IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

NORTHERN ARAPAHO TRIBE; EASTERN SHOSHONE TRIBE,

Applicants,

v.

WYOMING AND WYOMING FARM BUREAU FEDERATION,

Respondents.

APPLICATION TO THE HON. SONIA SOTOMAYOR FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Applicants Northern Arapaho Tribe and Eastern Shoshone Tribe hereby move for an extension of time of 30 days, to and including Wednesday, March 7, 2018, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit dated November 7, 2017 (Exhibit 1). A petition for rehearing en banc was denied November 7, 2017 (Exhibit 2).[1] The jurisdiction of this court is based on 28 U.S.C. §1254(1).

1. Unless an extension is granted, the deadline for filing the petition for certiorari is Monday, February 5, 2018.

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[1] The panel *sua sponte* granted panel rehearing to amend portions of the majority opinion and dissent. Ex. 2, at 2.

2. This case presents the question whether a century-old act of Congress diminished the boundaries of the Wind River Reservation, which Applicants currently inhabit. In 2008, pursuant to the Clean Air Act and regulations promulgated thereunder, Applicants applied to the Environmental Protection Agency (EPA) for authority to manage certain non-regulatory programs for air quality in areas under tribal jurisdiction. Such an application must describe the area over which a tribe seeks to assert its regulatory authority; accordingly, Applicants were required to clearly delineate the boundaries of the Reservation. Applicants claimed the boundaries of the Reservation that were set forth in an 1868 treaty with the United States. In comments to the proposed EPA action, Respondents, the State of Wyoming and the Wyoming Farm Bureau Federation, argued that the Reservation was diminished by an 1905 act of Congress. After consulting with the Department of Interior, which concluded that the 1905 Act had not changed the boundaries established in the 1868 treaty, EPA granted Applicants' application, agreeing that the 1905 Act did not diminish the Reservation's boundaries.

3. Respondents petitioned for review by the Tenth Circuit. In a 2-1 opinion, the Tenth Circuit granted the petition and vacated EPA's boundary determination. The majority acknowledged that in exercising its power to diminish reservation boundaries, Congress must "clearly express[]" its intent, and diminishment "'will not be lightly inferred.'" Op.11 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). The majority nevertheless concluded that the 1905 Act cleared that high bar. The majority first noted that the 1905 Act's language provided that

Applicants would "cede, grant, and relinquish to the United States, all right, title, and interest" in the land in dispute. Op.14. It rejected Applicants' and EPA's contention that the absence in the 1905 Act of a sum certain for Applicants in exchange for the land defeats a finding of diminishment. Next, the majority favorably cited previous congressional efforts to purchase the disputed land and statements in connection with those efforts. The majority conceded that none of those statements concerned the 1905 Act that Congress actually passed, but it deemed the prior, unenacted proposals as "predicate[s]" for the 1905 Act. Op.32. Finally, the majority concluded that the evidence of the subsequent treatment of the disputed lands was conflicting and did not affect its determination. Op.34-40.

4. Judge Lucero dissented. In his view, by equating the word "cede" with diminishment and disregarding the absence of a sum certain in the 1905 Act, the majority had produced "a new low-water mark in diminishment jurisprudence" and created "a needless circuit split" with the Eighth Circuit. Dis.1, 5 (citing *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987)). In light of precedents requiring a diminishment of sovereign territory to be unambiguous, Judge Lucero concluded that the 1905 Act opened the Reservation but did not change its boundaries. Dis.14.

5. Given the high stakes for sovereign tribes, diminishment disputes have long presented questions of exceptional importance warranting this Court's review. *See Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Decoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420

U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973). Here, the panel majority announced the unprecedented rule that "Congress's use of the word 'cede'" unaccompanied by sum-certain language in a surplus land act "can only mean one thing—a diminished reservation." Op.18. That holding runs counter to nearly a century of this Court's precedent interpreting surplus land acts, from *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to *Parker*, a recent unanimous decision rejecting diminishment that the majority mentioned only in passing. By attaching talismanic significance to the word "cede," the majority overlooked that Congress employed markedly different text in the 1905 Act than it did in earlier statutes diminishing the Reservation—precisely the kind of contrasting "change in language" that this Court emphasized in *Parker*, 136 S. Ct. at 1080, but that the majority entirely disregarded here. The decision also creates a circuit split with *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), in which the Eighth Circuit held that nearly identical statutory language did not diminish tribal lands.

6. Between now and the current due date of the petition, Counsel of Record, Paul D. Clement, has substantial briefing and oral argument obligations, including oral argument in *Encino Motorcars, LLC v. Navarro*, No. 16-1362 (U.S.) (January 17), a response to petition for rehearing en banc in *Amgen Inc. v. Sanofi*, No. 17-1480 (Fed. Cir.) (due January 23), oral argument in *Duke Energy Fla. v. FirstEnergy Corp.*, No. 17-3024 (6th Cir.) (January 25), a petition for certiorari in *Coscia v. United States* (U.S.) (due February 2), and a petition for certiorari in *DePuy Orthopaedics, Inc. v. United States ex rel. Nargol* (U.S.) (due February 5). Counsel also requires additional

time to research the extensive factual record and complex legal issues presented in this case.

For the foregoing reasons, Applicants request that an extension of time to and including Wednesday, March 7, 2018, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

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