

Nos. 14-9512, 14-9514

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

STATE OF WYOMING,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency; SHAUN MCGRATH, in his official capacity as Region 8 Administrator of the United States Environmental Protection Agency,
Respondents.

THE NORTHERN ARAPAHO TRIBE; EASTERN SHOSHONE TRIBE;
CITY OF RIVERTON, WYOMING; FREMONT COUNTY, WYOMING,
Intervenors.

STATE OF IDAHO; STATE OF ALABAMA; STATE OF COLORADO; STATE OF KANSAS;
STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NORTH DAKOTA;
STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF UTAH;
INDIAN LAW PROFESSORS; RIVERTON MEMORIAL HOSPITAL, LLC,
Amici Curiae.

On Appeal from the United States Environmental Protection Administration,
No. EPA-1-R08-2013-0007

PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

The divided panel decision in this case strips the Northern Arapaho and Eastern Shoshone Tribes of nearly two-thirds of their reservation homeland—a devastating holding that contradicts the judgment of two federal agencies, conflicts with precedent, disregards venerable canons of construction, all but ignores the Supreme Court’s latest word on diminishment, and “creates a new low-water mark in diminishment jurisprudence.” Dis.1. By any measure, the majority’s highly consequential and deeply flawed holding warrants en banc review.

First, the 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 Supreme Court precedent interpreting surplus land acts, from *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to *Nebraska v. Parker*, 136 S. Ct. 1072 (2016)—a unanimous decision rejecting diminishment that the majority mentioned only in passing. The panel’s undue focus on the word “cede” also conflicts with this Court’s emphasis on payment terms, *see Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010), and its caution against creating a “magic words” test of diminishment, *Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005). And the panel’s decision creates a “needless circuit split,” Dis.5,

with an Eighth Circuit decision holding that nearly identical statutory language did *not* diminish, *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987).

Moreover, by attaching talismanic significance to the word “cede,” the panel disregarded highly probative statutory text demonstrating that Congress did not diminish the boundaries of the Wind River Reservation in the 1905 Act. 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 the Supreme Court emphasized in *Parker*, but that the majority entirely overlooked here. The 1905 Act also includes a distinctive provision eliminating ambiguity and preserving the rights of a leaseholder who would have lost his claim had the reservation been diminished—a strong contemporary textual indication that Congress neither intended diminishment nor viewed the Act as doing so unambiguously. These provisions and other textual indications that Congress merely opened the reservation to settlement are critical in light of the long-settled presumption, reaffirmed in *Parker*, that only Congress can diminish a reservation and only if it makes its intent “unequivocal.” 136 S. Ct. at 1080.

Finally, by finding that Congress reduced the Wind River Reservation from more than 2.2 million acres to barely 800,000 acres, the panel adopted a position that expressly conflicts with descriptions of the reservation by the Supreme Court and this Court, that was repudiated by a special master’s exhaustive analysis

subsequently affirmed by the Wyoming Supreme Court, and that two federal agencies rejected in detailed legal opinions. *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); JA4553 (EPA); JA3624 (Department of Interior).

* * *

Rehearing en banc is warranted in light of the stark errors of law in the panel's reasoning and the many conflicts between its decision and other courts' precedents. The majority's position ultimately requires accepting that the Tribes agreed to forever part with almost two-thirds of their sacred homeland in return for the promise (and receipt) of practically nothing. The Northern Arapaho wisely rejected that offer a century ago; it should not be imposed on them today by judicial fiat. At the very least, they should not be subjected to such a serious deprivation of their sovereignty on such unprecedented grounds without rehearing by the full Court.

BACKGROUND

A. The Wind River Reservation

In 1868, the United States and the Eastern Shoshone Tribe created the Wind River Reservation through the Treaty of Fort Bridger. 15 Stat. 673. In 1878, the Northern Arapaho Tribe joined the Eastern Shoshone on the reservation. Op.7.

The Tribes and the federal government subsequently negotiated a series of land transactions. Through the "Lander Purchase" in 1874, the Eastern Shoshone

sold the United States a block of land for a fixed sum of \$25,000. 18 Stat. 291. Through the “Thermopolis Purchase” in 1897, the Tribes sold the federal government land around the Big Horn Hot Springs for a fixed sum of \$60,000. 30 Stat. 93, 94.

In addition, the federal government repeatedly sought to buy a large swath of tribal land north of the Big Wind River. In 1891, a federal commission offered to purchase that land for a fixed sum of \$600,000. JA357. But the Northern Arapaho opposed the offer, and Congress declined to ratify it. JA375-76. In 1893, Congress dispatched another commission, which offered a fixed sum of \$750,000. JA373-92. “Despite the higher offer, the Tribes refused three different proposals, and no agreement was reached.” Op.24.

B. The 1905 Act

In 1904, the federal government took a new approach. Rather than proposing a fixed-sum payment for total surrender of the tribal land, the government proposed “opening ... certain portions of [the] reservation for settlement,” with the Tribes to receive “the proceeds of the sale of the land” to the extent that the federal government as sales agent was able to sell plots to individual settlers. JA510-516. 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 v. Superintendent, 368 U.S. 351, 356 (1962) (emphasis added), without “diminish[ing] the reservation’s boundaries,” *Parker*, 136 S. Ct. at 1080.

After the Tribes purportedly accepted the 1904 offer,¹ Congress passed the 1905 Act. 33 Stat. 1016. The statute 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,” except lands south of the Big Wind River and west of the Popo Agie River. *Id.* 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.” *Id.* at 1018. The Act emphasizes that the government was not bound “to purchase any portion of the lands ... or to guarantee to find purchasers” for the land. *Id.* at 1020.

The individual land sales were a failure. 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. JA4634. Today, more than 75 percent of the land covered by the 1905 Act is tribal trust land. JA4635.

In 1977, more than seven decades after the 1905 Act was passed, Wyoming sued the Tribes in state court, arguing that the Act diminished the reservation and thereby severed the Tribes’ pre-existing water rights in the area covered by the Act.

¹ In fact, negotiators never actually collected a majority of Northern Arapaho signatures. JA1917.

The court appointed former Congressman Teno Roncalio as special master to adjudicate the dispute. After an extensive trial, he concluded that the 1905 Act did not diminish the reservation and that the Tribes were accordingly entitled to their earlier water rights. JA745-54. The Wyoming Supreme Court affirmed over a dissent that would have found the reservation diminished. *Big Horn I*, 753 P.2d at 76, 119. The Supreme Court denied certiorari on the diminishment question. 488 U.S. 1040 (1989).

C. Procedural History

In 2008, the Tribes applied to EPA for authority to be treated as a state for purposes of certain air quality programs affecting the area covered by the 1905 Act. Wyoming objected on the ground that the Act purportedly diminished the reservation. EPA sought an independent analysis from Interior, which concluded in a detailed opinion letter that the Act opened the reservation for settlement but did not change its historic boundaries. JA3624-46. Based on that opinion, as well as its own 83-page legal analysis and an assessment of the factual record, EPA concluded that the 1905 Act left the reservation undiminished. JA4553-646.

Wyoming petitioned for review in this Court. A divided panel vacated EPA's decision, concluding that "Congress's use of the word 'cede'" in the 1905 Act "can only mean one thing—a diminished reservation." Op.18. Although the panel plainly held its decision for the Supreme Court's *Parker* decision, it mentioned the decision

only in passing, even though that unanimous decision rejecting diminishment is highly pertinent to the issues presented here.

Judge Lucero dissented. In his view, the majority's position equating the word "cede" with diminishment represented "a new low-water mark in diminishment jurisprudence" and created "a needless circuit split." Dis.1, 5. 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.

REASONS FOR GRANTING REHEARING EN BANC

The question in this case is whether the 1905 Act diminished the reservation boundaries or merely opened the reservation to settlement by non-tribal members. Given the high stakes for sovereign tribes, diminishment disputes have long presented questions of exceptional importance requiring high-level review. *See Parker, supra; 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); *Seymour, supra*.

As these precedents illustrate, "some surplus land Acts diminished reservations," while "other surplus land Acts did not." *Solem*, 465 U.S. at 469. The standard for diminishment is appropriately high. Congress plainly established the

original boundaries of the reservation and only Congress can diminish the reservation and only through unambiguous language. The state bears “the burden of establishing an express congressional purpose to diminish,” *id.* at 475, which must be “unequivocal,” *Parker*, 136 S. Ct. at 1080. In conducting this analysis, courts “resolve any ambiguities in favor of the Indians” and must “not lightly find diminishment.” *Yankton*, 522 U.S. at 344; *see Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988).

I. The Panel’s Equation Of “Cession” With Diminishment Conflicts With Precedents From The Supreme Court, 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 the roughly 800,000 acres in the southwestern part of the reservation. 33 Stat. 1016. In return, the Tribes would receive “the proceeds received from the sale” of the land. *Id.* at 1018. In other words, “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 (finding no diminishment).

In the majority’s view, this statutory text “aligns with the type of language the Supreme Court has called ‘precisely suited’ to diminishment.” Op.14

(quoting *Yankton*, 522 U.S. at 344). But in fact, the cession-plus-conditional-pay-as-you-go-if-and-only-if-there-are-sales language in the 1905 Act is critically different from the language the Court has called “precisely suited” to diminishing reservation boundaries. Indeed, the very passage of *Yankton* cited by the majority refutes its position. *Yankton* stated that the “‘cession’ and ‘sum certain’ language” in the statute there was “‘precisely suited’ to terminating reservation status,” not that cession language *alone* would be precisely suited to such a purpose. 522 U.S. at 344 (emphasis added); accord *Decoteau*, 420 U.S. at 445. The difference 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.

The majority’s error, however, runs deeper. The panel issued the broad holding that “Congress’s use of the word ‘cede’ can only mean one thing—a diminished reservation.” Op.18. Attaching dispositive significance to the word “cede,” however, is squarely foreclosed by multiple Supreme Court decisions. In *Solem*, for example, the Court found such language strongly suggestive of diminishment, but not dispositive. 465 U.S. at 470. And the Supreme Court would

have little need for the three-part test of *Solem* and *Parker* if “cede” were a magic word sufficient for diminishment.²

Indeed, contrary to the majority’s position, one of the Supreme Court’s earliest precedents interpreting a surplus land act found that the reservation had not been converted into public lands (a finding closely related to non-diminishment) even though the tribe “*ceded, granted and relinquished*” title to the United States—almost exactly the same statutory language at issue here. *Ash Sheep*, 252 U.S. at 164-66. The majority’s holding thus not only “creates a new low-water mark in diminishment jurisprudence,” Dis.1, but squarely conflicts with multiple Supreme Court precedents—a paradigmatic basis for en banc rehearing, Fed. R. App. P. 35(b)(1)(A); Tenth Cir. R. 35.1(A).

B. The majority’s position is no more compatible with this Court’s precedents. In *Irby*, for example, this Court explained that “[s]um-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate.” 597 F.3d at 1123. The majority’s position ignores that sound teaching and elevates other statutory language

² Even in *Rosebud*, a rare case in which the Court found diminishment based on a statute lacking a sum-certain provision or express reference to the public domain, the Court found diminishment only after extensive analysis of the circumstances surrounding the transaction, *see* 430 U.S. at 591-605—analysis that would have been superfluous if cession language *alone* compelled a finding of diminishment.

over the congressional specification of the payment mechanism, even though the latter is far more probative of diminishment as *Irby* recognizes. Similarly, the majority's elevation of cession language to dispositive status is irreconcilable with *Shawnee Tribe*, which described the presence of "unconditional" sum-certain language as the "second half of the equation" in diminishment analysis. 423 F.3d at 1224. The majority's position not only disregards the "second half of the equation" by equating cession alone with diminishment, but also embraces precisely the kind of "magic words" test that *Shawnee Tribe* cautioned against creating. *Id.* at 1222, 1224. These intra-circuit conflicts further counsel in favor of en banc review. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A).

C. Finally, the majority's position conflicts with the Eighth Circuit's decision in *Grey Bear*, 828 F.2d 1286. There, the operative statutory language provided that the tribe would "*cede, surrender, grant, and convey* to the United States all their claim, right, title, and interest in" the unallotted part of the reservation in exchange for "the proceeds derived from the sale of said lands." *Id.* at 1290.

The Eighth Circuit acknowledged (consistent with *Solem*) that "such explicit reference to cession *suggests* that Congress intended to divest the reservation of its land." *Id.* (emphasis added). But *Grey Bear* did not transform this "suggest[ion]" into a dispositive indicator of diminishment. To the contrary, 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 here—“[c]ompensation for the lands was not set at any fixed price and 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, and the pay-as-you-go language suggests an intent merely to open the reservation to settlement. *Id.* (emphasis added).

The majority purported to distinguish *Grey Bear* in a half-sentence in a footnote, Op.17 n.6, but did not dispute the dissent’s observation that its decision created a “circuit split,” Dis.5. That split warrants rehearing by the full Court, *see* Fed. R. App. P. 35(b)(1)(B), particularly in light of the Court’s obligation to “resolve any ambiguities in favor of the Indians,” *Yankton*, 522 U.S. at 344.

II. The Panel’s Disregard Of Highly Probative Textual Evidence Conflicts With *Parker* And Other Binding Precedent.

By treating the cession language in the 1905 Act as dispositive, the panel disregarded other textual evidence that the Supreme Court has found highly probative—including in its recent and unanimous *Parker* decision, which the panel barely mentioned.

A. In *Parker*, the Court concluded that an 1882 surplus land act did not diminish the boundaries of the Omaha Tribe’s reservation. The Court relied on both the text of the 1882 act and the contrast between it and “the text of [two] earlier

treaties” that “terminated the Tribe’s jurisdiction over their land in unequivocal terms,” including sum-certain payment provisions. 136 S. Ct. at 1080. The Court explained that the “change in language” between those earlier treaties and the 1882 act “undermines [the] claim that Congress intended to do the same with the reservation’s boundaries in 1882.” *Id.*; *accord Mattz*, 412 U.S. at 504; *Seymour*, 368 U.S. at 355.

Precisely the same kind of textual evidence was available here, but the panel majority ignored it. The 1874 Lander Purchase Act, which all agree diminished the Wind River Reservation boundaries, expressly provided for a sum-certain payment of \$25,000 in exchange for tribal agreement “*to change the southern limit of said reservation.*” 18 Stat. 292 (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. 30 Stat. 94 (emphasis added).

When Congress “legislated against the backdrop” of those earlier laws in enacting the 1905 Act, it chose markedly different text. *Parker*, 136 S. Ct. at 1080. Unlike the Lander Purchase, the 1905 Act does not expressly “change ... the limit” of the reservation. Unlike the Thermopolis Purchase, the 1905 Act lacks both “surrender forever and absolutely” language and a sum-certain payment. Just as in

Parker, the “change in language” from earlier laws diminishing the Wind River Reservation “undermines [the] claim that Congress intended to do the same with the reservation’s boundaries” in the law at issue here. *Id.*

B. The panel majority also disregarded critical textual evidence in the 1905 Act itself.

First, the 1905 Act not only omits any sum-certain language, but plainly envisions the kind of pay-as-you-go system consistent with an intent to open a reservation for settlement without diminishing the reservation borders. Indeed, the 1905 Act includes distinctive language that unambiguously disclaims any federal government obligation to find interested purchasers or make any payments if settlers do not materialize. 33 Stat. 1020. Unless the Tribes sacrificed nearly two-thirds of their reservation in exchange for a guarantee of nothing, that language is precisely suited to opening up the reservation, and at odds with an unequivocal intent to diminish.

Second, the 1905 Act includes a provision stating that the statute would not “impair the rights” of leaseholder Asmus Boysen. *Id.* Boysen’s lease covering land affected by the 1905 Act included a clause providing that the lease “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 9 (1905). If the 1905 Act had diminished the reservation, Boysen’s lease would have terminated. Congress’ express statement the Act would

not “impair” his lease rights plainly indicates that it did not intend to diminish the reservation, let alone express an unambiguous and unequivocal intent to do so. Rather, as the Eighth Circuit (which then included Wyoming) explained, Congress simply intended “to open up a part of the vast territory occupied by the Indians to settlement.” *Wadsworth v. Boysen*, 148 F. 771, 778 (8th Cir. 1906); *accord Clarke v. Boysen*, 39 F.2d 800, 814 (10th Cir. 1930) (under 1905 Act, lands “ceded to the United States” were “set apart for entry and sale at a future date”).

The panel admitted in a footnote that the Boysen provision “may cut against diminishment.” Op.32 n.13. But the majority offered only the strained explanation that EPA’s reliance on the Boysen provision “was limited to a finding that the” 1905 Act placed the reservation land in trust. *Id.*; *but see* JA4592 (Boysen provision “further supports a view that Congress intended that the ceded lands *would remain part of the Reservation*”) (emphasis added); EPA Br.49 (Boysen provision “support[s] the conclusion that *no diminishment occurred*”) (emphasis added). As EPA, Interior, and the dissent all recognized, the Boysen provision “demonstrates Congress’ understanding the opened areas would *retain their reservation status.*” Dis.9 (emphasis added).

Third, the 1905 Act omitted the “school lands provision” that Congress routinely included in statutes diminishing Indian reservations. *See Yankton*, 522 U.S. at 349-50. The majority recognized that the absence of such a provision “may cut

against diminishment,” but dismissed the point with the citation-free observation that “the record in this case reveals that Wyoming may have received federal land elsewhere in exchange, obviating the need for a school lands provision.” Op.32 n.13.

The majority’s disregard of these relevant statutory provisions underscores the need for en banc review. That is doubly true in light of the venerable rules that only Congress can diminish a reservation and only if it does so “unequivocally.” *Parker*, 136 S. Ct. at 1081. Multiple textual indications—from the pay-as-you-go language and the United States’ express disclaimer of any responsibility to find buyers or make payments absent sales to the Boysen provision and omitted school lands language—cut against diminishment and foreclose an unequivocal intent to diminish. Only a novel and undue focus on “cede” allowed the majority to reach a contrary conclusion.

III. The Panel’s Diminishment Finding Conflicts With Descriptions Of The Reservation In Decisions From The Supreme Court, This Court, And Wyoming Courts.

Finally, the panel’s conclusion that the 1905 Act diminished the Wind River Reservation from more than 2.2 million acres to 800,000 acres conflicts with descriptions and analysis of the reservation in decisions from the Supreme Court, this Court, and Wyoming courts.

For example, in *United States v. Mazurie*, 419 U.S. 544 (1975), the Supreme Court referred to the “Wind River Reservation[’s] ... 2,300,000 acres” that

“straddle[] the Wind River”—a description irreconcilable with the majority’s position here. *Id.* at 546. Likewise, this Court has explained that the “reservation contains some 2,300,000 acres,” *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 901 (10th Cir. 1982), and that “the town of Riverton and other settlements” in the 1905 Act area “are within its boundaries,” *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980).

The panel’s decision also conflicts with the exhaustive diminishment analysis conducted by the special master and upheld by the Wyoming Supreme Court in *Big Horn I*, 753 P.2d 76. Even apart from that adjudication’s res judicata effect, *see* NAT Panel Br.20-28, the conflict between a state court and a federal court on the status of a large swath of the state’s only Indian reservation is a question of exceptional importance that merits en banc review. *Cf. Yankton*, 522 U.S. at 342; *Solem*, 465 U.S. at 466; *Seymour*, 368 U.S. at 353-54 (granting certiorari based on “importance” of diminishment question “to this country’s relationship to its Indian” tribes).

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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July 11, 2017

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this document complies with the word limit of Fed. R. App. P. 35(b)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,898 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in Times New Roman 14 using Microsoft Word 2016.

Dated: July 11, 2017

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- a. All required privacy redactions have been made per 10th Cir. R. 25.5;
- b. If required to file hard copies, that the ECF submission is an exact copy of those documents;
- c. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, updated July 11, 2017, and according to the program is free of viruses.

Dated: July 11, 2017

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

ATTACHMENT 1

February 22, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STATE OF WYOMING, and
WYOMING FARM BUREAU
FEDERATION

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; E. SCOTT
PRUITT, in his official capacity as
Administrator of the United States
Environmental Protection Agency; DEB
THOMAS, in her official capacity as
Acting Region 8 Administrator of the
United States Environmental Protection
Agency,*

Respondents.

THE NORTHERN ARAPAHO TRIBE;
EASTERN SHOSHONE TRIBE; CITY OF
RIVERTON, WYOMING; FREMONT
COUNTY, WYOMING,

Intervenors.

Nos. 14-9512 and 14-9514

* Pursuant to Fed. R. App. P. 43(c)(2) E. Scott Pruitt is substituted for Gina McCarthy as the Administrator of the United States Environmental Protection Agency, and Deb Thomas is substituted for Shaun McGrath as the Acting Region 8 Administrator of the United States Environmental Protection Agency.

STATE OF IDAHO; STATE OF
ALABAMA; STATE OF COLORADO;
STATE OF KANSAS; STATE OF
MONTANA; STATE OF NEBRASKA;
STATE OF NORTH DAKOTA; STATE OF
OKLAHOMA; STATE OF SOUTH
DAKOTA; STATE OF UTAH; INDIAN
LAW PROFESSORS; RIVERTON
MEMORIAL HOSPITAL, LLC,

Amici Curiae.

**PETITION FOR REVIEW OF A FINAL ORDER FROM THE
ENVIRONMENTAL PROTECTION AGENCY
(NO. EPA-1-R08-2013-0007)**

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Before **TYMKOVICH**, Chief Judge, **KELLY**, and **LUCERO**, Circuit Judges.

TYMKOVICH, Chief Judge.

This case requires us to determine whether Congress diminished the boundaries of the Wind River Reservation in Wyoming in 1905. We find that it did.

The Eastern Shoshone and Northern Arapaho Tribes jointly inhabit the Wind River Reservation. The State of Wyoming and the Wyoming Farm Bureau Federation challenge a decision by the Environmental Protection Agency granting the Tribes' application for joint authority to administer certain non-regulatory programs under the Clean Air Act on the Reservation. As part of their application for administrative authority, the Tribes were required to show they possess jurisdiction over the relevant land. In their application, the Tribes described the boundaries of the Wind River Reservation and asserted that most of the land within the original 1868 boundaries fell within their jurisdiction.

Wyoming and others submitted comments to the EPA arguing the Reservation had been diminished in 1905 by act of Congress, and that some land described in the application was no longer within tribal jurisdiction. After review, the EPA determined the Reservation had not been diminished in 1905 and the Tribes retained jurisdiction over the land at issue. Because the EPA decided the Tribes otherwise satisfied Clean Air Act program requirements, it granted their application.

Wyoming and the Farm Bureau appealed the EPA's Reservation boundary determination. Regionally applicable final actions of the EPA are directly appealable to this court. Exercising jurisdiction under 42 U.S.C. § 7607(b)(1), we grant the petition for review, vacate the EPA's boundary determination, and

remand for further proceedings consistent with this opinion. We find by its 1905 legislation, Congress evinced a clear intent to diminish the Reservation.

I. Background

The history of federal Indian policy in the United States is marked by a series of eras, each characterized by a different approach to the inevitable conflict between the Native Americans who inhabited western America and homesteaders flooding west in search of a better life. *Cohen's Handbook of Federal Indian Law* 7–8 (Nell Jessup Newton et al. eds., 2012). The story of the Wind River Reservation begins in the second half of the nineteenth century, when a new federal policy of allotment and assimilation began to take shape, which followed a period when Indian reservations were created throughout the western United States. Unsurprisingly, westward expansion placed pressures on the traditional lifestyles of the Native American tribes. Recognizing the potential for conflicts, particularly over land, the United States negotiated a series of treaties and agreements with dozens of tribes, including the Eastern Shoshone.

The Eastern Shoshone are part of the larger Shoshone Tribe, who in the mid-nineteenth century inhabited what would become the states of Colorado, Idaho, Nevada, Utah, and Wyoming. Henry Stamm, *People of the Wind River* 9 (1999). In 1863, the United States and the Eastern Shoshone entered into the First Treaty of Fort Bridger, 18 Stat. 685 (1863), which established “Shoshonee County,” an area encompassing more than forty-four million acres. *See United*

States v. Shoshone Tribe of Indians of Wind River Reservation of Wyo., 304 U.S. 111, 113 (1938). But the treaty proved to be short lived. With the end of the Civil War, a new wave of settlers forged westward. Fearing the Eastern Shoshone's homeland would be settled and thus lost forever, the tribal leader, Chief Washakie, urged the United States to reserve the Wind River Valley—the Tribe's historic buffalo hunting grounds—as the Eastern Shoshone's permanent homeland.

Chief Washakie's efforts were successful: in 1868, the United States and the Eastern Shoshone Tribe signed the Second Treaty of Fort Bridger, 15 Stat. 673 (1868). This treaty set aside roughly three million acres for exclusive tribal use. In exchange, the Tribe relinquished its claim to the land held under the 1863 treaty. *Shoshone*, 304 U.S. at 113. As it had promised, the United States developed the Reservation's infrastructure and began to establish and expand agricultural lands in an effort to aid the Eastern Shoshone's transition away from hunting wild game, which was rapidly disappearing. For their part, the Eastern Shoshone resolved to settle permanently on the Reservation, pursue an agrarian lifestyle, and send their children to school. But land issues persisted: settlers vied for agricultural lands south of the Big Wind River, and the Reservation's superintendent feared it would be impossible to observe the boundaries created by the 1868 treaty.

Meanwhile, Congress had departed from its previous policy of segregating tribes from homesteaders in favor of a new policy of educating Native American children in residential boarding schools and splitting up communal, tribally owned reservations into individual, privately owned parcels of land. Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 7–9 (1995). At the time, Congress, and indeed most of America, assumed the reservation system would eventually cease to exist and members of Native American tribes would become fully assimilated into American society. See *Solem v. Bartlett*, 465 U.S. 463, 468 (1984); Marta Adams et al., *American Indian Law Deskbook* 93 (2015). Thus, reservations began to shrink in size. In 1874, the Eastern Shoshone Tribe sold all of its land south of the forty-third parallel in the so-called Lander Purchase in exchange for a payment of \$25,000. 18 Stat. 291, 292 (1874). According to the ratifying act, this transaction “change[d] the southern limit of said reservation.” 18 Stat. at 292. Around this time, the Northern Arapaho—traditionally, an enemy of the Eastern Shoshone—joined the Eastern Shoshone on the Wind River Reservation, where they remain today. 1877 Comm’r Indian Aff. Ann. Rep. 19.

The Wind River Reservation boundaries changed again in 1897, when Congress passed legislation purchasing additional land. That act, known as the Thermopolis Purchase, provided that, in exchange for \$60,000, the Tribes agreed to “cede, convey, transfer, relinquish, and surrender forever and absolutely all their right, title, and interest of every kind and character” in a tract around the Big

Horn Hot Springs, located on the northern boundary of the Reservation. 30 Stat. 93, 94 (1897). Following up on failed efforts to acquire additional land from the Tribes in 1891 and 1893, in 1904 Representative Frank Mondell of Wyoming introduced a bill initiating the cession of the land north of the Big Wind River flowing through the north-central portion of the Reservation. The 1904 legislation was the framework for negotiations with the Tribes, which the Tribes ultimately agreed to as amended. Congress passed the 1904 agreement in 1905. 33 Stat. 1016 (1905). It is the 1905 Act that is at issue in this case.

But the 1905 Act was not the last piece of legislation affecting the Reservation. In 1934, Congress enacted the Indian Reorganization Act, the first step in its new national policy of tribal self-determination. *See* 48 Stat. 984 (1934). Since the Tribes voted to exclude themselves from this Act, however, Congress had to pass specific legislation to carry out its new policies on the Wind River Reservation. Thus, in 1939, Congress directed the Secretary of the Interior to restore to tribal ownership any unsold lands in the area that had been ceded in 1905. 53 Stat. 1128, 1129 (1939).

That brings us to the present day. Currently, approximately seventy-five percent of the land affected by the 1905 Act is held in trust by the United States for the Tribes and their members. In 2008, the Tribes applied to the EPA for authority to manage certain non-regulatory programs for air quality in areas under tribal jurisdiction. They were able to do so because in 1990, Congress amended

the Clean Air Act, 42 U.S.C. §§ 7401–671 (CAA), to authorize the EPA to treat Native American tribes as states for the purposes of the CAA. § 7601(d).

Pursuant to this grant of authority, the EPA promulgated the Tribal Authority Rule, 40 C.F.R. 49, under which qualified tribes may apply for authority to implement and manage programs for air quality in areas under tribal jurisdiction. 42 U.S.C. § 7601(d)(2)(B).

A successful application must describe the area over which a tribe seeks to assert its regulatory authority. Thus, in their application, the Tribes had to specify the proposed scope of their regulatory jurisdiction, which required them to clearly delineate the boundaries of the Reservation. The Tribes claimed the boundaries of the Wind River Reservation were those set forth in the 1868 treaty, reduced only by the Lander and Thermopolis transactions. As required by the CAA, the EPA notified all governmental entities located contiguous to the Reservation and provided local government and the general public notice and an opportunity to comment on the proposed boundary description. When a treatment-as-a-state application is subject to an objection, EPA may also request additional information or consult with the Department of the Interior. 40 C.F.R. § 49.9(d).

In their comments, Wyoming and the Farm Bureau argued the Reservation was diminished by the 1905 Act, which, they contended, established the current boundaries of the Reservation. Based on these objections, the EPA asked the

Department of the Interior for an analysis of the competing claims. In 2011, the solicitor issued a legal opinion concluding the 1905 Act had not changed the boundaries established by the 1868 treaty. Relying on this analysis, the EPA issued its final decision granting the Tribes' application. The decision agreed with the Tribes' interpretation that the 1905 Act did not diminish the boundaries of the Reservation.

II. Analysis

Our task here is limited: we must determine whether Congress diminished the Wind River Reservation in 1905 by legislative act.¹ As we have previously

¹ We must also address two jurisdictional issues:

(1) In response to the court's November 17, 2015 order for supplemental briefing regarding a mootness issue raised during oral argument, we have reviewed the parties' and intervenors' supplemental briefs and find this case is not moot. Mootness is a threshold requirement: without the existence of a live case or controversy, we cannot constitutionally exercise jurisdiction over a claim. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010). For a live controversy to exist, a present determination of the issues must have "some effect in the real world," and the parties must retain a concrete interest in the outcome of the litigation. *Id.* at 1109–10. Here, even though the EPA has revoked the Tribes' funding under the CAA, the EPA's determination of the Reservation boundaries still stands, and the EPA has not indicated it will reconsider its decision. Because the boundary determination affects the present and future rights and responsibilities of the parties, the case is not moot.

(2) We also find the Wyoming Farm Bureau has standing to sue on behalf of its members. For an organization to bring suit in its representative capacity, it must show, among other things, that "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Standing requires a concrete and particularized injury that is
(continued...)

explained, only Congress has the power to diminish reservation boundaries, and its intent “must be clearly expressed.” *Osage Nation v. Irby*, 597 F.3d 1117, 1121–22 (10th Cir. 2010). Even further, diminishment “will not be lightly inferred.” *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Nevertheless, we may not “ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe’s later claims.” *Osage Nation*, 597 F.3d at 1122 (quoting *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990)).

The Supreme Court has declined to infer a congressional purpose of diminishment from the passage of every surplus land act during the allotment and assimilation period. “Rather, it is settled law that some surplus land acts diminished reservations, and other surplus land acts did not.” *Solem*, 465 U.S. at 469 (citations omitted). “The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.” *Id.* To determine whether the 1905 Act had the effect of diminishing the Reservation, we

¹(...continued)

traceable to the defendant’s conduct and redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In this case, some Farm Bureau members own farms within the disputed area and face the costs of complying with a new regulatory regime following the EPA’s decision. We have previously recognized precisely this type of injury as sufficiently concrete and particularized. *See Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1144 (10th Cir. 2010). And since the alleged injuries are clearly traceable to the EPA’s decision and would be redressed by a reversal of that decision, Farm Bureau members have standing to sue in their own right. Therefore, we find the Farm Bureau has standing to sue on behalf of its members.

look to the well-settled approach described in *Solem*, where the Court outlined a hierarchical, three-step framework to ascertain congressional intent.

First, we look to the text of the statute, because it is “[t]he most probative evidence of congressional intent.” *Id.* at 470; *see also 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) (second alteration in original)).

Second, we examine the circumstances surrounding the passage of the act, “particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress.” *Solem*, 465 U.S. at 471; *see also Parker*, 136 S. Ct. at 1079; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351–52 (1998).

Third and finally, “to a lesser extent,” we look to “the subsequent treatment of the area in question and the pattern of settlement there.” *Id.* at 344; *Solem*, 465 U.S. at 471–72.

In doing so, we afford no deference to the EPA’s boundary determination. As our precedents tell us, “the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment].” *Osage Nation*, 597 F.3d at 1122 (alteration in original) (quoting *Yazzie*, 909 F.2d at 1393). Although examination of the historical record “involves a mixed question of law and fact,” *de novo*

review is appropriate “[w]here a mixed question ‘primarily involves the consideration of legal principles.’” *Id.* at 1393–94 (quoting *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986)). The EPA does not dispute this standard of review, because it concedes a de novo standard is “consistent with the [Administrative Procedure Act’s] ‘otherwise not in accordance with the law’ standard,” Aple. EPA Br. 23, which we apply to the agency action here.

A. The Text of the 1905 Act

We begin our analysis with the 1905 Act’s operative language, for “[s]tatutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation.” *Osage Nation*, 597 F.3d at 1122–23. “‘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 unallotted opened lands.’” *Id.* at 1123 (quoting *Solem*, 465 U.S. at 470). There are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must “establis[h] an express congressional purpose to diminish.” *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

Here, Article I of the 1905 Act reads,

The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do 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 the lands within and bounded by the following lines

33 Stat. at 1016 (emphasis added). This language of cession aligns with the type of language the Supreme Court has called “precisely suited” to diminishment. *Yankton Sioux*, 522 U.S. at 344. Indeed, it is nearly identical to the statutory language in cases where the Supreme Court has found a congressional purpose to diminish a reservation in the statute’s text.

For example, in *DeCoteau v. District County Court for the Tenth Judicial District*, the Court considered an act providing that 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 unallotted lands within the limits of the reservation.” 420 U.S. 425, 445 (1975). The Court found this language was precisely suited to a congressional purpose of terminating the Lake Traverse Indian Reservation. *Id.* Similarly, in *Rosebud Sioux Tribe v. Kneip*, the Court held Congress clearly evinced an intent to diminish the boundaries of the Rosebud Sioux Reservation when it passed a series of acts affecting unallotted lands on that reservation. 430 U.S. 584, 615 (1977). The first act, passed in 1904, provided that 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

unallotted portion of its reservation. *Id.* at 597. This too, the Court held, was language precisely suited to diminishment. *Id.*²

Two decades later, in *Hagen*, the Court found Congress evinced a clear intent to diminish a reservation even when it employed less express language of cession. The operative language of the statute at issue provided that “all the unallotted lands within said reservation shall be restored to the public domain.” 510 U.S. at 412. The Court held this language evidenced a congressional intent “inconsistent with the continuation of reservation status.” *Id.* at 414.³ And in *Yankton Sioux*, the Court unanimously held Congress spoke with a clear purpose of diminishment when it passed an act providing that the Yankton Sioux Tribe would “cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation.” 522 U.S. at 344, 351.

² Although the 1907 and 1910 Acts in *Rosebud* merely authorized the Secretary of the Interior “to sell or dispose of” the unallotted portions, the court found a “continuity of intent” from the earlier 1904 Act and a 1901 agreement, based on the circumstances surrounding the passage of the later acts. *Id.* at 606–13.

³ Citing to *Hagen*, the EPA argues that when the operative language does not restore ceded lands to the public domain, diminishment is less likely. We disagree. While the Court in *Hagen* found language restoring lands to the public domain probative of congressional intent to diminish a reservation, nowhere did it suggest the *absence* of public domain language cuts against diminishment—especially where, as here, the statute’s operative language includes even stronger language of cession than in *Hagen*.

In contrast, in cases where the Court has found a lack of clear congressional intent to diminish, the operative language of the 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. For example, in *Seymour v. Superintendent of Wash. State Penitentiary*, the Court concluded that an act providing “for the sale of mineral lands and for the settlement and entry under the homestead laws of surplus lands remaining on the diminished Colville Reservation after allotments were first made . . . did no more than open the way for non-Indian settlers to own land on the reservation.”⁴ 368 U.S. 351, 354–56 (1962). Similarly, in *Mattz v. Arnett*, the Court held an act providing that lands within a reservation were “subject to settlement, entry, and purchase” did not, on its own, “recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation.” 412 U.S. 481, 495–97 (1973).

The operative language in *Solem* itself was similar: the act merely “authorized and directed” the Secretary of the Interior “to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations” within the described boundaries. 465 U.S. at 472–73. The Court compared the language

⁴ The Tenth Circuit distinguished *Seymour* in *Ellis v. Page*, stating, “It is one thing to open an Indian Reservation to mineral exploitation, allotment to Indians, and non-Indian homesteaders by Congressional enactment as in *Seymour*. It is quite another to agree by treaty to cede and relinquish all claim, title and interest in the lands within the limits of a reservation.” 351 F.2d 250, 252 (10th Cir. 1965).

to the acts in *Rosebud* and *DeCoteau* and concluded that unlike in those cases, “the Secretary of the Interior was simply being authorized to act as the Tribe’s sales agent.” *Id.* at 473. The Court added, “Nowhere else in the Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries.” *Id.* at 474.⁵ Likewise, just last year in *Parker*, the Court held that an act stating the disputed lands would be “‘open for settlement under such rules and regulations as [the Secretary of the Interior] may prescribe,’” 136 S. Ct. at 1079 (alteration in original) (quoting 22 Stat. 341 (1882)), fell into the category of acts that “‘merely opened reservation land to settlement,’” *id.* (quoting *DeCoteau*, 420 U.S. at 448).⁶

Plainly, the 1905 Act falls into the first line of cases: those with express language of cession. Nevertheless, the EPA and the Tribes argue that Congress’s

⁵ The Court in *Solem* did acknowledge that language of diminishment present elsewhere in the act undisputedly supported the view that the reservation had been diminished. 465 U.S. at 474–75. Without express language of cession, however, isolated references to diminishment alone could not “carry the burden of establishing an express congressional purpose to diminish.” *Id.* at 475. Here, in addition to the express language of cession in Article I, Articles I, III, IV, VI, and IX of the 1905 Act refer to the diminished reservation. 33 Stat. at 1016, 1017, 1018, 1020, 1022.

⁶ The EPA points to a circuit case, *United States v. Grey Bear*, which it argues falls outside this framework. 828 F.2d 1286 (8th Cir. 1987). That case involved an interpretation of cession language for the Devils Lake Indian Reservation that is similar to *Rosebud*, *DeCoteau*, and here, but unlike these cases, 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. *Id.* at 1290–91.

intent remains unclear, because of the absence of words such as “sell” or “convey” that were present in other statutes during the period. But our task is not to divine why Congress may have chosen certain synonyms over others in this particular Act. We believe Congress’s use of the word “cede” can only mean one thing—a diminished reservation. A review of several dictionaries from the turn of the twentieth century confirms that adding the words “sell” or “convey” would not materially change the intent Congress evinced in the 1905 Act.⁷ And in any event, Article II of the 1905 Act includes the word “conveyed”:

⁷ Adding the words “convey” or “sell” to Article I would not have materially altered Congress’s expression of its intent, since the contemporaneous definitions of “cede,” “grant,” and “relinquish” were virtually indistinguishable from the definitions of “convey” and “sell.” For example, at the time, “cede” was defined as “[t]o yield or surrender, give up.” *Webster’s Commonsense Dictionary* 76 (J.T. Thompson ed., 1902). Likewise, “grant” was defined as “[t]o allow, yield, concede; to bestow or confer, in answer to prayer or request; to make conveyance of, give the possession or title of.” *Webster’s Practical Dictionary* 165–66 (1906). And “relinquish” was defined as “[t]o give up the possession or occupancy of; to quit; to forsake; to abandon; to give up; to resign,” *Webster’s Commonsense Dictionary* 405, or “[t]o withdraw from, leave behind; to give up, renounce a claim to, resign, quit, forsake, abandon, forego,” *Webster’s Practical Dictionary* 342.

By way of comparison, “convey” was defined as “to transfer to another, make over,” *id.* 81, and “[t]o carry; to remove; to transmit,” *Webster’s Commonsense Dictionary* 105. “Sell” was defined as “[t]o give or deliver in exchange for some equivalent; to exchange for money,” *id.* 438, and “[t]o transfer to another for an equivalent; to dispose of in return for something, esp. for money,” *Webster’s Practical Dictionary* 361. It is true the word “sell” could add the notion of an exchange for money, but the Supreme Court has found a statute’s operative language to be “precisely suited” to diminishment without the presence of the word “sell.” *See Rosebud*, 430 U.S. at 597.

In consideration of the lands *ceded, granted, relinquished, and conveyed* by Article I of this agreement, the United States stipulates and agrees to dispose of the same, as hereinafter provided

33 Stat. at 1019–20 (emphasis added).⁸

The EPA and the Tribes also argue the 1905 Act does not evince a clear congressional intent to diminish the Reservation, because it lacks unconditional payment of sum certain compensation in conjunction with cession. The 1905 Act does not provide for a single, lump-sum payment, but rather outlines a hybrid payment scheme, under which different amounts derived from the proceeds of sales of the ceded lands are allocated to specific funds. For example, the 1905 Act provides \$150,000 for “the construction and extension of an irrigation system within the diminished reservation,” \$50,000 for a school fund, and \$50,000 for the purchase of livestock. 33 Stat. 1017–18. The Act also creates a general welfare and improvement fund and appropriates \$85,000 for per capita payments of \$50 each. 33 Stat. 1018, 1020–21. As we explain in more detail below, it was

⁸ It is worth noting the Wyoming Supreme Court, applying *Solem*, held the operative language of the 1905 Act evinced Congress’s clear intent to diminish the Reservation. *Yellowbear v. State*, 174 P.3d 1270, 1282 (Wyo. 2008). Specifically, the court concluded the language of cession in Article I was “indistinguishable from the language of *DeCoteau*.” *Id.* And upon review of Yellowbear’s federal habeas petition, we concluded Yellowbear failed to present any argument “calling into question the correctness of [the Wyoming Supreme Court’s] decision.” *Yellowbear v. Atty. Gen. of Wyo.*, 380 F. App’x 740, 743 (10th Cir. 2010), *cert. denied sub nom.*, *Yellowbear v. Salzburg*, 562 U.S. 1228 (2011).

thought this hybrid payment scheme would yield more revenue to the tribes, since they would be paid from the proceeds collected from the homesteaders.

The EPA and the Tribes rely on *Solem*, where the Court held language of cession combined with a sum certain payment creates “an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.” 465 U.S. at 470–71. But this presumption is not a two-way street. In *Hagen*, the Court expressly rejected the argument that a finding of diminishment requires “both explicit language of cession or other language evidencing the surrender of tribal interests *and* an unconditional commitment from Congress to compensate the Indians.” 510 U.S. at 411 (emphasis added). The Court explained, “While 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.” *Id.* at 412. The Court continued, “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.” *Id.* And indeed, in *Rosebud*, the Court had likewise noted that a sum certain payment or lack thereof is only one of many textual indicators of congressional intent. 430 U.S. at 598 n.20. Congress’s decision to abandon the sum certain method of payment was “not conclusive with respect to congressional intent.”⁹ *Id.* at 588. What matters most is not the

⁹ The Court in *Rosebud* added that the act at issue was not completely devoid of a guaranteed payment. The Court observed, “[d]espite this ‘uncertain (continued...)”

mechanism of payment, but rather the “language of immediate cession.” *Id.* at 597.

Finally, the EPA and the Tribes argue the trusteeship language in the 1905 Act demonstrates that Congress merely meant for the United States to hold the land in trust for the Tribes until it was sold. The Act therefore effected no change in ownership until parcels were sold to settlers. In particular, the EPA and the Tribes point to Article IX of the Act, which provides,

[N]othing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the understanding that United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

33 Stat. at 1020–21. In support of this argument, the EPA relies on similar language the Court considered in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). But *Ash Sheep* is of limited utility in light of the Court’s more recent

⁹(...continued)
sum’ proviso,” the act mandated that “all lands herein ceded and opened to settlement . . . remaining undisposed of at the expiration of four years from the taking effect of this Act, shall be sold and disposed of for cash” *Rosebud*, 430 U.S. at 596 n.18 (citation omitted). In the Court’s words, such arrangement “suggests that Congress viewed this land as disestablished immediately.” *Id.* Similarly, here, the 1905 Act requires “[t]hat any lands remaining unsold eight years after the said lands shall have been opened for entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.” 33 Stat. at 1021.

precedent, in which it has concluded trust status is not incongruous with diminishment. And indeed, *Ash Sheep* is seldom mentioned in subsequent cases, because it dealt with the question whether lands became “public lands”—a question the Court has stated is “logically separate” from diminishment. *See Rosebud*, 430 U.S. at 601 n.24.

In any event, it is clear trust status can exist even if a reservation has been diminished. In *Rosebud*, for example, the Court considered a series of statutes in which the United States did not promise to find purchasers for the lands, but rather agreed to act as trustee for the Indians to dispose of the lands and collect and distribute the proceeds. 430 U.S. at 596, 608. The Court held congressional intent was to diminish the Rosebud Reservation, notwithstanding the trusteeship provisions. *See id.* 430 U.S. at 615. The Court agreed with the Eighth Circuit that “the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries.” *Id.* at 601 n.24 (quoting *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 102 (8th Cir. 1975)). Even the dissent acknowledged, “[o]f course, it is possible that Congress intended to remove the opened counties from the Reservation while leaving the Indians with a host of rights in the counties.” *Rosebud*, 430 U.S. at 622.

In sum, the express language of cession in the 1905 Act indicates Congress intended to diminish the boundaries of the Wind River Reservation,

notwithstanding the lack of a sum certain payment and the inclusion of a trusteeship provision.

B. The Historical Context of the Act

The contemporary historical context further confirms Congress intended to diminish the Wind River Reservation when it passed the 1905 Act. Although we believe the plain statutory language is precisely suited to diminishment, we also consider “the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress.” *Solem*, 465 U.S. at 471; *see also Yankton Sioux*, 522 U.S. at 351. As the Supreme Court has stated, “[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished.” *Id.* Of course, here, we need not search for unequivocal evidence, for the statutory language evinces a congressional intent of diminishment. But our scrutiny of the circumstances surrounding the 1905 Act confirms Congress indeed intended to diminish the Reservation’s boundaries.

The legislative history and the negotiations leading up to the 1905 Act reveal Congress’s longstanding desire to sever from the Wind River Reservation the area north of the Big Wind River. As in *Rosebud*, “[a]n examination of the legislative processes which resulted in the 190[5] Act convinces us . . . that this purpose was carried forth and enacted.” 430 U.S. at 592. “Because of the history

of the . . . Agreement, the 190[5] Act cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the [Wind River] Reservation.” *See id.*

In 1891, Congress drafted a bill that, had it passed, would have changed the Reservation’s boundaries to exclude the land north of the Big Wind River. Under the 1891 agreement, the Tribes were 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, and the water rights appertaining thereunto” for the sum of \$600,000. H.R. Exec. Doc. No. 52-70, at 29, 30 (1892). Though Congress did not ratify this agreement, two years later the Secretary of the Interior sent another commission to negotiate with the Tribes for the sale of the land north of the Big Wind River. This time, the United States asked for additional land and offered the Tribes \$750,000. H.R. Exec. Doc. No. 53-51, at 4 (1894). Despite the higher offer, the Tribes refused three different proposals, and no agreement was reached.¹⁰

Congressional activity resumed in 1904, when Representative Frank Mondell of Wyoming introduced a bill to further reduce the Wind River Reservation. The 1904 Mondell Bill was based on the 1891 and 1893 proposals. But by 1904, the Supreme Court had declared that Congress had plenary authority

¹⁰ Congress did successfully obtain the land around the Big Horn Hot Springs through the Thermopolis purchase in 1897. 30 Stat. at 94.

over relations with Native Americans, so Congress no longer needed tribal approval to change reservation boundaries. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). As Representative Thomas Frank Marshall, the Chairman of the Committee on Indian Affairs wrote, the 1904 Bill “propose[d] to reduce the reservation, as suggested . . . at the time of the making of the agreement of 1891” H.R. Rep. No. 58-2355, at 3 (1904).

The Mondell Bill, however, differed from the 1891 agreement in several respects. One amendment—and one the EPA and the Tribes point to—was the elimination of the \$600,000 sum certain payment. To that, Representative Marshall explained, “[The Mondell Bill] follows as closely as possible, under the changed conditions and the *present policy* of Congress relative to payments for lands purchased from Indians, the agreement of 1891 and the bill prepared at the time for carrying out the provisions of that agreement.” H.R. Rep. No. 58-2355, at 4 (emphasis added). “[The bill] follows the now established rule of the House of paying to the Indians the sums received from the ceded territory under the provisions of the bill.” H.R. Rep. No. 58-2355, at 2; *see also* H.R. Rep. No. 58-2355, at 8 (quoting letter from then-Acting Commissioner to the Secretary of the Interior A. C. Tonner explaining structure of payment framework). Thus, to comply with prevailing policy, the sum certain payment was excised and replaced with a framework whereby lands would be sold at different times and at different prices with the proceeds to be transferred to the Tribes. And, incidentally, it was

believed that the Tribes could realize greater compensation under such a framework. H.R. Rep. No. 58-2355, at 4 (observing “[t]he amount which the Indians would receive at \$1 an acre would be \$1,480,000”). As the Supreme Court has previously recognized, Congress adopted “‘a new policy in acquiring lands from the Indians [by] provid[ing] that the lands shall be disposed of to settlers . . . , and to be paid for by the settlers, and the money to be paid to the Indians only as it is received . . . from the settlers.’” *Rosebud*, 430 U.S. at 592 (footnote omitted) (alterations in original).

Given these congressional directives, in April 1904, Indian Inspector James McLaughlin met with the Tribes and presented the terms of the Mondell Bill in a series of meetings on the Wind River Reservation.¹¹ McLaughlin opened by stating,

My friends, I am sent here at this time by the Secretary of the Interior to present to you a proposition for the opening of certain p[or]tions of your reservation for settlement by the whites. It is believed that it will be to the best interests of your two tribes *to cede to the United States* the portions referred to.

¹¹ McLaughlin, who had also negotiated the 1897 Thermopolis Purchase, negotiated many land agreements with Native American tribes, including the Lower Brules, the Otoes, the Missourias, the Klamaths, the Modocs, the Yankton, the Sioux, the Red Lake Chippewas, the Mille Lacs Chippewas, the Pah-Utes, and the Standing Rock Sioux. James McLaughlin, *My Friend the Indian* 295 (1910). The Supreme Court has reviewed agreements he negotiated that resulted in diminishment in a number of cases, including *Rosebud* and *Hagen*.

Minutes of Council between James McLaughlin, U.S. Indian Inspector, and the Indians of the Eastern Shoshone and Arapaho Tribes, at 2 (Apr. 19–21, 1904) (emphasis added) (reproduced in JA 509–36) [Council Minutes]. But McLaughlin explained that since his last agreement with the Tribes, Congress’s policy for paying for ceded land had changed: “For several years past there has been a sentiment in Congress . . . opposed to paying the Indians a lump sum consideration for their lands. Instead of stipulating, or providing in the agreement, a lump sum consideration for any tract of land, they have determined upon giving the Indians the full benefit of the land by paying the Indians from the proceeds of the sale of the land as whitemen settle upon it.” Council Minutes, at 3. McLaughlin explained to the Tribes that they would “receive more in the aggregate than under the old lump sum agreements.” Council Minutes, at 4.

McLaughlin advised the Tribes during negotiations that the boundaries of the Reservation would change as a result of the Act, just as they would have under the agreement in 1891 and the negotiations in 1893. He stated,

I now wish to talk of the *boundaries of the reservation and the residue of land that will remain in your diminished reservation*. That being a very important matter. . . . The tract to be ceded to the United States, as proposed by the “Mondell Bill,” is estimated at 1,480,000 acres, leaving 800,500 acres in the diminished reservation.

Council Minutes, at 6 (emphasis added).¹² McLaughlin informed the Tribes that “a large reservation is not in your interest,” while the reduction would be, and that Congress could now unilaterally change the boundaries of the Reservation if the Tribes did not agree. Council Minutes, at 7.

Conveying the purpose of the Mondell Bill, McLaughlin told the Tribes that this agreement would allow the Tribes to “dispos[e] of the lands that you do not need” and that they would “realiz[e] money from the sale of that land, which will provide you with means to make yourselves comfortable upon your reservation” Council Minutes, at 3. He also referred to the ceded lands as “the public domain” and made clear the land on the north side of the Big Wind River (part of the ceded territory), after the agreement, would be different:

Those of you who have allotments on the north side of the river, if you so desire, can have them cancelled *and come within the diminished reservation*. * * * However, any of you who retain your allotments on the other side of the river can do so, and you will have the same rights as the whiteman, and can hold your lands or dispose of them, as you see fit. On the reservation, you will be protected by

¹² We acknowledge the Supreme Court stated in *Solem* that a “few scattered phrases” describing agreements as “reducing the reservation,” or “the reservation as diminished,” do not indicate a clear congressional purpose to diminish the boundaries of a reservation. 465 U.S. at 478; *see also id.* at 475 n.17 (reasoning “‘diminished’ was not yet a term of art in Indian law”). For as the Court observed, “[I]t is unclear whether Congress was alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers or to the reduction that a complete cession of tribal interests in the opened area would precipitate.” *Id.* (citation omitted). But here we are not limited to a few ambiguous phrases; rather, we are presented with a more complete set of circumstances similar to those the Supreme Court credited in *Rosebud*.

the laws that govern reservations in all your rights and privileges.

Furthermore, all of you who may retain your allotments *off the reservation*, will not lose any of your rights on the reservation, and you have rights the same as if you remained within the diminished reservation. You will have rights to surplus lands, the timber etc, *although your home may be on the public domain*.

Council Minutes, at 14 (emphasis added).

The tenor of the Tribes' understanding of the agreement reflects that the Reservation's boundaries would be diminished. One representative for the Eastern Shoshone told McLaughlin that his Tribe understood it was "parting with [its lands] forever and [could] never recover [them] again." Council Minutes, at 17. Long Bear, a chief of the Arapaho Tribe, proclaimed, "I understand what he comes for . . . and I will tell what part of the Reservation I want to sell. . . . I want to cede that portion of the reservation from the mouth of the Dry Muddy Gulch in a direct line to the mouth of Dry or Beaver Creek below Stagner's on Wind River." Council Minutes, at 9. Rev. Sherman Coolidge of the Arapaho added he was glad McLaughlin had come "to purchase a portion of our reservation. The proposed ceded portion has not been used except for grazing. . . . We need the money that we will get from the sale of these lands for improvements on the unceded portion." Council Minutes, at 12.

The Tribes and McLaughlin entered into an agreement, *see* Council Minutes, at 27, and McLaughlin reported the progress back to Washington. Specifically, he wrote,

The diminished reservation leaves the Indians the most desirable and valuable portion of the Wind River Reservation and the garden spot of that section of the country. It is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River, which, being never failing streams carrying a considerable volume of water, give natural boundaries with well-defined lines; *and the diminished reservation, approximately 808,500 acres . . .* allows 490 acres for each of the 1,650 Indians now belonging to the reservation. I have given this question a great deal of thought and considered every phase of it very carefully and became convinced that *the reservation boundary, as stipulated in the agreement*, was ample for the needs of the Indians

H.R. Rep. No. 58-3700, at 17 (1905) (emphasis added). But the 1904 Mondell Bill as negotiated with the Tribes was never approved. Instead, it was amended and codified as a new bill (the 1905 Act), which was approved by Congress on March 3, 1905. The legislative history reveals almost no debate about the cession and payment provisions of the 1905 Act; as discussed, most of the debate had occurred in the drafting of the 1904 Act. According to the House Report on the issue, the 1905 Act was “in harmony” with the Mondell Bill, with “the principal changes . . . in form rather than substance.” H.R. Rep. No. 58-3700, at 6.

We believe the circumstances surrounding the 1905 Act most closely resemble those in *Rosebud*. In 1901, McLaughlin was dispatched to negotiate

with the Indians on the Rosebud Reservation to cede unallotted portions of their reservation. *Rosebud*, 430 U.S. at 590. They agreed to cede 416,000 acres for a sum of \$1,040,000, but the agreement was not ratified because it “provided that the Government should pay for the lands outright.” *Id.* at 591 (citation omitted). The Supreme Court observed it was “undisputed” that had the agreement been ratified, it would have changed the reservation’s boundaries. *Id.* Working from that baseline, the Court concluded, “An examination of the legislative processes which resulted in the 1904 Act convinces us . . . that this purpose was carried forth and enacted.” *Id.* at 592.

Similarly, here, the unratified 1891 agreement with the Tribes served as a predicate for the 1905 Act. Indeed, in introducing the Mondell Bill, Representative Mondell had the 1891 agreement read into the record and then offered amendments to that agreement to reflect the revisions discussed. 38 Cong. Rec. 5,245, 5,245, 5,246–47 (1904). Thus, the actual congressional record belies the EPA’s finding that no continuity of purpose existed between the 1891 agreement and the 1905 Act. That provisions were revised to reflect the McLaughlin negotiations and the prevailing policy on compensating Native Americans for ceded land at the time is insufficient reason for severing and rendering irrelevant the circumstances prior to 1904.

Additionally, this case is unlike *Solem* because Congress, through its legislative history, explicitly stated its intent to cede portions of the Reservation.

See Solem, 465 U.S. at 477 (Congress enacted a “sell and dispose” act).

Moreover, the 1905 Act bears the same hallmarks that, as the Supreme Court put it, made *Solem* a “more difficult” case and evidenced diminishment. *Compare id.* at 474 (explaining act permitted “Indians already holding allotments on the opened lands to obtain new allotments . . . ‘within the respective reservations thus diminished’” (citation omitted)), *with* 33 Stat. at 1016 (“[A]nd any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof . . .”).¹³ In the end, Congress’s consistent attempts at the

¹³ Likewise, Congress’s inclusion or removal of certain provisions in the 1905 Act may cut against diminishment. First, the Act included a provision that retained the lease rights of one Asmus Boysen and gave him the option to purchase preferential land. 33 Stat. at 1020. Boysen’s agreement with the Tribes contained a clause that would have terminated the lease upon extinguishment of the Tribes’ title to covered lands. JA 4604. The EPA’s decision opined that Congress’s concern with the Boysen lease—particularly, its potential for clouding the title of certain opened lands—evinced an intent not to diminish the Reservation’s boundaries. JA 4606–07. The EPA’s understanding of Congress’s treatment of the Boysen lease was limited to a finding 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.” JA 4606. But as we explained in step one of our analysis, the existence of a trust relationship is not determinative of diminishment, and, unlike *Hagen*, this is not a “public domain” case. Additionally, the EPA pointed to Congress’s removal of a provision that would have required the United States to pay the Tribes for sections 16 and 36 (as school lands) or equivalent lands of each township. JA 4608–09. The Supreme Court found the inclusion of such a provision probative of diminishment in *Rosebud* and *Yankton Sioux*. *See Rosebud*, 430 U.S. at 599–601; *Yankton Sioux*, 522 U.S. at 349–50. But the record in this case reveals that Wyoming may have received federal land elsewhere in exchange, obviating the need for a school lands provision.

turn of the century to purchase the disputed land compel the conclusion that this intent continued through the passage of the 1905 Act. And the statements in the legislative history about the diminishment of the reservation, when taken together with the Act's plain language, provide ample support for the conclusion Congress understood it was separating the land north of the Big Wind River from the rest of the Wind River Reservation and indeed intended to do so.

C. Subsequent Treatment of the Area

Third and finally, and “[t]o a lesser extent,” we can consider “Congress’s own treatment of the affected areas, particularly in the years immediately following the opening,” as well as “the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.” *Solem*, 465 U.S. at 471. “[A]s one additional clue as to what Congress expected would happen,” we also “look to the subsequent demographic history of opened lands.” *Id.* at 471–72. But although such evidence can buttress a finding of diminishment based on the statutory text, the Supreme Court “has never relied solely on this third consideration.” *Parker*, 136 S. Ct. at 1081. Accordingly, subsequent events “cannot undermine substantial and compelling evidence from an Act and events surrounding its passage.” *Osage Nation*, 597 F.3d at 1122 (quoting *Yazzie*, 909 F.2d at 1396). Our review of the subsequent treatment of the area is therefore brief and ultimately does not impact our conclusion Congress intended to diminish the Reservation by the 1905 Act.

From the outset, we note the parties have provided volumes of material evidencing the treatment of the ceded land after the 1905 Act. Unsurprisingly, each side has managed to uncover treatment by a host of actors supporting its respective position. Recognizing this inevitability, the Supreme Court has warned that at times “subsequent treatment” may be “so rife with contradictions and inconsistencies as to be of no help to either side.” *Solem*, 465 U.S. at 478. Because we are unable to discern clear congressional intent from the subsequent treatment, we find it is of little evidentiary value. *See also* JA 4624 (the EPA conceding “Congressional and Executive Branch references to the opened area were inconsistent”); JA 3636 (Solicitor indicating “[t]he evidence from the years immediately after the 1905 Act indicates some inconsistent treatment of the 1905 area”).¹⁴

Nonetheless, we examine some of the more germane evidence. Perhaps the most telling indication that Congress intended to diminish the Reservation’s boundaries in the 1905 Act is the Indian Reorganization Act, 48 Stat. 984 (1934), in which Congress began implementing its new policy of Indian self-determination. But because the Tribes opted out of the Reorganization Act that would have restored the ceded lands, in 1939, Congress authorized the restoration

¹⁴ We agree with Judge Lucero that the *Solem* third step tells us little of value, and in fact “irrationally” requires us to infer intent from subsequent demographic developments. The better guide is statutory text and the historical context that drove Congressional action.

of “all undisposed-of surplus or ceded lands . . . which [we]re not at present under lease or permit to non-Indians,” and restored to tribal ownership the “balance of said lands progressively as and when the non-Indians owned the lands.” 53 Stat. 1128, 1129–30 (1939). In administering the land restoration, the Secretary of the Interior sought to “add” the restored lands to, or “make them part of,” the Reservation. For example, in one order, the Secretary stated,

Now, Therefore, by the virtue of authority vested in the Secretary of the Interior by section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that the restoration to tribal ownership of the lands described above, which are classified as undisposed of, ceded lands of the Wind River Reservation, Wyoming, . . . will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are *added to and made part of* the existing Wind River Reservation

9 Fed. Reg. 9,754 (1944) (emphasis added). It is difficult to conceive why the Secretary would have used such language if indeed the ceded lands at all relevant times remained part of the Reservation.

Subsequent statements made by Congress also support the conclusion Congress believed the 1905 Act changed the Reservation’s boundaries. In 1907, Congress extended the time for entry onto the ceded territory. In that Act, Congress referred to the land as “lands *formerly embraced* in the Wind River of Shoshone Indian Reservation, in Wyoming, which were opened for entry.” 34 Stat. 849 (1907) (emphasis added); *see also* H.R. Doc. No. 64-1757, at 9 (1916)

(stating “the [irrigation] project under consideration is within the ‘ceded lands’ portion of *what was formerly included in the Wind River or Shoshone Indian Reservation*” (emphasis added)). Again, Congress’s consistent reference to lands that were formerly part of the Reservation is probative of diminishment.

Likewise, some maps from the period indicate the Reservation only included the unopened lands. *See* JA 3638 (explaining 1907 map by the State of Wyoming and 1912 map by the General Land Office purported to show the Reservation’s boundaries only encompassed lands unopened by the 1905 Act). But, as the solicitor pointed out in her 2011 opinion, other maps merely reference the ceded lands as “open lands.” *Id.* Ultimately, we agree with the solicitor that “[t]hese references are ambiguous and inconsistent at best.” *Id.*

We also briefly consider the subsequent demographics of the ceded area, though this consideration is the least probative of congressional intent. *Solem*, 465 U.S. at 471–72. As we have previously stated, “‘subsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an Act and events surrounding its passage.’” *Osage Nation*, 597 F.3d at 1122 (quoting *Yazzie*, 909 F.2d at 1396). Here, the demographic history is mixed. On the one hand, only a small portion of the ceded land was ultimately sold to non-Indians because of disinterest in the area. *See* JA 3638. On the other hand, as the Wyoming Supreme Court has noted, roughly ninety-two percent of

the population of Riverton—the largest township on the ceded land—is non-Indian. *Yellowbear*, 174 P.3d at 1283. These mixed demographics do not establish that “non-Indian settlers flooded into the opened portion,” causing the area to “los[e] its Indian character,” *Solem*, 465 U.S. at 471–72; by the same token, they do not undermine our conclusion that the statutory language and historical context of the 1905 Act compel a finding of diminishment.

Finally, jurisdictional and judicial treatment of the area is also mixed and thus has little probative value. Wyoming has previously exercised criminal jurisdiction over parts of the disputed area. For example, in a 1960 opinion the Wyoming Supreme Court found the state had jurisdiction over a crime that occurred north of Riverton in the ceded lands. *Blackburn v. State* 357 P.2d 174, 179–80 (Wyo. 1960). Ten years later, the court held the state had jurisdiction over a murder committed in Riverton. *State v. Moss*, 471 P.2d 333, 339 (Wyo. 1970). And in *Yellowbear*, the court applied the *Solem* factors and concluded “that it was the intent of Congress in passing the 1905 Act to diminish the Wind River Indian Reservation.” 174 P.3d at 1284. The court thus determined the state had jurisdiction to prosecute *Yellowbear*. *Id.* Upon habeas review, we declined to disturb that decision. *Yellowbear*, 380 F. App’x at 743.

On the other hand, both Wyoming and several federal agencies have exercised civil jurisdiction over the disputed area. Aple. EPA Br. 65–66. And in deciding *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, we summarily

referred to the town of Riverton as being within the boundaries of the Reservation. 623 F.2d 682, 683 (10th Cir. 1980) (“Plaintiffs’ land is within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indians in Wyoming.”). But as the EPA acknowledged in its decision below, *Dry Creek* is “generally unrevealing regarding the legal effect of the 1905 Act,” given that we did not consider the 1905 Act in light of the *Solem* criteria. JA 4645.

Adding to the varied treatment is the Wyoming Supreme Court’s decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I)*, 753 P.2d 76 (Wyo. 1988), *aff’d sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), *overruled in part by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998). But *Big Horn I* actually tells us little about how courts have treated the Wind River Reservation. Contrary to the Tribes’ assertion, the court in *Big Horn I* did not interpret the 1905 Act as maintaining a larger Reservation. Instead, the court merely held the 1905 Act did not evince a clear intent to abrogate the *water rights* granted to the entire Wind River Reservation at its creation in 1868. *Big Horn I*, 753 P.2d at 93–94. The court never stated that its allocation of water rights was based upon the Reservation boundaries, nor did it make a specific finding about those boundaries.

Nevertheless, the Northern Arapaho argue *Big Horn I* bars Wyoming from challenging the EPA’s boundary determination on *res judicata* grounds. But, as detailed above, *Big Horn I* concerned the allocation of water rights, specifically

the priority dates for those rights. 753 P.2d at 83. The special master’s conclusion that the 1905 Act did not sever the 1868 priority date for water rights, *see id.* at 92, is not determinative on the issue of diminishment—the issues are mutually exclusive, and Wyoming is not relitigating the water rights determination. Indeed, in dispensing of the issue, the Wyoming Supreme Court merely stated, “A reservation of water with an 1868 priority date is not inconsistent with the permit provisions of the pre-Winters 1905 Act.” *Id.* at 93. Even more detrimental to the Northern Arapaho’s position, the Wyoming Supreme Court has since expressly rejected the Tribe’s characterization of *Big Horn I*. In *Yellowbear*, the court stated “while [the majority and the dissent] disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn River* agreed that the reservation *had been diminished*.” 174 P.3d at 1283 (emphasis added).

In sum, on balance the subsequent treatment of the ceded lands neither bolsters nor undermines our conclusion that the 1905 Act diminished the Wind River Reservation.

III. Conclusion

For the foregoing reasons, we find Congress diminished the boundaries of the Wind River Reservation. We therefore GRANT Wyoming’s petition for review, VACATE the EPA’s order, and REMAND for further proceedings consistent with this opinion.

14-9512 & 14-9514, Wyoming v. United States Environmental Protection Agency
LUCERO, J., dissenting.

The “Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred.” Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). Our respect for this right stems, or should stem, from Tribes’ status as “separate sovereigns pre-existing the Constitution.” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Although Congress possesses the unilateral authority to diminish the reservations of these sovereign nations, Solem v. Bartlett, 465 U.S. 463, 470 n.11 (1984) (citing Lone Wolf, 187 U.S. 553), we must not lightly assume that Congress has exercised this destabilizing power. Only when express statutory language, legislative history, and surrounding circumstances “point unmistakably to the conclusion that” a reservation was diminished should we read a statute as having that effect. DeCoteau v. Dist. Ct. for Tenth Jud. Dist., 420 U.S. 425, 445 (1975).

In 1905, Congress passed an act transferring certain lands in the Wind River Reservation to the United States. The federal government was to act as trustee by selling the lands and paying the Indians the proceeds. Act of March 3, 1905, 33 Stat. 1016 (the “1905 Act” or the “Act”). From this placement of property into trust status in exchange for a conditional promise of payment, my colleagues in the majority infer clear congressional intent to diminish the Wind River Reservation. I cannot agree. By deriving an intent to diminish absent sum-certain payment or statutory language restoring lands to the public domain, the majority opinion creates a new low-water mark in diminishment jurisprudence. Applying the three-step analysis from Solem, 465 U.S. at

470-71, I would hold that the 1905 Act did not diminish Reservation boundaries.

Accordingly, I respectfully dissent.

I

Our diminishment analysis begins with the statutory text. The Court has stated that “language evidencing the present and total surrender of all tribal interests,” when coupled with an “unconditional commitment from Congress to compensate the Indian tribe for its opened land,” creates a presumption of diminishment. Solem, 465 U.S. at 470-71; see also DeCoteau, 420 U.S. at 445-49 (finding diminishment based on language of cession and sum-certain payment). The 1905 Act states that the Indians “cede, grant, and relinquish to the United States, all right, title, and interest” to certain lands “within the said reservation.” 33 Stat. at 1016. But the United States did not agree to pay a sum certain. Instead, the Act provides that “the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.” Id. at 1021 (emphasis added). Moreover, the Act states that “nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands.” Id. at 1020. Citing the Act’s designation of a portion of the sale proceeds for per capita payments, the majority adopts the euphemism “hybrid payment scheme.” (Majority Op. 20.) However, the terms of the statute unambiguously reflect a conditional promise to pay.

Because the 1905 Act lacked sum-certain payment, the majority opinion’s reliance on sum-certain cases is misplaced. It repeatedly asserts that the language of the 1905 Act, like the statutory language in DeCoteau, is “precisely suited” to diminishment. (See, e.g., Majority Op. 14 (citing DeCoteau, 420 U.S. at 445).) But when the Court in DeCoteau made that observation, it was comparing the statutory language of an 1889 agreement to “that used in the other sum-certain, cession agreements” ratified in the same act. 420 U.S. at 446 (emphasis added). The DeCoteau Court distinguished both Seymour v. Superintendent, 368 U.S. 351 (1962), and Mattz v. Arnett, 412 U.S. 481 (1973), in part, on the ground that the acts at issue in those cases conditioned payment to the tribes on the “uncertain future proceeds of settler purchases”—precisely the situation presented here. DeCoteau, 420 U.S. at 448. In contrast, the 1891 act in DeCoteau “appropriate[d] and vest[ed] in the tribe a sum certain.” Id.

The 1905 Act differs from legislation deemed to have diminished reservations in another important respect: It did not restore the lands at issue to the public domain. Cf. id. at 446 (citing legislators’ statements that “ratified agreements would return the ceded lands to the ‘public domain’” to support claim that agreements unquestionably diminished reservations). Because the lands at issue here were held in trust under the Act, they remained Indian lands. In Ash Sheep Co. v. United States, 252 U.S. 159 (1920), the Tribe “ceded, granted, and relinquished to the United States all of their right, title and interest.” Id. at 164 (quotations omitted). However, the government did not provide unconditional payment, promising only to give the Indians the future proceeds of any land sales. Id. at 164-65. And, in language nearly identical to the 1905 Act, the

statute stated that the United States was not bound to purchase or sell the affected lands but rather to “act as trustee” in their disposal. Id. at 165-66. The Court determined, based on this language, that although the Indians had “released their possessory right to the government,” the lands remained “Indian lands” because any benefits derived therefrom would belong to the Indians as beneficiaries and not the government as trustee until the lands were sold. Id. at 166.¹

Admittedly, the retention of a beneficial interest is not dispositive of reservation status. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 601 n.24 (1977). But the majority too easily dismisses the trust status of the lands at issue. (See Majority Op. at 21-22.) “The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.” Solem, 465 U.S. at 468. Accordingly, although it is not determinative, Congress’ decision not to restore these lands to the public domain cuts strongly against the majority’s conclusion that the Reservation was diminished.

Given the absence of sum-certain payment or restoration of lands to the public domain, we could easily interpret the language of cession contained in the 1905 Act as merely opening portions of the Wind River Reservation to settlement.² In assessing

¹ The majority states that Ash Sheep is seldom cited in more recent diminishment cases because it addresses the different issue of whether lands became “public lands.” (Majority Op. 21-22.) But in DeCoteau, a case upon which the majority relies, the Court cites Ash Sheep in distinguishing Mattz based on the absence of sum-certain payment. See DeCoteau, 420 U.S. at 448.

² As in Solem, the 1905 Act provides that Indians who held an allotment within the opened territory would be permitted to obtain a new allotment in the unopened area,

statutory language nearly identical to the 1905 Act, the Eighth Circuit concluded that the Devils Lake Indian Reservation had not been diminished. United States v. Grey Bear, 828 F.2d 1286 (8th Cir.), vacated in part on other grounds on reh'g en banc, 836 F.2d 1088 (8th Cir. 1987). Specifically, the court held that although the language “do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest” was suggestive of diminishment, id. at 1290 (emphasis omitted) (quoting Act of April 27, 1904, ch. 1620, 33 Stat. 321-22), it did not “evince a clear congressional intent to disestablish the Devils Lake Reservation” absent an “unconditional commitment” by Congress to pay for the ceded lands, id.

The majority attempts to distinguish Grey Bear, noting that the legislative history of the act at issue there was not extensive and that subsequent treatment of the area weighed against a finding of diminishment. (Majority Op. 17 n.6.) But the majority does not appear to rest its holding in this case on the second and third steps of the Solem analysis. Instead, it claims that the “express language of cession in the 1905 Act indicates Congress intended to diminish the boundaries of the Wind River Reservation.” (Id. at 22.) The majority thus reaches a conclusion squarely opposite to one of our sibling circuits, creating a needless circuit split.

referring to the latter as the “diminished reserve.” 33 Stat. at 1016; Solem, 465 U.S. at 474 (describing unopened areas as “reservations thus diminished”). But the Supreme Court explained that this phrase “cannot carry the burden of establishing an express congressional purpose to diminish” because at the time of the Act, “‘diminished’ was not yet a term of art in Indian law.” Solem, 465 U.S. at 475 & n.17. Thus, Congress “may well have been referring to diminishment in common lands and not diminishment of reservation boundaries.” Id. Similarly, references to a reservation “in the past tense” should not “be read as a clear indication of congressional purpose to terminate.” Mattz, 412 U.S. at 498-99.

The Supreme Court has counseled that “[w]hen we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quotation and alteration omitted). Adhering to that principle in this case, we must read the 1905 Act as providing for sale and opening of lands rather than diminishment.

II

In very limited circumstances, courts have been willing to find diminishment even absent “explicit language of cession and unconditional compensation.” Solem, 465 U.S. at 471. But that is true only if surrounding circumstances “unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.” Id. A “few phrases scattered through the legislative history” are insufficient to manufacture clear congressional intent to diminish if a plain statement of that objective is lacking in the statutory text. Id. at 478.

Legislative history surrounding two ancillary portions of the 1905 Act counsel against an intent to diminish. First, Congress chose to omit a school lands provision from the 1905 Act, demonstrating its view that the opened lands retained their Reservation status. A precursor bill, presented to Congress in 1904, initially provided that the United States would pay \$1.25 per acre for sections 16 and 36, or equivalent lands, in the opened townships. 38 Cong. Rec. H5247 (1904). This provision mirrored the Wyoming Enabling Act, which grants sections 16 and 36 of each township to the state for school

purposes unless those lands are sold or disposed of, in which case the state may take other lands in lieu. Wyoming Enabling Act, ch. 664, § 4, 26 Stat. 222, 222-23 (1890). During debate on the 1904 bill, Representative Mondell proposed to strike the school lands provision. 38 Cong. Rec. H5247. He explained that although “the bill originally provided that the State should take lands on the reservation” for the price of \$1.25 per acre, eliminating the school lands provision would “leav[e] the State authorized under the enabling act to take lieu lands.” Id. (statement of Rep. Mondell) (emphasis added). Both Mondell’s statement and the decision to omit the provision evince the belief that sections 16 and 36 would remain part of the Reservation. The House Committee on Indian Affairs later reported that it had adhered to this policy in drafting the bill that would ultimately become the 1905 Act. See H.R. Rep. No. 58-3700, pt. 1, at 7 (1905) (stating that it had been “deemed wise by the committee to adhere to the policy laid down in the former bill and agreement,” under which there was no school lands provision and “Indians [were] to receive the same rates from settlers for sections 16 and 36 as paid for other lands”).³

Conversely, if a school lands provision is included in a statute, the Supreme Court has been more apt to find congressional intent to diminish. In Rosebud, for example, the

³ Although the Wyoming Enabling Act did not exempt reservations from the grant of sections 16 and 36 to the state for school purposes, the Wyoming Constitution disclaims “all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes.” Wyo. Const. art. XXI, § 26. Because “Congress is presumed to act with knowledge of controlling constitutional limitations” when it enacts new statutes, Golan v. Gonzales, 501 F.3d 1179, 1183 (10th Cir. 2007), the decision to omit the school lands provision is further evidence Congress believed the opened lands to retain their reservation status.

Court held that the inclusion of a similar school lands provision evinced “congressional intent to disestablish Gregory County from the Rosebud Reservation, thereby making the sections available for disposition to the State of South Dakota for school sections.” 430 U.S. at 601 (quotation omitted); see also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 349-50 (1998) (inclusion of school lands provision indicative of intent to diminish).⁴ The majority notes that the State of Wyoming may have received federal land elsewhere as a result of Congress’ decision to omit the school lands provision. (Majority Op. 32 n.13.) But that is exactly the point. By striking the provision, Congress recognized that Wyoming could take lieu lands elsewhere, rather than pay \$1.25 for “lands on the reservation.” 38 Cong. Rec. H5247 (statement of Rep. Mondell) (emphasis added); see also 26 Stat. at 222-23.

Also weighing against a finding of diminishment is a provision granting Asmus Boysen a preferential right to lease new lands “in said reservation” in lieu of his existing lease rights. 33 Stat. at 1020. The provision was opposed by a minority in the House of Representatives, who argued that Boysen should not be granted preferential rights because his lease would terminate upon passage of the Act, and because “other persons desiring to enter and settle upon the lands to be opened” should stand on equal footing.

⁴ In contrast to the Wyoming Enabling Act, the statute admitting North and South Dakota into the Union expressly provided that sections 16 and 36 “embraced in permanent reservations” would not “be subject to the grants . . . of [the] act.” Act of February 22, 1889, 25 Stat. 676, 679. However, as discussed in n.3, supra, the Wyoming Constitution served a similar function by disclaiming “all right and title” to lands held by Indian Tribes. Wyo. Const. art XXI, § 26. Accordingly, even if the grant of sections 16 and 36 on the Wind River Reservation was not expressly prohibited by the Wyoming Enabling Act, it makes sense that Congress would not have provided for Wyoming to take lands to which the state had “forever disclaim[ed] all right and title.” Id.

H.R. Rep. No. 58-3700, pt. 2, at 2, 3 (emphasis added). By describing the “lands to be opened” as being “in said reservation,” 33 Stat. at 1020, the 1905 Act demonstrates Congress’ understanding that the opened areas would retain their reservation status.⁵

The majority relies on a prior history of negotiations to conclude that the 1905 Act resulted in diminishment, citing Rosebud for the proposition that implied continuity in purpose from a prior agreement is informative. (See Majority Op. 31 (citing Rosebud, 430 U.S. at 590-92); see also id. at 15 n.2.) But the negotiation history presented here differs markedly from that considered by the Court in Rosebud. In Rosebud, the Rosebud Sioux Tribe reached an agreement with the United States to diminish reservation boundaries in 1901. 430 U.S. at 587. Although Congress failed to ratify the agreement, the Court concluded that the agreement’s purpose was carried out in subsequent acts passed in 1904, 1907, and 1910. Id. at 587-88, 592.

There were several factors in Rosebud that are not present in this case. Notably, a mere three years passed between the 1901 agreement and the 1904 act in Rosebud. It should be unsurprising that congressional intent remained static for such a brief period.

⁵ Although the trust status of lands is not dispositive of the diminishment issue, the inclusion of the Boysen provision is further evidence that the opened lands were placed in trust for the benefit of the Tribes. Boysen had previously entered into a mineral lease with the Tribes that included portions of the opened area. The terms of the lease provided it would terminate “in the event of extinguishment . . . of the Indian title to the lands covered by” the agreement. As discussed, supra, a minority opposed to the provision argued that there was no need to grant Boysen preferential rights to the opened lands because his existing lease rights would automatically terminate upon passage of the 1905 Act. But as Representative Marshall, the chairman of the subcommittee that considered the Boysen provision, explained, Indian title would not be extinguished 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.” 39 Cong. Rec. H1945 (1905) (statement of Rep. Marshall).

Here, my colleagues rely extensively on a proposed agreement from 1891, nearly a generation prior to passage of the 1905 Act. (See Majority Op. 24, 31.)

Further, in Rosebud the reason Congress failed to ratify the prior agreement “was not jurisdiction, title, or boundaries” but “simply put, money.” 430 U.S. at 591 n.10 (quotation omitted). The 1904 act was essentially identical to the 1901 agreement other than the form of payment. Id. at 594-97. In contrast, the government and Tribes in this case were unable to reach an agreement as to the particular lands to be opened in either 1891 or 1893. In 1891, certain members of Congress called for the opening of more lands than what was provided for in the proposed agreement. H.R. Doc. No. 52-70, at 7-8 (1892). And the Tribes rejected three separate counteroffers in 1893, indicating they did not wish to sell the lands under discussion. H.R. Doc. No. 53-51 (1894). Thus, unlike the three-year delay in Rosebud from an agreement that went unratified because of concerns over the manner of payment, we are presented with a fourteen-year halt following negotiations that failed because the parties could not agree on material terms.

Not only did a significant period of time elapse between the 1891 negotiations and the 1905 Act in this case, but any continuity of purpose was also disrupted by intervening agreements regarding cession of other portions of the Reservation. In 1896, for example, Inspector McLaughlin successfully negotiated the Thermopolis Purchase Act, under which the Tribes ceded the Big Horn Hot Springs to the United States in exchange for a sum-certain payment of \$60,000. Act of June 7, 1897, 30 Stat. 62, 93-94. At a council meeting in 1922, McLaughlin expressly distinguished the agreements underlying the 1897 and 1905 Acts, stating that they were “entirely distinct and separate” and that under

the 1905 Act, “the government simply acted as trustee for disposal of the land north of the Big Wind River.”

The absence of a continuity of purpose to diminish the Reservation is further evidenced by the negotiations preceding passage of the 1905 Act. In his 1903 negotiations with the Rosebud Tribe, McLaughlin stated that he was there “to enter into an agreement which is similar to that of two years ago, except as to the manner of payment.” Rosebud, 430 U.S. at 593. In this case, McLaughlin did not tell the Tribes in 1904 that he sought to reopen the 1891 or 1893 negotiations. And although the majority quotes McLaughlin’s use of the word “cede,” (Majority Op. 26), he used that term interchangeably with the concept of “opening . . . certain portions of [the] reservation for settlement by the whites.” Similarly, any references to a diminished reservation “may well have been referring to diminishment in common lands and not diminishment of reservation boundaries.” Solem, 465 U.S. at 475 & n.17.

Looking to the totality of the circumstances surrounding the 1905 Act, it cannot be said that they “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 (emphasis added). At best, the historical record is mixed regarding Congress’ intent. As such, it is insufficient to overcome ambiguity in the statutory text.

III

At the third step of the Solem analysis, we consider “[t]o a lesser extent . . . events that occurred after the passage of a surplus land act to decipher Congress’s intentions.”

Solem, 465 U.S. at 471. But this third prong comes into play only at the margins.⁶ If “an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” Solem, 465 U.S. at 472.

Because the statutory text and legislative history in this case fail to provide compelling evidence of congressional intent to diminish, we need not consider this third prong. Even if we did, however, I agree with the majority that the post-Act record is so muddled it does not provide evidence of clear congressional intent. (Majority Op. 34.)⁷ But, as with the first two steps in the analysis, this lack of clarity must not be treated as a

⁶ Although I acknowledge that controlling precedent permits courts to consider post-enactment events, I feel compelled to remark on the irrational nature of such an inquiry. The demographic makeup of an area decades or more following passage of a statute cannot possibly tell us anything about the thinking of a prior Congress. See Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers, 109 Yale L.J. 1, 19 (1999) (noting “[t]he conceptual problem with this approach, of course, is that postenactment developments reveal nothing about original congressional intent, much less intent sufficiently clear to satisfy the canon” requiring ambiguous statutes to be construed in favor of tribal interests). The Court itself has apparently recognized the dubiousness of this analysis, referring to “de facto” diminishment as a “necessary expedient.” Solem, 465 U.S. at 471, 472 n.13.

The third step of the Solem analysis cannot be meaningfully described as a tool to decipher congressional intent. Rather, it is a means of ignoring that intent. Courts should be loath to abandon the proper tools of statutory interpretation in any context, but to do so with respect to Indian law is particularly perverse given our canon of construction that “statutes are to be construed liberally in favor of the Indians.” Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. at 269 (quotation and alteration omitted).

⁷ I also agree with the majority that this controversy has not been rendered moot and that the Wyoming Farm Bureau has standing. (See Majority Op. 10-11 n.1.)

neutral element. Because we apply a “presumption that Congress did not intend to diminish,” Solem, 465 U.S. at 481, proponents of diminishment must show that “non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character,” id. at 471. The appellants have not met this burden.

Land sales in the opened area were largely a failure. By 1915, less than 10% of the land had been sold to non-Indians, prompting the Department of the Interior (“DOI”) to indefinitely postpone further sales. Less than 15% of the opened area was ultimately transferred to non-Indians. Cf. Yankton Sioux Tribe, 522 U.S. at 339 (noting that approximately 90% of unallotted tracts were settled in that case); Rosebud, 430 U.S. at 605 (same). The DOI continued to allot parcels in the opened lands to Tribal members, and in 1939, Congress restored tribal ownership over the unsold land. Act of July 27, 1939, ch. 387, 53 Stat. 1128. Today, approximately 75% of the lands opened for settlement by the 1905 Act is held in trust by the United States for the benefit of the Tribes and their members.

Despite the sometimes conflicting treatment of the area by non-Indian authorities, (see Majority Op. 34-39), there can be little doubt that most of the opened area retains its Indian character. Accordingly, we face no risk of upsetting “justifiable expectations,” Rosebud, 430 U.S. at 605, by construing the 1905 Act as maintaining Reservation boundaries.

IV

We consider in this case an Act that began with Inspector McLaughlin’s warning to the Tribes that “Congress had the right to legislate for the opening of Indian

reservations without consulting the Indians or obtaining their consent.” Recognizing that Congress possesses the nearly unfettered power to impose its will, leaving the Tribes “no choice but to consent,” the Court has held that “any doubtful expressions in [legislation] should be resolved in the Indians’ favor.” Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). This rule must be given “the broadest possible scope” in the diminishment context. DeCoteau, 420 U.S. at 447. In interpreting the 1905 Act, we must bear in mind the government’s “moral obligations of the highest responsibility and trust, obligations to the fulfillment of which the national honor has been committed.” United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) (citation and quotations omitted). With this heavy thumb on the scale, I would hold that the 1905 Act did not diminish the Wind River Reservation. I respectfully dissent.

ATTACHMENT 2

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

February 22, 2017

Elisabeth A. Shumaker
Clerk of Court

STATE OF WYOMING; WYOMING
FARM BUREAU FEDERATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; E. SCOTT
PRUITT, in his official capacity as
Administrator of the United States
Environmental Protection Agency; DEB
THOMAS, in her official capacity as
Acting Region 8 Administrator of the
United States Environmental Protection
Agency, *

Respondents.

THE NORTHERN ARAPAHO TRIBE;
EASTERN SHOSHONE TRIBE; CITY
OF RIVERTON, WYOMING; FREMONT
COUNTY, WYOMING,

Intervenors.

Nos. 14-9512 & 14-9514
(EPA No. EPA-1-R08-2013-0007)
(Environmental Protection Administration)

* **Error! Main Document Only.** Pursuant to Fed. R. App. P. 43(c)(2) E. Scott Pruitt is substituted for Gina McCarthy as the Administrator of the United States Environmental Protection Agency, and Deb Thomas is substituted for Shaun McGrath as the Acting Region 8 Administrator of the United States Environmental Protection Agency.

STATE OF IDAHO; STATE OF ALABAMA; STATE OF COLORADO; STATE OF KANSAS; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF UTAH; INDIAN LAW PROFESSORS; RIVERTON MEMORIAL HOSPITAL, LLC,

Amici Curiae.

JUDGMENT

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **LUCERO**, Circuit Judges.

This petition for review originated from the Environmental Protection Agency and was argued by counsel.

We find Congress diminished the boundaries of the Wind River Reservation. We therefore grant Wyoming’s petition for review and vacate the EPA’s order. The case is remanded in part for reconsideration in accordance with the opinion of this Court.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk