No. _____

IN THE
Supreme Court of the United States

CITY OF POCATELLO,
Petitioner,

v.

STATE OF IDAHO, THE UNITED STATES OF AMERICA, AND THE SHOSHONE-BANNOCK TRIBES,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the water right that Congress granted in 1888 to the City of Pocatello "in common with" the Shoshone-Bannock Tribes, and upon which the City has relied for well over a century, should be set aside on the ground that, although Congress properly manifested its "clear and plain" intent to diminish Treaty rights, Congress lacked the constitutional power to do so in the absence of Tribal consent.

2. Whether the rule of *Caldwell v. United States*, 250 U.S. 14 (1919), which requires that Congress use express words of conveyance to signify the sovereign's intent to convey its own lands to a non-governmental entity, should be extended to diminishment cases, where, as here, an act of Congress clearly manifests the sovereign's intent to diminish and convey tribal rights to water to another party.

3. Whether the Supreme Court of Idaho's construction of the Pocatello Townsite Act, as granting to the City of Pocatello only a federal right of access to reservation lands and a right to seek water rights under state law, rather than the grant of a federal water right, is inconsistent with the Supremacy Clause, which establishes that Indian reservations are to be governed by federal law, not state law, unless Congress has expressly provided to the contrary.

PARTIES TO THE PROCEEDING

The parties to all proceedings below were Petitioner City of Pocatello and Respondents the State of Idaho, the United States of America, and the Shoshone-Bannock Tribes ("Tribes").

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The opinion of the Supreme Court of Idaho (Pet. App. 1a-30a) is reported at 180 P.3d 1048. The order of the Supreme Court of Idaho denying the petition for rehearing (Pet. App. 136a-137a), and the remittitur to the District Court (Pet. App. 138a-139a) are unreported. The memorandum decision and order of the Idaho District Court (Pet. App. 31a-92a), the final recommendation of the Special Master to the District Court (Pet. App. 93a-100a), and the original order of the Special Master (Pet. App. 101a-135a) are unreported.

JURISDICTION

The decision of the Supreme Court of Idaho was rendered on February 19, 2008. A timely petition for rehearing was denied, and a final judgment entered, on April 3, 2008. On June 13, 2008, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including August 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the United States Constitution provides:

> [The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article II, § 2, cl. 2 of the United States Constitution provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

Article IV, § 3, cl. 2 of the United States Constitution provides, in relevant part:

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 10 of the Act of September 1, 1888, ch. 936, 25 Stat. 452 ("Townsite Act"):

> That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort

> Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

The Townsite Act is reprinted at Pet. App. 140a-154a.

The Act of March 3, 1891, ch. 543, 25 Stat. 452, provides that:

> That the Secretary of the Interior is authorized to grant rights of way into and across the Fort Hall Reservation in Idaho to canal, ditch, or reservoir companies [to go onto Fort Hall Reservation lands] for the purpose of enabling the citizens of Pocatello to thereby receive the water supply, contemplated by section ten (10) of [the Townsite Act], and may also attach conditions as to the supply of surplus water to Indians on said Fort Hall Reservation as may be reasonable and prescribe rules and regulations for the same.

The Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, ratified February 26, 1869 ("Second Treaty of Fort Bridger"), provides in relevant part:

> Article 11: No treaty for the cession of any portion of the reservations herein describe

> which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interest in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

INTRODUCTION

In the Western states, there is no commodity more precious than water. That is true today. It was true in 1888, when Congress enacted the Pocatello Townsite Act, Act of September 1, 1888, ch. 936, 25 Stat. 425 (the "Townsite Act"), to regularize the status of a large, unauthorized non-Indian settlement that had grown up at "Pocatello Junction" in the middle of the Fort Hall Indian Reservation. To legitimize the settlement, the Townsite Act ceded certain Reservation lands and made them available for purchase by the settlers. No water sources were appurtenant to the ceded lands. Thus, Congress, acting at the request of the executive branch, included Section 10 in the Townsite Act to afford Pocatello

> the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said

> town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts, drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

For well over a century, Pocatello has used waters diverted from Gibson Jack and Mink Creeks, which were on the Fort Hall Indian Reservation and were developed pursuant to the Townsite Act. To satisfy its future needs, Pocatello will also have to look to water resources on the Reservation.

In 1990, to confirm its Section 10 water rights, the City timely filed a claim with the Snake River Basin Adjudication ("SRBA") court.[1] That proceeding eventually reached the Supreme Court of Idaho, which declined to confirm the City's right under Section 10 on the grounds that: (1) the recognition of Pocatello's water right would diminish Indian treaty rights, and Congress's failure to secure

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[1] The SRBA was Idaho's first adjudication under the McCarran Amendment, which provides for joinder of the United States in certain cases relating to water rights. *See* 43 U.S.C. § 666(a) (2008). The SRBA court was required to resolve federally-based water rights claims, and to do so under federal law. Idaho Code § 42-1411A (2008). *See, e.g., United States v. State*, 23 P.3d 117 (Id. 2001); *Potlatch Corp. v. United States*, 12 P.3d 1260 (Id. 2000); *State v. United States*, 12 P.3d 1284 (Id. 2000); *United States v. City of Challis*, 988 P.2d 1199 (Id. 1999). Thus, federal constitutional and statutory issues were raised throughout the state court proceedings below.

tribal consent precluded diminishment;[2] (2) Congress did not properly manifest an intent to convey a vested water right because it did not use express words of conveyance, or explicit language that state water law did not apply on the Reservation; and (3) the history of the Idaho territory's prior appropriation system confirmed that Congress could not have granted Pocatello a federal water right, but only a right to seek to develop water on the Reservation under state law.

The loss of this water right will have significant consequences for the people of Pocatello, for whose benefit Congress enacted Section 10. As a growing municipality, Pocatello's need for a reliable and

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[2] This Court has used the term "treaty diminishment" to describe congressional action in pursuit of legitimate legislative objectives which, based on Congress's "clear and plain" intent, diminish tribal treaty rights. *See, e.g. South Dakota v. Yankton Sioux,* 522 U.S. 329, 343 (1998); *Hagen v. Utah,* 510 U.S. 399 (1994); *United States v. Dion,* 476 U.S. 734 (1986). *See also City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.,* 544 U.S. 197, 225 n. 2 (2005) (Stevens, J., dissenting). Courts have located the source of Congress's plenary power over Indian affairs most frequently in three constitutional provisions: the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2; and the Supremacy Clause, U.S. CONST. art. VI, cl. 2. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 551-52 (1974); *McClanahan v. Ariz. Tax Comm'n,* 411 U.S. 164, 172 n.7 (1973). "Court opinions most often refer to the commerce and treaty clauses as creating a general national power over Indian affairs . . . ." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 393 (2005 ed.). In addition, the federal government's authority to take property into trust for Indians is found in the Property Clause, U.S. CONST. art. IV, § 3, cl. 2.

certain water supply, confirmed by judicial action, cannot be overstated. Water continues to be a scarce resource in the arid West, made more so in regions like the Snake River basin of Eastern Idaho, where water resources have long been over-appropriated. Having been granted this right under Section 10, Pocatello should not be subject to the uncertainty of supply attendant to establishing its entitlement to water rights under state law.

Even more important, the Supreme Court of Idaho has announced a new rule of treaty diminishment with ramifications extending far beyond the general area of water rights and far beyond Pocatello, the Fort Hall Indian Reservation, or the State of Idaho. The Idaho court's new rule purports to limit the power of the federal government by conditioning Congress' authority to abrogate an Indian treaty on the consent of an affected tribe, and it extends the Caldwell "magic words" doctrine, previously limited to conveyances of the sovereign's lands, to treaty diminishment cases. *See Caldwell v. United States*, 250 U.S. 14, 20 (1919). The Idaho court's decision also turns the Supremacy Clause on its head, effectively holding that state law applies to Indian reservations unless Congress has expressly determined that federal law should apply.

The effect of these new principles will be broadly felt because the treaty diminishment doctrine applies in many substantive areas of law. The diminishment doctrine determines the impact of acts of Congress on tribal property and tribal jurisdiction. It is applied to determine whether statutes of general

applicability such as the Criminal Code, 18 U.S.C. § 1 *et seq.* (2008), and the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* (2008), apply to Indian tribes, and to interpret statutes of special applicability, such as the Townsite Act and surplus lands acts.[3] And, although the aim of the diminishment doctrine is to determine the impact of federal legislation on tribes, other parties have corresponding interests in jurisdictional disputes, so that the doctrine also affects the interests of non-tribal governmental units as well as private parties. The Idaho court's decision gives new impetus for parties to litigate already heavily litigated issues relating to the status of tribal property and jurisdictional boundaries. If the Idaho court is correct that Congress cannot diminish reservation boundaries or treaty rights without the consent of an affected tribe, established boundaries as well as the status of tribal property and rights throughout the West will be thrown into question.

The decision below is inconsistent with basic principles of federal law. It disregards the proper relationship of state and federal law, and it warrants review by this Court.

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[3] "Surplus land acts" are acts of Congress that cede land from Indian reservations and open that land up to settlement by non-Indians. *See, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) (determining jurisdictional effect of surplus lands acts, including the Act of Apr. 23, 1904, 33 Stat. 254, modifying boundaries of a Sioux reservation).

STATEMENT OF THE CASE

During the late 1980s, Pocatello was excluded from negotiations among the Tribes, the federal government and the State regarding the Tribes' water rights and the meaning of the 1888 Act. Pocatello therefore filed a timely water right claim with the Snake River Basin Adjudication. Pocatello contended that Section 10 granted the City a federal water right to remove waters from the Fort Hall Indian Reservation and convey them to the City for municipal uses. The SRBA Special Master, the District Court, and, finally, the Supreme Court of Idaho denied Pocatello's claim, ultimately concluding that Section 10 granted Pocatello a federal right to go on the Reservation and build structures for the conveyance of water, but that Pocatello's right to appropriate water was governed by state water law procedures.

A. History of the Fort Hall Indian Reservation and the Town of Pocatello.

President Andrew Johnson established the Fort Hall Reservation as a homeland for the Shoshone-Bannock Tribes by Executive Order in 1867. Executive Order of June 14, 1867, reprinted in EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS FROM MAY 14, 1855 TO JULY 1, 1912 at 75 (Washington, D.C.: U.S. Government Printing Office, 1912). In 1868, the Tribes and the United States entered into the Second Treaty of Fort Bridger, which established the terms and boundaries of the Reservation. Treaty with the Eastern Band

Shoshoni and Bannock, July 3, 1868, 15 Stat 673. Like many treaties made with Western tribes during that period, the Treaty contained a provision conditioning any cession of the Reservation on the written consent of a majority of adult male Indians.

Non-Indian railroad workers settled "Pocatello Station," located in the middle of the Fort Hall Reservation, initially to aid construction of an illegal railroad line across the Reservation and then to support the market that the railroad created. Exs. 5, 6.[4] Neither the trespass of the railroad nor that of the non-Indian settlers caused much concern at the outset. By the early 1880s, however, the Indian agent assigned to the Reservation reported disputes among the Railroad, the settlers, and the Tribes. Ex. 10. In 1885, the Department of Interior thought that the situation warranted the removal of the non-Indian community at Pocatello Junction and issued an order to that effect. But the settlers eventually persuaded the government to the contrary, and Congress authorized the executive branch to negotiate a cession of land from the Fort Hall Reservation to legitimize the settlement. *See* Exs. 11, 28, 32, 38.

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[4] "Ex. __" refers to exhibits attached to Pocatello's Motion for Summary Judgment dated January 18, 2005 (Exs. 1-47) or to Pocatello's Response to Respondents' Motion for Summary Judgment, dated March 3, 2005 (Exs. 48-75); those pleadings are identified as Exhibits 12 and 24 in the Clerk's Certificate of Exhibits of the record at the Supreme Court of Idaho, unless otherwise designated.

In May 1887, representatives of the United States Indian Agency and the railroad met with the Tribes. Ex. 11. A majority of the adult male members of the Tribes consented to a cession of approximately 1800 acres to form the new town of Pocatello. *Id.* The non-Indian settlers of Pocatello Junction had routinely used Reservation water sources over the years, but there was no discussion during the negotiations concerning Pocatello's water supply or whether the town would be granted a water right on the Reservation. Ex. 44.

In the ensuing months, officials in Washington began crafting the bill that would be adopted as the Townsite Act. The subject of formalizing the town's water supply first arose in correspondence between Peter Gallagher, the Fort Hall Indian Agent, and J.D.C. Atkins, the Commissioner of Indian Affairs, in November 1887. *See* Exs. 10, 15, 16, 19, 44. Agent Gallagher argued that Pocatello should be provided with a Reservation water supply, but the desire to avoid future conflict between Indians and settlers caused him to suggest that Pocatello be limited to the Portneuf River, which ran through a thin sliver of the ceded lands. Exs. 15, 18. Commissioner Atkins, however, thought that the Portneuf River could not provide enough good quality water to meet the town's needs. Exs. 11, 19. Thus, Commissioner Atkins

> deemed it advisable, as a matter of precaution, to insert in the bill a clause providing for the use by the citizens of the town, in common with the Indians, of the waters of any river,

> creek, stream, or spring flowing through the reservation lands in the vicinity of the town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches and canals, works, or other aqueducts, drain and sewerage pipes and other appliances on the reservation, as may be necessary to provide the town with proper water and sewerage facilities.

Ex. 11.

In February 1888, the Department of Interior transmitted to Congress a draft bill that included Commissioner Atkins's proposed language for Section 10. Ex. 11. During summer 1888, Congress was provided with alternative language that would have limited the City's water right to the Portneuf River, as suggested by Agent Gallagher. Exs. 16, 19.

On September 1, 1888, however, Congress adopted a version of the Townsite Act that included in Section 10 the broader language suggested by Commissioner Atkins. *See* page 2, *supra*. In 1890, Pocatello began using water from certain creeks on the Reservation. Exs. 60, 62, 64, 65. Pocatello claimed the right to use these water sources under the Townsite Act, and the City has used them ever since.

In 1890, the United States Indian Agency began receiving inquiries from private water companies that sought access to the Reservation to build water conveyance structures on behalf of the City. Ex. 20. The Agency was uncertain about whether Pocatello

could assign to independent agents its Section 10 rights to access the Reservation and build conveyance structures; the Agency therefore asked the Department of Justice to provide an analysis of Section 10. Deputy Attorney General George Shields concluded that private water developers could not access the Reservation because the right was limited to "citizens of Pocatello." *Id.*

In 1891, the Commissioner of Indian Affairs asked that Congress revisit the subject. Ex. 20. In doing so, he described Section 10 as a "grant" to the City, and he suggested that the water "privileges" granted to Pocatello would be more reliable if Congress extended to private corporations the authority to construct conveyance structures. *Id.* Congress responded by expressly extending to private entities the right of access to construct, operate, and maintain conveyances granted under Section 10 so as to "enable the citizens of Pocatello to receive the water supply, contemplated by section 10." Act of March 3, 1891, ch. 543, 26 Stat. 989, 1011 (1891).

B. History of the Dispute and Proceedings Below.

Pocatello, which is located in the southeastern part of present-day Idaho, has grown to have a population of approximately 55,000 people, and it is Idaho's second largest treated water provider. The Shoshone-Bannock Tribes continue to reside on the Fort Hall Indian Reservation in close proximity to Pocatello. *See* Map of Boundaries, Pet. App. at 155a. Today, the Reservation consists of 544,000 acres,

96% of which is owned by the Tribes. *See* http://www.shoshonebannocktribes.com (visited June 5, 2008). The disputed water right arises from water sources on the Reservation.

In 1985, the Tribes entered into negotiations with the United States and Idaho to resolve their claims to water in the Snake River. Pocatello asked to be included in the negotiations, but was denied that opportunity. Exhibit 4, Clerk's Certificate of Exhibits, Supreme Court of Idaho. The United States, Idaho, and the Tribes reached a settlement in 1990. Under that agreement, which relies on the Townsite Act to confirm the Tribes' *Winters* rights,[5] the Tribes may take as much as 581,031 acre-feet per year from various surface water and ground water resources. However, the parties to the settlement expressly agreed that Pocatello's rights to water under the Townsite Act were not determined by the settlement, and all of Pocatello's claims were reserved. The 1990 Agreement was ratified by Congress in the Act of November 16, 1990, P.L. No. 101-602, 104 Stat. 3059.

C. Snake River Basin Adjudication Court Proceedings.

In 1990, soon after the Idaho Legislature authorized the SRBA, Pocatello filed a claim for a federal water right under Section 10. The SRBA, which was commenced pursuant to the McCarran

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[5] *See Winters v. United States*, 207 U.S. 564 (1908) (when the sovereign establishes a reservation, it implicitly reserves water necessary to fulfill purposes of reservation).

Amendment, 43 U.S.C. § 666(a) (2008), and Idaho Code § 42-1406A (2008), is a "streamwide" adjudication, presenting the opportunity for water rights holders to adjudicate their water rights in an *in rem* proceeding. The SRBA has jurisdiction to adjudicate water rights established under federal law. Idaho Code § 42-1411A (2008). Under the SRBA, claims are heard in the first instance by a Special Master, who makes a recommendation to the SRBA District Court, which is a special jurisdiction division of the District Court. Idaho Code §§ 42-1406A (2008). *See also Walker v. Big Lost River Irrigation Dist.*, 856 P.2d 868, 871 (Id. 1993). The decision of the SRBA District Court is reviewable by the Supreme Court of Idaho. Idaho Code § 1-204 (2008). This proceeding presented Pocatello with its first opportunity to join all necessary parties, including the United States and the Tribes, in an adjudication of its Section 10 rights. The United States, the Shoshone-Bannock Tribes and the State of Idaho opposed Pocatello's claims under federal law, asserting that Section 10 did not grant a water right to Pocatello.

On cross-motions for summary judgment, the Special Master ruled that Section 10 created in Pocatello only a right to access the Reservation to remove water. Pet. App. at 134a.[6] On Pocatello's timely Petition to Challenge the Special Master's

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[6] Pocatello timely moved the Special Master to alter or amend her ruling. While she amended her ruling on certain issues, she did not alter her interpretation of Section 10. *See* Recommendation of the Special Master, Pet. App. 99a-100a.

Order, the matter was fully briefed and argued orally before the SRBA District Court. The SRBA District Court affirmed the decision of the Special Master, and held that Congress, in enacting Section 10, intended only to convey: (1) a right of access to the Fort Hall Reservation; and (2) the right to remove water arising on the Reservation by appropriation in accordance with state law. Pet. App. 91a.

D. Supreme Court of Idaho Proceeding.

The Supreme Court of Idaho affirmed the District Court's interpretation of Section 10 and rejected Pocatello's claim for a federal water right. Pet. App. 1a-2a. Noting that its decision was controlled by federal law, the Supreme Court of Idaho held that the language used by Congress signified its intent to convey to Pocatello a right of access to the Reservation, and the right to use water arising on the Reservation pursuant to state law, but not a federal water right. Pet. App. 7a.

According to the Idaho court, Section 10 did not diminish the Tribes' water rights because the Second Treaty of Fort Bridger required that the Tribes consent to any diminishment of their rights, and the Tribes had not given their consent to this diminishment. In the absence of such consent, Congress lacked the power to convey a federal water right to Pocatello. Pet. App. 28a-29a.

The Idaho court also applied the "express language" test of *Caldwell v. United States*, 250 U.S. 14 (1919), holding that Section 10 did not grant a water right to Pocatello because Congress had not

satisfied *Caldwell* by using the express "language of grant" or the precise term "water right." Pet. App. 7a-11a. According to the Idaho court, the only way for Congress properly to evidence "a transfer of property interest" under the Property Clause of the United States Constitution was to use such express terms as "grant bargain sell or convey." Pet. App. at 10a-11a.

Finally, the Supreme Court of Idaho, relying on the history of the development of the prior appropriation doctrine on the public domain (as opposed to a reservation),[7] found that Congress must have intended to convey to Pocatello only a right to access the Reservation to develop water supplies under state law, rather than a vested water right under federal law. Pet. App. 13a-17a. That was the case because, "under the Property Clause, it would require explicit language in order to overcome the right of the state to manage and allocate its own water resources." Pet. App. at 15a-17a.

REASONS FOR GRANTING THE PETITION

This case raises important questions concerning the nature and extent of congressional authority to

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[7] The public domain includes those lands "subject to sale or other disposal under the general land laws." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987), quoting Ernest C. Baynard, PUBLIC LAND LAW AND PROCEDURE § 1.1, at 2 (1986). The general land laws opened up certain federal land to settlement, and do not apply to Indian reservations. "Indian lands are not . . . public lands or part of the public domain and are thus not administered under the public land laws." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 391-92 (2005).

convey tribal property—in this case, the right to use water and land on a reservation. More generally, the decision below creates substantial confusion concerning the way in which federal statutes that effectuate treaty diminishment are to be construed by the state and federal courts. The rules adopted by the Supreme Court of Idaho are not simply incorrect, but will unsettle a broad range of matters previously thought settled, and are likely to encourage needless litigation.

The Supreme Court of Idaho has worked a revolution in the law. First, the Idaho court fundamentally altered existing federal law by holding that Congress cannot diminish Indian treaty rights unless it uses certain special words of art. Courts have not previously seen fit to place such a restriction on the exercise of Congress's constitutional power in this area. Second, the Idaho court misconstrued existing federal law by holding that Congress cannot lawfully diminish treaty rights with respect to water unless the tribe affected by the diminishment has consented to it. Here, too, courts have not previously restricted the constitutional powers of Congress in this way. Third, the Idaho court did fundamental violence to our system of federalism when it held that Pocatello, having been granted federal rights to enter the Reservation and build appropriate water delivery systems, was not also given a federal water right, but only the right to seek a right to water under state law. The Idaho court's assumption that state law prevails inside an Indian reservation (clearly "Indian country," and

hence subject to federal and tribal law) is not simply erroneous, but breathtaking in the depth of its error. *See* 18 U.S.C. § 1151(a); *DeCouteau v. Dist. County Court*, 420 U.S. 425, 428 n.2 (1975). Under the Supremacy Clause, federal law applies to reservations unless Congress has decided otherwise, and Congress has not decided otherwise in this case. *See, e.g., McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 171 (1973); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 147 (1996) (Souter, J., dissenting). Indeed, the Supremacy Clause sets aside state actions "that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Confederated Tribes of Colville Indian Reservation v. State of Wash.*, 591 F.2d 89, 91 (9th Cir. 1979) (internal citations omitted).

The diminishment doctrine is an active and routinely applied doctrine in Indian law litigation. Whether Congress has diminished treaty rights is often a central question for the proper resolution of diverse issues presented to state and federal courts in a multitude of substantive contexts. In areas as diverse as criminal prosecutions, personal injury suits, and the enforcement of state hunting and fishing regulations, the key to such questions as jurisdiction, applicable substantive law, or the enforcement of property rights may depend on whether Congress has diminished treaty rights. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (to determine whether a tribal court has jurisdiction over a school

child's claim against a school district for injuries required a careful examination of extent to which tribal sovereignty has been diminished); *Yellowbear v. State*, 174 P.3d 1270, 1278-83 (Wyo. 2008) (state had jurisdiction to prosecute crime as act of Congress diminished the boundaries of reservation, and situs of the crime was therefore no longer in Indian country).

How courts are to decide whether Congress has properly effectuated a diminishment of treaty rights is therefore critical to the administration of justice in diverse areas. By repudiating settled treaty diminishment law, the Idaho court has not only created doctrinal confusion, but has thrown open for dispute the status of matters long thought settled.

The questions presented in this case warrant review by this Court.

I. THE SUPREME COURT OF IDAHO'S RELIANCE ON THE ABSENCE OF TRIBAL CONSENT TO SET ASIDE CONGRESS'S "CLEAR AND PLAIN" INTENT TO DIMINISH TREATY RIGHTS IS ERRONEOUS AND PRESENTS AN ISSUE OF FAR-REACHING IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT.

1. The Supreme Court of Idaho held that when an Indian treaty requires tribal consent to diminish treaty rights, Congress lacks the constitutional power to diminish those rights absent such consent. The Idaho court held that

> in order to abrogate any treaty rights held by Tribes, a majority of adult male Indians must consent. Thus, the vote of a majority of adult male members of the Tribes was required in order to cede any water rights. Such consent was not given.

Pet. App. 28a. The Idaho court relied on the consent provision found in the Second Treaty of Fort Bridger, which states that a majority of the adult male membership of the Tribes must consent in writing to any future diminishment of the Reservation. Because the government complied with the consent provision as to the cession of the land that formed Pocatello, but not with respect to the grant of water rights, the Idaho court concluded that the treaty was not diminished as to the grant of a water right. Moreover, because Pocatello could not point to "a single instance where the Indians were apprised of the possibility that they were to lose some water rights" (Pet. App. 28a), the Idaho court concluded that Congress's language, conveying to Pocatello a right to use the waters "in common with" the Tribes, was not sufficient to convey a water right.

Thus, the court held that Congress had granted Pocatello a federal right to enter onto the Reservation and build structures for the removal of water, but not a federal water right. According to the court, Pocatello was required to seek a water right under state law. In other words, the Idaho court found that there was no diminishment of the treaty to vest a water right in Pocatello, but there

was diminishment to the extent that state water law was extended to govern waters within the boundaries of the Reservation.[8]

2. The Idaho court's ruling is inconsistent with decisions of this Court and with those of every federal court of appeals and state supreme or appellate court to have considered the question. All have held that the United States possesses plenary power over Indian affairs and may unilaterally abrogate Indian treaties with or without the consent of the tribe. *See, e.g., South Dakota v. Yankton Sioux*, 522 U.S. 329 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) ("*Rosebud*"); *Cherokee Nation v. S. Kan. R.R. Co.*, 135 U.S. 641 (1890); *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990); *State v. Larose*, 673 N.W.2d 157, 169 n.6 (Minn. App. 2003).

Many Western treaties contain a tribal consent provision. However, this Court has never invalidated any congressional abrogation of treaty rights on the ground that the government did not comply with such a provision. To the contrary, this

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[8] In addition, the Tribes were not asked to consent to the provisions of the Townsite Act which gave Pocatello the right to enter the reservation and build water delivery structures there. The Supreme Court of Idaho did not find that Congress acted unlawfully when it granted Pocatello those rights, but the court gave no explanation for why tribal consent was required in one case, but not the other.

Court has found that Congress validly diminished Indian treaty rights both in cases in which tribal consent was not requested and in cases in which it was actually refused. *See, e.g., Rosebud*, 430 U.S. at 587 (surplus land act diminished reservation despite failure to comply with treaty consent provision). This Court has even upheld the unilateral abrogation of treaty rights when the relevant tribe alleged that its consent had been obtained by fraud. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (adopting principle from *Chinese Exclusion Case*, 130 U.S. 581 (1889), that Congress's decision to abrogate a treaty raises non-justiciable political questions). This Court has never required Congress to acquire the consent of a tribe before allowing an act of Congress to diminish that tribe's treaty rights. *See, e.g., Hagen v. Utah*, 510 U.S. 399 (1994) (acts opening reservation to non-Indian settlement diminished tribe's sovereignty, notwithstanding tribe's refusal to consent, so that land was not "Indian country," but subject to state criminal jurisdiction); *United States v. Dion*, 476 U.S. 734 (1986) (holding Eagle Protection Act diminished tribe's implied rights to hunt without interference on reservation, without consent of tribe).

These decisions show that this Court has not previously assessed the validity of a diminishment by looking to the presence or absence of tribal consent. The Court looks to Congress, which is authorized to abrogate Indian treaties, and determines whether there is evidence of Congress's "clear and plain intent" to diminish. *See Yankton*

Sioux, 522 U.S. at 343; *Hagen*, 510 U.S. at 411; *Dion*, 476 U.S. at 738-39; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). If there is, that is the end of the inquiry. The Idaho court's decision, by contrast, disregards Congress's plenary authority to abrogate Indian treaties, and grants to the affected tribes a veto power that the courts will then be called upon to enforce. The Idaho court's view is based on a serious misapprehension of Congress's role, as well as its own.

3. The Idaho court's new treaty diminishment standard has widespread consequences for tribes and non-tribal governments. Courts rely on the diminishment doctrine to resolve all manner of conflicts over the meaning of federal statutes affecting Indian tribes. Some of those statutes narrowly relate to the affairs of a particular tribe, whereas others are laws of general applicability that relate to the entire nation. Tribal consent has not previously been thought necessary to validate congressional action of any type. *See Krystal Energy Co.*, 357 F.3d at 1057-62 (Bankruptcy Code provisions abrogate tribal sovereign immunity because Congress spoke "unequivocally" by using the term "foreign and domestic governments" and was not required to use the magic words "Indian Tribes"); *Pittsburg & Midway Coal Mining Co.*, 909 F.2d 1387 (10th Cir. 1990) (surplus lands acts restoring Indian lands to the public domain diminished tribe's lands); *Larose*, 673 N.W.2d at 169 n.6 (acknowledging congressional power to diminish Indian treaty rights without tribal consent); *State v. Wabashaw*, 740

N.W.2d 583, 591-92 (Neb. 2007) (federal statute granting certain states jurisdiction over crimes committed in "Indian Country" effectively abrogated treaty provision requiring tribal notification if crime committed by an Indian); *State v. Romero*, 142 P.3d 887 (N.M. 2006) (Pueblo Lands Act did not diminish boundaries of Indian reservation for purposes of determining state criminal jurisdiction).

The Idaho court's decision is contrary to established law and effectively creates a new rule of treaty diminishment—no act of Congress, not even a statute of general applicability, may be held to diminish tribal jurisdiction or tribal property unless it can be shown that the consent of the affected tribe has been sought and obtained. This new tribal veto over acts of Congress not only lacks any constitutional basis, but seriously impairs the power of Congress to abrogate treaties. In addition, the Idaho court's new rule promises to create enormous practical mischief. Over the years, Congress has altered the boundaries of countless Indian reservations, and it has often done so without seeking or obtaining the consent of the affected tribe. The invalidation of such congressional acts would throw into question the status of lands that were once part of an Indian reservation (as well as any assertion of non-tribal jurisdiction over them) and would necessarily lead to further disputes and litigation. Indeed, the Idaho court's holding has created great uncertainty in a sensitive area of Indian law that is already rife with litigation. The decision below will result in increased litigation

between non-Indian governments and tribes over the boundaries of reservations and the status of tribal treaty rights.

II. THE SUPREME COURT OF IDAHO'S ERRONEOUS EXTENSION TO DIMINISHMENT CASES OF THE RULE OF *CALDWELL V. UNITED STATES*, WHICH REQUIRES THE USE OF EXPRESS WORDS OF CONVEYANCE TO SIGNIFY THE SOVEREIGN'S INTENT TO CONVEY ITS OWN LANDS, WARRANTS REVIEW BY THIS COURT.

1. The Supreme Court of Idaho rejected Pocatello's claim to a water right on the ground that Section 10 does not contain explicit and express terms of conveyance. In doing so, the Idaho court cited *Caldwell v. United States*, 250 U.S. 14, 20 (1919), for the proposition that when a court is construing a federal statute granting privileges, "nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government." Pet. App. 7a-8a.

Thus, the Idaho court extended *Caldwell* to the treaty diminishment area and held that Section 10 did not sufficiently express Congress's intent to convey a water right to Pocatello because Congress did not include any of the traditional terms of conveyance such as "grant" or "convey," or the words "water right." Pet. App. 10a-11a. However, the Idaho court also held that the language Congress used in Section 10 was sufficiently express to grant

Pocatello the right to enter onto the Reservation, the right to build conveyance structures on the Reservation, and the right to remove water from the Reservation—upon Pocatello's compliance with state water law. Pet. App. 17a.

2. Under *Caldwell*, Congress must use express language to manifest its intent to convey property. This rule, which requires Congress to use the established language of conveyance—magic words that stand alone without resort to interpretation—has not been applied by any other court to treaty diminishment cases. Indeed, this Court has declined to hold Congress to an express language standard where Indian tribal property is concerned. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), for example, the Tenth Circuit applied the *Caldwell* standard, and thus denied a tribal claim to the bed of the Arkansas River on the ground that the relevant treaties did not contain clear and explicit language investing the tribe with title to the bed. This Court reversed, holding that treaties between the United States and Indian nations are not to be considered "exercises in ordinary conveyancing" by the federal government, and therefore found for the tribe based on a diminishment analysis. *Id.* at 631.

3. In lieu of a "magic words" test, this Court has undertaken a holistic analysis to determine whether Congress intended to diminish a tribe's treaty rights or reservation. This Court has described the inquiry as an examination of an act of Congress for indication of "baseline intent" to diminish treaty rights. *Hagen*, 510 U.S. at 415; *see also Rosebud*,

430 U.S. at 592. Under that test, the courts are required to examine the historic context surrounding the adoption of the statute, the language and structure of the statute, and subsequent patterns of settlement and use of the property in question. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Rosebud*, 430 U.S. at 586-88 (examining the language of the act, surrounding circumstances, and executive branch documents that were part of the legislative history); *Shawnee Tribe*, 423 F.3d at 1220-29 (considering language of the act, historical context of its enactment, and subsequent treatment of the area in question, including settlement patterns); *Pittsburg & Midway Coal Mining Co.*, 909 F.2d at 1393 (same).

4. Further, this Court has expressly rejected any trend toward requiring Congress to use express or explicit language to diminish Indian treaty rights—whether the diminishment involves issues of sovereignty or of property rights. *Rosebud*, 430 U.S. at 588 n.4 (express language of termination is not required). For example, in *Hagen*, 510 U.S. at 399, this Court rejected the argument that the diminishment doctrine could be reduced to a "clear statement rule":

> The Solicitor General, appearing as *amicus* in support of petitioner, argues that our cases establish a "clear-statement rule," pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional

> commitment from Congress to compensate the Indians . . . . We disagree. First, although the statutory language must "establis[h] an express congressional purpose to diminish," *Solem*, 465 U.S., at 475, we have never required any particular form of words before finding diminishment, *see* [*Rosebud,* 430 U.S. at 588 & n.4].

Id. at 411. Many decisions by the lower federal courts and the state courts are to the same effect. *See, e.g., Krystal Energy Co.*, 357 F.3d at 1058; *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052, 1060 (S.D. Cal. 1992) ("[f]rom *Rosebud* and *Dion* it is clear that a statute need not on its face express an intent to abrogate Indian treaty rights"); *State v. Greger*, 559 N.W.2d 854, 861 (S.D. 1997) (recognizing "no particular form of words is required" for diminishment); *State v. Perank*, 858 P.2d 927, 936 (Utah 1992) (holding that statutory language need not "expressly sever tribal jurisdiction to effectuate a diminishment").

To abrogate treaty rights, Congress need not make its intent "unmistakably clear" in a single section of a statute, *Krystal Energy Co.*, 357 F.3d at 1058, and it need not specify all potentially conflicting treaty rights that it intends to abrogate. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 479 n.22 (1979). "Even in the absence of a clear expression of congressional purpose in the text," courts may determine, based on a holistic review of the language

and background of the statute, that Congress intended diminishment. *Yankton Sioux*, 522 U.S. at 351. Thus, the diminishment doctrine recognizes the peculiar complexity of the matters inquired into and demands that reviewing courts piece together the available evidence to ascertain congressional intent. To do otherwise would risk negating Congress's clear intent based on its inartful expression.[9]

5. The decision below is contrary to basic constitutional principles. Congress has plenary constitutional authority over Indian tribes and tribal property. For the courts to require the inclusion of "magic words" before finding that Congress intended to diminish tribal treaty rights puts this broad power in jeopardy. Indeed, it is for this reason that the courts have seen fit to create few "express language" rules to circumscribe congressional authority. *See, e.g., Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (involving conveyance of federal property to non-governmental entities); *United States v. Union Pac. R.R. Co.*, 353 U.S. 116 (1957) (same); *Governor of Kan. v. Kempthorne*, 516 F.3d 833, 841-45 (10th Cir. 2008) (involving waiver of United States' sovereign immunity); *United States v. Dist. Court for Eagle County*, 401 U.S. 520 (1971) (same). The origin of such rules in judge-made law, and the implications they entail with respect to the separation of powers,

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[9] The contrary position, adopted in this case by the Supreme Court of Idaho, has never commanded a majority of this Court. For example, in *Rosebud*, Justice Marshall took that position in dissent, 430 U.S. at 618-20, while a majority of the Court specifically rejected it. *Id.* at 588 n.4.

argues for limiting the scope of their application rather than applying them expansively.

III. THE GROUNDS RELIED UPON BY THE SUPREME COURT OF IDAHO FOR ITS CONCLUSION THAT CONGRESS INTENDED TO GRANT POCATELLO A RIGHT TO USE WATER ARISING ON THE FORT HALL RESERVATION ONLY PURSUANT TO STATE LAW ARE CONTRARY TO THE SUPREMACY CLAUSE AND WARRANT REVIEW BY THIS COURT.

1. According to the Idaho court, Section 10 did not grant Pocatello a federal water right, but only the right to "access the surface waters on the Reservation, along with an opportunity to establish a water right under state law." Pet. App. 7a. The court reasoned that:

> it would require explicit language [in Section 10] in order to overcome the right of the state to manage and allocate its own water resources [on the Reservation]. There being no such explicit language in Section 10, state water law controls any claims by the City . . . .

Pet. App. 17a.

2. The Idaho court's reasoning is fatally flawed because of its starting premise: that the right to manage and allocate water resources on the Fort Hall Indian Reservation belongs to the state, rather than the federal government. Federal law—not state law—controls water sources on federal and tribal

lands: "[w]ater use on a federal or Indian reservation is not subject to state regulation absent explicit federal recognition of state authority" to do so. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981) (holding state regulation of waters arising within reservation to be entirely inappropriate). *Accord Cappaert v. United States*, 426 U.S 128, 145 (1976) (holding water right attendant to reservation was governed by federal, not state, standards); *Matter of Beneficial Water Use Permits*, 923 P.2d 1073, 1083 (Mont. 1996); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114-15 (Wyo. 1988), *aff'd by equally divided court*, 492 U.S. 406 (1989) (presumption that federal law controls water rights on Indian reservations).

Contrary to the Idaho court's conclusion, neither historical developments nor the Desert Lands Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321, suggest a contrary result. The Desert Lands Act was enacted to ensure that non-navigable waters located on the public domain would be subject to the jurisdiction of the states. Pet. App. at 15a-16a (*citing California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935)). But that statute did nothing to alter the federal government's jurisdiction over waters arising on federal reservations, including Indian reservations. Thus, in *FPC v. State of Oregon*, 349 U.S. 435, 445-49 (1955) ("*Pelton Dam*"), this Court held that Oregon could not require compliance with state water law in connection with

use of waters arising on a federal Indian reservation. *Id.* at 445.[10]

3. State law applies to water rights arising on Indian reservations only if Congress has said so expressly. Of course, Congress could have ceded to Idaho the right to manage and allocate water rights on the Reservation, and it could have required Pocatello to comply with territorial or state law as a condition of using water under Section 10.

In the Act of March 3, 1905, ch. 1440, 33 Stat. 1006 ("1905 Act"), for example, Congress conveyed the right to use waters on a reservation in connection with hydroelectric facilities, but expressly conditioned that grant on compliance with Washington state water law. The 1905 Act provided:

> That the right to the use of the waters on the Spokane River where the said river forms the southern boundary of the Spokane Indian

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[10] State law may apply to manage or administer federal and tribal water, but only to the extent that such waters may be subject to administration following a McCarran Act adjudication, which necessarily considers controlling federal issues. *See, e.g., Big Horn*, 753 P.2d at 94 (holding that "[f]ederal law has not preempted state oversight of reserved water rights . . . [but] water rights [arising on Indian reservations] in state adjudications must be judged by federal law," and therefore the role of the state is "not to apply state law, but to enforce the reserved rights as decreed under principles of federal law"); *see also United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934).

> Reservation may . . . be acquired by appropriation under and pursuant to the laws of the State of Washington.

Section 1, 33 Stat. 1006; *see also Wash. Water Power Co. v. Fed. Energy Regulatory Comm'n*, 775 F.2d 305, 312 (D.C. Cir. 1985) (construing 1905 Act) ("[Absent this express language, the Supremacy Clause would have made] an[y] attempt to appropriate water solely under Washington law from a stream flowing through a federal Indian reservation . . . precarious indeed"). *See also United States v. New Mexico*, 438 U.S. 696, 701 (1978) (enforcing state law jurisdiction over Forest Service's claims because the agency's organic act expressly required compliance with state law).

But that is not the case here. Section 10 contains no language that would affirmatively require Pocatello to comply with state law as a condition to the exercise of its federal water right. Absent such language, the Supremacy Clause precludes the imposition of any such requirement. Congress will be found to have extended state regulation to tribal land only if it has specifically directed such an incursion. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *Antoine v. Washington*, 420 U.S. 194, 204 (1975).[11]

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[11] The statute involved in this case is far from unique. Congress has enacted statutes granting access to Indian reservations for the purpose of withdrawing water in at least four other Western states. If these statutes are likewise

4. The Idaho court's erroneous conclusion that Congress intended state law to apply to its Section 10 grant is particularly perplexing because it follows from a wholly unnecessary analysis. Indeed, the precise phrase used by Congress in Section 10—"in common with" the Tribes—was construed by this Court in *Washington v. Wash. State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 677-78 (1979) ("*Fishing Vessel*"), as guaranteeing the right to share in a quantity of a resource. The Idaho court not only declined to follow this Court's construction of that language, it adopted an interpretation (*see*

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interpreted to subject parties accessing reservation water under a federal right to state regulation, the likely result will be additional conflict and litigation. *See, e.g., An Act to permit the construction of a smelter on the Colville Indian Reservation, and for other purposes*, April 28, 1904, 33 Stat. 567, ch. 1819 (granting company right to construct smelter on reservation and divert water of reservation); *An Act To authorize Arizona Water Company to construct power plant on Pima Indian Reservation in Maricopa County, Arizona*, Feb. 12, 1901, 31 Stat. 786 (granting company right to operate water power plant on the reservation and divert water of reservation); *An act granting to the Blue Mountain Irrigation and Improvement Company a right of way for reservoir and canals through the Umatilla Indian Reservation in the State of Oregon*, Jan. 10, 1893, 27 Stat. 417, ch. 32, (granting company right to build canal and divert water of the reservation); *An act granting to the Yuma Pumping Irrigation Company the right of way for two ditches across that part of the Yuma Indian Reservation lying in Arizona*, Jan. 20, 1893, 27 Stat. 420, ch. 39, (same); *An act granting the Umatilla Irrigation Company a right of way through the Umatilla Reservation in the State of Oregon*, Feb. 10, 1891, 26 Stat. 745, ch. 129 (granting company right of way through Reservation for diverting water off the reservation).

Pet. App. 22a-26a) that this Court expressly rejected in *Fishing Vessel*: that "in common with" conveyed only a right of access and a right to develop a resource pursuant to state law. *See* 443 U.S. at 676-78.[12]

If the Idaho court had interpreted this language in conformity with *Fishing Vessel*, it could have avoided its erroneous conclusion, which was both unnecessary and contrary to the Supremacy Clause. *See, e.g., Pelton Dam*, 349 U.S. at 449; *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

The Supreme Court of Idaho has determined that Congress must expressly say so when it does not intend to cede federal jurisdiction over Indian reservations to state officials. Otherwise, in the Idaho court's view, jurisdiction will pass from Congress to the states. That proposition is contrary to settled law, and to principles of federal supremacy. The decision below clearly warrants review by this Court.

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[12] The Idaho court effectively adopted Justice Powell's dissent, which took the position that the language of the treaties, granting tribes "the right to take fish . . . in common with all citizens of the territory," granted only a "right of access to fish," and not a specific percentage of the fish runs, as the majority held. *Fishing Vessel*, 443 U.S. at 698.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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