Nos. 14-9512 & 14-9514

In The
United States Court of Appeals
for the Tenth Circuit

STATE OF WYOMING and WYOMING FARM BUREAU FEDERATION,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; E. SCOTT PRUITT, as Administrator of the United States Environmental Protection Agency; DEB THOMAS, as Acting Region 8 Administrator of the United States Environmental Protection Agency,
Respondents.

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

On a Petition for Review Pursuant to 42 U.S.C. § 7607(b)(1) from a Decision by the United States Environmental Protection Agency.

BRIEF OF AMICI CURIAE FEDERAL INDIAN LAW PROFESSORS IN SUPPORT OF TRIBAL INTERVENORS' PETITION FOR REHEARING

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INTERESTS OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are all professors and scholars of federal Indian law. As Indian law is a complex field, amici have considerable interest in ensuring that federal Indian law decisions consistently and accurately reflect the distinctive history and rules of construction that govern this field. A motion for leave to file this brief is simultaneously being filed pursuant to Rule 29(a) of the Federal Rules of Civil Procedure.

ARGUMENT

Precedent stretching from 1832 to 2016 makes one thing plain: clear congressional intent is necessary to diminish tribal rights. The U.S. Supreme Court, in an opinion by Justice Clarence Thomas, unanimously affirmed this rule in the diminishment context just last year. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016). *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017) stated this rule, but failed to apply it. Instead, setting a "new low-water mark" in diminishment cases, *id.* at 882 (Lucero, J., dissenting), the majority held that Congress diminished the Wind River Reservation's treaty-pledged boundaries, despite the lack of clear language or an unconditional commitment to pay for the lands. En banc review is needed to correct this error.

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[1] No party's counsel authored this brief in whole or in part, and no person other than the *amici curiae* contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. Proc. 29(c)(5).

I. FROM CHIEF JUSTICE MARSHALL TO CHIEF JUSTICE ROBERTS, THE SUPREME COURT HAS REQUIRED CLEAR EVIDENCE OF CONGRESSIONAL INTENT TO FIND DIMINISHMENT OF TRIBAL RIGHTS

For almost two hundred years, the Supreme Court has demanded evidence of clear congressional intent before finding termination of tribal rights. *See Worcester v. Georgia*, 31 U.S. 515, 554 (1832) (stating that had the treaty been intended to remove tribal self-governance "it would have been openly avowed"). The Roberts Court has strongly endorsed this rule. *See Parker*, 136 S. Ct. at 1078-79 (demanding "clear" and "unequivocal" congressional intent for diminishment); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014) (requiring "clear" and "unequivocal" congressional intent to abrogate tribal sovereign immunity). The Tenth Circuit has as well. *See, e.g.*, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) ("We [will] construe federal laws as working a divestment of tribal sovereignty . . . only where Congress has made its intent clear"); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 981 (10th Cir. 1987) (demanding "clear evidence" of intent to remove tribal authority).

The rule serves three goals. First, it implements the policy, manifested since the founding, of respecting tribal sovereignty. Second, it implements the democratic norm of consent by mitigating Congress's vast power over Indian tribes. And third, in cases like this, which involve undermining a treaty-guaranteed reservation, it upholds the faith of the United States in keeping its treaty promises.

A. The Clear Intent Rule Implements the Federal Policy of Respect for Other Sovereigns—State, Foreign, or Tribal

"[B]eginning with Chief Justice Marshall and continuing for nearly two centuries," the Supreme Court "has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 n.5 (2016); *Worcester*, 31 U.S. at 556-57 (laws from the "commencement of our government . . . treat [tribes] as nations [and] respect their rights"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831) (tribes are "domestic dependent nations"; Cherokees "have been uniformly treated as a state from the settlement of our country"). A core part of the "profound importance" of tribal sovereignty is that courts may not interpret statutes to diminish tribal rights unless there is clear evidence of congressional intent to take them away. *Bay Mills*, 134 S. Ct. at 2031; *see Cohen's Handbook of Federal Indian Law* § 2.02[1] (2012 ed.) ("[T]ribal property and sovereign rights are preserved unless Congress's intent to the contrary is clear and unambiguous.").

This clear intent rule is not unique to Indian affairs. It exists in every area in which Congress has power to undermine the authority of other governments—foreign, state, or tribal. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 415-17 (1993). Like treaties with Indian tribes, treaties with

foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984). Similarly, statutes do not operate extraterritorially unless "the affirmative intention of the Congress [is] clearly expressed." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Clear evidence of congressional intent is also necessary to construe a statute to intrude on state authority. *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014).

In each of these areas, Congress has power to act, but its actions will undermine traditional boundary lines between governments. In such cases, "'the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Bond*, 134 S. Ct. at 2089. Here, diminishment would deprive the Eastern Shoshone and Northern Arapaho Tribes of tribal authority and federal protection, leaving them without power to protect the welfare of their children, the safety of their people, and the purity of their waters. This is the ultimate intrusion on sovereignty. Clear evidence of congressional intent is necessary to enact such a change.

B. In Indian Affairs, the Clear Intent Rule Furthers Democratic Norms of Consent

The clear intent rule also implements democratic norms of consent in the face of vast federal power. *See* Richard Collins, *Indian Consent to American*

Government, 31 Ariz. L. Rev. 365 (1989). The United States was founded on the principle of government by consent of the governed. Declaration of Independence ¶ 2 (1776). Yet tribal nations and their citizens were deemed outside the U.S. body politic when the Constitution was adopted and could not consent to its terms. Until the twentieth century, moreover, tribal Indians were not citizens of the United States, and could not vote in state or federal elections. Initially, tribal consent to federal power was achieved through treaties, but Congress ended treaty-making in 1871, and did not universalize Indian citizenship until 1924. 43 Stat. 253 (1924); 16 Stat. 544, 566 (1871). In the interim, Congress assumed vast "plenary power" over Native peoples, unbound by treaty rights or even the constitutional review accorded other laws. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

From the beginning, however, courts subjected exercises of plenary power to the clear intent rule. *See* Ex Parte *Crow Dog*, 109 U.S. 556, 572 (1883) (asserting federal jurisdiction over reservations "requires a clear expression of the intention of congress"); *United States v. Celestine*, 215 U.S. 278, 290-91 (1909) (stating that allotment act must "be construed in the interest of the Indian" and "it cannot be said to be clear that Congress intended" end of guardianship). The Supreme Court has continued this tradition, recognizing that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 134 S. Ct. at 2032; *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 60 (1978) ("[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

Allotment is the poster child for the need to temper Congress's power over Indian lives. Allotment took millions of acres of property and transformed tribal homelands. Indians had no right to refuse, either as tribes or as voting citizens. Statutes after *Lone Wolf*, like the 1905 Act here, were enacted with threats that even solemn treaties could not protect tribal property. Unsurprisingly, allotment "quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

But while much land is lost forever, courts temper allotment's impact by dictating that reservation boundaries remain intact absent clear evidence of congressional intent. *See Parker*, 136 S. Ct. at 1078-79; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). This rule implements the democratic faith of the nation. Courts may not, as the panel did here, so lightly ignore it.

C. In this Case, the Clear Intent Rule Respects the Fidelity of the United States to its Treaty Promises

Treaties are the promises of a nation, and are not to be broken lightly. In one of his earliest messages to Congress, President George Washington insisted that Indian treaties, no less than those with foreign nations, should be "executed with

fidelity." 1 Annals of Cong. 83 (1789). Secretary of War Henry Knox declared that enforcing such treaties concerned the "reputation and dignity" of the nation. 34 Jour. Continental Cong. 342-343 (July 18, 1788). The intent to break treaty pledges, therefore, "is not to be lightly imputed to the Congress." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). Thus while "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). "Indian treaty rights," in other words, "are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739 (1986); *see EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (quoting *Dion*).

Here, the boundaries of the Wind River Reservation were established by the 1868 Treaty of Fort Bridger, in which the Eastern Shoshone relinquished claims to 44 million acres of land in exchange for a "permanent home." 16 Stat. 673, art.IV (1868). The treaty declares that the United States' "honor is hereby pledged to keep" the peace the treaty established, and "solemnly agrees" to tribal authority over the reservation's boundaries. *Id.* at arts. I & II.

Before finding the 1905 Act revoked this solemn pledge, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 740. Despite this, the panel

here cobbled its diminishment finding from ambiguous language and history. Respect for the faith of our nation demands something more.

II. THE FACTS HERE UTTERLY FAIL TO SATISFY THE CLEAR INTENT RULE AS INTERPRETED IN *NEBRASKA V. PARKER*

The Supreme Court affirmed the clear intent rule just last year, in a unanimous opinion by Justice Thomas. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016). Although Congress could diminish a reservation, the Court found, "its intent to do so must be clear." *Id.* at 1079. There were far more compelling reasons to find diminishment in *Parker* than here. There, the entire disputed area was almost entirely owned and occupied by non-Indians, and "the Tribe was almost entirely absent from the disputed territory for more than 120 years." *Id.* at 1081. Nevertheless, the Court held, because the statute did not "clearly convey" that the opened lands lost reservation status, the reservation boundaries remained. *Id.* at 1079.

In *Parker*, the Court found that "Congress legislated against the backdrop" of two earlier laws that diminished the Omaha Reservation "'in unequivocal terms.'" 136 S.Ct. at 1080 (citations omitted). Here, too, Congress twice explicitly diminished the Wind River Reservation before 1905. The 1874 Lander Purchase stated that it would "change the southern limit of said reservation." 18 Stat. 291 (1874). The 1897 Thermopolis Agreement stated that part of the lands ceded would be "conveyed unto the State of Wyoming," and part "conveyed to the United States" and "declared to be public lands of the United States." 30 Stat. 93, 94 (1897). In

contrast, the 1905 Act has no statement that reservation boundaries will be altered, that the Act conveys land to anyone, or that ceded lands become public lands. Although James McLaughlin negotiated both the Thermopolis Agreement and the 1905 Act, the 1905 Act lacks even the comprehensive cession language of the Thermopolis Agreement. As the Court held in *Parker*, the lack of similarly clear language "undermines petitioners' claim that Congress intended to do the same with the reservation's boundaries" with the 1905 Act as the previous laws. 136 S.Ct. at 1080.

Most important, unlike those previous acts, there is no unconditional commitment to compensate the Shoshone and Arapaho for their lands. The Supreme Court has only once, in *Rosebud Sioux v. Kneip*, 430 U.S. 584 (1977), found diminishment in the absence of either a lump sum payment or statement that the lands would be "restored to the public domain." In *Rosebud Sioux*, the Court found unequivocal intent because the operative Act was intended to ratify an agreement from just three years before that clearly diminished the reservation. *Id.* at 595. Here, in contrast, the majority read the 1905 Act as though it incorporated an 1891 bill concerning different lands that the Tribes never agreed to. 849 F.3d at 878. The clear intent rule forbids interpreting a statute through the lens of a failed 14-year-old bill.

Nor is what the majority misnamed a "hybrid payment scheme," *id.* at 872, anything like an unconditional commitment to pay. In fact, it is a *restriction* on the permitted uses of any proceeds from the land. The 1905 Act expressly provides that the only "consideration" for opening the lands to settlement in the Act was that the United States would try to sell them. 33 Stat. 1016, art.II. The United States did not even promise that the lands would be sold. It stipulated that "nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described . . . or to guarantee to find purchasers for said land or any portion thereof." 33 Stat. 1018, art.IX. Without clear textual language indicating diminishment, this highly conditional agreement cannot provide clear intent.

The Supreme Court in *Parker* reiterated that where, as here, the text does not "clearly convey" intent to diminish, diminishment can only be found if other evidence "'*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" 136 S. Ct. at 1080 (citations omitted). In *Parker*, BIA documents from the 1880s onward referred to the disputed area as outside the reservation, and the BIA formally opined in 1964 and 1989 that the reservation had been diminished. Brief for Petitioners, *Nebraska v. Parker*, 2015 WL 7294863, *at* 11-15. Here, as even the *Wyoming v. EPA* majority recognized, the evidence of diminishment is at best

"mixed and has little probative value." 849 F.3d at 880. As *Parker* decreed, "mixed historical evidence" simply cannot "overcome the lack of clear textual signal that Congress intended to diminish the reservation." 136 S. Ct. at 1080.

Parker shows how the clear intent rule should be applied. *Wyoming v. EPA* cited *Parker*, but overlooked what it actually said.

CONCLUSION

The clear intent rule is almost as old as the Constitution itself, and the Supreme Court has endorsed it to the present day. It implements federal respect for sovereignty, democracy, and the faith of the nation. The majority in *Wyoming v. EPA* gave lip service to the rule, and then ignored it. Wherefore, amici request rehearing en banc.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

Bethany Berger is the Wallace Stevens Professor of Law at the University of Connecticut School of Law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds), co-author of two leading casebooks, *American Indian Law: Cases and Commentary* (with Anderson, Frickey & Krakoff), and *Property: Rules, Policies, and Practices* (with Singer, Davidson, and Penalver), and the author of many articles in the fields of American Indian law and property law. She was a co-author of an amicus brief submitted to the Supreme Court in *Nebraska v. Parker.*

Richard B. Collins is a Professor of Law at the University of Colorado, Boulder. He teaches and writes in the areas of constitutional law, Indian law, and property. He is a co-author of *Cohen's Handbook of Federal Indian Law* (1982 ed.), and many articles on federal Indian law.

Seth Davis is an Assistant Professor of Law, University of California, Irvine School of Law, where he teaches and writes in the areas of Federal Indian law, property, federal courts, and administrative law. His articles have appeared in the *California Law Review*, the *Columbia Law Review*, the *Notre Dame Law Review*, the *Wisconsin Law Review*, and the *Columbia Human Rights Law Review*. He is a co-author on the 2015 and 2017 supplements to *Cohen's Handbook of Federal Indian Law.*

Carole Goldberg is the Jonathan D. Varat Distinguished Professor of Law and former Vice Chancellor of Academic Personnel at the University of California Los Angeles. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (1982, 2005 & 2012 eds), co-author of a casebook, *American Indian Law: Native Nations and the Federal System* (7th ed. 2015), and author of many books and articles in the field of federal Indian law. From 2010 to 2013, she also served as a member of the U.S. Indian Law and Order Commission.

James Grijalva is the Lloyd & Ruth Friedman Professor of Law and Director of the Tribal Environmental Law Project at the University of North Dakota School of Law, where he teaches American Indian law, property law, environmental law and administrative law. Professor Grijalva has been a technical services contractor for the American Indian Environmental Office of the U.S. Environmental Protection Agency and a trainer for EPA's Office of Environmental Justice. He is the author of many articles and books on environmental law and federal Indian law.

Maggie McKinley (Fond du Lac Band Ojibwe) is an Assistant Professor of Law at the University of Pennsylvania School of Law. Her scholarship examines questions of legislative process, Constitutional Law, and Native American law. Her most recent article is *Lobbying and the Petition Clause*, 68 Stan. L. Rev. 1131 (2016).

Joseph William Singer is Bussey Professor of Law at Harvard Law School, where his scholarship focuses on property law and federal Indian law. He is an executive

editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds). He is the founding author of a leading casebook, *Property: Rules, Policies, and Practices*, and many books and articles on property and American Indian law.

Alex Tallchief Skibine (Osage Nation—Oklahoma) is a Professor at the University of Utah S.J. Quinney College of Law, where he teaches administrative law, constitutional law, torts, and federal Indian law. He formerly served as Deputy Counsel for Indian Affairs for the U.S. House of Representatives Committee on Interior and Insular Affairs. He is a co-author of *Cohen's Handbook of Federal Indian Law* (2005 ed.) and author of numerous articles in federal Indian law and constitutional law.

Michalyn Steele (Seneca Nation) is an Associate Professor of Law at the J. Reuben Clark Law School at Brigham Young University. She teaches courses in Federal Indian Law, Civil Rights, and Constitutional Law. Her research focuses on separation of powers principles and tribal sovereignty. Before entering academia, Professor Steele worked for six years at the U.S. Department of Justice and then for several years as Counselor to the Assistant Secretary for Indian Affairs, Larry Echo Hawk, at the U.S. Department of Interior.

CERTIFICATES

1. **Certificate of Compliance with Typeface and Typestyle Requirements.** This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word and set in 14-point Times New Roman type style.

2. **Certificate of Compliance with Type-Volume Requirements.** This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 2597 words, excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain this word count.

3. **Certificate of Digital Submission.** No privacy redactions were required in this petition and hence no such redactions were made. The electronic version of the petition has been scanned for viruses using Windows Defender and is, according to that program, free of viruses. The electronically filed version of the petition is an exact copy of the paper version filed with the clerk.

4. **Certificate of Service.** On this 17th day of July, 2017, I electronically filed this petition (including attachments) using the Court's appellate CM/ECF system. Counsel for all parties to this case are registered CM/ECF users and will be served by that system.

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