Nos. 17-1159 & 17-1164

In The Supreme Court of the United States

NORTHERN ARAPAHO TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

EASTERN SHOSHONE TRIBE,

Petitioner,

v.

STATE OF WYOMING, ET AL.,

Respondents.

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

STATE OF WYOMING'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress diminished the boundaries of the Wind River Indian Reservation in Wyoming in 1905.

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INTRODUCTION

In 1905, Congress ratified an agreement with the Eastern Shoshone and Northern Arapaho Tribes in which they agreed to "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands" in the Wind River Indian Reservation, except those within a specifically described "diminished reserve," in exchange for "consideration." When, in the context of the Clean Air Act, the Tenth Circuit was presented with the issue of whether the 1905 agreement and ratifying act truly diminished the reservation, it properly applied the three-step analytical framework set forth by this Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), and held that the reservation had been diminished.

Through their request for certiorari, the Tribes have not posed to this Court any new or significant concern about the law of reservation diminishment but instead primarily attack how the Tenth Circuit applied the language of the 1905 Act and surrounding relevant facts to well-established law. But because the Tenth Circuit correctly construed the plain language of the Act, faithfully applied its legislative history, considered in detail the parties' course of conduct, and accounted for prior decisions from multiple courts, its work in this case should deservedly be the final word: Congress intended to diminish the Wind River Reservation in 1905.

In their attack on merits of the decision below, which fills the bulk of their petition, the Tribes argue

first that the language of conveyance in the Act is ambiguous. But the Act's clarity can hardly be disputed in light of how this Court and the lower federal courts have construed such language in numerous cases. This Court has said that such plain terms of present and total surrender of all tribal interests as are found in the Act are "precisely suited" to diminishing a reservation. Second, the Tribes argue that the Court requires surplus land acts, like the 1905 Act, to include both language of immediate cession and a sum certain payment or restoration of the land to the public domain. But the Court has expressly stated that both are not required. Finally, they argue that ancillary provisions in the Act undermine the clarity of the Act. But these provisions were only necessary because the Act diminished the Reservation and, therefore, these provisions actually confirm the plain language of conveyance.

Aside from their arguments on the merits of the Tenth Circuit's decision, the Tribes posit that the decision has created a circuit split between the Tenth and Eighth Circuits. But the Eighth Circuit case they discuss, *Grey Bear*, dealt with an Act and legislative history that are materially different from those in this case. Far from creating a circuit split, the Tenth Circuit's decision here fell right in line with this Court's diminishment jurisprudence.

The Tribes argue that certiorari is necessary because the Tenth Circuit's decision conflicts with a hundred-year-old case from this Court, *Ash Sheep*. But that case did not ask or answer whether the

reservation there had been diminished. Again, the decision here is not at odds with any Supreme Court precedent.

Finally, the tribes argue that because this is a diminishment case, it is so important that the Court must review it. But the Court has never said it must review every diminishment case, and it should not. The Courts of Appeals have properly decided many diminishment cases along with many other important cases that cross their dockets. This one is a perfect example.

There is no good reason to grant certiorari in this case and the Tribes' petitions should be denied.

STATEMENT OF THE CASE

I. The law governing surplus land acts

As westward expansion marched forward, the United States confined the country's indigenous inhabitants to defined reservations, and then sought cessions of those lands to facilitate non-Indian settlement. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). Some of these acts of Congress, known as surplus land acts, changed reservation boundaries while others did not. *Solem*, 465 U.S. at 469. These acts fall into three distinct categories: (a) those that "sell and dispose" of reservation land, merely opening up the land for settlement by non-Indians without diminishing the reservation; (b) those where Congress unilaterally diminished the reservation by restoring unallotted lands to the public domain; and (c) those

that diminished the reservation because the Tribe ceded the land and Congress committed to pay the Tribe for the land outright or from the proceeds of future land sales.

The Court applies "a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Solem*, 465 U.S. at 470. That structure begins with the proposition that "only Congress can divest a reservation of its land and diminish its boundaries," and its intent to change boundaries must be clear. *Id.*

Step-one of the search for Congressional intent begins with the text of the statute, because it provides "the most probative evidence of diminishment." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). "Common textual indications of Congress' intent to diminish a reservation include '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests' ***or*** 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land.'" *Nebraska v. Parker*, ___ U.S. ___, 136 S. Ct. 1072, 1079 (2016) (quoting *Solem*, 465 U.S. at 470) (emphasis added). While language of cession coupled with a provision for definite payment creates "an almost insurmountable presumption" that the reservation had been diminished, *Solem*, 465 U.S. at 470-71, the lack of a provision for definite payment "does not lead to a contrary conclusion." *Hagen*, 510 U.S. at 412; *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 598 n.20 (1977)

(a sum certain payment or lack thereof is only one of many textual indicators of congressional intent).

The effect of most surplus land acts is readily discernable from the operative language of the act.[1] There are basically three types of these acts. "Sell and dispose" acts generally contain those or similar words in their operative provisions. For example, in *Solem*, the operative language in the act of 1908 provided:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to *sell and dispose* of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries[.]

Act of May 29, 1908, ch. 218, 35 Stat. 460 (emphasis added); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (1906 Act provided "sell or dispose"); *Mattz v. Arnett*, 412 U.S. 481 (1973) (1892 Act provided "subject to settlement, entry, and purchase"); *Parker*, 136 S. Ct. at 1077 (1882 Act provided "cause to be surveyed, if necessary, and sold" and "lands are open for settlement"). "Sell and dispose" acts lack the kind of language that would show Congressional intent to change reservation boundaries.

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[1] The operative provision of a surplus land act contains the language of conveyance. The remaining provisions of the act are sometimes referred to as inoperative, not because they are ineffective or meaningless, but because they are secondary to the language of conveyance.

Solem, 465 U.S. at 473; *Seymour*, 368 U.S. at 356; *Mattz*, 412 U.S. at 497-99; *Parker*, 136 S. Ct. at 1080.

In the second category of surplus land acts the operative language vacates and restores unallotted lands to the public domain. This language "indicates that the [a]ct diminished the reservation." *Hagen*, 510 U.S. at 414. For example, in *Hagen*, the operative language in the Act of 1902 provided:

> That the Secretary of the Interior [with tribal consent] shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation *shall be restored to the public domain*[.]

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263 (emphasis added); *Hagen*, 510 U.S. at 414 (finding 1902 Act diminished reservation); *see also Seymour*, 368 U.S. at 354 (finding 1892 Act diminished reservation); *Rosebud*, 430 U.S. at 589 (describing 1889 Act as diminishing reservation).

The third category of surplus land acts are those that contain cession language, which is the type of act at issue in the present case. Unlike acts that merely sell land within an intact reservation, these acts contain "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests[.]" *Solem*, 465 U.S. at 470. The Court has

found an intent to diminish in each of the surplus land acts containing cession language that it has considered in recent history. *See Rosebud*, 430 U.S. at 592, 604; *Yankton*, 522 U.S. at 358; *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985); *DeCoteau v. Dist. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 439 n.22 and 448 (1975).

For example, in *Yankton*, the Court found intent to diminish in the operative language of the Act of 1894:

> The Yankton tribe of Dakota or Sioux Indians *hereby cede*, sell, relinquish, and convey to the United States *all their claim, right, title, and interest* in and to all the unallotted lands within the limits of the reservation to said Indians as aforesaid.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 314 (emphasis added); *Yankton*, 522 U.S. at 344. Similarly, in *DeCoteau*, the operative language in the Act of 1891 provided:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians *hereby cede*, sell, relinquish, and convey to the United States *all their claim, right, title, and interest* in and to all the unallotted lands within the limits of the reservation[.]

Act of March 3, 1891, ch. 543, 26 Stat. 989, 1036 (emphasis added); *DeCoteau*, 420 U.S. at 439 n.22 (finding 1891 Act diminished reservation). The Court in *DeCoteau* also considered similar operative language from a host of different acts and found that each

resulted "in a reduction in the size of the affected reservations." *Id.* at 439.

When considering a cession act, the Court does not require "any particular form of words before finding diminishment." *Hagen*, 510 U.S. at 411. Thus, although the language of cession can vary somewhat, cession acts all result in diminishment. *DeCoteau*, 420 U.S. at 439 n.22 and 446 (describing different acts as "comparable"); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1399 (10th Cir. 1990) (describing surplus land Acts with the word "cede" to be "clear language of cession"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1224 (10th Cir. 2005) (finding agreement to "cede and convey" all land was an explicit reference to cession language and a "total surrender" of reservation lands).

The text of a surplus land act is typically straightforward and dispositive, but not always. Accordingly, if necessary, the court proceeds to step-two of the search for Congressional intent and considers " 'the historical context surrounding the passage of the surplus land Acts,' and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement." *Yankton*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411). "Even 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." *Id.* at 351.

While either clear language of immediate cession or unequivocal evidence from the surrounding circumstances can sustain a finding of diminishment, the subsequent treatment of the area in dispute standing alone will not. Thus, evidence of subsequent events, step-three of the Court's inquiry, can "reinforce a finding of diminishment or nondiminishment based on the text." *Parker*, 136 S. Ct. at 1081 (quotations and citations omitted). "But this Court has never relied solely on this third consideration to find diminishment." *Id.*

II. The 1905 Act and the subsequent restoration to the Reservation of most of the lands ceded in 1905

The United States established the Wind River Indian Reservation in 1868 and subsequently diminished it through three different acts of Congress in 1876 (the Lander Act), 1897 (the Thermopolis Act), and 1905. Together, those acts, coupled with later orders restoring lands to the Reservation, form the Reservation boundaries today.[2]

The 1905 Act traces its roots to 1891, when the Tribes agreed to cede "about 1,100,000 acres . . .

[2] The facts surrounding the negotiations, legislative history, and subsequent treatment of the ceded area are too numerous to lay out in full within the confines of this response. While the Tenth Circuit's opinion provides many important facts, Wyoming's opening brief below (Doc. 179), recounts the relevant historical events in more detail. In addition, in their opening brief below (Doc. 183), Fremont County and the City of Riverton demonstrated the full extent of the State's jurisdictional dominion over the ceded area.

embracing nearly all of the same lying north of the Big Wind River, together with a strip on the eastern side thereof, and leaving the diminished reservation with natural boundaries as far as practicable." JA343.[3] In return for the cession, the United States agreed to pay the tribes $600,000, or slightly more than fifty cents per acre. *Id.* The 1891 agreement allowed Indians who had selected allotments in the ceded lands to maintain those allotments, even though they would be outside the reservation. *Id.* Congress did not ratify the agreement, and a subsequent attempt to renegotiate the agreement with the Tribes in 1893 failed. ESApp.21a.[4]

In 1904, the House Indian Affairs Committee reported favorably on H.R. 13481, known as the Mondell Bill, "to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation[.]" JA1893. The bill's purpose was "to reduce the reservation," consistent with the 1891 agreement. JA1894. Despite a request from the Indian Affairs Commissioner to change the boundaries in the bill to include allotted lands north of the Big Wind River and east of the Popo-Agie River within the diminished reserve, the Committee believed "it is important that the boundaries of the diminished reserve shall so far as possible remain a water boundary."

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[3] "JA" refers to the Joint Appendix filed with the Tenth Circuit.

[4] "ESApp." refers to the Eastern Shoshone's Appendix while "NAApp." refers to the Northern Arapaho's Appendix. References to the Tenth Circuit's decision as amended after rehearing, *Wyoming v. United States EPA*, 875 F.3d 505 (10th Cir. 2017), are to the Eastern Shoshone's Appendix A.

JA1892. The bill took the same approach to allotments outside the new boundaries as did the 1891 agreement – tribal members could keep their allotments, though they would be outside the reservation. JA343. The Committee also explained that, unlike the 1891 agreement, the bill "follows the now established rule of the House of paying to the Indians sums received from the sale of the ceded territory under the provisions of the bill." JA1892.

While the Committee worked the bill, the Secretary of the Interior dispatched James McLaughlin, who had negotiated the agreement for the 1897 Thermopolis Act, to the Reservation to obtain the Tribes' consent. ESApp.22a-23a. When McLaughlin held council with the Tribes and introduced the contents of the bill, he took time "to talk of the boundaries of the reservation and the residue of land that will remain in your diminished reservation." JA514. He described the new reservation boundaries as mostly unchanged on the west and southwest, but changing on the north and the east to "follow[] down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line." JA514.

McLaughlin told the Tribes "a large reservation is not to your interest," and explained he could not change the new "boundary line" Congress wanted. JA515-16. He explained that natural water boundaries (the Big Wind River and Popo-Agie River) "are best for you" because "everybody will respect" them. JA521 ("Everybody knows it and there will be no uncertain lines."). McLaughlin noted his belief that "[t]he lands

embraced within the diminished reservation" are among "the finest in this section of the country," and that retaining reservation lands "north of the Wind River would cause you no end of trouble, as you would be continually over-run by the herds of the whiteman." JA521.

In his explanation, McLaughlin expressly distinguished lands south of the Wind River as "on the reservation" and those north of the River as "on the public domain." JA522. He stated "any of you who retain your allotments on the other side of the river can do so, and you will have the same rights as the whiteman, and can hold your lands or dispose of them or lease them, as you see fit." *Id.* By contrast, McLauglin explained, "On the reservation, you will be protected by the laws that govern reservations in all your rights and privileges." *Id.*

Members of both Tribes expressed their understanding of McLaughlin's description of the new reservation boundaries. JA517-18, 525. George Terry, Chief Councilman of the Shoshone, aptly stated: "This is no little bargain we are entering into. It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and we can never recover again. . . . The lands that we are about to dispose of have been our lands for ages." JA525.

The Tribes agreed to McLaughlin's proposal and Congress ratified the agreement in the Act of March 3, 1905. JA2063. Consistent with the plain explanation of

McLaughlin and the understanding of the Tribes, the operative language in the 1905 Act succinctly provides:

> The said Indians belonging to the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, 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 said reservation, except the lands within and bounded by the following described lines[.]

Act of March 3, 1905, ch. 1452, 33 Stat. 1016; NAApp.252-53 (emphasis added). Similar language was used in the earlier Lander Act ("cede") and the Thermopolis Act ("cede, convey, transfer, relinquish and surrender forever"), which the Tribes admit diminished the Wind River Indian Reservation. Shoshone Pet. at 23; Arapaho Pet. at 8-9; NAApp.267 and 274.

The 1905 Act also expressly described the reservation's new boundaries by providing that the Tribes ceded "all the lands embraced within the said reservation, except the lands within and bounded by the following described lines. . . ." NAApp.253. The description that follows is a metes and bounds description of the diminished reservation bounded on the north by the Big Wind River, and on the east by the Popo-Agie River. *Id.*; *see also* App.1a (depicting the boundaries as described in the 1905 Act). This description changed the reservation's boundaries and set aside a substantial residual piece of the original reservation for the Tribes' occupation. *See Minnesota v.*

Hitchcock, 185 U.S. 373, 389-90 (1902) (reservation created where Indians ceded large portion of land but left a distinct residual tract reserved for the Indians' occupation).

Consistent with the new boundaries, Congress repeatedly referred to the "diminished reserve" in Articles I, III, IV, VI, and IX of the 1905 Act. NAApp.252-66. Congress also distinguished the "diminished reserve" from the "ceded lands" and required "the survey and marking of the outboundaries of the diminished reservation." *Id.*

In exchange for the Tribes' land cession, Congress agreed to establish funds for irrigation, livestock, schools, general welfare, and per capita payments. NAApp.265-66. But, due to the recent change in Congressional payment policy, Congress agreed to provide those funds only from the proceeds of land sales and it did not commit itself to buy any of the lands. NAApp.263. Nonetheless, Congress immediately appropriated funds for the per capita payments. NAApp.265-66.

For three decades following the 1905 Act, the boundaries of the Wind River Reservation remained as described in the 1905 Act. However, with the 1934 passage of the Indian Reorganization Act, Congress dramatically shifted policy away from diminishing reservations and assimilating Indians into non-Indian culture and toward tribal self-determination. ESApp.31a. The Act authorized the Interior Secretary to "restore to tribal ownership" previously ceded but

unsold reservation lands. *Id.* Because the Wind River Tribes rejected the Indian Reorganization Act, Congress enacted special legislation in 1939 to accomplish the land restoration objective on their Reservation. *Id.* The special legislation authorized the Interior Secretary to restore to tribal ownership all undisposed-of lands ceded under the 1905 Act. *Id.*

Over the next three decades, the Secretary issued a series of orders restoring unsettled lands to the reservation. JA3579-81, JA3584-99, JA3604-05, JA3613-15, JA3621-23. Each order provided that the lands "are hereby restored to tribal ownership . . . *and are added to and made a part of the existing Wind River Reservation*, subject to any valid existing rights." JA3599 (emphasis added). Identical language in an order restoring lands to a different reservation was found to be evidence that Congress had previously diminished reservation boundaries. *United States v. So. Pac. Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976) (quoting a restoration order providing that lands "are hereby added to and made a part of the Walk River Reservation"); *see also Bundrick v. United States*, 7 Ct. Cl. 532, 536, 541 (Ct. Cl. 1985) (finding analogous restoration order restored ceded lands both to ownership and reservation status), *rev'd on other grounds*, 785 F.2d 1009 (Fed. Cir. 1986).

In their petitions, neither Tribe mentions these restoration orders, which the Tenth Circuit identified as a "telling indication that Congress intended to diminish the Reservation's boundaries in the 1905 Act." NAApp.31a. Instead, the Tribes gloss over the

restorations when they state that "[t]oday more than 75 percent of the land covered by the 1905 Act is land held in trust by the United States," thereby implying continuity of reservation status when the reality was discontinuity. Arapaho Pet. at 11. While the Tribes implication that these lands never lost their reservation status is incorrect, it is true that the vast majority of the ceded lands have been restored to the Reservation. Of the approximately 1.4 million acres ceded in 1905, over 1 million acres have been restored to the Reservation. App.2a (depicting the current reservation boundaries).

During the same period in which the restoration orders were issued, the Bureau of Reclamation finished the Riverton Reclamation Project. In 1953, Congress paid the Tribes $1,009,500 for the ceded lands in the reclamation project. Act of August 15, 1953, ch. 509, 67 Stat. 592. The Act provided that the payment constituted "full, complete, and final compensation . . . for terminating and extinguishing all of the right, title, estate, and interest . . . of said Indian tribes . . . in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of *that part of the former Wind River Indian Reservation* lying within [the reclamation project]." *Id.* at 592 (emphasis added).

III. Administrative and judicial interpretations of the 1905 Act

Since the Tribes ceded the lands in 1905, the State of Wyoming has pervasively exercised both criminal and civil jurisdiction in the unrestored areas. Wyoming state agencies have exercised civil regulatory jurisdiction in the ceded area to the fullest extent of their authority, especially in and around the City of Riverton. *See supra* n.2. In addition, the United States has never exercised, and has expressly disclaimed, Indian Country criminal jurisdiction over Riverton.

Before the Tenth Circuit's decision in the instant case, both state and federal courts have had to decide whether the 1905 Act diminished the Reservation. For example, in *State v. Moss*, 471 P.2d 333 (Wyo. 1970), the State of Wyoming charged a member of the Northern Arapaho Tribe with a murder in Riverton. *Id*. at 334. The state district court dismissed the charge, at Moss's urging, on the ground that the State lacked jurisdiction because Riverton was located within the reservation. *Id*. The State filed a bill of exceptions to the Wyoming Supreme Court, arguing that Riverton was not located in the reservation because the 1905 Act diminished the reservation boundaries. *Id.*

The United States appeared in the case as a friend of the court. JA4518. In its brief, the United States asserted that it "could not sustain a claim to criminal jurisdiction over the ceded portion of Wind River Indian Reservation if it attempted to assert jurisdiction." JA4522. The United States elaborated: "It is clear . . .

that *by the Act of March 3, 1905 . . . the intent of the Indian tribes and of the Congress of the United States was to remove from the organized reservation that area ceded to the United States*[.]" JA4524 (emphasis added). The Wyoming Supreme Court agreed with the State and the United States that the Reservation had been diminished and, therefore, that the State had criminal jurisdiction in Riverton. 471 P.2d at 339.

In fact, application of the Supreme Court's "clean analytical structure" so clearly confirms diminishment that the courts that have directly considered the issue before the present case have all determined that the 1905 Act diminished the reservation. For example, in *Yellowbear v. State*, a member of the Northern Arapaho Tribe challenged Wyoming's jurisdiction to prosecute him for a murder committed in Riverton. 174 P.3d 1270 (Wyo. 2008). Yellowbear argued that the 1905 Act did not diminish the reservation and, therefore, Riverton, which lies north of the Wind River, remained within the reservation. *Id.* at 1273.

The Wyoming Supreme Court evaluated this Court's diminishment precedent and three prior Wyoming cases addressing jurisdictional questions related to the 1905 Act lands.[5] *Id.* at 1273-84. The court unanimously found that the language in the 1905 Act is

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[5] The three prior Wyoming cases are *Moss*, *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960), and *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*), *judgment aff'd sub nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989), *overruled on other grounds by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998).

"indistinguishable from the language of *Decouteau*," which this Court found "precisely suited to disestablishment[.]" *Id.* at 1282. The court also noted that subsequent congressional treatment of the reservation and the orders restoring lands to the reservation indicated a diminished reservation. *Id.* at 1283-84. The court observed that, analogous to *Yankton* and *Hagen*: "(1) the seat of tribal government on the Wind River Indian Reservation is not within the ceded lands; (2) about 92% of the population of . . . Riverton is non-Indian; and (3) Riverton and . . . Wyoming provide sanitation, street maintenance, water and sewer service, planning and zoning, and law enforcement." *Id.* at 1283. Accordingly, the court concluded that Congress intended to diminish the Reservation. *Id.* at 1284.

Yellowbear then brought his assertion that the 1905 Act did not diminish the reservation to the Tenth Circuit. *See Yellowbear v. Att'y Gen. of Wyo.*, 380 Fed. App'x 740 (10th Cir. 2010) (Gorsuch, J.), *cert. denied sub nom.*, *Yellowbear v. Salzburg*, 562 U.S. 1228 (2011). The Tenth Circuit found the Wyoming Supreme Court's analysis in *Yellowbear v. State* to be "thorough and detailed" and "a careful exposition of the question." 380 Fed. App'x at 743. It concluded, "Mr. Yellowbear failed to give us any reason to think the Wyoming Supreme Court's rejection of his jurisdictional argument was an objectively unreasonable application of Supreme Court precedent; he has also failed to give us any reason to think that decision was incorrect." *Id.* Although the Tenth Circuit discussed these cases in

reaching its decision, ESApp.16a, the Tribes omit any mention of *Yellowbear* from their Petitions.

IV. Course of proceedings

In December 2008, the Tribes applied to EPA for treatment as a state under the Clean Air Act. *See* 42 U.S.C. § 7601(d). In their application, the Tribes asserted that the 1905 Act did not diminish the reservation and, therefore, they claimed jurisdiction over the areas that had been ceded but not restored. ESApp.2a. EPA approved the Tribes' application in December 2013. NAApp.59.

The State of Wyoming and the Wyoming Farm Bureau Federation brought suit in the Tenth Circuit challenging EPA's determination. That court applied the well-established three-step analytical framework to determine whether Congress intended the 1905 Act to diminish the boundaries of the reservation. ESApp.1a. After considering the plain language of the entire statute in light of the governing precedents from this Court, the historical context of the act, and the subsequent treatment of the area in dispute, a majority of the three-judge panel concluded that Congress intended to diminish the Reservation. ESApp.35a.

The Tenth Circuit began its analysis of the 1905 Act by reviewing the operative language of cession located in Article I. ESApp.10a. The court observed that the language of Article I aligned "with the type of language the Supreme Court has called 'precisely suited' to diminishment." ESApp.11a (quoting *Yankton*, 522

U.S. at 344). It then compared Article I with the operative language of surplus land acts considered by this Court in seven different cases, and found the 1905 Act "plainly" fell in line with those acts containing express language of cession.[6] ESApp.11a-16a. The court also noted that the 1905 Act contained language of cession not just in Article I, but in Articles III, IV, VI, and IX as well. ESApp.14a.

The Tenth Circuit then turned its attention to the method of payment set forth in the 1905 Act and concluded that the use of a hybrid payment scheme was not evidence of congressional intent to maintain the original reservation boundaries. ESApp.16a-18a. Hybrid payment schemes, like that employed in the 1905 Act, are consistent with diminishment. *See, e.g.*, *Rosebud*, 430 U.S. at 598 n.20 (a sum certain payment or lack thereof is only one of many textual indicators of congressional intent); *Hagen*, 510 U.S. at 412 ("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."). The court also concluded that the trusteeship

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[6] The Tribes fault the Tenth Circuit for not addressing *Parker* at length. But *Parker* involved a sell and dispose statute, and its only novel contribution to the law of diminishment was its determination that evidence of the subsequent history of an area cannot overcome the lack of clear language of cession and the lack of evidence demonstrating a contemporaneous understanding that the reservation had been diminished. 136 S. Ct. at 1081-82. Thus, *Parker* has little relevance to the cession act at issue in this case, and the Tenth Circuit properly dismissed it without extended discussion. ESApp.14a.

language in the 1905 Act provided no evidence of congressional intent contrary to the express language of cession found throughout the 1905 Act. ESApp.18a-19a. Thus, the Tenth Circuit concluded that the 1905 Act contains clear language of immediate cession and no contradictory text that would render the statute ambiguous. ESApp.19a.

The court next considered the historical context of the 1905 Act, which confirmed that Congress intended to diminish the Reservation. ESApp.20a. The panel conducted an exhaustive review of the legislative history and negotiations leading up to the 1905 Act. ESApp.20a-29a. After this review, the panel concluded that "the statements in the legislative history about the diminishment of the reservation, when taken together with the Act's plain language, provide ample support for the conclusion Congress understood it was separating the land north of the Big Wind River from the rest of the Wind River Reservation and indeed intended to do so." ESApp.29a.

Finally, the Tenth Circuit examined the subsequent treatment of the area. ESApp.29a-35a. After reviewing the treatment of the area by Congress, the federal government, the courts, the State, and the Tribes, the court concluded that "the 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."[7] ESApp.35a. Of course, subsequent events "cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010) (internal quotations omitted).

Both Tribes filed Petitions for Rehearing En Banc. Those petitions are substantively indistinguishable from the pending Petitions for Certiorari. However, "no judge on the original panel or the en banc court requested that a poll be called" and the petitions were denied. ESApp.152a. The original panel did grant rehearing *sua sponte* to the extent necessary to make several small amendments to the majority decision, which were accompanied by commensurate amendments to the dissenting opinion. *Id.*

REASONS TO DENY THE PETITIONS

At best, the Tribes' petitions argue that the Tenth Circuit misapplied a properly stated rule of law and, therefore, fail to make a compelling argument for certiorari. But their assertions of error are unfounded. The Tenth Circuit properly concluded that Congress diminished the Reservation based on the plain and unambiguous text of the 1905 Act. The Act contains clear language of immediate cession and no contradictory text in either the operative or inoperative provisions

[7] Wyoming asserts the Tenth Circuit erred in reaching this conclusion because the evidence of the subsequent treatment of the ceded area overwhelmingly demonstrates diminishment.

that would render the statute ambiguous. Instead, every provision in the Act points to one conclusion – diminishment. Failing to establish error, the Tribes' attempts to manufacture a circuit split and a conflict with a decision of this Court are equally unavailing. The Tenth Circuit's decision does not conflict with either *Grey Bear* or *Ash Sheep*, and the Tenth Circuit properly rejected both of these claims. Finally, the importance of this case alone does not warrant certiorari.

I. The Tenth Circuit correctly concluded that Congress diminished the Wind River Reservation in 1905.

A. The operative provisions of the 1905 Act unambiguously diminished the Reservation.

The Tribes contend that the Tenth Circuit's decision is "profoundly wrong." Arapaho Pet. at 26. They do so by mischaracterizing the diminishment analysis articulated by this Court and complaining about language the 1905 Act does not have. But they refuse to reckon with the language the 1905 Act does have – language that clearly and unequivocally evinces Congress' intent to diminish the reservation. No more is required.

The operative language in the 1905 Act evinces a plain and unambiguous intent to diminish the Wind River Indian Reservation. The Tribes agreed to "*cede, grant, and relinquish* to the United States, *all right, title, and interest*" to the lands north of the Wind River

and east of the Popo-Agie River. The Act specifically described the boundaries of the distinct residual tract remaining for their exclusive use and dominion. While Congress did not agree to pay a sum certain for the lands in full up front, it did provide adequate consideration for the bargain through a combination of initial unconditional payments coupled with the proceeds of future sales. Congress's intent to diminish the Reservation could not be more clearly expressed in the operative language of the act.

The Tribes' incorrectly assert that the Court requires both language of immediate cession and a sum certain payment or restoration of the land to the public domain. Shoshone Pet. at 21; Arapaho Pet. at 17-18. But the Court has never said that a surplus land act must contain two of the three "common textual indications of Congress' intent" to find diminishment. *Parker*, 136 S. Ct. at 1079. In fact, the opposite is true. "In *Hagen*, the Court expressly rejected the argument that a finding of diminishment requires 'both explicit language of cession or other language evidencing the surrender of tribal interests *and* an unconditional commitment from Congress to compensate the Indians.'" ESApp.17a (quoting *Hagen*, 510 U.S. at 441) (emphasis in original). As the Tenth Circuit succinctly explained: "Congress's decision to abandon the sum certain method of payment was not conclusive with respect to congressional intent. What matters most is not the mechanism of payment, but rather the language of immediate cession." ESApp.17a-18a (internal quotations and citations omitted).

The Tribes complain that the language of the 1905 Act is different than the language in the Lander Act and the Thermopolis Act. Shoshone Pet. at 23-24; Arapaho Pet. at 29. But the operative language of those acts is not meaningfully different than the 1905 Act. Each act uses at least the word "cede" and describes the specific territory ceded to the United States. The Lander Act was the least comprehensive in its use of synonyms for "cede" and it did not explicitly provide that the Tribe was surrendering "all right, title and interest" in the land. Yet the Tribes concede that the Lander Act indisputably resulted in diminishment. Surely, the more comprehensive operative language in the 1905 Act just as effectively diminished the Reservation.

The Tribes point to the language in the Lander Act stating that it was intended to "change the southern limit of said reservation." NAApp.274. But this language is not meaningfully different from the metes and bounds description of the new diminished reservation boundaries in the 1905 Act. A specific description of a new boundary evidences exactly the same intent to change the limits of the Reservation. In fact, all of the cession acts the Court has found to diminish reservations contain a clear description of either the diminished reservation or the ceded area. *See supra* p. 7.

Although obliquely, the Tribes also incorrectly assert that the Court requires both clear language of cession and unequivocal evidence of the contemporaneous understanding of the diminished status of the reservation. Shoshone Pet. at 27; Arapaho Pet. at 18. They also assert that the Tenth Circuit erred by declining to look

for such unequivocal evidence. Shoshone Pet. at 8; Arapaho Pet. at 18. But even the Eastern Shoshone Tribe admits, as it must, that unequivocal evidence of contemporaneous understanding is required only if the text of the act is ambiguous. Shoshone Pet. at 5 (quoting *Parker*, 136 S. Ct. at 1079 quoting *Yankton*, 522 U.S. at 351) ("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.") (internal quotations omitted) (emphasis added). However, as the Tenth Circuit and the Supreme Court of Wyoming have both concluded, the text of the 1905 Act is not ambiguous. Accordingly, the Tenth Circuit properly noted that it was not required to seek unequivocal evidence at step two of the inquiry.

Nevertheless, the Tenth Circuit conducted a thorough and probing inquiry into the historical context of the 1905 Act. It looked deeply into the legislative history of the bill and the negotiations with the Tribes, and compared those facts with analogous cases considered by this Court. ESApp.20a-29a. The Tenth Circuit's "scrutiny of the circumstances surrounding the 1905 Act confirms that Congress intended to diminish the Reservation's boundaries." ESApp.20a. It is difficult to discern how this phrasing is materially different from saying the court found "unequivocal evidence." Regardless, the Tenth Circuit properly concluded that the historical context "when taken together with the Act's plain language, compel[s] the conclusion Congress

intended to diminish the Wind River Reservation[.]" ESApp.29a.

The meaning of the 1905 Act is perfectly plain. Congress said "cede" because it meant cede. It said "diminish" because it meant to diminish. And it described the new boundaries by metes and bounds, because it meant to change the boundaries. This is not a close case and it does not warrant certiorari.

B. The inoperative provisions of the 1905 Act confirm diminishment.

The Tribes claim that the Tenth Circuit ignored inoperative provisions of the 1905 Act that contradict the clear language of cession in the operative provisions. They contend that the court disregarded the Boysen lease provision and the school lands amendment even though the court admitted that these provisions may cut against diminishment. Arapaho Pet. at 30-31; Shoshone Pet. at 24-25, 30-32. They further contend that the 1905 Act's allowance for Indians who had already received allotments on the ceded lands to keep them or exchange them for an allotment within the diminished Reservation demonstrates Congress's intent not to diminish the Reservation. *Id.* Even if these provisions did cut against diminishment, the court properly concluded that they were insufficient, individually or in the aggregate, to overcome the clear language of immediate cession. ESApp.28a-29a.

But these provisions do not cut against diminishment. First, Congress expected that, with the

exception of twenty-nine allottees, tribal members would surrender their allotments on the ceded land. *Id.* at 124 n.1 (citing H.R. Rep. No. 3700, 50th Cong., 3d Sess., pt. 1 at 19 (1905)). It would have been patently unfair to force the few remaining allottees in the ceded area off their land, particularly when they understood and consented to "the same rights as the whiteman" rather than the "laws that govern reservations." ESApp.25a. Congress's decision to protect the settled expectations of the allottees in the ceded area from the effects of diminishment does not cut against diminishment; it supports it.

Second, Asmus Boysen had a pre-existing mineral lease with the Tribes on certain lands within the ceded area. *Big Horn I*, 753 P.2d at 128 n.2. The lease would have expired by its terms upon diminishment. *Id.* Recognizing the inequity of this result, Representative Lacey of Iowa proposed an amendment to protect and continue Boysen's interests upon diminishment. *Id.* Accordingly, Congress provided that Boysen's lease would continue upon diminishment but only for a limited time to permit him to locate and purchase six hundred and forty acres in the ceded area. NAApp.262. Rather than cutting against diminishment, this amendment also demonstrates Congress's recognition of the consequences of diminishment.

Third, the final bill deleted a provision in Article II for the purchase of lands in lieu of Sections 16 and 36 within the ceded area. NAApp.255, 260-62. "The deletion of this provision was accomplished by an amendment of Representative Mondell who explained that it

was believed to leave Wyoming 'authorized under the enabling act to take lieu land.'" *Big Horn I*, 753 P.2d at 131 (quoting 38 Cong. Rec. 5247 (1904)). "The effect of this amendment is to demonstrate further the understanding of Congress that passage of the [1905 Act] not only would disestablish the ceded portion but also would extinguish Indian title to the ceded portion[]" thus implicating Wyoming's Act of Admission. *Id.* "Unless the ceded portion was disestablished as a reservation, however, the amendment to delete the requirement to pay for lieu lands had no significance." *Id.* Thus, absent diminishment, Congress would have had no need to discuss the effect of the 1905 Act on Sections 16 and 36.

In sum, each of these inoperative provisions are consistent with, and the natural consequences of, diminishment. Congress saw that diminishment would affect Mr. Boysen, allottees in the ceded area, and the State. It inserted or deleted provisions into the 1905 Act to address those effects. The Tribes' arguments about these inoperative provisions are wrong and provide no justification for certiorari.

II. There is no circuit split for the Court to resolve, because the Tenth Circuit's decision does not conflict with the Eighth Circuit's decision in *Grey Bear*.

The Tribes contend that the Tenth Circuit's opinion conflicts with the Eighth Circuit's decision in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir.

1987), and therefore a circuit split has arisen requiring resolution by the Court. Shoshone Pet. at 10-15; Arapaho Pet. at 24-26. They claim that the surplus land act at issue in *Grey Bear* was "virtually indistinguishable" from the 1905 Act, and yet the Eighth Circuit found that the reservation in that case had not been diminished. Shoshone Pet. at 11. They assert that the two decisions must be in conflict, but this is not so.

The Tenth Circuit considered this exact argument and rejected it. It noted that unlike the compelling legislative history indicating diminishment related to the 1905 Act, there was little legislative history evidencing a congressional intent to diminish the reservation in *Grey Bear*. ESApp14a. Moreover, the evidence of the subsequent treatment of the area in *Grey Bear* "strongly indicated Congress did not view the act as disestablishing the reservation." *Id.* Congress had repeatedly indicated in subsequent enactments that the reservation at issue in *Grey Bear* had not been diminished, and the federal government and Tribe had consistently exercised jurisdiction over the area creating settled expectations that should not be upset. *Grey Bear*, 828 F.2d at 1291. As congressional intent is the touchstone of the diminishment analysis, the Eighth Circuit could not ignore these facts. But those facts are not present in this case.

Grey Bear also involved a distinguishable statute. The operative language in the surplus land act at issue in *Grey Bear* is similar in some respects to the 1905 Act, but it is not identical, and the difference matters.

The operative language of the surplus land act at issue in *Grey Bear* provides:

> "ARTICLE I. The said Indians belonging on the Devils Lake Indian Reservation, North Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Devils Lake Indian Reservation now remaining unallotted . . . *except six thousand one hundred and sixty acres required for allotments to sixty-one Indians of said reservation entitled to allotments, but to whom allotments have not yet been made*. . . .

Act of April 27, 1904, ch. 1620, 33 Stat. 319 (emphasis added).

While Article I of the 1905 Act specifically defined the boundaries of the new diminished Wind River Reservation, the act in *Grey Bear* did not. Instead, considering the whole text of Article I in *Grey Bear*, what appears to be clear language of cession at the outset of the Article is rendered ambiguous by the latter language that fails to describe the boundary of a new diminished reservation and instead authorizes future Indian allotments anywhere within the boundaries of the existing reservation. It is little wonder that the Eighth Circuit found only that Article I "suggests congressional intent to disestablish the reservation boundaries," *Grey Bear*, 828 F.2d at 1290, while the Tenth Circuit found Article I of the 1905 Act "precisely suited" to diminishment. ESApp.11a.

Because *Grey Bear* presented unique facts not present in this case and a unique statute that differs materially from the 1905 Act, there is no conflict. Accordingly, the Tribes' petitions do not warrant certiorari.

III. The Tenth Circuit's decision does not conflict with this Court's decision in *Ash Sheep*.

The Tribes contend that the Tenth Circuit's opinion conflicts with *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), and the Court should grant certiorari to resolve the conflict. Shoshone Pet. at 16-20; Arapaho Pet. at 22-23. But there is no conflict, because *Ash Sheep* did not consider the question of diminishment.

In *Ash Sheep*, the Court considered whether the United States "became trustee for the Indians or acquired an unrestricted title by the cession of their lands[.]" 252 U.S. at 164. The act at issue there, like the 1905 Act, provided that the Indians had "ceded, granted, and relinquished" to the United States all their "right, title and interest" in the area at issue. *Id.* If the United States served as trustee, then the lands were "Indian lands rather than Public lands" for the purpose of assessing whether grazing by the Ash Sheep Company constituted trespassing. *Id.* at 163. The Court concluded that the United States served as trustee, the Indians retained a beneficial interest in the lands, and the lands were properly considered "Indian lands." *Id.* at 166.

The court never considered whether the act at issue in *Ash Sheep* diminished the external boundaries of the reservation. Instead, this Court has found that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Hagen*, 510 U.S. at 414. However, the converse is not true. "[T]he 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." *Rosebud*, 430 U.S. at 601 n.24 (internal quotation omitted). In fact, whether lands remain "Indian lands" under a surplus land act because of a retained beneficial interest is "logically separate from a question of disestablishment." *Id.*

Relying on this clear direction, the Tenth Circuit rejected the Tribes' argument, and the Tribes bring nothing new to bear on the question that would warrant certiorari.

IV. The importance of this case alone does not warrant certiorari.

The Tribes assert that certiorari should be granted because this case presents an issue of exceptional public importance. As Wyoming admitted in the proceedings below, this case is very important to the people living in Riverton and the other ceded areas, but the Tribes' attempts to justify certiorari because of the importance of this case are not compelling.

This case concerns a significant amount of land and the rights of many individuals, but there is no injustice for the Court to remedy here. The Tenth Circuit's decision maintains the lengthy status quo and protects the settled expectations of the thousands of non-tribal members living within the ceded area. The Tribes' petitions speak as if the Tenth Circuit's decision had a significant impact on the area, dramatically shrinking the area over which the Tribe presently exercised sovereign authority. But the converse is true. The EPA's decision concluding that the 1905 Act did not diminish the reservation was so disruptive to the status quo that the EPA stayed its own decision almost immediately. 10th Cir. Doc. 1, Ex. 3.

The Eastern Shoshone Tribe argues that this case has "broad deleterious implications" for other cases. Shoshone Pet. at 32. But the Tenth Circuit made no new law. That court applied the well-established *Solem* framework to the plain language of one statute. When one compares the 1905 Act with the other "sell and dispose," "public domain," and "cession" statutes considered by this Court, the 1905 Act falls neatly in line with those cases which have found diminishment. Moreover, when one considers all of these cases together, it is clear that each result is the product of a considered case-specific analysis. Thus, even two statutes that have some commonalities can lead to different, but equally correct, conclusions about Congress's intent. Accordingly, it is unlikely that this decision will dictate the result in future diminishment cases.

For their part, the Northern Arapaho Tribe suggests that this Court should hear every diminishment case. Arapaho Pet. at 3. This Court has never said that. Diminishment cases are not within the Court's original jurisdiction, and many diminishment cases have been resolved by the Circuit Courts. *See, e.g.*, *Osage Nation* (10th Cir. 2010); *Shawnee Tribe* (10th Cir. 2005); *Yazzie* (10th Cir. 1990). The United States Courts of Appeals decide many important cases, and they have mechanisms to ensure that the most important cases are given proper attention. But this case could not compel even one member of the Tenth Circuit to request that a poll be called on rehearing by the full court. Where this Court has established a clear framework for resolving cases and the lower court has properly applied that framework there is no good reason for this Court to grant certiorari.

CONCLUSION

The Court should deny the Tribes' Petitions.

Submitted this 18th day of May 2018.

Respectfully submitted,

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