No. 15-1789
Criminal

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH JOSHUA JACKSON,

Appellant.

Appeal from the United States District Court
For the District of Minnesota

BRIEF OF *AMICUS CURIAE* RED LAKE BAND OF CHIPPEWA INDIANS

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STATEMENT OF AMICUS CURIAE

The Red Lake Band of Chippewa Indians ("Band") is a federally recognized Indian tribe. The Band's lands in northern Minnesota include what is now known as the Red Lake Indian Reservation, the main body of which encompasses the land on which the crime in this case was committed, within the town of Redby. Redby is the seat and name of one of the four political districts on the Reservation from which representatives to the Tribal Council are elected. It is also six miles from the exterior boundary of the Reservation recognized by the United States. Exercising governmental jurisdiction over Redby is of utmost importance to the Band, where the tribe provides all services.

If this case were to lead ultimately to the inability of the Band to provide services and exercise jurisdiction over the roughly 15 acres remaining in fee ownership in Redby, it would be highly disruptive to the Band, to the residents of Redby, and frankly to the state and county that would have to step in. Accordingly, even though the Band is not a party and therefore not legally bound by the result, this case may have profound implications for the Band. Moreover, the Band has an intrinsic interest in attempting to ensure that its history is represented accurately. The Band therefore supports the position of the Appellee United States but has its own sovereign interests that are both more varied and

closer to home than the federal government's. Moreover, the Band also is acutely aware of the irony that it cannot participate as a party in a matter that may directly affect its sovereign authority to govern an area deep within the Red Lake Reservation — an area that is overwhelmingly "Indian" in character and over which the Band has exercised broad jurisdictional authority for hundreds of years.

The Band's Tribal Council authorized the filing of this brief. Both the United States and Mr. Jackson have consented to its filing, so it is irrelevant whether the first sentence of F.R.A.P 29(a) should be read as including sovereign Indian tribes. The Band funded this brief, and the Band's counsel authored it, in its entirety.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Band agrees with the United States that this case could be resolved without oral argument. If oral argument is held, the Band respectfully requests ten minutes of argument time. Because of the governmental nature of the Band's interest, which is not identical to that of the United States and in many ways greater, the Band requests that its time be in addition to that granted to the United States.

PROCEDURAL AND LEGAL POSTURE.

The Band was unaware of this case until the Eighth Circuit issued its opinion in October 2012. *United States v. Jackson* ("*Jackson I*"), 697 F.3d 670 (8th Cir. 2012). Since that time, the Band has monitored the proceedings in the case, including attendance at the August 2013 District Court hearing. It received leave from the District Court to file an *amicus* memorandum and did so.[1] District Court Docket ("DCD") 143 ("Amicus Memo.").

ARGUMENT

The District Court in its Memorandum Opinion and Order, DCD 146, and the Appellee in its brief have each addressed the issues in this case in a robust manner. The Band will not attempt to approach comprehensively the issues presented.

I. Law of the Case.

The Eighth Circuit's *Jackson I* opinion is the law of the case, although some of the arguments below may warrant revisiting some of that analysis.[2]

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[1] Because of the word limitation for amici, this brief is in part a condensed restatement of the Band's memorandum below. If the Court finds portions of this brief helpful, many of the facts and arguments were discussed more fully below.

[2] As the Eighth Circuit observed in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d

A. Applicability of Diminishment Analysis

This Court concluded in *Jackson I*, 697 F.3d at 672-73, that the proper analysis of the Act of February 8, 1905 ("1905 Act"), ch. 556, 33 Stat.708,[3] is by reference to the line of "diminishment" cases, including seven "modern" Supreme Court cases, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399, 404, (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962), and one Eighth Circuit case, *United States v. Wounded Knee*, 596 F.2d 790 (8th Cir.), *cert. denied*, 442 U.S. 921 (1979).

994, 1005 (8th Cir. 2010), *cert.denied sub nom. Hein v. Yankton Sioux Tribe*, 131 S. Ct. 3024 (2011), "Under the law of the case doctrine, 'a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice.' " (quoting *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995).

There were also some typographical and historical oversights in that opinion. Because of space limitations here, the Band refers the Court to its amicus memorandum below, DCD 143 at 6-11.

[3] The Court was apparently not made aware of the Act of June 25, 1910 ("1910 Amendment"), ch. 431, 36 Stat. 855, 861. While Defendant tries to make much of it, the 1910 Amendment is of limited importance to the analysis. Its sole focus was to allow issuance of a patent to the railroad, but the mere issuance of a patent does not affect the Indian country analysis. 18 U.S.C. § 1151(a).

Were it operating on fresh ground, the Band would assert that a number of factors make application of the analysis from those cases awkward at best.

Most notably, the 1905 Act at issue is not a "surplus lands" act, as this Court acknowledged, because on its face it was not intended to open lands for sale or settlement in the usual sense. *Jackson I*, 697 F.3d at 672-73. Second, the affected land – less than 320 acres – is relatively very small. The Supreme Court and *Wounded Knee* cases relied upon by this Court in *Jackson I* all involved tens, if not hundreds, of thousands of acres.[4] While the size of the "opened" area alone is not dispositive in any given case – Supreme Court precedent suggests that Congress could diminish a reservation by a square foot if it so chose – it logically affects the likelihood that Congress intended diminishment when the legislation is less than

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[4] For example, in *Yankton Sioux*, of some 430,000 acres within the tribe's reservation, roughly 262,000 acres were allotted to individual Indians and most of the other 168,000 acres were opened for entry by non-Indians. 522 U.S. at 334-36. In *Hagen*, 400,000 of 2,000,000 reservation acres were opened for entry 510 U.S. at 421. The smallest number of acres at issue in any of the Supreme Court cases cited in *Jackson I* was in *Mattz v. Arnett*, where the remainder of a roughly 25,000 acre reservation was to be opened for entry after allotments were made to the Indians. 412 U.S. 484, 504-07. The Supreme Court concluded that the reservation had not been diminished. Although the Eighth Circuit's opinion in *Wounded Knee* does not discuss the number of acres affected by the Big Bend Dam, the Court did note it was "a large quantity of valuable bottom land." 596 F.2d at 795. Wikipedia reports that the dam "creates Lake Sharpe," which "covers a total of 56,884 acres." https://en.wikipedia.org/wiki/Big_Bend_Dam. None of these cases involved a number of acres less that two orders of magnitude greater than the 300 acres at issue here.

express.

Perhaps most significantly, Congress knew by 1905 that the Red Lake Reservation almost certainly would not be allotted. *See infra*. Given that, if Defendant's contention here were correct, Congress would have had to have affirmatively (but silently) intended to create a permanent small island of non-Reservation land in the middle of the Reservation.

Finally, the vast majority of the once-patented land has been returned to tribal ownership in the intervening hundred years, and the evidence overwhelmingly supports the conclusion that Redby is of "Indian character."[5]

However, for purposes of this brief and consistent with it amicus role, the Band accepts that the three-factor test from *Yankton Sioux* and its precedents is applicable. *Yankton Sioux*, 522 U.S. at 344. Of course, "[t]hroughout this inquiry," the courts "'resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.'" *Id.* (quoting *Hagen*, 510 U.S. at 411).

B. The *Jackson I* Court Held that the Statute Itself Is "Inconclusive."

The *Jackson I* Court concluded that the "statute's text and legislative

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[5] On a clean slate, the Band would suggest that this situation is so different from those examined by the Supreme Court to date that a different analysis should be applied, including a requirement of an "express" statement by Congress.

history" are "inconclusive," noting that Supreme Court precedents therefore require "consideration of 'the historical context surrounding the passage of the [1905 Act], and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there.'" *Jackson I*, 697 F.3d at 677-78 (quoting *Yankton Sioux*, 522 U.S. at 344). For purposes of this brief, therefore, the Band accepts that only the second and third prongs of the test are relevant to the Court's analysis unless any of the new arguments and information presented are sufficient to revisit the *Jackson I* conclusion as to the first factor.

II. RED LAKE'S HISTORY OF CONSISTENTLY OPPOSING ALLOTMENT AND THE 1904 ACT.

In his brief, the Defendant asserts that "it is essential" to understand the United States' general policy of requiring allotment of tribal lands to individual Indians and the intended termination of communally owned tribal lands. Def.Br. at 33. The Defendant concludes, "[i]t is against this dismaying but uncontrovertible backdrop that the 1905 Act was conceived of and passed." *Id.* at 34. In his footnote to that sentence, the Defendant argues that the Band's ability to resist allotment is irrelevant because it is "***Congressional*** intent" that matters, and implies that the District Court elevated the Band's resistance above congressional intent. *Id.* at n.13.

What the Defendant ignores, however, is that the United States generally and

Congress specifically had already acknowledged by 1905 that allotment was not going to occur at Red Lake, or at "best" was extremely unlikely. Some recitation of the history of the 1889 and 1904 Acts is necessary to understand why Congress did in fact know that, notwithstanding its general policy, Red Lake would almost certainly never be allotted.

Section 3 of the 1889 Act provided in part that "there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation." Act of January 14, 1889 ("1889 Act"), § 3, ch. 24, 25 Stat. 642, 643 (included on Gov. Ex. 14). This mandatory language did in fact express the general policy of allotment described by the Supreme Court as the "patina" for diminishment of Indian reservations around the country. *Yankton Sioux*, 522 U.S. at 343-44 (quoting *Hagen*, 510 U.S. at 426 (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen")).

But as this Court has repeatedly acknowledged, the Band did successfully resist allotment. *Jackson I*, 697 F.3d at 673 (quoting *Nord v. Kelly*, 520 F.3d 848, 858 (8th Cir. 2008) (Murphy, J., concurring)). The opposition to allotment

expressed during the 1889 negotiations was steadfast.[6] It is undisputed that allotments were not made on the main body of the Red Lake Reservation before or after the 1905 Act was passed. Under the 1889 Act, the resistance was in spite of congressional intent. By 1904, Congress had acquiesced.

While the national policy of forcing allotments continued, but not at Red Lake. By the late 1890s, the United States had all but given up on forced allotments at Red Lake. As quoted in great detail in *Chippewa Indians v. United*

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[6] The Band quoted extensively in its amicus memorandum in the District Court to demonstrate the Band's steadfast opposition to allotment. DCD 143 at 12 n.10. Only brief excerpts are provided here.

> MAY-DWAY-GON·ON-IND. . . . I will never consent to the allotment plan. I wish to lay out a reservation here, where we can remain with our bands forever. I mean to stand fast to this my decision, whenever the Government feels inclined to pay for the lands.

H. Ex. Doc. No. 247, 51st Cong., 1st Sess., at 71 (Mar. 6, 1890) (portion of Third Council at Red Lake, July 3, 1889).

> MAY·DWAY·GON·ON-IND. We want the reservation we now select to last ourselves and our children forever. I shall touch the pen with the understanding that all you have said to us is the truth; that you respect the truth and the words of our Great Father.

Id. at 82 (portions of final Seventh Council at Red Lake, July 6, 1889)(all included on Gov. Ex. 14).

States, No. H-76, p. 92-96 (Report of Commissioner, Court of Claims, 1934),[7] letters within the Department of Interior acknowledged that allotment could not be done at Red Lake "at present." A letter from Honorable E. M. Browning, Commissioner of Indian Affairs, to the Secretary of the Interior dated May 9, 1896, stated in part:

> As I have said, I doubt the expediency of making allotments in severalty to the Red Lake Indians at present. Reference to said H. R. Ex. Doc. No. 247, will show that it was plainly and unmistakably their understanding, in signing the agreement that they were not to take their allotments in severalty; and this opposition has continued and still exists. Should the Department at this time attempt to force allotments upon them, the Commission would doubtless meet with strong and almost irresistable opposition. Then as I have said, the making of these allotments is not necessary to the carrying out of every other feature of the said Act of January 14, 1889.
>
> I accordingly respectfully recommend that allotments be not made to the Red Lake Chippewas at present, and that after the Chippewa Commission shall have completed all the work remaining for them to do, except to make allotments to the Red Lake Indians, the Commission be disbanded, leaving the work of allotting to those Indians for future consideration.

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[7] The Band has a copy of this published report from its historical files which is missing two pages. The Band is trying to locate a complete copy. In the meantime, the Band will email a copy to counsel for each party. At the Court's request, the Band will transmit a copy of the copy it has to the Court. The Band will contact the Court if it is able to obtain a complete copy for direction.

Id. at 94-95. The Secretary of the Interior responded in part on August 4, 1896: "Concurring in your views, as to the matter of allotments to the Red Lake Indians and for the reasons stated by you, you are directed to instruct the Chippewa Commission to take no steps to make allotments to the Red Lake Band of Chippewas at present." *Id.* at 95.

Upon its review, the Court of Claims summarized those findings:

> Several communications passed between the Secretary of the Interior and the Commissioner of Indian Affairs in 1895 and 1896, in which the advisability of making the allotments to the Red Lake Indians of their reservation was discussed and for various reasons stated in these communications it was deemed not advisable to make the allotments at the time these communications were written.

Chippewa Indians v. United States, 80 Ct. Cl. 410, 446 (Ct. Cl. 1935)

Early in the 1900s, the United States began pushing the Band for the cession of some 250,000 additional acres at Red Lake, which composed the western end of the Band's lands. The Band and the representative of the United States, James McLaughlin, negotiated an agreement in 1902 for the sale of that area for a sum certain, $1 million. Ian Smith, Historical Research Assoc., Inc., *A Study of the Act of February 8, 1905, and Its Impact on Red Lake Indian Reservation, Minnesota*, Apr. 16, 2013, at 11 ("Smith Report"). However, Congress balked and in 1903 proposed an alternative that would provide for payment over time as lands were

sold. *Id.* at 12. In the early summer of 1903, McLaughlin returned to Red Lake to see propose the alternative, but the Band refused. *Id.* (including in documents cited by Mr. Smith). Using its newfound powers after *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) [8], Congress simply passed the substitute without the Band's consent. *Id.*

Every version of the agreement and legislation contained identical language regarding allotment, including the final one enacted by Congress without the consent of the Band: that Band members "**shall be entitled** to allotments."[9] The permissive phrase "shall be entitled to" indicates accession to the Band's continuing opposition to allotment.

During McLaughlin's 1902 negotiations with the Band, the Band made very clear its continued refusal to accept allotment of the main body of the Reservation. The United States acknowledged that:

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[8] The Band has never acceded to the applicability of *Lone Wolf* to the Band's interest the main body of the Reservation, which was never ceded to the United States. It does not do so here, nor does it engage this or related foundational land questions in light of its amicus status.

[9] Act of February 20, 1904 ("1904 Act"), ch. 161, 33 Stat. 46 (Article IV of 1902 agreement with Red Lake Band); *Id.* at 48-49 (Article IV of actual enactment of Congress); Act of March 3, 1903, ch. 994, § 11, 32 Stat. 982, 1009-10 (revised language proposed by Congress for renewed negotiation with the Band).

> Mr. McLAUGHLIN. Now, you people seem to have gotten the matter of allotments somewhat confounded. **I am not here to force allotments upon you people**, although I know it would be for your own good.

H. Doc. No. 532, at 11, 57th Cong., 1st Sess. (Apr. 4, 1902) (emphasis added). That McLaughlin's statement is in the House Report itself is clear evidence that **Congress knew** not only of the Band's opposition to allotment, but also of McLaughlin's express representation that allotments would not be forced on the Band. The ultimate language of the 1904 Act evidences that clear understanding.

That permissive allotment language stands in stark contrast to other land cession and allotment acts from the same time period. The Band examined all Indian legislation a year before and after passage of the 1904 Act.[10] All seven of the acts or parts of acts authorizing allotments as a part of implementing a sale or opening of "surplus lands" used mandatory language regarding allotments along the lines that allotments "shall be made." [11]

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[10] The Band reviewed Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. III (Laws) (Washington: Government Printing Office, 1913). The review period covers late January 1903 through early 1905.

[11] Act of March 3, 1903, ch. 994, 32 Stat. 982, 998; Act of March 3, 1903, ch. 994, § 5, 32 Stat. 982, 1007-08; Act of March 3, 1903, ch. 994, § 5, 32 Stat. 982, 1007-08; Act of April 21, 1904, ch. 1402, § 8, 33 Stat. 189, 217; Act of April 23, 1904, ch. 1495, § 2, 33 Stat. 302, 303; Act of April 27, 1904, ch. 1620, § 3, 33 Stat. 319, 322; Act of April 27, 1904, ch. 1624, § 4, 33 Stat. 352, 359.A table quoting the specific language from

Congress clearly knew how to make allotment mandatory, but the use of permissive language is compelling evidence of ***congressional*** intent that allotment was not required at Red Lake, in turn rendering the Defendant's invocation of the national policy of forcing allotments irrelevant to the tribe.

This conclusion has profound implications for the interpretation of the 1905 Act at issue in this case. The "backdrop" relied upon so heavily by Defendant was not applicable at Red Lake at all. On the Red Lake Reservation, Congress was legislating knowing that tribal lands would remain in communal tribal ownership. In short, this means that when it decided to grant some 300 acres in fee to the railroad, Congress knew that those acres almost certainly would ***not*** someday be intermixed with other privately held lands, both Indian and non-Indian.

Under those circumstances, if Congress had intended to sever that island from the Reservation through diminishment, one would expect it to be express in its intention and to address the jurisdictional issues that would result. However, the 1905 Act and its legislative history (and the 1910 Amendment) are silent on these issues. In "historical context," this is compelling evidence that the 1905 Act was not meant to diminish the Red Lake Reservation by creating a small non-

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these acts is in the Amicus Memo., DCD at 18-19. (Because these statutes are cited for illustrative purposes only they are not included in the table of authorities).

Indian island in the large sea of unallotted tribal land.

III. THE 1905 ACT AND 1910 AMENDMENT.

The Band agrees with the United States that the statutory language, history, and evidence, as discussed in its brief, overwhelmingly do **not** show the "clear and plain" congressional intent required to find diminishment. *Yankton Sioux*, 522 U.S. at 343. However, this diminishment issue is of such importance to the Band that the Band is compelled to include additional arguments.

A. Factor 1: The Eighth Circuit Concluded that the Statute Itself Is Inconclusive, which Is the Law of the Case without More.

The Defendant spends a considerable portion of his brief regurgitating the same materials that led to the *Jackson I* Court's "inconclusive" conclusion regarding the statute and legislative history, Def.Br. at 21-32. None of that it is "substantially different" and so cannot disturb the *Jackson I* Court's conclusion. *Podhradsy*, 606 F.3d at 1005 (quoting *Bartsh*, 69 F.3d at 866). Moreover, many of Defendant's arguments run along the line of "but this was a patent." Of course, 18 U.S.C. § 1151(a) expressly states that reservation lands are Indian country "notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." The Appellant has done nothing to satisfy the *Podhradsy* standard.

However, the Band notes that several important arguments regarding this

first factor have not been made and may well be "substantially different" for purposes of revisiting the *Jackson I* conclusion. They are addressed in the order they appear in the 1905 Act.

1. The Addition of Section 5 by Last-Minute Amendment Undermines Its Significance Regarding Diminishment.

The Defendant, and to a lesser extent the *Jackson I* Court, placed great significance on Section 5 of the 1905 Act regarding prohibition of liquor on the lands granted to the railroad and the inclusion of the word "diminished" before "Red Lake Reservation".

While the *Jackson* I Court ultimately concluded that the section did not show sufficient evidence of congressional intent to diminish, it was clearly troubled by both issues raised by the language of Section 5. However, *Jackson I* did not consider the manner in which the section was added to the bill that became the 1905 Act.

Section 5 was added at the last minute to address the concerns of Congressman Steenerson, who was from Minnesota but apparently not from the district where the railroad was located. The debate on the amendment was brief but does explain that its purpose was to guard against "the introduction of liquor" into the area where this "railroad terminal is to be located," and Rep. Steenerson states that the bill generally "extends the right of way." 39 Cong. Rec. 1854

(1905).

The **timing** of the amendment is compelling evidence that Congress did **not** intend diminishment. Given the importance placed by the Defendant and *Jackson I* on the liquor prohibition and use of the word "diminished" in Section 5 (and only Section 5), in order to find that the final statute intended diminishment, one would have to assume the following: that the author of the legislation, Senator Nelson from Minnesota, did not intend diminishment, having included neither of these "key" elements. But then one would have to assume that Congressman Steenerson **did** intend diminishment and therefore acted (alone or in league with Senator Nelson) to introduce the pivotal diminishment language, but only after the bill had already passed the Senate and only by cleverly couching his true intent in an essentially undebated amendment dealing. In context, the legislative history of the amendment shows conclusively that Section 5 can have little if any import in a principled reading of the statute.

2. Section 6 Has Been Ignored to Date but Is Compelling Evidence that Congress Did Not Intend to Diminish the Reservation.

Another issue apparently not considered to date is the significance of Section 6 of the 1905 Act, which was omitted from the sections reproduced in *Jackson I*. 697 F.3d at 673-74. It reads: "That Congress reserves the right to alter, amend, or

repeal this Act or any part thereof." 33 Stat. at 709. Such language would be very odd in the context of a diminishment statute, because it would presumably allow Congress to then "undiminish" a reservation.

As significantly, the presence of Section 6 is very strong additional evidence of the conclusion that Congress was thinking of the 1905 Act as "akin" to a right-of-way, which is the antithesis of diminishment of the Reservation.

The language of Section 6, or very similar language, appears in 42 other Indian statutes from 1905 and before.[12] **All** of them grant rights-of-way to railroads in Indian country (and many allow telegraph and telephone lines to use the same corridor).[13] Of

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[12] Oklahoma State University has digitized "Indian Affairs: Laws and Treaties", the definitive multi-volume collection of Indian treaties and statutes compiled and edited by Charles J. Kappler and discussed in footnote 12, *supra*. *See* http://digital.library.okstate.edu/Kappler/. The Band performed a search at http://digital.library.okstate.edu/search.htm in the "Kappler's Indian Affairs" database using the language in Section 6 of the 1905 Act as the search terms.

[13] Act of July 4, 1884, ch. 177, 23 Stat. 69; Act of July 4, 1884, ch. 179, 23 Stat. 73; Act of June 1, 1886, ch. 395, 24 Stat. 73; Act of July 1, 1886, ch. 601, 24 Stat. 117; Act of July 6, 1886, ch. 744, 24 Stat. 124; Act of Feb. 24, 1887, ch. 254, 24 Stat. 419; Act of Mar. 2, 1887, ch. 319, 24 Stat. 446; Act of Feb. 18, 1888, ch. 13, 25 Stat. 35; Act of May 14, 1888, ch. 248, 25 Stat. 140; Act of May 30, 1888, ch. 337, 25 Stat. 162; Act of June 26, 1888, ch. 494, 25 Stat. 205; Act of July 26, 1888, ch. 718, 25 Stat. 350; Act of Jan. 16, 1889, ch. 49, 25 Stat. 647; Act of Feb. 23, 1889, ch. 202, 25 Stat. 684; Act of Feb. 26, 1889, ch. 280, 25 Stat. 745; Act of June 21, 1890, ch. 479, 26 Stat. 170; Act of June 30, 1890, ch. 638, 26 Stat. 184; Act of July 22, 1890, ch. 714, 26 Stat. 290; Act of Sept. 26, 1890, ch. 947, 26 Stat. 485; Act of Oct. 1, 1890, ch. 1248, 26 Stat. 632; Act of Feb. 24, 1891, ch. 288, 26 Stat. 783; Act of Mar. 3, 1891, ch. 535, 26 Stat. 844; Act of Feb. 20, 1893, ch. 144, 27 Stat. 465; Act of Feb. 27, 1893, ch. 169, 97 [sic] Stat. 487 (apparent misprint and should be "27"); Act of Feb. 27, 1893, ch. 171, 27 Stat. 492; Act

course, a railroad right-of-way does not diminish an Indian reservation. *Jackson I*, 697 F.3d at 676 & n.3. Why would Congress use boilerplate language from Indian rights-of-way statutes in the 1905 Act if it intended it to be a diminishment statute, particularly where the repeal language of Section 6 is facially inconsistent with diminishment (but not with revocation of a right-of-way)? It is compelling if not conclusive evidence in the statute itself that Congress did not intend diminishment.

B. Factor 2: Historical Context Overwhelmingly Suggests Diminishment Was Not Intended.

The United States and its expert historian assembled a significant collection of documents from around the time of the 1905 Act. The United States' briefing on the issue is compelling. The Band believes that, taken together, those exhibits absolutely compel the conclusion that the Reservation was not diminished by the 1905 Act and the 1910 Amendment. In contrast, the Appellant's arguments on historical context ring hollow. However, the Band believes several issues require correction or warrant mention.

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of Mar. 1, 1893, ch. 188, 27 Stat. 524; Act of Mar. 3, 1893, ch. 224, 27 Stat. 747; Act of Dec. 21, 1893, ch. 9, 28 Stat. 22; Act of Aug. 4, 1894, ch. 215, 28 Stat. 229; Act of Feb. 24, 1896, ch. 29, 29 Stat. 12; Act of Feb. 24, 1896, ch. 30, 29 Stat. 13; Act of Mar. 2, 1896, ch. 38, 29 Stat. 40; Act of Apr. 6, 1896, ch. 93, 29 Stat. 87; Act of Jan. 29, 1897, ch. 108, 29 Stat. 502; Act of Feb. 14, 1898, ch. 18, 30 Stat. 241; Act of Mar. 30, 1898, ch. 104, 30 Stat. 347; Act of June 4, 1898, ch. 377, 30 Stat. 430; Act of Jan. 28, 1899, ch. 65, 30 Stat. 806; Act of Feb. 4, 1899, ch. 88, 30 Stat. 816; Act of Mar. 2, 1899, ch. 374, 30 Stat. 990; Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368; Act of February 28, 1902, ch. 134, 32 Stat. 43. (Because these statutes are cited for illustrative purposes only they are not included in the table of authorities).

1. Example: Defendant Misconstrues Table Data as Evidence of a Reduction in the Area of the Reservation.

The Defendant makes much of the comparison between the Commissioner of Indian Affairs' reports for 1904 and 1905. The Defendant states: "That grant of land was recorded in the Annual Report of the Commissioner of Indian Affairs, which showed a reduction of 320 acres in the **total land area of the reservation** between 1904 and 1905." Def.Br. at 37 (emphasis added).

This claim is expressly controverted by the very tables on which Defendant relies. The heading on the table in the 1905 report describes the columns as a "Schedule of the name of each Indian reservation, under what agency or school, tribes occupying it, **area unallotted**, and authority for its establishment." Indian Affairs, Part I, Annual Reports of the Dep't of the Interior for the Fiscal Year Ended June 30, 1905 ("June 30, 1905 Annual Report"), at 494 (Washington: Government Printing Office, 1906)(emphasis added) (Appendix Ex. 5); *see also* Tr. 25-26 (Testimony of Mr. Smith). In other words, the column which Defendant asserts shows a reduction in the "total land area of the reservation" in fact only shows a reduction in the "unallotted" acres (as Mr. Smith pointed out in his report, Smith Report at 29-30). It is no surprise that the United States removed the railroad grant from the unallotted category because they were no longer available for allotment (were allotment ever to proceed). The change in the number of acres therefore is not probative of the diminishment question before the Court (although the reference in the table to a "right-of-way" in reference to the 1905 Act is). And again,

ownership of land in fee alone does not mean diminishment. 18 U.S.C. § 1151(a).

2. The Railroad Only Paid for Part of the Area Taken Pursuant to the Grant in the 1905 Act.

Not yet discussed by either party or the District Court, contemporaneous treatment of the purchase by the railroad and the United States reinforces that diminishment was not intended. It is undisputed that the railroad already had a right-of-way from the southern edge of the Reservation to the shore of Red Lake where Redby is today. Smith Report at 10-11. The 1905 Act allowed for a grant to the railroad of up to 320 acres. 33 Stat. at 708. The platted area consisted of 312.09 acres. Smith Report at 19. It is also undisputed that the railroad only paid for 300.50 acres. *See Jackson I*, 697 F.3d at 674; June 30, 1905 Annual Report at 93. The difference of 11.59 acres consisted of the area within the 312.09 acres already subject to the existing right-of-way. Smith Report at 19; Letter from Maj. 10th Cavalry, Acting U.S. Indian Agent, to Comm'r of Indian Affairs (Apr. 26, 1905) at 5 (Def. Supp. Ex. 4, DCD No. 129-2).

Since it did not pay for all of the land, does that render the patent invalid for the 11.59 acres, or for the entire 312.09 acres? Is there any credible argument that paying for a right-of-way at a lower price per acre is the same as paying a higher price per acre for a patent that purportedly severed land from the Reservation?

The fact that no one differentiated between the right-of-way acres and the patented acres strongly suggests that diminishment was not intended. The logical and most natural interpretation of the failure to pay for the 11.59 acres in 1905 is that the United States and

the railroad assumed that, even though a patent would issue, the land would remain part of the Reservation and that the compensation paid for the right-of-way acres was "sufficient" in some way to support the patent of those acres because the rights granted to the railroad were simply not that different from the earlier right-of-way. Whether the Band agrees with that analysis is irrelevant to this case if no diminishment is found. If the Court would otherwise conclude that diminishment is justified, however, the Band respectfully suggests that the case be remanded to determine this question. The potential ramifications of the railroad's apparent failure to compensate the Band fully for those 11.59 acres (and the United States' failure to collect full compensation) are simply too profound (and too fact-intensive) to be raised only by an amicus and on appeal.

3. Use of "Diminished" Reservation in Section 5 the 1905 Act Should be Read in Conjunction with a Similar Reference in an Act in 1913 and with Additional and Earlier References by the Department of the Interior.

As discussed above, the last-minute addition of Section 5 included a reference to the "diminished Red Lake Indian Reservation." The *Jackson I* Court concluded that it was "far more plausible" that Congress intended this language to indicate an additional diminishment by the 1905 Act, as it had when Congress used the term in the 1904 Act. 697 F.3d at 677.

Undiscussed by any party or opinion, however, Congress again used the term in 1913, in the form "Red Lake Diminished Reservation," in a statute regarding the attempts to drain swamp lands around the Reservation several years after. Act of June 30, 1913,

ch. 4, 38 Stat. 77, 88.[14] That act obviously did not diminish the Reservation. Congress' use of the term only three years after the 1910 Amendment makes it at least equally plausible that the use of "diminished" in the 1905 Act was merely descriptive, like the 1913 Act, and not operative, as in the 1904 Act.

Moreover, the Commissioner's Report in the 1930s Court of Claims case contains numerous quotations to references to the "diminished" reservation from 1892, 1896, 1902, and 1903. *Chippewa Indians v. United States*, No. H-76, p. 92-93, 95, 98, 100 (Report of Commissioner, Court of Claims, 1934). For example, the entire Minnesota congressional delegation wrote in 1902: "We . . . most heartily endorse and recommend [the] request to have the lands upon the ***diminished*** Red Lake Indian Reservation west of the westerly line of Beltrami County thrown open to settlement under the homestead laws of the United States." *Id.* at 98 (emphasis added).

C. Factor 3: Subsequent Treatment of the Railroad Area Is Conclusive: The Area is Wholly Indian In Character and Treated as such by Governments and Citizens Alike.

Were the Court to find this evidence regarding the "historical context" inconclusive, however, the subsequent treatment definitively shows that the railroad area

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[14] Part of an Indian appropriations act, the relevant portion, with emphasis added, reads:

> That the unexpended balance of the appropriation for the completion of the drainage survey of ceded Indian lands . . . is hereby reappropriated and made immediately available for an extension of the drainage survey . . . to cover the **Red Lake Diminished Reservation** in Minnesota, with a view to determining what portions thereof may be profitably and economically reclaimed by drainage to make the same suitable for agricultural purposes.

has retained a wholly "Indian character" absolutely inconsistent with diminishment. Today, almost all of the railroad grant is held in trust for the Band (and thus is Indian country), and what little fee land remains is largely held by Red Lake members or descendants of members, and there are only a handful of non-Indian residents in Redby.

1. Overwhelming Evidence of the Indian Character of Redby.

The evidence presented at the hearing was so overwhelming that the Defendant is left grasping at straws. He points out that some supplies used on the Reservation coms from off-reservation. Def.Br. at 42-43. That is, of course, absurd. If that were probative, one could as easily argue that Minneapolis is not part of Minnesota because many of its "supplies" come from other states.

"Redby" is one of four legislative districts, each of which provides two elected representatives to the Tribal Council. In fact, at least two of the Redby representatives on the Tribal Council in the last ten years own fee land in the town. Tr. 260-61. Mr. Westbrook also testified that at least one other Band member or descendant, his daughter, owns fee land in Redby. *Id.*

It is also notable that the evidence shows that non-Indians living and working in Redby are fully integrated into the community. *Id.* at 186. Her business obtains its business license from the Band, *Id.* at 183, and all of its fire,

police, ambulance, and water services from the Band.[15] *Id.* at 182, 197. Ninety-nine percent of her customers are Band members, and she hires Band member employees. *Id.* at 181. Her mother, Judy Lussier, testified similarly. *Id.* at 197.

No matter how one looks at present-day Redby, it is apparent that it is inherently a Red Lake tribal community.[16]

2. In this Case, the "Jurisdictional History" and "Justifiable Expectations" Referred to by the Supreme Court Compel a Conclusion of No Diminishment.

In some of its diminishment cases, the Supreme Court has looked at the subsequent treatment of "opened" lands and has focused on the "jurisdictional history" and "justifiable expectations" of the people involved. *See Hagen*, 510

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[15] That fee land owners in Redby pay taxes to Beltrami County is of no surprise or legal significance. It has long been held that fee lands within a reservation are subject to *ad valorem* taxation. *See, e.g.*, *Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992).

[16] Redby has been for many decades, and is, a major location of business and governmental operations of the Red Lake Band itself. The Band attests that the following tribally run and owned entities (from oldest to newest) operate or have operated within the original railroad platted area: the Red Lake tribal sawmill; Cedar Post Factory; Red Lake Fisheries; Redby Community Center; Red Lake Power Plant; Forestry Greenhouse; Redby Health Station; Indian Action; Water Tower; Commodity/Food Distribution; Forest Products; Halfway House; Redby Group Home; houses financed through Red Lake Tribal Credit Home Purchase Programs; houses rented through Red Lake Housing Authority Rental Home Programs; Water Bottling Plant; Red Lake Custom Doors; Red Lake Manufactured Homes; Food Service Program; New Beginnings; Red Lake Propane; and Red Lake Foods.

U.S. at 421; *Rosebud Sioux*, 430 U.S. at 603-605. In this instance, the "jurisdictional history" factors stand in stark contrast to *Hagen* and *Rosebud Sioux*, in which the Supreme Court found that a reservation had been diminished or disestablished.

Thus, the "subsequent treatment" and "jurisdictional history" in this case have created "justifiable expectations" on behalf of everyone that the Reservation was not diminished by the 1905 Act and that the Band is the governmental presence in Redby. Tr. 159-60. The Band is the government for Indians and non-Indians alike, on trust and fee lands alike. *Id.* at 175. A finding of diminishment here would "seriously disrupt" those expectations and at least cast into question whether the Band could or would continue to provide those services.

In short, the justifiable expectations of the Band and others are the result of a "jurisdictional history" that shows overwhelmingly that the railroad lands have remained a part of the Red Lake Indian Reservation. In the words of the Supreme Court in *Hagen* and *Rosebud Sioux*, those expectations and that history are a "practical acknowledgement that the Reservation was [not] diminished," and the justifiable expectations of the Band, its members, other Indians, non-Indians residents, the county, and the state should not be "upset by so strained a reading of the Acts of Congress as [Defendant] urges."

IV. *SMITH v. PARKER.*

Neither party cited *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2015), a recent decision in which this Court found that the Omaha Reservation had not been diminished by an 1882 surplus lands act. On October 1, 2015, the Supreme Court granted a writ of *certiorari, sub nom*. *Nebraska v. Parker*, No. 14-1406.

Smith may have some bearing on this case. Like the 1905 Act, the Court noted that "notably absent from this [statutory] language is any explicit reference to 'cession' combined with 'sum certain' payment." 774 F.3d at 1168. To reiterate, there is no "sum certain" in the 1905 Act. Looking at the "sum certain" cases, the underlying theme is that it is much more likely that Congress intended a wholesale divestiture (which is what diminishment is) if a tribe sells thousands of acres for a single fixed price. If payment is dependent on sale, then less than all might sell, in which case the tribe still holds the remainder. Although it is a very rough analogy, the 1905 Act "opened" 320 acres; only 300.59 sold.

The primary issue briefed to the Supreme Court in the petition and reply by Nebraska is whether the third factor – subsequent treatment – received sufficient weight in the courts below. On the third factor, the *Smith* case is a mirror image of this one. The *Smith* area is 98 percent non-Indian. The state and county exercised considerable, reportedly exclusive, jurisdiction over the area for decades until the tribe imposed the liquor sales tax at issue in 2006. Redby is essentially the opposite.

That at least four Justices voted to grant *cert.* suggests that a decision giving more weight to the third factor might possibly be forthcoming.

CONCLUSION

No one will ever point to the 1905 Act, or the 1910 Amendment, as paragons of legislative drafting. On balance and in their proper historical context, however, they cannot be viewed as evincing the clear congressional intent necessary to find diminishment, particularly in light of the unique history of the Band. They should be seen as what they were: a tool that allowed for timber to be transported by rail. That did not require diminishment, only access. The overwhelmingly "Indian" character of Redby today is confirmation of the historical context. The District Court's opinion should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Amicus Curiae filed in contains 6,862 words, excluding the table of contents, table of authorities, statement of amicus curiae, statement with respect to oral argument, and certificates of counsel and service, as counted by the word-processing system (Microsoft Word 2010) used to generate the brief. The brief otherwise complies with the type-volume limitations set forth in F.R.A.P. 29, 32(a)(7)(B) and (C)(Dec. 1, 2014) and Eighth Circuit Rule 28A(c).

I also certify that the electronic brief has been scanned for viruses and is virus free.

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