1 IN THE SUPREME COURT OF THE UNITED STATES
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3 NEBRASKA, ET AL., :
4 Petitioners : No. 14-1406
5 v. :
6 MITCH PARKER, ET AL. :
7 - - - - - - - - - - - - - - - - - - x
8 Washington, D.C.
9 Wednesday, January 20, 2016
10
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:19 a.m.
14 APPEARANCES:
15 JAMES D. SMITH, ESQ., Solicitor General of Nebraska,
16 Lincoln, Neb.; on behalf of Petitioners.
17 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
18 Private Respondents.
19 ALLON KEDEM, ESQ., Assistant to the Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 Federal Respondent.
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23
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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 14-1406, Nebraska v. Parker.

5 Mr. Smith.

6 ORAL ARGUMENT OF JAMES D. SMITH

7 ON BEHALF OF THE PETITIONERS

8 MR. SMITH: Mr. Chief Justice, and may it

9 please the Court:

10 For over a century, the following three

11 things have been true in the disputed area.

12 First, the non-Indian population has always

13 been greater than 98 percent.

14 Second, the Tribe never exercised

15 jurisdiction.

16 And third, by contrast, the State of

17 Nebraska has governed the disputed area.

18 The story of the disputed area is that of a

19 land that long ago lost its Indian character, if it ever

20 had any. The three things I mentioned at the outset

21 happened for a reason. They happened because it was

22 the -- or the intent of Congress in the context of the

23 times of the 1882 Act that the disputed area would be

24 diminished from the reservation.

25 JUSTICE KENNEDY: If I understand your

1 position correctly, you're not asking us to overrule
2 Solem?
3 MR. SMITH: No. No, Your Honor. We are not
4 asking you to overrule Solem. In fact, what we are
5 asking the Court to do is to imply -- apply the entire
6 Solem rule and, in particular, the compelling third
7 factor of the subsequent circumstances of the land's
8 jurisdictional history. As --
9 JUSTICE GINSBURG: From what -- from what
10 you just said and from your brief, I gathered -- perhaps
11 I was wrong -- that you are arguing for a de facto
12 diminishment test; that is, you pointed out the area has
13 been overwhelmingly populated by non-Indians and they --
14 they -- they haven't attempted before to exercise
15 governing authority.
16 MR. SMITH: Your Honor, we think the
17 de facto diminishment does fit within the third element
18 of the Solem test, which is the subsequent circumstances
19 of -- of after the enactment. And so obviously we would
20 not be opposed to the Court concluding and reaching this
21 decision on the grounds of de facto diminishment.
22 But we also think this case fits within this
23 Court's precedent under Solem, which would involve --
24 in -- in our view, the third element of the test is
25 particularly strong and compelling in this case, while

1 in Solem, in that particular case, it was -- it was -- I
2 guess I would call fairly easy to distinguish because,
3 as Solem talks about as far as the events, what took
4 place after the Act, the focus should be -- if you're
5 looking at intent of Congress, you should be looking at
6 what Congress is doing after the Act that is reflective
7 of not understanding essentially that they've diminished
8 the reservation.
9 JUSTICE SCALIA: It's a different Congress.
10 I mean, to say, you know, a later Congress did thus and
11 so, and therefore the earlier Congress, when it enacted
12 a particular statute, must have diminished. That
13 doesn't make any sense.
14 MR. SMITH: It --
15 JUSTICE SCALIA: And -- and -- and moreover,
16 if -- if the third factor is dispositive, as -- as you
17 assert, you would not -- we would not need the -- the --
18 the de facto diminishment doctrine whereby, by a sort
19 of, you know, adverse possession, a jurisdiction,
20 whether it's Indians or -- or even a State that used to
21 have a jurisdiction over a particular area has forfeited
22 it by long-, long-accepted usage to the contrary.
23 If -- if that is true and -- and if -- if
24 the third factor is as important as you say, we would
25 not need that doctrine. We -- we would just find

1 diminishment.

2 MR. SMITH: Well, and that would be

3 consistent with the concept that, if a party just -- if

4 they belatedly assert a claim to having sovereign

5 authority over this, as in this case it's over a hundred

6 and some years after the land was open for settlement,

7 that -- there -- at least the Sherrill case, some of the

8 principles in this case would be supportive of de facto

9 diminishment.

10 JUSTICE SCALIA: As far as --

11 JUSTICE GINSBURG: That case didn't involve

12 the -- the diminishment. Diminishment was not an issue.

13 MR. SMITH: That -- that is true. I -- I --

14 what I was referring to was the -- the principle at

15 least decided in the case as far as a long-standing

16 assumption of jurisdiction by the State over an area

17 that is primarily non-Indian in -- in population land

18 creates justifiable expectations, and if they did have

19 any sovereignty over it, they had long since forfeited.

20 JUSTICE SCALIA: But that's not what you're

21 arguing here. I -- I -- I understand you're arguing

22 diminishment, not -- not adverse possession, so to

23 speak.

24 MR. SMITH: We are arguing that it's no

25 longer part of the reservation. We are not saying it --

1 Court could not find it under the de facto, but we do
2 think the facts of this case does fit within Solem. And
3 if -- and if the Court applies the Solem test, the State
4 should prevail in this case, which --
5 CHIEF JUSTICE ROBERTS: You don't -- the
6 other side says you did not raise a City of Sherrill
7 argument. Do you agree with that?
8 MR. SMITH: We have -- we have --
9 CHIEF JUSTICE ROBERTS: A lot of the -- a
10 lot of the arguments you make seem to sound more in a
11 City of Sherrill-type proposition, but you haven't
12 raised that argument, have you?
13 MR. SMITH: We, I -- I believe in
14 paragraphs -- or pages 22, I think it's 25 of our brief,
15 we are at least citing Sherrill as -- as precedent for
16 the principle of loss of sovereignty, loss of sovereign
17 control by the fact that the State has long exercised
18 the jurisdiction.
19 But our focus --
20 JUSTICE GINSBURG: But that's based on what
21 Solem said. Solem did bring up a de facto diminishment.
22 This is on page 471 of the opinion.
23 It says "On a more pragmatic level, we have
24 recognized that who actually moved onto the open
25 reservation lands is also relevant to deciding whether a

1 surplus land Act diminished a reservation. Where
2 non-Indian settlers flooded into the opening portion of
3 the reservation and the area has long since lost its
4 Indian character, we have acknowledged that de facto if
5 not de jure diminishment may have occurred."
6 This was the theme that was picked up in
7 Sherrill, but it's stated in Solem.
8 MR. SMITH: Yes. Yes.
9 JUSTICE GINSBURG: And may I -- may I ask a
10 preliminary question? We're talking about a liquor
11 license or alcoholic beverage license and a sales tax on
12 alcoholic beverages. Does the State itself impose such
13 requirements, that is, a licensing requirement and a
14 sales tax?
15 MR. SMITH: The State itself does impose
16 liquor license requirements. They -- they can in --
17 State of Nebraska has sales taxes, yes, Your Honor.
18 JUSTICE SOTOMAYOR: This tax was not imposed
19 by the Tribe -- Tribe. This was a statute of Congress
20 that permitted the Indians to do this, correct?
21 MR. SMITH: My recollection was the Interior
22 Department approved the Tribe's request to have such an
23 ordinance, and then -- the Tribe's ordinance then was in
24 -- in effect.
25 JUSTICE SOTOMAYOR: Without jurisdictions,

1 Tribes can't tax at will. They have to get approval for
2 taxation, correct, from the Federal government?
3 MR. SMITH: Your -- your point would be
4 correct, Your Honor. The Tribe has to request it. They
5 have to have an ordinance. It has to be approved by
6 agency of the Federal government. Yes, that -- that is
7 true, but it still involves granting authority to a --
8 another sovereign.
9 JUSTICE SOTOMAYOR: What -- what else --
10 what else do you lose if this ruling is against you?
11 We've already circumscribed the powers of the Tribes on
12 their own reservations greatly, so what powers do you
13 lose?
14 You've already ceded to the Federal
15 government criminal prosecution powers. So you're not
16 losing out on that. What are you losing out on?
17 MR. SMITH: Well, Your Honor, I -- I -- I
18 take this -- it would be in the context of what are the
19 justifiable expectations of those who live in the
20 disputed area? What would be significantly disrupted as
21 far as their justifiable expectations?
22 I would start off with the first thing --
23 principle is just who governs you. Your -- we'd be
24 introducing an additional sovereign, the Tribe, into an
25 area which, for over 130 years, the Tribe has not

1 exercised any sovereign authority at all.

2 JUSTICE KAGAN: Mr. Smith, can -- can I take

3 you back to Justice Scalia's question? You know,

4 because usually, at least now, we don't think much of

5 subsequent history of any kind. Now, maybe they thought

6 a little bit more highly of it in the days when Solem

7 was written, but now it would -- it's -- it's pretty

8 much of a stretch to use subsequent legislative history

9 or subsequent history generally when we're dealing with

10 interpreting a statute.

11 I'm just wondering: Is there a reason why

12 it should be more credited here than in any other

13 context?

14 MR. SMITH: The Court's precedent, I

15 believe, recognizes in the area of land surplus acts

16 that Indian land surplus acts are a unique animal from

17 your normal legislative analysis. And that would be

18 because in the context of the times back before the turn

19 of, I guess, two centuries ago in the 1800s, Congress

20 would be doing land surplus acts in which the concept of

21 are we diminishing or not diminishing a reservation was

22 really nothing that Congress thought of.

23 You put that on the basic principle that

24 only Congress can diminish a reservation, it then

25 becomes the problem of how do we determine what Congress

1 intended when, frankly, the reality of the Court's
2 precedent is, it's something that Court -- or Congress
3 generally did not think of. They were inconsistent.
4 And so the Solem test really evolves out of an attempt
5 to determine what was the intent of Congress at the
6 time, which then is why legislative history, subsequent
7 or -- subsequent circumstances takes on greater
8 significance.
9 JUSTICE GINSBURG: When did this
10 diminishment idea as a legal concept -- you said when
11 Congress acted, they weren't thinking in terms of
12 diminishment.
13 When did diminishment become the big
14 question?
15 MR. SMITH: Well, it becomes -- it becomes a
16 big question when the issue is is it part of the
17 reservation --
18 JUSTICE GINSBURG: But at what point in
19 time? Because you -- I thought you just made this
20 statement that in 1882 Congress wasn't thinking in terms
21 of diminishment.
22 MR. SMITH: It becomes a big issue when the
23 issue is who -- frankly, who has authority to govern?
24 Is this still part of the reservation or not? Does the
25 Tribe have any authority over this area at all? And if

1 it's part of the reservation, it has authority;
2 acknowledged, it is limited authority, but it would have
3 authority over it, because if it's part of the
4 reservation. Now --
5 JUSTICE ALITO: On that question, as a
6 practical matter, if the Tribe were to exercise -- go to
7 the outer limits of its authority, what could it do in
8 the city of Pender besides opposing this liquor tax?
9 MR. SMITH: Well, what it can do, it can
10 displace State jurisdiction over environmental
11 regulations that this is a rural farming area. The
12 environment is very important. State regulation is very
13 important. It's what the people have expected. And I
14 could give an example: If you're a farmer, and the guy
15 across the road drops a load of manure in your pond
16 that's being used to feed cattle, you call the State of
17 Nebraska; you want them to come out and you want them to
18 do something. Those regulations would be replaced. You
19 call the State of Nebraska and the response is I'm sorry
20 you've called the wrong number.
21 JUSTICE SCALIA: What about municipalities?
22 What about self-governing -- or more or less
23 self-governing municipalities? Are there any of those
24 within this area?
25 MR. SMITH: Yes. There are self-governing

1 municipalities. There are villages. County,
2 obviously --
3 JUSTICE SCALIA: What -- would happen to
4 them? Would they continue to -- to exist?
5 MR. SMITH: They would continue to exist,
6 but you're going to have, what I would say, the
7 ambiguity of the extent of their authority versus the
8 extent of the Tribe's authority. You would have this
9 ambiguity in which is going to be -- I mean, people for
10 130 years, if you've expected the State of Nebraska,
11 your city council to be exercising local control, and
12 you bring in this outside authority --
13 JUSTICE SCALIA: Why would they continue to
14 exist? I mean, aren't they creatures of the State? Can
15 the State create municipalities on Indian Reservations?
16 MR. SMITH: I believe -- I believe the State
17 can create the municipalities. The issue is what
18 authority they have when you also have it on Tribal
19 land, because the Tribe --
20 JUSTICE SOTOMAYOR: I'm sorry. The Tribe
21 has acceded to State sovereignty and the environment and
22 in all sorts of things.
23 Have they threatened to take away the
24 State's activities in this village?
25 MR. SMITH: Not yet. The issue is going to

1 be --

2 JUSTICE SOTOMAYOR: This Tribe is awfully

3 small. You think they are going to have the power to

4 implement all of these things that you are fearful of?

5 To do substitute services to -- they can't tax for it

6 without the government's permission. So how are they

7 going to do all these, and why would they do all these

8 horrible things?

9 MR. SMITH: Well, I don't think it's --

10 JUSTICE SOTOMAYOR: I mean, it's nice to

11 have the power of taxation, but they still need the

12 government's approval.

13 MR. SMITH: I don't think it's simply the

14 test of being what -- what will they do. I think the

15 issue is once they have the authority, what --

16 JUSTICE SOTOMAYOR: Well, the question of

17 the City of Sherrill says if they try to exercise their

18 powers in a way that's harmful to settled expectations,

19 they might have a remedy in law. That's what City of

20 Sherrill says, but that didn't take away -- the City of

21 Sherrill didn't say the Indians weren't sovereign. It

22 just said they can't exercise the sovereignty. It

23 didn't say it was a diminishment. What they said is

24 they couldn't exercise it because of latches.

25 MR. SMITH: Well, if you say we've

1 introduced a tribe that in theory has authority, but
2 because they've never exercised it, they really have no
3 authority that -- that by itself, I would say, is the
4 inherent ambiguity of what is actually the limits of
5 their authority. You get litigations that start
6 disputing whether -- like under the Montana factors, as
7 far as they could regulate conduct that threatens, has
8 some direct effect on their tribe's integrity, economic
9 security, health and welfare. That's very, very broad.
10 And I -- to me, the -- the answer would be simply to say
11 this is not part of the reservation, rather than every
12 case that comes up when we have litigation and then
13 decide well, you're stopped from doing that.
14 CHIEF JUSTICE ROBERTS: Does the Tribe
15 exercise authority in the part of the reservation that's
16 not at issue here?
17 MR. SMITH: Yes. The Tribe absolutely
18 exercises authority in the part that's not part of the
19 reservation. They've stipulated to that, that on the
20 part that's not part of the reservation that they --
21 that they have ordinances, they provide services, that
22 they enforce their ordinances on the east -- in the
23 eastern part of the railroad, which is the -- clearly
24 within the Tribe and not on the west. So they have had
25 no presence, and they've acknowledged that. They have

1 no Tribal offices, schools, industries, businesses.
2 They've admitted that all of these governmental services
3 are provided by state and local agencies, not the Tribe.
4 That's the public expectation. That's what they expect
5 is --
6 CHIEF JUSTICE ROBERTS: In the -- in the
7 western part?
8 MR. SMITH: In the western part.
9 CHIEF JUSTICE ROBERTS: Well, what about in
10 the eastern part?
11 MR. SMITH: I'm sorry if I wasn't clear.
12 In our -- in the eastern part, the Tribe
13 does have its ordinances. It does provide services. It
14 does enforce its ordinances and laws in the eastern
15 part, but not in the western part, and never has. All
16 of those services are provided by the State of Nebraska.
17 The State of Nebraska, you name it in the form of
18 government services have been provided by the State of
19 Nebraska, its municipalities, not by the Tribe. This
20 comes in -- we come in; we're going to tax you; we're
21 going to take the money; and maybe you get services,
22 maybe you don't. And, in fact, the idea of local
23 control is if the people in the disputed area are
24 unhappy about what the Tribe is doing, unlike if it's
25 their local city council, they don't get to vote. They

1 don't get to remove them from office --

2 JUSTICE KAGAN: Mr. Smith, I -- I can

3 understand why people might be concerned, for all the

4 reasons that you're talking about. We do have pretty

5 clear and settled law in this area with respect to

6 diminishment, that we've said only Congress can

7 diminish, that the idea is that we're supposed to look

8 to congressional intent. And you say Congress didn't

9 really think in these terms. And there's something

10 that's fair about that.

11 But Congress did use very different language

12 in different ones of these acts, and we've looked to

13 that language as a pretty good guide to suggesting which

14 ones diminish and which ones do not. And it seems as

15 though the language here in -- in the act in which we're

16 concerned -- it's -- it's none of the language that

17 would suggest that Congress diminished this act.

18 So I was wondering if you could talk to

19 that. Is there anything in the language of this statute

20 that suggests a diminishment? Any of the usual kind of

21 we cede everything, we relinquish everything? Like,

22 what's the best you can do on that?

23 MR. SMITH: Appreciate that, Your Honor.

24 And -- and yes, the standard diminishment

25 test starts with looking at the Act. Is there language

1 in the Act? Hagen and Solem both specifically say no
2 particular form of words are required.
3 What we do have in this Act is we've got two
4 areas of the reservation. The area west of the
5 reservation, it's a very well-defined area. It doesn't
6 create a checkerboard effect.
7 What is significant is the different -- the
8 Act treats the area west of the railroad different than
9 the area east of the railroad. Specifically -- and this
10 is a major distinction in Solem -- there is nothing
11 reserved for the Tribe in the land on the west of the
12 railroad, the disputed area. There's nothing reserved
13 for -- in the bullpen, so to speak. There is no
14 reservation of land-use rights. There's no reservation
15 of land-use rights for schools, agency, Tribal religious
16 purposes, no reservation in mineral rights.
17 In Solem those were considered significant
18 factors because what you end up with is that the Tribal
19 headquarters, its governmental headquarters ended up in
20 Solem being in the disputed area.
21 JUSTICE SCALIA: Counsel, do you agree that
22 City of Sherrill did nothing more than deny particular
23 equitable relief and did not repudiate the proposition
24 of Indian sovereignty over the land in question?
25 Because if you agree with that, then I guess I'm more

1 inclined to give greater weight to the third factor.
2 But if you disagree with it, as I think you ought to,
3 then -- then I don't see why we need the third factor.
4 MR. SMITH: Well, City of Sherrill, it does
5 have the element of the Tribe trying to unilaterally
6 just --
7 JUSTICE SCALIA: Yes, but it says the Tribe
8 doesn't have sovereignty, is what it says.
9 MR. SMITH: It -- well, it says the Tribe
10 doesn't have sovereignty just to buy land back and get
11 back sovereignty that it had long ago lost --
12 JUSTICE SCALIA: That's right.
13 MR. SMITH: -- and it applies equitable
14 principles to say you're --
15 JUSTICE SCALIA: To say -- to say that the
16 Tribe does not have sovereignty.
17 MR. SMITH: Yes. Yes. And I -- and I think
18 it's perfectly reasonable for the Court to reach that
19 conclusion with a land which long ago it lost its Indian
20 character, long ago they've -- they've never exercised
21 any sovereignty, and then show up after the public, the
22 descendants, everyone who's lived there, and after 130
23 years you suddenly find out we -- we've got an Indian
24 Tribe that somehow has some governmental authority over
25 us.

1 We've never elected them; we don't have any
2 right to vote them out of office. If we don't like what
3 we're going to do, I guess we can complain to somebody,
4 but we can't recall members of the Tribal Council.
5 It's -- it is a recognition that those things happened
6 because that's what Congress intended to have happen,
7 and as Solem looks in the context of the times.
8 As far as that legislative history or
9 what -- what happened afterwards, Solem emphasizes the
10 decades immediately after the Act. And in the decades
11 immediately after this Act, we don't have what Solem
12 talks about, the rife with inconsistencies. What we
13 have is a total, one hundred percent consistent record
14 that everyone understood.
15 This land was diminished. It's not part of
16 the reservation. Congress in -- six years later, and I
17 understand the point about subsequent congressional
18 intent, but at least they did not take an action that
19 would reflect Congress didn't understand what they did.
20 JUSTICE KAGAN: Mr. Smith, on the City of
21 Sherrill point, the Chief Justice asked you before do
22 you agree whether this was -- whether this is waived.
23 And you said, well, we cite City of Sherrill on page 25
24 or something like that.
25 Below, what was the status of the City of

1 Sherrill argument in the lower courts?

2 MR. SMITH: The -- in the lower courts, the

3 argument -- the argument was made as far as that de

4 facto diminishment can be found. The Eighth Circuit's

5 opinion is what I would call a --

6 JUSTICE KAGAN: I'm not sure quite what that

7 means. Does that mean de facto diminishment under

8 Solem, or does that mean -- Solem -- or does that mean

9 that you talked about City of Sherrill as an independent

10 ground?

11 MR. SMITH: We talked about de facto

12 diminishment as an independent ground. I didn't argue

13 it, but my -- my recollection is Sherrill is not cited

14 for -- as authority for that, but we did make the

15 argument that it was de facto because Solem does say we

16 have recognized de facto diminishment.

17 Mr. Chief Justice, if -- if I may reserve

18 the remainder of my time if there's no further

19 questions.

20 CHIEF JUSTICE ROBERTS: Thank you.

21 Mr. Clement.

22 ORAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE PRIVATE RESPONDENTS

24 MR. CLEMENT: Mr. Chief Justice, and may it

25 please the Court:

1 The question in this case is whether an 1882
2 Act of Congress diminished the Omaha Reservation and
3 redrew its boundaries. We think multiple considerations
4 make clear that the Act of Congress did not diminish the
5 reservation, but simply opened up a portion of the
6 reservation for settlement within the existing
7 boundaries.
8 Now the first, and probably most
9 significant, factor is that the text of the statute uses
10 the classic language this Court has identified for
11 opening up a reservation for settlement without creating
12 a diminishment.
13 But secondly, and I think very telling and
14 specific to this statute, at the same time there is no
15 language in the statute that supports a finding of
16 diminishment. I think there is language in the statute.
17 Specifically, the final proviso of Section 8 that is
18 very inconsistent with the idea that what Congress did
19 is draw a new western boundary to the reservation,
20 because the -- that proviso gave Tribal members the
21 right to take their allotments east or west of the
22 right-of-way.
23 And the record reflects that many -- that --
24 that a number of members of the Tribe took their
25 allotments west of the right-of-way. And importantly, a

1 number of them took their allotments that actually
2 straddled the right-of-way.
3 CHIEF JUSTICE ROBERTS: What number?
4 What -- what is the number?
5 MR. CLEMENT: There are 15 --
6 CHIEF JUSTICE ROBERTS: Nine?
7 MR. CLEMENT: No, 15, I think -- excuse
8 me -- between 10 and 15, about 850 to 900 acres. But I
9 don't think --
10 CHIEF JUSTICE ROBERTS: Out -- out of how
11 many that took allotments?
12 MR. CLEMENT: Out of how many Tribal
13 members? I think there were roughly 300-plus
14 allotments. So it was, you know, three percent.
15 But I think the fact that they were allowed,
16 even though they're small numbers -- I'm not trying to
17 make a -- a volume argument here. I'm making an
18 argument that if what Congress just did is draw a new
19 western boundary to the reservation, it would have been
20 very odd to allow Tribal members to take their
21 allotments off the reservation, and maybe odder still to
22 allow them to take an allotment that essentially was
23 bisected by the new boundary.
24 CHIEF JUSTICE ROBERTS: Why would that be
25 odd? They -- they could have taken allotments anywhere,

1 couldn't they --

2 MR. CLEMENT: Anywhere --

3 CHIEF JUSTICE ROBERTS: -- within the area

4 that was opened up? Couldn't they have chosen to

5 purchase their --

6 MR. CLEMENT: I don't think --

7 CHIEF JUSTICE ROBERTS: -- or take

8 allotments outside the reservation?

9 MR. CLEMENT: I don't think that would have

10 been a logical assumption, given the conception of the

11 time, where I think Congress was thinking in the main

12 that Tribal ownership or Indian ownership went with the

13 reservation status.

14 And I think, again, if you think of this as

15 being a Surplus Land Act that simply opens the

16 reservation up, a portion of it to settlement, then it

17 makes perfect sense to say the Tribal members can take

18 their allotments anywhere on the reservation.

19 But if you think you've really drawn a new

20 boundary to the reservation, then I think it's more than

21 passing strange that you can take allotments to the west

22 of it, or you can take allotment and the new boarder is

23 smack dab through the middle of it. That --

24 JUSTICE KENNEDY: I don't understand the --

25 your answer to the Chief Justice's question. An Indian

1 who wanted to have an allotment off the reservation, and
2 allotments were generally available, could take that
3 allotment off the reservation if the Indian chose to do
4 so, correct?
5 MR. CLEMENT: No. My position is no, they
6 couldn't. And they could take it west of the
7 right-of-way, but I am saying that's how --
8 JUSTICE KENNEDY: Allotments were only open
9 to non-Indians?
10 MR. CLEMENT: No, no. Before any settlers,
11 non-Indians, came in, the existing Tribal members were
12 allowed to take their allotments.
13 JUSTICE KENNEDY: All right.
14 MR. CLEMENT: And they were allowed to take
15 their allotments anywhere on the preexisting
16 reservation.
17 JUSTICE KENNEDY: All right. So we're not
18 talking about allotments open to the general population?
19 MR. CLEMENT: No. No.
20 JUSTICE KENNEDY: Thank you.
21 MR. CLEMENT: And -- and this is clear from
22 the proviso in Section 8. It's the allotment only for
23 members of the Tribe. And they can take, consistent
24 with the historical understanding, an allotment anywhere
25 on the reservation, including west of the right-of-way.

1 And that seems to me to be very consistent with the idea
2 that the right-of-way is an interesting thing that the
3 Tribe granted through their reservation, but it's not
4 some new boundary. And I think the subsequent history
5 really supports that as well.
6 JUSTICE GINSBURG: What do you mean --
7 MR. CLEMENT: I mean, my friend on the other
8 side --
9 JUSTICE GINSBURG: But what do you mean,
10 Mr. Clement, of the language that I read from Solem
11 itself which seems to fit this case?
12 MR. CLEMENT: Well, I take that language,
13 Justice Ginsburg, as Justice Marshal writing for the
14 Court saying that when you're in the third factor, when
15 you witness de facto immunity -- I'm sorry -- de facto
16 sort of diminishment, that that may ultimately support a
17 conclusion that there was in fact diminishment as a
18 matter of law.
19 I don't take him to be opening up an
20 entirely different route to finding immunity --
21 diminishment, rather, that doesn't go through an act of
22 Congress. And I think that's the only way to read the
23 opinion as a whole because when the Court starts the
24 opinion, it says the very first principle in this area
25 is that only Congress can diminish a reservation.

1 And it's perfectly compatible with that to
2 say that when we get to the third factor and we're
3 looking at all sorts of things, we'll look at settlement
4 patterns as part of that. But I don't think it's
5 consistent with that world view to then say that,
6 actually, the third factor is a standalone alternative
7 route to find diminishment, not by congressional action,
8 but by market reaction to a surplus land Act.
9 JUSTICE SCALIA: Did -- did -- did we cite
10 Solem in Sherrill? I -- I don't really recall.
11 MR. CLEMENT: I -- I -- I don't recall.
12 I --
13 JUSTICE SCALIA: If it held that, it would
14 have been -- it would have been cited and Sherrill would
15 not have been any big deal.
16 MR. CLEMENT: Well, I -- I -- I think
17 that --
18 JUSTICE SCALIA: I thought Sherrill was a
19 big deal.
20 MR. CLEMENT: Well, I think -- I think --
21 JUSTICE SCALIA: Justice Ginsburg wrote it.
22 I think she thought it was a big deal.
23 (Laughter.)
24 MR. CLEMENT: I'm not here to tell you it's
25 not a big deal. I am telling -- I'm here to tell you

1 two things, though.

2 One is that Solem went out of its way to not

3 decide the diminishment issue. So it is clearly an

4 alternative way of thinking about the cases, and I don't

5 think they're coextensive. Which is to say, I think

6 there could be a particular assertion of Tribal

7 authority that you might say violates City of Sherrill

8 principles, even within an undiminished reservation.

9 And I do think it's then critically

10 important that -- my friend on the other side has not

11 raised this argument below. I certainly did not

12 understand it to be an independent argument in this

13 Court. It's all well and good to cite the case, but

14 that doesn't make it an independent argument.

15 Even his amici, who thought that they wanted

16 to bring before this Court the City of Sherrill

17 argument, admitted that the Petitioners hadn't made a

18 City of Sherrill argument.

19 CHIEF JUSTICE ROBERTS: But -- but Solem did

20 talk about de facto diminishment. And it seems to me

21 that you've got to recognize when they do that, they're

22 talking about something other than de jure, in other

23 words, pursuant to the law. It's pursuant to the facts

24 on the ground.

25 MR. CLEMENT: I understand,

1 Mr. Chief Justice, but I think there's two ways to talk
2 about de facto v. de jure. One way to talk about it is
3 that they're two totally alternative routes. Another
4 way is to say de facto diminishment means the settlement
5 patterns, and that's something that can inform the
6 ultimate conclusion of whether there's diminishment.
7 And I really think the Court in Solem was
8 using it in that passage in the latter respect. And I
9 think that's the only way to make sense of the case as a
10 whole, because --
11 JUSTICE GINSBURG: Except that it's -- it's
12 presented before the Court turns to apply the
13 principles.
14 MR. CLEMENT: Exactly. That's right. It's
15 part of the general principles of the Court --
16 JUSTICE GINSBURG: It's -- it's not -- it's
17 not tied to the third factor.
18 MR. CLEMENT: Well, I -- I -- I take,
19 though, that it actually is, in my view, tied to the
20 third factor. I think Justice Marshall was laying out
21 all of the factors, starting with the first and
22 governing principle, being that only Congress can
23 diminish. And he winds up the sort of general principle
24 section with this last thing about de facto/de jure --
25 de facto diminishment, and then that ties up exactly to

1 his discussion of settlement patterns in the third
2 factor of Solem. And I really think that's the right
3 way to read that opinion.
4 I would like to make one other very
5 important point here, though, is I think the Court
6 should understand that if you were to rule in favor of
7 Petitioners in this case, the parties would essentially
8 have to go back and reconstruct the right-of-way because
9 the railroad is no longer there. There's no
10 Rails-For-Trails program in Thurston County. So if you
11 take a Google map and look at this area, you can't even
12 tell where the right-of-way was.
13 Now, I think that's significant, because if
14 there really was a contemporaneous understanding in the
15 1950s and 1960s, when the railroad literally pulled up
16 its tracks and left, that the right-of-way was the
17 boundary of the reservation, then I think there would
18 have been some effort to sort of preserve that
19 jurisdictional boundary.
20 JUSTICE KENNEDY: Well -- well -- well,
21 please correct me if I'm wrong from the record. My --
22 my understanding was in the west portion, the Tribe had
23 done -- had exercised no jurisdiction until the Beverage
24 Control Ordinance recently, but on the east portion,
25 that they had. But then you say, well, we can't tell

1 the difference in east and west.

2 MR. CLEMENT: Well, I -- I -- I --

3 JUSTICE KENNEDY: And I mean, is -- is that

4 reading of the record mistaken?

5 MR. CLEMENT: Well, I -- I think what there

6 is is a practical understanding -- as Justice Sotomayor

7 indicated, this is not a wealthy Tribe that's looking to

8 assert jurisdictions in places that are impractical. So

9 it's made a judgment that most of its efforts are

10 directed at the eastern portion of the reservation.

11 But what I'm saying is --

12 JUSTICE KENNEDY: What -- what -- but does

13 the fact that nothing, if -- if the record is correct --

14 let's assume the record shows that the Tribe exercised

15 no jurisdiction over the western portion until this

16 alcoholic Beverage Control Ordinance. Is that relevant

17 to the case at all?

18 MR. CLEMENT: I don't think it's

19 dispositive. I think, yes, it's --

20 JUSTICE KENNEDY: Is it relevant?

21 MR. CLEMENT: Yes, relevant.

22 JUSTICE KENNEDY: Why is it -- why is it

23 relevant? To what point?

24 MR. CLEMENT: It -- it -- I think it could

25 be relevant to the third factor of Solem in a case where

1 the situation was very cloudy.

2 But one of the things also to keep in mind

3 is that even before Montana, the authority that a Tribe

4 would have over a principal non-Indian settlement on a

5 reservation is fairly limited. And if you're --

6 JUSTICE GINSBURG: Limited to what?

7 MR. CLEMENT: What's that?

8 JUSTICE GINSBURG: What -- what -- what does

9 it state beside the alcohol tax -- sales tax? What

10 else, on your theory, could the Tribe do in the way of

11 governance in this area?

12 MR. CLEMENT: I think as a practical matter,

13 Justice Ginsburg, there's two other things that are at

14 stake here, and they both go to the equities of the

15 Indians on the reservation, not the non-Indians, because

16 the non-Indians on the reservation, the Tribal authority

17 is very, very limited.

18 So one thing that is at issue here is the

19 potential to continue the revenue-sharing agreement with

20 the State. And this is something that the State

21 actually came to the Tribe about. And the theory of the

22 revenue-sharing agreement for the fuel taxes is that

23 there are going to be transactions in the western

24 portion of the reservation where it's actually Tribal

25 members that are buying gasoline over there, which does

1 happen, because there are a lot of gas stations over
2 there. And of course, the Tribe would have authority to
3 tax the Tribal members on the reservations for those --
4 those transactions. So what --
5 JUSTICE KENNEDY: You -- you --
6 Justice Ginsburg asked you a question, you said, as a
7 practical matter. I thought -- maybe I misinterpreted
8 her question here -- as a legal matter. As a legal
9 matter, if you prevail, can the Tribe cast any doubt on
10 the authority and the jurisdiction of the existing
11 municipality?
12 MR. CLEMENT: No, not at all. What they can
13 do is they can make cooperative agreements with the
14 State of Nebraska to tax Indians when they make
15 purchases in Pender.
16 And the other thing they can do is that,
17 when two Tribal members get in a scuffle in the village
18 of Pender, the Tribal authorities can be contacted, and
19 that matter can be handled in the Tribal courts --
20 JUSTICE ALITO: If the City of --
21 MR. CLEMENT: -- rather than the State
22 court.
23 JUSTICE ALITO: If the City of Pender is on
24 a reservation, under what authority could the Town of
25 Pender regulate things that go on in Pender?

1 MR. CLEMENT: Under -- under its
2 authority -- first of all -- I -- I mean, you know, let
3 me say two things:
4 One is: I'm not even sure, because of the
5 retrocession under -- after Public Law 280, it's not
6 even clear to me that Nebraska ceded its civil
7 jurisdiction that it enjoyed under 280. The -- the
8 retrocession, as I understand it, was criminal
9 retrocession with the exception of the motor vehicle
10 laws.
11 The second thing: As a practical matter, I
12 think this is very important to understand. The next
13 town east from Pender is the Town of Walthill. It is
14 unambiguously in the reservation boundaries. It is an
15 incorporated municipality of the -- of sort of civil
16 government of Nebraska.
17 In the Winnebago reservation --
18 JUSTICE ALITO: Well, just educate me
19 because I -- I don't know the law on this point. Can --
20 excuse me.
21 Can a State incorporate municipalities
22 within the boundary of a Indian Reservation?
23 MR. CLEMENT: Yes. It can, and it does, and
24 it's quite common. And what this Court -- in fact, this
25 Court in -- in -- in the Seymour case, one of its

1 earliest diminishment cases, confronted a Federal
2 township, Omak, Washington, that had always been a
3 township. There's civil authority there, but it's still
4 on the reservation. And that is actually quite common.
5 CHIEF JUSTICE ROBERTS: Does that displace
6 Tribal authority in that area?
7 MR. CLEMENT: No. Because again, remember,
8 the Tribal authority over the non-Indians is so small.
9 CHIEF JUSTICE ROBERTS: Well, the -- the --
10 we're talking about the area.
11 Can Tribal -- Tribal police patrol within
12 the municipality?
13 MR. CLEMENT: I think they probably could.
14 The only, really -- with an eye towards seeing if there
15 were Indians there who were, you know, needing
16 patrolling. And there's some evidence in the record --
17 this is at Joint Appendix 371 and 372 -- that there were
18 occasional patrols of the Tribe into Pender. There's
19 also a footnote in that same section that says that as a
20 practical matter, when a Tribal member was apprehended
21 in the Village of Pender, the police officer would call
22 over to the Tribal authorities and have them take over
23 the person.
24 CHIEF JUSTICE ROBERTS: So there's
25 overlapping jurisdiction? The municipality and the

1 Tribe --

2 MR. CLEMENT: Yes.

3 CHIEF JUSTICE ROBERTS: -- within the city?

4 MR. CLEMENT: Within the city. And one

5 other aspect --

6 CHIEF JUSTICE ROBERTS: Doesn't that create

7 conflict?

8 MR. CLEMENT: No. It really hasn't created

9 significant conflict. And what eliminates the conflict

10 is your Montana decision which substantially limits the

11 Tribe's authority over the non- --

12 JUSTICE GINSBURG: But the -- the liquor tax

13 that we're talking about is not imposed only on Indians,

14 right? It's imposed on everybody who buys liquor in

15 Pender.

16 MR. CLEMENT: It -- it is, but that is the

17 exception that proves the rule, because alcohol on

18 reservations has been a unique Federal authority for as

19 long as there's been Indian Reservations. In fact, this

20 Court had a case in 1911 arising out of the Omaha

21 reservation where it reaffirmed the Federal authority.

22 JUSTICE KENNEDY: So on Indian Reservation

23 lands, I take it Tribal police have jurisdiction over

24 non-Indians as to minor offenses?

25 MR. CLEMENT: I -- I don't think that's

1 actually true on the ground in Nebraska, at least as to
2 the highways. Because when they retroceded authority in
3 1970 --
4 JUSTICE KENNEDY: Well, you -- you have the
5 example of a scuffle. Suppose an Indian and a
6 non-Indian are in a scuffle. If -- if there's a -- a
7 minor criminal statute making this a minor offense, does
8 the Tribe have jurisdiction over the non-Indian?
9 MR. CLEMENT: I -- I don't think that it
10 would within the Village of Pender. And I think that is
11 a reflection of the very limited authority that the
12 Tribe has over non-Indians --
13 JUSTICE KENNEDY: And that's true with
14 reference to all Indian tribes? Can you cite me any
15 proposition for that?
16 MR. CLEMENT: Well, ultimately, it might
17 be -- it might turn on the scope of the Montana
18 decision. And obviously, this Court has the Dollar
19 General decision in front of it. I want to make one
20 more point, if I could, about the overlapping
21 authorities here, cause the other authority here is
22 Thurston County, if I just finish this one point.
23 Pender is the County seat of Thurston
24 County. Thurston County has -- by State statute since
25 1922, it's western boundary has been defined as

1 coextensive with the reservation, and there are Tribal
2 members who's one of the council on the county, is a
3 Tribal member. Thank you, Your Honor.
4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Kedem.
6 ORAL ARGUMENT OF ALLON KEDEM
7 ON BEHALF OF THE FEDERAL RESPONDENT
8 MR. KEDEM: Mr. Chief Justice, and may it
9 please the Court:
10 In Solem v. Bartlett, this Court explained
11 that once a block of land is set aside as a Indian
12 Reservation and no matter what happens to the title of
13 individual plots within the area, the entire block
14 retains its reservation status until Congress explicitly
15 indicates otherwise. It has not done so here.
16 I'd like to start, if I may, with the
17 question: What would change if this Court were to rule
18 that the reservation is still intact? First of all,
19 with respect to services, States can provide services to
20 members of tribes and nonmembers alike anywhere within
21 the reservation. And the State of Nebraska provides
22 services not only in the disputed area but on the east
23 side as well.
24 Let me give you a very specific example.
25 There's a town called Bancroft, which is split in half

1 by the right-of-way. There's another town called
2 Rosalie, which is clearly within the eastern undisputed
3 part of the reservation. There's a school district
4 called the Bancroft-Rosalie School District, which is
5 administered under the auspices of the State of
6 Nebraska. And that is true notwithstanding the fact
7 that much of the land is on the east side, and true
8 notwithstanding the fact that many members -- many
9 students who go to that school are members of the Tribe.
10 JUSTICE GINSBURG: That's what -- what the
11 State can do, but the State wouldn't be obliged to do
12 that, wouldn't be obliged to provide schools?
13 MR. KEDEM: I see no basis for the State to
14 refuse to provide services to its own citizens,
15 especially if they are not members of the Tribe.
16 CHIEF JUSTICE ROBERTS: Well, it would be a
17 question of sovereignty.
18 MR. KEDEM: The State --
19 CHIEF JUSTICE ROBERTS: This is -- this is
20 the reservation. That's your argument. It's the
21 reservation, and that's not the -- the State land, so
22 we're going to spend our money for schools or whatever
23 on the -- in the State, not on the reservation.
24 MR. KEDEM: The State retains regulatory
25 sovereignty to make laws with respect to its own

1 citizens and nonmembers on a reservation. That's true
2 on the east side. It's true on the west side.
3 I think you also may be left with the
4 impression, after my friend's argument, that the State
5 would stop issuing environmental permits and all of a
6 sudden the Tribe would start issuing them. That is not
7 correct. First of all, the Environmental Protection
8 Agency has been administering on the west side of the
9 reservation, including providing permits for animal feed
10 lots. There's also a permit for wastewater --
11 CHIEF JUSTICE ROBERTS: The Environmental
12 Protection Agency, which -- the State or Federal?
13 MR. KEDEM: Federal. Federal.
14 -- including a permit for a wastewater
15 treatment facility, although I believe it discharges
16 into Logon Creek on the east side; so it may not tell us
17 all that much about the jurisdiction.
18 JUSTICE KENNEDY: But our -- our questions
19 have been, suppose that you prevail, what can the State
20 do? And we say, oh, it's a practical matter. Don't
21 worry. They won't do -- the Tribe won't do anything.
22 The Tribe won't do anything. What could the Tribe do?
23 MR. KEDEM: What could the Tribe do?
24 JUSTICE KENNEDY: Yes, to regulate nonTribal
25 members.

1 MR. KEDEM: So the things that the Tribe
2 could do would be any express delegation of authority
3 from Congress. The only one that we've heard about is
4 the alcohol ordinance. Beyond that, the State and Tribe
5 could go back --
6 JUSTICE GINSBURG: We heard about the
7 fuel -- the revenue sharing of the fuel.
8 MR. KEDEM: That's right. There was an
9 agreement to share revenue fuel, although that was
10 something that the State entered into voluntarily with
11 the Tribe. Beyond that, the Tribe would have to fall
12 under one of the two Montana exceptions, which are, as
13 this Court is aware of because of the Dollar General
14 case, very limited.
15 CHIEF JUSTICE ROBERTS: I suppose one reason
16 the Tribe might -- might not provide services is because
17 the area is 98-point-whatever percent nonTribal, right?
18 MR. KEDEM: I think that's absolutely
19 correct.
20 CHIEF JUSTICE ROBERTS: So they would be --
21 any services would be for the -- how many? Nine -- nine
22 Indians in the area or 15?
23 MR. KEDEM: Pardon?
24 CHIEF JUSTICE ROBERTS: How many non-Indians
25 own land in the western part?

1 MR. KEDEM: It's almost entirely non-Indian
2 in the western part. And for the --
3 JUSTICE SCALIA: Couldn't the Tribe enact
4 ordinances that govern the Indians in the -- in the
5 western part?
6 MR. KEDEM: They could, but if we're talking
7 about the effect on nonmembers, they would have to fall
8 under the one -- one of the two Montana exceptions.
9 JUSTICE SCALIA: Okay. But at least as to
10 Tribal members in the west --
11 MR. KEDEM: That's right. Tribal members on
12 the reservation --
13 JUSTICE SCALIA: -- they would be subject to
14 the Tribe's jurisdiction which they otherwise would not?
15 MR. KEDEM: I think that that's accurate.
16 If I could go to the City of Sherrill argument, which
17 got brought up a lot today. I think this case is
18 extremely different from the City of Sherrill for a
19 number of reasons, but let me give you two big ones.
20 In the City of Sherrill, this Court held
21 that principles of equity restrained the Tribe from
22 trying to resurrect a claim of inherent sovereign
23 immunity.
24 In this case by contrast, first of all,
25 we're not just talking about the Tribe's jurisdiction.

1 We're talking about the jurisdiction of the United
2 States as well.
3 And second of all, we're not talking about a
4 claim of inherent authority. This is authority
5 exercised pursuant to a Federal statute, 18 U.S.C. 1161.
6 And it -- for that reason, principles of equity simply
7 don't apply here.
8 Moreover, in City of Sherrill --
9 JUSTICE SCALIA: I don't understand that.
10 Try -- try it again.
11 MR. KEDEM: Sure.
12 JUSTICE SCALIA: Principles of equity do not
13 apply here?
14 MR. KEDEM: They do not apply in the same
15 way. So in City of Sherrill the Court applied a
16 latches-type reasoning. But latches would not apply to
17 prevent the exercise of authority under a Federal
18 statute, an express delegation of authority under
19 Federal law.
20 JUSTICE SCALIA: Why not?
21 MR. KEDEM: Because that's what the Court
22 said, for instance, in the copyright decision that
23 Justice Ginsburg recently wrote, which is that when you
24 have background principles of equity, they are presumed
25 not to be -- apply and be displaced when there is a

1 substantive law that Congress passes to deal with the
2 same issue.
3 CHIEF JUSTICE ROBERTS: There's a law that
4 authorized the imposition of these taxes in the western
5 part of the reservation.
6 MR. KEDEM: The law authorizes the exercise
7 of this authority if there is a reservation and if the
8 Tribe applies to the Department of the Interior, which
9 has to approve the ordinance.
10 CHIEF JUSTICE ROBERTS: Well, doesn't that
11 beg the question? The question was whether or not this
12 reservation has been diminished. So it's not the
13 reservation.
14 MR. KEDEM: Well, that's the question with
15 respect to the application of the statute. But when
16 we're talking about City of Sherrill, we're talking
17 about background equitable principles. And I'm simply
18 making the point that those principles don't apply when
19 you have an express congressional statute dealing with
20 the same issue.
21 JUSTICE SOTOMAYOR: If the City of Sherrill
22 did apply --
23 MR. KEDEM: Pardon?
24 JUSTICE SOTOMAYOR: If the City of Sherrill
25 did apply, hypothetically -- I'm not nay-saying all the

1 differences you're pointing out -- would you lose?
2 MR. KEDEM: No. Because again --
3 JUSTICE SOTOMAYOR: Explain why not.
4 MR. KEDEM: -- we're not talking about just
5 what the Tribe can do. We're also talking about the
6 jurisdiction of the United States as well. And there's
7 certainly nothing in the City of Sherrill which suggests
8 that the jurisdiction of the United States pursuant to a
9 congressional creation of a reservation can be curtailed
10 by the Tribe's failure to exercise authority in the
11 disputed area.
12 JUSTICE SCALIA: Frankly, I'm more -- I'm
13 more inclined to vote your way if the City of Sherrill
14 does apply than if the City of Sherrill doesn't apply.
15 What you're telling me is, unless you get there through
16 Solem, it doesn't matter whether the State and
17 non-Indians have for generations viewed this land as
18 their own. That's what you're telling me, right?
19 MR. KEDEM: Well, I'm telling you that to
20 the extent City of Sherrill applies, it applies to a
21 very different question, not the question as to where
22 the borders of the reservation are. It applies to the
23 question what can the Tribe as a basis of its inherent
24 sovereignty do? Now, it might under different
25 circumstances if the Tribe tried to repurchase a bunch

1 of land --

2 JUSTICE SCALIA: That's not what city --

3 that's not what Sherrill said. Sherrill said the Tribe

4 had no jurisdiction. It said it had no sovereignty over

5 the area anymore.

6 MR. KEDEM: Again, the diminishment question

7 goes not just to the Tribe's sovereignty but the

8 jurisdiction as well of the United States.

9 And if we're talking about expectations,

10 another point that I would make is that the single best

11 evidence of what these parties could have expected is

12 the retrocession, because that was a unique moment in

13 which the State of Nebraska and the United States talked

14 directly and officially to one another about the burdens

15 and responsibilities for exercising jurisdiction in the

16 reservation. And the United States in the Federal

17 register as official can be said the entire reservation

18 remains intact.

19 And the State of Nebraska, as we point out

20 in our brief, had exactly the same understanding. The

21 assistant attorney general for Nebraska came and

22 testified before Congress that all of Thurston County is

23 within the Winnebago and within the Omaha Reservation.

24 JUSTICE SCALIA: That determines the meaning

25 of the 1882 statute.

1 MR. KEDEM: Not in the least. It goes to --
2 JUSTICE SCALIA: That's what I think.
3 MR. KEDEM: I was simply responding to the
4 point that the expectations here might be all in the
5 same direction.
6 I would also point to 30 years of Nebraska
7 revenue rulings, all of which say, point blank, Pender
8 is still part of the reservation. I would also point to
9 the definition of Thurston County.
10 As my friend pointed out, Pender is the
11 county seat. I think it's implausible to know that
12 the -- to assert that the State of Nebraska wouldn't
13 know that its own law specifies that all of Thurston
14 County is within the reservations of the Omaha and the
15 Winnebagos.
16 I would also like to address, if I could,
17 the tipping point theory that I think emerges from
18 Petitioner's reply brief, and that's the idea that in
19 1872, Congress tried but failed to diminish the
20 reservation because there were only about 300 acres
21 sold. But in 1882, it succeeded because a lot more land
22 was sold. I think there are a lot of problems with this
23 theory.
24 First of all, if that was what Congress had
25 in mind, presumably it would have specified some way to

1 know when the tipping point had been reached: Some
2 percentage of land sales, some other measure of success.
3 There's nothing about that in the text. There's nothing
4 about that in the legislative history.
5 Second of all, the concept that Congress
6 could attempt but fail to diminish a reservation, as my
7 friend said that it did in 1872, is a concept that is
8 wholly foreign to this Court's jurisprudence, which
9 makes clear that Congress has plenary power.
10 And finally, I think this Court should be
11 very reluctant to assume that Congress implicitly
12 transferred any part of its authority to change the
13 borders of an Indian reservation to private parties and
14 made it contingent on what this Court in Dakota referred
15 to as uncertain future sales.
16 CHIEF JUSTICE ROBERTS: Well, is that saying
17 there's no such thing as de facto diminishment?
18 MR. KEDEM: I think that de facto
19 diminishment, if you think of it as some sort of
20 freestanding alternative path to change the boundaries
21 of a reservation, I do agree that it doesn't exist.
22 But if you're talking about it --
23 CHIEF JUSTICE ROBERTS: How is that
24 consistent with the language in Solem that
25 Justice Ginsburg read?

1 MR. KEDEM: I -- I think it's a little bit
2 hard to know exactly what the court meant.
3 This Court has never found de facto
4 diminishment. All seven of its surplus land cases were
5 decided on the basis of congressional intent. And then
6 there were sometimes a few sentences thrown in about how
7 the status quo wouldn't change very much.
8 I want to leave you with one more point.
9 JUSTICE SCALIA: What about Sherrill?
10 MR. KEDEM: Pardon?
11 JUSTICE SCALIA: What about Sherrill?
12 MR. KEDEM: Sherrill is very explicit, but
13 it is not a diminishment ruling. There's a footnote in
14 City of Sherrill which makes very clear that it is not
15 deciding the diminishment issue or the jurisdiction of
16 the United States.
17 CHIEF JUSTICE ROBERTS: What's -- what's
18 vague about the language where non-Indian settlers
19 flooded into the opening portion of a reservation and
20 the area has long since lost its Indian character, we
21 have acknowledged that de facto, if not de jure
22 diminishment may have occurred.
23 MR. KEDEM: I think you have to read that
24 sentence in light of Yankton Sioux, which says that when
25 you're talking about the subsequent treatment of the

1 area and pattern of settlement, those are relevant only
2 insofar as they bear on the touchstone of the inquiry,
3 which is congressional intent.
4 If I can make one final --
5 CHIEF JUSTICE ROBERTS: Well, I think if you
6 look at the passage, it goes on, then, to discuss in
7 addition to that, then we look to subsequent demographic
8 history as an additional clue as to what Congress meant.
9 I -- I read those as the two different paragraphs as
10 making two different points.
11 MR. KEDEM: I think you could definitely
12 read it that way if you just had Solem. I think if you
13 read Solem in light of Yankton Sioux, you reach a
14 different result.
15 If I could make one final point about
16 unsettling expectations. There are more than 300
17 Federally-recognized Indian reservations all throughout
18 the United States. The single most unsettling thing
19 that this Court could do would be to suggest that the
20 borders of those reservations depend not on what
21 Congress said about them, but on shifting demographic
22 patterns or who provides what services where.
23 If there are no further questions.
24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Smith, you have four minutes remaining.

1 REBUTTAL ARGUMENT OF JAMES D. SMITH
2 ON BEHALF OF THE PETITIONERS
3 MR. SMITH: Thank you, Your Honor.
4 Where do I start?
5 Let's start first with -- pointed out to me
6 by co-counsel that a misstatement I made in response to
7 Justice Kagan. The Eighth Circuit briefs do cite
8 Sherrill in support of the proposition for de facto
9 diminishment. My apology. I hadn't argued at that
10 point, but it is there in the Eighth Circuit.
11 I would cite to the Joint Appendixes so the
12 Court is aware exactly where it can find that
13 undisputed, as far as the demographics, the
14 jurisdictional history, JA 215 to JA 216, JA 318 to JA
15 319, JA 609 to JA 611.
16 The -- the concept that, gee, nothing really
17 big's going to change, having the Tribal police show up
18 in their police vehicles patrolling the streets because
19 it's on Tribal land is going to be a huge disruption of
20 expectations.
21 My background is in criminal law. I know if
22 you have a crime you're investigating, you don't know --
23 not all crimes, you know, there's not a sign saying gee,
24 this was committed by an Indian; this was committed by a
25 non-Indian. You have a lot of who-done-its in which the

1 question is who's supposed to investigate, and you have
2 this overlapping jurisdiction where law enforcement
3 itself is confused as to who's supposed to be
4 investigating when they don't even know, maybe, who the
5 perpetrator is.
6 The idea that a Tribal member of a State
7 governmental authority is somehow shows --
8 JUSTICE SCALIA: Excuse me. Wouldn't --
9 wouldn't the latter be the case with respect to any
10 municipality that's within a reservation? We've been
11 told there are a lot of those. And -- and wouldn't
12 that -- wouldn't that be a problem in all of those,
13 being that you have overlapping jurisdiction of Tribal
14 police and municipal police? And until you know who the
15 perpetrator is, you don't know which one has
16 jurisdiction.
17 MR. SMITH: It's a problem if you know, and
18 chose to live on an Indian reservation. It -- it -- I
19 mean, that exists.
20 What's different in this case is the history
21 is 130 years of people who believe and chose. And they
22 are not living on an Indian reservation; they are living
23 in the State of Nebraska. I call the State patrol. The
24 Tribal police are not patrolling up and down my street.
25 That's the difference. It's the justifiable

1 expectations of the people who live there.
2 JUSTICE BREYER: Their point is, the
3 government says, fine, make that argument. Make it
4 under the rubric City of Sherrill. Maybe you make it
5 when you go down on remand or something, but it is
6 workable to divide the issue into two parts.
7 The first issue is what's the reservation,
8 and the second issue is what can you do on the
9 reservation?
10 When you get to question two, if the Tribe
11 has made no assertion of jurisdiction, nobody even knows
12 about it for 150 years. Maybe it's basically unfair to
13 let them do what they want to do. And that depends on a
14 lot of factors, such as what Congress says.
15 So what do you think of that argument?
16 Let's leave it for later. Nobody's argued it.
17 MR. SMITH: Glad I didn't answer what I
18 thought of that argument.
19 Your Honor, it is still -- invites the
20 litigation over what is the extent of the power. Who's
21 got the power to govern? What is the extent of their
22 power? Uncertainty, when you have expectations, you
23 live in an area where the State governs you, and then to
24 say we can go back and litigate all these issues is --
25 is just not what the public expects.

1 The people in Pender, this is a big deal.
2 They care about this. They have expectations. It's a
3 big deal whether a Tribe -- Tribal Council has authority
4 over us. We don't get to vote for them. Their
5 Constitution doesn't even allow us to appear at their
6 public meetings.
7 The concept that somehow or other we can't
8 find the right-of-way because it's not on Google is
9 frankly silly. It's very easy to go back, do surveys,
10 find exactly where the right-of-way is.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 MR. SMITH: Thank you, Your Honor.
13 CHIEF JUSTICE ROBERTS: The case is
14 submitted.
15 (Whereupon, at 11:17 a.m., the case in the
16 above-entitled matter was submitted.)
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