No. 04-3834

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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STATE OF WISCONSIN,
Plaintiff-Appellee

v.

THE STOCKBRIDGE-MUNSEE COMMUNITY
and ROBERT CHICKS,
Defendants-Appellants.

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ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN (Milwaukee)
Case No. 98-cv-00871-PJG
Magistrate Judge Patricia J. Gorence

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# REPLY BRIEF OF DEFENDANTS-APPELLANTS THE STOCKBRIDGE-MUNSEE COMMUNITY and ROBERT CHICKS

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## INTRODUCTION

As detailed in the Tribe's opening brief, the Supreme Court's diminishment jurisprudence rests on two bedrock principles. First, "[o]nce a block of land is set aside for an Indian Reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (emphasis added). Second, "only Congress can alter the terms of an Indian treaty by diminishing a reservation." Its intent to do so must be "clear and plain," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 354 (7th Cir. 1983).

The State does not dispute that, pursuant to these principles, this Court's role is to determine whether *particular* Congresses, via *particular* acts, possessed the *particularized* intent first to diminish and then to disestablish the Stockbridge-Munsee Reservation, thereby abrogating the 1856 Treaty. But faced with a dearth of evidence in the text or history of the 1871 and 1906 Acts that Congress intended to alter the Reservation's boundaries, the State tries mightily to shift this Court's attention elsewhere.

First, the State seeks to substitute "the turn-of-the-century assumption that Indian reservations were a thing of the past" and the related "notion that [the] reservation status of Indian lands" was "coextensive with tribal ownership," State

Br. 30 (quoting *Solem*), for the exacting legal standard that governs here. However, the Supreme Court (in *Solem* itself) and the federal Courts of Appeals have uniformly and unequivocally rejected such efforts. *See, e.g.*, *Solem*, 465 U.S. at 468-69 ("Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation . . . , we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations"); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) ("The Court's specific intent requirement has the effect of negating consideration of the congressional presumption that all reservations were to be temporary . . . . In short, the presumption . . . is irrelevant in determining whether the boundaries of a *specific* reservation were being diminished by the language of a given statute.") (emphasis in original); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 957-58 (9th Cir. 1982) (same).[1]

So too have the courts rejected the particular variants of the "turn-of-the-century assumption" argument advanced by the State here as a basis for finding the Tribe's reservation disestablished. Hence, as discussed in greater detail below, the courts have repeatedly held that neither (1) the sale of reservation land to non-Indians, nor (2) the allotment of such land to tribal members operates to alter reservation boundaries absent specific, affirmative evidence that Congress intended such a result.

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[1] Similarly, this Court in *Voigt*, 700 F.2d at 356-57, declined the State's invitation to rely upon the "removal policy which contemplated placing the Indians on lands farther west" as evidence of the intent behind specific treaty language.

Second, the State seeks to shift the focus away from the text and history of the 1871 and 1906 Acts by relying extensively on events taking place subsequent (in many cases, decades subsequent) to the passage of those Acts. Once again, however, the Supreme Court and the Courts of Appeals have rebuffed such efforts to locate the requisite evidence of congressional intent principally in post-enactment developments:

> There are . . . limits to how far we will go to decipher Congress's intention in any particular . . . 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.

*Solem,* 465 U.S. at 472. As demonstrated in detail in the Tribe's opening brief and below, the subsequent history of the Acts simply cannot bear the weight the State seeks to place on it.

## ARGUMENT

### I. The Operative Language of the Acts Reflects No Clear and Plain Congressional Intent to Diminish or Disestablish the Reservation

In its opening brief, the Tribe established the propositions that: (1) the operative statutory language is the "most probative evidence" of whether Congress intended to alter a reservation's boundaries; (2) language requiring a tribe to cede or surrender all interests in the reservation lands at issue, or restoring reservation lands to the public domain, has been viewed as precisely suited to diminishment; (3) language simply authorizing the United States to sell reservation lands to non-Indians, or allotting reservation lands to tribal members, has been deemed

insufficient for a finding of diminishment; and (4) whereas prior treaties involving the Tribe contained explicit language of cession, the 1871 and 1906 Acts mirror language repeatedly held by the Supreme Court not to diminish reservation boundaries. Tribe Br. 20-30.

The State does not, and cannot, dispute the first proposition. With respect to the second, it accuses the Tribe of arguing that "cession" and "restoration" are magic words in the absence of which a finding of diminishment can never be made. State Br. 38-39. However, the Tribe has advanced no such claim. At the same time, it is absolutely true that the Court has yet to conclude that reservation boundaries have been altered absent cession or restoration language.[2] In addition, and of critical importance here, the State has no answer to the Tribe's third and fourth propositions regarding the specific language used in the 1871 and 1906 Acts.

A. The 1871 Act

In calling simply for the appraisal and sale of Reservation timberlands, the 1871 Act tracks language that the Supreme Court has repeatedly rejected as a basis for diminishment. The State cannot deny the striking similarity between the language of the 1871 Act and the operative text at issue in *Solem*, *Mattz,* and

[2] *Rosebud Sioux Tribe v. Kniep,* 430 U.S. 584 (1977), is not to the contrary. State Br. 39. A 1904 Act used explicit language requiring that the Rosebud Sioux "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to . . . part of the Rosebud Indian Reservation." *Rosebud,* 430 U.S. at 596-97. In considering two subsequent Acts affecting the reservation, the Court found that "[n]one of the parties really disputes that the intent of the three Acts was the same," and that one of the Acts was the "functional twin" of the 1904 Act. *Id*. at 606-09. Unlike in *Rosebud*, the State cannot identify any statute preceding the 1871 or 1906 Acts that established "an unmistakable baseline purpose" to diminish or disestablish the Reservation.

*Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351 (1962), Tribe Br. 22-24, and posits no plausible explanation why the language here should be treated any differently than in those cases. Indeed, the conclusion that reservation boundaries were not altered obtains all the more strongly in this case, as the United States had repeatedly used cession language in prior treaties with the Tribe when it wished to affect those boundaries. Tribe Br. 25.

In response, the State can only weakly assert that "there are good reasons for the absence of [cession or restoration] language from the 1871 Act. First, the Tribe was not ceding land to the U.S., thus rendering cession language inapt. Nor . . . did it restore any lands to the public domain." State Br. 39. But this is circular reasoning at its zenith. The Supreme Court has pointed to cession and restoration language as virtually dispositive of diminishment precisely because of the actions it ordains. Where a tribe has ceded all interests in certain lands to the United States, it normally would be sensible to conclude that the interests that accompany reservation status were included in the cession. Likewise, because reservations are not considered part of the public domain, language restoring land to that domain is generally viewed as terminating reservation status. *Hagen v. Utah,* 510 U.S. 399, 412-13 (1994). That the 1871 Act did not accomplish either of these ends is precisely what makes it a poor candidate for a finding of diminishment, just as was true for the statutes at issue in *Solem, Mattz,* and *Seymour.*

The State also asserts in conclusory fashion that "the notion that land owned by private companies could retain reservation status was unthinkable under the

allotment era understanding that reservation status and Indian title were co-extensive." State Br. 46. As discussed above, "allotment era understanding[s]" have no bearing on Congress's particularized intent. Moreover, in *Seymour*, where the statute at issue called for the sale of reservation timberlands, Tribe Br. 23, the Supreme Court flatly rejected the argument that the "limits [of a reservation] would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians." *Seymour,* 368 U.S. at 357-58. The State's argument should fare no better here.

The State further claims that, unlike the statute at issue in *Solem*, the 1871 Act did not contemplate that the United States would act as a "sales agent" for the Tribe because "payment was guaranteed to the Tribe." State Br. 42. This is simply not the case. While the Act provided for a very low floor, the amount of revenue the Tribe was to receive for its timberlands was anything but fixed—the lands were to be auctioned off by the United States "to the highest bidder." (APP.143). The State's own expert characterized the United States' role under the Act as being that of a "sales agent," Tribe Br. 23-24, and the State should not now be heard to claim otherwise.[3]

Finally, the State seeks refuge in the non-operative language of the 1871 Act, but it can find no comfort there either. Tribe Br. 26-28. The State emphasizes that

[3] The distinction between the cases in which the United States acted as a mere "sales agent," and the cases in which the Court has found diminishment, is that in the latter, the reservation lands at issue were expressly ceded to the United States or restored to the public domain prior to their sale to non-Indians, thereby extinguishing the reservation status of those lands.

under section 7 of the Act, had the Indian party moved to a new reservation, the reservation status of the two townships would have ceased. State Br. 40-41. While this is almost certainly true, it sheds no light on the question before this Court. The Indian party never moved to a new reservation, and the State's assertion is accordingly of theoretical interest at best.

In short, the State wholly fails to distinguish the body of precedent holding that the mere sale or disposal of reservation lands to non-Indians, as effected by the 1871 Act, does not reveal a congressional intent to sever those lands from the reservation. Tribe Br. 22-25.[4]

B. The 1906 Act

The 1906 Act simply allotted the Tribe's previously unsold reservation land *to tribal members.* As the district court properly recognized, the 1906 Act "does not contain specific cession language or other explicit language evidencing the surrender of tribal interests in the reservation." (R.162, 132). This fact is particularly striking given that the Act itself, and the Appropriations bill of which it formed a part, both included explicit cession language with respect to other reservations. Tribe Br. 29 & n.6.

The State's argument amounts to nothing more than a series of *ipse dixits* that by allotting land in fee simple to tribal members, and leaving no communally-

[4] The State asserts that the Tribe "mischaracterizes" this body of law, State Br. 41, but utterly fails to substantiate its claim. Indeed, the State's brief is replete with loose claims that the Tribe has mischaracterized or "conveniently omit[ted]" relevant portions of the law. State Br. 50. Such claims should not be made lightly, and the Tribe takes exception to them here.

held land on the Reservation, the Act must by definition have disestablished the Reservation. The State's vehement assertions notwithstanding, however, the historical and legal record makes clear that Congress would not have understood either of these facts to substitute for an affirmative declaration that it was terminating the Reservation.

First, the State's argument that a treaty-protected reservation cannot exist *per se* in the absence of common tribal lands is belied by history. In the allotment era, it was not unusual to find recognized reservations that possessed little if any common land. For example, the 1855 Treaty with the Chippewa of Saginaw, *et al.* (11 Stat. 633) authorized members of the Saginaw Chippewa Tribe to select allotments, with no land to be held in common, within Isabella County and near Saginaw Bay in Michigan. In the subsequent 1864 Treaty with the Chippewa of Saginaw, *et al.* (14 Stat. 637), tribal members surrendered the right to select allotments at Saginaw Bay, but retained the right to select allotments "upon their reservation at Isabella." Similarly, in 1865 the Omaha Tribe entered into a treaty (14 Stat. 667) providing:

> The Omaha Indians being desirous of . . . abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe . . . , it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes . . . . The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation.

In both of these cases, the United States and the treating tribe understood that, even without communally-held land, a reservation could survive and flourish. By the same token, in 1921, the Ninth Circuit recognized the continuing existence of

the Coeur d'Alene Reservation, notwithstanding its finding that "[t]here are no tribal lands on the . . . reservation and all lands that had not been allotted were open to settlement on May 2, 1910." *Louie v. United States*, 274 F. 47, 48 (9th Cir. 1921).

Indeed, as the Tribe pointed out in its opening brief, a number of other reservations in Wisconsin were allotted in their entirety during the same period as the Stockbridge-Munsee Reservation, including the ones at Oneida and Red Cliff, but the State has continued to recognize those reservations to this day. Tribe Br. 47 n.12; *cf. State v. King*, 571 N.W.2d 680 (Wis. Ct. App. 1997) (discussing boundaries of Oneida Reservation established by Treaty of 1838 as remaining extant to this day). The State contests none of this, thereby making its charges that the Tribe is positing a "phantom" reservation, or one that is a "legal oxymoron," all the more curious. State Br. 55, 64.

The State's proposition that the fee-simple allotment of lands to tribal members automatically terminated the Reservation fares no better. It is well-established that the allotment of land to tribal members, without more, does not diminish or disestablish the allotted reservation. Tribe Br. 29-30 (discussing, *inter alia*, *Mattz,* 412 U.S. at 497 ("[A]llotment . . . is completely consistent with continued reservation status.")).[5] This is true for fee simple as well as for trust

[5] The State seeks to cast doubt on this principle by repeatedly quoting the statement in *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981), that the "allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction." However, *Montana* had nothing to do with diminishment, but focused solely on the Crow Tribe's jurisdiction to prohibit hunting and fishing

allotments. For example, in *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), then-Circuit Judge Blackmun considered the reservation status of a fee-patented allotment and explained that "[d]isestablishment . . . is not effected by an allotment to an Indian or by [the subsequent] conveyance of the Indian [fee] title to a non-Indian." *Id.* at 286. *See also Louie*, 274 F. at 47-49 (recognizing that allotted land held in fee is land "situate within the limits or boundaries of an Indian reservation"); *United States v. Frank Black Spotted Horse*, 282 F. 349, 351-52 (D.S.D. 1922) (rejecting the argument "that the mere giving of the [fee] patent by the government [to the Indian allottee] . . . operated to take it out of the reservation"). The 1864 Saginaw Treaty (14 Stat. 637) again serves as a clear refutation of the State's counter-historical narrative. Not only does that Treaty make it plain that the United States and the Saginaw Chippewa Tribe understood that the Tribe's Isabella Reservation could exist without communally-held land, it also makes clear their understanding that it could do so even where tribal members were to receive their allotments "in fee simple" upon a determination of competency,

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on non-Indian fee lands undisputedly within the boundaries of its reservation. *Montana,* 450 U.S. at 547. The *Montana dictum* runs counter to the Court's entire body of diminishment jurisprudence, which has expressly declined to equate allotment with the termination of reservation status. That the State relies on this *dictum*, rather than on any of the Court's diminishment or disestablishment holdings, demonstrates just how weak its allotment-based argument is.

The State also attempts to detract from the well-established law by quoting out of context a statement of the Tribe's expert, Dr. Oberly, that was directed at the jurisdictional concerns of the Office of Indian Affairs. State Br. 50. In truth, Dr. Oberly testified that allotment is not inconsistent with reservation status, (R.159, 34-39), and found no evidence in the historical record suggesting that Congress intended to disestablish the Reservation, (R.92, 3-4).

Art. 3, which determinations, in keeping with the pattern of the time, were largely made in blanket fashion shortly following Treaty ratification.[6]

Indeed, the State's argument defies logic. The State concedes, as it must, that the opening of reservation lands to non-Indians (which involved fee-simple grants) has long been held not to *per se* diminish or disestablish a reservation. State Br. 52. However, it nowhere explains why a different result should obtain with respect to fee simple grants to tribal members. The State argues that the United States and the tribes would have understood surplus land acts granting land to non-Indians to be less likely to affect reservation boundaries than statutes retaining all reservation land for tribal members, but cites not one whit of historical evidence in support of this argument. Not even the State's experts took such a radical position, and it surely would have come as a surprise to the Tribe to have been told that it could *better* protect its reservation by allowing non-Indians to occupy its lands as "helpful role models," State Br. 33, than by retaining that land for its own members. In *Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334 (9th Cir. 1996), the Ninth Circuit drew exactly the opposite conclusion in contrasting the facts of *Hagen,* where land was restored to the public domain for sale to non-Indians, and where diminishment was found, with the situation before it, where it held no diminishment to have resulted from an "executive order [that] restored lands solely to provide allotments to the members of

[6] When reservation lands are fee-patented, they are no longer subject to a federal restriction on alienation. Where the State errs is by equating the removal of this restriction with the termination of all federal supervision over a tribe and its lands.

the reservation. It applied *only to Indians* and involved no surplus land." *Id.* at 346 (emphasis added).

Finally, notwithstanding the State's erroneous assertions to the contrary, the 1906 Act did not confer citizenship on the Tribe's members. Congress knew precisely how to confer citizenship, having done so in both the 1843 and 1871 Acts. (APP.076, 144). Tribal members were likewise familiar with such language, and in the course of negotiating the Proposed Plan of Settlement formally rejected a proposal that "citizenship [shall] be declared for the entire membership on consummation of settlement." (APP.171).

The State's legal premise—that citizenship *per* se operated to terminate tribal and reservation status—is equally flawed. Citizenship is fully compatible with reservation and tribal status. *United States v. Celestine*, 215 U.S. 278, 287 (1909) ("The [General Allotment Act], which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations."); *United States v. Webb*, 219 F.3d 1127, 1135 (9th Cir. 2000) ("[N]either allotment, in and of itself, nor the grant of citizenship to Indians holding allotted land under the Dawes Act, revokes the reservation status of such land."). Thus, even if Congress had conferred citizenship via the 1906 Act, that fact would be irrelevant to the boundaries of the Reservation.

In sum, the State, in advancing its argument based on purported allotment-era understandings, urges this Court to reduce reservation status to a question of mere title. The courts, however, have consistently rejected such arguments, *Solem*,

465 U.S. at 470, and the State proffers no valid basis for departing from that well-established law here.

## II. The Legislative History and Circumstances Surrounding the Acts Do Not Provide Unequivocal Evidence that Congress Intended to Diminish or Disestablish the Reservation

The State's arguments regarding the legislative history and circumstances surrounding the 1871 and 1906 Acts rest upon a grossly inaccurate narrative in which the actions of Congress and the Tribe are motivated solely by the Tribe's inexorable quest for its own termination.[7] From this premise, the State seeks to manufacture tribal "consent" to the diminishment and disestablishment of its Reservation, and to analogize the circumstances surrounding the 1871 and 1906 Acts to those present in *Rosebud*, *DeCoteau v. Dist. County Court for the Tenth Judicial Dist.,* 420 U.S. 425 (1975), and *Yankton*.

But the State's analogy is sorely misplaced—in each of these three cases, (1) a tribal majority signed an agreement expressly ceding and relinquishing all interest in certain reservation lands, (2) Congress made plain in the legislative history its intent to ratify that agreement, and (3) Congress indeed passed legislation incorporating the agreement's express cession language. *Rosebud,* 430

[7] The State's narrative—where even the Treaty of 1856 that created the Reservation becomes evidence of its termination, State Br. 2-3, 43—is merely an extension of the discredited "abolition treaty" hypothesis adopted by the late Dr. James Clifton. (S-APP.258-262). Dr. Clifton presented the same hypothesis in *United States v. Washington* (involving the several "Stevens treaties" negotiated in 1854 and 1855 during Commissioner Manypenny's tenure), and it was soundly rejected. 873 F. Supp. 1422, 1439 (W.D. Wash. 1994) ("The record in this case does not support the contention that, with respect to the Stevens Treaties, the United States intended to break down tribal affiliations of the Puget Sound Tribes and absorb the tribal members as individuals."), *aff'd in relevant part*, 157 F.3d 630 (9th Cir. 1998).

U.S. at 590-91 & n.8, 593-97; *DeCoteau,* 420 U.S. at 436-41, 448; *Yankton,* 522 U.S. at 336-39, 352-54. The historical materials identified by the State here share none of these traits, and fall far short of the "unequivocal" evidence required to support a finding of diminishment. *Yankton,* 522 U.S. at 351.

A. The 1871 Act

The State does not, and cannot, contest the fact that the legislative history of the 1871 Act is bereft of any evidence that Congress contemplated diminishing the Reservation. Instead, that legislative history makes clear that Congress viewed itself as a sales agent acting on behalf of the impoverished Tribe. Tribe Br. 32-33.[8] The State seeks to divert attention from this fact by pointing to an unratified 1867 treaty that, in sharp contrast to the 1871 Act, would have expressly "cede[d] and relinquish[ed]" the entire two-township Reservation to the United States. (APP.131). But Congress did not purport to incorporate the 1867 treaty into the 1871 Act, and the State's expert recognized that the legislative history of the Act is devoid of any evidence that Congress even considered the treaty in connection with the Act. (R.137 (Newell Deposition) 92).

[8] One reading only the State's brief would have no idea that in the 1860s the Tribe was literally struggling for survival, that the Office of Indian Affairs was denying the Tribe the only economic support available to it (the Reservation's timber resources), and that non-Indian lumbermen were demanding access to those resources. Tribe Br. 6-8. It remains undisputed, however, that Congress acted to address these dire circumstances, and the State has never offered a plausible theory why such action would have required diminishment of the Reservation. *Id.* 32-34. The historical record is also clear that non-Indians' interest in the Tribe's lands was limited to harvesting the virgin timber, (R.92 (Oberly Report) 25-26, 28-33), and that those lands were thereafter abandoned, (R.93 (Cleland Report) 87).

The State's search for tribal consent in an 1868 draft document is even more perplexing. In the words of the State's expert, "[t]he draft treaty proposed" and "prepared *by the Indian Office* in the spring of 1868 apparently *was not submitted to the Stockbridge and Munsee*." (R.90 (Newell Report) 17) (emphasis added).[9] Nor was the draft document ever submitted to the Senate. (R.92 (Oberly Report) 21-22; R.162 (Order) 116). As the State's experts acknowledged, it is absurd to suggest that the 1868 draft document somehow informed congressional intent in 1871 when there is no evidence that Congress had any knowledge of its existence. (R.39 (Clifton Testimony) 130; R.137 (Newell Deposition) 92).

That the State hangs its hat entirely on the unratified 1867 treaty and 1868 draft document demonstrates just how weak its position is when it comes to the Act's legislative history and surrounding circumstances.

B. The 1906 Act

Notwithstanding its bold assertion that "everyone involved [with the 1906 Act] knew that the reservation would pass out of existence when all the land was fee-patented," State Br. 55, the State fails to cite a single shred of evidence that this was in fact the case. The State first tries to shoehorn the Proposed Plan of Settlement, the agreement negotiated by the Tribe and Inspector Beede, into its fictional narrative of self-termination and the paradigm set out in *Rosebud*, *DeCoteau*, and *Yankton*. But unlike in *Rosebud*, where the Commissioner of Indian Affairs instructed the Inspector to negotiate for the "cession" of reservation lands,

[9] The State erroneously asserts that the draft language was "hand-written" and "proposed" by the Tribe. State Br. 5, n.4, 45.

430 U.S. at 590-91, the Commissioner here merely instructed Beede to confer with the Tribe and "to settle upon a plan whereby [they] . . . may be given allotments *on the reservation* . . . ." (APP.163) (emphasis added). In the course of negotiating the Plan, moreover, the Tribe explicitly rejected proposed language that would have "accomplish[ed] the very objectives the [State] now seeks to achieve," *Mattz*, 412 U.S. at 503—i.e., that the "tribal relationship shall be dissolved . . . on consummation of settlement." (APP.171). On its face, the Proposed Plan provides solely for the allotment of Reservation lands, not for their cession as did the tribal agreements in *Rosebud*, *DeCoteau*, and *Yankton*, and certainly not for the termination of the Tribe itself. (APP.165-166).[10]

Finding no legitimate support in the Proposed Plan, the State can only muster ambiguous statements from various individuals—not one a member of Congress—characterizing the Proposed Plan and draft legislation as effecting the "settlement" and "adjustment" of the Tribe's affairs.[11] The Secretary of the Interior's initial transmission of the Proposed Plan to Congress, however, indicates that these terms merely refer to the long-standing disputes over tribal lands and funds:

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[10] The district court correctly recognized that the 1906 Act "is devoid of an indication that Congress intended to dissolve the Stockbridge and Munsee as a Tribe." (R.162, 142). Had it wanted to, Congress knew precisely how to terminate the Tribe, having done so in 1843. (APP.076).

[11] The State goes so far as to quote statements, State Br. 54 (quoting (S-APP.090)), from *the non-Indian citizens of Shawano County*, who were unabashedly advocating "for the interest of Shawano and the surrounding country that the reservation be allotted and opened up." Even these statements are silent with respect to the continued existence of the Reservation.

> The act of 1893 . . . unhappily, did not . . . provide ways and means to equitably adjust their financial and land matters, owing to the increased membership authorized by the said act. Therefore, to adjust these differences, it has been found necessary to devise a plan of settlement, which is provided for by the [e]nclosed draft of proposed legislation[.]

(APP.158); *see also* Tribe Br. 36-37. The State is simply unable to proffer any evidence that Congress equated these terms (which nowhere appear in the 1906 Act) with the termination of the Reservation or the Tribe itself.

In sum, there is no evidence that Congress considered the boundaries of the Reservation in connection with the 1871 and 1906 Acts. "In contrast to the [statutes at issue in *Rosebud* and *DeCoteau*]," the Acts "did not begin with an agreement . . . in which the Indians agreed to cede a portion of their territory to the Federal government." *Solem*, 465 U.S. at 476. The legislative history and the circumstances surrounding the Acts simply do not contain the unequivocal evidence necessary to support a conclusion of treaty abrogation.

## III. Matters Occurring Decades after the Acts Cannot and Do Not Demonstrate that Congress Clearly Intended to Diminish or Disestablish the Reservation

While subsequent history "will not substitute for [the] failure of the instrument's language or contemporaneous history to evidence an intention to terminate all or some of the reservation," *Shawnee Tribe v. United States*, 423 F.3d 1204, 1223 (10th Cir. 2005), the State nevertheless makes such evidence the lynchpin of its case.[12] The State's materials, however, wilt in the face of explicit

[12] The State quibbles with the Tribe's characterization of subsequent history evidence as carrying "little force" and being of "limited interpretive value." State

federal actions recognizing the boundaries of the 1856 Treaty Reservation and the United States' continuing supervision over the Tribe, and are patently insufficient to act as a proxy for clear congressional intent decades earlier.

A. The 1871 Act

The State cannot seriously dispute that in the 1893 Act Congress continued to recognize the 1856 Treaty Reservation, Tribe Br. 40, rather than the eighteen-section reservation hypothesized by the State. Nevertheless, the State asks the Court to place greater evidentiary weight on statements made in connection with bills that were *rejected* prior to the 1893 Act. State Br. 9, 47-48. *See* (R.90 (Newell

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Br. 31. But the Court has plainly characterized such evidence as "less illuminating than the contemporaneous evidence," *Hagen*, 510 U.S. at 420, and as the "least compelling [consideration]." *Yankton*, 522 U.S. at 356. Ultimately, "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place . . . ." *Solem*, 465 U.S. at 472.

There are good reasons for this. First, it is Congress, not bureaucrats in the Bureau of Indian Affairs ("BIA"), that has plenary power over Indian affairs. The revocation of prior treaty promises is a serious matter, and the Court has never been willing to locate that power in agency officials.

Second, the BIA's history in the administration of Indian affairs is a sad one at best. For much of the nineteenth and twentieth centuries, the BIA acted contrary to the interests of the tribes to whom it owed a trust responsibility, often grievously so. *See, e.g.,* Remarks of Kevin Gover, Assistant Sec'y of Indian Affairs, Dep't of Interior (Sept. 8, 2000), *available at* http://www.tahtonka.com/apology.html. There is nary a treaty promise made by the United States that a BIA official has not sought to disavow at some point. The courts have accordingly viewed it as their solemn responsibility to interpret the language and intent behind treaties and statutes affecting tribes as of the time they became law, rather than to blindly defer to subsequent statements of BIA officials stripping treaty or statutory promises of all force. *See, e.g., United States v. Washington,* 873 F.Supp.2d 1422, 1440-41 (W.D. Wash. 1994) (declining to rely on letter written by Commissioner of Indian Affairs Leupp *in 1905*, which letter, if followed, would have negated in significant part the "in common" treaty fishing rights instead vindicated by the courts in the *United States v. Washington* litigation), *aff'd in relevant part,* 157 F.3d 630 (9th Cir. 1998).

Report) 26-27). The proponents of these bills advocated the "extinction of the tribe," (S-APP.053, 055, 057)—a goal diametrically opposed to that achieved by the 1893 Act—and are plainly not a reliable source for ascertaining Congress's intent in 1893, let alone in 1871.[13]

Nor do the rote administrative reports cited by the State constitute cogent evidence that Congress clearly and plainly intended in 1871 to diminish the Reservation. While the Commissioner's 1872 annual report indeed refers to the "dispos[al]" of Reservation lands, State Br. 8, the Supreme Court has long held that this language does not "evince congressional intent to diminish the reservations." *Yankton*, 522 U.S. at 345. Nor are administrative references to a "diminished" reservation, first appearing in 1885, (S-APP.250), indicative of congressional intent in 1871, particularly where those references in all likelihood were simply to the sale of land. *See Solem*, 465 U.S. at 478 (declining to rely even on *contemporaneous* congressional reports referring to the "reduced" and "diminished" reservation).

B. The 1906 Act

The State's inventive narrative, in which the Tribe finally achieved its dissolution via the 1906 Act, cannot be reconciled with the actions of Congress or the Office of Indian Affairs.[14] In 1916, for example, Congress appropriated $95,000

[13] Nor may the statements of a single attorney (John Adams) advocating in 1892 on behalf of disenfranchised Citizen party members, State Br. 47-48, be equated with the intent or understanding of Congress or the Tribe.

[14] The State cites testimony from "the Tribe's attorney," State Br. 56, ignoring the fact that he was the District Attorney for Shawano County, was also representing non-Indian grantees of tribal allotments, and had already instructed county officials to place the lands on the tax roll. (S-APP.117, 124). Conflicts of interest aside,

"to be used in addition to the *tribal* funds of the Stockbridge and Munsee *Tribes* of Indians, for the payment of the members of the [same] who were enrolled under the [1893 Act], equal amounts to the amounts paid to the other members of *said tribe* prior to the enrollment under said Act[.]" 39 Stat. 123, 156 (emphasis added). This and other legislation, *see, e.g.,* 43 Stat. 644 (authorizing the Tribe to sue the United States in the Court of Claims), plainly contradicts the State's supposition that Congress terminated its supervision of the Tribe in 1906, and that the Tribe passed out of existence then. *See Status of the Wisconsin Winnebago*, 1937 WL 4598, at *2 (Sol. Gen.) (Mar. 6, 1937) (treating statute authorizing Wisconsin Winnebago to sue in the Court of Claims as indicating that "these Indians are still considered as a tribe or band by Congress and the Department [of the Interior]").

Likewise, it remains undisputed that the Office of Indian Affairs continued to provide myriad federal services on the Reservation (many of which, contrary to the State's claims, were linked to tribal status) and consistently reported approximately 600 tribal members under federal supervision. Tribe Br. 12-13.[15] The Office also

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nothing in the hearing report speaks to the question of whether the 1906 Act affected the Reservation's boundaries.

[15] With respect to liquor enforcement jurisdiction, State Br. 59-60, the historical record in fact reveals considerable confusion, (R.93 (Cleland Report) 102-03; R.136 (Cleland Deposition) 160-77). For example, in 1929, Deputy Spl. Officer John Winans, wrote that he "[knew] of no act of Congress which has ever dissolved the Stockbridge and Munsee Reservation or where the authority of the Federal Government relative to the Indian liquor laws has ever been surrendered," but nevertheless sought to clarify his jurisdiction. (APP.210). Nor were Commissioner Collier's views as unequivocal as the State suggests. In May 1933, he distinguished the two "portion[s]" of the Reservation. (APP.207) ("The . . . tracts . . . are not within the 18 sections reserved from disposition for the Indians [under the 1871 Act]. . . . [T]hey are in the opened part of the reservation . . . .") (APP.207).

continued to report the allotment status of Reservation lands following the issuance of fee patents in 1910, just as it did for the Red Cliff and Oneida Reservations. (R.92 (Oberly Report) 64-66). It had no need to do this for terminated reservations. By the same token, in 1917, the House Committee of Indian Affairs recognized the Reservation, along with the Red Cliff and Oneida Reservations, as "closed reservations" (i.e., they had not been opened to non-Indian settlement) where "all lands [had been] practically allotted." (R.157 (Master Documents) MD0583).

Accordingly, the historical record does not conflict with Assistant Commissioner of Indian Affairs Abbott's 1911 legal conclusion that the fee-simple allotment of available lands did not terminate the Reservation. Tribe Br. 43. Nor was that conclusion a "lone outlier," State Br. 59—it is fully consistent with the detailed legal analysis performed by the Department of Interior in 1974, (APP.240-242), and with further BIA opinions in 1996. (APP.243-244). [16]

Moreover, the United States reaffirmed the substance of Assistant Commissioner Abbott's conclusion when it sued the State of Wisconsin in 1924 to recover swamp lands throughout the two townships, (APP.199), "to be administered for the benefit of . . . the Stockbridge and Munsee Indians," (APP.202). The Tribe is not engaging in a "distortion of history," State Br. 59, when it makes this point.

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[16] In making its claims regarding the Abbott letter, the State continues to rely on the *dicta* in *United States v. Gardner,* 189 F. 690 (E.D. Wis. 1911), and *United States v. Anderson,* 225 F. 825 (E.D. Wis. 1915), but this *dicta* is premised on erroneous factual and legal assumptions. Tribe Br. 43-44. The Supreme Court has also made clear that the *post-facto* statements of individual legislators, such as the judge in *Gardner*, State Br. 58, are not probative of congressional intent. *See, e.g.*, *Chickasaw Nation v. United States,* 534 U.S. 84, 92-93 (2001).

The factual predicate for the United States' claim, as stated in its Complaint, was its recognition of the entire two-township Reservation as extant—"the true intent and meaning of the [1856 Treaty] [was] that all the lands of whatever character comprised in the two townships . . . should be reserved for the sole and exclusive benefit of the Stockbridge and Munsee Indians." (APP.198). The State proffers not one reason why the United States would conceivably have taken the remarkable step of suing the State had it believed otherwise.[17]

The State devotes more attention to rehashing the Tribe's organization and acquisition of lands under the IRA, which began three decades after the 1906 Act, than to any other facts in this case. Without question, the IRA has been a vehicle for the Tribe to reacquire communally-held lands within the two-township Reservation, and for the United States to reaffirm its treaty commitment that those townships comprise the Tribe's permanent homeland. However, the State fails entirely to rebut any of the reasons set forth in the Tribe's opening brief as to why the Tribe's IRA history is not probative of the congressional intent underlying the 1906 Act. Tribe Br. 45-48. It suffices to say that in light of the United States' actions between 1906 and 1935, the later IRA "reservation" proclamations render the subsequent history evidence, at most, contradictory and inconsistent. *See Solem*, 465 U.S. at 478-79. In fact, since 1939 the Department of Interior's own

[17] During this litigation, the State itself recognized that these lands were within the Reservation, (R.92 (Oberly Report) 52-53), as had the Supreme Court of Wisconsin in *State v. Donald*, 157 N.W. 794, 797-98, 810 (Wis. 1916) (confirming conclusions in referee's report that swamp lands are located "in" and "within" the "Stockbridge and Munsee Indian reservation[]").

maps have represented the Stockbridge-Munsee Reservation as the two townships set aside under the 1856 Treaty. (R.92 (Oberly Report) 62-63).[18]

Finally, the State does not dispute that the demographics of the two-township Reservation compare very favorably to cases in which the Supreme Court and Circuit Courts have found no diminishment or disestablishment. Tribe Br. 49-50. The State nevertheless attempts to gerrymander a more limited "disputed area" (by excluding lands reacquired by the Tribe) to skew the population statistics. The "disputed area," however, is the *entire* two-township Reservation. *See, e.g., Solem*, 465 U.S. at 480 (treating the disputed area as *the entire area alleged to have been diminished*). Thus, the demographics, and the problems of checkerboard jurisdiction, Tribe Br. 49 n.14, weigh heavily in the Tribe's favor.[19]

## CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court reverse the judgment of the district court.

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[18] The State submits several maps that *do not* depict the Reservation, State Br. 2, but that illustrate the result the State seeks in this case.

[19] The State's anecdotal evidence of having exercised jurisdiction within the Reservation does not support a finding of disestablishment in the absence of clear and plain congressional intent. *See City of New Town v. United States*, 454 F.2d 121, 123 (8th Cir. 1972). Such evidence is particularly unreliable here because beginning as early as 1879, the State took the "unsound" legal position of asserting broad jurisdiction over Indians and reservation lands, *State v. Rufus*, 237 N.W. 67, 68 (Wis. 1931), and via Public Law 280, 28 U.S.C. § 1360, Congress in 1953 expressly granted the State certain forms of civil jurisdiction over all Indian country within its boundaries.

Dated this 5th day of May, 2008.

Respectfully submitted,

By:_____

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CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)(i)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C)(i), the foregoing Reply Brief of Defendants-Appellants The Stockbridge-Munsee Community and Robert Chicks is proportionally spaced in Century Schoolbook font, has a typeface of 12 points in both the text and footnotes and contains 6,997 words.

DATED this 5th day of May, 2008.

By: _____
Cory J. Albright

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2008, I served the foregoing Reply Brief of Defendants-Appellants The Stockbridge-Munsee Community and Robert Chicks on Plaintiff-Appellee State of Wisconsin by causing two hard paper copies and one CD-ROM containing the full PDF digital version of said Reply Brief to be sent via the United States Postal Service, priority postage prepaid to:

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