Tulsa Law Review

Volume 29
Number 3 *Energy Symposium*

Volume 29 | Number 3

Spring 1994

Reservation Disestablishment: The Undecided Issue in Oklahoma Tax Commission v. Sac and Fox Nation

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RESERVATION DISESTABLISHMENT: THE UNDECIDED ISSUE IN *OKLAHOMA TAX COMMISSION v. SAC AND FOX NATION*

I. INTRODUCTION

Oklahoma Tax Commission v. Sac and Fox Nation[1] represents a great victory, not only for the Sac and Fox Nation,[2] but for all Indian tribes in Oklahoma. The primary issue in the case, addressed by this note, is that of Indian country and reservation disestablishment. The Supreme Court put an end to the argument repeatedly asserted by the Oklahoma Tax Commission that there was some distinction between a formal reservation and trust land.[3] The Court held "the *McClanahan* presumption against state taxing authority applies to all Indian country, and not just formal reservations."[4]

While the *Sac and Fox* decision is favorable to the tribe, the court left one issue undecided: "Whether the Sac and Fox Nation's reservation has been disestablished[5]."[6] The Sac and Fox Nation contends

1. 113 S. Ct. 1985 (1993).

2. The Sac tribe originally inhabited the area now around eastern Michigan, but they migrated to the Wisconsin area in the eighteenth century. The Fox tribe inhabited the area that is now Ilinois. The tribes ultimately united in 1885 as the Sac and Fox Nation. Today, the people of the Sac and Fox nation live in Iowa, Kansas, and Oklahoma. BILL YENNE, THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN TRIBES 67, 145 (1986).

3. In rejecting their argument the court stated: "Nonetheless, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, we rejected precisely the same argument — and from precisely the same litigant." *Id.* at 1991.

4. *Id.* at 1992.

McClanahan is the main case discussing the validity of state taxation in Indian Country. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). Appellant, an enrolled member of the Navajo tribe who lived on the Navajo reservation, brought suit for return of the money that was withheld from her wages. Additionally, she sought a declaration that the state tax was unlawful with regard to reservation indians. *Id.* at 166-67. Her income was derived from employment within the Navajo reservation. *Id.* Relying on the concept of federal preemption, the Court barred the state tax. *Id.* at 172. *McClanahan* established an almost *per se* rule against state taxation in Indian Country, absent congressional authority to the contrary. *Id.* at 173-74.

While *Sac and Fox* originates from taxation issues, taxation became merely a side issue and will not be discussed any further in this paper. Again, the main issue addressed in this paper is Indian Country and Reservation Disestablishment.

5. The term "disestablished" will be used interchangeably with "terminated" and "extinguished."

6. Another issue not decided by the Court concerned the taxation of non-tribal members, an issue the Sac and Fox Nation wanted decided, however, certiorari was not granted by the Supreme Court on that issue. Interview with William Rice, Attorney for the Sac and Fox Nation, in Stroud, Okla. (Nov. 18, 1993).

that its original 1867 reservation boundaries have never been terminated.[7] This issue raises many complex questions, but for now, one can only speculate on what the answers will be.

II. INDIAN COUNTRY

A. *Defining Indian Country*

The concept of "Indian country" has undergone many changes over the years.[8] The current definition of "Indian country" contained in the Federal Statutes states:

> The term "Indian country", as used in this chapter, means (a)all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[9]

While this definition is contained in the criminal code, the Supreme Court has applied the definition to civil jurisdiction as well.[10]

In *United States v. John*,[11] the Court moved away from categorizing the land at issue.[12] In addition to the statutory definition, the court applied a test, originally adopted in *United States v. Pelican*,[13] where the issue was whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government."[14]

While the definition may seem clear, there has been much litigation over whether a particular tract of land constitutes "Indian country."

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7. *Id.*

8. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 29-34 (Rennard Strickland ed., 1982) [hereafter COHEN].

9. 18 U.S.C. § 1151 (1988).

10. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). *See also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478-79 (1976).

11. 437 U.S. 634 (1978).

12. *Id.* at 649.

13. 232 U.S. 442 (1914).

14. United States v. John, 437 U.S. 634, 649 (1978) (quoting United States v. Pelican, 232 U.S. 442, 449 (1914)).

B. *Indian Country in Oklahoma*

The issue of Indian country is even more clouded in Oklahoma because of the lands' history.[15] Prior to statehood, Oklahoma was divided into two territories: Oklahoma Territory and Indian Territory.[16] Due to increased demand for land by white settlers, Congress passed the Indian General Allotment Act.[17] Under the General Allotment Act, the allottee receives an equitable and present usable estate in land while the federal government retains legal title; legal title does not pass to the allottee or his or her heirs until a fee patent has been issued. Since the Five Civilized Tribes were excluded from the coverage of the General Allotment Act,[18] Congress later passed the Curtis Act[19] to force allotment of their tribal lands. The General Allotment Act provided for "trust" allotments, and the Curtis Act provided for "restricted" allotments.[20]

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15. Prior to the establishment of Indian reservations, the land was, of course, home to numerous indigenous tribes. *See generally* 1 JOSEPH B. THOBURN & MURIEL H. WRIGHT, OKLAHOMA: A HISTORY OF THE STATE AND ITS PEOPLE 21-25 (1929); 1 GASTON LITTON, HISTORY OF OKLAHOMA 72-89 (1957). In the Louisiana Purchase, the United States acquired the land area including present-day Oklahoma. 1 THOBURN & WRIGHT, *supra*, at 109-110. Pursuant to the westward expansion of the United States, an Indian Territory west of the Mississippi was established and many eastern Indian tribes were removed to the land area now known as Oklahoma. 1 THOBURN & WRIGHT, *supra*, at 121-30, 133-45, 163-76; 1 LITTON, *supra*, at 106-42; *see also* Chadwick Smith & Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 TULSA L.J. 263 (1993); for a pre-removal history of southern tribes, those generally removed to the new territory, see R.S. COTTERILL, THE SOUTHERN INDIANS: THE STORY OF THE CIVILIZED TRIBES BEFORE REMOVAL (1954). As white settlement in the area increased, demands for the territory's organization as a state increased. 1 LITTON, *supra*, at 474-504. Ultimately, the territory was granted statehood in 1907. *Id.* at 506-30.

16. Act of May 2, 1890, ch. 182, 26 Stat. 81.

Three-fifths of the Oklahoma Territory consisted of Indian reservations occupied by the Cheyenne and Arapaho, Kiowa, Comanche and Apache, Osage, Kansas or Kaw, Potawatomi, Kickapoo, Shawnee, Iowa, Sac and Fox, Pawnee, Ponca, Otoe and Missouri, Tonkawa and Wichita. Ex Parte Nowabbi, 61 P.2d 1139, 1144 (Okla. Crim. App. 1936).

The Indian Territory consisted of the Five Civilized Tribes(Cherokee, Choctaw, Creek, Seminole, and Chickasaw) and the tribes of the Quapaw Agency. COHEN, *supra* note 7, at 773 (citing Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81).

17. 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 (1988 & Supp. IV 1992)). "Allotment was an assimilationist policy designed to free tribal lands from communal ownership so that white settlers could homestead among individual Indian landowners." Oklahoma *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77, 82 n.19 (Okla. 1985).

18. Harjo v. Kleppe, 420 F. Supp. 1110, 1121-22 (D. D.C. 1976).

19. Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495.

20. Trust allotments are issued through a trust patent in which the government holds the land for a period of years in trust for the allottee with an agreement to convey at the end of the trust period. *See Ex parte* Nowabbi, 61 P.2d 1139, 1151 (Okla. Crim. App. 1936). Restricted allotments convey the land in fee to the allottee, but prohibit its alienation for a stated period. *Id.*

The fact that all the Indian land in Oklahoma was subject to the allotment process, combined with the different allotments which resulted, lead to a somewhat unique history of Indian country in Oklahoma. Due to these circumstances, many have attempted to argue that there is no Indian country in Oklahoma.[21] *Ex Parte Nowabbi*[22] involved the issue of whether a restricted allotment was considered Indian country.[23] Nowabbi was seeking to be discharged from the State Penitentiary by writ of habeas corpus.[24] He claimed that the state courts were without jurisdiction because the offense for which he was imprisoned was committed in Indian country.[25] The court concluded that there was no Indian country jurisdiction in the area, once known as "Indian Territory," now Eastern Oklahoma.[26] The court based its decision, in part, on a 1906 amendment to the General Allotment Act which failed to reserve to the federal courts the jurisdiction to punish Indians in the Indian Territory for the crimes enumerated in the Major Crimes Act[27].[28]

State v. Klindt[29] expressly overruled *Nowabbi*. *Klindt* was an appeal by the State of Oklahoma challenging a district court's dismissal of charges against Klindt due to lack of jurisdiction.[30] The *Klindt* court concluded that the *Nowabbi* court had misinterpreted the statutes and cases[31] and that *Nowabbi* was in direct conflict with the *Seneca-Cayuga* holding that an allotment in eastern Oklahoma was Indian country.[32]

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21. This argument is usually based on one of two theories. First, allotment terminated all of the reservations in Oklahoma, therefore, because there are no reservations there is no Indian Country. *E.g.*, United States v. Okla. Gas & Elec. Co., 318 U.S. 206 (1943); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950). Alternatively, the argument has been asserted that only trust allotments should be considered Indian Country. *E.g.*, United States v. Ramsey, 271 U.S. 467 (1926); Ex Parte Nowabbi, 61 P.2d 1139 (Okla. Crim. App. 1936).

22. 61 P.2d 1139 (Okla. Crim. App. 1936).

23. *Id.* at 1151.

24. *Id.* at 1147.

25. *Id.* Nowabbi, a full-blood Choctaw Indian, was convicted of murdering Davison Houston, also a full blood Choctaw Indian. *Id.* The crime was committed on the Restricted Indian Allotment of Davison Houston. *Id.*

26. *Id.* at 1154, 1156. *See also* State v. Klindt, 782 P.2d 401, 403 (Okla. Crim. App. 1989).

27. 18 U.S.C. § 1153 (1988).

28. *Ex parte* Nowabbi, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936).

29. 782 P.2d 401, 404 (Okla. Crim. App. 1989).

30. *Id.* at 402. The alleged offense occurred at a smoke shop operated by the Delaware Tribe. *Id.* The land was owned by a full-blood cherokee and held in trust by the United States. *Id.*

31. *Id.* at 404.

32. *Id. Seneca-Cayuga* was an appeal by the State of Oklahoma from a district court's ruling that it lacked subject matter jurisdiction. Oklahoma *ex rel.* May v. Seneca-Cayuga Tribe, 711

In *Oklahoma Tax Commission v. Citizen Band Potawatomi*[33] the Supreme Court rejected the Oklahoma Tax Commission's argument that there was a distinction between a "formal reservation" and allotted land.[34] *Citizen Band Potawatomi* involved the Oklahoma Tax Commission's attempt to collect back taxes for cigarettes sold at a convenience store located on trust land and owned and operated by the Potawatomi tribe.[35] The Oklahoma Tax Commission asserted that the convenience store should be subject to State taxes because the store was not located on a formal reservation, but merely on trust land.[36] In rejecting this argument, the court stated: "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."[37] In determining whether land is Indian country, the question is "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government."[38]

The current line of cases seems to clearly establish that there is Indian country in Oklahoma regardless of the existence of a "formal reservation," a "trust" allotment, or a "restricted" allotment. However, there are those, including the Oklahoma Tax Commission, who would still challenge this assertion.[39]

C. *Legal Effect*

Disputes over whether an area constitutes Indian country are quite common, in fact it remains a constant battle between tribal and state governments. The determination that a particular area is Indian Country has many effects on the tribe and the state. There are political, economic and social effects which flow from this decision.[40]

P.2d 77, 78 (Okla. 1985). The state had attempted to enjoin certain tribes from conducting bingo games. *Id.*

33. 498 U.S. 505 (1991).

34. *Id.* at 511.

35. *Id.* at 507.

36. *Id.* at 511.

37. *Id.*

38. *Id.* (citing United States v. John, 437 U.S. 634, 648-49 (1978) and United States v. McGowan, 302 U.S. 535, 539 (1938)).

39. The Oklahoma Tax Commission raises this exact argument in *Oklahoma Tax Comm'n v. Sac and Fox Nation*. *See* Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1990 (1993).

40. Some of the many areas affected include taxing authority, environmental standards, hunting and fishing rights, water rights, civil adjudicatory jurisdiction, criminal juridiction, Indian gaming and adoption proceedings. Needless to say, this area is very complex and is beyond the scope of this paper. For more detailed discussion one should look to the specific area of interest. *E.g.*, Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Instrusion*, 64 WASH. L. REV. 581

Once it has been determined that an area constitutes Indian country, the battle between the tribe and the state continues. The dispute becomes one concerning who has authority in Indian country. Under *Worcester v. Georgia*[41] the legal effect was simple; the state was held to have no authority in Indian country. Under the *Worcester* rule, states have no authority in Indian country absent Congressional authorization.[42] However, over the years this rule has slowly disappeared, and state law seems to apply whenever the Supreme Court says it does.[43]

The Supreme Court's departure from the *Worcester* rule causes uncertainty in the determination of Indian country. Tribal and state jurisdictional disputes are common. The disputes involve criminal as well as civil jurisdiction, including tax and regulatory jurisdiction. Criminal jurisdiction is dependent upon the type of crime committed and whether non-Indians or Indians were involved. Civil jurisdiction becomes even more complicated. The type of civil jurisdiction, whether adjudicatory or regulatory, must first be determined. There are also an array of factors which must be weighed in the process of determining which government has jurisdiction. Some of these factors include whether a person, usually involved in a dispute, is an Indian; upon the ownership of the land involved[44] (indian or non-indian); upon state interests; and upon tribal or federal interests.

The process of determining the jurisdictional authority in Indian country is complicated and time consuming, and it also leads to a great deal of uncertainty. What remains clear is that once an area is classified as Indian country, many problems arise in attempting to ascertain whether the state or the tribe has jurisdiction.

(1989); Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C.L. REV. 743 (1984); Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty?*, 23 N.M.L. REV. 479 (1993); Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 AM. INDIAN L. REV. 523 (1992).

41. 31 U.S. (6 Pet.) 515 (1832).

42. *Id.*

43. While *Worcester* has never been explicitly overruled, states have been granted more and more authority in Indian country recently. Some cases have made rules without ever mentioning *Worcester*. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that the exercise of tribal criminal jurisdiction over non-Indians was inconsistent with the domestic dependent status of the tribes); Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989) (upholding the validity of New Mexico's severance taxes on oil production in Indian country); Oklahoma Tax Comm'n v. Citizen Band Potawatomi, 498 U.S. 505 (1991) (holding that a state may tax sales to non-Indians).

44. For discussion regarding non-Indian land ownership within Indian country, see notes 43-45, *infra*, and accompanying text.

D. *Reservations*

When determining whether a particular area is "Indian country," it should be noted that even land owned by non-Indians in fee simple can still be considered "Indian country."[45] Non-Indian owned land is considered Indian country if is located "within the limits of any Indian reservation."[46] For this reason, it is important to know whether a particular area constitutes a reservation.

Once a reservation has been established, it remains a reservation until Congress indicates otherwise.[47] Difficulty in this area arises where agreements and statutes have opened Indian reservations to non-Indian settlement.[48] The mere opening of a reservation does not terminate the reservation nor the portion which has been opened.[49] To determine whether a specific reservation has been disestablished, a "congressional determination to terminate [must] . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[50]

III. STATEMENT OF THE CASE

The Sac and Fox Nation is a federally recognized tribe.[51] Its tribal headquarters is located on 800 acres reserved by the tribe pursuant to the treaty of 1891.[52] This land is held in trust by the United States.[53] The tribe also owns other tracts of land in the area, as do some of the tribal members.[54] This land is also held in trust by the United States.[55]

45. 18 U.S.C. § 1151(a) (1988).
46. *Id.*
47. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1961) (quoting United States v. Celestine, 215 U.S. 278, 285 (1909)).
48. COHEN, *supra* note 8, at 44.
49. DeCoteau v. District County Court, 420 U.S. 425 (1975).
50. *Id.* at 444 (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973)).
51. Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1987 (1993).
52. *Id.* at 1988.
53. Petitioner's Brief, *Sac and Fox Nation* (No. 92-259).
54. *Id.*
55. *Id.*

The tribe imposes a tribal earnings tax[56] and a motor vehicle tax.[57] The State of Oklahoma imposes a state income tax,[58] motor vehicle taxes[59] and vehicle registration fees.[60] The taxes imposed by the tribe are not challenged. However, the taxing authority of the Oklahoma Tax Commission is at issue.

The Sac and Fox Nation originally brought this action against the Oklahoma Tax Commission in the United States District Court for the Western District of Oklahoma.[61] The Tribe was seeking an injunction to prevent the commission from enforcing the state income and motor vehicles taxes against its tribal members, as well as others.[62]

Both parties have relied on *McClanahan v. Arizona State Tax Commission*,[63] which held that a state, absent an express authorization from Congress, could not subject a tribal member living on the reservation, and whose income was derived from reservation sources, to a state income tax.[64] The Sac and Fox made three alternative arguments: 1) The 1867 reservation was never disestablished,[65] 2) The 1867 reservation was merely diminished, not disestablished,[66] and 3) Even if the Sac and Fox reservation was disestablished, there is still Indian country consisting of tribal trust lands, dependent Indian communities and Indian allotments.[67] The Oklahoma Tax Commission argued, as it did in *Oklahoma Tax Commission v. Citizen Band Potawatomi*,[68] that *McClanahan* applied only to tribes on established

56. "The earnings of any employee employed within tribal jurisdiction, whether or not that employee is a member of the Tribe, are subject to the earnings tax." Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1988 (1993) (quoting Sac and Fox Tribe of Indians of Okla. Code of Laws, tit. 14, ch. 4, § 402).

57. The motor vehicle tax applies to "all motor vehicles owned by a resident of, and principally garaged within the jurisdiction of the Sac and Fox Tribe of Indians of Oklahoma." *Id.* at 1988 (quoting Sac and Fox Tribe of Indians Okla. Code of Laws, tit. 14, ch. 8, § 802).

58. The statutes require all residents and nonresidents of Oklahoma who receive income in the state to pay Oklahoma income tax. *See* OKLA. STAT. tit., 68 § 2362 (1991) (explaining the Oklahoma taxable income of a nonresident); *id.* § 2368 (detailing persons required to make returns, income of estates and trusts, income of partnerships, returns by corporations, time for returns, verification of returns and form of returns).

59. *See* Okla. Stat. tit. 47, §§ 1101-03 (1991 & Supp. 1993); OKLA. STAT. tit. 68, §§ 2101-04 (1991 & Supp. 1993).

60. *See* OKLA. STAT. tit. 68, § 2103 (1991).

61. Petitioner's Brief, *Sac and Fox Nation* (No. 92-259).

62. *Id.*

63. 411 U.S. 164 (1973).

64. *Id.* at 165-66.

65. Respondent's Brief, *Sac and Fox Nation* (No. 92-259).

66. *Id.*

67. *Id.*

68. 498 U.S. 505 (1991).

reservations.[69] The Commission contended that the 1867 reservation had been disestablished, and thus *McClanahan* was inapplicable.[70]

In deciding the case, neither the District Court nor the Appellate Court decided the issue concerning the existence of the 1867 reservation.[71] Their focus was solely on where the tribal members worked, not where they lived.[72] Using *McClanahan* and *Citizen Band Potawatomi*, the District Court concluded that because the tribal headquarters was located on trust land, the state had no power to tax the tribal members who worked there.[73] The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision.[74]

IV. DECISION

In *Oklahoma Tax Commission v. Sac and Fox Nation*,[75] the Supreme Court held that unless authorized by Congress, a state does not have jurisdiction to tax in Indian country, regardless of "whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities."[76] The Court based its decision on *McClanahan v. Arizona State Tax Commission*.[77]

The Commission argued, as it did in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[78] that the *McClanahan* presumption against state taxation in Indian country only applied to formal reservations.[79] Once again, the Court rejected this argument.[80] The Supreme Court maintained that it has never drawn a

69. Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1989 (1993).

70. *Id.*

71. *Id.* at 1989-90. The appellate court gave the following reasoning for not deciding the issue:

> On appeal, the State asserts as error the district court's failure to determine the status of the Sac and Fox Reservation. In light of the Supreme Court's ruling in *Potawatomi*, we fail to see the relevancy of this issue. . . .
>
> * * *
>
> [W]e therefore agree with the district court that the status of the Sac and Fox Reservation is not a material issue in this case.

Oklahoma Tax Comm'n v. Sac and Fox Nation, 967 F.2d 1425, 1428 n.2 (10th Cir. 1992).

72. Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1989 (1993).

73. *Id.*

74. Oklahoma Tax Comm'n v. Sac and Fox Tribe, 967 F.2d 1425 (10th Cir. 1992).

75. 113 S. Ct. 1985 (1993).

76. *Id.* at 1993.

77. 411 U.S. 164 (1973).

78. 498 U.S. 505 (1991).

79. *Sac and Fox Nation*, 113 S. Ct. at 1990.

80. *Id.* at 1991.

distinction with regard to reservations, but it stated that the issue is merely whether the land is Indian country.[81]

While agreeing with the lower courts that the *McClanahan* presumption applied to all Indian country and not just formal reservations, the Court recognized an error in their decisions. In applying *McClanahan*, the residence of the tribal member must be determined.[82] Of significance is not only where the members work but also where they live.[83] The Court remanded the case so that the lower court can determine the residence of the tribal members.[84] Thus, the issue of whether the 1867 reservation has been disestablished will need to be decided.

V. The Issue On Remand: Reservation Disestablishment

A. *Uncertainty in the Law*

The Supreme Court has addressed the issue of reservation disestablishment on several occasions.[85] In *Solem v. Bartlett*,[86] the Court indicated that the precedents in the area of reservation disestablishment had created a "fairly clean analytical structure" to aid in determining whether a reservation has been disestablished.[87] The key in determining whether a particular reservation has been disestablished is congressional intent.[88] Three distinct factors are important in determining congressional intent: (1) statutory language, (2) surrounding circumstances, and (3) subsequent treatment.[89]

Statutory language is the most probative evidence of congressional intent.[90] When looking at the statute, it is important to examine the language regarding the unallotted opened lands and the manner in

81. *Id.* (citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi, 498 U.S. 505, 511 (1991)).
82. *Id.* at 1991.
83. *Id.*
84. *Id.* at 1993.
85. *E.g.*, Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1961) (holding Colville Indian Reservation is still in existence); Mattz v. Arnett, 412 U.S. 481 (1973) (holding Klamath River Reservation was not terminated); DeCoteau v. District County Court, 420 U.S. 425 (1975) (holding Lake Traverse Indian Reservation was terminated); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (holding Rosebud Sioux Reservation boundaries were diminished); Solem v. Bartlett, 465 U.S. 463 (1984) (holding Cheyenne River Sioux Reservation was not disestablished).
86. 465 U.S. 463 (1984).
87. *Id.* at 470.
88. *Id.* (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977)).
89. *Id.*
90. *Id.*

which the statute provides for compensation to the tribe for the opened land.[91]

Examples of clear language of an intent to terminate a reservation include: "the Smith River reservation is hereby discontinued," "the same being a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain," and "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished."[92] Additionally, an act stating: "[t]he. . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest. . ." indicated an intent to terminate a reservation.[93] The language of an act is insufficient to evidence an intent to terminate a reservation when it does no more than open the way for non-Indians to own land on the reservation.[94] For example, language stating reservation lands were "subject to settlement, entry, and purchase" merely opens reservation land for non-Indian ownership and does not disestablish the reservation.[95] Lastly, language authorizing the Secretary of the Interior to "sell and dispose" of Indian land is not sufficient to terminate a reservation.[96]

Secondly, with respect to statutory language, the manner in which a statute compensates a tribe for opened land is significant for a determination of disestablishment.[97] The Court seems to place emphasis on two methods. The first method is where the tribe is given a "sum-certain" for the unallotted land. In other words, the tribe is paid a set amount to compensate the tribe for all of the unallotted land. The second method involves payment to the tribe as the lands are sold. This method involves establishing a fund dependent on uncertain future sales of its land to settlers. Payment of a sum certain to the tribe indicates an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate.[98] Language signifying an intent to terminate a reservation, combined with a one-time payment to the tribe for a sum certain creates,

91. *Id.*

92. Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973).

93. Decoteau v. District County Court, 420 U.S. 425, 445 (1975).

94. *See* Mattz v. Arnett, 412 U.S. 481, 497 (1973); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356 (1962).

95. *Mattz*, 412 U.S. at 495.

96. Solem v. Bartlett, 465 U.S. 463, 472-73 (1984).

97. It is unclear why the method of payment signifies the intent of Congress regarding whether a particular reservation has been terminated.

98. *See* DeCoteau v. District County Court, 420 U.S. 425 (1977) (holding reservation was terminated where there was express language regarding termination, payment for a sum-certain, and tribal consent to the agreement); Mattz v. Arnett, 412 U.S. 481 (1973) (holding reservation

"an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[99]

The second factor used to determine Congressional intent encompasses the circumstances surrounding the passage of the act.[100] The most important surrounding circumstances are the manner in which the transaction was negotiated and its legislative history.[101]

When analyzing the transaction, the Court seems to be looking at whether there was tribal consent. In *DeCoteau*, where the reservation was found to have been terminated, the Court found importance in the fact that the tribe consented to the agreement.[102] However, in *Rosebud Sioux*, there was no tribal consent, and the reservation was still disestablished.[103] Although tribal consent is ostensibly one of the circumstances to be looked at, it remains unclear when the Court will find it important.

Legislative history is the second most important element of the circumstances surrounding a transaction. The clearest case is when the legislative history states the effect of a specific act on a reservation's boundaries. However, the clearest case is generally unavailable; at the time the surplus land acts were passed, the issue of reservation termination seemed unimportant, thus the debate usually centered around other aspects of the agreement.[104] To complicate the determination, a showing of mere congressional hostility to the continued reservation status of a particular tract of land is insufficient to indicate an intent to terminate.[105] One such openly hostile Congress,[106] nevertheless rejected several bills explicitly proposing reservation termination.[107]

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was not terminated where there was no express language regarding termination of the reservation nor a sum-certain payment); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) (holding reservation was not terminated where there was no express language regarding termination of reservation nor a sum-certain payment); *but see* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (holding reservation was terminated where there was arguably language regarding termination, but no payment for a sum certain nor tribal consent).

99. *Solem*, 465 U.S. at 470-71.

100. *Id.*

101. *Id.*

102. *DeCoteau*, 420 U.S. at 448.

103. *Rosebud Sioux*, 430 U.S. at 584.

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

105. Mattz v. Arnett, 412 U.S. 481, 499 (1973).

106. *Id.*

107. *Id.* at 504-05. These bills unequivocally provided for reservation disestablishment. For example, one bill proposed that the Klamath River Reservation, "be, and the same is hereby, abolished." *Id.* at 500.

The final factor used to determine Congressional intent is subsequent treatment. Subsequent treatment includes the manner in which the area in question was treated by Congress, the Bureau of Indian Affairs and local judicial authorities, as well as, who actually moved onto the land and whether the area retains its Indian character.[108] Express recognition of the continued existence of specific reservations by Congress and the Department of the Interior in subsequent statutes, of course, supports the continued existence of a reservation.[109] 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.[110] However, subsequent treatment may not always be clear, as both *DeCoteau* and *Solem* illustrate; problems occur where there is treatment that supports both disestablishment and continued existence of a reservation.[111] When this type of ambiguity exists, subsequent treatment cannot support a finding of disestablishment.

While the analytical structure given in *Solem* seems to be quite simple, its application evidences the law's uncertainty. In *Seymour*, *Mattz*, and *DeCoteau*, the test seemed to be consistently applied.[112] However, the application of the test in *Rosebud Sioux*, reveals the uncertainty. In *DeCoteau*, the Court placed importance on the payment for a sum-certain and tribal consent to find a reservation terminated.[113] However, in *Rosebud Sioux*, both sum-certain payment and consent were absent, and the Court still found that the reservation had been disestablished because of the language and subsequent treatment.[114] In discussing these factors the Court said that they were not dispositive, but merely considerations to be used when evaluating the

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

109. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356 (1961) (holding Colville Indian Reservation still exists); Mattz v. Arnett, 412 U.S. 481, 505 (1973) (holding Klamath River Reservation still exists).

110. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977) (noting over 90 percent of the area's population were non-Indians).

111. *See* DeCoteau v. District County Court, 420 U.S. 425, 442-44 (1975); Solem v. Bartlett, 465 U.S. 463, 470-72 (1984).

112. In *Seymour*, relying on language which merely opened the surplus land for settlement, the fact that there was no sum-certain payment, and subsequent recognition of the reservation by Congress, the Court held that the reservation was still in existence. *Seymour*, 368 U.S. at 359. In *Mattz*, relying on the same type of factors present in *Seymour* as well as legislative history which indicated that termination of the reservation had been previously rejected by Congress, the Court again held that the reservation still existed. *Mattz*, 412 U.S. at 506. In *DeCoteau*, relying on "cede, sell, and convey" language, payment of a sum-certain, and tribal consent, the reservation was found to be disestablished. *DeCoteau*, 420 U.S. at 445-449.

113. *DeCoteau*, 420 U.S. at 448.

114. *Rosebud Sioux*, 430 U.S. at 587.

surrounding circumstances.[115] Moreover, the Court stated: "although the Acts . . . were unilateral Acts of Congress . . . that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the Reservation Boundaries."[116] Furthermore, when the Court, in *Rosebud Sioux*, examined the legislative history, its examination included the history of the act which, although would have terminated the reservation, was expressly rejected by Congress.[117] The disparity with *Rosebud Sioux* is not only clear on its face, but is formally recognized by a dissenting opinion supported by three Justices.[118]

The Court's analysis in *Solem* seems to give a somewhat "clean analytical structure," however this is misleading. The Court's "clean analytical structure" is based on Congressional intent; the idea that one can obtain an objective meaning to a statute or treaty from Congressional intent is a fallacy.[119] As the precedent in this area illustrates, this so called "clean analytical structure" allows the court to pick and choose which factors will be decisive, and these factors will not be the same in every case.[120] The absence of a more definitive test and allowing the court to re-determine which factors are decisive produces a great deal of uncertainty.

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115. *Id.* at 598 n.20.

116. *Id.* at 587.

117. *Id.* at 592.

118. The dissenting opinion states:

> Until today, the effect on reservation boundaries of Acts disposing of surplus reservation land was well settled. The general rule, entitled to "the broadest possible scope," is that in interpreting these Acts "legal ambiguities are resolved to the benefit of the Indians." * * * Today, however, the Court obliterates this distinction, and, by holding against the Tribe when the evidence concerning congressional intent is palpably ambiguous, erodes the general principles for interpreting Indian statutes.

Id. at 617-18 (Marshall, J., dissenting).

119. The Court's reliance on congressional intent causes uncertainty no matter what issue is involved. The mere idea of congressional intent is deceiving because the assumption underlying this idea is that Congress, a politically diverse group, can possess a common intent. *See* Kenneth A. Shepsle, *Congress Is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. LAW & ECON. 239, 249 (1992) ("[I]t is still fruitless to attribute intent to the product of their *collective* efforts. Individual intents, even if they are unambiguous, do not add up like vectors.") (emphasis original). The fact that factors are needed to discern congressional intent also indicates the ambiguity that exists in using congressional intent.

120. *Compare* DeCoteau v. District County Court, 420 U.S. 425 (1975) (using payment of a sum certain and tribal consent as a basis for terminating a reservation) *with* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (holding even in absence of a sum certain and tribal consent a reservation had been terminated).

B. *The Law's Application in* Sac and Fox

Neither the lower federal courts nor the Supreme Court addressed the issue of disestablishment in *Sac and Fox*, therefore the question of whether the Sac and Fox Reservation was disestablished remains, at least temporarily, unanswered. For the moment, one can only hypothesize as to what the answer will be, but any hypothesis requires an application of the purported test.

A proper analysis begins with the first factor, the language of the relevant statute. The Sac and Fox Allotment Agreement states: "[t]he Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the following described tract of land. . . ."[121] The agreement also provides for a sum-certain payment of $485,000.00 to the tribe for the opened land.[122]

The Oklahoma Tax Commission, relying heavily on the *DeCoteau* decision, urges that the presence of these factors support its contention that the original Sac and Fox Reservation was terminated by the Sac and Fox Allotment Agreement.[123] The Sac and Fox Nation responds to this "cede, sell, and convey" argument by asserting that the language is ambiguous.[124] This assertion is based on the fact that the language used in the Allotment Agreement is similar to earlier treaties, with the Sac and Fox, using the same type of language wherein their reservation was not extinguished.[125] Construing the language in light of the earlier agreements, the Sac and Fox Nation maintains that the language is ambiguous and thus must be interpreted in favor of the tribe.[126] The Sac and Fox Nation further questions the relevancy

121. Act of February 13, 1891, ch. 165, 26 Stat. 749, 750.

122. Petitioner's Brief, *Sac and Fox Nation* (No. 92-259).

123. *Id.*

124. Respondent's Brief, *Sac and Fox Nation* (No. 92-259).

125. *Id. See also* Respondent's Brief, *Sac and Fox Nation* (No. 92-259) (citing Treaty with the Sac and Fox, Nov. 3, 1804, 7 Stat. 84 ("[The Sac and Fox] do hereby cede and relinquish forever to the United States, all the lands included within the above-described boundary.")); Treaty with the Sac and Fox, July 15, 1830, 7 Stat. 328 ("But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President. . . to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes."); Treaty with the Sac and Fox, Sept. 21, 1832, 7 Stat. 374 ("Out of the cession made in the preceding article, the United States agree to a reservation for the use of . . . tribes. . . ."); Treaty with the Sac and Fox, May 6, 1861, 12 Stat. 1171 (containing "cede, relinquish, and convey" language, but not terminating the reservation).

126. Respondent's Brief, *Sac and Fox Nation* (No. 92-259).

of a sum-certain provision in a determination of congressional intent to terminate a reservation.[127]

The "cede, sell, and convey" language used in the Sac and Fox Agreement combined with the sum-certain payment seems to present a strong argument in favor of disestablishment. The Court has held that "cede, sell, and convey" language was sufficient to indicate congressional intent to disestablish a reservation.[128] However, not all "cede, sell, and convey" language convincingly indicates a Congressional intent to disestablish.[129] Furthermore, the presence of these two factors — language of cession and sum-certain payment — creates "an *almost* insurmountable presumption that Congress meant for the tribe's reservation to be" terminated;[130] possibly the presumption may be overcome. Finally, the Court in *Rosebud Sioux* stated that sum-certain payment is merely a factor to be considered and should not be dispositive one way or the other.[131]

Application of the second factor requires an examination of the surrounding circumstances including legislative history and the nature of the negotiations. The Tax Commission contends that Congress' policy, at the time of the Sac and Fox agreement, was intended to disestablish and individualize all of the reservations in Indian Territory with the ultimate goal of creating the State of Oklahoma.[132] This contention concerning the policy during allotment is wrong.[133] The general policy of an allotment act[134] "was to continue the reservation

127. Interview with William Rice, Attorney for the Sac and Fox Nation, in Stroud, Okla. (Nov. 18, 1993); Respondent's Brief at 15, *Sac and Fox Nation* (No. 92-259).

128. DeCoteau v. District County Court, 420 U.S. 425, 439-40 (1974).

129. Justice Douglas has written:

> Congress in the very Act that opened the instant reservation opened several other reservations also. But as respects them it used different language. In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" a described tract. Another agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion" of a named reservation as specifically described. Another agreed to sell to the United States "all that portion" of the reservation described by metes and bounds. Congress made an unmistakable change when it came to the lands ceded in the instant case.

DeCoteau v. District County Court, 420 U.S. 425, 463-64 (1975) (Douglas, J., dissenting).

130. Solem v. Bartlett, 465 U.S. 463, 470-71 (1984) (emphasis added).

131. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 598 n.20 (1977).

132. Petitioners's Brief, *Sac and Fox Nation*, (No. 92-259).

133. Mattz v. Arnett, 412 U.S. 481, 496 (1973) (stating policy of allotment was not immediate termination of reservations).

134. *E.g.*, Act of June 17, 1892, 27 Stat. 52.

system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing."[135] The Sac and Fox Nation contends that the nature of the transaction calls for interpreting the language in favor of the tribe.[136] Further, the Sac and Fox Nation asserts that the Sac and Fox representatives were illiterate and unsophisticated, and the government merely gave them an ultimatum.[137] Because they characterize the agreement as a contract of adhesion, the Sac and Fox Tribe argues that it should be interpreted strictly against the government in favor of the tribe.[138]

The final factor concerns the subsequent treatment of the area in question. The Oklahoma Tax Commission does not discuss this factor. The Sac and Fox, on the other hand, refer to the subsequent treatment and recognition of the reservation by the Department of the Interior and the Sac and Fox National Council in support of their position.[139]

It would appear, based on the Sac and Fox Nation's arguments, that the Oklahoma Tax Commission will have to come up with some stronger arguments on remand. However, this assumption is based on the idea that the Court will strictly follow the law and realistically, it may not. First, whether right or wrong, the effects of this decision are too important for the Court not to consider them in deciding the issue of whether the Sac and Fox Reservation has been extinguished. Moreover, the current test allows the Court to determine the desired outcome, then use the test to support the decision. Therefore, it is inevitable that the Court will not reinstate the original boundaries of the Sac and Fox Nation because of the complications which would

135. *Mattz*, 412 U.S. at 496.

136. Respondent's Brief, *Sac and Fox Nation* (No. 92-259).

137. *Id.* at 16.

138. *Id.* In contending that the treaty was nothing more than a contract of adhesion, the Sac and Fox Nation argued not only that the Sac and Fox representatives were "illiterate and unsophisticated" but also that Congress merely issued an ultimatum to the representatives and further, that Congress "knew exactly" how to disestablish the reservation had it intended to do so. *Id.* A fundamental premise of the traditional theory of contract is that each party is not only aware of the substance of a contract but can successfully protect his or her interests; where this premise does not hold, the contract is one of adhesion. *See* Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Generally, contracts of adhesion are presented exactly as an ultimatum — on a "take it or leave it" basis. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983). Although Professor Rakoff analyzes contracts of adhesion in the commercial context, he contends that the legal system's determination to enforce contracts of adhesion is a question of the "genera[tion] and alloca[tion] of power," *id.* at 1229-45, and concludes that certain form terms should be "presumptively unenforceable," *id.* at 1258.

139. *Id.* at 15 ("[T]he Interior Department and the Sac and Fox National Council, from the time of the Allotment Agreement through at least 1915, acted consistently with the notion that the 1867 Reservation boundaries had not been extinguished.").

arise if the entire area was considered "Indian country."[140] It is likely that the Court's decision will be a compromise between the requests of each party. Nevertheless, it remains unclear where, between the two extremes, the Court's decision will ultimately fall.

VI. CONCLUSION

As one can see from the case law, challenging the existence of a reservation is not a new issue. However, in Oklahoma, the assumption has generally been that there are no Indian reservations.[141] This assumption has gradually begun to disappear.[142] With the demise of this assumption, new cases raising the issue of reservation disestablishment are likely to surface.

The extent of the existence of reservations in Oklahoma is still uncertain. Because the area now comprising Oklahoma once consisted almost entirely of Indian reservations,[143] many are anxiously awaiting the outcome of the Court's decision in *Sac and Fox*. Many Indian tribes in Oklahoma would like to see their original reservation boundaries restored. There are those who believe that many of these tribes have very strong arguments to support their positions. Whether these tribes will follow the lead of the Sac and Fox Nation in reclaiming their reservations boundaries remains to be seen.

The outcome in *Sac and Fox* is important, not only to the parties involved, but to everyone in Oklahoma. While everyone anxiously awaits a decision, it could be years before a final determination is made. But, even if the Sac and Fox Nation fails to obtain its ultimate goal, there are many tribes waiting in line to bring their own claims.

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140. *See* discussion, *supra* part II., subsection C., on the legal effect of determination that land is Indian country.

141. *See* Kirke Kickingbird, *"Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" From "Oklahoma Hills" by Woody Guthrie*, 29 TULSA L.J. 303, 332-38 (1993) (discussing various misconceptions regarding the status of Indian country in Oklahoma).

142. *See id.* at 338-43.

143. *See, e.g.*, 1 THOBURN & WRIGHT, *supra* note 15, at 219-50.