Nos. 17-1159 and 17-1164

In the Supreme Court of the United States

NORTHERN ARAPAHO TRIBE, PETITIONER

v.

STATE OF WYOMING, ET AL.

EASTERN SHOSHONE TRIBE, PETITIONER

v.

STATE OF WYOMING, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding, consistent with longstanding precedent of the Wyoming Supreme Court, that Congress diminished the Wind River Reservation, home of the Eastern Shoshone and Northern Arapaho Tribes, by the Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016.

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OPINIONS BELOW

The opinion of the court of appeals (Eastern Shoshone Tribe (EST) Pet. App. 1a-49a), as revised *nunc pro tunc*, is reported at 875 F.3d 505. A prior opinion of the court of appeals (EST Pet. App. 51a-99a) is reported at 849 F.3d 861.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2017. Petitions for rehearing were denied on November 7, 2017 (EST Pet. App. 151a-152a). On

January 17, 2018, Justice Sotomayor extended the time within which to file petitions for writs of certiorari to and including March 7, 2018, and the petitions were filed on February 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Eastern Shoshone Tribe and Northern Arapaho Tribe (collectively, Tribes) reside on the Wind River Reservation (Reservation) in Wyoming. EST Pet. App. 2a. The Reservation was created for the Eastern Shoshone Tribe by the Treaty with the Shoshonees and Bannacks, July 3, 1868, 15 Stat. 673. EST Pet. App. 4a. At that time, the Reservation covered roughly three million acres. *Ibid.*

In 1874, the Eastern Shoshone Tribe relinquished the portion of the Reservation south of the forty-third parallel. Act of Dec. 15, 1874 (Lander Purchase), ch. 2, 18 Stat. 291; see EST Pet. App. 5a. Around the same time, the Northern Arapaho joined the Eastern Shoshone on the Reservation. EST Pet. App. 5a. The Reservation's boundaries changed again in 1897, when the Tribes relinquished certain land located on the Reservation's northern boundary. Act of June 7, 1897 (Thermopolis Purchase), ch. 3, § 12, 30 Stat. 93; see EST Pet. App. 5a-6a. It is undisputed that lands conveyed by the Tribes under the Lander Purchase and the Thermopolis Purchase are no longer part of the Reservation. See EST Pet. App. 5a-6a.

In the early years of the twentieth century, U.S. Indian Inspector James McLaughlin and the Tribes reached another agreement regarding Reservation land, embodied in the Act of Mar. 3, 1905 (1905 Act), ch. 1452, 33 Stat. 1016, which is at issue in this case. EST Pet. App. 6a. Article I of the 1905 Act provided

that the Tribes "do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the [Reservation], except the lands within and bounded by" lines set forth in the text of Article I, lying to the south of the mid-channel of the Big Wind River and west of the mid-channel of the Popo-Agie River. 33 Stat. 1016; see EST Pet. App. 22a-27a. Article II of the 1905 Act provided that "[i]n consideration of the lands ceded, granted, relinquished, and conveyed by Article I," the United States would dispose of the lands to purchasers at certain prices per acre, with the proceeds "to be paid to and expended for said Indians" in the manner provided by the 1905 Act, including per capita payments and payments for enumerated purposes. 33 Stat. 1019-1020. Article IX of the 1905 Act provided that the "United States shall act as trustee for said Indians to dispose of" the lands opened for sale, 33 Stat. 1021, which the 1905 Act referred to as the "ceded lands," *e.g.*, Art. VI, 33 Stat. 1018; see also Art. I, 33 Stat. 1016 ("the portion of said reservation hereby ceded"). The 1905 Act referred to the lands retained by the Tribes under Article I as the "diminished reserve" or "diminished reservation." Art. I, 33 Stat. 1016; Art. III, 33 Stat. 1020; Art. IV, 33 Stat. 1017; Art. VI, 33 Stat. 1018; Art. IX, § 3, 33 Stat. 1022. For example, the 1905 Act provided that some of the funds realized from the sale of the ceded lands were to be used for "the survey and marking of the outboundaries of the diminished reservation." Art. IX, § 3, 33 Stat. 1022.

Pursuant to the 1905 Act, the United States held approximately 1.48 million acres of "ceded" lands,[1]

[1] The legislative history of the 1905 Act describes the "lands proposed to be ceded" as including 1.48 million acres. H.R. Rep.

Art. VII, 33 Stat. 1018, in its capacity as "trustee for said Indians to dispense of said land" and "pay over to the[Tribes] the proceeds received from the sale thereof only as received," Art. IX, 33 Stat. 1021; see *State* v. *Moss*, 471 P.2d 333, 334-335 (Wyo. 1970). By Presidential Proclamation, the unallotted, ceded lands were opened for purchase and settlement on June 2, 1906. 34 Stat. 3208-3209. Demand for the lands was low, and only about 196,000 acres were sold. Northern Arapaho Tribe (NAT) Pet. App. 233. In 1915, the Department of the Interior (DOI) ceased sales of the ceded lands. *Id.* at 233-234.

In 1939, as part of the distribution of a judgment fund for the Shoshone Tribe following this Court's decisions in *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937), and *United* States v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938), Congress directed the Secretary of the Interior (Secretary) "to restore to tribal ownership all undisposed-of surplus or ceded lands within * * * land use districts" to be established by the Secretary. Act of July 27, 1939 (1939 Act), ch. 387, § 5, 53 Stat. 1129; see EST Pet. App. 31a. Fol-

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No. 2355, 58th Cong., 2d Sess. 3 (1904). Other documents list the total as 1,438,633 acres. See *Jurisdiction—Hunting and Fishing on the Wind River Reservation*, 2 Op. of Solicitor of Dep't of Interior Relating to Indian Affairs 1185, 1191 n.7 (1943); see also Northern Arapaho Tribe (NAT) Pet. App. 180. The lower figure may represent the ceded lands minus those lands selected for allotments. The portion of the Reservation not open for sale comprised approximately 808,500 acres. H.R. Rep. No. 2355, at 3.

lowing the 1939 Act, a series of secretarial orders returned the majority of the ceded lands to tribal ownership. See NAT Pet. App. 169-170.[2]

Congress again addressed a portion of the ceded lands in the Act of Aug. 15, 1953 (1953 Act), ch. 509, 67 Stat. 592. Following the 1905 Act, the United States had withdrawn approximately 332,000 acres of the ceded lands for the Riverton Reclamation Project, and compensated the Tribes for roughly 100,000 acres. H.R. Rep. No. 269, 83d Cong., 1st Sess. 1-2 (1953). The 1953 Act returned 70,500 acres of this land to the Tribes, while the United States retained approximately 161,500 acres. *Id.* at 2. "[A]ll" of the "unentered and vacant" lands in the specified area were "restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public lands laws of the United States." 1953 Act § 2, 67 Stat. 612. The United States paid $1,009,500 to the Tribes, as "full, complete, and final compensation * * * for terminating and extinguishing all of the right, title, estate, and interest * * * and any and all past and future damages arising out of

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[2] The orders included the following language:

> I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of ceded lands of the Wind River Reservation, Wyoming, and which total 625,298.82 acres * * * are hereby restored to tribal ownership for the use and benefit of the * * * Tribes * * * , and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

9 Fed. Reg. 9749, 9754 (Aug. 10, 1944) (reproduced at NAT Pet. App. 170). The Secretary used the same language to restore lands on numerous other reservations. See NAT Pet. App. 170-171.

the cession to the United States" of those lands pursuant to the 1905 Act. 1953 Act, 67 Stat. 592; see also H.R. Rep. No. 269, at 2.

Following the 1939 and 1953 enactments, approximately 1.07 million acres of the original 1.48 million acres of ceded lands are now held in trust by the United States for the tribal government or individual members. NAT Pet. App. 180. Those lands are now Indian country subject to federal and tribal jurisdiction without regard to whether the 1905 Act diminished the Reservation and removed those lands from reservation status at that time. The remainder of the ceded lands is in private, state, or local government hands or under the control of federal agencies. The lands that have not been returned to tribal ownership include, *inter alia*, the majority of the land comprising Riverton, Wyoming, a city of approximately 11,000 people. See U.S. Census Bureau, U.S. Dep't of Commerce, *Quick Facts*, *Riverton City, Wyoming*, https://www.census.gov/quickfacts/fact/table/rivertoncitywyoming/PST045216; see also NAT Pet. App. 181-182.[3]

2. In 1990, Congress amended the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, to permit the U.S. Environmental Protection Agency (EPA) "to treat Indian tribes as States" for certain purposes. 42 U.S.C. 7601(d)(1)(A). EPA then promulgated the Tribal Authority Rule, 40 C.F.R. Pt. 49, which allows qualified tribes to apply for eligibility to implement and manage air quality programs and functions "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. 7601(d)(2)(B); see EST Pet. App. 6a-7a. A tribe's application must clearly identify the area

[3] Riverton acquired a patent for 160 acres in 1907 and now encompasses approximately 6300 acres. NAT Pet. App. 181-182 & n.68.

over which it seeks eligibility to be treated as a State. See 40 C.F.R. 49.7(a)(3).

In 2008, the Tribes applied to be "treat[ed] * * * as States" under the CAA for the purpose of carrying out certain non-regulatory CAA functions pertaining to the Reservation. EST Pet. App. 6a. Pursuant to EPA's Tribal Authority Rule, the Tribes' application identified the boundaries of the Reservation, which they submitted were undiminished by the 1905 Act. *Id.* at 7a. The Tribes subsequently requested that EPA not address the lands subject to the 1953 Act, discussed at pages 5-6, *supra*. NAT Pet. App. 62. EPA notified appropriate governmental entities and the public of the Tribes' application. EST Pet. App. 7a. In their comments, the State of Wyoming and the Wyoming Farm Bureau Federation disputed the Reservation boundaries asserted by the Tribes. *Ibid.* Pursuant to 40 C.F.R. 49.9(d), which permits consultation with DOI when a "tribe's jurisdictional assertion" "is subject to a conflicting claim," *ibid.*, EPA sought DOI's input regarding whether the 1905 Act diminished the Reservation's boundaries. EST Pet. App. 7a. DOI concluded that it did not. *Ibid.*; see NAT Pet. App. 201-251.

Based on DOI's views and its own analysis, EPA determined that the 1905 Act did not diminish the Reservation's boundaries. NAT Pet. App. 199-200; see *id.* at 65-200. Consistent with the Tribes' request, EPA did not address the lands subject to the 1953 Act. *Id.* at 63, 67. Accordingly, on December 6, 2013, EPA granted the Tribes' application, making them eligible for participation in grants and other non-regulatory CAA programs

pertaining to the Reservation, as undiminished by the 1905 Act. *Id.* at 59-64.[4]

3. The State of Wyoming and the Wyoming Farm Bureau Federation filed petitions for review in the Tenth Circuit pursuant to 42 U.S.C. 7607(b)(1), challenging EPA's conclusion that the 1905 Act did not diminish the Reservation's boundaries. EST Pet. App. 1a-49a. The City of Riverton and Fremont County intervened as petitioners, and the Tribes intervened as respondents. See *id.* at 1a. A divided panel of the Tenth Circuit held that the 1905 Act diminished the boundaries of the Reservation. *Id.* at 35a.[5] The panel therefore granted the petition for review, vacated EPA's determination that the Reservation had not been diminished by the 1905 Act, and remanded it to the agency for further proceedings consistent with the court's opinion. *Ibid.*

a. "To determine whether the 1905 Act had the effect of diminishing the Reservation," the court of appeals applied "the well-settled approach described in [*Solem* v. *Bartlett*, 465 U.S. 463 (1984)], where th[is] Court outlined a hierarchical, three-step framework to ascertain congressional intent." EST Pet. App. 9a.

At step one of the *Solem* framework, the court of appeals looked to "the text of the statute" as "'[t]he most

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[4] These programs include grant funding, 42 U.S.C. 7405; requests for National Ambient Air Quality Standards redesignations, 42 U.S.C. 7407(d)(3); and reviewing or commenting on nearby permitting and sources, 42 U.S.C. 7426, 7661d(a)(2). NAT Pet. App. 60-61.

[5] On November 7, 2017, the court of appeals denied the Tribes' petitions for rehearing en banc. EST Pet. App. 151a-152a. At the same time, the panel majority *sua sponte* granted panel rehearing in part to amend and supersede its prior opinion, "*nunc pro tunc* to the original filing date of February 22, 2017." *Id.* at 152a. A revised dissent also was filed. *Ibid.* References in this brief to the majority and dissenting opinions refer to the revised versions.

probative evidence of congressional intent.'" EST Pet. App. 9a (quoting *Solem*, 465 U.S. at 470) (brackets in original); see *id.* at 10a-19a; see also *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016). The majority held that "the express language of cession in the [1905] Act's operative text, taken together with the [1905] Act's other references to diminishment, strongly suggests that Congress intended to diminish the boundaries of the Wind River Reservation." EST Pet. App. 19a. In particular, the court compared the 1905 Act's language to the text of statutes this Court has previously considered and concluded that the 1905 Act's text "aligns with the type of language th[is Court] has called 'precisely suited' to diminishment." *Id.* at 11a (quoting *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998)); see *id.* at 11a-15a.

The court of appeals also rejected several contrary arguments at *Solem*'s first step. While the 1905 Act did not provide for unconditional payment of a sum certain to the Tribes, the majority noted that this Court has "rejected the argument that a finding of diminishment requires 'both explicit language of cession * * * *and* an unconditional commitment from Congress to compensate the Indians.'" EST Pet. App. 17a (quoting *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994)). Similarly, although the United States served as trustee to dispose of the ceded lands under the 1905 Act, the court of appeals pointed out that this Court has found congressional intent to diminish a reservation "notwithstanding * * * trusteeship provisions." *Id.* at 19a (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977)).

Turning to *Solem*'s second step, the court of appeals considered whether "the manner in which the transaction was negotiated with the tribes involved and the

tenor of legislative reports presented to Congress" demonstrated congressional intent to diminish the Reservation's boundaries. EST Pet. App. 20a (quoting *Solem*, 465 U.S. at 471); see *id.* at 10a. The court noted that it "need not search for unequivocal evidence" of congressional intent because the 1905 Act contained "express language of cession." *Id.* at 20a. But the court determined that "[t]he contemporary historical context * * * confirm[ed]" congressional intent to diminish the Reservation because "[t]he legislative history and the negotiations leading up to the 1905 Act reveal Congress's longstanding desire to sever from the Wind River Reservation the area north of the Big Wind River." *Ibid.*; see *id.* at 20a-29a (detailing this history). In particular, the court noted that an unratified 1891 agreement would have provided for cession in addition to a lump-sum payment. *Id.* at 20a-21a. That agreement, the court reasoned, "served as a predicate for the 1905 Act," and the fact that thereafter "provisions were revised to reflect [intervening] negotiations and the prevailing policy on compensating Native Americans for ceded land at the time is insufficient reason for severing and rendering irrelevant the circumstances prior to 1904." *Id.* at 27a-28a. The court analogized this case to *Rosebud Sioux Tribe*, *supra*, which relied on a "continuity of purpose" between an unratified prior agreement and the ultimate legislation. EST Pet. App. 28a; see *id.* at 27a-28a. The court also observed that James McLaughlin, the U.S. Indian Inspector, had stated to the Tribes during negotiations that the "boundaries of the reservation" would change and the Reservation would be "diminished," *id.* at 24a (citation and emphases omitted), and had made similar statements in

his report to Washington after the negotiations, *id.* at 26a; see *id.* at 25a-27a (similar).

"Third and finally, and '[t]o a lesser extent,'" the court of appeals considered "'Congress's own [subsequent] treatment of the affected areas,'" "'the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands,'" and "'the subsequent demographic history of opened lands.'" EST Pet. App. 29a (quoting *Solem*, 465 U.S. at 471-472) (first set of brackets in original). Although "the parties ha[d] provided volumes of material evidencing the treatment of the ceded land after the 1905 Act," the court found those submissions inconsistent and "of little evidentiary value." *Id.* at 30a. The court therefore concluded that "on balance the subsequent treatment of the ceded lands neither bolsters nor undermines our conclusion, based on steps one and two * * * , that the 1905 Act diminished the Wind River Reservation." *Id.* at 35a.

b. Judge Lucero dissented. EST Pet. App. 36a-49a. Like the majority, the dissent "[a]ppl[ied] the three-step analysis from *Solem*." *Id.* at 36a-37a. At step one, the dissent would have held that, in the "absen[ce of] sum-certain payment or statutory language restoring lands to the public domain," the 1905 Act did not clearly demonstrate congressional intent to diminish the Reservation. *Id.* at 36a; see *id.* at 37a-41a.

At step two, the dissent would have found that the circumstances surrounding passage of the 1905 Act failed to provide "unequivocal[]" evidence of Congress's intent to diminish the Reservation. EST Pet. App. 41a (quoting *Solem*, 465 U.S. at 471). The dissent disagreed with the majority's conclusion that there was a "continuity of purpose" between Congress's earlier

efforts to dispose of Reservation lands and the 1905 Act that evidenced a congressional intent to diminish the Reservation. *Id.* at 45a-46a. Among other things, the dissent noted that the 14-year delay between the 1891 negotiations and the 1905 Act was far longer than the three-year delay at issue in *Rosebud Sioux Tribe*, *supra*. EST Pet. App. 45a. Moreover, the dissent would have found that the 1905 Act's legislative history "counsel[s] against an intent to diminish," because, *inter alia*, Congress decided not to provide for state school lands in the area of the ceded lands, suggesting that Congress intended the area to "remain part of the Reservation." *Id.* at 41a-42a.

Finally, the dissent stated that it was unnecessary to consider *Solem*'s third step "[b]ecause the statutory text and legislative history in this case fail to provide compelling evidence of congressional intent to diminish." EST Pet. App. 48a. But even if the dissent considered subsequent events, it "agree[d] with the majority that the post-Act record is so muddled that it does not provide evidence of clear congressional intent." *Ibid.*

4. The Tenth Circuit denied the Tribes' petitions for rehearing en banc, with no active judge requesting that a poll be called. EST Pet. App. 151a-152a; see p. 8 n.5, *supra*.

ARGUMENT

Petitioners contend (EST Pet. 10-34, NAT Pet. 17-36) that the court of appeals erred in holding that the 1905 Act diminished the Reservation. This Court's review of that question is not warranted. Although EPA and DOI concluded that the 1905 Act did not diminish the Reservation, neither the court of appeals' application of the well-settled framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), nor its holding

that the 1905 Act diminished the Reservation, conflicts with any decision of this Court or of another court of appeals. To the contrary, the Tenth Circuit's decision is consistent with decisions of the Wyoming Supreme Court, which has twice held that the 1905 Act diminished the Reservation, removing from it the portions of the lands ceded in the 1905 Act that have not expressly been returned to full tribal trust status by subsequent Acts of Congress. See *Yellowbear* v. *State*, 174 P.3d 1270 (Wyo. 2008); *State* v. *Moss*, 471 P.2d 333 (Wyo. 1970). When the Tenth Circuit declined to disturb one of those decisions on federal habeas corpus review, *Yellowbear* v. *Attorney Gen.*, 380 Fed. Appx. 740, 743 (2010) (Gorsuch, J.), this Court denied a writ of certiorari, *Yellowbear* v. *Salzburg*, 562 U.S. 1228 (2011) (No. 10-7881). The same result is warranted here.

1. Contrary to petitioners' suggestions (EST Pet. 16-20; NAT Pet. 19-26), the court of appeals' decision is not contrary to any decision of this Court.

a. Petitioners first contend (EST Pet. 26; NAT Pet. 20-21; see Nat'l Congress of Am. Indians Amicus Br. 3, 22) that the court of appeals departed from *Solem*'s framework by assigning talismanic significance to the term "cede" in the 1905 Act, NAT Pet. 20-21 (citations omitted), rather than reading the statute "as a whole," EST Pet. 26 (quoting *Solem*, 465 U.S. at 476). But the court's analysis at *Solem*'s first step considered "the express language of cession"—that the Tribes "hereby cede, grant, and relinquish to the United States, all right, title, and interest" in the ceded lands, 1905 Act, Art. I, 33 Stat. 1016—"*taken together with* the [1905] Act's other references to diminishment." EST Pet. App. 19a (emphasis added). Those "other references to diminishment" include the 1905 Act's six references to

the land not opened for sale as the "diminished reserve" or "diminished reservation." Art. I, 33 Stat. 1016 ("diminished reserve"); Art. III, 33 Stat. 1020 ("diminished reserve"); Art. IV, 33 Stat. 1017 ("diminished reservation"); Art. VI, 33 Stat. 1018 ("diminished reservation"); Art. IX § 3, 33 Stat. 1022 ("diminished reservation" and "diminished reserve"); see EST Pet. App. 14a n.****** (reciting those references).

The court of appeals acknowledged (EST Pet. App. 14a n.******) that in *Solem*, this Court found an isolated statutory reference to "the reservation thus diminished"—which together with isolated language restoring land to the "public domain" was "[u]ndisputedly" supportive of diminishment—insufficient to "carry the burden of establishing an express congressional purpose to diminish." *Solem*, 465 U.S. at 475. But the court of appeals explained that here, the references to "the diminished reservation" in "Articles I, III, IV, VI, and IX of the 1905 Act" were "in addition to the express language of cession in Article I." EST Pet. App. 14a n.****** (citing 33 Stat. 1016, 1017, 1018, 1020, 1022). Considered together, the court concluded, those two aspects of the statutory text "strongly suggest[] that Congress intended to diminish the boundaries of the Wind River Reservation." *Id.* at 19a. Thus, because the court of appeals did not rely on language of cession alone, this case does not present the question whether Congress would have "evinced a clear and plain intent" to diminish a reservation "simply by using language of cession." NAT Pet. i; cf. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below.").

The court of appeals' reliance on those two aspects of the statute does not conflict with this Court's cases. The

Court has long recognized that language of cession—even if unaccompanied by a lump-sum payment—can provide evidence of congressional intent to diminish. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 597 (1977) (referring to the phrase "'cede, surrender, grant, and convey'" as "language of immediate cession") (citation omitted); see also *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (referring to such language, in combination with sum-certain language, as "precisely suited" to terminating reservation status); *DeCoteau* v. *District Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975) (same). And this Court has stated that statutory "references to * * * the unopened areas as constituting 'the reservation thus diminished' support [the] view that the [relevant] [a]ct diminished the reservation," even if such references, in the context of a particular statute, may not be "dispositive." *Solem*, 465 U.S. at 475.[6]

Petitioner NAT contends (Pet. 20) that an Act of Congress may diminish the boundaries of a reservation "only when (1) the statutory text guaranteed the tribe a sum-certain payment in exchange for reservation lands; (2) the statutory text made clear that the reservation lands would be restored to the public domain; or

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[6] Petitioners point (EST Pet. 2, 8, 12, 14; NAT Pet. 15) to the court of appeals' statement that "Congress's use of the words 'cede, grant, and relinquish' can only indicate one thing—a diminished reservation." EST Pet. App. 15a. But the court made that statement in response to the argument that the 1905 Act did not diminish the Reservation because Article I does not include the words "sell" or "convey"—although "convey" is included in Article II. *Ibid.* Contrary to petitioners' suggestion (EST Pet. 2, 8, 12, 14; NAT Pet. 15), the court's statement does not mean that it relied solely on language of cession to reach its conclusion at step one of the *Solem* framework.

(3) there is unequivocal evidence supporting diminishment in the contemporaneous legislative and historical record." See Nat'l Congress of Am. Indians Amicus Br. 13 (similar). This Court has made clear, however, that in diminishment cases, courts must "examine all the circumstances surrounding the opening of a reservation," and it has rejected a magic-words approach. *Hagen* v. *Utah*, 510 U.S. 399, 412 (1994); see also, *e.g.*, *ibid.* ("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."); *Solem*, 465 U.S. at 470-471 (Although the combination of "language of cession" and "an unconditional commitment from Congress to compensate the Indian tribe for its open land" creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished," "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment."); *Rosebud Sioux Tribe*, 430 U.S. at 598 n.20 (in determining whether Congress intended to diminish a reservation, "the method of payment, whether lump-sum or otherwise, is but one of many factors to be considered") (citation omitted). Thus, this Court's decisions have not held that diminishment may be found only in the specific circumstances petitioners identify.[7]

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[7] Petitioner EST further contends (Pet. 27) that the court of appeals failed to faithfully apply *Solem* because, at the second step of the analysis, it relied "on equivocal evidence about the contemporaneous understanding of the 1905 Act." But as petitioner EST acknowledges (*ibid.*), the court quoted *Yankton Sioux Tribe* and cited *Solem* for the proposition that "[e]ven in the absence of 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."

b. Nor does the court of appeals' decision conflict with this Court's decision in *Nebraska* v. *Parker*, 136 S. Ct. 1072 (2016). Petitioner NAT contends (Pet. 27) that *Parker* "goes a long way to making clear that the 1905 Act did not unequivocally diminish the Wind River Reservation." But the statute at issue in *Parker* merely permitted the survey, appraisal, and sale of certain lands and "open[ed those lands] for settlement," Act of Aug. 7, 1882, ch. 434, § 2, 22 Stat. 341; it lacked both the express language of "cession" and the references to a "diminished reservation" or "diminished reserve" upon which the majority in this case relied. See 136 S. Ct. at 1077-1080; *id.* at 1080 (contrasting text of statute at issue in *Parker* with earlier treaties between the United States and the Omaha Tribe, that included, *inter alia*, language of cession).

c. Contrary to petitioners' assertions (EST Pet. 16-20; NAT Pet. 23), the court of appeals' decision also does not conflict with this Court's decision in *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). There, the Court considered whether unsold lands held under a 1904 surplus land act by the United States as sales agent for the Crow Tribe constituted "land belonging to any Indian or Indian tribe" subject to the livestock-trespass provision currently codified at 25 U.S.C. 179. 252 U.S. at 163 (quoting Rev. Stat. § 2117 (1875)); see *id.* at 163-166. The Court concluded that "until sales should be

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EST Pet. App. 20a (quoting *Yankton Sioux Tribe*, 522 U.S. at 351) (brackets in original). Although the court stated that because it had found clear language of diminishment, it did not need to look for *unequivocal* evidence of the contemporaneous understanding of the 1905 Act, *ibid.*, it nonetheless considered such evidence and found that it supported a finding of congressional intent to diminish. *Id.* at 20a-29a.

made" by the United States, as trustee, to purchasers, "any benefits which might be derived from the use of the lands would belong to the beneficiaries," *i.e.*, the Indians. *Id.* at 166. Thus, the lands remained "Indian lands" subject to the statute until they were sold. *Ibid.*

Petitioner EST observes that the surplus land act for the reservation at issue in *Ash Sheep* and the 1905 Act include similar language, and it construes the Court's determination in *Ash Sheep* that "the lands in question 'did not become Public lands' but instead remained Indian lands" as "a holding that the statute did not diminish the reservation." EST Pet. 17-18 (quoting *Ash Sheep*, 252 U.S. at 166) (internal quotation marks omitted). But the lands at issue in *Ash Sheep* remained "Indian lands" because the tribe retained a beneficial interest. 252 U.S. at 166. As this Court explained in *Rosebud Sioux Tribe*, however, "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." 430 U.S. at 601 n.24 (quoting *Rosebud Sioux Tribe* v. *Kneip*, 521 F.3d 87, 102 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977)). Thus, "whether lands become 'public lands' under * * * *Ash Sheep*, is * * * logically separate from a question of disestablishment," *ibid.*, as the dissenting judge in the court of appeals acknowledged, EST Pet. App. 39a (Lucero, J., dissenting) ("Admittedly, the retention of a beneficial interest is not dispositive of reservation status.").

Moreover, *Ash Sheep* addressed the status of *unsold* land held by the United States as tribal sales agent pursuant to a surplus land statute. By contrast, the lands at issue here are the almost 200,000 acres that were *sold* pursuant to the 1905 Act. See NAT Pet. App. 233a. The remaining land opened for sale under the

1905 Act—well more than a million acres—was either restored to the Tribes in trust or addressed by a subsequent statute. Because *Ash Sheep* does not speak to the status of lands that were actually sold pursuant to a surplus land statute, the decision below does not contravene its reasoning.

2. Nor does the decision below conflict with any decision of a state court of last resort or of another court of appeals.

a. The Tenth Circuit's conclusion that the 1905 Act diminished the Reservation is consistent with decisions of the Wyoming Supreme Court, the only other court that has expressly decided the issue. In *Moss*, *supra*, a criminal defendant contended that the murder he was alleged to have committed within the City of Riverton occurred in "Indian country" as defined in 18 U.S.C. 1151, such that it was within the exclusive jurisdiction of the United States. 471 P.2d at 333-334. The court rejected the defendant's contention that "the agreement and 1905 Act had no effect on the area that was Indian country," and thus upheld the State's criminal jurisdiction. *Id.* at 339.

Similarly, in *Yellowbear* v. *State*, *supra*, the Wyoming Supreme Court rejected a defendant's argument that his crimes—which also took place in Riverton—occurred in Indian country because the 1905 Act did not diminish the Reservation. 174 P.3d at 1273-1284. Applying this Court's diminishment caselaw, the court concluded that "it was the intent of Congress in passing the 1905 Act to diminish the Wind River Indian Reservation and to remove from it the lands described as 'ceded, granted, and relinquished' thereunder." *Id.* at 1284. The Tenth Circuit subsequently rejected the *Yellow-*

bear defendant's petition for post-conviction relief, explaining that he failed to provide "any reason to think" the Wyoming Supreme Court's "thorough and detailed" decision was incorrect, *Yellowbear*, 380 Fed. Appx. at 743, and this Court denied the defendant's petition for a writ of certiorari, *Yellowbear*, 562 U.S. at 1228.[8]

b. Contrary to petitioners' contentions (EST Pet. 10-15; NAT Pet. 24-26), the court of appeals' decision does not conflict with the Eighth Circuit's 1987 decision in *United States* v. *Grey Bear*, 828 F.2d 1286, vacated in part on other grounds, 836 F.2d 1088. *Grey Bear* considered whether the Act of Apr. 27, 1904 (1904 Act), ch. 1620, 33 Stat. 319, disestablished the Devils Lake Sioux Indian Reservation in North Dakota. 828 F.3d at 1289-1290.[9] That Act stated that the tribe "cede[d], surrender[ed], grant[ed], and convey[ed] to the United States" certain lands. *Id.* at 1290 (quoting 1904 Act, Art. I, 33 Stat. 321) (emphasis omitted). The Eighth Circuit concluded that this language, "standing alone, does not evince a clear congressional intent to disestablish the Devils Lake Reservation." *Ibid.*; see also *ibid.* ("[W]e refuse, without more, to infer" clear congressional intent to disestablish the reservation.); *id.* at 1290 n.5 (noting that this Court's cases finding diminishment had not "rel[ied] solely upon this language of cession").

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[8] Prior to *Moss* and *Yellowbear*, the Wyoming Supreme Court held that the State had authority to prosecute an Indian for a crime committed within the area affected by the 1953 Act. *Blackburn* v. *State*, 357 P.2d 174 (1960). Because *Blackburn* considered both the 1905 and 1953 Acts, the *Moss* and *Yellowbear* courts found that it was not dispositive of the question presented in those cases. *Yellowbear*, 174 P.3d at 1283; *Moss*, 471 P.2d at 337.

[9] The Devils Lake Reservation is now known as the Spirit Lake Indian Reservation. See *United States* v. *Lara*, 541 U.S. 193 (2004).

In addition, the Eighth Circuit explained that although "[t]he legislative history" of the relevant act was "inconclusive," the "[j]urisdictional history of [the] lands" and "subsequent congressional enactments" supported its finding that the reservation's boundaries were not disestablished. *Id.* at 1291.

The court of appeals' decision in this case is not in conflict with *Grey Bear*. Here, the court did not rest its decision on the 1905 Act's language of cession "standing alone." *Grey Bear*, 828 F.2d at 1290. It relied on that language in combination with the 1905 Act's various "references to diminishment." EST Pet. App. 19a. And unlike in *Grey Bear*, see 828 F.2d at 1290-1291, the court concluded that evidence at step two of the *Solem* framework—including "Congress's longstanding desire to sever from the Wind River Reservation the area north of the Big Wind River," EST Pet. App. 20a, the history of negotiations, and the negotiator's statements to the Tribes and in his report of the negotiations—confirmed its view that Congress intended to diminish the Reservation, *id.* at 20a-29a; see *id.* at 14a n.******* (discussing *Grey Bear*). That the Eighth and Tenth Circuits reached different conclusions regarding different statutes enacted against different historical backdrops does not support petitioners' assertion of a conflict warranting this Court's review. See *Solem*, 465 U.S. at 469 ("The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.").

3. Finally, contrary to petitioners' suggestions (*e.g.*, EST Pet. 3; NAT Pet. 1), this Court's review is not necessary to restore the status quo regarding the boundaries of the Reservation. At least since the Wyoming Supreme Court's decision in *Moss* in 1970, the question of

the allocation of criminal jurisdiction on lands sold pursuant the 1905 Act has been settled. 471 P.2d at 339; see also *Yellowbear*, 174 P.3d at 1284. The United States does not assert Indian country criminal jurisdiction over the lands ceded in the 1905 Act and not subsequently returned to full trust status. The decision below is thus consistent with longstanding expectations regarding the allocation of jurisdiction in the region. But see EST Pet. App. 33a-35a (finding "jurisdictional and judicial treatment of the area" inconclusive because Wyoming and some federal agencies have at times exercised civil jurisdiction over the area).

Nor is petitioner EST correct (Pet. 33-34) that the decision below threatens to upend expectations regarding other reservations. That argument depends on the notion that "[u]nder the decision below," other land acts will "automatically be deemed to show clear congressional intent to diminish solely because" they contain "cession language—and regardless of whether other textual or non-textual factors counsel against such a conclusion." *Ibid.* But as discussed above, see pp. 13-16, *supra*, the court of appeals' decision does not depend solely on language of cession. Thus, "[t]he effect of any given surplus land Act" will continue to depend—as did the court's decision in this case—"on the language" of the particular Act "and the circumstances underlying its passage." EST Pet. App. 9a (quoting *Solem*, 465 U.S. at 469).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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