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

BRIEF OF APPELLANT

KATHERINE M. MENENDEZ
Assistant Federal Defender
U.S. Courthouse, Suite 107
300 South Fourth Street
Minneapolis, MN 55415

Attorney for the Appellant

MICHAEL ZWICKEY
Legal Intern

SUMMARY AND REQUEST FOR ORAL ARGUMENT

In 1905, Congress passed a law granting 320 acres from the Red Lake Reservation in Minnesota to a railroad company to establish a townsite. In 2011, Joseph Jackson pleaded guilty to crimes committed on that land, which is today the town of Redby. However, he disagreed that the federal government had the authority to prosecute him because the 1905 Act, and its 1910 amendment, diminished the reservation. As a result the town of Redby is not "Indian country" within the meaning of 18 U.S.C. § 1153.

The district court considered the issue and concluded that the 1905 Act did not diminish the reservation. Mr. Jackson urges that this decision is incorrect. The plain language of the Act and its amendment, the surrounding historical context, and the legislative history all indicate that Congress intended to diminish the reservation. Moreover, the contemporaneous understanding of everyone affected by the Act - demonstrates that it diminished the reservation. Therefore the district court's conclusion was erroneous and this Court should vacate Mr. Jackson's conviction.

The issue raised in this Brief is legally and factually complex, and oral argument will greatly assist the Court. Given the extent of the record and the difficulty of the question presented, Mr. Jackson seeks twenty minutes in which to argue his case to the Court.

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JURISDICTIONAL STATEMENT

The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, presided at Joseph Jackson's guilty plea and sentencing. The government originally invoked the jurisdiction of the district court pursuant to 18 U.S.C. §§ 1153 and 3231. Whether the government had proper jurisdiction is the issue on appeal.

The district court clerk first entered judgment on the docket on November 30, 2011, and Mr. Jackson appealed his jurisdictional challenge to this Court. On October 2, 2012, this Court vacated the district court's judgment, and ordered the case to be remanded in accordance with its opinion. Specifically, the Court found that the district court had erroneously dismissed Mr. Jackson's challenge to federal jurisdiction over the part of the Red Lake Indian Reservation where the crime had occurred. Following remand, the parties agreed that the district court would consider the jurisdictional question and then Mr. Jackson could decide whether to withdraw his plea.

An evidentiary hearing was held before Judge Donovan W. Frank on August 14–15, 2013. Following its eventual determination that jurisdiction was proper, Mr. Jackson was resentenced with the agreement of the parties. The second judgment was entered on the docket on March 6, 2015. Joseph Jackson filed a notice of appeal on March 15, 2015. This notice was timely within the meaning of

Federal Rule of Appellate Procedure 4(b). Joseph Jackson again invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE

I.

THE DISTRICT COURT ERRED BY FINDING THAT REDBY, MINNESOTA, WAS NOT DIMINISHED FROM THE RED LAKE RESERVATION BY THE 1905 ACT OF CONGRESS, AS AMENDED.

City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005)

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)

U.S. ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975)

STATEMENT OF THE CASE AND OF THE FACTS

I. Statement of the Case

On June 7, 2010, Joseph Jackson was indicted in the district court for the District of Minnesota on multiple counts of felony assault and discharge of a firearm during the commission of a crime of violence. These charges stemmed from an April 29, 2010, assault carried out by Mr. Jackson in the town of Redby, MN.

Mr. Jackson filed a Motion to Dismiss Indictment for Lack of Jurisdiction on June 23, 2010. (Doc. No. 22.) He argued that the district court lacked subject matter jurisdiction because the crimes occurred on lands that had been diminished from the Red Lake Reservation by the 1905 Act of Congress to Allow the Minneapolis, Red Lake and Manitoba Railway Company to Acquire Certain Lands in the Red Lake Reservation, hereinafter the "1905 Act". (Doc. Nos. 32 & 43.)

On August 5, 2010, United States Magistrate Judge Raymond L. Erickson issued a Report and Recommendation ("R&R") advising that the Motion be denied. (Doc. No. 38.) The R&R determined that Redby had not been diminished from the Red Lake Reservation by the 1905 Act. The district court adopted the R&R, including its legal and factual findings, and denied Mr. Jackson's motion to dismiss. (Doc. No. 44.)

Mr. Jackson entered a plea of guilty on January 20, 2011. (Doc. Nos. 57 & 58.) He pleaded guilty to two counts in the indictment on the condition that he could "have the United States Court of Appeals for the Eighth Circuit review [the district court's] August 23, 2010 Order." The government agreed to allow Mr. Jackson to withdraw his plea if he prevailed in his appeal. (Doc. No. 58.) The district court sentenced Mr. Jackson on November 30, 2011 (Doc. No. 75), and he filed a notice of appeal shortly thereafter (Doc. No. 76).

On October 2, 2012, this Court vacated the district court's August 23, 2010, judgment and remanded for further proceedings. *United States v. Jackson*, 697 F.3d 670 (8th Cir. 2012). It held that the district court "erred in precluding Mr. Jackson's Indian country defense" because the government failed to produce sufficient evidence to show that the 1905 Act did not diminish the Red Lake Reservation, and therefore Mr. Jackson should be allowed to withdraw his guilty plea pursuant to the conditional plea agreement. *Id.* at 678. The case was remanded.

Mr. Jackson did not withdraw his plea of guilty and instead the parties and the court agreed to first address the legal question of diminishment. (Tr. 3–4.) The district court held an evidentiary hearing on August 14 and 15, 2013.[1] The

[1] The transcript from the hearing will be cited herein as "Tr."

government presented the testimony of five witnesses: Ian Smith, Project Historian with Historical Research Associates; Harlan Beaulieu, Red Lake Realty Officer; Debra Glynn, co-owner of the Redby One Stop, a convenience store in Redby, Minnesota; Janet Beaulieu, Assistant Director for the Red Lake Housing and Finance Corporation in Red Lake, Minnesota; and Captain Dana Lyons of the Red Lake Department of Public Safety. (Doc. Nos. 111, 112 & Tr. 7–239.) Mr. Jackson presented testimony of three witnesses: Judy Kay Lussier, co-owner of the Redby One Stop in Redby, Minnesota; Charlene Sturk, Beltrami County Recorder; and Thomas Westbrook, enrolled member of the Red Lake Band of Chippewa Indians and owner of the Redby Store in Redby, Minnesota. (Doc. No. 112 & Tr. 239–69.) In addition to witness testimony, the parties introduced approximately thirty exhibits. (*See* Doc. Nos. 113–14.)

After the evidentiary hearing, the parties filed extensive post-hearing briefing on the diminishment issue between November 2013 and January 2014. The court also received amicus briefing from the Red Lake Band of Chippewa Indians in March 2014. (Doc. No. 143.). The court issued a Memorandum and Order on May 21, 2014, rejecting Mr. Jackson's challenge to jurisdiction. This appeal followed.

II. Factual Background[2]

A. Establishment of the Red Lake Reservation and Land Cession

The Treaty of October 1863 established the Red Lake Reservation by stipulating that the Red Lake and Pembina Bands of Chippewa Indians would cede approximately ten million acres of their traditionally occupied land, reducing their territory to 3.2 million acres.[3] In 1889 and again in 1904, the Red Lake Band ceded two additional portions of its reservation. *See* Act of Jan. 14, 1889, 25 Stat. 642 ("1889 Act"); Act of Feb. 20, 1904, 33 Stat. 46 ("1904 Act"). Only 543,848 acres remained after the 1904 Act.

During this same time period, Congress granted five rights-of-way to railroad companies that affected the Red Lake Reservation.[4] (Historical Study at 8–9.) In these grants, Congress included provisions for the railroads to take

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[2] The factual recitation in this Brief cites the district court's Order rejecting Mr. Jackson's claim of diminishment, the record established at the evidentiary hearing, and the legal memoranda of the parties. There are few, if any, disagreements about what the "truth is" in the record. Instead, the parties disagree regarding whether the facts support a finding of diminishment, a legal question.

[3] Ian Smith, "A Study of the Act of February 8, 1905, and its Impact on the Red Lake Indian Reservation, Minnesota," April 19, 2013. (Hereinafter "Historical Study").

[4] Many historical documents were attached to the Historical Study and accepted into evidence in electronic form by the district court. Included on that disc were copies of many Acts of Congress from the turn of the last century. A few of those laws are included in the Appendix, and others are cited directly.

additional lands adjacent to the rights-of-way for the purpose of building railway stations and other facilities. (*Id.*) Congress also enacted a law that would allow railroads to obtain rights-of-way on Indian reservations through a regulatory framework with the Secretary of the Interior, which would no longer require an act of Congress for each individual right-of-way. (Historical Study at 10); Act of Mar. 2, 1899 ("1899 Act"), 30 Stat. 990.

B. Redby: The Land at Issue

In 1903, pursuant to the 1899 Act, the Red Lake Transportation Company obtained a permanent right-of-way for a previously constructed rail line running through the southern part of the Reservation to Redby. (Historical Study at 11.) The Company compensated the Red Lake Band in exchange for the right-of-way. (*Id.*) The Minneapolis, Red Lake and Manitoba Railway Company ("MRL&M Railway") acquired the Red Lake Transportation Company, including the permanent right-of-way to Redby, in June 1904. (Historical Study at 14.)

Later that year, the MRL&M Railway sought additional lands in Redby in order to create a "proper terminus" for its rail line. (*Id.*) Congress granted MRL&M Railway's request, and in February 1905, enacted legislation ("1905 Act") giving MRL&M Railway "the right to select and take from the lands of the

Red Lake Indian Reservation . . . . no more than 320 acres."[5] The title of the Act used the phrase "to acquire certain lands," while the text referred to "title vesting." (*Id.* at 89–90.) The Act also included specific language prohibiting alcohol on the land.

The lands that MRL&M Railway chose to take from the Reservation, slightly less than the 320 acres permitted, are shown on a map submitted to the Secretary of the Interior. (Historical Study at 20.) The Secretary approved the transaction in March 1905, transferring 312.09 acres within Redby from the Red Lake Band to MRL&M Railway.[6] (Historical Study at 23.) In May, MRL&M Railway issued a check for the amount of $6,816.20 in exchange for the 312.09 acres. (Historical Study. at 21.)

In June 1905, MRL&M requested that a patent be issued for the 312.09 acres acquired through the 1905 Act, but the Secretary of the Interior denied the request at that time. The Secretary stated that a patent was not needed because title had already vested in the company. (Historical Study at 24.) However, after additional

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[5] The law was formally titled "An Act to Allow the MRL&M Railway Company to Acquire Certain Lands in the Red Lake Indian Reservation." A copy of the Act in the Congressional Record is Exhibit 1 in Mr. Jackson's Appendix. It will be referred to as the 1905 Act throughout this Brief.

[6] The 1905 edition of the Annual Report of the Commissioner of Indian Affairs (ARCIA), a yearly status report on Indian Country, reflects a 312.09 acre reduction in the Red Lake Reservation's size. Appendix Exhibit 6.

lobbying, Congress enacted "Section 24" of the Act of June 25, 1910 ("1910 Amendment"), expressly amending the 1905 Act.[7] The amendment reads:

> After said company shall have filed maps of definite location and the same shall have been approved by the secretary of the Interior, as provided in section three, and compensation shall have been made to the tribes of Indians and occupants, as provided in section two, the Secretary of the Interior shall cause a patent for the land selected and taken to be issued to said company, the same to be in proper form to show the title vested in the company to the land selected by the terms of the grant in this Act contained.

Following this amendment, MRL&M Railway received a patent for the 312.09 acres in October 1916. (Patent, Appendix Exhibit 8.) No other act was passed during this time period allowing for a patent to issue to a railway company anywhere in Indian country, making MRL&M Railway's situation unique. (Tr. 83.) The MRL&M Railway continued to operate on its 312.09 acres, which fully encompasses the town of Redby, until 1938. (Tr. 154–56, 167–68.)

After the MRL&M Railway ceased operations, the Red Lake Band began an effort to restore the 312.09 acres into trust, which it has been able to do with approximately 95% of the land. (Tr. at 154.) Its efforts continue today.

The Red Lake Band provides most of the services in the Redby area, including public utilities, street maintenance, and emergency services. (Tr. at 159,

[7] The 1910 Amendment is included in the Appendix Exhibit 2. It will be referred to as the 1910 Amendment.

181–82, 203, 221–24.) Children in Redby also attend Red Lake Schools. (Tr. 186.) However, certain lots within Redby (including the lot where Mr. Jackson alleges the offense occurred) are privately held by individuals who are not members of the Red Lake Band. (Tr. 240-46.) They pay taxes to Beltrami County, which is adjacent to Red Lake, and the property deeds and transfers are registered with the county, just like non-tribal lands surrounding Red Lake.
(Tr. 158, 185, 195, 243, 244.)

SUMMARY OF ARGUMENT

In 1905, Congress passed a law granting approximately 320 acres from the Red Lake Reservation in northern Minnesota to a railroad company to establish a townsite at the end of its existing right of way. In 2011, Joseph Jackson pleaded guilty to committing crimes within that land, which today comprises the town of Redby within the current Red Lake Reservation. However, he disagreed that the Major Crimes Act gave the federal government the authority to prosecute him for the offenses because the 1905 Act, and its 1910 amendment, diminished the reservation. As a result the town of Redby is not "Indian country" within the meaning of 18 U.S.C. § 1153.

The district court considered the issue and concluded that the 1905 Act, as amended, did not diminish the reservation. However, Mr. Jackson urges that this decision is incorrect. The plain language of the Act and its amendment, when read in light of the historical context and the law's legislative history, indicates that Congress intended to diminish the reservation, and congressional intent is the "touchstone" of diminishment analysis. Moreover, the contemporaneous understanding of everyone -- the Red Lake residents, the railroad, and the federal government -- demonstrates that the Act indeed diminished the reservation. Although the current character of the land is in many ways indistinguishable from the other parts of Red Lake, in some ways Redby remains unique. Therefore the

district court's conclusion regarding diminishment was erroneous and the Court should vacate Mr. Jackson's conviction.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING THAT REDBY, MINNESOTA, WAS NOT DIMINISHED FROM THE RED LAKE RESERVATION BY THE 1905 ACT OF CONGRESS, AS AMENDED

The district court erred when it rejected Mr. Jackson's challenge to federal jurisdiction over the offense he committed in Redby, Minnesota, and found that Redby had not been diminished from the reservation more than a century ago. Although the court applied the correct legal standard to exploration of the evidentiary record, the court reached the incorrect conclusion about diminishment. The statutory language of the 1905 Act, particularly when considered in light of its 1910 Amendment, the legislative history, the historical context surrounding the passage of the Act, the contemporaneous understanding of the impact of the Act, and the subsequent treatment of the land all weigh in favor of a finding of diminishment.

A. Legal Framework: "Indian Country" and Diminishment

1. Standard of Review

The district court erred in determining that the Act of 1905, as amended in 1910, did not diminish the Red Lake Reservation by approximately 320 acres at the current site of Redby. Challenges to a district court's jurisdiction over crimes in "Indian country" are reviewed *de novo*. *United States v. Thunder Hawk*, 127 F.3d 705, 706 (8th Cir. 1997).

2. Jurisdictional Overview: The Major Crimes Act and Indian Country

Under the "Major Crimes Act," the federal government has jurisdiction to prosecute certain serious offenses committed by "any Indian" when such crimes happen "within the Indian country." 18 U.S.C. § 1153. "Indian country" comprises in part "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). In order to establish federal jurisdiction, "the government has the burden to prove that a crime was committed in Indian country." *United States v. Jackson*, 697 F.3d 670, 671 (8th Cir. 2012) (hereinafter "*Jackson I*") (citing *United States v. Jewett*, 438 F.2d 495, 497 (8th Cir. 1971)). Absent such evidence, the federal courts lack jurisdiction over "Major Crimes."[8]

[8] The government and Mr. Jackson disagree regarding the precise location of the offense in this case. Mr. Jackson's position is that it occurred on a plot of land that was privately held at the time of the offense, and had not been restored to trust status. The government intended to prove that the offense occurred on "trust" land within Redby. The question of where precisely the offense occurred is one for the jury, if it is relevant to the Indian country determination. However, the district court declined to consider whether crimes committed on lands restored to trust status give rise to federal jurisdiction because it found that the reservation had never been diminished in the first place, making it unnecessary to reach that issue. (Order at 22.)

3. Diminishment: A Multi-Factor Analysis

Whether diminishment has occurred is first and foremost a question of congressional intent. Since Congress "possesses plenary power over Indian affairs," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citations omitted), "only Congress can diminish the boundaries of an Indian reservation," *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 224 (2005) (Stevens, J., dissenting). Accordingly, the "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. The Supreme Court has identified three factors which play into a determination of whether a particular reservation has been diminished: the statutory language of the Act in question; the historical context surrounding the passage of the Act; and, to a lesser extent, the subsequent treatment of the land and pattern of settlement. *See Jackson*, 697 F.3d at 672 (citing *Yankton Sioux Tribe*, 522 U.S. at 344).

Statutory Language

"The most probative evidence of congressional intent is the statutory language." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 444-45 (1975)). "Explicit reference to cession . . . strongly suggests that Congress meant to divest [land] from the reservation . . . ."

Id. "When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its . . . land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-71. Thus, courts have closely scrutinized congressional Acts for particular words or phrases that demonstrate "the present and total surrender of all tribal interests" in reservation lands. *Yankton Sioux Tribe*, 522 U.S. at 344.

While there is no particular wording required for a finding of diminishment, courts have presumed a congressional intent to diminish when an Act refers to the "cession" or "relinquishment" of reservation lands. *See, e.g.*, *DeCoteau*, 420 U.S. at 445 (finding diminishment when Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in [reservation lands]."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590 (1977) (finding diminishment where Act effectuated "negotiations with the Indians . . . for the *cession* of [reservation lands]." (emphasis added); *Yankton Sioux Tribe*, 522 U.S. at 338 (finding diminishment when Tribe voted to "cede, sell, relinquish, and convey to the United States" all unallotted reservation lands). Such language is "precisely suited" to diminishment and creates a presumption that Congress intended to alter reservation boundaries. *Yankton Sioux Tribe*, 522 U.S. at 344.

Diminishment has not been found, however, where an Act merely provides for the future opening of reservation lands to eventual sale and settlement. *See, e.g.*, *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354-355 (1962) (determining that Act providing for the "sale of mineral lands and for the settlement and entry . . . of other surplus lands" did not diminish reservation); *Mattz v. Arnett*, 412 U.S. 481, 494 (1973) (finding no diminishment under Act providing for "disposition and sale of lands" and for "settlement, entry, and purchase"); *Solem*, 465 U.S. at 472 (holding that Act authorizing Secretary of the Interior to "sell and dispose" of reservation lands did not diminish boundaries). These provisions, on their own, "'did no more than to open the way for non-Indian settlers to own'" reservation land. *Solem*, 465 U.S. at 473 (quoting *Seymour*, 368 U.S. at 356). The mere opening of lands for future settlement, without additional evidence of diminishment, does not alter reservation boundaries.

Whether the term "diminishment" appears in the statutory language is "one important factor to be considered in . . . determin[ing] the intent of Congress." *United States v. Wounded Knee*, 596 F.2d 790, 795 n.7 (8th Cir. 1979). The intentional omission of the term can suggest that Congress intended to leave reservation boundaries intact, though its absence is by no means definitive. *See United States v. Wounded Knee*, 596 F.2d 790, 794-95 (8th Cir. 1979). At the same time, an Act referencing "diminishment," without more, does not

automatically reduce the size of a reservation. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 819 (8th Cir. 1983).

At the turn of the century, "Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one." *Yankton Sioux Tribe*, 522 U.S. at 343. The "notion that reservation status of Indian lands might not be coextensive with the tribal ownership was [then] unfamiliar . . . ." *Solem*, 465 U.S. at 468. As such, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Yankton Sioux Tribe*, 522 U.S. at 343. Because of this imprecision, courts have held that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Solem*, 465 U.S. at 471.

While the precise quantum of evidence necessary to find diminishment is yet unclear, this Court has provided some guidance. In *U.S. ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973), the Court considered an Act authorizing the Secretary of the Interior to "sell and dispose" of lands on the Cheyenne River and Standing Rock Reservations. The Act provided for allotments on the "reservations thus *diminished*" and for the use of timberlands so long as they

"remain part of the *public domain*."[9] *Id.* at 687 (emphasis in original). This language, according to the court, did not plainly evince a congressional intent to diminish the reservations, although it was a "close question." *Id.* In *U.S. ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), the Court examined an Act instructing the Secretary of the Interior to "sell and dispose" of land on the Pine Ridge Reservation. The Act also provided that "any Indian to whom allotments have been made on the tract to be ceded may . . . relinquish [them] . . . *on the diminished reservation*." *Id.* at 122 (emphasis added). According to the Court, this statutory language "conclusively show[ed]" a clear congressional intent to diminish the Pine Ridge Reservation. *Id.* The Court further noted that it was unnecessary to consider the legislative history "in view of the unambiguous terminology used in the Act . . . ." *Id.*

Between *Erickson*'s "close question" and *Parkinson*'s "unambiguous terminology," there remains an interpretive grey area. Thus, in order to divine congressional intent, it is often necessary to look beyond the statutory language.

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[9] "The public domain was the land owned by the government, mostly in the West, that was 'available for sale, entry, and settlement under the homestead laws . . . . '[T]he President [would] order, from time to time . . . parcels of land belonging to the United States to be reserved from sale and set apart for public uses.' This power of reservation was exercised for various purposes, including Indian settlement . . . ." *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (internal citations omitted).

Historical Context and Subsequent Treatment

Absent clear and plain evidence of congressional intent from the statute's text alone, Supreme Court precedent mandates the consideration of extrinsic evidence to determine whether a reservation has been diminished. *Yankton Sioux Tribe*, 522 U.S. at 344. Specifically, the court should examine "the historical context surrounding the passage of the [Act]," as well as the "subsequent treatment of the area in question . . . ," *Yankton Sioux Tribe*, 522 U.S. at 344, to consider whether diminishment occurred. *See also Hagen v. Utah*, 510 U.S. 399, 411 (1994).

> When events surrounding the passage of [an Act]—particularly . . . the tenor of 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, [courts] have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remain unchanged.

Solem v. Bartlett, 465 U.S. 463, 471 (1984). Also relevant in determining congressional intent are the "events that occurred after the passage of [the Act]." *Id.* "Congress's own treatment of the affected areas, particularly in the years immediately following the [Act], has some evidentiary value." *Id.*

B. The 1905 Act, As Amended, Diminished the Reservation

When this multi-factor analysis is applied to the 1905 Act, as amended in 1910, it becomes clear that Congress intended to diminish the boundaries of the Red Lake Indian Reservation. Every factor previously applied to claims of diminishment weighs in favor of a finding that the 1905 Act diminished the reservation.

1. Statutory Text: The 1905 Act, As Amended

The plain language of the 1905 Act, as amended, signals congressional intention to diminish the reservation. The district court's suggestion that this Act's text was essentially nothing more than a railroad right-of-way, and therefore did not result in diminishment, is neither supported by the text of the Act, nor by the historical record. (Order at 14-15.) Key statutory elements of the Act itself give rise to the conclusion of diminishment.

Certainly, this Court determined, in *Jackson I*, that "Section 1 and Section 5 of the 1905 Act do not provide clear and plain evidence of congressional intent to diminish the Red Lake Reservation's boundaries by the grant of this rather substantial Reservation acreage to expand the railroad's terminal facilities." *Jackson I*, 697 F.3d at 677. However, when these two sections are read along with the rest of the Act's text, along with the subsequent 1910 Act and in light of the Acts' legislative history and the surrounding historical context, congressional

intent to diminish is revealed. A close examination of both statutes demonstrates the error in the district court's findings.

First, comparing the 1905 Act as amended to railroad right-of-way legislation from the turn of the last century shows that this was not a mere right-of-way, but rather a cession of land. Second, the title of the Act and its discussion of compensation support a finding of diminishment. Third, the use of the term "diminished" in the text of the Act is persuasive evidence of congressional intent. Fourth, the inclusion of an express liquor prohibition in the Act by a legislator concerned about the issue strongly suggests that Congress knew it was diminishing the reservation through its 1905 action. Finally, the issuance of a patent via the 1910 Amendment provides clear and unique evidence of congressional intent to diminish the reservation and give permanent title to the railroad. Each of these aspects of the text of the 1905 Act as amended support a conclusion that it evinces a clear intent to diminish.

Not a Right-of-Way

The district court concluded that the 1905 Act was little more than a law extending a railroad's right-of-way, and therefore it did not diminish the

reservation. An examination of the Act as amended along with the railroad right-of-way legislation of the era reveals that the 1905 Act is very different indeed.[10]

Indeed, many of the unique elements of the 1905 Act are in sharp contrast to the railroad right-of way-legislation frequently seen during this era. Such statutes were congressional mainstays during the rise of the railroad, and many of them contain similar, if not verbatim, language to one another. As such, the government's examples have far more in common with each other than they do with the 1905 Act.

First, at the turn of the century, Acts granting railroads rights-of-way through reservation lands were expressly titled as "rights-of-way," and the term appears regularly throughout the text of these Acts.[11] The 1905 Act, by contrast, is

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[10] The district court gave weight to the conclusion of the historian, Ian Smith, that the 1905 Act was similar to a right-of-way statute, and such statutes generally do not give rise to a finding of diminishment. (Order at 18.) However, Mr. Jackson urges that this conclusion deserves no particular deference, whether it is considered the conclusion of the historian or of the district court. Both were examining the same documents now before the Court and the same statutes, and the true character of the 1905 Act, as amended, is a legal conclusion rather than a factual one.

[11] *See, e.g.*, Act of April 24, 1888, 25 Stat. 90 ("An Act granting the right of way to the Duluth, Rainy Lake River and Southwestern Railway Company . . . ."); Act of June 2, 1890, 26 Stat. 126 ("An Act granting to the Duluth and Winnipeg Railroad Company a right of way through certain Indian reservations in Minnesota"); Act of October 1, 1890, 26 Stat. 660 ("An act granting right of way to the Red Lake and Western Railway and Navigation Company across Red Lake Reservation . . . ."); Act of April 14, 1896, 29 Stat. 92 ("An Act Granting to the Duluth and North Dakota Railroad Company right of way through certain Indian reservations . . . ."); Act of March 2, 1899, 30 Stat. 990 ("An Act To provide for

entitled "An Act to allow the Minneapolis, Red Lake and Manitoba Railway Company *to acquire* certain lands in the Red Lake Indian Reservation, Minnesota." (emphasis added). The term "right-of-way" is completely absent from the Act's title, nor is it mentioned in the text. *See* Act of February 8, 1905, 33 Stat. 708.

Moreover, statutes, providing rights-of-way did not vest ownership of reservation lands in the railroad companies. Accordingly, these Acts make no mention of the term "title." *See, e.g.*, Act of April 24, 1888, 25 Stat. 90; Act of October 1, 1890, 26 Stat. 660. The 1905 Act, however, provides that "*title* to said lands shall vest in the said railway company" if compensation is made to the tribes. 1905 Act (emphasis added). The Act also gave the railroad express permission to "select and take" lands. 1905 Act, § 1.

Similarly, railroad rights-of-way were explicitly limited in their scope. Such legislation often permitted use of reservation lands only for railway-related purposes. *See, e.g.*, Act of April 24, 1888, 25 Stat. 91 (allowing land use for "station houses, depots, yards, machine-shops, side-tracks, turn-outs, and water stations); Act of June 2, 1890, 26 Stat. 126 (same); Act of October 1, 1890, 26 Stat. 660 (permitting right of way for "general railway uses and purposes only"). The 1905 Act, in contrast, contains no restriction whatsoever on the use of lands

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the acquiring of rights of way by railroad companies through Indian reservations . . . .")

granted to the railway company. Finally, unlike rights-of-way acts, the 1905 Act does not require the consent of the Indian tribes before vesting rights.[12]

The district court pointed to the statement of Representative Steenerson during the House debate prior to the 1905 Act, wherein he described the Act as extending the railroad's right-of-way. (Order at 14.) However, this characterization by one congressperson cannot be given such weight as to undermine the plain language of the Act, which is in so many ways unlike a right-of-way law.

Compensation

Another important textual aspect of the 1905 Act is that it expressly provided for compensation to the Indians, both collectively and individually, and explicitly stated the total number of acres to be removed from the reservation. *See* 1905 Act, § 2. "[A]n unconditional commitment from Congress to compensate the Indian tribe for its opened land" is language "precisely suited" to diminishment.

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[12] *See, e.g.*, Act of April 24, 1888, 25 Stat. 91 ("consent of the Indians to said right of way shall be obtained . . . . before any right under this act shall accrue to said company."); Act of June 2, 1890, 26 Stat. 126 ("consent of the Indians on said reservation as to the amount of said compensation and right of way shall have been first obtained . . . ."); Act of October 1, 1890 26 Stat. 661 ("consent of a majority of the male adults of the said Red Lake Chippewa Indians shall be obtained . . . ."); Act of April 14, 1896, 29 Stat. 92 ("the provisions of this Act shall not apply to the Red Lake Reservation until the consent of the Red Lake Indians shall be obtained . . . .").

Yankton Sioux Tribe, 522 U.S. at 344 (quoting *Solem*, 465 U.S. at 470). This is true even if the exact sum or method of compensation is not specified on the face of the Act. *See Rosebud Sioux Tribe*, 430 U.S. at 596 (finding diminishment under Act providing compensation for reservation lands later purchased by settlers); *DeCoteau*, 420 U.S. at 436-37 (same). This fact supports a finding of diminishment, but was not addressed by the district court in its Order.

"Diminished" — An Essential Part of the Act

An additional explicit clue that Congress intended diminishment with the 1905 Act is that the statute itself employed the term "diminished" in its text. Section 5 of the 1905 Act provides that the lands taken by the railroad "shall . . . remain a part of the *diminished* Red Lake Reservation" for the purpose of "prohibiting the . . . sale of intoxicating liquors in the Indian country . . . ." The explicit internal reference supports a finding that the 1905 Act diminished the reservation.

The district court minimized the impact of "diminished" in the text, concluding that it was commonly used in reference to Red Lake beginning in 1890, and therefore the presence of the term in the 1905 Act does not show an intent to further diminish the reservation. (Order at 18-19.) Specifically, the government argued and the court implicitly accepted that the diminishment referred to by the

term is that caused by earlier congressional Acts from 1863, 1889 and 1904, rather than by the Act itself. This conclusion is unsupported.

First, as this Court noted in its pre-remand opinion, "Congress had (in 1904) used the term 'diminished reservation' five times in provisions that clearly referred to the Red Lake Reservation *as diminished by that Act*." *Jackson I*, 697 F.3d at 677. "Although it is possible to construe 'the diminished reservation' in Section 5 of the 1905 Act as referring to the Reservation as diminished by [previous Acts], it is far more plausible to conclude that Congress used the term consistently in the two statutes, in which case 'the diminished reservation' in Section 5 refers to the Reservation as diminished *by the 1905 Act*." *Id.* (citing *Mattz*, 412 U.S. at 504 & n.22).

Moreover, the record simply fails to support the district court's conclusion that the Red Lake Reservation was widely referred to as diminished even prior to the 1905 Act. (Order at 18.) The government pointed to two pages from an 1890 report to Congress in which the Secretary of the Interior made reference to the boundaries of the "diminished" Red Lake Reservation. *See* Govt's Post-Remand Memorandum, p. 20. However, the remaining 191 pages of the report simply refer to the territory as the "Red Lake Reservation." Two isolated examples do not establish that "diminished" was a household term for the Reservation by 1905. It is also notable that three of the government's other examples are essentially the

same document the Annual Reports of the Commissioner of Indian Affairs (the ARCIA) from 1897, 1898, and 1901, in which the "Red Lake (diminished) Reservation" is discussed in reference to timber and logging operations. Such sparse evidence does not overcome this Court's valid conclusion that Congress used the term "diminished" consistently with prior legislation, and therefore its presence in the Act is indicative of diminishment by the Act itself. *See Wounded Knee*, 596 F.2d at 792-94 (holding that Congress did not inadvertently omit the term "diminished" from statute when it used the term consistently in three similar Acts).

Liquor Prohibition

The liquor prohibition added to the 1905 Act also clearly points to congressional intent to diminish the Red Lake Indian Reservation. Because a general ban on liquor on tribal bands had been in effect for years by 1905 (Tr. 95), such a section would be unnecessary surplusage if the land in question remained an unchanged part of the Reservation. As this Court acknowledged in its pre-remand opinion, "the prohibition was unnecessary if the Act did not diminish the Reservation because the Act of July 23, 1892 . . . already prohibited the introduction and sale of intoxicating liquors in Indian country." *Jackson I*, 697 F.3d at 677 (citations omitted).

The district court concluded that the liquor prohibition is not evidence of diminishment because similar provisions appeared in other surplus land legislation, notwithstanding the general liquor prohibition. (Order at 19.) However, the record supports a contrary conclusion. First, Mr. Smith, the government's historian, acknowledged that he was unaware of the inclusion of the liquor prohibition in any right-of-way legislation in this era (Tr. 95-102), undermining his claim that the 1905 Act is essentially nothing more than a right-of-way law. Also, the examples of other liquor prohibitions proffered by Mr. Smith are similar to the one considered in *Rosebud Sioux Tribe*, 430 U.S. at 613. The Supreme Court, addressing the same argument the government relied upon below, stated: "As there existed, in 1910, an outstanding prohibition against the introduction of intoxicants into 'Indian Country,' the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country,' because [they are] not in the Reservation." 430 U.S. at 613 (internal citation omitted). A decade later, in *Yankton Sioux Tribe*, the Court reaffirmed this conclusion. There, a surplus-lands Act prohibited liquor on "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians . . . ." 522 U.S. at 350–51. Although the Commissioner of Indian Affairs had recommended, before the Act's passage, that Congress "fix a penalty for the

violation . . . most effective in preventing the introduction of intoxicants *within the limits of the reservation*," *id.* at 350 (citation omitted), the Court—citing *Rosebud Sioux Tribe*—concluded that the provision more reasonably suggested diminishment, *id.* at 351. The Court then added: "We assume that Congress is aware of existing law when it passes legislation." *Id.* at 351 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

The liquor prohibition in the 1905 Act does not suggest that it would apply to lands retained or reserved; rather, it applies only to "territory hereby *granted*." If the liquor prohibitions in *Rosebud Sioux Tribe* and *Yankton Sioux Tribe*—provisions less clearly suggestive of diminishment than this one—were construed in favor of diminishment, then the 1905 Act's prohibition must also suggest diminishment.

1910 Amendment

In this case, the 1905 Act must be read along with 1910 Amendment in an effort to discern congressional intent; indeed in this case Congress acted twice rather than a single time, giving even more explicit evidence regarding its intent than is usually available. The two Acts together, not merely the first, provide the plain statutory language, and the fact that the Amendment was even adopted is unique, instructive, and cannot be ignored. When the 1910 Amendment is

considered, it becomes even more clear that Congress intended to diminish the Red Lake Indian Reservation.

The 1910 Amendment, which caused a patent to issue, confirms that the 1905 Act was much more than a mere right-of-way. The patent itself is explicit in granting "all rights and privileges . . . of whatsoever nature . . . to its successor and assigns forever." (Presidential Patent, Appendix Exhibit 8.) The government pointed to no other similar legislation, let alone a mere right-of-way, in which Congress acted in the years after passage to clarify its intention in an earlier statute. Nor is there any evidence before the Court about similar presidential patents. Here, Congress voted to require a patent to issue further cementing the previous cession of lands. The patent itself, when finally signed by the President of the United States, could not have been more clear about the scope of rights it cemented.

In sum, the 1905 Act as amended is full of textual evidence that Congress intended it to diminish the Red Lake Indian Reservation.

2. The Historical and Legislative Context

Even if this searching analysis of the text were not so conclusive, a close examination of the history of Redby, Minnesota, and the context surrounding the 1905 Act as amended reveals that not only did Congress intend to diminish the Red Lake Reservation through the 1905 Act and its 1910 Amendment, but at the time

and in the decades that followed, everyone from the railroad, to state and local governments, to the tribe itself, believed that they had done so.

a. The Era of "Allotment and Assimilation"

It is essential to understand the overarching motivation and goals of those in the United States government who charted the direction of national policy toward Native American communities during the timeframe surrounding the congressional action at issue in this case. Beginning in the later part of the nineteenth century and throughout the late 1920s, the "theme of Indian policy . . . was 'civilization and assimilation'." *Cohen's Handbook of Federal Indian Law*, p. 72 (Nell Jessup Newton, ed., 2012). As Mr. Cohen describes, "[a]t the heart of this policy was legislation providing for the acquisition of Indian lands and resources." *Id.* Sadly the policy makers of the era argued that Indian people needed to adopt a "civilized" life of farming and work and be "mainstreamed" into society.

Tragically, the zeal with which the ill-conceived policies of assimilation and allotment were pursued guaranteed loss of millions of acres of tribal lands around the nation, and indeed millions were taken from tribes in Minnesota alone.

> 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. Official policy reflected this attitude; in 1889, the commissioner of Indian Affairs wrote: "The American Indian is to become the Indian American." To both the Indian and the Indian Agent, this was a battle to the death, and federal

> officials were ordered to use the full force of the law to achieve assimilation.

Cohen's Handbook, p. 73 (citing Commissioner of Indian Affairs Annual Report, H.R. Exec. Doc. No. 51-1 at vi (1890)). The federal government, including both the Executive Branch and Congress, which generally did the bidding of the Indian Affairs Commission "experts," was resolutely committed throughout these decades to chip away at tribal lands, tribal sovereignty, and Native American culture. It is against this dismaying but uncontrovertible backdrop that the 1905 Act was conceived of and passed.[13]

b. Report of the House Committee

The House Committee Report, detailing debate prior to passage of the 1905 Act, describes correspondence between the Commissioner of Indian Affairs and the Secretary of the Interior, and provides further context for the passage of the

[13] The district court concluded that, aside from clear congressional intent, the intent of the Red Lake Band to resist allotment during this era was relevant to the Court's decision and weighed against a finding of diminishment. (Order at 16-17.) Perhaps unfortunately, the Supreme Court decisions and their progeny make clear that *congressional* intent, not its wisdom nor its popularity, is the central question. Red Lake's ability to resist allotment in the late nineteenth century was impressive but, sadly, the overarching intent of Congress to chip away at the reservation after the Allotment Act is written even more clearly in the statutes passed throughout the era. The fact that Red Lake admirably and successfully resisted other efforts at allotment referenced by the district court does nothing to alter a conclusion that the 1905 Act as amended was consistent with the actions of a Congress widely dedicated to reducing the extent of Indian lands nationwide.

law. Mr. Tonner, the acting Commissioner, begins by explaining that the provisions of the bill allow the Minneapolis, Red Lake and Manitoba Railway Company to "select and take from the lands of the Red Lake Indian Reservation." (Appendix Exhibit 7.) The Report makes no mention of a right-of-way, instead saying that the railroad may "take" whichever lands it chooses, so long as it does not exceed 320 acres. *Id.*

What is perhaps more telling, however, is the Commissioner's discussion of "cession or grant of land" coupled with a mention of compensation. This type of language is "'precisely' suited to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344. While the Report does not discuss a specific sum of money to be given to the Indians, it does state that the amount of compensation "shall be ascertained and determined [by] the Secretary of the Interior" and that it shall be paid within one year after the Act's passage. (Appendix Ex. 7) This language is further evidence of Congress' intent to grant the railroad more than a mere right of way.

3. Contemporaneous Understanding: A Critical Consideration

In addition to legislative history, actions taken in the immediate wake of the passage of the Act shed further light on congressional intent and the meaning of the statue. That "contemporaneous understanding," supports a finding of diminishment. *Solem*, 465 U.S. at 471.

First, the historical record suggests that the Indian residents of the land ceded by the 1905 Act were removed from the land and compensated for their lost property. Included in the Appendix are an appraisal of Indian owned property on the "proposed townsite of the Minneapolis, Red Lake, and Manitoba Railway," and correspondence regarding the amount of damages to be paid to the Indians for that property.[14] The schedule of appraisal lists ten Indian owned houses on the property, and payment is made as "compensation to the individual occupants owning the property." App'x Ex. 4. The fact that houses were swiftly removed from the land is very strong evidence that the occupants of those dwellings were similarly removed and relocated to other property which still belonged to the Band.[15]

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[14] *See* "Letter from Secretary, Dept. of the Interior, to The Commissioner of Indian Affairs, March 18, 1905 (with attached list of improvements); included in the Appendix at Exhibit 4.

[15] The government contended that "(I)ndian Agents continued to work in the area of Redby and report on the tribal members living in the area." (Govt's Post-Remand Memo at 24, App'x Ex. 10.) However, the only indication of continued Indian presence in the area of Redby described in the historical report itself is discussion of a "local character" bootlegging whiskey at Redby, the nearest railroad terminus to the reservation, sometime in the past. (Historical Study at 31.) There is no discussion of any other management of Indian affairs in Redby in the report or its documents. The record strongly suggests that once the railroad owned the land in Redby, the Red Lake members left and did not return until after the repurchase agreement in 1939.

Second, the Acting Commissioner of Indian Affairs in 1905 and 1906, certainly the government official most responsible for Indian policy during this era, behaved entirely as though this was a diminishment of the reservation, rather than a mere right-of-way. In commenting on the Act prior to its passage, he characterized it as a "cession or grant of land." That grant of land was soon 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.[16] This is in marked contrast to the railroad right-of-way statutes, which had led to no acreage reduction in the annual reports.

Similarly, when the MRL&M railroad requested a patent for the land in question, the Secretary of the Interior denied the request. (Tr. 105.) According to the federal government, the land fully vested and such patent was unnecessary. (Tr. 105.) The railroad's interest in the 312 acres was also such that it readily displaced a lesser interest hold in a portion of those lands by the Episcopal Church. (Tr. 124.) The church's interest was described as "not permanent" and not proprietary. (Tr. 123-24.) The interests granted by the 1905 Act were altogether different.

[16] Relevant portions of the 1904 and 1905 Commissioner Reports are included as Exhibits 5 and 6 in the Appendix.

The district court relied upon Bureau of Indian Affairs documents and maps that continued to reference the diminished Red Lake Reservation as including the land selected and taken by the railway company pursuant to the Act of 1905, and concluded that those documents show the reservation was not diminished. (Order at 20.) There is certainly no dispute that the *exterior* boundaries of Red Lake were not changed by the Act, nor that the 312 acres taken by the railway company lay within those exterior boundaries. But there can be no assertion that Congress is precluded from diminishing a reservation by passing a law removing a portion of interior land from reservation status, as happened here. If the definition of "Indian country" meant nothing more than that land had to be within exterior boundaries of a reservation, then this court would have readily affirmed the earlier decision finding jurisdiction. The question of congressional intent does not end at the exterior boundaries.

Third, the very way in which the land in question was handled following the 1905 Act demonstrates how radically different that statute was from the rights-of-way to which the district court compares it. Unlike mere rights-of-way, the Act of 1905 carved a town out of the Red Lake Reservation, and gave that town to the railway company forever. The townsite was platted in detailed maps, planning for future development. (Tr. 105.*)* In 1905, the railroad was an essential part of the present and future; indeed, no one envisioned then that the railroad would leave

Redby by 1939. Not only did the railway company own the land and prepare it for development, but it sold parcels of the land to private non-Indian citizens as soon as 1906, when Britta Olson purchased land in the acreage given to the railroad by the 1905 Act.[17] (Tr. 242-43.)

These facts reflect a "widely held, contemporaneous understanding" that the 1905 Act diminished the reservation. *Solem*, 465 U.S. at 471. In this case the multi-faceted historical context immediately following the 1905 Act's passage should be given even more weight in light of the fact that Congress acted five years after the initial statute to clarify its intention with the 1910 Amendment. Had any of the actions taken—from the removal and compensation of the Indian residents, to the reduction in acreage shown in the Commissioner's reports, to the sale of land to a non-Indian resident—been inconsistent with congressional intent, had the Commissioner erroneously assumed a further cessation that legislators intended, then the 1910 Amendment would have curbed or correct such erroneous assumptions. Instead, Congress plainly reaffirmed the understanding that this Act was more than a railroad right-of-way with the explicit grant of a patent. The

[17] Indeed, although in later years business owners followed the tribal code in Redby, there is no evidence whatsoever that any residents or businesses in the first half of the century were subject to tribal code or required to obtain tribal licenses to operate.

impact of the Act and the contemporaneous understanding of its meaning support a finding of diminishment.

4. Subsequent Treatment

Although less important than the above-explored considerations, the subsequent treatment of the land and its current character are both factors in determining whether diminishment occurred. Actions taken by the Red Lake Band since 1939 to reacquire the lands that had been thought lost for good are further evidence of diminishment.

a. Trust Lands in Redby

In 1939, following the collapse of the railroad, the Red Lake Tribal Council decided to re-purchase available portions of the land from the railroad "as an addition to the Indian Reservation." (Appendix Ex. 3.) Such action would have been unnecessary had the land been part of the reservation already, as the district court concluded. The Tribal Council believed that lands that were once part of the reservation had been lost and wanted to reclaim them.

Not only has the Band repurchased land in Redby, but over the decades, the band has purchased or made attempts to purchase property relinquished by congressional Acts preceding the Act of 1905. The process for those clearly diminished lands and for the lands in Redby is the same. (Tr. 172-73.) The land is

acquired and placed in trust for the Red Lake Band, regardless of whether the property is inside or outside of the official reservation boundaries as currently set.

The government suggested, but did not argue, that the lands restored to trust are Indian country even if other plots of land within Redby are not, instead relying on its position that none of Redby was diminished. The district court did not address this question. It is clear that subsequent actions by the Red Lake Band do not alter original congressional intent toward the land: if the area in question was diminished by the 1905 Act and 1910 Amendment, it remains diminished today regardless of restoration of portions of the land to trust.

In sum, the fact that the Band has worked for decades to restore land removed from tribal ownership supports, rather than undermines, a finding of original diminishment.

b. Current Character of Redby

The current treatment of the land in question does little to answer the question before the Court, namely whether the reservation was diminished a century ago. While we have strong evidence regarding the character and use of the area today, the record is understandably less developed regarding earlier decades. It is known that property transfers of the land in question have always been recorded in Beltrami County, not in the Red Lake Reservation land office. (Tr. 240-46.) Property taxes have been paid to the state of Minnesota, and not the

Band. Charlene Sturk, Beltrami County Recorder, testified that there are currently thirty-one tax assessed parcels within Redby. (Tr. 245.) Property that was originally sold by the railroad company to non-Indian owners was later resold to non-Indian owners, and those transactions were all recorded with the county. (Tr. 240-46.) Nothing in the record suggests that the Red Lake Band had any involvement in or control over the land taken under the Act of 1905 during the first three decades after the Act was passed.

Moreover, even the modern character of the land gives rise to conflicting conclusions. Today, much of the land has been put into trust, and the Red Lake Band has assumed responsibility for many things in Redby, regardless of the ownership or status of the land. For instance, the tribe provides law enforcement, fire protection, education and most utilities. However, even in recent years, there was a time when law enforcement from other jurisdictions would come onto the reservation until the tribal council stopped that practice.[18] (Tr. 222.) In addition, both Police Chief Lyons and Thomas Westbrook testified that supplies for

[18] Although no witness who testified could remember an instance in which Beltrami County had prosecuted an offense in Redby, the record makes very clear that such a prosecution occurred, and suggests that it occurred at Judy Lussier's property. In 1964, the Minnesota Supreme Court considered a state prosecution of Mr. Lussier for burglary in Redby, and concluded that the state lacked jurisdiction. *State v. Lussier*, 269 Minn. 176 (1964). However, for such a decision to exist, there must have been at least one such state prosecution of a crime from Redby.

businesses came from off the reservation as a matter of routine. (Tr. 232, 253.) Judy Lussier testified about the "unique" character of her business. (Tr. 195.) She acknowledged that she valued her place in the community, and would not "jeopardize" it by not complying with the tribal code. (Tr. 200.)

In fact, the treatment of these 312 acres over the last hundred years actually supports a finding of diminishment because of the stark contrast between the early and later parts of the twentieth century. If the railroad had not left Redby, there would be no question about the character of the land: it was not Indian country from 1905–1939, and it remains non-Indian country today absent affirmative action by Congress to restore reservation status.

CONCLUSION

For the above reasons, the Act of February 8, 1905, as amended in 1910, diminished the Red Lake Indian Reservation by roughly 312 acres. The statutory text, when read as a whole, provides clear and plain evidence of diminishment, and the historical context of the Act's passage and the subsequent treatment of the land also demonstrate Congress' intent to diminish the reservation. Therefore, Mr. Jackson asks this Court to reverse the district court's determination of jurisdiction, vacate his conviction, and remand for further proceedings.

Dated: July 9, 2015

Respectfully submitted,

s/ Katherine M. Menendez

KATHERINE M. MENENDEZ
Assistant Federal Defender
U.S. Courthouse, Suite 107
300 South Fourth Street
Minneapolis, MN 55415
612-664-5858

Attorney for the Appellant

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

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 Brief of Appellant filed in contains 9,588 words, excluding the table of contents, table of citations, statements with respect to oral argument, addendum 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(a)(7)(B) and (C)(Dec. 1, 1998) and Eighth Circuit Rule 28A(c).

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

Dated: July 9, 2015

Respectfully submitted,

s/ Katherine M. Menendez

KATHERINE M. MENENDEZ
Assistant Federal Defender
District of Minnesota

U.S. Courthouse, Suite 107
300 South Fourth Street
Minneapolis, MN 55415
612-664-5858

Attorney for the Appellant

In the
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For the Eighth Circuit

United States of America,

Appellee,

v.

Joseph Joshua Jackson,

Appellant.

Appeal No. 15-1789

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 July 9, 2015 he served the following documents electronically through CM/ECF to the below-listed party:

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

Deidre Yvonne Aanstad, AUSA

s/Jay Vicha