No. 09-5050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION,
*Appellant/Plaintiff*,

v.

THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION,
*Appellees/Defendants*.

On Appeal from the United States District Court
For the Northern District of Oklahoma (Payne, J.)
Case No. 01 CV – 0516 – JHP – FHM

# BRIEF OF THE APPELLEES

**OKLAHOMA TAX COMMISSION**
Kathryn L. Bass,
Chief Deputy General Counsel
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102
Phone: (405) 319-8550

**MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.**
Lynn H. Slade
William C. Scott
Joan D. Marsan
Post Office Box 2168
Albuquerque, NM 87103-2168
Phone: (505) 848-1800

*Counsel for Appellees*

**ORAL ARGUMENT REQUESTED**

September 14, 2009

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## I. INTRODUCTION

More than 70 years ago, the United States Supreme Court squarely held the State of Oklahoma may tax the income of an Osage Nation member derived within Osage County.[1] The Nation, through this lawsuit, would upend this longstanding recognition of taxing authority and more than a century of settled jurisdictional expectations premised on the understanding that the Osage Nation's Reservation had been disestablished. This action threatens not only to deprive the State of needed taxing authority, but also to subject the predominately non-member population of Oklahoma's largest county to the Nation's recently and expansively asserted claim of jurisdiction.

This case challenges an unbroken string of federal judicial decisions holding property and income of Osage members subject to state income and other taxes. The Second Amended Complaint seeks to sidestep these decisions by contending that all of Osage County remains a reservation and, if it is, the challenged taxes are preempted. However, the clear intent of Congress in the Osage Division Act, ch. 3572, 34 Stat. 539 (1906), and Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), as confirmed by contemporaneous understandings of the intent of those acts, requires the rejection of the Nation's late-blooming claims. The Nation grounds its preemption claim in the Supreme Court's decision in *McClanahan v.*

[1] *See Leahy v. Okla. State Treasurer*, 297 U.S. 420, 421 (1936).

*Arizona State Tax Commission*, 411 U.S. 164 (1973). But it ignores that *McClanahan* and cases following it have expressly distinguished Osage County and both the Osage Division Act and the Oklahoma Enabling Act reflect broad intent to authorize taxation of fee lands-related income. Federal law does not preempt Oklahoma's taxation of income of Osage members who earn their income and reside on fee lands in Osage County.

## II. APPELLEES' STATEMENT OF THE CASE

The Defendants-Appellees, Thomas E. Kemp, Jr., Jerry Johnson, and Constance Irby, Commissioners of the Oklahoma Tax Commission, supplement the Nation's discussion of procedural posture in its statement of the case because of the significance to the record on appeal of details the Nation omitted. The Nation filed this case in 2001. After this Court's December 2007 decision remanded for determination of claims against the Commissioners, the court entered its March 27, 2008 Scheduling Order (Aplee. Supp. App. at 428), setting briefing and discovery deadlines and trial on March 14, 2009. Following full briefing on the Commissioner's Motion to Dismiss ("Motion to Dismiss"), the district court's September 18, 2009 order (Aplt. App. at 204) requested briefing on summary judgment.

The Commissioners filed their Supplemental Brief in Support of Alternative Motion for Summary Judgment ("S/J Brief") (Aplt. App. at 205), supported by

three affidavits and associated historical, demographic, and land status materials. The Nation neither filed a cross-motion for summary judgment, nor sought additional time for discovery under Fed. R. Civ. P. 56(f). Instead, the Nation's Response Brief in Opposition to Alternative Motion for Summary Judgment ("S/J Response") (Aplt. App. at 332) largely accepted the facts stated in the Commissioners' Statement of Undisputed Material Facts ("Undisputed Material Facts").[2] Then, two weeks after the summary judgment briefing had closed, the Nation filed a Motion to Strike Certain Exhibits to Defendants' Motion for Summary Judgment ("Motion to Strike") (Aplee. Supp. App. at 1). The district court considered the Motion, notwithstanding its tardiness, and denied it except with respect to three sentences of one affidavit, January 23, 2009 Minute Order (Aplee. Supp. App. at 65).[3] The Nation's notice of appeal, docketing statement

[2] The Nation left uncontested Undisputed Material Facts Nos. 1, 4, 6, 8, 9, 13-15, 17-26, 29 and 30, and those facts were deemed admitted under the district court's local rule. *See* N.D. Okla. LRCv 56.1(c); Reply in Support of Alternative Motion for Summary Judgment of Defendants Kemp, Johnson, and Irby at 1 ("S/J Reply") (Aplt. App. at 368). The district court denied the Motion to Strike as to the evidence referenced in Undisputed Material Facts Nos. 2, 3, 5, 7, 16, and 27, facts gleaned from *The Osage People*, a learned treatise by David Baird, Ph.D., *see* footnote 3, *infra*, and as to the evidence underlying Undisputed Material Fact No. 12, which refers to excerpts from learned treatises authenticated in Professor Lawrence Kelly's Sept. 23, 2009 Affidavit ("Kelly S/J Aff.") (Aplt. App. at 241).

[3] The Motion to Strike was granted only as to certain conclusory statements regarding reservation status in Paragraph 8, the first sentence of Paragraph 12, and the second sentence of Paragraph 13 of the Kelly S/J Affidavit. It was denied as to all remaining portions of the Kelly S/J Affidavit; the entirety of the summary

and opening brief here do not challenge the order denying its Motion to Strike or the admissibility of the summary judgment record. The Nation's failure to controvert critical facts or challenge the Order denying the Motion to Strike in this Court confirms the propriety of the district court's consideration of summary judgment evidence of Commissioners' expert historian, demographer, and landman, and other facts that support the decision below.[4]

The district court's January 23, 2009 Order granting summary judgment ("S/J Order") (Aplt. App. at 381) concluded that, considering the statutory language of the Osage Division Act, the contemporaneous Oklahoma Enabling Act, and the surrounding circumstances, the 1906 Osage Division Act reflects Congress' "unmistakable intent" to disestablish the Osage Reservation. S/J Order at 9 (Aplt. App. at 381). The district court also held, whether or not Osage County remains a reservation, Congressional enactments reflect the intention that "Osage unrestricted fee lands, and income related to them, are presumptively subject to state taxes." *Id*. at 22.

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judgment affidavits of demographer Warren Glimpse ("Glimpse S/J Aff.") (Aplt. App. at 305) and expert land status witness Bill Harwell, ("Harwell S/J Aff.") (Aplt. App. at 290); and excerpts from David Baird, *The Osage People* (1972) ("Baird") (Aplt. App. at 235).

[4] *See Hill v. Kemp*, 478 F.3d 1236, 1250-51 (10th Cir. 2007) (failure to raise an issue until reply brief constitutes waiver of that issue); *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1174 (10th Cir. 2005) (failure to raise an issue in an opening brief, docketing statement, or statement of issues waives that issue).

The Nation filed a Rule 59 Motion for Reconsideration ("Rule 59 Motion") (Aplee. Supp. App. at 66) seeking reconsideration of the summary judgment order. Although the Nation's brief to this Court does not argue denial of its Rule 59 Motion was error, it argues from exhibits to its Rule 59 Motion in Appellant's Brief and includes those exhibits in its Appendix here.[5] This appeal addresses the propriety of summary judgment on this record.

## III. APPELLEES' STATEMENT OF FACTS

Oklahoma's attainment of statehood concluded a concerted effort to make a unified state out of what had been a diverse amalgamation of tribal nations.

[5] *See* Aplt. Br. at 48. The Rule 59 Motion submitted documents regarding the State's receipt of gambling revenues only after summary judgment was granted, Aplt. App. at 410-415, and the district court properly declined to consider those documents. Mar. 16, 2009 Minute Order (Aplt. App. at 416). The Nation has not challenged that denial so it cannot rely on these documents as a ground for *reversal* of the judgment. *See Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475 (10th Cir. 1993) (summary judgment may not be reversed on basis of materials not before district court when summary judgment was granted). However, this Court may consider the documents submitted by both parties in the post-trial briefing, even though the district court did not consider those documents, in determining whether the summary judgment should be *affirmed* on grounds not relied upon by the district court. *See, e.g., Kellogg v. Metro. Life Ins. Co.*, 549 F.3d 818, 825 (10th Cir. 2008) (appellate court "may affirm on any basis supported by the record, even though not relied on by the district court"). Materials submitted to a district court on a Rule 59 motion, even after it has granted a motion for summary judgment, are part of the record on appeal. *See Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1246 (10th Cir. 2003).

Francis Paul Prucha, *The Great Father* 737-57 (1984) ("Prucha").[6] Statehood was preceded by intensive efforts to allot and disestablish the reservations of those tribal nations and to instead make their members landholding citizens of the United States. *Id.* at 748-54. The final result was a state unlike others in the American West: Upon Oklahoma's statehood, tribal members of the Territories "maintained an identity as Indians and for many years far surpassed the Indian population of other states. There are no Indian reservations in Oklahoma, however, and the reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." *Id.* at 757.

While there were unique features to the Osage Division Act, the Osage Tribe was subject to the same forces that made the Oklahoma Indians "an anomaly in Indian-white relations. Many had long been acculturated to the white man's ways and took an active part in the formation of the new state and in its economic and political life." *Id.; see also* B.B. Chapman, "*Dissolution of the Osage Reservation,*" 20 Chronicles of Oklahoma (Sept. 1942), Mot. to Dismiss, App. D. (Aplt. App. at 98). ("Thirteen Indian reservations were in Oklahoma Territory as

[6] Prucha is "the preeminent historian of United States Indian policy," whose work has been cited by the United States Supreme Court. *See* Kelly S/J Aff., ¶ 10 (Aplt. App. at 244), *and* Aff. of Lawrence C. Kelly (Jan. 23, 2009) ("Kelly R. 59 Aff."), ¶ 11, Ex. C to Resp. of Defendants Kemp, Johnson, and Irby to Plaintiff Osage Nation's R. 59 Mot. and Opening Brief ("R. 59 Resp.") (Aplee. Supp. App. at 276-277); *United States v. Lara*, 541 U.S. 193, 201 (2004); *Hagen v. Utah*, 510 U.S. 399, 426 n.5 (1994); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 504 n.11 (1986); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985).

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.").[7]

The Osage Tribe became one of a number of tribes residing in the "Indian Territory" when it removed from Kansas to lands it purchased from the Cherokee Nation in 1872. *See* Act of June 5, 1872, ch. 310, 17 Stat. 228. When the Indian Territory was divided in 1890 between lands of the "Five Civilized Tribes and Quapaw Agency tribes," which remained the "Indian Territory," with other tribes, the Osage Tribe was included within the Oklahoma Territory. Oklahoma Organic Act, ch. 182, 26 Stat. 81 (1890). The Organic Act made Nebraska law applicable throughout the Oklahoma Territory and vested in the Territorial courts exclusive jurisdiction over all actions except those between "Indians of the same tribe, while sustaining their tribal relations." *Id.* §§ 9, 11, 12.

In 1894, following its policy of encouraging the abandonment of the reservation system, the federal government sent a special Osage Commission to the Osage, seeking to interest them in allotment. W. David Baird, *The Osage People*

[7] Chapman's work is referenced in the Kelly S/J Affidavit, ¶ 10, Aplt. App. at 244, and Rule 26 Report of Lawrence C. Kelly ("Kelly Rule 26 Report") at 14, 23, 24, 26-27, 30-31, 42, Kelly Rule 59 Affidavit, Exhibit 1 (Aplee. Supp. App. at 292-320).

68 (1972) ("Baird"),[8] S/J Br., Ex. A (Aplt. App. at 237). By June, 1904, Osage support for allotment of tribal lands was reflected by the Osage election of a Chief that favored allotment. An allotment bill was drafted and approved by the Tribe in a subsequent general election. Baird, at 70 (Aplt. App. at 238). Meanwhile, Congress passed the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, creating the Osage Townsite Commission and authorizing the sale of certain townsites within the Osage Reservation. In February, 1906, an Osage delegation representing all factions of the Tribe took an allotment bill drafted and approved by the Tribe to Washington, D.C. Baird, at 70 (Aplt. App. at 237).

On June 28, 1906, Congress enacted the Osage Division Act. The legislative history of the Division Act reflects the Osage focused primarily on the apportionment and management of mineral rights and tribal funds but recognized acceptance of allotment would end traditional tribal government. *See infra*,. Point V.A.i.(a). Under the Division Act, the Osage were different from other Oklahoma tribes in that, when they acquiesced to allotment, the surface passed, with limited exceptions, to only 2,229 identified Osage members. The Act provided for division of the Tribe's lands among members through a series of four "selections," a 160-acre homestead that would be restricted until Congress provided otherwise,

[8] Baird is recognized as authoritative on the Osage. Kelly S/J Aff., ¶ 11 (Aplt. App. at 245), *and* Kelly R. 26 Report at 43 (Aplee. Supp. App. at 320) (from R. 59 Rec.).

and three other selections of "surplus lands," constituting over two-thirds of the former tribal lands. Division Act, § 2. Restrictions would be removed on the surplus lands after twenty-five years, unless the Secretary earlier granted a "certificate of competency." *Id.*, § 2, Seventh.

Congress then transferred to members the beneficial interest in substantially all other tribal assets, including minerals and existing and expected funds. *See id*. The Act established a tribal government with uniquely limited tribal membership, governmental authority, and restricted funding. *See* Division Act, § 4.

Contemporaneously with the Division Act, Congress enacted the Oklahoma Enabling Act. The Enabling Act did not treat Oklahoma tribes and Indians like reservation Indians. It gave Oklahoma Indians the right to vote on statehood issues and prescribed that the Osage Reservation would become Osage County, Oklahoma. Enabling Act, § 2.

For a century, the Division Act limited Osage tribal membership to only those who held mineral interests as "headright" owners, and participation in tribal government was open just to those headright owners. Not until 2006, after Congress recognized the Osage Nation's right to form a government with a membership extending beyond holders of mineral interests, did the Osage Nation adopt its present Constitution and seek to assert sovereignty over the territory

allotted away from the Tribe in 1906 and jurisdiction over the non-mineral interests of non-members.

## IV. SUMMARY OF THE ARGUMENT

The district court correctly entered summary judgment dismissing the Nation's claims that all of Osage County continues to be a reservation and that, if it does, federal law preempts Oklahoma's taxation of incomes of all Osage members who both reside and earn income in Osage County. The Osage Division Act and Oklahoma Enabling Act clearly intended to disestablish the Reservation upon the division of the Tribe's lands and funds and the creation of Oklahoma, as reflected in (i) the language of the acts; (ii) the historical context surrounding passage of the acts; and (iii) events following passage of the acts. *See Hagen v. Utah*, 510 U.S. 399, 411 (1994), *and* Point IV.A., *infra.* Given federal statutory authorization for State taxation in the 1906 Acts and judicial affirmation of Oklahoma's taxing authority, federal law contemplates, rather than preempts, Oklahoma's taxation of incomes if the Osage member does not earn the income and reside on trust or restricted Indian lands. *See Leahy v. Okla. State Treasurer*, 297 U.S. 420, 421 (1936), *and* Point IV.B., *infra.* The district court reasonably concluded that federal laches principles foreclose injunctive and declaratory relief in light of undisputed evidence of Oklahoma's long unchallenged reliance on its taxing authority, the potential prejudice to Oklahoma and nonmember citizens, and the Nation's

unexcused delay in asserting this claim. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-218 (2005), *and* Point V.C., *infra.*

## V. ARGUMENT

### A. The District Court Properly Held Congress Disestablished the Osage Reservation.

The district court properly applied the framework for assessing reservation status set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984). As the Supreme Court's cases command, the district court analyzed the terms and language of the relevant statutes, congressional intent as evidenced by contemporaneous statements and history, and subsequent demographic changes and jurisdictional understandings. *See, e.g.*, *Hagen*, 510 U.S. at 411.

*Solem* instructs, "[e]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." 465 U.S. at 471. Indeed, "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998). In its brief, the Nation criticizes the district court for finding the Osage Reservation was disestablished in the absence of explicit language of cession and payment of a sum certain. *See* Aplt. Br. at 31 & 35. However, an analysis of all three factors

prescribed by *Solem*, *Hagen*, and other cases, taken as a whole, reveals whether or not a reservation was disestablished, not simply the presence or absence of certain "magic words." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005); *see also Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 662 (7th Cir. 2009) ("[Courts] cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation.").

Context is key to determining disestablishment:

> When events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the 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. Importantly, "[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. Here, the district court correctly assessed all three factors and found the relevant 1906 Acts disestablished the Osage Reservation.

The Nation incorrectly urges that because a canon of construction provides ambiguities should be resolved in favor of tribes, the district court erred in finding the Osage Reservation was disestablished. *See* Aplt. Br. at 42-43. But "canons are not mandatory rules. . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The canon must operate alongside the disestablishment test, which emphasizes the importance of a contextual reading of the statute. *See Yankton Sioux Tribe*, 522 U.S. at 343-44 & 349; *see also Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[Even] though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.") (citations omitted). "Moreover, the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation*, 534 U.S. at 95.

Here, the relevant Acts, and the contemporaneous history, as well as subsequent actions in response to the relevant Acts, clearly demonstrate Congress' intent to disestablish the reservation. In such circumstances, canons do not, indeed

cannot, direct a result contrary to Congress intent. *See Strate v. A-1 Contractors*, 520 U.S. 438, 446, 449 (1997) (a general rule applies only in the absence of a different Congressional direction). Rather, courts must "avoid reliance on platonic notions of Indian sovereignty and . . . look instead to the applicable treaties and statutes which define the limits of state power." *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973). The Supreme Court has expressly required lower courts to consider the context provided by legislative history and surrounding circumstances. That context makes plain congressional intent to disestablish.

**i. Clear Congressional Intent to Disestablish the Osage Reservation is Evident in the Language of the Relevant Acts.**

"The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 410. Although the Nation faults the district court for citing "no legal precedent for a finding of reservation disestablishment here," Aplt. Br. at 28, the district court quite properly relied on the most probative legal authority determinative of disestablishment: the language of the Osage Division Act and the Oklahoma Enabling Act, which evince Congress' intent to disestablish the Osage Reservation.

**a. The Osage Division Act Demonstrated Congress' Intent that the Reservation Be Disestablished.**

While the Osage Division Act does not include certain "hallmark diminishment language," the Division Act includes other language which demonstrates Congress' intent that the Reservation be disestablished. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 662-63 (concluding that, although the act in question did not include cession language or payment of a sum certain, the act did include other language that indicated an intent to diminish the reservation). A "reservation" consists of lands set aside under federal superintendence for the residence of tribal members. *See Cohen's Handbook of Federal Indian Law* 34 (Rennard Strickland, et al., eds., 1982). The Osage County contemplated by the Division Act did not fit that description.

The Osage Division Act provided that "all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe." Division Act, § 2. The Act's exceptions reserved for the Tribe three tracts totaling 480 acres for "the use and benefit of the Osage Indians, exclusively, for dwelling purposes," and boarding school, reservoir, and agents residence areas totaling slightly over 110 acres, all subject to sale by the Tribe. *Id*. § 2, Ninth, Tenth. The only other lands "excepted" were to be sold, including the federal and tribal government buildings, and "the Chief's house"; the

"cemetery reserve" was to be donated to the Town of Pawhuska. *Id*. § 2, Eleventh, Twelfth. The proceeds of all sales were to be "placed to the credit of the individual members of said tribe" and not to the Tribe. *See, e.g., id*. § 2, Ninth, Tenth, Eleventh.

Having reserved fewer than 600 acres for the Tribe, the Division Act mandated allotment of the entire remaining 1.5 million acre surface of the Osage Reservation to tribal members.[9] *Id.* § 2. Negating any continued tribal role, Division Act § 7 provides "[t]hat the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto . . . ."

Taxability was specifically addressed in Division Act:

> That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years . . . : *Provided, that 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, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, That the surplus lands shall be nontaxable*

[9] The Nation is simply incorrect that the Division Act "does not involve a Surplus Lands Act that opened the reservation to settlement." *See* Aplt. Br. at 28. Congress' clear intent with respect to the Osage "surplus lands" was to facilitate the removal of restrictions and the prompt sale to non-Indians. That was precisely what transpired following 1906. Glimpse S/J Aff. ¶¶ 9-10 (Aplt. App. 307-08).

> *for a period of three years from the approval of this act*, except where certificates of competency are issued or in case of the death of the allottee . . .

*Id.* § 2, Seventh (emphasis added). These provisions resulted in their intended effect: the rapid divestiture of the vast majority of Osage County lands from tribal members to non-members in the period immediately succeeding the Act's passage (*see* Section IV.A.iii, *infra*). *See also* Kelly R. 59 Aff., ¶ 9 (Aplee. Supp. App. at 276).

Further probative of Congress' intent is the Act's treatment of the former tribal minerals and funds. While the "oil, gas, and other minerals covered by [the tribe's] lands . . . are reserved to the use of the tribe for a period of twenty-five years," the Act transfers to the headright owners the entire beneficial interest in the minerals, including proceeds of production and the right to transfer of title upon the removal of restrictions on alienation. Division Act, § 2, Seventh.

Although Division Act § 4 states that "all funds belonging to the Osage tribe . . . shall be held in trust by the United States . . . except as herein provided," the exceptions constituted every substantial resource the Tribe then had or expected to have. The Act transferred from the Tribe to its headright-owning members (1) all funds arising from the Tribe's sale of its lands in Kansas and all claims the Tribe may have against the United States, *see id.* § 4, First; (2) "all royalty received from

oil, gas, coal and mineral leases," *id.*;[10] (3) "all moneys received from the sale of town lots" and other properties to be sold under the Division Act, *id.* § 4, Second; and (4) "all monies to be received from the sale of grazing lands," *id*. Congress, at the request of the headright members, stripped the Tribe of substantially all assets of a tribe pertinent to governing a reservation.

While allotment alone may not indicate intent to disestablish a reservation, the manner in which allotment of Osage lands was effected reflects the intent to shift governmental functions from the Osage Tribe to Osage County, which is consistent with an intent to disestablish. In *Solem*, *Mattz*, and *Seymour*, the proceeds of sale of unallotted lands were to be used by the United States on a continuing basis for the benefit of the tribe or its members. *See Solem,* 465 U.S. at 473-74; *Mattz v. Arnett*, 412 U.S. 481, 495-96 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355-56 (1962). The Osage Division Act's unusual provisions distributing all substantial present and future tribal funds (except for emergency amounts), to individual allottees eliminated any continuing

[10] *See also Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 232-33 (D.D.C. 2008), *rev'd on other grounds*; *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) ("Osage headrights are the product of the Osage Allotment Act of 1906, which allotted Osage tribal lands to individual members, but preserved the mineral estate of those lands for common management under the direction of the tribe. The proceeds of the mineral estate were to be held in trust for, and distributed per capita to, individual Osage Indians." (citations omitted)).

tribal role or interest and contemplated a future, severely limited tribal role inconsistent with governing a reservation.

Denying the Tribe the power to determine its own government structure, Division Act § 9 prescribed the form and role of the Tribe's government. For decades tribal members and others viewed the Osage government as limited to managing the mineral estate for headright owners, to the degree that members filed suit to enforce that view.[11] Current Principal Chief Jim Gray shares the view of the limited tribal government role prior to the 2004 Act, Pub. L. 108-431, 118 Stat. 2609 (2004). *See* Depo. of Osage Nation Principal Chief Jim Gray (Jan. 13, 2009) ("Gray Depo.") at 23:9-16 & 99:5-11, R. 59 Resp., Ex. I (Aplee. Supp. App. at 364-65) (from R. 59 Rec.).

Contrary to the Nation's contention, the Osage Division Act repeatedly expresses the intent that the Osage Reservation terminate. The Act provides that the "lands, moneys, and interests of . . . deceased members" shall descend to heirs "according to the laws of the Territory of Oklahoma, or of the State *in which said reservation may be hereinafter incorporated*," *see* Division Act, § 6 (emphasis added). By stating that the reservation will "hereinafter be incorporated" into Osage County, the Act recognized that the "reservation" will be made "part of

[11] This Court rejected the members' claim, *see Logan v. Andrus*, 640 F.2d 269, 271 (10th Cir. 1981); however, this Court has also recognized the Osage were powerless to change their form of government without an Act of Congress. *See Fletcher v. United States*, 116 F.3d 1315, 1319-20 (10th Cir. 1997).

another thing," or "merged" or "form[ed] (individual or units) into a legally organized group that acts as one." *See Webster's New World Dictionary* 684 (3d. Coll. Ed. 1988). In Section 11, the Division Act refers to the "Reservation" in the past tense ("[A]ll lands taken or condemned by any railroad company in the Osage Reservation . . . are reserved from selection and allotment [under the Act] and confirmed in such railroad companies."). This provision by its terms speaks retrospectively. The Nation, lacking any statutory text suggesting reservation-like government for the Osage, relies on statutory references to a "reservation." This argument fails to recognize that, in contemporaneous statutes, Congress often referred to a "reservation" to denote the tribe's former lands or status or merely to provide geographic reference points. *See Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387, 1409 (10th Cir. 1990) ("references to a reservation must be discounted as convenient colloquialisms").

**b. The Oklahoma Enabling Act Expresses Congress' Clear Intent that the Osage Reservation Be Disestablished.**

The Oklahoma Enabling Act confirms that no reservation would remain at Osage or elsewhere within Oklahoma. Though the Oklahoma Enabling Act was part and parcel of the same legislation enacted to also serve as an enabling act for Arizona and New Mexico, Oklahoma and its Indians were treated differently from

the other two prospective states.[12] Unlike the Arizona and New Mexico provisions of the Act, the Oklahoma provisions made no distinction between tribal and non-tribal residents of the State, because in Oklahoma they were to be treated as one and the same under the Act—taxable. *Compare* 34 Stat. 267, § 24 (Arizona/New Mexico provision prohibiting discrimination against any person on the basis of race or color "*except as to Indians not taxed*"), *with id.* § 3 (in an otherwise substantively identical provision concerning Oklahoma, omitting any exception as to "Indians not taxed"); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (stating "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (internal citation omitted)). Other differences between the Oklahoma Enabling Act and the Arizona and New Mexico counterparts of the same bill signify that Oklahoma reservations would not survive Oklahoma statehood. While the provisions of the Act disclaiming *title* to federal and Indian lands are identical, *compare id*. § 3, Third, *with id*. § 25, Second,[13] the Arizona and New Mexico provisions contain a

[12] The New Mexico and Arizona portions of the Act, though enacted as part of the 1906 Act, did not become effective due to Arizona's rejection in 1906 of joint statehood; the Arizona and New Mexico portions were reenacted in slightly modified form in 1910.

[13] Both cited sections contain the identical language, "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to [public lands] and to all lands lying within said limits [of the proposed State] owned or held by any Indian or Indian tribes . . . ." The Nation misinterprets

significantly broader exception disclaiming *jurisdiction*, encompassing both federal public lands *and Indian lands*:

> [E]xcept as hereinafter provided, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, *and such Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*.

*Id*. § 25, Second (emphasis added). The Oklahoma counterpart of this provision, limits federal power over "jurisdiction, disposal, and control" only to "public lands," and *not* Indian lands.

> [A]nd that until the title to any such *public land* shall have been extinguished by the United States, the same shall be and remain subject to the *jurisdiction, disposal, and control* of the United States.

*Id*. § 3, Third (emphasis added). The Oklahoma provision lacks a comparable reservation of federal jurisdiction regarding Indian lands because, with reservations eliminated, no such provision was needed.

Concerning taxes, although both the Oklahoma and Arizona/New Mexico sections contain language providing that "no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the

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the Oklahoma disclaimer as supporting continued tribal *jurisdiction* over lands as to which all trust or restricted status has terminated. *See* Aplt. Br. at 34. This language unambiguously pertains only to title, not jurisdiction.

United States or reserved for its use," only the Arizona and New Mexico section limits the imposition of State taxes to "any Indian who has severed his tribal relations:"

> But nothing herein, or the ordinance herein provided for, shall preclude the State *from taxing, as other lands and other property are taxed, any lands and other property* owned or held by any Indian *who has severed his tribal relations* and has obtained a patent from the United States or from any person . . . .

*Id*. § 25, Second (emphasis added). The clear import of this language is that New Mexico and Arizona can only tax lands and other property of any Indian who has severed his or her tribal relations. *See United States v. Osage County Comm'rs*, 193 Fed. 485, 489 (W.D. Okla. 1911), *aff'd*, 216 Fed. 883, 885 (8th Cir. 1914), *app. dismissed*, 244 U.S. 663 (1917) (provision that Osage surplus lands be nontaxable for three years clearly means the lands are taxable after the three year period because "such is the obvious purpose of defining the period of exemption"). Oklahoma entered the Union without any such limitation.

Similarly, in an era when most Native Americans were not yet recognized as United States citizens, the Enabling Act gave Oklahoma Indians the right to vote for or against statehood, and thus to acquiesce, or not, to rights and responsibilities similar to those of state citizens, including taxation.[14] Enabling Act, § 2 ("That all

[14] With respect to tribal members, the Oklahoma Constitution recognizes as tax exempt only "such property as may be exempt by reason of treaty stipulations,

male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma . . . are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State.").

These significant differences between Oklahoma and other states persuasively support the understandings of historians and government officials that the Enabling Act contemplated no Oklahoma reservations would survive statehood. *See King*, 502 U.S. at 221. The only interpretation of the Enabling Act that gives meaning to these significant differences is reflected in the consensus of historians and others that, following the Enabling Act, no reservations existed in Oklahoma. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

With Osage concurrence, the Enabling Act transmuted the former reservation into an Oklahoma county and supplanted, as to civil and criminal matters alike, tribal government with State and County government. *See* Enabling Act, §§ 2, 21.[15] It replaced the formerly Indian character of government over the

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existing between the Indians and the United States government, or by federal law, during the force and effect of such treaties or federal law." Okla. Const. art. X, § 6.

[15] *See Osage County Comm'rs*, 193 Fed. at 490 (Under the Enabling Act, the constitutional convention was required "to constitute the Osage reservation a single

area with one emanating from state law, with a county seat, voting districts, and judges designated under non-tribal law. *Id.* As the district court noted, the Enabling Act reinforced that no reservations would remain after Statehood by providing that the laws of the Oklahoma Territory "shall extend over and apply to said State until changed by the legislature thereof." S*ee* S/J Order at 15 (Aplt. App. at 395). Oklahoma or federal courts were granted jurisdiction in all cases pending in Territorial courts or subsequently arising in the new State. Enabling Act, §§ 2, 13, 19, 21.

The Nation's contention that references in the Enabling Act to an "Osage Indian Reservation" reflect the intent that a reservation continue, *see* Aplt. Br. at 34, stands history on its head. The statute's references were either in the past tense or geographic. [16] The Act addressed the introduction of intoxicating liquors into "those parts of said State *now known* as the Indian Territory and the Osage Indian Reservation and any other parts of said State *which existed as Indian Reservations*

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county, pending allotment, and until legislative change, designate the county seat and regulate the first election of county officers. These Indians were to obtain the advantages of state and local government which would redound to their welfare and advancement.")

[16] The Enabling Act also made geographic reference to other tribal areas as "reservations," including the "Tonkawa Indian Reservation," the "Pawnee Indian Reservation," the "Osage and Kansas Indian reservations," and "the Indian reservations lying northeast of the Cherokee Nation," though there is no indication continued reservation status was intended for those other areas. *See* Enabling Act, §§ 6, 8.

*on the first day of January, nineteen hundred and six*." *Id.* § 3 (emphasis added). The Osage Reservation no more survived Statehood than did the Indian Territory. This and other Enabling Act references to an Osage "Reservation" do not imply that a reservation will continue. They carry little weight in light of the Act's provisions reflecting a jurisdictional status for tribes, including the Osage, inconsistent with reservation status.

Given the absence of statutory language indicating reservation status, the Nation relies instead on what the Acts did not say, contending that, because Congress did not employ specific language of "cession and sum certain payment," the Osage Reservation must have remained intact. However, the Supreme Court has long held there is no requirement of any "particular form of words before finding diminishment." *Hagen*, 510 U.S. at 411. Indeed, because at the time of allotment Congress had not yet conceived of a reservation that was coextensive with land owned by non-Indians, *see Solem*, 465 U.S. at 468, "the unique historical context makes it unreasonable for us to demand a clearer statement in the statutory language." *Stockbridge-Munsee Cmty.*, 554 F.3d at 665 (Ripple, J., concurring).

**ii. The Historical Context Surrounding Passage of the 1906 Acts Points to Disestablishment.**

The undisputed facts established "contemporary historical evidence," including Congressional reports leading up to and concurrent with the passage of

relevant acts, and correspondence among government officials and between tribal members and the government, demonstrating disestablishment of the Osage Reservation. *Hagen*, 510 U.S. at 416-417 (1994). Recognizing "courts need not rest on statutory language alone," the court in *Stockbridge-Munsee Cmty.*, 554 F.3d at 663, distinguished an 1871 Act from other allotment acts, concluding "[t]he circumstances surrounding the passage of this legislation show that it was more than a run-of-the-mill allotment act." The court found the historical events indicated that the 1871 Act was designed to reduce the size of the reservation and "the reservation was consistently treated as if it had been diminished by the 1871 Act." *Id.* The same analysis for a 1906 Act disclosed that "the circumstances surrounding the act show that Congress wanted to extinguish what remained of the reservation when it passed the act." *Id.* at 664. The court concluded it was clear that "all the parties at the table—the Tribe, the Department of the Interior, and Congress—expected that the completion of the allotment process would end the 1856 treaty and the reservation it created." *Id.*

Here, the Nation criticizes the district court for "relying only on passing references in subsequent non-legal academic commentary." Aplt. Br. at 29. The district court's analysis, to the contrary, was thorough and grounded in undisputed summary judgment evidence not challenged here. The district court recognized subsequent Congresses took action based on their understanding that the 1906 acts

disestablished the Osage reservation. S/J Order at 16-17 (Aplt. App. at 396-397). It relied on preeminent historian Francis Paul Prucha, whose works digest the legislative history of the relevant period and whom the Supreme Court has cited repeatedly as authoritative, most pertinent for this case in *Hagen*, 510 U.S. at 426 n.5. The district court considered the affidavit of Lawrence C. Kelly whom the Supreme Court also has cited. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 181 n.12 (1989). Professor Kelly collected and reviewed contemporary historical evidence, compelling evidence admitted and considered by the district court as reflected in its unchallenged Order on the Motion to Strike. *See* n. 3, *supra.*

The district court relied, not on "passing references," but on the clear conclusions of the leading historians on Indian policy, Oklahoma, and the Osage, that the Osage reservation was "dissolved." *See* Kelly S/J Aff., ¶ 10 (referencing authoritative works of Terry P. Wilson, *The Underground Reservation: Osage Oil* (1985); Berlin B. Chapman, "Dissolution of the Osage Reservation," *Chronicles of Oklahoma* (1942); Baird, *The Osage People* (1972), and Prucha, as supporting his statement that following 1906, "the Osage Reservation no longer existed and that the area became Osage Country, a subdivision of the state of Oklahoma." *See also*

Kelly R. 26 Report (Aplee. Supp. App. 42-45) (from R. 59 Rec.).[17] The Nation's only arguably historical witness, ethno-anthropologist Garrick Bailey, Ph.D, testified in his deposition that Lawrence Kelly is a "very good historian" (at 240:12-24), Kelly accurately "reported what the historical record said" (at 247:14-19), and Bailey had not formed a contrary opinion on whether "Osage County today is or is not a reservation" (at 281:11-17). *See* Depo. of Garrick Bailey, Ph.D (Jan. 19, 2009), R. 59 Resp., Ex. D. ("Bailey Depo.") (Aplee. Supp. App. at 327) (from R. 59 Rec.).

The district court recognized the historical context leading up to the 1906 Act in which Congress "systematically negotiated or legislated" transfers of tribal lands and the opening of tribal lands to non-Indians. S/J Order at 14 (Aplt. App. at 394) (*citing* Prucha). Prucha's work, *The Great Father*, analyzes the forces at work on tribes in the Indian and Oklahoma Territories as Oklahoma moved toward statehood. *See* Prucha, at 737-56 (Aplee. Supp. Add. at 103). The Dawes Commission implemented an allotment process with respect to the Five Civilized Tribes, similar to the process that occurred on the Osage reservation:

> Some part of each allotment was designated a homestead and made inalienable for a period of years. . . . The rest comprised land for townsites, schools,

[17] The Nation has abandoned any objection to consideration of Kelly's S/J Affidavit, by its failure to raise a challenge in its docketing statement or opening brief. *See* n. 6, *infra.*

> and other public purposes, and coal and mineral lands held for tribal benefit.

*Id.* at 754 (Aplee. Supp. Add. at 121).

Significant as background for the Osage, in 1906, Congress understood the Dawes Commission to have accomplished the "extinguishment of the national or tribal title" of the Five Civilized Tribes, a task integral to preparing Oklahoma for statehood. H.R. Rep. No. 59-496, at 9 (1906) (Aplee. Supp. Add. at 28); *id.* at 11 ("The work for which the Commission was created, . . . namely, 'the extinguishment of the national or tribal title to any lands within that territory,' is well advanced toward completion.").[18] This process resulted in the disestablishment of the Creek and other Oklahoma reservations. *See Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007).

Though the Osage and other Oklahoma tribes were excepted from the Dawes Commission process, the summary judgment record reflects the Osage were acutely aware of these pressures and acted in response to them. As the district court recognized, *see* S/J Order at 12-13 (Aplt. App. at 392-93), Congress sought to divest the Osage Tribe of its title to the vast majority of lands and limit the scope and role of the Tribe's government, which it did by dividing the Tribe's lands and

[18] Significantly, in that era, loss of Indian title was equated with loss of Indian country status. *See Solem*, 465 U.S. at 468 (at the turn of the 19th-20th centuries, "the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.").

funds, distributing them to its members, and setting strict limits on the Osage form of government. *See* Osage Division Act, §§ 2, 4, 9. The Congressional record bears this out. Preceding the passage of the Osage Division Act, and having observed the activities of the Dawes Commission, "[f]or several years, the Osage tribe of Indians, of Oklahoma, 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, an Osage delegation appeared before Congress to consider a bill and arrange negotiations at Osage between the United States and the Osage Tribe, "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." Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 1478 Before the H. Subcomm. of the Comm. on Indian Affairs, Vol. 1, 58th Cong. 8 (1905) (Aplt. App. at 9). Members of the Tribe were "very anxious to bring about the allotment at the earliest possible time," but sought to have the lands "held together until such time as the allotment can be made and then leave the new State of Oklahoma to do what in its wisdom seems fit in respect of the division of this territory into different counties." 40 Cong. Rec. 3572, 3581 (Statement of Sen. Dillingham) (1906) (Aplee. Supp. Add. at 51).

Congress and the Osage recognized that dissolution of their reserve would result in tribal members' loss, by transfer or otherwise, of much of the land to be allotted. *See* Division of Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before the Subcomm. of the Comm. on Indian Affairs, Vol. 2, 58th Cong. 4 (1905) (Aplt. Add. at 59) (Statement of John Palmer, of the Osage delegation) ("Those people [the Kansas Indians] have nearly all lost their land."); Baird, at 68 (Aplt. App. at 237) ("James Bigheart and Black Dog, for example, noted that, like Indians of other tribes, the Osages might very well lose their allotments after the dissolution of the reserve."). The Osage sought to ensure their lands would not become alienable through the receipt of certificates of competency, but this approach was rejected. *See* Hearings on H.R. 17478, Vol. 2 at 4 (Statement of Mr. Palmer) ("We were favorable to the language of the old Dawes Act, that the Government shall hold this land in trust for twenty-five years for the benefit of the Indians, and we think that would be better than to have it so that they could get the deeds after certificates of competency have been issued"); & *id.* (Statement of Chairman Curtis) ("You can not do that.").

The Osage sought to keep their surplus lands free from tax, but this, too, was rejected. S. Rep. No. 59-4210, at 8 (1906) (Letter of C.F. Larrabee, Acting Comm'r, Office of Indian Affairs) ("It is believed that the Osage Indians should be required to pay taxes on their surplus lands the same as citizens of Oklahoma

Territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of State and county maintenance through taxation on their surplus lands."). (Aplee. Supp. Add. at 49).

A primary concern of tribal leadership, however, was addressed. Chief Bigheart wished to ensure that some members were not enriched at the expense of others as the Tribe's land and assets were divided and distributed to its members. *See* Hearings on H.R. 17478, Vol. 2 at 11-14 & 55 (Aplt. Add. at 17-20 & 54). This was accomplished by: allotting lands in several rounds, severing the mineral estate from the surface state, retaining the mineral estate in trust for the tribe for the benefit of individual tribal members, and retaining a tribal government that would serve primarily to manage the mineral estate or to the members. *See* Osage Division Act, §§ 2, First-Fifth; 3, & 9.

An Osage delegate to Congress, Black Dog, through a translator, expressed concerns that recognized the division process would terminate reservation status:

> He says that he personally sees Indians in Oklahoma living on their reservations who have had negotiations with the Government, but since they have been compelled to take their allotments they are not doing as well as the Indians who live on the reservations.

Hearings on H.R. 1478, Vol. 1 at 6 (Aplt. Add. at 12).

The "manner in which the [Division Act] transaction was negotiated," *see Solem*, 465 U.S. at 471, reflects the clear Congressional intent and Osage

understanding that allotment would end reservation status. As in *Stockbridge-Munsee Community*, the Osage Division Act was intended to address the Osage Tribe's request that its lands and assets be divided and given to certain individual tribal members. The circumstances surrounding the passage of the Division Act demonstrate that "all the parties at the table" intended for the Osage Reservation to be disestablished. *See Stockbridge-Munsee Cmty.*, 554 F.3d at 664.

The Nation, in lieu of evidence as to contemporaneous understandings of the dispositive Acts, advanced below only evidence dating almost a century *after* passage of the relevant Acts.[19] *See* S/J Response at 15-16. This evidence was "contemporaneous" to the current litigation, not to the dispositive 1906 enactments in issue, and was not material to the second element of the disestablishment test. *See Hagen*, 510 U.S. at 411 ("[W]e have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage.") The Nation now advances slim snippets of legislative history that reflect an intent to retain trust protections for the remaining trust or restricted lands. *See* Aplt. Br. at 30. These do not contradict the strong indications in the 1906 Acts of an intent to disestablish. The summary

[19] The Nation presented no evidence below that properly can be characterized as evidence of contemporaneous understandings; instead, it referenced only the present-day understanding of Osages that they have a unique and continuing culture, and sources from the mid-1990s to the present. Although the Nation now denominates that evidence as evidence of "events subsequent" to the dispositive acts, it still lacks probative value. *See infra* Point V.A.iii.

judgment evidence on contemporaneous understandings, read as a whole, clearly reflects Congress' intent that the relevant acts disestablish the Osage Reservation.

### iii. The Events that Occurred After Passage of the 1906 Acts Point To Disestablishment.

"Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux*, 522 U.S. at 351. Although the Court has called this factor the "least probative," it has also recognized "[w]hen an area is predominately populated by non-Indians with only a few remaining pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S. at 471 n.12.

Factors indicating disestablishment include a dramatic decrease in Indian settlement and increase in non-Indian settlement immediately following the passage of the relevant Acts, *see Yankton Sioux Tribe*, 522 U.S. at 356, and settled jurisdictional expectations pertaining to the affected area, *see Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 598 n.20 (1977) ("longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land use" demands a finding of diminishment), *and Yankton Sioux Tribe*, 522 U.S. at 357 ("The State's assumption of jurisdiction over the territory, almost

immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding.").

The uncontested facts support the district court's finding that the third factor weighs in favor of disestablishment. In just three years, from the 1907 Special Census following the founding of Oklahoma to the 1910 Census, the total Osage County population grew by a third; then it grew by 82% from 1910 to 1920, and by another 30% from 1920 to 1930, roughly tripling the 1907 total population. Glimpse S/J Aff., ¶¶ 9-10 (Aplt. App. at 307-08). Although the Census did not specifically track changes in the Osage member population, during that same period, of the total 1910 County population of 20,101 only 1,345 persons identified themselves as Osage members and by 1920 the total Indian population was 1,208 out of a total of 36,536 persons residing in Osage County. *Id.* By the 2000 Census, the total non-Indian population stood at over five-sixths of the County population of 44,437, and the Osage member population of 1,569 was barely 3.5%. *Id.* at ¶ 14 (Aplt. App. at 309).

The uncontested facts further established that, pursuant to the Division Act and the subsequent Act of March 3, 1909, ch. 256, 35 Stat. 778, authorizing the Secretary of the Interior to sell the "surplus lands" of the Osage, allotment and allottees' Division Act-authorized transfers following 1907-1910 dramatically shifted land ownership from the Tribe and its members to nonmembers. By 1957,

the surface rights to 1.1 of the 1.4 million-acre reservation had been alienated from trust or restricted status. Baird at 83 (Aplt. App. at 239). As of 1972, of the 1,464,838.5 acres that were allotted under the 1906 Act, just 231,070.59 acres held by 436 individual Indians remained in restricted ownership. *See* Osage Nation of Indians Judgment Funds: Hearing on S. 1456 and S. 3234 Before the Sen. Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 92nd Cong., 2d Sess. 18 (1972) (March 24, 1972 Letter from Office of the Secretary, U.S. Dep't of the Interior) ("1972 Hearings") App. B to Motion to Dismiss (Aplt. App. at 89). Osage County land records now reflect only 109 acres held by the United States in trust for the Osage Nation and 518.14 acres of land described in those records as "Indian Village Lands" "set aside for the use and benefit of the Osage Indians." Harwell S/J Aff., ¶¶ 3-5 (Aplt. App. at 291-92). These lands amount to roughly 0.04% of the total land in Osage County. *Id.* ¶ 6.

The uncontested facts on summary judgment also show that shortly after passage of the 1906 Acts, the Superintendent of the Osage Agency began to acknowledge the jurisdiction of the State and County over Osage County, a recognition that would be inconsistent with continued reservation status. In 1916, the Bureau of Indian Affairs Superintendent's annual report stated his "office has experienced no difficulty in maintaining order upon the reservation. This duty, of course, falls to the County and State officials." Kelly S/J Aff., Ex. B (Aplt. App. at

259). The Superintendent's 1919 Annual Report (Aplt. App. at 263) declares "Osage County is organized and the duties of maintaining order devolves on the County and State officials." The 1920 Annual Report (Aplt. App. at 267) refers to towns in "Osage County, formerly the Osage Indian Reservation." These reports by the official with immediate responsibility for the Osage stand uncontroverted in the summary judgment record regarding contemporaneous agency understandings. *See also* Kelly R. 26 Report at 33-39 (Aplee. Supp. App. at 316-317) (detailing Osage Agent and Department of the Interior reports respectively acknowledging that the reservation no longer existed). They provide substantial support for the district court's summary judgment.

The Nation's reference to Section 17 of the 1917 Indian Appropriations Act, ch. 146, 39 Stat. 969, 983, as reflecting an understanding the reservation remained intact misunderstands the effect of the provision. The section provided, "[A]ll of Osage County, Oklahoma shall *hereafter be deemed Indian country* within the meaning of the Acts of Congress making it unlawful to introduce intoxicating liquors into Indian country." (Emphasis added). The section has the opposite import, because it plainly reflects the understanding that, but for the new statute, Osage County was *not* Indian country and would only have that status pertaining to alcohol "hereafter."

The Nation now denominates evidence it presented below under the heading of "contemporaneous understandings" as evidence of events subsequent to the dispositive acts. *See* Aplt. Br. at 35-41. However labeled, the evidence is entitled to little or no weight under the Supreme Court's standards, because it is too far removed temporally from the 1906 Acts to inform the Court's determination of 1906 Congressional intent.

The Nation exaggerates the importance of the unremarkable extension of remaining restrictions on alienation on lands not in issue here. *See* Aplt. Br. at 25 ("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."). Congress extended restrictions in perpetuity on all Indian lands in the Indian Reorganization Act of 1934, *see Cohen's Handbook of Federal Indian Law* § 15.03, at 968 (Nell Jessup Newton, et al., eds., 2005) (discussing general extension of trust periods over Indian lands), and only enacted specific statutes for Osage and other Oklahoma tribes because they were not subject to that Act.

The Nation relies on references to a "reservation" in legislative history of the 2004 Osage Act, *see* Aplt. Br. at 36-37, but the text of the statute does not employ that term, instead describing the Nation as "based in Pawhuska, Oklahoma." 118 Stat. 2609. The statute only authorizes the Nation to determine its own

membership and governmental structure. It only confirms the limited powers that Congress allowed the post-1906 Osage government. *See Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 663-664 (7th Cir. 2009) (reference to a "reservation" in an 1893 statute "about the Tribe's membership, not its land, cannot be understood as a resurrection of the original reservation boundaries.").

Nor is it probative that the Acting General Counsel of the National Indian Gaming Commission opined that certain Osage lands lie within a "reservation" or that the agency authorized gaming based on the opinion. *See* Aplt. Br. at 37-39) (*citing* July 28, 2005 Letter from Penny Coleman (Aplt. App. at 166-172)). The opinion does not apply the Supreme Court's disestablishment test; rather, it merely catalogues materials the Nation submitted and states without analysis that "gaming on the two parcels is authorized." *United States v. Lara*, 541 U.S. 193, 200, 203 (2004) (Congress, which has plenary power over tribes, has the exclusive authority to recognize, terminate and restore the federally recognized status of tribes).[20]

Oklahoma's compacting with the Nation regarding gaming and cigarette taxation, *see* Aplt. Br. at 39-40, is not evidence supporting continued reservation

[20] The Nation also cites a string of statements contemporary to this litigation, not the dispositive acts, that shed no light on the intentions of the 1906 Congress, including an October 25, 1997 gubernatorial proclamation declaring the day "Osage Day;" prefatory language in stipulations by U.S. Department of Justice attorneys in 2006, a prefatory statement in a 2005 Opinion and Order in *Quarles v. United States*, No. 00-CV-0913-CVE-PJC (Doc. No. 165); a 2004 U.S. Geological Survey map; and a February 15, 1994 letter from a Regional Office of the Office of the Solicitor to the Oklahoma Water Resources Board. *See* Aplt. Br. at 40 n.17.

status. The Nation did not advance this argument or the evidence cited until after the district court entered summary judgment; accordingly, it cannot be grounds for reversal. *See* n. 6, *supra.* However, even if considered, as to gaming, the Compact only agrees to the Nation conducting gaming in compliance with federal law. *See* Compact at 17, Aplee Add. at 102. The Nation is responsible for complying with federal law, including procedures for acquiring fee lands for gaming purposes. *See id.*, Okla. Stat. tit. 3A, § 280 (2009) *and* 25 C.F.R. Part 151. As to cigarette taxation, the Nation advances no explanation why the State's agreeing to allow sales on fee lands implies reservation status.

Finally, the Nation criticizes the district court for citing "modern-day demographic statistical data," *see* Aplt. Br. at 41, but does not address the undisputed record evidence of dramatic shifts immediately following 1906 in jurisdictional patterns, demography, and land status described above. That is the only material summary judgment evidence of subsequent events that sheds light on Congress' intentions in 1906. The district court correctly entered summary judgment to that effect.

### B. Federal Law Does Not Preempt Oklahoma's Taxation of Osage Members Residing or Earning Income on Fee Lands in Osage County.

The Nation's Second Amended Complaint challenges Oklahoma income taxation based upon the contentions that (1) Osage County remains a federal Indian

reservation and (2), *if so*, federal law preempts Oklahoma income tax as applied to Osage members who both live and work anywhere within the Osage "Reservation." The Nation is wrong, both that Osage County remains a reservation and that, even if it were a reservation, federal law precludes Oklahoma income taxation. The Nation relies primarily for its preemption theory on *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), but does not address caselaw recognizing that *McClanahan's* holding was premised on specific attributes of the Navajo Reservation, compellingly present at Navajo, but uniquely absent at Osage. *McClanahan* and Supreme Court cases contemporaneous to it cited the Supreme Court's earlier decision in *Leahy v. Oklahoma State Treasurer*, 297 U.S. 420 (1936), which upheld Oklahoma's income taxation of Osage members. *See McClanahan*, 411 U.S. at 169-170; *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973) (*Leahy* holds "a state may tax an Indian's pro rata share of income from a tribe's restricted mineral resource."); *United States v. Mason*, 412 U.S. 391, 397 (1973). The district court correctly held that, whether or not Osage County remains a reservation, federal law contemplates Oklahoma income taxation, unless the taxpayer both lives and earns the income on trust or restricted lands. S/J Order at 22 (Aplt. App. at 402).

The Commission exempts those Osage members who both live and work on trust or restricted lands from the payment of state income tax.[21] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973), and cases applying it require no more. As to Osage members specifically, federal statutes reinforce repeatedly that Osage members pay state tax, unless the subject matter of the tax relates exclusively to trust or restricted lands. Federal preemption analysis requires consideration of all federal statutes and policies affecting the challenged activity. *See Rice v. Rehner*, 463 U.S. 713, 732 (1983) (general rules regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"). That full analysis reflects ample statutory support for the challenged taxes.

*McClanahan* and its progeny provide an exemption only where the activity in question is "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *Id.* at 179. *McClanahan* arose on an un-opened, treaty reservation comprised solidly of trust or restricted lands, in which the unaltered treaty authorized the exclusion of all non-members. *See McClanahan*, 411 U.S. at 174-175 (the 1865 Treaty provisions for a "reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos . . . was meant to establish the lands as

[21] *See* Okla. Admin. Code § 710:50-15-2, Aplee. Supp. Add. at 79.

within the exclusive sovereignty of the Navajo . . . .").[22] When these principles are applied to Osage lands, they provide no shield from Oklahoma income taxes for Osage members who do not live and work on trust or restricted lands.

*McClanahan* provides a presumption, not a rule. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("The residence of a tribal member is a significant component of the *McClanahan presumption* against state tax jurisdiction." (Emphasis added.)). Here, the relevant statutes explicitly subjecting the Osage to state law and permitting state taxation of the Osage override the *McClanahan* presumption.[23]

The Oklahoma Enabling Act, indicating there would be no "Indians not taxed" in Oklahoma, omits exceptions for such Indians where in other States' enabling acts, including the 1906 counterparts for Arizona and New Mexico (which were contained in the same statute as the Oklahoma act), such exceptions

[22] *McClanahan* also relied upon the provisions of the Arizona Enabling Act (as finally adopted in 1910) not present in the Oklahoma Enabling Act: that Indian lands are "under the absolute jurisdiction and control" of the United States, 411 U.S. at 175, and Arizona could tax Indian lands and property only if located "outside of an Indian reservation," *id.* at 176, *see* Point V.A.i.b., *supra.*

[23] The Appellant's Brief falsely accuses the district court of relying on "judicial balancing of interests" in its preemption analysis. Aplt. Br. at 44. To the contrary, the district court expressly relied on "Congressional intent that such [fee] lands be subject to State taxation." S/J Order at 22 (Aplt. App. at 402).

are preserved.[24] The Osage Division Act provides that Osage lands[25] "shall become subject to taxation" and members "shall have the right to manage, control, and dispose of" those lands "the same as any citizen of the United States." Division Act, § 2, Seventh. Congress expressly subjected to Oklahoma tax the only major resource reserved to the Osage Tribe for the benefit of tribal members. In 1942, perhaps the preeminent scholar of federal Indian law, Felix Cohen, concluded that the specific statutory exemptions excusing the Osage from certain taxes did not imply a general exemption: "No general exemption of Osage Indians as such from the payment of taxes can be implied from these statutes. On the contrary, the plan has been to teach the Indians, by partial taxation, to assume the responsibilities of citizenship." Felix Cohen, *Handbook of Federal Indian Law* 450 (Univ. of N.M. Press prtg. 1971) (1942).

Neither *McClanahan* nor its progeny suggest federal law preempts such taxation in light of Congressional intent. Recognizing the unique Osage history

[24] *Compare* Enabling Act, § 25 (Arizona and New Mexico) *with* § 3 (Oklahoma); *see also* 25 Stat. 676, § 4 (Feb. 22, 1889) (Aplee. Supp. Add. at 81) (exception for "Indians not taxed" in North Dakota, South Dakota, Montana, and Washington); 18 Stat. 475, § 4 (Mar. 3, 1875) (Aplee. Supp. Add. at 90) (same as to Colorado); 28 Stat. 107, § 3 (July 16, 1894) (Aplee Supp. Add. at 93) (same as to Utah). Other significant distinctions between the Oklahoma and Arizona and New Mexico Enabling Acts also imply the same intent. *See supra*, Point IV.A.i.b.

[25] That the act refers to "lands" and not "income" is of no moment; income tax did not become a fixture of the federal government's tax scheme until the passage of the 16th Amendment to the United States Constitution in 1913.

and status, the Supreme Court distinguished its *McClanahan* holding from the Osage context twice the very same year the *McClanahan* opinion issued. *See United States v. Mason*, 412 U.S. 391, 397 (1973) (distinguishing *McClanahan* and other cases as "of questionable relevance, since they arose under [other Acts] rather than the Osage Allotment Act"). In *Mason*, in an opinion by Justice Marshall, who two months earlier had authored the *McClanahan* opinion, the Court upheld Oklahoma's estate taxation of an Osage member's estate. It observed that *McClanahan*, had cited the Court's prior decisions affirming taxation of the Osage, and that the *McClanahan* exemption did not apply to Osage because "the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *Id.* at 396 n.7 (*quoting McClanahan*, 411 U.S. at 171). The Nation's attempt to distinguish *Mason* because it is not an income tax case misses the pertinent point of the decision.[26]

*Mason* followed the Court's earlier holdings affirming taxation of Osage income. In *Choteau v. Burnet*, the Court affirmed Congress' intent that Osage allottees pay federal income tax on oil and gas royalties, reasoning, "[i]t is evident

[26] The Appellant's Brief wrongly criticizes the district court for citing cases pertaining to taxes other than income taxation. Aplt. Br. at 47. To the contrary, each of the taxes involved in the cases the district court cited reflects the federal statutory policy to require Osage members to pay Oklahoma taxes on non-restricted lands and income.

that as respects his property other than his homestead his status is not different from that of any citizen of the United States." 283 U.S. 691, 695-96 (1931). In *Leahy v. Oklahoma State Treasurer*, the Court extended *Choteau* to Osage members' oil and gas income. 297 U.S. 420, 421 (1936); *see also West v. Oklahoma Tax Comm'n*, 334 U.S.717, 726 (1948) (Oklahoma estate tax validly applied to Osage estate); *cf. Okla. Tax Comm'n v. United States*, 319 U.S. 598, 609 (1943) (same, Five Civilized Tribes members' estates).

In every Supreme Court case holding federal law preempts state income taxation, the Court has required that the tribal member both live and earn the pertinent income on trust or restricted land, whether or not there is a formal reservation. *See Sac & Fox*, 508 U.S. at 124 (immunity from state income taxation applies only to "tribal members living *and* working on land set aside for those members." (emphasis added)); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-467 (1995) (State may tax income of tribal members who "live in Oklahoma outside Indian country but work for the Tribe on tribal lands."); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (state may not tax cigarette sales at tribal store located on trust land); *McClanahan*, 411 U.S. at 174-175 (treaty lands from which tribe had authority to exclude non-Indians). While the Court has equated tribal trust or restricted lands, not involved here, with "reservation" lands, *see Citizen Band Potawatomi*, 498

U.S. at 611, the Court has never held that a State is preempted from taxing the income of a tribal member living and working on fee lands within "reservation" boundaries, where the reservation consists primarily of non-member lands occupied by non-members. Federal law protects trust or restricted lands from state law, as it did the treaty lands in *McClanahan*; it does not so protect fee lands within Osage County from state taxation in light of the federal statutes expressly contemplating state tax.

The Nation's brief mischaracterizes the district court's reference to *Atkinson Trading Co. v. Shirley*, 532 U.S. 654, 653 n.5 (2001). *See* Aplt. Br. at 56. It is not critical whether *Atkinson* pertained to member or nonmember taxation; rather, the district court correctly recognized that *Atkinson's* footnote 5 ("Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land") may affect whether the definition of "Indian country" status of lands in the federal criminal code, 18 U.S.C. § 1151, has talismanic effect on state, tribal, and federal *civil* jurisdiction or, alternatively, was referenced as describing cases turning on retained federal power over trust or restricted lands. For example, the Supreme Court has never held the "dependent Indian community" prong of the "Indian country" statute, 18 U.S. § 1151(b), affects otherwise applicable civil jurisdiction, including state taxation, and there are compelling reasons it should not.

The district court correctly recognized that, given Congress' intent generally to allow state taxation of Osage members' fee lands and related activities, there is no federal preemption of Oklahoma's imposing income taxation on Osage members residing and earning income on fee lands in Osage County.

### C. The District Court Correctly Understood and Applied Laches Law.

The Nation's attack on the district court's laches ruling misses the mark both factually and legally. Contrary to the Nation's assertion, the district court correctly based its ruling on uncontroverted facts in the record and on long-standing precedent of the Supreme Court and this Court.

#### i. Laches Applies to the Nation's More Than 70-Year Delay In Challenging Oklahoma's Imposition of Income Tax.

The district court correctly concluded that the doctrines of laches and acquiescence bar the Osage Nation's claims.[27] Laches exists where there is "(a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982); *accord*, *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997). "Laches may be found . . . where a party, having knowledge of the relevant facts, acquiesces for an

[27] The Nation's assertion that the Commissioners never pleaded laches or any other equitable defense is meritless. The Commissioners raised the laches defense in their Motion to Dismiss at 23-25 (Aplt. App. at 80-82), and again in their S/J Brief at 19-22 (Aplt. App. at 228-231).

unreasonable length of time in the assertion of a right adverse to his own." *Jicarilla Apache Tribe*, 687 F.2d at 1338. Here, the district court correctly ruled that the Nation's delay of more than 70 years in challenging the State's imposition of its income tax, and the resulting prejudice the late-asserted claim would cause to the State's long-standing reliance on its taxing authority, and potentially other authorities, bars the Nation's claims.

#### ii. The District Court Premised its Laches Decision on Uncontroverted Facts in the Record.

##### a. Undisputed Facts Established Unreasonable Delay.

The undisputed material facts before the district court established the Nation's unreasonable delay in bringing suit and prejudice to the Commissioners as a result of that delay. During summary judgment briefing, the Nation did not dispute that (a) "[a]s authorized by the 1907 Oklahoma Constitution, art. X, §12, Oklahoma first imposed an income tax on the incomes of persons resident in Oklahoma on May 26, 1908 and has imposed such tax, with certain amendments, continuously since that date," and (b) "since at the latest the early 1930's, the Commission has at all times taken the position that members of the Osage Nation residing and working on fee lands within Osage County are subject to Oklahoma income tax." Undisputed Material Facts, ¶¶ 29 & 30 (Aplt. App. at 218-219).

Based on those undisputed material facts, the district court properly found that the "Osage Nation has left unchallenged the State's taxation of the income of its members for more than seventy years." S/J Order at 7 (Aplt. App. at 387). Also, consistent with long-established precedent, the district court recognized "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)." S/J Order at 22 (Aplt. App. at 402); *see also Leahy v. Okla. State Treasurer*, 297 U.S. 420 (1936) (oil and gas royalty income of Osage tribal member who had received certificate of competency held subject to Oklahoma income taxation).

**b. Undisputed Facts Establish Prejudice and Reliance**.

The Nation specifically conceded below that the Commissioners have a "long-standing reliance on the legitimacy of their taxing authority." *See* S/J Resp. at 20 (Aplt. App. at 356). The undisputed facts establish there has been long-standing assumption of jurisdiction by the State and County governments over Osage County – an area that is predominately owned and populated by non-Indians. *See Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 604-605 (1977) ("long standing assumption of jurisdiction by the State of an area that is over 90% non-Indian both in population and in land use" creates "justifiable expectations"

concerning State authority.). Since 1906, the population of Osage County has consistently been more than 90% non-Osage tribal members. Glimpse S/J Aff., ¶¶ 10, 14 (Aplt. App. at 308). Based on the 2000 census, Osage tribal members make up only 3.5% of the total county population. *Id.* Moreover, lands held in trust for the benefit of the Osage tribe amounts to only 0.04% of the total land in Osage County. Harwell S/J Aff., ¶ 6 (Aplt. App. at 292). Moreover, police protection, utility service and other licensing and regulatory control in Osage County have been provided by State, County, and city governments, not the Osage Nation. *See* Depo. of Ty Koch (Jan. 15, 2009), at 41, R. 59 Resp., Ex. E (Aplee. Supp. App. at 333); Depo. of George Wyman (Jan. 23, 2009) at 12, 23, 25-27, R. 59 Resp., Ex. F (Aplee. Supp. App. at 337); Depo. of Robert W. Wilson (Jan. 23, 2009) at 18-19, 24, 31, 33, R. 59 Resp., Ex. G (Aplee. Supp. App. at 343) (from R. 59 Rec.).

The Nation may not use evidence of payments to the State from gaming revenues, not submitted below on summary judgment, *see* Appellant's Brief at 48, *citing* Aplt. App. at 412, to belatedly create a fact issue undermining the district court's laches ruling. *See* n. 6, *supra.* But, even if considered, the evidence that "some of" the payments pertained to fee land gaming does not controvert that the Commissioners and others in Osage County will suffer substantial prejudice if the Nation's late-asserted claims prevail.

### iii. The Nation Fails to Controvert the Applicability of Laches.

The Nation trivializes the impact of asserting so far-reaching a claim so long after it accrued. The Commissioners' more than 70-year exercise of income taxing authority clearly distinguishes this case from *Indian Country, USA, Inc. v. Oklahoma*, 829 F.2d 967, 974 (10th Cir. 1987), which considered the State's authority to regulate bingo conducted only a brief period before the State's challenge pertaining to a 100-acre tract of treaty land that the federal government had promised "would remain immune from state or territorial laws." *Id*. at 974.

The district court's quotation from *Idaho v. Coeur d'Alene,* 521 U.S. 261 (1997), did not "confuse[] common law governing resolution of disputes to title to property with established principles of federal Indian law determining the intergovernmental jurisdiction over tribal members and nonmembers inside Indian country." Aplt. Br. at 51. The Tribe in *Coeur d'Alene* was not simply seeking title to land; it sought "a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use or affect in any way the submerged lands" as well as a "preliminary and permanent injunction prohibiting [Idaho] from regulating, permitting or taking any action" in derogation of the Tribe's claims. 521 U.S. at 265. The district court correctly quoted *Coeur d'Alene* with regard to the practical and legal problems flowing from

claims, like those the Nation advances here, which seek to diminish the State's control over a vast reach of lands.

#### iv. The Supreme Court's Decision in *City of Sherrill* Applies to Bar the Nation's Claims Here.

The Nation is correct that the facts in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), are different from the facts here. The facts here present an even more compelling case for the application of laches than did *City of Sherrill*. In that case, the Supreme Court held that the doctrines of laches, impossibility, and acquiescence barred the Oneida Indian Nation's ("OIN") suit to prevent a city's taxation of certain parcels of land the OIN had purchased in 1997 and 1998 within the exterior bounds of its reservation, even though the reservation had never been disestablished. *Id.* at 202-03, 215 n.9, 221. The Court observed, "[t]he principle that the passage of time can preclude relief has deep roots in our law," *id*. at 217, and "long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory." *Id.* at 218. The Court recognized that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use" may create "justifiable expectations" that "merit heavy weight." *Id.* at 215-16 (*quoting Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)).

Significantly supporting the district court's laches ruling, the *City of Sherrill* Court expressed concern that acceptance of the OIN's claims would be the beginning, not the end, of the matter: "If [the Oneida tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220.

Here, the potential jurisdictional effect would span a 1.5 million acre county where only 3.5% of the population of Osage County is identified as Osage Indian, less than one percent of the land is held in trust for the Nation, and approximately 85% of Osage County land, even as of 1973, was not in restricted status. *See* 1972 Hearings, Motion to Dismiss, App. B (Aplt. App. at 89). Law enforcement within Osage County has been almost exclusively a State or Osage County responsibility, even with respect to crimes committed by or against Osage members. *See* Point V.D.ii.b; *and* R. 59 Resp., Ex. E at 35-37 (Aplee. Supp. App. at 335); i*d.*, Ex. H at 143 (Aplee. Supp. App. at 361) (from R. 59 Rec.). Since 1907, the State and Osage County governments have provided education and other services in Osage County, including to members of the Osage. *See* R. 59 Resp., Ex. E at 35-37 (Aplee. Supp. App. at 335); *id.*, Ex. J at 28 (Aplee. Supp. App. at 381) (from R. 59 Rec.). Until roughly 2004, the Osage Nation government did not seek to exercise

jurisdiction over fee lands and nonmembers. *See* R. 59 Resp., Ex. I, at 23, 99 (Aplee. Supp. App. at 364-65); i*d.*, Ex. H at 51-52 (Aplee. Supp. App. at 354-55) (from R. 59 Rec.).

Contrary to the Nation's mollifying comments, *see* Aplt. Br. at 50-52, recognition of the Osage Reservation and invalidation of state income taxation at this late date would disrupt not only the Commissioners' collection of state income taxes, but would invite future litigation necessary to resolve conflicts between newly asserted Osage jurisdiction and long-standing State, County, and municipal jurisdiction.[28]

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's award of summary judgment in favor of the Commissioners.

## REASONS FOR ORAL ARGUMENT

This appeal requires resolution of an important question of law regarding the continued existence of the Osage Reservation, and potentially other reservations, in

[28] The record reflects that, if the district court had held all of Osage County remains a reservation, the Nation's liquor control laws; sales, vehicle registration, possessory interest, hotel lodging, and tobacco taxes; and other regulatory ordinances would have applied to all persons in Osage County, and the Nation would have considered enforcing such ordinances broadly, spawning new rounds of litigation. *See* Depo. of Osage Nation Principal Chief Jim Gray, R. 59 Resp., Ex. I (Aplee. Supp. App. at 362) (from R. 59 Rec.).

Oklahoma and the circumstances in which federal law preempts state taxation. Although the factual record on summary judgment does not raise issues of fact, the Appellant's brief raises issues that may be clarified by oral argument. Oral argument will assist the Court to correctly address issues important to Oklahoma and Native American tribes and nations. Oral argument will also assist the Court by allowing Commissioners' counsel to address questions the Court may have and new points the Nation may raise in its reply.

**MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.**

*/s/ Lynn H. Slade*
Lynn H. Slade
William C. Scott
Joan D. Marsan
Post Office Box 2168
Albuquerque, NM 87103-2168
Phone: (505) 848-1800

**OKLAHOMA TAX COMMISSION**
Kathryn L. Bass
Chief Deputy General Counsel
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102
Phone: (405) 319-8550

## CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed. R. App. At P. 32(a)(7)(B), I hereby certify that **BRIEF OF APPELLEE** is proportionally spaced and contains 13,979 words, exclusive of the items identified in Fed. R. App. At P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2007, which was used to prepare the brief.

**MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.**

*/s/ Lynn H. Slade*
Lynn H. Slade
Post Office Box 2168
Albuquerque, NM 87103-2168
Phone: (505) 848-1800
Fax: (505) 848-1889

## CERTIFICATE OF DIGITAL SUBMISSION COMPLIANCE

I hereby certify that on September 14, 2009, I electronically filed the foregoing **BRIEF OF APPELLEES** with the Clerk of the Court via electronic mail to esubmission@ca10.uscourts.gov., and I hereby certify that all privacy redactions have been made, the foregoing **BRIEF OF APPELLEES** is an exact copy of the written document filed with the Clerk, and that this submission has been scanned for viruses with Symantec Antivirus, and according to the program, it is free of viruses.

**MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.**

*/s/ Lynn H. Slade*
Lynn H. Slade
Post Office Box 2168
Albuquerque, NM 87103-2168
Phone: (505) 848-1800
Fax: (505) 848-1889

## CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2009, I provided other counsel an identical copy of the foregoing **BRIEF OF APPELLEES** submitted to the Clerk in scanned PDF format via electronic mail on this date, and will deliver two copies of the Brief, Appellees' Supplemental Appendix, and Appellees' Addendum within two business days of this date via overnight mail or courier, addressed as follows:

Gary Stanley Pitchlynn, gspitchlynn@pitchlynnlaw.com
Olin Joseph Williams, jwilliams@pitchlynnlaw.com
Stephanie Elaine Moser Goins, smgoins@pitchlynnlaw.com
Pitchlynn & Williams, PLLC
124 East Main Street
P. O. Box 427
Norman, Oklahoma 73070
*Attorneys for Appellant/Plaintiff*

Thomas P. Schlosser, t.schlosser@msaj.com
Morisset, Schlosser & Jozwiak
801 2nd Avenue, Suite 1115
Seattle, WA 98104

**MODRALL, SPERLING, ROEHL,**
**HARRIS & SISK, P.A.**

By: */s/ Lynn H. Slade*