Nos. 17-1159 & 17-1164

In The Supreme Court of the United States

NORTHERN ARAPAHO TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

EASTERN SHOSHONE TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS FREMONT COUNTY, WYOMING AND CITY OF RIVERTON, WYOMING'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress clearly intended to diminish the Wind River Indian Reservation in Wyoming via a 1905 statute.

PARTIES TO THE PROCEEDING BELOW

The State of Wyoming and Wyoming Farm Bureau Federation were the Petitioners in the Tenth Circuit Court proceeding.

The Respondents included the United States Environmental Protection Agency, E. Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency and Doug Benevento, in his official capacity as Region 8 Administrator of the United States Environmental Protection Agency.

Intervenors included Fremont County, Wyoming, and the City of Riverton, Wyoming.

Respondent-Intervenors included the Northern Arapaho Tribe and the Eastern Shoshone Tribe.

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RESPONSE IN OPPOSITION TO CERTIORARI

Respondents Fremont County and Riverton, Wyoming (hereinafter "Respondents") respectfully request that this Honorable Court deny the petitions for writs of certiorari submitted by the Northern Arapaho and Eastern Shoshone Tribes in Dockets numbered 17-1159 and 17-1164. References to the Eastern Shoshone Tribe's Appendices will be cited as "EST App."

INTRODUCTION

The question presented is whether a 1905 statute diminished the Wind River Indian Reservation in Wyoming. This issue has been examined thoroughly throughout the last century, and has been exhaustively litigated on the criminal, civil and administrative law fronts. The Tenth Circuit panel's decision is a culmination of these analyses, affirming that the 1905 Act did indeed diminish the boundaries of the reservation. The State, County, and municipalities have asserted their jurisdiction in the ceded area for over one hundred years.

SUMMARY OF THE ARGUMENT

This case does not adequately meet any of the bases necessary for grant of a writ of certiorari. First, it does not create a conflict between the circuit courts. While Petitioners argue that the *Grey Bear* decision issued by the Eighth Circuit conflicts with the panel's

decision, it is distinguishable in several ways. The panel decision also does not conflict with decisions of the Wyoming Supreme Court. That court's opinion in the *Yellowbear* case was a comprehensive analysis of the reservation diminishment issue, and has been noted by the Tenth Circuit in this and other cases. And finally, the panel's decision does not conflict with prior decisions of this Court. The cession act contained language evincing clear Congressional intent to diminish the Wind River Indian Reservation, as well as a sum certain payment. This decision is also distinguishable from both the *Nebraska* and *Ash Sheep* cases noted by the Petitioners. The petitions for writs of certiorari should therefore be denied.

REASONS TO DENY CERTIORARI

I. THE DECISION BELOW DOES NOT CREATE A CONFLICT BETWEEN CIRCUITS

A. *Grey Bear* is distinguishable

The decision below by the Tenth Circuit is not in conflict with the decisions made by other Circuits. Petitioners argue that *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), a reservation disestablishment case, is in direct conflict with the panel's decision. However, *Grey Bear* is distinguishable on several material points.

The framework for analyzing whether a reservation was diminished was set forth in *Solem v. Bartlett*, 465 U.S. 463 (1984), and has been employed in many

subsequent cases. This test examines Congressional intent to diminish via the plain language of an act and the circumstances surrounding its passage. It also inquires whether Congress provided for an unconditional payment to a tribe, and considers the subsequent treatment of the area claimed to have been ceded. *Id.* at 470-71.

While the Eighth Circuit found that the language of the cession act in *Grey Bear* suggested Congressional intent to disestablish the reservation boundaries, it also determined that the lack of a sum certain payment failed to contribute to an insurmountable presumption of disestablishment. *Grey Bear*, 828 F.2d at 1290; *Solem*, 465 U.S. at 470-71. By contrast, the Tenth Circuit panel found that payment was promised by Congress, both in lump sum allocations and from proceeds of future sales. EST App. at 16a.

However, while the existence of both clear cession language and an unconditional promise of payment have been deemed to be solid evidence of Congressional intent to diminish (*Solem*, 465 U.S. at 470-71), this Court has opined that both are not necessary. In *Hagen v. Utah*, 510 U.S. 399, 412 (1994), the Court ruled that, "While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion." As this Court has previously dealt with the issue of whether or not analysis of both of the first two prongs of the *Solem* test is required, certiorari is not necessary.

Additionally, the Eighth Circuit applied a strict reading of the language of the act to determine whether complete disestablishment of the reservation was intended. It noted that Congress, in the past, has "forthrightly stated" an intent to disestablish, accepting only language indicating vacation of tribal rights to the land or restoration to the public domain. *Grey Bear*, 828 F.2d at 1290, citing *Mattz v. Arnett*, 412 U.S. 481 (1973). The Tenth Circuit only had to determine clear language of Congressional intent of diminishment of the reservation, rather than its entire disestablishment, though the standards for both may be the same. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 160 (2d Cir. 2003). The panel further distinguished *Grey Bear* by noting that the legislative history therein was limited, and that the subsequent treatment of that area did not bolster a finding of diminishment. EST App. at 14a, n.2.

II. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF THE WYOMING SUPREME COURT

The Wyoming Supreme Court has rendered a string of decisions regarding the boundaries of the Wind River Indian Reservation, all of which have determined that the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 (hereinafter "the Act" or "the 1905 Act") diminished the reservation. First, in *Merrill v. Bishop*, 237 P.2d 186 (Wyo. 1951), the Court considered the water rights of landowners along Owl Creek and held that the 1905 Act ceded and relinquished to the United

States all lands between Owl Creek and the Wind River, such lands becoming part of the public domain until conveyed to settlers. *Id*. at 187, 189.

Next, in *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960), the Court held that a crime committed approximately eight miles north of the City of Riverton and that the area for many miles north of it, were not within the reservation boundaries, and that those and other lands were no longer Indian Country as defined by 18 U.S.C. § 1151. *Id*. at 174-76. The Court addressed the issue again in *State v. Moss*, 471 P.2d 333 (Wyo. 1970), in conjunction with a murder committed within Riverton by a Northern Arapaho tribal member. Therein the Court redetermined that Riverton was not in Indian Country and that the ceded land was not part of the reservation. *Id.* at 337, 339.

The Court set forth in detail the events and circumstances pertaining to the 1905 Act in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 119-35 (Wyo. 1988). While the majority and the dissent failed to see eye to eye on the issue of water rights, both sides agreed that the reservation boundaries had been diminished. *Id.* at 84, 112, 114, 119-35.

And finally, the Wyoming Supreme Court's rulings culminated with a comprehensive analysis of the history of the cession of reservation land in *Yellowbear v. State*, 174 P. 3d 1270 (Wyo. 2008). Upon habeas review, the Tenth Circuit declined to disturb that decision. *Yellowbear v. Atty. Gen. of Wyo.*, 380 Fed. Appx. 740, 743

(10th Cir. 2010). In *Yellowbear*, the Wyoming Supreme Court applied the *Solem* analysis, first determining that the language of the Act clearly evinced Congressional intent to diminish the reservation, with the ceded lands losing their status as "Indian Country." *Yellowbear*, 174 P.3d at 1282. The Court next determined that, while some of the payments to the Tribes were to come from the sale proceeds, other specific payments were appropriated by Congress, including $85,000 for per capita payments, $35,000 for surveying, and $25,000 for an irrigation system, thus effecting a sum certain payment. *Id.* at 1278.

The Court in *Yellowbear* next examined the events and circumstances surrounding passage of the Act, and acknowledged the detailed examination made in the *Big Horn* case and indicated that those actions indicated cession. *Id*. at 1283. And finally, the Court reviewed the treatment of the area subsequent to the passage of the Act, including city law enforcement jurisdiction, the fact that the seat of tribal government on the Wind River Indian Reservation is not within the ceded lands, and that the vast majority of the population of the City of Riverton is non-Indian, and determined that these factors provided further evidence of Congressional intent to diminish the reservation.

The Tenth Circuit decision is not contradictory to any Wyoming Supreme Court decision, and in fact, pays deference to the analysis and decision in *Yellowbear*. EST App. at 33a, 35a.

III. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

A. The Act's language, evincing clear Congressional intent to diminish, is similar or identical to that in other cases where diminishment was found.

The Tenth Circuit determined that the language of the Act contained explicit terms of cession, precisely suited to diminishment of the reservation. EST App. at 11a. The Tribes herein agreed to "*cede, grant, and relinquish*" to the United States, "*all right, title, and interest*" in the diminished area. 33 Stat. at 1016 (emphasis added). Such language was deemed dispositive in several cases, including *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 445 (1975), where the Court considered an act providing that the Sisseton-Wahpeton Tribe agreed to "*cede, sell, relinquish, and convey* to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." (emphasis added); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) where the Tribe agreed to "*cede, surrender, grant, and convey* to the United States *all their claim, right, title, and interest in and to*" (emphasis added) the ceded lands, and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1997), where an act provided that the Yankton Sioux Tribe would "*cede, sell, relinquish, and convey* to the United States all their *claim, right, title, and interest in and to* all the unallotted lands within the limits of their reservation." 522 U.S.

at 344, 351 (emphasis added). Subsequent cases have not disproved that that language such as that used in the 1905 Act is the best evidence of Congressional intent to diminish a reservation.

B. The Act also included a sum certain payment.

The 1905 Act made provisions both for payment from the proceeds of land sales and for other specific payments. Sums paid directly to the Tribes included $85,000 for per capita payments, $35,000 for surveying, and $25,000 for an irrigation system, with repayment to be made to the United States from proceeds of future land sales. 33 Stat. at 1021-22. Contrary to the Tribes' argument, these payments constitute a sum certain payment, evincing Congressional intent to diminish the reservation. However, a sum certain payment is not necessarily required for a finding of diminishment.

While the Court in *Solem* ruled that, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian land," it did not state that a sum certain payment is a necessary element of diminishment. *Solem*, 465 U.S. at 470. Instead the Court indicated that an unconditional commitment from Congress to compensate the Indian tribe for its opened land, in addition to clear language of cession, is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *Id*. The Court further declared that explicit language of cession and unconditional compensation are not

prerequisites for a finding of diminishment. *Id.* This concept was reiterated in *Hagen*, where the Court found that, while the presence of both makes a very strong case, both are not necessary. *Hagen*, 510 U.S. at 411. In *Hagen*, the Court expressly rejected the argument that a finding of diminishment requires "both explicit language of cession or other language evidencing the surrender of tribal interests *and* an unconditional commitment from Congress to compensate the Indians." *Id*. The *Solem* Court also cited *Rosebud* as an example that unconditional compensation and explicit language of cession are not prerequisites for a finding of diminishment. *Solem*, 465 U.S. at 471.

C. *Nebraska v. Parker* is distinguishable.

Petitioners argue that *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) gave clear guidance reaffirming that both the language of cession and a sum certain payment are necessary for a finding of diminishment. However, *Parker* is distinguishable in that it did not contain clear language of cession evincing Congressional intent to diminish.

In *Parker*, this Court reiterated the maxim from *Solem* that unambiguous statutory language is a clear indicator of intended diminishment, including explicit reference to cession language or an unconditional commitment from Congress for compensation for the opened land. *Id*. at 1079, citing *Solem*, 465 U.S. at 470. The Court also noted that *Hagen* established that statutory language restoring portions of a reservation to the

public domain indicates diminishment. *Parker*, 136 S. Ct. at 1079, citing *Hagen*, 510 U.S. at 414. Therefore, the Court in *Parker* found that diminishment had not occurred. By contrast, the language in the Tenth Circuit's decision was deemed to evince clear intention for diminishment. EST App. at 13a.

The record of negotiations surrounding the cession also shows strong intent for diminishment, in the case at bar, while the same in *Parker* seems to be severely lacking. *Parker*, 136 S. Ct. at 1080-81. Additionally, after opining that the "concerns about upsetting the 'justifiable expectations' of the almost exclusively non-Indian settlers who live on the land are compelling . . . but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries," this Court rested its decision squarely on the lack of statutory language evincing diminishment. *Id*. at 1082. The review panel's decision in the present case stated that the statutory language was strong enough to show diminishment was intended, and that the record of negotiations bolstered this evidence of Congressional intent to diminish the reservation. EST App. at 29a. This case includes clear language of cession bolstered by a strong historic record, while *Parker* was devoid of both.

D. *Ash Sheep* has been overruled.

Petitioners argue that, since the statutory language at issue in *Ash Sheep Company v. United States*,

252 U.S. 159 (1920), is identical to that in the case at bar, and further argue that neither case included a sum certain payment, the panel's decision is therefore in conflict with this Court's precedent. They also argue that, in both cases, the land was merely put in trust for the benefit of the Tribes. However, these arguments are not compelling, for various reasons.

First, *Ash Sheep* had been superseded by statute, as noted by the Court in *Solem*, 465 U.S. at 468. While the Court in *Ash Sheep* ruled that, because tribes retained a beneficial interest, the property was therefore prevented from becoming public land, *Solem* later made note that a 1948 act uncoupled reservation status from Indian ownership. *Id.*; *Ash Sheep*, 252 U.S. at 165; *see also* Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151).

As the review panel noted, trust status may exist even if a reservation has been diminished. EST App. at 19a. The Court in *Rosebud* found Congressional intent to diminish the reservation, despite trust provisions included in the cession statute. *Rosebud*, 430 U.S. at 615. Statutory language creating a trust relationship, therefore, is not prohibitive of diminishment.

Additionally, in discussing whether a 1904 act diminished a reservation in *Rosebud*, the appeals court stated, "The case of *Ash Sheep Co. v. United States*, [citation omitted] is not in point. The act in question therein contains several provisions which the 1904 Act does not. *Ash Sheep* itself recognized that each treaty must be judged by itself." *Rosebud Sioux Tribe v. Kneip*,

375 F. Supp. 1065, 1074 (D.S.D. 1974). Upon appeal this Court also recognized that retention of a beneficial interest does not erode the scope and effect of the cession, or preserve the original reservation boundaries, further stating that the question of whether lands become public lands is separate from a question of disestablishment. *Rosebud*, 430 U.S. at 601 n.24.

E. If this case differs in any way from precedent, it is that it does not give real consideration to the third *Solem* prong.

The Tenth Circuit rested its decision on the first two parts of the *Solem* framework, finding that Congressional intent to diminish the reservation was supported by the language of the Act and by a sum certain payment. EST App. at 29a. The Court then moved on to state that the subsequent treatment of the ceded lands neither bolstered nor undermined its conclusion. EST App. at 30a.

While the subsequent treatment of the land is not to be elevated over other considerations, or even given equal weight, it also should not be brushed aside. Both *Rosebud* and *DeCoteau* acknowledged that, when an area has long since lost its Indian character, diminishment may have occurred. *Rosebud*, 430 U.S. at 588, n.3 and 604-05; *DeCoteau*, 420 U.S. at 428. While the panel described the record as "mixed" concerning *Solem*'s third prong regarding the issue of subsequent treatment of the land (EST App. at 30a, 33a), the balance of

this mixture was not fully explored, and may have been mischaracterized.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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