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 O'CONNOR delivered the opinion of the Court.

In this case we decide whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century. If the Reservation has been diminished, then the town of Myton, Utah, which lies on opened lands within the historical boundaries of the Reservation, is not in "Indian country," see 18 U. S. C. §1151, and the Utah state courts properly exercised criminal jurisdiction over petitioner, an Indian who committed a crime in Myton.

On October 3, 1861, President Lincoln reserved about 2 million acres of land in the Territory of Utah for Indian settlement. Executive Order No. 38–1, reprinted in 1 C. Kappler, Indian Affairs: Laws and Treaties 900 (1904). Congress confirmed the President's action in 1864, creating the Uintah Valley Reservation. Act of May 5, 1864, ch. 77, 13 Stat. 63. According to the 1864 Act, the lands were "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." *Ibid.* The present-day Ute Indian Tribe includes the descendants of the Indians who settled on the Uintah Reservation.

In the latter part of the 19th century, Federal Indian policy changed. See F. Cohen, Handbook of Federal Indian Law 127–139 (1982 ed.). Indians were no longer to inhabit communally owned reservations, but instead were to be given individual parcels of land; any remaining lands were to be opened for settlement by non-Indians. The General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau* v. *District County Court*, 420 U. S. 425, 432 (1975).

Pursuant to the General Allotment Act, Congress in 1894 directed the President to appoint a commission to negotiate with the Indians for the allotment of Uintah Reservation lands and the "relinquishment to the United States" of all unallotted lands. Act of Aug. 15, 1894, ch. 290, §22, 28 Stat. 337. That effort did not succeed, and in 1898 Congress directed the President to appoint another commission to negotiate an agreement for the allotment of Uintah Reservation lands and the "cession" of unallotted lands to the United States. Act of June 4, 1898, ch. 376, 30 Stat. 429. The Indians resisted those efforts as well. A series of bills that would have opened the Reservation unilaterally (*i. e.*, without the consent of the Indians) were subsequently introduced in the Senate but were not enacted into law. See Leasing of Indian Lands, Hearings before the Senate Committee on Indian Affairs, S. Doc. No. 212, 57th Cong., 1st Sess., 3 (1902).

In 1902, Congress passed an Act which provided that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 263.[1] The

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[1]The 1902 Act provided in relevant part:

"That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of

allotments under the 1902 Act were to be 80 acres for each head of a family and 40 acres for each other member of the Tribes. The Act also provided that when the deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain" and subject to homesteading at $1.25 per acre. *Ibid.* The proceeds from the sale of lands restored to the public domain were to be used for the benefit of the Indians.

A month after the passage of the 1902 Act, Congress directed the Secretary of the Interior to set apart sufficient land to serve the grazing needs of the Indians remaining on the Reservation. J. Res. 31, 57th Cong., 1st Sess. (1902), 32 Stat. 744.[2] The

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one dollar and twenty-five cents per acre: *And provided further*, That . . . the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." 32 Stat. 263–264.

[2]The 1902 Joint Resolution provided in relevant part:

"In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation

resolution clarified that $70,000 appropriated by the 1902 Act was to be paid to the Indians "without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain." *Id.*, at 745.

In January 1903, this Court held that Congress can unilaterally alter reservation boundaries. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567–568. On March 3, 1903, Congress directed the Secretary to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of March 3, 1903, ch. 994, 32 Stat. 998.[3] The 1903 Act also

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such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

. . . . .

"The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain." 32 Stat. 744–745.

[3]The 1903 Act provided in relevant part:

"[Money is hereby appropriated to] enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, . . . as provides for the allotment of the . . . Uintah and White River Utes in Utah . . . : *Provided, however*, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed

specified that the grazing lands specified in the 1902 joint resolution would be limited to 250,000 acres south of the Strawberry River. In 1904, Congress passed another statute that appropriated additional funds to "carry out the purposes" of the 1902 Act, and deferred the opening date "as provided by the [1902 and 1903 Acts]" until March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 207.[4]

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by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act: *And provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the Act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four." 32 Stat. 997–998.

[4]The 1904 Act provided in relevant part:

"That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, . . . as

In 1905, Congress again deferred the opening date, this time until September 1, 1905, unless the President were to establish an earlier date. Act of March 3, 1905, ch. 1479, 33 Stat. 1069.[5] The 1905 Act repealed the provision of the 1903 Act limiting the grazing lands to areas south of the Strawberry River. The Act further provided that

"the manner of opening [Reservation] lands for

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provides for the allotment of the Indians of the Uintah and White River Utes in Utah." 33 Stat. 207–208.

[5]The 1905 Act provided in relevant part:

"That so much of the Act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

"That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date 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 by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days

> 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 by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof." 33 Stat. 1069.

All lands remaining open but unsettled after five years were to be sold for cash, in parcels up to 640 acres. The "proceeds of the sale of such lands" were to be "applied as provided in the [1902 Act] and the Acts amendatory thereof and supplemental thereto." *Id.*, at 1070.

The Government once again failed to obtain the consent of the Indians. On July 14, 1905, President Roosevelt issued the following Proclamation:

> "Whereas it was provided by the [1902 Act], among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, `shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of

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from the time when the same are thereby opened to settlement and entry: . . . *And provided further*, That all lands opened to settlement and entry under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The 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." 33 Stat. 1069–1070.

> [$1.25] per acre.'
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> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the [1903 Act], and was extended to March 10, 1905, by the [1904 Act], and was again extended to not later than September 1, 1905, by the [1905 Act], which last named act provided, among other things: [`That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town-site laws of the United States . . . .']
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> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation . . . will on and after the 28th day of August, 1905, 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 of the United States." 34 Stat. 3119–3120.

The Proclamation went on to detail a lottery scheme for the allocation of the lands to settlers.

In 1989, petitioner was charged in Utah state court with distribution of a controlled substance. The offense occurred in the town of Myton, which was established within the original boundaries of the Uintah Indian Reservation when the Reservation was opened to non-Indian settlement in 1905. Petitioner initially pleaded guilty, but subsequently filed a motion to withdraw his guilty plea. The basis of the motion was that the Utah state courts lacked jurisdiction over petitioner because he was an Indian and the crime had been committed in Indian country. The trial court denied the motion, finding that petitioner is not an Indian.

The state appellate court reversed. It concluded that petitioner is an Indian, a determination that is not at issue in this Court. The court also held that Myton is in Indian country, relying on *Ute Indian Tribe* v. *State of Utah*, 773 F. 2d 1087 (1985) (en banc), cert. denied, 479 U. S. 994 (1986), in which the Tenth Circuit held that the Uintah Indian Reservation was not diminished when it was opened to settlement in 1905. Because Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian country, cf. *Negonsott* v. *Samuels*, 507 U. S. ___, ___ (1993); *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 471–474 (1979), the appellate court held that the state courts lacked jurisdiction over petitioner. The court accordingly vacated petitioner's conviction.

The Utah Supreme Court reversed on the authority of *State* v. *Perank*, 858 P. 2d 927 (1992), in which the court had held (on the same day as the decision in petitioner's case) that the Reservation had been diminished and that Myton was outside its boundaries, and thus that petitioner's offense was subject to state criminal jurisdiction. 858 P. 2d 925 (1992); see *Solem* v. *Bartlett*, 465 U. S. 463, 467 (1984) ("As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries"). The court accordingly reinstated petitioner's conviction.

We granted certiorari, 507 U. S. ___ (1993), to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished.

We first address a threshold question: Whether the

State of Utah, which was a party to the Tenth Circuit proceedings, should be collaterally estopped from relitigating the Reservation boundaries. In *Perank*, the Utah Supreme Court noted that "neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case." 858 P. 2d, at 931. Because "[r]es judicata is an affirmative defense in both criminal and civil cases and therefore is waivable," *id.*, at 931, n. 3, the court went on to consider the merits of the State's claim.

Petitioner's only recourse would have been to attack the judgment in *Perank* on the ground that the Utah Supreme Court failed to give effect *sua sponte* to the prior determination in *Ute Indian Tribe* that the Reservation had not been diminished. Although that issue is one of federal law, see Restatement (Second) of Judgments §86 (1982), it was not presented in the petition for a writ of certiorari. It therefore is not properly before us. *Yee* v. *Escondido*, 503 U. S. ___, ___ (1992); see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. ___ (1993) *(per curiam)*. Moreover, petitioner disavowed the collateral estoppel argument at the petition stage, in response to a brief filed by the Ute Indian Tribe:

> "The question presented in the petition was whether the reservation had been diminished by acts of congress. [This Court's Rule 14.1(a)] does not appear to allow different issues to be raised. The Ute Indian Tribe argues that the Supreme Court of the State of Utah should have reached a different decision in [*Perank*] based on the doctrine of collateral estoppel . . . . Regardless of the opinion held by the Ute Indian Tribe of the *Perank* decision, *the decision has been made and is controlling in petitioner's case*." Supplemental Brief for Petitioner 2 (filed Dec. 2, 1992) (emphasis added).

Because we see no reason to consider an argument

that petitioner not only failed to raise but on which he expressly refused to rely in seeking a writ of certiorari, we turn to the merits.

In *Solem* v. *Bartlett*, we recognized that

> "it is settled law that some surplus land Acts diminished reservations, see, *e. g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U. S. 425 (1975), and other surplus land Acts did not, see, *e. g.*, *Mattz* v. *Arnett*, 412 U. S. 481 (1973); *Seymour* v. *Superintendent*, 368 U. S. 351 (1962). The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." 465 U. S., at 469.

In determining whether a reservation has been diminished, "[o]ur precedents in the area have established a fairly clean analytical structure," *id.*, at 470, directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. *Ibid.* We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. *Id.*, at 471. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Ibid.* Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. *Id.*, at 470, 472; see also *South Dakota* v. *Bourland*, 508 U. S. ___, ___ (1993) (slip op., at 7) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"), quoting *County of Yakima* v.

Confederated Tribes and Bands of Yakima Nation, 502 U. S. ___, ___ (1992) (slip op., at 17) (internal quotation marks omitted).

The Solicitor General, appearing as *amicus* in support of petitioner, argues that our cases establish a "clear-statement rule," pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians. See Brief for United States as *Amicus Curiae* 7–8. We disagree. First, although the statutory language must "establis[h] an express congressional purpose to diminish," *Solem*, 465 U. S., at 475, we have never required any particular form of words before finding diminishment. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 588, and n. 4 (1977). Second, we noted in *Solem* that a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished. 465 U. S., at 470–471. While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion. In fact, the statute at issue in *Rosebud*, which we held to have effected a diminishment, did not provide for the payment of a sum certain to the Indians. See 430 U. S., at 596, and n. 18. We thus decline to abandon our traditional approach to diminishment cases, which requires us to examine all the circumstances surrounding the opening of a reservation.

The operative language of the 1902 Act provided for allocations of Reservation land to Indians, and that "all the unallotted lands within said reservation shall be *restored to the public domain*." 32 Stat. 263 (emphasis added). The public domain was the land

owned by the Government, mostly in the West, that was "available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." E. Peffer, The Closing of the Public Domain 6 (1951). "[F]rom an early period in the history of the government it [was] the practice of the President to order, from time to time, . . . parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Grisar* v. *McDowell*, 6 Wall. 363, 381 (1868). This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, "when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 471 (1915).

It follows that when lands so reserved were "restored" to the public domain—*i. e.*, once again opened to sale or settlement—their previous public use was extinguished. See *Sioux Tribe* v. *United States*, 316 U. S. 317, 323 (1942) (President ordered lands previously reserved for Indian use "`restored to the public domain[,] . . . the same being no longer needed for the purpose for which they were withdrawn from sale and settlement'"); *United States* v. *Pelican*, 232 U. S. 442, 445–446 (1914). Statutes of the period indicate that Congress considered Indian reservations as separate from the public domain. See, *e. g.*, Act of June 25, 1910, §6, 36 Stat. 857 (criminalizing forest fires started "upon the public domain, or upon any Indian reservation") (quoted in *United States* v. *Alford*, 274 U. S. 264, 266–267 (1927)). Likewise, in *DeCoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status*, can hardly be questioned . . . . The sponsors of the legislation stated repeatedly that

the ratified agreements would return the ceded lands to the `public domain.'" 420 U. S., at 446 (emphasis added).

In *Solem*, the Court held that an Act which authorized the Secretary of the Interior to "`sell and dispose of'" unallotted reservation lands merely opened the reservation to non-Indian settlement and did not diminish it. 465 U. S., at 472–474. Elsewhere in the same statute, Congress had granted the Indians permission to harvest timber on the opened lands "`as long as the lands remain part of the public domain.'" *Id.*, at 475. We recognized that this reference to the public domain "support[ed]" the view that a reservation had been diminished, but that it was "hardly dispositive." *Id.*, at 475. We noted 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. The Act in *Solem*, however, did not "restore" the lands to the public domain. More importantly, the reference to the public domain did not appear in the operative language of the statute opening the reservation lands for settlement, which is the relevant point of reference for the diminishment inquiry. Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to terminate reservation status.

In *Seymour* v. *Superintendent*, 368 U. S. 351 (1962), for example, the question was whether the Colville Reservation, in the State of Washington, had been diminished. The Court noted that an 1892 Act which "`vacated and restored to the public domain'" about one-half of the reservation lands had diminished the reservation as to that half. *Id.*, at 354. As to the other half, Congress in 1906 had provided for allotments to the Indians, followed by the sale of mineral lands and entry onto the surplus lands under the homestead laws. This Court held that the 1906

Act did not result in diminishment: "Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain." *Id.*, at 355. This Court subsequently characterized the 1892 Act at issue in *Seymour* as an example of Congress' using "clear language of express termination when that result is desired." *Mattz*, 412 U. S., at 504, n. 22. And in *Rosebud*, all nine Justices agreed that a statute which "`restored to the public domain'" portions of a reservation would result in diminishment. 430 U. S., at 589, and n. 5; *id.*, at 618 (Marshall, J., dissenting).

In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not terminate a reservation, *Ute Indian Tribe*, 773 F. 2d, at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co.* v. *Yazzie*, 909 F. 2d 1387, 1400, cert. denied, 498 U. S. 1012 (1990).

Until the *Ute Indian Tribe* litigation in the Tenth Circuit, every court had decided that the unallotted lands were restored to the public domain pursuant to the terms of the 1902 Act, with the 1905 Act simply extending the time for opening and providing for a few details. *Hanson* v. *United States*, 153 F. 2d 162, 162–163 (CA10 1946); *United States* v. *Boss*, 160 F. 132, 133 (Utah 1906); *Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 21–23 (1957); *Sowards* v. *Meagher*, 108 P. 1112, 1114 (Utah 1910). Petitioner argues, however, that the 1905 Act

changed the "manner" in which the lands were to be opened. That Act specified that the homestead and townsite laws would apply, and so superseded the "restore to the public domain" language of the 1902 Act, language that was not repeated in the 1905 Act. We disagree, because the baseline intent to diminish the Reservation expressed in the 1902 Act survived the passage of the 1905 Act.

Every congressional action subsequent to the 1902 Act referred to that statute. The 1902 Joint Resolution provided an appropriation prior to the restoration of surplus Reservation lands to the public domain. 32 Stat. 744. The 1903 and 1904 Acts simply extended the deadline for opening the reservations in order to allow more time for surveying the lands, so that the "purposes" of the 1902 Act could be carried out. 32 Stat. 997; 33 Stat. 207. And the 1905 Act recognized that they were all tied together when it provided that the proceeds of the sale of the unallotted lands "shall be applied as provided in the [1902 Act] and the Acts amendatory thereof and supplementary thereto." 33 Stat. 1070. The Congress that passed the 1905 Act clearly viewed the 1902 statute as the basic legislation upon which subsequent Acts were built.

Furthermore, the structure of the statutes requires that the 1905 Act and the 1902 Act be read together. Whereas the 1905 Act provided for the disposition of *unallotted* lands, it was the 1902 Act that provided for allotments to the Indians. The 1902 Act also established the price for which the unallotted lands were to be sold, and what was to be done with the proceeds of the sales. The 1905 Act did not repeat these essential features of the opening, because they were already spelled out in the 1902 Act. The two statutes —as well as those that came in between—must therefore be read together.

Finally, the general rule that repeals by implication are disfavored is especially strong in this case,

because the 1905 Act *expressly* repealed the provision in the 1903 Act concerning the siting of the grazing lands; if Congress had meant to repeal any part of any other previous statute, it could easily have done so. Furthermore, the predicate for finding an implied repeal is not present in this case, because the opening provisions of the two statutes are not inconsistent: The 1902 Act also provided that the unallotted lands restored to the public domain could be sold pursuant to the homestead laws. Other surplus land Acts which we have held to have effected diminishment similarly provided for initial entry under the homestead and townsite laws. See *Rosebud*, 430 U. S., at 608; *DeCoteau*, 420 U. S., at 442.

Contemporary historical evidence supports our conclusion that Congress intended to diminish the Uintah Reservation. As we have noted, the plain language of the 1902 Act demonstrated the congressional purpose to diminish the Uintah Reservation. Under the 1902 Act, however, the consent of the Indians was required before the Reservation could be diminished; that consent was withheld by the Indians living on the Reservation. After this Court's *Lone Wolf* decision in 1903, Congress authorized the Secretary of the Interior to proceed unilaterally. The Acting Commissioner for Indian Affairs in the Department of the Interior directed Indian Inspector James McLaughlin to travel to the Uintah Reservation to "endeavor to obtain [the Indians'] consent to the allotment of lands as provided in the law, and to the restoration of the surplus lands." Letter from A. C. Tonner to James McLaughlin (April 27, 1903), reprinted in S. Doc. No. 159, 58th Cong., 3d Sess., 9 (1905). The Acting Commissioner noted, however, that the effect of the 1903 Act was "that if the [Indians] do not consent to

the allotments by the first of June next the allotments are to be made notwithstanding, and the unallotted lands . . . are to be opened to entry" according to the terms of the 1902 Act. *Id.*, at 8–9.

Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation:

> "`By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments.
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> . . . . .
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> "`You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress 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*.'" Minutes of Councils Held by James McLaughlin, U. S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903, excerpted in App. to Brief for Respondent 4a-5a (emphasis added).

Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding, by him conveyed to the Indians, that the Reservation would be diminished by operation of the 1902 and 1903 Acts notwithstanding the failure of the Indians to give their consent.

The Secretary of the Interior informed Congress in February 1904 that the necessary surveying could not be completed before the date set for the opening, and requested that the opening be delayed. Letter from E. A. Hitchcock to the Chairman of the Senate Committee on Indian Affairs (Feb. 6, 1904), reprinted in S. Doc. No. 159, *supra*, at 17. In the 1904 Act, Congress accordingly extended the time for opening

until March 10, 1905, and appropriated additional funds "to enable the Secretary of the Interior to do the necessary surveying" of the Reservation lands. 33 Stat. 207. The Secretary of the Interior subsequently informed Congress that a further extension would be necessary because the surveying and allotments could not be completed during the winter. Letter from E. A. Hitchcock to the Chairman of the House Committee on Indian Affairs (Dec. 10, 1904), reprinted in S. Doc. No. 159, *supra*, at 21.

The House of Representatives took up the matter on January 21, 1905. The bill on which debate was held provided that "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 of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered." H. R. 17474, quoted in 39 Cong. Rec. 1180 (1905). Representative Howell of Utah offered as an amendment "[t]hat 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.* Significantly, Representative Howell offered his amendment as an addition to, not a replacement for, the language in the bill that explicitly referred to the lands' restoration to the public domain. He explained:

> "In the pending bill these lands, when restored to the public domain, are subject to entry under the general land laws of the United States, coupled with such rules and regulations as the President may prescribe. In my humble judgment there should be some provision such as is embodied in my amendment, limiting the lands in the reservation to entry under the homestead, town-site, and mining laws alone for one year from the date of the opening. . . .

> "Congress should see to it that until such time as those lands easy of access, reclamation, and irrigation are settled by actual home makers the provisions of the homestead law alone shall prevail. This policy is in accord with the dominant sentiment of the time, viz, that the public lands shall be reserved for actual homes for the people." *Id.*, at 1182.

Although the amendment was rejected in the House of Representatives, *id.*, at 1186, the Senate substituted the current version of the 1905 Act, which is similar to the amendment offered by Representative Howell but omits the restoration language of the House version. 39 Cong. Rec. 3522 (1905). In the hearings on the Senate bill, Senator Teller of Utah had stated that "I am not going to agree to any entry of that land except under the homestead and town-site entries," because "I am not going to consent to any speculators getting public land if I can help it." Indian Appropriation Bill, 1906, Hearings before the Senate Subcommittee of the Committee on Indian Affairs, 58th Cong., 3d Sess., 30 (1905). Thus, although we have no way of knowing for sure why the Senate decided to limit the "manner" of opening, it seems likely that Congress wanted to limit land speculation. That objective is not inconsistent with the restoration of the unallotted lands to the public domain: Once the lands became public, Congress could of course place limitations on their entry, sale, and settlement.

The Proclamation whereby President Roosevelt actually opened the Reservation to settlement makes clear that the 1905 Act did not repeal the restoration language of the 1902 Act. In that document, the President stated that the 1902 Act provided that the unallotted lands were to be restored to the public domain, that the 1903, 1904, and 1905 Acts extended the time for the opening, and that those lands were now opened for settlement under the

homestead laws "by virtue of the power in [him] vested *by said Acts of Congress*." 34 Stat. 3120 (emphasis added). President Roosevelt thus clearly understood the 1905 Act to incorporate the 1902 Act, and specifically the restoration language. This "unambiguous, contemporaneous, statement, by the Nation's Chief Executive," *Rosebud*, 430 U. S., at 602, is clear evidence of the understanding at the time that the Uintah Reservation would be diminished by the opening of the unallotted lands to non-Indian settlement.

The subsequent history is less illuminating than the contemporaneous evidence. Since 1905, Congress has repeatedly referred to the Uintah Reservation in both the past and present tenses, reinforcing our longstanding observation that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 348–349 (1963) (internal quotation marks omitted). The District Court in the *Ute Indian Tribe* case extensively cataloged these congressional references, and we agree with that court's conclusion: "Not only are the references grossly inconsistent when considered together, they . . . are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905." 521 F. Supp. 1072, 1135 (Utah 1981). Because the textual and contemporaneous evidence of diminishment is clear, however, the confusion in the subsequent legislative record does nothing to alter our conclusion that the Uintah Reservation was diminished.

Finally, our conclusion that the statutory language and history indicate a congressional intent to diminish is not controverted by the subsequent demographics of the Uintah Valley area. We have

recognized that "[w]hen an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U. S., at 471–472, n. 12. Of the original 2 million acres reserved for Indian occupation, approximately 400,000 were opened for non-Indian settlement in 1905. Almost all of the non-Indians live on the opened lands. The current population of the area is approximately 85 percent non-Indian. 1990 Census of Population and Housing, Summary Population and Housing Characteristics: Utah, 1990 CPH-1–46, Table 17, p. 73. The population of the largest city in the area—Roosevelt City, named for the President who opened the Reservation for settlement—is about 93 percent non-Indian. *Id.*, Table 3, p. 13.

The seat of Ute tribal government is in Fort Duchesne, which is situated on Indian trust lands. By contrast, we found it significant in *Solem* that the seat of tribal government was located on opened lands. 465 U. S., at 480. The State of Utah exercised jurisdiction over the opened lands from the time the Reservation was opened until the Tenth Circuit's *Ute Indian Tribe* decision. That assumption of authority again stands in sharp contrast to the situation in *Solem*, where "tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908." 465 U. S., at 480. This "jurisdictional history," as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area. Cf. *Rosebud*, 430 U. S., at 604–605.

We conclude that the Uintah Indian Reservation has been diminished by Congress. Accordingly, the town of Myton, where petitioner committed a crime, is not in Indian country and the Utah courts properly exercised criminal jurisdiction over him. We therefore affirm the judgment of the Utah Supreme Court.

So ordered.