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

BRIEF OF *AMICUS CURIAE*, THE SEMINOLE NATION OF OKLAHOMA, IN SUPPORT OF PETITIONER/APPELLANT REGARDING THE DEFINITION OF INDIAN COUNTRY

Eugene K. Bertman, OBA #19406
gbertman@mccormickbryan.com
Jennifer Henshaw McBee, OBA #19170
jmcbee@mccormickbryan.com
MCCORMICK & BRYAN, PLLC
2529 S. Kelly Ave., Suite A
Edmond, OK 73013
Telephone: (405) 225-2300
Facsimile: (405) 225-2301
Attorneys General for the Seminole Nation of Oklahoma

July 24, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

I. INTRODUCTION

The Seminole Nation of Oklahoma (the "Seminole Nation") submits the following amicus brief in support of the Petitioner/Appellant, David B. Magnan for his Petitotion for writ of habeas corpus pursuant to 28 U.S.C. § 2254. All parties have consented to the filing of this brief pursuant to Fed. R. App. P. Rule 29(a). The Nation does not support the proposition that Mr. Magnum should be exonerated for his crimes. It is clear from the record that he admitted to killing four individuals on the subject one-acre tract and he must be punished for his crimes. However, the Seminole Nation of Oklahoma supports reversal of the District Court because the property at issue is Indian Country pursuant to 18 U.S.C. § 1151(c), Thus, Mr. Magnum should be tried under 18 U.S.C. § 1153 in the United States District Court for the Eastern District.

II. INTEREST OF THE AMICUS CURIAE

The Seminole Nation of Oklahoma is a federally recognized Indian tribe located within the confines of Seminole County, Oklahoma. The one-acre tract at issue in this case is part of a Seminole allotment to Jimpsey Tiger, Seminole Role No. 1204. The Seminole Nation has an interest in the status of the property because if it is Indian country, the Nation will have limited criminal jurisdiction, as well as more extensive civil and legislative authority with respect to certain activities on the property. *See eg.* 18 U.S.C. § 1152; *Montana v. United States*, 450 U.S. 544 (1981). In addition to the jurisdictional issue, many of the Seminole Nation's citizens are confronted with the same checkerboard jurisdictional issue as in this case where a one-acre tract in the middle of their restricted allotment was conveyed to the Seminole Nation Housing Authority for the

building of a home under a Mutual Help and Occupancy Agreement pursuant to a program sponsored by the Seminole Nation in conjunction with the Department of Housing and Urban Development. *See generally Hous. Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098, 1099 (Okla. 1990) *overruled on other grounds by Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.*, 896 P.2d 503, 509 (Okla. 1994).

III. STATEMENT OF THE CASE

In the underlying State Court action, Petitioner pled guilty to three counts of First Degree Murder and was sentenced to death. *Magnan v. State*, 207 P.3d 397, 401 (Okla. 2009). Petitioner challenged the jurisdiction of the State Court on appeal for the statutorily required sentence review in the Oklahoma Court of Criminal Appeals. *Id.* Among other issues, the Petitioner raised the issue over whether the one-acre tract where the crime occurred was Indian country under 18 U.S.C. § 1151(c), which would deprive the State Court of jurisdiction. *Id.* at 402. The Oklahoma Court of Criminal Appeals held that the land was not Indian country and thus, was not subject to the Major Crimes Act found at 18 U.S.C. § 1153. *Id*. at 402-06.

Thereafter, Petitioner filed the underlying action in the United States District Court for the Eastern District of Oklahoma for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, on the basis that the one-acre tract where the crimes were committed is Indian country and thus, the crimes were subject to the exclusive jurisdiction of the Federal courts under the Major Crimes Act, 18 U.S.C. § 1153. *Petitioner's Brief in Support of Habeas Corpus Relief*, District Court Doc. # 25, Filed August 2, 2010. The

District Court, by order dated August 23, 2011, denied the petition. *Opinion and Order*, District Court Doc. No. 36, filed August 23, 2011. This appeal ensued.

The issue on appeal is whether the property is Indian country pursuant to 18 U.S.C. § 1151, thus depriving the State Court of jurisdiction under to 18 U.S.C. § 1153.

IV. SUMMARY OF THE ARGUMENT

The one-acre allotment remains Indian Country as defined by 18 U.S.C. § 1151(c) because the Indian title to the tract has not been extinguished. The surface rights remain in restricted status because the deed in 1970 from Kizzie Tiger, one of Jimpsey Tiger's descendants, to the Seminole Nation Housing Authority (1) was not properly approved pursuant to the laws to remove the restrictions against alienation as enacted by Congress and the implementing regulations promulgated by the Secretary of the Interior; *See McElroy v. Pegg,* 167 F.2d 668, 671 (10th Cir. 1948) ("Congress has plenary power to impose, continue, remove, qualify, or reimpose restrictions with respect to the conveyance of Indian lands."); or (2) was only intended to be a mortgage despite the deed being in absolute form, thus, Congress only lifted the restricted status for the one acre tract for the purposes of a foreclosure action. 25 U.S.C. § 483a; *Fed. Land Bank of Wichita v. Burris*, 790 P.2d 534, 538 (Okla. 1990). In addition, even if this Court determines the restriction to alienation for the surface rights have been removed, since the underlying mineral interests have remained restricted to alienation, the Indian title has not been completely extinguished and the subject one-acre tract is Indian country. *See*

discussion in Hydro Res., Inc. v. U.S. E.P.A., 608 F.3d 1131, 1159 (10th Cir. 2010)[1]

V. FACTUAL BACKGROUND REGARDING THE TITLE TO THE ONE-ACRE TRACT

There is little dispute as to the underlying facts regarding title to the one-acre tract at issue. The one-acre tract is part of a larger 200-acre allotment to Jimpsey Tiger, Seminole Role No. 1204. [EH Tr. pp. 54-55; EH Def's Ex. 12 at 3, and 5].[2]

Jimpsey Tiger died in 1944 and the property passed in 1/5th fractional interests in the 200 acre allotment to his second wife Lena Tiger and four children, Mandy Tiger Wise, George Tiger, Corena Tiger and Kizzie Tiger, whom all were greater than ½ Indian blood. [EH Def's Ex. 12 at 5] With the approval of the Secretary of the Interior, Lena Tiger sold her 1/5th interest in the surface rights only to the 200-acre allotment to George Tiger. [EH Def's Ex. 12 at 5.] In 1950, with the approval of the Secretary of the Interior, Kizzie Tiger purchased all surface rights from her siblings (2/5 from George Tiger, 1/5 from Mandy Tiger Wise and 1/5 from Corena Tiger). [EH Def.'s Ex 12 at 5, 11.] As of 1950, Kizzie Tiger owned all of the surface rights (1/5th acquired by inheritance and 4/5th by conveyance from her siblings) and 1/5th of the mineral rights (acquired by inheritance) under restricted status. [EH Def.'s Ex. 12 at 5-6.]

---

[1] "To be sure, Congress sought to mitigate, to a degree, the checkerboarding created by the allotment system by extending federal jurisdiction over 'all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*.' 18 U.S.C. § 1151(c) (emphasis added)." *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1159 (10th Cir. 2010)

[2] The amicus will use the same record convention as Petitioner. The state court record was filed on December 20, 2010 at Docket No. 29. Citations to that record are in the following formats. "EHR" refers to the evidentiary hearing record prepared by the state trial court, including the parties' stipulations and the trial court's findings of fact and conclusions of law. "PH Tr." refers to the transcript of the June 28, 2004 preliminary hearing in state trial court. "EH Def.'s Ex." refers to Defendant's exhibits introduced at the December 17, 2007 state trial court evidentiary hearing. "EH Tr." refers to the transcript of the December 17, 2007 state trial court evidentiary hearing.

On February 20, 1970, Kizzie Tiger, now Kizzie Tiger Wolf, executed a deed purporting to convey the surface rights to the property to the Seminole Nation Housing Authority but expressly reserving the mineral interests. [EH Def's Ex. 19.] After executing the deed, Kizzie Tiger Wolf petitioned the Seminole County District Court in Oklahoma for judicial approval of the deed. [EH Def's Ex. 14 at 5-8.] The conveyance was made for the construction of a house. [EH Def's Ex. 14 at 5-8.] Under the terms of the agreement, Kizzie Tiger Wolf was required to make monthly payment and, if she failed to make the payments, she could lose her home. [EH Def's Ex. 14 at 30] Specifically, in court, Mrs. Wolf was asked:

> Q. Mrs. Wolf, do you understand that under this contract you will be required to make certain monthly payments on the house?
> A. yes.
> Q. Do you understand that in the event for any reason you fail to make the monthly payments, and this failure to pay continues over a period of time, you may lose the house?
> A. Yes, sir.

[EH Def's Ex. 14 at 30.] Pursuant to the terms of the contract, after a set term of years, the Seminole Nation Housing Authority would deed the property back to Mrs. Wolf. *Hous. Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098, 1099 (Okla. 1990) *overruled on other grounds by Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.*, 896 P.2d 503, 509 (Okla. 1994); [EH Def's Ex. 20.] In 1981, pursuant to the terms of the contract, the Seminole Nation Housing Authority conveyed the property back to Kizzie Tiger Wolf. [EH Def's Ex. 20.]

Kizzie Tiger Wolf died in 1991. [EH Def.'s Ex. 15 at 1] Her full interest in the surface rights and her 1/5th interest in the mineral rights were divided among her husband

and their nine children, all of whom were at least ½ Indian blood. [EH Def.'s Ex. 15 at 57-63; EH Def's Ex. 12 at 6] At the time of the murders by Petitioner, these interests remained in the possession of Kizzie Tiger Wolf's heirs and their successors. [EH Def's Ex. 12 at 6].

Previously in 1998, another murder occurred on the same property. [EH Def's Exhibits 25, 26 and 27] In that case the Federal Government sought to prosecute Carl Woods in Federal Court. The United States District Court for the Eastern District of Oklahoma dismissed the complaint based on the jurisdiction issue under the 18 U.S.C. § 1151. [EH Def's Ex. 26 at p. 12.] However, that court did not consider the application of *McElroy v. Pegg*, 167 F.2d 668 (10th Cir. 1948) and Okla. Stat. tit. 46 § 1. The decision was not appealed to this Court.

VI. THE ONE ACRE TRACT IS SEMINOLE INDIAN COUNTRY

A. The 1970 Seminole County District Court Proceeding Could Not Transfer the 4/5 Purchased Interest in the One-Acre Tract

The transfer to the Seminole Nation Housing Authority in February 1970 failed to comply with the Act of August 11, 1955, 69 Stat. 666, to transfer the Kizzie Tiger Wolf's 4/5 purchased interests in the one acre-tract. Thus, the property stayed in restricted status and is Indian country pursuant to 18 U.S.C. § 1151(c).

In 1887, Congress passed the General Allotment Act providing for the allotment of reservation lands in the United States, including the Oklahoma territory. 24 Stat. 388. The act, for various reasons, specifically exempted the Five Civilized Tribes, which included the Seminole Nation, and several other tribes in the Oklahoma Territory. *Id.* As

time went on, there was increasing pressure for allotment of the Five Civilized Tribes, thus, Congress created the Commission for the Five Civilized Tribes in 1893 to negotiate allotment of those lands. The Seminole Nation entered into an agreement for allotment of its lands with the Commission on December 16, 1897, 30 Stat. 567. Congress ratified the agreement on July 1, 1898. Under the agreement, the Seminole Nation's allotments were restricted from alienation under various conditions dependent on the status of the property. The agreement with the Seminole Nation was amended and supplemented several times. *See eg.* Seminole Supplemental Agreement, 31 Stat. 250 (1900); Section 8 of the Act of March 3, 1903, 32 Stat. 982. In each of the amended and supplemental agreements, the restriction on alienability was extended, either in time or to the different classes of allotted property.

Beginning in 1904, Congress stopped individually negotiating with the Five Civilized Tribes regarding allotment and adopted a policy of passing legislation that applied to all of the Five Civilized Tribes equally. The first act that affects the allotment at issue in this case was passed by Congress on May 27, 1908, 35 Stat. 312. That act required that any member of the Five Civilized Tribes with at least ¾ Indian blood could not alienate their allotment without approval by the Secretary of the Interior until April 26, 1931. Jympsey Tiger was a full blood Seminole and thus, his land was restricted from alienation. [EH Def. Ex. 12 at 5.] In 1928, Congress passed 45 Stat. 495, which extended the restriction on the allotment for another 25 years until April 26, 1956.

Jimpsey Tiger died on January 1, 1944. His lands, which included the one-acre tract where the murders occurred, were inherited by his wife and children, who were all

at least ½ Indian blood. Under a 1933 Act, Congress extended the restrictions to members of the Five Civilized Tribes with at least ½ Indian blood, no matter how they obtained their interest in the allotment (eg. inheritance) would remain restricted from alienation unless otherwise approved by the Secretary of the Interior until April 26, 1956. 47 Stat. 777. Thus, the allotment remained under restriction to alienation.

In 1947, Congress again extended the date for termination of the restriction for lands "whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, or whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and hereby, removed at and upon his or her death." 61 Stat. 731, § 1 (1947) (Also known as the August 4, 1947 Act). Thus, the restriction on alienation of Jimpsey Tiger's allotment was yet again continued. The act further authorized the removal of the restrictions by the Oklahoma State District Courts for lands acquired by inheritance under specific guidelines. 61 Stat. 731, § 2.

In 1950, George William Tiger purchased Lena Tiger's interest, with the Secretary of the Interior's approval. [EH Def's Ex. 12 at 10.] After that, Kizzie Tiger purchased the surface rights from all her siblings, including the 2/5 interest owned by George William Tiger. The transfer to Kizzie Tiger was approved by the Secretary of the Interior and remained restricted to further alienation. [EH Def's Ex. 18.]

In 1955, Congress again extended the restrictions on alienation for "the lives of the Indians who own such lands subject to such restrictions on the date of this Act." 69 Stat. 666, § 1 (1955). Section 2 provides a procedure to remove restrictions by the Secretary of the Interior. The act requires the Secretary of the Interior to act upon petition for removal

of the restrictions by the affected Indian. It is important to note that Congress recognized a distinction between seeking administrative removal of restrictions and seeking judicial approval of a conveyance of restricted lands; Section 4 of the act expressly continued applicability of the Act of August 4, 1947, including the requirement for Oklahoma State District Court approval of conveyances of restricted inherited lands.

By 1970, there were two methods to remove restrictions from restricted Five Tribes allotments: state judicial approval of conveyances resulting in removal of restrictions, and Federal administrative removal of restrictions. If the land was inherited, it could be conveyed pursuant to § 1 of 61 Stat. 731, the 1947 Act, which was continued in effect by the 1955 act. Removal of restrictions from purchased restricted interests had to be administratively approved by the Secretary of the Interior as required by the 1908 act and the 1955 act. 69 Stat. 666. [EH Tr. pp. 35-36.] Thus, the only way in which the Department of the Interior could have approved removal of restrictions of the subject tract would have been through the administrative process under the 1955 acts. 69 Stat. 666. There is no federal law or regulation authorizing some kind of blend of the administrative and the judicial actions resulting in removal of restrictions.

With that framework in mind, this Court has held that "[w]here an Indian holds legal title to lands with a restriction against alienation, the title may be transferred only under rules and regulations prescribed by the Secretary of Interior, and with his consent and approval or that of his duly authorized representative." *Bailey v. Banister*, 200 F.2d 683, 685 (10th Cir. 1952). Thus, transfers must be done in strict conformance with the Secretary of the Interior rules, regulations and statutes. "Congress has plenary power to

impose, continue, remove, qualify, or reimpose restrictions with respect to the conveyance of Indian lands." *McElroy v. Pegg*, 167 F.2d 668, 671 (10th Cir. 1948).

In 1970, Kizzie Tiger Wolf filed a petition in the Seminole County District Court to approve a previously executed deed to the Seminole Nation Housing Authority for the subject one-acre tract. [EH Def's Ex. 14.] After the required notice and a hearing pursuant to the August 4, 1947 act, 61 Stat. 731, the Court approved the transfer. [EH Def's Ex. 14 at 31.]

The problem is that the record shows that Kizzie Tiger Wolf's interest in the one-acre tract was partially inherited and partially purchased. Pursuant to the plenary authority of Congress, there were two separate procedures to transfer those two distinct categories of property interests. The inherited lands were controlled by the August 4, 1947 act, 61 Stat. 731. To remove the restrictions to the purchased lands, the procedures outlined in 69 Stat. 666 must be used. *See generally McElroy v. Pegg*, 167 F.2d 668 (10th Cir. 1948).

There is no evidence in the record that Kizzie Tiger Wolf complied with the requirements of 69 Stat. 666 and thus, the Seminole County District Court approval in 1970 was only effective as to the 1/5 inherited interest. Any removal of restrictions on the 4/5 purchased interest could have occurred only if the administrative procedures set by Congress under the 1955 Act. 69 Stat. 666. The Seminole County District Court could not approve the transfer to the Seminole Nation Housing Authority in violation of the Acts of Congress.

In order to get around requirements of the 1955 Act, 69 Stat. 666, the District Court and the Oklahoma State Court in the present case determined that the Acknowledgment of the Notice of the Hearing and the appearance of M. Dean Storts at the hearing were equivalent to the approval of the conveyance by the Secretary of the Interior. *See* Order and Opinion, District Court Doc. No. 36 at p. 12 -13; *Magnan v. State*, 207 P.3d 397, 404 (Okla. 2009).

That determination cannot be sustained under the 10th Circuit Jurisprudence. The BIA has specific regulations in 25 C.F.R. 152.1 *et seq*. Those regulations carry the force and effect of law. *McElroy v. Pegg*, 167 F.2d 668, 671 (10th Cir. 1948). Congress could have allowed the transfer to occur as it did in under the State court proceeding, but did not. *Id.* The District Court and the Oklahoma State Court could not ignore the regulations and find Secretary of Interior administrative approval based on the Federal probate attorney's participation in the state judicial proceeding under the 1947 Act. 61 Stat. 731 This Court has already determined that the administrative approval of the removal of restrictions must be obtained according to regulations imposed by the Secretary of the Interior. *McElroy*, 167 F.2d at 671.

Since the 4/5 purchased interest remained in restricted status, the Indian title had not been extinguished. The one-acre tract was Indian country pursuant to 18. U.S.C. 1151(c) at the time the murders occurred and the case must be tried under the Major Crimes Act, 18 U.S.C. § 1153, in Federal court.

B. The 1970 Deed Was A Mortgage

In the District Court and in the underlying State Court action, those Courts determined that notice to on the Area Director for the Bureau of Indian Affairs, notice to the United States Department of Interior and the appearance of M. Dean Storts, Trial Attorney for the United States Department of Interior was sufficient to remove the restrictions as to the one-acre tract. *See* Order and Opinion, District Court Doc. No. 36 at p. 12 -13; *Magnan v. State*, 2009 OK CR 16, 207 P.3d 397, 404. Even if that is the case, the conveyance to the Seminole Nation Housing Authority could only be a mortgage. Under Oklahoma law,

> [e]very instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such either in an action to enforce the mortgage or pursuant to a power of sale as provided for in the Oklahoma Power of Sale Mortgage Foreclosure Act.

Okla. Stat. tit. 46 § 1; *Fourth Nat. Bank v. Mem'l Park*, 75 P.2d 887, Syl. 1 (Okla. 1937). Thus, the deed could only operate as a mortgage.

"Whether a transaction, evidenced by an absolute conveyance, will be held to be a sale or only a mortgage must be determined by a consideration of the peculiar circumstances of each case." *Edmundson v. State ex rel. Johnson*, 73 P.2d 150, 151 (Okla. 1937) "The form of the conveyance is not conclusive." *Id.* "The intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract." *Id.*

The evidence shows that the deed was given for the specific purpose of building a house. [EH Def.'s Ex. 14 at 1-2; EH Def's Ex. 19] The deed specifically provided that it would only vest in the Seminole Nation Housing Authority if a house was constructed on the property within two years of the execution of the deed. [EH Def's Ex. 19] Moreover, the agreement entered into by the parties provided for monthly payments and after all the payments were made the property was to be transferred back to Mrs. Wolf. [EH Def.'s Ex. 14 at 30.] The property was always to be defeasible upon completion of the payments. [EH Def's Ex. 20.] The facts surrounding this transaction do not show a sale of the property, but a form of security. Thus, the 1970 deed to the Seminole Nation Housing Authority was a mortgage.

With respect to mortgages of restricted Indian allotments, 25 U.S.C. § 483a[3] applies. Thus, under the section, the land remained restricted as to alienation except for a foreclosure action to enforce the underlying mortgage. Specifically, the statute provides "[f]or the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land …." § 483a. Conversely, that means for all other purposes the land remained restricted.

This analysis can be seen in *Fed. Land Bank of Wichita v. Burris*, 790 P.2d 534

[3] In 1970, Section 483 provided as follows: The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.[3]

(Okla. 1990). In that case, the Oklahoma Supreme Court held that the State Courts had jurisdiction to hear foreclosure actions under 25 U.S.C. § 483a because it treated the land as unrestricted solely for that purpose. *Fed Land Bank of Witchita*, 790 P.2d at 537. However, it determined that for any other purpose, the land was restricted. *Id.*

Thus, the conveyance to the Seminole Nation Housing Authority was a mortgage to secure payment for the construction of the house on the one-acre tract. Pursuant to 25 U.S.C. 483a, the mortgage did not lift the restrictions on the subject property. The restrictions would only be lifted for a foreclosure action.

In this case, the restrictions were never lifted because Kizzie Tiger Wolf completed her payments and the Seminole Housing Authority released its mortgage by a quick claim deed. The land remained in restricted status at the time of the murders and is Indian country pursuant to 18 U.S.C. § 1151(c).

C. The Indian Title Has Not Been Extinguished In Light Of The Remaining Mineral Interest

Even if this Court determines that restrictions to alienation to the surface estate has been removed, there is no dispute that the underlying mineral interests have not been extinguished. [EH Def's Ex. 12] Pursuant to 18 U.S.C. § 1151(c), those mineral interest should be sufficient to show that the property is Indian country because the entire Indian title had not been extinguished.

There are conflicting decisions regarding this issue. In *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131 (10th Cir. 2010), this Court discussed 18 U.S.C. § 1151. Specifically this Court stated that

> To be sure, Congress sought to mitigate, to a degree, the checkerboarding created by the allotment system by extending federal jurisdiction over "all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*." 18 U.S.C. § 1151(c) (emphasis added).

Id. at 1159. Section 1151 recognizes that even a right-of-way running across a tract of land would be sufficient to place land within Indian country under § 1151(c). Thus, a mineral interest, which is similar to a right-of-way should be sufficient to place the tract in Indian country. This Court noted that the reason Congress added the right-of-way piece was to expand the notion of Indian country to avoid the splitting of land and creating a worse checkerboarding of jurisdiction.

However, it must be noted that in *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009) *aff'd sub nom. Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), the Northern District of Oklahoma stated that

> The retention of a subsurface mineral interest for the benefit of the Nation's members does not render the entirety of Osage County a reservation. The term reservation refers to land set aside under federal protection for the residence of tribal Indians. *See* Cohens Handbook Of Federal Indian Law at 34 (1982 ed.). The mineral retention did not preserve the surface estate for the residence of Osage members and cannot continue or establish a reservation. *See Sac & Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1267 (10th Cir.2001) (land reserved by the government to preserve the tracts status as a tribal burial ground did not make that land a reservation, as it was not reserved for or used for purposes of residence). Similarly, *Murphy v. Sirmons,* 497 F.Supp.2d 1257, 1290 (E.D.Okla.2007), expressly rejected the contention that an "unobservable," partial mineral interest could support "Indian country" status for the surface of those lands.

Id. at 1259.

That analysis is at odds with this Court's analysis in *Hydro Res., Inc.* and with

numerous decisions and statutes holding mineral interests are estates in property.[4] Moreover, under § 1151(c), the definition of Indian country includes "unobservable" rights-of-way. Thus, that cannot be a reason to determine if Indian title has been extinguished.

VII. CONCLUSION

The one-acre tract at issue in this case remains in Indian country whether the restrictions remained in place because of the failure to follow Congress' proscribed procedures or because the transaction was nothing more than a mortgage controlled by 25 U.S.C. 483a. Thus, the Major Crimes Act, 18 U.S.C. § 1153 applies to the murders committed by Petitioner. The Federal courts have exclusive jurisdiction and the writ of habeas corpus should issue.

Respectfully submitted,

/s/Eugene K. Bertman

Eugene K. Bertman, OBA #19406
gbertman@mccormickbryan.com
Jennifer Henshaw McBee, OBA #19170
jmcbee@mccormickbryan.com
MCCORMICK & BRYAN, PLLC
2529 S. Kelly Ave., Suite A
Edmond, OK 73013
Telephone: (405) 225-2300
Facsimile: (405) 225-2301
Attorneys General for the Seminole Nation of Oklahoma

[4] Okla. Stat. tit. 12 § 1141.2 ("Real property" means land and fixtures and includes the surface estate and the minerals underlying lands located in the State of Oklahoma"); *Cox v. Lasley*, 639 P.2d 1219, 1221 (Okla. 1981) ("A mineral interest in and to oil and gas in place constitutes an interest in real estate."); *State ex rel. Com'rs of Land Office v. Cont'l Oil Co*., 273 P.2d 1002, 1003 (Okla. 1954), etc…

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The foregoing Brief of *Amicus Curiae*, The Seminole Nation of Oklahoma, in Support of the Petitioner/Appellant Regarding the Definition of Indian Country complies with the type-volume limitations of Fed R. App. 29(d) and 32(a)7(B) because this brief contains 5644 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed R. App. P. 32(a)(6).

3. This brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2011 in 13-point Times New Roman.

CERTIFICATE REGARDING DIGITAL VERSION OF BRIEF

IT IS HEREBY CERTIFIED THAT:

1. All required privacy redactions have been made and the foregoing brief submitted in Digital Form is an exact copy of the written document filed with the Clerk, and

2. The Digital Form has been scanned for viruses with ESET Cybersecurity, version 4.0.76.0 with the most recent virus definitions (version 7325).

/s/Eugene K. Bertman

Dated: July 24, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2012, I served the foregoing Brief of *Amicus Curiae*, The Seminole Nation of Oklahoma, in Support of the Petitioner/Appellant Regarding the Definition of Indian Country to the following through (ECF) electronic service:

Chad A. Readler
Counsel of Record
Jones Day
325 John H. McConnell Blvd.
Columbus, OH 43215
Attorney for Petitioner

Gary Peterson
211 N. Robinson Ave., Suite 450 South
Oklahoma City, OK 73102
Attorney for Petitioner

Steven Broussard
Michael J. Lissau
Hall, Estill Hardwick, gable Golden & Nelson, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103
Attorneys for Petitioner

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

/s/Eugene K. Bertman