

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS ROYE WAHPEKECHE,
Petitioner,

V.

DAVID ROGERS, WARDEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is an Indian who was convicted by the State of Oklahoma for a crime that was committed on land that is within the Citizen Potawatomi Nation (“CPN”) Reservation, is part of an original CPN/Absentee Shawnee Allotment, and/or is a dependent Indian community. Before, during, and after his conviction, Petitioner has maintained the State of Oklahoma lacked jurisdiction over him and presented evidence the CPN Reservation was not disestablished and deeds proving the land is an Indian Allotment. At each stage, the courts have disagreed but for different reasons. The questions presented are:

1. Did Congress disestablish the CPN Reservation through the Act of March 3, 1891?
2. Were the restrictions on the Indian Allotment on which the alleged crimes were committed ever extinguished?

3. Can a habeas petitioner waive or fail to preserve an argument regarding subject matter jurisdiction?

4. When a criminal defendant demonstrates the land on which he is accused of committing a crime was originally an Indian Allotment, is it the State's or the defendant's burden to prove the Indian title and restrictions were extinguished or remain in place?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Thomas Roye Wahpekeche.

The respondent is David Rogers,¹ Warden of the Joseph Harp Correctional Center.

¹ Applicant is housed at Joseph Harp Correctional Center, where Luke Pettigrew served as Warden at the time the appeal was filed with the United States Court of Appeals for the Tenth Circuit. Warden Pettigrew has since left that position, and David Rogers is now the Warden of Joseph Harp Correctional Center. Accordingly, Warden Rogers is the proper respondent Rule 2(a), *Rules Governing Section 2254 Cases in the United States District Courts*; Fed. R. App. P. 43(c)(2).

LIST OF PROCEEDINGS

State of Oklahoma v. Thomas Roy Wahpekeche, District Court of Cleveland County, Oklahoma, No. CF-2013-236

December 21, 2015: Judgment and sentence entered after jury conviction

Thomas Roy Wakpekche v. State of Oklahoma, Oklahoma Court of Criminal Appeals, No. F-2015-1137

April 27, 2017: Opinion affirming judgment and sentence.

Thomas Roy Wakpekche v. State of Oklahoma, District Court of Cleveland County, Oklahoma, No. CF-2013-236

June 18, 2018: First application for post-conviction relief denied.

Thomas Roy Wakpekche v. State of Oklahoma, Oklahoma Court of Criminal Appeals, No. PC-2018-816

September 19, 2018: Post-conviction appeal dismissed as untimely.

Thomas Roy Wakpekche v. State of Oklahoma, District Court of Cleveland County, Oklahoma, No. CF-2013-236

July 31, 2020: Denying second application for post-conviction relief. Granting request for appeal out of time.

Thomas Roy Wakpekche v. State of Oklahoma, Oklahoma Court of Criminal Appeals, No. PC-2020-0541

September 11, 2020: Granting request for post-conviction appeal out of time.

Thomas Roy Wakpekeche v. State of Oklahoma, Oklahoma Court of Criminal Appeals, Nos. PC-2020-717 and MA-2021-581

September 30, 2021: Affirming denial of post-conviction relief. Mandamus petition denied.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, U.S. District Court for the Western District of Oklahoma, No. 5:21-cv-01106-PRW

October 20, 2023: Habeas petition dismissed.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, U.S. District Court for the Western District of Oklahoma, No. 5:21-cv-01106-PRW

November 1, 2023: Notice of appeal construed as request for certificate of appealability; certificate denied.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, U.S. District Court for the Western District of Oklahoma, No. 5:21-cv-01106-PRW

January 25, 2024: Denying motion to alter or amend judgment.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, United States Court of Appeals for the Tenth Circuit, No. 23-6176

November 20, 2024: Granting certificate of appealability.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, United States Court of Appeals for the Tenth Circuit, No. 23-6176

March 11, 2026: Opinion affirming district court's denial of habeas relief.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, United States Court of Appeals for the Tenth Circuit, No. 23-6176

May 8, 2026: Denying petition for rehearing and rehearing en banc.

Thomas Roy Wahpekeche v. Luke Pettigrew, Warden, Supreme Court of the United States, No. 26A181

August 13, 2026: Granting extension of time to file petition for a writ of certiorari.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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TO: The Honorable Chief Justice and Associate Justices
of the United States Supreme Court:

Thomas Roye Wahpekeche respectfully petitions for a
writ of certiorari to review the judgment of the United States
Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for
the Tenth Circuit is reported at *Wahpekeche v. Pettigrew*, 169
F.4th 1176 (10th Cir. 2026). *See* Appendix A.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on March 11, 2026. *Id.* The petition for rehearing was denied on May 8, 2026. *See* Appendix B. The original deadline for this Petition was August 6, 2026, but on July 15, 2026, Petitioner requested an extension of time to file this Petition. This Court, on August 13, 2026, granted an extension until August 26, 2026.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over the habeas petition pursuant to 28 U.S.C. § 2254. *See* Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves application of 28 U.S.C. § 2254, as Mr. Wahpekeche applied for and has been denied a writ of habeas corpus. *See* Appendix D.

This petition involves 18 U.S.C. § 1151, which provides that the term “Indian country” means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This petition involves 18 U.S.C. § 1152, which states:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This petition involves 18 U.S.C. § 1153(a), which states:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the

Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

This petition involves application of the Act of March 3, 1891, 26 Stat. 1016, which is included in Appendix D.²

STATEMENT OF THE CASE

A. The Charges and Convictions Below.

More than a decade ago, Mr. Wahpekeche was charged in the District Court of Cleveland County, Oklahoma, Case No. CF-2013-236, of violating various Oklahoma state laws as a result of alleged sexual conduct with a minor. He pled not guilty, went to trial, and was convicted and sentenced to life with the possibility of parole in December 2015. He is incarcerated at the Joseph Harp Correctional Center in Lexington, Oklahoma.

² The entire portion of the 1891 Act ratifying various agreements with various Tribes is included Appendix D because comparison of the effective language as it relates to each agreement with each Tribe is informative.

B. Petitioner Consistently Argued the State Lacked Subject Matter Jurisdiction Before, During, and After Trial.

Prior to his conviction, Mr. Wahpekeche argued that the Oklahoma state court lacked jurisdiction over him because he is an Indian and the crimes occurred in Indian country. *See* Appendix E. Ultimately, the court found it had jurisdiction. Post-trial, Mr. Wahpekeche moved to dismiss based on a lack of jurisdiction. To support his argument, he introduced the original Indian Deeds, showing the land was an Indian Allotment. *See* Appendix F. Throughout the state trial, direct appeal, and state habeas proceedings, he continued to assert Oklahoma lacked subject matter jurisdiction over his alleged crimes. Similarly, throughout his federal habeas proceedings, Mr. Wahpekeche argued Oklahoma lacked jurisdiction over him because he is an Indian and the crimes occurred in Indian country.

He alleges membership in the Kickapoo Tribe and the

presence of Indian blood; the State takes no position on his status as an Indian. He contends that the land where the crimes allegedly occurred is Indian country because it lies within the CPN Reservation, is part of an original CPN/Absentee Shawnee allotment, and/or is a dependent Indian community.

C. Proceedings Below

After his conviction at trial, Petitioner moved to dismiss his conviction based on a lack of subject matter jurisdiction, but the trial court denied his motion. He then filed his direct appeal in the Oklahoma Court of Criminal Appeals (“OCCA”), arguing, *inter alia*, the state lacked jurisdiction; the OCCA affirmed.

He sought post-conviction relief in the District Court of Cleveland County, Oklahoma, which was denied in June 2018. He appealed that denial to the OCCA, which appeal was dismissed as untimely. However, he was ultimately granted a

motion to appeal out of time by the District Court of Cleveland County, Oklahoma and the OCCA due to court delays that resulted in his appeal being untimely. After considering his appeal on the merits, the OCCA denied his request for post-conviction relief in September 2021. *See Thomas Roy Wahpekeche v. State of Oklahoma*, Oklahoma Court of Criminal Appeals, Nos. PC-2020-717 and MA-2021-581.

Petitioner sought habeas relief in the United States District Court for the Western District of Oklahoma; the magistrate judge recommended denying relief, and the district court adopted the recommendation in part and dismissed the petition in October 2023. The district court construed Mr. Wahpekeche's jurisdictional claims as resting on the continued existence of the CPN Reservation under 18 U.S.C. § 1151(a). *See Thomas Roy Wahpekeche v. Luke Pettigrew, Warden*, U.S. District Court for the Western District of Oklahoma, No. 5:21-cv-01106-PRW. The same

court denied his certificate of appealability a month later. In January 2024, that court also denied his motion to alter or amend the judgment.

On November 20, 2024, the Tenth Circuit granted Mr. Wahpekeche's *pro se* request for a certificate of appealability. *See Thomas Roy Wahpekeche v. Luke Pettigrew, Warden*, United States Court of Appeals for the Tenth Circuit, No. 23-6176. On March 11, 2026, after merits briefing, including a supplemental and reply brief filed by undersigned counsel after being appointed as CJA counsel, the Tenth Circuit denied habeas relief.

The court held that Congress disestablished the CPN Reservation through the Act of March 3, 1891, that Mr. Wahpekeche did not preserve his characterization of the land as an Allotment or a dependent Indian community, and that an anticipatory procedural bar prevented relief on his remaining claims. *See Appendix A.*

On the disestablishment question, the court reasoned that the 1891 Act contained cession language and that the tribe received \$160,000 in compensation, which together created a presumption of an intent to disestablish the reservation. *Id.* at pp.4-6. The court declined to treat this Court’s discussions of the Reservation in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), as controlling, reasoning that neither opinion addressed disestablishment. *Id.* at pp.7-8. Thus, the panel found this Court’s statement that the building at issue in *C & L Enterprises*, 532 U.S. at 415 was “not on the Tribe’s reservation” was not determinative or evidence that the Reservation remains and was not disestablished. *Id.* Similarly, the panel was unpersuaded that the CPN Reservation was not disestablished considering this Court’s

conclusions in *Oklahoma Tax Comm’n*, 498 U.S. at 511 that: the land on which the cigarette sales in that case occurred “was held in trust for the Potawatomis”; there is no “distinction between tribal trust land and reservations”; and that the land “had been validly set apart for the use of the Indians” and “thus qualifies as a reservation for tribal immunity purposes.” *Id.*

The court distinguished its prior decision in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325, 1328 (10th Cir. 1998), wherein the court found the Citizen Band Potawatomi’s agreement to cede interest in the land in exchange for payment was “not an unambiguous expression of an intent to abrogate” the CPN’s pre-existing treaty rights to the land. *Id.* at pp.5-7. The panel found that because *Collier* had referred to the reservation as a “former” reservation, such was controlling. *Id.*

Mr. Wahpekeche timely petitioned for rehearing and

rehearing en banc. Following the denial of rehearing on May 8, 2026, this Petition followed.

STATEMENT OF FACTS

The Act of March 3, 1891 ratified a prior agreement with the CPN. Among other provisions, it preserved and confirmed allotted land within the Reservation to individual Indians of both the CPN and Absentee Shawnee, while opening surplus land to non-Indian settlement. *See* Act of March 3, 1891, ch. 543, 26 Stat. 1016.

On August 7, 1891, President Harrison issued a U.S. Homestead Deed dated for allotted Land to John Sloan, an “Indian of the Absentee Shawnee tribe.” *See* Appendix F p.3. The land described in that deed included 321 acres in the Eastern half of Section 35, Township 10, North, Range 1, East of the Indian Meridian. *Id.*

On July 22, 1911, that same land was deeded from John Sloan’s widow and heirs to a person named John Wilson via

“Indian Deed Inherited Lands.” *Id.* p.4. That deed was approved by the Department of the Interior in 1912 and recorded in the Office of Indian Affairs. *Id.* p.5.

Within that same land, Mr. Wahpekeche lived on lot number 178, described as “being a part of Section 335, Township 10, North, Range 1, East of the Indian Meridian,” during all times relevant to his alleged criminal conduct. In 2013, he purchased the land from the Housing Authority of the Absentee Shawnee Tribe. *Id.* pp.1-2.

Mr. Wahpekeche was convicted of crimes allegedly committed at his house, which is both within the Reservation and an Indian Allotment. During trial, Petitioner raised the issue of subject matter jurisdiction, and the state trial court held a limited evidentiary hearing at which there was conflicting evidence of whether the land was “trust land” or not. *See* Appendix E. The trial court held it was not trust land based solely on testimony from a law enforcement officer and

despite not having deeds going back to the 1800's showing it was an Indian allotment; the court confirmed all jurisdictional objections were preserved for appeal, but the court. *Id.*

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH THE TENTH CIRCUIT'S PRIOR DECISIONS WHICH CONFIRMED THE CPN RESRVATION'S EXISTENCE.

The decision below is the first in the Nation to hold that Congress disestablished the CPN Reservation. That conclusion cannot be reconciled with this Court's precedent or with the Tenth Circuit's prior decisions. Thus, this Court should grant the Petition.

This Court has held that only Congress can disestablish a reservation, and that it must clearly express its intent to do so. In *McGirt v. Oklahoma*, the Court explained that disestablishment requires clear congressional expression of an "intent to [disestablish], commonly with an explicit

reference to cession or other language evidencing the present and total surrender of all tribal interests.” 591 U.S. 894, 904 (2020) (cleaned up). Just as important, the Court held that allotment of a reservation does not by itself end reservation status. *Id.* 591 U.S. at 906. As the Court put it, “to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.” *Id.* Once a reservation is established, it retains that status until Congress explicitly indicates otherwise. *Id.*

The framework this Court set out in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), identifies that statutory language is “the most probative evidence of congressional intent.” Here the 1891 Act contains no language abolishing the Reservation – instead the Reservation remained and the land was allotted and opened up to non-Indian settlement. Congress knew how to abolish a reservation when it wished to, but it used no such language as to the CPN Reservation. *See Mattz v. Arnett*, 412

U.S. 481, 497 (1973) (allotment does not “suggest that Congress intended thereby to terminate” a reservation).

The decision conflicts with Tenth Circuit case law. In *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, the Tenth Circuit held that “the language, legislative history, and historical circumstances of the 1891 Act do not evince a sufficiently clear Congressional intent to abrogate the Potawatomi Tribe’s treaty right to the exclusive use and occupancy of its former reservation.” 142 F.3d 1325, 1334 (10th Cir. 1998). If the 1891 Act did not clearly abrogate the Tribe’s treaty right to exclusive use and occupancy, the same Act could not unambiguously disestablish the Reservation. The panel’s reliance on *Collier*’s passing references to a “former” reservation cannot bear the weight the panel placed on it.

The decision below is also irreconcilable with this Court’s own treatment of the CPN land. In *Oklahoma Tax*

Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, this Court found no distinction between Oklahoma’s admission that the tribe’s land was held in trust by the Federal Government and a reservation. 498 U.S. at 511.³ This Court held that Oklahoma could not tax “on-reservation” sales to tribal members. *Id.* at 508, 511 (1991). If the Reservation had been disestablished in 1891, sales to tribal members on that land could not be “on-reservation” sales beyond the State’s taxing authority. *Id.* at 508.

Similarly, in *C & L Enterprises, Inc.*, 532 U.S. at 414-415, this Court determined that the Tribe waived sovereign immunity related to a contract action involving a building “not on the Tribe’s reservation or on land held by the Federal Government in trust for the Tribe.” The panel’s decision

³ That the State of Oklahoma admitted the land was held in trust for the tribe cannot be reconciled with the state trial court’s finding before conviction that land within the same Reservation was not “trust land.”

finding disestablishment cannot be squared with this Court's repeated findings that the CPN Reservation remains. Otherwise, both *Oklahoma Tax Commission* and *C & L Enterprises, Inc.* are founded on a false premise.

The panel's decision also conflicts with this Court's discussion of the 1891 Act in *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975). There, this Court recognized that the March 3, 1891 Act as it related to the Sisseton and Wahpeton Indians was different than other agreements with Tribes, including the CPN, ratified by the same Act:

The other agreements employed cession language virtually identical to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all 'unallotted' portions, the result being merely a reduction in the size of the affected reservations.

Id. at 438. *See also id.* at fn.21 and fn.22. Thus, *DeCoteau* confirmed that unlike Sisseton and Wahpeton Indian land, the CPN Reservation was not sold in its entirety. Because

only a portion was sold, such is merely a diminishment not a disestablishment of the Reservation. Yet, the Tenth Circuit held the CPN's Reservation had been disestablished by the same 1891 Act this Court already found merely diminished the CPN Reservation.

The question of whether the CPN Reservation continues to exist is one of exceptional importance. It determines whether Oklahoma or the United States has criminal jurisdiction over Indians within a large area of the State, and the decision below departs from this Court's precedent in resolving it. This Court should grant certiorari.

II. THE DECISION BELOW TREATED A DEFECT IN SUBJECT MATTER JURISDICTION AS WAIVEABLE, CONTRARY TO THIS COURT'S PRECEDENT.

The decision below also warrants review because it treated Mr. Wahpekeche's challenge to the state court's subject matter jurisdiction as an argument that could be waived. If the crimes occurred in Indian country and Mr.

Wahpekeche is an Indian, then the United States, not Oklahoma, had jurisdiction. *See* 18 U.S.C. §§ 1151, 1153. Whether Oklahoma had jurisdiction to prosecute him is therefore a question of subject matter jurisdiction.

This Court has held that “[s]ubject-matter jurisdiction can never be waived or forfeited,” and that “courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented” when a requirement “goes to subject-matter jurisdiction.” *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

The panel found Mr. Wahpekeche failed to preserve and waived arguments that the land on which the crimes were committed was a dependent Indian community and/or an Indian Allotment. *See* Appendix A, pp.8-14. By faulting Mr. Wahpekeche, a *pro se* habeas petitioner, for allegedly failing to preserve his Allotment and dependent-Indian-community arguments in the precise procedural manner the panel

demanded, the decision below treated a jurisdictional defect as one that could be forfeited. That is inconsistent with *Gonzalez* and requires review.

Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union and never reassumed criminal jurisdiction over Indian country. Act of June 16, 1906, 34 Stat. 267, 270. A State that disclaimed such jurisdiction, and never reassumed it, cannot acquire jurisdiction over crimes committed by an Indian in Indian country through an Indian's procedural misstep. Subject matter jurisdiction, like matter itself, can neither be created nor destroyed. Because the decision below permitted exactly that, this Court should grant review.

III. THIS CASE GIVES THE COURT AN OPPORTUNITY TO ARTICULATE BURDENS OF PROOF AND PROOF NECESSARY FOR ESTABLISHING AN INDIAN ALLOTMENT AND WHAT IS REQUIRED TO PROVE RESTRICTIONS FROM THE ALLOTMENT HAVE BEEN REMOVED.

An Indian Allotment is land that was originally issued and deeded to an Indian, there was an Indian title, and restrictions have not been extinguished; such land is Indian country. 18 U.S.C. § 1151(c). Under federal law, an Indian Allotment may take either of two forms: a trust allotment, meaning land held by the United States in trust for the benefit of an Indian, or a restricted allotment, meaning land owned by an Indian subject to a restriction on alienation in favor of the United States. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999). Both trust allotments and

restricted allotments are Indian country whether or not they lie within a reservation. *Id.*⁴

The land at issue in this case was an Indian Allotment via the 1891 Act, which confirmed allotments were being made to members of the Citizen Band of Pottawatomie Indians under the General Allotment Act. *See* Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1016-22. The Act provided that “all such allotments so made shall be confirmed,” that allotments “in process of being made shall be completed and confirmed,” and that the title in each allottee would be protected as provided by federal law. *Id.* at 1017.

The same Act contained parallel language for the Absentee Shawnees, confirming allotments already made, in process, or to be made, and providing that once confirmed and

⁴ Oklahoma has previously admitted in this Court that the area of the CPN Reservation is held in trust for the CPN by the Federal Government. *Oklahoma Tax Comm’n*, 498 U.S. at 511.

approved by the Secretary of the Interior, “the title in each allottee shall be evidenced and protected in every particular” under the governing federal allotment statute. *Id.* at 1020.

Once Mr. Wahpekeche made a “presentation of prima facie evidence as to his legal status as an Indian and as to the location of the crime as Indian Country, the burden shift[ed] to the State to prove it has subject matter jurisdiction.” *Hogner v. State*, 500 P.3d 629, 631 (Okla. Crim. App. 2021).

The land at issue is identified in the record as part of Section 35, Township 10 North, Range 1 East of the Indian Meridian, Cleveland County, Oklahoma and the original patent states that John Sloan, “an Indian of the Absentee Shawnee tribe,” was allotted the West half of Section 35, Township 10 North, Range 1 East of the Indian Meridian, Oklahoma Territory, containing 320 acres. *See* Appendix F p.3. The patent further states that the United States would hold the land, subject to the restrictions and conditions in the

General Allotment Act, “for the period of twenty five years in trust for the sole use and benefit” of John Sloan or, if deceased, his heirs, with the President retaining discretion to extend the trust period. *Id.*

Land can lose allotment status if Indian title is extinguished or if the federal trust/restriction is lawfully removed. For a trust allotment, the ordinary mechanism is issuance of an unrestricted fee simple patent. When a fee simple patent issues, “the title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated.” *Larkin v. Paugh*, 276 U.S. 431, 439 (1928). Until that occurs, trust allotments retain their Indian restrictions.

This Court holds that allotted lands held in trust remain Indian country because the Government retains control and the lands do not become “other than Indian country through the distribution into separate holdings.” *United States v.*

Pelican, 232 U.S. 442, 449 (1914). For a restricted allotment, restrictions are not lost by implication. Where federal law requires approval to convey restricted allotment interests, a conveyance that does not satisfy that approval requirement does not remove the restrictions, and the tract remains Indian country. *Magnan v. Trammell*, 719 F.3d 1159, 1176 (10th Cir. 2013).

Magnan gives this Court reason to grant the petition because the State argued that the land “appears” to have ceased being a trust allotment when sold in 1911 and that it “does not appear” a later owner was an Indian or received the land with restrictions. But this begs the question of whether the State can carry its burden to prove the restrictions were removed by inference rather than a documented extinguishment of Indian title. Moreover, the panel’s holding that Mr. Wahpekeche could waive this subject matter jurisdictional issue by “failing to raise [it] when objecting to

the magistrate judge's report" (Appendix A p.14) implicates critical questions of subject matter jurisdiction and whether it can be waived as the Tenth Circuit assumed. This Court should grant the petition to set forth the burden as articulated in *Hogner* and determine the parameters required for the State to meet its burden, whether restrictions can be deemed extinguished based on inference, and whether the issue of land that was an Indian allotment remains so can be waived.

CONCLUSION

For the reasons set forth above, petitioner, Thomas Royce Wahpekeche, respectfully requests that the Court grant review in this case.

DATED this 26th day of August 2026.

Respectfully submitted,

OGBORN MIHM, LLP

Jason B. Wesoky
Member of the Tenth Circuit's CJA
Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
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