OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT HAGEN, Petitioner v. UTAH

CASE NO: 92-6281

PLACE: Washington, D.C.

DATE: Tuesday, November 2, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT HAGEN :

Petitioner :

v. : No. 92-6281

UTAH :

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Washington, D.C.

Tuesday, November 2, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

MARTIN E. SENECA, JR., ESQ., Reston, Virginia; on behalf of the Petitioner.

RONALD J. MANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

JAN GRAHAM, ESQ., Attorney General of Utah, Salt Lake City, Utah; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-6281, Robert Hagen v. Utah.

Spectators are admonished do not talk until you leave the courtroom. The Court remains in session.

Mr. Seneca, you may proceed.

ORAL ARGUMENT OF MARTIN E. SENECA

ON BEHALF OF THE PETITIONER

MR. SENECA: Mr. Chief Justice, may it please the Court:

This is an Indian case. What we've got before us is the jurisdiction of the State of Utah over Indians for purposes of criminal prosecution. It comes to the Court by way of the boundary issue, that the question presented is whether or not the boundary of the Uintah Reservation was disestablished by a series of congressional enactments beginning in 1902 and culminating in 1905.

This case, this issue, has been resolved at one point by an en banc decision of the Tenth Circuit Court of Appeals which was rendered in 1985 that held that the reservation boundary had not been disestablished.

The State of Utah petitioned this Court for cert, cert was denied, and that position then holds that

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the reservation boundary remains the original boundary of the Uintah Reservation as established in 1864.

QUESTION: That was a divided vote, wasn't it, in the Tenth Circuit?

MR. SENECA: Yes. There was a dissent.

The way that the case comes today, and what took place, is we have one Robert P. Hagen, who was charged with possession and distribution of marijuana out of his residence, which was a trailer located in Myton, Utah, which is a small community located within the exterior boundaries of the Uintah Reservation.

He was brought before the trial court. They concluded that he was not an Indian, and took jurisdiction of the case. He is a member of the Little Shell band of Chippewa Indians, which is not a federally recognized tribe, but nonetheless, he is an Indian.

The court at the trial level held that he was not an Indian, took jurisdiction. He appealed. At the appellate court level, the appeals court -- the Utah State appeals court held that the State had not made an appropriate showing that Mr. Hagen was not an Indian, and they also held that the en banc decision of the Tenth Circuit Court of Appeals on the reservation boundary issue was the law, and therefore they dismissed the charges against -- the jurisdictional issue against Mr. Hagen, and

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released him.

The State of Utah then appealed the decision of the Utah court of appeals to the Utah supreme court, and the decision of the Utah supreme court was based upon another set of facts. They reached the disestablishment of the Uintah Reservation through another case called the Perank case, which was a case where there was an Indian who committed a felony, a burglary, and again in Myton, Utah, and it was that case that the State of Utah chose to address the disestablishment issue, and in that case they held completely opposite to the position that the Tenth Circuit had concluded in the 1985 decision, the en banc decision of that court.

We have a situation here where the appeal of Mr. Hagen was submerged into the appeal -- the decision of the supreme court of Mr. Perank, and the question that comes before this Court is basically a jurisdictional question. Now, it's couched in terms of whether or not the reservation was disestablished, and the reason it's couched in those terms is that if the reservation boundary had been disestablished, then Myton, Utah, is not in Indian country, and if it's not in Indian country, then it doesn't matter what your -- whether you're an Indian or a non-Indian, you are subject to the jurisdiction of the State of Utah for criminal prosecution.

QUESTION: Mr. Seneca, you did not represent the petitioner in the proceedings below, right?

MR. SENECA: That's correct.

QUESTION: And indeed, you did not represent the petitioner when the petition for certiorari was filed.

MR. SENECA: That's also correct.

QUESTION: In your brief you rely on collateral estoppel of the State to relitigate this question after the Tenth Circuit decision, but I suppose that can be waived, and for our purposes, isn't it waived as we take the case?

MR. SENECA: What we have put forward for the Court's review is our position and our arguments as to why collateral estoppel should be considered by the Court and --

QUESTION: Well, do you agree that collateral estoppel as a defense can be waived?

MR. SENECA: Of course, it can be.

QUESTION: And it certainly wasn't raised in the cert petition, was it? I mean, that was --

MR. SENECA: It wasn't raised directly, but everything that surrounded the cert petition talked about collateral estoppel, and the only thing that was not done was the words "collateral estoppel" used.

QUESTION: Well, I don't think you're right on

that, Mr. Seneca. The question presented in your petition for certiorari is whether the Uintah and Ouray Reservation, Indian Reservation was diminished by the act of May 27th, 1902 so as to confer criminal jurisdiction over Indians within the unallotted area of the reservation upon the State of Utah. That to me doesn't smack at all of collateral estoppel.

Granted, you've changed the question in your brief so that you could smuggle in collateral estoppel, but your question presented says nothing about collateral estoppel.

MR. SENECA: Mr. Chief Justice, if I might just bring to the Court's attention that the question presented really focuses on a jurisdictional issue. Regardless of how it is said, at bottom, the question presented addresses the issue of jurisdiction.

QUESTION: -- it's affirmative defense, it's not jurisdictional.

MR. SENECA: I'm sorry, I didn't hear you.

QUESTION: What you call collateral estoppel, issue-preclusion, is an affirmative defense.

MR. SENECA: That's correct.

QUESTION: It is not jurisdictional, so I don't understand how this being a jurisdictional question, the jurisdiction of the tribal court versus the State court,

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helps you out with an affirmative defense, which it appears you've dropped when you came to this Court.

MR. SENECA: What we've done, Justice Ginsburg, our concern and our view on this is, what we're talking about is the liberty of an individual, and all that we have presented to the Court for its consideration is this defense. We feel, and we've given the reasons why we feel that it has not been waived, and it's basically there then for this Court to exercise its judgment on that issue.

QUESTION: Even if you were right that you didn't somehow waive it, you recognize that issue preclusion does not operate against the Federal Government the way it would against an individual. Why should States and the citizenry the States represent attract any less respect?

That is, if we don't apply issue preclusion rigidly against the Federal Government, why should we apply it rigidly against the State or local government?

MR. SENECA: The underlying policy on -- for that issue preclusion has to deal with the building up of various positions on issues that may finally come to this Court so that the Court can have the advantage, then, and the understanding of this various Court's working on that issue in bringing it to the Court.

In our set of facts, it's site-specific, it's

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issue-specific, it's not something that's going to recur. This is a one-time kind of issue that this Court would have to deal with, and so the issue-preclusion issue and the policy underlying all of that would not apply in this set of circumstances and to these facts.

QUESTION: All of that suggests a kind of question that we would not grant certiorari on ordinarily, something that is site-specific and fact-specific. The issue you present in your petition for certiorari is a conflict between the supreme court of Utah and the Tenth Circuit over whether there was a diminution of the reservation. That's quite a separate question from whether the State of Utah might be collaterally estopped in this case.

MR. SENECA: I don't disagree with the Chief Justice's characterization here that there is a difference involved here. All that we're putting forward in this instance is when it comes down at bottom, this Court is going to have to decide whether or not that reservation boundary has been disestablished or not.

One of the ways in which this Court can reach that is to look at the tremendous amount of work that has been done in the Federal courts at the district court level, at the Tenth Circuit Court of Appeals level, and one of the ways that this Court could reach that decision

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is say, hey, this thing has already been decided, it's already been worked. There's been a tremendous amount of effort that's been put forward on this case, and it is -- the case has been decided.

QUESTION: Well, assuming, Mr. Seneca, that we have to address the issue de novo and decide it, do you plan to get into that argument this morning?

MR. SENECA: If we -- if --

QUESTION: On the reservation boundary, whether it was diminished or not?

MR. SENECA: Absolutely.

QUESTION: If we have to resolve it de novo?

MR. SENECA: Yes.

QUESTION: In other words, if you -- if the Court holds you have waived the collateral estoppel issue, you feel you're still in Court and can win on the merits?

MR. SENECA: Absolutely.

QUESTION: Why don't we go to the merits, then.

MR. SENECA: And let's address those.

We have a series of congressional enactments beginning with the 1902 act, which was an act that began the opening process for the Uintah Reservation.

QUESTION: If all we had before us was the text of the 1902 act, would you agree that the reservation boundary had been diminished?

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MR. SENECA: Not under the decisions of this Court, the Solem decision, primarily, which is the most recent decision.

QUESTION: Well, I would have thought there were decisions of the Court that say, language of reverting to the public domain would be treated as diminishing the reservation boundary.

MR. SENECA: I think that it's clear that that is certainly evidence of something to be considered, but is not dispositive of the issue, is not conclusive. We find that that language, in terms of what is the public domain, is an issue. Does it refer to title? Does it refer to the opening?

And what does public domain mean? I think it's a term that is ambiguous at best, at least in these opening statutes with regard to reservation openings, and so when we refer to --

QUESTION: Do you think an Indian reservation can be -- do you have any instance in which Indian reservations are referred to as the public domain? I mean, I am --

MR. SENECA: Not -- not --

QUESTION: -- at a loss to understand what that phrase could possibly have meant in that statute unless it meant the diminishment of the reservation.

MR. SENECA: What we have in the historical context is a position that the Congress has taken in legislative enactments that basically was an assimilation policy that was going to open reservation areas for non-Indian settlement, was going to allot individual Indians pieces of land, and the whole idea was for them to be assimilated into the dominant society.

In the -- section 5 of the General Allotment Act --

QUESTION: And you're saying that allowing white settlers to come onto the reservations would be referred to as restoring the reservation to the public domain, permitting the entry by white settlers would be described in that fashion with those words?

MR. SENECA: Yes.

QUESTION: I cannot imagine that.

MR. SENECA: We have the position that was taken in the line of cases that has come before this Court. What we have -- we have those cases where those reservations have been diminished: the DeCoteau case, where there was a clear understanding between the Indians and the Government that that reservation boundary was to be vacated, to be disestablished. There was an agreement reached. There was a cession agreement reached. In the Rosebud case, a similar cession agreement was reached.

In this instance, there is no such agreements. In fact, the Ute Indians resisted the allotment of their reservation all the way. There was never any agreement by the Ute Indian Tribes to be involved in disestablishment.

QUESTION: Is my recollection correct that the operative provisions of the 1902 act were conditioned on that agreement, so that the act in which the public domain, reversion to public domain language occurred, was never itself operative to effect anything? Isn't that correct?

MR. SENECA: That's correct, as the Justice indicated, that it was conditioned upon an agreement with the Ute Indians, and that agreement was never forthcoming.

QUESTION: Well, the later statutes by themselves didn't do anything, either. They had to tag onto the 1902 statute, didn't they?

MR. SENECA: Well, the 1903 and 1904 were basically an extension of time for the opening and additional appropriations to get surveys done, the real operative aspect of the opening heard in the 1905 statute, and the 1905 statute, which was the last of these lines of enactments for the opening of the Uintah Reservation, basically indicated that the entry would be under the general homestead and town site laws, and so the --

QUESTION: Did it have any reference to

reversion to public domain?

MR. SENECA: Not in the 1905 statute.

So what we have, then, is a set of circumstances where the language that was set forth in the Solem v. Bartlett case, where this Court indicated that diminishment will not be lightly inferred; our analysis of surplus land acts requires that Congress clearly evinced an attempt to change boundaries before diminishment will be found, and so the issue and the test has to deal with what was the congressional intent in dealing with this diminishment, or with the reservation boundary of the Uintah Reservation?

Now, the Tenth Circuit in their analysis of going through this voluminous record that was before the Court at that time found that there was no clear expression by the Congress to diminish the Uintah Reservation, and it's our position that nothing has changed.

The facts of the Uintah Reservation haven't changed, and as I was discussing this issue with Mr. Hagen, and as we were reviewing this, we got to thinking about the various elements involved in diminishment cases.

The most recent position that this Court has set forward is the Solem case. There has been nothing since

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that time.

QUESTION: May I just ask a general question? Is it your position that the tribe retains the power to exclude people from the reservation?

MR. SENECA: One of the elements of sovereignty is to be able to exclude undesirables from the reservation.

QUESTION: Well, could they exclude all non-Indians except the residents?

MR. SENECA: No, they could not.

QUESTION: Why not, if it's a --

MR. SENECA: Because those people that have come onto the reservation come onto the reservation, and most of them, at least those parcels of property that they have, begin with a Federal patent, and so there they are -- they are on that reservation with the support of --

QUESTION: Those are the people who have bought property there.

MR. SENECA: Yes.

QUESTION: What about tourists, for example? Could they exclude tourists from the reservation?

MR. SENECA: Only if somehow that tourist was engaged in some kind of conduct that would --

QUESTION: Well, is that typical of reservations, that the Indians have to give a reason for

their exclusion of non-Indians? Don't they have an absolute authority to do that if the person just has no particular right to be there?

MR. SENECA: The particular right that we're referring to, and I think that what you're driving at, is clearly this, that on the trust lands, the lands that actually belong to the Indians, they can exclude people from --

QUESTION: Well, I'm thinking frankly of the -- on this map that's in the brief, there's a big white area --

MR. SENECA: Yes.

QUESTION: -- which I gather is all inhabited, but that, I gather, would be governed by the tribe under your submission.

MR. SENECA: Not entirely. This Court has addressed that issue in a number of cases. We have indicated, and this Court has told us that we as Indians do not have criminal jurisdiction over non-Indians, so that we begin with that. We cannot exercise criminal jurisdiction over non-Indians.

This Court has also in the Yakima case -- what we refer to as the Brendale decision -- has indicated that in those reservations where there is a dominant non-Indian community, that we cannot zone --

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QUESTION: What can you do? That's -- what I'm curious about is, what would be the consequences of accepting your position beyond the jurisdictional point in Mr. Hagen's case? If this Court said, you're right, that reservation was not diminished, what else follows from that determination in addition to, Mr. Hagen will be subject to -- not be subject to trial in a State court? What are the other consequences?

MR. SENECA: In reality, that is the primary consequence.

QUESTION: What -- primary or not, what other consequences would there be?

MR. SENECA: There -- we're talking about -- basically there are two kinds of jurisdictions that we're dealing with here, criminal and civil jurisdiction. We do not have criminal jurisdiction over the non-Indian community.

Then that leaves civil jurisdiction. What civil jurisdiction do we have over the non-Indians residing in that area? The civil jurisdiction goes to those areas where there is a consensual relationship with the tribe. Then, on the civil area, then they can be brought into tribal court and we can deal with the civil aspects of that consensual relationship.

Now, in terms of -- I've already mentioned --

QUESTION: I think you've answered the question, Mr. Seneca. Thank you.

Mr. Mann, we'll hear from you.

ORAL ARGUMENT OF RONALD J. MANN

ON BEHALF OF THE UNITED STATES AS

AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision --

QUESTION: How do you explain away Seymour and the other cases indicating that that language is

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sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually --

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

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MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description --

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The -- stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of

this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where -- you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the --

QUESTION: That wasn't the operative language there. That was just --

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that

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that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted --

MR. MANN: Now, in that case also, you'll -- if you -- when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it

seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded that the reservation -- that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that -- that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved

here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of cases that have considered surplus land acts from this period of time, and I think it's fair to say that --

QUESTION: And we declined to do that --

MR. MANN: -- in all -- in all --

QUESTION: -- but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the -- what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the

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reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closely to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are --

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

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QUESTION: I think you're probably right, but to -- I wouldn't say that to -- it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be -- that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to

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returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

General Graham, we'll hear from you.

ORAL ARGUMENT OF JAN GRAHAM

ON BEHALF OF THE RESPONDENT

MS. GRAHAM: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin my argument by focusing on the point that was just raised by Justice Souter, and that is that whether or not the term "cession" or "cede" as was used in some of the cases that have been before the Court is less explicit than a congressional mandate that is conceded in this act to be, these lands shall be restored to the public domain.

It is the State of Utah's position that in fact

that is the result of the cede language. In fact, it's interesting to point out that though the term "cession" was used in the statute in the DeCoteau case that this Court decided in 1975, the United States in that case argued against the effectiveness of that term and, in fact, their statement was in their brief that the term -- use of the term "cession" in that statute was ineffective, because the heading in the brief stated, "The absence of language in the 1891 act expressly altering the boundaries of the reservation or returning the land to the public domain shows that the reservation boundaries were not altered." I'd like --

QUESTION: Your trouble in this case is, isn't it, that nothing in fact was operative until the 1905 act, and the 1905 act rather conspicuously omitted the reference to returning to the public domain?

MS. GRAHAM: I don't think that is our problem in this case, Your Honor. I know that has been argued, but I think it's very clear that the 1902 act provided what was in Rosebud the unmistakable baseline intent to diminish these surplus lands. That is, remove them --

QUESTION: By agreement.

MS. GRAHAM: -- from the reservation.

QUESTION: By agreement, isn't that right?

MS. GRAHAM: -- and clearly --

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QUESTION: Ma'am, it was to --

MS. GRAHAM: Yes, Your Honor.

QUESTION: -- diminish it by agreement.

MS. GRAHAM: The 1902 act, yes --

QUESTION: Right, which they never got --

MS. GRAHAM: -- did require --

QUESTION: Which the Government --

MS. GRAHAM: It did require consent.

QUESTION: And the Government never got that consent.

MS. GRAHAM: It did not get consent. The following year, after the 1902 act was passed, an extension act was passed in 1903, in fact, March of that year, but 2 months earlier something very important happened, and that was that this Court rendered its decision in Lone Wolf v. Hitchcock, overwhelmingly ruling that consent was no longer needed in the negotiations with the Indians.

The 1903 act that governed this Uintah reservation and was an amendment to the 1902 act quickly made that change pursuant to Lone Wolf, pursuant to that decision, and changed the statute to say basically we'd like you to go get consent, but if consent is not forthcoming, go ahead and assign the allotments, and that was a clear change between 1903 and 1902.

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But 1902 still provided the two key congressional mandates that were needed to accomplish the only purpose of this law, too -- to assign allotments to the Indians, and to open the surplus lands to non-Indian settlers.

Those two key mandates were only provided in the 1902 act. They were never provided in any of the three extension acts that simply delayed the time for opening the reservation for 1 year.

The fact that the public domain language was not used in the 1905 act, it wasn't used in either one of the other two extensions, either, the two mandates about granting allotments and opening -- making -- excuse me, restoring the surplus lands to the public domain remained, and in fact were clearly confirmed by the presidential proclamation that really opened these lands.

QUESTION: Before you get to the presidential proclamation, can you help me out on one part of the 1902 and 1903 acts?

MS. GRAHAM: Yes, Your Honor.

QUESTION: The 1902 act refers to the unallotted lands being restored to the public domain, is that not correct?

MS. GRAHAM: Yes.

QUESTION: And the 1903 act abandons the

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requirement of Indian consent for allotments, isn't that correct?

MS. GRAHAM: That's right, Your Honor.

QUESTION: It doesn't abandon the requirement for Indian consent insofar as it might be relevant to the restoration of the unallotted lands, or does it?

MS. GRAHAM: I believe that the consent requirement in the 1902 act was as well tied to the allotments, and in fact --

QUESTION: So your argument then really is, if we're talking about unallotted lands, consent was never necessary, is that correct? I thought that it was understood under the 1902 act Indian consent was necessary both for allotments, allotted lands, and for the disposition of the unallotted lands to be restored to the public domain.

MS. GRAHAM: I think it's very clear, Your Honor, and -- I think it's a very good question, and I think the reasonable interpretation of the act, to be fair, is that the 1902 act was intended by Congress really to be consented to by the Indians --

QUESTION: Because Lone Wolf hadn't been decided yet.

MS. GRAHAM: That's correct.

QUESTION: Yes.

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MS. GRAHAM: Both ways. But it's very clear --

QUESTION: And if you accept that, then the 1903 amendment it seems to me doesn't really reach the more difficult question of whether Indian consent was still required for the unallotted lands.

MS. GRAHAM: I think that question is specifically answered in a later statute, Your Honor, and that was that initially the Uintah and White River bands were going to be paid $70,000 by the United States for allotments that were coming, really, from the Uncompahgres, who had been given the opportunity to pick allotments there as well.

And initially, I believe in the 1902 Joint Resolution from the Congress, it was stated that they'll get their money when the consent that was referred to in the 1902 act is forthcoming. It is specifically stated in the 1903 act, I believe, that the Indians would not -- or, excuse me, that the Indians would not have to wait for their money until they consented to the restoration of the lands to the public domain, so I think that makes it clear that really the consent was probably seen as related to both, and was removed as to both.

The real argument here, and I could cite many, many cases from this Court about what the phrase, "restored to the public domain" means. This is a clear

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congressional mandate in the first line of the 1902 act. It is expressly repeated in the presidential proclamation that really opened these lands in 1905 by President Roosevelt, and it's the first line of that proclamation. It states very simply that whereas the 1902 act provided that these surplus lands were going to be restored to the public domain, so be it, and went on to discuss the particulars of how that would be done and the registration process and so forth.

QUESTION: Well, General Graham, what weight do you think we should give to the presidential proclamation on the question before us, that is, the congressional intent?

MS. GRAHAM: The Court has looked to it before in these diminishment cases, Your Honor, that have been rendered here, and in fact I think the United States argued in one of the cases that it was the most probative evidence from the chief executive officer of the country as to what the act of Congress meant that he himself was going to implement by opening.

QUESTION: Do you cite in your brief the cases that support reliance on the presidential proclamation in interpreting the statute?

MS. GRAHAM: I believe we cite the DeCoteau reference there --

QUESTION: DeCoteau?

MS. GRAHAM: -- Your Honor, and I want to say I'm not absolutely certain that it was cited in our brief. I am fairly certain that it was referenced by the Court in that case.

QUESTION: Ms. Graham, if the congressional intent at the time this legislation is passed is the turning -- is what this turns on, then do I understand correctly that the demographics are irrelevant, because one couldn't know in 1902 and 1905 what the population would be like nowadays?

MS. GRAHAM: Your Honor, I think that the decisions of this Court have made demographics a relevant factor. The unanimous decision of this Court in the Solem case in 1984 clearly stated that that was one of the four parts of the "fairly clean analytical structure" that the five prior decisions had really established, and kind of a clear precedent there.

The demographic factors have been considered relevant and have been important in cases. They were important in the Solem case, and they were important in the Rosebud case, and I believe that they're important in the case before the Court today.

QUESTION: Is it important what is the result, what are the consequences of the decision whether this

reservation is diminished? I understand what the effect is on Mr. Hagen, but what other effect would it have to say that this -- if the decision is that -- against you that it hasn't been diminished, then what, other than giving -- removing from the State courts authority with respect to Mr. Hagen would be the consequence?

MS. GRAHAM: Well, Your Honor, there would be dramatic consequences, and those are consequences that are being experienced now as a result of the en banc decision in 1985.

There is confusion in this community about what authority there is to enforce the laws, whether State and local law enforcement has authority over Indians who commit criminal acts in this area, this area that for 70 years has really not been considered part of the reservation by anyone, so that jurisdictional void is there.

QUESTION: But the focus is on criminal jurisdiction, not other issues.

MS. GRAHAM: The particular problem that brings this case to the Court is a criminal case, and it's a very typical problem.

QUESTION: But is there an area other than who has authority to try an offender?

MS. GRAHAM: Indians for crimes?

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QUESTION: Yes.

MS. GRAHAM: Yes. There's a complete separate potential problem, the scope of which we don't know fully yet, Your Honor, and that is in the civil area. This Court has clearly upheld two exceptions, or two situations when tribal authorities on reservations may regulate, tax, license, and have non-Indians answer to them in civil matters, and that is when there is business, or a tort relationship with a tribe or a tribal member, the non-Indian has to come to the tribal court, and those exceptions have been preserved in the recent cases of Brendale and Lawling.

The Law and Order Code of the Ute Tribe purports to reach rather far in authority over non-Indians if this land is called a reservation, and I -- by answering your question about civil and tax and regulatory matters, Your Honor, I don't want to undermine in any way the serious problem that is being experienced in the criminal areas, because it's very simple.

A person is arrested for criminal conduct in this disputed area. The tribe will decline normally jurisdiction, if it properly goes there, citing that the individual is not an Indian. The Federal court declines on the same basis. The State proceeds to prosecute and have the person answer for those crimes, and of course the

defendant does what you would expect them to do -- claim that they are an Indian.

That is precisely what happened with Mr. Hagen. That is precisely what happened with Mr. Perank, the companion case from the Utah supreme court, and in fact the Ute Tribe challenged Mr. Perank's Indian status even though his father was a fullblood Ute and lived on the reservation when Mr. Perank was born.

So the State has a bit of a problem there in enforcing the laws, and we are losing control, if you were, in terms of who is really going to answer for prosecuting those people. There is a community to protect, after all, and that's also part of my job, and it's a very serious consequence that is worsening.

Now, if this Court rules the other way, that these lands, this disputed area, which is $400,000 -- excuse me, 400,000 acres, basically to the western end of the undisputed reservation, which is 1.2 million acres, the State of Utah's position is there will be no consequences.

That is precisely what has happened for three generations in this community since President Roosevelt opened up these surplus lands, not part of the 1.2 million acre reservation. When that happened in 1905, in fact there were over 20 communities formed within the first

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year.

This area was settled by non-Indians. To compare the population statistics and the demographics to the fact situation that was before the Solem court, and it was important to the Solem court, it's a dramatic difference. The difference is that was a 50-50 population there. The Uintah Reservation is 95 percent-plus non-Indian. There are 20,000 residents in the disputed area here, only 300 Indians, and approximately half are tribal members.

In the largest city in this disputed area that was settled by non-Indians, there are 350 businesses. Two are owned by Indians. The tribal seat --

QUESTION: What is that city?

MS. GRAHAM: Roosevelt.

QUESTION: Roosevelt.

MS. GRAHAM: Named after the opening President, Your Honor.

The tribal seat of government -- we do think that's important. The tribal seat of government for the Indians is in the undisputed reservation, in the trust lands, on the tribal lands at Fort Duchesne, not in these disputed lands here, and as the majority noted in Solem, few homesteaders ever really showed up at the Cheyenne River Reservation. Here, they arrived in droves. Within

1 year there were more homesteaders, non-Indian homesteaders, than lands could be provided for.

QUESTION: I know we may have said it in some earlier cases, but don't you really have trouble understanding how current demographics has anything to do with the meaning of a 1902 statute? I mean, it either meant what it meant, or it didn't mean what it -- how can current demographics say anything about what it meant in 1902?

MS. GRAHAM: You know, Your Honor, the way the Solem court --

QUESTION: 1905, depending on --

MS. GRAHAM: Yes.

MS. GRAHAM: -- what you want to pick.

MS. GRAHAM: Yes, thank you. I think the way the Solem court explained the relevance of that is, to be honest, these surplus land acts are very difficult to discern. As Justice Souter correctly noted, really the environment, the congressional intent at this time was all these reservation would be -- the surplus lands would be restored to the public domain.

So I think they're considered unique, and perhaps -- and I think the Solem court calls that factor an unorthodox factor but an important one, and the warning given there was, we look to the subsequent demographics as

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one indication of what Congress may have intended, but the warning there is, to impose reservation status on lands that were settled, populated by non-Indians, poses a great burden on the administration of law enforcement there, and of course we think that's what, really, our case is all about, and such a compelling difference between this case and Solem.

I wanted to address briefly another major difference between the Solem result and the one that the State of Utah seeks here, and that is its treatment of public domain language. Here, the fact that the surplus lands are going to be restored to the public domain is the key congressional mandate in the act, along with, of course, the allotment to the Indians.

In the Solem act, it was very different. The operative language up front there was clearly a merely sell-and-dispose statute, like the one this Court addressed in the Mattz case, and in fact the only reference to public domain, they were literally the last two words of the last section of the act, and that section had only to do with timber rights.

So we don't believe that the Solem's balancing that incidental, unimportant reference to public domain can really match up against what is in the first line of the Uintah statute, that clear congressional mandate, so

we think those were the two major differences that describe -- that explain the difference in the result.

I also want to address the concern that Justice Souter raised about whether or not the public domain mandate had been somehow repealed by not being included in the 1905 act, because that was the last extension act before President Roosevelt did open the lands up.

You know, the argument here really is that that phrase was repealed by the inclusion of the homestead and townsite restriction, and in fact the argument I believe that the tribe makes is that the homestead and townsite restriction is so inconsistent with the language of restored to the public domain that they couldn't possibly exist together, and therefore the latter must have repealed the prior.

The State of Utah strongly disagrees, and in fact the homestead and townsite manner of disposing, selling the lands was the most typical way to deal with the lands when they were restored to the public domain. Of course, it was the specific device used to restore these lands to the public domain in the Rosebud case.

I think really critical for this Court to take -- to be aware of at this point on the point of the effect of the 1905 act, and did it repeal that mandate in the 1902 act, is really what the United States and the Ute

Tribe itself specifically agreed to and represented to the United States Court of Claims in 1957, and that stipulation is referred to in our briefs, and it is excerpted in the county's amicus brief in support of the petition for cert.

It is 24 pages long, and at paragraph 16, it expressly states that the allotments were made, that the surplus lands were restored to the public domain pursuant to the 1902 act and amendments thereto.

QUESTION: That may show the Government has taken an inconsistent litigating position, but I don't know that that 1957 declaration by the Government sheds much light on the intent of Congress in 1905.

MS. GRAHAM: Well, it simply is evidence, Your Honor, I think important evidence, that as the Solem court stressed was important, all parties saw this the same way. This is 1957. This is 50 years after the opening of these lands, and still, even the tribe and the United States, it was their view that the lands had clearly been restored to the public domain and by that act there, and in fact --

QUESTION: I agree that it can be used in making the decision, but it really isn't a form of estoppel, I don't think, and the fact it comes so long afterwards may make it less useful than if it came shortly afterwards.

MS. GRAHAM: Well, more probative perhaps, Your

Honor, as the Court has said, to look at the -- of course, the most probative has to be the statutory language, and I just have to say for the State of Utah, Your Honor, that we think we have the clearest possible case, and that is, when you have in the first line a mandate that the lands are going to be restored to the public domain, and in fact that the presidential proclamation that implements it repeats that line, that that's fairly clear language.

QUESTION: May I interrupt you right there? I have in mind the language for the 1902 act, which refers to --

MS. GRAHAM: Yes.

QUESTION: -- unallotted lands within said reservation shall be restored to the public domain. The last proviso of the 1903 acts says that the time for opening the unallotted lands to public entry, which I assume is referring to the same lands, goes on, "...on said Uintah Reservation shall be..." -- so forth and so on. Doesn't that imply that the land remains on the reservation after opening to public entry?

MS. GRAHAM: I apologize, Your Honor. Let me make sure I see where you are here. This is the 1903 act?

QUESTION: What page of which brief are we --

QUESTION: It's on page 49 of the joint appendix, the runover of the footnote quoting the 1903

act. The last proviso says that "The time for opening the unallotted lands to public entry on said Uintah Reservation," and I would have read that as referring to the same lands -- same unallotted lands referred to in the 1902 act, that the 1903 language seems to contemplate that those lands are "on said Uintah Reservation."

MS. GRAHAM: Yes, well, of course, you know, before the presidential proclamation opened the act, they were still part of the reservation. They really -- they're restored to the public domain, I think effective with the proclamation, because it had to occur at the same time as the allotment process.

The way it was set up was the Indians were given the opportunity to first select their own allotments, and they picked the ones along the riverbed, and after that was complete, then the surplus -- thereby defined as the surplus is opened up, so I think that's --

QUESTION: It's open to public entry on said reservation.

MS. GRAHAM: Yes.

QUESTION: So it seems to me that that contemplates that the public entry is compatible with remaining on the reservation. That's what that language suggests to me.

MS. GRAHAM: Well, Your Honor, I just have to

say I don't think that --

QUESTION: That's a fair reading of it.

MS. GRAHAM: -- there's much support for that, at least in the cases that -- the ones that this Court has treated a directive, an operative directive of "shall be restored to the public domain" as fairly clear, and even though sometimes -- and, in fact, a lot of the parties in the long history of this litigation have pointed to language, well, those lands are -- those are the reservation lands, or -- there is a reservation there, a big one, 1.2 million acres, and we have often tried to argue that just because there's a reservation to lands being on a reservation doesn't mean that another small part of it isn't removed from the reservation when it's opened to settlement by non-Indians, because of course the reservation, the trust lands that are there now are unchallenged by the State and, of course, always have been.

The argument -- I wanted to just complete the thought about the effect of the stipulation that the United States and the tribe entered into, only that after it's said expressly -- and I would like to note that this express stipulation was adopted by the court and the court of claims expressly held that the 1902 act and acts amending it did, in fact, restore those surplus lands to

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the public domain.

Two paragraphs down in that stipulation, at paragraph 19, the tribe and the United States discussed the homestead device, if you will, of opening the lands, and found absolutely nothing inconsistent with the public domain concept.

There really is only one case that has ever held that a congressional mandate, an operative phrase in a surplus land act restoring those surplus lands to the public domain did not affect removal from the reservation, and that, of course, is the Tenth Circuit decision, the en banc decision in 1985.

I must say to this Court that I think that opinion is a confused opinion. I think it completely misstated this Court's holding in the Solem case, and the -- at two points in the case it talks about public domain language does affect the wholesale diminishment, and when it's used for the Gilsonite removal it's of course completely clear, and in two other parts of the opinion it says, "Our conclusion is this language does not affect the disestablishment," and in fact in the concurring opinion Justice Seymour says that yes, public domain language used to be an indicator of diminishment, Solem dictates a different result.

We think that is clearly not the case. We think

Solem did a good job of summarizing and applying the decisions of this Court.

The reality of the lands that we're talking about here, the 400,000 acres, are this. There is less tribal presence there than there was in the DeCoteau reservation, or than there was in the Rosebud Reservation. These are non-Indian lands, non-Indian communities, and they have been since Roosevelt opened them. The State's jurisdiction was essentially unquestioned for three generations, and the Tenth Circuit is alone in the field in upsetting the status quo.

We believe the law is clear. The lands were restored to the public domain. Those words mean what they seem to mean, and those lands were removed from the reservation when opened just as Congress intended them to be. The tribe and the U.S. expressly agreed so 30 years ago. Federal claims adopted that ruling. The tribe and the U.S. now urge on this Court a completely different view. That turns a century of legal precedent about that language on its head.

In response, I would like to quote the Court in Rosebud that said, "The longstanding assumption of jurisdiction by the State over an area that is over 90 percent non-Indian both in population and in land use not only demonstrates the party's understanding of the

meaning of the act, but has created justifiable expectations which should not be upset by so strained a reading.

The State of Utah respectfully asks this Court to honor those justifiable expectations and affirm the judgment of the Utah supreme court.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Graham. The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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CASE 92-6281

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BY Ann Marie Federico

(REPORTER)