

brief), for defendant-appellee State of Utah.

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Before HOLLOWAY, Chief Judge, and SETH, DOYLE, BARRETT, McKAY, LOGAN and SEYMOUR, Circuit Judges.

#### ON REHEARING EN BANC

WILLIAM E. DOYLE, Circuit Judge.

The above entitled matter was considered by the court en banc on the motion for rehearing. The result was that the majority of the Judges decided that there should be reconsideration and a different result. It will be recalled that in the dissenting opinion which was written previously, this writer agreed with the position which has been taken by District Judge Jenkins (*Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D.Utah 1981)), who generally ruled that the Uintah Reservation and its lands remain the property of the tribes that are involved. As to the questions whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that the Indians lost title to these lands, the view of this writer is contrary to the view of the trial court.

#### I.

##### THE UINTAH ISSUE

[1] With respect to the case against disestablishment, it was even clearer in connection with the Uintah Indian Reservation than the other areas. The district court pointed out in its opinion that the Act of May 5, 1864, 13 Stat. 64, which established the Uintah Reservation provided that "the

lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" 521 F.Supp. 1072 at 1111, quoting H.R.Rep. No. 660, 53d Cong., 2d Sess., 1-3 (1894). The Uintah Reservation was thus clearly established as a permanent home for the Ute Tribe. Considering that Congress' intent to establish and set aside the Uintah Reservation was clearly expressed, disestablishment of that reservation would require an equally clear expression of congressional intent to change the status of the reservation.

Recently the Supreme Court decision in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), clarified that only in two types of situations should courts find that Congress intended to disestablish an Indian reservation. The first of these is when Congress uses explicit language of cession in an opening act and also gives indication of an unconditional commitment to compensate Indians for their opened lands. 104 S.Ct. at 1166. The other situation is "[w]hen events surrounding the passage of a surplus land act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . ." *Id.* But neither the intent behind the Indian Appropriations Act of 1905, ch. 1479, 33 Stat. 1048 [hereinafter cited as 1905 Act], that allegedly diminished the Uintah Reservation, nor the language used in that Act, is sufficiently clear to support a finding that the Act disestablished or diminished the Uintah Reservation. Indeed the language used in that Act is sufficiently clear to support a finding that the Act did not disestablish or diminish the Uintah Reservation. Neither the language used in that Act nor any other aspect of it gives clear support for a finding that the Act disestablished or diminished the Uintah Reservation. Nor does the legislative history support the allegation approached.

The original opinion, 716 F.2d 1298, in this case inferred, from a series of laws passed between 1902 and 1905, that Congress intended to diminish the size of the Uintah Reservation. The opinion stated that Congress' intent in passing the Indian Appropriations Act of 1902, ch. 888, 32 Stat. 245 [hereinafter cited as 1902 Act], was to disestablish the Reservation and that its original intent carried through to the 1905 Act that actually opened the Reservation to non-Indian settlers. The object of this was certainly different from the conclusion that was set forth. But we now conclude that no intention to alter the Reservation's boundaries was present. Actually the intent was to open the Reservation to non-Indian settlers and this couldn't effect the result that was suggested.

The district court's opinion was indeed well researched on this question, and others as well. The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1903 and 1904 extending the time set for the opening of the Reservation. See Indian Appropriations Act of 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.

It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," 716 F.2d at 1312, that carried through into the 1905 Act. To do so is

1. The brief submitted by the Cities and Counties suggests that the 1905 Act necessarily diminished the Uintah Reservation because BIA personnel and local residents immediately thereafter began referring to the "former" Reservation. These contemporaneous interpretations of the Act are entitled to little weight. Congress' authority over reservations is plenary, *Lone Wolf*

inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.

[2] An examination of the 1902-1905 series of Congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, 104 S.Ct. at 1167, provides inferences against diminishment. The district court's initial decision that the Uintah Reservation was not disestablished or diminished is correct. The strongest inference that is to be drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. With respect to the Reservation's boundaries, the only inference that can be drawn is that Congress had no intention for them to change. Congress' use of "homestead and township acts" language in the 1905 Act, as contrasted with its use of "public domain" language in the 1902 Act, is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation.<sup>1</sup>

[3] The original opinion's conclusion that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed we accept the district court's view that the Reservation's boundaries were not changed by the 1905 Act.

## II.

### THE FOREST RESERVE PROBLEM

[4] We will next discuss the status of the 1,010,000 acres of the Uintah Forest

*v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903), and it is Congress' intent that must govern our decision. The interpretation, wishful or not, given to the 1905 Act by whites living in the Reservation area cannot overcome the lack of compelling evidence that Congress intended to diminish the Uintah Reservation.

Reserve, which was set aside under the authority of the 1905 Act. The Act provided:

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, . . . such portion of the lands within the Uintah Indian Reservation as he considers necessary.

33 Stat. at 1070.

There is nothing in the 1905 Act or in its legislative history which establishes a "total surrender of tribal interests" or a "widely-held contemporaneous understanding that the affected reservation would shrink," as required by *Solem*, 104 S.Ct. at 1166. The act merely authorized President Theodore Roosevelt to set apart reservation lands as a forest reserve. This he did. Proclamation of July 14, 1905, 34 Stat. 3113. Indeed the 1905 Act specifically reserved the Utes' timber interests in the lands by authorizing forest officials to sell as much timber as could be safely sold for fifteen years and to pay the money to the Utes. 33 Stat. at 1070.

There is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation. That evidence is shown when the 1905 Act is contrasted with the Act of Apr. 4, 1910, ch. 140, 36 Stat. 269. The latter clearly extinguished a portion of the reservation lands for reclamation purposes. The reclamation lands were originally set aside under the authority of the 1905 Act. This was in the same manner as the forest lands which had been set aside. Yet five years later Congress showed that it could be explicit when it dealt with the reclamation lands. It said: "All right, title and interest of the Indians in the said lands are hereby extinguished, and control thereof shall pass to the owners of the lands irrigated from said

2. The applicable forest service laws mentioned in the 1905 Act are limited by 16 U.S.C. § 480, which provides that criminal and civil jurisdic-

project. . . ." 36 Stat. at 285. In contrast, Congress never enacted a subsequent statute extinguishing the Utes' interests in the lands withdrawn for the forest reserve.

Also, when Congress compensated the Utes for 973,779 acres of the forest lands in 1931, it recognized the lands as "belonging to such Indians." Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092.

Despite the fact that neither the language of the 1905 Act nor its legislative history evidences congressional intent to remove the forest lands from the Uintah Reservation, the district court and this court in its original opinion concluded that the reservation had been diminished because withdrawal of lands for a forest reserve was inconsistent with continued reservation status. 521 F.Supp. at 1138; 716 F.2d at 1314. In reaching this decision, both courts stressed that the administrative authority over the forest lands was transferred from the Department of the Interior to the Department of Agriculture. Such a change in the administration of the lands, however, does not rise to the level of a subsequent event establishing clear congressional purpose to diminish, as required by *Solem*, 104 S.Ct. at 1166-67.<sup>2</sup>

We therefore conclude that the Uintah Reservation was not diminished by the withdrawal of the national forest lands.

### III

#### THE UNCOMPAHGRE RESERVATION

Following rehearing it became necessary to consider the status of the Uncompahgre Reservation in Utah. This is said to be the least popular of the group. The position which is taken by the district court and by this court in the earlier opinion was that the entire Uncompahgre Reservation had been disestablished. However, there is a lack of evidence of this fact unless there can be disestablishment by failure to develop the area. The State of Utah supports the district court's original decision. Un-

tion is not affected by the existence of a national forest. Thus, Indian jurisdiction does extend to Indians on forest lands.

