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Winner, Best Appellate Brief in the 1998-99 Native American Law Student Association Moot Court Competition

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SPECIAL FEATURES

WINNER, BEST APPELLATE BRIEF IN THE 1998-99 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

*Lisa F. Cook Gambler & Melissa E. Stephenson**

Questions Presented

I. Whether the Muscogee (Creek) Nation government, reorganized under the Oklahoma Indian Welfare Act (OIWA) maintains jurisdiction to promulgate regulations over lands within Nation territory when the territory has not been disestablished or diminished, and the health and welfare of the tribe is at stake.

II. Whether the Muscogee (Creek) Nation maintains jurisdiction over waters within the Nation territory which includes the Arkansas River under either the doctrine of collateral estoppel or the Winter's doctrine.

III. Whether the Muscogee (Creek) Nation meets the Environmental Protection Agency (EPA) criteria to qualify for Treatment As a State (TAS) status and therefore the EPA approval of the Nation's application is valid.

Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

Statement of the Case

I. Proceedings and Disposition of the Court Below

The opinion of the United States Court of Appeals, Tenth Circuit, is unreported. That opinion reversed the United States District Court grant of summary judgment to Appellant Tulsa, and upheld the EPA approval of the Treatment As a State (TAS) application to the Muscogee (Creek) Nation in June 1998.

The Order of the United States District Court for Oklahoma, dated October 1997, is also unreported. That Order granted summary judgment to Tulsa.

II. Statement of Facts

The facts of this case are in dispute. The Muscogee (Creek) Nation (hereinafter Muscogee Nation or the Nation), formerly identified as the Creeks by non-Indian settlers, is one of the "Five Civilized Tribes," a federally

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recognized Indian nation with its territory and population centered in eastern Oklahoma. In January 1996, the Muscogee Nation reestablished the traditional green corn harvest religious ceremonial to give thanks for the resurgence of Muscogee government and its economic successes. (Jt. App. 3) The Nation chose a site on 100 acres of original Nation fee land in Tulsa, in recognition of the role that towns like Tallasi Town (Muscogee language for Tulsa) had in the great Creek Confederacy. (Jt. App. 3) The ceremony, of deep religious and economic significance to the Muscogee Nation, utilizes waters of the Arkansas River. (Jt. App. 3)

The Muscogee Nation was concerned about water pollution from the city of Tulsa wastewater treatment plant operated by the city of Tulsa twelve miles upstream from the ceremonial site on the Arkansas River. (Jt. App. 3) The plant operates under an Environmental Protection Agency (EPA) administered National Pollution Discharge Elimination System (NPDES) permit. (Jt. App.3) The Muscogee Nation sought recognition from the EPA for Treatment As a State (TAS) as encouraged by the 1987 amendments to the Clean Water Act (CWA). *See* 33 U.S.C. § 1377(e). (Jt. App. 3) The EPA granted the Nation TAS status in August 1996. (Jt. App. 3) The Muscogee Nation then legislated water quality standards (WQS) for the section of the Arkansas River in dispute in this case and all other water within Muscogee Nation borders. (Jt. App.3)

Tulsa filed the present action in January 1997 in response to the EPA's planned revision of Tulsa's NPDES permit to comply with the Muscogee Nation's WQS. (Jt. App. 3) Tulsa challenges Muscogee Nation TAS status based on allegations of insufficient tribal jurisdiction, and inappropriate EPA administrative action. (Jt. App. 4)

III. Standard of Review

The issues presented in this appeal are issues of law and are reviewed de novo. *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (*en banc*).

Summary of Argument

The Muscogee Nation and the EPA request affirmation of the Tenth Circuit Court of Appeals decision validating and enforcing EPA's approval of the Muscogee Nation's application for TAS status.

The Muscogee Nation has maintained jurisdiction over lands within its territory, including the bed of the Arkansas River and the Mackey Site. The Nation's jurisdiction over lands within its original borders has not been disestablished nor diminished by the Curtis Act or the Five Tribes Act. Moreover, the limitation established on Muscogee Nation governmental functions by those two Acts, the presidential approval power over all proposed tribal legislation, was repealed by the OIWA.

The Muscogee Nation has also maintained jurisdiction over waters within Nation territory which include a portion of the Arkansas River. As a threshold matter, the city of Tulsa should be precluded from litigating this issue again because the doctrine of collateral estoppel applies to Oklahoma's rights as to all sections of the Arkansas River running over territory granted to the Five Civilized Tribes. In the alternative, the Winter's Doctrine reserves to the Muscogee Nation a quality of territory water to fulfill the purposes of the reservation and guarantee habitability for the Nation's people.

The Muscogee Nation meets all of the Environmental Protection Agency (EPA) criteria to qualify for Treatment As a State (TAS): (1) It has a governing body carrying out substantial governmental duties; (2) It seeks to apply water quality standards which pertain to protection of water resources held by the Nation or otherwise within the borders of an Indian reservation; and (3) In the EPA Administrator's judgment, the Nation can carry out its technical functions in a manner consistent with the terms and purposes of CWA. *See* 33 U.S.C. § 1377(e) (1988).

Argument

a. Historical Background

As in so many cases involving Native American rights, the facts of this case hinge on specific historical events that are subject to more than one interpretation. Aboriginal Muscogee Nation land was located in what is now the state of Georgia. Due to non-Indian influx into that region and demand for land, the Muscogee Nation was removed by the U.S. Government to Indian Territory which today is part of the state of Oklahoma. *See* Removal Treaty, Mar. 24, 1832, art. IV, 7 Stat. 366 (provision for land patents to the Creek Nation from the United States).

In exchange for cession of lands east of the Mississippi River, the United States conveyed this new land in Indian Territory with title in fee simple to the Muscogee Nation. *Id.* at art IV. The Treaty of 1832 also guaranteed to the Muscogee Nation the perpetual right of self-government. *Id.* at art. XIV.

The Muscogee Nation later fought for the confederacy during the Civil War, and in punishment the United States took the western half of Indian Territory, designating it as "Oklahoma Territory." *See* Oklahoma Territory Organic Act, May 2, 1890, § 1-28, 26 Stat. 81. The eastern half of Indian Territory, however, remained in fee simple title as property of the Indian Nations, with specific land forever set apart in fee simple as a home for the Muscogee Nation. *See* Treaty with the Creek Indians, June 14, 1866, art. III, 14 Stat. 785, 786-87 (forever setting aside Creek lands). The original boundaries of the Muscogee Nation bordered on the west by a north-south running line running through present day Seminole, Oklahoma. (Jt. App. 1) The southern border was marked by the Canadian River, the northern border was an east-west line running just above present day Tulsa, Oklahoma, and

the eastern border ran northeast from Eufala, Oklahoma, to Fort Gibson, and then continued directly north to Chouteau, Oklahoma. (Jt. App. 1)

In 1867, Congress passed the General Allotment Act (codified as amended at 25 U.S.C. § 331 et. seq. (1983)). Its purpose was to assimilate tribes consistent with the *future* goal of terminating tribal reservation land bases. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 128 (1982) (emphasis added). Muscogee Nation land, like that of the other Five Civilized Tribes, was excluded from the Allotment Act because those Indian Nations held their lands in fee simple. *See* 25 U.S.C. § 339. Congress believed that because the Five Tribes held their land in fee, rather than by aboriginal title of occupation held in trust by the federal government, those Indian Nations could not be divested of their territories without their consent. However, the land fever and anti-tribal sentiment was strong during this period in American history, so in 1893 Congress created the Dawes Commission to negotiate allotment agreements with, among others, the Muscogee Nation. *See* Act of Mar. 3, 1893, ch. 209, 27 Stat. 612.

The Muscogee Nation resisted all efforts to open any part of their territory to non-Indian settlement. Congress responded by adding several coercive provisions to the Indian Department Appropriations Act, June 7, 1897, ch. 3, 30 Stat. 62. One of these provisions provided for presidential approval power over all laws passed by any of the councils of the Five Tribes. *Id.* at 62. The Muscogee Nation continued to insist on its legal rights conferred by treaty and fee title ownership of its territories. Consequently, Congress passed the Curtis Act, which provided for strong-arm forced allotment of tribal lands without tribal consent unless the tribe "agreed" to allotment. *See* Act of June 28, 1898, § 28, 30 Stat. 495, 504-05. The Curtis Act was enacted with the understanding that Muscogee title did not allow for unilateral divestment, and minimally required the "consent" of the Muscogee Nation to allow for any allotment. *Id.*

The Curtis Act resulted in an agreement with the Muscogee Nation that provided for the termination of the entire Muscogee government by Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. However, continued Muscogee Nation resistance and administrative difficulties resulted in the passage of the Five Tribes Act of April 1906, ch. 1876, 34 Stat. 137, in which Congress expressly perpetuated the existence and government of each of the Five Tribes. Subsequent courts have held that throughout this upheaval the Muscogee government persisted. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988). Neither the Curtis Act nor the Five Tribes Act ever mentioned water rights, nor did they contain express language that abrogated or diminished the original boundaries of Muscogee tribal territory.

In 1936, Congress passed the Oklahoma Indian Welfare Act (OIWA). *See* Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501 et. seq. (1983)). The OIWA, like the Indian Reorganization Act (IRA) passed two years before (Act of June 18, 1934, 48 Stat. 984, as amended (Indian

Reorganization Act), 25 U.S.C. §§ 461 et seq.) provided for constitutional governments and corporate charters for Indian tribes in Oklahoma. The self-government provision of the OIWA is different from the IRA, however, and does not contain the same limiting language. *See* Oklahoma Indian Welfare Act, § 3, 25 U.S.C. § 503. *See also* Indian Reorganization Act §§ 461 et. seq., 25 U.S.C. 476.

In 1979, under the authority of the OIWA, the Muscogee Nation adopted a new constitution. This constitution expressly secured the boundaries of the Nation's territory as they appeared in 1900 based upon the treaties between the U.S. government and the Muscogee Nation. The Muscogee Nation government established under the 1979 constitution applied to the EPA for Treatment As a State (TAS) status under the Clean Water Act (CWA). Following EPA approval, the Muscogee Nation passed the water quality standards at issue in this case.

The CWA prohibits discharges from a point source of any pollutant into waters unless the discharge complies with the Act's requirements. *See* 33 U.S.C. § 1311(a). The National Pollution Discharge Elimination System (NPDES) permit requires emission compliance from dischargers. *See* 33 U.S.C. § 1342. NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, such as Oklahoma since 1996, by a state agency subject to EPA review. *See* 33 U.S.C. § 1342(b). Where a state is granted authority to administer the NPDES program, the EPA continues to administer NPDES permits for federal territories not within state jurisdiction. *See* 56 Fed. Reg. 64876.

Under the NPDES program, each state must adopt water quality standards for its waters. *See* 33 U.S.C. § 1313. These standards are subject to review and approval by EPA. *See* 33 U.S.C. § 1313(a). Once water quality standards have been adopted, either the EPA or a state will issue NPDES permits only to dischargers who are in compliance with the state's standards. *See* U.S.C. § 1341(a). Regardless of whether the EPA or a state is granting NPDES permits, all upstream permits must comply with legitimate downstream water quality standards. *See generally, Arkansas v. Oklahoma et al.*, 503 U.S. 91 (1992).

In 1987, Congress added 1377(e) to the CWA that authorizes EPA to permit tribes to be "treated as a state" (TAS) for the purposes of establishing water quality standards. *See* 33 U.S.C. § 1377(e). EPA issued a final rule in 1991 implementing this provision by setting forth the standards for processing tribal requests for TAS status and the attached authority to establish these standards. *See* 56 Fed. Reg. 64,876 (1991) (codified at 40 C.F.R. § 131.8(b)(3)). It is EPA approval of Muscogee Nation TAS status under these regulations that are at issue in the present case.

b. Analysis

I. The Muscogee (Creek) Nation, Reorganized Under the Oklahoma Indian Welfare Act Which Repealed the Curtis Act and Five Tribes Act, Maintains Jurisdiction to Promulgate Regulations Over Lands Within Nation Territory Because the Territory Has Not Been Disestablished Nor Diminished, And the Health and Welfare of the Tribe is at Stake.

A. Muscogee Nation Territory Has Not Been Disestablished.

The Muscogee Nation jurisdiction over lands within its original national borders has not been disestablished. To determine whether tribal rights to territory and land have been disestablished, this court should apply the test set out in *United States v. Dion*, 476 U.S. 734 (1986). Disestablishment of tribal treaty rights is an abrogation of those rights. Abrogation of treaty rights should never be lightly imputed; however, where Congress has explicitly used its authority to abrogate a Native American treaty right, Congressional will controls. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).

There is no explicit language in either the Curtis Act or the Five Tribes Act disestablishing the Muscogee Nation's original territorial boundaries. Because of the lack of specific language in these Acts, the presumption is strong that there was no Congressional intention to abrogate territory granted in the Treaty of 1866. *See* Treaty with the Creek Indians, June 14, 1866, art. III, 14 Stat. 785, 786-87 (guaranteeing Muscogee territory in fee with the promise that no part of the land should ever be embraced in any territory or state).

In *Dion*, the Court considered whether a Native American who takes an eagle on tribal land violates the Eagle Protection Act, 16 U.S.C. § 668(a) (1962). *See Dion*, 476 U.S. at 737. *Dion* stated that the preference for an explicit statement by Congress was not a per se rule. *Id.* at 739. However, the Court in that case established that there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty." *Id.* at 740.

The *Dion* test established a high standard of proof for abrogation. *Id.* at 741. *Dion* is consistent with the long settled tenet that Indian treaty rights are too fundamental to be easily cast aside, and "absent explicit statutory language, [the courts] have been extremely reluctant to find Congressional abrogation of treaty rights . . . ." *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979).

The Curtis Act and the Five Tribes Act admittedly were enacted with the future elimination of Muscogee Nation territory and eventual Muscogee Nation assimilation in mind. But as this Court has said,

> acts that sought to achieve the same ends in a specific situation as allotment did in general, . . . which was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians and to promote interaction between the races and encouraging the Indians to adopt white ways, . . . do not, alone, recite or even suggest that Congress intended thereby to terminate [those specific reservations or trust status lands]. *Mattz v. Arnett*, 412 U.S. 481, 490 (1973).

Under even the broadest application of the *Dion* test, however, neither the Curtis Act nor the Five Tribes Act abrogated the Muscogee Nation's external territorial boundaries conferred under the Treaty with the Creek Indians. *See* Treaty of June 14, 1866, 14 Stat. at 785. Neither the Curtis Act nor the Five Tribes Act contains language that expressly abrogates the territorial boundaries of the Five Civilized Tribes. *See* Act of Mar. 3, 1893, ch. 209, 27 Stat. 612. *See also* Act of Mar. 4, 1906 (Act of Mar. 1, 1901, ch. 676, 31 Stat. 861). In addition, neither the legislative history nor surrounding circumstances of these two Acts show the required Congressional consideration of Muscogee Nation treaty rights plus the intention by Congress to abrogate those rights. *Id.* Consequently, when the *Dion* test is applied to the facts in this case, this Court must reject Tulsa's claim that the Muscogee Nation had been disestablished with regard to its territorial boundaries.

B. Muscogee Nation Territory Has Not Been Diminished.

The Muscogee Nation's external boundaries have not been diminished in geographic scope. Although the Curtis Act, June 28, 1898, § 28, 30 Stat. 495, 504-05 [hereinafter Curtis Act], subjected the Muscogee Nation's land base to coerced allotment, the Muscogee national land base was not diminished. This Court has never been willing to "extrapolate from early twentieth century colonial ideas about the purported demise of Indian reservations any specific congressional purpose to diminish reservations with the passage of every surplus land act." *See Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984). This ruling also applies to Indian lands held in fee, or in arrangements not typically referred to as "reservations." *See generally Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (holding that trust lands validly set apart for the use of Indians qualified as "reservations" for the purposes of defining Indian Country). The first principle of the *Solem* test dictates that once land is set aside as "Indian Country" it remains so unless Congress explicitly indicates otherwise, regardless of the title status of individual plots within its boundaries. *See U.S. v. Celestine*, 215 U.S. 278, 285 (1909). Nor will diminishment be lightly inferred. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977). In this case, the standard for finding diminishment is even higher because the Five Civilized Tribes held their land in fee, and thus possessed land rights superior to other Indian tribes. *See Montana v. United States*, 450 U.S. 544 (1981).

Indeed, this Court has *specifically* acknowledged that the Five Civilized Tribes held their title under special historical circumstances that gave them superior title to other "reservation" Indians. *Id.* at 555 (emphasis added).

A small group of surplus land acts have been found to diminish reservations. *See Rosebud Sioux Tribe*, 430 U.S. at 615 (holding that the Rosebud Sioux Reservation was diminished because surrounding circumstances of congressional activity unequivocally demonstrated that Congress evinced intent to change boundaries). *See also DeCoteau v. District County Court*, 420 U.S. 425, 444-45 (1975) (explaining that the reservation was diminished due to express reference to cession and total surrender of all tribal interests).

Most surplus acts, however, did not diminish reservations. *See generally Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (holding the reservation not diminished when both act and legislative history fail to provide substantial and compelling evidence of congressional intent to diminish). *See also Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) ("Indian country" not diminished because statutory language, "notwithstanding the issuance of any patent," applies with equal force to fee patents issued to non-Indians and Indians alike).

In *Rosebud* and *DeCoteau*, this Court found language of diminishment in legislative action towards specific tribes that contained clear expression of congressional intent to diminish. *See Rosebud Sioux Tribe*, 430 U.S. at 615. *See also DeCoteau v. District County Court*, 420 U.S. at 425. In both cases, the tribes involved were located on reservation land held in trust for the tribe by the U.S. government, and possessed only aboriginal title. *See Rosebud Sioux Tribe*, 430 U.S. at 586. *See also DeCoteau*, 420 U.S. at 427. Conversely, in *Mattz* and *Seymour*, despite the extensive allotment of land to non-Indians within original tribal territory, this Court did not find any clear expression of congressional intent to diminish reservation boundaries. *See Mattz v. Arnett*, 412 U.S. at 481. *See also Seymour v. Superintendent*, 368 U.S. at 351.

To determine whether Muscogee Nation territory was diminished, it is necessary to examine two factors. First, this Court must look at the history of congressional dealings with the Nation through Congressional enactments and the surrounding circumstances of that legislation. Second, this Court must consider the facts in the instant case in light of the analyses provided in the above-cited case law to determine whether under *Solem* this court should find Muscogee Nation territorial diminishment.

In 1887, Congress passed the General Allotment Act (codified as amended at 25 U.S.C. §§ 331 et seq. (1983)), which provided that lands held in trust for Indians by the United States would be divided up and parcels given to individual Indians in fee simple. The General Allotment Act, § 8, specifically excluded the Five Civilized Tribes, including the Muscogee Nation, from application of the Act because their lands were held in fee simple title. *Id.*

The superior quality of the title held by these Nations meant that these Tribes would have to consent to allotment to be divested of their property right. *See Woodward v. De Graffenried*, 238 U.S. 284, 294 (1915). Thus, the Allotment Act was passed with the understanding that Congress did not have the authority to unilaterally diminish the exterior boundaries of the Muscogee Nation held in fee simple.

Congress then empowered the Dawes Commission to negotiate consensual allotment agreements with the Five Civilized Tribes. *See* Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645. Because the Tribes refused to negotiate with the Dawes Commission to allot their lands, several coercive provisions were later added into the Appropriations Act of June 7, 1897. 30 Stat. 62. One of these provisions was the requirement for presidential approval power over all legislation of the Five Civilized Tribes. *Id.* at ch. 3. With this provision, the Tribes' governments were essentially held hostage to the allotment process. They could not receive much needed monies to assist their people unless their governments surrendered to a presidential approval provision.

Although the Seminole Nation reached an agreement with the Dawes Commission, the Muscogee Nation continued to resist agreement to allot its lands. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). Although a tentative agreement was reached between the Nation and the Dawes Commission, the Nation did not consent to abolish any of its title to its lands, and never consented to a diminishment of Muscogee Nation borders. *See* Creek Agreement, Mar. 1, 1901, 31 Stat. 861.

Congress then passed the Curtis Act to force allotment and eventual termination of the Five Civilized Tribes. This Act incorporated the tentative Muscogee Nation agreement providing that this agreement would supersede any inconsistent provisions of the Curtis Act if ratified by October 1, 1898. The Muscogee Nation never voted to ratify the tentative agreement incorporated in the Curtis Act, but Congress proceeded to allot sections of land to non-Indians within Muscogee Nation territorial boundaries.

The facts in this case can be distinguished from the facts in *Rosebud v. Kneip*, and *DeCoteau v. District County Court*, and are more closely analogous to the facts in *Mattz v. Arnett*, and *Seymour v. Superintendent*. As recounted above, neither the Curtis Act nor the Five Tribes Act contains the type of explicit language of diminishment found in *Rosebud* or *DeCoteau*, nor any other expression of congressional intent to immediately diminish the territorial boundaries of the Muscogee Nation. In addition, the legislative history fails to provide substantial and compelling evidence of congressional intent to diminish the external boundaries of the Muscogee Nation. In fact, Congressional understanding at the time was that Congress did not posses the power to affect such a diminishment, because of the superior fee title held by the Muscogee Nation in their territory. *See Woodward v. De Graffenried*, 238 U.S. at 294.

This Court should hold that the Muscogee Nation Indian Country has not been diminished. The Nation continues to have regulatory jurisdiction over lands within its original external boundaries. There has been no express congressional intent to diminish the Nation's external boundaries. Further, because the Muscogee Nation possesses its territory in fee simple, lack of express consent by the Muscogee Nation to any purported diminishment, at a time when Congress believed such consent was required, compels this Court to find that the Nation's territorial boundaries have not been diminished.

C. The Muscogee Nation Retains Inherent Power to Regulate Both Indians and Non-Indians for the Health and Welfare of the Tribe.

In general, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within the external borders of a reservation. *See Montana*, 450 U.S. at 564. *See also Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997) (reaffirming). In *Montana*, however, this Court affirmed inherent tribal power to regulate even non-members on non-Indian land within reservation borders when, as here, non-member conduct threatens the political integrity, economic security, or the health and welfare of the tribe. *See Montana*, U.S. 450 at 556. In the instant case, Tulsa's conduct threatens the political integrity, economic security, *and* health and welfare of the Muscogee Nation.

This Court has applied the *Montana* principle regarding threatening conduct by non-members in several cases. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), a fractured court struggled to apply the *Montana* principle to a zoning scheme. Although the actual holding in *Brendale* was determined by a two vote swing decision which was too specific to the reservation in that case to be usable as precedent,[1] there was a seven justice majority which agreed that a unitary solution for regulation of reservation land was legally desirable, and the disagreement was over the level to which the threatening conduct must rise before that unitary jurisdiction belongs to the tribe. *See Brendale*, 492 U.S. at 430.

A more recent case which applied the *Montana* principle was *A-1 Contractors v. Strate*, 520 U.S. at 445. In *Strate*, this Court found that a tribe had given up adjudicatory jurisdiction over a small stretch of highway which it had given as a federal right-of-way and which the state maintained. *Id.* at 456. *Strate* is distinct from this case in two ways. First, the tribe in *Strate* was seeking to assert adjudicatory jurisdiction over non-members and non-Indians. *Id.* at 456. Second, adjudicatory jurisdiction would have to arise from an event arising on the federal right of way and otherwise not affecting the

1. Otherwise, the Court has established a definition of "Indian character" which might, depending on a particular tribe's history, result in a different constitutional standard for differing tribes.

health and welfare of the tribe. *Id.* at 457. In contrast, the Muscogee Nation in this case is seeking to assert regulatory jurisdiction within Nation territory, over conduct that is inherently threatening to the health and welfare of the tribe. Courts have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. "A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribes' water rights." *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981). *See also City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (tribal promulgation of stringent water quality standards is permissible in accord with powers of inherent sovereignty). *See also Montana v. Environmental Protection Agency*, 137 F.3d 1135, 1141 (10th Cir. 1998) (tribal promulgation of water quality standards for heavily allotted reservation consistent with inherent sovereignty).

The fact that some landowners within Muscogee Nation boundaries cannot become members of the tribe, nor participate in tribal government is not pertinent to the disposition of this case. As has been repeatedly recognized by Congress and upheld by this Court, a superior right exists when Indian tribes act to protect tribal territory and people from substantial threats to tribal health and welfare (even when their actions affect non-Indians on non-Indian owned fee lands within tribal territory). *See Montana v. United States*, 450 U.S. at 556. *See also United States v. Mazurie*, 419 U.S. 544, 557 (1975), and *Brendale*, 492 U.S. at 432.

Further, this case does not involve a situation, such as was the case in both *Montana* and *Brendale*, where the individual property rights of non-Indian owners of fee land are effected. *See Montana*, 450 U.S. at 544. *See also Brendale*, 492 U.S. at 408. In this case, the subject of regulation is water quality, something that cannot be isolated by individual land ownership, and which directly and substantially effects the health and welfare of all of the Muscogee Nation members. In addition, the administrative nature of establishing and enforcing water quality standards involves extensive procedural protections for non-Indian land holders within Muscogee Nation territory, which Courts have held to be more than enough to protect their interests. *See Albuquerque v. Browner*, 97 F.3d 415 (where full and fair opportunity for notice and comment was provided).

D. The Muscogee Nation Legislature is Not Subject to the Presidential Approval Power from the Curtis Act or Five Tribes Act Because the Oklahoma Indian Welfare Act Repealed that Requirement.

The language in the Indian Department Appropriations Act, Curtis Act and Five Tribes Act which requires all Muscogee Nation legislation to be submitted for presidential approval has been repealed by the Oklahoma Indian Welfare Act. (OIWA) The language in the OIWA's self-government section

taken together with the general repealer clause have already been found to have reinstated the Muscogee Nation's authority to establish tribal courts. *See Muscogee (Creek) Nation v. Hodel*, 670 F. Supp. 434, 446 (D.D.C. 1987). In that case, even though the Curtis Act was found to have abolished Muscogee Nation courts, the strong language of the self-government clause in combination with the general repealer clause was found to have restored the Muscogee Nation's power under the earlier 1866 Treaty to operate tribal courts. That case's reasoning is even more compelling here because the Muscogee Nation never lost the authority under its treaties with the U.S. government to pass legislation. Moreover, the requirement for presidential approval existed solely as a coercive weapon to compel allotment, and is in direct conflict with the expressly stated purposes of OIWA.

The tripartite government of the Muscogee Nation created by the CREEK CONSTITUTION of 1867 has survived the attempted United States congressional statutory dismemberment of the late nineteenth and early twentieth centuries, and has been expressly perpetuated by the United States government. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976), aff'd. sub nom. *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). Following the judicial decision in *Harjo v. Kleppe*, the Muscogee Nation held an election in which the People adopted the MUSCOGEE (CREEK) CONSTITUTION of 1979. *See Muscogee Nation v. Hodel*, 670 F. Supp. at 435. This constitution was approved by the Secretary of the Interior on August 17, 1979. *Id.* It continues to be the instrument by which the Nation maintains its governing authority and under which the Nation carries out its substantial governmental duties.

The Constitution of the Muscogee Nation divides its tribal government into three branches: Executive, Legislative, and Judicial. Except as provided in the Constitution, these three departments are separate and distinct and do not exercise the powers properly belonging to the others. *See Burden v. Cox*, 1 Okla. Trib. 247, 251 (Muscogee (Cr.) Nation D. Ct. 1988). Duties of the Executive Branch of the Muscogee Nation include approval or veto of Muscogee National Council legislation. *See* MUSCOGEE (CREEK) CONSTITUTION, art. VI, § 6, sub§ A. Legislative duties of the Muscogee National Council include legislating on matters involving the Nation (MUSCOGEE (CREEK) CONSTITUTION, art. VI, and § 7, sub. § E), and the creation by the National Council of courts inferior to the Muscogee Supreme Court. *Id.* at art. VII, § 1. The Judicial Power of the Muscogee Nation is vested in one Supreme Court. *Id.* at art. VII, and § 1. Constitutional duties of that Court include establishing procedures to insure that an appellant receives due process of law, and prompt, speedy relief. *Id.* at art. VII, § 3.

The essence of the solemn promises of the United States government to the Nation guaranteeing its inherent right to self-government remains binding upon the United States. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1143 (D.D.C. 1976). The Muscogee people are entitled to democratic self-government. *Harjo v. Andrus*, 581 F.2d 949, 954 (D.C. Cir. 1978) (citing

Harjo v. Kleppe, 420 F. Supp. at 1144). Muscogee governmental legitimacy is the logical and just result of the persistent and successful political struggle of the Muscogee Nation lasting more than a century. The Muscogee Nation is a national government capable of exercising sovereign governmental authority and regulatory jurisdiction over its original land base conferred in fee simple in the Removal Treaty of Mar. 24, 1832 (7 Stat. 366), and the Treaty of June 14, 1866 (14 Stat 785).

In the alternative, even if the language in the OIWA general repealer clause is ambiguous in regard to the presidential approval requirement in the Curtis Act and Five Tribes Act, the language should be construed to abolish that power because its only purpose was to coerce the tribes to assimilate. The trust relationship between the federal government and the states requires courts to construe statutes in the manner most beneficial to the tribe. *See Carpenter v. Shaw*, 280 U.S. 363 (1930). Therefore, even if the language in the OIWA is ambiguous, this Court should find that the general repealer clause of the OIWA repeals the earlier language in prior Acts which was so adverse to Muscogee Nation self-government. This Court should find that the continuation of such a requirement is inconsistent with Muscogee Nation political legitimacy, and the current federal Indian policy of self-determination and government-to-government relationships.

II. The Muscogee (Creek) Nation maintains Jurisdiction Over Waters Within Nation Territory Which Includes the Arkansas River under Either the Doctrine of Non-Mutual Collateral Estoppel or the Winter's Doctrine.

Under the doctrine of non-mutual collateral estoppel, the city of Tulsa is precluded from asserting any claim against the Muscogee Nation for that portion of the Arkansas River running over the riverbed within Muscogee Nation territory. The doctrine of collateral estoppel, or issue preclusion, applies when: 1) the party or privy against whom the defense is raised in a different cause of action; 2) has already had the opportunity to actually litigate an ultimate fact or issue; 3) which was necessary to the determination of a final judgment in an earlier action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325 (1979).

Federal courts use federal preclusion doctrines when determining the estoppel effects of a prior judgment from a federal court. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982). Because Federal courts no longer require mutuality to apply collateral estoppel, application of the doctrine is appropriate in this case so long as the other elements of that doctrine are met. *See Parklane*, 439 U.S. at 325 (1979).

In this case, Tulsa is arguing for state rather than Muscogee Nation water rights, and thus is acting as a privy of the state of Oklahoma. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), Oklahoma challenged treaty language from the Choctaw and Cherokee treaties which was identical to the language in the Creek Treaty of 1866. *Id.* at 652. That case determined that

the language in the treaties between the U.S. government and the Five Civilized Tribes granted title in fee to portions of the Arkansas River and riverbed running through those Indian Nations' territories. *Id.*

Once the elements of collateral estoppel are met, as they are in the present case, the party resisting preclusion must prove: 1) the party seeking to apply collateral estoppel could have easily joined the earlier litigation; 2) that a full and fair opportunity to litigate the ultimate issue was not provided. *See Parklane*, 439 U.S. at 326. The Muscogee Nation is a sovereign entity with political processes which must be followed before a decision to join in litigation can be made. In this case, it would not have been easy for the Nation to join the earlier litigation in a timely manner. In addition, Oklahoma had every incentive for a vigorous defense in *Choctaw Nation*, and litigated the issue all the way to the United States Supreme Court. There can be no question that Oklahoma was afforded a full and fair opportunity to litigate the fee ownership of the Arkansas riverbed that was granted to any of the Five Civilized Tribes in their treaties. The binding effect of this judgment applies to Oklahoma and any privy. To allow Tulsa to dispute identical language in the Muscogee Nation treaty which this Court has already ruled on would directly undermine the compelling reasons courts apply the doctrine of preclusion. It would result in inconsistent rulings, and allow Oklahoma through its privy to collaterally attack an earlier final judgment. This court should apply the doctrine of collateral estoppel to Tulsa's claim against the Muscogee Nation for that portion of the Arkansas River riverbed running through Muscogee Nation territory, and hold that the Nation retains jurisdiction over that section of the Arkansas riverbed at issue in this case. Because the Muscogee Nation maintains territorial control of the Arkansas riverbed, the water running over it is within Indian Country and appropriate for regulation by the Muscogee Nation.

In the alternative, if the court rejects the compelling reasons for application of collateral estoppel in this case, the Muscogee Nation still retains its reserved water rights in the Arkansas River under Winter's doctrine. In addition, the Muscogee Nation also retains inherent authority under the Winter's doctrine to regulate the quality of that water for the benefit of the health and welfare of the Nation's people.

The Winter's Doctrine establishes that water was reserved for the Muscogee Nation in 1832 when the land was set aside in fee simple title for Nation territory. *See Winters v. United States*, 207 U.S. 564, 577 (1908). The Winter's Doctrine establishes an implied reserved right of Indian tribes to a quantity of water at the time a reservation is established so that reservation environments are habitable. *Id.* In Oklahoma, from the time of statehood until 1978 it was wrongly assumed that there were no Indian reservations. CLINTON, NEWTON & PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS, 1164 (1973), The Michie Company (1991). It has since been held, however, that under the plain language of the Indian Country statute

Indian allotments held in trust by the United States or in fee by member Indians can also be Indian Country. *See State v. Littlechief*, 573 P.2d 262 (Okla. 1978) (interpreting 18 U.S.C. § 1151(c) (1976)). This ruling is equally applicable to restricted allotments of the former Indian Territory in Eastern Oklahoma. *See State v. Burnett*, 671 P.2d 1165, 1167 (Okla. Crim. App. 1983) (Indian country includes all Indian allotments with title not extinguished, including rights-of-way running through the same).

Until recently, Oklahoma had been thought of as lacking Indian land with "reservation" status because Oklahoma tribes held land in fee simple title. *See generally Ex parte Nowabbi*, 61 P.2d 1139 (Okla. Crim. App. 1936). That erroneous theory has since been expressly overruled. *See State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989). Despite subsequent turmoil resulting from, among other things, assimilationist policies and erratic swings in federal Indian policy, there are still lands within the exterior boundaries of the 1866 Muscogee Nation territory under Muscogee Nation jurisdiction pursuant to the patents and promises dating back to treaties between the Nation and the U.S. government. *See Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. the Oklahoma Tax Commission*, 829 F.2d 967, 972 (1987).

The test for Indian Country is not whether the Indian land is called a "reservation," but whether or not the land was validly set aside for Indian tribes. *See Citizen Band of Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 498 U.S.505 (1991). *See also United States v. Pelican*, 232 U.S. 442, 449 (1914) (defining Indian Country). The Mackey Site in question in this case is part of the original treaty land of the Muscogee Nation, and is the primary site of economic development and the ceremonial for which the WQS in question have been promulgated. The Tenth Circuit Court of Appeals has concluded that the Mackey Site is the purest form of Indian country; that it is land validly set apart for the use and benefit of the Muscogee Nation. *See Indian Country, U.S.A., Inc.*, 829 F.2d at 976.

Thus, when land was validly set aside in fee simple for the Muscogee Nation in 1832, and because that land is Indian country and has not been disestablished or diminished, Winter's water rights were reserved for the Muscogee Nation as well. This valid set aside occurred long before Oklahoma became a state. Moreover, Oklahoma disclaimed any state jurisdiction, right, or title over Indian lands and Congress expressly preserved Federal authority over those lands when Oklahoma became a state. *See* Oklahoma Enabling Act, June 16, 1906, § 3, 34 Stat. 270, 269 (expressly reserving federal and tribal jurisdiction over Indians, their lands, and property). Only the tribal or federal governments, not the state, can extinguish this jurisdictional power. *Id.* Further, Oklahoma has not taken any affirmative legislative action to assume jurisdiction under Public Law 280, and has not repealed the disclaimer of jurisdiction over Indian country contained in the CONSTITUTION OF THE STATE OF OKLAHOMA, art. I, § 3.

Moreover, assertion of state jurisdiction under the Clean Water Act (CWA) requires that a state apply for EPA delegation of authority by demonstrating adequate legal authority over Indian lands. *See* 40 C.F.R. § 123.23(b) (1993). The state of Oklahoma tried to demonstrate such legal authority in regard to the CWA, but later voluntarily withdrew its assertion. *See* 47 Fed. Reg. 27, 273-74 (upon EPA recommendation, Oklahoma expressly withdrew its assertion to demonstrate legal authority to regulate activities within Oklahoma Indian Country). Oklahoma has acquired EPA delegation of regulatory jurisdiction over the Five Civilized Tribes in Eastern Oklahoma under the Underground Injection Control program, which contains an express clause allowing for such assumption of jurisdiction. *Id.* Because Oklahoma has withdrawn its application for legal authority over the Five Civilized Tribes, including the Muscogee Nation, with regard to the CWA, the presumption is that federal and tribal regulatory jurisdiction controls.

In addition, by applying directly to the EPA for renewal of its NPDES permit, Tulsa has implicitly acknowledged that it is located within territory not subject to state jurisdiction. The state of Oklahoma was granted NPDES permitting authority in 1996, and now has jurisdiction over the granting and renewing of OPDES permits within state jurisdiction. By going to the EPA to renew its permit, Tulsa is acquiescing to continued federal jurisdiction, which is only appropriate where the state permitting authority does not have jurisdiction to function. Consequently, by its actions Tulsa is affirming that the territorial boundaries of the Muscogee Nation still control, and within those boundaries either federal or tribal regulatory jurisdiction applies.

There are no cases bearing directly on the issue of the level of quality reserved water must meet. But several cases have demonstrated a trend toward validating the concept that the need for water *quantity* in a reserved water right may also implicitly contain a standard for water *quality* as indispensable to make Indian lands habitable and fulfill the purposes of the reservation. This Court has held that the creation of an Indian reservation by the Federal government implies an allotment of water necessary to make the reservation livable. *See Arizona v. California*, 373 U.S. 546, 599 (1963) (overruled on other grounds). *See also Arizona v. California*, 460 U.S. 605, 609 (1983). In *United States v. Gila River Irrigation Dist.*, 804 F. Supp. 1 (D. Ariz. 1992), the court enjoined non-Indian irrigators from diverting the river flow, as the resultant salt content in the river was a detriment to the tribe's right to the natural flow of the river. This Court has also suggested an implicit element of water quality in cases when the Federal government withdraws land from the public domain for a federal purpose, requiring that unappropriated water appurtenant to land is reserved to the extent needed to accomplish the purpose of the reservation. *See Cappaert v. United States*, 426 U.S. 128, 137 (1976).

In this case, the Muscogee Nation has promulgated WQS under the auspices of the EPA in order to conduct ceremonies to enhance its economic

development. Following the logic of the preceding cases, since the Muscogee Nation lands, riverbed and waters have been reserved in fee simple for the purpose of providing a homeland for the Nation, this water must be of such quality, as well as quantity to be able to support the Muscogee Nation. The reservation of Muscogee Nation territory must have included both adequate water quantity and quality so that the Muscogee people could live on their lands forever.

In addition, no language in the Curtis Act or the Five Tribes Act indicates that Congress sought to affect or limit Muscogee Nation water rights. In fact, neither of these acts contains any indication whatsoever that Congress even considered the water rights of any of the Five Civilized Tribes. When the *Dion* test is applied to the facts in this case, this Court must find that the Muscogee Nation has not been disestablished with regard to its property rights in the Arkansas River. Further, given the total lack of language indicating Congressional consideration of Muscogee Nation water rights, it would be impossible for Tulsa to meet the *Solem* test to find diminishment of Nation rights in the Arkansas River.

III. The Muscogee (Creek) Nation Meets EPA Criteria to Qualify for TAS, and the EPA'S Approval of the Nation's TAS Application Is Valid.

The purpose of the Clean Water Act (CWA) is to establish a comprehensive federal statutory scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1988). Historically, the CWA excluded explicit or implicit reference to Tribes and any potential tribal role in helping to fulfill the purposes of the CWA by protecting water quality in Indian Country. *See* CWA § 502(3), 33 U.S.C. § 1362(3) (1988) (definition of "State" excluding reference to Tribes). However, states were precluded from exercising regulatory jurisdiction on Indian trust lands under general principles of federal Indian law. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, n.18 (1987). This legislative omission resulted in unregulated zones on tribal lands, a substantial impediment to fulfillment of the goals of CWA. To rectify this situation, the 1987 Congress amended the CWA, expressly authorizing the EPA Administrator to treat qualifying tribes as states (CWA § 518 (codified at 33 U.S.C. § 1377(e) (1988)) for the purposes of promulgating § 303 Water Quality Standards (WQS) (codified at 33 U.S.C. § 1313(a)). Congress has recognized the important role of tribes in cleaning up the nation's waters.

By congressional statute, the EPA can delegate CWA program implementation to Tribes for Treatment As State (TAS) for protection of water quality in Indian Country if the tribe demonstrates these threshold criteria: 1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; 2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources that

are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or are otherwise within the borders of an Indian reservation; and 3) the Indian tribe is reasonably expected to be capable, in the EPA Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of CWA and of all applicable regulations. *See* 33 U.S.C. § 1377(e) (1988). Congress established the TAS program as a rational means to achieve water quality on tribal lands, and its methods are entitled to great judicial deference. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Pursuant to section 518, EPA promulgated five regulations advancing criteria by which EPA will approve tribes for TAS for various CWA programs. EPA regulations establish the basic requirements a Tribe must meet in order to qualify for treatment as a State. *See* 40 C.F.R. § 131.8(a) (tribal qualifications for TAS status for water quality standards) and (b) (tribal application requirements). The EPA determined that the Muscogee Nation met each of the required criteria under the CWA that authorized the EPA to treat it as a state for promulgation of CWA § 303 Water Quality Standards (WQS) (codified at 33 U.S.C. § 1313(a)). In making this determination, the EPA was carrying out its statutory duty pursuant to the 1987 congressional amendments to the CWA expressly defining "States" in CWA to include "Indian Tribes that qualify for treatment as a state for the purpose of water quality standards." *See* 40 C.F.R. § 131.3 (1991). In light of the Agency's statutory responsibility for implementing environmental statutes, its interpretation of the intent of Congress in allowing for tribal management of water quality within the Muscogee Nation is entitled to substantial deference. *See Washington Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). *See also Chevron, USA v. NRDC*, 467 U.S. 837 (1984).

A. The Muscogee Nation Is a Federally Recognized Tribe.

The Muscogee Nation is federally recognized by the Secretary of the Interior in the U.S. Department of the Interior as an autonomous Indian tribe. 63 Fed. Reg. 71,943 (Dec. 30, 1998). As a federally recognized tribe, the Muscogee Nation fulfills this requirement for TAS status under CWA.

B. The Muscogeee Nation is Reasonably Capable of Carrying Out the Functions of an Effective WQS Program.

The EPA Administrator correctly determined that the Muscogee Nation is reasonably capable of carrying out the functions of an effective WQS program under CWA § 303. (Jt. App. 3) The Nation participates in the Inter-Tribal Environmental Council of Oklahoma based in Tahlequah, Oklahoma. As a member of that organization, the Muscogee Nation has access to technical assistance from the Office of Environmental Services. Moreover, the EPA provides technical assistance to tribes through publication of a Reference

Guide to Water Quality Standards for Indian Tribes 4 (Jan. 1990). Tribes qualifying for TAS status can receive funding to carry out their water quality provisions. 33 U.S.C. § 1377(e), § 104 (Research, Investigation, and Training), and § 106 (Grants for Pollution Control). Pursuant to TAS authority, these resources are available and confirm the Muscogee Nation's ability to reasonably administrate an effective WQS program.

C. The Muscogee Nation Has an Independent Governing Body that Includes Separation of Powers Between Three Branches of Government, Each Capable of Carrying Out Substantial Governmental Duties and Powers.

As described above, the Muscogee national government is a constitutional, tripartite government, effectively fulfilling executive, legislative, and judicial functions with internal separation of powers. *See Muscogee (Creek) Nation*, 670 F. Supp. at 443. The Muscogee Nation and its tripartite government has successfully survived attempted statutory dismemberment and continues to effectively govern for the health and welfare of its people, and acts independently of any requirement for presidential approval.

Under the CWA, the EPA appropriately delegated to the Muscogee Nation regulatory authority to promulgate § 303 Water Quality Standards. In support of primacy for tribal governments in managing reservation environmental programs, the EPA has a policy to avoid checkerboarding and fractionalization of reservations into trust and fee lands. In this case, the EPA exercised its administrative authority consistently with EPA regulations and in a manner not contrary to law in granting TAS status to the Muscogee Nation for the purposes of establishing water quality standards. The EPA's decision in this case is supported by the administrative record, and is due deference from this Court.

Conclusion

The Muscogee Nation and EPA Administrator, Carol Browner, request that the Supreme Court uphold the decision of the Court of Appeals that the EPA's CWA § 303 water quality program delegation to the Muscogee (Creek) Nation is valid and enforceable.