IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, et al., Plaintiffs, and STATE OF NEBRASKA Plaintiff-Intervenor, v. MITCHELL PARKER, In his official Capacity as Member of the Omaha Tribal Council, et al., Defendants, and THE UNITED STATES OF AMERICA, Defendant-Intervenor.	Case No. 4:07-cv-03101 **PLAINTIFFS' RESPONSE TO DEFENDANTS' AND DEFENDANT-INTERVENOR'S BRIEFS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Nineteenth-century Euroamericans valued agrarianism and self-sufficiency, even as Thomas Jefferson's ideal of a nation of yeoman farmers became increasingly unrealistic. Supporters of Indian policy reform touted agriculture as the highest and best use of land, in some cases genuinely believing that family-based farming was the key to Indians' survival. In other cases, supporters of reform used agrarian rhetoric to justify further dispossessing Indian tribes, arguing that Indians would need less land as farmers, freeing up "surplus" land to be developed by Euroamericans. Both groups wanted to eliminate reservations: the former because they believed tribalism and collectivism held Indians back, and the latter because they believed reservations locked up land that could be put to productive use by non-Indians.

The policy of allotment in severalty—dividing collectively held Indian reservations into individually owned parcels—proved to be a workable compromise between humanitarians who advocated Indian assimilation and those

> who wanted to develop Indian lands. This alliance was not fully realized until 1887 when Congress passed the General Allotment Act, also known as the Dawes Act after Massachusetts Senator Henry Dawes, one of its key proponents. The Dawes Act called for reservations to be divided among individual Indians into allotments of land of a set size, and any leftover land would be opened to Euroamerican settlers.
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> The 1882 Act at issue in this litigation was an important precursor to the Dawes Act. Alice Cunningham Fletcher, an ethnologist, arrived on the Omaha Reservation in 1881 to study the tribe, and she quickly became an advocate of the tribe's campaign for stronger titles to land. She helped the tribe petition Congress and secure passage of the 1882 Act, which combined allotment with land cession. After her experience allotting the Omaha Reservation, Fletcher became an advocate of Indian policy reform and helped promote assimilation in general, as well as the Dawes Act in particular.

(Dr. Emily Greenwald, *The Western Boundary of the Omaha Reservation* (2011) (hereinafter "Greenwald Report"), Filing #117-1 at CM/ECF p. 8-9.)

That the 1872 and 1882 Acts at issue in this case preceded the Dawes Act is an important distinction.[1] The vast majority of surplus lands passed out of tribal control following the 1877 enactment of the General Allotment Act. Felix S. Cohen's Handbook of Federal Indian Law 72-74 (2012 ed.); *Solem v. Bartlett*, 465 U.S. 463, 467 n. 6 (1984). Under the Dawes Act, individual parcels of land were allotted to tribe members with the remaining parcels declared surplus and opened for settlement by Euroamericans. *Solem*, 465 U.S. at 466-67. Thus, the "checkerboard" pattern of distribution arose when

[1] Indeed, the Supreme Court has never addressed diminishment within the context of a pre-Dawes allotment act. See, *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425 (1975) (reservation terminated by 1891 Act); *Hagen v. Utah*, 510 U.S. 399 (1994) (reservation diminished through series of acts passed in 1901, 1903 and 1905); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (reservation diminished by 1904, 1907 and 1910 acts); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1988) (reservation diminished by 1894 act); *Seymour v. Supt. of Wash. State Pen.*, 368 U.S. 351 (1962) (reservation not disestablished by 1906 act); *Solem v. Bartlett*, 465 U.S. 463 (1984) (reservation not diminished by 1908 act); *Mattz v. Arnett*, 412 U.S. 481 (1973) (reservation not disestablished by 1892 act).

allotments to tribe members were interspersed with surplus lands purchased by non-Indian settlers. *Id.*, 465 U.S. at 472 n.12.

The 1872 and 1882 Acts at issue here were similar to the Dawes Act (to the extent the acts provided for allotments to tribe members along with the sale of surplus lands to settlers), but also fundamentally different. From the beginning, the Omaha Tribe sought to "separate" a contiguous 50,000 acres from the western portion of the reservation for settlement by non-tribe members and ultimately to "segregate" the eastern portion of the reservation allotted to tribe members from the western portion of the reservation settled by Euroamericans. Joint Stipulation of Facts (filing #100) at ¶¶ 49, 51, 67 (hereinafter "J.S.")

The 1872 Act specifically referred to the 50,000 acres from the western portion of the reservation as the land "separated from the remaining portion of said reservation" and as the "lands so separated." (J.S., Filing #100 at ¶ 51.) After the survey for sale of the western portion of the reservation pursuant to the 1872 Act, the Commissioner of Indian Affairs reported that "49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve." (J.S., Filing #100 at ¶ 53.) From this point forward, whether the Office of Indian Affairs ("OIA") reported the Omaha Reservation acreage as total acres or as a combination of allotted and unallotted acres, the 49,762 acres from the western portion of the reservation were deducted from the OIA's report of the size of the Omaha Reservation. (J.S., Filing #100 at ¶¶ 103-06, 108-10; Greenwald Report, Filing #117-1 at CM/ECF p. 26-27.)[2]

[2] The United States mistakenly asserts that the OIA's reported acreage of the Omaha Reservation was inconsistent because the OIA listed the total reservation "acreage as 143,225 prior to the 1882 Act." (Br. of the United States in Supp. of Summ. J., Filing #127 at CM/ECF p. 28)

Although the 1872 Act resulted in only the sale of 300 acres, (J.S., Filing #100 at ¶ 53) the Omaha Tribe continued their efforts to dispose of the roughly 50,000 acres from the western portion of the reservation. (J.S., Filing #100 at ¶¶ 54-56, 59.) The tribe's request gained traction in 1882. In introducing a new bill to sell this land, Senator Saunders explained that the sale "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." (J.S., Filing #100 at ¶ 67.) Under the bill, "[t]he lands that [the tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished." *Id.*

Senator Saunders explained that the Omahas did not want to live in the area to be sold. "I do not think an acre of this land will be sold to the Indians. . . ," and "I did not think as a matter of fact a single acre of land [west of the right of way] would go into the hands of Indians." (J.S., Filing #100 at ¶ 68.) Senator Saunders' belief was consistent with the report submitted by the local agent which stated, "there are no Indians living on the western portion of the Omaha reservation." (J.S., Filing #100 at ¶ 68.) When the bill was referred to the House, Representative Valentine confirmed Senator Saunders' assessment: "You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through

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(hereinafter "US Brief"). The United States failed to recognize that it was the 1872 Act, not the 1882 Act, which resulted in the approximately 50,000 acres being removed from the reported size of the Omaha Reservation leaving the reservation acreage at 143,225. Similarly, the United States relies upon Senator Haskell's representation that the total reservation size prior to the sale proposed by the 1882 Act would be 150,000 acres. *Id*. The United States fails to disclose that the Senator subsequently corrected himself on the record, stating that after the sale, 143,000 acres would remain in the reservation. (Greenwald Report, Filing #117-1 at CM/ECF p. 15 n.60 citing Congressional Record, 47th Cong., 1st sess., July 26, 1882, 13: 6539.)

that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it." (J.S., Filing #100 at ¶ 76.) "They do not care about making selections over on that side of the road at all." (J.S., Filing #100 at ¶ 77.)

The Omaha Tribe similarly expressed their desire to sell the 50,000 acres west of the railroad right of way and for the railroad to serve as the new boundary of their reservation. "Do not sell the land [west of the right of way] under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it. When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements." (J.S., Filing #100 at ¶ 76.)

In 1885, Omaha and Winnebago Agent George Wilson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder." (J.S., Filing #100 at ¶ 94.) In 1887, the Secretary of the Department of the Interior referred to land west of the railroad right of way as "within the limits of the former Omaha Indian Reservation." (J.S., Filing #100 at ¶ 96.) In 1901, Indian Agent Charles Mathewson reported, "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and forms the southwestern boundary of the Omaha Reservation." (J.S., Filing #100 at ¶ 107.)

The 1935 Annual Statistical Report for the Winnebago Agency listed three "reductions" to the original acreage of the Omaha reservation, including the "[s]ale of

land west of railroad, 50,157 acres." (J.S., Filing #100 at ¶ 113.) From the late 1880's to the present, Indians have comprised less than two percent of the population west of the right of way. (J.S., Filing #100 at ¶ 115.) Although the Omaha Tribe has enforced the provisions of the Omaha Tribal Code east of the railroad right of way, it has never sought to do so west of the right of way. (J.S., Filing #100 at ¶¶ 138-143.) Nor does the Omaha Tribe offer foster care, medical, welfare or child protective services west of the right of way. (J.S., Filing #100 at ¶ 144.) The Omaha Tribe does not have any offices, schools, industries or business west of the right way. (J.S., Filing #100 at ¶ 145.) The Omaha Tribe does not conduct tribal celebrations or ceremonies west of the right of way. (J.S., Filing #100 at ¶ 146.) The Omaha Tribe does not conduct governmental or ceremonial activities west of the right of way and has no mineral rights or other claims to land west of the right of way. (J.S., Filing #100 at ¶ 147.)

The Supreme Court's "analysis of surplus land acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found." *Solem*, 465 U.S. at 471. Thus, the central question in this litigation is whether Congress intended to alter the boundary of the Omaha Reservation when it "separated" and "segregated" 50,000 acres west of the railroad right of way for settlement by non-tribe members and thereafter treated the area west of the right of way fundamentally different from the tribal lands east of the right of way.

RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

A party seeking summary judgment must submit "a separate statement of material facts about which the moving party contends there is no genuine issue to be tried." NECivR 56.1(a)(1). Additionally, the required statement of material facts "should consist of short numbered

paragraphs, each containing pinpoint references to affidavits, pleadings…or other materials that support the material facts stated in the paragraph." NECivR 56.1(a)(2).

I. Defendants Did Not Submit a Separate Statement of Material Facts as Required by NECivR 56.1 and the Undisputed Facts in the Joint Stipulation of Facts Constitute Their Factual Submission.

Defendants did not submit a statement of material facts in their Brief in Support of Motion for Summary Judgment in accordance with the Federal Rules of Civil Procedure and this Court's Local Rule 56.1. (Defs.' Br. In Supp. of Mot. for Summ. J., Filing #114 at CM/ECF pp. 5-7 (hereinafter "Defs.' Brief"). Because they did not submit a statement of material facts, Defendants also did not provide pinpoint citations as support for any of their factual allegations. Defendants instead incorporate by reference, and rely on the Statement of Undisputed Facts, paragraphs 1-167, pages 1-26 from the parties' Joint Stipulation of Facts (filing #100) (the "Undisputed Facts"). To the extent that Defendants intended to submit the Undisputed Facts as its "separate statement of material facts" as required by NECivR 56.1, no response is necessary as Plaintiffs do not oppose or otherwise dispute the Undisputed Facts.

II. Defendants' Additional Disputed Facts Are Not Properly Supported and Were Not Deemed Admitted in the Tribal Court.

While not submitted in accordance with NECivR 56.1, Defendants also reference the controverted facts, set forth in the separately-numbered paragraphs 1-16, pages 26-28, of the Joint Stipulation of Facts (the "Disputed Facts"). Defendants incorrectly argue that Plaintiffs failed to controvert the Disputed Facts in the Tribal Court and these facts are therefore admitted because NECivR 56.1 applied in the Tribal Court proceedings. Because the Tribal Court has its own summary judgment procedure, and because Defendants failed to properly support the Disputed Facts, the Disputed Facts were not deemed admitted and the Court should not adopt the Disputed Facts.

Rule 27 of the Omaha Tribal Code Rules of Civil Procedure is titled "Summary Judgment" and states:

> Any time 30 days after commencement of an action, any party may move the court for summary judgment as to any or all of the issues presented in the case and such shall be granted by the court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Such motions, which shall be served not less than ten (10) days prior to the hearing on said motion, may be supported by affidavits, discovery, or memoranda, all of which must be made available to opposing parties a least five (5) days prior to the hearing.

Omaha Tribal Code R. of Civ. P. 27, available at: http://omaha-nsn.gov/wp-content/uploads/2013/08/Title-02-Rules-of-Civil-Procedure.pdf.[3] Further, Omaha Tribal Code Rule of Civil Procedure 1(d) states "Any procedures or matters not specifically set forth herein shall be handled in accordance with the Federal Rules of Civil Procedure insofar as such are not inconsistent with these rules, and with general principles of fairness and justice as prescribed and interpreted by the Court." Omaha Tribal Code R. of Civ. P. 1(d).

Defendants argue that the "Tribal Code does not have specific provisions governing procedure on summary judgment." (Defs' Brief, Filing #114 at CM/ECF p. 6.) As set forth in Rule 27, Defendants are simply wrong. Tribal Code Rule of Civil Procedure 27 sets forth a clear procedure to be followed by the parties in summary judgment proceedings. Indeed, the parties must set a hearing date, serve the motion no less than 10 days prior to the hearing, and provide all evidence to be submitted in support of the motion to the opposing party no less than five days prior to the hearing. This procedure is similar to that followed in Nebraska state courts. Neb. Rev. Stat. §25-1332 (The parties must set a hearing date and may serve affidavits in support of or in opposition to the motion. "The motion shall be served at least ten days before the time fixed

[3] The Tribal Code Rules of Civil Procedure were updated in 2013. However, the sections cited herein were exactly the same during the pendency of the Tribal Court proceedings as they are in the 2013 edition of the Rules. This Court may therefore rely on the 2013 edition as published on the Omaha Tribe's Website.

for the hearing."). While perhaps not as robust as the procedure set forth in NECivR 56.1, it is a procedure similar to that followed in Nebraska state court, and there is no need to substitute the Federal Rules of Civil Procedure or this Court's Local Rules for the Tribal Code Rules of Civil Procedure. Plaintiffs fully complied with Tribal Code Rule of Civil Procedure 27, and Defendants do not argue otherwise.

In addition, Defendants rely on a two-page excerpt of the parties' summary judgment hearing in Tribal Court as support for the misleading assertion that the Tribal Judge "agreed that the rules applicable in this Court would be adhered to in the tribal court." (Defs.' Brief, Filing #114 at CM/ECF p. 6.) However, Defendants did not submit the transcript of the full discussion from the summary judgment hearing. In that discussion, the Tribal Judge inquired of Plaintiffs' counsel whether Plaintiffs disputed the facts set forth in Defendants' brief. In response, counsel for Plaintiffs stated:

> MR. SUMMERLIN: Except to the extent we did -- I guess and I -- forgive me, Your Honor, if the court has more specific procedure in the manner in which they wanted us to respond to their statement of facts.
> THE COURT: No.
> MR. SUMMERLIN: We provided an affidavit in response to their statement of facts from Emily Greenwald that -- I don't want to minimize it. It took issue with some of their facts, but they were, you know, things kind of more about what does this mean as opposed to saying, well, you know, the facts that you've stated are wrong. We're -- our argument is more that, well, the facts you stated are – you know, it's from a document that's correct, but you reached the conclusion that that means X, and we say no, it really means Y.

(Tr. of Summ. J. Hr'g, at pp. 13-14.)

After a discussion during which counsel for Plaintiffs specifically objected to the application of NECivR 56.1, the Tribal Judge determined that he was going to "apply the rules that would make it through both" and that he is "not knowledgeable . . . about all of the rules in the local rules." (*Id.* at pp. 13-16.) At no point during the summary judgment hearing did the Tribal Judge explicitly state that he would apply this Court's Local Rules, a fact which a reading

of the full transcript of the discussion clearly shows. The Tribal Judge's statement regarding the Local Rules is ambiguous at best and is not a sufficient basis on which to determine that the Disputed Facts were deemed admitted, particularly in light of the Tribal Judge's failure to make any specific factual findings.[4]

In light of the clear procedure set forth in the Tribal Code Rules of Civil Procedure, the Tribal Court's ambiguity with respect to which rules applied, and the statements by Plaintiffs' counsel objecting to the Disputed Facts and the application of the Local Rules, the Disputed Facts were not deemed admitted in the Tribal Court proceedings. Thus, Plaintiffs address the Disputed Facts as set forth below, in accordance with NECivR 56.1.

III. Plaintiffs' Response to Defendants' Disputed Facts.

Treating the Disputed Facts as submitted in accordance with NECivR 56.1, Plaintiffs submit the following "concise response" to the Disputed Facts.[5]

1. The 1882 Act was different from the 1854 Treaty cession of Omaha lands and different from the 1865 Treaty cession and sale of lands by the Omaha Indians to the federal government for use as a reservation for the Winnebagos.

Response: Plaintiffs do not dispute that the text of the 1882 Act, the 1854 Treaty, and the 1865 Treaty is not identical. The remainder of this paragraph contains, at best, a legal argument and is addressed more fully below.

[4] Plaintiffs more fully address the Tribal Court's lack of factual findings below.

[5] Because Defendants did not actually submit the Disputed Facts in accordance with NECivR 56.1, Plaintiffs must guess, based on the Tribal Court record, which documents in the record in this matter support the Disputed Facts. Because Defendants included the Disputed Facts nearly verbatim in their Brief in Support of Motion for Summary Judgment, Plaintiffs assume that, if Defendants had complied with NECivR 56.1, the citations would be the same as those submitted in Tribal Court.

2. Specifically, the 1882 Act, which allowed reservation land to be sold to white settlers, did not use certain language found in the 1854 and 1865 Treaties, to-wit:

- "forever relinquish all right and title"
- "In consideration of and payment for the country herein ceded, and the relinquishments herein made"
- "cede, sell, and convey to the United States a tract of land from . . . their present reservation"
- "vacate and give possession of the lands ceded [by this treaty] immediately after its ratification."

Response: Plaintiffs do not dispute that these terms and phrases are not found verbatim in the 1882 Act. The remainder of this paragraph contains, at best, a legal argument and is addressed more fully below.

3. The 1882 Act did not provide for the total surrender of all tribal rights on the opened lands.

4. The 1882 Act did not require that the Omaha tribal members vacate any part of the reservation.

5. The 1882 Act did not provide for a relinquishment of title to the land in exchange for a specific sum of money, as did the 1854 and 1865 Treaties.

6. The 1882 Act did not restore the opened lands to the public domain.

7. The 1882 Act did not prohibit access by the Omaha Tribe to the opened lands following its passage.

Response to paragraphs 3-7: As submitted in the Tribal Court, Defendants' only citation as support for the statements set forth in paragraphs three through seven is an unsupported

"summary" contained on page 52 of the report of their expert, R. David Edmunds. Plaintiffs do not dispute that Mr. Edmunds included these statements in his report. However, Plaintiffs dispute that the statements are properly referenced material statements of fact for purposes of summary judgment. Mr. Edmunds does not cite any factual material supporting his statements and does not attest to having any personal knowledge of these statements. As such, these statements are unsupported legal conclusions, which are specifically prohibited from inclusion in a statement of material facts by NECivR 56.1(a)(2) ("The statement must not contain legal conclusions.").

8. At all times pertinent to the issues before this Court, Indian allotments, by definition, could only be granted upon reservation land.

Response: In the Tribal Court, Defendants did not provide any citation or support for this statement. It is therefore an unsupported legal conclusion, which is specifically prohibited from inclusion in a statement of material facts by NECivR 56.1(a)(2).

9. Additionally, the Kimball Opinion erroneously concluded that an earlier Act unsuccessfully attempting to sell part of the reservation constituted a "de facto diminishment."

Response: Plaintiffs do not dispute that the 1989 Kimball opinion concluded that diminishment occurred. The remainder of this paragraph is not a factual statement but instead contains a legal argument that is at the center of this case, whether diminishment occurred, and is addressed more fully below.

10. In 2009, the EPA brought an administrative enforcement action against Krusemark Ag, Inc. for the assessment of civil penalties pursuant to Section 14 of the Federal Insecticide,

Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 and related federal regulations (the "EPA Action").

Response: Plaintiffs do not dispute that the EPA may have taken the action described in this paragraph. To the extent this paragraph contains a legal argument regarding the meaning of the EPA's action, it is addressed more fully below and in Plaintiff-Intervenor's Brief.

11. On December 1, 2009, the EPA entered into and filed a Consent Agreement and Final Order with respect to the EPA Action.

Response: Plaintiffs do not dispute that the EPA may have taken the action described in this paragraph. To the extent this paragraph contains a legal argument regarding the meaning of the EPA's action, it is addressed more fully below and in Plaintiff-Intervenor's Brief.

12. Krusemark Ag, Inc. is located at 58395 849th Road, Pender, Nebraska 68047 and is a pesticides producing establishment (the "Krusemark Ag Facility"). The Krusemark Ag Facility is situated and operates west of the abandoned Sioux City and Nebraska Railroad right of way.

Response: Plaintiffs do not dispute the address of the Krusemark Ag, Inc. facility. To the extent this paragraph contains a legal argument regarding the location of the facility, it is addressed more fully below and in Plaintiff-Intervenor's Brief.

13. In December 2007, the EPA published a Fact Sheet in which the EPA indicated its intent to issue final National Pollutant Discharge Elimination System (NPDES) permits to the concentrated animal feeding operations (CAFO) of Bruns Feedlot, LLC.

Response: Plaintiffs do not dispute that the EPA may have taken the action described in this paragraph. To the extent this paragraph contains a legal argument regarding the meaning of the EPA's action, it is addressed more fully below and in Plaintiff-Intervenor's Brief.

14. Bruns Feedlot, LLC is located at 1172 I Ave Pender, Nebraska 68047. Bruns Feedlot, LLC is situated and operates west of the abandoned Sioux City and Nebraska Railroad right of way.

Response: Plaintiffs do not dispute the address of Bruns Feedlot. To the extent this paragraph contains a legal argument regarding the location of the facility, it is addressed more fully below and in Plaintiff-Intervenor's Brief.

15. If the foregoing properties were considered to be outside the boundaries of the Omaha Indian Reservation, the EPA would not be involved; rather, the Nebraska Department of Environmental Quality would have exerted jurisdiction.

Response: In the Tribal Court, Defendants did not provide any citation or support for this statement. It is therefore an unsupported legal conclusion, which is specifically prohibited from inclusion in a statement of material facts by NECivR 56.1(a)(2). Further, these legal conclusions are addressed more fully below and in Plaintiff-Intervenor's Brief.

16. Although not artfully drawn, the "Waiver of Extradition," is tacit acknowledgment by Thurston County that venue for Mr. Saunsoci's violation was properly in the Omaha Tribal Court.

Response: In the Tribal Court, Defendants did not provide any citation or support for this statement. It is therefore an unsupported legal conclusion, which is specifically prohibited from inclusion in a statement of material facts by NECivR 56.1(a)(2). Further, these legal conclusions are addressed more fully below and in Plaintiff-Intervenor's Brief.

Because (1) none of the Disputed Facts are properly supported; (2) most of the Disputed Facts are legal conclusions and are therefore prohibited by NECivR 56.1 from inclusion in a statement of material facts; and (3) the Disputed Facts are controverted as set forth above, the

Court should not adopt them. Regardless, none of the Disputed Facts are material and summary judgment should be still be granted in favor of Plaintiffs even if the Court deems the Disputed Facts admitted, or as the name suggests, disputed.

ARGUMENT

I. The Parties Agree that the Standard of Review for Issues of Federal Law is De Novo.

Plaintiffs argued in their Brief in Support of Motion for Summary Judgment that the only issue before the Court—whether the 1882 Act diminished the Omaha Reservation—is an issue of federal law outside of the Tribal Court's jurisdiction and, thus, the Court must therefore decide the diminishment question without giving deference to the Tribal Court decision. (Pls.' Br. In Supp. of Mot. for Summ. J., Filing #118 at CM/ECF pp. 31-37) (hereinafter "Pls.' Brief"). Alternatively, Plaintiffs argued that the standard of review for this central issue is *de novo*. (*Id.*) Defendants likewise argue that the Tribal Court's decisions regarding issues of federal law must be reviewed *de novo* by this Court. (Defs.' Brief, Filing #114 at CM/ECF pp. 7-8.) The United States put it similarly, stating that "the issue of whether the Reservation boundary was diminished is purely a matter of federal law," and therefore *de novo* review of the Tribal Court's decision is required. (US Brief, Filing #127 at CM/ECF pp. 7-8.) Based on the submissions of the parties,[6] there is no disagreement regarding what standard of review this Court must apply to the central diminishment question. The standard of review is *de novo*.

As set forth in Plaintiffs' Brief in Support, *de novo* review requires the court to review "the record anew [and] give no deference to determinations made by the trial judge." *Northwest Airlines, Inc. v. Phillips*, 675 F.3d 1126, 1134 (8th Cir. 2012); *see also Salve Regina Coll. v.*

[6] The State of Nebraska did not address the standard of review but incorporated the arguments set forth in Plaintiffs' Brief in Support. (Pl. Intervenor's Br. in Supp. of Pls.' Mot. for Summ. J., Filing #126 at CM/ECF p. 15.) Plaintiffs therefore assume that the State of Nebraska agrees that, if any deference is afforded the Tribal Court decision at all, the standard of review is *de novo*.

Russell, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.").

> *De novo* review is review without deference…. When we review a district court's decision *de novo*, we take note of it, and study the reasoning on which it is based. However, our review is independent and plenary; as the Latin term suggests, we look at the matter anew, as though it had come to the courts for the first time.

Zervos v. Verizon New York, Inc., 252 F.3d 163, 168 (2d Cir. 2001) (internal citations omitted). In light of the parties' agreement on the standard of review, and the fact that the central questions for the Court are all questions of federal law only, the Court must make a determination on the diminishment question without deference to the Tribal Court's decision.

II. The Tribal Court Made No Factual Findings and No Deference is Possible.

Defendants separately argue that the court should apply a "deferential, clearly erroneous standard" to "any independent factual findings" of the Tribal Court. (Defs.' Brief, Filing #114 at CM/ECF p. 8.) The United States does not address the issue of "factual findings," asserting instead that the issue before the court "is purely a matter of federal law." (US Brief, Filing #127 at CM/ECF p. 8.) Plaintiffs agree with United States as there are no factual questions presented in this matter. Thus, the Court need not apply a "deferential, clearly erroneous" standard to anything presently before it.

The Tribal Court did not make any factual findings. (Tribal Ct. Mem. Opinion and Order, Filing #82-1.) Rather, the Tribal Court explicitly stated that "the material facts in this case are settled historically ***and only the legal interpretation of the facts is open to contest.***" (*Id.* at CM/ECF p. 9) (emphasis added). The Tribal Court put it another way in its conclusion, referencing generally the facts as "stated by the parties in their briefs" and determining that "[t]he only disputed matters are ***the legal interpretations to be accorded to the facts***, as analyzed under the guidelines of the United States Supreme Court." (*Id.* at CM/ECF p. 41-42) (emphasis

added). Put simply, even if the Court were to afford some deference to the "factual findings" of the Tribal Court, there is simply nothing to "defer" to because the Tribal Court deliberately made only legal interpretations without making any factual determinations whatsoever. As a result, after weeks of exchanging drafts, negotiating precise language, and requesting conferences with the Court, the parties agreed to 167 separate paragraphs of undisputed material facts and set those facts out clearly in the Joint Stipulation of Facts. Thus, the Joint Stipulation of Facts, as well as any other uncontroverted facts properly set forth in a separate statement of material facts pursuant to NECivR 56.1, constitutes the factual record in this matter.

III. Congress Intended to Diminish the Reservation.

The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This inquiry requires the Court to "examine ***all circumstances*** surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399 (1994) (emphasis added). The 1882 Act helped effectuate the goal of Congress and the Omaha Tribe to separate from the reservation approximately 50,000 acres west of the railroad right of way (the "Disputed Territory") for nearly-exclusive settlement by non-Indians.

Viewed in context, Congress unequivocally demonstrated its intent to alter the boundaries of the Omaha Reservation. Long before the 1882 Act there existed a crucial distinction between the Disputed Territory and the rest of the Omaha Reservation. Members of the Omaha Tribe did not want to live on the land west of the right of way. As the United States admits in its brief "the Omaha Reservation had few, if any, tribal members living in the western portion of the reservation prior to the 1882 Act." (US Brief, Filing #127 at CM/ECF p. 37.) This was not due to a lack of opportunity. In 1865, when Omaha Tribe members were able to select allotments

anywhere within the original boundaries, all chose land on the eastern half of the Reservation. (J.S., Filing #100 at ¶¶ 41-45.)

It is unsurprising then, that in 1871, when the Omaha Tribe sought to raise funds for farming and housing, its leaders sought to separate and sell the uninhabited western portion of the Reservation. Acting on the Tribe's request, Congress enacted legislation authorizing the Secretary of the Interior, with the consent of the Omaha Tribe, to separate and sell this land. Over the next years, Congress and the Omaha Tribe effected the separation and sale of all the land west of the railroad right of way almost exclusively to non-Indian settlers. By 1919, absolutely ***no Indian trust land remained west of the right of way***. (J.S, Filing #100 at ¶ 102.)

The 1882 Act "was more than a run-of-the-mill allotment act," *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 663 (7th Cir. 2009). Such acts aimed to integrate non-Indian settlers amongst tribe members, *see*, *e.g.*, *Mattz v. Arnett*, 412 U.S. 481, 497, and often resulted in a "checkerboard" pattern of tribal and non-tribal lands within the original reservation boundaries, s*ee, e.g.*, *Seymour v. Superintendent of Wash. State Pen.*, 368 U.S. 351, 358 (1962). Here, the Omaha Tribe requested that the Disputed Territory "be separated from the remainder" of the reservation for settlement by non-tribe members. (J.S., Filing #100 at ¶ 49.) Congress agreed to "break[] up that portion of the reservation which is to be sold" and "segregate[]" the lands occupied by tribe members. (*Id.* at ¶ 67.) The Omahas understood that, after this requested separation, the railroad right of way would become the new boundary of the reservation. "[T]he white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements." (*Id.* at ¶ 76.) Both Congress and the Omaha Tribe intended to separate and segregate the

Disputed Territory from the remainder of the reservation with the railroad right of way as the new western boundary.

The parties agree as to the framework of the inquiry in which the Court must engage to decide whether Congress intended diminishment—statutory language, surrounding circumstances, subsequent history, and contemporary demographic trends. As shown below, the Tribe and the United States have mishandled these interpretative tools in several key ways. But more fundamentally, they have also failed to answer *the* critical question. Why not believe Congress intended to do exactly what the Omaha Tribe requested of it and what it ultimately accomplished—complete severance and segregation of the Disputed Territory from the remainder of the reservation?

A. Statutory Language: No Magic Words Are Required.

"[E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Solem v. Bartlett*, 465 U.S. 463, 471 (1984).

Despite this clear directive from the Supreme Court, Defendants and the United States suggest the absence of "magic words" of cession or provisions for a payment of a sum certain in the 1882 Act is dispositive. (Defs.' Brief, Filing #114 at CM/ECF pp. 20-22; US Brief, Filing #127 at CM/ECF pp. 10-13.) The United States claims, for example, that "[e]very Supreme Court diminishment ruling involved a statute that at minimum included explicit language of cession, or allotment of tribal land and return of surplus land to the public domain." (US Brief, Filing #127 at CM/ECF p. 11.)

The Court should not accept such a formalistic and superficial reading of Supreme Court precedent. The Supreme Court outright rejected a similar argument in *Hagen v. Utah*, 510 U.S. 399 (1994), where the United States argued that past Supreme Court "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 unconditional commitment from Congress to compensate the Indians." *Id.* at 411. The Supreme Court unequivocally "disagree[d]," stating "we have never required any particular form of words before finding diminishment." *Id.*; *accord Stockbridge-Munsee Cmty.*, 554 F.3d at 662 ("[W]e...cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation."); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005) ("no magic words are required").

To the contrary, the Supreme Court further explained:

> [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***. 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. . . . 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**.

Hagen, 510 U.S. at 411-12 (emphasis added). Under this holistic approach, the Supreme Court in *Hagen* concluded that Congress diminished the Unintah Reservation despite the fact that the operative statutes did not include express cession language nor provision of a sum certain payment. The Court reached this conclusion *in part* because one of the relevant statutes, the 1902 Act, which reserved allocations of the reservation for Indians, restored the unalloted lands to "the public domain." *Id.* at 412.

Hagen also exposes a fatal flaw in the argument of Defendants and the United States, that being their determination to interpret the 1882 Act within a vacuum by totally ignoring the related 1872 Act. Indeed, the 1902 Act in *Hagen* that included the "public domain" language was not Congress' last word regarding the opening of the Reservation. In 1903, 1904, and 1905, Congress passed Acts extending the deadline for opening the reservation. *Id.* at 404-06. The

1905 Act also provided "[t]hat the said unalloted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President . . . ." *Id.* at 406 n.5. The Supreme Court refused to interpret the 1905 Act in isolation "because the baseline intent to diminish the reservation expressed in the 1902 Act survived the passage of the 1905 Act." *Id.* at 415. Instead the Court stated "the two statutes—as well as those that came in between—must therefore be read together." *Id.* at 416.

The Supreme Court's decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) also illustrates the importance of reviewing all of the circumstances surrounding the passage of the statute in question. The Defendants and the United States stress the fact that the statute at issue in *Rosebud* included the language "cede, sell, relinquish, and covey to the United States." (Defs.' Brief, Filing #114 at CM/ECF p. 21; US Brief, Filing #127 at CM/ECF p. 11.) They conveniently leave out, however, the fact that *Rosebud* involved three distinct statutes that the Court concluded diminished separate portions of the reservation. *Rosebud Sioux Tribe*, 430 U.S. at 585. Importantly, only one of the statutes, the 1904 Act, included express cession language.[7] The 1907 and 1910 Acts contained no such language. *Id.* at 612-13 ("The 1910 Act is substantially similar to the 1907 Act and used identical operative language authorizing and directing the Secretary of the Interior 'to sell and dispose of all that portion of the Rosebud

[7] The inclusion of cession language of the 1904 Act was not free from controversy. As Justice Marshall pointed out in his dissent, the inclusion of the cession language was the result of Congress ratifying a 1901 Agreement between the United States Indian Inspector and the Tribe that Congress had previously rejected. *Rosebud Sioux Tribe*, 430 U.S. at 618-19 (Douglas, J., dissenting). In Justice Marshall's view, this cession language was more "form" than "substance." *Id.* And the majority expressly admitted that its interpretation of the 1904 Act was heavily influenced by the history preceding the Act. *Id.* at 592 ("Because of the history of the 1901 Agreement, the 1904 Act cannot, and should not, be read as if it were the first time Congress addressed itself to the dimunition of the Rosebud Reservation.").

Indian Reservation . . . except such portions thereof as have been or may be hereafter allotted to Indians.'"). The Supreme Court nonetheless found that, like the 1904 Act, the 1907 and 1910 Acts accomplished the same purpose—diminishment of separate portions of the Reservation. *Id.* at 615. Had the Supreme Court focused only on the language of the 1907 and 1910 Acts in isolation and ignored the surrounding context of the 1901 Agreement and the 1904 Act, the Court most certainly would not have concluded the Reservation was twice more diminished.

As in *Hagen* and *Rosebud*, the 1882 Act must be read in light of the surrounding historical context, including the 1872 Act. The 1872 Act authorized the Secretary of the Interior, with the consent and concurrence of the Omaha Tribe, to "cause . . . a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres," ***to be taken from the western part thereof, and to be separated*** from the remaining portion of said reservation by a line running along the section lines from north to south. . . ." (J.S., Filing #100 at ¶ 51.) The Omaha Tribe later consented to the Act, (Emily Greenwald, *The Western Boundary of the Omaha Reservation* (2011) (hereinafter "Greenwald Report"), Filing #117-1 at CM/ECF p. 12 n. 34 citing *ARCIA* 1872 and 1873, Filing #117-13, pp. 25, 31,) and official reports from 1874 onward consistently treated the Omaha Reservation as having been reduced by 50,000 acres following passage of the 1872 Act (Greenwald Report, Filing #117-13, p. 24 n. 118 citing *ARCIA* 1873, Filing #117-27, p. 4; J.S., Filing #100 at ¶ 53.) Congress did not need to include express cession language because both Congress and the Tribe understood that the land west of the right of way had been separated from the Omaha Reservation. Read in context, as required by the Supreme Court, the absence of express cession language in the 1882 Act does not disturb the necessary conclusion that Congress intended to diminish the Omaha Tribe Reservation.

B. Surrounding Circumstances Unequivocally Reveal An Intent to Diminish[8]

Even if the statutory language of the 1882 Act, read in light of the 1872 Act, does not unambiguously evidence diminishment, the Eighth Circuit has recently directed that when a "statute's text and legislative history [is] inconclusive, Supreme Court precedents mandate consideration 'of the historical context surrounding the passage of the . . . Act, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there.'" *United States v. Jackson*, 697 F.3d 670, 678-79 (8th Cir. 2012) (quoting *Yankton Sioux Tribe*, 522 U.S. at 344). Using its decision in *Rosebud Sioux Tribe* as an example, the Supreme Court explained:

> When events surrounding the passage of a surplus land act—***particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative reports presented to Congress***—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, [it is appropriate] to infer that Congress shared the understanding and that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471 (emphasis added). And *Rosebud* is not the only example where courts have found diminishment in the absence of explicit language of cession and unconditional compensation. The Tenth Circuit, for example, held the Osage Reservation was disestablished by a 1906 Act of Congress, despite the Act having no explicit termination language and failing to

[8] The Omaha Tribe argues the Tribal Court's "findings" regarding the surrounding circumstances and subsequent history should be "reviewed under the deferential clearly erroneous standard." (Defs.' Brief, Filing #114 at CM/ECF p. 25.) Not so. No deference is owed the Tribal Court decision. As discussed above, the Tribal court did not make factual findings to which this Court can defer. Regardless, if there is any traditional review of the tribal court decision, *de novo* is appropriate for each prong of the *Solem* test because the inquiry is to deduce Congressional intent. *See, e.g.*, *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990) (explaining that in diminishment cases, "the Supreme Court has applied a *de novo* standard of review in determining congressional intent").

provide a sum-certain payment.[9] *Osage Nation v. Irby*, 597 F.3d 1117, 1123-24 (10th Cir. 2010), *cert. denied*, __ U.S. __, 131 S. Ct. 305 (2011). The Seventh Circuit reached the same conclusion even though the operative Acts (1871 and 1906) at issue included "no hallmark diminishment language" because "[t]he circumstances surrounding the passage of this legislation show[ed] that it was more than a run-of-the-mill allotment act." *Stockbridge-Munsee Cmty.*, 554 F.3d at 662-63. Finally, the Eighth Circuit in *Jackson* reversed the district court for considering only the language of a particular act and ignoring "the distinct context" surrounding that act. *Jackson*, 697 F.3d at 675.

Here, the circumstances surrounding the 1882 Act unequivocally demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. Indeed, the historical record is imposing and one-sided in support of diminishment.

Starting in 1871, and continuing for over a decade, the Omaha Tribe demonstrated it wished to separate and sell the Disputed Territory. The Omaha chiefs twice appealed to Congress to accomplish this objective. (J.S., Filing #100 at ¶¶ 48-49.) Congress did in fact separate[10] and attempt to sell this land in 1872 but was initially unsuccessful. (*Id.* at ¶¶ 48-53.)

[9] The statutes at issue in *Osage Nation* were actually much less indicative of Congress' intent to diminish the Osage Tribe Reservation than the statutes at issue here. Indeed the Tenth Circuit frankly acknowledged that "the Act ***did not open any land for settlement by non-Osage***, there is no sum certain ***or any other payment arrangement*** in the Act. And neither [Act at issue] contain express termination language." *Osage*, 597 F.3d at 1123-24 (emphasis added).

[10] This is demonstrated by the fact that from 1874 onward, the Commissioner of Indian Affairs consistently treated the Omaha Reservation in its official reports as having been diminished by approximately 50,000 acres. (Greenwald Report, Filing #117-1 at CM/ECF p. 26.) The United States' effort to minimize the significance of these acreage reports is unpersuasive. The plain language of the Commissioner's statement to Congress shows that pursuant to the 1872 Act "49,762 acres have been appraised for sale in trust for said Indians leaving 143,225 acres as their

In 1882, after the Omaha Tribe also failed in its attempt to sell the Disputed Territory to the Ponca Indians, (*Id.* at ¶¶ 54-56), Congress acted again to sell the same land as authorized by the 1872 Act. (*Id.* at ¶¶ 78-81.) As discussed in more detail in Plaintiffs' Brief in Support of Motion for Summary Judgment, the legislative history of the 1882 Act demonstrates the parties understood and agreed that the Disputed Territory would be separated and sold primarily to non-Indian setters. (Pls.' Brief, Filing #118 at CM/ECF pp. 39-43.)

As Senator Valentine explained:

> You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. ***The Indians say they want that portion west of the railroad sold***. This could be done under existing law, but if sold under existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, ***the white men will occupy up to the railroad on the west***. They will build stations and towns; and ***the Indians will come up to the railroad from the east*** and get the benefit of these improvements.

(J.S., Filing #100 at ¶ 76) (emphasis added).)

The Omaha Tribe again consented to the 1882 Act. (Greenwald Report, Filing #117-1 at CM/ECF p. 18.) Clearly, the 1882 Act was not a unilateral enactment, but rather the product of an agreement with the Tribe that established "an unmistakable baseline purpose of [diminishment]." *Rosebud*, 430 U.S. at 592; *see also DeCoteau*, 420 U.S. at 448 (explaining it was significant that the Act before the Court was "not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented").

Despite these facts, the United States claims that "there is no evidence in the record that Omaha Indians at the time understood the 1882 Act would alter their boundaries (as opposed to

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diminished return." (Annual Report of the Commission of Indian Affairs 1874, Filing #117-27 at CM/ECF pp. 3-4.)

merely selling land to non-Indian settlers)." (US Brief, Filing #127 at CM/ECF p. 20.) This dubious assertion is remarkable in light of the evidence showing the Tribe repeatedly requested and consented to separating the Disputed Territory from the inhabited portion of the Reservation. The Indians wanted "that portion west of the railroad sold" so that "the white men will occupy up to the railroad on the west" and "build stations and towns" from which the Tribe would benefit. (J.S., Filing #100 at ¶ 76.)

Moreover, the Act itself distinguishes between future treatment of land west of the right way and land east of the right of way. (Greenwald Report, Filing #117-1 at CM/ECF p. 16-17; Act of August 7,1882, 22 Stat 341, Filing #117-17, at pp.54-65.) Section 8 of the Act, for example, provides that "the residue of lands lying east of the said right of way" would be patented to the Omaha Tribe, which would be held in trust for twenty-five years and then be conveyed to the Omaha Tribe. (Act of August 7,1882, 22 Stat 341, Filing #117-17 at CM/ECF at pp. 60-61.) No such provision existed for the residue land west of the right away. (*Id.*) Finally, the Omaha Tribe's treatment of the Disputed Territory after the 1882 Act shows it understood the altered boundaries. Given their choice of allotments, only 10-15 Omaha Tribe members selected allotments west of the right of way.[11] (J.S., Filing #100 at ¶ 91.) This was consistent with the expectations of Congress when passing the 1882 Act, as reflected by Senator

[11] The United States contends the fact Congress allowed individual Indians to select allotments on the Disputed Territory indicates Congress did not want to diminish the Reservation. But this is no different than the Acts in *Rosebud Sioux Tribe*, where the Court found diminishment despite the Acts allowing for Indians to select allotments from the territory in question. *Rosebud Sioux Tribe*, 430 U.S. at 608 (quoting the statute, which instructed the Secretary of the Interior to sell or dispose of portions of the reservation, except for those that had been, or would be allotted to tribe members); *see also Osage Nation*, 597 F.3d at 1123-24 (concluding the Osage Reservation was disestablished even though the Act "allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement"). Furthermore, Congress' allowance to Tribe Members to select allotments west of the right of way carries little weight considering Congress did not expect tribe members to actually select this land and few actually did.

Saunders' belief that he did "not think an acre of this land [west of the right of way] will be sold to the Indians." (*Id.* at ¶ 68; *see also* Annual Report of Commissioner Affairs ("ARCIA") 1882, LXVII, Filing #117-18, pp. 2-3) (In his 1882 annual report, Commissioner of Affairs Hiram Prince explained that while Indians were permitted to select land west of the right of way, "it is not thought that there are any who desire to make selections there").)

Further, Congress' treatment of the Omaha Reservation after the allotment process was complete demonstrates Congress believed the reservation was diminished. For example, the 1912 Act, which authorized the Secretary of the Interior to sell all unalloted land within the Reservation to the highest bidder, also expressly provided that the laws of the United States prohibiting the introduction of intoxicants into the Indian country would be applicable to the affected land for a period of twenty-five years. (Ch. 121, 37 Stat. 111, § 2, Filing #117-25, p. 12.) There would be no reason to include this provision in the 1912 Act if Congress believed the land was to remain within the Omaha Reservation. Congress' inclusion of this provision shows "that Congress was aware that the opened, unalloted areas would henceforth not be 'Indian country,' because not in the Reservation." *Rosebud Sioux Tribe*, 430 U.S. at 613; *accord Yankton Sioux*, 522 U.S. at 350-51 (reaching the same conclusion as in *Rosebud Sioux Tribe* because the inclusion of the provision "signal[ed] a jurisdictional distinction between reservation and ceded land"); *Jackson*, 697 F.3d at 677 ("[T]he prohibition was unnecessary if the Act did not diminish the Reservation because [a prior Act] already prohibited the introduction and sale of intoxicating liquors in Indian country.").

C. Subsequent Treatment of the Disputed Territory

1. The Jurisdictional History Demonstrates Diminishment.

As the above discussion and Plaintiffs' Opening Brief demonstrates, everyone understood Congress changed the boundaries of the Omaha Reservation through the 1872 and 1882 Acts. The jurisdictional history of the Disputed Territory overwhelmingly shows this to be true. This includes, but is not limited to the following facts:

- The Bureau of Indian Affairs historically treated the Disputed Territory in both word and deed as if it was not a part of the Omaha Reservation for more than a century. (Pls.' Brief, Filing #118 at CM/ECF pp. 45-47.)

- The State of Nebraska has consistently provided all governmental services within the Disputed Territory. (Greenwald Report, Filing #117-1 at CM/ECF p. 2; *see also* Pls.' Brief, Filing #118 at CM/ECF pp. 48-49.)

- The Omaha Tribe has consistently chosen not to enforce the provisions of its Tribal Code in the Disputed Territory and not to offer foster care, medical care, or welfare or child protective services. (J.S., Filing #100 at ¶¶ 138-145.)

- The complete absence of the Omaha Tribe's physical presence in the Disputed Territory, including no Tribal seat of government, office, school, industry, or business on the Disputed Territory. (J.S., Filing #100 at ¶¶ 145, 147.)

These factors all strongly demonstrate the fact that the parties have consistently treated the Disputed Territory separate and distinct from the Omaha Reservation. *See Hagen*, 510 U.S. at 421. "The State's assumption of jurisdiction over the territory, almost immediately after the [Act of 1882] and continuing virtually unchallenged to the present day" reinforces the conclusion that the boundaries were indeed changed. *Yankton Sioux Tribe*, 522 U.S. at 356.

For a myriad of reasons, the attempts by the Tribe and the United States to create ambiguity by focusing on the more recent efforts by the Department of the Interior and other federal agencies to assert jurisdiction, as well as isolated decisions of certain State officials are unpersuasive. (Defs.' Brief, Filing #114 at CM/ECF pp. 35-38; US Brief, Filing #127 at

CM/ECF pp. 20-35.) First, "the requirement in *Solem* for unequivocal evidence is limited to the period surrounding passage of the statute in question." *Yazzie*, 909 F.2d at 1409. "[S]ubsequent evidence need not be completely unambiguous on its face." *Id.* at 1409 n. 28 (citing *DeCoteau*, 420 U.S. at 442 and *Rosebud Sioux Tribe*, 430 U.S. at 603).

Second, the events cited by the United States and the Tribe are "too far removed temporally from the [1882 Act] to shed much light on [1806] Congressional intent." *Osage*, 597 F.3d at 1126. It stands to reason that the Authorities' treatment of the Disputed Territory is more probative "in the years immediately following the opening," *Solem*, 465 U.S. at 471, than actions so far removed from the Act. "In light of the clear assumption of jurisdiction over the past 70 years by the State of [Nebraska] on the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory history of congressional and administrative actions in other respects carries but little force." *Rosebud Sioux Tribe*, 430 U.S. at 604, n.27; *see also Yankton Sioux Tribe*, 522 U.S. at 804-05 (refusing to allow modern attempts by the Tribe to exercise civil, regulatory, or criminal jurisdiction to change its conclusion that "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day," reinforced its holding of diminishment).

2. Demographics

The demographics of the Disputed Territory strongly support the determination that land is no longer a part of the Reservation. The Supreme Court has observed the demographics of the territory in four cases where it concluded the reservation was diminished (or disestablished)—*Yankton Sioux*, *Hagen*, *Rosebud Sioux*, and *DeCoteau*. In each of these cases, the population of non-Indians on the land in question greatly exceeded that of Indians. *See Yankton Sioux*, 522 U.S. at 356-57 (two-thirds of the population was made up of non-Indians and more than 90% of

the reservation lands were still in Indian hands); *Hagen*, 510 U.S. at 421 (over 85% of the population was non-Indian); *Rosebud Sioux*, 430 U.S. at 605 (involved land that was "over 90% non-Indian both in population and in in land use") *DeCoteau*, 420 U.S. at 428 (approximately 90% of the population was non-Indian and collectively owned approximately 85% of the land). In contrast, the Supreme Court observed in *Solem*, where the Court found no diminishment, that the overall population of the land was evenly divided between Indians and non-Indians. 465 U.S. at 480.

The demographics of the Disputed Territory are even more striking than even *Yankton Sioux*, *Hagen*, *Rosebud Sioux*, and *DeCoteau*, and far more compelling than *Solem*. Since the early twentieth century, Indians have comprised less than two percent (2%) of the population west of the right of way. (J.S., Filing #100, ¶ 115.) The following table illustrates this point:

Table 1. Indian and Non-Indian Population East and West of Railroad Right of Way.

Census Year		Total	Non-Indian	Non-Indian %	Indian	Indian %
1900	Thurston - East of ROW	2361	1404	59.47%	957	40.53%
	Thurston & Cuming West of ROW	4374	4362	99.73%	12	0.27%
1910	Thurston - East of ROW	3778	2838	75.12%	940	24.88%
	Thurston & Cuming West of ROW	3957	3885	98.18%	72	1.82%
1920	Thurston - East of ROW	4399	3748	85.20%	651	14.80%
	Thurston & Cuming West of ROW	3846	3844	99.95%	2	0.05%
1930	Thurston - East of ROW	4841	3822	78.95%	1019	21.05%
	Thurston & Cuming West of ROW	4188	4153	99.16%	35	0.84%
1990	Thurston - East of ROW	3248	1365	42.03%	1883	57.97%
	Thurston & Cuming West of ROW	2624	2613	99.58%	11	0.42%
2000	Thurston - East of ROW	3349	1012	30.22%	2337	69.78%

	Thurston & Cuming West of ROW	2519	2498	99.17%	21	0.83%

(Greenwald Report, Filing #117-1 at CM/ECF p. 27.) These statistics show that the land west of the right of way, the Disputed Territory, has no Indian character.

The United States claims that these demographics are distinguishable from *Yankton Sioux*, *Hagen*, *Rosebud Sioux*, and *DeCoteau* because "the Omaha Reservation had few, if any, tribal members living in the western portion of the reservation prior to the 1882 Act." (US Brief, Filing #127 at CM/ECF p. 38.) This only proves is that unlike the other cases, the Disputed Territory *never* had any Indian character. Plaintiffs submit that it was this total lack of Indian character that made the Disputed Territory the logical choice for the Omaha Tribe and Congress to separate and sell.

Attempting to dodge these stark facts, the United States asserts that the Tribe used the western portion as a hunting ground and "as a buffer and security zone to protect against attacks from other tribes." (US Brief, Filing #127 at CM/ECF p. 39.) Besides being unsupported by evidence, this assertion has little relevance, as Plaintiff is unaware of any case law suggesting such uses could support continued reservation status unless the Act provided for such a continued use, nor does the United States cite any.

In a last-ditch effort to claim the Disputed Territory maintained some Indian character, the United States points to anecdotal evidence of certain Tribe members playing prominent roles in the settlement of Pender and attempts to use statistics to show the Indian population has grown in the Disputed Territory. (US Brief, Filing #127 at CM/ECF p. 39.) While historically interesting, the participation of a few Omaha Indians in the history of Pender does not change the fact that the Tribe itself has never been active there. And the United States' creative use of statistics does not change the fact throughout history, an extremely small percentage (less than

2%) and number (between 2 and 72) of Omaha Tribe members have, at any given time, lived west of the railroad right of way. (*See* chart above, Greenwald Report, Filing #117-1 at CM/ECF p. 27.)

CONCLUSION

Did Congress clearly evince an intent to change the boundaries of the Omaha Reservation when it enacted the 1872 and 1882 Act? If so, "diminishment will be found." *Solem*, 465 U.S. at 471. Both the Omaha Tribe and Congress sought to "separate" and "segregate" 50,000 acres for settlement by non-tribe members from the area where the Omaha resided. This land was almost completely settled by non-tribe members. The land was removed from the reported acreage of the reservation. The railroad right of way was referred to as the new boundary of the reservation. The land east of the right of way was treated differently than the land west of the right of way. The Omaha Tribe referenced the right of way as the western boundary of its reservation. The Omaha Tribe never sought to enforce its Tribal Code west of the right of way, though it did so east of the right of way. And Indian Agents referred to the right of way as the western boundary of the reservation. The jurisdictional history and population demographics of the disputed territory overwhelmingly "demonstrates a practical acknowledgment that the Reservation was diminished." Hagen v Utah, 510 U.S. 399, 421 (1994). As the Supreme Court explained, "[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. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." *Solem*, 465 U.S. at 471.

Dated this 29th day of August, 2013.

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

BY: HUSCH BLACKWELL LLP
Gene Summerlin – 19611
Mark Hill – 24903
610 J Street, Suite 200
Lincoln, NE 68508
(402) 458-1500
gene.summerlin@huschblackwell.com
mark.hill@huschblackwell.com

BY: /s/ Gene Summerlin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of August, 2013, this Response to Defendants' and Defendant-Intervenor's Briefs in Support of Motion for Summary Judgment was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all CM/ECF Participants.

/s/ Gene Summerlin