IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION, Plaintiff, vs. THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; and CONSTANCE IRBY, Secretary-Member of the Oklahoma Tax Commission, Defendants.	)	Case No.:01-CV-0516-JHP-FHM

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO SUPPLEMENTAL BRIEF IN SUPPORT OF ALTERNATIVE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS KEMP, JOHNSON, AND IRBY

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COMES NOW Plaintiff Osage Nation (the "Nation"), pursuant to the Court's *Order* of September 18, 2008, and respectfully submits this response brief in opposition to the supplemental brief in support of alternative motion for summary judgment [Docket No. 79] filed in this case by Defendants Thomas E. Kemp, Jr., as Chairman of the Oklahoma Tax Commission ("OTC"), Jerry Johnson, as Vice-Chairman of the OTC, and Constance Irby, as Secretary-Member of the OTC (collectively, "Defendants" or "Commissioners"). For the reasons provided in this brief in opposition, the Nation requests the Court deny Defendants' motion for summary judgment (as converted by the Court from Defendants' motion to dismiss). In support of its response, the Nation advises the Court as follows.

INTRODUCTION

The Nation has previously filed a response brief in opposition to the Commissioners' motion to dismiss and included within its response brief several exhibits and factual references in support. The Nation incorporates all exhibits and factual references provided in that response brief to this brief in opposition and, together with the matters presented herein, the Nation requests the Court deny the Commissioners' motion.

The Nation requests the Court deny the Commissioners' motion since there are genuine issues as to certain material facts involved in this case and, as such, summary judgment is not appropriate. Due to ongoing discovery in this case, the Nation does not waive the right to submit additional materials in support of its claims at an appropriate time pursuant to the scheduling order in this case. Alternatively, should the Court determine that there are no genuine issues of material facts involved, the Nation asserts that the Commissioners are not entitled to a judgment as a matter of law, based on the legal authority provided herein.

ARGUMENT AND AUTHORITIES

I. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate only if the admissible evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is considered "material" if, under the governing substantive law, it could have an effect on the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" if a reasonable jury could find in favor of the nonmoving party on the evidence presented. *Id.*

Reviewing the record as a whole, a court "…must disregard all evidence favorable to the moving party that the jury is not required to believe" and give credence to the evidence favoring the nonmovant. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). The evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to that party. *Id*.

Summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact, and the Court should determine whether there is a genuine issue for trial, not weigh the evidence. *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995).

II. STATEMENT OF DISPUTED MATERIAL FACTS.

1. As a general matter, the Nation objects to any of the Commissioners' statements of material "facts" and attached affidavits that are based on opinions or research of historians or authors proposing to comment on the legal status of the Osage Reservation. "A summary judgment affidavit may not contain expert testimony unless the affiant has first been designated as an expert witness under Fed. R. Civ. P. 26(a)(2)." *Bryant v. Farmers Insurance Exchange*, 432 F.3d 1114, 1122-23 (10th Cir. 2005). Although the parties need not submit evidence in a form that would be admissible at trial, the content or substance of the evidence itself must be admissible. *Id.* at 1122. If not being submitted as expert testimony, the evidence presented for summary judgment must be (1) based on the affiant's personal knowledge; (2) helpful to a clear understanding of the witness' testimony or determination of the fact in issue, and (c) not based on scientific, technical, or other specialized knowledge . *Id*. at 1122-23. In this case, no expert witnesses have been designated as such; the

Commissioners' affiant's historical analysis and opinion are based on specialized historical knowledge, and are therefore not generally admissible. Thus, the Nation objects to Commissioners' statement nos. 2, 3, 5, 7, 10, 12, 16, and 27 and requests that those statements not be considered for purposes of the Commissioners' motion for summary judgment.

2. The Nation objects to paragraph eleven of the Commissioners' statement of material facts, which states that the terms of the Oklahoma Enabling Act, 34 Stat. 267, provided that, upon statehood, the Osage Reservation "became" Osage County, Oklahoma. Rather, the Enabling Act clearly sets apart as a separate district the Osage Indian Reservation in the newly-formed state. 34 Stat. 267, § 2. Nothing in the Enabling Act clearly establishes that the Osage Indian Reservation would cease to exist, in both a factual and legal sense, upon being designated as a separate county. In fact, the Enabling Act contains many references to the Osage Indian Reservation in a present tense that would be contiguous with the geographical boundary of Osage County, to-wit:

> [A]nd all persons qualified to vote for said delegates shall be eligible to serve as delegates; and the delegates to form such convention shall be one hundred and twelve in number, fifty-five of whom shall be elected by the people of Indian Territory, and two shall be elected by the electors ***residing in the Osage Indian Reservation*** in the Territory of Oklahoma; and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall apportion the Territory of Oklahoma into fifty-six districts, as nearly equal in population as may be, except that such apportionment shall include as ***one district the Osage Indian Reservation***, and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall appoint an election commissioner who shall establish ***voting precincts in said Osage Indian Reservation***, and shall appoint the judges for election in ***said Osage Indian Reservation***; and two delegates shall be elected from said Osage district . . . [t]hat ***in said Indian Territory and Osage Indian Reservation***, nominations for delegate to said constitutional convention may be made by convention . . . .

§ 2 (emphasis added).

> Section 3 of the Enabling Act provides:
>
> Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as ***the Indian Territory and the Osage Indian Reservation*** and within any other parts of said State which existed as Indian reservations . . . .

(emphasis added).

> Section 21 of the Enabling Act provides:
>
> That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall ***constitute the Osage Indian Reservation*** a separate county, and provide that it 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, and designate the county seat thereof . . . .

34 Stat. 267, 268-69, 277 (emphasis added).

3. The Nation objects to Commissioners' statement number twenty-eight that implies Congress has concluded the Osage Reservation does not exist. Notably, the statements relied upon by the Commissioners do not speak to the Osage Reservation, specifically, but are statements of general characterization and contained only in Senate Reports, not a specific act of Congress. Moreover, in December, 2004, Congress enacted "An Act to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government." P.L. 108-431, 118 Stat. 2609. The legislative history for the Act specifically finds that "[t]he Osage Tribe is a federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma" with a full committee hearing on H.R. 2912 being "held on the Osage Reservation on March 15, 2004." H.R. Rep. 108-502.

Clearly, general statements in congressional reports relied upon by the Commissioners that there are no reservations in Oklahoma, are not conclusive.

The Court may take judicial notice of the following undisputed facts in the form of official documents and records that specifically refute the facts relied upon by the Commissioners:

4. On July 28, 2005, upon an official inquiry by the National Indian Gaming Commission ("NIGC"),[1] the NIGC concluded by an opinion letter that the Nation "may conduct gaming on the parcels because they lie within the Tribe's reservation." The opinion states that its conclusion was based on historical documents and official records from the U.S. Department of the Interior acknowledging that the Osage Reservation boundaries have not been disestablished. A copy of the NIGC opinion is attached as Exhibit "3" in the Nation's Response Brief [Dkt. 76].

5. The State of Oklahoma has on its own accord recognized that the boundaries of Osage County make up the Osage Indian Reservation. On October 25, 1997, the Governor of Oklahoma signed an Executive Department Proclamation recognizing the day celebrated as the Osage Centennial and declaring the day as "Osage Day." Among other things, the Proclamation states:

[1] The National Indian Gaming Commission is a federal agency within the U.S. Department of the Interior, created by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. (the "IGRA"), to regulate certain Indian gaming activity that occurs on, among other things, land within Indian reservations. *See* 25 U.S.C. § 2703(4)(A). The NIGC's determination is significant because: (1) it necessarily concludes that no act of Congress has disestablished the Osage Reservation boundaries, and (2) in order for the NIGC to permit gaming in the reservation it necessarily has to also find that the Nation maintains powers of governance and authority over all lands within the reservation boundaries in order to lawfully conduct Indian gaming under the IGRA, dispelling any arguments by the State that the Nation's governance powers over the reservation were diminished over time. In the area of Indian affairs, deference should be given to rule and policy determinations made by the Department of Interior and Bureau of Indian Affairs. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

> Whereas, the Osage Reservation covering all of Osage County is the only federally recognized reservation remaining in Oklahoma; and
> Whereas, the Osage Tribe Mineral Estate occupies all of Osage County . . . .

Notably, the Proclamation references the Osage Reservation and the Osage Mineral Estate separately, acknowledging a distinction between the two terms. A copy of the 1997 Proclamation is attached as Exhibit "4" in the Nation's Response Brief [Dkt. 76].

6. In *Osage Nation v. United States*, the United States Court of Federal Claims, Case No.: 99-550 L, attorneys with the U.S. Department of Justice and U.S. Department of the Interior entered into Stipulations of Fact with attorneys for the Nation that provides in paragraph two: "The Osage Reservation is located in northern Oklahoma. The Reservation covers roughly 1.47 million acres. The boundaries of the Osage Reservation are co-extensive with the boundaries of present-day Osage County, Oklahoma." This fact was adopted by the Court and incorporated in its written order filed in that case on September 21, 2006. A copy of the Stipulations of Fact is attached as Exhibit "5" in the Nation's Response Brief [Dkt. 76].

7. On September 28, 2005, in a *Opinion and Order* issued in *Quarles v. U.S.A., et al*., U.S. District Court for the Northern District of Oklahoma, Case No.: 00-CV-0913-CVE-PJC [Docket No. 165], District Judge Eagan specifically finds that "Osage County is 'Indian country,' as defined by 18 U.S.C. § 1151, and falls under the supervision of the [Bureau of Indian Affairs]." *Opinion and Order*, at page 3. Notably, the Bureau of Indian Affairs, who was at one time a party to this litigation, did not dispute or object on the record to this finding by Judge Eagan.

8. Attached as Exhibit "6" in the Nation's Response Brief [Dkt. 76] is a copy of a map produced by the U.S. Department of the Interior and the U.S. Geological Survey showing the Osage Indian Reservation as the only Indian reservation in Oklahoma. The U.S. Environmental Protection Agency has a website showing a map produced by the Bureau of Indian Affairs that clearly depicts the Osage Reservation as a federally-recognized reservation. The website is: http://www.epa.gov/pmdesignations/biamap.htm

9. A letter, dated February 15, 1994, from a Regional Office of the Office of the Solicitor, to the Oklahoma Water Resources Board (the "Board"), provides notice to the Board that the state agency "has no jurisdiction or authority to adjudicate the rights of the Osage Tribe to use the waters appurtenant to its reservation . . . ." The letter goes on to state that "[t]he Osage Reservation was confirmed by Congress in the Act of June 5, 1872, 17 Stat. 228" and that the "boundaries of the reservation are essentially coextensive with the boundaries of Osage County." Essentially, the letter provides notice to the state that it has no authority to adjudicate issues concerning water rights in the Osage Reservation since federal law preempts state law in this area.[2] A copy of the February 15, 1994, letter is attached as Exhibit "7" in the Nation's Response Brief [Dkt. 76].

III. THE COMMISSIONERS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF THE OSAGE INDIAN RESERVATION BOUNDARIES BEING DISESTABLISHED.

The Commissioners are not entitled to summary judgment that the Osage Reservation boundaries have been disestablished as a matter of law. The U.S. Supreme Court has developed an analytical framework for determining the continuing legal status of a

[2] This letter was one of the documents relied upon by the NIGC in its July 28, 2005, opinion letter finding that the Nation's reservation continues to exist.

reservation and, under that analysis, the Commissioners cannot show as a matter of law that the Osage Reservation boundaries have been disestablished. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The language in the surplus land acts along with other factors are important to the determination of whether the exterior boundaries of an Indian reservation continue to exist. A state acquires primary jurisdiction over unallotted opened lands carved out of a reservation if the applicable surplus land act freed those lands of their reservation status, thereby diminishing the reservation boundaries. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Solem*, at 467. In contrast, the entire opened area remains Indian country if the surplus land act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Solem*, at 470.

In its review of the reservation status cases, the Court has developed an analytical structure to determine the effect of congressional legislation on existing reservations. According to its own precedent, the Court has provided "'a fairly clean analytical structure' directing us to look to three factors." *Hagen v. Utah*, 510 U.S. at 411-12 (quoting *Solem*, 465 U.S. at 470). First, "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. [citation omitted]. *Id*. Second, "[w]e have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous

understanding of the particular Act and matters occurring subsequent to the Act's passage." *Id*. Finally, "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Yankton Sioux*, 522 U.S. at 356. These three factors and their application to a given set of facts are addressed in turn.

A. Statutory Language.

The first, and most significant, factor the Court uses is to review the statutory language used to open the Indian lands. In *Solem*, the Court acknowledged that "only Congress can divest a reservation of its land and diminish its boundaries" and that "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Solem*, 465 U.S. at 470. A review of the statutory language used to open the lands has always been present in the reservation status cases and has always been the first and foremost starting point implemented by the Court for their analysis.

The most conclusive rule comes from *Hagen* where the Court held that language of "the restoration of unallotted lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Hagen*, 510 U.S. at 414. Further, such language must be in the "operative section" of a surplus land act. *Id*. In *Hagen*, the operative language of the Act of May 27, 1902, 32 Stat. 263, provided for allotting reservation land to Indians, and that "all the unallotted lands within said reservation shall be restored to the public domain." *Id*. at 412. Notably, in *Solem*, the Court held that an Act that granted permission for the Indians to harvest timber on the opened lands "as long as the lands remain part of the public domain" did not diminish the reservation

boundaries. *Solem*, 465 U.S. at 475. However, in reference to the term "public domain" in *Solem*, the Court in *Hagen* pointed out that the language did not "restore" the lands to the public domain and such language was not in the operative section of the statute opening the lands for settlement. *Hagen*, 510 U.S. at 413. This is entirely consistent with the holding in *Seymour* where the Court held that the use of the language "vacated and restored to the public domain" in an 1892 Act had diminished the Colville Reservation as to the North Half but not as to the South Half of the reservation since no such language was used in the 1906 Act referencing the South Half. *Seymour*, 368 U.S. at 354 ("Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain.") *Id*. at 355.

Another rule, not so conclusive as that in *Hagen*, has been described as a "nearly conclusive" or "almost insurmountable" presumption of diminishment of reservation boundaries. *Yankton Sioux*, 522 U.S. at 343. In *Yankton Sioux*, the Court held that when the surplus land act contains "both explicit language of cession, evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly conclusive,' or 'almost insurmountable,' presumption of diminishment arises." *Id*. This is referred to as the "cession and sum certain" language and is viewed as being "'precisely suited' to terminating reservation status." *Id*. (quoting *DeCoteau*, 420 U.S. at 445).

In sum, the following structure for reviewing statutory language factor emerges: First, congressional intent to diminish has been determinatively found when the operative section

of the surplus land act contains language that "restores" the opened area back to the "public domain." *See Hagen*, 510 U.S. at 414. Second, congressional intent to diminish is most likely found when "cession" and "sum certain" language is present in the surplus land act. This has been described as meaning both "explicit language of cession evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land . . . .'" *Yankton Sioux*, 522 U.S. at 344. The payment does not have to be a fixed sum, but could be based on the proceeds from the sale of the lands. *Rosebud Sioux*, 430 U.S. at 596. Finally, congressional intent to diminish has not been found when language of the surplus land act simply offers non-Indians the opportunity to purchase land within the established reservation. *Solem*, 465 U.S. at 467. This is considered the "sell and dispose of" language and is usually coupled with a provision authorizing the government to create an account to deposit proceeds from the sale of the lands to the benefit of the Indian tribe. *See e.g.*, *Mattz*, 412 U.S. at 495; *Solem*, 465 U.S. at 473.

B. Historical Context

The next factor considered when reviewing the reservation cases has been to review the historical context surrounding the passage of legislation opening up the reservation. Under the reservation cases, this factor has not produced any specific event contained within the historical context that has been dispositive. Rather, this factor has been used essentially to justify the conclusion reached and to provide support for the holding that the statutory language evidenced either disestablishment or no disestablishment of the reservation boundaries.

When the Court found that the reservation had not been disestablished by the surplus land act, a review of the historical context provided support in various forms. For instance, after the passage of the act, Congress continued to recognize the existence of the reservation in various forms of language in subsequent legislation. *Seymour*, 368 U.S. at 356; *Mattz*, 412 U.S. at 505; *Solem*, 465 U.S. at 478-79. Federal agencies, such as the Department of the Interior, have continued to recognize and treat the area in a manner consistent with continued reservation status. *Seymour*, 368 U.S. at 357; *Mattz*, 412 U.S. at 505; *Solem*, 465 U.S. at 480. Legislative history and reports of the surplus land acts generally will provide support for congressional intent for the status of the reservation boundaries. *Mattz*, 412 U.S. at 499; *Solem*, 465 U.S. at 472. References were made within the surplus land act for setting aside portions of lands for "agency, school, and religious purposes" for as long as needed for the benefit of the Indians.[3] *Solem*, 465 U.S. at 474. Also, references were made within the surplus land act that directed the Geological Society to examine the opened area for "lands bearing coal" and exempted those sections from allotments, "the apparent purpose being to reserve those mineral resources for the whole tribe." *Id.*

C. Demographics and "Indian Character" of Lands

The final factor has pragmatic relevance as to what happened to the opened area after the passage of a surplus land act. In situations where non-Indians settled on the opened area and the land has since lost its "Indian character," the Court has acknowledged that *de facto*, if

[3] For this, the Court stated "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474.

not *de jure*, diminishment may have occurred. *Solem*, 465 U.S. at 471; *Yankton Sioux*, 522 U.S. at 356.

However, despite the Court's reliance on this pragmatic factor in its decisions, it is always the last factor to be considered and has been referred to as "the least compelling," *Yankton Sioux*, 522 U.S. at 356., "unorthodox" and a "potentially unreliable method of statutory interpretation." *Solem*, 465 U.S. at 472, n.13. The Court in *Yankton Sioux* acknowledged that every surplus land act necessarily resulted in entry of non-Indian settlers to the opened area that degraded the "Indian character" of the reservation, "yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Yankton Sioux*, 522 U.S. at 356 (citing *Solem*, 465 U.S. at 468-69). Most important is the language in 18 U.S.C. § 1151, that allows for all land within the reservation boundaries to be Indian country, including all land title of which is held in fee. 18 U.S.C. § 1151(a); *Seymour*, 368 U.S. at 357. This represents Congress's understanding and intent for the reservation boundaries to remain in existence despite lands within the boundaries held in fee, including those held by non-Indians or owned by townsites. *Seymour*, 368 U.S. at 358.

In none of the cases did the Court feel compelled to find the reservation boundaries to be diminished or terminated solely on the basis of the jurisdictional history and demographics of the opened area without language in the surplus land legislation providing evidence of disestablishment. Arguably, to find diminishment solely on the jurisdictional history and demographics of the opened area despite the lack of clear evidence of congressional intent to diminish would be contrary to well established federal Indian law that only Congress had the power to modify or eliminate tribal rights. *See Yankton Sioux*, 522

U.S. at 343 ("[o]nly Congress can alter the terms of an Indian treaty by diminishing a reservation.").

D. Application to the Osage Reservation

The Commissioners' argument that the Osage Allotment Act and the Oklahoma Enabling Act served to disestablish the Osage Reservation boundaries is without merit. There is no language in either statute that reflects Congress' intent to terminate the Osage Reservation. In fact, the Osage Allotment Act provided for the entire reservation lands, except for certain select parcels, to be allotted among Osage members. In other words, there was no surplus land act, per se, that opened up unallotted land within the reservation for non-Indian settlement.

There is no language in the Osage Alottment Act and the Enabling Act that "restores" the opened area back to the "public domain." *See Hagen*, 510 U.S. at 414. Also, there is no language in those acts that provide for a "cession" of lands and payment of a "sum certain" to the Nation for those lands. The Commissioners cannot cite to any provision of those acts that show an intent by Congress to disestablish the reservation boundaries and remove the interests of the federal government and the Nation over the reservation lands. In fact, as referenced in paragraph two of the Nation's Statement of Disputed Facts *supra*, the Enabling Act consistently refers to the Osage Indian Reservation in a present tense.

As evidenced by the court documents and official government documents referenced in paragraphs three through nine of the Nation's Statement of Disputed Facts *supra*, there is no question that the historical context favors the Nation's position that the Osage Reservation remains in existence today. Indeed, the NIGC made a determination that the Osage

Reservation was not disestablished after it had reviewed and considered historical records and documents. Further, there are numerous examples of how the people and communities of Osage County still acknowledge the history, culture, and tradition of the Osage people within the county.[4] In other words, it cannot be said that the Osage Reservation has lost its Indian character since statehood.

Thus, the Commissioners are not entitled to summary judgment as a matter of law on this issue.

IV. THE COMMISSIONERS ARE NOT ENTITLED TO SUMMARY JUDGMENT THAT TAXATION OF INCOME FROM OSAGE MEMBERS WHO BOTH RESIDE AND EARN THAT INCOME WITHIN THE NATION'S INDIAN COUNTRY IS LAWFUL.

Under well-established federal law, the State is without authority to levy and collect taxes off the income of tribal members who both earn that income and reside in Indian country. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (tribe seeks injunction against state collection of motor fuels tax and income tax on tribal members in Indian country); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (tribe seeks injunction against state collection of motor vehicle excise tax and income tax on tribal members in Indian country); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (tribe seeks injunction against state collection of taxes for cigarettes sales in Indian country); *McClanahan v. State Tax Comm'n of Arizona*,

[4] Attached hereto as Exhibit "1" is a copy printed from the website of the Oklahoma Historical Society providing some history of Osage County including the statement that the County is contiguous with the Osage Nation Reservation. Attached as Exhibit "2" is a copy printed from the website of Osage County providing various references to the "rich history and culture in Osage County [that] is credited to the Osage Nation, which relocated here in 1872."

411 U.S. 164 (1973) (tribe seeks injunction against state collection of income taxes on tribal members in Indian country).

Supreme Court cases hold that this rule applies in Indian country, as that term is defined in 18 U.S.C. § 1151, without limiting the rule to only trust and restricted lands. *See, e.g., Chickasaw Nation*, 515 U.S. at 453; *Sac and Fox Nation*, 508 U.S. at 123 (recognizing that Indian country includes, among other things, "formal" and "informal" reservations). The legal definition of Indian country, as provided in 18 U.S.C. § 1151, includes all land (even lands held in fee) within an Indian reservation. *See* 18 U.S.C. § 1151(a). The Supreme Court specifically has held that the income tax is "unlawful as applied to reservation Indians with income derived wholly from reservation sources" without limiting the rule to only income earned from working for a tribe. *McClanahan*, 411 U.S. at 165.

The Commissioners' argument that the State may nevertheless tax income of tribal members who reside and work on fee lands within a reservation is especially disingenuous considering the Commissioners' own regulations provide that tribal members are exempt from Oklahoma income tax when those members reside and earn income from sources (not limited to tribal employment) within Indian country, as defined under 18 U.S.C. § 1151. *See* OAC 710:50-15-2 (attached as Exhibit "8" in the Nation's Response Brief [Dkt. 76]). Further, this rule has been applied by written decision to actual taxpayer protests filed with the Commissioners by Oklahoma taxpayers who attempted to claim the exemption. *See, e.g.*, Oklahoma Tax Commission Decision, 2006-05-04-23, N-01-025 (attached as Exhibit "9" in

the Nation's Response Brief [Dkt. 76]).[5] Thus, the Commissioners are not entitled to summary judgment on the issue of their ability to tax the income of tribal members who both reside and earn that income in Indian country.

The leading Supreme Court case in this area of law is *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). In *McClanahan*, the Supreme Court held that the State's imposition of income tax on a tribal member who earned income wholly from reservation sources was an interference with tribal sovereignty, and that the State had no jurisdiction to impose such taxes. *Id*. at 181. As such, all case law relied upon by the Commissioners that were decided prior to *McClanahan* are not applicable and are not binding on this Court to the extent they are contrary to *McClanahan*. Even the Oklahoma case relied upon by Commissioners, *Leahy v. State Treasurer*, 49 P.2d 570 (Okla. 1935), was mentioned and disposed of by the Supreme Court in *McClanahan* as inapplicable in light of the Indian sovereignty doctrine. *Id*. at 169-71.

Nothing in the Osage Allotment Act or the Oklahoma Enabling Act evidences congressional intent for the Commissioners to be able to tax Osage tribal members' income when that income is earned within the Osage Reservation. Assuming, arguendo, that the State of Oklahoma may have statutory authority to levy and collect other types of taxes on Osage members' property or from other sources within the Osage Reservation does not mean the Commissioner have authority to tax the income of Osage members when that income is earned within the reservation. Indeed, the Supreme Court case relied upon by the

[5] The Nation provides this written ruling, not in agreement with any legal conclusions provided in the ruling, but, rather, to show the Commissioners' use and reliance of the definition of Indian country under Section 1151.

Commissioners, *United States v. Mason*, 412 U.S. 391 (1973), pertained to Oklahoma estate tax on Osage property, not income tax earned by tribal members. The Court in *Mason* even referred to its decision in *McClanahan* and distinguished the two different types of taxes. *Mason*, 411 U.S. at 396, fn 7.

Likewise, the Commissioners' reliance on *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943) and *West v. Oklahoma Tax Comm'n*, 334 U.S. 717 (1949) does not support their proposition. The issue in *Oklahoma Tax Comm'n v. United States* pertained to state inheritance taxes imposed upon three deceased members of the Five Civilized Tribes—not income tax earned by tribal members within Indian country. *Id*. at 599-600. The *West* case is also distinguishable since it pertains to state inheritance taxes being applied to the estate of a restricted Osage Indian—not to income tax earned by an Osage member within Indian country. *West*, 334 U.S. at 718. In any case, to the extent any of the cases cited by the Commissioners are directly contrary to *McClanahan* and progeny, such authority is not applicable.

Against the backdrop of tribal sovereignty over their territory and tribal members, precedent exists for tribes seeking to enjoin unlawful state taxation on behalf of tribal members. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). The Commissioners cannot provide legal authority that permits them to be able to tax the income of Osage tribal members who both reside and earn that income within the Nation's Indian country—the

Osage Reservation. As such, the Commissioners' motion for summary judgment on this issue should be denied.

V. THE COMMISSIONERS ARE NOT ENTITLED TO SUMMARY JUDGMENT THAT TAXATION OF INCOME FROM OSAGE MEMBERS WHO BOTH RESIDE AND EARN THAT INCOME WITHIN THE NATION'S INDIAN COUNTRY IS LAWFUL DUE TO LONG STANDING RELIANCE ON SUCH TAXING ACTIVITY.

The Commissioners' long-standing reliance on the legitimacy of its unlawful activity does not make it lawful under general equitable principles and policy. With the adoption of the U.S. Constitution, Indian affairs came exclusively under federal authority. U.S. Const. art I, § 8, cl. 3; *see County of Onieda, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985). Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. *See e.g, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As such, only Congress can alter the terms of an Indian treaty by diminishing a reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909). Congressional intent to do so must be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738-39 (1986). Finally, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Hagen v. Utah*, 510 U.S. at 411 (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992)).

Due to the preemptive nature of the plenary authority that Congress has over Indian affairs, the State of Oklahoma's long-standing practice of asserting jurisdiction in the Osage Reservation does not foreclose the Nation's right to challenge the unlawful activity. *See e.g., Indian Country, U.S.A. v. State of Oklah.*, 829 F.2d 967, 974 (10th Cir. 1987) ("[T]he past

failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands.").

The Commissioners' reliance on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) for the proposition that laches serves as a bar to the Nation's claims is also without merit in this case. Unlike the Oneida Indian Nation in *City of Sherrill*, the Osage Nation has occupied and maintained a continuous presence in their reservation since before Oklahoma's statehood. Further, the Nation is not basing its claim on newly acquired parcels of land purchased on the open market upon which the Nation now claims aboriginal title; rather, the Nation's claim for relief concerns the prohibition recognized by federal law against unlawful state taxation on tribal members within Indian country. The issue in *City of Sherrill* concerned the tribe's attempt to prohibit the collection of property taxes on newly-acquired land by the tribe. The instant case does not involve the collection of property taxes.

Thus, the Commissioners' motion for summary judgment as to its long-standing reliance on its taxing activity in the Osage Reservation should be denied.

CONCLUSION

WHEREFORE, Plaintiff Osage Nation respectfully submits this objection and response brief in opposition to the motion and brief of Defendants seeking summary judgment and dismissal. For the reasons provided herein, the Nation requests the Court deny the Defendants' motion in all respects.

Dated this 3rd day of October, 2008.

Respectfully submitted,

/s/ O. Joseph Williams

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2008, a true and complete copy of the within and foregoing **PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO SUPPLEMENTAL BRIEF IN SUPPORT OF ALTERNATIVE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS KEMP, JOHNSON, AND IRBY** was electronically transmitted to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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