No. _____

In the
Supreme Court of the United States

NORTHERN ARAPAHO TRIBE,

Petitioner,

v.

STATE OF WYOMING;
WYOMING FARM BUREAU FEDERATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW W. BALDWIN
BERTHENIA CROCKER
KELLY A. RUDD
BALDWIN, CROCKER & RUDD, P.C.
P.O. Box 1229
Lander, WY 82520

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 16, 2018

QUESTION PRESENTED

This Court has instructed that only Congress may diminish the boundaries of an Indian reservation, and only when its intent is clear and plain. Applying that standard, this Court has found statutes to effect diminishment only in three circumstances: (1) the text provides for a guaranteed sum-certain payment to the tribe in exchange for reservation land: (2) the statute includes a provision restoring reservation land to the public domain; or (3) the negotiations and legislative history surrounding the statute unequivocally support diminishment.

In the decision below, a divided Tenth Circuit panel blazed a fourth path that undervalues sovereignty interests and gives short shrift to this Court's most recent decision on the question. Based primarily on language of cession, unaccompanied by any sum-certain or public-domain language or unequivocal legislative history, the court of appeals concluded that a 1905 Act of Congress diminished the Wind River Reservation in Wyoming—home to two Indian tribes—to one-third its size. In reaching that result, the Tenth Circuit overruled two federal agencies that concluded that the 1905 Act did not diminish the Reservation, split from the Eighth Circuit on virtually identical statutory text, and, in the dissenting judge's view, "create[d] a new low-water mark in diminishment jurisprudence."

The question presented is:

Whether Congress evinced a clear and plain intent in the 1905 Act to diminish the Wind River Reservation by nearly two-thirds simply by using language of cession.

PARTIES TO THE PROCEEDING

Petitioner Northern Arapaho Tribe intervened as a respondent in the court of appeals.

Respondents State of Wyoming and the Wyoming Farm Bureau Federation were petitioners in the court of appeals.

Non-intervenor respondents in the court of appeals included the U.S. Environmental Protection Agency; E. Scott Pruitt, in his official capacity as Administrator of the U.S. Environmental Protection Agency; and Doug Benevento, in his official capacity as Acting Region 8 Administrator of the U.S. Environmental Protection Agency.

Additional intervenors in the court of appeals were the Eastern Shoshone Tribe; the City of Riverton, Wyoming; and Fremont County, Wyoming.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Regulation

Other Authority

PETITION FOR WRIT OF CERTIORARI

This case presents the exceptionally important question whether Congress intended to strip two Indian tribes that live on Wyoming's only Indian reservation of two-thirds of their sovereign territory. A divided Tenth Circuit panel held that the Wind River Reservation—home to the Northern Arapaho and Eastern Shoshone Tribes since the nineteenth century—was "diminished" to one-third its size by a 1905 Act of Congress that provided the Tribes with practically nothing in return. To reach that conclusion, the panel overruled contrary judgments from two federal agencies, departed from this Court's precedent, and split from the Eighth Circuit. As the dissenting judge correctly observed, the decision below "creates a new low-water mark in diminishment jurisprudence." App.41 (Lucero, J., dissenting). The need for certiorari could not be more pressing.

This case concerns the Wind River Reservation in Wyoming, which was established by federal treaty in 1868. Over the next several decades, the Tribes twice permanently relinquished portions of their land to the United States in exchange for fixed payments. Those statutes used language precisely suited to diminishment and plainly and unambiguously modified the United States' treaty obligations and reduced the sovereign territory of the Tribes. Thus, in 1874, Congress ratified a statute that "change[d] the southern limit" of the Reservation in exchange for a sum-certain. App.274. In 1897, in exchange for another sum-certain, the Tribes agreed to "forever and absolutely" relinquish another segment of the

Reservation, most of which was then "declared to be public lands of the United States." App.267.

But in 1905, Congress took a different tack and passed a statute in which the Tribes would "cede, grant, and relinquish" two-thirds of their land to the United States as a "trustee," who would attempt to sell parcels of the land to settlers and "pay over to [the Tribes] proceeds from the sale[s] thereof only as received." App.252; App.263. That approach—which provided zero guaranteed compensation to the Tribes and, in fact, produced few land sales and little revenue for the Tribes—was consistent with contemporaneous "surplus land acts," which guaranteed no lump-sum payment to Tribes and "did no more than open the way for non-Indian settlers to own land on the reservation," *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962), without "diminish[ing] the reservation's boundaries," *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016).

For a century, the Tribes understood their Reservation to be undiminished by the 1905 Act. And in 2008, they applied to the Environmental Protection Agency ("EPA") to manage certain air-quality programs affecting that land. After Wyoming and others objected that the 1905 Act diminished the Reservation, EPA and the Interior Department exhaustively considered the matter, and both agreed that the 1905 Act did no such thing. But a Tenth Circuit panel reached the opposite result in a divided decision. According to the majority, the Tribes relinquished the vast majority of their sovereign territory for the promise (and receipt) of almost nothing.

The Tenth Circuit's decision is untenable. This Court has admonished that only Congress may diminish an Indian reservation and only when its intent is "clear and plain." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The Tenth Circuit's determination that Congress acted with such intent here flouts 100 years of diminishment jurisprudence, from this Court's 1920 decision in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to this Court's 2016 decision in *Parker*. Moreover, the Tenth Circuit's conclusion conflicts with an Eighth Circuit decision holding that a materially identical statute did not diminish a reservation. *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987). Although that split is reason enough to grant certiorari, the decision below conflicts with the conclusions of two federal agencies and is profoundly wrong. Indeed, this case is little different from *Parker*, decided just two Terms ago, but barely mentioned by the Tenth Circuit. As in *Parker*, earlier acts used distinct language that clearly evinced an intent to diminish. But, as in *Parker*, the relevant act merely opened the reservation to such land sales as the market would bear, which is insufficient to overturn previous treaty promises or sever the Tribes' sovereignty.

This Court stated long ago that "Indians have rights of occupancy to their lands" that are "sacred." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831). No Indian tribe should be deprived of its sovereign territory without this Court's review, and certainly not under novel reasoning incompatible with the precedents of this Court and other courts of appeals. Certiorari is plainly warranted.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 875 F.3d 505 and reproduced at App.1-55. The EPA decision at issue before the Tenth Circuit is reported at 78 Fed. Reg. 76,829 (Dec. 19, 2013) and reproduced at App.59-64. The legal analyses of EPA and the Interior Department are unreported but reproduced at App.65-251.

JURISDICTION

The Tenth Circuit issued its opinion on February 22, 2017. On November 7, 2017, the Tenth Circuit denied a petition for rehearing en banc, but the panel *sua sponte* granted panel rehearing and issued an amended opinion. On January 17, 2018, Justice Sotomayor extended the time for filing this petition to and including March 7, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The 1905 Act, 33 Stat. 1016, the 1897 Thermopolis Purchase Act, 30 Stat. 93, and the 1874 Lander Purchase Act, 18 Stat. 291, are reproduced at App.252-75.

STATEMENT OF THE CASE

A. General Principles of Sovereignty and Diminishment

"In the latter half of the nineteenth century, large sections of the western States and Territories were set aside for Indian reservations." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). As the century progressed, the westward migration of settlers, *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 341 (1945); App.4, the "need for cash and direct

assistance," *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 431 (1975), and other factors led tribes to permanently relinquish reservation land in exchange for fixed payments. This is known as "diminishment," which "freed [Indian] land of its reservation status." *Hagen v. Utah*, 510 U.S. 399, 409 (1994).

Toward the beginning of the twentieth century, Congress began to alter its approach toward Indian lands. "Congress passed a series of surplus land acts … to force Indians onto individual allotments carved out of reservations and to open up unallotted lands"—*i.e.*, "surplus" lands—"for non-Indian settlement." *Solem*, 465 U.S. at 466-67. The language of these surplus lands act differed, with some obligating the United States to make immediate sum-certain payments, and others simply opening land to settlement with tribes paid only to the extent of sales to settlers by the United States as trustee. "[I]t is settled law that some surplus land acts diminished reservations," while "other surplus land acts did not." *Id.* at 469.

"The framework … to determine whether an Indian reservation has been diminished is well settled." *Parker*, 136 S. Ct. at 1078. "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. Thus, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* "The mere fact that a reservation has been opened to

settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977).

The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton*, 522 U.S. at 343. Because diminishment simultaneously reduces a tribe's sovereign territory and modifies earlier treaty promises of the United States, this Court has long required Congress' intent to diminish to be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738-39 (1986). Accordingly, courts begin with a "presumption that Congress did not intend to diminish the reservation," *Solem*, 465 U.S. at 481, and "any doubtful expressions … should be resolved in the Indians' favor," *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

This Court employs a three-factor framework to discern whether Congress intended diminishment. The starting point is the statutory text, which provides the "most probative evidence." *Parker*, 136 S. Ct. at 1079. Language "providing for the total surrender of tribal claims in exchange for a fixed payment" or a "provision restoring portions of a reservation to 'the public domain'" are "hallmarks" of diminishment. *Id.* Second, courts examine the "history surrounding the passage of the … Act." *Id.* at 1080. Because the statutory language is paramount, however, the historical evidence must "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. Third, courts "consider both the subsequent

demographic history of opened lands … as well as the United States' 'treatment of the affected areas.'" *Parker*, 136 S. Ct. at 1081. As with the legislative history, evidence regarding the subsequent treatment of the land must "unequivocally" support diminishment. *Id.* at 1080. This Court "has never relied solely on" the subsequent treatment of land to find diminishment. *Id.* at 1081.

B. The Wind River Reservation and the 1905 Act

The Wind River Reservation was established in present-day Wyoming in 1868 by a federal treaty between the Eastern Shoshone Tribe and the United States. *See* Fort Bridger Treaty, 15 Stat. 673 (1868). The 1868 Treaty guaranteed the Eastern Shoshone approximately 3 million acres of land as "their permanent home" and precluded "permanent settlement elsewhere," but it also permitted "other friendly Tribes or individual Indians" to settle on the Reservation "as from time to time [the Eastern Shoshone] may be willing, with the consent of the United States, to admit amongst them." 1868 Treaty, arts. II, IV. In 1878, pursuant to this provision, the Northern Arapaho Tribe joined the Eastern Shoshone on the Reservation, where they have a sovereign "equal right" to reservation land, *see* App.5-6; App.72-73; JA366,[1] after their first reservation, which spanned four states, had been overrun by settlers and the Tribe brutally attacked by the U.S. military.[2] The

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

[2] In 1864, for example, the U.S. Army attacked, killed, and mutilated unarmed Tribe members—largely women and children—in what is known as the Sand Creek Massacre. *See*

Reservation is now the only sovereign home for the Northern Arapaho and the only Indian reservation in Wyoming today.

In the decades following the 1868 Treaty, the Tribes negotiated two land transactions with the federal government that were ultimately enshrined in federal statutes. The first is known as the "Lander Purchase," which Congress ratified in 1874. *See* App.273-75. In the Lander Purchase, the Eastern Shoshone agreed to relinquish approximately 700,000 acres of Reservation land to the United States in exchange for a fixed sum of $25,000. App.274-75. As the Lander Purchase Act explains, the statute was intended to "*change the southern limit of said reservation*." App.274 (emphasis added). The Lander Purchase indisputably diminished the Wind River Reservation.

Subsequently, the federal government pursued a much larger swath of Reservation land north of the Big Wind River. But those attempts failed. In 1891, a federal commission offered a fixed sum of $600,000 to the Tribes if they agreed to "cede, convey, transfer, relinquish and surrender, forever and absolutely … all [the Tribes'] right, title, and interest, of every kind and character, in and to the lands." App.22. The Northern Arapaho squarely opposed the offer, and Congress declined to ratify it. JA375-76. In 1893, Congress dispatched another commission with a fixed-sum offer of $750,000 for the same land. App.22. "Despite the

---

Flute v. United States, 808 F.3d 1234, 1237-39 (10th Cir. 2015) (noting that "although the United States promised to pay reparations to the survivors … it never fulfilled its obligations").

higher offer, the Tribes refused three different proposals, and no agreement was reached." App.22.

In 1897, the Tribes agreed to a far more modest agreement known as the "Thermopolis Purchase," in which they sold approximately 55,000 acres of land to the federal government. Congress ratified that agreement in 1897. *See* App.267-72 As with the Lander Purchase Act, the intent to diminish the Reservation was clear: The Tribes agreed to "cede, convey, transfer relinquish, and surrender *forever and absolutely* all their right, title, and interest" in the land in exchange for $60,000. App.267-68 (emphasis added). Moreover, when Congress ratified the Thermopolis Purchase, the government relinquished "one mile square" of the land "unto the State of Wyoming," and the remainder was "declared to be public lands of the United States." App.272. The Thermopolis Purchase indisputably diminished the Wind River Reservation.

In 1904, Congress adopted a different approach toward the lands north of the Big Wind River. Congress no longer sought to acquire the land outright in exchange for a sum-certain, but instead proposed opening the land to entry by homesteaders. As the federal delegate explained when opening the negotiations, "My friends, I am sent here at this time … to present to you a proposition for the opening of certain p[or]tions of your reservation for settlement by the whites." JA510. Rather than pay the Tribes "lump sum consideration" for the lands, the delegate continued, the Tribes would make "the surplus lands[] of [the] reservation open to settlement" and, in turn, would receive "the proceeds of the sale of the land" to

the extent that the federal government was able to sell plots to individual settlers. JA510-16. That approach was consistent with contemporaneous surplus land acts, which "did no more than open the way for non-Indian settlers to own land on the reservation," *Seymour*, 368 U.S. at 356, without "diminish[ing] the reservation's boundaries," *Parker*, 136 S. Ct. at 1080.

Following these discussions, Congress passed the 1905 Act at issue here.[3] The 1905 Act contained no sum-certain payment to the Tribes and no language restoring lands to the public domain. *See* App.252-66. Instead, the Act provided that the Tribes would "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation" (approximately 1.5 million acres), except lands south of the Big Wind River and west of the Popo Agie River (approximately 800,000 acres). App.252-53. The government would "act as trustee for said Indians to dispose of said lands and … pay over to them the proceeds received from the sale thereof only as received,"App.263, with certain amounts to be allocated for "an irrigation system," "live stock," a "school fund," and other purposes, App.256-57. The 1905 Act emphasizes, however, that the government was not bound "to purchase any portion of the lands … or to guarantee to find purchasers." App.263.

The 1905 Act included other relevant provisions. One proviso discusses the rights of a prominent mineral leaseholder on the Reservation named Asmus

---

[3] Federal negotiators never obtained Northern Arapaho consent for the 1904 agreement. App.79 n.6.

Boysen, whose lease from the Tribes included a clause providing that it "shall terminate" in "the event of the extinguishment … of the Indian title to the lands covered." H.R. Rep. No. 58-3700, pt. 2, at 3 (1905). After a debate about the effect of the 1905 Act on the leasehold and assurances that the Act would not terminate the lease, Congress included a proviso expressly stating that the Act would not "impair the rights" of Boysen. App.262. In addition, the 1905 Act included a provision allowing tribal members who had selected allotments on the opened lands to "have the same allotted and confirmed to him or her," thereby ensuring the Tribes could maintain a physical presence on the opened lands. App.253. Furthermore, the 1905 Act omitted certain provisions Congress routinely used in other statutes diminishing Indian reservations, such as a "school lands provision" reserving sections of the land for common schools. *See Yankton*, 522 U.S. at 349-50.

The individual land sales to settlers envisioned by the 1905 Act largely failed to materialize. Fewer than 200,000 of the nearly 1.5 million acres opened by the 1905 Act were sold, and the Tribes received only modest proceeds, far less than the $600,000 and $750,000 offered and rejected for a lump-sum sale. App.180. Today, more than 75 percent of the land covered by the 1905 Act is land held in trust by the United States for the benefit of the Tribes and their members. App.180.

C. The EPA Proceedings

The Clean Air Act authorizes EPA to treat Indian tribes like states in managing certain air-quality programs in areas under tribal jurisdiction. *See* 42

U.S.C. §7601(d); 40 C.F.R. Part 49. To qualify, interested tribes must submit applications to EPA describing the areas over which they claim jurisdiction. App.7.

In 2008, the Northern Arapaho and Eastern Shoshone filed an application with EPA concerning all lands encompassed by the 1868 Treaty minus those permanently relinquished in the 1874 Lander Purchase and the 1897 Thermopolis Purchase. App.7. The state of Wyoming and the Wyoming Farm Bureau Federation—respondents here—objected, contending that the 1905 Act diminished the Reservation. App.8.

In 2009, EPA sought an independent analysis from the Interior Department ("Interior"). In a detailed opinion letter, Interior found no diminishment. *See* App.201-51. As Interior's opinion explained, "[u]nlike the Lander Purchase and the Thermopolis Purchase, the language of the 1905 Act, its legislative history, and the circumstances surrounding its enactment do not reveal clear congressional intent to diminish and alter the exterior boundaries of the Wind River Reservation." App.251.

EPA agreed with Interior in its own exhaustive 83-page legal analysis. *See* App.65-200. Beginning with the 1905 Act's text, EPA similarly observed that, "particularly in comparison with the 1874 Lander and 1897 Thermopolis Purchases Acts, … the operative language does not evince clear Congressional intent to also alter and diminish the Reservation boundaries, nor was it necessary to do so in order to achieve the Act's main purpose of opening the lands to settlement." App.115-16. EPA emphasized that the "1905 Act did not provide for a fixed sum certain

payment to the Tribes in exchange for the lands," but instead "predicated payment to the Tribes on prospective sales to homesteaders, and the United States expressly declined to commit to conduct any such sales." App.116. EPA thought it unlikely that Congress intended "to immediately reduce the Reservation by more than half without any guarantee that the Tribes would ever receive compensation in consideration for those lands." App.116. EPA noted that the United States had previously taken the position that the 1905 Act did not evince clear intent to diminish. App.117; *see In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys. (Big Horn I)*, 753 P.2d 76 (Wyo. 1988).

EPA further concluded that "the circumstances surrounding the 1905 Act … do not support a finding of clear Congressional intent that the Act would permanently sever and alter the exterior boundaries of the Reservation." App.119. For example, EPA noted that the federal delegate who met with the Tribes "repeatedly referred to the bill as opening the Reservation to settlement by non-Indians, and did not speak in terms of altering the 1868 Treaty terms with respect to the exterior boundaries of the Reservation." App.120. EPA likewise observed that the 1905 Act expressly protected the rights of leaseholder Boysen, App.129-34, and it concluded from its review of the legislative history that the "prevailing view" within Congress was that the "1905 Act would retain a Tribal trust interest in the opened lands and that those lands would not be returned to the public domain," App.133. In addition, EPA thought Congress' "explicit deletion" of the school lands provision, App.137, "indicate[d] Congress' understanding that the opened area would

retain its Reservation character," App.135. Finally, EPA concluded that events subsequent to the 1905 Act did not clearly demonstrate that the Reservation had been diminished. App.147-99.

In light of its analysis, EPA approved the Tribes' application claiming jurisdiction over the lands in the 1905 Act. App.59.

D. The Tenth Circuit's Decision

Respondents petitioned for review of EPA's boundary determination. *See* 42 U.S.C. §7607(b)(1). In a sharply divided opinion, the Tenth Circuit vacated EPA's determination and concluded that the 1905 Act had diminished the Wind River Reservation.

The majority acknowledged that Congress must "clearly express[]" its intent to diminish, and diminishment "'will not be lightly inferred.'" App.9. The majority nevertheless concluded the 1905 Act cleared that high bar. The majority first noted that the 1905 Act's language provided that the Tribes would "cede, grant, and relinquish to the United States, all right, title, and interest" in the land in dispute. App.12. The majority deemed this language "'precisely suited' to diminishment," App.12, and "[t]he lack of a sum certain payment and the inclusion of a trusteeship provision do not compel a different conclusion," App.21. According to the majority, sum-certain language was unnecessary because the 1905 Act included a "hybrid payment scheme," in "which different amounts derived from the proceeds of sales of the ceded lands are allocated to specific funds," such as for the purchase of livestock. App.17-18. Furthermore, the majority continued, the absence of any language restoring the disputed lands to the

public domain was irrelevant, because "whether lands became 'public lands' … is 'logically separate' from diminishment." App.20. At bottom, the majority concluded, "Congress's use of the words 'cede, grant, and relinquish' can only indicate one thing—a diminished reservation." App.16.

Next, the majority examined the historical context surrounding the 1905 Act's passage. The majority acknowledged that only "'unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished.'" App.21. But the court never identified any such "unequivocal evidence," and believed that it "need not search for" it, "for the statute contains express language of cession." App.21. The majority did mention congressional efforts to diminish the Wind River Reservation in 1891 and afterwards and related statements. The majority conceded that none of the statements concerned the 1905 Act, but it deemed the unenacted 1891 proposal a "predicate" for the 1905 Act. App.29. Drawing an analogy to *Rosebud Sioux Tribe v. Kneip*, the majority suggested that "Congress's consistent attempts at the turn of the century to purchase the disputed land compel the conclusion that this intent continued through the passage of the 1905 Act." App.29-31. The majority acknowledged that the Boysen provision and the school lands provision "may cut against … a finding of diminishment," but it reasoned those provisions could not "defeat" a finding of diminishment. App.30 n.14.

Finally, the majority examined the history following the enactment of the 1905 Act. The court was "unable to discern clear congressional intent from

the subsequent treatment" and thus found "little evidentiary value" in it. App.32.

Judge Lucero dissented, deeming the majority's opinion "a new low-water mark in diminishment jurisprudence." App.41. Judge Lucero first observed that the 1905 Act did not provide the Tribes with a lump-sum payment or "restore the lands at issue to the public domain." App.41-43. Instead, "the lands at issue here were held in trust under the Act" and therefore "remained Indian lands," as this Court had concluded in 1920 when interpreting a similar statute. App.43 (citing *Ash Sheep*, 252 U.S. 159). In light of the absence of either sum-certain or public-domain language, Judge Lucero continued, "we could easily interpret the language of cession contained in the 1905 Act as merely opening portions of the Wind River Reservation to settlement," as the Eighth Circuit concluded when addressing a materially identical statute. App.44-45 (citing *Grey Bear*, 828 F.2d 1286). Judge Lucero thus faulted the majority for "reach[ing] a conclusion squarely opposite to one of our sibling circuits, creating a needless circuit split." App.45.

Judge Lucero next explained that the "surrounding circumstances" did not support diminishment, let alone "unequivocally." App.46. For example, "[b]y striking the provision" regarding school lands, "Congress recognized that Wyoming could [not] take … lands *on the reservation*." App.48. Likewise, the Boysen provision demonstrated "that the opened areas would retain their reservation status." App.49. And Judge Lucero rejected the majority's reliance on the unenacted proposals from the 1890s, because those failed negotiations took place "nearly a

generation prior to the passage of the 1905 Act." App.50. "At best," Judge Lucero concluded, "the historical record is mixed regarding Congress' intent," and therefore "it is insufficient to overcome ambiguity in the statutory text." App.52.

Judge Lucero did agree with the majority on one issue: "the post-Act record is so muddled it does not provide evidence of clear congressional intent." App.53. Accordingly, in the absence of clear evidence of Congress' intent to diminish, Judge Lucero concluded "the 1905 Act did not diminish the Wind River Reservation." App.55.

Both Tribes filed petitions for rehearing en banc. The court denied the petitions after modifying the majority and dissenting opinions.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision strips the Northern Arapaho and Eastern Shoshone Tribes of a substantial portion of their sovereign homeland—a devastating holding that conflicts with this Court's precedent, a published Eighth Circuit decision, and the judgments of two federal agencies. By any measure, the Tenth Circuit's highly consequential and deeply flawed holding warrants this Court's review.

The Tenth Circuit's decision hinges on the notion that the phrase "cede, grant, and relinquish" unaccompanied by sum-certain or public-domain language is "precisely suited" to and "can only indicate … diminishment. App.12; App.16. That proposition is irreconcilable with this Court's precedents. This Court has *never* held that "cession" language alone supports diminishment. On the contrary, this Court has found diminishment under prong one of the *Solem*

framework only when the relevant statute provided a sum-certain payment in exchange for reservation lands or included language that restores reservation lands to the public domain. *See Yankton*, 522 U.S. at 344; *Hagen*, 510 U.S. at 412; *Decoteau*, 420 U.S. at 445. Indeed, the only case finding diminishment in the absence of sum-certain or public-domain language, *see Rosebud*, 430 U.S. at 615, did so on the basis of unequivocal legislative history supporting diminishment under prong two, *see Solem*, 465 U.S. at 469 n.10. That is plainly not the case here, as the panel not only failed to find such unequivocal history, but disclaimed the need even to look for it.

The decision below thus represents an unprecedented departure from 100 years of diminishment jurisprudence, including the many cases underscoring that the absence of sum-certain transfers and the presence of the sort of pay-as-you-go language included in the 1905 Act is indicative of congressional intent merely to open reservation lands to settlement, and not a reflection of Congress' intent to extinguish tribal sovereignty over long-held sacred lands secured to the Tribe by prior treaty. It is therefore no surprise that the decision below has "create[d] a needless circuit split" with the Eighth Circuit, which found no diminishment after scrutinizing materially indistinguishable statutory text. *See Grey Bear*, 828 F.2d at 1290.

The Tenth Circuit's bottom-line conclusion is deeply flawed. If the Court had not given talismanic status to the word "cede," it would have recognized multiple textual indications that Congress did *not* intend to diminish the Reservation. Both the Boysen

proviso and the absence of school-land provisions are inconsistent with a clear intent to diminish. And the most striking textual feature of the 1905 Act is its contrast with two earlier acts that plainly diminished the Wind River Reservation using language—referencing sums certain, the public domain, or both—that actually is perfectly suited for diminishment. As this Court emphasized in *Parker*, such a "change in language" is significant. 136 S. Ct. at 1079-80. But the Tenth Circuit barely mentioned *Parker*, even though it closely resembles this case and is this Court's last word on diminishment. The decision below mistakenly strips the Tribes of their sovereign territory and fully merits this Court's review.

I. The Tenth Circuit's Decision Conflicts With Precedent From This Court And The Eighth Circuit.

A. The operative language of the 1905 Act provides that the Tribes "hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within said reservation," except for roughly 800,000 acres in the southwestern part of the reservation. App.252. In return, the federal government offered no lump-sum payment, but would serve as "trustee" for the Tribes, sell individual plots of the land to settlers, and pay the Tribes "the proceeds received from the sale[s]." App.263. Those proceeds, if they materialized, would then be channeled to specific causes, including the creation of "an irrigation system," the purchase of "live stock," and the development a "school fund." App.256-57. The statute underscored that the United States was

not guaranteeing that sales would occur or that any minimum level of proceeds would be transferred.

In the Tenth Circuit's view, this statutory text "aligns with the type of language this Court has called 'precisely suited' to diminishment." App.12 (quoting *Yankton*, 522 U.S. at 344). The Tenth Circuit reasoned that "Congress's use of the words 'cede, grant, and relinquish' can *only* indicate … a diminished reservation." App.16 (emphasis added). That attribution of dispositive significance to language of cession, unaccompanied by sum-certain or public-domain references, is quite plainly wrong. The view has no support in this Court's diminishment jurisprudence and conflicts with the whole line of this Court's cases. This Court has concluded that an Act of Congress diminished the boundaries of an Indian reservation only when (1) the statutory text guaranteed the tribe a sum-certain payment in exchange for reservation lands; (2) the statutory text made clear that the reservation lands would be restored to the public domain; or (3) there is unequivocal evidence supporting diminishment in the contemporaneous legislative and historical record.

Indeed, the very case cited by the Tenth Circuit to support the notion that the 1905 Act is "precisely suited" to diminishment refutes it. In *South Dakota v. Yankton Sioux*, this Court examined a 1904 statute providing that a tribe would "cede, sell, relinquish, and convey" certain lands to the United States in exchange for "a fixed payment of $600,000." 522 U.S. at 344. The Court concluded that "[t]his 'cession' *and 'sum certain' language* is 'precisely suited' to terminating reservation status" and thus that the

Yankton Sioux reservation had been diminished. *Id.* (emphasis added). Likewise, in *DeCoteau v. District County Court*, the Court examined an 1891 statute providing that a tribe would "cede, sell, relinquish, and convey to the United States" certain lands in exchange for a "sum certain" payment of $2.50 per acre transferred to the United States. 420 U.S. at 445, 448. The Court explained that the negotiations preceding the agreement "show plainly that the Indians were willing to convey *to the Government, for a sum certain*, all of their interest in all of their unallotted lands," and "[t]he Agreement's language … was precisely suited to this purpose." *Id.* at 445 (emphasis added). The Court therefore found diminishment.

The difference between sum-certain language and the pay-as-you-go language included in the 1905 Act is critical, because pay-as-you-go language, even when accompanied by language like "cede" or "relinquish," is "precisely suited" to opening a reservation to settlement to the extent of later hoped-for sales to settlers, and is actually ill-suited to a definitive and immediate termination of reservation lands. Indeed, a number of this Court's decisions have made clear that a conditional promise to transfer proceeds from whatever land sales may occur is inconsistent with congressional intent to permanently diminish a reservation.

Most recently, in *Parker*, the Court examined an 1882 statute that opened reservation lands for settlement without guaranteeing payment. As the Court explained, "rather than the Tribe's receiving a fixed sum for all of the disputed lands, the Tribe's

profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land." *Parker*, 136 S. Ct. at 1079. The Court concluded that "it is clear that the 1882 Act falls into [the] category of surplus land Acts … that 'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.'" *Id.* The same reasoning applied in *Solem v. Bartlett*, *Seymour v. Superintendent,* and *Mattz v. Arnett*, 412 U.S. 481 (1973)—all of which involved statutes containing pay-as-you-go language, none of which was found to diminish a reservation. *See Solem*, 465 U.S. at 473 (the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the [government] was simply being authorized to act as the Tribe's sales agent"); *DeCoteau*, 420 U.S. at 448 (noting that statutes in *Seymour* and *Mattz* could not support diminishment because they "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit"). Needless to say, none of those cases ever recognized that "hybrid payment scheme[s]" would render the absence of sum-certain payments irrelevant, App.17, for a "hybrid payment scheme," after all, is merely a "euphemism" for a "conditional promise to pay," App.42 (Lucero, J., dissenting).

To be sure, "cession" language may be suggestive of diminishment—even "strongly suggest[ive]," *Solem*, 465 U.S. at 470—but contrary to the Tenth Circuit, absent sum-certain or public-domain language, this Court has never deemed such language as a dispositive indicator of an intent to diminish. For

example, in *Ash Sheep Co. v. United States*—one of this Court's earliest precedents interpreting a surplus land act—the Court concluded that disputed portions of a reservation remained "Indian lands" and did not become "public lands" (a holding closely related to non-diminishment) even though the tribe "*ceded, granted and relinquished*" title to the United States. 252 U.S. at 164-66 (emphasis added). Likewise, in *Rosebud Sioux Tribe v. Kneip*, the Court examined a 1904 statute providing that a tribe would "cede, surrender, grant, and convey to the United States" certain portions of their reservation in exchange for the proceeds from the sale of opened lands, rather than receive a sum-certain payment. 430 U.S. at 597. Although the Court found diminishment in *Rosebud*, it did so based on "unequivocal" evidence of diminishment in the contemporaneous historical record—*not* because of clear and plain statutory text. *See Solem* 465 U.S. at 469 n.10 (explaining that the statutory text in *Rosebud* failed to "clearly sever[] the Tribe from its interest in the unalloted open lands," and noting that *Rosebud* found diminishment only because "the circumstances surrounding the passage" of the statute "unequivocally demonstrated that Congress meant … to diminish the Rosebud Reservation"); *Big Horn I*, 753 P.2d at 117 (affirming special master's decision distinguishing *Rosebud*); JA752.

In this case, the contemporaneous historical record does not include unequivocal evidence of diminishment, and the Tenth Circuit has effectively conceded as much. *See, e.g.*, App.30 n.14 (noting that some legislative history "cut[s] against" diminishment").

Nor does the 1905 Act restore any reservation lands to the public domain, which (outside of those cases involving sum-certain payments) is the *only* other instance in which this Court has been willing to find that statutory text diminished an Indian reservation. *See Hagen*, 510 U.S. at 414. As with the absence of sum-certain language, the failure to reference the return of lands to the public domain is not a triviality or a search for magic words. Just as the sum-certain language indicates a definitive one-time transfer of sovereignty, a reference to "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Id.* But the language of cession *without* sum-certain or public-domain references is far more consistent with opening up the reservation for settlement, and certainly does not effect an unambiguous surrender of sovereignty. And if this Court's cases make one principle clear, it is that only Congress may work a diminishment, and only if it does so clearly.

In short, the Tenth Circuit's holding turns on its novel reasoning that cession language, by itself, "can only indicate … diminishment." That unprecedented determination, which infringed the sovereignty of two Indian tribes, readily warrants this Court's review.

B. The pressing need for certiorari is only underscored by the circuit split with the Eighth Circuit. In *United States v. Grey Bear*, the Eighth Circuit examined a statute whose operative statutory language provided that a tribe would "cede, surrender, grant, and convey to the United States" certain

portions of reservation land in exchange for "the proceeds derived from the sale of said lands." 828 F.2d at 1290. The Eighth Circuit acknowledged that "such explicit reference to cession *suggests* that Congress intended to divest the reservation of its land." *Id.* (emphasis added). But *Grey Bear* properly treated this "suggest[ion]" as just that, and did not convert it into an unequivocal indicator of diminishment. Instead, the Eighth Circuit observed that the "Act does not contain an *unconditional* commitment by Congress to pay the tribe for the ceded lands," because—as in *Parker*, *Solem*, *Seymour*, *Mattz*, and this case—"the tribe was guaranteed reimbursement only for the lands actually disposed of by the government." *Id.* The court then found no diminishment because the "'cede, surrender, grant, and convey' language of the 1904 Act, *standing alone, does not evince a clear congressional intent to disestablish* the" reservation; rather, the pay-as-you-go language suggested an intent merely to open the reservation to settlement. *Id.* (emphasis added). The Eighth Circuit then went on to consider the second and third *Solem* factors, ultimately ruling in favor of the tribe and against diminishment.

In a footnote, the Tenth Circuit attempted to distinguish *Grey Bear* on the ground that the "legislative history of the act was quite limited, and the subsequent treatment of the area strongly indicated Congress did not view the act as disestablishing the reservation." App.15 n.7. Those observations apply equally here and fail to distinguish *Grey Bear*. Consistent with the need for diminishment to come from Congress and be clear, to support diminishment, the legislative history must be

"unequivocal." *Parker*, 136 S. Ct. at 1079. Here, the panel majority not only disclaimed a need to search for unequivocal legislative history, but actually acknowledged that some legislative history "cut[s] against" diminishment. App.30 n.14. Subsequent history, the least probative factor, must be even more unequivocal, and here, as in *Grey Bear*, subsequent history underscores that settlement efforts were largely unsuccessful and much of the territory at issue retains its character as Indian land.

In reality, as this Court underscored in *Parker*, the statutory text is the "most probative evidence" of diminishment. *Parker*, 136 S. Ct. at 1079. And, as the Tenth Circuit majority acknowledged, the text of the 1905 Act at issue here is materially identical to that in *Grey Bear*. App.15 n.7. The difference in result is explained not by any material difference in legislative or subsequent history, but by the Tenth Circuit's mistaken view that language of cession, featured in both the 1905 Act and the *Grey Bear* statute, has talismanic import. That view is inconsistent with a whole line of this Court's cases and is certainly in conflict with *Grey Bear*. Given that this Court has granted certiorari in diminishment cases even in the absence of a circuit split, the clean and direct split between the decision below and *Grey Bear* plainly merits this Court's review.

II. The Tenth Circuit's Conclusion That The Wind River Reservation Has Been Diminished Is Profoundly Wrong.

This Court's intervention is further warranted because the result reached below is as wrong as the methodology applied. Application of this Court's

three-factor diminishment framework readily demonstrates that Congress did not clearly and plainly intend to diminish the Wind River Reservation.

A. The Statutory Text Does Not Evince the Requisite Clear and Plain Congressional Intent to Diminish.

The "first and most important step" in determining diminishment is analysis of the statutory text. *Parker*, 136 S. Ct. at 1080. *Parker* reaffirmed the primacy of text, not just because the question is ultimately one of statutory construction, but because the diminishment context demands clear action *by Congress*. The reservation at issue here was established by treaty, and only Congress can abrogate such treaty commitments and only if it does so clearly. *United States v. Celestine*, 215 U.S. 278, 290-91 (1909). Looking for evidence of clear, unequivocal congressional intent in places other than statutory text is a dubious enterprise, as *Parker* reaffirms. *Parker* likewise underscores the importance of differences in statutory language between earlier statutes that indisputably worked a diminishment and later, more equivocal, statutes. *Parker* thus goes a long way to making clear that the 1905 Act did not unequivocally diminish the Wind River Reservation, and yet the Tenth Circuit barely acknowledged its existence, even though it is this Court's most recent word on diminishment.

In *Parker*, an Indian tribe agreed in 1854 to "cede" and "forever relinquish all right and title to" certain lands to the United States in exchange for a fixed payment of $840,000. 136 S. Ct. at 1076. In 1865, the

tribe again agreed to "cede, sell, and convey" additional land to the United States in exchange for a sum-certain of $50,000. *Id.* at 1077. But then "Congress took a different tack," empowering the Secretary of the Interior in 1882 to "open" additional reservation lands for "settlement" and to sell individual plots in a "piecemeal" fashion to settlers. *Id.* at 1077-79. "So rather than the Tribe's receiving a fixed sum for all of the disputed lands, the Tribe's profits were entirely dependent upon how many nonmembers purchased appraised tracts of land." *Id.*

This Court held that the 1882 statute did not diminish the reservation. In reaching that conclusion, the Court emphasized the "change in language" between the 1882 statute and two prior statutes that "terminated the Tribe's jurisdiction over their land 'in unequivocal terms.'" *Id.* at 1080. As the Court explained, there are certain "hallmarks" of diminishment statutes, such as "language 'providing for the total surrender of tribal claims in exchange for a fixed payment'" or "a statutory provision restoring portions of a reservation to the 'public domain.'" *Id.* at 1079. The 1854 and 1865 statutes included such hallmarks, because in those statutes the tribe "ceded the lands and relinquished any claims to them in exchange for a fixed sum." *Id.* at 1080. But the 1882 statute "bore none of these hallmarks," and because "Congress legislated against the backdrop" of those prior statutes, the Court refused to infer a congressional intent to diminish when Congress deliberately chose to "speak[] in much different terms." *Id.* at 1079-80.

That reasoning perfectly fits this case. The 1874 Lander Purchase Act, which all agree diminished the Reservation, expressly provided for a sum-certain payment of $25,000 in exchange for tribal agreement "*to change the southern limit of said reservation*." App.274-75 (emphasis added). Similarly, the 1897 Thermopolis Purchase Act provided that the Tribes "hereby cede, convey, transfer, relinquish and *surrender, forever and absolutely all their right, title, and interest of every kind and character* in" the cited territory, in exchange for a sum-certain payment of $60,000. App.267-68 (emphasis added). And for good measure, Congress made explicit that the lands encompassed by the Thermopolis Purchase would either be "conveyed unto the State of Wyoming" or declared "public lands of the United States." App.272.

The 1905 Act, however, "took a different tack." *Parker*, 136 S. Ct. at 1077. The Tribes agreed to "cede, grant, and relinquish" the disputed lands to the United States, but only for the United States to "act as trustee … to dispose of said lands" and pay the Tribes "the proceeds received from the sale thereof." The Act did *not* employ either sum-certain or public-domain language. As in *Parker*, Congress' "change in language" from two prior statutes unequivocally diminishing the Reservation undercuts any notion that Congress sought to diminish the Reservation in the 1905 Act. *See* App.251 (Interior reaching same conclusion); App.115-16 (EPA reaching same conclusion); *see also Seymour*, 368 U.S. at 355 (finding no diminishment in 1906 statute after comparing it to 1892 statute that "restor[ed] the North Half of the reservation to the public domain").

The problems with the Tenth Circuit's decision run deeper still, as other textual provisions strongly suggest that Congress sought to *preserve* the boundaries of the Reservation. As EPA, Interior, and Judge Lucero observed, the 1905 Act expressly provided that it would not impair the rights of Asmus Boysen, whose preexisting lease on the Reservation "terminate[d]" "in the event of the extinguishment … of the Indian title to the lands covered." H.R. Rep. No. 58-3700, pt. 2, at 3 (1905). Congress' decision to clarify that Boysen's lease rights were unimpaired underscores that there was no "extinguishment" of Indian title.

Similarly, the 1905 Act expressly permitted members of the Tribes to *remain* on the opened portion of the Reservation, as the statute provided that tribal members who had previously selected allotments on the opened lands could have those allotments "confirmed to him or her." App.253. As this Court explained in *Solem* in similar circumstances, "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S. at 474; *see also Parker*, 136 S. Ct. at 1077 (noting ability of tribal members to take allotments in newly-opened territory).

Finally, it is equally difficult to imagine why Congress would have excluded a school lands provision in the 1905 Act when it routinely included such provisions in statutes diminishing Indian reservations. *See Yankton*, 522 U.S. at 349-50; *Rosebud*, 430 U.S. at 601. As with many states, Wyoming's Enabling Act granted it the right to receive

certain lands from the federal government in order to establish public schools. *See* 26 Stat. 22, 222-23 (1890). But Wyoming disclaimed all right and title to Indian lands, Wyo. Const. art. XXI, §26, and thus it had no need to establish schools in areas under tribal jurisdiction. The absence of a school lands provision thus is just one more reason supporting the conclusion that the 1905 Act "did no more than open the way for non-Indian settlers to own land on the reservation," *Seymour*, 368 U.S. at 356, without "diminish[ing] the reservation's boundaries," *Parker*, 136 S. Ct. at 1080.

B. The Legislative History Does Not Support Diminishment.

The negotiations and legislative history surrounding the statute confirm what the 1905 Act's text makes clear: no "unequivocal" evidence supports diminishment. *Id.* at 1079. The Tenth Circuit never suggested otherwise. And with good reason, for it is impossible to read the historical record and reach the conclusion that Congress unambiguously intended to diminish the Wind River Reservation. Indeed, the federal commission that negotiated with the Tribes in advance of the 1905 Act consistently described the proposal as merely "open[ing]" "certain p[or]tions of [the] reservation" to "settlement," without affecting the Reservation's boundaries. JA510-16. And that explanation is consistent with how many legislators described the 1905 Act. *See, e.g.*, JA3689 ("In brief, the bill provides for the opening to homestead settlement and sale … of about a million and a quarter acres in the Wind River Reservation in central western Wyoming." (statement of Rep. Mondell)); JA3689 ("[A]n agreement has been made with the

Indians on this reservation for its opening and this bill largely follows that agreement." (statement of Rep. Fitzgerald)); JA3692 ("[T]his bill involves the opening to sale and settlement of a reservation embracing something like 1,000,000 acres." (statement of Rep. Hitchcock)). That is hardly unequivocal evidence supporting diminishment.

The historical evidence regarding the Boysen and school lands provisions is equally revealing. As to the former, the legislative history indicates that the Boysen provision was a "principal point" of debate before Congress passed the 1905 Act. App.132. One member raised a concern that Boysen's leasehold would be terminated. The Chairman of the House Committee on Indian Affairs explained that the concern was misplaced because "these lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians," and so the termination clause in Boysen's lease "*does not apply*." App.133. To avoid any possible confusion, however, Congress added the Boysen proviso.

As for the absence of a "school lands provision," the original bill introduced in 1904 regarding the Reservation *included* a school lands provision. *See* JA3678. This provision was struck during the House debate, thus preventing the state from taking land "on the reservation." JA3678. As EPA explained in its analysis, "[t]hese statements in the legislative history and the explicit deletion of the school lands provisions … indicate Congress' understanding that the opened area would remain Reservation land." App.137.

The Tenth Circuit recognized in a footnote that the legislative history surrounding the "inclusion" of the Boysen provision and "removal" of the school lands provision "may cut against … diminishment." App.30 n.14. That should have ended the prong-two debate, as that concession shows the lack of unequivocal history supporting diminishment. *See Parker*, 136 S. Ct. at 1079.

The panel nevertheless advanced the novel theory that the "unratified 1891 agreement with the Tribes served as a predicate for the 1905 Act," which "compel[s] the conclusion" that Congress maintained an intent to diminish the Reservation for the 14-year stretch between 1891 and 1905. App.29-31. As support, the majority relied almost exclusively on *Rosebud*. In *Rosebud*, a tribe agreed in 1901 to relinquish lands to the United States in exchange for a sum-certain, but Congress never ratified the agreement. 430 U.S. at 590. Then, in 1904, Congress enacted a statute in which the tribe transferred land to the United States in exchange for proceeds derived from land sales. *Id.* at 596-97. Among other things, the Court thought it highly probative that Congress included a school lands provision in the 1904 statute, which demonstrated "congressional intent to disestablish." *Id.* at 600-01. The Court therefore concluded that the intent to diminish the reservation was "carried forth" from 1901 to 1904. *Id.* at 587-92.

There are numerous material distinctions between *Rosebud* and this case. Here, unlike *Rosebud*, Congress never ratified the earlier 1891 agreement, and the *Tribes* never consented to it. And unlike the ratified agreement in *Rosebud*, the 1905

Act contains no school lands provision. But the biggest difference is that unlike the three-year gap in *Rosebud*, here there was a fourteen-year chasm between the failed 1891 negotiations and the 1905 Act. Equally important, in the middle of that fourteen-year chasm, Congress enacted the Thermopolis Purchase Act of 1897, which provides a shining example of the kind of language that results in unambiguous diminishment. Thus, *Rosebud* may be instructive when the only efforts to dispose of reservation land occur within a few years and culminate in a single legislative act. But when Congress has enacted multiple prior statutes addressing a reservation, including one subsequent to and closer in time to earlier negotiations, the difference in language in the enacted text emphasized in *Parker* is far more revealing than any supposed similarity in intent between 1891 negotiators and 1905 legislators.

C. The Subsequent Treatment of the Land Further Counsels Against Diminishment.

With neither the statutory text nor the legislative history of the 1905 Act clearly reflecting an intent to diminish, only the strongest and most "unequivocal evidence" of subsequent treatment could support diminishment. *Parker*, 136 S. Ct. at 1080. No such evidence exists, as every decisionmaker involved in these proceedings has concluded that the subsequent evidence is at best mixed.

Indeed, much of the post-enactment evidence militates against diminishment. The effort to open up lands on the reservation for settlement was hardly a success. Only a small fraction of the lands identified

in the 1905 Act were ever sold to non-Indians, and 75 percent of the land remains tribal trust land today. App.54 (Lucero, J., dissenting); *see also Parker*, 136 S. Ct. at 1081 (emphasizing subsequent history "particularly in the years immediately following the opening"). Moreover, "several federal agencies" have exercised jurisdiction over the disputed lands since 1905. App.36. And, following the 1905 Act, Congress appropriated funds to the Bureau of Indian Affairs for irrigation and reclamation projects in the opened areas, which may explain why the Wyoming delegation wanted the lands to retain their Indian character. App.151-55. In addition, the Tenth Circuit has previously referred to the town of Riverton—the largest township on the disputed lands—as being "within the boundaries of the Reservation." App.36. Remarkably, *this* Court, too, has previously indicated that the Reservation includes the lands at issue here. *See United States v. Mazurie*, 419 U.S. 544, 546 (1975) (referring to the "Wind River Reservation['s] … 2,300,000 acres" that "straddle[] the Wind River").

* * *

It is difficult to overstate the stakes of this case. Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and this Court has described the lands they inhabit as "sacred," *Cherokee Nation*, 30 U.S. (5 Pet.) at 48. Accordingly, this Court has regularly granted review in diminishment disputes that threaten to strip Indian tribes of sovereign territory, even in the absence of a circuit split. *See Parker*, 136 S. Ct. 1072; *Hagen*, 510 U.S. 399; *Yankton*,

522 U.S. 329; *Solem*, 465 U.S. 463; *Rosebud*, 430 U.S. 584; *Decoteau*, 420 U.S. 425; *Mattz v. Arnett*, 412 U.S. 481; *Seymour*, 368 U.S. 351; *Ash Sheep*, 252 U.S. 159.

With the clear split between the Eighth and Tenth Circuit interpreting materially indistinguishable text, this case is, *a fortiori*, deserving of plenary review. Indeed, Wyoming has conceded that "this case is of exceptional public importance," Wyo. En Banc Br.1, and understandably so. The Northern Arapaho and Eastern Shoshone have lived on the Wind River Reservation for approximately 150 years, and the Reservation is their only sovereign home. A divided Tenth Circuit has just declared that the Reservation has been reduced to a mere fraction of its historic size through an Act of Congress that promised and provided them practically nothing. That mistaken judgment deserves this Court's plenary review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ANDREW W. BALDWIN
BERTHENIA CROCKER
KELLY A. RUDD
BALDWIN, CROCKER & RUDD, P.C.
P.O. Box 1229
Lander, WY 82520

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 16, 2018