In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15-1789

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH JOSHUA JACKSON,

Appellant.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RED LAKE RESERVATION WAS DIMINISHED BY CONGRESSIONAL ACTS IN 1905 AND 1910.

The Congressional Acts of 1905 and 1910, granting land from the Red Lake Reservation to a railroad company for a township and ordering a subsequent patent, diminished the Red Lake Reservation by 312.09 acres. The district court reached an incorrect legal conclusion when it decided to the contrary. Both the United States ("the government") and Amicus Red Lake Band of Chippewa Indians ("Red Lake Band") have submitted Briefs urging this Court to affirm the district court. As this matter has been extensively briefed at every stage, most of the arguments raised in both Briefs were adequately addressed in Mr. Jackson's opening Brief. However, a few points require response.

A. Contemporaneous Understanding

The contemporaneous treatment of the property during the years between and immediately following the Acts plainly demonstrate diminishment. *Solem v. Bartlett*, 465 U.S. 463, 471 (1984). It is simply untrue that "there is no evidence of Indian removal," as the government asserts. Govt's Brief at 33. The historical record strongly indicates that the Native Americans who had lived in Redby prior to the 1905 Act were removed following the passage of the law, along with their homes. Def's App'x, Ex. 4. Not only was an itemized list of homes and their

estimated value prepared, but the railroad's attorney transmitted a check for $6,816.20 to compensate the removed Indians for their homes. History Study at 21. While the "Indian character" of the land may have been restored in the later decades following the reacquisition of part of Redby by the Red Lake Band following the dissolution of the railroad in 1938, the immediate removal of and payment for the Indian homes in the area following the 1905 Act strongly demonstrates that Congress, the Commissioner of Indian Affairs and the removed Indians all correctly understood that the land at issue had been diminished.

Moreover, the Commissioner's Annual Reports for 1904 and 1905 demonstrate this understanding. Def's App'x, Ex. 5 and 6. The reduction of 320 acres from the Red Lake Reservation is plainly reflected in the 1905 Report. The Band attempts to diminish the significant impact of this chart by pointing out that the leading atop of the column reflecting the remaining acerage of the reservation is called "area unallotted." Amicus at 18. This argument is unpersuasive. The chart is clearly designed to apply to other reservations, not just one Band that had resisted allotment. The chart shows all land that remains part of the reservation that has not yet been allotted, a category that explicitly excludes the land given to the railroad for its townsite. The land at issue in the present case was plainly never allotted, but also no longer remained part of the reservation.

B. Not a Right-of-Way

The 1905 Act as Amended diminished the Red Lake Reservation by giving the land at issue permanently to a railroad company for a townsite. The Band and the government, as they have done through this litigation, strive mightily to characterize the 1905 Act, as amended in 1910, as nothing more than a railroad right-of-way. This effort remains unpersuasive.

Amicus attempts to support this claim by pointing to Section 6 of the 1905 law, which gives Congress the power to "alter, amend, or repeal" the Act. Amicus, p. 16. In support of its position, Amicus points to a list of other Acts that *did* grant rights-of-way and included similar provisions. Amicus, p. 16, n.13. However, all the Acts listed contained far more critical provisions reflecting their right-of-way status, most critically a provision stating that the land *would be forfeited* if it was not used by the railroad for its intended purpose. *See* Amicus, p. 16, n. 13; s*ee also* FRED A. SEATON & ELMER F. BENNETT, FEDERAL INDIAN LAW 591 (2007). Such a provision is totally absent from the 1905 Act. Indeed, instead of reflecting that the Act was a right-of-way, Section 6 can be more persuasively read to emphasize that the 1905 Act was a unilateral decision by Congress that would be made regardless of the Indians' consent. Congress included the section to show that it, and only it, could alter the agreement with the railroad, should it choose to do so.

Many other aspects of the 1905 Act differ from railroad right-of-way legislation frequently seen during that era. For example, most railroad right-of-way acts contained very similar or identical language to one another. *See, e.g.*, Def's Brief at 24. The 1905 Act does not include such language. Acts granting rights-of-way were expressly titled "rights-of-way," and that term continues to appear throughout the text of the rest of those Acts. The term is absent from the 1905 Act's title and only appears in reference to the already-existing right-of-way. Right-of-way legislation does not mention title vesting in the railway company, unlike the 1905 Act. When taken as a whole, these factors point to the conclusion that the 1905 Act was a Congressional land grant that diminished the reservation, not a right-of-way.

C. Red Lake Resistance to Allotment Does Not Control

Both Amicus and the government emphasize that Red Lake strongly and successfully resisted allotment, and therefore the 1905 Act as amended should not be read to have diminished the reservation. Govt's Brief at 32; Amicus at 5. This argument is unavailing.

First, the critical question that is paramount in this Court's assessment is whether Congress intended diminishment, not whether the tribe agreed. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (noting that the "touchstone to determine whether a given statute diminished or retained

reservation boundaries is congressional purpose."). As explored in Mr. Jackson's opening Brief, the historical backdrop of the 1905 and 1910 legislation was a strong Congressional commitment to assimilate Native Americans and chip away at the reservations. This commitment went beyond efforts at allotment, which was one tool in the quiver of Congress and the executive branch. The goal was broader, and utilized 'legislation providing for the acquisition of Indian lands and resources."

> Thus the goal was to end the tribe as a separate political and cultural unit, destroy the Indian's own heritage and language, and replace all of this with an American heritage.

Cohen's Handbook, p. 73 (citing Commissioner of Indian Affairs Annual Report, H.R. Exec. Doc. No. 51-1 at vi (1890).

Moreover, the historical record of Congressional activities involving Red Lake definitively refutes the assertion that because Red Lake resisted allotment, Congress gave up on its efforts to reduce the size of the reservation. Indeed, in 1904 Congress passed an Act further reducing the size of the reservation over Red Lake disagreement and without the consent of Band members.[1] This unilateral action was described as consistent with a new policy to "deal with [Indians']

[1] Ian Smith, "A Study of the Act of February 8, 1905, and its Impact on the Red Lake Indian Reservation, Minnesota," April 19, 2013. ("Historical Study"), at pp. 11-12, Appx 31a and 32a.

property in such a manner as is deemed to be for their best interests." House of Representatives, "Indians of the Red Lake Reservation, Minn.," 58th Congress 2d Session, 1904, H.Rpt. 735, serial 4578, 5. Clearly Congress, rather than giving up its efforts to reduce the size of Red Lake, simply gave up on efforts to force allotment on an unwilling Band. Congress continued other acts of diminishment, including the 1904 Act and the 1905 Act granting a townsite to the railroad.

D. The 1910 Patent Amendment

A critical piece of evidence supporting a finding of diminishment is the unique step Congress took to grant the railroad's request for a patent. *See* Opening Brief, pp. 9-10, 31-21. The government attempts to minimize the impact of this reality by noting that U.S.C. §1153 defining Indian Country specifically does so "notwithstanding the issuance of any patent . . . ." However, this misapprehends Mr. Jackson's argument.

The issuance of the patent in this case is not, in itself, dispositive of the question of diminishment. Mr. Jackson does not argue that because there was a patent, the reservation was necessarily reduced in size. However, the patent is very persuasive evidence of Congressional intent to diminish. The patent request was originally denied, not because the Secretary of the Interior did not agree with the extent of the railroad's lawful and permanent ownership of the land, but because the government believed the land to be "fully vested," rendering a patent

unnecessary. This assurance was not enough for the railroad. Ultimately, a patent was ordered by no less than Congress itself, and was later signed by the President, granting "all rights and privileges . . . of whatsoever nature . . . to its successor and assigns forever." (App'x Ex. 8). Congress surely would not have taken such an unusual step unless it intended a permanent reduction in the size of the reservation. Neither Amicus nor the government point to any other legislation, including a railroad right-of-way, with similar language that did not result in diminishment.

E. *Smith v. Parker*: The Supreme Court Weighs In

Amicus also points to this Court's decision in *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2015), as having some bearing in this case. In *Parker*, liquor store operators challenged the Omaha Reservation's imposition of a liquor tax on the grounds that a classical piece of surplus lands legislation may have diminished the reservation. The district court applied the three-factor test outlined in *Solem* and found that the reservation had not been diminished, but focused almost entirely on the text of the statute itself. This Court affirmed in a short opinion.

Recently, the Supreme Court granted certiorari in this case to address whether ambiguous evidence concerning the first two factors of *Solem*'s analysis necessarily forecloses the possibility that diminishment can be found based on other considerations. *See Nebraska v. Parker*, No. 14-1406 (certiorari granted October 1, 2015). The Court will likely decide what weight to give the third

factor, subsequent treatment, and will further explore the correct diminishment analysis. Mr. Jackson suggests that any ruling on this issue emphasizing a multi-factor analysis will support a finding of diminishment in this case.

CONCLUSION

For all the reasons set forth in Mr. Jackson's opening Brief, as well as contained herein, Mr. Jackson urges the Court to conclude that the district court erred when it found that the 1905 Act as amended did not diminish the Red Lake Reservation. Instead, the language of the Act, the legislative history, the historical context and the contemporaneous treatment of the land all strongly support a conclusion that the reservation was diminished by 312.09 acres.

Dated: November 30, 2015

Respectfully submitted,

s/ Katherine M. Menendez

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UNITED STATES OF AMERICA,	)	Appeal No. 15-1789
	)	
v. Appellee,	)	
	)	**CERTIFICATE OF COMPLIANCE**
JOSEPH JOSHUA JACKSON,	)	**AND OF VIRUS FREE ELECTRONIC**
	)	**BRIEF**
Appellant.	)	

I hereby certify that the Reply Brief of Appellant filed in contains 1,765 words, excluding the table of contents, table of citations, and certificates of counsel and service, as counted by the word-processing system (Microsoft Word) used to generate the brief. The brief otherwise complies with the type-volume limitations set forth in F.R.A.P. 32.

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

Dated: November 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the Office of the Federal Defender for the District of Minnesota and that on November 30, 2015 he served the following documents electronically through CM/ECF to the below-listed party:

A. Reply Brief of Appellant;
B. Certificate of Compliance (bound in brief).

Deidre Yvonne Aanstad, AUSA

s/ Jay Vicha