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 U.S. Environmental Protection Agency, No. EPA-1-R08-2013-0007.

BRIEF OF AMICUS CURIAE THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF TRIBAL INTERVENORS' PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae hereby makes the following disclosures:

For purposes of this action, the following are the parent companies and publicly held corporations, along with their subsidiaries and affiliates, that own a ten percent (10%) or more interest or stock in the disclosing party(ies), or that have a financial interest in the outcome of this litigation:

> None. The National Congress of American Indians is a not-for-profit organization.

Respectfully submitted,

s/ Daniel E. Gomez

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IDENTITY & INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, the National Congress of American Indians ("NCAI"), is the oldest and largest national organization that represents and advocates for American Indians and tribal governments. NCAI's membership includes more than 250 Native American tribes and Alaskan Native villages, and countless individual tribal citizens. NCAI has a longstanding interest in matters relating to tribal sovereignty and jurisdiction, and in supporting tribes' and Indian peoples' rights to self-determination and self-governance—both dependent to a large extent on tribal governments' ability to exercise their inherent governmental powers.

Since 1944, NCAI has advised tribal, federal, and state governments on a broad range of tribal and individual Indian issues, including providing briefing as amicus curiae to numerous federal courts, including the United States Supreme Court, on reservation disestablishment and diminishment. NCAI is thus well-positioned to provide this Court with critical context on the law applicable to the recognition, disestablishment, and diminishment of Indian reservations, and the importance to tribal governments and individual Indians of the development of the law in this area.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that this brief has not been authored, in whole or in part, by counsel for a party in this case, and no entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION & SUMMARY

Challenges to reservation boundaries require interpretation of statutes Congress enacted when it began allotting Indian lands for white settlement in the 1880s. Almost a century passed before challenges to these boundaries reached the courts in earnest, and by design and necessity, the United States Supreme Court established a legal framework for interpreting these surplus lands acts that appropriately set a high standard for challenging historic boundary lines. The federal courts' adherence to this framework represents an important protection of the rights of Indian tribes and Indian people, for whom such boundaries represent settled tribal jurisdictional boundaries, property rights, cultural identity, and much more.

Although the Supreme Court recently reaffirmed this framework, the panel's majority decision represents a relaxed analysis for finding diminishment. As a result, the decision introduces new uncertainty into established precedent. The Supreme Court has admonished that courts cannot "remake history" in reservation boundary challenges, but the majority's decision raises the specter of new challenges to reservation boundaries nationwide because of its less rigorous approach to interpreting statutes enacted to benefit Indians. Because of its profound impact not only on the Northern Arapaho and the Eastern Shoshone Tribes, but on all American Indian nations, the majority's decision justifies additional review.

ARGUMENT & AUTHORITIES

I. THE MAJORITY'S ANALYSIS INTRODUCES UNCERTAINTY INTO RESERVATION BOUNDARY CHALLENGES BY APPLYING A LESS RIGOROUS TEST THAN REQUIRED BY THE SUPREME COURT

Since it emerged more than 50 years ago, the Supreme Court's framework for interpreting historic surplus lands acts has required a more rigorous analysis than is applied in ordinary statutory interpretation. In its operation, the framework appropriately sets a high standard for disturbing boundary lines Congress set well over a century ago.[2] As the dissent noted, the majority's analysis represents a "new low-water mark in diminishment jurisprudence." Slip op. at 1 (Lucero, J., dissenting). This resulted, in part, because the panel incorrectly placed undue emphasis on the word "cede" in the Act of March 3, 1905, 33 Stat. 1016 (the "1905 Act"). Additionally, the panel overlooked entirely the Indian law canons of construction—a critical requirement in the framework because it provides an essential protection of the rights of Indian tribes.

1. Under the Supreme Court's established framework, a reservation cannot be diminished based solely on the language common in all surplus lands act providing for "cession" of Indian lands. If this were the case, the judicial construction of many of the acts might result in diminishment, notwithstanding the original intent, and many

[2] Some 108 years ago, the Supreme Court recognized that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). More recently, stating this principle succinctly, the Court admonished that in interpreting surplus lands acts "we cannot remake history." *Nebraska v. Parker*, ___ U.S. ___, 136 S. Ct. 1072, 1082 (2016); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

decisions establishing the precedent in this area likely would have had different outcomes. The Supreme Court recently re-affirmed its long-standing requirement that the framework for diminishment requires more—it requires payment of a sum certain to the tribe, and/or indication that the land is to be returned to the public domain. *See Parker*, 136 S. Ct. at 1077. Unless courts are faithful to the entire framework, tribal jurisdiction is placed at risk in modern-day litigation over historic boundaries.

The majority's analysis is problematic because of its undue emphasis on the language of cession in the 1905 Act, as evidenced by its conclusion: "We believe Congress's use of the word 'cede' can only mean one thing—a diminished reservation." Slip op. at 18. As the dissent correctly observed, the majority's result represents an outlier in diminishment jurisprudence. This is amply illustrated by the conflict between its ruling and the Eighth Circuit's decision in *United States v. Grey Bear*, which found no diminishment based on statutory language virtually identical to that in the 1905 Act.[3] The 1905 Act contains neither an unconditional commitment to compensate, nor return of the land to the public domain. The majority's decision thus represents a relaxed analysis—one that departs from the Supreme Court's long-standing framework—and that, as the dissent correctly notes, creates "a needless circuit split." Slip op. at 5.

[3] *See* 828 F.2d 1286, 1290 (8th Cir.), *vacated in part on other grounds on reh'g en banc*, 836 F.2d 1088 (8th Cir. 1987). The Eighth Circuit concluded that such language "standing alone, does not evince a clear congressional intent to disestablish" a reservation. *Id*. Consistent with other decisions, the court made clear that to discern clear intent to diminish a reservation, language of cession or sale must be "buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its open land" or must set forth that the land is "vacated and restored to the public domain." *Id*.

2. The majority's analysis also fails to apply the Indian law canons of construction, a critical requirement of the framework and a long-recognized protection in federal law of the rights and property interests of Indian tribes and Indian people. The Indian law canons have the critical function of ensuring, in modern-day litigation, that language in historical acts affecting Indians—but to which the tribes had no real opportunity to influence—is "construed in the interest of the Indian."[4] *Celestine*, 215 U.S. at 290. Without the canons, the framework becomes a standard statutory interpretation analysis. The majority's omission of the cannons not only relaxes the standards in the test but it introduces further uncertainty because other Courts of Appeal have acknowledged their importance.[5]

The absence of the Indian law canons from the majority's decision is an error of consequence because their inclusion likely would have resulted in a different outcome.

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[4] *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973). In the context of surplus lands acts, this rule is a corollary to the key premise of the framework that a reservation cannot be diminished absent explicit language or a very clear intent to change reservation boundaries. *See generally* Susan D. Campbell, *Reservations: The Surplus Lands Acts & the Question of Reservation Disestablis*hment, 12 Am. Indian L. Rev. 57, 59 (1984).

[5] *See, e.g.*, *Oneida Indian Nation of New York v. City of Sherill, New York*, 337 F.3d 139 (2d Cir. 2003) (concluding 1838 treaty did not diminish or disestablish Oneida reservation), *rev'd on other grounds*, 554 U.S. 197 (2005); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000) (finding 1894 act did not diminish Nez Perce Reservation); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996) (concluding 1886 Executive Order did not diminish Chehalis Indian Reservation); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951 (9th Cir. 1982) (1904 Act did not disestablish Flathead Reservation).

The primary function of the canons is to avoid close calls that are harmful to Indian interests. In this case, the majority and the dissent recognize that the statutory language could be subject to competing interpretations. Such ambiguity should be dispositive against a finding of diminishment.

The Supreme Court's framework appropriately places substantial barriers to modern-day challenges to historic Indian reservation boundaries. Rehearing is warranted to ensure that the proper standards are applied, with the interpretive scales favoring tribal interests, and that the decision as precedent is consistent with other circuits' decisions on similar statutory language.

II. A RELAXED ANALYSIS UNDER THE FRAMEWORK THREATENS TO DISRUPT INDIAN SELF-GOVERNANCE AND SELF-DETERMINATION NATIONWIDE

At stake for American Indian nations in reservation diminishment cases is not just a legal framework, but tribal self-determination and self-governance—essential cornerstones of tribal sovereignty.[6] The hallmark of self-governance is that tribes exercise their own governmental functions, including criminal justice and law enforcement, civil and regulatory authority, and historical and cultural preservation. *See Federal Indian Law* §1.07, at 98-108. For tribes, sovereignty and jurisdiction derive from their "Indian country," which includes recognized reservations. *See* 18 U.S.C. §

[6] *See Cohen's Handbook of Federal Indian Law* § 1.07, at 93-108 (2012 ed.) [hereinafter *Federal Indian Law*]. The era of self-determination and self-governance is defined as from 1961 to present, and follows the "disastrous" era of forced termination (1943-1961) during which tribes lost not only substantial reservation lands, but in several cases had their governments terminated entirely, without their consent. *Id.* § 1.07, at 94.

1151; *see also Federal Indian Law* at § 3.04, at 183. The uncertainty created by the majority's analysis threatens to throw existing tribal jurisdiction into disarray by inviting a new wave of challenges based on the decision's new, less stringent, framework.

1. Among other impacts of diminishment is the loss of tribal criminal and law enforcement jurisdiction, both critical components of self-governance, and both bound to tribes' Indian country jurisdiction. *See Federal Indian Law*, at ch. 9. Under the Indian Country Crimes Act, 18 U.S.C. § 1152, tribes have concurrent criminal jurisdiction with federal agencies within Indian country over certain crimes. If lands are no longer within Indian country, jurisdiction would shift to the states, depriving Indian people of critical protections their tribes currently provide.[7]

According to the most recently available data, 165 tribes employ full-time sworn law enforcement officers, almost all of which have cross-deputation agreements with other tribal or local governments, and 188 tribes had some form of judicial system.[8] The re-emergence of tribes in the self-governance era has had many successes, including the Violence Against Women Act, 42 U.S.C. § 13701 *et seq*., which expanded tribes' law enforcement jurisdiction to address a disproportionately high amount of domestic

[7] *See, e.g.*, Discrimination Against Native Americans in Border Towns: A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C. (2011), available at http://www.usccr.gov/pubs/BorderTowns_03-33-11.pdf.

[8] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, (December 2005), *available at* https://www.bjs.gov/index.cfm?ty=pbdetail&iid=543.

violence against Native American women and children in Indian country.[9]

Reservation boundaries represent the geographical bounds of tribal law enforcement and the jurisdiction of tribal courts to protect tribal citizens. Since the eras of allotment and termination, new tribal legal systems have arisen to benefit and protect Indian people, and they have been based on historic reservation boundaries. Diminishment threatens these jurisdictional boundaries and therefore the strides made by tribes in criminal and law enforcement over the last several decades. In fact, many diminishment cases arise by challenges from persons detained by tribal law enforcement to avoid prosecution. Fear of diminishment would chill the ability of law enforcement officers to exercise their jurisdiction to its fullest extent. A new wave of challenges to reservation boundaries, particularly under a relaxed legal analysis, would result in contraction these and many other areas of tribal self-governance.

2. The specter of reservation boundary challenges also threatens tribes' fundamental civil and regulatory jurisdiction, also critical to self-governance.[10] Diminishment thus threatens many areas of core tribal jurisdiction, including protection of historic hunting, fishing, and gathering rights—specifically, tribes' right to regulate nonmember activities in Indian country. *See Federal Indian Law,* § 18.06[1], 1185

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[9] Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than other women in the United States, much of which occurs within Indian country. *See* Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* at 2 (2007).

[10] Civil and regulatory jurisdiction refers to the rights of tribes to exercise authority over reservation affairs. *See Williams v. Lee*, 358 U.S. 217, 223 (1959).

(citing *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993)). Also, tribes have the power to regulate the environment within their jurisdiction, and, as is at issue in this case, to obtain approval to exercise federal program jurisdiction within their Indian country. *See Federal Indian Law*, § 10.01[1], 784. The United States Environmental Protection Agency reports that hundreds of tribes have accepted some role in environmental protection in Indian country, which points to the potentially far-reaching implications of the decision ultimately reached in this case.[11]

Another important exercise of tribal civil jurisdiction relates to the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. (the "ICWA"), through which tribes protect their youngest and most vulnerable citizens. Under ICWA, tribes have exclusive adjudicatory jurisdiction over families living in Indian country, but their authority is lessened for tribal families outside reservation boundaries. Even in predominantly non-Indian towns within reservations, tribes' exclusive jurisdiction over Indian children affords a significant protection. Reservation diminishment poses a direct threat to tribes' authority under ICWA, and its goal of strengthening Indian families.

3. The majority's decision also threatens tribes' ability to protect their cultural and historical resources and sites. Under the National Historic Preservation Act, tribes are authorized to create their own Tribal Historic Preservation Officer programs ("THPOs"), but the reach of such programs is limited to "tribal lands" defined as "all

[11] *See* U.S. E.P.A., *Profile of Tribal Government Operations* (Summer 2007), available at http://purl.access.gpo.gov/GPO/LPS100783.

lands within the exterior boundaries of any Indian reservation[.]" 16 U.S.C. §§ 470a(d)(2) & 470w. There currently are 171 THPOs nationwide.[12] Reservation diminishment has the effect if curtailing the reach of THPOs.

In all of these, and many other core areas of governance, Indian tribes have exercised self-governance for decades based upon the certainty of the geographical boundaries of their Indian country, and also with the assurance that those boundaries cannot be challenged except under the most exceptional of circumstances. The strides tribes have made in self-governance would be significantly threatened by a flurry of reservation boundary challenges based on a less-stringent application of the framework.

CONCLUSION

Representing a relaxed analysis under the Supreme Court's framework, the majority's decision could encourage a new wave of challenges to longstanding reservation boundaries. NCAI strongly supports the tribal intervenors' petition for a rehearing to provide further review of the important issues in this appeal, and to ensure that the framework is applied accurately and uniformly nationwide.

[12] *See* National Association of Tribal Historical Preservation Officers, http://nathpo.org/wp/thpos/find-a-thpo/.

Respectfully submitted,

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s/ Daniel E. Gomez

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 10th Cir. R. 25.3, 25.4, 31.5, and 40.2, I hereby certify that on this the 17th day of July, 2017, six (6) copies of the above and foregoing instrument, the "BRIEF OF AMICUS CURIAE THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF TRIBAL INTERVENORS' PETITION FOR REHEARING," was delivered to an express service for delivery the next day to the Clerk of Court, and I also electronically transmitted a full, true, and correct copy to the Clerk of the Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to counsel of record in this case, all of whom are ECF registrants.

s/ Daniel E. Gomez