CASE NO. 11-7072
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID B. MAGNAN,

Petitioner - Appellant,

v.

RANDALL G. WORKMAN, Warden,
Oklahoma State Penitentiary,
E. SCOTT PRUITT, Attorney General,
State of Oklahoma,

Respondents - Appellees.

On Appeal from the United States District Court
For the Eastern District of Oklahoma
The Honorable Judge Ronald A. White
D.C. No. CIV-09-438-RAW-KEW

APPELLANT'S REPLY BRIEF

STEVEN A. BROUSSARD
MICHAEL J. LISSAU
Hall, Estill, Hardwick, Gable, Golden
& Nelson, P.C.
320 S. Boston Ave., Suite 200
Tulsa, Oklahoma 74103
Telephone: (918) 594-0400

CHAD A. READLER
Counsel of Record
Jones Day
325 John H. McConnell Blvd.
Columbus, Ohio 43215
Telephone: (614) 469-3939

GARY PETERSON
211 N. Robinson Ave., Suite 450 South
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3367

Oral Argument Requested

December 6, 2012

TABLE OF CONTENTS

Page

Table of Authorities ... iii

I. *DE NOVO* REVIEW GOVERNS THIS APPEAL ... 1

A. AEDPA Does Not Apply To Jurisdictional Determinations ... 1

B. Even If AEDPA Applies, The State Court's Decision Was Contrary To Clearly Established Federal Law And Involved An Unreasonable Determination Of The Facts ... 5

II. OKLAHOMA ADMITS CRITICAL FACTS CONFIRMING THAT THE ATTEMPTED CONVEYANCE OF THE PROPERTY RIGHTS IN 1970 WAS INVALID UNDER FEDERAL LAW ... 6

A. The 1970 Proceeding Failed To Provide Statutorily Required Secretarial Approval ... 8

1. By Oklahoma's own admission, Storts lacked authority to approve the deed ... 9

2. Storts failed to affirmatively approve the conveyance ... 11

3. Any purported approval at the 1970 proceeding violated statutory and regulatory requirements ... 12

B. Oklahoma's Reliance On *Woods* Is Misplaced ... 15

C. The Equitable Considerations Cited By Oklahoma Cannot Dictate The Existence Of Federal Jurisdiction ... 15

III. KIZZIE TIGER WOLF'S TRANSFER OF THE LAND TO THE HOUSING AUTHORITY CREATED A RESULTING TRUST, WHERE WOLF REMAINED THE REAL OWNER ... 16

A. The Court Can Review Whether A Trust Arose Here ... 17

B. As Argued In The State Court Below, Wolf Was The True Owner Of The Property Before, During, And After The Transaction ... 18

TABLE OF CONTENTS
(continued)

Page

IV. SEPARATELY, BECAUSE THE INDIAN MINERAL INTERESTS IN THE PROPERTY WERE NEVER EXTINGUISHED, THE PROPERTY WAS INDIAN COUNTRY AT THE TIME OF MAGNAN'S CRIMES 22

A. The Oklahoma Court Violated Clearly Established Federal Law By Ignoring The Plain Language Of § 1151(c) And Instead Applying A Non-Statutory Balancing Test..........23

B. The Mineral Estate May Not Be Ignored For Purposes Of Determining Indian Country Status 27

CONCLUSION 31

CERTIFICATE OF COMPLIANCE..........33

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page

CASES

Adamo Wrecking Co. v. United States,
434 U.S. 275 (1978) ... 4

Ahboah v. Housing Authority of Kiowa Tribe,
660 P.2d 625 (Okla. 1983) ... 19, 20

Alaska v. Native Village of Venetie Tribal Government,
522 U.S 520 (1998) ... passim

Aramark Leisure Servs. v. Kendrick,
523 F.3d 1169 (10th Cir. 2008) ... 2

Black v. Workman,
682 F.3d 880 (10th Cir. 2012) ... 25, 27

Blatchford v. Sullivan,
904 F.2d 542 (10th Cir. 1990) ... 2, 3, 21

Burgess v. Watters,
467 F.3d 676 (7th Cir. 2006) ... 4, 5

Cacy v. Cacy,
619 P.2d 200 (Okla. 1980) ... 16

Carcieri v. Salazar,
129 S. Ct. 1058 (2009) ... 24

Carter v. Ward,
347 F.3d 860 (10th Cir. 2003) ... 7

Crowell v. Benson,
285 U.S. 22 (1932) ... 4

Daigle v. Shell Oil Co.,
972 F.2d 1527 (10th Cir. 1992) ... 17

Detrich v. Ryan,
677 F.3d 958 (9th Cir. 2012) ... 5

Ellis v. Page,
351 F.2d 250 (10th Cir. 1965) 3, 21

Enron Oil & Gas Co. v. Worth,
947 P.2d 610 (Ok. Civ. App. 1997)....................28, 29

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians,
466 U.S. 765 (1984)....................7

Gonzalez v. Thaler,
132 S. Ct. 641 (2012)....................17

Green v. Nelson,
595 F.3d 1245 (11th Cir. 2010) 6

House v. Hatch,
527 F.3d 1010 (10th Cir. 2008) 5, 8

Housing Auth. of Seminole Nation v. Harjo,
790 P.2d 1098 (Okla. 1990)....................19, 20

Hydro Res., Inc. v. U.S. E.P.A.,
608 F.3d 1131 (10th Cir. 2010) 24, 26

Jay v. Boyd,
351 U.S. 345 (1956)....................7, 9

Kalb v. Feuerstein,
308 U.S. 433 (1940)....................4

Kimzey v. Flamingo Seismic Solutions Inc.,
696 F.3d 1045, 2012 U.S. App. LEXIS 21360 (10th Cir. 2012)....................29, 30

Little Light v. Crist,
649 F.2d 682 (9th Cir. 1981) 28

Lockyer v. Andrade,
538 U.S. 63 (2003)....................7

Lonchar v. Thomas,
517 U.S. 314 (1996)....................3

Magnan v. State,
207 P.3d 397 (Okla. Crim. App. 2009)..passim

Marcus Food Co. v. DiPanfilo,
671 F.3d 1159 (10th Cir. 2011) 2

Miller-El v. Dretke,
545 U.S. 231 (2005)...5, 8

Murphy v. Sirmons,
497 F. Supp. 2d 1257 (E.D. Okla. 2007) 5

Negonsott v. Samuels,
933 F.2d 818 (10th Cir. 1991) 3

Ng Fung Ho v. White,
259 U.S. 276 (1922)..4

Oklahoma Tax Comm'n v.Potawatori Indian Tribe,
498 U.S. 505 (1991)...16

Osage Nation v. Irby,
597 F.3d 1117 (10th Cir. 2010) 28

Park Lane Res. LLC v. Dep't of Agric.,
378 F.3d 1132 (10th Cir. 2004) 2

Pittsburg & Midway Coal Mining Co. v. Watchman,
52 F.3d 1531 (10th Cir. 1995) 30, 31

Reber v. Steele,
570 F.3d 1206 (10th Cir. 2009) 3

Richie v. Workman,
599 F.3d 1131 (10th Cir. 2010) 1

Service v. Dulles,
354 U.S. 363 (1957)..7, 13

Seymour v. Superintendent of Washington State Penitentiary,
368 U.S. 351 (1962)...28

Tafoya v. Dep't of Justice,
748 F.2d 1389 (10th Cir. 1984) 17

Tiger v. W. Inv. Co.,
221 U.S. 286 (1911) 7

U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.,
582 F.3d 1131 (10th Cir. 2009) 1

United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260 (1954) 7, 13

United States v. Cotton,
535 U.S. 625 (2002) 21

United States v. Grimley,
137 U.S. 147 (1890) 4

United States v. John,
437 U.S. 634 (1978) 15, 23

United States v. Pelican,
232 U.S. 442 (1912) 20, 23

United States v. Ramsey,
271 U.S. 467 (1926) 23, 25

United States v. Tony,
637 F.3d 1153 (10th Cir. 2011) 21

United States v. Yuginovich,
256 U.S. 450 (1921) 12

Williams v. Taylor,
529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) 25

Yellowbear v. Attorney General of Wyoming,
380 F. App'x 740 (10th Cir. 2010) 4

STATUTES

35 Stat. 312 10

59 Stat. 313 11

61 Stat. 731 ....10, 12

69 Stat. 666 ....11, 12, 13

18 U.S.C. § 1151(b) 3, 26, 27

18 U.S.C. § 1151(c) ....passim

28 U.S.C. § 2254(d) 1, 5, 6, 8, 11

OTHER AUTHORITIES

25 C.F.R. § 1.2 (1960) 14

25 C.F.R. §§ 121.34, 121.36, 121.37, 121.43 (1970) 14

9 U.S. Attorneys' Manual § 9-20.100 Criminal Resource Manual at 677 (1997) 16, 18, 23

I. *DE NOVO* REVIEW GOVERNS THIS APPEAL.

A. AEDPA Does Not Apply To Jurisdictional Determinations.

Because every issue raised in this appeal goes to the question of federal jurisdiction, the Court must apply *de novo* review to the underlying proceedings. *See U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1138 (10th Cir. 2009) ("The basis for federal jurisdiction is a question of law to be reviewed de novo.").

Respondent (hereinafter, "Oklahoma" or the "State") argues that AEDPA's deferential standard of review should apply because the underlying state court opinion involved the resolution of the substance of Magnan's claims. (Appellee's Br. at 11-16.) To be sure, AEDPA applies to claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). It does not apply, however, when a "state court decided the petitioner's claims . . . on procedural grounds." (Appellee's Br. at 13 (citing *Richie v. Workman*, 599 F.3d 1131, 1141-42 (10th Cir. 2010).)

Here, the critical state court determination was procedural in nature. The Oklahoma Court of Criminal Appeals ("OCCA") singularly addressed the "threshold" procedural issue: whether Oklahoma had jurisdiction over Magnan's offenses. *Magnan v. State*, 207 P.3d 397, 406 (Okla. Crim. App. 2009) (noting the "threshold jurisdictional issue"). Because jurisdictional questions are procedural in

nature, they do not constitute an adjudication "on the merits" under AEDPA. *See, e.g.*, *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1169-70 (10th Cir. 2011) (recognizing that jurisdiction is a separate matter that must be established "before proceeding to the merits"); *Aramark Leisure Servs. v. Kendrick*, 523 F.3d 1169, 1173 (10th Cir. 2008) (same). While these cases lie outside the habeas context, the nature of a jurisdictional issue does not change depending on the nature of the case.

Oklahoma thus resorts to taking the untenable position that a jurisdictional decision is *not* "on the merits" when jurisdiction is denied, but "on the merits" when jurisdiction is accepted. (Appellee's Br. at 14 (arguing *Park Lane Res. LLC v. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004), is "inapposite" because it stands for proposition that "jurisdictional *dismissals* are not 'on the merits'") (emphasis original).) Of course, that is not the case. Questions of jurisdiction—regardless of their resolution—are procedural ones that fall outside AEDPA's purview.

Indeed, the Court has long recognized that jurisdictional issues in federal habeas proceedings are distinct from merits issues, and thus subject to *de novo* review. For instance, in *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), the Court addressed whether New Mexico courts had jurisdiction over an Indian convicted in state court for a crime covered by the Indian Major Crimes Act. At issue was whether certain land in New Mexico remained a "dependent Indian

community" under 18 U.S.C. § 1151(b), giving federal courts exclusive jurisdiction. *Id.* at 544. In resolving this purely "jurisdictional question," the Court applied *de novo* review. *Id.*; *see also Ellis v. Page*, 351 F.2d 250, 251-52 (10th Cir. 1965) (applying *de novo* review in habeas case involving jurisdictional question of whether an Indian's crime was committed on an Indian reservation); *Negonsott v. Samuels*, 933 F.2d 818, 819 (10th Cir. 1991) (applying *de novo* review in habeas case to determine whether state court properly exercised jurisdiction over crime committed in area asserted to be Indian Country).

While AEDPA changed the landscape with regard to claims "adjudicated on the merits" by state courts, it did not alter the long-standing principle that questions of jurisdiction are procedural in nature and subject to *de novo* review. *See Reber v. Steele*, 570 F.3d 1206, 1209 (10th Cir. 2009) (noting that the "[a]bsence of jurisdiction in the convicting court is a proper basis for federal habeas relief" and that *de novo* review applies to issues of "subject matter jurisdiction"). Indeed, § 2254 itself "demands . . . conviction by a court of competent jurisdiction." *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996). Accordingly, deference to a court that lacks jurisdiction would be wholly unwarranted. (*See* Appellant's Br. at 19.)

Equally unavailing is Oklahoma's contention that cases involving administrative agencies, bankruptcy judges, military courts and the like are "inapposite." (Appellee's Br. at 14-15.) To be sure, those cases did not involve a

federal statute requiring Article III courts to afford deference in certain contexts. (*Id.* at 14-15.) That said, they do share a crucial proposition that Oklahoma seems to eschew: federal courts give non-Article III entities deference with respect to legal and factual findings (much like they would under AEDPA), but no deference on questions of jurisdiction. *See, e.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-83 (1978); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Crowell v. Benson*, 285 U.S. 22, 54, 62 (1932); *Kalb v. Feuerstein*, 308 U.S. 433 (1940).

Oklahoma cites no authority to the contrary. In *Yellowbear v. Attorney General of Wyoming*, 380 F. App'x 740 (10th Cir. 2010), the Court did doubt (but ultimately did not resolve) the petitioner's argument that "state courts cannot rule on the extent of federal jurisdiction." *Id.* at 742 (quotation and brackets omitted). Magnan, however, does not question the OCCA's authority to make a jurisdictional determination. Rather, he argues that that determination should be reviewed *de novo*.

Burgess v. Watters, 467 F.3d 676 (7th Cir. 2006), is likewise unenlightening. The *Burgess* petitioner apparently did not contest the applicability of AEDPA and, indeed, the court did not even consider any other standard of review, failing to make the crucial distinction between procedural issues and substantive decisions

"on the merits." *See id.* at 681. The same goes for *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1267 (E.D. Okla. 2007).

B. Even If AEDPA Applies, The State Court's Decision Was Contrary To Clearly Established Federal Law And Involved An Unreasonable Determination Of The Facts.

As to the merits of the appeal, Oklahoma's primary tack is to point out what it deems is an absence of clearly established federal law. But the State is wrong, as Magnan points out in each section below. Oklahoma, moreover, completely ignores that, as Magnan previously noted (Appellant's Br. at 22), AEDPA's clearly established law standard does not apply to state court findings "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *House v. Hatch*, 527 F.3d 1010, 1019 (10th Cir. 2008) (citing 28 U.S.C. § 2254(d)(2)). While § 2254(d)(2)'s standard may be "'demanding,'" it is not "'insatiable . . . [as] deference does not by definition preclude relief.'" *Id.* (alteration in original) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)). Accordingly, Magnan is equally entitled to habeas relief where the OCCA erred factually in finding state court jurisdiction. *Id.* at 1019, 1025; *see also Miller-El*, 545 U.S. at 240 (2005) (granting habeas relief under § 2254(d)(2) because the evidence on issues raised on habeas, "viewed cumulatively," warranted relief); *Detrich v. Ryan*, 677 F.3d 958 (9th Cir. 2012) (granting relief

under § 2254(d)(2) due to state court's unreasonable determination of fact); *Green v. Nelson*, 595 F.3d 1245, 1251 (11th Cir. 2010) (same).

Separately, to avoid any confusion regarding Magnan's right to seek habeas review, it bears noting that although, as Oklahoma points out, Magnan initially "waived his right to appeal" his conviction and sentence at his sentencing hearing (Appellee's Br. at 3), he revoked that waiver when he filed a written petition in error within the time permitted by statute, and the OCCA in turn properly considered the non-waivable jurisdictional issues raised in that appeal. *See Magnan v. State*, 207 P.3d at 402. He is thus not precluded from petitioning for habeas relief (and the State does not suggest otherwise).

II. OKLAHOMA ADMITS CRITICAL FACTS CONFIRMING THAT THE ATTEMPTED CONVEYANCE OF THE PROPERTY RIGHTS IN 1970 WAS INVALID UNDER FEDERAL LAW.

Moving to the merits of the appeal, Oklahoma acknowledges that the Secretary of Interior had to approve Kizzie Tiger Wolf's 1970 conveyance to the Housing Authority for the transfer to comply with federal law. (Appellee's Br. at 26 n.10.) Oklahoma further acknowledges that if the conveyance did not comply with federal law, the alienability restrictions remained in place and the property today remains Indian Country. (*Id.* at 20 n.6.) And in the face of overwhelming evidence confirming that the conveyance did not satisfy federal law, the State dedicates just two pages (*id.* at 26-27) to the evidence of the 1970 conveyance.

Instead, the State puts virtually all of its eggs in the AEDPA-standard-of-review basket. The state court's decision, however, violated several principles of clearly established federal law, most notably that the conveyance of restricted property by a Five Tribes member is invalid without the statutorily required approval by the Secretary of Interior. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 299-310 (1911). Here, the purported Secretarial approval was invalid because it failed to satisfy the "conclusive" text of the controlling statute. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

The purported approval also failed to satisfy the Department of Interior's own regulations, which are "binding" upon the Secretary. *Service v. Dulles*, 354 U.S. 363, 372 (1957). Failure to abide by them invalidates the action. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Likewise, the purported approval failed to emanate from an official specifically delegated that power "under [the Secterary's] rulemaking authority." *Jay v. Boyd*, 351 U.S. 345, 351 n.8 (1956). These principles of established federal law each independently confirm that the conveyance was invalid. *See Carter v. Ward*, 347 F.3d 860, 864 (10th Cir. 2003) (decision is violation of clearly established federal law where court "unreasonably refuses to extend that principle to a new context where it should apply") (quotation marks and citation omitted); *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (finding clearly established federal law in general "gross

disproportionality principle" applicable to criminal sentences even though the Supreme Court had "not established a clear and consistent path for courts to follow").

Magnan is also entitled to relief under § 2254(d)(2) because the evidence, "viewed cumulatively," is so overwhelmingly in his favor that the state court decision "'was based on an unreasonable determination of the facts.'" *Miller-El*, 545 U.S. at 274 (quoting 28 U.S.C. § 2254(d)(2)); *see also House*, 527 F.3d at 1019. Among a mountain of other evidence, three current or former Interior Department officials offered uncontroverted testimony that the conveyance was invalid.

A. The 1970 Proceeding Failed To Provide Statutorily Required Secretarial Approval.

Oklahoma admits that the 1970 conveyance "had to be approved by the Secretary of the Interior." (Appellee's Br. at 26 n.10.) Secretarial approval, however, was absent, for three reasons: (1) Storts did not have authority to approve the conveyance; (2) Storts did not actually approve the conveyance on behalf of the Secretary; and (3) any "approval" at the hearing did not comply with the controlling statute or binding Department regulations.

1. By Oklahoma's own admission, Storts lacked authority to approve the deed.

The State argues that Storts's participation in the 1970 hearing was "intended to constitute Secretarial approval of the conveyance." (*Id.* at 27.) But *intended* approval is not *actual* approval. And Oklahoma *admits* that Storts lacked authority to approve the conveyance.

All agree that "[i]n 1970, the *area director* was the person to whom the Secretary of the Interior had delegated his authority to approve the removal of restrictions from allotted land." (*Id.* at 26 (emphasis added).) Magnan's witness confirmed as much. (EH Tr. at 29.)[1] Yet as Oklahoma acknowledges, Storts was *not* the Area Director in 1970. (*See* Appellee's Br. at 26-27 (distinguishing between "the area director and Mr. Storts").) He thus did not have delegated authority to approve the removal of restrictions (*see* EH Tr. at 31), a fact confirmed by the testimony of three current or former Interior Department officials. Without a specific delegation of authority, Storts could not approve the conveyance on behalf of the Secretary. *See Jay*, 351 U.S. at 351 n.8 (explaining that government administrator, "*under his rulemaking authority*," can delegate powers to subordinates) (emphasis added).

The most the State can muster in response is that Storts "appeared not only on behalf of Ms. Wolf, . . . but on behalf of the Department of the Interior."

[1] Citations to the record are in the format described in footnote 1 of Appellant's Brief.

(Appellee's Br. at 26.) That contention is misleading at best. Storts appeared as "successor to the United States Probate Attorney" (EH Def.'s Ex. 14 at 12), which, as Magnan explained in his opening brief and the State does not dispute, was the title for lawyers designated by the Secretary of Interior to "'counsel and advise'" or "'appear and represent'" allottees of the Five Civilized Tribes concerning their restricted lands. (*See* Appellant's Br. at 37-38 (quoting 35 Stat. 312, § 6; 61 Stat. 731, § 4).) Thus, pursuant to his statutory role, Storts did "appear[] . . . on behalf of Ms. Wolf." (Appellee's Br. at 26.)

That said, he could not have *also* appeared as an impartial delegate of the Secretary to determine whether to approve the conveyance. According to the State, Storts appeared both as an advocate for Wolf and an impartial decision-maker for the Department of Interior. To do so means that Storts breached his ethical obligations as an attorney by representing two clients (Wolf and the Department) with differing interests at the same time in the same proceeding. That makes no sense. Instead, as with every other aspect of the 1970 proceeding, Storts "appear[ed] and represent[ed]" Kizzie Tiger Wolf in seeking state court approval to convey her *inherited* interests pursuant to the 1947 Act. (*See* Appellant's Br. at 28-30.)

Oklahoma counters that "it is clear that . . . the area director . . . approved of the deed." (Appellee's Br. at 27.) Oklahoma, however, cites no evidence in

support of this supposedly "clear" fact. Nor has any court ever said as much—not the state court, not the *Woods* court, not even the 1970 state court. In truth, the Area Director merely "acknowledge[d] receipt of notice" of the 1970 proceeding (EH Def.'s Ex. 14 at 12), a far cry from "consent and approval." 59 Stat. 313, § 1.

2. Storts failed to affirmatively approve the conveyance.

The state court's conclusion that Storts's participation in the 1970 proceeding "constituted the requisite approval of the Secretary of the Interior," *Magnan v. State*, 207 P.3d at 404, is also "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). There is no record indicating that Storts affirmatively approved the conveyance—the minimum requirement no matter which statute applies. *See* 69 Stat. 666, § 2(a) (1955 Act: requiring Indian to "*apply* to the Secretary of the Interior for an *order* removing restrictions") (emphasis added); 59 Stat. 313, § 1 (1945 Act: requiring "*consent and approval* of the Secretary of the Interior") (emphasis added). Instead, Storts did no more than decline to ask any questions at the hearing. (*See* EH Def.'s Ex. 14 at 30 ("No questions.").)

Oklahoma's lone support for its contention that Storts approved the conveyance is the state court's order approving the deed. (Appellee's Br. at 27 n.11.) That order, however, addresses the 1947 Act's provisions addressing *inherited transfers* only, not those addressing purchased transfers. Indeed, as

Magnan pointed out in his opening brief (at 31-33), the order provides only that (1) Storts "requested the Court to approve said deed without submitting the same at public auction" (EH Def.'s Ex. 14 at 4)—foregoing the 1947 Act's allowance for "competitive bidding," 61 Stat. 731, § 1(d)—and (2) that Storts "agreed that said conveyance would be in the best interest" of Kizzie Tiger Wolf (EH Def.'s Ex. 14 at 4)—satisfying the 1947 Act's requirement that the conveyance be in "the best interest of the Indian." 61 Stat. 731, § 1(c).

3. Any purported approval at the 1970 proceeding violated statutory and regulatory requirements.

The State's argument fails for a third reason, namely that the 1970 conveyance did not comply with Department of Interior regulations. As explained in Magnan's opening brief, three statutes were enacted prior to 1970 regarding the removal of alienability restrictions on Indian land: the 1928, 1945, and 1955 Acts. (*See* Appellant's Br. at 26-27.) Pursuant to long-standing precedent, the most recent law on the books—the 1955 Act—controls. *See United States v. Yuginovich*, 256 U.S. 450, 463 (1921); (*see also* EH Tr. at 31, 36 (current Interior Department officials testifying that 1955 Act governs).)

To comply with the 1955 Act, two things were required: (1) an application by the landowner, and (2) an order from the Secretary. 69 Stat. 666, § 2(a). Rather than arguing that either requirement was met, let alone both, the State instead

argues that the 1945 Act controls. (Appellee's Br. at 26 n.10.) But Oklahoma cites no authority to that effect.

Equally unavailing is its assertion that the 1955 Act does not address the removal of restrictions for a particular conveyance. The face of the statute contains no such limitation. *See* 69 Stat. 666, §§ 1, 2(a) ("Any Indian of the Five Civilized Tribes may apply to the Secretary of the Interior for an order removing" "restrictions against alienation . . . of lands belonging to Indians of the Five Civilized Tribes in Oklahoma.").

At all events, regardless which statute applies, "the regulations of the Department of the Interior were" basically ignored, a fact the State largely confirms. (Appellee's Br. at 27 (noting that regulations "were not followed to the letter").) Notably, "regulations validly prescribed by a government administrator are *binding* upon him . . . even when the administrative action under review is discretionary in nature." *Service*, 354 U.S. at 372 (emphasis added). On that basis, the Supreme Court invalidated an action by the Attorney General where he personally considered an application to suspend deportation because, by regulation, the Attorney General had delegated that authority to the Board of Immigration Appeals. *United States ex rel. Accardi*, 347 U.S. 260, 267 (1954).

As Magnan pointed out in his opening brief (at 35-36), Department regulations in effect in 1970 required: (1) an "[a]pplication for the removal of

restrictions"; (2) "made in triplicate on approved form Five Civilized Tribes, 5-484"; (3) "submitted to the superintendant for the Five Civilized Tribes or any field clerk"; (4) an "order" from the Secretary "providing the terms under which the land may be sold"; (5) the advertisement of the property "for sale at public auction"; (6) an inspection and appraisal; and (7) "appropriate endorsements upon the order for removal of restrictions from the land sold and on the deed of conveyance." 25 C.F.R. §§ 121.34, 121.36, 121.37, 121.43 (1970). Not one of these regulations was complied with.

Nor can this failure be explained by a general Department regulation permitting the Secretary to "'waive or make exceptions to his regulations . . . where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.'" (Appellee's Br. at 27 (quoting 25 C.F.R. § 1.2 (1960).) Other than quoting the regulation, the State makes no attempt to argue that it was complied with. It was not. Because its terms are "binding" on the Secretary, the Secretary must (1) "find[] that [a] waiver or exception is in the best interest of the Indians," and (2) affirmatively "waive or make [an] exception[]" to the applicable regulation. *Id.* There is no evidence of either one, let alone both. And any ambiguity as to the statutory or regulatory requirements and their application here must be resolved in favor of preserving the Indian Country designation. (*See* Appellant's Br. at 41-43.)

B. Oklahoma's Reliance On *Woods* Is Misplaced.

No more availing, for numerous reasons, is the State's reliance on the decision in *United States v. Woods*. (*See* Appellee's Br. at 20-22, 26-27.) For one thing, the *Woods* court lacked much of the jurisdictional evidence in this record, a point Oklahoma fails to answer. (Appellant's Br. at 43-46.) For another thing, as a trial court case involving a different defendant, *Woods* is not binding here. And at all events, Oklahoma does not contest the fact that the past treatment of property cannot override the proper application of the Indian Country statute. (Appellant's Br. at 45 (citing *United States v. John*, 437 U.S. 634, 649-54 (1978)).)

C. The Equitable Considerations Cited By Oklahoma Cannot Dictate The Existence Of Federal Jurisdiction.

Lastly, Oklahoma resorts to myriad arguments ranging from subsequent tax treatment of the property to the State's expenditure of resources exercising jurisdiction. (*See* Appellee's Br. at 28-36.) Plainly, such considerations are irrelevant in determining whether a state criminal court violated the province of exclusive federal jurisdiction.

Even if the equities cited by the State could apply as to the property owner, they cannot apply to Magnan, who was a stranger to these activities. Simply put, Oklahoma cannot foreclose Magnan from asserting his rights based on the actions of others, in particular, actions no court would ever permit Magnan to challenge. For instance, the result of a hypothetical title dispute, such as Ms. Wolf's heirs

bringing a quiet title action, cannot impact whether *Magnan* is ultimately executed as a result of being tried in the wrong court. Likewise, *Magnan's* due process and habeas rights cannot be trumped because the State spent some amount of "time and resources" exercising jurisdiction over this one-acre tract of land. (*Id.* at 31.)

Because the 1970 conveyance did not extinguish the Indian title to the surface estate, the land at issue was subject to exclusive federal jurisdiction.

III. KIZZIE TIGER WOLF'S TRANSFER OF THE LAND TO THE HOUSING AUTHORITY CREATED A RESULTING TRUST, WHERE WOLF REMAINED THE REAL OWNER.

Likewise, as explained in Magnan's opening brief, there is little doubt that Wolf was always the "real owner" of the property at issue, given the nature of the transfer to the Housing Authority for her benefit. *Cacy v. Cacy*, 619 P.2d 200, 202 (Okla. 1980); (Appellant's Br. at 47-57). The property was held in trust, a dispositive fact because, as both the Supreme Court and Department of Justice recognize, "land held in trust by the United States for a tribe or individual Indian is also accorded Indian Country status." 9 U.S. Attorneys' Manual § 9-20.100 Criminal Resource Manual at 677 (1997) (citing *Oklahoma Tax Comm'n v.Potawatori Indian Tribe*, 498 U.S. 505 (1991)). Here too, Oklahoma's response avoids the plain record before the state court.

A. The Court Can Review Whether A Trust Arose Here.

The State asserts that the Court need not determine whether a resulting trust was created because Magnan failed to raise and exhaust the claim in the state court proceeding. (Appellee's Br. at 36-37.) Given the jurisdictional issues at the heart of this appeal, however, the issue is one the court must take up. "Subject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). Indeed, "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Id.* (citation omitted); *see also Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539-41 (10th Cir. 1992) ("our responsibility to ensure even sua sponte that we have subject matter jurisdiction before considering a case differs from our discretion to eschew untimely raised legal theories"). Put another way, the Court "must . . . satisfy itself of its power to adjudicate in every case and *at every stage of the proceedings* and the court is not bound by the acts or pleadings of the parties." *Tafoya v. Dep't of Justice*, 748 F.2d 1389, 1390 (10th Cir. 1984) (emphasis added).

Likewise, there is no doubt that Magnan's jurisdictional claim was raised and exhausted in all prior proceedings. Indeed, that was the singular focus of those proceedings. Thus, to the extent jurisdictional challenges must be raised previously, that is exactly what occurred here.

B. As Argued In The State Court Below, Wolf Was The True Owner Of The Property Before, During, And After The Transaction.

Further, the state court was presented with a clear factual record demonstrating the existence of a resulting trust. For example, Monta Sharon Blackwell, a former Deputy Commissioner of Indian Affairs for the Department of Interior, testified in state court that Wolf received "a valuable benefit" by having the housing authority construct her home. (EH Tr. at 102.) Alan Woodcock, the Field Solicitor for the Department of Interior, agreed, stating that there was "no question" that Wolf's conveyance of the land to the Housing Authority was done "for the benefit of the owner." (*Id*. at 49.) As the Department of Justice has emphasized, guidance from the Field Solicitor is critical in making Indian Country determinations. *See* 9 U.S. Attorneys' Manual § 9-20.100 Criminal Resource Manual at 677 ("United States Attorneys should attempt to familiarize themselves with the boundaries of their off-reservation allotments with the assistance of the Field Solicitor.").

The Warranty Deed and the Order Approving Deed and Authorizing [Its] Delivery, both of which were presented in state court, confirmed this plain conclusion. The Warranty Deed stated "that a dwelling unit will be completed upon the hereinafter described property within two years from the date hereof" under the terms of the Annual Contributions Contract between the Housing Authority and the Secretary of HUD. (EH Def.'s Ex. 19.) The Order in turn notes

that the conveyance was made to the Housing Authority "for and in consideration of the benefits to be derived by the Petitioners under the terms of a certain contract entered into between the [Housing Authority] and the Petitioner[], which said terms provide among other things that the [Housing Authority] will cause a dwelling unit to be constructed for said Petitioner[]." (EH Def.'s Ex. 14 at 1.)

Likewise, as further revealed in state court, the entity holding the deed in trust for Wolf was the Housing Authority, a government agency supervised and funded by the United States government. *See Housing Auth. of Seminole Nation v. Harjo*, 790 P.2d 1098, 1101-02 (Okla. 1990) (explaining in detail the control HUD had over the Housing Authority). For the Housing Authority to construct a house for Wolf, she was required temporarily to give legal title of the property to the Housing Authority under HUD's Mutual Help program. (*See* EH Def.'s Ex. 25 at 186, 188.) That program, which was designed to construct and fund housing for Indians with low incomes, included HUD-based regulations and restrictions imposed on the Housing Authority. *Harjo*, 790 P.2d at 1102. The federal government's control over Wolf's property following the conveyance demonstrates the government's superintendence over this "Indian Country" parcel. *Id*. at 1101-02.

The State falls short in its effort to distinguish *Harjo* and *Ahboah v. Housing Authority of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983). As illustrated in Magnan's

opening brief (at 51-55), *Harjo* and *Ahboah* not only detail the control the federal government had over these housing authority operations, *Harjo*, 790 P.2d at 1101-02, but also highlight how land originally classified as Indian Country maintains its Indian characteristics and restricted status despite a series of transfers between an Indian owner and a housing authority, *Ahboah*, 660 P.2d at 626, 629. Contrary to the State's suggestion, the focus is not on the original classification of the Indian land or even the type of transaction between an Indian owner and a housing authority. Rather, the focus is on the regulation and federal superintendence the government exercises over the transaction and subsequent construction while legal title was in its possession. *See id*. at 629 (citing *United States v. Pelican*, 232 U.S. 442, 449 (1912)); *see also Harjo*, 790 P.2d at 1103-04.

Here, as demonstrated in the state proceedings, the transaction was no different than the many other Housing Authority transactions that occurred in eastern Oklahoma, with HUD controlling nearly every aspect of the transaction. Accordingly, regardless who held legal title to the Wolf property, the United States government held the land in trust for her benefit. As a result, under well-established federal law, the land maintained its Indian characteristics. *See Pelican*, 232 U.S. at 447-49 (holding that when the government holds land in trust for Indians it maintains its Indian characteristics and is Indian Country).

* * * * *

As a final note, the State claims that as a matter of policy, Magnan's request for habeas relief should be denied because determining whether land is Indian Country is "complicated and often, as in this case, requires a title search" (Appellee's Br. at 41), making jurisdictional determinations difficult and the job of law enforcement "all but impossible." (*Id*. at 41-42.)

To be sure, clear cut rules defining Indian Country benefit everyone, law enforcement included. But ultimately, it is courts, not law enforcement, that determine whether jurisdiction exists to hear a case. *See United States v. Tony*, 637 F.3d 1153, 1157-58 (10th Cir. 2011) ("Subject-matter jurisdiction cannot be forfeited or waived 'because it involves a court's power to hear a case.'") (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). And issues concerning jurisdiction, especially when determining whether land is Indian Country, often require complex factual and historical analysis. *See, e.g., Blatchford*, 904 F.2d at 542 (analyzing cases back to 1913 to determine whether land is Indian Country); *Ellis*, 351 F.2d at 250 (citing Treaty of October 21, 1982 as basis for determining land was not Indian Country). Making this determination is a court's obligation, indeed duty, one that is especially critical when the outcome means the difference between life and death.

Here, that determination should have been fairly routine. After all, in state court, five knowledgeable witnesses each testified that the land was Indian Country at the time of the crimes. (EH Tr. at 24, 38-39, 62-63, 76, 84.) In fact, one witness, Eddie Streater, the Superintendent of the Wewoka Agency, BIA, stated that if law enforcement would have called him following the Magnan crimes, he would have informed them that the land was restricted Indian Country:

> Q: And if the BIA police called you today about a crime that had been committed in that same house how would you advise them?
>
> A: I would advise that our Agency still considers that to be restricted.

(*Id.* at 31.) The State offered no testimony to the contrary.

All told, because the land never lost its Indian Country status, it is subject to exclusive federal jurisdiction.

IV. SEPARATELY, BECAUSE THE INDIAN MINERAL INTERESTS IN THE PROPERTY WERE NEVER EXTINGUISHED, THE PROPERTY WAS INDIAN COUNTRY AT THE TIME OF MAGNAN'S CRIMES.

Oklahoma "does not dispute that 4/5ths of the mineral rights remain restricted." (Appellee's Br. at 42 n.14.) Nor does the State dispute that Indian ownership of mineral interests constitutes "title" to those mineral interests under applicable Oklahoma law. In short, there should be no dispute that Indian title has not been extinguished as to 80% of the mineral interests in this allotment.

Faced with this plain conclusion, Oklahoma argues that there is "no clearly established federal law regarding what effect, if any, mineral interests have in determining whether land is considered Indian country," and, further, that "only the surface estate" supposedly matters "for purposes of determining criminal jurisdiction." (Appellee's Br. at 43, 51.) It is wrong on both counts.

First, clearly established federal law confirms that Indian allotments that remain restricted against alienation constitute Indian Country. *United States v. Ramsey*, 271 U.S. 467, 471 (1926). Further, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S 520 (1998), commands that courts determine Indian Country status by interpreting the intent of Congress as expressed through § 1151, *not* by applying a judicially crafted balancing test, as the state court did here. *See also* 9 U.S. Attorneys' Manual § 9-20.100 Criminal Resource Manual at 677 (citing *Ramsey*, *Venetie*, *John* and *Pelican* as governing federal law on the definition of "Indian Country").

Second, the law is well-settled that the owner of the mineral estate has clear and dominant rights over the surface estate and that, in any event, Indian title to the mineral estate cannot be ignored for purposes of determining Indian Country status.

A. The Oklahoma Court Violated Clearly Established Federal Law By Ignoring The Plain Language Of § 1151(c) And Instead Applying A Non-Statutory Balancing Test.

All seem to agree that Indian ownership of 80% of the mineral interests constitutes "title" to an estate in the subject property under Oklahoma law. Nor is there disagreement that the key question here is "what Congress meant by the words 'Indian titles.'" (Appellee's Br. at 46-47.) Indeed, clearly established federal law requires courts to determine whether an allotment is "Indian country" by applying the definition set forth in § 1151. *Cf. Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009) (where the "statutory text is plain and unambiguous, . . . [the courts] must apply the statute according to its terms"). Indeed, the Supreme Court in "*Venetie* held that Congress–not the courts, not the states, not the Indian tribes–gets to say what land is Indian country subject to federal jurisdiction." *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1151 (10th Cir. 2010).

Despite this clearly established rule, the state court did not even reference, much less apply, the Indian Country definition in § 1151(c). Rather than seeking to determine "what Congress meant by the words 'Indian titles,'" as it was required to do under clear Supreme Court precedent (Appellee's Br. at 46-47), the state court applied its own "contacts and interests" balancing test, framing the issue as "whether a fractional interest in the mineral estate that is subject to restriction on alienation as Indian allotment property may burden the unrestricted surface estate

in such a way to cause the surface estate to be categorized as Indian Country." *Magnan*, 207 P.3d at 405. The court in turn determined that the property was not Indian Country because Indian ownership of 80% of the mineral estate "subject to restrictions on alienation as Indian allotment property" is "insufficient to deprive the State of criminal jurisdiction over the surface of the property at issue here." *Id*.

In so doing, "'the state court applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases.'" *Black v. Workman*, 682 F.3d 880, 892 (10th Cir. 2012) (quoting *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)) (second alteration in original). First, as Oklahoma concedes, in *Ramsey*, the Supreme Court established that "an allotment constitutes Indian country whether it is a trust allotment or a restricted allotment." (Appellee's Br. at 43 (citing *Ramsey*, 271 U.S. at 470-71).) Here, there is no dispute that the property at issue is part of an original restricted Indian allotment and that 80% of the mineral interests remain "subject to restrictions on alienation as Indian allotment property." *Magnan*, 207 P.3d at 405. Therefore, the state court's holding that the subject property is not Indian Country contradicts "governing law," set forth in *Ramsey*, that restricted allotments constitute Indian Country.

Second, the state court's decision contradicts the holding in *Venetie*, 522 U.S. 520, 525 (1998), that the Indian Country determination must be based on

Congress's definition of Indian Country in § 1151(c). This Court's analysis of *Venetie* bears repeating: "Simply put, *Venetie* held that Congress–not the courts, not the states, not the Indian tribes–gets to say what land is Indian country subject to federal jurisdiction." *Hydro Res.*, 608 F.3d at 1151. Thus, the starting point for determining what land Congress says is Indian Country is the plain meaning of § 1151. *See id*. at 1148 (basing its holding on "*Venetie's* exposition of the statute's plain meaning").

Venetie examined the meaning of the term "dependent Indian communities" in § 1151(b), determining that it means land that was set aside for Indian use and federal superintendence. 522 U.S. at 527. In so doing, the Supreme Court rejected the circuit court's use of a balancing test to determine whether land is a dependent Indian community, as it "reduced the federal set-aside and superintendence requirements to mere considerations." *Id*. at 531 n.7. In other words, courts cannot override the statutory definition of Indian Country by balancing the statute against extra-statutory considerations.

Yet that was exactly what occurred here. Rather than apply the statutory language of § 1151(c), the state court balanced Indian ownership of an 80% interest "in the mineral estate that is subject to restrictions on alienation as Indian allotment property" against "the State's interest in exercising criminal jurisdiction over this property." *Magnan*, 207 P.3d at 405, 406. That the mineral estate "is

subject to restrictions on alienation as Indian allotment property," *id.*, makes the property an "Indian allotment, the Indian titles to which have not been extinguished," plain and simple. 18 U.S.C. § 1151(c). Just as the balancing test in *Venetie* improperly reduced to "mere considerations" the elements that make land a dependent Indian community under § 1151(b), *i.e.*, federal set-aside and superintendence, the state court's balancing test here reduced to "mere considerations" the elements that make land an "Indian allotment, the Indian titles to which have not been extinguished" under § 1151(c), *i.e.*, unextinguished Indian title to the allotment's mineral estate. Because the state court "applie[d] a rule [*i.e.*, the balancing test] that contradicts the governing law set forth in [Supreme Court] cases," its decision was "contrary to Supreme Court law." *Black*, 682 F.3d at 892 (quotation omitted) (third alteration original).

B. The Mineral Estate May Not Be Ignored For Purposes Of Determining Indian Country Status.

Having conceded that Indian title to 80% of the mineral interests in the subject Indian allotment has not been extinguished, Oklahoma argues "that for purposes of determining criminal jurisdiction, it is only the surface estate that matters." (Appellee's Br. at 51.) That is so, the State contends, because the "reserved mineral interests do not affect the surface estate of the land." (*Id*. at 47.) None of Oklahoma's cases, however, involve the application of § 1151(c), the only section of the statute that involves "title" to property, and thus the only section that

implicates both the surface and subsurface estates. What is more, Oklahoma ignores the fact that the surface and subsurface estates are inextricably linked, as the owner of the subsurface estate has clear, established rights over the surface for purposes of exploring for and producing minerals. *Enron Oil & Gas Co. v. Worth*, 947 P.2d 610, 613 (Ok. Civ. App. 1997).

To start, the State cites two Supreme Court cases and several circuit cases involving Indian reservations, asserting that these cases "strongly suggest that mineral interests are *not* relevant" here because in each instance, whether the tribes at issue retained mineral interests in the land had no bearing on the land's status as a reservation or the tribe's regulatory authority over the surface. (*Id*. at 44-45.) But only three of these cases, *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), and *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981), involved an Indian Country determination under § 1151. And even then, those cases concerned only Indian reservations, § 1151(a). That distinction is significant. After all, unlike a § 1151(c) analysis, which turns on the status of the Indian titles, thereby implicating the title to the mineral interests in the real property, reservations are distinct statutory creations, and determining reservation status has nothing to do with title considerations. *See Osage Nation*, 597 F.3d at 1121-22 ("Congress has the power to diminish or disestablish a reservation," and in determining whether Congress

has done so, "Congress's intent at the time of the relevant statute governs [the courts'] analysis.").

Oklahoma next argues that "what makes land Indian country is a federal set-aside and federal superintendence of the land." (Appellee's Br. at 45.) According to the State, because the federal government no longer has superintendence over the surface estate, any federal superintendence over the subsurface "has no bearing on the commission of crimes on the surface," as Indian "reserved mineral interests do not affect the surface estate of the land." (*Id*. at 46-47.)

This narrow view ignores the significance of the mineral rights. Notably, "an owner of a mineral estate which has been severed from the surface has the exclusive right of reasonable ingress and egress upon the surface for purposes of exploration, development, and production of minerals." *Enron Oil & Gas*, 947 P.2d at 613. Indeed, contrary to the State's contention, in "Oklahoma, the owner of a mineral interest has the right to enter the land to explore for oil and gas," which "is in the nature of a property right, and the surface estate is servient to the dominate estate for the purpose of oil and gas development." *Kimzey v. Flamingo Seismic Solutions Inc.*, 696 F.3d 1045, 2012 U.S. App. LEXIS 21360, at *5 (10th Cir. 2012). In that sense, the mineral owners enjoy access to the surface estate akin to a "right[] of way running through the [allotment]." 18 U.S.C. § 1151(c).

In other words, Indian ownership of the mineral estate includes, as "a property right," the right to make use of the surface. *Kimzey*, 2012 U.S. App. LEXIS 21360, at *5. Accordingly, federal superintendence over the mineral estate extends to the surface of the property, given the unquestioned Indian ownership of the dominant mineral estate. For this reason too, the surface of this allotment remains Indian Country.

* * * * *

The parties' disagreement here is perhaps best reflected by their respective readings of *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995). Oklahoma argues that "only the surface estate" matters here because "*Watchman* confirms that for purposes of determining Indian country, the surface and subsurface estates may be treated separately." (Appellee's Br. at 51.) In fact, just the opposite is true.

In *Watchman*, the Navajo Nation sought to impose a business tax on revenues gained from a mine located on land in which 47% of the surface area (but none of the mineral interests) were held in trust by the United States "for individual Navajo allottees," on the ground that the mine was located on Indian Country as defined by § 1151(c). 52 F.3d at 1534-35. In response, the mining company argued that § 1151(c) "contemplates a title-based jurisdictional nexus," and that "[b]ecause the Tribe [was] attempting to tax the source gains from [the

company's] mining activities, there must be Indian title or a trust relationship to the subsurface coal estate to establish its jurisdiction." *Id*. at 1536. Thus, the company argued, the mine was not in Indian Country because none of the Navajos had "any interest in the subsurface coal estate." *Id.* This Court disagreed, holding that the "Navajo trust allotments are Indian country by definition under 18 U.S.C. § 1151(c)," and therefore could be subject to tribal jurisdiction to tax the mineral estate regardless of whether the tribe had title to the mineral estate. *Id*. at 1541.

Here, Oklahoma makes essentially the same argument rejected in *Watchman*. Just as the mining company argued that the Navajo's interest in the surface estate was irrelevant for purposes of determining the tribe's jurisdiction to tax the mineral interests, given the alleged absence of nexus between the surface and the taxation of subsurface minerals, the State argues that only the surface estate matters for purposes of determining criminal jurisdiction because title to the mineral interests "has no bearing on the commission of crimes on the surface." (Appellee's Br. at 46.) *Watchman* found "no citations in support of [this] rather novel theory," 52 F.3d at 1542, and Oklahoma offers none here. Thus, under *Watchman* and the plain language of the Indian Country statute, the unextinguished Indian title to the mineral estate of the property means the property is "Indian country by definition under 18 U.S.C. § 1151(c)." *Id*. at 1541.

CONCLUSION

For the reasons stated above and in Magnan's opening brief, the Court should reverse the district court's denial of Magnan's § 2254 petition and hold that Oklahoma lacked jurisdiction to prosecute him for his crimes, allowing the federal government properly to assert jurisdiction.

Dated: December 6, 2012

Respectfully submitted,

s/ Chad A. Readler
Chad A. Readler
Counsel of Record
careadler@jonesday.com
JONES DAY
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Gary Peterson
211 N. Robinson Ave., Suite 450 South
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3367

Steven A. Broussard
Michael J. Lissau
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, Oklahoma 74103
Telephone: (918) 594-0400

ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 7,352 words. I relied on my word processor to obtain the word count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

s/ Chad A. Readler

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLANT'S REPLY BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee program version 4.5.0.1852, with updated virus definitions, and, according to the program, the document is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Chad A. Readler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S REPLY BRIEF was furnished through (ECF) electronic service to the following on this the 6th day of December, 2012:

Jennifer L. Crabb, Esq.
Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Attorney for Respondent

s/ Chad A. Readler
One of the Attorneys for Petitioner