No. 17-

IN THE

Supreme Court of the United States

EASTERN SHOSHONE TRIBE,

Petitioner,

v.

WYOMING, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress clearly intended in 1905 to diminish the Wind River Reservation in Wyoming, home to the Eastern Shoshone Tribe.

PARTIES TO THE PROCEEDING BELOW

Petitioner here, the Eastern Shoshone Tribe intervened as a respondent in the court of appeals.

Wyoming and the Wyoming Farm Bureau Federation were the petitioners in the court of appeals.

The non-intervenor respondents in the court of appeals included the U.S. Environmental Protection Agency; E. Scott Pruitt, in his official capacity as Administrator of the U.S. Environmental Protection Agency; and Doug Benevento, in his official capacity as Acting Region 8 Administrator of the U.S. Environmental Protection Agency.

Additional intervenors in the court of appeals were the Northern Arapaho Tribe; the City of Riverton, Wyoming; and Fremont County, Wyoming.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

The Eastern Shoshone Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

INTRODUCTION

The question presented here is whether a 1905 statute diminished the Wind River Reservation in Wyoming, sovereign territory of the Eastern Shoshone Tribe. A divided panel of the Tenth Circuit concluded that the statute had diminished the reservation. In doing so, the panel did not apply this Court's established standards for diminishment claims. It also departed from decisions of this Court and of the Eighth Circuit, which reached contrary conclusions about materially identical statutes.

In particular, the law at issue here provided that the Shoshone would "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to" certain specified lands. App. 159a. The Tenth Circuit concluded that this language unambiguously shows intent to diminish, stating that "Congress's use of the words 'cede, grant, and relinquish' *can only indicate one thing*—a diminished reservation." App. 15a (emphasis added). This Court, by contrast, held in *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920), that the exact same phrase, in a substantively indistinguishable 1904 statute, did not convert "Indian lands" into "Public lands," *id.* at 166, i.e., did not diminish a reservation. The Eighth Circuit has similarly held that "'cede, surrender, grant, and convey' language" regarding a reservation, "standing alone, does not evince a clear congressional intent to disestablish." *United States* v. *Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1088 (8th Cir. 1987) (en banc).

This Court should grant certiorari to resolve the circuit conflict and correct the departure from this Court's precedent. It should also grant review to reaffirm the fundamental principle that because there is a "presumption that Congress did not intend to diminish the Reservation," *Solem* v. *Bartlett*, 465 U.S. 463, 481 (1984), clear evidence of congressional intent (be it unambiguous statutory text or unequivocal historical evidence) is required before a court may conclude that a tribe has been divested of its sovereign lands, *e.g.*, *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016).

The 1905 Act does not evince such intent. To the contrary, it is the kind of law that this Court has held does not show clear intent to diminish: The Act did not provide that the lands at issue were being restored to

the public domain; it did not pay the Indians a fixed sum for the lands; and it did provide that the United States would act as a trustee by selling individual parcels for the Shoshone's benefit. This Court has never held that such a statute diminished a reservation.

As Wyoming acknowledged below (Reh'g Opp. 1), "this case is of exceptional public importance." A divided panel of the Tenth Circuit has concluded that Congress deprived the Shoshone of reservation lands that Congress had promised the tribe would have in perpetuity, and that are at the heart of the Shoshone's sovereignty and cultural heritage. While that alone would justify this Court's review, statutes with similar language apply to other reservations, risking invasions of the core sovereignty of those reservations' tribes as well. Under these circumstances, this Court's review is warranted.

OPINIONS BELOW

The revised opinion of the court of appeals (App. 1a-49a) is reported at 875 F.3d 505. The court's initial opinion (App. 51a-99a) is reported at 849 F.3d 861. The Environmental Protection Agency decision that was reviewed by the court of appeals (App. 153a-157a) is reported at 78 Fed. Reg. 76,829 (Dec. 19, 2013).

JURISDICTION

The court of appeals entered judgment on February 22, 2017. On November 7, 2017, the court denied rehearing en banc but granted panel rehearing and entered an amended opinion. On January 17, 2018, Justice Sotomayor extended to March 7, 2018, the time to file a petition for certiorari. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Act of March 3, 1905, 33 Stat. 1016, is reproduced in the appendix.

STATEMENT

A. Diminishment Doctrine

1. Around the turn of the twentieth century, "Congress passed a series of surplus land Acts," i.e., laws intended "to open up [reservation] lands for non-Indian settlement." *Solem*, 465 U.S. at 466-467. These statutes were enacted in response to a "continuing demand for new lands for the waves of homesteaders moving West." *Id.* at 466.

Opening reservation land for non-Indian settlement does not necessarily remove the land from a reservation. "Rather, it is settled law that some surplus land Acts diminished reservations … and other surplus land Acts did not." *Solem*, 465 U.S. at 469. The laws themselves, however, were often ambiguous on this point. *See Parker*, 136 S. Ct. at 1079. Consequently, this Court has "never been willing to extrapolate … a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Solem*, 465 U.S. at 468-469. To the contrary, the Court has long held that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470. To give effect to this holding, courts construing surplus-land acts apply a "presumption that Congress did not intend to diminish the Reservation." *Id.* at 481.

2. "The [three-step] framework … employ[ed] to determine whether an Indian reservation has been di-

minished [by a surplus-land act] is well settled." *Parker*, 136 S. Ct. at 1078. At step one, the court examines "the statutory text," which is the "most probative evidence." *Id.* at 1079. At step two, the court considers "events surrounding the passage" of the act, "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Solem*, 465 U.S. at 471. At step three (which is least important), the court examines the "subsequent understanding of the status of the reservation." *Parker*, 136 S. Ct. at 1079.

In applying that framework, this Court has consistently admonished that Congress's "intent to [diminish] must be clear." *Parker*, 136 S. Ct. at 1079. This requirement that "Congress clearly evince an intent to change boundaries," *Solem*, 465 U.S. at 470 (quotation marks omitted) applies to all three steps of the diminishment framework. At step one, the general rule that textual "ambiguities are resolved to the benefit of the Indians" is given "the broadest possible scope." *DeCoteau* v. *District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975). And if the statutory language is ambiguous, steps two and three must provide "'unequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation" to find diminishment. *Parker*, 136 S. Ct. at 1079 (quoting *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)). In short, if neither a statute's text nor the relevant history demonstrates clear congressional intent to diminish, the Court is "bound … to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

B. Factual And Administrative Background

1. "In 1863, the United States and the Eastern Shoshone entered into the First Treaty of Fort Bridger, which established 'Shoshonee County,' an area encompassing more than forty-four million acres." App. 4a (citation omitted). Five years later, however, a second treaty provided for the Shoshone to surrender those 44 million acres in exchange for just three million acres in modern-day Wyoming—the Wind River Reservation. *See United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 113 (1938). In this second treaty, the United States guaranteed the Shoshone "absolute and undisturbed use and occupation" of the land, in perpetuity. 15 Stat. 673, 674 (1868).

Despite this promise, the reservation was diminished twice in the late nineteenth century. In an 1874 transaction known as the Lander Purchase, the United States bought land in the reservation's southern portion for the fixed sum of $25,000, via a statute that was expressly intended "to change the southern limit of said reservation." 18 Stat. 291, 292 (1874). And in an 1897 transaction known as the Thermopolis Purchase, the United States bought land in the reservation's northeast corner for the fixed sum of $60,000. 30 Stat. 93 (1897). The statute effecting that sale provided that the Shoshone—and the Northern Arapaho Tribe, which was moved to the reservation in 1878, *see Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 487 (1937)—were "forever and absolutely" surrendering their rights "of every kind and character" to the land. 30 Stat. at 94. It also "declared" that virtually all of the purchased lands were "public lands of the United States," *id.* at 96, meaning they were no longer part of the reservation, *see Hagen* v. *Utah*, 510 U.S. 399, 413 (1994).

Despite agreeing to these sales, the tribes rebuffed efforts by the United States to buy reservation land north of the Wind River, which is the area in dispute here. In 1891, the government offered to purchase land in that area for $600,000, but no agreement was ever ratified. App. 20a-21a. "[T]wo years later the … United States asked for additional land and offered the Tribes $750,000. Despite the higher offer, the Tribes refused three different proposals, and no agreement was reached." App. 21a (citation omitted).

2. In 1905, Congress enacted the law at issue in this case. The Act provided that the Shoshone and Arapaho "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within [their] reservation, except the lands within and bounded by the following described lines…." App. 159a. Unlike the 1874 statute, the 1905 Act did not refer to changing the boundaries of the reservation. Nor, unlike the 1897 statute, did it state either that the tribes were "forever and absolutely" giving up their rights "of every kind and character" to the land, or that the land was becoming "public lands of the United States." 30 Stat. at 94, 96. And in further contrast to the earlier statutes, the Act did not pay the tribes a fixed sum for their land. Rather, it provided that the United States would act as "trustee" in selling plots of land, with the tribes being paid only whatever "proceeds [were] received" from such sales. App. 169a-170a.

Most of the land opened to settlement by the Act was never sold, and Congress later returned the unsold parcels to tribal use and occupancy. *See* 53 Stat. 1128, 1129-1130 (1939).

3. In 2008, the Shoshone and Arapaho applied to the Environmental Protection Agency for authority to manage air-quality programs on the reservation under the Clean Air Act. *See* 42 U.S.C. §7601(d). The application required the tribes to delineate the reservation's boundaries, and respondents objected to the tribes' delineation because it reflected no diminishment by the 1905 Act. App. 2a-3a. EPA rejected respondents' objection, based on its own analysis and on an Interior Department opinion, each of which concluded that the Act had merely opened the reservation land for settlement, without diminishing the reservation. App. 3a; *see* App. 153a-157a.

C. Tenth Circuit Proceedings

1. A divided panel of the court of appeals granted respondents' petition for review of EPA's decision and held that the 1905 Act diminished the Wind River Reservation. App. 52a.

The panel stated that it was resolving the case at step one of this Court's "three-step framework," App. 59a, and rested its decision specifically on the Act's use of the word "cede." It reasoned that "Congress's use of … 'cede' can only mean one thing—a diminished reservation." App. 65a. In other words, the panel concluded, "the express language of cession in the 1905 Act indicates Congress intended to diminish the boundaries of the Wind River Reservation." App. 69a.

The panel next purported to apply step two of this Court's diminishment framework. It explicitly declined, however, to look for the "'unequivocal evidence' of the contemporaneous … understanding of the status of the reservation" that this Court's precedent requires to support a finding of diminishment, *Parker*, 136 S. Ct.

at 1079. Rather, the panel asserted that it "need not search for [such] unequivocal evidence," because "the statutory language evinces a congressional intent of diminishment." App. 70a. The panel's step-two analysis did not identify unequivocal evidence, stating instead that the historical record supported diminishment "when taken together with the Act's plain language." App. 79a; *see also* App. 70a (step-two evidence "confirms" Congress's intent to diminish).

As to step three (subsequent treatment of the relevant land), the majority explained that the evidence was inconclusive, "neither bolster[ing] nor undermin[ing]" the panel's holding based on the statutory text. App. 85a; *accord* App. 80a ("Our review of the subsequent treatment of the area … does not impact our conclusion[.]").

Judge Lucero dissented. In his view, the majority had departed from this Court's precedent "[b]y deriving an intent to diminish absent sum-certain payment or statutory language restoring lands to the public domain." App. 86a. He also explained that the panel's ruling was inconsistent with the Eighth Circuit's decision in *Grey Bear*. As he put it, the majority had "reache[d] a conclusion squarely opposite to one of our sibling circuits, creating a needless circuit split." App. 90a-91a. In response to the majority's contention (App. 64a n.6) that *Grey Bear* was distinguishable because of extra-textual factors, i.e., steps two and three, Judge Lucero observed that the majority's diminishment holding did not rest on contemporaneous evidence or subsequent events (step two or three), but simply on the statutory text, App. 90a.

2. The Shoshone and Arapaho petitioned for rehearing en banc. The full Tenth Circuit declined to re-

hear the case, but the panel granted rehearing and issued a revised opinion and dissent (each dated *nunc pro tunc* to the date of the original decision).

The majority's revised opinion made relatively minor changes. (A comparison of the two opinions appears at Appendix C.) For example, after the tribes and Judge Lucero noted that the panel had resolved the case solely at step one (thus making stark the conflict with *Grey Bear*), the panel declared otherwise by adding the italicized words to the following sentence: "[T]he subsequent treatment of the ceded lands neither bolsters nor undermines our conclusion, *based on steps one and two of the* Solem *framework*, that the 1905 Act diminished the Wind River Reservation." App. 35a (emphasis added). But it did not significantly revise its actual analysis.

The revised opinion also retained the statement that, notwithstanding this Court's precedent, unequivocal evidence of diminishment was not needed at step two. App. 20a. The panel again cited no authority to support this statement, but it did slightly alter its explanation. Whereas previously it had deemed unequivocal evidence unnecessary because "the statutory language evinces a congressional intent of diminishment," App. 70a, the reason the revised opinion gave was that "the statute contains express language of cession," App. 20a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CIRCUIT CONFLICT

A. The Tenth Circuit's Textual Holding Departs From *Grey* Bear

The court of appeals held here that the 1905 Act's language clearly diminished the Wind River Reserva-

tion. As Judge Lucero explained, that holding conflicts with *Grey Bear*, in which the Eighth Circuit construed substantively identical language.

1. The operative clause of the 1904 law at issue in *Grey Bear* is very similar to its counterpart in the 1905 Act. As explained, the latter provided that the tribes "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to" a specified portion of their reservation. App. 159a. The statute in *Grey Bear* similarly provided that the Indians of the Devils Lake Reservation "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" to the unallotted portion of their reservation. 33 Stat. 319, 319 (1904). These two key clauses are "virtually indistinguishable." *DeCoteau*, 420 U.S. at 446.

In each act, moreover, the tribe or tribes received an indeterminate sum of money (based on how much land was eventually sold to settlers) rather than a fixed sum. Specifically, the 1905 Act provided that "the United States agree[d] to pay the … Indians the proceeds derived from the sales of said lands." App. 169a. Likewise, in *Grey Bear* the United States promised "to pay to" the Indians of the Devils Lake Reservation "the proceeds derived from the sale of [their] lands." 33 Stat. at 321. Consistent with this payment approach, both acts described the United States "as trustee for said Indians," *id.* at 323-324; App. 164a-169a—reinforcing the notion that the Indians retained a beneficial interest in the land notwithstanding the cession language.

2. The Eighth Circuit held in *Grey Bear* that the act at issue had not diminished the reservation. Looking to this Court's precedent, the court reasoned that "although the 'cede, surrender, grant, and convey' lan-

guage … suggests congressional intent to disestablish," the statute "does not contain an unconditional commitment by Congress to pay the tribe for the ceded lands." 828 F.2d at 1290. "[S]tanding alone," the court concluded, "the 'cede' … language of the 1904 Act … does not evince a clear congressional intent to disestablish." *Id.* And finding "no [forthright] expression of congressional intent" to diminish, the court "refuse[d], without more, to infer one." *Id.*

The panel here, by contrast, held that the 1905 Act's virtually identical "cession language," App. 14a n.*******, did reveal a clear intent to diminish the reservation. Indeed, the Tenth Circuit declared that "Congress's use of the words, 'cede, grant, and relinquish' can only indicate one thing—a diminished reservation." App. 15a. And whereas *Grey Bear* reasoned that the absence of a sum-certain payment rendered the statute ambiguous, the panel here deemed what it called "the mechanism of payment" irrelevant in light of "the 'language of immediate cession.'" App. 18a. The two decisions are simply irreconcilable.

3. The Tenth Circuit disputed that conclusion in a footnote, stating that in *Grey Bear*, "the legislative history of the act was quite limited, and the subsequent treatment of the area strongly indicated Congress did not view the act as disestablishing the reservation." App. 14a n.*******. In other words, the panel asserted, "although step one of the *Solem* analysis pointed to diminishment" in *Grey Bear*, "steps two and three made it clear that was not Congress's intent." *Id.*

That reading of *Grey Bear* is untenable. Contrary to the Tenth Circuit's statement that in that case "step one … pointed to diminishment," App. 14a n.*******, the Eighth Circuit made clear that the statutory lan-

guage itself—i.e., without considering steps two and three—did not clearly show intent to diminish. Indeed, the court was explicit on this point: "We conclude that the 'cede, surrender, grant, and convey' language of the 1904 Act, standing alone, does not evince a clear congressional intent to disestablish the Devils Lake Reservation." 828 F.2d at 1290. That is a pure step-one holding, and directly in conflict with the decision below.

The Eighth Circuit did go on to steps two and three, but nowhere did it remotely hint that those steps overcame text that supposedly "pointed to diminishment." App. 14a n.*******. To the contrary, the court labeled the step-two evidence "inconclusive." 828 F.2d at 1291. Because statutory text is "[t]he most probative evidence" regarding diminishment, *Hagen*, 510 U.S. at 411, "inconclusive" step-two evidence could not have, as the Tenth Circuit suggested, overcome clear textual evidence of diminishment. Nor could evidence at step three, a step that this Court "has never relied solely on … to find diminishment," and that can only "'reinforc[e]' a finding of diminishment or nondiminishment based on the text." *Parker*, 136 S. Ct. at 1081 (brackets in original) (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). The Tenth Circuit pointed to nothing in *Grey Bear*—because there is nothing—supporting its claim that the Eighth Circuit's holding rested on steps two and three, rather than (in conflict with the decision below) on step one.

Wyoming argued below, however (Reh'g Opp. 8-9), that the 1905 Act is distinguishable from the statute in *Grey Bear* because the former "define[d] the boundaries of the new diminished Reservation, while the act in *Grey Bear*" authorized Indian allotments anywhere within the existing reservation, making the statute's cession language "ambiguous." This proposed distinction (like the

Tenth Circuit's) has no basis in the Eighth Circuit's opinion. That court never mentioned reservation boundaries in its analysis, instead resting its holding, as discussed, on the ambiguity resulting from the use of cession language without a sum-certain payment.[1]

In sum, the Eighth and Tenth Circuits employed conflicting reasoning in adopting opposite interpretations of materially identical statutory text. *Grey Bear* held that "'cede, surrender, grant, and convey' language …, standing alone, does not evince a clear congressional intent to disestablish," 828 F.2d at 1290, whereas the panel here held that "Congress's use of the words, 'cede, grant, and relinquish' can only indicate one thing—a diminished reservation." App. 15a. If this case had arisen in the Eighth Circuit, therefore, the court's step-one conclusion—and, for reasons explained immediately below, the ultimate outcome—would have been different.

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[1] After the tribes sought rehearing, the panel revised the concluding sentence of its statutory analysis to add mention of the 1905 Act's "references to diminishment." App. 19a. But the panel did not invoke these references in seeking to distinguish *Grey Bear*, nor did respondents. For good reason: *Solem* held that even express reference in a statute to the "reservation thus diminished" does not demonstrate clear congressional intent to diminish. 465 U.S. at 475. As the Court explained, during the relevant era, "'diminished' was not yet a term of art in Indian law. When Congress spoke of the 'reservation thus diminished,' it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries." *Id.* at 475 n.17. The 1905 Act's "references to diminishment," App. 19a, therefore do not meaningfully distinguish that law from the one in *Gray Bear*.

B. The Circuit Conflict Is Dispositive Here Because *Grey Bear* And The Decision Below Each Rested On The Statutory Text

After Judge Lucero's dissent and the tribes' rehearing petitions explained why the panel's original step-one holding conflicted with *Grey Bear*, the panel issued a revised opinion declaring that its diminishment holding was actually based on both step one and step two. *See supra* p.10. But as explained, neither the original opinion nor the revised one followed this Court's precedent in conducting the step-two analysis. This Court requires evidence that "'*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Parker*, 136 S. Ct. at 1080 (quoting *Solem*, 465 U.S. at 471) (emphasis and brackets added in *Parker*). The majority acknowledged that requirement, App. 20a, but stated that it did not "need [to] search for unequivocal evidence, for the statute contains express language of cession." *Id.* This statement shows that the panel's step-two conclusion depended on its step-one holding. Had the Tenth Circuit read the statutory text as the Eighth Circuit did, i.e., as not showing the requisite clear congressional intent to diminish, it could not have found diminishment unless the historical evidence was unequivocal—which the majority rightly never claimed it was. Because the majority's step-two analysis and conclusion thus flowed entirely from its step-one holding, the panel's revised opinion does not eliminate the conflict with *Grey Bear*.

C. Further Percolation Is Unwarranted

Giving other courts time to weigh in on the circuit conflict described above is unlikely to assist this Court, because a large percentage of the nation's Indian res-

ervations are in the Eighth and Tenth Circuits. Indeed, five of this Court's nine diminishment cases (*Parker*, *Solem*, *DeCoteau*, *Yankton Sioux*, and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)) arose from the Eighth Circuit, while a sixth, *Hagen*, arose from within the Tenth Circuit. This Court, moreover—perhaps in recognition of the importance of any holding that a sovereign's territory has been diminished—has repeatedly granted review to resolve diminishment issues where a 1-1 conflict (or even no conflict at all) was alleged. *See Solem*, 465 U.S. at 466 (certiorari granted "[b]ecause" of a conflict between the Eighth Circuit and the South Dakota Supreme Court); *DeCoteau*, 420 U.S. at 430-431 (same); *Yankton Sioux*, 522 U.S. at 342 (same); *Hagen*, 510 U.S. at 409 (certiorari granted "to resolve the direct conflict between … the Tenth Circuit and the Utah Supreme Court"); *Parker* (no conflict); *Rosebud* (same); *Mattz* (same); *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) (same). Particularly given the division in the panel below (and the conflict with *Ash Sheep* discussed immediately below), the 1-1 circuit conflict here similarly merits this Court's immediate attention.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

Certiorari is independently warranted because the panel departed from *Ash Sheep*, in which this Court held that a statute materially identical to the 1905 Act did not convert "Indian lands" into "Public lands," 252 U.S. at 166—i.e., did not diminish the reservation in question.

A. *Ash Sheep*'s Holding Is Contrary To The Decision Below

The 1904 law at issue in *Ash Sheep* is strikingly similar to the 1905 Act. It provided that the Crow Indians "cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines…." 33 Stat. 352, 356 (1904). The 1905 Act, as discussed, likewise provided that the Shoshone and Arapaho "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within [their] reservation, except the lands within and bounded by the following lines…." App. 159a. The statutory language on which the Tenth Circuit's analysis here hinged ("cede, grant, and relinquish to the United States") thus appears verbatim in the *Ash Sheep* law.

Both statutes, moreover, provided that the United States would not pay a fixed sum for the opened land, but instead would sell unallotted land and "pay the proceeds to the Indians." *Ash Sheep*, 252 U.S. at 165; *compare* 33 Stat. at 357-358, *with* App. 168a-169a. Consistent with that payment structure, both statutes identically described the United States as a "trustee for said Indians to dispose of said lands." 33 Stat. at 361-362; App. 169a. Both statutes even included references to a "diminished reservation," 33 Stat. at 359; App. 163a, 172a, although such language does not necessarily suggest (let alone establish) intent to diminish, *see supra* n.1.

Taking "all of the[se] provisions … together," *Ash Sheep*, 252 U.S. at 166, this Court concluded that under the 1904 statute, the lands in question "did not become 'Public lands'" but instead remained "Indian lands." *Id.* That is a holding that the statute did not diminish the

reservation: As this Court has explained, "public domain" status is "equated … with a congressional purpose to terminate reservation status." *Hagen*, 510 U.S. at 413; *see also id.* at 428 n.8 (Blackmun, J., dissenting) ("[T]his Court has used ['public domain'] interchangeably with … 'public land[s].'" (citing cases) (last alteration in original)). Given the near-identity of the two statutes, *Ash Sheep*'s holding is flatly inconsistent with the decision below.

B. The Panel's Reasons For Not Following *Ash Sheep* Are Infirm

The Tenth Circuit's two rationales for departing from *Ash Sheep* are flawed. First, the panel dismissed *Ash Sheep* as irrelevant because it is "seldom mentioned in subsequent cases." App. 19a. But as Judge Lucero observed, App. 39a n.1, *DeCoteau* cited *Ash Sheep* for the critical proposition that the absence of a fixed payment for opened land is strong textual evidence of no diminishment, 420 U.S. at 448. More fundamentally, a lower court may not disregard this Court's decisions because they are "seldom mentioned." *Ash Sheep* has never been overruled, and this Court has made clear that "[i]f a precedent of this Court has direct application …[,] the Court of Appeals should follow the case." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Indeed, adherence would be required even if *Ash Sheep* "appear[ed] to rest on reasons rejected in some other line of decisions." *Id.* That is not the situation, however. To the contrary, *Ash Sheep*'s reasoning, especially its textual analysis, is fully consistent with this Court's modern diminishment jurisprudence. *See Solem*, 465 U.S. at 472-473; *Parker*, 136 S. Ct. at 1079-1080.

The panel's other justification for not following *Ash Sheep* was its assertion—based on a footnote in *Rosebud*—that "whether lands became 'public lands' … is 'logically separate' from diminishment." App. 19a (quoting *Rosebud*, 430 U.S. at 601 n.24); *accord* Wyoming Reh'g Opp. 10-11. That assertion fails for three reasons.

First, for over a half century, this Court has consistently described diminishment as restoration of land to public-domain status. For example, *Seymour* explained that the lower court had held that "th[e] reservation had since been dissolved and the land … restored to the public domain." 368 U.S. at 353. Similarly, *DeCoteau* described the issue on appeal as whether the relevant reservation "was terminated and returned to the public domain." 420 U.S. at 426-427; *see also id.* at 446 ("That the lands … were returned to the public domain, stripped of reservation status, can hardly be questioned[.]"). And as noted, the Court in *Hagen* (citing these precedents) stated that its "cases considering operative language of restoration [to the 'public domain'] have *uniformly equated* it with a congressional purpose to terminate reservation status." 510 U.S. at 413 (emphasis altered). Whatever weight might otherwise be placed on *Rosebud*'s footnote, it cannot contradict *Hagen*'s more recent holding, which is itself consistent with this Court's statements stretching back decades. The principle expressed in these cases—that diminished lands are "public lands" or within the "public domain"—necessarily means that *Ash Sheep*, by holding that the lands in question were not "public lands," found no diminishment.

Second, the only case *Rosebud* for its suggested diminishment/public-lands dichotomy, *United States* v. *Pelican*, 232 U.S. 442 (1914), provides no support. That case ruled that Indian allotments held in trust by the

United States were "Indian country" for jurisdictional purposes, under a predecessor to 18 U.S.C. §1151. 232 U.S. at 444, 449. *Pelican* did not hold anything with respect to either public-domain status or diminishment.

Third, *Rosebud*'s statement was dictum. As this Court unanimously clarified in *Solem*, *Rosebud* rested on step two of the diminishment framework. *See* 465 U.S. at 469; *contra* App. 12a (implying that *Rosebud* was a step-one decision). It was a step-two ruling because the relevant statutory text was ambiguous. *See Solem*, 465 U.S. at 469-470 n.10 ("[N]one of the Rosebud Acts *clearly* severed the Tribe from its interest in the … lands." (emphasis added)). Consequently, *Rosebud* "held that the circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress meant for each Act to diminish the Rosebud Reservation." *Id.* Because the *Rosebud* footnote cited by the panel here was unrelated to step two, it was unnecessary to the Court's holding.

In short, the Tenth Circuit's interpretation of the 1905 Act directly contradicts *Ash Sheep*'s construction of an all-but-identical statute. This Court has previously granted review—even absent a circuit conflict like the one here—where a lower court's diminishment ruling "appeared to … conflict with applicable decisions of this Court." *Mattz*, 412 U.S. at 485. It should do so again here.

III. THE DECISION BELOW IS WRONG

Under a proper analysis, the 1905 Act did not diminish the Wind River Reservation. The Tenth Circuit—which never acknowledged the "presumption" against diminishment recognized in *Solem*, 465 U.S. at

481—found diminishment only by misapplying this Court's framework, at both step one and step two.

A. The Text Of The 1905 Act Precludes A Diminishment Finding

1. As discussed, the panel's step-one holding effectively rested on one clause in the Act, specifically its cession language. App. 10a-16a. But this Court has held, consistent with normal rules of statutory construction, that surplus-land acts must be read "as a whole." *Solem*, 465 U.S. at 476. And the 1905 Act contains several strong textual indications that Congress did not intend to diminish the Wind River Reservation.

a. First, the Act did not pay the tribes a fixed sum for the opened land. Instead, the United States agreed "to pay the said Indians the proceeds derived from the sales of [their] lands." App. 169a. This Court has repeatedly held that such a provision—making a "Tribe's profits … entirely dependent upon how many nonmembers purchased … land" in the ceded tract—indicates that Congress did not intend to diminish the reservation. *Parker*, 136 S. Ct. at 1079; *see also Solem*, 465 U.S. at 473; *DeCoteau*, 420 U.S. at 448. Indeed, except where a statute expressly restored reservation land to the "public domain," *Hagen*, 510 U.S. at 414, this Court has *never* held that statutory text lacking a sum-certain payment showed clear congressional intent to diminish a reservation. The 1905 Act contains no "public domain" language. Nor does it contain anything like the language this Court has characterized as "clear language of express termination"—namely, "the … reservation is hereby discontinued" and "the reservation lines … are hereby[] abolished." *Mattz*, 412 U.S. at 504 n.22. All these omissions demonstrate that the 1905 Act does not "clearly evince an 'intent to change

boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615).[2]

Perhaps to distinguish this case from *Parker*, *Solem*, and *DeCoteau* (each of which found the absence of sum-certain language relevant), the panel characterized the 1905 Act as a "hybrid payment scheme" because it specified how certain proceeds would be spent. App. 16a-17a. That misses the point. The lack of sum-certain language is important because it indicates that the United States was disposing of the land for the tribe and paying over the sale proceeds as the land was sold, rather than immediately assuming ownership of the land and placing it into the public domain. *See Solem*, 474 U.S. at 473. *How* the sale proceeds were spent is immaterial. Indeed, the laws in *Solem* and *Seymour* likewise earmarked certain proceeds for specified purposes. *See* 35 Stat. 460, 463 (1908); 34 Stat. 80, 82 (1906). Yet in neither case did this Court suggest that the law involved a "hybrid" rather than a no-fixed-payment scheme, or suggest that the earmarking provision provided evidence of an intent to diminish the reservation.

The panel also quoted *Hagen*'s statement that "[w]hile 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." 510 U.S. at 412, *quoted in* App. 17a. The omission of a sum-certain payment is indeed not dispositive. But it is important. Again, this Court has never held

[2] The panel suggested that *Rosebud* was an example of a case finding diminishment at step one absent either public domain language or a sum-certain payment. App. 12a. But *Rosebud* was a step-two case. *See supra* p.20. Moreover, *Rosebud* held (at step two) that Congress's intent to diminish was carried forward from an earlier agreement that *had* included sum-certain language. *See* 430 U.S. at 591-592.

statutory text sufficient to establish diminishment absent such a payment, save where the statute expressly restored the land to the "public domain." Together with the other evidence discussed herein, the lack of a sum-certain payment provision precludes a finding that Congress clearly intended to diminish the reservation.

b. Comparing the text of the 1905 Act with "earlier treaties between the United States and the Tribe" reinforces the conclusion that the Act did not diminish the reservation. *Parker*, 136 S. Ct. at 1080. As recounted above, the United States entered into two earlier agreements with the Shoshone that indisputably diminished the reservation—each time using far clearer language than the Act's, and each time providing for a fixed payment. The 1874 Lander Purchase, in which the Shoshone were guaranteed $25,000, was expressly intended "to change the southern limit of said reservation." 18 Stat. at 292. And the 1897 Thermopolis Purchase not only "declared [the ceded territory] to be public lands," but also specified that the tribes were surrendering their rights "of every kind and character" in the land "forever and absolutely." 30 Stat. at 94, 96. It too, moreover, involved a fixed-sum payment, $60,000. The 1905 Act's different language (together with its omission of a fixed payment) strongly suggests that Congress had a different intent than in 1897 and 1874. *See Mattz*, 412 U.S. at 504 ("[F]rom 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms.… But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate[.]"); *accord Parker*, 136 S. Ct. at 1080; *Seymour*, 368 U.S. at 355.

This conclusion follows not just as a matter of ordinary statutory construction—the Act's narrower lan-

guage indicates that Congress intended something different than in the prior agreements—but more specifically under the canon that agreements with tribes must be interpreted as "they would naturally be understood by the Indians," *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979). The Act's departure from the words that Congress had used to implement what all agreed were diminishments would have sensibly led the Shoshone to understand the Act's dissimilar language as having a different effect.

c. The 1905 Act's provision that the United States would "act as trustee for [the] Indians to dispose of [the ceded] lands" also undermines the panel's step-one holding. App. 169a. This Court has stated that such language, providing for the United States to "act as the Tribe's sales agent," suggests no intent to diminish. *Solem*, 465 U.S. at 473. The Act's trustee language, in fact, is quite similar to that in *Seymour*. *See* 34 Stat. at 82. And there this Court found no diminishment, explaining that the law merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." 368 U.S. at 356. The same is true of the 1905 Act.

d. The Act's treatment of the opened lands is still more evidence contradicting the panel's reading. The Act did not force tribal members off the opened land, instead allowing them to maintain allotments there. App. 160a. As this Court noted in *Solem*, it is "difficult to imagine why Congress would have" permitted tribal members "to continue to obtain individual allotments on the affected portion of the reservation" unless it "anticipate[d] that the opened area would remain part of

the reservation." 465 U.S. at 474. Wyoming ventured an explanation below (Reh'g Opp. 12), namely that Congress expected only 29 allottees to maintain their allotments. But *Solem*'s point that Congress would not have permitted Indian allotments on diminished land does not turn on the number of such allotments, but simply on the fact of them. *See* 465 U.S. at 474.

e. The final textual indication of no diminishment is the Act's omission of a "school-lands" provision, i.e., a provision requiring the United States to pay the tribes for specified land in each township, and to set that land aside for the state to establish public schools. This Court has repeatedly held that the inclusion of such a provision suggests congressional intent to diminish (because the state would not need to establish schools unless it had jurisdiction over the land). *See Yankton Sioux*, 522 U.S. at 349-350; *Rosebud*, 430 U.S. at 599-601. Its absence here suggests the opposite—particularly given that an earlier draft of the bill did include a school-lands provision. *See* App. 29a n.**********; *infra* pp.30-32.

2. At an absolute minimum, all these textual features, taken together, render the Act's text ambiguous as to whether Congress intended to diminish the reservation. That ambiguity is dispositive, because mixed textual evidence of congressional intent cannot support a finding of diminishment. In *Solem*, for example, this Court acknowledged that "some language" in the relevant statute supported diminishment—specifically, references to the unopened lands as the "reservation thus diminished" and to the opened areas as being in "the public domain." 465 U.S. at 474-475. Despite that language, this Court unanimously concluded that the statute, "read as a whole," did not reveal a clear con-

gressional intent to diminish the reservation. *Id.* at 475-476. The same result should have obtained here.

Instead, the panel asserted that the Act's cession language sufficed because this Court had supposedly deemed similar language "precisely suited" to diminishment. App. 11a. That is wrong. All three cases the panel cited involved cession language *plus* either a sum-certain payment (*Yankton Sioux* and *DeCoteau*) or unequivocal extratextual evidence (*Rosebud*). *See, e.g.*, *Yankton Sioux*, 522 U.S. at 344 ("'cession' *and* 'sum certain' language is 'precisely suited' to terminating reservation status" (emphasis added)). As noted, this Court has never found statutory text sufficient to establish diminishment absent either a sum-certain payment or express language restoring tribal land to the "public domain."

The panel also ignored some of the contrary textual indications described above—such as the critical contrast with prior agreements—in derogation of this Court's directive that surplus-land acts (like other statutes) be read "as a whole." *Solem*, 465 U.S. at 476. And even when it addressed contrary textual evidence, the majority adopted a "divide-and-conquer" strategy, explaining away several of the points discussed above on the ground that each was insufficient *standing alone* to preclude diminishment. *E.g.*, App. 19a (stating that by itself, "trust status is not incongruous with congressional intent to diminish a reservation"). Again, that ignores the requirement to read statutes as a whole. It also inverts this Court's mandate that textual ambiguities be resolved against diminishment. *See DeCoteau*, 420 U.S. at 447. Had the panel followed that precedent, it could not have found the "substantial and compelling evidence of … intention to diminish," *Solem*, 465 U.S. at 472, that is required to overcome the "broadest possi-

ble" presumption against diminishment, *DeCoteau*, 420 U.S. at 447.

B. The Contemporaneous Evidence Forecloses A Finding Of Diminishment

1. The panel acknowledged this Court's holding that only unequivocal step-two evidence can support a diminishment finding. App. 20a. It nonetheless did not apply that standard, on the ground that "the statute contains express language of cession." *Id.* The panel then improperly relied on equivocal evidence about the contemporaneous understanding of the 1905 Act to "confirm[]" its textual conclusion and hold that the reservation was diminished. *Id.*

That was a serious error. Stripping a tribe of control over its land is enormously consequential—and a step that "[o]nly Congress has the power to" take, *Parker*, 136 S. Ct. at 1082. Hence, courts should not conclude that Congress has exercised that power unless the evidence unambiguously supports that conclusion, lest a sovereign nation have its territory taken away by courts rather than Congress. This Court's repeated holding that unequivocal historical evidence is required, in other words, respects the fact that Indian tribes are "separate sovereigns pre-existing the Constitution," *United States* v. *Bryant*, 136 S. Ct. 1954, 1962 (2016). It also recognizes that evidence of what Congress intended over a century ago will often be murky. *See Parker*, 136 S. Ct. at 1079; *Solem*, 465 U.S. at 468-471.

2.a. Under the proper standard, the panel could not have found diminishment at step two. It focused on two earlier efforts by the United States to open the land at issue here: negotiations with the tribes in 1891 and a bill introduced in Congress in 1904. The majority

concluded that with each effort Congress intended to diminish the reservation, and that this intent should be carried forward to the 1905 Act. That reasoning fails.

As to the 1891 negotiations, Judge Lucero's dissent rightly explained that whatever Congress's intent was then, the *fourteen-year* gap between the negotiations and the 1905 Act—nearly five times as long as the three-year gap in *Rosebud*, on which the panel relied—made it inappropriate to carry that intent into the next century. App. 45a; *see also* App. 45a-46a (discussing other differences with *Rosebud*). That is particularly true not only because of the intervening 1897 Thermopolis Purchase (which involved different statutory language), but also because only about ten percent of the members of Congress in 1891 were still members in 1905. *See* Biographical Directory of the United States Congress 1774-present, http://bioguide.congress.gov/biosearch/biosearch.asp (visited Feb. 16, 2018). The Court in *Rosebud*, moreover, found continuity of congressional purpose because "there [wa]s no indication" that Congress's intent had changed over the three years. 430 U.S. at 594. The same is not true here; evidence that Congress did not intend the 1905 Act to diminish the reservation pervades the historical record. *See infra* pp.29-32.

As to the 1904 bill, the panel discerned congressional intent to diminish from 1904 negotiations between Indian Inspector James McLaughlin and t1he tribes. App. 22a-27a. To begin with, however, this Court has explained that "historical evidence of negotiations" post-dating *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), has little value in a diminishment analysis, because *Lone Wolf* held that "Congress could unilaterally … divest [tribes] of their reservation lands," rendering negotiations after that decision vestigial.

Parker, 136 S. Ct. at 1081 n.1. And even if the 1904 negotiations had weight, they offer decidedly mixed evidence regarding Congress's intent. Some statements that McLaughlin made (those the panel quoted) do suggest intent to diminish. But others indicate the contrary. For example, McLaughlin began the negotiations with the statement—a statement that provided the context for everything that followed—that he had "a proposition for the *opening* of certain portions of your reservation for settlement by the whites." App. 23a (emphasis added). He also made several later references to opening. *See* C.A.J.A. 510, 511, 512, 515 (negotiation minutes). The historical record thus does not unequivocally show that in 1904 Congress intended to diminish the reservation.

b. In any event, other contemporaneous evidence points against intent to diminish, precluding a step-two diminishment finding. In debating the 1905 Act, for example, House members repeatedly described it as merely opening reservation lands for sale. These members included the bill's sponsor, Frank Mondell of Wyoming (who was not in Congress in 1891). In introducing the bill, he characterized it as "provid[ing] for the opening to homestead settlement and sale … a million and a quarter acres in the Wind River Reservation." 39 Cong. Rec. 1,941-1,942 (1905). A second member similarly referred to the bill as simply "opening to sale and settlement … a reservation embracing something like 1,000,000 acres." *Id.* at 1,945 (Rep. Hitchcock). And a third described the land at issue as being "on this vast reservation," which is inconsistent with the notion of diminishment. *Id.* at 2,729 (Rep. Lind). The panel never addressed these statements—in derogation of this Court's requirement that a court "examine *all* the circumstances surrounding the opening of a reserva-

tion," *Hagen*, 510 U.S. at 412 (emphasis added), *quoted in Parker*, 136 S. Ct. at 1079.

The majority did address two ways in which the 1905 Act changed from the 1904 bill it relied on, acknowledging that those changes "cut against" diminishment. App. 28a n.**********. First, the Act omitted a school-lands provision that had been included in the 1904 bill. *See* H.R. Rep. No. 58-3700, at 8 (1905). As discussed, *see supra* p.25, the absence of that provision suggests (at step one) no intent to diminish. That the omission was a conscious choice reinforces that suggestion at step two. Second, the 1905 Act added to the 1904 bill a provision that granted a particular individual (Asmus Boysen) a preferential right to purchase opened lands, in exchange for him giving up certain lease rights he had in those lands. App. 168a. Several members opposed this provision as unnecessary because Boysen's lease rights, by their terms, would terminate upon diminishment. *See* H.R. Rep. No. 58-3700, pt. 2, at 9 (minority report). But the House disagreed, voting to include the provision. As the chairman of the subcommittee that considered the issue explained, the opened lands were "not restored to the public domain" under the Act, but "simply transferred to the … United States as trustee" for the tribes. 39 Cong. Rec. 1,945. The House therefore deemed the Boysen provision necessary—because members understood that the tribe retained interests in the opened lands—and the Senate followed suit, S. Rep. No. 58-4263, at 2 (1905). This advertent change is inconsistent with intent to diminish.

The panel's responses to the Boysen and school-lands revisions lack merit. The panel agreed that the Boysen provision indicated that the United States would "retain a Tribal trust interest in the opened lands and that those lands would not be returned to the public do-

main." App. 29a n.**********. But, the panel claimed, "the existence of a trust relationship is not determinative of diminishment," and in any event "this is not a 'public domain' case." *Id.* The latter claim is demonstrably wrong; the entire issue here is whether the 1905 Act effected a diminishment and thus returned the opened land to the "public domain." *See supra* pp.19-20. (Indeed, as just noted, a key House member expressly stated that the opened lands were "not restored to the public domain." 39 Cong. Rec. 1,945. (Rep. Marshall).) And the panel's former claim fares no better, because the question is not whether a trustee relationship is "determinative." The question is whether the evidence "'*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink.'" *Parker*, 136 S. Ct. at 1080 (quoting *Solem*, 465 U.S. at 471) (emphasis and brackets added in *Parker*). The Boysen provision shows that the answer is no, because this Court has repeatedly held that a surplus-land act's preservation of a trustee relationship suggests no intent to diminish. *See supra* p.24.[3]

As for the school-lands provision, the panel claimed "the record … reveals that Wyoming may have received federal land elsewhere in exchange, obviating the need for a school lands provision." App. 29a n.**********. In reality, what the record reveals is a recognition among members of Congress that Wyoming's constitution *allowed* it to receive other lands. *See* 38 Cong. Rec. 5,247 (1904) (Rep. Mondell) ("I pro-

[3] Likewise meritless is Wyoming's assertion below (Reh'g Opp. 12-13 & n.4) that the Boysen provision was added to redress the "inequity" resulting from unilateral termination of his lease. Nothing in the legislative history supports that theory, nor does anything in the one authority Wyoming cited to support it (a footnote in a dissenting opinion).

pose to offer an amendment striking out all the provisions with regard to school lands. That will leave the State with the right under her constitution to take lieu lands[.]"). But that was also true in *Yankton Sioux*: South Dakota's enabling act had a school-lands provision identical to Wyoming's. *Compare* 26 Stat. 222, 222-223 (1890), *with* 25 Stat. 676, 679 (1889). Hence, "the need for a school lands provision" was equally "obviat[ed]" in *Yankton Sioux*. App. 29a n.**********. Yet the Court there regarded the provision's inclusion as evidence of intent to diminish. *See* 522 U.S. at 349-350. The absence of a school-lands provision here is evidence of the opposite intent.

Put simply, as Judge Lucero's dissent explained, "[a]t best, the historical record is mixed regarding Congress' intent. As such, it is insufficient to overcome ambiguity in the statutory text." App. 47a. Because "both [the] act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish," the courts are "bound … to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

IV. THE COURT OF APPEALS' RULING HAS BROAD DELETERIOUS IMPLICATIONS

As Wyoming acknowledged below (Reh'g Opp. 1), "this case is of exceptional public importance."

Most immediately, the panel's decision severely infringes the Shoshone's sovereignty. Tribal sovereignty is inherently tied to a tribe's lands—which is why this Court applies a presumption against diminishment. In addition to harming the tribe's dignitary interests and cultural identity, diminishment of a reservation causes concrete damage to the tribe's ability to govern and to

provide for its members. On non-reservation land, for example, tribes cannot tax, license, or otherwise regulate non-Indians "who enter consensual relationships with the tribe or its members," *Montana* v. *United States*, 450 U.S. 544, 565 (1981), nor resolve "child custody proceeding[s]" under the Indian Child Welfare Act, 25 U.S.C. §1911(a). Tribes' criminal jurisdiction over members is also limited on non-reservation land. *See Kelsey* v. *Pope*, 809 F.3d 849, 860-863 (6th Cir. 2016), *cert. denied sub nom. Kelsey* v. *Bailey*, 137 S. Ct. 183 (2016). Finally, diminishment can affect tribes' ability to determine the best use of their water rights, *see In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 93 (Wyo. 1988) (subsequent history omitted), rights that provide a vital revenue stream for the Shoshone.

The panel's holding, moreover, would have repercussions beyond Wind River, because other surplus-land acts include core language similar to the 1905 Act's, i.e., "cession language" but no sum-certain payment. In addition to the ones addressed in *Ash Sheep* and *Grey Bear*, these statutes include:

- 36 Stat. 440 (1910) (Pine Ridge Indians);
- 34 Stat. 124 (1906) (Lower Brule Indians);
- 33 Stat. 46 (1904) (Red Lake);
- 29 Stat. 321 (1896) (San Carlos);
- 12 Stat. 1171 (1861) (Sacs, Foxes, Iowas); and
- 10 Stat. 1069 (1854) (Ioways).

Under the decision below, each of these statutes, and any others with similar language, would automatically be deemed to show clear congressional intent to diminish solely because of the cession language—and regardless

of whether other textual or non-textual factors counseled against such a conclusion. The Tenth Circuit's decision thus invites litigation that would threaten the territory of numerous independent sovereigns around the country. That risk justifies this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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