

OSAGE NATION, Plaintiff–Appellant,
v.

Constance IRBY Secretary—Member of the Oklahoma Tax Commission; Thomas E. Kemp, Jr., Chairman of the Oklahoma Tax Commission; Jerry Johnson, Warden, Vice–Chairman of the Oklahoma Tax Commission, Defendants–Appellees.

Oklahoma Farm Bureau; Oklahoma Cattlemen’s Association; Osage County Farm Bureau; Osage County Cattlemen’s Association; Oklahoma Association of Electric Cooperatives; Oklahoma Independent Petroleum Association; Oklahoma Municipal League; Oklahoma Rural Water Association; Oklahoma Wildlife Management Association; Environmental Federation of Oklahoma; Public Service Company of Oklahoma; Oklahoma State Chamber of Commerce and Industry, Amici Curiae.

No. 09–5050.

United States Court of Appeals,
Tenth Circuit.

March 5, 2010.

Background: Indian tribe brought action against State of Oklahoma, Oklahoma Tax Commission, and Commission’s members seeking declaration that tribe’s reservation had not been disestablished and remained Indian country, and that tribe members who were employed and resided within reservation’s geographical boundaries were exempt from paying state income tax, and seeking injunction prohibiting defendants from collecting income tax from such members. Following reversal of its decision to allow the suit to proceed against the State and the Tax Commission, 260 Fed.Appx. 13, the United States District Court for the Northern District of Okla-

homa, James H. Payne, J., 597 F.Supp.2d 1250, granted summary judgment to remaining defendants. Tribe appealed.

Holding: The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that Osage reservation was disestablished by Congress.

Affirmed.

1. Indians ⇌158, 159

Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred.

2. Indians ⇌159, 249

Congress’s intent to terminate a reservation must be clearly expressed, and there is a presumption in favor of the continued existence of a reservation, but courts may not ignore plain legislative language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe’s later claims.

3. Federal Courts ⇌776

While determining congressional intent is a matter of statutory construction, which typically involves a de novo review, to the extent that statutory construction turns on an historical record, it involves a mixed question of law and fact for which de novo review in appropriate.

4. Federal Courts ⇌776

Where a mixed question of law and fact primarily involves the consideration of legal principles, then a de novo review by the appellate court is appropriate.

5. Indians ⇌158, 159

Congress’s intent at the time of the relevant statute governs court’s analysis as to whether a reservation has been diminished or disestablished.

6. Indians ⇔158, 159, 170

Allotment/opening of a reservation alone does not diminish or terminate a reservation.

7. Indians ⇔170

In ascertaining whether it was Congress's intent to diminish or disestablish a reservation, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage, but the operative language of the statute carries more weight than incidental language embedded in secondary provisions of the statute.

8. Indians ⇔170

The Court will infer diminishment or disestablishment of a reservation despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of the allotment act unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

9. Indians ⇔170, 249

When considering an allotment act, the court looks to explicit statutory language and surrounding circumstances, as well as to subsequent events, including congressional action and the demographic history of the opened lands, for clues to whether Congress expected the reservation boundaries to be diminished; subsequent events will not govern, however, if an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands.

10. Indians ⇔158, 159

Subsequent events and demographic history can support determination that Congress had diminished or disestablished reservation and can confirm other evi-

dence, but they cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an act and events surrounding its passage.

11. Indians ⇔158, 159

Statutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation.

12. Indians ⇔170

Explicit reference in an act to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.

13. Indians ⇔159

An act's language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation, such as by making reservation lands subject to settlement, entry, and purchase.

14. Indians ⇔159

An act's language authorizing the Secretary of the Interior to "sell and dispose" of reservation land is insufficient to terminate a reservation.

15. Indians ⇔159

The manner in which a statute compensates a tribe for opened land is also instructive as to whether statute has terminated a reservation; for example sum-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate.

16. Indians ⇔158, 159, 249

Explicit statutory language signifying an intent to terminate a reservation combined with a sum-certain payment creates an almost insurmountable presumption

that Congress meant for the tribe's reservation to be diminished.

17. Indians ⇔170

Osage Allotment Act disestablished Osage reservation in Oklahoma; although Act did not contain express termination language or directly open the reservation to non-Indian settlement, and although it allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement, manner in which the Act was negotiated reflected clear congressional intent and Osage understanding that the reservation was to be disestablished, Act was passed at a time when the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations in preparation for Oklahoma's statehood, the Osage themselves had presented an allotment proposal to Congress, concerns that some tribal members were not unfairly enriched at the expense of other tribal members were addressed in the Act through provisions that allotted land in several rounds, severed the mineral estate and placed it in trust for the tribe, and provided for a form of tribal government, and after enactment federal officials responsible for the Osage lands repeatedly referred to the area as a "former reservation" under state jurisdiction, and the reservation underwent a dramatic shift in demographics and land ownership. Act June 28, 1906, § 1, 25 U.S.C.A. § 345 note.

18. Indians ⇔158, 159

If a statute is ambiguous as to whether it terminated a reservation, court turns to the circumstances surrounding the passage of the act, in particular the manner in which the transaction was negotiated and its legislative history, for evidence of a contemporaneous understanding that the affected reservation would be diminished or disestablished as a result of the proposed legislation, and the court also some-

times considers whether there was tribal consent.

19. Indians ⇔170

Actions following passage of allotment act undertaken by Congress, the Bureau of Indian Affairs (BIA), and local authorities with regard to the unallotted open lands, particularly in the years immediately following the opening, have some evidentiary value in determining whether Congress intended to disestablish the reservation through the act.

20. Indians ⇔170

Express recognition of the continued existence of specific reservations by Congress in statutes enacted subsequent to allotment act supports the continued existence of a reservation.

21. Indians ⇔159

A state's unquestioned exertion of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment.

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

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

Before TACHA, EBEL, and KELLY,
Circuit Judges.

PAUL KELLY, JR., Circuit Judge.

Plaintiff–Appellant the Osage Nation (“the Nation”) appeals from the grant of summary judgment for Defendants–Appellees. The Nation sought (1) a declaratory judgment that the Nation’s reservation, which comprises all of Osage County, Oklahoma, has not been disestablished and remains Indian country within the meaning of 18 U.S.C. § 1151; (2) a declaratory judgment that Nation members who are employed and reside within the reservation’s geographical boundaries are exempt from paying state income tax; and (3) injunctive relief prohibiting Defendants from collecting income tax from such tribal members. 1 Aplt.App. at 24.

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

Background

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

Contemporaneous to passing the Oklahoma Enabling Act, Congress enacted the Osage Allotment Act. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. The 1906 Osage Allotment Act severed the mineral estate from the surface estate of the reservation and placed it in trust for the tribe. *Id.* at §§ 2–3. The Act included several provisions regarding tribal government and tribal membership and granted the Osage tribal council general tribal authority. *See Logan v. Andrus*, 640 F.2d 269, 270 (10th Cir.1981) (noting that nothing in the Osage Allotment Act “limited the authority of the officers therein named to mineral administration or any other specific function”). The Act also allotted most

of the Osage surface land in severalty to tribal members. Osage Allotment Act at § 2.

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

In 1999, a tribal member who was employed by the Tribe on trust land and lived within the boundaries of the Osage County on fee land protested the State’s assessment of income tax on her. *Osage Nation v. Oklahoma ex rel. Okla. Tax Comm’n*, 260 Fed.Appx. 13, 15 (10th Cir.2007). The Oklahoma Tax Commission determined that she did not live in Indian country within the meaning of 18 U.S.C. § 1151, and that her income was taxable. *Id.* After the Commission’s decision, the Osage Nation filed the instant suit seeking declaratory and injunctive relief. *Id.* at 15–16. Specifically, the Nation seeks a declaratory judgment: “(1) that the Nation’s reservation boundaries have not been extinguished, disestablished, terminated, or diminished and is and remains the Indian country of the Nation; and (2) that the Nation’s members who both earn income and reside within the geographical boundaries of the Nation’s reservation are not subject to or required to pay taxes to the State . . . on [] income.” 1 Aplt.App. at 24. The Nation further seeks injunctive relief prohibiting “Defendants . . . from levying or collecting Oklahoma state income taxes upon the income of the Na-

tion’s members who both earn income and reside within the geographical boundaries of the Nation’s reservation.” 1 Aplt.App. at 24.

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

On remand, the remaining defendants moved to dismiss, and the district court converted their motion to one for summary judgment. 1 Aplt.App. at 204. The district court determined that “the Osage reservation ceased to exist more than a century ago,” 2 Aplt.App. at 389, and that tribal members that work and live on private fee lands in Osage County are not exempt from state income tax, 2 Aplt.App. at 397–02. Applying *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005), the district court also held that federal equity practice precludes the Nation from advancing its claims after Oklahoma has governed Osage County for over a hundred years. 2 Aplt.App. 405–07.

Discussion

[1, 2] It is well established that Congress has the power to diminish or dises-

establish a reservation unilaterally, although this will not be lightly inferred. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 470, 472, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Congress's intent to terminate must be clearly expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and there is a presumption in favor of the continued existence of a reservation, *Solem*, 465 U.S. at 472, 104 S.Ct. 1161. Courts may not "ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir.1990) (quoting *Or. Dept of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985)).

[3,4] We have noted that "the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment]." *Yazzie*, 909 F.2d at 1393 (listing cases). While determining congressional intent is a matter of statutory construction, which typically involves a *de novo* review, to the extent that statutory construction turns on an historical record, it involves a mixed question of law and fact. *Id.* "Where a mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Id.* at 1393-94 (internal quotation marks and citation omitted).

[5-10] We apply the three-part test summarized in *Solem* to determine whether a reservation has been diminished or disestablished. Congress's intent at the time of the relevant statute governs our analysis. The Supreme Court has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a

reservation. Aplee. Br. at 18. In ascertaining Congress's intent, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage. *Solem*, 465 U.S. at 469, 104 S.Ct. 1161. The "operative" language of the statute carries more weight than incidental language embedded in secondary provisions of the statute. *Id.* at 472-76, 104 S.Ct. 1161. The Court will infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of [the] act "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* at 471, 104 S.Ct. 1161. In addition to (1) explicit statutory language and (2) surrounding circumstances, the Court looks to (3) "subsequent events, including congressional action and the demographic history of the opened lands, for clues to whether Congress expected the reservation boundaries to be diminished." *Yazzie*, 909 F.2d at 1395. Such latter events will not govern if "an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands. . . ." *Solem*, 465 U.S. at 472, 104 S.Ct. 1161. Thus, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." *Yazzie*, 909 F.2d at 1396.

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

A. *Statutory Language*

[11-14] Statutory language is the most probative evidence of congressional intent

to disestablish or diminish a reservation. “Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.” *Solem*, 465 U.S. at 470, 104 S.Ct. 1161. Examples of express termination language include: “the Smith River reservation is hereby discontinued,” *Mattz v. Arnett*, 412 U.S. 481, 505 n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (discussing 15 Stat. 221 (1868)); “the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain,” *id.* (discussing 27 Stat. 63 (1892)); “the reservation lines of the said Ponca and Otoe and Missouri Indian reservations . . . are hereby, abolished,” *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977) (discussing 33 Stat. 218 (1904)); “the . . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest,” *DeCoteau v. District County Court*, 420 U.S. 425, 455–56, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (discussing Agreement of 1889, ratified by 26 Stat. 1035 (1891)). An act’s language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation—e.g., making reservation lands “subject to settlement, entry, and purchase.” *Mattz*, 412 U.S. at 495, 497, 93 S.Ct. 2245; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Likewise, language authorizing the Secretary of the Interior to “sell and dispose” of reservation land is insufficient to terminate a reservation. *Solem*, 465 U.S. at 472–73, 104 S.Ct. 1161.

[15, 16] The manner in which a statute compensates a tribe for opened land is also

instructive. Some statutes provide that the tribe will be paid a sum-certain amount as compensation for all of the unallotted land. Others provide payment to the tribe as the lands are sold. Sum-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate. Compare *DeCoteau*, 420 U.S. 425, 95 S.Ct. 1082 (holding that the reservation was terminated where there was express language regarding termination, a sum-certain payment, and tribal consent to the agreement) with *Mattz*, 412 U.S. 481, 93 S.Ct. 2245 (holding that the reservation was not terminated where there was no express language regarding termination nor a sum-certain payment). Explicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates “an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.” *Solem*, 465 U.S. at 470–71, 104 S.Ct. 1161.

[17] The *Solem* court found additional factors weighing in favor of continued reservation status: (a) authorization for the Secretary of the Interior to set aside lands for tribal purposes; (b) permission for tribal members to obtain individual allotments before the land was officially opened to non-Indian settlers; and (c) reservation of the mineral resources for the tribe as a whole. 465 U.S. at 474, 104 S.Ct. 1161. All three of these factors are present in the Osage Allotment Act. Unlike other allotment acts, the Act did not directly open the reservation to non-Indian settlement. With the exception of certain parcels of trust land reserved for the Osage Nation, the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement. As the Act did not open any land for settlement by non-Osage, there is no sum-certain or

any other payment arrangement in the Act. And neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language. Thus, the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.

B. *Circumstances Surrounding Passage of the Act*

[18] If the statute is ambiguous, we turn to the circumstances surrounding the passage of the act, in particular the manner in which the transaction was negotiated and its legislative history, for evidence of a contemporaneous understanding that the affected reservation would be diminished or disestablished as a result of the proposed legislation. *Solem*, 465 U.S. at 471, 104 S.Ct. 1161. The Court sometimes considers whether there was tribal consent. *Compare DeCoteau*, 420 U.S. at 448, 95 S.Ct. 1082 (the reservation was found to have been terminated, and the Court found importance in the fact that the tribe consented to the agreement) *with Rosebud Sioux*, 430 U.S. at 587, 97 S.Ct. 1361 (the reservation was disestablished although there was no tribal consent).

The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. *See* Francis Paul Prucha, *The Great Father* 737-57 (1984) (Aplee.Supp.Add.104-24). In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations. *See* H.R.Rep. No.

59-496, at 9, 11 (1906) (Aplee. Supp. Add. at 28, 30). While the Osage were excepted from the Dawes Commission process, the Osage felt pressure having observed the Commission's activities with respect to other tribes, and "[f]or several years, the Osage . . . ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe." S.Rep. No. 59-4210, at 1 (1906) (Aplee. Supp. Add. at 42). In 1905, the Osage approached Congress to begin negotiating a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." 1 Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before the H. Subcomm. of the Comm. on Indian Affairs, 58th Cong. 8 (1905) ("Division Hearings") (Aplt. Add. at 9). The Osage were "very anxious to bring about the allotment at the earliest possible time." 40 Cong. Rec. 3581 (1906) (Statement of Sen. Dillingham) (Aplee. Supp. Add. at 51). Congress and the Osage recognized that allotment may result in loss of much of the tribal land. *See, e.g.,* W. David Baird, *The Osage People* 68 (1972) (2 Aplt. App. at 237) ("James Bigheart and Black Dog, for example, noted that, like Indians of other tribes, the Osage may very well lose their allotments after dissolution of the reserve."). The Osage also recognized that the allotment process would terminate reservation status. 1 Division Hearings, at 6 (Aplt. Add. at 12) (statement of Black Dog, Osage Representative) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations.").

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

The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act, and uncontested facts in the record provide further evidence of a contemporaneous understanding that the reservation had been dissolved. Historian Lawrence Kelly concludes that “[t]reatises and articles in professional journals that have considered the history of the former Osage Reservation have acknowledged that, after the Osage Allotment Act and Oklahoma’s admission to the Union in accordance with the Oklahoma Enabling Act, the Osage Reservation no longer existed and that area became Osage County, a subdivision of the State of Oklahoma.” Kelly Aff., ¶ 10 (2 Aplt.App. 244). Historian Francis Prucha has thoroughly discussed the United States’ persistent efforts to end tribal con-

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

Instead of presenting evidence regarding widely held understanding of the Osage Allotment Act at the time it was passed, the Osage Nation primarily presents evidence of continued existence of their reservation contemporaneous to this litigation including: (1) the legislative history of the 2004 Osage Act, which refers to the Osage as a “federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma,” H.R.Rep. No. 108–502, at 1 (2004); (2) the Assistant Secretary for Indian Affairs’ certification of an Osage Tribe Liquor Control Ordinance in 2005, Aplt. Add. at 95–100; (3) a 2005 National Indian Gaming Commission opinion letter concluding that certain parcels of fee land in Osage County are part of the tribe’s reservation, 1 Aplt.App. at

166–72; (4) a 1997 gubernatorial proclamation declaring October 25, 1997 as “Osage Day,” 1 Aplt.App. at 174; (5) the 2005 compact between the Osage Nation and the state of Oklahoma authorizing the Nation to conduct gaming on its “Indian lands” which has resulted in the operation of casinos on fee lands in Osage County, Aplt. Add. at 101–03; (6) the Osage Nation’s compacts with the state regarding sharing of revenue from gaming activity and cigarette sales, Atkinson Aff. (2 Aplt. App. at 411–12); Mashunkashey Aff. (2 Aplt.App. at 414–15); (7) a “reservation” sign on a state highway, 1 Aplt.App. at 141; and (8) a map by the Dept. of the Interior and the U.S. Geological Survey depicting the boundaries of an Osage reservation as Osage County, 1 Aplt.App. at 182. Such evidence is too far removed temporally from the 1906 Act to shed much light on 1906 Congressional intent. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 420, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (subsequent legislative record “is less illuminating than the contemporaneous evidence” because it does not contain “deliberate expressions of informal conclusions about congressional intent [at the time of enactment]”).

C. *Post-enactment History*

[19–21] The final factor used to determine Congressional intent to disestablish is subsequent events. Actions by Congress, the Bureau of Indian Affairs (BIA), and local authorities with regard to the unallotted open lands, “particularly in the years immediately following the opening, ha[ve] some evidentiary value.” *Solem*, 465 U.S. at 471, 104 S.Ct. 1161. Express recognition of the continued existence of specific reservations by Congress in subsequent statutes, of course, supports the continued existence of a reservation. *See e.g., Seymour*, 368 U.S. at 356, 82 S.Ct. 424 (citing statutes enacted 50 years after allot-

ment); *Mattz*, 412 U.S. at 505, 93 S.Ct. 2245. In contrast, a state’s unquestioned exertion of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment. *Rosebud Sioux*, 430 U.S. at 604–05, 97 S.Ct. 1361 (“The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use . . . demonstrates the parties’ understanding of the meaning of the Act.”). The Court has also explicitly focused on population demographics, noting that “[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.” *Solem*, 465 U.S. at 471, 104 S.Ct. 1161 (acknowledging that this was an “unorthodox and potentially unreliable method of statutory interpretation,” 465 U.S. at 472 n. 13, 104 S.Ct. 1161, but admitting a desire that the result be in some general conformance with the modern day balance of the area demographics, *id.* at 472 n. 12, 104 S.Ct. 1161).

The uncontested facts support disestablishment under this prong of the *Solem* test. After enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a “former reservation” under state jurisdiction. For example, an annual report from the Superintendent to the Commissioner of Indian Affairs notes that his office “has experienced no difficulty maintaining order. . . . This duty, of course, falls to the County and State Officials.” 2 Aplt.App. at 259 (1916 report); *see also* 2 Aplt.App. at 263 (1919 report) (same); 2 Aplt.App. at 268 (1920 report) (“Osage County, formerly Osage Indian Reservation, is organized under the constitution of the State of Oklahoma and the duty of maintaining order and enforce-

ing the law is primarily in the hands of the County officials.”); 2 Aplt.App. at 272 (1921 report) (same); 2 Aplt.App. at 276 (1922 report) (same). Such “‘jurisdictional history’ . . . demonstrates a practical acknowledgment that the Reservation was diminished.” *Hagen*, 510 U.S. at 421, 114 S.Ct. 958. Compare *Solem*, 465 U.S. at 480, 104 S.Ct. 1161 (not finding diminishment where “tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908”) with *Hagen*, 510 U.S. at 421, 114 S.Ct. 958 (finding diminishment where “[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened”).

In addition, uncontested population demographics demonstrate a dramatic shift in the population of Osage County immediately following the passage of the Osage Allotment Act. From the 1907 Special Census following the founding of Oklahoma to the 1910 Census, Osage County’s population grew by a third. Glimpse Aff., ¶ 9 (2 Aplt.App. at 307–08); 2 Aplt.App. at 319–29 (census data for 1907, 1910, 1920, and 1930). By 1910, Osage Indians represented roughly six percent of the Osage County population. Glimpse Aff., ¶ 9 (2 Aplt.App. at 307–08). From 1910 to 1920, the county’s population grew by 82%, but the Indian population in the county (not limited to Osage Indians) dropped to roughly 3 percent. Glimpse Aff., ¶ 10 (2 Aplt.App. at 308). As of the 2000 Census, Osage Coun-

ty was 84% non-Indian, Osage Indians accounting for 3.5% of the county’s population. Glimpse Aff., ¶ 14 (2 Aplt.App. at 309); 2 Aplt.App. at 331 (2000 population demographics map for Osage County).

Land ownership also dramatically shifted from tribal members to nonmembers through certificates of competency. By 1957, 1.1 million of the 1.4 million-acre county was alienated from trust/restricted status, Baird at 83 (2 Aplt.App. at 239), and as of 1972, just 231,070 acres remained in restricted ownership. 1 Aplt.App. at 89. As of 2008, the United States holds about 0.04% of the total land in Osage County in trust for the Osage Nation. Harwell Aff., ¶¶ 3–6 (2 Aplt.App. at 291–92). Like in *Hagen*, we think “[t]his ‘jurisdictional history,’ as well as the current population situation in [Osage County], demonstrates a practical acknowledgment that the Reservation was diminished.” *Hagen*, 510 U.S. at 421, 114 S.Ct. 958.

We conclude that the Osage reservation has been disestablished by Congress.¹ As a result, we need not reach whether tribal members who reside and earn income on fee lands located within the geographic boundaries of a reservation are exempt from state income tax. We also need not address the district court’s application of laches to this case, although we note that the Nation concedes that Oklahoma has had a “long-standing practice of asserting jurisdiction” in Osage County. 2 Aplt.App. at 356. “[T]he longstanding assumption of

1. In reaching this conclusion, we have also carefully considered the other arguments raised by the Nation including: (1) that tribal, federal, and state sovereign authorities currently co-exist within the reservation’s boundaries, Aplt. Br. at 19, 33–34; (2) that the district court improperly relied on judicial statements involving other tribes and reservations in Oklahoma, Aplt. Br. at 24; (3) that the district court improperly relied on “modern academic commentary of historians and

demographers, post hoc commentary which has little probative value” and “is not subject to the legal standards applied by the Supreme Court,” Aplt. Reply Br. at 11–12, Aplt. Br. at 24; (4) that the district court placed undue reliance on modern-day demographics, Aplt. Br. at 41–42; and (5) that the Defendants’ 2000 census data is misleading and underrepresents the Osage, Aplt. Reply Br. at 16–17. To the extent these arguments are not subsumed by our analysis, we are not persuaded.

jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations” that “merit heavy weight.” *City of Sherrill*, 544 U.S. at 215–16, 125 S.Ct. 1478 (internal quotation marks and citations omitted) (applying laches, acquiescence, and impossibility to preclude the Oneida Indian Nation’s requested relief).

AFFIRMED.

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



**FOREST GUARDIANS; Carson Forest
Watch, Plaintiffs–Appellants,**

v.

**United States FOREST SERVICE,
Defendant–Appellee.**

No. 06–2306.

United States Court of Appeals,
Tenth Circuit.

March 8, 2010.

Steven Sugarman, Belin & Sugarman, Alletta D’A. Belin, Land and Water Fund of the Rockies, Santa Fe, NM, for Plaintiffs–Appellants.

Jan Elizabeth Mitchell, Asst. U.S. Attorney, David C. Iglesias, U.S. Attorney, Office of the United States Attorney, District of New Mexico, Andrew A. Smith, Office of the U.S. Attorney, Albuquerque, NM, David C. Shilton, United States Department of Justice, Environment & Natural Resources Division, Washington, DC, for Defendant–Appellee.

Before HENRY, Chief Judge, TACHA, KELLY, BRISCOE, LUCERO, MURPHY, HARTZ, O’BRIEN, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

ORDER

This matter is before the court on the appellants’ *Petition For Panel Or En Banc Rehearing*. We also have a response from the United States Forest Service. Both the petition and response were circulated to all of the judges of the court who are in regular active service. A poll was called, and a majority voted to grant rehearing en banc. Consequently, the appellants’ petition is GRANTED.

On or before April 23, 2010, the appellants shall file a supplemental brief, limited to 20 pages in length in a 13 point font, addressing the issues raised and arguments addressed in Section II B of the majority opinion issued on August 26, 2009, and the dissent which accompanied that decision. On or before Friday June 4, 2010, the Forest Service shall file a supplemental response addressing the same issues. The appellants may submit an optional reply, limited to 10 pages in length, within 10 days of service of the response brief.

All of the supplemental briefs shall be filed using the court’s Electronic Case Filing system. In addition, within 2 business days of the ECF filing, 15 hard copies of the briefs must be received in the clerk’s office. We also direct both parties to submit an additional 10 hard copies of their original merits briefs at the time the hard copies of the supplemental briefs are submitted.

This matter will be heard on the court’s September 2010 argument calendar. That calendar is currently set for the week of