No. 08-135

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

REPLY OF CITY OF POCATELLO TO BRIEF OF THE UNITED STATES IN OPPOSITION

Barry Sullivan
Jenner & Block LLP
330 North Wabash Avenue
Chicago, IL 60611
(312) 222-9350

A. Dean Tranmer
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149

Sarah A. Klahn*
Mitra Pemberton
White & Jankowski, LLP
511 16th Street, Suite 500
Denver, CO 80202
(303) 595-9441

*Counsel of Record

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Caldwell v. United States, 250 U.S. 14 (1919).... 1, 3

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 8

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) 4

Hagan v. Utah, 510 U.S. 399 (1994) 3

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) 7

Johnson v. United States, 163 F. 30 (1st Cir. 1908) 4

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 6

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) 6

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 US 172 (1999) 3

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 4, 6

South Dakota v. Bourland, 508 U.S. 679 (1993) 6

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 3

State v. Wabashaw, 740 N.W.2d 583 (Neb. 2007) 6

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 6

Washington v. Wash. State Commercial Passenger Fishing Vessel, 433 U.S. 658 (1979) 5

Yellowbear v. State, 174 P.3d 1270 (Wyo. 2008) 6

STATUTORY PROVISIONS AND TREATIES

43 U.S.C. § 666 (2008) 7

Act of March 3, 1891, Chapter 543, 26 Stat. 989, 1011 7

Act of September 1, 1888, ch. 936, 25 Stat. 425 7

Treaty with Cheyenne and Arapahoe, Oct. 28, 1867, 15 Stat. 593 6

Treaty with Crows, May 7, 1868, 15 Stat. 635 6

Treaty with the Eastern Band of Shoshoni and Bannock Tribes, July 3, 1868, 15 Stat. 673 5

Treaty with Kiowas, Comanches and Apaches, Oct. 21, 1867, 15 Stat. 581, 589 6

Treaty with Navajo, June 1, 1868, 15 Stat. 667 6

Treaty with Northern Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655 6

Treaty with Sioux and Arapahoe, Apr. 29, 1868, 15 Stat. 635 6

Treaty with Utes, Mar. 2, 1868, 15 Stat. 619..... 6

Petitioner City of Pocatello ("Pocatello") respectfully submits this reply in response to the brief in opposition ("Opp.") filed by the United States (the "government").

INTRODUCTION

The government seeks to diminish the importance of this case by asserting that Pocatello misunderstands the Idaho Supreme Court's decision. According to the government, the Idaho court did not hold that Congress lacked the power to grant a water right to Pocatello, but only that Congress chose not to grant such a right in this case. *See* Opp. 10-11. The government supports that assertion by stating that Congress's choice is clear on the face of the statute (Opp. 10), but that statement is incorrect.

The plain language of the Act of September 1, 1888, ch. 936, 25 Stat. 425 ("1888 Act") does not support the government's position. The government's reading of the statute depends instead on the application of several inapplicable and improper tools of construction. In the government's view: (1) Congress may not constitutionally exercise its power unless it uses certain "magic words" of conveyance; (2) Congress may not diminish treaty rights unless it complies with the rule of *Caldwell v. United States*, 250 U.S. 14 (1919), a requirement this Court has never imposed in a diminishment case; (3) Congress may not apply federal law with respect to water rights on Indian reservations without expressly stating that federal, rather than state law,

applies; and (4) Congress may not affect tribal rights without the consent of the tribe where a limitation to that effect appears in a relevant treaty.

Thus, this is not a case in which the government divines congressional intent from the "plain language" of a statute, let alone one in which the "plain language" shows that Congress decided not to exercise its power. This is a case in which the court below first purported to condition the exercise of congressional power on Congress's satisfying certain tests that the court devised, and then determined that there was no need to decide what Congress actually intended because Congress had not satisfied the court's requirements. In essence, therefore, the Idaho court held that Congress lacked the power to legislate because Congress had failed to satisfy unprecedented requirements that the court imposed. That is a matter that clearly warrants review by this Court.

ARGUMENT

1. The government opposes the granting of certiorari on the ground that Pocatello allegedly has challenged only an "alternative holding" of the Idaho Supreme Court, and not the holding itself. (Opp. 10.) The government's assertion is incorrect. Pocatello has directly challenged the Idaho court's central holding, that is, that Section 10 cannot be construed as a congressional grant of a water right to Pocatello because Section 10 does not contain "historically recognized and accepted terms of conveyance such as 'grant' 'bargain' 'sell' or 'convey' evidencing a transfer in a property interest... [and] such statutes are

construed to pass nothing but what is conveyed in clear and explicit language. *Caldwell v. United States*, 250 U.S. at 20." Pet. App. 11a (internal quotation marks omitted). Thus, the Idaho Supreme Court determined that Congress lacks the power to convey a water right unless it uses the requisite "magic words." That clearly is a limitation on the power of Congress to legislate, and it is a limitation that never has been imposed by this Court in this area. *See* Pet. 27-30.

2. By finding Section 10 wanting under the *Caldwell* "express language" rule, the Idaho Supreme Court's holding (and the government's argument to this Court) confound two separate lines of authority. *See* Pet. 27-28. The government defends the decision below on the ground that the Idaho court did "not contradict any precedent of this Court in applying the *Caldwell* rule in this context." Opp. 14. But the *Caldwell* rule holds that express statutory language provides the only means for establishing clear congressional intent in those circumstances in which the rule applies. By contrast, this Court has consistently declined to hold that express statutory language is required to establish a clear congressional intent to diminish treaty rights. *Hagan v. Utah*, 510 U.S. 399, 411 (1994). Moreover, as Pocatello has shown (Pet. 28-29), the Court consistently has adhered to that position even in cases (*see, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)) contemporaneous with those that the government has cited and misconstrued. *See* Opp. 14, *quoting Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172,

202 (1999).[1] In diminishment cases, the courts "are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977), *quoting Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.).

3. The Idaho court imposed yet another improper limitation on the power of Congress – conditioning the application of federal law over waters on the Fort Hall Reservation on Congress's express assertion of federal jurisdiction. Pet. App. 17a. The government imposes this requirement and suggests that the analysis under Section 10 involves only the question whether state law controls "*non-Indians* and their access to *water*." Opp. 15 (emphasis in original). But the government mischaracterizes the question and misstates the law: federal law necessarily controls the distribution of natural resources on tribal lands, whether those resources are being developed by Indians or non-Indians (like Pocatello), unless Congress expressly provides otherwise. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981) ("water use on a federal [Indian] reservation is not subject to state regulation absent explicit federal recognition of state

---

[1] This confusion is further evidenced by the government's rephrasing of the question presented: "Whether Section 10... grants petitioner an *express* federal right to waters on the Fort Hall Indian Reservation..." (emphasis added). If the government truly believes that the right must be made "express," certiorari clearly should be granted to decide the question, since no such requirement has ever been imposed by the Court in this type of case.

authority"). In other words, the default rule is exactly contrary to that posited by the Idaho court. There is no need for Congress to assert directly that federal law applies to water rights on a reservation, and its "failure" to do so cannot work a forfeiture. The Idaho court's theory, now adopted by the government (*see* Opp. 15), turns the Supremacy Clause on its head. Moreover, knowing that its theory cannot pass muster, the government also erroneously suggests that Pocatello waived the point in the Idaho court. However, the point was clearly made and appropriately briefed by Pocatello below. (*See, e.g. City of Pocatello v. State of Idaho*, No. 33669, Idaho Supreme Court, City of Pocatello's Opening Brief 14-17, City of Pocatello's Reply Brief 8, 11-15, 30.)[2]

4. The government also seeks (Opp. 11) to denigrate the importance of this case by asserting, again without foundation, that the case involves only the meaning of language peculiar to a single instrument, the Treaty with the Eastern Band of Shoshoni and Bannock Tribes, July 3, 1868, 15 Stat. 673 ("1868 Second Treaty of Fort Bridger"), and that the tribal consent requirement that the court below imposed on Congress will have limited practical effect. But the language is not peculiar to this treaty. At least seven other Indian treaties have a

---

[2] The government makes the same error when it purports to invoke state water law concepts to parse the federal statutory phrase "in common with" (*see* Opp. 15-16), rather than look to this Court's interpretation of the phrase in *Washington v. Wash. State Commercial Passenger Fishing Vessel,* 433 U.S. 658 (1979). *See* Pet. 35-36.

consent provision nearly identical to that involved here, and several of those consent provisions previously have been the subject of litigation.[3] Indeed, this Court has previously found diminishment in four of those cases, notwithstanding non-compliance with the relevant consent provisions. *See South Dakota v. Bourland*, 508 U.S. 679 (1993); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).[4] At least three other state and federal decisions address these treaties and analyze the diminishment issue without regard to the tribal consent requirement. *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005); *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008);[5] *State v. Wabashaw*, 740 N.W.2d 583 (Neb. 2007). The decision below puts in question the integrity of this jurisprudence, and, even more important, the power of Congress to act without tribal consent.

---

[3] Treaty with Kiowas, Comanches and Apaches, Oct. 21, 1867, 15 Stat. 581, 589, Art. 12; Treaty with Cheyenne and Arapahoe, Oct. 28, 1867, 15 Stat. 593, Art. 12; Treaty with Utes, Mar. 2, 1868, 15 Stat. 619, Art. 16; Treaty with Sioux and Arapahoe, Apr. 29, 1868, 15 Stat. 635, Art. 12; Treaty with Crows, May 7, 1868, 15 Stat. 635, Art. 11; Treaty with Northern Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655, Art. 8; Treaty with Navajo, June 1, 1868, 15 Stat. 667, Art. 10.

[4] In that respect, as Pocatello has shown (*see* Pet. 22-24), the decision below directly conflicts with this Court's established jurisprudence.

[5] *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008), addresses diminishment of the 1868 Second Treaty of Fort Bridger, the same treaty at issue in this case.

5. Finally, the government makes much of the fact (Opp. 5) that Pocatello decided to file a federal law claim for its Section 10 water right in the SRBA, implying that Pocatello somehow sat on its rights. But Pocatello had no appropriate forum for adjudicating its rights until the SRBA was established. In fact, Pocatello has relied upon the water right granted in the 1888 Act since 1890, when Pocatello began using water from certain creeks on the Reservation and claimed the right to do so under the 1888 Act. Exs. 60, 62, 64, 65 to Ex. 24 of the Clerk's Certificate of Exhibits.[6] Of course, judicial confirmation is the very core of a water right. But it was not until the initiation of the SRBA, as Idaho's first McCarran Amendment adjudication, that Pocatello had its first opportunity to join all necessary parties, including the United States and the Tribes (all of whom previously were immune from suit) to adjudicate its Section 10 rights. *See* 43 U.S.C. § 666 (2008) ("McCarran Amendment"); *In*

---

[6] The government mentions (Opp. 4-5) an 1891 letter written by assistant attorney-general George Shields, which purportedly supports the government's view that Pocatello's Section 10 water right must be obtained under state law. However, Shields's letter was limited to opining that corporate intermediaries could not develop reservation water supplies on behalf of the city. Congress immediately overturned Shields's interpretation by adopting the Act of March 3, 1891, ch. 543, 26 Stat. 989, 1011 ("1891 Act") which broadened the right of access to private corporations "for the purpose of enabling the citizens of Pocatello to receive the water supply, contemplated by section 10 [of the 1888 Act]." *See* Pet. 13. The government suggests no legal basis for this Court to defer to such a post-enactment legal interpretation, particularly where, as here, Congress immediately and expressly repudiated it.

re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 87-88 (Wyo. 1988); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-11 (1976). From the inception of the SRBA in 1987, however, Pocatello has claimed a water right under Section 10 of the 1888 Act. *See* Ex. 4 to the Clerk's Certificate of Exhibits.

CONCLUSION

Contrary to the government's assertions, the petition for a writ of certiorari raises serious and substantial questions of federal law. The decision below is contrary to the Constitution of the United States and to this Court's jurisprudence. Moreover, as a practical matter, that decision promises to have a substantial and pernicious effect on water rights throughout the west and on many other areas of the law affected by the diminishment doctrine.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Barry Sullivan
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611
(312) 222-9350

A. Dean Tranmer
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149

Sarah A. Klahn*
Mitra Pemberton
White & Jankowski, LLP
511 16th Street, Suite 500
Denver, CO 80202
(303) 595-9441

* *Counsel of Record*

November 13, 2008