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Osage Nation v. Irby: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of its Reservation Status

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NOTE

OSAGE NATION V. IRBY: THE TENTH CIRCUIT DISREGARDS LEGAL PRECEDENT TO STRIP OSAGE COUNTY OF ITS RESERVATION STATUS

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> *It seemed to the Major that the Indian would never be left alone to work out his own destiny; it seemed to him that until the last foot of Indian land had fallen into the hands of the land-greedy hordes there would be chaos.*[1]

I. Introduction

Osage County, Oklahoma, once the exclusive domain of the Osage Nation's reservation, today has a population that is only 3.5% Osage Indian.[2] After displacing the Osage Indians from their home in Kansas and abruptly resettling them in Indian Territory, the federal government has persistently encroached on Osage land until little remained in tribal hands. Of the 1.4 million acres that once constituted the Osage Reservation, less than 0.04% remains in restricted tribal ownership.[3] In *Osage Nation v. Irby*, the Tenth Circuit Court of Appeals took one further step to deprive the

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1. JOHN JOSEPH MATHEWS, WAH'KON-TAH: THE OSAGE AND THE WHITE MAN'S ROAD 130 (1981) [hereinafter MATHEWS, WAH'KON-TAH].

2. Osage Nation v. Irby, 597 F.3d 1117, 1127 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

3. *Id.* These land statistics are as of 2000. Restricted ownership refers to the way in which tribes traditionally hold their reservation lands, with the federal government owning the underlying fee title and the tribes retaining rights of use and occupancy. *See* Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 602-03 (2000) (describing restricted ownership as "tribal use at federal sufferance" and noting that "discovery conferred fee title, and, thus, transferability, upon the United States, subject only to tribal rights of use and occupancy which were extinguishable by federal conquest or purchase").

Osage Nation of its tribal landholdings. Disregarding the canons of construction – mandatory rules of statutory interpretation for issues involving Indians – the court ruled that the Osage Reservation has been disestablished.

This note argues that the Tenth Circuit's *Osage Nation v. Irby* decision incorrectly and unjustly stripped Osage County of its status as Indian Country. The court adhered to a line of authority that misapplies the relevant standard for finding diminishment or disestablishment of a reservation, ignores rules of construction for statutes regarding Indian tribes, and engages in increasingly results-oriented judicial activism. As a result of the Tenth Circuit's decision, the Osage Nation has been deprived of one of the fundamental aspects of its sovereignty – exemption from state taxation on reservation lands.[4] After *Irby*, Osage tribe members who reside in Osage County and are employed by the Osage Nation are subject to state taxation of their income.[5]

The Tenth Circuit purports to adhere to *Solem v. Bartlett*'s[6] test for ascertaining congressional intent to disestablish or diminish a reservation.[7] The Court, however, assigns improper weight to many of the test's factors, largely ignores allotment and assimilation's impact on the Osage Nation in Oklahoma, and disregards the canon of construction requiring that ambiguities regarding congressional intent be construed in favor of the continued existence of the Osage Reservation.[8]

Part II of this note reviews the creation and subsequent allotment of the Osage Reservation in present-day Oklahoma, the guiding principles of federal Indian law that (until recently) have governed a court's inquiry into diminishment or disestablishment, and the Supreme Court's recent trend away from these principles and toward a judicial-activist and results-

4. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country . . . we have employed . . . a more categorical approach: absent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians.") (internal quotation marks omitted). For a general overview of tribes' exemption from state taxation, see Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation *and* Leech Lake Band of Chippewa Indians v. Cass County, 23 AM. INDIAN L. REV. 55 (1998-1999).

5. *See generally Irby*, 597 F.3d 1117.

6. 465 U.S. 463 (1984).

7. This note discusses *Solem v. Bartlett*'s test in Part II.B.2.

8. *Solem*, 465 U.S. at 470-72.

oriented approach. Part III summarizes the factual and procedural background giving rise to *Osage Nation v. Irby* and discusses the Tenth Circuit's flawed legal analysis and disregard of established precedent. Part IV argues that courts deciding questions of diminishment or disestablishment should return to a strict application of *Solem v. Bartlett*'s three-tiered analytical framework. Courts should weigh each factor according to the hierarchy of probative evidence explicitly established in *Solem*. The presence or absence of explicit statutory language should be more persuasive than the context in which the act was passed or the events occurring after its passage. Moreover, in the event of any ambiguity, courts should apply the canons of construction to favor the continuation of Indian reservations. This note concludes in Part V.

II. Law Before the Case

A. The Osage Nation

In 1870, the federal government removed the Great and Little Osage Indians from their home in Kansas.[9] The United States sold the Osage Tribe's Kansas territory and used the proceeds to purchase from the Cherokee Tribe a new plot of land in Indian Territory.[10] In 1872, Congress set aside this tract of land "to provide [the] Osage tribe of Indians with a reservation . . . ."[11] The Congressional Act of June 5, 1872 created the Osage Reservation by recognizing and setting apart the territory "[b]ounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas."[12] Today, this tract of land constitutes Osage County, the largest county in Oklahoma and the seat of the Osage Nation.

In response to settlers' increased demand for property in Indian Territory and the growing desire to merge Indian tribes into mainstream white culture, Congress embarked on a policy era of allotment and assimilation, largely marked by the passage of the General Allotment Act in 1887,[13]

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9. *Id.*

10. *Id.*

11. 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.").

12. *Id.* at 229.

13. *See* Ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 334, 339, 341-42, 348-49, 381 (2006)) ("An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the

commonly known as the Dawes Act. Despite the general trend toward allotment and assimilation, however, the Osage Reservation was specifically exempted from the Dawes Act.[14] But exclusion from the Dawes Act was not the only instance of unique federal treatment of the Osage Tribe. For example, in 1907, when Congress passed the Oklahoma Enabling Act in preparation for Oklahoma's admission to statehood, it evinced congressional intent to treat the Osage Reservation as a tract of land distinct from the rest of Oklahoma Territory.[15]

In conjunction with the Oklahoma Enabling Act, Congress passed the Osage Allotment Act of 1906,[16] which Oklahoma alleges disestablished the Osage Reservation.[17] The Osage Allotment Act established the legal membership of the Osage Nation and then provided for the division of tribal lands among tribe members.[18] Additionally, the Osage Allotment Act severed the reservation land's mineral estate from its surface estate and placed the mineral estate in trust for the Tribe.[19]

Congress did not revisit the Osage Nation's membership or the status of the Tribe's landholdings until 2004, when it passed An Act to Reaffirm the Inherent Sovereign Rights of the Osage Tribe to Determine Its Membership and Form of Government, which purported to clarify the Osage Allotment

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Territories over the Indians, and for other purposes."). For an historical overview of the General Allotment Act and its goals, see John D. Barton & Candace M. Barton, *Jurisdiction of Ute Reservation Lands*, 26 AM. INDIAN L. REV. 133, 139-40 (2001-2002).

14. 25 U.S.C. § 339 (2006). For an in-depth discussion of the Osage tribe's exemption from the allotment policy, see Micah T. Zomer, Comment, *Returning Sovereignty to the Osage Nation: A Legislative Remedy Allowing the Osage to Determine Their Own Membership and System of Government*, 32 AM. INDIAN L. REV. 257 (2007-2008).

15. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906) ("An Act To enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States . . . ."). The Enabling Act directed that Oklahoma Territory be divided into 56 districts for the purpose of electing delegates to serve on a constitutional convention, but particularly required that "such apportionment shall include as one district the Osage Indian Reservation." *Id.* § 2. The Act further directed that the Osage Reservation would constitute "a separate county, and . . . shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma . . . ." *Id.* § 21.

16. Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906) ("An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.").

17. *See* Osage Nation v. Irby, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011); Osage Nation v. Oklahoma *ex rel.* Okla. Tax Comm'n, 260 F. App'x 13, 15 (10th Cir. 2007).

18. Osage Allotment Act § 2, 34 Stat. 539, 540-43 (1906).

19. *Id.* § 3.

Act.[20] While the Act acknowledges that the Osage Nation is based in Pawhuska, Oklahoma, it nowhere refers to an existing Osage Reservation and is silent as to whether Osage County is currently classified as such.[21]

The principal case addressed in this note, *Osage Nation v. Irby*, raises the question whether the Osage Reservation was indeed disestablished by the Oklahoma Enabling Act and the Osage Allotment Act of 1906, or whether it remains intact as Indian Country today. Oklahoma's ability to levy state income taxes on Osage tribe members employed by the Osage Nation and living within Osage County turns on the resolution of this question.[22]

B. Guiding Principles of Law

1. Canons of Construction

The Indian law canons of construction provide special rules of statutory interpretation for courts to employ in cases where an Indian tribe was a party to a treaty or statute passed by Congress. The canons of construction find their source in Indian tribes' status as pre-constitutional sovereigns and the traditional trust relationship that has since developed between the federal government and the tribes.[23] Because of the relatively unequal bargaining power between the Indian nations and the federal government at the time many tribal agreements and treaties were written, as well as the language barriers that likewise existed, the canons direct courts to "look beyond the written words to the larger context that frames the Treaty."[24]

The canons of construction provide the foundation for the interpretation of any text affecting Indian rights, and have been reaffirmed by federal

20. Act of Dec. 3, 2004, Pub. L. No. 108-431, 118 Stat. 2609.

21. Osage Nation v. Irby, 597 F.3d 1117, 1121 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

22. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991).

23. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN]. The trust relationship is a foundational principal of federal Indian law, whereby the federal government acts in its fiduciary capacity as trustee of the Indian tribes. As with traditional trusts, this relationship implies that the federal government, as guardian of the Indian wards (or as trustee of the Indian beneficiaries), must act in the tribes' best interests. For an historical overview of the trust relationship and its parameters, see John Fredericks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 107-15 (1988-1989).

24. COHEN, *supra* note 23, at 121.

courts of appeal in numerous recent opinions.[25] The canons take operative effect, however, only when the plain text of a document is unclear.[26] The canons of construction have particular importance for statutes passed during the allotment and assimilation era of federal Indian policy because congressional intent regarding the future of Indian reservations was itself unclear at the time.[27]

The first canon of construction requires courts to liberally construe treaties, agreements, statutes, and executive orders in the light most favorable to the tribes.[28] Likewise, it directs courts to resolve any textual ambiguities in favor of the Indians.[29] This rule of interpretation recognizes that agreements between the federal government and the tribes were not negotiated at arm's length and that, much like contracts of adhesion, tribes often had no choice but to accept the terms of an agreement as offered.[30]

The second canon of construction requires courts to construe treaties, statutes, and agreements as the Indians themselves would have understood them at the time they were written.[31] This rule of interpretation takes into account the language barrier that characterized negotiations, as well as the interpretational shortcomings between English and native languages.[32]

The third and final canon of construction requires that indigenous property rights be preserved absent clear and unambiguous congressional intent to the contrary.[33] In the context of determining whether an Indian reservation has been diminished or disestablished, this rule of construction should carry special force.

2. Solem v. Bartlett

Solem v. Bartlett is the landmark 1984 Supreme Court opinion that merged the holdings of numerous diminishment and disestablishment cases into one "fairly clean" analytical framework.[34] The purpose of the *Solem*

25. *See, e.g.*, Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008); HRI, Inc. v. E.P.A., 198 F.3d 1224, 1245 (10th Cir. 2000).

26. *Cal. Valley Miwok Tribe*, 515 F.3d at 1266 n.7.

27. *See* Solem v. Bartlett, 465 U.S. 463, 468-69 (1984).

28. COHEN, *supra* note 23, at 119.

29. *Id.*

30. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth" – How Long a Time Is That?*, 63 CALIF. L. REV. 601, 617-18 (1975).

31. COHEN, *supra* note 23, at 119-20.

32. Wilkinson & Volkman, *supra* note 30, at 610-11.

33. COHEN, *supra* note 23, at 120.

34. Solem v. Bartlett, 465 U.S. 463, 470-72 (1984).

framework is to ascertain whether Congress intended to diminish or disestablish a particular Indian reservation.[35] Courts faced with this question are directed to consider three factors, arranged in a hierarchy of their probative value as to congressional intent: (1) the statutory language employed by Congress to open reservation lands, (2) the circumstances surrounding the passage of a particular act, and (3) the subsequent demographic history and land tenure patterns of the opened lands.[36]

Solem v. Bartlett came before the Supreme Court after John Bartlett, a Cheyenne River Sioux tribe member, pleaded guilty to and was convicted of attempted rape in South Dakota state court.[37] While serving time in the state penitentiary, Bartlett sought federal habeas corpus relief on the ground that he committed the offense on the Cheyenne River Sioux Reservation.[38] Bartlett argued that despite a congressional act opening portions of the land to non-Indian settlement, the Reservation remained Indian Country, and was therefore beyond South Dakota's criminal jurisdiction.[39]

Before laying out the three-tiered framework for finding diminishment or disestablishment, Justice Marshall acknowledged the historical backdrop of allotment and assimilation policy that contextualized many of the acts opening reservations to non-Indian settlement. The *Solem* decision recognized that at the time that Congress passed most surplus land and allotment acts, it simply did not foresee the continuing existence of Indian reservations.[40] Congress believed that, within one generation, Indians would fully assimilate into "traditional" American society, eliminating the need for a reservation system.[41] In light of these beliefs, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."[42]

While admitting that Congress may have been less than meticulous in drafting allotment era statutes, the Court nonetheless required meticulous application of the canons of construction to those acts. Despite Congress's expectation that the reservation system would fade into extinction (often resulting in ambiguously drafted surplus land and allotment acts), the *Solem* Court warned that it had "never been willing to extrapolate from this

35. *Id.*
36. *Id.*
37. *Id.* at 465.
38. *Id.*
39. *Id.*
40. *Id.* at 468.
41. *Id.*
42. *Id.*

expectation a specific congressional purpose of diminishing reservations . . . ."[43] Instead, the Court emphasized that the effect of a given act ultimately depends on the text itself and the circumstances surrounding its passage,[44] and not solely on the policy era in which it was enacted.

Solem v. Bartlett's analytical framework begins with the premise that only Congress has the power to diminish or disestablish a reservation.[45] Moreover, congressional intent to do so must be "clearly evince[d]" before a court will find that the boundaries of a reservation have indeed been altered.[46] The *Solem* Court identified three factors that may evince congressional intent to diminish or disestablish a reservation. The Court made clear, however, that courts applying these factors should not give them equal weight, but should consider them in order of their probative value.[47] The *Solem* framework thus takes the form of a hierarchy, with three tiers of probative evidence.

The first tier – and most probative evidence of intent to diminish or disestablish – is the statutory language itself.[48] The text of an act is most likely to suggest diminishment or disestablishment where the act includes "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests . . . ."[49] Indeed, the existence of strong language of cession and an unconditional commitment to pay for any opened land creates an "almost insurmountable presumption" that Congress intended to alter reservation bounds.[50]

The second tier of probative evidence focuses on the circumstances surrounding a surplus land or allotment act's passage, including any events demonstrating a contemporaneous understanding of diminishment or disestablishment. This evidence includes the manner in which the act was negotiated with the tribe and the contents of any legislative reports made to Congress.[51] To a lesser extent, courts may also consider events occurring after the act's passage, including both Congress's and the Bureau of Indian Affairs' treatment of the disputed land.[52]

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43. *Id.* at 468-69.
44. *Id.* at 469.
45. *Id.* at 470.
46. *Id.*
47. *See id.* at 470-72.
48. *Id.* at 470.
49. *Id.*
50. *Id.* at 470-71.
51. *Id.* at 471.
52. *Id.*

In the final and least probative tier of evidence, courts may consider the affected land's population demographics as an "additional clue" to indicate what Congress foresaw when it passed the statute.[53] The Court noted, however, that "subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation."[54]

After establishing the three-tiered framework, the *Solem* Court once again stressed that the canons of construction govern the interpretation of a statute purporting to diminish or disestablish an Indian reservation. The Court maintained that "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived . . . ."[55]

The Court applied the tripartite framework to conclude that the surplus land act at issue did not diminish the Cheyenne River Sioux Reservation.[56] The relevant act's absence of explicit language regarding cession of Indian rights, coupled with the presence of textual provisions suggesting that the disputed lands would continue to remain a part of the reservation, was critical to the Court's holding.[57] Because the Court could not find explicit intent to disestablish in the act's text or the circumstances surrounding its passage, it held that "[t]he presumption that Congress did not intend to diminish the reservation therefore stands . . . ."[58]

C. The Court Strays from Faithful Application of Solem v. Bartlett

1. South Dakota v. Yankton Sioux Tribe

In *South Dakota v. Yankton Sioux Tribe*,[59] the Supreme Court applied the *Solem v. Bartlett* test to determine whether an 1894 surplus land statute diminished the Yankton Sioux Reservation in South Dakota.[60] In this case, the Court began to stray from a strict application of the *Solem* framework. Instead, the Court relied on historical circumstances to circumvent the plain

53. *Id.* at 471-72.
54. *Id.* at 472 n.13.
55. *Id.* at 472.
56. *Id.* at 481.
57. *Id.* at 473-74.
58. *Id.* at 481.
59. 522 U.S. 329 (1998). For a history of the dispute leading to the Supreme Court decision (which the author aptly describes as "result oriented"), see *Recent Developments*, 23 AM. INDIAN L. REV. 155, 155-57 (1998-1999).
60. *See Yankton Sioux Tribe*, 522 U.S. at 333.

language of the agreement purporting to diminish the reservation, failed to adhere to the canons of construction regarding textual ambiguities, and (mis)placed increased weight on the second and third tiers of probative evidence.

An 1858 treaty between the United States and the Yankton Sioux Tribe established the Yankton Sioux Reservation.[61] The question of diminishment arose after several counties in South Dakota formed a recycling and waste management district for the purpose of constructing a landfill.[62] The site acquired for the landfill fell within the Yankton Sioux Reservation's 1858 treaty boundaries. When the waste district applied for a state permit for the landfill, the Yankton Tribe intervened on environmental grounds.[63]

The 1894 surplus land agreement between the Yankton Sioux and the federal government provided that the Yankton Tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . ."[64] The agreement further provided that the federal government would compensate the Tribe with a single, fixed-sum payment of $600,000.[65] But the surplus land agreement also contained a saving clause, stating that "[n]othing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States."[66] The Tribe thus argued that the saving clause preserved the Yankton reservation boundaries as established in the 1858 treaty.[67]

The *Yankton* Court began its diminishment inquiry with the first tier of the *Solem* framework: the text of the 1894 agreement. The Court concluded that language of cession in the agreement and a sum-certain payment for the opened lands gave rise to the "almost insurmountable" presumption of diminishment first recognized in *Solem*.[68]

The Court strayed from faithful application of the *Solem* framework, however, when it failed to give due credence to the agreement's saving

61. *Id.* at 333-34.
62. *Id.* at 340.
63. *Id.* at 340-41.
64. *Id.* at 337 n.1.
65. *Id.* at 338.
66. *Id.* at 337 n.1.
67. *Id.* at 345.
68. *Id.* ("[T]he 1894 Act . . . bears the hallmarks of congressional intent to diminish a reservation.").

clause. Despite the Court's concession that statutory language is the most probative evidence of congressional intent,[69] the Court both failed to give effect to the plain language of the saving clause and abandoned the canon of construction requiring that statutory ambiguities be resolved in the tribe's favor.

Instead of reading the 1894 surplus land act holistically and giving the saving clause the "literal construction" that the *Solem* framework's first tier demands, the Court relied on lower tiers of probative evidence, and particularly the circumstances surrounding the agreement, to circumvent the plain language of the saving clause.[70] The Court reasoned that the saving clause's actual purpose was to preserve vital annuities of cash, food, clothing, and firearms promised to the Yankton Tribe in its 1858 treaty with the federal government.[71] The Court explained: "[r]ather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a 'sensible construction' . . . ."[72] But this construction resulted in inconsistent interpretation of the agreement: the Court broadly construed the land cession and sum-certain payment provisions to find diminishment,[73] but gave the saving clause a narrow reading, solely on the basis of extra-textual circumstances.

When the Tribe raised the issue of statutory construction, the Court summarily disposed of the argument. The Court maintained that "[t]he principle according to which ambiguities are resolved to the benefit of Indian tribes is not . . . 'a license to disregard clear expressions of tribal and congressional intent.'"[74] What the Court failed to address, however, was that the Yankton Sioux surplus land agreement's saving clause was unique. Instead of requiring that prior treaties remain in effect only to the extent that they did not conflict with the subsequent agreement,[75] the Yankton saving clause plainly provided that *nothing* in the surplus land agreement was to be construed to abrogate the earlier treaty terms.[76] While this unique clause's inclusion should provide a sufficiently clear expression of

69. *Id.* at 344.

70. *Id.* at 345-46.

71. *Id.* at 346.

72. *Id.* (citing United States v. Granderson, 511 U.S. 39, 56 (1994)).

73. *Id.* at 349.

74. *Id.* (quoting DeCoteau v. Dist. Cnty. Court, 420 U.S. 425, 447 (1975)).

75. A.J. Taylor, Note, *A Lack of Trust:* South Dakota v. Yankton Sioux Tribe *and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 WASH. L. REV. 1163, 1183-84 (1998).

76. *Yankton Sioux Tribe*, 522 U.S. at 337 n.1.

legislative and tribal intent to avoid diminishment altogether, the Court refused to admit that its presence even rendered the agreement ambiguous.[77]

The Supreme Court also departed from precedent in applying the second prong of the *Solem* framework. When considering the circumstances surrounding the surplus land agreement's passage, the Court readily admitted that "the context of the Act is not so compelling that, standing alone, it would indicate diminishment."[78] Yet the Court used the circumstances under which the agreement was executed to buttress its flawed first-prong analysis, concluding that the circumstances surrounding passage did not rebut the presumption of diminishment arising from the language of cession and the fixed-sum payment.[79] This conclusion ignores that the Court relied on second-tier contextual evidence to conduct its statutory interpretation in the first place. Furthermore, in finding that the Tribe understood that the 1894 agreement would diminish its reservation lands, the Court relied exclusively on evidence from the Bureau of Indian Affairs commissioners sent to negotiate with the Tribe.[80]

The Court's application of the *Solem* framework's third factor sealed the Yankton Tribe's fate. In analyzing whether shifts in demographics and land tenure patterns had resulted in de facto diminishment, the Court found the disputed land to be "predominantly populated by non-Indians with only a few surviving pockets of Indian allotments," despite an increase in the Indian population in the area following the opening of a tribal casino.[81] Likewise, the Court noted that less than 10% of the 1858 reservation lands remained in Indian ownership.[82] As a final consideration, and in a prelude to *City of Sherrill v. Oneida Indian Nation*,[83] the Court, relying on South Dakota's consistent exercise of governmental authority over the land in question, held that diminishment occurred.[84]

South Dakota v. Yankton Sioux Tribe strikingly marks the Court's departure from *Solem v. Bartlett*'s three-tiered hierarchical framework. Moreover, it illustrates the Court's increasing willingness to ignore the Indian law canons of construction in questions of statutory interpretation, witnessed yet again in *Sherrill*.

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77. *See id.* at 349.
78. *Id.* at 351.
79. *Id.* at 351-52.
80. *See id.* at 352.
81. *Id.* at 356-57.
82. *Id.* at 356.
83. 544 U.S. 197 (2005).
84. *Yankton Sioux Tribe*, 522 U.S. at 357.

2. City of Sherrill v. Oneida Indian Nation

In *City of Sherrill v. Oneida Indian Nation*, the Oneida Indian Nation contested paying property taxes to the City of Sherrill, New York.[85] The taxes were levied on property originally contained within the Oneida Reservation in the early nineteenth century and reacquired by the Tribe in the late 1990s.[86] When the City of Sherrill attempted to evict the Oneida Nation for its failure to pay property taxes assessed on the disputed lands, the Tribe sought equitable relief prohibiting the present and future imposition of property taxes.[87] The Tribe alleged that with the open-market purchase of once-tribal parcels of land, its aboriginal title and fee simple title were unified. As a consequence of tribal sovereignty, the Tribe argued, it was exempt from state taxation.[88]

By introducing a laches analysis into Indian property claims and relying almost exclusively on current demographics (while ignoring the historical context that produced those demographics), the Supreme Court broke new ground. In ruling against the Tribe, the Court noted that "[t]he long-standing 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."[89] The Court was particularly persuaded by New York's exercise of jurisdiction over the Oneida land parcels for more than 200 years[90] and the Tribe's alleged lapse in asserting its sovereign right to the property, despite reacquiring the land only shortly before litigation.[91] The Court further emphasized the "impracticality of returning" the parcels of land to sovereign Indian control.[92]

In his dissent, Justice Stevens recognized that "the Court has ventured into legal territory that belongs to Congress. . . . [T]he Court has done what only Congress may do – it has effectively proclaimed a diminishment of the

85. *Sherrill*, 544 U.S. at 202. For an in-depth critique of the *Sherrill* case, see Curtis Berkey, City of Sherrill v. Oneida Indian Nation, 30 AM. INDIAN L. REV. 373 (2005-2006).

86. *Sherrill*, 544 U.S. at 202.

87. *Id.* at 211-12.

88. *Id.* at 213-14.

89. *Id.* at 215 (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977)) (internal quotation marks omitted).

90. *Id.* at 215-16.

91. *Id.* at 216-17.

92. *Id.* at 219.

Tribe's reservation and an abrogation of its elemental right to tax immunity."[93]

In both *South Dakota v. Yankton Sioux* and *City of Sherill v. Oneida Indian Nation*, the Supreme Court ventured further and further from a faithful application of the *Solem v. Bartlett* test. By conflating the first and second prong inquiries and by placing increased weight on the less probative second and third tiers of evidence, the Court invited the courts of appeal to follow suit. The Tenth Circuit's opinion in *Osage Nation v. Irby* thus joins this line of cases that misapplies the *Solem* test and strays from the Indian law canons of construction.

III. Osage Nation v. Irby

A. Statement of the Case

In 1999, an Osage tribal member protested Oklahoma's assessment of state income tax on her.[94] She was employed by the Tribe on trust land, but lived on fee land in Osage County, Oklahoma.[95] The Oklahoma Tax Commission applied 18 USC § 1151 and found that the tribal member did not reside in Indian Country.[96] The Commission concluded that because

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93. *Id.* at 224-25 (Stevens, J., dissenting). In so remarking, Justice Stevens is referencing Congress's exclusive "plenary power" over Indian affairs. William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 45 (1992) ("It is virtually axiomatic in Indian law that the Congress has 'plenary power' concerning Indian affairs. This control over American Indians and their affairs stems predominantly from the so-called 'Indian Commerce Clause.' The single grant of power awarded Congress by the United States Constitution authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'"); *see also* April L. Seibert, Note, *Who Defines Tribal Sovereignty? An Analysis of* United States v. Lara, 28 AM. INDIAN L. REV. 393, 393 (2003-2004) (citation omitted) (noting that tribes possess inherent sovereignty, giving them the authority to "exercise powers free of the strictures of the Constitution unless limited by treaty or Congress"); Aaron F.W. Meek, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 147, 151 (2010-2011) ("[I]t is well settled that Congress is the supreme arbiter in Indian affairs. Congressional power is exclusive and preemptive . . . . In addition to its plenary nature, Congress's power is also supreme to all other branches of government.").

94. Osage Nation v. Irby, 597 F.3d 1117, 1121 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011); Osage Nation v. Oklahoma *ex rel.* Okla. Tax Comm'n, 260 F. App'x 13, 15 (10th Cir. 2007).

95. *Irby*, 597 F.3d at 1121.

96. *Id.*

she did not reside in Indian Country, Oklahoma could assess state income tax against her.[97]

The Osage Nation then filed suit against the State of Oklahoma and the Oklahoma Tax Commission, seeking a declaratory judgment that: (1) the Osage Nation's reservation remains intact as Indian Country and consists of the entirety of Osage County, and (2) tribe members living in Osage County are exempt from state taxation on income earned from employment by the Osage Nation.[98] The Osage Nation also sought injunctive relief preventing the Oklahoma Tax Commission from assessing or collecting state income tax from such tribal members.[99]

After the Osage Nation restructured its lawsuit to proceed against the individual members of the Oklahoma Tax Commission under *Ex parte Young*'s[100] exception to Eleventh Amendment immunity,[101] the district court considered the Oklahoma Tax Commission members' motion to dismiss, which it converted to a motion for summary judgment.[102] The court found that the Osage Reservation had been disestablished more than 100 years ago,[103] and that income earned on non-trust land is "presumptively subject to state taxes."[104] The district court further found that a ruling in favor of the Osage Nation would "contravene substantial reliance interests" of the State in its ability to exercise sovereign authority over the county in question.[105] The district court granted the defendants' motion for summary judgment, finding that the Osage Reservation had been disestablished.[106] In the principal case discussed in this note, the Tenth

97. *Id.*

98. *Okla. Tax Comm'n*, 260 F. App'x at 15-16.

99. *Id.* at 16.

100. 209 U.S. 123 (1908).

101. *See Okla. Tax Comm'n*, 260 F. App'x at 22; Hill v. Kemp, 478 F.3d 1236, 1255-56 (10th Cir. 2007) ("[T]he Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself."). For an historical discussion of tribal sovereign immunity, see Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99 (1999-2000).

102. Osage Nation v. Oklahoma *ex rel.* Okla. Tax Comm'n, 597 F. Supp.2d 1250, 1252 (N.D. Okla. 2009), *aff'd*, 597 F.3d 1117 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

103. *Id.* at 1257.

104. *Id.* at 1264.

105. *Id.* at 1265-66.

106. *Id.* at 1266.

Circuit Court of Appeals affirmed the district court's finding of disestablishment.[107]

B. The Tenth Circuit's Decision

The Tenth Circuit noted that "[t]he pivotal issue in this case is whether the Nation's reservation has been disestablished, not Oklahoma's tax policies."[108] The United States Supreme Court has held that "only Congress can divest a reservation of its land and diminish its boundaries,"[109] and that its intent to do so must be "clear and plain."[110] Citing *Solem*, the Tenth Circuit in *Irby* stated that "[i]t is well established that Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred."[111] In laying out the guiding principles for discerning congressional intent, the Tenth Circuit acknowledged that there is an initial presumption in favor of the continued existence of a reservation.[112]

To determine whether Congress intended to disestablish the Osage Reservation when it passed the Osage Allotment Act of 1906, the Tenth Circuit relied on the Supreme Court's three-tiered *Solem v. Bartlett* framework. The Tenth Circuit summarized the test as follows: "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.'"[113] The Tenth Circuit Court of Appeals treated each prong of the *Solem* framework in turn before ultimately concluding that Congress intended to disestablish the Osage Reservation when it enacted the Osage Allotment Act of 1906.[114]

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107. Osage Nation v. Irby, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

108. *Id.*

109. Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress *explicitly* indicates otherwise.") (emphasis added).

110. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (quoting United States v. Dion, 476 U.S. 734, 738-39 (1986)) (internal quotation marks omitted).

111. *Irby*, 597 F.3d at 1121-22.

112. *Id.* at 1122 (citing *Solem*, 465 U.S. at 472).

113. *Id.* (quoting Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1395 (10th Cir. 1990)).

114. *Id.* at 1122-27.

Under the first prong of the *Solem* framework, the Tenth Circuit concluded that the Osage Allotment Act did not "unambiguously suggest diminishment or disestablishment of the Osage reservation."[115] The Act did not contain explicit language of cession, and because the entirety of the Reservation was allotted to tribe members, it likewise did not provide sum-certain payment for acquired lands.[116] Moreover, the court noted the presence of secondary factors identified in *Solem* favoring the continued existence of a reservation.[117] Among these secondary factors were (1) the Secretary of the Interior's reservation of lands for tribal purposes, (2) the grant of individual allotments to tribal members before the land was opened to non-Indian settlement, and (3) the reservation of mineral resources for the tribe itself.[118]

Under the second prong of the *Solem* framework, the Tenth Circuit maintained that the circumstances surrounding the Osage Allotment Act's passage "reflect[ed] clear congressional intent and Osage understanding that the reservation would be disestablished."[119] The court emphasized the historical congressional policy of allotment and dissolution of reservations, particularly those of the Oklahoma tribes.[120] The court further relied on historical Osage interest in negotiating allotment to support the proposition that the Osage understood that the Act would terminate the Reservation.[121] The court was not persuaded by the Osage Nation's proffer of current evidence indicating the continued existence of the Osage Reservation.[122]

Under the third prong of the *Solem* framework, the Tenth Circuit held that the "dramatic shift" in Osage County's population demographics and land ownership after allotment favored a finding of disestablishment.[123] In particular, the court emphasized the State's exercise of jurisdiction over

115. *Id.* at 1124.

116. *Id.* at 1123-24.

117. *Id.* at 1123.

118. *Id.*

119. *Id.* at 1124.

120. *Id.* Although at the time the Osage Allotment Act was enacted, federal Indian policy toward Indians favored dissolution of reservations, federal policy has vacillated throughout history, shifting from allotment and assimilation, to reorganization, to the modern era of self-determination. For an historical overview of these shifting federal policies in the context of Indian land claims, see Patrick W. Wandres, Note, *Indian Land Claims:* Sherrill *and the Impending Legacy of the Doctrine of Laches*, 31 AM. INDIAN L. REV. 131 (2006-2007).

121. *Irby*, 597 F.3d at 1125.

122. *Id.* at 1125-26.

123. *Id.* at 1127.

Osage County after the Act's passage, noting that the "jurisdictional history . . . demonstrates a practical acknowledgement that the Reservation was diminished."[124]

Based on a superficial application of *Solem*'s three-tiered framework, the Tenth Circuit held "that the Osage Reservation has been disestablished by Congress."[125] Having so held, the court did not reach the question of 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."[126]

C. The Tenth Circuit's Disregard of Established Legal Precedent

The Tenth Circuit's holding in *Osage Nation v. Irby* not only strips the Osage Nation of its reservation holdings, but also deprives the tribe of "a core incident of tribal sovereignty"[127] – tribal immunity from state income taxation on Indian land.[128] Beyond the specific implications for the Osage Nation, the Tenth Circuit adds its holding to a series of cases disregarding the canons of construction and increasingly replacing the textual inquiry into congressional intent with an emphasis on less probative evidence tending to favor non-tribal interests.

Although the Tenth Circuit properly selected the *Solem v. Bartlett* framework to determine whether the Osage Reservation has been disestablished, the court's ultimate holding is incorrect for a number of reasons. Recall that the *Solem* test begins with an initial presumption favoring the continued existence of a reservation absent clear and plain intent to the contrary, followed by an examination of three factors in declining order of importance: (1) the statutory language employed by Congress to open reservation lands, (2) the circumstances surrounding the passage of a particular act, and (3) the subsequent demographic history and land tenure patterns of the opened lands.[129] First, in its preliminary considerations, the court failed to give adequate weight to the "presumption in favor of the continued existence of a reservation,"[130] merely paying lip service to this

124. *Id.* (alteration in original) (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)) (internal quotation marks omitted).

125. *Id.*

126. *Id.*

127. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 224 (2005) (Stevens, J., dissenting).

128. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 764-65 (1985).

129. Solem v. Bartlett, 465 U.S. 463, 470-72 (1984).

130. *Irby*, 597 F.3d at 1122.

presumption without actually heeding it. Second, in inferring congressional intent to disestablish the Osage Nation's reservation under *Solem's* first prong, the court of appeals failed to accord appropriate weight to the Osage Allotment Act's statutory text, which nowhere explicitly diminishes or disestablishes the Osage Reservation and instead presents many factors that the Supreme Court has identified as supporting the continued existence of an Indian reservation. Finally, regarding the second and third *Solem* factors, the Tenth Circuit rather selectively examined the circumstances surrounding the Osage Allotment Act's passage and subsequent history, without giving due consideration to the history of the Osage Nation in Oklahoma.

1. Preliminary Considerations: The Requirement of Clear Congressional Intent and the Presumption in Favor of the Continued Existence of the Osage Reservation

Before beginning its application of the *Solem v. Bartlett* framework to the Osage Nation's claim against disestablishment, the Tenth Circuit Court of Appeals acknowledged that congressional intent to "disestablish a reservation unilaterally . . . will not be lightly inferred."[131] Rather, Supreme Court precedent requires clear, if not explicit, congressional intent to support a finding of diminishment or disestablishment. Despite the erroneous result in *South Dakota v. Yankton Sioux Tribe*, the Court there correctly stated that "only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be 'clear and plain.'"[132] Likewise, in *United States v. Dion*, the Supreme Court aptly noted that "in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'"[133] The *Dion* Court further stated that "Indian treaty rights are too fundamental to be easily cast aside," and that "different standards" exist "for determining how such a *clear and plain intent* must be demonstrated."[134]

In addition to the heavy burden that a requirement of clear and plain congressional intent imposes, the Supreme Court has established a presumption in favor of the continued existence of an Indian reservation. In *Solem v. Bartlett*, the Court stated that where both statutory text and legislative history leave congressional intent unclear, it is "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not

131. *Id.* at 1121-22.

132. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (citation omitted) (quoting United States v. Dion, 476 U.S. 734, 738-39 (1986)).

133. *Dion*, 476 U.S. at 739 (citations omitted).

134. *Id.* (emphasis added) (citations omitted).

take place and that the old reservation boundaries survived the opening."[135] This language in *Solem* requires courts deciding questions of diminishment or disestablishment to resolve any ambiguities regarding congressional intent in favor of the tribe and the continued existence of the reservation. The Tenth Circuit, however, gives only a cursory nod to the presumption in favor of the continued existence of the Osage Reservation. In one short phrase, buried within the text of a paragraph, the court of appeals admits that "there is a presumption in favor of the continued existence of a reservation"[136] and then seemingly disposes of this presumption, without further consideration.

Neither the Oklahoma Enabling Act nor the Osage Allotment Act contains language "clearly and plainly" disestablishing the Osage Reservation. Furthermore, the circumstances surrounding and events following the acts' passage do not unequivocally suggest that the Osage Reservation's disestablishment was either intended or understood. Despite these ambiguities, discussed at greater length *infra*,[137] the court of appeals failed to apply the appropriate presumption in favor of the continuing existence of the Osage Reservation. The Osage Allotment Act of 1906's text, as well as its concurrent and subsequent understanding, simply do not present the "substantial and compelling"[138] evidence required to support a finding that the Osage Reservation has been terminated. Therefore, the Tenth Circuit Court of Appeals should have shown solicitude to the Osage Nation, heeding the presumption favoring the continued existence of the Osage Reservation and resolving the question presented in *Osage Nation v. Irby* in favor of the tribe.

2. Solem*'s First Factor: The Statutory Language Employed by Congress to Open Reservation Lands*

To arrive at its holding in *Irby*, the Tenth Circuit shifted the weight assigned to evidence under the *Solem* framework's hierarchical structure. Under the first prong, the court failed to accord due consideration to the absence of statutory language terminating the Osage Reservation, basing its decision instead on ambiguous historical circumstances. The Tenth Circuit also failed to give proper weight to the *Solem* Court's supplementary first-prong factors that indicate congressional intent to preserve Indian Country and point to the continued existence of the Osage Reservation.[139]

135. Solem v. Bartlett, 465 U.S. 463, 472 (1984).
136. *Irby*, 597 F.3d at 1122.
137. *See infra* notes 172-202 and accompanying text.
138. *Irby*, 597 F.3d at 1122.
139. *See infra* notes 154-69 and accompanying text.

In commencing its analysis of the first *Solem* factor, the Tenth Circuit Court of Appeals stated that "[s]tatutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation."[140] The logical corollary of this principle is that the *absence* of clear statutory language should carry equal probative weight in determining whether a reservation has been disestablished or diminished. Because statutory language best illustrates congressional intent – and as explicitly directed by the Supreme Court itself – this prong of the *Solem v. Bartlett* framework should be given the most weight in determining whether the Osage Reservation continues to exist.

Although the Tenth Circuit did not give due credence to the *absence* of language explicitly terminating the Osage Reservation in the Osage Allotment Act, it did at least recognize the kind of language that would accomplish that function with its *presence*. The *Irby* court noted that the Supreme Court has found diminishment or disestablishment of a reservation where the statutory language expressly references "cession or other language evidencing the present and total surrender of all tribal interests . . . ."[141] Examples of explicit termination language include: "the Smith River reservation is hereby *discontinued*,"[142] "the same being a portion of the Colville Indian Reservation . . . is hereby, *vacated and restored to the public domain*,"[143] and "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, *abolished*."[144]

The Osage Allotment Act contains no similarly explicit statutory language disestablishing the Osage Reservation. The Act merely states that "all lands belonging to the Osage tribe of Indians in Oklahoma Territory . . . shall be

140. *Irby*, 597 F.3d at 1122-23.

141. *Id.* at 1123 (quoting *Solem*, 465 U.S. at 470). In *Solem v. Bartlett*, the Supreme Court stated that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress *explicitly* indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis added) (citing United States v. Celestine, 215 U.S. 278, 285 (1909)).

142. Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 (emphasis added) ("An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes for the Year ending thirtieth June, eighteen hundred and sixty-nine, and for other Purposes.").

143. Act of July 1, 1892, ch. 140, 27 Stat. 62, 63 (emphasis added) ("An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes.").

144. Act of Apr. 21, 1904, Pub. L. No. 58-125, 33 Stat. 189, 218 (emphasis added) ("An Act Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes.").

divided among the members of said tribe . . . ."[145] After existing tribe members were given the opportunity to select three 160-acre allotments, the remaining tribal lands were to be "divided as equally as practicable" among the members of the tribe, keeping the entirety of the original Osage Reservation in tribal hands.[146] Recognizing that allotment and diminishment are wholly separate, the Tenth Circuit admitted that "[t]he Supreme Court has repeatedly stated . . . that allotment/opening of a reservation alone does not diminish or terminate a reservation."[147] But despite overtly acknowledging the Supreme Court's direction, the *Irby* court's ultimate finding of disestablishment (without a finding of explicit congressional intent to do so) appears nonetheless to conflate allotment with disestablishment. Given that Osage allotment was voluntary, exclusively among tribal members, and allowed no lands to pass outside Osage control, this conflation is indeed enigmatic.

Aside from the absence of explicit language disestablishing the reservation, language in the Osage Allotment Act indicates a contemporaneous understanding that the Osage Reservation would in fact continue in existence after allotment and statehood. Congress refers to the "Osage Reservation" several times throughout the course of the Act. Specifically, section 4 of the Act states that "[t]here shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum . . . for the support of the Osage Boarding School and for *other schools on the Osage Indian Reservation conducted or to be established* and conducted for the education of Osage children."[148] Section 6 of the Act also alludes to the continued existence of the reservation, stating that "the lands, moneys, and mineral interests . . . of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, *or of the State in which said reservation may be hereinafter incorporated* . . . ."[149] Rather than showing explicit intent to disestablish the Osage Reservation, these references imply that the Osage Reservation would continue to exist after Oklahoma joined the Union and indefinitely into the future. The Tenth Circuit's opinion in *Osage Nation v. Irby* utterly fails to note these textual indicators supporting the continued existence of the Osage Reservation.

145. Osage Allotment Act, ch. 3572, § 2, 34 Stat. 539, 540 (1906).

146. *Id.* § 2, 34 Stat. at 541.

147. Osage Nation v. Irby, 597 F.3d 1117, 1122 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

148. Osage Allotment Act, § 4, 34 Stat. at 544 (emphasis added).

149. *Id.* § 6 (emphasis added).

The manner of compensation for tribal lands allotted or opened to the public for settlement may also provide evidence of Congress's intent regarding the Osage Reservation.[150] One-time "sum-certain" payments often indicate an intent to terminate the reservation status of a tract of land, while "payment that is contingent on future sales usually indicates an intent not to terminate."[151] In its discussion of compensation, the court of appeals echoed the Supreme Court, stating that "[e]xplicit 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.'"[152] When the court applied the rule, however, it only briefly noted that the Osage Allotment Act contains no terms of payment because the land was not intended to be sold or opened for settlement.[153] It failed to consider that the absence of payment may itself be a strong indicator against disestablishment or that the absence of terms disposing of Osage lands to nonmembers is strong evidence that Congress intended to leave the Osage Reservation intact.

In addition to the first prong's principal examination of the act's statutory text to discern clear congressional intent to find diminishment or disestablishment, the Supreme Court has laid out supplementary statutory factors that support the continued existence of an Indian reservation under the *Solem* framework's first prong. In *Irby*, the Tenth Circuit listed the supplementary factors as follows: "(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

150. *Irby*, 597 F.3d at 1123.

151. *Id.* For instance, the Supreme Court held that an Indian Reservation remained in existence where there was neither express statutory language regarding termination of the reservation nor the promise of a "sum-certain" payment for tribal lands. *Id.* (citation omitted).

152. *Id.* (quoting Solem v. Bartlett, 465 U.S. 463, 470-71 (1984)).

153. *Id.* at 1123-24. After registered tribe members had their choice of three tracts of land within the reservation, the remainder was to be equitably divided among the members of the tribe. Osage Allotment Act, § 2, 34 Stat. at 541. The Act further stated that "the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe . . . ." *Id.* § 7, 34 Stat. at 545. Moreover, the right to execute deeds to any Osage lands was placed within the sole authority of the principal chief of the Osage, subject to approval by the Secretary of the Interior. *Id.* § 8. Although tribally executed deeds likely were not within the Supreme Court's contemplation at the time it wrote the language, these deeds nonetheless fall more in line with "payment that is contingent on future sales" (which "usually indicates an intent *not* to terminate"), rather than sum-certain payments (which often indicate an intent to terminate). *See Irby*, 597 F.3d at 1123.

the tribe as a whole."[154] The Osage Allotment Act of 1906 contains each of these three elements, which further supports the conclusion that Congress intended continuation of the Osage Reservation when the Act was passed.[155]

Turning to the first supplementary factor, the Osage Allotment Act expressly permits the Secretary of the Interior to set aside reservation land for tribal purposes.[156] It reserves lands on which the Secretary of the Interior could erect buildings for both tribal and government uses.[157] The Act also protects from allotment tracts of tribal land used for an Osage Boarding School and for an Osage Nation cemetery. The sale of these lands was left to the Tribe's discretion "under such rules and regulations as the Secretary of the Interior may provide . . . ."[158] All of these textual references fit seamlessly within the first supplementary factor's finding of "authorization for the Secretary of the Interior to set aside lands for tribal purposes."[159] As a result, they all support the continued existence of the Osage Reservation.

As for the second supplementary factor, which requires "permission for tribal members to obtain individual allotments before the land was officially opened to non-Indian settlers,"[160] the Osage Allotment Act fully allots the Osage Reservation and nowhere permits settlement of reservation lands by non-Osage settlers.[161] The Osage Allotment Act not only gave tribal members permission "to obtain individual allotments before the land was

154. *Irby*, 597 F.3d at 1123 (citing *Solem*, 465 U.S. at 474).

155. *Id.*

156. Osage Allotment Act, § 4, 34 Stat. at 540-43.

157. *Id.* § 2, 34 Stat. at 543 (authorizing the Secretary of the Interior to sell the United States Indian agent's office building, the Osage council building, and other government buildings in Pawhuska "and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select . . . ").

158. *Id.*

159. *Irby*, 597 F.3d at 1123 (citing *Solem*, 465 U.S. at 474).

160. *Id.* (citing *Solem*, 465 U.S. at 474).

161. The Act explicitly states 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* . . . ." Osage Allotment Act, § 2, 34 Stat. at 540 (emphasis added). According to the Act, each tribe member was to select three 160-acre tracts of land. *Id.* § 2, 34 Stat. at 540-42. The Act contains special provisions for selecting land on behalf of minors or adults who "fail[], refuse[], or [are] unable" to select their allotments. *Id.* § 2, 34 Stat. at 540-41 (providing that selections for adults and minors are to be made by the United States Indian agent for the Tribe, subject to the approval of the Secretary of the Interior). After each recognized tribe member has made his or her three selections, the Act disposes of any remaining lands by dividing them "as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands." *Id.* § 2, 34 Stat. at 541.

officially opened to non-Indian settlers" (as the second supplementary statutory factor requires),[162] but, in fact, reserves *all* reservation lands to tribal members, never opening it to non-Indian settlers at all.[163] As a result, the Osage Allotment Act's language and effect not only satisfy the second supplementary factor, but indeed surpass its mandate. Coupled with the lack of explicit language of disestablishment, the retention of tribal ownership and absence of non-Indian settlement on the Osage Reservation strongly support its continued existence.

Finally, turning to the third supplementary statutory factor, which requires "reservation of the mineral resources for the tribe as a whole,"[164] the Osage Allotment Act reserves to the Osage Tribe all oil, gas, coal, and mineral rights associated with any of the allotted surface lands on the Reservation.[165] It provides that any leases for these mineral rights must be made by the Osage Nation and that all royalties from such leases must be paid to the Tribe.[166] With all resource rights and royalties vested in the Tribe, the third supplementary factor is easily satisfied, and, along with the first two supplementary factors, evidences the continued existence of the Osage Reservation.

After examining the Osage Allotment Act's language under *Solem*'s principal and supplementary factors, the Tenth Circuit Court of Appeals ultimately held that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation."[167] Although the court of appeals is correct that the Act suggests neither diminishment nor disestablishment, its analysis falls short. The court of appeals simply stated that "neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language."[168] The Tenth Circuit utterly failed to discuss the Osage Allotment Act's textual references to the Osage Reservation that imply the Reservation's continuing existence. And while the court of appeals admitted that all three of the supplementary statutory factors (which also evidence the continued existence of the reservation) were present, it did not explore them in any depth.[169]

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162. *Irby*, 597 F.3d at 1123 (citing *Solem*, 465 U.S. at 474).

163. Osage Allotment Act, § 2, 34 Stat. at 540-42.

164. *Irby*, 597 F.3d at 1123 (citing *Solem*, 465 U.S. at 474).

165. Osage Allotment Act, § 3, 34 Stat. at 543-44.

166. *Id.*

167. *Irby*, 597 F.3d at 1124.

168. *Id.*

169. *Id.* at 1123. Although the Tenth Circuit acknowledged that the Osage Allotment Act is "unlike other allotment acts" that terminated the reservation status of tribal lands, the court did not truly examine this difference and the evidence that supports it. *Id.*

Under *Solem*'s first prong analysis, the Tenth Circuit failed to place sufficient weight on both the absence of statutory language expressly terminating the Osage Reservation's status as Indian Country and the clear presence of statutory factors that support its continued existence. Rather, the Tenth Circuit summarily labeled the Act's language as ambiguous and hastened to discuss the other prongs of the *Solem v. Bartlett* framework.[170] The court relied on less probative tiers of evidence to divine congressional intent that is clearly absent in the Osage Allotment Act's text.[171] But as the most indicative means to ascertain congressional intent, the Tenth Circuit should have given the *Solem v. Bartlett* test's first prong the weight it deserves. Only thereafter should the *Irby* court have turned to the *Solem* framework's second and third tiers as a means of supplementing the primary inquiry into the Act's language.

3. Solem*'s Second Factor: The Circumstances Surrounding the Act's Passage*

After holding that the Osage Allotment Act's language does not unambiguously suggest the Osage Reservation's termination, the Tenth Circuit Court of Appeals considered *Solem*'s second prong: the circumstances under which the statute was passed. The *Irby* court stated:

> 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.[172]

The Supreme Court in *Solem*, on the other hand, required that the "events surrounding the passage of a surplus land Act . . . *unequivocally reveal* a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation . . . ."[173] The connotative difference in the courts' language reveals the *Irby* court's departure from the Supreme Court's mandate. In examining the circumstances surrounding the relevant act's passage, the Supreme Court's language suggests that courts must find unequivocal, concrete evidence of a "contemporaneous understanding that the affected reservation" would be disestablished "as a

170. *See id.* at 1124.
171. *Id.* at 1124-27.
172. *Id.* at 1124 (citing Solem v. Bartlett, 465 U.S. 463, 471 (1984)).
173. *Solem*, 465 U.S. at 471 (emphasis added).

result of the proposed legislation."[174] The Tenth Circuit's language, on the other hand, substantially lowers the evidentiary burden for a finding of disestablishment by requiring only "evidence," without the exigency of the Supreme Court's "unequivocal" requirement. Before the *Irby* court even begins its second-prong analysis, its explicatory language, when compared to that of the Supreme Court, already favors non-Indian interests.

But aside from its remiss explanation of *Solem*'s second prong, the *Irby* court did not closely examine the events leading up to the Act's negotiation or its legislative history. Instead, the Tenth Circuit primarily relied on the broad assertion that the Osage Allotment Act "was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations."[175] This assertion directly contradicts the Supreme Court's statement in *Solem* that "we have never been willing to extrapolate from th[e] expectation [that the reservation system would cease to exist] a specific congressional purpose of diminishing reservations."[176]

To support its holding, the Tenth Circuit largely relied on the fact that the Five Civilized Tribes' lands were allotted and their reservations extinguished in preparation for Oklahoma's statehood.[177] Although the court of appeals acknowledged that the Osage Nation was not included in the Dawes Commission's disestablishment of other reservations in Oklahoma,[178] it failed to acknowledge the Osage Nation's special history among the Oklahoma tribes.[179]

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174. *Id.*

175. *Irby*, 597 F.3d at 1124.

176. *Solem*, 465 U.S. at 468-69.

177. *Irby*, 597 F.3d at 1124.

178. *Id.*

179. In *Wah'Kon-Tah: The Osage and the White Man's Road*, author John Joseph Mathews highlights the difference between the Osage Nation and the other Indian tribes in Oklahoma Territory, in particular the Five Civilized Tribes. He remarks, "The Osages were never included as the sixth 'civilized tribe.'" MATHEWS, WAH'KON-TAH, *supra* note 1, at 121. Moreover, *Cohen's Handbook of Federal Indian Law* treats the Osage Tribe individually in its discussion of the Oklahoma tribes, but treats the Five Civilized Tribes as a collective group. No other Indian tribes with a presence in Oklahoma are separately discussed. *See* COHEN, *supra* note 23, at 297. In another work on the Osage Nation, *The Osages: Children of the Middle Waters*, John Joseph Mathews again emphasizes the distinction between the Osage Allotment Act and other tribes' allotment acts:

> The act of June 28, 1906, was called an "allotment act," but was not in the sense that other acts individualizing tribal property were allotment acts. The other tribes . . . certainly tired, disillusioned, and less resistant, accepted individual allotment . . . on the urgings of the commissioners, who could hear the politicians and the ever present Heavy Eyebrows shouting for more land. The Osages, on the other hand, by the act would hold their land intact but not

The Tenth Circuit asserted that in the wake of the Dawes Commission, the Osage Nation "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.'"[180] But the court of appeals ignored that much of this pressure was applied by sources outside of the tribe. In the years preceding the Act, the "pressure for allotment of the Osage reservation steadily increased from the local white population, the Bureau of Indian Affairs, and some mixed-blood Osage as well."[181] In 1894, the federal government sent the "Osage Commission" to Pawhuska, the heart of the Osage Reservation, to discuss the possibility of allotment.[182] A delegation of full-blood Osages responded with a list of concerns regarding allotment: "the Osage were not ready for allotment; . . . the Osage did not desire allotment; . . . they could not agree on how the land, in case of allotment, was to be divided; [and] . . . there were individuals on the tribal roll illegally . . . ."[183] With control of the Osages' governing body, the National Council, in the hands of an anti-allotment faction, "the Bureau of Indian Affairs . . . played its trump card by abolishing the council."[184]

After the Osage National Council was abolished, it became "obvious to all concerned that allotment was just a matter of time, and that regardless of the feeling of the Osage it was going to come."[185] The Osage Nation presented a proposed allotment act to Congress in early 1906, and the Osage Allotment Act was passed in June of that year.[186] The court of appeals appeared to take Osage "initiation" of and consent to allotment as prima facie evidence of a contemporaneous understanding that the Osage Reservation would be disestablished. The court made no closer inspection of how the Osage political landscape was altered to pursue allotment.

> communally . . . . They called their allotments wah-tha-do-bi, "can't-go-beyond." There would be no "land run" into the Osage Reservation . . . .

JOHN JOSEPH MATHEWS, THE OSAGES: CHILDREN OF THE MIDDLE WATERS 772-73 (1982).

180. *Irby*, 597 F.3d at 1124 (quoting S. REP. NO. 59-4210, at 1 (1906)).

181. 5 GARRICK ALAN BAILEY, CHANGES IN OSAGE SOCIAL ORGANIZATION: 1673-1906, at 89 (Univ. of Or. Anthropological Papers No. 5, 1973), *available at* http://natural-history.uoregon.edu/sites/default/files/mnch/UOAP_5.pdf.

182. *Id.*

183. *Id.*

184. *Id.* at 90.

185. *Id.*

186. Osage Nation v. Irby, 597 F.3d 1117, 1125 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

The Tenth Circuit based much of its discussion of the *Solem v. Bartlett* framework's second prong on skewed historical commentary about the nature of tribal-government relations and the status of reservations in Oklahoma. The court never carefully examined the record surrounding the Osage Allotment Act's adoption, which provides evidence of an understanding that the Osage Reservation would not be terminated.[187] For example, discussion in the House of Representatives prior to the Act's passage indicates that there was an understanding that a reservation relationship would continue between the federal government and the Osage Nation.[188] Indeed, the Oklahoma Constitution, ratified only shortly after the Osage Allotment Act's passage, also indicates a contemporaneous understanding that the Osage Reservation remained in existence.[189] Later congressional decisions similarly evince an understanding that Osage County was still tribal land.[190]

The record before the Tenth Circuit Court of Appeals in *Osage Nation v. Irby* simply did not present the unequivocal evidence of a contemporaneous understanding favoring disestablishment that *Solem v. Bartlett* requires. In truth, the record did not even show the *Irby* court's misarticulated evidentiary standard of "evidence" (rather than unequivocal evidence). Noting a general sentiment regarding federal Indian policy at the time the Act was passed hardly qualifies as evidence regarding a specific tribe, particularly with such compelling indications to the contrary. Without such evidence supporting a contemporaneous understanding of disestablishment, the court of appeals should have shown deference to the Osage Nation and the presumption in favor of the continued existence of the Osage Reservation. After ignoring a

187. The Tenth Circuit Court of Appeals quoted historian Francis Prucha, who wrote, "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." *Id.* at 1125 (alteration in original) (citation omitted). The Tenth Circuit also cites Berlin B. Chapman, who stated that "'[t]he last of [Oklahoma's] reservations to be dissolved by allotments was that owned and occupied by the Osage . . . .'" *Id.* (citation omitted).

188. In debate on the House Floor, one representative stated that "[the Osage Indians] are still in the hands of the Government for twenty-five years, the same as they are now, except the land is segregated and each individual is given a certificate of his proportionate share." 59 CONG. REC. 7196, 7200 (1906) (statement of Rep. Curtis).

189. Article 17, section 8 states that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County . . . ." OKLA. CONST. art. 17, § 8.

190. One such congressional act declared "that all of Osage County, Oklahoma, shall hereafter be deemed to be Indian country within the meaning of the Acts of Congress making it unlawful to introduce intoxicating liquors into the Indian country." Act of Mar. 2, 1917, ch. 146, § 17, 39 Stat. 969, 983.

plethora of evidence supporting the Osage position under *Solem*'s most probative factor and then brushing aside any true analysis of *Solem*'s second most probative factor, the *Irby* court placed substantial weight on *Solem*'s least probative factor (and with a myopic, misguided analysis, at that), disregarding the Supreme Court's directive.

4. Solem*'s Third Factor: The Subsequent Demographic History and Land Tenure Patterns of the Opened Lands*

The *Solem* framework's final prong for gleaning congressional intent examines "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."[191] Courts look with particular reference to the actions of Congress, the Bureau of Indian Affairs, and local governing authorities.[192] "Express recognition of the continued existence of specific reservations by Congress in subsequent statutes, of course, supports the continued existence of a reservation."[193] A state's exercise of jurisdiction over an area formerly considered a reservation, however, may support a finding of disestablishment.[194]

Although it articulates the third prong as examining both congressional action and demographic history, the Tenth Circuit did not concentrate on congressional action,[195] but instead emphasized the Supreme Court's focus on population demographics in making determinations regarding possible disestablishment. In *Solem v. Bartlett*, the Court stated that "[w]here non-

191. *Irby*, 597 F.3d at 1122 (internal quotation marks omitted) (citing Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1395 (10th Cir. 1990)).

192. *Id.* at 1126.

193. *Id.*

194. *Id.*

195. The court of appeals failed to give weight to a number of congressional acts recognizing the Osage Reservation's existence as late as 2004. *See, e.g.*, Act of Nov. 24, 1942, ch. 640, § 3, 56 Stat. 1021, 1022 (codified as amended at 25 U.S.C. § 373c); Act of May 11, 1938, ch. 198, § 6, 52 Stat. 347, 348; Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified as amended at 25 U.S.C. § 398); Osage Reaffirmation Act, Pub. L. No. 108-431, 118 Stat. 2609 (2004). Likewise, it ignored that the Osage Tribe Liquor Control Ordinance, certified by the Assistant Secretary for Indian Affairs in 2005, states that the Osage Nation's jurisdiction extends to all Indian Country within the original bounds of the Osage Reservation, as delineated in the Act of June 5, 1872. Osage Tribe Liquor Control Ordinance, 70 Fed. Reg. 3054, 3055 (Jan. 19, 2005). The National Indian Gaming Commission has also issued an opinion letter permitting the Osage Nation to conduct gaming operations on fee lands in Tulsa, Oklahoma because they are within Osage County and "lie within the Tribe's reservation." *See* Opening Brief of Appellant at 37-38 Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010) (No. 09-5050), 2009 WL 2429151.

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."[196] The *Solem* Court provided the caveat that this is an "unorthodox and potentially unreliable method of statutory interpretation."[197]

In its discussion of whether the Osage Allotment Act's post-enactment history supports a finding of disestablishment, the Tenth Circuit considered both Oklahoma's assertion of State jurisdiction over reservation territory and a shift in Osage County's population demographics. The court of appeals held that the assumption of jurisdiction in Osage County by county and state officials favors disestablishment. It summarily stated that the "jurisdictional history . . . demonstrates a practical acknowledgement that the Reservation was diminished."[198] The court also noted that Osage County's population demographics rapidly shifted after the Osage Allotment Act's passage, and that land ownership changed hands from tribal members to non-Indian settlers, largely due to competency certificates issued by the Tribe's United States Indian agent.[199] This curt and dismissive discussion ignores that assimilation efforts were well underway even before the Osage Allotment Act's passage.[200] Furthermore, changes in ownership of allotted Osage Reservation lands simply should not be dispositive to the court's finding of disestablishment because the individual and voluntary transfer of title to tribal lands after the Osage Allotment Act went into effect is not a probative indicator of congressional intent at the time the Act was signed into law. The court of appeals treated the assumption of jurisdiction and a demographic

196. Solem v. Bartlett, 465 U.S. 463, 471 (1984).

197. *Id.* at 472 n.13.

198. *Irby*, 597 F.3d at 1127 (alteration in original) (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)) (internal quotation marks omitted).

199. *Id.*

200. In *South Dakota v. Yankton Sioux Tribe*, Justice O'Connor recognized the prevalent attitude of the day, noting that "[w]ithin a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335 (1998). The Osages did not easily fall to the assimilation influence. Well into the 1890s, the Osage Tribe clung to its traditional way of life. Many tribe members continued to wear traditional Osage dress and continued to practice their native religion. But "[b]y 1906 the traditional ceremonies had almost completely disappeared and most of the people were making a conscious effort to forget the 'old way.'" BAILEY, *supra* note 181, at 85. Author Garrick Alan Bailey attributes the decline of the Osage culture to three major factors: a shrinking population, economic changes, and pressure from federal Indian agents. Around the time of allotment, the Osage Reservation saw an influx of white inhabitants. Soon, the white reservation residents outnumbered the Osage population. *Id.*

change (largely motivated by efforts to assimilate the tribes into mainstream society) as "uncontested facts support[ing] disestablishment under [the third] prong of the *Solem* test."[201] The Tenth Circuit erred in this respect, placing far more significance than it should on these "least compelling" factors.[202]

In applying the *Solem v. Bartlett* framework's third prong to the principal case, the Tenth Circuit Court of Appeals placed far too much emphasis on Oklahoma's exercise of jurisdiction over Osage County and its population demographics. The Tenth Circuit likewise failed to recognize – or even consider – acts of Congress and other administrative agencies demonstrating an understanding that the Osage Reservation has endured the Osage Allotment Act of 1906. Along with its blatant disregard of evidence supporting the Osage position under *Solem*'s first (and most probative) prong, the *Irby* court failed to engage in meaningful second-prong analysis, relying almost exclusively on *Solem*'s third (and least probative) prong. Not only did the court of appeals depart markedly from Supreme Court precedent by placing improper weight on demographic evidence, it did so with a myopic disregard of equally compelling demographic evidence and congressional action favoring the Tribe's position.

Rather than adhere to the Supreme Court's mandate in *Solem*, the *Irby* court misapplied the relevant standard for finding diminishment or disestablishment of a reservation, ignored the canons of construction, and engaged in result-oriented judicial activism. To better effectuate federal trust responsibilities in the era of tribal self-determination, courts should return to a strict application of *Solem*'s tripartite framework, placing the greatest weight on the relevant act's statutory language, with due regard for the canons of construction's requirements for resolution of statutory ambiguities in the tribe's favor and for clear congressional intent to alter tribal property rights.

IV. Recommendations

The *Osage Nation v. Irby* opinion joins a line of authority that disregards established federal Indian law precedent and refuses to observe the canons of construction. With the Supreme Court's denial of certiorari on June 27, 2011, the *Irby* opinion has unfortunately secured its position as poorly decided Tenth Circuit precedent. Courts deciding questions of reservation diminishment or disestablishment in the future should avoid the Tenth

201. *Irby*, 597 F.3d at 1126.
202. *Yankton Sioux Tribe*, 522 U.S. at 356.

Circuit's flawed analysis and return to a faithful interpretation of the *Solem v. Bartlett* test, guided by the canons of construction.

First, so long as *Solem* remains the test for ascertaining congressional intent to diminish or disestablish an Indian reservation, courts must strictly adhere to its analytical framework. In applying the *Solem* test, courts must acknowledge that its three prongs are not to be weighed equally. The evidence presented under those prongs should be accorded the weight proportionally assigned to them by the *Solem* Court. The relevant act's plain language purporting to affect reservation boundaries should be given the greatest weight. Just as the presence of language clearly diminishing or disestablishing a reservation would be highly determinative of congressional intent, the absence of this language should receive comparable treatment. Such language should be regarded as the foremost expression of congressional purpose.

Second, when interpreting the relevant act's text affecting Indian land, courts should closely follow the canons of construction. Where a statute's language is ambiguous, the ambiguity must be construed in the light most favorable to the tribe and in favor of the presumption of the reservation's continued existence. Ambiguity might arise through either the inclusion of conflicting textual provisions or the absence of language explicitly declaring a reservation to be diminished or disestablished. To avoid continuing encroachment on what little land remains in tribal hands today, courts must take to heart the trust relationship between the federal government and the tribes. The courts must also apply the canons of construction as a product of that trust relationship. Courts must return to a policy of interpretation that upholds and esteems these guiding principles of federal Indian law.

Third, where turning to the circumstances surrounding the passage of an act alleged to have diminished or disestablished a reservation, courts must do so only as a means of supplementing the language of the statute. Courts should not use the circumstances surrounding passage as means of turning ambiguous language against the tribes. In examining the context of such an act, courts should pay special attention to the tribe's understanding of and attitude toward the act. The courts should also note the presence of external pressure from the federal government, the Bureau of Indian Affairs, or the area's non-Indian community. Where courts turn to an historical inquiry to gauge congressional intent, the courts should remain cognizant of the disparity in bargaining power between the federal government and the tribes that contextualized many tribal agreements.

Finally, while courts may certainly examine the current demographic population and land tenure of a disputed tract of land to better understand the

modern context framing the issue of diminishment or disestablishment, this *Solem* framework prong should be given minimal weight consistent with its "third-tier" status. Post-hoc examination of ever-shifting demographics simply cannot provide sufficient insight into congressional intent at the time the statute or agreement was executed. Moreover, courts should not use the modern-day effects of the now-decried allotment and assimilation policies to hold against tribal interests.

V. Conclusion

In *Osage Nation v. Irby*, the Tenth Circuit Court of Appeals held that Osage Allotment Act of 1906 disestablished the Osage Reservation. Although the Tenth Circuit correctly selected the *Solem v. Bartlett* test for determining congressional intent to diminish or disestablish a reservation, the court's application of the test is fraught with errors. The result is an unjust decision.

The court of appeals entirely failed to heed the presumption in favor of the continued existence of a reservation and to construe ambiguities in congressional intent in favor of the tribe. In analyzing the Act's statutory language, the court found the absence of language expressly terminating the Osage Reservation "not unambiguous," despite references to the Reservation that imply its continued existence, as well as additional factors supporting its continued existence. In determining the contemporaneous understanding of the Act, the court unquestioningly accepted the Tribe's "initiation" of an allotment agreement as strong evidence of disestablishment. The court never inquired into the Tribe's attitude during allotment or the hefty political price with which allotment was paid.

Finally, in examining the history since the Act's passage, the court placed far too much emphasis on the State's exercise of jurisdiction over Osage County and the County's current population demographics, while ignoring that numerous governmental agencies have recognized the Osage Reservation's continuing existence. With its faulty analysis and utter disregard of the canons of construction, the Tenth Circuit Court of Appeals stripped the Osage Nation of its crucial status as Indian Country, joining the ranks of other government entities that have lusted after the Osage people's tribal lands.