IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs, v. MITCHELL PARKER, In his official capacity as Member of the Omaha Tribal Council, BARRY WEBSTER, In his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, In his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, In his official capacity as Secretary of the Omaha Tribal Council, TIM GRANT, In his official capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member of the Omaha Tribal Council, and ANSLEY GRIFFIN, In his official capacity as Chairman of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control. Defendants.	Case No. 4:07-cv-03101 JOINT STATUS REPORT AND MOTION FOR STATUS CONFERENCE WITH DISTRICT JUDGE

Plaintiffs and Defendants file this Joint Status Report pursuant to the court's Memorandum and Order dated October 4, 2007.

1. Cross motions for summary judgment were heard by the Omaha Tribal Court on September 10, 2012.

2. On February 4, 2013, the Omaha Tribal Court issued a "Memorandum Opinion and Order," ruling in favor of Defendants, on the parties' cross motions for summary judgment. *See* Ex. 1.

3. Plaintiffs request that the court lift the stay currently in place.

4. Additionally, Defendants request that the temporary restraining order be lifted. Plaintiffs object to that request.

5. The parties jointly request a status conference with the assigned District Judge.

Dated this 14th day of February, 2013.

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs.

BY: HUSCH BLACKWELL LLP
Gene Summerlin - 19611
Mark Hill – 24903
610 J Street, Suite 200
Lincoln, NE 68508
(402) 434-8040
gene.summerlin@huschblackwell.com
mark.hill@huschblackwell.com

BY: /s/ Gene Summerlin

and

MITCH PARKER, In his official capacity as Member of the Omaha Tribal Council, BARRY WEBSTER, In his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, In his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, In his official capacity as Secretary of the Omaha Tribal Council, TIM GRANT, In his official capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member of the Omaha Tribal Council, and ANSLEY GRIFFIN, In his official capacity as Chairman of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants.

BY: STINSON MORRISON HECKER LLP
Patricia Zieg - 14662
Nora Kane – 21562
1299 Farnam St.
Omaha, NE 68102
(402) 342-1700
pzieg@stinson.com
nkane@stinson.com

BY: /s/ Nora Kane

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of February, 2013, this Joint Status Report and Motion for Status Conference with District Judge was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all CM/ECF Participants.

/s/ Gene Summerlin

OMAHA TRIBAL COURT) IN TRIBAL COURT

MACY, NEBRASKA) OMAHA NATION IN NEBRASKA & IOWA

****

THE VILLAGE OF PENDER, NEBRASKA, CV. No.08-2
RICHARD M. SMITH, DONNASMITH,
DOUG SCHRIEBER, SUSAN SCHRIEBER,
RODNEY A. HEISE, THOMAS J. WELSH,
JAY LAKE, JULIE LAKE, KEITH BREHMER and
RON BRINKMAN Plaintiffs,
v. MEMORANDUM OPINION AND ORDER
RODNEY MORRIS, In his Official Capacity as
Chairman of the Omaha Tribal Council,
DORAN MORRIS JR., In his Official Capacity as
Vice-Chairman of the Omaha Tribal Council,
TILLIE ALDRICH, In her Official Capacity as
Treasurer of the Omaha Tribal Council,
GWEN PORTER, In her Official Capacity as
Secretary of the Omaha Tribal Council,
JEFFREY S. MILLER, In his Official Capacity as
Member of the Omaha Tribal Council,
MITCHELL PARKER, In his Official Capacity as
Member of the Omaha Tribal Council,
FORREST ALDRICH JR., In his Official Capacity as
Member of the Omaha Tribal Council,
Defendants.

****

STATEMENT OF THE CASE

This case presents the question whether, in an 1882 statute that ratified an agreement for the sale of Omaha tribal lands, Congress intended to diminish the boundaries of the Omaha Reservation in Nebraska. Non-Indian bar owners in Pender, Nebraska, which is in the portion of the Omaha Reservation subject to the 1882 Act, contest the Omaha Tribe's imposition of an alcohol regulations and tax upon them alleging that the land sale constituted a diminishment of the Reservation. If Congress intended to diminish the Omaha Reservation by enacting the 1882 statute, the area involved would no longer constitute "Indian country" as defined by 18 U.S.C. 1151[a] and would deny the Omaha Tribe the right to seek regulation and taxation of alcohol

sales in Pender. If Congress did not intend the diminishment of the Omaha Reservation, then the issue of regulation and taxation of non Indian fee owners of bars on the Reservation would conform to rules governing such actions within recognized reservation boundaries.

The early history of the United States is a story of forced migration of the native people in advance of white settlement of the west. By the early 1700's, the Omaha Tribe arrived on land along the Missouri River in present day Nebraska. *Plaintiff's Exh. 10 @ 4-5.* The Tribe's primary camp was at the confluence of Omaha Creek and the Missouri River where the Tribe engaged in hunting and agrarian pursuits, actively trading with merchants along the Missouri River. *Defendant's Exh 4 @4-5.*

By the early 1800's, the Omaha Tribe was beset by epidemics of disease, including smallpox, as well as attacks from the west by neighboring tribes resulting in a loss of approximately half of the Tribe's population . *Id* In hopes of securing some peace, the Omaha Tribe entered into "peace and friendship" treaties with the United States in 1815 and again in 1825. *Plaintiff's Exh. 10 @ 5.* However, these treaties did not provide the Omahas with promised protection against the Sioux and other area tribes. *Defendant Exh. 4 @ 9-10, en 15.* Subsequent treaties involving the Omaha Tribe resulted in further loss of the Tribal land base and, more importantly, of hunting rights to lands in Iowa. *Id.@ 8-9, en 14.* By the 1840's, the Omaha people were nearly destitute from the cumulative effects of federal Indian policy and treaty making. *Id.*

Overall, the federal policy toward the Indian nations changed in the 1840's in order to support the wave of European immigration to North America of individuals and families seeking to farm the vast expanse of western lands. *Plaintiff's Exh. 10 @ 5, n 8.* More emphasis was

placed on Indian land cessions and concurrent Indian settlement on defined reservations. *Id. @ 5-6.*

In this context, in 1854, the Omaha Tribe entered into an agreement with commissioners representing the United States government for the sale of Tribal lands in exchange for monetary payments. *Defendant's Exh. 4 @10-11, en 17; Defendant's Exh. 5; 10 Stat. 1043.* The Treaty with the Omaha, 1854 called for the Omaha Tribe to cede its claim and relinquish its occupancy of all lands west of the Missouri River and south of a line due west of the entrance of the Iowa River into the Missouri. *Defendant's Exh. 5.* In exchange, the Tribe was to receive cash payments, goods, and services totaling $890,000.00 over a period of 50 years. *Id.*

The actual boundaries of the Omaha Reservation, encompassing approximately 300,000 acres, were not settled until later, following a selection by the Omaha Tribe of land including the Blackbird Hills which were closely associated with the Tribe since its entry into the territory of Nebraska. *Defendant's Exh. 4 @14, en 25.* The 1854 Treaty also introduced the prospect of assignment, or allotment, of individual parcels of land to Tribal members as part of the agreement. *Plaintiff's Exh. 10 @7, n 20.* However, no allotments appear to have been made pursuant to the 1854 Treaty. *Id. @ 8.*

In the 1860's, the Omaha Tribe took pity on destitute members of the Winnebago (Ho Chunk) Tribe who sought to resettle on the Omaha Reservation from their reservation in Dakota territory. *Defendant's Exh. 4 @ 16, en 30.* In 1865, the Omaha Tribe agreed to sell approximately 97,500 acres, constituting the northern part of its Reservation, to provide for a reservation for the Winnebagos. *Defendant's Exh. 4 @ 17, en 32; 14 Stat. 667.* The agreement provided that the Omaha Tribe would sell the northern part of their reservation to the United

States government for fifty thousand dollars together with extensions of prior obligations that the government promised to the Tribe. *Defendant's Exh. 6.*

The 1865 Treaty contained provisions relating to assignment of land to individual Tribal members which differed from the allotment provisions contained in the 1854 Treaty. *Plaintiff's Exh. 10 @ 9-10.* The 1865 allotments were smaller in size from the 1854 Treaty allotments, causing consternation among the Omaha people, many of whom saw individual ownership of land as a hedge against the forced removal to Indian Territory *Defendant's Exh. 4 @17-18, en 34.* A land survey was conducted prior to the allotments.. *Plaintiff's Exh. 10 @8, n 23.*

After several years, which included disputes over the substance and process, allotments were completed and individual members of the Omaha Tribe were issued "certificates" of allotment to parcels of land. *Defendant's Exh. 4 @20-21.* The allotments were made in the eastern section of the Omaha Reservation, where Tribal members had formed communities near the Missouri River. *Plaintiff's Exh. 10 @ 9 n 29; Defendant's Exh. 4 @21, en 41.*

The allotments did not provide a panacea for the problems plaguing the Omaha people due to the reality that successful farming required the input of capital to buy seed, buildings and equipment. *Defendant's Exh. 4 @ 21-22, en 42.* The Tribe continued to seek resources to secure their claim to their reservation land. In 1871, Chiefs of the Omaha Tribe appealed to Congress to allow the sale of up to 50,000 acres of land from the western portion of their Reservation to obtain additional funds to support farming activities. *Plaintiff's Exh. 10 @9.* In 1872, Congress passed legislation allowing the sale of land on the Omaha Reservation, together with land sales on other reservations, with the lands to be appraised and sold in 160 acre parcels or as a whole. *Id.; 17 Stat. 391.* The land was put on sale in 1873, but due to the high appraised value and lack

of interest of buyers, only 300 acres were actually sold. *Plaintiff's Exh.10 @ 10, n 36; Defendant's Exh. 4 @ 23.*

Following the failure of the 1872 land sale, some Omahas met with chiefs of the Ponca Tribe and offered to sell some of the individual allotments. *Defendants' Exh. 4 @ 24, en 47.* The proposed sale was disallowed by federal officials. *Id., en 49.* In 1874, Congress approved a sale of approximately 12,350 more acres in the northeastern portion of the Omaha Reservation to the Winnebago Tribe to expand the Winnebago Reservation. *Defendant's Exh. 4 @ 23-24 Plaintiffs' Exh. 10 @ 11, n 43;18 Stat.146.* The proceeds of the sale, eighty-two thousand dollars, was to be applied by the Secretary of Interior for the use of the Omaha Tribe. *18 Stat. 146 @ 170.*

In 1877 the United States government ordered the removal of the Ponca Tribe from their reservation in northern Nebraska to Indian Territory citing the need for protection of the Tribe from neighboring Sioux Indians. *Plaintiff's Exh. 10 @ 12; Defendant's Exh. 4 @ 25, en 50.* This action raised fears among the Omahas that the removal of the Poncas foreshadowed their own possible removal from the Omaha Reservation. *Id.* This fear was compounded when, in 1879, the Bureau of Indian Affairs ordered the Omaha and Winnebago Agencies to be combined and placed on the Winnebago Reservation. . *Defendant's Exh. 4 @ 25-26, en 53.*

In 1880, the Sioux City and Nebraska Railroad Company obtained agreements from the Omaha and Winnebago Tribes for a right-of-way through the respective reservations from northwest to southeast for construction of track and stations for cash payment. *Plaintiff's Exh. 10 @ 11; Defendant's Exh. 4 @ 28 en 62.* The Omahas continued to seek avenues to gain funds and resources. By this time the Tribe had split into a progressive minority and a traditional, conservative majority, who differed in their respective approaches to the looming influx of white

settlers. *Defendant's Exh. 4 @26-27, en 56,58.* The progressives saw allotment and farming as a hedge against the potential of forced removal portended by the Ponca experience and favored selling lands to achieve the goal of . *Id.* The traditionalists favored retaining communal lands. *Id., en 59.*

After it was disclosed that the "certificates" of allotment which had previously been assigned to Tribal members were not fee title to the lands, the progressives, led by Alice Fletcher, an ethnologist who arrived on the Omaha Reservation to study the Omaha people, pressed to petition Congress to grant the allottees clear title *Plaintiff's Exh. 10 @ 12-13; Defendant's Exh. 4 @29-30, en 64-66.* The petition led to legislation proposed by Senator Alvin Saunders of Nebraska in 1882, which was reported out as Senate bill 1255 (hereafter "S. 1255"). *Id.*

S. 1255 was debated over several months. The Senate approved the bill, which only dealt with the sale of the land in the western section of the Reservation on April 22, 1882. *Plaintiff's Exh. 10 @ 13.* S. 1255 was referred to the House of Representatives where it was debated in that chamber with a focus on the allotment of land on the Omaha Reservation. *Id.* The House amended S. 1255 and the bill was referred to a conference committee. *Id.* On August 3, 1882, the bill with amendments was approved by both houses of Congress and on August 7, 1882 it was signed into law by President Chester A. Arthur . *Id. @ 14; Defendant's Exh. 4 @ 44, en 107*

Section 1 of the 1882 Act (22 Stat. 341) provides:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior,

> July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

Section 2 of the Act provides in part:

> That after the survey and appraisements of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act . . .

Section 3 of the Act provides:

> That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

Section 5 of the Act provides in part:

> That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, . . .

Section 8 of the Act provides in part:

> That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance [sic] whatsoever . . . Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

The Act resulted in the appraisal of the lands opened for settlement listing the acreage available at 50,157. *Plaintiff's Exh. 10 @18 n. 85.* According to the Report of the Commissioner of Indian Affairs for 1884, the number of acres allotted to individual members of the Omaha Tribe was 78,609.68, 876.60 of which were listed as being "west of the railroad." *Id.* Approximately 55,000 acres were patented to the Omaha Tribe for future allotments. *Id.*

The land open for settlement was sold quickly but payments were not always timely. *Plaintiff's Exh. 10 @19, 22; Defendant's Exh. 4 @ 52-54.* In 1884, the town-site of Pender was platted. *Plaintiff's Exh. 10 @ 22 n. 107.* Thurston County was organized in 1889. *Plaintiff Exh. 10 @ 22.*

Following the sale of the opened lands, the non-Indian population of the land west of the railroad right-of-way surged to approximately 99% in recent census data. *Plaintiff's Exh. 10 @ 28.* Members of the Omaha Tribe continued to reside on allotments following the initial sale and individual Omahas participated in the community affairs of Pender shortly after the opening of the reservation. *Defendant's Exh. 4 @ 64-65.* The subsequent treatment of the opened area involved in the 1882 Act by the federal government, the State of Nebraska, and the Omaha Tribe is extensive and the interpretation to be accorded to the various actions is actively debated by the parties.

In 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code governing the sale, possession and distribution of alcohol within the Omaha Reservation. *Plaintiff's Special Appearance and Complaint for Declarative and Injunctive Relief.*. The Tribe's Alcoholic Beverage Control Title required liquor licensees in the Village of Pender to comply with the ordinance and to pay license fees to the Tribe. *Id.* The Alcoholic Beverage Control Title also imposed a ten percent tax on liquor sales. *Id.*

In response, Village of Pender and a number of sellers of alcoholic beverages in Pender filed suit in the United States District Court for the District of Nebraska on April 17, 2007. *Id.* Following the issuance of a temporary restraining order on the implementation of the Alcoholic Beverage Control Title, the District Court stayed the litigation and directed the Plaintiffs to exhaust remedies available in the Omaha Tribal Court.

Plaintiffs filed their action on January 7, 2008 in the Omaha Tribal Court. Following extensive discovery, covering over four years, both parties filed motions for summary judgment on their claims relating to the effect of the 1882 Act on the boundaries of the Omaha Reservation. After briefing by the parties, a hearing was conducted on September 10, 2012 for oral arguments. The parties do not contest individual facts as raising genuine issues but agree that the material facts in this case are settled historically and only the legal interpretation of the facts is open to contest. Therefore, the issue before the Court is whether, by enacting the 1882 land sale Act for the portion of the Omaha Reservation west of the right-of-way of the Sioux City and Nebraska Railroad Company, the Forty-Seventh Congress intended to diminish the Omaha Indian Reservation by the sale of land to white settlers.

OPINION

During the last half of the nineteenth century, the United States government engaged in a program to settle Indian tribes on reservations with the goal of opening up vast expanses of land

for white settlement while encouraging tribal members to abandon communal lifestyle for individual property ownership and farming the land. *Solem v. Bartlett, 522 U.S. 329, 466 (1984).* In order to accomplish these goals, Congress authorized commissions to enter into treaties with the various tribes and to negotiate the settlement of tribal members through allotment of parcels of land to individuals and the sale of the remaining lands to non-Indian settlers. *Id. @ 467.*

The effect on the reservation boundaries of the allotment of land to individual tribal members and the sale of the "surplus" lands to white settlers has been the subject for a series of United States Supreme Court cases. *Seymour v. Superintendant of Washington State Pennitentiary, 368 U.S. 351 (1962); Mattz v. Arnett, 412 U.S. 481 (1973); DeCoteau v. District County Court for the Tenth Judicial Circuit, 420 U.S. 425 (1975); Rosebud Sioux Tribe v Kneip, 430 U.S. 584 (1977); Solem v. Bartlett, 465 U.S. 463 (1984); Hagen v. Utah, 510 U.S. 399 (19940; South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).* "[I]t is settled law that some surplus land acts diminished reservations . . . and other surplus land acts did not . . . *Hagen, 510 U.S. @ 410 quoting Solem, 465 U.S. @ 469 (citations omitted).* "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem, 465 U.S. @ 470.*

In order to determine the effect of any surplus land act, the Supreme Court has developed a "fairly clean analytical structure" *Id. @ 411.* Congress has plenary authority over Indian affairs, including the right to alter terms of a treaty with Indian tribes, and only Congress can diminish an Indian reservation. *Yankton, 522 U.S. @ 34 citing United States v. Celestine, 215 U.S. 278,285 (1909).* "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. The most probative evidence of the intent of

Congress is the statutory language employed by the Congress in opening Indian lands for non-Indian settlement. *Hagen, 510 U.S. @ 411.*

In reviewing the language of the statute, the Court imposes canons of construction to the analysis. First, the language of the statute must " clearly evince" the intent of Congress to change the boundaries of a reservation. Solem, 465 U.S. @ 470. Next, ambiguities of language in the statute must be construed broadly in favor of the Indians due to the vast inequities in the bargaining power of the government over the tribes and of the trust responsibility of the United States over the tribes. *Decoteau, 420 U.S. @ 447; Hagen, 510 U.S. @ 422 (Blackman, J. dissenting).* Third, operative terms of absolute " cession" and the inclusion of a fixed "sum certain" in the granting clause of an act, creates a "nearly conclusive" or " almost insurmountable" presumption of diminishment of a reservation through sale of tribal lands. *Yankton, 522 U.S. @ 792, citing Solem, 465 U.S. @470.* Similarly, language in an act which "restores" or:"vacates" the land sold to the "public domain" evidences a Congressional intent to terminate the reservation status of land sold to non-Indians. *Hagen, 510 U.S. @ 414, citing Seymour, 368 U.S. @ 354-55.I*

The second prong of the Supreme Court analysis involves the examination of the "events surrounding" the passage of an allotment-era land act for clear-cut evidence of a "widely-held contemporaneous understanding" that Congress intended the reservation boundaries to be altered. *Solem, 465 U.S. @471.* The contemporary historical context of the passage of the act includes the legislative history of the act, reports on the negotiations of the land sale, executive and presidential declarations, reports of executive agencies overseeing Indian matter, and congressional enactments surrounding the passage of the act in question. *Id.; Rosebud, 430 U.S. @ 602; Seymour, 368 U.S. @355-5.* In the absence of a "clear expression" in the statutory

language relating to the intent of Congress, only "unequivocal" evidence contained in the surrounding circumstances will allow a finding of diminishment of a reservation. *Yankton, 522 U.S. @351.*

The third, and least compelling, prong of the Supreme Court analysis, involves the examination of the subsequent jurisdictional and demographic history of the region opened for settlement under the applicable act. *Solem, 465 U.S. @472.* This analysis can serve to provide an "additional clue"as to what was foreseen by Congress in enacting legislation opening a reservation for white settlement. *Id.* However, subsequent history and demographics provides an "unorthodox and potentially unreliable method of statutory interpretation." *Id.* Demographic and subsequent history must act in concert with "substantial and compelling" evidence of the intent of Congress to diminish a reservation, contained in both he language of the act and its legislative history in order to be given effect. *Id.*

This Court first considers the language of the 1882 Act as it relates to the intent of Congress in opening the Omaha Reservation for sale and settlement. Section 1 of the 1882 Act (22 Stat. 341) provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty . . .

Section 3 of the 1882 Omaha land Act provides:

> That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of

> five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

The United States Supreme Court has been clear that the inclusion of certain language in a land sale statute raises a "nearly conclusive" or an "almost insurmountable" presumption of a Congressional intent to diminish the boundaries of an Indian reservation based upon the decision in *DeCoteau, 420 U.S. 425 (1975).. Yankton, 522 U.S. @ 344, citing Solem, 465 U.S. @ 470; Hagen, 510 @ 411.*

In *DeCoteau*, the Court examined Article 1 of the 1891 land sale act which stated:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby **cede, sell, relinquish, and convey** to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made. *DeCoteau, 420 U.S. @ 456 (emphasis added).*

Furthermore, Article 2 of the 1891 Act provided:

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the **sum of two dollars and fifty cents per acre for each and every acre thereof** . . ."*Id.(emphasis added).*

The Court has found that the terms such as "cede," "sell," and "relinquish," and "convey" when combined with the intent to pay a "sum certain" for the land create an "unconditional commitment from Congress to compensate the Indian tribe" for its opened land. *Yankton, 522 U.S. @ 344.* Language of cession and sum certain were contained in the agreements which led the Supreme Court to findings of disestablishment or diminishment of the Lake Traverse Indian Reservation in South Dakota, certain lands in four South Dakota counties originally on the Rosebud Reservation, and the unallotted portions of the Yankton Sioux Reservation in South Dakota. *DeCoteau, 420 U.S. @445-48 ("cede, sell, relinquish, and convey . . . all their claim right, title, and interest" in all the unallotted land for two dollars and fifty cents per acre);*

Rosebud, 430 U.S. @ 593-7 ("cede, surrender, grant, and convey . . . all their claim, right, title, and interest" in unallotted land for no less than two dollars and fifty cents per acre, proceeds to be "paid to the Indians."); Yankton, 522 U.S. @ 344 ("cede, sell, relinquish, and covey . . . all their claim, right, title, and interest in and to all unallotted lands" for six hundred thousand dollars).

The Supreme Court has also found that operative language in an act providing that the opened land be "restored" or "vacated" to the "public domain" indicated the intent to diminish a reservation. *Hagen, 510 U.S. @ 413-14; Rosebud, 430 U.S. @ 589.* In *Hagen*, the Court held that "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status." *Id @ 414.* The Court discussed language of restoration to the public domain as evidence of congressional intent in contrasting cases in which diminishment was not found (*Seymour, Mattz*) with those in which diminishment was found (*Rosebud*). *Id.*

The operative language of the 1882 Act authorized the Secretary of Interior to "cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty . . ." *Section 1, 1882 Act.* The proceeds of the sale, after payment of fees "shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior." *Article 3, 1882 Act.*

Language indicating that the United States intended to act as an agent for the tribe in surveying and auctioning land with proceeds held in trust for the members of the tribe, such as

that in the 1882 Act, has been used to support findings of the lack of congressional intent to diminish reservations. In *Seymour*, the Supreme Court contrasted language in an 1892 statute vacating the northern half of the Colville Reservation in Washington State to the public domain with a 1906 act in which proceeds from sale of opened land was to be "deposited in the Treasury of the United States to the credit" of the members of the Tribe in the southern half of the reservation. *Id. @355-6.* The Court found that the 1906 Act did "no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.*

In *Mattz*, the Court found that an 1892 Act affirming the Proclamation of President Benjamin Harrison opening the Klamath River Reservation in California for settlement did not terminate the Reservation. *Id.@ 504.* The Court stated that, after repeated attempts by members of Congress to terminate the Klamath Reservation, language of a conference bill in 1892 permitted allotments on the land and provided that proceeds from the sale of unallotted land be held in trust for the "maintenance and education" of the Indians, rather than for their removal. *Id.* The Court stated that Congress knew how to express an unequivocal intent to terminate or diminish a reservation by citing language in acts passed between 1871 and 1892. *Id.* In light of this, lack of clear termination language militates against a casual inference of termination. *Id.*

In *Solem*, the Supreme Court determined that language of the Act of May 29, 1908, directing the Secretary of the Interior to "sell and dispose" of all of certain described land on the Cheyenne River and Standing Rock Sioux Indian Reservations in North Dakota and South Dakota together with language that the proceeds from the sale were to be "deposited in the Treasury of the United States, to the credit of the Indians" did not evidence an intent to diminish.

Id.@ 472-4. Such language simply inferred an intent by Congress that the United States was "simply being authorized to act as the Tribe's sales agent." *Id. @ 473.* The Court rejected other language in the 1908 Act referring to opened lands remaining part of the public domain and the use of the phrase "reservations thus diminished" as not containing sufficient clarity and relevance to overcome the clear expression of congressional intent to preserve the reservations contained in the remainder of the Act. *Id. @ 475-6.*

Plaintiffs' concede that the 1882 Act lacks the determinative language of diminishment applied by the Supreme Court. *Brief in Support of Plaintiffs' Motion for Summary Judgment @35; Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment @ 2.* Rather, Plaintiffs discuss the language of the 1872 Act as providing the requisite Congressional intent to diminish the boundaries of the Omaha Reservation. In several cases, the Supreme Court has examined language of previously, or subsequently enacted legislation to clarify the intent of the surplus land act in question.

In *Rosebud*, the Court found that a 1901 amendment to the 1889 Treaty clearly indicated an intention to remove certain counties in South Dakota from the Rosebud Sioux Reservation. *430 U.S. @ 587.* The Court cited the unilateral power of Congress to abrogate treaties with Indian Tribes pursuant to *Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)* to negate the requirement of tribal consent for acts passed in 1904, 1907 and 1910 opening lands on the Rosebud Reservation for sale to white settlers. *Id.* The Court also found that the language of the acts "was identical with or derivative from" the language of the proposed 1901 amendment, which had been ratified by the Tribe, with only the terms for method of payment altered. *Id. @ 588.*

In *Hagen,* the Court determined that 1903, 1904 and 1905 Acts simply extended the time for the opening of the Uintah Reservation in Utah while providing a few other details extending

the intent of the 1902 Act allotting land to the Ute Indians and providing for the sale of all of the unallotted lands. *510 U.S. @ 412-15.* The 1902 Act provided for restoration of the unallotted lands to the "public domain" which the Court held as nearly determinative in finding an intent to diminish the Uintah Reservation. *Id.* The Court cited the specific references to the 1902 Act in the subsequent legislation as indicating that the earlier act was the "basic legislation" and that failure to repeat exact language of the 1902 Act restoring land to the public domain could be inferred. *Id. @ 415-16.*

In *DeCoteau*, the Supreme Court examined "sum certain" and "cession" language in the 1891 Act opening the Lake Traverse Reservation in South Dakota for settlement with numerous other acts ratified by Congress at the same time. *420 U.S. @ 439 nn. 21, 22.* In each of the acts the language determined the outcome of the opening of the respective reservations.

Finally, in *Seymour*, the Supreme Court contrasted language in the 1906 Act providing for the sale and settlement of lands on the northern portion of the Colville Reservation in Washington State with the language of the 1892 Act which vacated the southern part of the reservation to the public domain. *368 U.S. @ 355.* The Court based its determination that the northern half of the reservation remained Indian country was partially controlled by the method of payment, i.e. depositing proceeds from the sale in the United States Treasury for the credit of the Indians. *Id. @ 356.* The Supreme Court found that this form of payment indicated the intent of Congress to preserve "federal responsibility for and jurisdiction over" the tribal rights on the Colville Reservation. *Id. @ 356.*

In relation to earlier Omaha Acts, the language of the 1882 Act differs substantially from language of cession and sum certain contained in the 1854 Treaty and 1865 Winnebago land sale which are discussed more fully below. *See Plaintiffs Exh. 5; Treaty of March 6, 1865, 14 Stat.*

667, Plaintiffs' Exh. 10, n 22. Missing from the 1882 Act is language requiring the Omaha people to vacate and remove themselves from the land proposed to be sold. *Id.*

The language employed in the 1882 Act also differs from the language employed in the 1872 Act. The 1872 Act calls for the sale of lands in the western portion of the Omaha Reservation to be "separated from the remaining portion of the reservation." *Section One, 1872 Act.* In addition, the 1872 Act provided that all patents for lands sold under the respective acts were to have a clause "forever prohibiting the sale of intoxicating liquors on such lands . . ." *Section 5, 1872 Act.* In *Yankton,* the Supreme Court stated that a reasonable inference could be made from the inclusion of a similar liquor prohibition in lands sold would be meaningless in light of the general prohibition of liquor in Indian country if the land was to remain within the reservation. *522 U.S. @ 350.* Each of these provisions, which have supported a finding of diminishment, differ from the 1882 Act which contains neither a reference to the separation of the land sold from the remaining reservation nor a prohibition of alcohol on the lands sold.

The 1882 Act does not incorporate the 1872 Act by reference nor does it specifically cite to the earlier act. The1872 Act may more appropriately provide evidence of the "surrounding circumstances" and "legislative history" of the 1882 Act rather than controlling the interpretation of the language of the 1882 Act, itself. The language of the 1872 Act does contain substantial ambiguity and is not entirely supportive of a finding for diminishment. By providing for the deposition of the funds from the sale of land in the U.S. Treasury for the benefit of the Omaha Indians, the language of the 1872 Act is similar to the 1882 Act in that both support a finding of preservation of the Omaha Reservation boundaries following the guidance of the Supreme Court.

The sale of land comprised only a portion of the 1882 Act. Section 5 of the Act provides for the allotment of land and states in part:

> That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, . . .

Section 5 of the Act is clarified by Section 8 which provides in relevant part:

> . . . Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

Defendants contend that the provision allowing for allotments west of the described railroad right of way clearly indicates the intention of Congress to preserve the reservation intact following the sale of the unallotted lands. Since there was no limitation, most, if not all, of the allotments under the 1882 Act could have been selected in the western portion of the Omaha Reservation. However, if tribal members had selected a large number of allotments in the opened area, it would been in opposition to the intention of the Tribe and Congress seeking to use the proceeds of the sales to provide resources for agricultural development on the Reservation. And, in fact, this did not occur.

It does appear that only tribal lands could be allotted to Indians circa 1882. When discussing the effect of the Dawes Act of 1887, 25 U.S.C. section 331, the Supreme Court has been clear that the allotment policy was enacted to provide tracts of "reservation lands" to individual Indians. *Yankton, 522 U.S. @ 333; DeCoteau, 420 U.S. @ 432.* In addition, in

Solem, the Supreme Court stated that the inclusion of Section 2 of the Cheyenne River Act, providing for continued permission to obtain allotments in the "affected portion of the reservation before the land was officially opened to non-Indian settlers" supported an interpretation that the opened area was to remain part of the Cheyenne River Indian Reservation. *Solem, 465 U.S. @ 474.* However, the fact that allotments have been made in an opened area does not negate a finding of diminishment/termination of reservation status. *See e.g., DeCoteau, 420 U.S. 425 (1975); Hagen, 510 U.S. 399 (1994); Yankton, 522 U.S. 329 (1998).*

Considering all of the circumstances, the inclusion of the language clarifying that tribal members could choose allotments on the western portion of the Omaha Reservation prior to the sale of land does suggest that Congress intended a continued tribal presence in the opened area. This language, however, does not resolve the issue definitively.

Following a full examination of the language of the 1882 Act, this Court does not find language of "cede, sell, relinquish" nor language providing for a "sum certain" nor language restoring the land sold to the "public domain," and therefore the 1882 Act does not raise a presumption of diminishment of the Omaha Reservation following the sale and allotment of reservation lands. Nor does the Act require Tribal members to vacate the area but rather allows for selections of allotments in the area of the proposed sales. Furthermore, the inclusion of language providing that the United States was to act as the sales agent of the Omaha Tribe in selling the "surplus" lands while depositing the proceeds in the Treasury for the benefit of the Omaha Indians, conforms with the cases finding a preservation of reservation boundaries following allotment and land sales. i.e. *Seymour v. Superintendant, 368 U.S. 351, (1962); Mattz v. Arnett, 412 U.S. 481 (1973); Solem v. Bartlett, 465 U.S. 463 (1984).*

Based upon an examination of the language of the 1882 Act, the Court finds a lack of support for the intent of Congress to diminish the boundaries of the Omaha Reservation. As a corollary, the intent of Congress to preserve the boundaries of the Omaha Reservation following the sale of surplus land to settlers is evident through the language applied in the statute.

Under the Supreme Court's analysis, this finding does not dispose of this issue. The Supreme Court has stated that the lack of specific language of "cession" and "sum certain" does not automatically raise a presumption of preservation of reservation status. *Hagen, 510 U.S. @ 411.* Thus, a further examination of the circumstances surrounding the passage of the 1882 Act and the Act's legislative history as well as an examination of the subsequent history of the area must be undertaken to determine if there is unequivocal evidence of a intent by the Forty-Seventh Congress of the United States to diminish the Omaha Reservation in spite of the language of the statute.

This Court next re-examines the acts and treaties which led up to the 1882 Act to illuminate the facts and circumstances surrounding the passage of the 1882 Act. The Omaha people had maintained settlements in what was to become eastern Nebraska by the Missouri River since the seventeenth century. *Defendants' Exh. 4 @ 3;en 1; Plaintiffs' Exh 10@ 4, n 7b.* By the mid-nineteenth century, the Omahas had been forced by disease and attacks by Dakota Sioux intruders to seek protection from the nascent government of the United States through a series of agreements. *Defendants' Exh. 4 @ 5, en 5.* The Omaha Tribe ceded its claim to lands in Iowa in the Prairie du Chien Treaty of 1830 for annuity payments. *Id. @ 7-8.*

By the mid-1840's the annuities had run out and the situation for the Omaha people had become extremely dire. *Id. @9.* By the 1850's the United States government entered into a policy of acquiring tribal lands in the central great plains for settlement by non-Indians and of

removing the tribes to more compact reservations. *Plaintiffs' Exh. 10 @ 4; Defendants' Exh 4 @ 10.* In 1854, the Omaha Tribe entered into a treaty with the federal government in which the Tribe agreed to "cede" and to "relinquish" tribal lands in Nebraska west of the Missouri River and south of a line demarking the Omaha Reservation for agreed annual payments. *Plaintiffs Exh. 5.* The treaty required the Omahas to "vacate the ceded country" and to "remove to the lands reserved" for them in the agreement. *Id.*

The treaty also restated the federal promise of protection for the Omahas and further provided authority for the President to assign tracts of land to individual Omaha Indians, a precursor of the later allotment policy of the United States. *Id.* Apparently, no assignments were made under the 1854 Treaty. *Plaintiffs' Exh. 10 @ 8.* The 1854 Treaty, containing language found by the Supreme Court to support a diminishment of Tribal lands, undeniably effected a cession of Omaha Tribal lands and established the Omaha Reservation. The Omahas eventually settled on boundaries of their reservation, comprising approximately 300,000 acres, which included the Blackbird Hills, a traditional home for the Omaha people. *Defendants' Exh. 4 @ 14-15; Plaintiffs' Exh. 10 @ 6.*

Having a reservation was not a panacea for the Omaha people. In spite of the repeated promises by the government to provide protection for the Omaha people, attacks by Dakota intruders continued, limiting access by Omaha hunters to lands in the western section of the reservation. *Defendants' Exh. 4 @ 15.* By 1863, destitute members of the Winnebago or Ho-Chunk Tribe, began to settle in the northern parts of the Omaha Reservation. *Defendants' Exh. 4 @ 16.* The Omahas, who took pity on the Winnebago people and who also sought a buffer against further incursions by the more hostile Sioux Indians, agreed to sell land in the northern part of their reservation for a homeland for the impoverished Winnebagoes. *Id.*

In March of 1865, leaders of the Omaha Tribe signed a treaty agreeing to "cede, sell, and convey" to the United States approximately 97, 500 acres of the northern portion of the Omaha Reservation for fifty thousand dollars to be applied for "goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements" on the reservation. *Treaty of March 6, 1865, 14 Stat. 667, Plaintiffs' Exh. 10, n 22.* Significantly, the 1865 Act required the Omaha Indians to "vacate and give possession of the lands ceded by this treaty immediately upon ratification." *Article 1, Treaty of March 6,* 1865.

As part of the agreement, a new allotment process was implemented replacing the failed assignments of the 1854 Act. *Defendants' Exh. 4 @ 17-18, en 32; Plaintiffs' Exh. 10 @ 8.* The terms of allotment were less favorable in the 1865 treaty but were accepted by the Omahas, partly because of their fear of losing their land and being forced to remove to Indian Territory. *Defendants' Exh. 4 @18-19.* The fear of removal was partially due to legislative action in the Nebraska territorial legislature seeking the abolition of the Omaha Reservation in anticipation of statehood for Nebraska. *Id. @ 20.* Again, as in the 1854 Treaty, Congress utilized language of cession with a sum certain to clearly indicate the intent to diminish the Omaha Reservation following the sale of land for the Winnebago Reservation in the 1865 Treaty and Act.

The allotments under the 1865 Act were completed by 1871. *Plaintiffs' Exh. 10 @ 8.* However, the conditions leading to the insecurity of the Omaha people regarding their ability to avoid removal had not been allayed by the allotments or by the meager annuities. *Defendants' Exh. 4 @ 20-21.* The allotments had been in the eastern portion of the Reservation, the traditional site for villages, while the Omaha Tribe continued to hunt, with diminishing success, on the western lands of the Reservation. *Plaintiffs' Exh. 10 @ 9; Defendants' Exh. 4 @ 2, en 41.* In August 1871, a request was made on behalf of the Omaha people for Congress to authorize the

sale of 50,000 acres of land in the western portion of the Omaha Reservation to settlers for capital to fund homes and farms. *Plaintiffs' Exh. 10 @ 9.*

Action on the request was delayed until 1872 when Congress authorized the Secretary of the Interior " to cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south." *Act of June 10, 1872, 17 Stat. 391 [Plaintiffs' Exh. 10 @ 9, n. 32.]* A minimum price of two dollars and fifty cents per acre was set and the proceeds of the sale were to be placed in the United States Treasury to the credit of the Indians. *Id.* The sale was advertised but little interest was generated, apparently by the high minimum price. *Plaintiffs' Exh. 10 @10-11; Defendants' Exh. 4 @ 2, en 45.*

As previously discussed, the language utilized in the failed 1872 Act is ambiguous as to the intent of Congress when authorizing the sale of lands on the Omaha Reservation. In contrast, the 1854 Treaty and 1865 Act clearly evince the intent of Congress to diminish the Omaha Reservation. During the period in question, "Congress was fully aware of the means by which termination (of reservation status) could be effected." *Mattz, 412 U.S. @ 504.* As a whole, the facts and circumstances surrounding the enactments leading up to the 1882 Act do not reveal an unequivocal statement of a Congressional purpose to diminish the Omaha Reservation.

Another fundamental line of inquiry into the circumstances surrounding the passage of the 1882 consists of an examination of the legislative history of the 1882 Act. The legislative history of the 1882 Act comprises entries in the Congressional Record for the 47th Congress and the United States Senate as well as various reports to the respective houses of Congress. *See, e.g. Plaintiffs' Exh. 10, nn. 47-50, 58-64.*

The debates in Congress and the Senate concerning the sale of land on the Omaha Reservation began in the 46th Congress with discussions of reviving the land sale proposal of 1872 to allow the sale of the roughly "49,461.71" acres left unsold by the 1872 Act. *Plaintiffs' Exh. 10, n. 48.* Concerns were raised about selling the land in a single block, fearing that this would encourage a single speculator to purchase the land for a reduced rate which would run counter to the government's policy of settling many "white" farmers among the Indians to encourage the Indians' adoption of an agrarian lifestyle. *Id.* Apparently, no action was taken on this proposal. *Plaintiffs' Exh. 10 @12.*

Another bill, designated S.1255, was reported to the Senate on February 20, 1882. *Plaintiffs' Exh. 10 @ 13.* During the discussions of the bill, Senators expressed serious concerns about the status of land within the western area either selected for allotments by members of the Omaha Tribe or purchased outright by Indians in relation to taxation by the State of Nebraska. *Defendants' Exh. 4 @32; Plaintiffs' Exh. 10, n. 58.* Other issues raised by Senators included whether the Omahas were getting a fair price for the land and whether the amount of land proposed for sale would leave an adequate amount of land for proper agricultural purposes. *Plaintiffs' Exh. 10, n. 58.* S. 1255 was passed with amendments and referred to the House of Representatives. *Id.*

In the House of Representatives, the Committee for Indian Affairs added allotment provisions. *Plaintiffs's Exh. 10 @ 13.* Debate in the House focused on whether Omahas would be allowed to select their allotments before the land sales and whether allotments could be chosen in all parts of the Reservation. *Id., n 60.* Representatives also questioned whether the selection of the western land was an attempt to swindle the Indians out of their most valuable land. *Id.* After amendments were offered to require allotments prior to the sale and to designate

that allotments could be selected "either east or west of said right of way," the bill finally was passed by the House. *Id.; Defendants's Exh. 4 @41-43.* The bill was sent back to the Senate, and after conference, was approved and sent to President Chester A. Arthur for his signature. *Plaintiffs' Exh. 10@ 14.*

In spite of intense discussion of many aspects of the bill, neither side can point to a definitive statement regarding the effect of the land sale on the boundaries of the Omaha Reservation. Plaintiffs point to references in the Congressional Record to the amount of land left for the Tribe after the sale as about 100,000 acres. Defendants call attention to the discussions leading to the amendment allowing selections of allotments anywhere on the Reservation. "[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose" to diminish an Indian reservation. *Solem, 465 U.S. @ 478.* Similarly, the statements contained in the legislative history of the 1882 Act do not clear up the uncertainty about the key issue of diminishment.

This Court could find no reference in its review of the legislative history to specific boundaries of the Omaha Reservation in any of the debates and discussions. One key reason for this omission may be apparent in the statement of Representative Dudley Haskell of Kansas, who defined the federal policy in effect at the time. Haskell stated that "[b]efore any land is sold they are at liberty to make their individual selections of one hundred and sixty acres to every head of a family, eighty acres to every widow, and forty to every child. These severalty selections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to issued in fee simple . . ." *Plaintiffs' Exh. 10 @ 13, n. 60.*

Federal Indian policy at the end of the nineteenth century envisioned opening Indian reservations to white settlement with the goal of having the Indians "enter traditional American society" by turning them into farmers within a generation. *Solem, 465 U.S. @ 468.* Therefore, Congress failed to be "meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.* References to smaller acreage left after a sale of land could as likely allude to the "reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers" as it could to the "reduction that a complete cession of tribal interests in the opened area would precipitate." *Id.*

Another aspect of the surrounding circumstances related to the opening of a reservation for white settlement is contemporaneous understanding of the Indians involved in the sale. *DeCoteau, 420 U.S. @ 434-435; Yankton, 522 U.S. @353.* In the Report to Congress dated July 1, 1882, Representative Haskell included summaries of statements by a number of Omaha Tribal members advocating passage of the 1882 Act. *Plaintiffs' Exh. 10, n. 59.* The overwhelming sentiment of the "memorials" of Omaha ancestors was a desire to gain title or permanency to the lands on which they resided and a fear of removal from their homeland. *Id.* Absent are statements, by and to the Indians, which in other cases decided by the Supreme Court, have indicated that all parties understood that the sale of land would involve a dissolution of reservation boundaries. *See e.g., DeCoteau 420 U.S. @432 "We never thought to keep this reservation for our lifetime;" Yankton, 522 U.S. @ 352 "This reservation alone proclaims the old time and old conditions;" Hagen, 510 U.S. @417 "[c]ongress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation . . ."(emphasis in original).*

The contemporaneous understanding and legislative history of the 1882 Act contain examples which are interpreted by each party as supporting its assertions as to the intent of Congress in authorizing the sale of land on the Omaha Reservation. In cases where the Supreme Court has found Congressional intent to diminish/disestablish reservations based upon language in the respective Acts, it also found unequivocal support in the surrounding circumstances and contemporaneous history. *See, e.g. DeCoteau, 420 U.S. @ 455; Hagen, 510 U.S. @ 420; Yankton, 522 U.S. @ 354.* In contrast, in the cases where the Supreme Court did not find diminishment in language, it also found lack of support in the contemporaneous history. *Solem, 465 U.S. @478; Mattz, 412 U.S. @ 503.*

Some Congressmen and Senators speak as if they believe that the 1882 Act would change the status of the land offered for sale while others clearly speak as if they are convinced that the Tribal character of the land will remain following the land sales. Tribal members speaking about the land sales are primarily concerned with obtaining good title for their allotments and reserving their land base in Nebraska from forced removal as was the fate of the Poncas. As previously stated, "(i)t is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish" a reservation. *Solem, 465 U.S. @ 478.*

In this case, this Court does not find clear and unambiguous evidence of the intent to diminish the Omaha Reservation which is inconsistent with the implications of non-diminishment found in the language of the 1882 Act. Therefore, the Court must look further to see if there is convincing evidence in the subsequent history of the area to overcome the lack of clear diminishment language in the 1882 Act and the failure of unequivocal evidence in the surrounding circumstances of its passage.

The United States Supreme Court utilizes a third prong of the inquiry into the effect of surplus land acts over the boundaries of Indian Reservations , that being an investigation of the subsequent jurisdictional and demographic history of the area opened for settlement. *Solem, 465 U.S. @ 471.* The history involved in this case consists of nearly 130 years and this inquiry is fraught with peril due to the mass of data involved and the potential unreliability of the interpretation. *Id.*

Plaintiffs raise, and rely on, several lines of evidence relating to the subsequent history of the land opened for settlement under the 1882 Act. After the opening of the Omaha Reservation in 1884, settlers poured into the area seeking to take advantage of the good land. *Plaintiffs' Exh. 10 @ 22, n 105.* By September of that year claims for nearly 43,000 acres had been filed. *Id.* The town of Pender was established by 1890 and grew to approximately 700 in population by the mid 1890's. *Plaintiffs' Exh. 10 @ 22.*

Plaintiffs point to census data compiled by Emily Greenwald which show that the non-Indian population of areas west of the railroad right of way has consistently been over 99% between 1900 and 2000. *Plaintiffs' Exh. 4 @ 27-28.* In contrast, the non-Indian population of the area east of the right of way has ranged from 30.22 % in 2000 to a high of 85.20% in 1920. *Id.* In *Hagen*, the Supreme Court stated that demographic evidence showing that an area is "predominantly populated by non-Indians with only a few pockets of Indian allotments" could burden the administration of State and local governments if the land is considered Indian Country. *Hagen, 510 U.S. @420 quoting, Solem, 465 U.S. @ 471-472, n. 12.*

The parties disagree as to the number and impact of Omaha allotments and the Tribal presence in the opened area west of the railroad right of way. Plaintiffs state that only 10 allotments totaling approximately 876 acres west of the right of way. *Plaintiffs' Exh. 10 @ 17-*

18. Furthermore, Plaintiffs claim that the opened area was settled almost exclusively by non-Indians. *Plaintiffs' Brief in Support of Motions for Summary Judgment @ 42.*

Defendants place the number of allotments to Omaha Tribal members at 15 in the opened area, even after substantial pressure by Commissioner of Indian Affairs, Hiram Price, to discourage the practice.. *Defendants' Exh. 4 @ 61-64.* Furthermore, Defendants cite a number of Omaha tribal members who played important roles in the early settlement of the Village of Pender. *Defendants' Exh. 60 @ 18-20.*

Plaintiffs cite a number of references to the size of the Omaha Reservation in a series of Annual Reports of the Commissioner of Indian Affairs following the land sale as evidence that the Omaha Reservation had been diminished by the Act of 1882. *Plaintiffs' Exh. 10 @24-26, nn 118-123-Reports for 1874, 1876, 1884, 1888, 1898.* The reports show that the listed acreage of the reservation was approximately 143,000 acres and seek to account for this by subtracting the 50,000 acres opened for settlement from the 192,867 acres cited in the 1873 Annual Report. *Plaintiffs' Exh. 10 @ 24, n 118.*

Defendants claim that the statistics utilized by the Office of Indian Affairs are not clearly defined and contain substantial errors and inconsistencies. *Defendants' Exh. 4 @56-57.* Defendants point out that the figures prior to the 1882 land sales list the size of the Omaha Reservation as approximately 143,000 acres, which could not be accurate in that only a few hundred acres were sold under the largely failed 1872 Act. *Id.*

The subsequent treatment of the opened area as evidenced by "Congress, courts and the Executive" have provided additional evidence into the impact of the land sale. *Solem, 465 U.S. @ 469-70.* Plaintiffs cite to a series of acts of Congress extending the time for payment under the 1882 Act. *Plaintiffs Exh. 10 @ 19, citing acts in 1885, 1886, 1888, 1890, and 1894.*

Particularly, Plaintiffs claim that the 1888 Act presents compelling evidence of the change of status of the area west of the right of way. The Act states:

> The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act upon which the purchaser shall be in default, under existing law, for sixty days after the passage of this act, in payment of any part of the purchase-money, or in the payment of any interest on such purchase-money for the period of two years previous to the expiration of said sixty days. The Secretary of the Interior shall thereupon without delay cause all such land, together with all tracts of land embraced in said act not heretofore sold, to be sold by public auction, after due notice, to the highest bidder over and above the original appraisal thereof, upon the terms of payment authorized in said act. And the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians, in such manner as shall be hereafter determined by law.

Plaintiffs' Exh. 10 @ 19-20, n 92.

Plaintiffs cite cases *Drummond v. United States, 34 F.2d 755(8th Cir. 1929)* and *Hooks v. Canadian Holding Co., 272 P. 366 (Okla. 1928)* for support of its contention that following default in a sales contract, Indian land automatically reverts to the tribe rather than allowing resale. *Plaintiffs' Brief in Support of Motion for Summary Judgment @ 36-37.*

Defendants claim that Plaintiffs' reliance on the 1888 is misplaced in that, if the 1882 Act diminished the Omaha Reservation, there would be no basis for reversion of the land to the Tribe upon default in payment by a non-Indian purchaser. *Defendants' Reply Brief in Support of Motion for Summary Judgment @ 3.* Defendants further claim that the 1894 Act extending the time for payment contained a provision stating that "this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained," thereby signifying a retained interest in the land west of the right of way twelve years after the passage of the 1882 Act. *Defendants' Exh. 4 @ 54.*

Both parties cite to semantic distinctions in the vast series of references to the Omaha Reservation during the years following the 1882 land sale to support their conclusions as to the impact of the land sale. Plaintiffs point to statements such as that of United States Indian Agent

George Wilkinson in 1885 who said that "[t]he Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers . . ." *Plaintiffs' Exh. 10 @ 19, n. 88.* Defendant cite numerous examples of references in executive reports and in the congressional acts extending the period for payment of land being sold "on" or "in" the Omaha Reservation as support for its contentions. *Defendants' Exh. 4 @ 54-55.*

The parties have a major disagreement over the opinions of the Field Solicitor's Office of the United States Department of Interior specifically addressing the issue of the boundaries of the Omaha Reservation. On June 27, 1989, Marcia Kimball, Office of Solicitor, United States Department of Interior, issued a letter opinion to Jerry Jaeger, Area Director, Bureau of Indian Affairs stating that her conclusion that the "most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned railroad right of way . . ." under a theory of de facto diminishment. *Plaintiffs' Exh. 10 @ 3, n. 5.*

Subsequently, as Defendants point out, Patrice Kunesh, Deputy Solicitor for Indian Affairs, issued a letter to Priscilla Wilfahrt, Twin Cities Solicitor, stating that the June 27, 1989 Kimball letter was incorrect, concluding that the western boundary of the Omaha Reservation had not been altered by the 1882 Act and that the Kimball opinion was withdrawn and not "to be relied upon or used by your office." . *Defendants' Exh. 4 @ 81, en 225, 226.* The April 16, 2012 Kunesh Memo refers to Wilfahrt's April 24, 2008 opinion reaching the opposite conclusion from Kimball's regarding the western boundary of the Omaha Reservation. *Id.*

Defendants and the United States, as Amicus, motioned the Court to accept a formal opinion of the Department of Interior dated September 5, 2012 affirming the 2008 conclusion of the Solicitor. Plaintiffs objected to the new evidence on the basis of the record having been settled at the time of the request. This Court agreed, finding that the evidence was merely a

restatement of the prior opinion of the Department of Interior rejecting the 1989 opinion. Defendants and Amicus then asked that this Court take judicial notice of the September 5 letter opinion and the Court again declines the invitation, finding that inclusion of additional evidence after the close of the arguments is prejudicial to the Plaintiffs.

Plaintiffs submit evidence based upon the depositions of the members of the Omaha Tribal Council at the time relating to Tribal activities in the opened area. According to the deposition answers, Tribal authorities have not enforced sections of the Omaha Tribal Code relating to fire protection, animal control, fireworks, wildlife and parks, business permits and licenses, child protective services, education on a regular basis west of the railroad right of way. The Tribe does not have administrative or governmental offices nor does the Tribe conduct regular ceremonies west of the right of way. *Id.*

Defendants claim the Omaha Tribe has attempted to provide law enforcement services in the opened area but were met with hostility and resistance from the state and local officials and residents of Pender and the surrounding area. *Defendants' Exh. 50.* Defendants also cite to Federal Environmental Protection Agency actions involving agricultural actions against firms located west of the railroad right of way, claiming that the sole basis for federal, rather than state, involvement would be recognition of the Reservation status of the land in question. *Defendants' Exh. 51.*

P.L. 280 is likely another factor affecting the apparent lack of tribal administration on the Omaha Reservation. In 1953 the United States Congress passed 67 Stat. 588, codified as 18 U.S.C. section 1360 and 18 U.S.C. section 1162, and more commonly known as P.L. 280, providing that Nebraska, together with four other states, should have both civil and criminal jurisdiction over all the Indian country within the states to the same extent as the states exercised

jurisdiction in the rest of the state. *Omaha Tribe of Nebraska v Village of Walthill, 344 F. Supp.823, 825-826(D. Neb. 1971).* P.L. 280 was part of a change of policy by the federal government from seeking to empower tribal governments to one of the eventual termination of tribal governance. *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering, 476 U.S. 877, 895 (1986).*

The federal policy of termination was reversed during the civil rights era of the 1960's allowing for retrocession of state jurisdiction back to the federal government and tribes. *Walthill, 344 F. Supp. @ 826.* The Omaha Tribe and Nebraska eventually agreed on a partial retrocession of criminal jurisdiction on the Omaha Reservation, leaving out jurisdiction over crimes on public highways. *Id. @ 827.* In spite of the eventual retrocession of criminal jurisdiction, Thurston County law enforcement agencies and county courts continued to arrest and try Indians on criminal charges. *Id. @ 828.* Therefore, there is evidence that the allocation of jurisdiction over the area west of the right of way was impacted by the general loss of jurisdiction over the entire reservation occasioned by P.L. 280 and the subsequent disagreements over retrocession.

Plaintiffs present a case decision by the District Court for Thurston County in *State v. Picotte*, in which an Indian was accused of a crime in Pender, Nebraska. *Brief in Support of Plaintiffs' Motion for Summary Judgment @ 38-39.* The state court determined that the western portion of Thurston County was no longer within the Omaha Reservation. *Id.* Plaintiffs also submit an opinion of Nebraska Attorney General Jon Bruning in 2007 opining that the Omaha Reservation had been diminished. *Defendants' Exh. 4 @ 77, en. 213.*

Both sides present additional evidence, including maps, to support their contentions in relation to subsequent treatment of the area. However, as the Supreme Court has stated,

evidence of subsequent jurisdictional and demographic patterns is "less illuminating" and is the"least compelling" in terms of authority when reaching a decision regarding alteration of the boundaries of the Omaha Reservation. *Hagen, 510 U.S. @ 420; Yankton, 522 U.S. @ 356.* An examination of the factual matters presented here reveals the problems with this type of evidence.

"Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet . . . not every surplus land Act diminished the affected reservation." *Yankton, 522 U.S. @ 356.* On review, the demographic changes on the Omaha Reservation may not reflect the same circumstances as that of other reservations subject to the Supreme Court's boundary analysis. Prior to the land sale, few if any Omaha Indians made the western portion of the Reservation a home but rather used the land as a buffer and security zone as well as a hunting ground. *Defendants' Exh. 4 @ 15, en 26.* There were few, if any, non-Indians in the area. *Plaintiffs' Exh. 10 @ 12, n 51 (citing one persons offer to buy the entire 50,000 acres in 1881).* Therefore, the demographic pattern was not one of Indians being displaced by non-Indian settlers but of non-Indians inhabiting an area previously used by the Omahas primarily for hunting and security.

Additionally, Indian allotments passed quickly out of Indian hands following the enactment of the federal allotment policy. *Defendants' Exh. 60 @ 3-8.* By 1916, ninety percent of the fee patents issued to allotees of the Omaha Tribe, mostly on the eastern portion of the Reservation, had been sold or mortgaged to the point of risk of loss. *Id. @ 7, n 16.* According to the census data provided by Plaintiffs' expert, in 1920 over 85% of the population east of the right of way, an area not disputed as part of the Omaha Reservation, was non-Indian. *Plaintiffs' Exh. 10 @ 27-28.* Applying a notion of "de facto" or "de jure" diminishment to demographic

patterns such as those presented in this case could lead to a perverse application of a doctrine similar to adverse possession. This could result in not only the loss of tribal control over disputed areas but over any area where the population ratios reached a critical mass.

The treatment of the opened area by executive agencies and Congress "is so rife with contradictions and inconsistencies as to be of no help to either side." *Solem, 465 U.S. @ 478.* The same applies here. Reports of the size of the Omaha Reservation appear to be inconsistent and do not specify the parameters for the stated acreage, whether referring to Indian controlled lands or to actual reservation totals. The dispute over the changing opinions of the Department of the Interior, which have led to diametrically opposite conclusions as discussed above, dramatically point to the hazard of using subsequent jurisdictional history to divine the intent of a former Congress.

Similarly, reliance on isolated statements in the long historical record or on differences in map descriptions of an area, commonly lack authority and usually do not yield clarity in a search for Congressional intent. The same can be said of a state court case in which the Omaha Tribe was not involved or the opinion of a state Attorney General who admits that the ultimate decision for the opinion stated is a matter of federal law. *Defendants' Exh. 4 @ 77, en. 213.* In each of these matters, there is no evidence that the full record was examined as has been done by the parties to this action, and there is significant peril in relying on any of the assertions made.

The cases cited by Plaintiffs for support of their contention that defaulted land has to revert to tribal ownership do not conform with a reading of the cases. In *Drummond,* the issue was whether land sold by an Indian allotee to non-Indians would contain original restrictions on alienation if returned to the allotee by virtue of default of the mortgage. *34 F. 2d @ 755-759.* In *Hooks*, the issue involved a specific act of Congress requiring the reversion of defaulted land to

the tribe for resale by the federal government. *272 P. @ 366-367.* Neither case supports the proposition put forward by Plaintiffs nor requires a finding of diminishment based upon their holdings.

The key issue in this case is the western boundary of the Omaha Reservation and whether it changed following the passage of the 1882 Act. If the intent of Congress in 1882 was to alter the western boundary of the Omaha Reservation to a geographically defined line, such as the right of way for the Sioux City and Omaha Railroad, this fact should appear in the vast array of evidence produced by the research of the parties. The Court has examined references physical description of the boundaries of the Omaha Reservation, starting with the initial survey completed in 1855, to find evidence supporting the arguments of either side. The report of the 1855 survey listed the boundaries of the Omaha Reservation as follows:

> The South-east corner is known as the mouth of Woods Creek or the point where said creek empties in the Missouri River, thence running due west six miles two hundred ninety eight (298) rods to the south branch of Blackbird Creek, said creek is 15 feet wide and has a cotton wood sight tree on the east bank of 16 inches diameter, thence west six miles 160 rods to Middle Creek, said creek is 25 feet wide, and runs to the south then west 16 miles 202 rods to the South-west corner of Reservation and known as a mound, two and one-half feet in diameter and two feet high with the sod taken from the south side and said mound is further described as being 16 rods south of 60 rods west of a small branch creek, thence north 15 miles 260 rods to Middle Creek, said Creek is 24 feet wide and runs to the South-west, thence north 2 miles 60 rods to North-west corner, and said corner is known as a mound 3 feet in diameter and 2 feet 6 inches high, sod taken from the west, thence east 17 miles 252 rods to south branch of Omaha Creek, said creek is 15 feet across, thence east three (3) miles 285 rods to the Missouri River, thence down said river to the place of beginning, and containing 300,00 acres of land, and said boundary line is further described by having mounds erected on the high ground from 80 rods to one mile apart, and so situated as to be visible from one to the other, and sod taken from the outside of said line as completed by me the 27th day of June A.D. 1855. W. Barnum, Surveyor.

Field Notes of the Boundary of the Omaha Indian Reservation, June 27, 1855, W. Barnum, Surveyor, Defendants' Exh. 4 @ 15, en 26.

From the notes of the surveyor, only limited information can be gleaned. The first being that the western boundary of the Omaha Reservation was 28 miles 660 rods from the starting point on the Missouri River, as it then flowed. *Id.* A rod is 16.5 feet. *Black's Law Dictionary, 1980.* Thus, the total distance of the original western boundary from the eastern limit of the Reservation is approximately 30.06 miles. The 1854 Omaha Reservation comprised what is now all of Thurston County and adjacent areas of Cuming, Burt and Dixon Counties. *Plaintiffs' Exh. 10 @ 7-8, n 21.*

In 1865, the treaty selling the northern part of the Omaha Reservation for use a homeland for the Winnebago Tribe, referred only to the "western boundary line of the reservation" when describing the land sale. *Treaty with the Omaha, 1865, 14 Stats., 667.* Other specific descriptions of the western boundary line of the Omaha Reservation in subsequent Congressional acts have evaded discovery by this Court.

The parties actively dispute whether references in various executive reports following the 1882 Act to the western boundary of the Omaha Reservation being either 25 or 30 miles from the Missouri River help to confirm or to preclude a finding that the Reservation was diminished. *See, e.g. Plaintiffs' Exh. 1, Declaration of E. Greenwald; Plaintiffs' Exh. B (illustrative map of Omaha Reservation); Defendants' Exh. 22; Defendants' Exh. 4 @54-55 en 144.* Other than confirming the original distance as approximately 30 miles from the Missouri River to the western boundary, such random references do little but acknowledge the approximate distance across the southern border of the Reservation and conform to the lack of specificity in defining the boundaries that was commonplace in the era of surplus land acts. (The eastern boundary of the Omaha Reservation has been the subject of extended litigation resulting in the Omaha Tribe

receiving Blackbird Bend, a peninsula of land in the State of Iowa, due to the change of the course of the Missouri River over time. *See, e.g. Wilson v. Omaha Tribe, 442 U.S. 653 (1979).* There is nothing in this record indicating that the change of course of the Missouri River altered the original relationship as noted in the 1855 survey.)

As discussed above, in 1953, Nebraska was a mandatory state for reassigning jurisdiction over tribes within its boundaries from the federal government and tribe to the State by virtue of P.L. 280. In 1968, Congress changed its position on the allocation of jurisdiction in Indian country by passing Act of April 11, 1968, Title IV, § 403, 82 Stat. 79, codified 25 U.S.C. 1323(a). *Walker v Rushing, 898 F.2d 672, 673-674 (8th Cir. 1990).* The United States Secretary of Interior was designated by the President to accept such retrocession on behalf of the United States. *Id., citing, Exec. Order No. 11,435, 33 Fed.Reg. 17,339 (1968)*

The process required the legislature of the State of Nebraska to formally request "retrocession" of the jurisdiction by resolution, which was passed by the Nebraska unicameral. *Walker v Rushing, 898 F.2d @ 674, citing Res. 37, 80th Neb.Leg. (1969); Defendants' Exh. 30.* The retrocession approved by the legislature was partial in that it included only criminal jurisdiction, and only in Thurston County, and only for the Omaha Tribe, all while excluding jurisdiction over offenses involving the operation of motor vehicles on public roads or highways. *Id.* The partial retrocession was approved by the Eighth Circuit. *Omaha Tribe v. Village of Walthill, 460 F.2d 1372 (8th Cir. 1972).*

In 1969, the Secretary of the Interior accepted federal and tribal retrocession pursuant to the Presidential order. The acceptance contained a detailed description of the boundaries of the portion of the Omaha Reservation in Thurston County, Nebraska, which was the subject to the agreed retrocession of jurisdiction, as follows:

> Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F.R. 17339), I hereby accept, as of 12:01 a.m., e.s.t., October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr., as follows: Commencing at the southwest corner of lot 8 of sec. 34, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence east to the northeast corner of T. 24 N., R. 7 E. of the Sixth Principal Meridian; thence south to the south line of the Omaha Indian Reservation as originally surveyed; thence east along the south line of the Omaha Indian Reservation as originally surveyed to the line between secs. 32 and 33, T. 24 N., R. 10 E. of the Sixth Principal Meridian; thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian; [thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian(sic-*repeats previous line*)]; thence east to the eastern boundary line of the State of Nebraska; thence in a northwesterly direction along said boundary line to the north line of sec. 36, T. 26 N., R. 9 E. of the Sixth Principal Meridian extended east; thence west along the section lines to the northwest corner of lot 1 of sec. 36, T. 26 N., R. 7 E. of the Sixth Principal Meridian; thence south to the northeast corner of lot 3 of sec. 12, T. 25 N., R. 7 E. of the Sixth Principal Meridian; thence west to the northwest corner of lot 2, sec. 10, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence south along the west boundary line of the Omaha Indian Reservation as originally surveyed to the point of beginning except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th regular session on the 16th day of April 1969. WALTER J. HICKEL, Secretary of the Interior.

Defendants' Exh. 31.

Following the description of the boundaries on a plat map of Thurston County, the western boundary begins at "the southwest corner of lot 8 of sec. 34, T. 25 N., R. 5 E. of the Sixth Principal Meridian" which is just over the Thurston County line in adjacent Wayne County (assuming that county lines conform to township lines) approximating the original boundary as surveyed in 1855. The point of origin is approximately 29 miles from the point of intersection of the boundary of the Reservation with the current position of the Missouri River, also conforming to the 1855 survey.

The line then proceeds easterly following the southern line of Thurston County. The line turns north between sections 32 and 33, T. 24 N., R. 10 E. of the Sixth Principal Meridian , the sections being in adjacent Burt County. The line turns east at the northwest corner of section 21, T. 24 N. R. 10E. of the Sixth Principal Meridian to the eastern boundary of the State of Nebraska. The line then continues along the eastern boundary of the State to the northern boundary of the Omaha Reservation.

Continuing along the boundary between the Winnebago and Omaha Reservations, the line continues westerly along this boundary to the northwest corner of lot 2, section 10, T. 25 N., R. 5E. of the Sixth Principal Meridian, which is again in the adjacent Wayne County. The line finally turns south "along the west boundary line of the Omaha Indian Reservation as originally surveyed to the point of beginning."

This description, prepared in 1970, and which is the culmination of an Act of Congress, approved by the Legislature of the State of Nebraska and the Omaha Tribe as well as President of the United States and his Secretary of Interior, contains the most complete legal description of the boundaries of the Omaha Reservation. It provides additional evidence of the subsequent history of the opened area indicating that the State of Nebraska, the United States government and the Omaha Tribe all understood that the retrocession covered the listed boundaries within Thurston County as late as 1970 and the description appears to conform with the original 1854 boundaries.

CONCLUSION

This case is considered on cross-motions for summary judgment. The undisputed facts of the case, stated by the parties in their briefs, have been considered together with the other facts raised in the lengthy discovery by each side. Material facts are not in dispute. The only disputed

matters are the legal interpretations to be accorded to the facts, as analyzed under the guidelines of the United States Supreme Court.

After a thorough consideration, this Court finds that the 1882 Act contains none of the semantic cues raising presumptions of diminishment detailed by the Supreme Court. *Yankton, 522 U.S. 329 (1998); Hagen v. Utah,, 510 U.S.399 (1994); Rosebud v.Kneip, 430 U.S. 584 (1977); DeCoteau v. District Court, 420 U.S. 425 (1975).* The Court further finds that the language employed in the statute aligns with language used in those cases in which the Supreme Court found that the reservation boundaries survived the sale and opening of the reservation for white settlement. *Solem v. Bartlett, 465 U.S. 463 (1984); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendant, 368 U.S. 351 (1962).* The language of the 1882 Act does not support a finding of diminishment.

A review of the surrounding facts and circumstances related to the opening of the Omaha Reservation for settlement reveals a record that is rife with the same type of contradictions which have beset other courts in examining this line of inquiry. However, there is no unequivocal support for a finding of diminishment and substantial evidence for finding that the boundaries of the Omaha Reservation were to be preserved following the sale of land in the western portion of the Reservation.

Finally, the subsequent history of the region contains demographic evidence and evidence of the failure of tribal administration in the contested area which have supported diminishment in cases where there is a clear presumption for finding diminishment. No such presumption exists in this case. "(S)ubsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." *Osage Nation v Irby,*

597 F. 3d 1117, 1122 (10th Cir. 2010) (quoting, Midway Coal Mining Co. v Yazzie, 909 F. 2d 1387, 1396 (10th Cir. 1990). Even if subsequent history could overrule contrary evidence, in this case, the subsequent history contains numerous contradictions and ambiguities which do not point in a single direction.

Applying the traditional canons of construction for cases involving Tribal jurisdiction to the facts and law of this case, the Court finds that both the "Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish" Omaha tribal lands, and therefore this Court is bound by the traditional solicitude of Courts toward Indian tribes to "rule that diminishment did not take place and that the old boundaries survived the opening" of the Omaha Reservation pursuant to the Act of 1882. *Solem, 465 U.S.@ 472, citing Mattz, 412 U.S. @ 505; Seymour 368 U.S. 351(1962).*

Therefore, the motion of Plaintiffs for summary judgment relating to the intent of Congress to diminish the Omaha Reservation by enacting the 1882 Act is denied. The motion of Defendants for summary judgment relating to the preservation of the boundaries of the Omaha Reservation following the 1882 Act is granted.

Finding that the Omaha Reservation boundaries have not been altered, the Court examines the law relating to the right of the Omaha Tribe to promulgate regulations pertaining to alcohol sales on the Reservation. In *Rice v Rehner*, the United States Supreme Court examined 18 U.S.C. section 1161, which provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

Rice, 463 U.S. 713, 716 (1983).

The United States Supreme Court construed this act, which ended the general prohibition of alcohol in Indian Country in effect since 1832, to require tribal regulations of alcohol within tribal boundaries to conform to state licensing schemes for alcohol control. *Id. @ 732.* Plaintiffs concede the right of the Omaha Tribe to regulate liquor sales on the Reservation in their first claim for relief. *Special Appearance and Complaint for Declarative and Injunctive Relief, paragraph 64.*

No other issues are raised in Plaintiffs' petition. Any issue relating to the scope and extent of regulations under *Atkinson Trading Company Inc. v. Shirley, 532 U.S. 645 (2001)*, cited by Plaintiffs in their brief for summary judgment, are not presently before this Court.

NOW THEREFORE IT IS ORDERED as follows:

1. That the motion of Plaintiffs for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to diminish the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is denied.

2. That the motion of Defendants for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to preserve the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is granted.

DATED: February 4, 2013

BY THE COURT:

Mick Scarmon
Chief Judge, Omaha Tribal Court

ATTEST:

Clerk of Court

OMAHA TRIBAL COURT FILED FEB 04 2013 MACY, NEBRASKA