

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 04-3834

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STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

THE STOCKBRIDGE-MUNSEE COMMUNITY  
AND ROBERT CHICKS,

Defendants-Appellants.

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ON APPEAL FROM AN ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT, ENTERED IN THE UNITED  
STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
WISCONSIN, THE HONORABLE PATRICIA J. GORENCE  
PRESIDING

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BRIEF AND SEPARATE SUPPLEMENTAL APPENDIX OF  
PLAINTIFF-APPELLEE

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BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

The appellants' jurisdictional summary is complete and correct.

STATEMENT OF THE CASE

This case generated a massive record in the court below. To assist the District Court in accessing the relevant historical documents, the parties jointly prepared a set of Master Documents (R-156-57),

comprising the documents both sides referenced in their summary judgment filings. The references in the decision below “[MD\*]” are to these documents. The parties also filed extensive proposed findings of fact. The State’s proposed findings of fact are located at R-133.

The parties’ experts were as follows: for the State, Dr. James Clifton, Dr. Lawrence Kelly, Dr. Richard Zeitlin, and Alan Newell; for the Tribe, Dr. James Oberly and Dr. Charles Cleland.

To help the court visualize the land areas at issue here, the State’s appendix begins with a series of six colored maps the State prepared for the preliminary injunction hearing (S-APP. 001-006).<sup>1</sup> These maps depict the progression of the Stockbridge Reservation from 1856 to the present.

## STATEMENT OF FACTS

The original Stockbridge-Munsee reservation was created by the 1856 Treaty. *See* 11 Stat. 663 (APP. 92-107). That reservation consisted of two 36-section townships, now known as the Towns of Red Springs and Bartelme (APP. 93, 108-09A; depicted on S-APP. 001).

The Treaty’s recital clauses recall longstanding tribal dissension, but express the shared goal of both factions to eventually terminate

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<sup>1</sup>The State will refer to its appendix as “S-APP.”

tribal relations, the only difference being over how quickly this should occur (APP. 92-93). The Citizen party favored immediate cessation of tribal relations, whereas the Indian party sought a gradual approach:

a majority of the said tribe . . . are desirous soon to remove and to resume agricultural pursuits, and gradually to prepare for citizenship, and a number of other members of the said tribe desire at the present time to sever their tribal relations and to receive patents for the lots of land at Stockbridge now occupied by them.

(APP. 92).

### *GENESIS OF THE 1871 ACT*

The poor soil quality of the reservation caused severe economic hardship, leading the Tribe to petition the Commissioner of Indian Affairs (“Commissioner”) for relief in November 1866. The petition, signed by members of both tribal factions, asked for “a new Treaty, whereby we can be delivered from our present troubles” and “be brought into a more congenial country” (S-APP. 12).

On February 15, 1867, tribal representatives and federal officials negotiated and signed a treaty (“1867 Treaty”), which provided for an explicit cession of the entire 72-section reservation to the United States (APP. 131). It also provided that the 224 members of the Citizen party would receive cash payments for their share of the tribal estate and lose tribal status (*id.*). The Treaty further provided that the Tribe would subsequently consist only of the 168-member Indian party, for which

the U.S. would procure a suitable tract of agricultural land, to be held as restricted allotments,<sup>2</sup> *i.e.*, “without power of alienation” absent approval by the Secretary of the Interior (“Secretary”) (APP. 132). Any approved sale would necessitate a corresponding “relinquishment” of tribal membership (*id.*). All agree that, if ratified, this treaty would have indisputably disestablished the reservation (S-APP. 298).

Both factions began lobbying Congress for ratification of the Treaty or enactment of legislation with similar terms. The 1867 Treaty was not ratified due to congressional squabbling over Indian treaty-making<sup>3</sup> (S-APP. 298-99). In an 1870 petition to both Houses of Congress, Citizen party members urged approval of the Treaty, with an amendment allowing Citizens to opt for land “in lieu of money” (S-APP. 036). Indian party leaders Darius Charles and Jeremiah Slingerland “visited Washington on many occasions . . . to advance the goal of

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<sup>2</sup>In Indian law, “allotment” refers to the distribution of specific parcels of reservation land to individual Indians, generally with a restriction on alienation for a period of time. *Yankton Sioux Tribe v. Gaffney*, 188 F.3d 1010, 1015-16 (8th Cir. 1999).

<sup>3</sup>After 1871, U.S.-tribal relations were conducted by statute rather than treaty. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.) at 74-75.

selling the reservation and disenfranchising the ‘Old Citizens’” (S-APP. 312).<sup>4</sup>

In 1870, Wisconsin Senator Timothy Howe introduced S. 610, drafted by Charles and Slingerland, who described their legislative goals:

The Tribe . . . being still anxious to accomplish the desired change [set out in the 1867 Treaty] have appointed [us] to represent their wishes, and to devise a plan by which they may realize the value of their timbered lands, and at some future day obtain a more favorable location. Some members of the tribe are also desirous of severing themselves from the tribe and withdraw their share of the common property. Under these circumstances, your Memorialists have prepared with care . . . S. 610. Its provisions if carried into effect will, we think, bring about all that the treaty of 1867 was designed to accomplish, viz, the final settlement of our affairs, and that too without any charge to the government.

(APP. 138-39). Congress understood that S. 610 originated with the Tribe (S-APP. 307).

S. 610 became the 1871 Act<sup>5</sup> (S-APP. 306-07). Its principal terms were:

- The two townships were to be sold at public auction for not less than their appraised value (Secs. 1 and 2). Lands remaining unsold after one year would be re-offered, at not less than \$1.25 per acre (Sec. 2). The government would

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<sup>4</sup>Meanwhile, the Indian party devised another treaty proposal that, while never submitted to Congress, embodied the essential terms of the ensuing Act: the cession of 1.5 townships, and retaining the southern half of Red Springs as a reservation for the remnant Indian party (S-APP. 16-34, 299). S-APP. 16-31 is the Tribe’s hand-written version of the draft; S-APP. 32-34 is a typescript version.

<sup>5</sup>An Act for the Relief of the Stockbridge and Munsee Tribe of Indians, ch. 38, 16 Stat. 404 (1871).

credit the tribe at “sixty cents per acre” for lands remaining unsold (Sec. 4).

- The Secretary was “authorized to reserve from sale a quantity of said lands not exceeding eighteen contiguous sections, . . . subject to allotment to members of the Indian party” (Sec. 2).
- The proceeds from the sales would be split proportionately between the Citizen and Indian parties, with the Citizens’ share distributed in cash and the Indian party’s share held by the U.S. for its benefit (Sec. 5).
- Up to \$30,000 of the Indian party’s funds could be used for “securing a new location for said tribe, and in removing and aiding them to establish themselves in their new home . . . [in which case] the said eighteen sections of land reserved for their use by the second section of this act shall be sold . . . and the proceeds thereof placed to their credit” (*id.*).
- Two rolls were to be prepared. The “citizen roll” would comprise those desiring “to separate their relations with said tribe, and to become citizens of the United States.” The “Indian roll” would comprise those desiring “to retain their tribal character and continue under the care and guardianship of the United States” (Sec. 6).
- Entry on the citizen roll would “be held as a full surrender and relinquishment” of tribal membership, and “they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States” (Sec. 6).
- The remaining Tribe, renamed the “Stockbridge tribe of Indians,’ . . . may be located *upon lands reserved by the second section of this act*, or such other reservation as may be procured for them” (Sec. 7).
- After a “permanent reservation shall be obtained . . . by said tribe, either at their present home or elsewhere,” it

was to be subdivided and a “just and fair allotment” made among tribal members (Sec. 8).

- The title to the allotments would be held in trust for the Tribe by the U.S. The remaining surplus lands were to remain in trust, subject to future allotments or sale for the Tribe’s benefit (Sec. 9).

(APP. 142-45) (emphasis added).

With the 1871 Act, Congress intended and expected that the non-reserved lands would pass into the hands of logging interests, rather than non-Indian settlers (S-APP. 270-71, 277, 306). “The interest of Congress was not to promote the rapid settlement of farmer-homesteaders, but rather to maximize revenue to the Tribe for selling the pinelands”<sup>6</sup> (S-APP. 305). There was virtually no settlement—by anyone—on the 54 sections of timberlands sold under the 1871 Act (S-APP. 293).

Pursuant to the Act, the Tribe selected as its “permanent home” 18 contiguous sections in the southeastern portion of the two townships, *i.e.*, the south half of Red Springs, the area the Indian party proposed as its new reservation in the draft 1868 treaty (S-APP. 41-42; depicted on S-APP. 002). Accordingly, the Secretary reserved those lands from sale (APP. 146-47, 162). By 1874, the other 54 sections of the 1856

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<sup>6</sup>As early as 1850, the Stockbridge-Munsee were not “traditional Indians,” but virtually indistinguishable from their white neighbors in language, religion, and livelihood (S-APP. 328-31).

reservation had been disposed of in accordance with the 1871 Act (S-APP. 307A).

### *SUBSEQUENT UNDERSTANDING OF THE 1871 ACT*

After implementation of the 1871 Act, it was universally understood—by the Tribe and the United States—that the reservation had been reduced to 18 sections (S-APP. 281-87, 332, 336).

All available information from the Department of Interior (“Interior”) confirms this view. In his 1872 annual report, the Commissioner of Indian Affairs (“Commissioner”) reported that “steps are now being taken to dispose of all of [the Stockbridge] reservation, with the exception of eighteen sections . . . reserved for their future use” (S-APP. 047). The Commissioner’s subsequent reports between 1872 and 1910 variously described the reservation as having an acreage of 11,520 or 11,803; as being “diminished”; as limited to a “little over a half township” or “half a township” (S-APP. 250). In 1898, he summarized the history of the reservation since 1856: “its area has been changed under the provisions of the Act of [1871] which authorized the sale of one entire township and half of the other. . . . The total area of this reservation as *diminished* under the Act of 1871 is 11,520 acres” (S-APP. 69-70) (emphasis added); *accord* (S-APP. 63, 72, 76). Similarly, in 1904, the Commissioner reported to the U.S. Attorney

in Milwaukee that the 18 contiguous sections set apart on August 4, 1871 “compose the [tribe’s] present reservation” (S-APP. 102-03).

Interior’s maps complemented its reports, reducing the depiction of the reservation from two townships to half a township between the 1870’s and the 1890’s (S-APP. 309).

Congress had the same understanding. An 1888 Senate committee report stated that under the 1871 Act, the Secretary set aside 18 sections “of the old reservation for the use of the Indian party, and this little reservation they are now occupying” (S-APP. 52). This statement was reiterated in two different reports in 1890 (S-APP. 54, 56). During an 1891 debate on what became the 1893 Act, one congressman described the 18 sections as “a remnant of the reservation that was disposed of under the act of 1871” (S-APP. 58).

Citizen party complaints that it had been wrongfully disenfranchised by the 1871 Act induced passage of the 1893 Act,<sup>7</sup> which restored tribal membership to Citizen party members, guaranteeing them “their pro rata share in tribal funds and in the occupancy of tribal lands.” 27 Stat. at 745. The 1893 Act did not address reservation boundaries (S-APP. 281, 287-91, 322-23).

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<sup>7</sup>An Act for the Relief of the Stockbridge and Munsee Tribe of Indians, ch. 219, 27 Stat. 744 (1893).

John Adams, Stockbridge attorney and Citizen party member, testifying before Congress in 1892, straightforwardly acknowledged that the Tribe knew the reservation had been reduced to 18 sections.

*Mr. Adams.* They have only eighteen sections of land, the balance of their reservation having been sold under act February 6, 1871.

. . . .

*Senator Jones.* Were they entitled at that time to seventy-two sections of land?

*Mr. Adams.* Yes, sir; as stated in Article I, of said treaty of 1856.

*Senator Jones.* And they gave up their township of land and their claim to the seventy-two sections for this present reservation?

*Mr. Adams.* Yes, sir; for the present reservation, and the money . . . .

*Senator Jones.* What is their present reservation?

*Mr. Adams.* Their present reservation contains eighteen sections . . . .

(S-APP. 61-62).

Against this background, the Supreme Court concluded that “all Indian rights had ceased” in the 54 sections. *Minnesota v. Hitchcock*, 185 U.S. 373, 398 (1902).

#### *GENESIS OF THE 1906 ACT*

With the re-enrollment of the Citizens, tribal membership swelled to over 500 by 1894. The 8920 acres of commonly held tribal lands were not enough to make the allotments required under the 1893 Act. *Wisconsin v. Stockbridge-Munsee Community, et al.*, 366 F.Supp.2d 698, 719 (E.D. Wis. 2004) (hereinafter, “*Stockbridge II*”). This situation

engendered another round of tribal complaints, petitions, and requests to Interior and Congress, culminating in the 1906 Act.<sup>8</sup>

The Tribe expressed its frustration at the delay in the “settlement of our affairs” in an 1899 petition to the Secretary (APP. 162). It was willing to accept

“most anything that will secure us in the right in the management of our own property and to be relieved from the protection and care of the Government of the United States for we feel that we are fully competent and able to sustain ourselves in conducting our own affairs. We have been doing so for the last twenty-five years or more; therefore we ask that the balance of our land may speedily be allotted and that a special agent, with such instructions, be sent on to carry out the treaty of 1856. . . .”

. . . .

“. . . [We] would most respectfully ask that our affairs be wound up and let every man be his own master, for they are well able and capable to conduct their own affairs as any white man, and our women are as good housekeepers as can be found in any community in the country.”

(APP. 163).

The Secretary thereupon dispatched special agent Cyrus Beede to the reservation in late 1900 to meet with tribal members and develop a plan “for an equitable settlement of their affairs with the Government,” including addressing the shortage of land to make the required allotments (APP. 163-64). On December 8, 1900, a majority of the Tribe’s voting members agreed to a plan of settlement providing for the

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<sup>8</sup>Act of June 21, 1906, ch. 3504, 34 Stat. 325, 382 (1906).

patenting<sup>9</sup> to tribal members of all the available land and, at the government's expense, the purchase of additional lands or provision of cash payments for those not receiving land within the 18 sections (APP. 159).

The Secretary promptly sent Congress draft legislation to implement the plan, which was “designed and intended to adjust and settle all matters pertaining to the affairs of the Stockbridge and Munsee tribe of Indians” (APP. 158). The Secretary cited Beede's observation that “[t]he time has fully arrived when the affairs of this unfortunate people should be settled and their relations with the Government cease” (APP. 160).

Congress was subsequently inundated with statements from both Interior and the Tribe that the proposed legislation would accomplish the Tribe's goals of completely distributing its land and money to the membership and terminating federal supervision over the Tribe.

The Green Bay Indian Agency reported in 1901 that Interior had “for some time been convinced that the Stockbridge Indians ought no longer to remain wards of the Government, as they are intelligent and fully capable of caring for themselves, but owing to the various factions

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<sup>9</sup>In the federal land context, “patent” refers to fee-simple conveyance of public land to an individual. BLACK'S LAW DICTIONARY at 115 (8th ed. 2004).

existing in the tribe it has, until recently, been impossible to effect a settlement of their tribal affairs. . . . [Now we have] secured more than a majority . . . to a plan of settlement which provides for an equitable division of the tribal property . . . .” (S-APP. 82). The Agency reiterated these views in 1902 and 1903 (S-APP. 92-93).

In April 1902, the Secretary forwarded to the Chairman of the Senate Indian Affairs Committee a tribal petition seeking immediate passage of the pending bill (S-APP. 84-85).

The office [of the Secretary] must desire to disband us as a tribe and allow us to mingle with the white people and pass out of existence as a tribe, but from the way in which our bill is left with Congress to care for itself there is little evidence of such a desire. The Stockbridge and Munsee Indians are huddled together on their reservation like cattle in a pen waiting for a settlement of their tribal affairs.

(S-APP. 86-87). The Indian Agent assigned to the Tribe reported in 1904 that “with very few exceptions the sentiment is universal for the passage of the bill” (S-APP. 94).

The House report acknowledged that the patenting bill was “intended to adjust and finally settle all of the affairs of the Stockbridge and Munsee tribe of Indians. The bill is drawn so as to carry out the plan of settlement formulated in an agreement on December 8, 1900, which was signed by more than a majority of the male adult Indians” (S-APP. 96). The report concluded that the bill “furnishes the best

means possible for settling for all time the affairs of the tribe” (S-APP. 97).

The plan would finally become law in 1906. Passage was delayed by an impasse between House and Senate on how to fund the no-land payments. *See Stockbridge II*, 366 F.Supp.2d at 721. The Tribe resolved the impasse by allowing the U.S. to draw the payments from its federally-protected tribal trust fund (S-APP. 107). The Tribe recognized that its purpose was “settling all difficulties among the Indians & making United States citizens of them as there is [no]<sup>10</sup> longer any reason for maintaining their Tribal relations” (S-APP. 108). With the funding impasse resolved, the bill passed and was signed into law (APP. 175).

The 1906 Act fulfilled the objectives of the 1900 petition. *See United States v. Anderson*, 225 F. 825, 831-32 (E.D. Wis. 1915). Its effect was clear, given the contemporary understanding “that a reservation disappeared when its lands were fully allotted and the Indians became citizens” (S-APP. 310). Indeed, the policy of assimilation—and the concomitant dissolution of tribal status—was at

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<sup>10</sup>Read in the context of the entire letter, the State presumes that the writer unintentionally omitted the word: “no.”

its zenith around the turn of the century and the years immediately thereafter (S-APP. 324).

After passage of the 1906 Act, all interested parties continued to recognize that its implementation would end federal supervision over the Tribe. For example, in his 1906 annual report, the Commissioner observed that with the Act, “[i]t is hoped that the affairs of these Indians can be settled and the Government’s supervision of them cease” (S-APP. 112).

The Tribe concurred. Responding to a proposal that would restrict the alienation of the patents (thereby prolonging federal supervision over the property) (S-APP. 113-14), the Tribe’s attorney strenuously objected. He told Congress that tribal members “want the [fee] patents issued,” and that “Congress is doing them an injustice in withholding the patents” (S-APP. 117). “The idea was not to patent part of the land to part of the Indians, but to forever wind up the Stockbridge Indians’ affairs—to patent all the land there was to them” (S-APP. 117, 123). The move to impose restrictions failed, and Interior issued tribal members their unrestricted patents on April 4, 1910 (APP. 177).

## *SUBSEQUENT UNDERSTANDING OF THE 1906 ACT*

The common and frequently expressed understanding of the 1906 Act after it was implemented was that it had disestablished the Stockbridge reservation.

Less than two months after issuance of the patents, a tribal member asked the Commissioner whether tribal members were now citizens (and thus subject to tax on their property). The response was unequivocal: “All restrictions and control of the United States having been relinquished by the issuance of patents in fee simple, the lands are taxable the same as are lands of all other residents of the State of Wisconsin” (APP. 177).

Federal officials clearly and consistently deemed the reservation terminated. Without fail, the Commissioner’s annual reports reported that there was no unallotted reservation land remaining after the issuance of the fee patents in 1910 (S-APP. 128-31, 134-35, 141).

The Keshena Indian Agency’s annual reports demonstrate that the Tribe was no longer under federal supervision. For example the 1923 report explained that the Stockbridge Indians having been “allotted and having had all restrictions removed several years ago, have ceased to be a Government care beyond the settling of occasional back annuity claims and the arrangement for the attendance of a few

needy ones in non-reservation schools” (S-APP. 146); *accord* (S-APP. 136-42, 144, 146, 149, 152). Further, the Tribe had no functioning business committee or other “governmental” structure to handle its affairs after 1910 (S-APP. 132).

A Prohibition-based jurisdictional quandary that arose in the 1920’s and ‘30’s further illustrates the universal belief in the reservation’s demise. The Town of Red Springs (site of the 18 sections reserved for the Tribe under the 1871 Act) was rife with alcohol violations by Indians. Acknowledging variously that the problems were on “territory adjacent to the Menominee Reservation” (S-APP. 155); on the “former Stockbridge Reservation” (APP. 209); in “the country bordering the [Menominee] Reservation and known as the old Stockbridge Reservation” (S-APP. 160); “outside of the [Menominee] Reservation and under jurisdiction of the State” (S-APP. 154), State and federal officials nevertheless sought some federal basis for enforcing the liquor laws against the Stockbridge. *See also* (S-APP. 162, 166-67, 170). Assistant Commissioner John Collier resolved the matter in a letter dated November 20, 1933, in which he explicitly concluded the reservation had been abolished through the fee-patenting under the 1906 Act (S-APP. 172).

The U.S. District Court for the Eastern District of Wisconsin had reached the same conclusion in 1911 and 1915. In *United States v. Gardner*, 189 F. 690 (E.D. Wis. 1911), the court observed that prior to the 1906 Act the reservation consisted of 18 sections, but after the patents issued, “there remained no reservation, but . . . each allottee in fee simple had become thereby a citizen of the United States, and a citizen of the state in which he resides and amenable to the laws of said state.” *Id.* at 694; *accord Anderson*, 225 F. at 825 (the reservation “has been dissolved through the patenting in fee simple of the lands comprising the same to the members of the tribe”).

#### *REORGANIZATION UNDER THE IRA*

The Indian Reorganization Act of 1934 (“IRA”), 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, signaled abandonment of the prior assimilation policy and restoration of tribal sovereignty. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.) at 84-89. The IRA promoted tribal self-government by allowing tribes to reorganize and adopt tribal constitutions. It also authorized the Secretary to acquire lands “for the purpose of providing for Indians,” and “to proclaim new Indian reservations on lands [thus] acquired.” 25 U.S.C. §§ 465, 467.

Shortly after enactment of the IRA in 1934, the Tribe applied for reorganization. Its application, and Interior’s response, reaffirm that

neither the Tribe nor the United States believed the Tribe's reservation had survived the 1906 Act.

The Tribe candidly acknowledged that it had neither a reservation nor any lands on which to create a reservation. A tribal resolution dated February 20, 1934 requested that Interior "restore to us sufficient land for the establishment of a Reservation" (S-APP. 173). One tribal leader wrote to the Commissioner in 1933 that his "idea would be a new reservation of a few thousand acres" (S-APP. 168). Another urged federal acquisition of lands "formerly in the old Stockbridge Reservation" (S-APP. 178). In 1935, a tribal leader complained about trespassing on the sub-marginal lands "adjoining our former Stockbridge Ind. Reservation on the West" (S-APP. 183). In 1937, the Tribe sought the continuation of the Indian Emergency Conservation Work program "on what is eventually to be our new reservation" (S-APP. 184).<sup>11</sup>

Reflecting the universal understanding that no reservation existed, Interior suspended action on the Tribe's request for reorganization because it had no reservation (APP. 223-24). Relatedly, Interior concluded that the Tribe had not been under federal

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<sup>11</sup>The neighboring community shared this opinion (S-APP. 179-181).

supervision since the former reservation had been fee-patented in 1910 (S-APP. 175, 182). Accordingly, Interior denied the Tribe's application until there was a "plan for acquiring land and *setting up a reservation status* for these Indians" (APP. 221-23) (emphasis added).

To remedy the no-land problem, Interior acquired approximately 1050 acres of land in the Town of Bartelme, within the confines of the original Stockbridge-Munsee reservation. In a "Proclamation Setting Aside Land for Reservation," dated March 19, 1937, the Secretary then "proclaimed [those lands] to be an Indian reservation" (APP. 227; depicted on S-APP. 004). This reservation proclamation removed "[t]he original obstacle to the Band's organization" (APP. 228), and left "the way open for completing tribal organization" (S-APP. 185).<sup>12</sup>

Subsequently, on July 1, 1937, the Tribe submitted a new constitution to Interior for approval (S-APP. 186-87). The territorial clause read as follows:

The jurisdiction of the Stockbridge Munsee Community shall extend to all lands purchased, now or hereafter, by the United States for the use of members of the said Community.

(S-APP. 187).

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<sup>12</sup>A 1971 General Accounting Office report submitted to the Senate reported that "[i]n March 1937 the Secretary of the Interior established the new Stockbridge Reservation and the land was placed in tribal trust" (S-APP. 238). The 1,050 acres were comprised "of former reservation lands" (*id.*).

After several revisions to the draft constitution, F. H. Daiker, Assistant to the Commissioner, found it satisfactory and recommended that a special tribal election be convened to adopt the constitution. Summarizing the relevant tribal history and reorganization process, Daiker explained that reorganization was “conditioned upon the establishment of a reservation for these Indians. The status of the reservation of these Indians has now been established and the constitution and by-laws resubmitted is, in my opinion, satisfactory from the viewpoint of law and policy” (S-APP. 189). The constitution was then approved by Interior after a tribal election held on October 30, 1937 (S-APP. 190, 194-95).

A dispute immediately arose over whether eligibility to serve on the Tribal Council under the new constitution was limited to members living on the new proclaimed reservation, or extended to those who lived in Red Springs—*i.e.*, within the original 1856 boundaries but outside the “new” reservation (S-APP. 198-200). Clearly differentiating between the former reservation and the newly proclaimed reservation, Interior declared that all members living “within the *original* confines of the Stockbridge Reservation” were eligible to hold office, whereas the Tribe’s jurisdiction, by contrast, “is clearly limited to ‘all lands

purchased, heretofore or hereafter, by the United States for the benefit of said Community” (APP. 233).

### *CREATION OF THE MODERN RESERVATION*

By March 1940, Interior had purchased an additional 1200 acres of land within the Town of Bartelme for the Tribe (APP. 216). By proclamation dated December 7, 1948, the Secretary declared that these “are hereby added to and made a part of the existing reservation established March 19, 1937” (S-APP. 210; depicted on S-APP. 005). The Secretary told Wisconsin Senator Alexander Wiley that “there is no apparent reason why this land should not be added to and made a part of the existing reservation.” Up until then, the Secretary observed, the reservation had consisted of only the 1050 acres proclaimed reservation in 1937 (S-APP. 208).

On April 15, 1938, Interior obtained jurisdiction on the Tribe’s behalf of approximately 12,085 acres within the original 1856 reservation (APP. 216). The land had originally been purchased through the Farm Security Administration (“FSA”) (*id.*). Legislative efforts to add the FSA lands to the reservation extended from 1948 to 1972. The Secretary urged Senator Wiley to sponsor legislation to place these lands in trust for the Tribe, a necessary prerequisite to adding them to the reservation (S-APP. 208-09). In 1950, the Tribe lobbied

Congress directly with a similar request, revealing its view that the FSA lands were not yet part of the reservation (S-APP. 211-12).

In 1952 Interior clearly distinguished between “the 2,240 acres of land purchased and designated by the Secretary of the Interior as the Stockbridge-Munsee reservation” and the 13,887 acres of FSA and additional “submarginal” lands (S-APP. 213). A report by Congress that same year cited similar numbers (S-APP. 214-15), stating that after the 1856 Treaty and the 1871 and 1906 Acts, the Stockbridge-Munsee “were no longer wards of the Government having been given their citizenship in 1909. From this date to the Reorganization Act of June 18, 1934, this group was independent of any Government supervision” (S-APP. 217).

On October 9, 1972, Congress enacted Public Law 92-480,<sup>13</sup> declaring the FSA and other submarginal lands “part of the reservation heretofore established for . . . the Stockbridge Munsee Indian Community” (APP. 235; depicted on S-APP. 006). In the hearings leading up to the passage of the law, witnesses consistently testified that, without the FSA lands, the Stockbridge reservation consisted of only the 2250 acres proclaimed reservation in 1937 and 1948 (S-APP. 227-36).

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<sup>13</sup>Act of October 9, 1972, Pub. L. No. 92-480, 86 Stat. 795 (1972).

Both before and after 1972, tribal officials and members repeatedly acknowledged that the reservation was limited to the approximately 2250 acres proclaimed reservation in 1937 and 1948. For example, Tribal President Arvid Miller told Senator Wiley on January 24, 1962 that, although the government had purchased 13,000 acres for the Tribe, they were “never actually added to the small reservation we have of some 2200 acres of land” (S-APP. 222); *accord* (S-APP. 218-21). A 1970 tribal resolution stated that the “Reservation proper of I.R.A. lands as it is referred to, is in such limited portion, consisting of 2,250 acres.” Because the “declared reservation” is “far too small” to meet tribal needs, the Tribal Council requested “that said Farm Security Land be declared and made a part of the present existing reservation” (S-APP. 226).

The Bureau of Indian Affairs (“BIA”) agreed. In 1967, the Chief of the BIA’s Tribal Government Section stated that the 1937 proclamation established “what is presently known as the Stockbridge Reservation” (S-APP. 223). Elsewhere, the BIA explained that “the Stockbridge-Munsee Indians are using 15,327 acres of land, of which 2,250 acres have been declared to be a reservation” (S-APP. 224-25).

The Tribe's understanding that its original reservation no longer existed continued after passage of the 1972 Act. In its Conservation Code enacted in 1974, it identified its territory as:

all lands and waters acquired by purchase under the provisions of Section 16 of the Act of June 18, 1934 (48 Stat. 984) and proclaimed to be an Indian reservation for the use and benefit of the Stockbridge-Munsee Tribe of Indians of Wisconsin.

(S-APP. 239).

### *DEMOGRAPHIC AND JURISDICTIONAL FACTS*

The evolving demographics of the original two-township reservation show that the disputed area did not consistently maintain an "Indian character" after the congressional enactments of 1871 and 1906, and is predominantly non-Indian today.

Census data shows a surge of non-Indians into both Bartelme and Red Springs within a decade after the reservation had been fee-patented. In 1920 there were 302 whites and 77 non-whites in Bartelme; in 1930 the numbers were 229 and 31, respectively. By 1940—after tribal members moved onto the newly proclaimed reservation and FSA lands—there were 254 whites and 256 non-whites (S-APP. 294-96). Red Springs in 1920 had 322 whites and 507 non-whites, and by 1940 the white population had eclipsed the non-white population, 471 to 435 (S-APP. 294).

In both townships, tribal populations have increased in recent years, but tribal households are concentrated in the 1937/1948 proclaimed lands, and the lands added to the reservation in 1972. Within the disputed area of the two townships, Stockbridge tribal members only comprise an estimated 17% of the population.<sup>14</sup>

The State of Wisconsin has consistently exercised jurisdiction over the disputed area, with the Tribe's full consent. Pre-1920 court records show that Stockbridge Indians regularly litigated claims in Wisconsin state courts, including criminal, divorce, and land law (S-APP. 279). In 1903, the Green Bay Indian Agency reported that Stockbridge Indians "submit[ted] their local differences and troubles to the civil and criminal courts" (S-APP. 093). In 1944, the Tomah Indian Agency similarly reported that "[t]he Stockbridge people sanction the enforcement of State laws and have encouraged its enforcement by local authorities" (S-APP. 205). Consistently, both Indian Agents and U.S. Attorneys were repeatedly told that they did not have jurisdiction over

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<sup>14</sup>This estimate is based on Chairman Robert Chicks' assertion that in 1998 258 of the 671 households in the two townships were tribal (APP. 247). Apparently, only 84 of those households were in the disputed area (S-APP. 338-39, 342-43). Assuming that average tribal and non-tribal households are similarly sized, the population in the disputed area as of 1998 was 83% non-tribal (413 of the 497 households) and 17% tribal (84 of the 497 households).

the old 1856 reservation in its entirety, but only over the lands proclaimed reservation in 1937 and 1948 (S-APP. 206-07C; 216).

## SUMMARY OF ARGUMENT

Long before the 1856 Treaty, both tribal factions looked forward to the Tribe's eventual dissolution and concomitant disestablishment of its reservation. The 1871 Act was an important step towards this ultimate goal. With its implementation, 54 contiguous sections of the previous 72-section reservation were sold, and the proceeds distributed to the Tribe. The Indian party chose to retain the remaining 18 sections of the old reservation as its new reservation. It too, however, sought to dissolve federal supervision and eliminate all restrictions on tribal property. Congress granted the Tribe's request by passing the 1906 Act, which finished the process of tribal dissolution and reservation diminishment by allotting and fee-patenting the remaining reservation lands to the tribal members until there was no reservation left.

Only Congress can diminish or disestablish a treaty-created reservation. This court must look to statutory language, surrounding circumstances, subsequent history, and contemporary demographic trends in the disputed area to determine congressional intent. The State will demonstrate that, using each of these interpretive tools, the

evidence is overwhelming that, as the District Court concluded, Congress intended to diminish the reservation to 18 sections in 1871 and to disestablish the reservation entirely in 1906.

## ARGUMENT

### I. CONGRESSIONAL INTENT TO DIMINISH IS ASCERTAINABLE FROM STATUTORY LANGUAGE, SURROUNDING CIRCUMSTANCES, SUBSEQUENT HISTORY, AND DEMOGRAPHIC AND JURISDICTIONAL FACTS.

In seven cases the Supreme Court has determined whether Indian reservations were diminished<sup>15</sup> by acts of Congress: *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent of Wash. State Pen.*, 368 U.S. 351 (1962). The Court concluded that Congress intended to diminish the reservations in *Yankton*, *Hagen*, *Rosebud* and *DeCoteau*; it found no intent to diminish in *Solem*, *Mattz*, and *Seymour*.

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<sup>15</sup>“Disestablishment” refers to a reservation’s termination, while diminishment refers to a reduction in size. *Yankton*, 188 F.3d at 1017.

The “touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose.” *Yankton*, 522 U.S. at 343. The Court has employed three categories of information to discern congressional intent: 1) statutory language; 2) surrounding historical circumstances; and 3) subsequent treatment and history of the disputed area. *See id.* at 344. Although statutory ambiguities are to be resolved in favor of the tribe, that canon of construction is not a license to disregard Congress’ clear intent. *DeCoteau*, 420 U.S. at 447; *accord Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998).

Statutory language is the “most probative evidence of diminishment,” *Hagen*, 510 U.S. at 411. “Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.” *Solem*, 465 U.S. at 470. However, the Court has “never required any particular form of words before finding diminishment,” and has explicitly rejected a “clear-statement” requirement. *Hagen*, 510 U.S. at 411; *accord Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005) (“no magic words are required”).

Absence of explicit language does not equal absence of congressional intent to diminish. The absence of such language was typical in surplus land acts, which

seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When [they] were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. . . .

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. . . . Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

*Solem*, 465 U.S. at 468; *see also Montana v. United States*, 450 U.S. 544, 559-60 n.9 (1981).

The Court has held that absent “a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished.” *Yankton*, 522 U.S. at 351.

When events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of 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, we 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 remained unchanged.

*Solem*, 465 U.S. at 471. Thus, although Congress used “strikingly similar” language in the enactments examined in *Seymour* (where the Court found no diminishment) and *Rosebud*, “the circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress meant for each Act to diminish the Rosebud Reservation.” *Solem*, 465 U.S. at 469-70 n.10.

Subsequent treatment of a tribe and its lands by Congress, the Bureau of Indian Affairs, and the Department of Interior are also probative of the reservation’s disestablishment or continued existence. See *Yankton*, 522 U.S. at 351; *Solem*, 465 U.S. at 471, 480; *Seymour*, 368 U.S. at 356-57.

The Tribe misleadingly asserts that “the Court has noted that subsequent history carries ‘little force’ and has ‘limited interpretive value.’” Tribe’s Brief, 19. In *Yankton* and *Hagen*, cited in support of this claim, the Court simply concluded that the specific historical facts before it were unilluminating and therefore carried “little force” and had “limited interpretive value.” See *Yankton*, 522 U.S. at 355-56; *Hagen*, 510 U.S. at 420. While the Court has found such subsequent history unhelpful where it is mixed, revealing no “consistent, or even dominant” approach, *Yankton*, 522 U.S. at 356, it clearly is relevant here, where the belief in the reservation’s demise was nearly universal.

Finally, courts consider “the pattern of settlement,” or the racial and ethnic composition of the disputed area after the reservation’s opening. *See Yankton*, 522 U.S. at 356-57; *Solem*, 465 U.S. at 480. The relevant demographic data is drawn from the population in the disputed area, not the population on lands held in trust or otherwise located within undisputed Indian country. *See Hagen*, 510 U.S. at 421; *Solem*, 465 U.S. at 480. Together with demographics, the courts have assessed the state’s assertion of jurisdiction over the disputed lands after the reservation’s alleged diminishment or disestablishment. *See Yankton*, 522 U.S. at 357; *Rosebud*, 430 U.S. at 604-05; *DeCoteau*, 420 U.S. at 442-43.

Two aspects of the Supreme Court’s diminishment jurisprudence are of particular note in the present case.

First, unlike here, all the Supreme Court’s diminishment cases involved surplus land acts. Common during the late 19th and early 20th centuries, these acts furthered Congress’ ultimate policy objective during that period—the eventual dissolution of both reservations and tribes. In the long term, Congress “anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process.” *Solem*, 465 U.S. at 468. Such legislation effectuated a congressional “policy which looks to the breaking up of tribal relations,

the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States.” *Matter of Heff*, 197 U.S. 488, 499 (1905);<sup>16</sup> *see also Mattz*, 412 U.S. at 496 (“When all the lands had been allotted and the trust expired, the reservation could be abolished.”).

In the short term, the acts forced Indians onto allotments in order to turn them into farmers and accelerate their cultural “assimilation,” and opened unallotted “surplus” lands to non-Indian settlement. *Solem*, 465 U.S. at 466-67. Federal policymakers believed that settlement of non-Indians onto these lands would hasten assimilation by giving Indians helpful role models. *See, e.g., Yankton*, 522 U.S. at 335-36 (“Congress speculated that ‘close contact with the frugal, moral, and industrious people who will settle [on the reservation] [would] stimulate individual effort and make [the Tribe’s] progress much more rapid than heretofore’”) (citation omitted).

In all the surplus land acts examined by the Supreme Court, the assimilation process was never completed: Indian landholdings with restricted, federally-supervised title remained, and citizenship had not been granted to all tribal members. The change in federal policy in the

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<sup>16</sup>*Overruled in part on other grounds, United States v. Nice*, 241 U.S. 591, 601 (1916), and *superseded by statute as stated in County Yakima v. Confederated Tribes & Bands*, 502 U.S. 251, 264 (1992).

1930's left many surplus land act reservations (like those before the Supreme Court) with a "checkerboard" pattern of tribal and non-tribal lands within original reservation boundaries. *See, e.g., Seymour*, 368 U.S. 351, 358; *Solem*, 465 U.S. at 480 (population of disputed area "evenly divided" between Indians and non-Indians).

It is this situation—where an act's implementation resulted in a partial or incomplete elimination of restricted tribal landholdings—that the Court has addressed in its diminishment cases. In the three no-diminishment cases—*Seymour*, *Mattz*, and *Solem*—the affected tribe retained an interest in the territory opened to non-Indian settlement. In *Solem*, for example, "only half of the opened lands ever passed out of Indian ownership," and the act reflected continuing reservation status by reserving land "for agency, school, and religious purposes, to remain reserved as long as needed." 465 U.S. at 474, 480 n.26; *see also Mattz*, 412 U.S. at 495-96 n.17 (Indians retained trust allotments in disputed area); *Seymour*, 368 U.S. at 355 (surplus lands opened for entry subject to allotments).

In stark contrast, neither act at issue here was a surplus land act, and the termination of reservation status was not interrupted, but completed. Congress' intention to terminate federal supervision over

the Stockbridge-Munsee and their lands was not only plain, but fully realized through the two acts.

A second important factor in the Court's diminishment jurisprudence is the source of the legislation. If the impetus for the act came from the tribe, or the tribe clearly consented to the reduction of its reservation, the Court has found diminishment. *See Yankton*, 522 U.S. at 352-353; *Hagen*, 510 U.S. at 417; *DeCoteau*, 420 U.S. at 433-35.

For example, in *DeCoteau*, tribal spokesmen said: "The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. . . . We are anxious to become citizens and vote." 420 U.S. at 433 (citation omitted). Subsequent negotiations between the tribe and Interior showed that the tribe wished "to sell outright all of their unallotted lands." *Id.* at 435. In finding that the reservation had been terminated, the Court emphasized that this was "not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented." *Id.* at 448.

Further, the common understandings of the time obviously inform Congress' intent in enacting legislation. In the decades before and after 1900, the ownership of allotments in fee-simple patents was equated with dissolution of federal superintendence and tribal status.

During that era, property held by Indians in fee (as opposed to some form of trust or restricted ownership) was not deemed Indian country. *Solem*, 465 U.S. at 468; see also *Montana*, 450 U.S. at 559 n.9 (“allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction”). Further, patent ownership brought with it U.S. and State citizenship, extending State law jurisdiction to the new citizen. See *Yankton*, 188 F.3d at 1016. In “the nineteenth century, the prevailing view was that tribal affiliation was inconsistent with acquisition of United States and state citizenship.” See *Wisconsin v. Stockbridge-Munsee Community, et al.*, 67 F.Supp.2d 990, 997 (E.D. Wis. 1999) (hereinafter, “*Stockbridge I*”); see also FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 153 (before passage of Citizenship Act of 1924, which made all U.S.-born Indians U.S. citizens, citizenship was generally considered “incompatible with continued participation in tribal government or tribal property”) (S-APP. 248).<sup>17</sup>

The Tribe cites *United States v. Celestine*, 215 U.S. 278 (1909), for the proposition that “citizenship is not inconsistent with reservation status.” Tribe’s Brief, 44. But *Celestine* dealt with the grant of citizenship to a particular Indian, who continued to reside on a

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<sup>17</sup>However, the cessation of tribal relations did not mean that the U.S. lost criminal jurisdiction over Indians under the Indian criminal statutes. See, e.g., *Celestine*, 215 U.S. 278.

recognized reservation containing restricted land under federal supervision. 215 U.S. at 290. If, as here, the entire tribe had been declared citizens and all the land fee-patented, the Court undoubtedly would have found the reservation terminated.

Whether land lies within an Indian reservation has critical legal consequences. It determines the allocation of jurisdiction among the tribe, the state, and the United States. “States acquire[] primary jurisdiction” over lands that have lost reservation status. *Yankton*, 522 U.S. at 343. Taxation,<sup>18</sup> zoning, fishing and hunting activities, and environmental regulation are among the jurisdictional areas affected by reservation status. *See, e.g., Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989) (zoning); *Mattz* (fishing); and *Yankton* (environmental regulation).

The State will show that all categories of relevant evidence point decisively in the same direction—the diminishment and disestablishment of the Stockbridge Reservation. The language of the 1871 and 1906 Acts, together with the circumstances surrounding their passage and the subsequent treatment and history of the lands in

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<sup>18</sup>*See* Tribe’s Brief, 2-3.

question, leave no doubt that Congress intended first to diminish and then to disestablish the Stockbridge Reservation.

## II. THE 1871 ACT DIMINISHED THE STOCKBRIDGE-MUNSEE RESERVATION TO 18 SECTIONS.

After exhaustively evaluating the historical record and applying the relevant law, the District Court correctly concluded that Congress intended the 1871 Act to diminish the 1856 reservation. *See Stockbridge I*, 67 F.Supp.2d at 1016; *Stockbridge II*, 366 F.Supp.2d at 779. The Wisconsin Supreme Court had reached the same conclusion in *State v. Davids*, 182 Wis. 2d 186, 514 N.W.2d 23 (1994).

### A. The Statutory Language Reveals Intent to Diminish.

The 1871 Act's plain terms reveal congressional intent to effectuate the tribal division sought by the Tribe, selling three-quarters of the reservation for timber harvest, using the sales proceeds to "cash out" Citizen members seeking to terminate their tribal status, and facilitating the acquisition of a new reservation for Indian members wishing (for the time being) to retain tribal status.

In apparent recognition of the overwhelming weight of the historical evidence of Congress' intent, the Tribe strenuously insists on a search for "magic words," an approach emphatically rejected by the

Court. *See Hagen*, 510 U.S. at 411. The Tribe emphasizes the absence of (a) explicit language of cession, or (b) language restoring land to the public domain. Tribe’s Brief, 20-21. But there are good reasons for the absence of this language from the 1871 Act. First, the Tribe was not ceding land to the U.S., thus rendering cession language inapt. Nor, unlike the surplus land acts, did it restore any lands to the public domain.

Moreover, the Tribe’s assertion that the Court has never found diminishment without explicit language of cession or restoration to the public domain is simply wrong.<sup>19</sup> In *Rosebud*, the Court found that two Acts had diminished a reservation, although they contained “neither words of cession nor words of termination. They simply ‘authorized and directed’” the sale of specified lands. 430 U.S. at 620 (Marshall, J., dissenting). Looking to explicit language from an earlier statute, the majority found “an unmistakable baseline purpose of disestablishment,” which carried over into the subsequent acts. *Id.* at 592.

The District Court correctly concluded that the 1871 Act “does not contain explicit reference to cess[ion],” but failed to recognize “other language evidencing the surrender of all tribal interests in the 54

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<sup>19</sup>It is also illogical. One could just as plausibly argue that because the Court has never found diminishment of a reservation outside South Dakota or Utah, no Wisconsin reservation could have been diminished.

sections.” *Stockbridge II*, 366 F.Supp.2d at 761. The Act explicitly directed the sale of at least 54 contiguous sections of the reservation, the “cashing out of” the majority of the Tribe, and the selection of a new reservation by the remaining tribal minority.

The Act directed the Secretary to sell the two townships, but “reserve from sale a quantity of said lands not exceeding eighteen contiguous sections,” “subject to allotment to members of the Indian party” (APP. 142-43). The Act guaranteed the Tribe payment for the entire area offered for sale (APP. 143). Further, the majority Citizen party’s portion would be paid out in cash. Those payments effectuated their “full surrender and relinquishment” of any tribal benefits, and insured that “they and their descendants” would become “citizens of the United States” (APP. 144).

The Act also provided for a new reservation for the Tribe’s surviving remnant. The newly-constituted “Stockbridge tribe of Indians” could choose either the 18 sections reserved from sale, “or such other reservation as may be procured for them”; the Indian party’s share would be credited to it, and could be used for “securing a new location for said tribe” (APP. 143-44). After a “permanent reservation shall be obtained . . . either at their present home or elsewhere,” it was to be subdivided and a “just and fair allotment” made to those

remaining (APP. 144-45). The creation of a new reservation clearly evinces Congress' intention that wherever the new reservation would be, it would not be on the minimum of 54 sections to be sold under the Act.

In an effort to squeeze the 1871 Act into surplus land act jurisprudence, the Tribe miscasts it as an attempt to open the reservation to non-Indian settlement. Tribe's Brief, 24. It clearly was not: "[t]here is no indication that Congress' purpose in selling the 54 sections was to encourage non-Indians to settle among members of the Tribe to promote interaction between them or to encourage the Indians to adopt white ways." *Stockbridge II*, 366 F. Supp. 2d at 765. As the Tribe's expert admitted, "[t]he interest of Congress was not to promote the rapid settlement of farmer-homesteaders" (S-APP. 305). Even the Tribe acknowledges that no non-Indians moved onto the 54 sections. Tribe's Brief, 10 n.3. Indeed, the land's inhospitability for farming and settlement is why the Tribe sought a new reservation in the first place. *Id.*, 6.

The Tribe seeks refuge in the purported "axiom" that "the opening of reservation lands for sale or disposal to non-Indians does not diminish a reservation." Tribe's Brief, 24 (citing *United States v. Thomas*, 151 U.S. 577 (1894)). Again, the Tribe mischaracterizes the

settled caselaw. “[S]ome surplus land acts diminished reservations . . . and other surplus land acts did not.” *Solem*, 465 U.S. at 469. The Court has consistently held that the “mere” opening of a reservation does not by itself prove diminishment. *See Rosebud*, 430 U.S. at 586-87, and *DeCoteau*, 420 U.S. at 444, *quoted in* Tribe’s Brief, 24.

Nor was the U.S. simply acting as the Tribe’s “sales agent” as the Tribe contends. Tribe’s Brief, 23-24. The U.S. has always administered the sales of tribal trust lands. If that fact, plus the distribution of sales proceeds to the tribe, always rendered the U.S. a “sales agent,” the Court would never find diminishment. The Court has found the “sales agent” role to exist only where a surplus land act merely opened to non-Indian settlement a reservation area in which the tribe retained interests, and the sales and payment to the Tribe were uncertain. *See, e.g., Solem*, 465 U.S. at 473, 480 (the opening was a “failure,” with “[f]ew homesteaders perfecting claims”). Such was not the case here, where all tribal interests in the land were severed and payment guaranteed to the Tribe. Moreover, the bulk of the proceeds from the sale was not held by the U.S. for the Tribe’s benefit, but was promptly paid to Citizen party members whose tribal status was being terminated.

The 1871 Act's plain import is amply confirmed by the circumstances leading up to and surrounding its enactment, and the subsequent uncontradicted understanding that it had severed the 54 sections from the reservation.

B. Surrounding Circumstances and Subsequent History Reveal Intent to Diminish.

The Tribe implies that the 1871 Act arose in a vacuum. It did not.

The 1856 Treaty had sown the seeds of the eventual dissolution of both the Tribe and its reservation, recognizing that a majority was “desirous soon to remove and to resume agricultural pursuits, and gradually to prepare for citizenship,” whereas others “desire[d] at the present time to sever their tribal relations and to receive patents” for the lands they occupied (APP. 92; S-APP. 258-63). The 1871 Act was a significant step in this process. The Act was a congressional response to the Tribe's plea to effectuate the Citizen party's departure and obtain a more hospitable home for the remaining Indian party. Everyone involved understood and intended that the 54 contiguous sections of timberlands would be sold to logging companies and cease to be an Indian reservation.

Moreover, the Act’s essential elements—the Tribe’s partitioning, the “cashing out” by the Citizen party, and the establishment of a “new” smaller reservation for the remaining Indian party—were previously agreed to in an 1867 Treaty approved by both factions, and carried over into the Act. Clearly, the subsequent Act was not a unilateral enactment, but rather the product of an agreement with the Tribe that established “an unmistakable baseline purpose of disestablishment.” *Rosebud*, 430 U.S. at 592. *See also DeCoteau*, 420 U.S. at 448.

The 1867 Treaty, which was never ratified, endeavored to alleviate the harsh conditions and continuing internal strife experienced on the reservation during the 1860’s (APP. 130-36).<sup>20</sup> Had it been ratified, the Treaty would have facilitated the Tribe’s breakup, allowing the Citizens to “cash out” and attain citizenship, and established the remaining Indian party members on a new reservation (S-APP. 281A, 298). The Treaty also identified a total of 392 members, with the Citizen and Indian parties numbering, respectively, 244 and 168 (APP. 130-31).

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<sup>20</sup>It was not considered and rejected by Congress, as the Tribe suggests. Tribe’s Brief, 26 n.4. Rather, it fell victim to “wrangling between the Senate and House over Indian treaty-making,” and the end to treaty-making in 1869 (S-APP. 298-99).

The Treaty provided for the cession of the entire two-township reservation to the United States in exchange for a fixed sum payment. The Tribe's expert Dr. Oberly conceded that had it been ratified, the Treaty would have disestablished the reservation (S-APP. 298).

In 1868, the Indian Party proposed new treaty language that ceded three-fourths of the reservation and retained 18 sections (the southern half of Red Springs) as a smaller reservation (S-APP. 16-34, 299). The 1868 draft treaty was never endorsed by the whole Tribe, but these essential terms would reappear in the 1871 Act.

The clear goals of the 1867 Treaty and 1868 draft were directly carried over into the Act. Accordingly, both tribal factions actively lobbied Congress for legislation to implement the 1867 Treaty's provisions. *See supra* at 4-5. A Citizen party petition urged Congress to approve the 1867 treaty, with an amendment allowing the Citizens to opt for land "in lieu of money" (S-APP. 35). Indian party leaders Charles and Slingerland urged passage of S. 610, which would become the 1871 Act. The bill, they explained, would "bring about all that the treaty of 1867 was designed to accomplish, viz, the final settlement of our affairs" (APP. 137). Congress passed the legislation.

There were two notable differences between the 1871 Act and the 1867 Treaty. First, whereas the Treaty would have conveyed the entire

two-township reservation to the United States and relocated the Indian party on a new reservation, the Act offered the Indian party the alternative of selecting the reserved 18 sections (APP. 144-45). Second, whereas the Treaty would have paid a fixed sum for the 54 sections, the public auction was designed to maximize the Tribe's revenue by selling the land "for the highest price possible" (S-APP. 326). Consequently, the Tribe received substantially more under the Act than it would have under the Treaty (S-APP. 321).

Emphasizing the absence of any specific discussion of diminishment in the Act's legislative history, the Tribe implies that Congress must have intended that the lands would retain their reservation status even after being sold to the timber companies. Tribe's Brief, 32-34. But the notion that land owned by private companies could retain reservation status was unthinkable under the allotment era understanding that reservation status and Indian title were co-extensive. For that reason, it would have been superfluous to declare expressly that the reservation boundaries would change after the land was sold. There is no evidence in the historical record that *anyone*—in Congress or outside—believed the two-township reservation would or could continue to exist after the Act's implementation.

The Tribe extrapolates from a congressional statement that the reservation lands would be sold only with tribal consent that Congress viewed the U.S. as a mere “sales agent.” Tribe’s Brief, 33. The Supreme Court disagrees. It has found tribal consent highly probative of diminishment where it was understood that the reservation would shrink. *See, e.g., Yankton*, 522 U.S. at 352-53.

Notwithstanding the Tribe’s efforts to inject uncertainty into the 1871 Act’s purpose, no one in its immediate wake or for decades afterward was uncertain about its effect. The historical record is imposing and one-sided. Between the 1871 Act and the 1906 Act, Interior consistently reported, and Congress was consistently told, that the 1871 Act reduced the reservation to 18 sections (S-APP. 47, 52, 54, 58, 63, 70, 72, 76, 102-03, 250). And the Tribe agreed (S-APP. 61-62).

The Tribe asserts that the 1893 Act “reaffirmed in strong terms” the 1856 reservation.<sup>21</sup> Tribe’s Brief, 10. It relies on a single phrase—“upon which they have ever since resided”—which simply locates the Tribe geographically. As John Adams, a tribal member lobbying

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<sup>21</sup>*Yankton* rejected a similar argument based on an explicit “saving clause” purporting to maintain all terms of a prior treaty. The tribe argued that Congress could not therefore have intended to alter the reservation boundaries established under the treaty. The Court rejected a “literal construction” of the clause, requiring instead a “sensible construction” in light of the obvious intent of Congress. 522 U.S. at 345-46 (citation omitted).

Congress on behalf of the “Old Citizens,” testified in 1892, the Tribe had relinquished its 72-section reservation “for the present reservation, and the money” and its “present reservation contains eighteen sections” (S-APP. 61-62).

The Tribe’s own experts disagree with its present assertion. Dr. Oberly conceded that the 1893 Act “[d]idn’t have anything to do with dimensions of a reservation,” but “really focused on [tribal] membership” (S-APP. 322-23). Dr. Cleland went further, admitting that during the 1870’s, 1880’s, and 1890’s “everyone thought the reservation was the 18 sections,” a view that “started soon after the 1871 legislation” (S-APP. 332, 336). The Tribe has identified no person—governmental, tribal or otherwise—who believed differently.

### III. THE 1906 ACT DISESTABLISHED THE REMAINDER OF THE RESERVATION.

The 1906 Act was the final step in the progression toward the reservation’s voluntary dissolution begun decades earlier. Its express terms called for the fee-patenting of the entire 18-section reservation, leaving no tribally-owned or restricted lands whatsoever, thereby granting the Tribe’s request to have its reservation and tribal status terminated. When fully implemented with the issuance of fee patents in 1910, the Stockbridge Reservation ceased to exist—until a new

reservation was created by proclamation in 1937. Again, the surrounding circumstances, subsequent treatment, and changed demographics overwhelmingly reflect that reality.

A. The Statutory Language Reveals Intent to Disestablish.

The 1906 Act called for the complete fee-patenting of all the land within the 18-section diminished reservation. It provided that tribal members “shall . . . be given allotments of land and *patents therefore in fee simple . . .*” (APP. 175) (emphasis added).

This was manifestly not a surplus land act. On the contrary, Congress explicitly recognized that the existing reservation had no *surplus* land as there wasn’t even enough land to make the statutorily-required allotments:

That as there is not sufficient land within the limits of the Stockbridge and Munsee Reservation to make the allotments in the quantities above specified, all available land in said reservation shall first be allotted to the heads of families and single persons residing thereon, *until said reservation land shall be exhausted*, the additional land that may be required to complete the allotments to be obtained in the manner hereinafter specified . . . .

(APP. 175) (emphasis added). The manner specified was to acquire the additional lands from the Menominee (APP. 176). Tribal members were required either to accept allotments or to take cash in lieu of land (*id.*).

Unlike the surplus land acts in *Mattz*, *Seymour* and *Solem*, the 1906 Act did not simply open up the reservation to non-Indian

settlement while retaining tribal interests in the area. Instead, the 1906 Act maintained *no* allotted lands under restriction for tribal members, and *all* the land within the reservation was subject to fee patents, whereupon all the tribal members would become citizens and all vestiges of reservation status would disappear.

In contrast to non-diminishing statutes, the 1906 Act reserved no land for school, agency or religious purposes to benefit the Tribe. *See Solem*, 465 U.S. at 474. Upon implementation of the Act, the area would unquestionably be “divested of all Indian interests.” *Id.* at 468.

At this time, “allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.” *Montana*, 450 U.S. at 559 n.9. The Tribe’s expert Oberly agrees: “a reservation disappeared when its lands were fully allotted and the Indians became citizens” (S-APP. 310). This uniform view undercuts the Tribe’s argument that “[t]he 1906 Act includes no language that evinces a congressional intent to disestablish the reservation.” Tribe’s Brief, 28.

The Tribe misguidedly relies on *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996). The Tribe suggests that the executive order at issue restored “all reservation lands” to the public domain. *Id.* The Tribe conveniently omits the opinion’s next sentence: “The order also provided that approximately

471 acres ‘be, and the same is hereby, withdrawn from sale or other disposition, and set apart for the use and occupation of the Chehalis Indians.” *Id.* at 344 (citation omitted); *accord id.* at 345 (the order set apart “471 acres for an Indian school”). Thus, unlike the Stockbridge Tribe under the 1906 Act, the Chehalis Tribe retained restricted property set aside for tribal purposes. Further, in stark contrast to the Stockbridge, who received fee patents under the 1906 Act, the Chehalis received titles with 25-year restrictions on alienability. *Id.*

As with the 1871 Act, the Tribe pursues its quest for “magic words,” emphasizing the lack of “cession” language in the 1906 Act. Tribe’s Brief, 28-29. Once again, the reason such language is absent is because the Tribe was ceding no land to the United States.

Finally, the Tribe cites several cases purportedly supporting the proposition that “mere allotment of reservation lands to tribal members—whether the allotment is held in trust by the U.S. or in fee by the member—does not diminish or disestablish the reservation.” Tribe’s Brief, 29-30. Those cases are inapposite because they: (1) involved property with restricted title, which remains under federal supervision, *see United States v. Sutton*, 215 U.S. 291, 292-93 (1909); *Celestine*, 215 U.S. at 286; (2) involved partial fee-patenting, creating a “checkerboard” reservation with restricted tribal land *and*

unrestricted fee-simple land, *see Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967); *Hildebrand v. Taylor*, 327 F.2d 205 (10th Cir. 1964), *cited in Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965); (3) involved surrounding circumstances clearly demonstrating the parties' intent to continue the reservation, *see United States v. Webb*, 219 F.3d 1127, 1130-31 (9th Cir. 2000); or (4) involved unallotted land opened to non-Indian homesteaders, *Mattz*, 412 U.S. at 485.

By erasing all vestiges of tribal land ownership and conveying the entire reservation to individual Indians through fee patents, the 1906 Act's terms clearly and plainly reflect Congress' intent to disestablish the reservation.

B. Surrounding Circumstances Reveal Intent to Disestablish.

The circumstances leading up to and surrounding the 1906 Act's passage, and subsequent understanding of its effects, resoundingly confirm the view that once the Act was fully implemented, the reservation ceased to exist.

According to Dr. Oberly, federal assimilation policies were "strongest between 1890 and about 1910 or so" (S-APP. 324). During this period the Stockbridge, a highly assimilated tribe ready and eager for citizenship, gave Congress an opportunity to swiftly dissolve at least

one reservation. The Tribe's rendition of events preceding the 1906 Act suggests that the impetus came from Washington, in the person of Inspector Beede. Tribe's Brief, 35. The Tribe omits that Beede was dispatched in response to a tribal petition seeking "most anything that will secure us in the right in the management of our own property and to be relieved from the protection and care of the government of the United States" (APP. 163).

Beede's discussions resulted in a December 8, 1900, agreement for a "full and complete settlement of all obligations . . . of whatever nature or kind, either express or implied, from whatever source" (S-APP. 100). The Tribe concedes that the substance of the 1900 plan was carried over into the 1906 Act, except that any cash payments to tribal members in lieu of land would come from the Tribe's funds, rather than the U.S. Treasury. Tribe's Brief, 36; *see Rosebud*, 430 U.S. at 594-95 (Congress only intended to change the source of payments in prior agreement). However, it again invokes "magic words," and erroneously asserts that there is "absolutely no congressional commentary evincing an understanding that the Act would disestablish the Reservation." The Tribe ignores a plethora of documents in the legislative history showing unequivocally that both the U.S. and the Tribe understood just that.

For example, Congress was specifically informed of Beede's view that "[t]he time has fully arrived when the affairs of this unfortunate people should be settled and their relations with the Government cease" (S-APP. 160). The House report, quoting from letters from Interior, stated that this bill was "designed and intended to adjust and settle all matters pertaining to the affairs of the Stockbridge and Munsee Indians with the United States," and observed that a "large majority of the tribe are earnestly desirous of laying aside their tribal relations and becoming United States citizens" (S-APP. 90).

Interior agreed, reporting in 1903:

As the Stockbridge Indians are only nominally under the jurisdiction of this agency an agent's influence over them is very limited. They are citizens in all respects except that they hold their land in common, and have an undivided tribal fund. They exercise the right of franchise, and submit their local differences . . . to the civil and criminal courts. . . . They are anxiously awaiting a division of their lands and a final adjustment of their tribal affairs . . . .

(S-APP. 93). The Green Bay Indian Agency repeatedly described the Tribe as intelligent and industrious, ready for citizenship, and ready to settle its tribal affairs (S-APP. 82, 92-93).

The Tribe argues that the terms "settling" or "adjusting" the Tribe's affairs do not necessarily imply termination. Tribe's Brief, 36-37. But during the relevant time period, the only remaining vestiges of federal supervision involved land and money (S-APP. 93). The 1906 Act

permanently resolved both. Any fair reading of the voluminous legislative history compels the conclusion that everyone involved knew that the reservation would pass out of existence when all the land was fee-patented.

The Tribe ascribes to Congress the intent to create a legal oxymoron—an Indian reservation with no restricted land. Once the 18-section area had been entirely fee-patented, it was no longer “validly set apart for the use of the Indians . . . under the superintendence of the government,” *United States v. Pelican*, 232 U.S. 442, 449 (1914), and thus could no longer be considered a reservation. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) (reservation is “land set aside *under federal protection* for the residence of tribal Indians”) (emphasis added). Had Congress intentionally created this unprecedented anomaly, surely some indication of that intent could be found in the voluminous historical archives concerning the 1906 Act. Tellingly, neither of the Tribe’s experts could cite any example of continuing federal supervision over fully fee-patented lands (S-APP. 320A-B, 332B). As the Court remarked in *Montana*, the Tribe’s theory of Congress’ intention “defies common sense.” 450 U.S. at 559-60 n.9.

The universal understandings of the day, coupled with the Tribe’s explicit pleas to have its tribal relations cease, support only one

conclusion: Congress intended to end the reservation with the issuance of fee patents and the granting of citizenship.

C. Events Following the 1906 Act Reveal Consistent Understanding of Disestablishment.

1. 1906 to IRA.

Any conceivable doubt about either Congressional or Tribal intent was laid to rest after the 1906 Act's passage. When federal officials sought legislation to impose continuing restrictions on the fee patents, the Tribe fought back. At a Senate committee hearing in 1909 the Tribe's attorney vigorously objected to any effort to forestall implementation of the 1906 Act. He testified that "[t]he idea was . . . to forever wind up the Stockbridge Indians' affairs – to patent all the land there was to them" (S-APP. 317). The Tribe won that battle, and the patents were issued in fee simple on April 4, 1910 (S-APP. 318).

Almost immediately after issuance of the patents, a tribal member wrote to Interior inquiring about the effect of the patenting on his legal status; he wondered whether "we are indians (sic) or are we citizens?" The response was unequivocal: "All restrictions and control of the United States having been relinquished by the issuance of patents in fee simple, the lands are taxable the same as are lands of all other residents of the State of Wisconsin. Indians receiving patents in

fee simple are citizens of the State or Territory wherein they reside” (APP. 177). The author was C.F. Hauke, the second in command at the Office of Indian Affairs (“OIA”)<sup>22</sup> (S-APP. 333). The Hauke letter represented the unanimous understanding of the Tribe, Interior, and Congress at least until 1974, with the exception of the short-lived and clearly erroneous 1911 Abbott letter.

In 1911 the U.S. Attorney in Milwaukee, after charging a Stockbridge member with rape on the former reservation, asked Assistant Commissioner of Indian Affairs Frederic Abbott about the reservation’s status after the 1906 Act (APP. 179-80). Abbott believed that the reservation had survived, but thought it important “to have the question of jurisdiction in criminal cases in the State of Wisconsin decided by the Federal courts” (APP. 189).

The issue was promptly resolved by the *Gardner* decision, concluding that the reservation was disestablished when all the patents were issued in 1910, but not beforehand when the rape occurred. *See* 189 F. at 694-96. Before the fee-patenting, the reservation was intact and there was federal jurisdiction over it. But after issuance of the patents, “there remained no reservation [and] each allottee in fee simple had become thereby a citizen of the United States, and a citizen

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<sup>22</sup>BIA’s predecessor agency.

of the state in which he resides and amenable to the laws of said state.” *Id.* at 694. The court affirmed this ruling four years later. *See Anderson*, 225 F. 825. *Gardner’s* author had special insight into the Act’s intent—as a member of Congress he had sponsored it (S-APP. 316, 319).

Significantly, Abbott’s position was even rejected by the Department of Justice which, as the court observed, conceded that the reservation had been disestablished after the patents issued. *See* 189 F. at 694. This did not surprise Dr. Cleland. He candidly admitted that Abbott’s opinion “obviously . . . wasn’t adopted” as it was not “the general position that was taken by the government before or after”; Cleland was unaware of anyone else in the 20th century holding a similar view (S-APP. 335).

The Tribe incorrectly asserts that the Abbott letter comports with modern-day diminishment jurisprudence. Tribe’s Brief, 43. Abbott misapplied the two cases he relied on, *Celestine* and *Sutton*, by failing to recognize the distinction between the restricted (still subject to federal supervision) allotments in those cases, and fee-simple patents, which, by definition, lack any federal supervision. Perhaps because of the uniqueness of the Stockbridge situation, *i.e.*, the fee-patenting of an

entire reservation, he failed to appreciate the legal significance of the absence of *any* remaining restricted land in the 18 sections.

In any event, the Abbott letter faded into obscurity. The massive documentary record since 1911 contains no known reference to it (S-APP. 335). Interior consistently maintained the opposite view until 1974, and at times thereafter as well. The Tribe's emphasis on the fleeting Abbott opinion is understandable, given the overwhelming contrary weight of the historical record. However, that lone outlier cannot sustain the immense weight the Tribe places upon it.

The Tribe's distortion of history continues with its patently untrue assertion that "[f]ollowing the Abbott letter, the Department of Interior continued to take the legal position that the two-township Reservation remained an extant jurisdictional entity." Tribe's Brief, 45.

First, as with the 1871 Act, after the 1906 Act Interior's reports consistently reflected the reservation's disestablishment, clearly indicating that supervision had ended (S-APP. 137, 142, 144, 146, 149, 152).

Second, in response to efforts to establish a basis for federal jurisdiction over liquor activities in the southern half of Red Springs, then-Assistant Commissioner Collier could hardly have been more explicit about the reservation's termination:

There is no tribal unallotted land in Wisconsin belonging to this tribe [the Stockbridge]. All lands allotted to them have been patented in fee, hence none of this reservation is now held in trust. *These lands are not located within the exterior boundaries of any existing Indian reservation.*

In view of the above circumstances, this land has lost its character as “Indian country” and we would not be justified in attempting to secure legislation extending or restoring the Indian liquor laws to this territory.

(S-APP. 172) (emphasis added).

The Tribe also points to a federal attempt to recover swamp lands from the State of Wisconsin within the 54 sections sold under the 1871 Act. Tribe’s Brief, 45. This episode does not imply the reservation’s continuation beyond 1910.<sup>23</sup> It merely reflects the Tribe’s desire, assisted by the federal government, to recover property it believed belonged to it. In any event, the land claim failed in the courts (S-APP. 308). Had it succeeded, any land recovered would have been “allotted and patented to individual Indians” (APP. 191). Thus, the recovery of this land would not have revived the reservation that had long since disappeared.

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<sup>23</sup>The Tribe suggests that tribal money management, school operation, health care administration, and liquor enforcement demonstrate continuing federal supervision. Tribe’s Brief, 12. This is incorrect. As Cleland acknowledged, none of these services is inconsistent with disestablishment, since even Indians who have received fee patents and become citizens remain eligible for government services (S-APP. 332A, 333A).

## 2. IRA to 1972.

The efforts of Interior, the Tribe, and Congress from the 1930's through the 1970's to create a new reservation and then expand it reflect their shared belief that the Stockbridge-Munsee reservation of 1856 no longer existed. Indeed, this history is simply inexplicable if, as the Tribe now contends, the 1856 reservation had never been diminished, let alone disestablished.

The OIA explicitly rejected the Tribe's first application for reorganization because it had no reservation (APP. 221-23). Individual tribal leaders expressed in various ways their understanding that the old reservation was gone (S-APP. 168, 178, 183-84). Most importantly, a tribal resolution from February 20, 1934 asked the Commissioner to "*restore to us sufficient land for the establishment of a Reservation*" (S-APP. 173) (emphasis added). Clearly, from the beginning of the reorganization process, the Tribe agreed with the OIA's conclusion.

The 1937 Proclamation of a new reservation of 1050 acres removed the legal obstacle to reorganization, allowing approval of the tribal constitution (S-APP. 188-94, 227). That constitution itself recognized that the reservation was limited the newly proclaimed 1050 acres and any future additions. The Tribe's delineation of its jurisdiction in its constitution explicitly reveals its understanding that

its former reservation had been abolished. *See DeCoteau*, 420 U.S. at 443.

The 1948 Proclamation and the 1972 Act, adding respectively 1200 and 13,887 acres to the reservation cannot be reconciled with the Tribe's current view that its original reservation had survived the 1871 and 1906 Acts.

Congress' explicit addition of the FSA lands to the reservation undeniably shows that it believed the lands being added were outside the reservation. This action—a century after the 1871 Act—continues the virtually unbroken understanding shared by the federal government and the Tribe that the reservation had disappeared, only to be recreated through the reservation proclamations in 1937 and 1948, and the 1972 Act.

Interior subsequently continued to adhere to this view. In 1981 it accepted a large parcel of land in trust for the Menominee Tribe (S-APP. 240-43). Upon approval, those lands became part of the Menominee Reservation pursuant to 25 U.S.C. § 903d(c) (S-APP. 244). Those lands are located in the northeast corner of the old Stockbridge Reservation, as depicted in blue in the “1972-Present” map of the reservation prepared by the State (S-APP. 006). This expansion of the Menominee Reservation into the original Stockbridge Reservation is

obviously incompatible with the view that the original Stockbridge Reservation survived the 1871 and 1906 Acts.

The Tribe complains that the district court took a “one-sided view” of the subsequent history. Tribe’s Brief, 50. Any fair appraisal of the record shows that it is the history itself that is one-sided, and overwhelmingly so.<sup>24</sup> Only by persuading a court to rewrite that history could the Tribe credibly seek to resurrect the reservation that was disestablished in 1910.

The Tribe disparages the IRA history because, according to the Tribe, Interior’s actions were “not premised on a legal conclusion that the 1906 Act had disestablished the reservation, or on any analysis of the congressional intent motivating the Act. Rather, the position was merely premised upon the view that it was necessary for the Tribe to hold common lands or restricted fee lands in order to reorganize under the IRA.” Tribe’s Brief, 46; *accord id.*, n.13. The argument is baseless, both factually and legally.

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<sup>24</sup>The Tribe cites Kenneth Payton’s 1974 Interior Department opinion that the original reservation had survived. Tribe’s Brief, 43 n.9. That opinion was based on Payton’s “ cursory review” of the record, and the recent decision in *U.S. ex rel. Feather v. Erickson*, 489 F.2d 99 (8th Cir. 1973) (APP. 241-42). Payton’s analysis was undermined by the Supreme Court’s reversal of *Feather* in *DeCoteau*, and subsequently repudiated within Interior, particularly after *Rosebud* and *DeCoteau* (S-APP. 245-46).

The Tribe ignores the fundamental point: without restricted lands or common lands, the reservation ceased to exist. As its own expert agreed, “a reservation disappeared when its lands were fully allotted and the Indians became citizens” (S-APP. 310). This is as true today as it was 150 years ago when the reservation was first established. Moreover, it was the repeatedly expressed view of all involved, including the federal government and the Tribe itself.

The Tribe posits a “phantom” reservation after 1910, one that contained not one square inch of restricted or common land, and whose inhabitants had all expressly been declared citizens and no longer subject to federal supervision. This phantom reservation must have existed in a parallel legal universe, unknown even to the Tribe itself. Further, the Secretary in proclaiming the new reservation in 1937 and adding to it in 1948, and Congress in expanding it in 1972, must have blundered royally by establishing a new reservation where one already existed.

Neither the Tribe nor its experts can identify any recognized reservation with the attributes of the phantom Stockbridge reservation. Recognizing such a reservation would make legal history, upsetting fundamental principles that have guided the federal government and the courts ever since the reservation era began in the mid-19th century.

D. Demographic and Jurisdictional Facts Reveal Intent to Disestablish.

The demographic composition of the disputed area and the State's exercise of jurisdiction there provide the final evidence that the Tribe's property is limited to the reservation as reconstituted in 1937, 1948, and 1972. *See Yankton*, 522 U.S. at 356-57. As of 1998, Stockbridge tribal members comprise only 17% of the population living on the disputed lands. *See supra* at 25-26. This is virtually the same as the 85% non-Indian population in the disputed area in *Hagen*, which supported the Court's conclusion of diminishment. 510 U.S. at 421.

Throughout the twentieth century, that population has consistently consented to the jurisdiction of the law, courts, and law enforcement authorities of the State of Wisconsin. *See supra* at 26-27. These facts are inconsistent with the Tribe's claim that the 1856 reservation has continuously existed for the last 152 years, and fully support conclusion the reservation was disestablished. *See, e.g., Yankton*, 522 U.S. at 357, *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 604-05.

## CONCLUSION

For the reasons stated above, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 21st day of April, 2008.

Respectfully submitted,

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## CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7)(B) and in Circuit Rule 32. The length of this brief is 13,847 words.

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