IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-1642

Richard M. Smith, *et al.*

Appellants

v.

Mitch Parker, *et al.*

Appellees

Appeal from U.S. District Court for District of Nebraska
(4:07-cv-03101)

APPELLANT-INTERVENOR STATE OF NEBRASKA'S REPLY BRIEF

STATE OF NEBRASKA, Appellant-Intervenor

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Appellees place undue emphasis on the absence of what has been historically considered to be "hallmark diminishment language" in the 1882 Act, thus limiting the practicality of the Supreme Court's analytical framework for examining the potential diminishing impact of surplus land acts on reservation land and creating a rigid formula hinging largely on syntax. Rather, as the Supreme Court intended, Appellants have demonstrated that when "all the circumstances surrounding the opening" of the land west of the right-of-way are given proper consideration, the evidence establishes diminishment of the Omaha Tribe's reservation following passage of the 1882 Act. See, *Solem v. Bartlett*, 465 U.S. 463, 471 (1984). Appellants have articulated not only the basis for diminishment, but the significant concerns created by such a shift in jurisdictional authority. The State of Nebraska, as an Intervenor in this suit, has sought to avoid duplicating the arguments presented by Appellant-Plaintiffs. Thus, the absence of a particular line of argument in the State-Appellant's brief should not be interpreted to indicate a lack of support for the Plaintiff-Appellants' reasoning.

I. THE ABSENCE OF "HALLMARK DIMINISHMENT LANGUAGE" IS NOT DISPOSITIVE OF THE ISSUE OF WHETHER THE OMAHA TRIBE'S RESERVATION WAS DIMINISHED FOLLOWING PASSAGE OF THE 1882 ACT

Appellees go to great length to identify examples of "hallmark diminishment language" in their response briefs and note the absence of such language from the 1882 Act. Indeed, a side-by-side comparison of the language from various surplus

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land acts examined by the Supreme Court was provided in support of the conclusion that the existence of clear language of diminishment, or the absence of such language, should dictate the outcome of the Court's holdings. See, Appellees Response Brief at 23-24. Similarly, Appellees argue that the inclusion of hallmark phrases in the Treaties of 1854 & 1865 bears on the diminishing effect of the 1882 Act. See, Appellees Response Brief at 31. On a superficial level, the results of this comparison might appear compelling; however, such an outcome is not particularly remarkable. Not surprisingly, in cases that involve the presence of "hallmark diminishment language," Congressional intent is easily discerned and diminishment is found to have occurred. The shortcoming in Appellees' argument is that such an analysis does not account for the clear admonishments from the Courts that "[u]ltimately, no magic words are required as prerequisites for finding reservation boundaries have been altered." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005). Indeed, while "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands" such references "are not prerequisites for a finding of diminishment." *Solem*, 465 U.S. at 470. Here, Appellants have shown that the other circumstances surrounding the opening of the land west of the right-of-way and the historical demographics of the area evince a diminishment of the Omaha Tribe's reservation.

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II. THE CIRCUMSTANCES SURROUNDING THE OPENING OF THE LAND WEST OF THE RIGHT-OF-WAY AND DEMOGRAPHIC HISTORY EVINCE DIMINISHMENT OF THE OMAHA TRIBE'S RESERVATION FOLLOWING PASSAGE OF THE 1882 ACT

The circumstances surrounding the opening of the land west of the right-of-way and demographic history of the area evince diminishment of the Omaha Tribe's reservation following passage of the 1882 Act. "Where 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." *Id.* (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.3 (1977); and *DeCoteau v. District County Court*, 420 U.S. 425, 428 (1975)). "When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Id.* at n.12. "Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country." *Id.* These concerns, presented by the State in its Initial Brief, are not directly addressed by Appellees but rather summarily dismissed as "exaggerations". See, Appellee Response Brief at 45.

"In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, [courts] look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 471-72.

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"Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient." *Id.* at n.13 (internal citation omitted).

III. THE STATE HAS NOT ADOPTED CONFLICTING POSITIONS REGARDING THE DIMINISHMENT OF THE OMAHA TRIBE'S RESERVATION FOLLOWING PASSAGE OF THE 1882 ACT

The State has not adopted conflicting positions regarding the diminishment of the Omaha Tribe's reservation following passage of the 1882 Act. Appellees reference NEB. REV. STAT. § 22-187 in an effort to identify inconsistent treatment of the area in question by the State. See, Appellee Response Brief at 41. Essentially, Appellees argue that the Nebraska Legislature recognized the Omaha Tribe's *undiminished* boundary by virtue of this statutory provision. However, the statutory language providing for the "Omaha Indian reservation *as originally surveyed*…" would be rendered superfluous by Appellees line of argument. Rather, this language supports the conclusion that that the Nebraska Legislature recognized the Omaha Tribe's reservation was diminished and intended to identify the county boundaries by the originally surveyed lines prior to diminishment.

Appellees suggest the same statutory language constitutes acknowledgment by the State that the area in question was part of the Omaha Tribe's reservation when criminal jurisdiction in Thurston County was retroceded to the federal government in

1969. See, Appellee Response Brief at 42. However, Appellees point to no language within the retrocession law that acknowledges any specific boundary lines. P.L. 280 transferred jurisdiction over "All Indian country within the State" of Nebraska to the State in 1953 without delineating the boundary lines of such Indian country. See, 18 U.S.C. § 1162; 28 U.S.C. § 1360. Yet, "the Omaha Indians wished to be returned to the criminal jurisdiction of the United States." *United States v. Brown*, 334 F. Supp. 536, 542 (D. Neb. 1971).

Since P.L. 280 allowed "the state to retrocede all or any measure of the jurisdiction it acquired in 1953 and the United States to assume all or any measure of the jurisdiction retroceded by the state," the Legislature was able to adopt LR 37, thereby retroceding jurisdiction "in the areas of Indian country located in Thurston County, Nebraska…" See, *Brown*, 334 F. Supp. at 543-45. Through LR 37, the State simply retroceded the jurisdiction over the Omaha Reservation it had previously acquired, as part of "all Indian country within the State." The State made no attempt to define the boundary lines of that jurisdiction in LR 37 and only retroceded jurisdiction, to the extent the state had acquired jurisdiction under P.L. 280 in 1953. Since the State had not acquired jurisdiction over Pender under P.L. 280, but instead in 1882 when Congress diminished the Omaha Reservation, there was no retrocession over this land that could occur under LR 37. The fact that the federal government, in 1969, delineated the Omaha Indian Reservation as originally

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surveyed as part of the State's retrocession in no way serves as an acknowledgement by the State that those were the boundary lines intended by Congress in 1882.

In addition, Appellees accuse the State of seeking to "have it both ways" by taking a position in support of a finding of diminishment because a purportedly contrary position was asserted in an earlier litigation. See, Appellee Response Brief at 47 (citing *Lamplot v. Heineman*, 4:06-cv-03075). Appellees made the same claim to the District Court, and despite its clear inaccuracy, have chosen to reassert it here.

In *Lamplot*, the State argued in support of its motion to dismiss the action that the Omaha Tribe was an indispensable party because the relief sought by the plaintiffs would result in a diminishment of the Tribe's reservation. See, 4:06-cv-03075 (Filing No. 14). In a supplemental reply brief, it was noted that "the State's rebuttal brief is intended to illustrate the problems with attempting to resolve this case without participation of the Omaha Tribe, not to suggest that Pender, Nebraska lies within the Omaha Tribe's reservation. The State has not argued that Pender, NE is within the Omaha Tribe's reservation boundaries, nor will it do so." *Id.* at (Filing No. 31 at 2).

CONCLUSION

The absence of any particular phrasing is not dispositive of the issue of whether a surplus land act affects a diminishment of a reservation. Rather, the Court should consider all circumstances surrounding passage of the Act and the demographic history of the area in question. Appellants have established a record that demonstrates diminishment occurred subsequent to the passage of the Act. Based on the foregoing, the State respectfully requests that the Court find the District Court erred in determining that the original boundaries of the Omaha Tribe's Reservation had not been subsequently diminished by Congress through the Act of August 7, 1882.

Respectfully submitted this 5th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, a copy of the foregoing document was electronically filed with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system causing notice of such filing to be served upon all parties' counsel of record. I further certify that the document was scanned for viruses and is virus-free.

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