SUPREME COURT OF THE UNITED STATES

No. 92–6281

ROBERT HAGEN, PETITIONER *v.* UTAH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[February 23, 1994]

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, dissenting.

"Great nations, like great men, should keep their word," *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (Black, J., dissenting), and we do not lightly find that Congress has broken its solemn promises to Indian tribes. The Court relies on a single, ambiguous phrase in an Act that never became effective, and which was deleted from the controlling statute, to conclude that Congress must have intended to diminish the Uintah Valley Reservation. I am unable to find a clear expression of such intent in either the operative statute or the surrounding circumstances and am compelled to conclude that the original Uintah Valley Reservation boundaries remain intact.

Two rules of construction govern our interpretation of Indian surplus-land statutes: we must find clear and unequivocal evidence of congressional intent to reduce reservation boundaries, and ambiguities must be construed broadly in favor of the Indians.[1]

[1]"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians," *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 247 (1985), and the Indians' unequal bargaining power when agreements were negotiated, see, *e.g., Choctaw Nation* v. *United States*, 119 U. S. 1, 28 (1886); *Jones* v. *Meehan*, 175 U. S.

Congress alone has authority to divest Indians of their land, see *United States* v. *Celestine*, 215 U. S. 278, 285 (1909), and "Congress [must] clearly evince an `intent . . . to change . . . boundaries' before diminishment will be found." *Solem* v. *Bartlett*, 465 U. S. 463, 470 (1984), quoting *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 615 (1977); see also *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973). Absent a "plain and unambiguous" statement of congressional intent, *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 346 (1941), we find diminishment only "[w]hen events surrounding the [Act's] passage . . . *unequivocally* reveal a widely held, contemporaneous understanding" that such was Congress' purpose. *Solem*, 465 U. S., at 471 (emphasis added).

1, 11 (1899). "[T]reaties were imposed upon [the Indians] and they had no choice but to consent. As a consequence, this Court often has held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970). Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts "have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, Handbook of Federal Indian Law 221 (1982 ed.) (hereinafter Cohen). The principle "has been applied to the particular issue of reservation termination to require that the intent of Congress to terminate be clearly expressed." *Id.,* at 43.

In diminishment cases, the rule that "legal ambiguities are resolved to the benefit of the Indians" also must be given "the broadest possible scope." *DeCoteau*, 420 U. S., at 447; see also *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the [Indians]"); *United States* v. *Nice*, 241 U. S. 591, 599 (1916); *United States* v. *Celestine*, 215 U. S., at 290. For more than 150 years,[2] we have applied this canon in all areas of Indian law to construe congressional ambiguity or silence, in treaties, statutes, executive orders, and agreements, to the Indians' benefit.[3]

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[2]The maxim that ambiguous provisions should be construed in favor of the Indians was first articulated by Justice McLean in *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832) (concurring opinion) ("The language used in treaties with the Indians should never be construed to their prejudice"); see also *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912) ("This rule of construction has been recognized, without exception, for more than a hundred years").

[3]The canon has been applied to treaties and statutes to preserve broad tribal water rights, see, *e.g., Choctaw Nation* v. *Oklahoma*, 397 U. S., at 631; *Winters* v. *United States*, 207 U. S. 564, 576 (1908), hunting and fishing rights, see, *e.g.*, *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675 (1979); *Antoine* v. *Washington*, 420 U. S. 194, 199–200 (1975); *Menominee Tribe* v. *United States*, 391 U. S. 404, 406, n. 2, 413 (1968); *Tulee* v. *Washington*, 315 U. S. 681, 684–685 (1942); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918), and other land rights, see, *e.g., County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S., at 247–248; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 354 (1941); *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396 (1902); and to protect tribes from state taxation authority, see, *e.g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *McClanahan* v. *Arizona State Tax*

Although the majority purports to apply these canons in principle, see *ante,* at 11, it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.

Comm'n, 411 U. S. 164, 174 (1973); *Squire* v. *Capoeman*, 351 U. S. 1, 6-7 (1956); *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367 (1930); *Choate* v. *Trapp*, 224 U. S., at 675; *The Kansas Indians*, 5 Wall. 737, 760 (1867).

The special canons of construction are particularly relevant in the diminishment context because the allotment statutes are often ambiguous regarding their effect on tribal jurisdiction and reservation boundaries. During the 19th century, land was considered Indian country and thus subject to tribal jurisdiction "whenever the Indian title had not been extinguished." *Bates* v. *Clark*, 95 U. S. 204, 208 (1877). In passing the General Allotment Act of Feb. 8, 1887, 24 Stat. 388, and related statutes, Congress no doubt assumed that tribal jurisdiction would terminate with the sale of Indian lands and that the reservations eventually would be abolished. See *Solem*, 465 U. S., at 468. The General Allotment Act itself did not terminate the reservation system, however, but was intended to assimilate[4] the Indians by transforming them into agrarians and opening their lands to non-Indians. See *Mattz*, 412 U. S., at 496. After this goal of the allotment policies proved to be a disastrous failure,[5] Congress reversed course

[4]"The theory of assimilation was used to justify the [allotment] legislation as beneficial to Indians. Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers. The taking of these lands was justified as necessary for the progress of civilization as a whole." Cohen 128.

[5]The 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934. See 2 F. Prucha, The Great Father 896 (1984). John Collier testified before Congress that nearly half of the lands remaining in Indian hands were desert or semi-desert, and that 100,000 Indians were "totally landless as a result of allotment." Hearings before the House Committee on Indian Affairs on H.R. 7902, 73d Cong.,

with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U. S. C. §461 *et seq.*, which allowed surplus-opened Indian lands to be restored to tribal ownership. Finally, in 1948 Congress resolved the ensuing jurisdictional conflicts by extending tribal jurisdiction to encompass lands owned by non-Indians within reservation boundaries. See Act of June 25, 1948, 62 Stat. 757 (codified as 18 U. S. C. §1151 (defining "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government")).[6] Reservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction.

As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen. It resolves the resulting statutory ambiguities by requiring clear evidence of specific congressional intent to diminish a reservation based on the

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2d Sess., 17 (1934); see also D. Otis, The Dawes Act and the Allotment of Indian Lands, 124–155 (Prucha ed.) (1973) (discussing results of the allotments by 1900).

[6]Congress' extension of tribal jurisdiction to reservation lands owned by non-Indians served pragmatic ends. "[W]here the existence or nonexistence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of §1151." *Seymour* v. *Superintendent,* 368 U. S. 351, 358 (1962).

language and circumstances of each individual land act. See *Solem*, 465 U. S., at 469. Accordingly, statutory language alone of sale and settlement to non-Indians is insufficient to establish diminishment. "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U. S., at 586–587; see also *DeCoteau*, 420 U. S., at 444 ("[R]eservation status may survive the mere opening of a reservation to settlement"). "[S]ome surplus land Acts diminished reservations, . . . and other surplus land Acts did not," *Solem*, 465 U. S., at 469, and we have refused to find diminishment based on language of opening or sale absent additional unequivocal evidence of a congressional intent to reduce reservation boundaries or divest all Indian interests. Thus, in *Seymour*, 368 U. S., at 355, the Court found no diminishment under a statute providing for the settlement and entry of surplus lands under the homestead laws, and in *Mattz*, 412 U. S., at 495, the Court concluded that a statute opening the reservation "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights" did "not, alone, recite or even suggest that Congress intended thereby to terminate the . . . Reservation." *Id.*, at 497. Most recently, in *Solem*, 465 U. S., at 472, we unanimously agreed that a statute authorizing the Secretary of the Interior to "sell and dispose" of surplus Indian lands did not diminish the reservation.

In contrast, the only two cases in which this Court previously has found diminishment involved statutes and underlying tribal agreements to "cede, sell, relinquish, and convey to the United States all [the Indians'] claim, right, title, and interest" in unallotted lands, *DeCoteau*, 420 U. S., at 439, n. 22, or to "cede, surrender, grant, and convey to the United States all [the Indians'] claim, right, title, and interest" in a defined portion of the reservation. *Rosebud*, 430

U. S., at 591, n. 8. The Court held that in the presence of statutory language "precisely suited" to diminishment, *id.,* at 597, supported by the express consent of the tribes, "the intent of all parties to effect a clear conveyance of all unallotted lands was evident." *DeCoteau*, 420 U. S., at 436, n. 16.[7] I need hardly add that no such language or underlying Indian consent accompanies the statute at issue in this case.

The majority opinion relies almost exclusively on the fact that the Act of May 27, 1902, ch. 888, 32 Stat. 263 "restored [the unallotted lands] to the public domain" to conclude that the Uintah Valley Reservation was diminished. I do not agree that this ambiguous phrase can carry the weight of evincing a clear congressional purpose. We never authoritatively have defined the public domain, and the phrase "has no official definition. In its most general application, a public domain is meant to include all the land owned by a government—any government, anywhere" (footnote omitted). E. Peffer, The Closing of the Public Domain 5 (1951).[8] Most

[7]Other statutes have used express language of geographical termination. See 15 Stat. 221 ("the Smith River reservation is hereby discontinued"), and 33 Stat. 218 ("the reservation lines . . . are hereby abolished.").

[8]Although the phrase "public domain" appears infrequently in our precedents, this Court has used it interchangeably with references to "public lands." See, *e.g.*, *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 468 (1915). Black's Law Dictionary 1229 (6th ed. 1990), defines the public domain as "[l]and and water in possession of and owned by the United States and the states individually . . . . *See also* Public Lands." See *Amoco Production Co.* v. *Gambell*,

commonly, the public domain and public lands "have been defined as those lands subject to sale or other disposal under the general land laws." *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 206 (1987), quoting E. Baynard, Public Land Law and Procedure, §1.1, p. 2 (1986); see also *Kindred* v. *Union Pacific R. Co.*, 225 U. S. 582, 596 (1912) (the term

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480 U. S. 531, 549, n. 15 (1987) ("reject[ing] the assertion that the phrase `public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute").

"public lands" ordinarily was "used to designate such lands as are subject to sale or other disposal under general laws"); *Union Pacific R. Co.* v. *Harris*, 215 U. S. 386, 388 (1910); *Newhall* v. *Sanger*, 92 U. S. 761, 763 (1876) ("The words `public lands' are habitually used . . . to describe such as are subject to sale or other disposal under general laws").

Nothing in our precedents stating that lands reserved from the public domain were "reserved from sale," *Grisar* v. *McDowell*, 6 Wall. 363, 381 (1868), or "withdrawn from sale and settlement," *Sioux Tribe* v. *United States*, 316 U. S. 317, 323 (1942), however, demonstrates that restoration of those lands to the public domain was "inconsistent" with continued reservation status, *ante*, at 15. Under 19th-century Indian-land policies, non-Indians could not purchase, and generally could not enter, lands reserved for exclusive use by Indian tribes. Indian reservations obviously were not part of the public domain to the extent that they were reserved from non-Indian purchase. The opening of these lands under the Allotment Acts, on the other hand, necessarily restored *all* such lands to the public domain, in the sense that the lands were made available for entry and sale. Restoration of lands to the public domain thus establishes only that the lands were opened to access by non-Indians and to settlement and purchase, a condition "completely consistent with continued reservation status." *Mattz*, 412 U. S., at 497.

In our most recent diminishment case, we unanimously rejected the argument adopted by the majority here—"that Congress would refer to opened lands as being part of the public domain only if the lands had lost all vestiges of reservation status." *Solem*, 465 U. S., at 475. Instead, we observed that "even without diminishment, unallotted opened lands could be conceived of as being in the `public domain' inasmuch as they were available for settlement." *Id.,*

at 475, n. 17; see also Whether Surplus Lands in Uintah and Ouray Reservation are Indian Lands, II Op. Sol. 1205 (1943) ("restored to the public domain" is "only a method of indicating that the lands are to be subject to disposition under the public land laws"). *Solem* concerned an allotment statute that referred to opened lands as "part of the public domain," 465 U. S., at 475, and as "within the respective reservations thus diminished," *id.*, at 474. The Court refused to infer diminishment from this language, however, finding "considerable doubt as to what Congress meant in using these phrases." *Id.*, at 475, n. 17. We concluded that when balanced against the applicable statute's stated goal of opening the reservation for sale to non-Indians, "these two phrases cannot carry the burden of establishing an express congressional purpose to diminish." *Id.*, at 475.

The majority's focus on the fact that the public domain language in *Solem* was not in the operative portion of the statute, see *ante*, at 14, ignores the *Solem* Court's additional conclusion that the public domain is an ambiguous concept that is not incompatible with reservation status. Furthermore, the fact that the public domain language in *Solem* was not operative and did not use the word "restored" should be irrelevant under the majority's own analysis, since the character of the lands as "part of the public domain" would be "inconsistent" with their continued reservation status. *Ante*, at 15. Under the majority's present interpretation, the opened lands could not have been both part of the public domain and part of the reservation. *Solem*, however, concluded precisely the opposite.[9]

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[9]The Court never before has held that an isolated reference to the public domain is sufficient to support a finding of diminishment. In every case relied upon by the majority for this contention, the relevant public

In light of this Court's unanimous reasoning in *Solem* and our common interpretation of the public domain as lands "subject to sale . . . under general laws," *Kindred*, 225 U. S., at 596, therefore, I cannot conclude that the isolated phrase "restored to the public domain" is an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U. S., at 470. This language bears no relation to the "plain and unambiguous" language that our precedents require or that we found controlling in *DeCoteau* and *Rosebud*. Restoration to the public domain simply allowed Indian lands to be sold, something we repeatedly have said is never sufficient to establish an intent to diminish.

Although the Court relies on the negotiation history of the 1902 Act and that of the Act of Mar. 3, 1903, ch. 994, 32 Stat. 998, to support its conclusion, nothing in the negotiations with the Ute Indian Tribe "unequivocally reveal[s] a widely held, contemporaneous understanding" that the Uintah Reservation boundaries would be diminished. *Solem*, 465 U. S., at 471. The ever-present Inspector James McLaughlin, who negotiated the *Rosebud* and *DeCoteau* agreements that this Court found to contain express language of disestablishment, used no comparable

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domain language was accompanied by express additional language demonstrating such intent. See *DeCoteau*, 420 U. S., at 446 ("returned to the public domain, *stripped of reservation status*") (emphasis added). Three of the cases cited by the majority, in fact, discuss the same statute, 27 Stat. 62. See *Seymour*, 368 U. S., at 354 ("*vacated* and restored to the public domain") (emphasis added); *Mattz*, 412 U. S., at 504, n. 22 (same); *United States* v. *Pelican*, 232 U. S. 442, 445 (1914) (same).

language here.[10] Instead, McLaughlin spoke largely in terms of "opening" the reservation to use by non-Indians.[11] The Indians similarly responded primarily in terms of "opening" and opposed the proposed sale.[12]

The Court isolates a single comment by McLaughlin from the six days of negotiations to argue that diminishment was understood. But McLaughlin's "picturesque" statement that "there will be no

[10]In negotiating the 1901 Agreement, for example, McLaughlin explained to the Rosebud Sioux Indians that "`[t]he cession of Gregory County' by ratification of the Agreement `will leave your reservation a compact, and almost square tract . . . about the size and area of Pine Ridge Reservation.'" *Rosebud*, 430 U. S., at 591–592.

[11]See, *e.g.*, Minutes of Council Meetings between Inspector James McLaughlin and Ute Indians, May 18–23, 1903, App. to Brief for Duschesne County, Utah, as *Amicus Curiae* 333a, 336a (hereinafter Minutes) ("After you have taken your allotments the remaining land is to be opened for settlement"), *id.*, at 342a ("The surplus lands will be opened to settlement"), *id.*, at 354a ("As certainly as the sun rises tomorrow [your reservation] is to be opened"), *id.*, at 358a ("[I]t is not for you to say whether this reservation is to be opened or not"), *id.*, at 359a ("Do not lose sight of the fact that the reservation is to be opened"), *id.*, at 363a ("The reservation will certainly be opened").

[12]See, *e.g.*, *id.*, at 339a ("When they put us on the reservation . . . they were not to open it"), *id.*, at 340a ("The president made this reservation here for the Indians and it ought not to be opened up"), *id.*, at 343a ("I don't want you to talk to us about opening our reservation. . . . We don't want this reservation opened, and we do not want White people coming in among us"), *id.*, at 344a ("[W]e do not want this reservation thrown open"); *ibid.* ("[T]hey told us that this land would be ours always and that it would

outside boundary line to this reservation," *ante*, at 18, cannot be understood as a statement that the reservation itself was being abolished, since the Uintah Valley Reservation unquestionably survived the opening. McLaughlin's discussion, which went on to explain that each Indian "will have a boundary to your individual holdings," Minutes 368a, is more readily understood as a reference to a change in *title* to the reservation lands, which clearly would have occurred under the Acts, or to the fact that the lands within the reservation boundary would be open to entry by non-Indians.

McLaughlin's statements immediately following this passage strongly suggest that some Indian interests survived the opening. In response to Indian concerns regarding lifting of the reservation line, McLaughlin stated:

> "You fear that you are going to be confined to the tract of land allotted. That is not so, and I will explain a little more clearly. . . . Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests." *Id.*, at 368a-369a.

Elsewhere, McLaughlin confirmed this statement: "My friends, when you take your allotment you are deprived of no privileges you have at the present time." *Id.*, at 365a.

Although the discussions regarding the allotments concededly are subject to varying interpretations, none of them provides the type of unequivocal evidence of an intent to diminish boundaries or abolish all Indian interests that we require where

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never be opened"), *id.*, at 346a ("We are not going to talk about opening our reservation"), *ibid.* ("[W]e do not want to have the reservation thrown open"), *id.,* at 351a ("I am on this reservation, and I do not want this land thrown open"), *id.*, at 357a ("[T]he Indians do not want the reservation opened").

statutory intent to diminish the reservation is not express. On their face, the negotiations establish that the 1902 Act would have done "no more than open the way for non-Indian settlers to own land on the reservation." *Seymour*, 368 U. S., at 356. Moreover, the record contains no evidence whatsoever of the Indians' contemporaneous understanding regarding the Act of March 3, 1905, ch. 1479, 33 Stat. 1069, which is the operative Act in this case.

What the negotiations do show is that the Indians overwhelmingly opposed the allotments. After six days of meetings between McLaughlin and the Ute Tribe, only 82 of the 280 adult male Utes agreed to sign the allotment agreement, see Consent Form of Uintah and White River Utes (May 23, 1903); H. Doc. No. 33, 58th Cong., 1st Sess., 7 (Dec. 1, 1903), and McLaughlin reported that the Ute Indians were "unanimously opposed to the opening of their reservation." Letter of May 30, 1903, from McLaughlin to the Secretary of the Interior, reprinted in H. Doc. No. 33, p. 7. Although after *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), Congress unquestionably had authority to terminate reservations unilaterally, we relied heavily on the presence of tribal consent in *Rosebud* and *DeCoteau* to find a contemporaneous intent to diminish. In *Solem*, by contrast, we held that the surrounding circumstances "fail[ed] to establish a clear congressional purpose to diminish the reservation" because the 1908 Act there "did not begin with an agreement between the United States and the Indian Tribes." *Solem*, 465 U. S., at 476. To the extent that the absence of formal tribal consent counseled against a finding of diminishment in *Solem*, therefore, the Ute Indians' persistent withholding of consent requires a similar conclusion here.

Even if the 1902 Act's public domain language were express language of diminishment, I would conclude that the Uintah Valley Reservation was not diminished because that provision did not remain operative in the 1905 Act. It was this latter Act that actually opened the Uintah Valley Reservation to sale and settlement, and that Act's language on its face does not support a finding of diminishment. The Act provided in relevant part:

> "That the time for *opening to public entry* the unallotted lands on the Uintah Reservation in Utah having been fixed by law . . . it is hereby provided that the time for *opening said reservation* shall be extended . . . and that the *manner of opening such lands for settlement and entry*, and for disposing of the same, shall be as follows: That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and town-site laws of the United States and shall be opened to settlement and entry*. . . . *And provided further*, That . . . [t]he proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto." *Ibid.* (emphasis added in part).

This language, which speaks only of opening the lands for entry and settlement, is indistinguishable from that which we previously have concluded "cannot be interpreted to mean that the reservation was to be terminated." *Mattz*, 412 U. S., at 504; see also *Solem*, 465 U. S., at 473; and *Seymour*, 368 U. S., at 356. Neither the Court nor the parties dispute this conclusion.

Nor did the 1905 Act preserve the 1902 Act's public domain provision. In contrast to the Act of April 21, 1904, ch. 1402, 33 Stat. 207, the 1905 Act did not open the lands "as provided by" the 1902 Act, *ibid.*, nor was it passed expressly to "carry out the

purposes of" the 1902 Act, as were both the 1903 and 1904 Acts. See 32 Stat. 997 and 33 Stat. 207. On its face, the 1905 Act preserved only one portion of the earlier statute—that portion regarding payment of the proceeds from the unallotted land sales. Other provisions of the 1902 Act unquestionably were superseded, since the 1905 Act restricted settlement of the opened lands to that under "the general provisions of the homestead and town-site laws," 33 Stat. 1069, rather than under the general laws as provided by the 1902 Act. Thus, the plain language of the 1905 Act, which actually opened the reservation, did *not* restore the unallotted lands to the public domain, but simply opened the lands for settlement.

Nothing in this case suggests that the 1902 Act established a baseline intent to diminish the reservation like that the Court confronted in *Rosebud*. In that case, an original statute and agreement with the Indians to "cede, surrender, grant, and convey" all their interests in designated lands unequivocally demonstrated a collective intent to diminish the Great Sioux Reservation. See 430 U. S., at 591, n. 8. Both the legislative history of two subsequent allotment statutes and the presence of majority tribal consent to those land allotments established that this original intent to diminish was preserved. All parties agreed that the later statutes "must have diminished [the] Reservation if the previous Act did." See *Solem*, 465 U. S., at 473, n. 15.

By contrast, the 1902 Act contains no equivalent language of diminishment, and none of the Acts at issue here were supported by Indian consent. Prior congressional attempts to open the Uintah Valley Reservation demonstrate that the requirement of the "consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes" was central to the 1902 Act. 32 Stat. 263. In 1894, 1896, 1898, and 1902, Congress enacted statutes requiring Indian consent to open the Uintah Valley Reservation,

but none of these Acts became effective because that consent was not forthcoming.[13] After the passage of the 1903 Act and the decision in *Lone Wolf*, Congress dispatched Inspector McLaughlin to negotiate the allotments with the Tribe. Throughout this period, the Ute Tribe resisted the allotments, twice sending delegations to Washington to voice their opposition. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp., at 1113,

[13]The Indian Appropriations Act of Aug. 15, 1894, ch. 290, §20, 28 Stat. 337, authorized a commission to allot the Uncompahgre Reservation unilaterally, but required that the same commission "negotiate and treat" with the Uintah Valley Reservation Indians for the relinquishment of their lands, "and if possible, procure [their] consent" to such allotments. See *id.*, at §22, 28 Stat. 337. A House Report explained that in contrast to the Uncompahgre Indians, who had "no title to the lands they occupy" and occupied them only temporarily, the Uintah Indians were "the owners of the lands within the reservation, because the [enabling Act] . . . provided that the lands within the Uintah Reservation should be `set apart for the permanent settlement and exclusive occupation of the Indians.'" H. R. Rep. No. 660, 53d Cong., 2d Sess. 1, 2–3 (1894), quoting Act of May 5, 1864, ch. 77, 13 Stat. 63. In order to allot the Uintah Reservation lands, therefore, it was "first necessary to obtain the consent of the Indians residing thereon." The Act of June 10, 1896, ch. 398, 29 Stat. 321, 341–342, and the Act of June 4, 1898, ch. 376, 30 Stat. 429, also conditioned opening of the reservation on Indian consent. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1111–1114 (Utah 1981) (discussing pre-1902 efforts to open the Uintah Reservation).

Congress rebuffed all subsequent attempts to allot the reservation unilaterally, see S. Doc. No. 212, 57th Cong., 1st Sess. (1902) (proposal of Rep. Sutherland of Utah), or to sever large portions of the reservation,

1125. When Congress finally opened the Uintah Reservation to non-Indian settlement in 1905, it removed the public domain language from the opening statute and severely restricted non-Indian access to the opened lands. Even if the 1902 Act contained express language of termination, then, the facts of this case would much more closely mirror those in *Mattz*, 412 U. S., at 503–504, where Congress ultimately abandoned its prior attempts to "abolish" the reservation in favor of simply opening the lands to entry and settlement.

Concededly, nothing in the 1905 Act expressly repealed the 1902 Act's public domain language, and the 1905 Act could be construed as either preserving that provision or replacing it. Ordinarily under these circumstances, the canon that repeals by implication are disfavored might require us to construe the later Act's silence as consistent with the earlier statute. See *ante*, at 16. The Court's invocation of this canon here, however, "fails to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 766 (1985).

In *Blackfeet Tribe*, the Court refused to rely on the rule against repeals by implication under circumstances analogous to those presented here.

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see S. 145, 57th Cong., 1st Sess. (1902), reproduced in S. Doc. No. 212, 57th Cong., 1st Sess. (1902) (proposal of Sen. Rawlins of Utah). In hearings regarding the reservation in 1902, Indian Affairs Commissioner Jones testified: "There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree . . . you have got to use some arbitrary means to open the land." *Id*., at 5. Congress did not heed this advice, however, but again required the Ute Tribe's consent in the 1902 Act.

That case involved the question whether a 1924 provision authorizing States to tax tribal mineral royalties remained in force under a 1938 statute which was silent on the taxation question but which repealed all prior inconsistent provisions. The State argued that because the 1938 statute neither expressly repealed the earlier taxation provision nor was inconsistent with it, the rule against repeals by implication required a finding that the State's taxation power remained intact. The Court rejected this argument as, among other things, inconsistent with two fundamental canons of Indian law: that a State may tax Indians only when Congress has clearly expressed such an intent, and that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Ibid.* Cf. *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367 (1930); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).

A similar construction is required here. The 1905 Act does not purport to fulfill the "purposes" of the 1902 Act nor to preserve its public domain language; the Act instead simply opens the lands for settlement under the homestead and townsite laws. Under these circumstances, both the requirements that congressional intent must be explicit and that ambiguous provisions must be construed in favor of the Indians compel a resolution in favor of petitioner Hagen. Although a "canon of construction is not a license to disregard clear expressions of tribal and congressional intent," *DeCoteau*, 420 U. S., at 447, no such clear expression is evident here.

The legislative history of the 1905 Act supports the conclusion that Congress materially altered the operative language in the 1902 Act by deleting the public domain provision. Like the 1902 Act, the House version of the 1905 bill, H.F. 17474, provided "[t]hat so much of said lands as will be under the provisions

of said acts *restored to the public domain* shall be open to settlement and entry" under the general land laws. 39 Cong. Rec. 1180 (1905) (emphasis added). Representative Howell of Utah, in a proposed amendment that was *not* ultimately adopted, sought to limit non-Indian entry under this bill "to entry only under the homestead, town-site, and mining laws of the United States." *Ibid.* Howell's proposal, however, would have referred to the public domain in two places:

> "so much of said lands as will be under the provisions of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President. . . . *And further provided*, That for one year immediately following the *restoration of said lands to the public domain* said lands shall be subject to entry only under the homestead, town-site, and mining laws of the United States." *Ibid.* (emphasis added in part).

Senate bills later introduced by Senator Smoot of Utah, S. 6867 and S. 6868, 58th Cong., 3d Sess. (which ultimately were adopted in relevant part as the 1905 Act), also limited the opening to entry under the homestead and townsite laws but struck the House bill's public domain language. In its place, the bills stated

> "[t]hat the time for *opening to public entry* the unallotted lands having been fixed by law . . . it is hereby provided that the *manner of opening* such lands for settlement and entry, and for disposing of the same shall be as follows: That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States" (emphasis added).

No subsequent attempt was made to reintroduce the public domain language into the Senate bills. When the House and Senate bills were submitted to the conference committee, the committee again struck

the House version containing the public domain language and replaced it with the Senate bill. See 39 Cong. Rec. 3919 (1905). Congress adopted this conference bill as the 1905 Act.

The legislative history thus demonstrates that Congress both removed the public domain language from the 1905 Act and restricted entry to the homestead and townsite laws. Although the Court attempts to dismiss the altered language of the 1905 Act as evidence that "Congress wanted to limit land speculation," *ante*, at 20, this reasoning explains only the presence of the homestead and townsite limitation; it does not explain Congress' simultaneous *deletion* of the public domain language. We do not know why this latter change was made. Possibly Congress thought the language had no substantive meaning at all; possibly the deletion was a response to the Indians' continued withholding of consent, or it is possible that opening lands under the homestead and townsite laws was incompatible with their restoration to the public domain and thus to sale "under general laws." See *Newhall* v. *Sanger*, 92 U. S., at 763. We do know, however, that we must construe doubt regarding Congress' intent to the Indians' benefit when we are left, as we are here, without the "clear statement of congressional intent to alter reservation boundaries," necessary for a finding of diminishment. *Solem*, 465 U. S., at 478.

President Theodore Roosevelt's Proclamation sheds no competing light on Congress' intent but simply summarized the language of the allotment statutes. The operative portion of the Proclamation declared that "all the unallotted lands" would "in the manner hereinafter prescribed and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws." 34 Stat. 3120. Thus, the crucial portion of the Proclamation under which the lands actually were opened restricted the opening to the terms of the

1905 Act. Furthermore, all other contemporaneous Presidential Proclamations regarding the reservation universally referred to the 1905 Act rather than the 1902 Act as the opening authority. See Presidential Proclamation of July 14, 1905, 34 Stat. 3116 (Uintah forest reserve); Proclamation of August 3, 1905, 34 Stat. 3141 (Uintah reservoir and agricultural lands); Proclamation of August 14, 1905, 34 Stat. 3143 (townsites); Proclamation of August 14, 1905, 34 Stat. 3143 (reservoir lands).

Although contemporary demographics and the historical exercise of jurisdiction may provide "one additional clue as to what Congress expected" in opening reservation lands, *Solem*, 465 U. S., at 472, in that case, we unanimously agreed:

> "There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. *When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands*, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening. *Mattz* v. *Arnett*, 412 U. S., at 505; *Seymour* v. *Superintendent*, 368 U. S. 351 (1962)." 465 U. S., at 472 (emphasis added).

Absent other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment. Cf. *Rosebud*, 430 U. S. 584 (1977). While these factors may support a finding of diminishment where congressional intent already is clear, therefore, the Court properly does not contend that they may be controlling where Congress' purpose is ambiguous.

Aside from their tangential relation to historical congressional intent, there are practical reasons why we are unwilling to rely heavily on such criteria. The history of the western United States has been characterized, in part, by state attempts to exert jurisdiction over Indian lands. Cf. *United States* v. *Kagama*, 118 U. S. 375, 384 (1886) ("[The Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies"). And the exercise of state jurisdiction here has not been uncontested. The Constitution of the Ute Indian Tribe, which was approved by the Secretary of the Interior in 1937, defines the Tribe's jurisdiction as extending "to the territory within the original confines of the Uintah and Ouray Reservations," quoted in *Ute Indian Tribe*, 521 F.Supp., at 1075. See also Ute Law and Order Code §1–2–2 (1975), set forth in *Ute Indian Tribe*, 521 F. Supp., at 1077, n. 8. More than two decades ago, *amicus* Roosevelt City agreed to the limited exercise of tribal jurisdiction within its city limits. See Memorandum of Agreement between Roosevelt City and the Ute Tribe, Jan. 11, 1972, cited in *Ute Indian Tribe*, 521 F. Supp., at 1077, n. 8. Federal agencies also have provided services to Indians residing in the disputed areas for many years. In fact, after reviewing the substantial jurisdictional contradictions and confusion in the record on this question, the District Court in *Ute Indian Tribe* concluded: "One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of `unquestioned' exercise of state authority." *Id.*, at 1146.

One hundred thirty years ago, Congress designated the Uintah Valley Reservation "for the permanent settlement and exclusive occupation of" the Ute Indians. Act of May 5, 1864, ch. 77, 13 Stat. 63. The

1905 opening of the reservation constituted a substantial breach of Congress' original promise, but that opening alone is insufficient to extinguish the Ute Tribe's jurisdiction. Nothing in the "face of the Act," its "surrounding circumstances," or its "legislative history" establishes a clear congressional purpose to diminish the Uintah Reservation. *DeCoteau*, 420 U. S., at 445. I appreciate that jurisdiction often may not be neatly parsed among the States and Indian tribes, but this is the inevitable burden of the path this Nation has chosen. Under our precedents, the lands where petitioner's offense occurred are Indian country, and the State of Utah lacked jurisdiction to try him for that crime. See 18 U. S. C. §1151.

I respectfully dissent.