claims, likely outweigh any financial detriment alleged by the State as a result of losing income tax revenue from the Nation's members.

[25] *See* discussion *supra* at 16, 39, 48.

the reservation will not be adversely affected since the scope and extent of the Nation's jurisdiction over non-Indians are outlined by the Nation's own laws and by federal law.[26] Laches and other common law equity principles do not bar the Nation's claims.

This Court should reverse the district court's ruling that laches and other equity principles bar the Nation's claims.

CONCLUSION

For the reasons provided, Osage Nation respectfully requests the Court REVERSE the district court granting summary judgment and REMAND for entry of summary judgment and injunctive relief in favor of the Nation.

Dated this 27th day of July, 2009.

[26] *See e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (Tribe has no jurisdiction to adjudicate discrimination claim concerning non-Indian selling fee land to another non-Indian on a reservation); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001) (With very limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation. Neither *Montana* exception applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land.); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal courts have no authority to hear claims against nonmembers arising out of accidents on state highways running through a reservation.); *Montana v. United States*, 450 U.S. 544 (1981) (Tribes may only regulate non-Indians on fee land in Indian country when there is a consensual commercial relationship, or when non-Indian conduct threatens the health, welfare, political integrity, or economic security of the tribe.).

Respectfully submitted,

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ATTORNEYS FOR APPELLANT OSAGE NATION

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Osage Nation respectfully requests the Court set this appeal for oral arguments. This appeal has significant implications involving the clarification of the jurisdictional boundaries for the Osage Nation and the limits of the Appellees' taxing authority over the Nation's members within those boundaries. Oral argument is necessary so that Plaintiff-Appellant may fully frame the legal and historical issues and analysis before this Court in order to aid the Court in its decisional process. *See* Fed. R. App. P. 34(a)(2)(C).

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 13,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

Certificate of Compliance for Digital Submissions

All required privacy redactions have been made, and this ECF submission is an exact copy of the hard copy being filed with the Clerk.

This digital submission has been scanned for viruses on July 27, 2009, with the AVG ver 8.5 program and, according to the program, is free of viruses.

/s/ O. Joseph Williams

_____

Attorney for Appellant, Osage Nation
July 27, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2009, a true and correct copy of the within and foregoing **OPENING BRIEF OF APPELLANT** was electronically transmitted to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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O. JOSEPH WILLIAMS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION, Plaintiff, v. STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; DON KILPATRICK, Secretary-Member of the Oklahoma Tax Commission, Defendants.	)	No. 01-CV-516-JHP-FHM

ORDER

Now before the Court is Defendants' Motion for Summary Judgment (Dkt.# 79). Defendants initially filed a motion to dismiss (Dkt.# 72), under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) arguing: (1) the Court lacks subject matter jurisdiction over the Nation's claim for a judicial determination as to reservation status; and (2) the Nation has failed to adequately state a claim upon which relief may be granted. The Court converted Defendants' motion to dismiss to a motion for summary judgment pursuant to Fed.R.Civ.P. 56 and provided the parties with additional time to present all materials made pertinent to such a motion. Plaintiff Osage Nation ("the Nation") has opposed the motions, and Defendants have filed Replies.

In its Second Amended Complaint ("Complaint"), the Nation seeks a declaratory judgment

that its reservation boundaries have not been disestablished and that, as a matter of law, the Osage Reservation is Indian country within the meaning of 18 U.S.C. §1151. The Nation further seeks injunctive relief prohibiting Defendants from imposing and collecting taxes on the income of the Nation's members who both reside and earn income within reservation boundaries.

In general, summary judgment is proper where the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).* An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id. at 249*.

In considering a motion for summary judgment, this court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988).* In regard to the necessary burdens, however, the Supreme Court has instructed that:

> in cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file. Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule,"and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by their own affidavits, or by the"depositions, answer to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Furthermore, if on any part of the prima facie case there is insufficient evidence to require submission of the case to the jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).* In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex, 477 U.S. at 323-24.*

I. Article III Jurisdiction

Defendants have asserted a federal jurisdictional challenge to the claims asserted by the Nation. Specifically, Defendants challenge the standing of the Nation to bring its claim regarding the status of its reservation against Defendants, as members of the Oklahoma Tax Commission.

When a court makes an inquiry as to a party's standing, the court must accept as true all material allegations of the complaint, and any other particularized allegations of fact, in affidavits or in amendments to the complaint. *Warth v. Seldin, 422 U.S. 490, 501 (1975).* "If, after this opportunity [to present facts to support standing], the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id. at 501-02.*

In its Complaint, the Nation alleges that its reservation boundaries were established by the Act of June 5, 1872, and that those reservation boundaries have never been disestablished by Congress. The Nation further alleges that the functions of its tribal government are carried out within its reservation and that, by virtue of its constitution, the Nation's jurisdiction and exercise of self-government extends to all lands within its reservation. The Nation does not seek to have this Court create or re-establish its reservation boundaries; rather, its claim against Defendants is based

on allegations that its reservation continues to exist and that Defendants' present taxing activity against its tribal members located in the reservation violates federal law.

Thus, construing these material allegations as true, the Court finds the Nation has standing to challenge the actions of Defendants under well-established law prohibiting the state from imposing and collecting taxes on the income of a tribal member who both resides and earns that income within Indian Country. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe of Oklahoma, 498 U.S. 505 (1991); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).*

Likewise, it is well-established that Indian tribes have standing to sue to protect sovereign or quasi-sovereign interests. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)(Indian tribe had standing as a tribe, apart from the claims of individual tribal members, to challenge legality of state motor vehicle tax); Prairie Band of Potawatomie Indians of Pierce, 253 F.3d 1234, 1241 (10th Cir. 2001)(Indian tribe had standing to sue State of Kansas to prevent interference with or infringement on tribe's right to self-government).* Therefore, the Court finds the Nation has adequately alleged Defendants' taxing activity within its reservation boundaries is an unlawful infringement on the Nation's sovereignty and right of self-government. Thus, Defendants' challenge to federal jurisdiction is overruled.

II. Introduction

In this case, the Nation mounts an unprecedented challenge, asserting that the income of any Osage member who works and resides anywhere within Osage County is absolutely immune from state income taxation, even if that member works on privately owned fee land, not held in trust by

the United States or subject to federal restraints on alienation (private fee lands), drives exclusively on state or county maintained roads to a home on private fee lands, has children attending state supported schools, and receives the great bulk of his or her social services from the State, not the Nation. Defendants' concern is expressed in the Joint Status Report:

> Because of its potentially far-reaching impact on the State of Oklahoma, this is one of the more important cases relating to state sovereignty and jurisdiction to arise since statehood in 1907. In this case, the Osage Nation seeks to divest the state of over 100 years of the exercise of sovereignty and jurisdiction over all of Osage County, the largest county in Oklahoma in area. If the Osage Nation were to prevail, precedent would be set potentially threatening the jurisdiction of the state as a whole, the counties, and local jurisdictions. If the Osage Nation's original reservation boundaries have not been disestablished, then a number of other tribes in Oklahoma could assert the same claim. The implications of this on the civil and criminal jurisdiction of the state are staggering, because this is a state that is largely made up of former Indian reservations.

(Dkt.# 66 Joint Status Report at 1-2.).

The Nation's Complaint requests two kinds of relief. First, the Complaint asks this Court to declare that all 2,296 square miles of Osage County comprise a reservation. Second, based upon the claim that the entire county should be declared a reservation, the Complaint seeks to prospectively enjoin the Commissioners, in their official capacities on behalf of the State of Oklahoma Tax Commission (Commission), from levying Oklahoma state income taxes upon the Nation's members who earn income and reside anywhere within the geographic boundaries of its alleged reservation – all of Osage County. The Complaint also seeks to support its claim by contending that a federal criminal statute, 18 U.S.C. § 1151, forecloses state taxation of all income

earned within "Indian country."

Defendants contend they have not acted in excess of their authority under federal law, and have not violated federal law in imposing Oklahoma's income tax on incomes of members of the Osage Nation who neither earn income in employment nor reside on Trust, or Restricted Lands In Osage County. Further, Defendants argue that Osage County is not a reservation, and the tax is not preempted because the Nation cannot show specific federal statutes or established policies that foreclose the State's legitimate interest in securing revenues necessary to support its services to tribal members in predominantly non-Indian and non-Osage, Osage County.[1] Specifically, Defendants allege the Osage Reservation, as created by the Act of June 5, 1872, was disestablished, dissolved, and no longer exists as provided by, and pursuant to, the intent of Congress. *See Hagen v. Utah*, 510 *U.S. 399, 410-411 (1994).* Defendants contend Congress' intent is reflected in:

> (a) the statutory language used in the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267 (the "Enabling Act"), and the Osage Allotment Act, Act of June 28, 1906, 34 Stat. 539 (the "Allotment Act"), by which Congress disestablished the Osage Reservation, providing, among other things, for taxation of the Osage and conversion of the reservation into a county, and subjecting the Osage to state law;
>
> (b) the historical context surrounding the passage of the Enabling Act and the Allotment Act, *see United States v. Mason, 412 U.S. 391, 396 n.7 (1973)*; *Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007);*
>
> (c) the contemporaneous understandings surrounding the passage of the Enabling Act and the Allotment Act, which, reflect the influx of nonmember population and recognition by federal officials of the former reservation status of the Osage Reservation in the years soon following those Acts, reinforce Congress' intent to disestablish the Osage Reservation; and

1. Osage County population is 80% non-Indian and 95% nonmembers of the Nation, and less than one-sixth of Osage County remains in residential status. *See 2000 United States Census.*

(d) even if the Osage Reservation was not disestablished, dissolved, and terminated pursuant to the Enabling Act and the Allotment Act, federal law does not preempt or otherwise bar the Commissioner Defendants from imposing Oklahoma's income tax on income of Osage members who neither earn income from employment on, nor reside on, Trust or Restricted Lands in Osage County, because State taxation, including income taxation, of such Osage members is expressly contemplated and permitted by federal law, including the Enabling Act and the Allotment Act. *See United States v. Mason, 412 U.S. 391, 396 n.7 (1973).*

Finally, Defendants argue the equitable defense of laches bars the Osage Nation's claims for declaratory and injunctive relief. The Osage Nation has left unchallenged the State's taxation of the income of its members for more than seventy years. The State would be prejudiced if declaratory or injunctive relief were now entered upsetting its long-standing taxation of the income of Osage members who neither reside on, nor earn income from employment on, Trust or Restricted Lands in Osage County. *See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).*

III. Background

To be clear, this action does not concern taxation of tribal members living and earning income on trust or restricted lands in Osage County. Consequently, this case does not present the issues addressed in prior litigation concerning tribal members residing and working on trust or restricted lands. *See, e.g., Okla. Tax Comm n v. Sac & Fox Nation, 508 U.S. 114 (1993).* Indeed, Defendants do not contest the right of Osage tribal members both earning income and residing on the limited, scattered parcels of trust or restricted lands within Osage County to be free from state income taxation. Instead, the Nation asks this Court to confirm the entirety of Osage County is a reservation, notwithstanding that Congress provided for the transfer or sale of the surface of all but

a very few acres of Osage lands, thereby disestablishing any reservation more than a century ago. Premised upon its requested ruling confirming reservation status, the Nation then asserts that all tribal members who reside and work *anywhere* in Osage County are exempt from state income taxation, even if they neither reside nor work on trust or restricted lands, and irrespective of whether other factors material in prior preemption cases support state taxation.

These positions are contrary to long settled understandings and expectations concerning land status and principles governing federal preemption of state taxing jurisdiction. Since the allotment of the Osage Reservation and Oklahoma Statehood as enacted in 1906, Congress and the courts have repeatedly recognized there are no reservations in Oklahoma. As Congress recognized over seventy years ago, [i]n Oklahoma the several Indian reservations have been divided up. . . as a result of this program, ***all Indian reservations as such have ceased to exist*** and the Indian citizen. . . is assuming his rightful position among the citizenship of the State." *S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added) cf., Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007) ("A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process.").*

The Nation's attempt to categorically exempt its members, who are Oklahoma citizens, recipients of Oklahoma services, and subject to Oklahoma laws, from state income taxation simply because they reside and work anywhere in Osage County disregards established law. Even within acknowledged reservations, exemptions from state tax have depended on specific factors establishing tribal and federal interests overriding a state's valid interest in raising revenue to support its services. The Nation fails to plead any such factors supporting preemption of Oklahoma's

legitimate taxing interest.

Applicable policies, treaties and statutes reflect the unmistakable intent that Osage County is no longer a reservation. No federal policy exempts the Nation's members who both work and reside on non-trust, non-restricted lands within Osage County from Oklahoma state income tax -- whether or not the lands are a reservation. The Oklahoma Organic Act,[2] the Oklahoma Enabling Act,[3] and the Act for the Division of the Lands and Funds of the Osage Indian[4] ("Osage Allotment Act") reflect Congressional intent to subject the Nation, its members and its lands to Oklahoma law and to disestablish and terminate Osage County's reservation status. Further, neither the United States Supreme Court, nor any court, has held that the federal criminal law provisions of 18 U.S.C. § 1151 apply to immunize activities on Oklahoma private fee lands from state taxation. However, even if there remained an "Osage reservation," no federal policy erects a general barrier against income taxation of tribal members whose livelihoods and residences do not implicate trust or restricted land. The Court will not unsettle the jurisdictional understandings established by enactment over a century ago.

IV. The Osage Reservation does not Remain Intact

The Oklahoma Organic Act, the Oklahoma Enabling Act, and the Osage Allotment Act, demonstrate the Osage reservation ceased to exist more than a century ago. A reservation consists of lands set aside under federal superintendence for the residence of tribal members. *See COHEN'S*

2. Act of May 2, 1890, Ch. 182 § 1, 26 Stat. 81 (1890).

3. Act of June 16, 1906, Ch. 3335, 34 Stat. 267 (1906).

4. Act of June 28, 1906, Ch. 3572, 34 Stat. 539 (1906).

HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed.). The 1906 Osage Allotment Act terminated the federal set-aside and federal superintendence of Osage County as the place of residence of Osage members. While that Act retained certain small tracts for tribal use and occupancy and reserved the minerals underlying Osage County for the Nation, the great majority of lands in Osage County were freed from restrictions on their alienability. Income that relates exclusively to those unrestricted private fee lands is the subject of this action. Whatever may be the status of the mineral estate and the islands of trust or restricted lands, the plain Congressional intent in 1906 was to terminate any reservation status as to surface estate lands in Osage County that were freed of restrictions on alienation.

The Supreme Court has articulated an analytical structure for determining when Congress disestablished a reservation. *Solem v. Bartlett, 465 U.S. 463, 470 (1984)*. The most probative evidence of diminishment is the statutory language used to open the Indian lands. *Hagen v. Utah, 510 U.S. 399, 411 (1994)*. The historical context surrounding the passage of the relevant act also informs the analysis. *Id.*

> When events surrounding the passage of [applicable statutes] particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471.

The language of the1906 Osage Allotment Act and the surrounding historical

circumstances establish Congress' plain intent to terminate the Nation's reservation and to subject the Nation, its members, and their non-restricted lands to Oklahoma law and Oklahoma courts. The Osage Allotment Act effected the transfer of nearly all Osage tribal lands to its members. The Act declared that the tribal lands of the Nation "shall be equally divided among the members of said tribe" by allowing each member to make three selections of 160 acres of land, with the remaining unselected lands divided equally among all members by an appointed commission. Osage Allotment Act §§ 1, 2. [5] "Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided. . . . Osage Allotment Act, § 2, Fourth. The remaining selections would be "surplus land and shall be inalienable for twenty-five years," *Id.*, provided that any adult member could petition the Secretary of the Interior ("Secretary") to issue a "certificate of competency, authorizing [such member] to sell and convey any of the lands deeded him by reason of this act, except his homestead . . . . *Id.*, § 2; Seventh. Upon the issuance of the certificate of competency, "the lands of such member (except his or her homestead) shall become subject to taxation, and such member . . . . shall have the right to manage, control, and dispose of

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5. The Division Act limited such allotments and related rights to those on the official U.S. Government roll as of January 1, 1906, and certain of their children. Members so enrolled were known as headright owners. *See* Osage Allotment Act, §§ 1-4; *Quarles v. Dennison, 45 F.2d 585, 586 (10th Cir. 1930) (defining headright)*. The roll so established constituted "the legal membership" in the Nation. Osage Allotment Act, § 1.

his or her lands the same as any citizen of the United States." *Id.*

Other provisions of the Act reinforce the intent to terminate the reservation. "The Osage Boarding School reserve, . . . the reservoir reserve . . . , and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska" were reserved from selection but could be sold "under such rules and regulations as the Secretary of the Interior may provide." *Id.*, § 2, Tenth. The "United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which said buildings are situated, shall be sold to the highest bidder . . . " with the proceeds to be "placed to the credit of the individual members of Osage tribe of Indians. . . ." *Id.*, § 2, Eleventh.[6]

Although the Osage Nation retained the beneficial interest in the minerals underlying the former Osage reservation area, that interest is contrasted starkly with the pattern divesting the surface, either directly or through authorizations for future sales, of all vestiges of tribal ownership. *See* Osage Division Act, §§ 2-4.[7] While the minerals underlying the former tribal

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6. The Supreme Court has described the Government's plan for Osage members under the 1906 Division Act. *See Choteau v. Burnet, 283 U.S. 691, 694 (1931) ("This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes."); see also Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 579 (1928) (same, regarding Creek tribal members).*

7. Of the total original Osage lands comprising over 1.47 million acres, all were allotted except 645.34 acres retained by the tribe and 4,575.49 acres reserved for town sites, schools, cemeteries and federal agency purposes(with those lands generally subject to sale). *See* Report of Subcommittee on Indian Affairs, Osage Nation of Indian Judgment Funds at 18 *accompanying* S. 1456 and S. 3234 (March 28, 1972). As of 1972, of the 1,464,838.5 acres that were originally allotted, only 231,070.59 acres remained in restricted status. *Id.*

lands were reserved to the Nation, all royalties received from such minerals were to be "placed in the Treasury of the United States to the credit of the members of the Osage tribe . . . and . . . . distributed to the individual members . . . . [8] Osage Allotment Act, § 4, Second. Consequently, the Nation stood as recipient of those funds solely for the benefit of the allottee members.

Although the Act contemplated a continuing tribal government, it left few powers to exercise. All moneys received from the sale of terminated reservation land, as with the royalties from minerals, were held as property of individual members. Osage Allotment Act, § 4, First. Public highways could be established within the "Osage Indian Reservation" lands without any compensation therefore." Osage Allotment Act, § 10. Although the Act mentions the "Osage Indian Reservation," as do some subsequent enactments, it plainly does so only to describe a known geographic area. Given that the Enabling Act, earlier in the same month, had subjected the Osage lands to Oklahoma law and courts, the Division Act left little role for a general tribal government over a "reservation" area. Despite the Complaint's assertion that it arises under the Act of June 28, 1906, the Osage Allotment Act, the Act does not support this contention. The termination of Osage reservation status was part of a broader pattern of reservation termination

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8. The retention of a subsurface mineral interest for the benefit of the Nation's members does not render the entirety of Osage County a reservation. The term reservation refers to land set aside under federal protection for the residence of tribal Indians. *See* COHEN S HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed.). The mineral retention did not preserve the surface estate for the residence of Osage members and cannot continue or establish a reservation. *See Sac & Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1267 (10th Cir. 2001) (land reserved by the government to preserve the tract s status as a tribal burial ground did not make that land a reservation, as it was not reserved for or used for purposes of residence). Similarly, *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007), expressly rejected the contention that an "unobservable," partial mineral interest could support "Indian country" status for the surface of those lands.

accompanying Oklahoma s entry into the Union.

During the late 1890s and early 1900s, Congress systematically negotiated or legislated transfers of tribal lands to tribal members and the opening of unallotted lands to settlement and entry by non-Indians. *See generally, II FRANCIS PAUL PRUCHA, THE GREAT FATHER, 735-757 (1984) ("Prucha").* Thirteen Indian reservations were in Oklahoma Territory as established by an act of Congress on May 2, 1890. The 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; *see also B. B. Chapman, Dissolution of the Osage Reservation, 20 Chronicles of Oklahoma 244 (1942).* Francis Paul Prucha, "widely considered the leading historian of federal Indian policy," has concluded that, as a result of this history: " There are no Indian reservations in Oklahoma . . . and the reservation experience that was fundamental for most Indian groups in the Twentieth Century was not part of Oklahoma Indian history." *PRUCHA at 757.* Recently, the U. S. District Court for the Eastern District of Oklahoma reached the same conclusion in *Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007).*

The language of the Oklahoma Enabling Act and its incorporation of the Oklahoma Organic Act support the conclusion that there are no Indian reservations in Oklahoma. The Act of March 3, 1885, Ch. 341, 23 Stat. 362 (1885) , which applied to territories generally, was made applicable by passage of the Oklahoma Organic Act to the Oklahoma Territory upon its formation in 1890. Section 9 of the 1885 Act provided that any Indian committing a crime within any of the Territories of the United States shall be subject to the laws of the Territory and be subject to the same punishment as a non-Indian. 23 Stat. 362, 385. The Oklahoma Organic Act,

Ch. 182, 26 Stat. 81 (1890), § 11 generally made laws of the state of Nebraska applicable throughout the Oklahoma Territory. Under the Organic Act, the Territorial courts had jurisdiction over crimes involving Indians, whether or not the crime occurred on Indian lands. The Territorial courts were given jurisdiction over all cases involving Indians, except controversies between members of the same tribe, while maintaining their tribal relations. Organic Act, § 12.

This broad jurisdiction over tribes and their members under the Organic Act was carried forward under § 20 of the Enabling Act. The Oklahoma Enabling Act, Ch. 3335, 4 Stat. 267, §13, provided that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof. Consequently, Territorial law subjecting all residents, regardless of race or ethnicity, to the same courts and making them subject to the same penalties was extended over all Oklahoma Indians, including the Nation, upon Statehood.[9] Accordingly, the Oklahoma Enabling Act also does not support the Nation's claim for relief.

These provisions have led to the understanding that Oklahoma reservations were disestablished. As stated in *Murphy v. Sirmons* with respect to the Muscogee (Creek) Nation, "State laws have been applied over the lands within the boundaries of the Creek nation for over a hundred years. *Murphy v. Sirmons*, 497 F. Supp. 2d at 1290. "The Organic and Enabling Acts confirm that . . . Indian reservations do not exist in Oklahoma." *Id*. at 1289-1290.

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9. The Complaint cites a disclaimer provision of § I of the Enabling Act However, such provisions pertain to retained tribal lands, not the unrestricted lands involved here. *See*, *e.g., Indian Country USA, Inc. v. Okla.*, 829 F.2d. 967, 976-81 (10th Cir. 1987).

Contemporaneous consensus at the time also reflected the understanding that the Acts divested Oklahoma tribes of both title and jurisdiction through land transfers authorized by contemporaneous legislation, and that Oklahoma law would apply to all civil matters occurring on former Indian lands. *Cf., Montana v. United States*, 450 U.S. 544, 559 n. 9 (1981) (allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.).[10] Section 21 of the Enabling Act specified that the former Osage reservation should constitute a separate county, and that Oklahoma's constitutional convention shall designate the county seat and provide rules and regulations and define the manner of conducting the first election for officers in said county. The Supreme Court recognized that Osage history distinguished the Nation from tribes like the Navajo Nation in *United States v. Mason, 412 U.S. 391 (1973).* *Mason* held the United States had no duty to resist payment of Oklahoma inheritance tax on unrestricted interests in an Osage deceased member's estate. The *Mason* Court distinguished *McClanahan v. Ariz. State Tax Comm'n , 411 U.S. 164, 174 (1973),* because *McClanahan* had contrasted the trust land of the Navajo Reservation with the status of the Osage as described in *Oklahoma Tax Comm n v. United States,* 319 U.S. 598 (1943), observing "that 'the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community.'" *Mason, 412 U.S. at 396 n.7.*

Subsequent Congressional enactments further confirm Congress' intent and contemporaneous understanding that there were no remaining reservations in Oklahoma. The

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10. The Supreme Court observed in *United States v. Oklahoma Gas & Elec. Co.,* 127 F.2d 349, 353 (10th Cir. 1942), *aff'd,* 318 U.S. 206 (1943), that it is common knowledge that lands allotted in severalty in Oklahoma are essentially a part of the [non-Indian] community in which they are situated . . . ."

legislative history of the Oklahoma Indian Welfare Act, Ch. 831, 49 Stat. 1967 (1936), a statute central to defining an Oklahoma tribes' status, provides: [i]n Oklahoma the several Indian reservations have been divided up. . . as a result of this program, ***all Indian reservations as such have ceased to exist*** and the Indian citizen. . . is assuming his rightful position among the citizenship of the State. S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added). In a Senate report accompanying a 1974 amendment to the Federal Property and Administrative Services Act, the Report explained: The Committee amendment to H.R. 8958 adds a provision that will extend the same disposal authority for excess land in Oklahoma that is provided by the bill for the rest of the United States. ***This provision is necessitated by the fact that there are no reservations in Oklahoma***." *S. Rep. No. 93 -1324, 93rd Cong., 2nd Sess. 2 (Dec. 11, 1974) (emphasis added).* Under *Solem v. Bartlett,* those understandings are entitled to great weight. *See Shawnee Tribe v. United States, 423 F.3d 1204, 1227 (10th Cir. 2005) ("we may not ignore the plain language of the instrument that 'viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.'")(citation omitted); Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1020 (8th Cir. 1999) ("It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements, context has been found to play a similarly important role in interpreting the language of the surplus land acts.").*

V. Income of Tribal Members Working and Living on Private Fee Lands in Osage County is not Exempt from Taxation — Federal Common Law

The Complaint arises under several bases in federal law, including federal treaties, statutes and federal common law. However, none of these sources support the claim that tribal members working and living anywhere within Osage County are immune from Oklahoma income tax. Consequently, the focus is on the Nation's assertion that federal common law governing tribal immunity from state taxation preempts Oklahoma's taxation authority.

The Nation seeks to immunize all tribal members in Osage County from income tax if they both live and earn income in Osage County irrespective of the actual status of the land on which the members reside, and the actual source of that income. Federal common law with respect to the preemption of state income taxation of reservation Indians does not support such a broad claim.[11] *See McClanahan v. Ariz. State Tax Comm n, 411 U.S. 164 (1973).* In *McClanahan,* the United States Supreme Court analyzed treaties and statutes applicable to the trust land of the Navajo Nation before concluding Arizona's taxation was preempted. *McClanahan's* holding, however, was premised on the fact the Court was dealing with a reservation. Therefore, *McClanahan,* merely established that a tribal member who resided on a recognized reservation, and whose income was derived wholly from reservation sources, was exempt from state income taxation. *Id. at 179. McClanahan* never established either an exemption applying categorically to all tribal members residing in Indian country, or an exemption which applied, regardless of the source of the tribal member's income.

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11. *See Dep t of Tax. & Finance of NewYork v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69 (1994) (challenge to tribal taxation) ("Respondents' challenge to New York s regulatory scheme is essentially a facial one. In reviewing a challenge of this kind, we do not rest our decision on consequences that, while possible, are by no means predictable. …[W]e confine ourselves to those alleged defects that inhere in the regulations as written.") The facial challenge the Nation presents here is whether all members living and earning income on fee lands within Osage County are absolutely immune from tax.

Further, although the Supreme Court has referenced Indian country status as supportive of tribal immunity from state taxation, *see Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993),* its cases do not support the notion that all lands described by the subparagraphs of 18 U.S.C. § 1151 are automatically immunized from state taxation. To the contrary, while "Indian country" status under 18 U.S.C. § 1151 has been deemed pertinent in some instances, the Court has in each case considered other factors in determining state taxing powers.

Application of the Indian country analysis to address taxation have required lands to satisfy two requirements: "first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998)(addressing dependent Indian community subcategory of Indian country.").* The Court's most recent reference to the pertinence of the federal criminal code in civil matters, *Atkinson Trading Co. v. Shirley, 532 U.S. 654 (2001),* reversed the Tenth Circuit's determination that the Navajo Nation could tax Atkinson's fee lands operation within the boundaries of the Navajo Nation under the language of 18 U.S.C. § 1151(a) defining Indian country as lands within the limits of an Indian reservation, notwithstanding the issuance of any patent . . ." The Court made plain that "Indian country" status is not dispositive if there is no "claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over non-members on non-Indian fee land." 532 U.S. at 653 n.5. Under the same analysis, given that there is no claim Congress expressly immunized tribal members' incomes in "Indian country" from state taxation, Section 1151 simply does not address an Osage tribal member's claimed immunity from state

income taxation.

Also, probative of the issue is the tribes' diminished power over fee lands and enhanced state powers over such lands. Income derived from fee land sources is akin to income derived outside the tribe's jurisdiction, which *is* subject to taxation. Indeed, in *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980),* the Supreme Court contrasted the taxability of cigarettes marketed by the smoke shops to persons outside Indian country, and which value was not generated on the reservation , with the claim of the tribal member in *McClanahan* who derived all her income from reservation sources. The *Colville* Court rejected the notion that a tribe could exploit "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [to] authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* Instead, the Court found, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id. at 157.*

Under a preemption analysis, income of a tribal member resident on fee lands earned from sources in which the Nation does not have a significant interest, i.e., from employment with the State or a non-member enterprise or entity, even in Osage County (assuming it were a reservation), would be subject to state income tax. The Nation fails to address whether tribal interests, or federal interests that could give rise to preemption under federal law, are implicated when tribal members earn income on fee lands and drive across state highways to a home on fee lands. The Complaint fails to articulate a single federal interest that conflicts with Oklahoma

income taxation of such members.

As applied to the unique and uncommon history of Oklahoma tribes, and the Osage Nation in particular, these principles do not oust or preempt Oklahoma's income taxation challenged here. *See Oklahoma Tax Comm n v. United States, 319 U.S. 598 (1943).* In holding that portions of the estates of deceased members of the Five Civilized Tribes are subject to Oklahoma estate taxation, the Oklahoma Tax Commission Court recognized that principles applicable to Indians elsewhere in the United States do not apply directly to Oklahoma Indians: "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy . . . [T]hey are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and [express] tax exemptions." *319 U.S. at 603*. The Court distinguished the sovereignty principles laid down in *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1831)*, where "the Indian tribes were separate political entities with all the rights of independent status -- a condition which has not existed for many years in the State of Oklahoma." *319 U.S. at 602.* Recognizing that Oklahoma supplies "schools, roads, courts, police protection, and all the benefits of an ordered society. . . " to the tribal members involved in the case, and that an income tax, based solely on ability to pay. . . , " [12] is not an unreasonable burden, *Id. at 609*, the Court upheld Oklahoma's taxes on the restricted cash and securities in the tribal members' estates, but disallowed only the tax on statutorily restricted allotment lands, which the statute expressly rendered expressly"restricted and tax exempt." *Id.*

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12. The Court also noted the substantial wealth of members of the Osage Tribe. *Id.* at 609 n.13.

at 611.

With respect to Osage lands in Osage County, the Supreme Court long ago recognized the Congressional intent that such lands be subject to state taxation. *See McCurdy v. United States, 246 U.S. 263, 269-70 (1918) (once restrictions on Osage lands were removed pursuant to the Act of June 28, 1906, former Osage restricted lands became subject to state taxation).* In *Choteau v. Burnet, 283 U.S. 691, 695-96 (1931)*, the Court reasoned similarly that an Osage allottee's income from oil and gas royalties after the removal of restrictions under the 1906 Osage Act is subject to federal income tax. "His shares of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that any citizen of the United States." *Id.* [13] With respect to the Osage, Oklahoma's Congressional delegation has expressly acknowledged that funds and securities, income, and estates of these Osage Indians are subject to taxation, the same as for other citizens. *Hearing before the Subcommittee on Indian Affairs on H. Con. Res. 108 (July 22, 1953), Statement of Oklahoma Members in Congress.* Osage unrestricted fee lands, and income related to them, are presumptively subject to state taxes.

VI. The Major Crimes Act

The Supreme Court requires a tribe alleging claims under federal common law to "articulate

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13. The Court relied on § 2, Seventh, of the Osage Allotment Act, Ch. 3572, 34 Stat. 539 (1906): "upon the issuance of such certificate of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state [law]. " *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty., 538 U.S. 701, 712 (2003).* Just as in *Inyo County*, it is unclear what federal law, if any, the Tribe's case "aris[es] under." *Id* (*quoting 28 U.S.C. § 1331)(brackets in original).* The Nation's citation to a federal criminal statute and cases pertaining to trust or restricted lands affords no specific support.

Given the requirement of a prescription of federal law, *see Id.*, 18 U.S.C. § 1151 is not a federal law that the Nation's case arises under. In addition to defining federal criminal powers, that statute "confer[s] upon Indian tribes jurisdiction over certain criminal acts occurring in 'Indian country.'" *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001).* The statute's legislative history confirms that it was intended to codify prior case law governing jurisdiction to prosecute crimes in Indian country. *See Report of Judiciary Committee accompanying H. R. 3190, 80th Cong., 1st Sess. (April 24, 1947) at A-91, A-92.* It does not establish civil immunities from state taxation.

The Supreme Court's references to 18 U.S.C. § 1151 in prior cases do not support a different result. *Okla. Tax Comm n v. Sac & Fox Nation, 508 U.S. 114 (1993*), does not address taxation on fee lands within an alleged reservation. Rather, it reversed a decision in which the lower courts construed *McClanahan v. Ariz. State Tax Comm n, 411 U.S. 164 (1973),* as immunizing tribal members income from State taxation whenever the income was derived from tribal employment on tribal trust lands, and specifically required that the member *also* live on trust land: ***"The residence of a tribal member is a significant component*** of the *McClanahan* presumption against state tax jurisdiction." *Sac & Fox, 508 U.S. at 123 (emphasis added).*

Although *Sac & Fox* contains some broad language, it narrowed the scope of available immunity to tribal members living and working on land set aside for those members. *Id. at 124.* The *Sac & Fox* Court s discussion of *Oklahoma Tax Comm n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 511 (1991),* while employing broad language regarding Indian country, again emphasized that the case concerned a tribal convenience store located outside the reservation on ***land held in trust*** for the Potawatomi. *508 U.S. at 125 (emphasis added).* Thus, while the Court in *Sac & Fox* and *Citizens Band* referred to Section 1151, neither case addressed tax immunity with respect to tribal members both working and residing on fee lands. Indeed, subsequent to both those decisions, the Supreme Court ruled that Oklahoma may tax the income of tribal members who earn income working for the tribe on tribal lands, but who live outside Indian country. *See Oklahoma Tax Comm n v. Chickasaw Nation, 515 U.S. 450, 464 (1995).* Given that holding, the Nation cannot establish that state income taxation is foreclosed when the taxpayer neither works nor lives on restricted lands.

While the Supreme Court has occasionally said Section 1151 ***generally*** applies to questions of civil jurisdiction, the cases have carefully couched such language in nonmandatory terms. *DeCouteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975) (emphasis added); see also Alaska v. Native Village of Venetie, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking . . .").* Rejecting any contention that "Indian country" status prescribes mandatory civil tax consequences, the Supreme Court in *Atkinson Trading Co. v. Shirley, 520 U.S. at 654,* expressly rejected applying Section 1151 to require a nonmember to pay Navajo Nation taxes on fee lands

within an undisputed, treaty-based reservation.[14] In fact, given the disestablishment of the Osage and other Oklahoma reservations long before the Indian country statute was codified, using the 1948 statute to exempt Osage members from state income tax is particularly anomalous. *See, e.g., Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999) ("Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definition of Indian country, and the intentions of that Congress . . . are what we must look to here.").* Considering the context of sovereignty pertinent to state taxation of tribal members, and Congress' understanding in 1906 that Osage members were citizens of Oklahoma for taxation and other purposes, 18 U.S.C. § 1151 creates no rights that may be asserted by such members - or by the Nation in this action.

VII. Longstanding Reliance by the State of Oklahoma Is a Significant Factor Counseling Against a Decision Altering Jurisdictional Assumptions.

The ability to raise revenues to support its services to Osage County lands and the tax status of Osage tribal members is of critical importance to Oklahoma. If this Court were to now establish Osage County as a reservation more than a century after Congress was understood to have dissolved that status *and* that such status automatically deprives Oklahoma of the ability to fund services in Osage County through income taxes, the State's provision of services would be

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14. Cases such as the Tenth Circuit s decision in *Pittsburgh & Midway Coal Miining Company v. Watchman*, 52 F.3d 1531, 1540 (10th Cir. 1995), which rejected the argument that Section 1151 applies only to criminal jurisdiction, could not take into account the Supreme Court's subsequent guidance in *Atkinson*. They do not address whether federal policies preempt a state's ability to tax income in circumstances that do not implicate substantial federal interests.

severely threatened. Such a ruling would also affect the State's Sovereign rights, the State's jurisdiction over its citizens, and critical revenue, across a broad piece of land in which Congress has previously recognized the State has a right to exert its dominion. See Enabling Act, Ch. 3335, 34 Stat. 267 (1906), § 11.

Such a result would contravene substantial reliance interests, as did a similar claim affecting riverbed rights in Idaho: "[The Tribe's claim] is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 282 (1997). Similarly, standards of federal Indian law and federal equity practice preclude the Nation from advancing its claims here. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214 (2005). In *City of Sherrill*, the Court ruled that equitable considerations of laches, acquiescence and impossibility barred the Oneida Tribe's claim that it could exercise sovereign control over lands within the boundaries of the tribe's former reservation and avoid payment of city property taxes.

Oklahoma has governed Osage County as a county for over 100 years. The County is predominately non-Indian and non-Osage.[15] The Osage have not sought to reestablish their claimed reservation or to challenge the State s taxation until recently. Recognizing Osage County as a reservation and ousting Oklahoma income taxation over Osage members would have significant practical consequences not only for income taxation, but potentially for civil, criminal and regulatory jurisdiction in Osage County.

Accordingly, Defendants' Motion for Summary Judgment is granted.

James H. Payne
United States District Judge
Northern District of Oklahoma

15. According to the 2000 United States Census, Osage County had a population of 44,437, of whom 9,209 (or 20.7%) identified themselves as being American Indians, in whole or in part. The number of inhabitants of Osage County who identified themselves as Osage Indians, in whole or in part, was 2,403 (or 5.4% of the population of Osage County).