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

RESPONDENT WYOMING FARM BUREAU FEDERATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress clearly evinced an intent to diminish the Wind River Indian Reservation in Wyoming.

PARTIES TO THE PROCEEDINGS

The Wyoming Farm Bureau Federation and the State of Wyoming were Petitioners in the Tenth Circuit proceeding below.

The United States Environmental Protection Agency; E. Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency; and Doug Benevento, in his official capacity as Region 8 Administrator of the United States Environmental Protection Agency were Respondents in the Tenth Circuit proceeding below.

Fremont County, Wyoming, and the City of Riverton, Wyoming were Intervenors in the Tenth Circuit proceeding below.

The Northern Arapaho Tribe and the Eastern Shoshone Tribe were Respondent-Intervenors in the Tenth Circuit proceeding below.

CORPORATE DISCLOSURE STATEMENT

Respondent Wyoming Farm Bureau Federation ("Respondent") is a non-profit trade association. Respondent certifies that it is privately held, has no parent corporation, and has never issued any public stock, and, thus, no publicly held company owns 10 percent or more of its stock.

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Respondent Wyoming Farm Bureau Federation (hereinafter "Respondent") respectfully requests that this Honorable Court deny the petitions for writs of certiorari submitted by the Northern Arapaho and Eastern Shoshone Tribes in Dockets numbered 17-1159 and 17-1164. References to the Eastern Shoshone Tribe's Petition will be cited as "EST Pet." References to the Eastern Shoshone Tribe's Appendices will be cited as "EST App." References to the Northern Arapaho Tribe's Petition will be cited as "NAT Pet." References to the Northern Arapaho Tribe's Appendices will be cited as "NAT App."

INTRODUCTION

The question of whether a Congress evinced a clear intent to diminish a reservation is one that this Court and others have thoroughly addressed on multiple occasions going back more than a century. The Tenth Circuit's decision below fits easily within this tradition. This issue has been litigated extensively, and the jurisprudence is both well-established and widely accepted. There is simply no reason why this Court needs to weigh in.

SUMMARY OF THE ARGUMENT

The Petitions in this case do not present a controversy that that satisfies the requirements typically necessary for this Court to grant writs of certiorari. First, the Tenth Circuit's decision below does not create a circuit split. Contrary to Petitioners' contention that the decision below conflicts with the Eight Circuit's decision in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), it is clearly distinguishable. Nor does the Tenth Circuit's decision conflict with this Court's precedent. Petitioners' primary example of a conflict, *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), has borne almost no precedential weight in this Court's jurisprudence and was premised on law that Congress has subsequently changed, while every other case in which this Court has not found a clear intent to diminish a reservation is easily distinguishable. The plain and unambiguous language of cession found in the act of Congress at issue in this case, combined with evidence from the historical record, evince a clear congressional intent to diminish the Wind River Indian Reservation. The petitions for writs of certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE EIGHTH CIRCUIT'S DECISION IN *U.S. V. GREY BEAR*

Petitioners argue that the Tenth Circuit's decision below conflicts with decisions made by other circuits, focusing particularly on the Eighth Circuit's decision in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987). *Grey Bear*, however, is clearly distinguishable from this case, and does not conflict with the Tenth Circuit's decision below.

Grey Bear dealt with the appeal of eleven defendants charged with the murder of a man on the Devils Lake Sioux Indian Reservation. *Id.* at 1288. The defendants argued, *inter alia*, that their convictions were invalid because the federal district court in which their trial was held lacked subject matter jurisdiction, claiming that the Reservation had been disestablished by Congress via treaty and statute in 1904. *Id.* According to Petitioners, the Eighth Circuit's holding that Congress had not clearly expressed an intent to diminish the Devils Lake Sioux Indian Reservation is in direct conflict with the Tenth Circuit's decision below, but, in reality, both courts applied the same well-settled test and simply came to different conclusions based on the differences in the evidence presented in each case.

Petitioners' assertion of a circuit split is premised primarily on a mischaracterization of the Tenth Circuit's holding: that it "turns on its novel reasoning that cession language, by itself, 'can only indicate . . . diminishment.'" NAT Pet. at 24. This of course ignores the fact that, while the Tenth Circuit did conclude that the 1905 act of Congress opening up the Wind River reservation ("1905 Act") contained "express language of cession," and—in keeping with the requirements of this Court's precedent[1]—afforded that conclusion substantial weight in coming to its conclusion, the Tenth Circuit did not in any way limit its analysis to the text of the 1905 Act. *See* NAT App. at 16 (finding express language of cession); NAT App. at 21–38 (analyzing the historical context of the 1905 Act and the subsequent treatment of the area).

The fact that the court in *Grey Bear* declared language of cession practically identical to the language used in the 1905 Act insufficient, standing alone, to evince a clear congressional intent to diminish or disestablish an Indian reservation, does not conflict with the Tenth Circuit's reasoning. Contrary to Petitioners' arguments, both courts applied the same three-step test first articulated by

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[1] See *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) ("[W]e start with the statutory text, for '[t]he most probative evidence of diminishment is, of course, the statutory language used to open Indian lands.'" (citation omitted)); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unalloted opened lands.").

this Court in *Solem*. Both courts engaged in substantially similar textual analyses. Both courts recognized that no single factor in the *Solem* test is dispositive, and both came to their respective conclusions based upon holistic examinations of statutory text, historical context, and Congress's subsequent treatment of the areas in dispute.

In *Grey Bear*, the Eighth Circuit analyzed the language of cession Congress used in its statute opening up the Devil's Lake Indian Reservation. The language stated that the Indians of the Devils Lake Reservation:

> 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 . . . . In consideration of the land ceded, relinquished, and conveyed by article one of this agreement . . . the United States stipulates and agrees to dispose of the said lands to settlers under the provisions of the homestead and town-site laws . . . and to pay to said Indians the proceeds derived from the sale of said lands . . . .

Act of April 27, 1904, ch. 1620, 33 Stat. 321–22 (emphasis added). The court found that the "language of the Act suggests congressional intent to

disestablish the reservation boundaries," but that the lack of an unconditional commitment to pay for the ceded lands and Congress's subsequent repeated recognition of a non-disestablished Devils Lake Reservation meant that Congress did not manifest the clear intent to disestablish that is necessary to overcome "the strong presumption favoring retention of reservation status." *Grey Bear*, 828 F.2d at 1290–91.

In this case, however, the Tenth Circuit found that Congress *did* in fact make at least a partial unconditional commitment to pay for the ceded land, both in lump sum allocations and from proceeds of future sales. NAT App. at 17–18. While recognizing that this hybrid payment structure may fall short of the "sum certain payment" that this Court held creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished," in *Solem*, 465 U.S. at 470–71, the Tenth Circuit also recognized that "this presumption is not a two-way street." NAT App. at 18. It quotes the opinion in *Hagan v. Utah*, in which this Court expressly rejected Petitioners' argument that a finding of diminishment requires both language of cession *and* a sum-certain commitment to pay, saying that:

> [w]hile the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion. In fact, the statutes at issue in *Rosebud,* which we held to have effected a diminishment, did

> not provide for the payment of a sum certain to the Indians.

510 U.S. 399, 412 (1994). The presence or absence of a Congressional promise of sum-certain payment—like the presence or absence of language of cession, evidence from legislative history, and Congress's subsequent treatment of the area—is but one of several factors courts must consider in making determinations of this kind.

While the Eighth Circuit in *Grey Bear* found that a lack of sum-certain payment, combined with a relatively scant legislative history and repeated recognition of the Devils Lake Reservation by Congress in the years following the alleged disestablishment created enough doubt regarding Congress's intent to foreclose a holding of disestablishment, this does not conflict with the Tenth Circuit's reasoning below. In this case, the Tenth Circuit engaged in an extensive analysis of the contemporary historical context and legislative history of the 1905 Act, finding that it "reveal[s] Congress's longstanding desire to sever from the Wind River Reservation the area north of the Big Wind River," and indicates that Congress intended diminishment. NAT App. at 21–31. The Tenth Circuit also found evidence of subsequent treatment of the area was mixed and "of little evidentiary value." NAT App. at 32. Applying this Court's precedent, the same precedent applied by the Eighth Circuit in *Grey Bear*, the Tenth Circuit weighed the textual and historical evidence and found that it clearly indicated a congressional intent to diminish the Wind River

Reservation. While its ultimate conclusion differs from the one the Eighth Circuit reached, both courts faithfully applied the test this Court laid out in *Solem* to the facts on the ground.

II. THE DECISION BELOW DOES NOT CONLFICT WITH THIS COURT'S PRECEDENT

A. *Ash Sheep Co. v. United States* Is a Rarely Cited Decision Based on Old Law That This Court Has All But Overruled.

Petitioners rest the bulk of their argument that the Tenth Circuit's opinion below conflicts with this Court's precedent on *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920)—a century-old decision, superseded by statute, the reasoning of which has largely been ignored in subsequent decisions by this Court.

In *Ash Sheep*, the Court was called upon to interpret a 1904 law that contained similar language to the 1905 Act at issue here. The law in *Ash Sheep* provided that the Crow Tribe Indians "cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines . . . ." 33 Stat. 352, 356 (1904). The law in *Ash Sheep* also stated that, "the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." 33

Stat. at 361. This is nearly identical to language found in the 1905 Act.

The Court in *Ash Sheep* held that this trustee relationship, despite the language of cession, indicated that the Crow Tribe retained a beneficial interest in the land. 252 U.S. at 165. Because they retained a beneficial interest, it therefore could not become a part of the public domain and remained Indian land. *Id.* Several key factors make this case inapposite, however.

First, as this Court noted in *Solem*, the holding in *Ash Sheep* has been superseded by statute. *Solem*, 465 U.S. at 468. While the Court in *Ash Sheep* ruled that, because tribes retained a beneficial interest, the property was therefore prevented from becoming public land, *Ash Sheep*, 252 U.S. at 165, *Solem* recognized that Congress "uncouple[d] reservation status from Indian ownership" in 1948. *Solem*, 465 U.S. at 468. *See also* Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151).

Indeed, this Court has held that statutory language indicating trust status does not necessarily mean that Congress did not intend to diminish a reservation. In *Rosebud*, the Court found congressional intent to diminish the reservation, despite trust provisions similar to those found in the statutes at issue in *Ash Sheep* and this case. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

Second, as noted by the Tenth Circuit, *Ash Sheep* has had very little influence on the

development of this Court's diminishment precedent and "is seldom mentioned in subsequent cases." NAT App. at 20. *Ash Sheep* may not have ever been explicitly overturned, but it certainly has been almost completely ignored by this Court in the near century since it was decided. In fact, the Court has cited this case only six times, and has never discussed it at any length. The two most in-depth discussions appear in *Solem*, where the Court notes its holding has been superseded by a 1948 statute, 465 U.S. at 468, and *Rosebud*, where *Ash Sheep* is mentioned as a *c.f.* cite in a footnote. 430 U.S. at 601 n.24. Both cases cite *Ash Sheep* in the specific context of explaining that its reasoning is no longer applicable. Several of this Court's most important diminishment cases, such as *Parker*, *Yankton Sioux Tribe*, *Hagan*, *Mattz*, and *Seymour*, do not cite *Ash Sheep* at all. The primary case Petitioners rely upon to show that the Tenth Circuit's opinion below conflicts with this Court's precedent has a vanishingly small precedential footprint, has *never* been relied on by this Court to decide a case, and is premised on law that no longer even exists.

B. The Tenth Circuit's Opinion is Consistent with a Long Line of This Court's Cases.

There is an obvious reason that Petitioners are forced to turn to a 98-year-old case of limited precedential value and a fundamental misreading of a single contemporary case to buttress their argument in favor of granting their Petition: The Tenth Circuit's opinion below is comfortably in line with this Court's well-established diminishment precedent. The

circumstances at issue in this case are strikingly similar to past cases where this Court has found clear evidence of congressional intent to diminish or disestablish a reservation, such as *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, *Rosebud Sioux Tribe v. Kneip*, *Hagen v. Utah*, and *South Dakota v. Yankton Sioux Tribe*. Cases in which this Court has not found a clear intent to diminish or disestablish, such as *Seymour v. Superintendent*, *Mattz v. Arnett*, *Solem v. Bartlett*, and *Nebraska v. Parker*, however, can all be easily distinguished.

According to the text of the 1905 Act, the Tribes agreed to "cede, grant, and relinquish" to the United States, "all right, title, and interest" in the diminished area. 33 Stat. at 1016. This is nearly identical to the language of cession this Court has previously found indicated congressional intent to diminish in *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 445 (1975) (where the Sisseton-Wahpeton Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unalloted lands within the limits of the reservation."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (where the Rosebud Sioux Tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to [the unalloted reservation lands] within the boundaries of Gregory County . . ."); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1997) (where the Yankton Sioux Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unalloted lands within the limits of their reservation."). Just like in these cases, the 1905 Act's language was "precisely suited" to the purpose of ceding reservation land to the federal government. *Id*.

Petitioners cite *Hagen* for the proposition that either a sum certain payment or some explicit reference to restoring land to the public domain is necessary for a finding of diminishment. NAT Pet. At 17–18. *Hagen*, however, stated merely that this Court's cases have "uniformly equated [language restoring land to the public domain] with a congressional purpose to terminate reservation status." 510 U.S. at 414. As the Tenth Circuit stated below, "[t]here are no magic words of cession required to find diminishment." NAT App. at 11. *Hagen* explicitly rejects the argument Petitioners are attempting to make, citing *Rosebud*—a case in which this Court found diminishment in the absence of both sum-certain and public-domain language. 510 U.S. at 412.

In addition to *Ash Sheep*, each of this Court's cases in which a congressional intent to diminish was not found can be readily distinguished from this case. Contrary to Petitioners' claims, *Nebraska v. Parker*, this Court's most recent statement on this issue, does not stand for the proposition that both language of cession and a sum certain payment are necessary for a finding of diminishment. What this Court actually did in *Parker*, however, was reaffirm the maxim from *Solem* that unambiguous statutory language is a clear indicator of intended diminishment, including explicit reference to cession language or an unconditional

commitment from Congress for compensation for the opened land. 136 S. Ct. 1072, 1079 (2016). The law at issue in *Parker* did not include either clear language of cession, nor did the Court find strong contextual evidence of an intent to diminish. This case, however, presents both unambiguous statutory language of cession and a legislative history that points strongly in favor of diminishment.

In cases such as *Solem, Seymour*, and *Mattz*, the acts at issue also did not include clear, unambiguous language of cession. As pointed out by the Tenth Circuit below, the operative language of these statutes "merely opened a reservation to settlement by non-Indians or authorized the Secretary of the Interior to act as a 'sales agent' for the Native American tribes." NAT App. at 14. Unlike here (and in cases like *Rosebud* and *DeCoteau*), "the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." *Solem*, 465 U.S. at 472–73. The lack of clear cession language, present in the 1905 Act, doomed these cases, and make this case clearly distinguishable.

III. THIS CASE PRESENTS NO NOVEL FACTS OR LEGAL ARGUMENTS AND DOES NOT WARRANT THIS COURT'S INTERVENTION

This is a case in which a widely accepted and well-established test was applied to a fairly standard set of facts, resulting in an outcome that looks remarkably similar to the outcomes of previous cases where this Court found clear congressional intent to

diminish. The Tenth Circuit did not make any particularly novel legal arguments in its opinion, nor did either of the two Petitioners in their briefs before this Court. And while the Tenth Circuit's decision was clearly correct, even if it was not, this case would still not warrant a grant of certiorari. Even if the Tenth Circuit was wrong in its conclusions, that would only amount to a simple misapplication of what all parties agree is a well-established rule. As this Court's Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. *See* S. Shapiro, et al., Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

Beyond the primary factors this Court looks to when determining whether to grant a petition for a writ of certiorari—the existence of a circuit split or a direct conflict with the Court's precedent—these Petitions do not present any other compelling reason to grant review. The fact that the rule governing the diminishment or disestablishment of a reservation is already well-settled, and that any diminishment decision will necessarily be highly fact-based, *See Solem*, 465 U.S. at 469 ("The effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage."), also means that a decision by this Court in this case would be of limited precedential value.

Barring a dramatic reversal in this Court's diminishment jurisprudence, all future courts tasked with determining whether a reservation has been diminished or disestablished will continue to follow the three-part *Solem* framework. Those courts will continue to focus primarily, though not exclusively, on the plain meaning of the statutory text. A decision by this Court on the merits would, at most, provide another updated example of how to apply the well-established *Solem* rule, which this Court again did only two years ago, in *Nebraska v. Parker*. In a time where more and more issues are competing for space on this Court's limited docket, there is no compelling reason to reaffirm a well-settled doctrine that the Court so recently revisited.[2]

[2] Even the EPA, which was the Respondent in the Tenth Circuit, apparently recognized that this case does not warrant this Court's review, as the agency chose not to appeal the Tenth Circuit's judgment.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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