Case No. 09-5050

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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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

_____

APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

_____

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I. FED. R. APP. P. 35 STATEMENT

The Panel Decision misapprehends the analytical framework required by the United States Supreme Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), for questions of "reservation diminishment." The Panel Decision found no language in the Osage Act of 1906 expressing Congress' intent to terminate the boundaries of the Osage Indian Reservation. (Op. at 11.) Yet, the Panel erroneously disregarded the Osage Act's plain language and proceeded to infer Congress' intent to disestablish the reservation solely from modern events and the statement of one witness opposed to the bill. (Op. at 13). The Panel Decision is an unprecedented approach to statutory construction that conflicts with precedent.

The Panel Decision marks an expansive departure from *Solem* and the related body of Supreme Court and Tenth Circuit jurisprudence by inferring congressional intent to disestablish the Osage Reservation from an act allotting tribal lands to individual Indians (in contrast to a surplus land or land sale act); and despite the lack of statutory language evidencing Congress' intent to disestablish; and despite the lack of unequivocal evidence showing Congress' contemporaneous understanding that the Osage Act would terminate or alter reservation boundaries.

By inferring reservation disestablishment solely from the allotment of lands to tribal members, the Panel Decision also conflicts with rulings of the Supreme Court, Eighth Circuit, and Ninth Circuit Court of Appeals. Due to this conflict of authority, and because tribal land was allotted on scores of Indian reservations, a ruling that permits judicial inference of reservation disestablishment solely from allotment presents a

question of exceptional importance. *See* N. Newton, *Cohen's Handbook of Federal Indian Law* § 16.03[2] (2005) (discussing allotment).

The Panel Decision conflicts with *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. Dist. County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary.*, 368 U.S. 351 (1962); *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990); *United States v. Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000); and *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) (rehearing pending). Rehearing *en banc* is necessary to secure and maintain uniformity of the courts' decisions.

II. SPECIFIC ISSUES FOR REHEARING OR REHEARING *EN BANC*

This petition for rehearing is based on four specific errors overlooked in the Panel Decision that conflict with Supreme Court and Tenth Circuit jurisprudence:

A. The *Osage Nation* Panel improperly inferred congressional intent to disestablish and terminate the boundaries of the Osage Indian Reservation, despite the lack of *any* statutory language indicating that Congress intended to disestablish the reservation when it allotted lands to tribal members in 1906. Neither the Supreme Court nor the Tenth Circuit has ever found diminishment of an Indian reservation without some affirmative evidence of congressional intent to diminish in the relevant statutory language. The *Osage Nation* decision is unprecedented.

B. The *Osage Nation* Panel erroneously inferred congressional intent to disestablish the Osage Reservation through an allotment act that distributed Osage Reservation lands solely to tribal members, reserved the mineral estate in trust, and did not cede, create, open, or restore any "surplus lands" for non-Indian settlement. The Panel Decision conflicts with Supreme Court precedent in *Mattz*, 412 U.S. at 495-96, that mere allotment is insufficient to disestablish an Indian reservation. *See also Webb*, 219 F.3d at 1135 (allotment not adequate to terminate reservation). Neither the Supreme Court nor the Tenth Circuit has ever found that an allotment act (as distinguished from a surplus land act that also restored or opened "surplus lands" to non-Indian entry) resulted in disestablishment of an Indian reservation.

C. In direct conflict with the Supreme Court's direction in *Solem*, the Court inferred congressional intent to disestablish the Osage Reservation despite the lack of *unequivocal* evidence (indeed, any evidence at all) that revealed a widely held, contemporaneous understanding that the Osage Act of 1906 would result in termination of reservation boundaries. The Court misapprehended the *Solem* test by omitting the critical word "unequivocal." (Op. at 12.) The Court then proceeded to rely entirely on one ambiguous comment from the legislative record to infer congressional intent to terminate reservation boundaries ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations." (Op. at 13.))

D. Despite finding ambiguity in the Osage Act, the *Osage Nation* Panel failed

to apply, or even cite, principles of statutory construction that require that ambiguities in statutes relating to Indians be construed in the Indians' favor. Application of the Indian law canons is mandatory in this case under binding Supreme Court and uniform Tenth Circuit precedent.

III. ARGUMENT AND AUTHORITY IN SUPPORT OF REHEARING

A. The *Osage Nation* Panel Improperly Inferred Congressional Intent to Disestablish the Osage Reservation Despite the Lack of Any Statutory Text Evidencing Intent to Terminate Reservation Boundaries.

Never in Supreme Court or Tenth Circuit jurisprudence has a reservation been held disestablished or diminished without at least some affirmative expression of congressional intent to diminish in the language of the statute itself. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (analyzing 1894 Act that contained "plain language" evincing "congressional intent to diminish the reservation"); *Hagen v. Utah*, 510 U.S. 399, 413 (1994) (finding that operative language of 1902 Act restoring reservation lands to public domain expressed statutory intent to diminish); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (analyzing 1904 Act that contained express "cede, surrender, grant, and convey" language that is "precisely suited to disestablishment"); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 445 (1975) (finding that "the face of the Act and its surrounding circumstances and legislative history all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891"); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355 (1962) (discussing an 1892 Act that diminished the North Half of the Colville Reservation through operative statutory language that "vacated and restored" the

reservation lands "to the public domain"). The Panel Decision here is unprecedented.

The *Osage* Panel found no statutory language in the Osage Act, or any other act, that expresses congressional intent to disestablish or diminish the boundaries of the Osage Reservation. (Op. at 11.) The Osage Act allotted reservation lands to tribal members without suggesting any effect on reservation boundaries. *Id*. The Act did not sell lands or open areas to non-Indian settlement. *Id.* As noted in the Panel's Opinion, "[t]he Supreme Court has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation." (Op. at 8.) The Panel also found that *all* of the factors discussed by the Supreme Court in *Solem* "weighing in favor of continued reservation status" are present in the Osage Act. (Op. at 11.) Nothing in the Act suggests intent to disestablish the Osage Reservation. *Id.* Despite these findings, the *Osage* Panel overlooked the plain language of the Act and erroneously proceeded to infer Congress' intent to disestablish the reservation from other "circumstances." (Op. at 11.)

Since statutory language is the best evidence of congressional intent, the Supreme Court and this Court have always rooted diminishment analysis in the language of the act itself. *Solem*, 465 U.S. at 470 (stating the statutory language is the most probative evidence of congressional intent). Here, the Panel radically departs from Supreme Court and Tenth Circuit precedent by finding reservation disestablishment despite the absence of *any* statutory support.

The Court's decision further misapprehends Supreme Court cases involving statutes that were ultimately interpreted to maintain reservation boundaries intact. In

Seymour[1] and *Mattz*, the Supreme Court held that acts simply opening the way for non-Indians to buy lands on reservations, without more, did not evince congressional intent to diminish the reservation. *Yankton Sioux*, 522 U.S. at 345. In *Solem*, an act that authorized the Secretary to "sell and dispose" of lands surplus to allotment did not provide sufficient evidence of intent to diminish reservation boundaries. *Id.* The statutory language at issue in *Osage* is far <u>less</u> suggestive of reservation diminishment than the language in *Solem*, *Mattz*, and *Seymour*, all cases in which the Supreme Court <u>*declined*</u> to find diminishment.

The Panel's Decision also conflicts with Tenth Circuit precedent. In both *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1530 (10th Cir. 1997) and *Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1401-1403 (10th Cir. 1990), the Court reviewed historical context and contemporaneous understanding to illuminate congressional intent, but properly rooted the respective rulings in the express language of the relevant statutes. *Id.* Inferring intent to disestablish without any textual support in the statute itself is unprecedented in this Circuit.

The Panel's willingness to infer congressional intent to terminate reservation boundaries even though the plain language of the Osage Act offers nothing to support a disestablishment finding also conflicts with this Circuit's general Indian law jurisprudence. "Silence is not sufficient to establish Congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *National Labor*

[1] Like this case, *Seymour* involved a 1906 allotment act, passed at a time when Congress expressly abolished certain other reservations. 368 U.S. at 355.

Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002); *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D. N.M. 1995), *aff'd* 115 F.3d 1498 (10th Cir. 1997) (congressional silence is to be interpreted in favor of Indians); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (2004) (silence in state enabling act would not be construed to impair Indian rights). To the extent that congressional silence creates an ambiguity, that ambiguity must be construed liberally in favor of the Osage Nation and in favor of continued reservation status. *See infra* Section III.D.

The Court's finding of reservation disestablishment, based on an allotment act that contains no language evidencing congressional intent to disestablish is unprecedented and directly conflicts with well-established jurisprudence of this Circuit and the Supreme Court. Rehearing or rehearing *en banc* is required.

B. The Court's Inference of Congressional Intent to Disestablish the Osage Reservation Based on an Allotment Act Conflicts with Precedent that Allotment is Insufficient to Terminate A Reservation.

Distribution of reservation lands to Indians is not adequate to establish congressional intent to disestablish a reservation. *United States v. Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000); *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 965 (8th Cir. 2009) . To the contrary, the Supreme Court has stated that the policy of allotment was to "continue the reservation system and the trust status of Indian lands" and also that allotment is "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 496-97. Treating land allotment as tantamount to disestablishment creates the "impractical pattern of checkerboard jurisdiction . . . avoided by the plain language of [18 U.S.C.] § 1151 . . . [and] the result would be merely to recreate confusion Congress

specifically sought to avoid." *Seymour*, 368 U.S. at 358. The Panel's inference of congressional intent to disestablish the Osage Reservation from an act that allotted reservation lands solely among tribal members, with no "surplus lands" opened for non-Indian settlement or restored to the public domain is unprecedented.

The Panel's Decision misconstrues and misquotes certain language from *Solem* as applicable to "allotment acts." (Op. at 8.) However, *Solem*, and other cases in which the Supreme Court analyzed congressional intent to diminish a reservation have all involved "surplus land acts"; i.e., acts in which unallotted "surplus lands" are ceded by the Tribe to the United States and opened for non-Indian settlement or restored to the public domain. *See Solem*, 465 U.S. at 469; *see also* § III.A *supra*.

The Osage Act of 1906 is not a surplus land act. The Osage Act did not open any portion of the Reservation for settlement or restore Indian lands to the public domain. Reservation surface lands were allotted solely to tribal members and the entire subsurface was retained in tribal trust. Nothing in the text of the Act suggests congressional intent to alter reservation boundaries. In fact, numerous present tense references in the Act, read in context with the well-documented resistance of the Osage to Dawes Act-style allotment, [2] and allotment acts applicable to other tribes, indicate Congress intended to preserve, rather than terminate the Osage Reservation. In statutory interpretation, courts may look to related statutes to ascertain congressional intent on the assumption that when Congress passes a new statute, it acts in awareness of all previous statutes on the same subject.

[2] The Panel failed to address or consider Osage opposition to allotment. Historian David Baird noted, "the full bloods' opposition to allotment was confirmed." *Compare* 2 Aplt. App. at 237 *with* Op. at 13 (*citing* Black Dog's statement, Aplt. Add. at 12).

United States v. Quarrell, 310 F.3d 664, (10th Cir. 2002). Prior to passage of the 1906 Osage Act, Congress had abolished other Oklahoma reservations. *See* Section 8 of the Act of April 21, 1904, 33 Stat. 189, 218 (1904) ("That the reservations lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished….") Thus, the conspicuous silence in the Osage Act as to disestablishment of the Osage Reservation is significant evidence of Congress' intent to preserve the Osage Reservation. Rehearing is necessary to address the Panel's misconstruction of Osage Act's plain language.

C. The Court Improperly Relied upon One Ambiguous Statement From the 1906 Legislative Record; None of the Evidence Cited By the Court Unequivocally Reveals a Contemporaneous Understanding That Reservation Boundaries Would Be Terminated.

The Panel's Decision inferred congressional intent to disestablish the Osage Indian Reservation, an inference based on its subjective interpretation of vague and ambiguous legislative history. (Op. at 12-13.) The Panel also erroneously relied upon analysis from modern academic commentators[3] and questionable demographic information.[4] (Op. at

[3] The Panel notes a sweeping, overbroad generalization in F. Prucha, *The Great Father* (1984), that Oklahoma lacks any Indian reservations. (Op. at 12, 15.) Yet, Prucha's statement comes from a chapter limited in scope to the "Five Civilized Tribes" in Oklahoma Indian Territory, and makes no mention of the Osage. The chapter, titled "Liquidating the Indian Territory" deals exclusively with territorial boundaries from which the Osage Reservation had been specifically excluded. In general, the Prucha citations are illustrative of the Panel's misplaced reliance on modern academic commentary as persuasive evidence of the requisite legislative intent for the second prong of the *Solem* analysis. The non-lawyer historians' conclusory statements, relied upon frequently by the Panel, make no attempt to consider or distinguish the legal effect of allotment's "dissolution" of the tribe's *title* to the entire surface estate from the legal issue of disestablishment or diminishment of reservation boundaries for *jurisdictional* purposes. *See Solem*, 465 U.S. at 470 ("Once a block of land is set aside for an Indian

14-19.) *Cf. Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1297 (8th Cir. 1994) *cert. denied*, 513 U.S. 1103 (1995) (Of the three *Solem* factors, statutory language is most probative, therefore exclusive reliance on the historical context and demographics of the settled area is inappropriate.) By contrast, the panel gave no weight to Congress' subsequent references to the continuing Osage Reservation in, e.g., 25 U.S.C. § 398 (1924), 25 U.S.C. § 396f (1938), 25 U.S.C. § 373c (1942), and the Reaffirmation Act of 2004, Pub. L. No. 108-431.[5]

The evidence relied upon by the *Osage* panel to infer congressional intent does not *unequivocally* reveal a widely held, contemporaneous understanding that the Osage Act would terminate reservation boundaries. The Panel's reliance on one vague statement from a witness opposed to the legislation (discussed *supra* at 3 and *infra* at 11) to support an inference that Congress intended to terminate the Osage Reservation departs from

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Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.") Thus, the historians' conclusory statements are not probative evidence of legislative intent and unequivocal contemporaneous understanding of the effect of the Osage Act upon reservation boundaries at the time of passage in 1906.

[4] The Panel notes the influx of non Indians by 1910 (Op. at 19), but that cannot reflect the 1906 Osage Act's effect because all surface and subsurface land alienation was restricted for 25 years. Act of June 28, 1906, §2, 34 Stat. 539, 541 (1906). Further, the Panel appears to conflate restricted ownership and trust property in its lands statistics. *Id*.

[5] Referring to the Reaffirmation Act of 2004, the Panel incorrectly stated the Act "does not specifically refer to an Osage reservation in the text of the statute, and does not address the reservation status of the Osage land." (Op. at 5). Yet, the Act itself clearly refers to the Osage Reservation: "Congress hereby clarifies that the term 'legal membership'… 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." (emphasis added).

Solem, 465 U.S. at 471, conflicts with binding precedent, and demands rehearing. *E.g.*, *BedRoc Ltd. v. United States*, 541 U.S. 176, 186-87, n.8 (2004) (refusing to examine legislative history in conflict with plain meaning).

The Panel's Decision begins with a correct analysis that mere allotment of tribal lands has never been sufficient to infer disestablishment of a reservation. (Op. at 8-11.) Although the text of the Osage Act simply allots lands to tribal members, the Panel overlooks the Act's language and proceeds to infer disestablishment based on its interpretation of statements in the legislative record. (Op. at 12-14.) Yet, the legislative history relied upon by the Court is entirely consistent with the Nation's argument that the purpose of the Osage Act was simply allotment and not reservation termination. The quotations from the legislative record cited by the Panel discuss the division and allotment of lands to tribal members, but lack any mention of ceding lands, dissolution of reservation boundaries, general opening of lands for non-Indian settlement, or restoration of lands to the public domain. (Op. at 12-14.)

The Court's determination that "the Osage also recognized that the allotment process would terminate reservation status" is based solely on one remarkably ambiguous statement from an Osage Representative, Black Dog. (Op. at 13.) The lone statement of Black Dog, read into the record through an interpreter, hardly reveals an unequivocal, widely held contemporaneous understanding by the Osage that allotment of their lands by the proposed Osage Act would also terminate the Osage Reservation. Far from supporting termination, the legislative record contains no evidence that Congress intended the Osage Act to terminate reservation boundaries while allotting lands to tribal

members.

Notably, the Panel failed to correctly recite the Supreme Court's test from *Solem* prior to its analysis of the legislative record, omitting the critical word "unequivocal." *See* Op. at 12 (stating, "if the statute is ambiguous, we turn to the circumstances surrounding the passage of the act, . . . for evidence of a contemporaneous understanding" and omitting the word "unequivocal" in front of "evidence"). This Court's omission of the word "unequivocal" in its recitation of the *Solem* test is not insignificant. The Supreme Court has mandated that diminishment is not to be lightly inferred. *Solem*, 465 U.S. at 470. The Supreme Court prohibits inference of diminishment on anything less than an unequivocal showing that Congress affirmatively intended to change reservation boundaries. *Id.*, at 470-71. Here, the Panel inferred intent to disestablish and terminate the reservation without any statutory text supporting that intent and based solely on ambiguous testimony in a legislative hearing. This analysis conflicts with binding precedent and warrants rehearing or rehearing *en banc*.

The legislative history relied upon by the Court here is vastly distinguishable from, and far more equivocal than, legislative history that supported diminishment findings in past Supreme Court decisions. In *Yankton Sioux Tribe*, in addition to express diminishment language in the text of the statute, the record contained an agreement between the Tribe and the United States for the sale, cession, and relinquishment of tribal lands, legislative reports discussing restoration of the surplus lands to the public domain, and a contemporaneous Presidential proclamation opening the lands to non-Indian settlement. *Yankton Sioux Tribe*, 522 U.S. at 336-338, 352-354. Notably, the Supreme

Court stated that those contemporaneous events (far more compelling than those present in *Osage Nation*) were *not sufficient* standing alone to provide unequivocal evidence of Congress' intent to diminish the reservation. *Id.*, at 351.

The unequivocal evidence relied upon in other Supreme Court cases to support a diminishment finding is also illustrative. In *Hagen*, in addition to express statutory language evidencing intent to diminish, the Court cited letters that discussed the "restoration of the surplus lands," meeting minutes that explained there would be "no outside boundary line to the reservation," letters from Interior discussing the "opening" of the reservation to non-Indian settlement; and a Presidential Proclamation opening the reservation. *Hagen*, 510 U.S. at 416-420. In *Kneip*, the Court cited an agreement of sale and cession between the Tribe and the United States. *Kneip*, 430 U.S. at 591. The record also contained unequivocal statements in legislative reports that "the purpose of the bill is to ratify and amend an agreement . . . providing for the cession to the United States of the unallotted portion of their lands . . . and opening the same to settlement and entry under the homestead and town-site laws." *Id.* at 595. The record in *DeCoteau* also contained a "straightforward" negotiated agreement by which the Tribe agreed to cede, sell, and convey unallotted surplus lands. *DeCoteau*, 420 U.S. at 448.

The contemporaneous legislative record in this case contains nothing even remotely similar to the evidence found persuasive by the Supreme Court in *Yankton Sioux*, *Hagen*, *Kneip*, and *DeCoteau*. Moreover, all of those cases also involved statutes with express language evidencing intent to diminish. The Panel Decision made a significant departure from precedent in this case by inferring congressional intent to

disestablish the Osage Reservation on a record containing only conflicting statements addressing allotment of lands to tribal members. Supreme Court precedent requires *unequivocal* evidence. Rehearing is required.

D. The Court Failed to Apply Deeply Rooted Indian Law Canons of Construction That Require Any Ambiguities in Statutes Affecting Indians to be Liberally Construed for the Benefit of the Indians.

The Panel's Decision incorrectly found that the Osage Act was ambiguous as to whether Congress intended to permanently disestablish the boundaries of the Osage Reservation. (Op. at 11.) (In fact, nothing in the Act supports disestablishment.) The Panel compounded its error by failing to apply (or even reference) a principle "deeply rooted" in Supreme Court jurisprudence that requires "statutes to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("[w]hen we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence"); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985) ("the standard principles of statutory construction do not have their usual force in cases involving Indian law . . . statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

This long-standing principle of Indian law jurisprudence is fully applicable to cases analyzing congressional intent to terminate or diminish reservations. *Yankton Sioux Tribe*, 522 U.S. at 344 (stating that in diminishment cases, "we resolve any ambiguities in favor of the Indians and we will not lightly find diminishment"); *Hagen*, 510 U.S. at 411

(same). If there is ambiguity in the Osage Act, application of the Indian canons in favor of the Osage Nation is mandatory.

IV. CONCLUSION

The Panel decision in *Osage Nation* conflicts with and radically departs from Supreme Court and Circuit Court jurisprudence regarding questions of "reservation diminishment." Osage Nation respectfully requests rehearing or rehearing *en banc*.

Dated this 2nd day of April, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2010, a true and correct copy of the within and foregoing Petition for Rehearing or Rehearing *en banc* 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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FILED
United States Court of Appeals
Tenth Circuit

March 5, 2010

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

OSAGE NATION,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

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

No. 09-5050

COMMERCE AND INDUSTRY,

Amici Curiae.

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

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

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

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

KELLY, Circuit Judge.

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

A. Statutory Language

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

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

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

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

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

B. Circumstances Surrounding Passage of the Act

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

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

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

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

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

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

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

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

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

C. Post-enactment History

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

demographics, id. at 472 n.12).

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

In addition, uncontested population demographics demonstrate a dramatic

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

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

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

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

AFFIRMED.

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