Nos. 14-9512 and 14-9514 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, and WYOMING FARM BUREAU FEDERATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

NORTHERN ARAPAHO TRIBE, and EASTERN SHOSHONE TRIBE,

Intervenors.

EPA'S PRELIMINARY MERITS BRIEF
(Deferred Appendix Appeal)

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

The Environmental Protection Agency is not aware of any currently pending cases raising the same or similar issues. The following cases are provided as prior appeals under 10th Cir. R. 28.2(C)(1):

Northern Arapaho Tribe v. Harnsberger, 660 F. Supp. 2d 1264 (D. Wyo. 2009), *affirmed in part, vacated in part*, 697 F.3d 1272 (10th Cir. 2012).

Yellowbear v. State, 174 P.3d 1270 (2008); *habeas petition denied, Yellowbear v. Wyo. Attorney Gen.*, 636 F. Supp. 2d 1254 (D. Wyo. 2009); *affirmed, Yellowbear v. Attorney Gen. of Wyo.*, 380 Fed. Appx. 740, 2010 WL 2053516 (10th Cir. May 25, 2010), *cert. denied, Yellowbear v. Salzburg*, 131 S.Ct. 1488 (2011).

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988).

State v. Moss, Crim. No. 2896 (Aug. 7, 1969); *reversed*, *State v. Moss*, 471 P.2d 333 (Wyo. 1970).

Blackburn v. State, 357 P.2d 174 (Wyo. 1960).

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

1905 Act	Act of March 3, 1905, 33 Stat. 1016 (1905)
1939 Act	53 Stat. 1128 (1939)
1943 Opinion	Opinion of the Solicitor of the Department of the Interior, M-31480 (February 12, 1943), 2 Op. Sol. on Indian Affairs 1185
1953 Act	67 Stat. 592 (1953)
1953 Act area	Lands described by Section 1 of the Act of 1953, 67 Stat. 592 (1953)
1953 Act lands	Lands described by Section 1 of the Act of 1953, 67 Stat. 592 (1953)
2011 Solicitor Opinion	Opinion of the Solicitor of the Department of the Interior, October 26, 2011
APA	Administrative Procedure Act, 5 U.S.C. § 706
BIA	United States Bureau of Indian Affairs
Bureau	Wyoming Farm Bureau Federation
CAA	Clean Air Act
DOI	United States Department of the Interior
DOI Solicitor	Solicitor of the United States Department of the Interior
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
J.A.	Joint Appendix

JBC	Joint Business Council of the Eastern Shoshone and Northern Arapaho Tribes
NAAQS	National Ambient Air Quality Standards
Reservation	The Wind River Reservation, Wyoming
Sale Area	Lands available for sale under Article I of the Act of March 3, 1905, 33 Stat. 1016 (1905)
SIP	State Implementation Plan
TAR	Tribal Authority Rule
TAS	Treatment in the Same Manner as a State
U.S.	United States

JURISDICTION

Section 307(b)(1) of the Clean Air Act ("CAA") provides the appropriate United States Court of Appeals with jurisdiction to review final actions of the Environmental Protection Agency ("EPA") that are locally or regionally applicable. 42 U.S.C. § 7607(b)(1). Petitioners challenge a final EPA action under the CAA granting an application from the Northern Arapaho and the Eastern Shoshone Tribes ("Tribes") to be treated in the same manner as a State ("TAS") for certain non-regulatory CAA programs on the Wind River Indian Reservation in Wyoming ("Reservation"). The petitions were timely filed. Accordingly, this Court has jurisdiction to review the petitions under CAA section 307(b)(1).

STATEMENT OF THE ISSUES

1. Whether Congress clearly evinced an intent in the Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"), to diminish the boundaries of the Reservation, as established by the Second Treaty of Fort Bridger, 15 Stat. 673 (July 3, 1868), less those lands sold under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897).
2. Whether EPA's regulations addressing tribal consortia required the Tribes to provide assurances in their application that they could individually carry out the non-regulatory CAA functions they seek to administer when

the Tribes are not a consortium, nor did they rely on a consortium to meet any of the applicable TAS criteria.

3. Whether EPA's regulations required EPA to provide the State of Wyoming ("Wyoming" or "the State") with an additional opportunity to comment with respect to the jurisdictional boundaries of the Reservation when Wyoming had already commented on those boundaries as potentially including lands described by Section 1 of the Act of 1953, 67 Stat. 592 (1953) ("1953 Act area" or "1953 Act lands"), and when EPA did not act on the Tribes' TAS application with respect to the 1953 Act area.

4. Whether it was arbitrary and capricious for EPA not to decide whether the 1953 Act area is within the boundaries of the Reservation after the Tribes requested that EPA not act on their TAS application with respect to that area.

STATEMENT OF THE CASE

I. Nature of the Case.

A. Introduction.

Under the CAA, States have a primary role in implementing a variety of the statute's programs and functions in their areas (generally outside of Indian

country), subject to EPA's oversight. In 1990, Congress amended the CAA to add a comprehensive tribal provision authorizing EPA to treat Indian tribes similarly to States and thereby allowing tribes to take a primary role under the statute in their areas. EPA's CAA regulations therefore provide that EPA may treat Indian tribes in the same manner as States with respect to implementing CAA provisions within, among other areas, the respective tribe's reservation. Under EPA's regulations, the applicant tribe must specify the area over which it asserts authority, and EPA must decide the jurisdictional scope of the tribe's program.

The Northern Arapaho Tribe and the Eastern Shoshone Tribe jointly inhabit the Wind River Reservation in western Wyoming. The Tribes submitted a TAS application with respect to certain non-regulatory CAA programs in which the Tribes specified the boundaries of the Reservation. EPA-WR-000002-215 (J.A._).[1] Wyoming and other entities submitted comments to EPA in which they asserted that the original Reservation boundaries had been diminished by the 1905 Act, and that Wyoming therefore had authority over certain areas the Tribes had specified as being within the exterior boundaries of the Reservation. EPA-WR-004031-4182; 004188-4264R; 004274-78; 004279-4554R (J.A._;_;_;_). EPA was

[1] The specific CAA programs for which the Tribes requested TAS authority are described *infra* at n.6.

therefore required to address this Reservation boundary question in acting on the TAS application. After seeking and considering the legal opinion of the Solicitor of the Department of the Interior ("DOI"), EPA-WR-009733-55 (J.A._), EPA thoroughly analyzed the boundary question and determined that the 1905 Act did not diminish the boundaries of the Reservation. Having determined that the Tribes otherwise qualified for TAS under EPA's regulations, EPA granted the Tribes' application with respect to the non-regulatory CAA programs requested by the Tribes within the Reservation boundaries specified by EPA in its TAS decision.

Petitioners Wyoming, the Wyoming Farm Bureau Federation ("Bureau"), the City of Riverton and Fremont County ("Provisional Intervenors")[2] (collectively "Petitioners"), challenge EPA's TAS decision.[3] Petitioners' arguments go primarily to EPA's Reservation boundary determination. Wyoming also raises two arguments asserting that EPA's TAS decision is inconsistent with EPA's regulations.

[2] On April 28, 2014, the Court granted the City and County provisional intervenor status. ECF Doc. 10170834.

[3] The Bureau's standing is subject to the Northern Arapaho's pending Motion to Dismiss.

B. Statutory and Regulatory Background.

1. Clean Air Act Overview.

The CAA, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through a system of shared federal, state, and tribal responsibility. EPA establishes National Ambient Air Quality Standards ("NAAQS"), which are nationally applicable standards establishing permissible concentrations for six common (or "criteria") air pollutants. 42 U.S.C. §§ 7408-09. *See* 40 C.F.R. pt. 50.

Each State must submit for EPA's approval a State Implementation Plan ("SIP") providing for the attainment and maintenance of the NAAQS and meeting the other requirements of the Act. 42 U.S.C. § 7410(a)(1), 7410(k). *See generally Train v. NRDC, Inc.*, 421 U.S. 60 (1975). SIP provisions are federally enforceable upon their approval by EPA. 42 U.S.C. § 7413. If EPA finds that a State has failed to submit a required SIP, or that a SIP is incomplete, or if EPA disapproves a SIP in whole or in part, EPA must promulgate a Federal Implementation Plan ("FIP"). *Id.* § 7410(c).

2. Indian Tribes' Eligibility to Implement CAA Programs.

Congress first comprehensively addressed the role of tribes under the CAA in the 1990 Amendments. Specifically, under CAA section 301(d), 42 U.S.C.

§ 7601(d), Congress authorized EPA to treat tribes in the same manner as States if certain criteria are met. *Id.* Under section 301(d) and EPA's regulations, tribes may choose, but are not required, to manage CAA programs. Section 301(d) allows tribes to manage such programs with respect to "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B).

Congress recognized the unique circumstances of tribes under the CAA by providing EPA with discretion to determine how tribal roles should be implemented, and with authority to implement the CAA federally where tribes are treated differently from States. Specifically, Congress directed EPA to promulgate regulations "specifying those provisions of [the CAA] for which it is appropriate to treat Indian tribes as States," *id.* at § 7601(d)(2), and also authorized EPA to "promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof." *Id.* at § 7601(d)(3). Congress also provided that "[i]n any case in which [EPA] determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, [EPA] may provide, by regulation, other means by which [EPA] will directly administer such provisions so as to achieve the appropriate purpose." *Id.* at § 7601(d)(4).

EPA promulgated the Tribal Authority Rule ("TAR") pursuant to this authority. 40 C.F.R. pt. 49. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000). EPA interpreted the term "reservation" in section 7601(d)(2)(B) to include both reservations that had been formally designated as such (formal reservations), and trust lands that have been validly set apart for the use of a tribe even though not formally designated as a reservation (informal reservations). 63 Fed. Reg. at 7,254, 7,258 (Feb. 12, 1998); *Ariz. Pub. Serv. Co.*, 211 F.3d at 1285.[4]

For TAS applications covering areas within the exterior boundaries of a reservation, the application must clearly identify the exterior boundaries of the reservation, including, for example, a map and a legal description of the area. 40 C.F.R. § 49.7(a)(3). The appropriate EPA Regional Administrator "shall decide the jurisdictional scope of the tribe's program." *Id.* at § 49.9(e).

EPA is to notify all "appropriate governmental entities"[5] within 30 days of

[4] EPA interpreted the term "other areas within the Tribe's jurisdiction" under section 7601(d)(2)(B) as generally including all non-reservation areas of "Indian country," as defined in 18 U.S.C. § 1151, over which a tribe can demonstrate authority, which include dependent Indian communities and Indian allotments. 63 Fed. Reg. at 7258-59; 18 U.S.C. § 1151(b), (c). *See Ariz. Pub. Serv. Co.*, 211 F.3d at 1294-95 (upholding EPA's interpretation of CAA section 7601(d)(2)(B) as including reservations, dependent Indian communities and allotments).

[5] EPA defines "appropriate governmental entities" as "states, tribes and other federal entities located contiguous to the tribe applying for eligibility." 63 Fed. Reg. 7,254, 7,267 (Feb. 12, 1998). EPA also provides to local governmental

EPA's receipt of an initial, complete TAS application. *Id.* at § 49.9(b). For applications addressing air resources within the external boundaries of a reservation, EPA's notification is to specify the geographic boundaries of the reservation. *Id.* at § 49.9(b)(1). Governmental entities must notify EPA in writing of any dispute concerning the boundary of the reservation. *Id.* at § 49.9(c). Such written objections must "clearly explain the substance, bases, and extent of" the objections. *Id.* at § 49.9(d). If a tribe's assertion of jurisdiction is subject to a competing claim, EPA may request additional information from the Tribe and may consult with DOI. *Id.*

C. Factual Background.

1. Nature of EPA's TAS Decision.

The Tribes sought TAS authority only for certain non-regulatory CAA programs. *See* EPA-WR-000002-22 (J.A._) (TAS application).[6] The TAS

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entities, industry, and the general public notice an opportunity to comment on the applicant tribe's reservation boundary description. 65 Fed. Reg. 1322 (Jan. 10, 2000).

[6] The Tribes sought, and EPA granted, approval only with respect to CAA section 105, 42 U.S.C. § 7405 (related to grant funding), section 107(d)(3), *id.* at § 7407(d)(3) (related to a tribe's opportunity to receive certain notices and participate in EPA NAAQS redesignations for the Reservation), sections 505(a)(2) and 126, *id.* at §§ 7661d(a)(2), 7426 (related to reviewing and/or commenting on certain nearby permitting and sources), section 112(r)(7)(B)(iii), *id.* at § 7412(r)(7)(B)(iii) (related to receiving risk management plans of certain stationary

approval does not provide the Tribes with the authority to regulate any source subject to regulation under the CAA. Rather, EPA's previously promulgated FIPs and other federal programs for reservation areas of Indian country will provide the applicable CAA regulatory requirements for sources located within the exterior boundaries of the Reservation. *See* 40 C.F.R. §§ 49.151, 49.166.[7]

2. Administrative Proceedings on EPA's TAS Decision.

Pursuant to the TAR, 40 C.F.R. § 49.7(a)(3)(i), the Tribes defined the geographic scope of their TAS application as within the boundaries of the Reservation, which had not been diminished by the 1905 Act.[8] EPA-WR-000118 (J.A._). EPA provided notice to Wyoming, the public, and other entities, including the Congressional delegation, of the opportunity to submit written comments on the Tribes' Reservation boundary description. *See* 40 C.F.R. § 49.9(b)-(c); 65 Fed.

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sources), and sections 169B, 176A, and 184, *id.* at §§ 7492, 7506a, and 7511c (related to participation in certain interstate and regional air quality bodies).

[7] EPA previously stayed its TAS decision with respect to the areas that are in dispute pending the Court's decision in this case.

[8] The Tribes' application defines the boundaries as those "established in the 1868 Treaty, less those areas covered by the Lander and Thermopolis Purchase Agreements plus those lands acquired in Hot Springs County, Wyoming pursuant to 54 Stat. 628, 642 (1940)." EPA-WR-000118 (J.A._).

Reg. 1322-23; EPA-WR-004107-109; 004183-187 (J.A._;_). Wyoming requested and received, as did the public, an extension of time to provide comments. Wyoming submitted comments asserting that the Reservation had been diminished by the 1905 Act. EPA-WR-004279-475 (J.A._). Wyoming also submitted additional comments on three separate occasions after the comment period closed. EPA-WR-004476-90; 004491-509; 004510-20 (J.A._;_;_).

Due to the competing jurisdictional claims, EPA in its discretion sought the opinion of the DOI Solicitor. The Solicitor analyzed the issue and on October 26, 2011, provided EPA with a written legal opinion determining that the Reservation boundaries had not been diminished by the 1905 Act ("2011 Solicitor Opinion"). EPA-WR-009733 (J.A._).

On December 4, 2013, the Tribes requested that EPA not consider the 1953 Act lands as part of the geographic scope of their TAS application. EPA-WR-0011527 (J.A._).[9] On December 6, 2013, EPA issued its final decision approving the Tribes' application. EPA-WR-0012587-707 (J.A._). EPA concluded that the

[9] Attached to this brief are maps illustrating the 1953 Act lands, and the 1905 Act lands. The maps are cited solely for background information and the Court may consider them as such. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (court may consider extra-record background information to inform the court's understanding of the factual context).

Tribes met the requirements of the CAA and TAS regulations. *Id.* It also concluded that the boundaries of the Reservation had not been diminished by the 1905 Act. *Id*. The geographic scope of EPA's decision did not include the 1953 Act lands.[10] *Id.*; 000023 (J.A._) (Reservation map).

At the time the Tribes applied for TAS, their governmental structures included a Joint Business Council ("JBC"), through which the two Tribes' Business Councils would meet in joint session to address management and administration of joint assets. On September 18, 2014, the Northern Arapaho Business Council issued an announcement stating that it had withdrawn its participation in the JBC. As of the date of the filing of this brief, EPA is continuing to coordinate with the Tribes as how the approved CAA programs will be jointly managed and, with respect to the Tribes' federal grants, is addressing the tribal governance development as a matter of grants program administration. The Tribes have committed to developing a framework to establish a joint management structure for their federal grants. While this cooperative structure is under development, EPA has temporarily suspended, but has not terminated, its grants to the Tribes. EPA will continue to assess the tribal governance development as a

[10] EPA's boundary description matches that in the Tribes' application, less the 1953 Act lands. *See supra* n.8.

matter of program administration and will apprise the Court of any significant developments to the extent they affect the issues raised in this case.[11]

3. The Wind River Reservation History

The story of the Wind River Reservation is a familiar one, fraught with competing pressures to settle the West and extract its resources while trying to preserve past promises made to Indian nations. Unlike many reservations subject to these "familiar forces,"[12] the Wind River Reservation is today largely held in trust for the Tribes and the United States ("U.S.") never stopped acting as trustee within its boundaries after it was partially opened for sale from 1905 to 1915 under the 1905 Act. Only 11% of the entire 1.4 million opened acres were actually sold. Today, 75% of the Reservation lands that were open for sale are currently held in trust for the Tribes and their members.

a. The Reservation's Establishment.

The Reservation was established on July 3, 1868, by the Second Treaty of Fort Bridger, 15 Stat. 673, which was entered into by the U.S. and the Shoshone

[11] These events occurred after EPA's final TAS decision and are thus outside the scope of the record presented to the Court. EPA brings these facts to the Court's attention to ensure that the Court is apprised of developments regarding the Tribes' governmental structure.

[12] *DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975).

and Bannock Tribes. EPA-WR-0008118 (J.A._). The Shoshone relinquished to the U.S. claims to more than 44 million acres in modern day Colorado, Utah, Idaho, and Wyoming, in exchange for a permanent homeland on the Reservation. *Id.*; EPA-WR- 0012616 (J.A._). The Reservation consisted of 3,054,182 acres "set apart for the absolute and undisturbed use and occupation of the Shoshone[e] Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing . . . ." *Id.;* Art. II, 15 Stat. 674; EPA-WR-008119 (J.A._).[13] The U.S. settled the Northern Arapaho Tribe on the Reservation in 1878. *See United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938).

b. 1872-1896: Successful and Unsuccessful Efforts to Purchase Portions of the Reservation.

Congress authorized the President in 1872 to negotiate with the Shoshone for the relinquishment of lands and to change the Reservation's southern boundary due to mining activity.[14] 17 Stat. 214 (1872); EPA-WR-000218 (J.A._). Ultimately, the Shoshone agreed to relinquish approximately 700,000 acres for $25,000 over a five-year period. EPA-WR-0012617; 001735-37 (J.A._;_). Congress ratified the agreement known as the "Lander Purchase." 18 Stat. 291

[13] Art. 2 of the Treaty described the boundaries. EPA-WR-0012616 (J.A._).

[14] Treaty-making ended in 1871 when Congress mandated that agreements with Indian tribes be approved by both chambers. 16 Stat. 544 (1871).

(1874). The purpose was "to change the southern limit of said reservation." *Id.* at 292; EPA-WR-0012617 (J.A._). There is no dispute that through the Lander Purchase agreement and legislation, the U.S. acquired the tribal lands and changed the boundaries of the Reservation. EPA-WR-0012618 (J.A._).

There were two unsuccessful attempts in 1891 and 1893 by federal commissions to negotiate additional land cessions from the Tribes. EPA-WR-0012619 (J.A._). In 1891, Congress appropriated $15,000 "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations . . . ." 26 Stat. 989, 1009 (1891); EPA-WR-0012619 (J.A._). Accordingly, the Secretary appointed a commission to negotiate with the Tribes for the "surrender of such portion of their reservation as they may choose to dispose of . . . ." EPA-WR-000266; 0012619 (J.A._;_). A proposed agreement was reached whereby 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 and to the lands, and the water rights appertaining thereunto . . . ." EPA-WR-000262; 0012619 (J.A._;_). The subject lands generally included the area north of the Big Wind River and a strip on the eastern side of the Reservation. *Id.* In exchange, the Tribes were to receive a lump sum payment of $600,000. EPA-WR-000260; 0012620 (J.A._;_).

The agreement required ratification by Congress; EPA-WR-000261 (J.A._), but it was not. EPA-WR-0000319 (J.A._).

In 1892, Congress authorized the Secretary to send another commission to negotiate with the Tribes. 27 Stat. 120, 138 (1892); EPA-WR-0012620 (J.A._). In 1893, the new commission negotiated for the cession of all land north of the Big Wind River and along the southern border in exchange for a lump sum payment of $750,000. EPA-WR-000280; 0012620 (J.A._;_). The Tribes refused to cede lands on the southern border, rejected three different proposals, and no agreement was reached. EPA-WR-000280-83 (J.A._).

In 1896, Indian Inspector James McLaughlin negotiated an agreement with the Tribes for the sale of 55,040 acres at Big Horn Hot Springs near the town of Thermopolis. EPA-WR-0012620-21 (J.A._). The lands were to be "set apart as a national park or reservation, forever reserving the said Big Horn Hot Springs for the use and benefit of the general public, the Indians to be allowed to enjoy the advantages of the convenience that may be erected thereat with the public generally." EPA-WR-000299; 0012621 (J.A._;_). Congress ratified the agreement, known as the "Thermopolis Purchase." 30 Stat. 62 (1897); EPA-WR-003500; 0012621 (J.A._;_). It 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 and to the lands and the water rights appertaining thereunto . . . ." 30 Stat. 62, 94. The Tribes received a lump sum payment of $60,000. *Id*. The lands were not reserved as a park with tribal access as originally intended; some were given to the State with the remainder declared public lands. *Id*. at 96. There is no dispute that Congress purchased the land and diminished the Reservation boundaries with the Thermopolis Purchase. EPA-WR-0012621 (J.A._).

c. The 1905 Act.

Consideration to open up parts of the Reservation for settlement began in 1904 when U.S. Representative Frank Mondell of Wyoming introduced H.R. 13481. It provided for opening some lands for sale under homestead, town-site, and coal and mineral land laws. EPA-WR-0010055-65; 000321; 0012621 (J.A._;_;_). The bill contemplated tribal consent. The bill bore some similarity to the previous unsuccessful agreements. Article I provided that the Tribes would "cede, convey, transfer, relinquish and surrender, forever and absolutely . . . all their right, title, and interest of every kind and character in and to the lands and the water-rights appertaining thereunto . . . ." EPA-WR-0010055 (J.A._). "In consideration," the Tribes would receive a $600,000 lump sum payment under Article II. *Id*. That language changed by the time Inspector McLaughlin met to

negotiate an agreement on April 19, 1904. McLaughlin described the proposal as "having the surplus lands of your reservation open to settlement and realizing money from the sale of that land." EPA-WR-000426 (J.A._). He explained that instead of an outright sale of land, as had been contemplated in the past, "the government as guardian [will be] trustee . . . selling the lands for them, collecting for the same and paying the proceeds." EPA-WR-000425-26 (J.A._). The Tribes entered into the agreement. EPA-WR-004675; 0012622 (J.A._;_).

Subsequently, a new bill, H.R. 17994, was introduced to ratify the agreement. EPA-WR-000337; 0010068 (J.A._;_). The new bill differed in significant ways. The primary differences are: (1) it weakened of the operative language; (2) it deleted the sum certain payment; (3) it included a new provision establishing the U.S. as trustee to hold the lands in trust for the Tribes for the purpose of potential future sales, but with no guarantee to sell the land, and any proceeds credited to the Tribes; (4) it deleted the provision which allowed the State to choose school lands in the area open for sale; and (5) included a new "Boysen" provision that permitted a lessee on the ceded area to choose in lieu lands because the 1905 Act retained Indian interests. EPA-WR-0010055-56 (J.A._). Congress enacted the bill on March 3, 1905. 33 Stat. 1016 ("1905 Act"); EPA-WR-002058 (J.A._).

Article I of the Act provides that the Tribes "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 described by the statute, generally those south of the mid-channel of the Big Wind River and west of the mid-channel of the Popo Agie River. 33 Stat. 1016; EPA-WR-002058 (J.A._). Article I also allowed Indians who previously selected an allotment in the opened area to either keep that allotment or select another allotment in the area not open to settlement. *Id*.

Article II sets forth the manner of compensation, whereby the U.S. would dispose of the land and "pay the said Indians the proceeds derived from the sale of said lands." EPA-WR-002059 (J.A._). Article IX 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." EPA-WR-002060 (J.A._).

The lands held by the U.S. and available for sale under Article I (the "Sale Area"), totaled approximately 1,480,000 million acres. EPA-WR-000318-19 (J.A._).[15] The portion of the Reservation not available for sale totaled 808,500

[15] The legislative history states that 1,480,000 acres were opened. Other documents state that 1,438,633.66 acres were open for settlement. *See e.g.*, EPA-WR-005017

acres. *Id*. By Presidential Proclamation, the Sale Area was opened for settlement on June 2, 1906. EPA-WR-008193 (J.A._). The demand for the lands was relatively low, with only approximately 196,000 acres being sold pursuant to the 1905 Act. EPA-WR-0012684; 0009747 (J.A._;_). Because land sales were low and the U.S. continued to generate significant proceeds for the Tribes from grazing fees on the vast amount of lands still held in trust within the Sale Area, it was closed for sale and settlement after only 10 years. EPA-WR-0012665 (J.A._).

d. Post-1905 Statutes Restore Lands to Tribal Ownership, Reserve Mineral Rights and Compensate For Past Uses.

In 1939, Congress directed the Secretary to restore to tribal ownership the unsold land in the Sale Area. 53 Stat. 1128 (1939). Under this authority, significant acreage was restored to tribal ownership.[16]

In 1940, the U.S. acquired land in trust for the Tribes within Hot Springs County adjacent to, and outside of, the northern Reservation boundary established by the 1868 Treaty. 54 Stat. 642 (1940). These lands are not subject to the present

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n.7; 009747 (J.A._;_). The difference may represent the acres already selected as allotments in the ceded area.

[16] As of 1943, 297,023.13 acres were restored to tribal ownership. EPA-WR-0005017 n.7 (J.A._). More acres have been added since, but the record does not indicate a total number. *See infra* n.38 (Restoration Orders).

dispute.

In 1952 and 1953, Congress passed legislation for irrigation projects. The 1952 Act purchased land from the Tribes for the Boysen Dam and reservoir, while expressly reserving tribal mineral rights. 66 Stat. 780 (1952). The 1953 Act provided "the sum of $1,009,500 for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil of said Indian tribes and their members in and to the lands" and for damages arising out of past and future uses in the Riverton Reclamation Project and the 1905 Act area, and restored unused lands back to tribal ownership. 67 Stat. 592 (1953).[17] It also stated "all unentered and vacant lands . . . are hereby restored to the public domain . . . ." *Id.* at 612.

Currently, approximately 75% of the lands that were subject to the 1905 Act are now held in trust by the U.S. for the Tribes or their members.[18] EPA-WR-009827; 009838A; 0012685 (J.A._;_;_).

STANDARD OF REVIEW

Because the CAA does not articulate a standard or scope of review for the

[17] The 1953 Act lands are located within the larger Sales Area.

[18] These trust lands are informal reservation under the TAR, *supra* n.4, and Indian Country under 18 U.S.C. § 1151 irrespective of their treatment under the 1905 Act.

final agency action under review here, the appropriate default standard and scope of review are those of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See, e.g., HRI v. EPA*, 608 F.3d 1131, 1146 (10th Cir. 2010) (*en banc*).[19] Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See HRI v. EPA*, 608 F.3d at 1145. When the Court is reviewing an EPA decision applying federal Indian common law, the most relevant APA standard of review is whether the agency's decision is "otherwise not in accordance with law." *Id.* at 1145 (quoting 5 U.S.C. § 706(2)(A)).

A reviewing court should apply this standard of review to the agency decision based on the record presented by the agency. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). *See also* 5 U.S.C. § 706 (courts "shall review the whole record or those parts of it cited by a party"). When there is a contemporaneous explanation of the agency decision, the validity of that action

[19] CAA section 307(d)(9), 42 U.S.C. § 7607(d)(9), specifies a standard of review applicable only when EPA has either taken an action specifically listed in CAA section 307(d)(1), or when EPA otherwise determines that it applies. 42 U.S.C. § 7607(d)(1), (9). *See NRDC v. EPA*, 638 F.3d 1183, 1190 (9th Cir. 2011). Neither circumstance applies here. Accordingly, the APA's arbitrary and capricious standard applies. *Id.*

"must stand or fall on the propriety of that finding, judged of course, by the appropriate standard of review," and thus "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).[20]

Petitioners and the *amici* argue that the standard of review in this case with regard to EPA's Reservation boundary determination is *de novo*. This Court has applied the *de novo* standard in conducting a diminishment analysis, *see Osage Nation v. Irby*, 597 F.3d 117, 1122 (10th Cir. 2010), and that is consistent with the APA's "otherwise not in accordance with law" standard. 5 U.S.C. § 706(2)(A)). *See HRI v. EPA*, 608 F.3d at 1145.

However, to the extent EPA's interpretation of the CAA is under review

[20] EPA has previously shown that the Court should not consider either Wyoming's or the Provisional Intervenors' extra-record materials on the merits, and EPA herein relies upon its previous memoranda. *See* ECF Docs 01019254509; 01019276137; 01019371279; 01019378891. For the reasons articulated in those memoranda, the Court should not consider any arguments that are based upon the extra-record materials. It bears highlighting, however, that Wyoming's and the City and County's contentions that the Court may consider extra-record materials on the basis that it may determine legal issues *de novo* should be rejected. *See Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1136 (10th Cir. 1991) ("The scope of judicial review refers merely to the evidence the reviewing court will examine in reviewing an agency decision. The standard of judicial review refers to how the reviewing court will examine that evidence."); ECF Docs 01019276137; 01019267008.

here, EPA is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). *See, e.g., U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012). In addition, EPA's interpretation of the TAR is "controlling" unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted).

SUMMARY OF THE ARGUMENT

EPA's approval of the Tribes' TAS application should be upheld. Judged under any standard of review, its thorough analysis and ultimate determination that the Reservation was not diminished by the 1905 Act are sound and based on a voluminous and comprehensive record.

EPA's legal analysis on the Reservation boundaries is 83 pages long and based upon an Administrative Record of nearly 13,000 pages. EPA-WR-0012603-96 (J.A._). After a careful analysis of the 1905 Act language, the surrounding circumstances, and the subsequent treatment of the ceded area, EPA concluded, based on substantial evidence in the record, that Congress did not express clear intent to diminish the Reservation boundaries in the 1905 Act. EPA sought and received an opinion from the DOI Solicitor, who has expertise over such matters, and she concluded independently that the 1905 Act did not diminish the Reservation. EPA-WR-009733 (J.A._).

The statutory language does not contain language that the Supreme Court considers as indicating or creating a presumption of diminishment: cession of all title and interest, restoration of lands to the public domain, or payment of sum certain to the Tribe. Instead, the U.S. served as trustee in disposing of the unallotted Sale Area lands, with proceeds credited to the Tribes, and the Tribes retained allotments and beneficial interests in the Sale Area.

The surrounding circumstances do not unequivocally reveal intent to diminish. There were two failed agreements in the 14 years prior and the introduction of a bill in 1904. The 1905 Act differed from those in land scope, method of payment, establishment of the U.S. as trustee over the lands, deletion of a school lands provision, and the inclusion of other provisions which indicate Congress knew the Sale Area would remain Reservation.

The subsequent treatment, although mixed, shows that the jurisdictional status of the area has long been in dispute. What is not disputed is that the U.S. continued to serve as trustee and manage the unsold land for benefit of the Tribes. Congress restored vast acreage to tribal ownership under a 1939 Act. Finally, the majority of the Sale Area did not lose its Indian character. Few lands were sold after the opening, and sales ceased after only 10 years. Today, 75% of the land opened for sale is now held in trust by the U.S.

Petitioners incorrectly argue that EPA ignored contradictory or confusing historical facts. As explained below, EPA squarely addressed this evidence (including Petitioners' comments), put them in historical context, and interpreted them in accordance with the legal framework.[21]

Further, EPA did not violate the TAR because the Tribes are not a consortium under the regulations and did not rely on a consortium to meet any aspect of the TAS eligibility criteria, and because EPA was not required to provide an additional opportunity for comments after the Tribes reduced the geographic scope of their application by requesting that EPA not consider lands subject to the 1953 Act. Accordingly, the Court should uphold EPA's approval of the Tribes' TAS application under the CAA in its entirety.

ARGUMENT

I. Reservation Diminishment Framework.

The Supreme Court has established a "fairly clean analytical structure" for determining whether a particular act diminished a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The first of several governing principles is that only Congress can divest a reservation of its land and terminate its boundaries. "Once a

[21] *See e.g*, EPA-WR-0012614; 0012632; 0012635; 0012636; 0012642; 0012644; 0012649; 0012650; 0012656; 0012674; 0012677; 0012678; 0012680; 0012683; 0012685; 0012687; 0012693; 0012694-5 (J.A._;_;_;_;_;_;_;_;_;_;_;_;_;_;_;_;_;_;_).

block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

Congress must clearly evince intent to change the boundaries. *Solem*, 465 U.S. at 470; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (the intent to diminish must be "clear and plain."). "With regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation." *Absentee Shawnee Tribe of Indians of Ok. v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988). Thus, diminishment "will not be lightly inferred." *Solem*, 465 U.S. at 470; *DeCoteau*, 420 U.S. at 444; *Yankton*, 522 U.S. at 344.

Also, the Indian canons of construction govern, so courts resolve ambiguities in favor of the Indians. This general rule that "legal ambiguities are resolved to the benefit of the Indians" is given the "broadest possible scope" in diminishment cases. *DeCoteau*, 420 U.S. at 447.

With these guiding principles in mind, the Supreme Court has established a three-prong test for analyzing congressional intent to diminish a reservation:

A. The Statutory Language.

First, the most probative evidence of congressional intent is the statutory language. *Solem*, 465 U.S. at 470. Legislation that merely allots or opens a reservation to settlement does not alone diminish the boundaries. *See Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010). Although the Supreme Court has never required a particular form of words, *Hagen v. Utah*, 510 U.S. 399, 411 (1994), an explicit reference to a cession or total surrender of all tribal interests in the land, coupled with an unconditional commitment from Congress to pay the tribe for its land in the form of a lump sum payment, can create an "almost insurmountable presumption" that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470-71. Yet, "Congress has used clear language of express termination when that result is desired." *Mattz v. Arnett*, 412 U.S. 481, 505 n.22 (1973) (citing 15 Stat. 221 (1868) ("the Smith river reservation is hereby discontinued"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished.").

When the operative language merely sells or disposes of land, it generally indicates congressional intent to open the land for settlement, leaving the reservation intact. *Mattz*, 412 U.S. at 497 (reservation not terminated by discretionary allotment act and opened land for settlement); *Solem*, 465 U.S. at

472-73 ("sell and dispose"). Similarly, a finding of no diminishment would more readily be found when the operative language does not immediately sever all tribal rights to the area, but instead provides that the tribe retains an interest in the land with the U.S. acting as continued trustee. *See Solem*, 465 U.S. at 474; *compare DeCoteau*, 420 U.S. at 444-46 ("cede, sell, relinquish, and convey" all their "claim, right, title, and interest" coupled with a sum certain payment indicates a total surrender of Indian rights); *see also Yankton*, 522 U.S. at 337*; Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591-92 (1977).

Lastly, when the operative words do not restore the ceded lands to the public domain, diminishment is less likely. *See Hagen*, 510 U.S. at 412-13 (reservation diminished when land restored to the public domain); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) (reservation not disestablished when land not "vacated and restored to the public domain").

B. Surrounding Circumstances.

Second, the Court considers events surrounding the passage of the act. *Solem*, 465 U.S. at 470. The Supreme Court has explained:

> Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

Yankton, 522 U.S. at 343 (citation omitted). This is because at the time of

allotment and surplus land acts, Congress believed that reservations would eventually be obsolete, consistent with the prevailing idea that private ownership of land would "civilize" and "assimilate" Indians. *See id.*, at 335-6, 343-44. However, the Supreme Court has never been willing to extrapolate from the general expectations in the allotment era to a specific congressional purpose to diminish a reservation in a particular case. *Solem*, 465 U.S. at 468; *Mattz*, 412 U.S. at 496-7 (rejecting congressional hostility to the reservation's status in the allotment era as supporting termination of boundaries).

When the statutory language is unclear, disestablishment can be found in the surrounding circumstances only "[w]hen events surrounding the passage of a surplus land act . . . *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); *see also Yankton*, 522 U.S. at 351; *Osage*, 597 F.3d at 1124.

C. Subsequent Events.

Finally, and to a lesser extent, courts take into consideration events that occurred after the passage of the act, particularly events immediately following it, to decipher Congress' intentions. *Solem*, 465 U.S. at 471. Such events include Congress' and the Executive branch's subsequent treatment of the land, the

assumption of jurisdiction, and how judicial and local authorities viewed the lands. *Id.* This last prong by itself cannot provide the requisite evidence of Congressional intent to diminish. *Solem*, 465 U.S. at 472 ("When both 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") (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. at 351); *see Osage*, 597 F.3d at 1122. The Supreme Court has refused to give weight to subsequent events evidence when there is a "mixed record" that "reveals no consistent, or even dominant, approach." *Yankton*, 522 U.S. at 356*; see also Solem*, 465 U.S. at 478.

On a more "pragmatic level," courts can factor into the analysis subsequent demographics. *Solem*, 465 U.S. at 471. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long-since lost its Indian character," it may be considered evidence in support of diminishment. *Id.* "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation." *Id.* at 472, n.13. This Circuit has made clear that demographic evidence should only be utilized to support or confirm the language of a surplus land act. *Pittsburg & Midway Coal Mining Co.*

v. Yazzie, 909 F.2d 1387, 1393, 1396 (10th Cir. 1990) ("[s]ubsequent events and demographic history can support and confirm other evidence but cannot stand on their own."); *accord Osage*, 597 F.3d at 1122; *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1228 (10th Cir. 2005). If there is a long-standing history of "unquestioned actual assumption of state jurisdiction over . . . unallotted lands," *Rosebud*, 430 U.S. at 603, and those lands are predominantly non-Indian, it can create "justifiable expectations" which may, in conjunction with the requisite statutory language or unequivocal surrounding circumstances, provide some evidence of Congressional intent to diminish. *Rosebud*, 430 U.S. at 605; *accord Hagen*, 510 U.S. at 421.

II. EPA Reasonably Concluded That There Was No Clear Congressional Intent To Diminish the Reservation In The 1905 Act.

The 1905 Act does not contain language that typifies diminishment. Specifically, EPA and the DOI Solicitor found that the statute did not provide for an outright surrender of all tribal interest in the lands in exchange for a sum-certain payment. Rather, Congress: (1) allowed Indians to remain on allotments in the ceded portion; (2) did not restore the lands to the public domain; (3) did not expressly define new boundaries; (4) did not provide for sum certain payment; and (5) directed the U.S. to act as trustee for disposing the lands, with all lands remaining Indian lands while available for sale. These provisions support non-diminishment.

A. The Operative Language Is Insufficient to Find Clear Diminishment.

The 1905 Act does not contain all the key elements indicating clear congressional intent to diminish. Although there are "no magic words" required for diminishment, *Shawnee*, 423 F.3d at 1222, the 1905 Act lacks "explicit language of cession, evidencing the present and total surrender of all tribal interests" plus a sum certain payment showing an "unconditional commitment" by Congress to compensate the Tribes for their lands. *Yankton*, 522 U.S. at 344 (internal citations omitted).

The Supreme Court has considered a variety of operative language concerning cession or sale, but has never found such language alone as dispositive. It is only when the cession language is coupled with sum certain payment, the restoration of land to the public domain, or an express and continued purpose to change the boundaries (evidenced by previous federal action) that the Court has found diminishment. None of those conditions exist here. *See e.g.*, *DeCoteau*, 420 U.S. at 456 (finding diminishment with "cede, sell, relinquish and convey" and sum certain payment); *Rosebud*, 430 U.S. at 597 (finding diminishment with "cede, surrender, grant, and convey" where there were unequivocal surrounding circumstances supporting diminishment); *Hagen*, 510 U.S. at 412 (finding diminishment with "all the unallotted lands within said reservation shall be

restored to the public domain" and sum certain payment); *Seymour*, 368 U.S. at 354-55 (finding no diminishment with "to sell or dispose of"); *Mattz*, 412 U.S. at 495 (finding no diminishment with "hereby declared to be subject to settlement, entry, and purchase"); *Solem*, 465 U.S. at 472-73 (finding no diminishment with "to sell and dispose of").

Article I of the 1905 Act provides that the Tribes "cede, grant, and relinquish to the United States, all right, title, and interest . . . to all the lands embraced within the said reservation." 33 Stat. 1016; EPA-WR-002058 (J.A._).[22] The Supreme Court described similar cession language as being in between the extremes of legislation that clearly intends to diminish reservation boundaries and acts that do not demonstrate clear intent to diminish. *Solem*, 465 U.S. at 469, n.10. Although this cession language alone could provide some evidence of intent to diminish, it does not evince a total and immediate surrender of all tribal interests when read with the rest of the operative language, as explained below.[23]

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[22] The Eight Circuit held that "cede, surrender, grant and convey to the United States all their claim, right, title and interest . . . ." language in a 1904 surplus land act, standing alone, did not evince clear congressional intent to disestablish the Spirit Lake Reservation. *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987), *vacated in part on other grounds on rehearing en banc*, 836 F.2d 1088 (8th Cir. 1987), *cert. denied*, 493 U.S. 1047 (1990).

[23] The operative language excludes "convey" which is often present in statutes affecting diminishment. *See e.g.*, *DeCoteau*, 420 U.S. at 440 n.22; *Yankton*, 522

B. The U.S. Continued to Act As Trustee and Thus the Lands Remained Indian Lands.

Under the express language of the statute, the U.S. continued to act as trustee for the Tribes, signifying no diminishment. The Supreme Court held in a similar context that such lands available for sale remained "Indian lands." *Ash Sheep Co. v. United States*, 252 U.S. 159, 164-66 (1920).

In Article IX, the U.S. committed to act as trustee, offering the lands for sale. EPA-WR-002060 (J.A._). In *Seymour*, the Supreme Court described this type of provision as one that "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id*. at 356. In an analogous context, the Supreme Court held that such lands remained Indian lands, rather than public lands. *Ash Sheep*, 252 U.S. at 164-66. Further, proceeds from the lands sales were credited to the

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U.S. at 344. Petitioners argue that the word "convey" appears in Article II relating to the manner of payment. EPA-WR-0012633 (J.A._). In *Hagen*, however, the Court explained that even though the act at issue in *Solem* described the opened lands as in the public domain," which could indicate diminishment, the phrase "did not appear in the operative language of the statute opening the reservation lands for settlement, which is the relevant point of reference for the diminishment inquiry." *Hagen*, 510 U.S. at 413. The fact that "convey" appears elsewhere in the 1905 Act has less import than if it appeared in the operative language. *See Osage*, 597 F.3d at 1117 (operative language carries more weight than incidental language in secondary provisions) (citing *Solem*, 465 U.S. at 472).

Tribes and not deposited in the general fund of the Treasury, further evincing a continued trust relationship. *See Seymour*, 368 U.S. at 355-56. Additionally, Article I permitted Indians who previously selected an allotment within "the portion of said reservation hereby ceded" to "have the same allotted and confirmed to him or her" or to select other lands within the non-ceded portion before the lands were opened for entry. EPA-WR-002058 (J.A._). In *Solem*, the Court found such a provision indicates that the Sale Area would have continuing Indian character, which is inconsistent with diminishment. 465 U.S. at 474. When read together, these provisions do not demonstrate clear congressional intent to diminish because the U.S remained trustee in the Sale Area, which retained its Indian character by remaining Indian lands.

Indeed, the Wyoming Supreme Court in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 93-94, 112 (Wyo. 1988) ("*Big Horn*"), held that because the unsold 1905 Act lands remained Indian lands, they retained a federal reserved water right priority date from the 1868 Treaty. Before the Special Master, Wyoming and the U.S. litigated whether the 1905 Act diminished the Reservation. The Special Master, after briefing and hearing expert testimony, agreed with the U.S., finding that the 1905 Act did not diminish the boundaries. Special Master Report, EPA-WR-000727-77; 0012640-

41 (J.A._;_). EPA-WR-000774-83 (J.A._).[24] Thus, the U.S. trusteeship over the Sale Area Indian lands indicate intact boundaries.

C. The 1905 Act Lacks a Fixed or Unconditional Payment.

Next, the 1905 Act does not provide for an unconditional fixed payment. EPA understood, contrary to Petitioners' characterizations, *see e.g.*, Bureau Br. at 27, that the lack of a sum certain payment does not in and of itself preclude diminishment. EPA-WR-0012634 (J.A._) (citing *Rosebud*, 430 U.S. 584, 598 n.20). Other provisions of the Act, however, bolster EPA's conclusion that a lack of sum certain payment indicates an absence of intent to immediately sever Indian interests. For example, Article IX states that the U.S. would not be bound "in any manner . . . to purchase any portion" "or to guarantee to find purchasers . . . for any portion" of the opened lands. This provision shows a lack of commitment, and thus a lack of unconditional consideration, and an understanding that the lands might remain unsold Indian lands. Coupled with the lack of a fixed sum payment, EPA reasonably concluded that Congress did not express its intent to diminish the boundaries. There are no provisions indicating an outright or immediate surrender of tribal interests in exchange for unconditional consideration. *Solem*, 465 U.S. at

[24] The parties thereafter entered into a stipulation as to the boundaries. *See* EPA-WR-001133 (J.A._).

470-71; *Yankton*, 522 U.S. at 344.

Wyoming erroneously argues that the Tribes received a lump sum payment because the Tribes received funds for certain benefits. Various 1905 Act Articles indeed provided funds for surveys, irrigation, livestock, general welfare, per capita payments, bridges, etc. but they were not payment for the lands. In order to qualify as a sum certain payment under the *Solem* test, the compensation must be *unconditional consideration for the land*. *See Solem*, 465 U.S. at 470 (payment is "to compensate the Indian tribe for its opened land"). This requirement is basic contract law, as incorporated into diminishment law. Indeed, the benefits were to be paid *out of* the land sale proceeds, so they could not be payment *for* the land sales. *See* EPA-WR-009739 n.19 (J.A._). Importantly, the State does not cite a single case that considered these types of funds - which were ubiquitous in treaties and surplus land acts – as qualifying as a sum certain payment in exchange for the sale of tribal lands under diminishment law.

D. The Sale Area Was Not Restored to the Public Domain.

Additionally, the 1905 Act does not restore the ceded land to the public domain. Although not dispositive, the Supreme Court has never found diminishment where the land was not restored to the public domain by the

operative language or by inference from other provisions.[25] *See Hagen*, 510 U.S. at 413-14 (discussing diminishment jurisprudence as it relates to land restored to the public domain); *id.* at 412-14 (reservation diminished because restored to public domain); *DeCoteau*, 420 U.S. at 441; *Rosebud*, 430 U.S. at 600-01) (inferred from school lands provision and State Enabling Act); *Yankton*, 522 U.S. at 349-54 (inferred from school lands and liquor law provisions, and supported by legislative history).[26] Here, the lands were not restored to the public domain, but instead remained Indian lands. *See Ash Sheep*, 252 U.S. at 164-66. This Indian land status is consistent with intact boundaries.

E. The 1905 Act Does Not Expressly Change the Boundaries.

The 1905 Act does not contain language expressly changing the Reservation boundaries. "Congress has used clear language of express termination when that result is desired." *Mattz*, 412 U.S. at 504, n.22 (citing 15 Stat. 221 (1868) (reservation is "hereby discontinued"); 33 Stat. 218 (1904) ("the reservation lines .

[25] The legislative history provides: "[T]hese lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians . . . ." EPA-WR-0010073 (J.A._).

[26] In *Solem*, the Court found no diminishment even though the land was restored to the public domain. 465 U.S. at 475. But the opposite situation has never occurred.

. . are hereby abolished.")); EPA-WR- 0012631 (J.A._).[27] Congress chose not to use such language here. In fact, Article I refers to the ceded lands "embraced within the said reservation." The allotment language refers to individuals who have selected a tract of land "within the portion of said reservation hereby ceded." These references indicate that the lands for sale were within the larger, existing Reservation – not that they were being severed.

As EPA noted, it is true that the 1905 Act uses the terms "diminished reserve" or "diminished reservation" in various provisions. EPA-WR-0012642-45 (J.A._). But the Supreme Court has rejected the notion that such terms in and of themselves establish clear Congressional intent to diminish, because in the 19th and early 20th centuries, such language did not constitute a term of art in Indian law. *See Solem*, 465 U.S. at 474; *see also Mattz*, 412 U.S. at 498 (act referring to reservation in past tense does not equate with clear intent to terminate boundaries). The term "diminished reservation" can be easily understood as making a

[27] As EPA explains, the survey provision in Art. IX was not to demark new boundaries; rather it corrected inconsistent boundary descriptions between the 1868 Treaty and the 1904 Agreement on the southern and western portion of the Reservation. That area was not affected by the 1905 Act. 33 Stat. 1016, 1022; EPA-WR-0012639-40 (J.A._); *see also* EPA-WR-009739 n.19 (J.A._). The survey provision in Art. III, relating to water rights, has been interpreted as demonstrating that the parties intended some land within the Sale Area would remain Indian property. Special Master Report, EPA-WR-000777; 0012640-41 (J.A._;_).

geographic distinction between the area opened up for sale and not reserved solely for the Indians versus the remaining area which stayed closed to settlement and reserved exclusively for the Indians. *See Solem*, 465 U.S. at 475, n.17 ("When Congress spoke of the 'reservation thus diminished,' it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries.") (citation omitted); EPA-WR-0012642-43 (J.A._).

As an additional analytical tool, EPA contrasted the language in the 1905 Act with that in the Lander Purchase and Thermopolis Purchase Acts, which indisputably diminished the Reservation boundaries.[28] EPA-WR-0012628-34 (J.A._). These were the only two congressional acts directly affecting the Reservation after the 1868 Treaty and before the 1905 Act.[29] The Lander Purchase Act's purpose was "to change the southern limit of said reservation." 18 Stat. 291, 292; EPA-WR-003441; 0012629 (J.A._;_). Article III referred to the area north of

[28] The Supreme Court has recognized that differences in operative language in prior statutes affecting the same reservation are important to understanding Congressional intent regarding the statute at issue. *See Seymour*, 368 U.S. at 355-56.

[29] Inspector McLaughlin negotiated the agreements that led to the Thermopolis Purchase Act and the 1905 Act. EPA-WR-0012630 n.15 (J.A._). He explained subsequently that "the two agreements are entirely distinct and separate from each other, and [under the 1904 agreement] the government simply acted as trustee for disposal of the land north of the Big Wind River." EPA-WR-001681; 0012630 (J.A._;_).

the ceded lands as "the southern line of the Shoshone reservation." EPA-WR-003441 (J.A._). Article II provided for a lump sum payment of $25,000 in consideration. *Id.*

The Thermopolis Purchase Act stated the Tribes "cede, convey, transfer, relinquish and surrender, forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunder. . . ." 30 Stat. 93, 94. This was coupled with a $60,000 lump sum payment. *Id*.

By contrast, Congress chose very different language, payment, retention of tribal interests, and maintained the U.S. as trustee in the 1905 Act. EPA-WR-0012629-30 (J.A._). Congress omitted an unconditional fixed payment as well as the words "surrender, forever and absolutely" the tribal interests "of every kind and character in and to the lands" from the 1905 Act. The Lander Purchase Act defined new boundaries, but the 1905 Act did not. *Id*. When these previous congressional acts, which are specific to the Reservation, one of which was negotiated by the same Inspector, are contrasted to the 1905 Act, it is evident that the requisite clear intent to diminish is absent.

The Bureau argues that the 1905 Act language is exactly like that in *DeCoteau,* where the Court found diminishment. Bureau Br. at 22. The statute in

DeCoteau used the phrase "cede, sell, relinquish, and convey . . . all their claim, right, title, and interest" which is similar, but not identical, to the 1905 Act. 420 U.S. at 445. The Bureau fails to mention, however, that the statute at issue in *DeCoteau* provided for a sum certain payment and returned the land to the public domain, which were critical elements in finding diminishment in that case. *Id*. at 446. Neither sum certain payment nor transfer to the public domain occurred here, let alone both. In fact, the Sale Area remained Indian lands.

Wyoming cites *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965), to argue that the 1905 Act contains express language of diminishment. However, *Ellis* supports, not undermines, EPA's interpretation. First, although decided after *Seymour*, *Ellis* was decided before the development of the three-pronged test in diminishment law. Second, the operative language there was stronger and dissimilar to the 1905 Act. The Treaty in *Ellis* provided: "cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation . . . ." 351 F.2d at 252. Third, it provided a $1,500,000 sum certain payment. *Id.* The Supreme Court has found that provisions like these, *together*, create an "almost insurmountable presumption" of diminishment. *Yankton*, 522 U.S. at 351. These provisions are not present here.

In sum, EPA reasonably concluded, after considering all arguments, that the statutory provisions did not contain language expressing clear congressional intent

to diminish the boundaries. EPA-WR-0012645-46 (J.A._). The operative language, the U.S.'s refusal to commit to selling the land and its continued role as trustee, the continued Indian interests in the Sale Area, manner of payment, and failure to restore the land to the public domain all counter against finding the necessary "present and total surrender of all tribal interests." *Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470; *Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48).

III. The Surrounding Circumstances Do Not Unequivocally Reveal a Widely-Held Contemporaneous Understanding to Diminish.

When the statutory language is unclear, diminishment can be found in the surrounding circumstances only when they "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink . . . ." *Solem*, 465 U.S at 471. There is no question that some of the historical evidence here is mixed or unclear, as is often the situation in diminishment cases, because Federal and local policies towards Native Americans shifted often.[30] Ultimately, after examining the legislative history and tribal negotiations, EPA concluded that the overall surrounding circumstances did not support a finding of clear congressional intent and did not unequivocally reveal a widely-held understanding

[30] *See United States v. Lara*, 541 U.S. 193, 201-3 (2004) (discussing evolving Federal Indian policies).

that the 1905 Act would diminish the Reservation. EPA-WR-0012647-64 (J.A._).

In 1904, H.R. 13481 was introduced to open parts of the Reservation to settlement. The bill's eventual language was dramatically different from that in the failed 1891 and 1893 negotiations and thus does not indicate a continued purpose to change the boundaries. *Compare Rosebud*, 430 U.S. at 596-99; EPA-WR-0012647-48; 0010055 (J.A._;_). Under the 1891 proposed 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*" in exchange for $600,000 lump sum. 1891 Agreement, at 29 (emphasis added); EPA-WR-000262 (J.A._). The bill, after amendments, did not contain the above italicized words. EPA-WR-0010056 (J.A._). The bill also deleted the sum certain provisions and added that the U.S. would act as trustee in disposing of the land. *Id.*; *see also* EPA-WR-00326 (J.A._).

McLaughlin, who did not negotiate the prior failed agreements, went to the Reservation to negotiate with the Tribes. His opening remarks were:

> 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 portions of your reservation for settlement by the whites.

EPA-WR-000424 (J.A._). He described the bill as "having surplus lands of your

reservation open to settlement and realizing money from the sale of that land." EPA-WR-000426 (J.A._). In terms of payment, he explained "the government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indian . . . ." EPA-WR-000425-26 (J.A._).

EPA analyzed the statements of the tribal negotiators. Keeping in mind the U.S. superior negotiation skills and knowledge of the language, *see* EPA-WR-012649-50 (J.A._), EPA concluded that the tribal negotiators did not clearly demonstrate an understanding that the reservation boundaries would change. *See, e.g.*, EPA-WR-000431-32 (J.A._) (Long Bear statement reflecting concern over price); EPA-WR-000434 (J.A._) (Sherman Coolidge statement reflecting opinion that money will be of more value than the lands' use for grazing); EPA-WR-000439 (J.A._) (George Terry statement reflecting seriousness of selling the land). EPA concluded that these and other quotes indicate that the tribal members knew they were selling their land, non-Indians could move onto it, and they should get paid fairly. They do not, however, clearly show a widely-held understanding that the boundaries of the reservation would change simply because the lands would be available for sale. EPA-WR-0012650 (J.A._).

McLaughlin also described the "boundaries of the reservation and the residue of land that will remain in your diminished reservation . . . . The tract to be

ceded to the United States, as proposed by the "Mondell Bill," is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation." EPA-WR-000428 (J.A._). EPA interpreted his statement in light of other comments which made a distinction between the area reserved for the exclusive protection of the Tribes (the diminished reserve) and the area opened up to settlement (Sale Area). EPA-WR-0012651-52 (J.A._); *see Solem*, 465 U.S. at 475, n.17. McLaughlin explained the difference:

> A little corner of land left north of the Wind River would cause you no end of trouble, as you would be continually over-run by the herds of the whiteman . . . . On the reservation, you will be protected by the laws that govern reservations in all your rights and privileges . . . .

EPA-WR-000436 (J.A._). McLaughlin continued making the distinction between the Sale Area and the exclusive tribal area (protected from settlers) with the Big Horn River acting as a natural separation. He explained the agreement to the Secretary of DOI:

> 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 . . . by the Big Wind River . . . [and] Big Popo-Agie River . . . [and] by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it opened to settlement, and the Indians would be eventually compelled to give it up.

EPA-WR-004691 (J.A._). The Court in *Solem* found that "[i]n 1908, 'diminished' was not yet a legal term of art in Indian law." 465 U.S. at 475, n.17. Based on this, the Court reasoned that when Congress used the term "reduced reservation" and "reservations as diminished," it was "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," and thus found no diminishment. *Id.* at 478. Here, EPA construed McLaughlin's language similarly and concluded that although he may have been speaking of diminished boundaries, he also could have been describing the geographic area left for exclusive tribal protection. Being unclear, the statement could not support a finding of express intent to diminish. "[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish . . . ." *Solem*, 465 U.S. at 478. EPA appropriately concluded that while there are historical statements that could be construed as intent to diminish the Reservation, on balance, the surrounding circumstances do not "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; EPA-WR-0012664 (J.A._).

After McLaughlin negotiated the 1904 Agreement, a new bill was introduced, H.R. 17994, to replace the old one. The new bill added a provision to allow Asmus Boysen priority to choose lands from the ceded area in lieu of a lease interest, and deleted a provision requiring the U.S. to pay $1.25 per acres for sections 16 and 36 of each township for State school lands. EPA-WR-00012653-54 (J.A._). These changes support the conclusion that no diminishment occurred.

The Boysen provision arose because Boysen entered into a lease with the Tribes for mineral prospecting in 1899. The lease provided that it would terminate if Indian title to the land was extinguished. There was disagreement among Congressmen as to whether the bill would extinguish the title and thus end the lease. EPA-WR-0012654-57 (J.A._). Ultimately, Congress agreed that the 1905 Act did not restore land to the public domain and thus did not extinguish Indian title, but rather, only transferred title to the U.S. as trustee for the Indians. EPA-WR-0010073 (J.A._). So Congress gave Boysen priority to choose in lieu lands to avoid any cloud on his leasehold interest due to the continued tribal interests. When Indian interests remain in the lands, it counsels against diminishment.[31] *See*

[31] Petitioners claim EPA does not know the difference between Indian title and "reservation" land. State Br. at 63; Bureau Br. at 29. However, that is precisely the distinction that EPA makes when explaining that the 1905 Act transferred Indian interests but did not change the boundaries. Moreover, Petitioners define "reservation" as requiring the land to be for the "exclusive use" and "occupancy"

Hagen, 510 U.S. at 412-13; *Seymour*, 368 U.S. at 354-56.

EPA similarly concluded that the Indians retained an interest in the ceded lands by analyzing the deletion of the school lands provision. EPA-WR-0012657 (J.A._). The 1904 agreement and H.R. 13481 provided that the U.S. would pay the Tribes for sections 16 and 36 in each township or in lieu lands "on the reservation," for schools and withhold them from settlement. EPA-WR-0010057-58 (J.A._). The final 1905 Act did not contain a school lands provision. It was deleted because the Wyoming Enabling Act allowed the State to choose school lands if those lands were not "on the reservation." [32] EPA-WR-0010057; 0012658 (J.A._;_). The provision's deletion indicates Congress thought the ceded lands were "on the reservation."

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of Indians. That definition is overly restrictive, and has evolved over time. *See Cohen*, § 3.04(2)(c)(ii) (2005 ed.). There would be no such thing as diminishment law or modern reservations if non-Indian fee land could not be within the boundaries of a reservation, because the opening to settlement would necessarily destroy the "exclusive use" and "occupancy" that Petitioners advance. This proposition has been summarily rejected. *See Osage*, 597 F.3d at 1122; *see also* 18 U.S.C. § 1151(a).

[32] Wyoming was admitted to the Union as the 44th State on July 10, 1890. 26 Stat. 222, ch. 664 (1890). The State Constitution disclaims all right and title to lands within the boundaries of the Reservation and reserves jurisdiction to the U.S. unless Congress extinguishes title. Wyo. Const. Art. 21, § 26; EPA-WR-0012619 (J.A._).

In *Rosebud*, 430 U.S. at 599-601, and *Yankton*, 522 U.S. at 349-50, the Supreme Court found that the inclusion of school lands provisions in a statute can indicate intent to diminish. In *Rosebud*, the Court explained that the provision was intended to implement South Dakota's Enabling Act, which granted sections 16 and 36 to the State for schools, but only upon the extinguishment of the reservation. 430 U.S. at 599-601. The Court reasoned that the statute at issue must have extinguished the reservation and restored the lands to the public domain, because it was the only way the State could get the school lands. *Id.* Like South Dakota, Wyoming's Enabling Act prohibits school lands "on the reservation." Congress' decision to exclude the school lands provisions in the 1905 Act, enabling the State to select lands elsewhere, indicates Congress understood the Reservation boundaries survived.

IV. The Subsequent Treatment Reveals a Mixed Record with No Justifiable Expectations.

Finally, courts look to events after the passage of the act, particularly immediately following it, to decipher Congress' intentions. *Solem*, 465 U.S. at 471. This last prong cannot on its own provide the requisite evidence of congressional intent to diminish. *Solem*, 465 U.S. at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351); *Osage*, 597 F.3d at 1122. Moreover, a "mixed record" that presents "no consistent, or even dominant, approach" carries "but little

force." *Yankton*, 522 U.S. at 355-356 (internal citations omitted); *see Solem*, 465 U.S. at 478 (finding subsequent treatment that was "rife with contradictions and inconsistencies" to be "of no help to either side").

A. Non-Indian Settlers Did Not Flood The Ceded Area, Which Currently is 75% Held In Trust For the Tribes and Their Members.

Immediately after the Reservation's opening, land sales were low. The area was open for settlement for fewer than 10 years, from 1905 to 1915. EPA-WR-0012665 (J.A._). As of 1909, only 7.91% of the opened acres were actually sold. EPA-WR-009747, 53 (J.A._). In 1915, DOI postponed the land sales. EPA-WR-001478 (J.A._). This postponement was largely due to the fact that lands in the Sale Area generated large sums of money for the Tribes from grazing fees. *Id.* By 1915, DOI indefinitely postponed sales. *Id.* At that time, only 8.97% of open acres had been sold to non-Indians. EPA-WR-009747, 53 (J.A._). Ultimately, only 13.6% of the 1,438,633.66 acres opened to settlement were disposed of to non-Indians.[33] EPA-WR-009747 (J.A._); *see also* Solicitor's Opinion, M-31480 (February 12, 1943), 2 Op. Sol. on Indian Affairs 1185, 1191 n.7 ("1943

[33] The 2011 Solicitor Opinion states that about 11% of all of the ceded lands were sold to non-Indians. EPA-WR-009753 (J.A._). Whether 11% or 13%, it is remarkably low.

Opinion"); EPA-WR-005017 (J.A._). Additionally, the Secretary continued to issue allotments, totaling about 35,000 acres, to Indians in the ceded area after the 1905 Act. EPA-WR-009827; 0012667-68 (J.A._;_).[34] Thus, Wind River is not a case where "non-Indian settlers flooded into the opened portion" or where "the area has long since lost its Indian character." *Solem*, 465 U.S. at 471-72; *compare Yankton*, 522 U.S. at 339 (90% of unalloted lands settled by non-Indians); and *Rosebud*, 430 U.S. at 605 (over 90% non-Indian in both population and land statistics). The lack of non-Indian settlers reinforces the conclusion that no diminishment, and in fact virtually little change, occurred.[35]

[34] The record contains several allotment statistics. The 2011 Solicitor Opinion states 50,000 acres, EPA-WR-009747 (J.A._), but it notes another source stating 33,064.74 acres. EPA-WR-009747 n.41 (J.A._). A letter from BIA says 35,550.71 acres were allotted, which is the rough figure used here. WPA-WR-0009827 (J.A._).

[35] Contrary to Petitioner's assertion, the meager sales did not meet Congress' expectations. Bureau Br. at 35. Congress stated: "It is believed that under the present bill, taking into consideration coal and mineral lands, at least $1 an acre would be $1,480,000. It is believed that at least 150,000 acres of this land will be taken up under the homestead law at $1.50 an acre; that possibly 150,000 acres more would be taken at $1.25 an acre; the remaining lands would unquestionably, with the possible exception of about 100,000 acres of very rough, mountainous land, sell for $1 an acre." EPA-WR-0004658 (J.A._). "Provided a good quality of lignite coal is found . . . together with the possibility of . . . precious minerals, my estimate of what the Indians would realize from the cession would be about $1,250,000 . . . ." EPA-WR-004692 (J.A._).

B. Subsequent Congressional and Executive Treatment Are Mixed But Do Not Support a Diminishment Finding.

The most salient and undisputed facts are that the Tribes retained a beneficial interest in the Sale Area and the U.S. continued to serve as trustee. The record shows the Executive and Legislative branches acted accordingly after the 1905 Act.[36] Although the record is ambiguous in places, EPA concluded that the majority of the record did not support clear congressional intent to diminish.

EPA found that the following evidence, among others, did not reveal intent to diminish the boundaries:

- After the 1905 Act, the unsold opened lands remained under the administration of the Bureau of Indian Affairs ("BIA") and not under the jurisdiction of the General Land Office. EPA-WR-0012667 (J.A._).
- The BIA continually managed the unsold ceded land for the Tribes, including approving grazing and oil and gas leases under the Indian leasing regulations, and crediting the royalties to the Tribes. EPA-WR-0012667-68 (J.A._).

[36] The Tribes continued to view the U.S. as trustee in the Sale Area. EPA-WR-001674 (J.A._) ("We think the Government should take care of the ceded part of our reservation . . . the lands are still ours and the feed is ours.").

- In 1912, the Secretary stated that Indians retained a beneficial interest in the unsold ceded lands. EPA-WR-001637-38; 0012668 n.48 (J.A._;_).
- DOI granted several railroad rights-of-way pursuant to an Indian lands statute, 25 U.S.C. § 312 *et seq.*; EPA-WR-0012668 n.49 (J.A._).
- Congress repeatedly appropriated money for BIA for irrigation projects in the ceded area, including a 1916 Indian Appropriations Act that allocated $5,000 to pay for "irrigation of all the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." 39 Stat. 123, 158 (1916); EPA-WR-0012668-70 (J.A._).
- Various statutes referred to the land as "ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming," *see e.g.*, 34 Stat. 825 (1906), or "within the ceded portion of the Shoshone Reservation," and similar. *See e.g.*, 35 Stat. 650-51 (1909); 54 Stat. 642 (1940). EPA-WR-0012670-71; 0012681 (J.A._;_).
- Numerous Executive Branch documents describe the land as "open," "ceded portion of," or "part of" the Reservation. EPA-WR-0012672-74 (J.A._).
- A 1952 Act, 66 Stat. 780 (1952), which purchased lands and rights from the Tribes in the ceded area for construction of the Boysen Dam and reservoir,

while reserving mineral rights to the Tribes, demonstrates Congressional recognition of continuous tribal interests in the ceded lands; EPA-WR-0012682-83 (J.A._).

- A 1953 Act, 67 Stat. 592 (1953), paid for lands within the Riverton Reclamation Project and compensated the Tribes for prior unauthorized uses, which demonstrates Congressional recognition of continued tribal interests in the opened area. EPA-WR-0012683-84 (J.A._).

In 1934, Commissioner of Indian Affairs John Collier issued an opinion explaining, among other things, Federal policies over the years. EPA-WR-009605-10; 0012675 (J.A._;_) (EPA analysis of the opinion). He explained that the general pre-1890 policy was to extinguish Indian title to lands such that they were "separated from the reservation." The general post-1890 policy, in contrast, was for "opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians." EPA-WR-009606 (J.A._). He concluded that the Reservation was among the latter. EPA-WR-009608 (J.A._).

In 1939, Congress directed the Secretary to "restore to tribal ownership" significant acreage within the opened portion of the Reservation. 53 Stat. 1128, 1129-30 (1939) ("1939 Act"). The Act directed the Secretary to "restore to tribal

ownership all undisposed-of surplus land" within the Sale Area. The Secretary explained the purpose of the bill:

> The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. *One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white owned lands within the reservation*.

EPA-WR-00630 (J.A._) (emphasis added). Thus, the 1939 Act supports EPA's view that the boundaries were never dissolved, and when the land did not sell, title was restored to the Tribes from what was previously an equitable interest in the open land. *See Mattz*, 412 U.S. at 505 ("Congress has recognized the reservation's continued existence . . . by restoring to tribal ownership certain vacant and undisposed of ceded lands. . . ."); EPA-WR-0009750 (J.A._).

Petitioners claim that the 1939 Act confirms the 1905 Act diminished the boundaries. They assert that restored lands could not be "added to and made part of the existing" Reservation if those lands already were within the boundaries. Bureau Br. at 35 n.15; Wyo. Br. at 69-70. As EPA explained, the 1939 Act does not contain this language. Rather, the Act directs the Secretary to "restore [lands] to tribal ownership." EPA-WR-00 12677-81 (J.A._). The "added to and made part of the existing reservation" language was a standard phrase inserted in numerous Secretarial Restoration Orders issued all over the country. *See* EPA-WR-0012679

n.58 (J.A._) (list of Orders with identical language); *see also* EPA-WR-009605-009674 (J.A._) (Orders). Indeed, this exact language was used in two Secretarial Orders restoring land to the Cheyenne River Sioux Reservation, which the Supreme Court found not to be diminished in *Solem*, 465 U.S. at 463.[37] Under the 1939 Act for Wind River, the Secretary merely included that rote language in the Restoration Orders, providing no evidence of congressional intent to diminish the Reservation in 1905.[38] *See County of Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 246-48 (1985) (subsequent treaties in referring to prior land sales did not ratify unlawful sales and fail to demonstrate unambiguous intent to extinguish Indian title).

Wyoming points to *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976), as supporting its position that the Restoration Orders were evidence that Congress intended to diminish the boundaries. Pet. Br. at 70.

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[37] 6 Fed. Reg. 3,300 (June 12, 1941); EPA-WR-009636 (J.A._); 17 Fed. Reg. 1,065 (Feb. 2, 1952); EPA-WR-009670 (J.A._).

[38] The following are the Restoration Orders made under the 1939 Act: 5 Fed. Reg. 1,805 (May 17, 1940); 7 Fed. Reg. 7,458 (Sept. 22, 1942), corrected by 7 Fed. Reg. 9,439 (Nov. 17, 1942); 7 Fed. Reg. 11,100 (Dec. 30, 1942); 8 Fed. Reg. 6,857 (May 25, 1943); 9 Fed. Reg. 9,749 (Aug.10, 1944); as amended by 10 Fed. Reg. 2,812 (March 14, 1945); 10 Fed. Reg. 2,254 (Feb. 27, 1945); 10 Fed. Reg. 7,542 (June 22, 1945); 13 Fed. Reg. 8,818 (Dec. 30, 1948); 39 Fed. Reg. 27,561 (July 30, 1974); as amended by 40 Fed. Reg. 42,553 (Sept. 15, 1975); 58 Fed. Reg. 32,856 (June 14, 1993).

However, unlike here, the restoration act in *Southern Pacific* itself directed the Secretary to "set aside acres . . . from the public domain . . . *as an addition*" to the reservation. Act of June 22, 1936, ch. 698, s. 1, 49 Stat. 1806-7 (emphasis added). The court then pointed to the Order as implementing the express statutory text. The court did not hold that the Secretarial Order alone showed that Congress previously diminished the reservation. Notably inapposite to this case, the court found that the operative language of the cession statute and the sum certain payment was "virtually identical" to that in *DeCoteau*. *Id*. at 695. To support its conclusion of diminishment, the court contrasted the sum certain payment with the type of arrangement in the 1905 Act, which was "merely providing that the uncertain proceeds of sales of the opened lands be applied for the Indian's benefit." *Id.* at 695-96. *Southern Pacific* does not help Wyoming.

Contrary to Petitioners' assertions, EPA considered the inconsistencies and contrary viewpoints in the historical record. For example, in 1916, when discussing oil and gas leasing, Rep. Clark stated, "[t]his is not land on an Indian reservation." Yet in the same statement, he later said, "[i]t is still Indian land and the Indians are entitled to it." EPA-WR-000394; 0012671 (J.A._;_); *see also* EPA-WR-000518 (J.A._) (describing lands as "formerly included" in the Reservation); 0012672 (J.A._). EPA discussed 1907, 1912, and 1923 maps which depicted the

Reservation as consisting only of the non-ceded portion. ERA-WR-0012672-73 (J.A._). EPA pointed out 1905 and 1914 maps, and 1932 testimony, which described the ceded portion as within the Reservation boundaries. EPA-WR-009757-59; 0012672-73 (J.A._;_).[39]

Similarly, EPA and the DOI Solicitor addressed the 1943 Solicitor's Opinion. EPA-WR-0012680-81; 009750-51 (J.A._;_). The 1943 Opinion examined whether the State or Tribes could regulate hunting and fishing in particular places within the ceded and non-ceded areas. Although the Opinion mentioned the Reservation "had been diminished by the act of March 3, 1905," EPA-WR-005012 (J.A._),[40] and that the State police powers attached to the ceded

[39] Additionally, EPA noted a 1909 Senate Report on a mineral claims statute, consistently referring to the claims on the 1905 Act area as being within the Reservation. EPA-WR-0012670-71 (J.A._). The next year, another Senate Report referred to "desert lands formerly in the Shoshone or Wind River Indian Reservation." *Id.* This Report referred to the 1905 Act lands as "within the limits of the ceded portion of the Shoshone or Wind River Indian Reservation." *Id.* Another Senate Report simply referred to "the ceded portion of the Wind River Reservation." *Id.* Thus, while Congress was occasionally inconsistent, EPA concluded that overall, it treated the Reservation as intact. EPA-WR-0012674 (J.A._).

[40] EPA highlights statements throughout the 1943 Opinion that counter the diminished boundary description. *See* EPA-WR-0012681 (J.A._). For example, the Solicitor found that the Tribes retained rights in and a trust was impressed upon the open lands. *Id.*

lands, EPA-WR-005016 (J.A._),[41] it expressly stated it was *not* addressing whether the ceded lands "never ceased to be part of the reservation." EPA-WR-005019, n.8 (J.A._). So the 1943 Opinion does not shed light on the diminishment question.[42]

Wyoming maintains that EPA's decision was arbitrary and capricious because about half a dozen documents concerning the surrounding circumstances are not in the record. Wyo. Br. at 73-6. It criticizes the agency for not having those documents because they are "publicly available." But Wyoming fails to explain why it did not provide these exact documents to EPA during the comment period. Nevertheless, as detailed above, EPA considered all the materials before it, including inconsistent or ambiguous evidence. The comprehensive administrative record includes information substantially similar to that raised in the few historical documents identified by Wyoming, which, even if they had been timely provided to EPA, would not have added significant information for its consideration. *See Am. Min. Congress v. Marshall*, 671 F.2d 1251, 1255 (10th Cir. 1982) (agency not arbitrary and capricious because it "considered the relevant factors and alternatives after a full ventilation of the issues"); *Pennaco Energy, Inc. v. U.S.*

[41] The 1943 Opinion predates the 1948 Indian Country statute, 18 U.S.C. § 1151, and case law governing concurrent civil jurisdiction.

[42] The 2011 Solicitor Opinion supersedes any cursory or contradictory conclusions in the 1943 Opinion.

Dep't of Interior, 377 F.3d 1147, 1157-58 (10th Cir. 2004) (rejecting argument that agency was arbitrary and capricious by failing to consider an affidavit contradicting agency decision because agency did consider the substance, and decision was based on substantial evidence in the record).

Woods Petroleum Corp. v. Department of Interior, 47 F.3d 1032, 1037 (10th Cir. 1995), is distinguishable. There, the court found the Secretary's disapproval of an Indian mineral lease arbitrary and capricious because the agency failed to consider the factors in the statute's guidelines and acted in a manner contrary to its previous decisions without explanation. *Id.* at 1040. That situation is not present here. EPA analyzed thousands of historical documents pertaining to the diminishment inquiry and properly applied the three-prong test. The record covers over 110 years of the Reservation's history and includes almost 13,000 pages. It stretches credulity to describe it as "incomplete" or "selective." Wyo. Br. at 75. Accordingly, the court should reject Wyoming's argument that the absence of a handful of documents renders EPA's decision unlawful.[43]

EPA rationally concluded that even though inconsistent or inconclusive

[43] The proper remedy would be for the court to remand to EPA for consideration of the additional documents, not to invalidate the decision, as Wyoming posits. *Woods*, 47 F.3d at 1041 (citing *Camp*, 411 U.S. at 142-3).

statements and documents existed, the majority of the record did not reveal clear congressional intent to diminish. EPA-WR-0012672; 0012673 (J.A._;_). Lacking clear intent in the statutory language and surrounding circumstances, EPA could not find diminishment based upon these subsequent statements alone. *See Osage*, 597 F.3d at 1122; *Yankton*, 522 U.S. at 356; *Solem*, 465 U.S. at 478.

C. The Assumption of Jurisdiction in the Ceded Lands as a Whole Has Been Mixed.

EPA considered the jurisdictional history of the Sale Area and acknowledged it was mixed. EPA-WR-0012686-87 (J.A._). It discussed how Riverton's jurisdictional status has been disputed over the years. EPA-WR-0012686, n.70 (J.A._).[44] The State courts entertained Riverton's status with varying results. *See Blackburn v. State*, 357 P.2d 174 (Wyo. 1960) (State has

[44] A 1907 State publication described Riverton as "within the Indian Reservation." EPA-WR-0012674 n.55 (J.A._). DOI described Riverton as part of the Reservation in 1913 and described the Reservation in 1932 as approximately 2,238,644 acres, which would include Riverton. *Id*. This Circuit and the Supreme Court described the reservation as containing 2,300,000 acres. *See Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 901 (10th Cir. 1982); *United States v. Mazurie*, 419 U.S. 544 (1975). In 1980, this Circuit stated "[t]he reservation is large and that town of Riverton and other settlements are within its boundaries." *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh. denied*, 450 U.S. 960 (1981); *but cf. Shoshone Tribe v. United States*, 82 Ct. Cl. 23, 48-49 (1935) (describing "diminished reservation" of 808,500 acres); *Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937) (describing that cession left "808,500 acres in the diminished reservation").

jurisdiction over crime on highway north of Riverton); *State v. Moss*, Crim. No. 2896 (Aug. 7, 1969) (U.S. has jurisdiction over crime in Riverton because it is Indian Country); *reversed*, 471 P.2d 333 (Wyo. 1970); Special Master Report, EPA-WR-000777 (J.A._) (finding 1905 Act did not diminish boundaries for purposes of reserved water rights).

EPA acknowledged that the U.S. has periodically expressed inconsistent positions. *Id.* For example, in 1970, the U.S. Attorney's Office filed an amicus brief in *Moss*, stating that Riverton was not part of the Reservation. The Bureau is incorrect, though, in saying the U.S. recognized the diminished boundaries "until the EPA decision." Bureau Br. at 37. After *Moss*, the U.S. argued and provided expert witness testimony before the Special Master in *Big Horn*, that the Reservation was not diminished. EPA-WR-000727; 0012646-47, 0012667-68; 0012688-90 (J.A._;_;_;_). Wyoming argued to the contrary, but the Special Master agreed with the U.S. EPA-WR-00774-83 (J.A._). In any event, the fact that the U.S. has conveyed inconsistent views toward land opened to settlement is not uncommon in a context such as this. *See Rosebud,* 430 U.S. at 604, n.27; *Yankton*, 522 U.S. at 356; *Solem,* 465 U.S. at 478-79 (discussing contradictory and inconsistent treatment by courts, Executive branch, and Congress).

EPA acknowledged that the State has exercised criminal and civil regulatory

jurisdiction over the portions of the ceded area held in fee. EPA-WR-0012686-87 (J.A._). But historically, states often asserted jurisdiction because they assumed, much like the Federal government, *see Solem*, 465 U.S. at 468 and *Mattz,* 412 U.S. at 496, that opening reservations to settlement would lead to their demise. *See, e.g.*, Robert N. Clinton *et al*., *American Indian Law* 788-89 (3d ed. 1991) (states often asserted jurisdiction over lands opened to settlement because, during the allotment era, they assumed reservations no longer existed).

Moreover, civil jurisdiction is not mutually exclusive in Indian Country. The exercise of zoning authority by a local government, for example, does not mean the tribal government *lacks* concurrent authority simply because it is not exercising it. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 n.3 (1989) ("The possibility that the county might have jurisdiction to prohibit certain land uses ... does not suggest that the Tribe lacks similar authority."); *see also Confederated Tribes of the Colville Indian Reservation v. Washington,* 591 F.2d 89 (9th Cir. 1979) (tribal fishing regulations within reservation waters did not preempt state fishing regulations concerning the same waters). In other words, it is unsound to conclude that non-Indian fee land within the ceded area is not within reservation boundaries simply because one government exercised its concurrent jurisdictional authority. *Solem*, 465 U.S. at

467 ("Federal, State, and Tribal authorities share jurisdiction over these lands . . . under 18 U.S.C. § 1151(a))."

Nevertheless, and contrary to Wyoming's assertion that it has exclusively exercised civil jurisdiction in recent years, *see* Wyo. Br. at 76-77, the record shows that Federal agencies have considered the entire 1905 Act area to be Reservation land. *See, e.g*, EPA-WR-0011686 (J.A._) (2005 USGS groundwater monitoring); 0011734-50 (J.A._) (BIA 2008 Federal Register Notice announcing coal bed and natural gas project area in Fremont County); 0011751-61 (J.A._) (2007 Fish and Wildlife Service Wolf Management Plan); 010722-010845 (J.A._) (EPA grants to Tribes under § 106 of CWA); 0011158-0011463 (J.A._) (same); 0011535-0011668 (J.A._) (EPA grants to Tribes under § 103 of CAA).

Wyoming is incorrect in arguing that the Sale Area was not Indian Country simply because the U.S. did not enforce the Indian Country liquor law prohibition. Wyo. Br. at 72. The term "Indian Country" under the federal liquor law, 25 U.S.C. § 241, was uniquely understood at the time, and was subsequently expressly codified, to exclude lands patented in fee (even if Indian owned) in "non-Indian communities." *See Dick v. United States*, 208 U.S. 340 (1908) ("Indian Country" under liquor law prohibition statute does not apply to land no longer in Indian title); 18 U.S.C. § 1154(c), 1940 notes ("Indian Country" excludes land no longer

in trust or no longer has restrictions); *id*. 1949 notes (definition of "Indian Country" to exclude fee-patented lands in non-Indian communities in "subsection (c) [is added] . . . in order to conform it . . . more closely to the laws relating to intoxicating liquor in the Indian Country as they have heretofore been construed."). Thus, the absence of federal liquor law enforcement in non-Indian locales of the Sale Area carries no weight. EPA's conclusion that the jurisdictional patterns were mixed in the entire ceded area is supported by the record.

D. The Subsequent Demographics, Mixed Jurisdictional History, and Lack of Disruption Do Not Support Diminishment or Justifiable Expectations.

The Supreme Court recognized that subsequent demographics are a "potentially unreliable" method to interpret congressional intent. *Solem*, 465 U.S. at 472 n.13. Demographic evidence should therefore only be used to support or confirm the language of a surplus land act. *See Yazzie*, 909 F.2d at 1393, 1396; *Shawnee Tribe*, 423 F.3d at 1223. Here, the vast majority of lands within the Sale Area is held in trust and thus retain their Indian character. The Supreme Court has never focused on the population of one town, such as Riverton, within a larger sale area, to find diminishment. Further, as noted above, the jurisdictional disputes are long-standing, so any expectations surely are not settled. Lastly, Petitioners exaggerate and misconstrue how jurisdiction impacts non-Indians in Indian

Country and present a false picture of jurisdictional chaos. Consequently, the evidence does not support or result in justifiable expectations of diminishment.

Currently, approximately 1,073,766.47 acres of the 1,438,633.66 acres in the Sale Area, or about 75%, are held by the United States in trust for the Tribes or tribal members. EPA-WR-0012685 (J.A._). Of the 1,438,633 acres opened for sale, only 196,360, or approximately 13%, were alienated.[45] EPA-WR-0012666 (J.A._). These statistics are consistent with non-diminishment. *See Yazzie*, 909 F.2d at 1419 (55% of the land surface is presently either in Navajo fee ownership or held in trust for the Tribe or individual members); *compare Yankton* (fewer than 10% of the original reservation lands remained in Indian hands); *Rosebud*, 430 U.S. at 605 (over 90% non-Indian in both population and land statistics).

Although Riverton is about 90% non-Indian, it represents only 6,310 acres of the 1,438,633.66 opened for settlement, or 0.4% of the entire area. EPA-WR-0012685 (J.A._). The Supreme Court has never focused on such a tiny fraction of an entire area to find diminishment. *See Solem*, 465 U.S. at 472. The vast majority of the ceded land retains its Indian character as trust lands, which is consistent with intact boundaries.

If there is a long-standing assumption of State jurisdiction over an area

[45] Some land is owned by the State and U.S., mostly within the 1953 Act area.

which is predominantly non-Indian, it can create "justifiable expectations" that should not be disrupted by interpreting a surplus lands act in a strained manner. *Rosebud*, 430 U.S. 604-5; *Osage*, 597 F3d at 1127-28.[46] Here, although the State and local governments have been exercising their authority over the ceded fee lands, a finding of reservation boundaries would not be disruptive because, objectively, there should not be settled expectations. First, 75% of the Sale Area is now held in trust for the Tribes or their members. Second, Petitioners are aware

[46] "Justifiable expectations" under *Rosebud* are not the same as the equitable defenses articulated in *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197 (2005). In dicta, the Court in *Osage* cited *Sherrill* after noting Oklahoma's long-held assumption of jurisdiction and justifiable expectations. *Osage*, 597 F3d. at 1127-28. The *Sherrill* defenses bar a claim that would judicially restore tribal jurisdiction to lands long under local jurisdiction, seeking an inherently disruptive remedy, 544 U.S. at 219. In contrast, *Rosebud's* justifiable expectations are merely one consideration in the third prong of the diminishment analysis. The Supreme Court noted their differences when it explained that any concerns regarding disruption or justifiable expectations in reservation boundary cases follow the analysis set forth in *Rosebud*, 430 U.S. at 604-5, *Hagen*, 510 U.S. at 421, and *Solem*, 465 U.S. at 479-80. *See Sherrill*, 544 U.S. at 215, 219-20. The Court explained that, unlike equitable defenses in land claim cases, justifiable expectations are considered in "the different, but related, context of the diminishment of an Indian reservation." *Sherrill*, 544 U.S. at 215. Thus, the Court did not alter its long line of diminishment cases or merge the two concepts. *See id.* at 215 n.9 (explaining that the equitable defenses bar the remedy, not that diminishment law is changed). Importantly, the U.S. was not a party in *Sherrill* or *Osage*. Generally, equitable defenses do not lie against the U.S. when it acts as a sovereign to enforce its own rights or when acting as trustee for Indians. *See, e.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940); *New Mexico v. Aamodt*, 537 F.2d 1102, 1110 (10th Cir. 1976).

that the area has been in dispute periodically. As explained above, Petitioners know about the long-standing boundary controversy from Congressional acts dealing with the tribal interests in the area and litigation in *Moss*, *Blackburn*, and *Big Horn*.[47] They cannot reasonably claim that the area's jurisdictional status has ever been settled in their favor. Third, Petitioners greatly exaggerate – and misconstrue – the effects of Indian Country jurisdiction.

The Provisional Intervenors devote their entire brief to the subsequent treatment of a narrow portion of the 1905 Act Sale Area. The third prong alone, however, cannot form the basis of diminishment. *See Solem*, 465 U.S. at 472; *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. at 351; *Osage*, 597 F.3d at 1122. In

[47] This Court is no stranger to the boundary controversy. *See Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012); *Yellowbear v. Attorney Gen. of Wyo.*, 380 Fed. Appx. 740, 2010 WL 2053516 (10th Cir. May 25, 2010), *cert. denied, Yellowbear v. Salzburg*, 131 S.Ct. 1488 (2011). In *Harnsberger*, the Court did not reach the boundary issue because it found dismissal was proper for failure to join the Eastern Shoshone Tribe as an indispensable party. 697 F.3d at 1284. In *Yellowbear*, the Court did not independently entertain the boundary issue. Rather, it held that under the habeas corpus standard of review in 28 U.S.C. § 2254, the Wyoming Supreme Court's ruling that Riverton was not within the Reservation was not an unreasonable application of Federal law. 380 Fed. Appx. at 743. The Court noted: "A state court's decision on a federal question generally does not preclude a federal court from subsequently reaching a contrary conclusion." *Id.* at n.3 (citation omitted).

any event, their parade of horribles is unfounded.[48]

Under principles of Federal Indian law, tribes lack criminal jurisdiction over non-Indians in Indian country and have limited civil jurisdiction over non-Indians on fee land within Indian Country.[49] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribe lacks criminal jurisdiction over non-Indian); *Montana v. United States*, 450 U.S. 544 (1981) (tribe generally lacks civil regulatory jurisdiction over non-Indians on non-Indian fee land within reservation, absent exceptions).[50] *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S.

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[48] For example, they claim there will be "unfettered subdivision of lands without any governmental oversight." Br. at 10. Civil cases in local courts would be "in a state of confusion." Br. at 11. A non-Indian could have his "estate divided between two Tribes." Br. 13. "[A]ssurances that the quality of the building being erected . . . will be lacking." Br. at 17. Law enforcement and the public will be "in a state of confusion . . . ." Br. at 22. These examples misunderstand the law and working relationships in Indian Country. *See also* http://www.wyofile.com/specialreport/can-state-tribes-share-jurisdiction-riverton/ (relationship "is working very well" between City of Mt. Pleasant, Michigan, within boundaries of Saginaw Chippewa Indian Reservation, and Tribe.) Also, EPA's TAS approval is for non-regulatory programs only, so much of what they argue is not a result of EPA's decision.

[49] One exception is if tribes exercise jurisdiction over non-Indians who commit enumerated domestic violence crimes against Indian victims under the Violence Against Women Reauthorization Act, Title IX, Pub. L. 113-4 (March 7, 2013), 127 Stat. 54.

[50] The *Montana* exceptions are: (1) if the non-Indian enters into a consensual relationship with the tribe; or (2) if the conduct threatens or has a direct effect on the political integrity, economic security or health or welfare of the tribe.

316 (2008) (sale of fee land to non-Indian on reservation not subject to tribal law); *Brendale,* 492 U.S. 408 (tribe has zoning jurisdiction over non-Indian in closed part of reservation but lacks zoning jurisdiction over non-Indian in open/heavily non-Indian fee area of reservation).

This general principle extends to tribal court jurisdiction. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court lacks jurisdiction to adjudicate civil case involving accident between non-Indians on state-owned road within boundaries of reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court lacks jurisdiction over claims involving conduct of state officer on reservation). To be sure, the State's ability to tax and prosecute members of Federally recognized tribes is affected (although not necessarily displaced); but the practical impact on *non-Indians* and the State/local governmental authority on non-Indian fee land are far less pronounced as Petitioners claim. Further, in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), this Circuit held that prior criminal convictions are not subject to collateral attack because reservation boundary determinations are applied prospectively. In short, Petitioners do not have reasonably justifiable expectations about the boundaries being diminished due to the vast trust lands in the area, the long-standing dispute over the boundaries, and the limited jurisdictional impacts over non-Indians.

V. This Case is Distinguishable from *Rosebud*.

Petitioners argue this case is like *Rosebud*. But EPA and the DOI Solicitor explained its important differences. EPA-WR-0012660-664; 009743-45 (J.A._;_). While the operative language in *Rosebud*'s 1904 Act is similar to the 1905 Act, the other provisions and surrounding circumstances are readily distinguishable. EPA and DOI carefully analyzed *Rosebud* and reasonably concluded that the facts here are significantly different, and that *Rosebud* is thus not controlling here.

In *Rosebud*, the Court found an uninterrupted intent to change the Rosebud Sioux Reservation boundaries due to an unratified agreement which culminated with a surplus lands act three years later. *Rosebud*, 430 U.S. at 596-99. McLaughlin negotiated all the agreements in *Rosebud*, providing further continuity of purpose, unlike here. McLaughlin expressly described the change in the size of the Rosebud Reservation by telling the Tribe the act "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of the Pine Ridge Reservation." *Rosebud*, 430 U.S. at 591-92. After that agreement failed, Congress directed McLaughlin to seek the *same* agreement but instead of a lump sum payment, the Tribe would be paid as lands were sold. *Id.* at 592-93. When McLaughlin returned, he told the Tribe he returned to enter into a similar arrangement except for payment, and that "[y]ou will still have as large a

reservation as Pine Ridge after this is cut off." *Id*. at 593. The *Rosebud* Court found that there was "no indication that Congress intended to change anything other than the form of, and responsibility for, payment" because all other provisions remained the same, including the operative language and land area. *Id*. at 594-5.

Here, as EPA pointed out, the circumstances are dissimilar. EPA-WR-0012660-64 (J.A._). The operative language in the proposed agreement and subsequent act were identical in *Rosebud*, 430 U.S. at 592-3, 596-97. But the operative language in the 1905 Act differed from that of the 1891 agreement by excluding the strikethrough words and adding the bracketed words: "cede, [grant] ~~convey~~, ~~transfer~~, relinquish ~~and surrender~~, ~~forever and absolutely~~… all their right, title and interest, ~~of every kind and character in~~ [which they may have to]" the lands. Additionally, the operative language in *Rosebud* expressly provided for the cession of a portion of the reservation: "The said Indians . . . do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted . . . ." 33 Stat. 256; *Rosebud*, 430 U.S. at 597. In contrast, the Wind River Tribes agreed to "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," 33 Stat. 1016 (emphasis added), which does not indicate the severance of a portion of the Reservation.

McLaughlin did not tell the Wind River Tribes that the 1905 Act would be "similar" to the failed attempts years earlier. He did not describe the ceded lands in Wind River as "cut off" from the reservation, as in *Rosebud.* Also, there were only three years in between the failed agreement and the act in *Rosebud*. Here, there are fourteen years separating the 1891 failed agreement and the 1905 Act, which makes finding an uninterrupted attempt to diminish tenuous. EPA-WR-012664 (J.A._).

Additional differences are:

- There were intervening events between the 1891 failed agreement and the 1905 Act, countering a continuity of purpose: the 1893 failed *negotiations* (not just unratified agreements like in *Rosebud*), the introduction of H.R. 13481, the subsequent negotiations with the Tribes, the resulting 1904 agreement, and the introduction of H.R. 17994, which became the 1905 Act. Throughout the process, the language, payment, trusteeship, and scope of the proposed legislation changed.
- In contrast to *Rosebud*, the land base subject to 1905 Act cession was different in the 1893 failed negotiations (and was the primary factor for their

failure). There was never a meeting of the minds regarding the land base prior to the 1905 Act.

- The 1905 Act, unlike in *Rosebud*, 430 U.S. at 599-600, did not contain state school lands provisions, which suggests that Congress intended the Sale Area to remain Reservation lands, as supported by the legislative history. *Compare Yankton*, 522 U.S. at 349-50.
- Unlike *Rosebud*, the 1905 Act allowed Indians to retain allotments in the ceded area, preserving its Indian character. *See Solem*, 465 U.S. at 474 ("permission to continue to obtain individual allotments on the affected portion of the reservation before the land was officially opened to non-Indian settlers" suggested that the opened area was to remain a part of the reservation).[51]
- Congress added the Boysen provision to the 1905 Act, indicating its intent for lands within the Sale Area to retain tribal interests, and not be returned to the public domain, as was the case in *Rosebud*.

[51] Not all statutes that provide for allotment and sale of lands have been interpreted as leaving reservation boundaries intact. *See, e.g.*, *DeCoteau*. The statute in *DeCoteau*, however, provided for "the outright cession of surplus reservation lands," rather than simply their sale for the benefit of the tribe like here. 420 U.S. at 439.

- The 1905 Act does not restore the ceded land to the public domain, which can indicate intent inconsistent with continued reservation status. *See Hagen*, 510 U.S. at 414. In *Rosebud*, the Court found that the land was restored to the public domain because it was the only way to comport the school lands provision with South Dakota's Enabling Act. 430 U.S. at 599-601.
- Between 1891 and 1905, there were three failed attempts in 1893 to reach agreement with the Tribes. In 1893, the U.S. Commissioner described the Wind River 1891 agreement as "gone" and "dead." EPA-WR-000289 (J.A._). The chain of intent found in *Rosebud* did not contain intervening failed or "dead" agreements.
- The area in *Rosebud* lost its tribal character (over 90% non-Indian in both population and land statistics), *see* 430 U.S. at 605, but the Sale Area here did not (75% of the entire area is held in trust).

The differences between *Rosebud* and this case are significant. Under the Supreme Court's framework, the statutory language, the circumstances, and the aftermath must point in the same direction to find clear intent to diminish. So the differences are decisive in demonstrating that *Rosebud* is not controlling here.

VI. EPA's Boundary Conclusion Should Be Upheld.

EPA's determination that the 1905 Act did not diminish the boundaries of the Reservation is in accordance with governing law. The determination is based on a thorough legal analysis and detailed application of the historical facts. EPA considered arguments and information that could be interpreted to support or contradict a diminishment finding and rendered a persuasive decision based on substantial and compelling evidence in the voluminous record.

The 1905 Act does not contain the requisite express language manifesting clear congressional intent to diminish the Reservation boundaries. The surrounding circumstances do not unequivocally reveal a widely-held and contemporaneous understanding that the Reservation would be diminished. Although the subsequent treatment evidence is mixed, EPA reasonably concluded that on balance, it did not support a finding of clear congressional intent. Petitioners are aware of the long-standing jurisdictional disputes, and therefore any purported expectations cannot reasonably be justified. Finally, 75% of the overall ceded area is held in trust for the tribes and their members. EPA could not infer diminishment lightly, and did not do so, after analyzing the relevant factors. *See Solem*, 465 U. S. at 470.

VII. EPA's TAS Decision is Fully Consistent With EPA's Regulations.

A. The Tribes Are Not a Consortium Under The TAR.

Wyoming argues that the Tribes' joint governmental structure constitutes a consortium under the TAR and that each Tribe was required to provide reasonable assurances that it may carry out necessary TAS functions in the event their joint government does not do so. Wyo. Br. at 78-79. Wyoming is wrong.

The Wind River Reservation is unique in the sense that it is occupied by two independent sovereign Tribes sharing an undivided equal interest in, and exercising equal governmental authority over, a single shared reservation land base. To manage these shared assets and govern the Reservation, the Tribes long ago established joint governmental structures and agencies delegated with various executive, legislative, and judicial powers. Among others, these included the Tribe's Joint Business Council and the Wind River Environmental Quality Commission. As explained below, these uniquely situated Tribes and their governmental institutions are fundamentally distinct from the type of inter-tribal partnerships EPA intended to cover under the consortium provisions of the TAR. *See* 40 C.F.R. §§ 49.2(d) (generally defining "Indian Tribe Consortium," or "Tribal Consortium" to mean "a group of two or more Indian tribes"); 49.7(a)(5).

The consortium provisions of the TAR provided opportunities for tribes with

relatively fewer available resources and less expertise to rely on the combined resources of an inter-tribal partnership to meet the capability eligibility criterion. 59 Fed. Reg. 43,956, 43,963-64 (August 25, 1994). EPA intended this approach to provide economies of scale for tribes with contiguous or otherwise similar air resources seeking to administer CAA functions over their respective separate Indian country areas. *Id.* at 43,973.

For purposes of the TAR, tribal consortia would thus typically consist of tribes that are generally located in the same state or part of the country, or that have other connections or interests, that have pooled their environmental resources to maximize efficiencies for the consortia membership as a whole. *Id.* Simply put, the Wind River Tribes do not fit this model, and EPA did not intend the TAR to shoehorn the Tribes' joint governmental institutions into the consortia framework or to require that each Tribe make an unnecessarily redundant capability demonstration before EPA may approve their TAS.[52] Rather, the Tribes properly

[52] In fact, EPA never intended the TAR to require any tribe to rely on a consortium for any purpose in demonstrating that it meets the TAS criteria. Any such reliance would reflect a discretionary choice by a tribe and would be reflected in the tribe's TAS application. Because the Wind River Tribes' joint government does not constitute a consortium under the TAR, their TAS application is appropriately silent on this point. The Tribes did not apply as a consortium, and EPA did not process their application as such.

identified their joint governmental agencies and capabilities in demonstrating that they meet the statutory and regulatory TAS criteria.

Therefore, Wyoming is incorrect in its argument that EPA failed to comply with the TAR's requirements with respect to tribal consortia, which do not apply in this case. Even if the TAR were ambiguous on this point, EPA's interpretation of its own regulation controls. *Auer v. Robbins*, 519 U.S. at 461. *See also Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief . . . ."); *Via Christi Reg'l Med. Ctr, Inc. v. Leavitt*, 509 F.3d 1259, 1272 (10th Cir. 2007) (finding that an informal agency interpretation of its own regulations is entitled to great deference). Accordingly, the Court should reject Wyoming's argument regarding 40 C.F.R. § 49.7(a)(5).[53]

[53] Wyoming argues that the Northern Arapaho Tribe has disbanded the JBC and that this is somehow significant with respect to Wyoming's argument regarding tribal consortia. Wyo. Br. at 79 n.8. EPA's TAS decision does not require that the Tribes jointly manage the Reservation through the JBC. Moreover, because EPA's decision was proper at the time it was made, this subsequent event cannot render it arbitrary and capricious. *See Newton C'nty Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1988) ("This court's task is to make sure the [agency] considered the information available at the time it made its decision; if the agency's decision was proper at the time it was made, our inquiry is at an end.") (citation omitted). As explained in the Statement of the Case at Heading I.C.2, EPA is coordinating with the Tribes as to how the CAA programs covered by the TAS decision will be

B. EPA Was Not Required to Decide Whether The 1953 Act Area is Within The Reservation After The Tribes Asked EPA Not to Act on The TAS application With Respect to The 1953 Act Area.

Wyoming argues that the TAR required EPA to provide an opportunity for Wyoming to comment on what it claims is a redefined reservation boundary after the Tribes asked EPA not to act on the application with respect to the 1953 Act area. This is not so. The Court should also reject Wyoming's argument that EPA's TAS decision is contrary to the TAR and arbitrary and capricious because EPA did not determine whether the 1953 Act area is within the Reservation's boundaries after the Tribes requested that EPA not act on their application with respect to that area. Wyo. Br. at 79-80.

The Tribes initially sought TAS approval for an area that included the 1953 Act lands, and, as required by the TAR, EPA provided Wyoming and others with an opportunity to comment on the reservation boundary contained in the Tribes' application. 65 Fed. Reg. at 1322-23; EPA-WR-004107-109; 004183-187 (J.A._;_). Wyoming submitted extensive comments, but made little reference to the 1953 Act (asserting that the 1953 Act shows that Congress understood the 1905

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jointly managed by the Tribes.

Act to have diminished the Reservation). EPA-WR-004301-02 (J.A._). EPA addressed this comment in its analysis. EPA-WR-0012683-84 (J.A._). Therefore, Wyoming took advantage of its opportunity to comment on the entire Reservation boundary asserted by the Tribes in their application, and EPA took those comments into account in reaching its decision.

The TAR allows tribes to seek TAS for "areas" within their respective reservations. 40 C.F.R. § 49.7(a)(3). Thus, a tribe is not required to seek TAS for its entire reservation. Consistent with this provision, the Tribes requested that EPA not address the 1953 Act lands at this time, and EPA honored this request. EPA-WR-0012601-02 (J.A._). EPA is to "decide the jurisdictional scope of the tribe's program." 40 C.F.R. § 49.9(e). Consistent with both the TAR and the scope of the program authority sought by the Tribes, the 1953 Act area is not included in the geographic scope of EPA's TAS decision, and EPA did not address the area further. EPA-WR-0012602 (J.A._). Therefore, EPA's decision is completely consistent with the TAR.

Contrary to Wyoming's assertion, this reduction of the geographic scope did not create a new Reservation boundary that would prevent EPA from acting on the Tribes' application without first providing Wyoming an additional opportunity to comment under the TAR. Had EPA approved the Tribes for lands that were not

described in the Tribe's application, Wyoming might have a point. However, the opposite occurred here. EPA's decision approves the Tribes' TAS application for a geographic reservation area smaller than that which had been asserted in the application. Wyoming has not shown how the TAR requires an opportunity for additional comment in these circumstances, nor can it do so. The Court should therefore reject Wyoming's argument that EPA's decision is inconsistent with the TAR because EPA did not provide an additional opportunity for comment after the Tribes requested that EPA not act upon their application with respect to the 1953 Act lands.

The Court should also reject Wyoming's argument that EPA's decision is arbitrary and capricious under *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001). Wyo. Br. at 79-80. The court there reviewed EPA's federal operating permit program for Indian country under Title V of the CAA. *Michigan*, 268 F.3d at 1080. In that final rule, EPA specified that it would treat as Indian country any areas where the Indian country status was in question; and the issue was whether EPA's approach for such in-question areas exceeded EPA's authority under the CAA. *Id.* The court was troubled that EPA's approach appeared to be premised on the existence of federal authority without any need for EPA to ever decide whether such in-question areas were, or were not, Indian country. *Id.* at 1084-85.

The court found that EPA had impermissibly created its own authority by determining that questions as to land status existed and then declining to answer those same questions. The court was clear that there was no separate source of federal authority over such in-question areas, and that EPA must eventually decide the land status issue. *Id.* at 1084-87. The court therefore overturned the Title V rule as applied to in-question areas. *Id.*

Contrary to Wyoming's apparent contention, *Michigan* does not stand for the proposition that EPA must determine the reservation status of an area of land when the question is not presented to EPA nor necessary to the specific decision being made. Congress has not charged EPA with deciding the reservation status of particular parcels of land when it is not necessary for EPA to do so under one of the statutes EPA administers. Rather, EPA would need to determine the jurisdictional status of any disputed area under the court's reasoning in *Michigan* only if it were necessary to do so in order to decide whether to approve a TAS application, or if the question were submitted to EPA in the context of implementing a program. As discussed above, the Tribes requested that EPA not act on their TAS application with respect to the 1953 Act area.[54] Neither

[54] With regard to Wyoming's assertion that EPA believes that state-issued permits in the "disputed area" are invalid, EPA has made no jurisdictional determination one way or the other with respect to the 1953 Act area, and it has stayed the

Wyoming nor any other party has requested that EPA resolve the question with respect to any particular situation that would require EPA to do so. The status of the 1953 Act area, therefore, was not before EPA. As a result, there is no present need for EPA to decide the jurisdictional status of the 1953 Act area for CAA regulatory purposes, and EPA is not required to do so under the CAA or the court's rationale in *Michigan*. The Court should therefore reject Wyoming's argument that it was arbitrary and capricious for EPA not to decide the reservation status of the 1953 Act area under the court's reasoning in *Michigan*.

CONCLUSION

For all these reasons, the Petitions for Review should be denied.

effectiveness of the TAS decision with respect to the disputed area that is covered by the TAS decision.

Dated: April 6, 2015

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

EPA believes that oral argument will assist the Court in the resolution of the issues raised in the Petitions for Review and therefore requests that oral argument be scheduled.

CERTIFICATION OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User's Manual and Local Rules it is hereby certified that: (1) no privacy redactions were required for this document, (2) the electronic version of this document is an exact copy of the written document to be filed with Clerk, (3) the digital copy of this document has been scanned for viruses with the most recent version of Microsoft Forefront Client

Security, which was last updated on April 6, 2015, and, according to the program, is free of viruses.

/s/ David A. Carson

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 19,705 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the glossary of acronyms.

s/ David A. Carson

CERTIFICATE OF SERVICE

It is hereby certified that on April 6, 2015, the undersigned caused this document to be served by filing it through the Court's ECF system. Any counsel not registered with the Court's ECF system will be served by United States mail.

/s/ David A. Carson

ADDENDUM

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3517)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7601

§ 7601. Administration

Currentness

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(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator--

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if--

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 301, formerly § 8, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992; amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, §§ 3(b)(2), 15(c)(2), 84 Stat. 1677, 1713; Aug. 7, 1977, Pub.L. 95-95, Title III, § 305(e), 91 Stat. 776; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 107(d), 108(i), 104 Stat. 2464, 2467.)

Notes of Decisions (11)

42 U.S.C.A. § 7601, 42 USCA § 7601
Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7607

§ 7607. Administrative proceedings and judicial review

Currentness

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(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

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CREDIT(S)

(July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681-2684.)

Notes of Decisions (316)

42 U.S.C.A. § 7607, 42 USCA § 7607
Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

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Code of Federal Regulations
Title 40. Protection of Environment
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Subchapter B. Grants and Other Federal Assistance
Part 49. Indian Country: Air Quality Planning and Management (Refs & Annos)
Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.1

§ 49.1 Program overview.

Currentness

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as States. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as States under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.2

§ 49.2 Definitions.

Currentness

(a) Clean Air Act or Act means those statutory provisions in the United States Code at 42 U.S.C. 7401, et seq.

(b) Federal Indian Reservation, Indian Reservation or Reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) Indian Tribe Consortium or Tribal Consortium means a group of two or more Indian tribes.

(e) State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.3

§ 49.3 General Tribal Clean Air Act authority.

Currentness

Tribes meeting the eligibility criteria of § 49.6 shall be treated in the same manner as States with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.4

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Currentness

Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS–related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) and (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for Federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The "2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the Federal district courts against States in their capacity as States.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be "judicial" and "in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be "judicial" and "in State court."

(q) The provision of section 105(a)(1) that limits the maximum Federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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40 C.F.R. § 49.5

§ 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Currentness

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as States. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as States with respect to such provisions.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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40 C.F.R. § 49.6

§ 49.6 Tribal eligibility requirements.

Currentness

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian tribe in the same manner as a State for the Clean Air Act provisions identified in § 49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.7

§ 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

Currentness

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of § 49.6 for Clean Air Act program approval. The application shall concisely describe how the Indian tribe will meet each of the requirements of § 49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self–Determination and Education Assistance Act (25 U.S.C. 450, et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in demonstrating under paragraph (a)(4) of this section that the tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with § 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of § 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA–administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.8

§ 49.8 Provisions for tribal criminal enforcement authority.

Currentness

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the Federal Government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate Federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in § 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

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Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.9

§ 49.9 EPA review of tribal Clean Air Act applications.

Currentness

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under § 49.7 in a timely manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-reservation areas, appropriate governmental entities may request a single 30–day extension to the general 30–day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of § 49.6 for purposes of a Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a State with respect to that provision, to the extent that the provision is identified in § 49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in § 49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar State submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Notes of Decisions (4)

Current through March 26, 2015; 80 FR 16222.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter B. Grants and Other Federal Assistance
Part 49. Indian Country: Air Quality Planning and Management (Refs & Annos)
Subpart A. Tribal Authority (Refs & Annos)

40 C.F.R. § 49.10

§ 49.10 EPA review of State Clean Air Act programs.

Currentness

A State Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Current through March 26, 2015; 80 FR 16222.

End of Document

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40 C.F.R. § 49.11

§ 49.11 Actions under section 301(d)(4) authority.

Currentness

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum Federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum Federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

SOURCE: 63 FR 7271, Feb. 12, 1998; 65 FR 51433, Aug. 23, 2000; 76 FR 23879, April 29, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

Notes of Decisions (1)

Current through March 26, 2015; 80 FR 16222.

End of Document

March 3, 1905.
[H. R. 17994.]
[Public, No. 185.]

CHAP. 1452.—An Act To ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming, and to make appropriations for carrying the same into effect.

Preamble.

Whereas James McLaughlin, United States Indian inspector, did on the twenty-first day of April, nineteen hundred and four, make and conclude an agreement with the Shoshone and Arapahoe tribes of Indians belonging on the Shoshone or Wind River Reservation in the State of Wyoming, which said agreement is in words and figures as follows:

Agreement with Indians of the Shoshone or Wind River Reservation, Wyo.

This agreement made and entered into on the twenty-first day of April, nineteen hundred and four, by and between James McLaughlin, United States Indian Inspector, on the part of the United States, and the Shoshone and Arapahoe tribes of Indians belonging on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, witnesseth:

Lands ceded.

ARTICLE I. 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 the said reservation, except the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: *Provided*,

Allotments to Indians.

That any individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and 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 at any time before the lands hereby ceded shall be opened for entry.

Disposal of lands.

ARTICLE II. 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 under the provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law, within three years therefrom, shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded, within two years after the opening of the same to entry, shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law, the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making

entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entrymen fails to make the payments herein provided for or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited, and the entry shall be forfeited and canceled, unless the Secretary of the Interior shall in his discretion, and for good cause, excuse for not exceeding six months, the said failure, application for which must be made by the settler on or before the date of the payment which would bring him or her in default, and all lands except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry, shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal, and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, and also to pay the said Indians the sum of one dollar and twenty-five cents per acre for sections sixteen and thirty-six, or an equivalent of two sections in each township of the ceded lands, the amounts so realized to be paid to and expended for said Indians in the manner hereinafter provided.

Proviso.
Unsold lands.

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available, which per capita payment shall be from the proceeds of the sale of sections sixteen and thirty-six or an equivalent of two sections in each township within the ceded territory, and which sections are to be paid for by the United States at the rate of one dollar and twenty-five cents per acre: *And provided further*, That upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

Distribution of proceeds.

Proviso.
Balance.

ARTICLE IV. It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians: *Provided*, That in the employment of persons for the construction, enlargement, repair and management of such irrigation system, members of the said Shoshone and Arapahoe tribes shall be employed wherever practicable.

Irrigation.

Proviso.
Indian labor.

ARTICLE V. It is agreed that at least fifty thousand dollars of the moneys derived from the sale of the ceded lands shall be expended, under the direction of the Secretary of the Interior, in the purchase of live stock for issue to said Indians, to be distributed as equally as

Live stock.

possible among the men, women and children of the Shoshone or Wind River Reservation.

Schools.

ARTICLE VI. It is further agreed that the sum of fifty thousand dollars of the moneys derived from the sales of said ceded lands shall be set aside as a school fund, the principal and interest on which at four per centum per annum shall be expended under the direction of the Secretary of the Interior for the erection of school buildings and maintenance of schools on the diminished reservation, which schools shall be under the supervision and control of the Secretary of the Interior.

General welfare fund.

ARTICLE VII. It is further agreed that all the moneys received in payment for the lands hereby ceded and relinquished, not set aside as required for the various specific purposes and uses herein provided for, shall constitute a general welfare and improvement fund, the interest on which at four per centum per annum shall be annually expended under the direction of the Secretary of the Interior for the benefit of the said Indians; the same to be expended for such purposes and in the purchase of such articles as the Indians in council may decide upon and the Secretary of the Interior approve: *Provided, however*, That a reasonable amount of the principal of said fund may also be expended each year for the erection, repair and maintenance of bridges needed on the reservation, in the subsistence of indigent and infirm persons belonging on the reservation, or for such other purposes for the comfort, benefit, improvement, or education of said Indians as the Indians in council may direct and the Secretary of the Interior approve. And it is further agreed that an accounting shall be made to said Indians in the month of July in each year until the lands are fully paid for, and the funds hereinbefore referred to shall, for the period of ten years after the opening of the lands herein ceded to settlement, be used in the manner and for the purposes herein provided, and the future disposition of the balance of said funds remaining on hand shall then be the subject of further agreement between the United States and the said Indians.

Proviso. Annual expenditure.

Proceeds.

ARTICLE VIII. It is further agreed that the proceeds received from the sales of said lands, in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement.

Government to act only as trustee to sell, etc.

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township or to dispose of said land except as provided herein, or to guarantee to find purchasers for said land or any portion thereof, it being the understanding 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.

Existing rights not impaired.

ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

Effect.

ARTICLE XI. This agreement shall take effect and be in force when signed by U. S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof, the said James McLaughlin, U. S. Indian Inspector, on the part of the United States, and the male adult Indians belonging on the Shoshone or Wind River Indian Reservation, Wyo-

ming, have hereunto set their hands and seals at the Shoshone Agency, Wyoming, this twenty-first day of April, A. D. Nineteen hundred and four.

JAMES MCLAUGHLIN, [SEAL.]
U. S. Indian Inspector.

No.	Name.	Age.	Mark.	Tribe.
1	George Terry	48		Shoshone (Seal).
2	Myron Hunt	48	X	" (Seal).
	(And 280 more Indian signatures.)			

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open council to the Indians of the Shoshone or Wind River Reservation, Wyoming; that it was fully understood by them before signing, and that the agreement was duly executed and signed by 282 of said Indians.

CHARLES 'LAHOE,
Shoshone Interpreter.
MICHAEL MANSON,
Arapahoe Interpreter.

SHOSHONE AGENCY, WYOMING,
April 22, 1904.

We, the undersigned, do hereby certify that we witnessed the signatures of James McLaughlin, U. S. Indian Inspector, and of the two hundred and eighty-two (282) Indians of the Shoshone or Wind River Reservation, Wyoming, to the foregoing agreement.

JOHN ROBERTS,
Missionary of the Protestant Episcopal Church on the Reservation.
JOHN S. CHURCHWARD,
Assistant Clerk, Shoshone Agency, Wyo.

SHOSHONE AGENCY, WYOMING,
April 22nd, 1904.

I hereby certify that the total number of male adult Indians, over eighteen (18) years of age, belonging on the Shoshone or Wind River Reservation, Wyoming, is four hundred and eighty-four (484), of whom two hundred and eighty-two (282) have signed the foregoing agreement.

H. E. WADSWORTH,
U. S. Indian Agent.

SHOSHONE AGENCY, WYOMING,
April 22nd, 1904.

Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, except as to Articles II, III, and IX, which are amended and modified as follows, and as amended and modified are accepted, ratified, and confirmed: Agreement ceding lands Shoshone Reservation, Wyo., amended and ratified.

ARTICLE II. 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, under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash, as hereinafter provided, at the following prices per acre: All lands entered under the homestead Disposal of lands. Homestead entries.

law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law within three years therefrom shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited and the entry shall be held for cancellation and canceled, and all lands, except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior: *And provided*, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled: *Provided further*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

Town-site, coal, and mineral entries.

Proviso. Asmus Boysen.

Rights under lease.

Sale after eight years.

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available: *And provided further*, That upon the completion of the said fifty dollars per capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

Proceeds. Per capita payment.

Proviso. Securing water rights.

ARTICLE IX. It is understood 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

United States to act as trustee.

or any portion thereof, it being the understanding 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.

Opening of lands to entry.

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and six, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter said lands except as prescribed in said proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry, and the rights of honorably discharged Union soldiers and sailors of the late civil and of the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Proclamation.

R. S., secs. 2304, 2305, p. 422. Vol. 31, p. 847.

Homestead entries. Payments.

All homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid, payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid. Upon all entries the usual fees and commissions shall be paid as provided for in homestead entries on lands the price of which is one dollar and twenty-five cents per acre. Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless entry and payment shall be made within three years from the date of location all rights thereunder shall cease; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall cease, and any payments therebefore made shall be forfeited, and the entry shall be held for cancellation and canceled; that nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one of the Revised Statutes of the United States by paying for the land entered the price fixed herein; that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.

Town-site, coal, and mineral entries.

Commutation. R. S., sec. 2301, p. 421.

Proviso. Lands unsold after eight years.

Appropriation for per capita.

SEC. 3. That there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of eighty-five thousand dollars to make the per capita payment provided in article three of the agreement herein ratified, the same to be reimbursed from the first money received from the sale of the lands herein ceded and relinquished. And the sum of thirty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury of the United States not otherwise

Reimbursable.

Surveys, etc.

appropriated, the same to be reimbursed from the proceeds of the sale of said lands, for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary; and the sum of twenty-five thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, to be used in the construction and extension of an irrigation system on the diminished reserve, as provided in article four of the agreement.

Irrigation.

Approved, March 3, 1905.

March 3, 1905.
[H. R. 18196.]
[Public, No. 166.]

CHAP. 1453.—An Act To amend section forty-four hundred and five of the Revised Statutes of the United States.

Steamboat-Inspection Service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section forty-four hundred and five of the Revised Statutes of the United States be, and it is hereby, amended to read as follows:

Meetings of board; assignment of districts.
R. S., sec. 4405, p. 853, amended.

"SEC. 4405. The supervising inspectors and the Supervising Inspector-General shall assemble as a board once in each year, at the city of Washington, District of Columbia, on the third Wednesday in January, and at such other times as the Secretary of Commerce and Labor shall prescribe, for joint consultation, and shall assign to each of the supervising inspectors the limits of territory within which he shall perform his duties. The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of Commerce and Labor, shall have the force of law. The supervising inspector for the district embracing the Pacific coast shall not be under obligation to attend the meetings of the board oftener than once in two years; but when he does not attend such meeting he shall make his communications thereto, in the way of a report, in such manner as the board shall prescribe: *Provided*, That the Secretary of Commerce and Labor may at any time call in session, after reasonable public notice, a meeting of an executive committee, to be composed of the Supervising Inspector-General and any two supervising inspectors, which committee, with the approval of the said Secretary, shall have power to alter, amend, add to, or repeal any of the rules and regulations made, with the approval of the Secretary of Commerce and Labor, by the board of supervising inspectors, either by virtue of this section or under any power granted by this title, or any amendments thereof, such alteration, amendment, addition, or repeal, when approved by the said Secretary, to have the force of law, and to continue in effect until thirty days after the adjournment of the next meeting of the board of supervising inspectors. The foregoing powers of such executive committee, acting with the said Secretary, shall also extend to the approval of the instruments, machines, and equipments referred to in section forty-four hundred and ninety-one of this title."

Regulations to be approved by Secretary of Commerce and Labor.

Proviso.
Executive committee authorized.
Amendment, etc., of regulations.

Use of instruments for security of life.
R. S., sec. 4491, p. 868.

Effect.

SEC. 2. That this Act shall take effect and be in force on and after the first day of July, nineteen hundred and five.

Approved, March 3, 1905.

PUBLIC ACTS OF THE FORTY-THIRD CONGRESS

OF THE

UNITED STATES,

Passed at the second session, which was begun and held at the city of Washington, in the District of Columbia, on Monday, the seventh day of December, 1874, and was adjourned without day on Thursday, the fourth day of March, 1875.

ULYSSES S. GRANT, President. HENRY WILSON, Vice-President and President of the Senate. MATT. H. CARPENTER was elected President of the Senate, *pro tempore*, on the twenty-third day of December, 1874, and so acted from time to time until the first day of January, 1875. HENRY B. ANTHONY was chosen President of the Senate, *pro tempore*, on the twenty-fifth day of January, 1875, and so acted until the first day of February, 1875. He was again chosen on the fifteenth day of February, 1875, and so acted from time to time until the twenty-third day of February, 1875. JAMES G. BLAINE, Speaker of the House of Representatives.

CHAP. 1.—An act making an appropriation to enable the Postmaster General to carry into effect the law requiring the prepayment of postage on newspapers, approved June twenty-fifth, eighteen hundred and seventy-four. Dec. 15, 1874.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sum of thirty thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purchase of scales for the use of the Post-Office Department. Proposals for furnishing said scales shall be invited by seven days public notice given by the Postmaster General, and the contract shall be awarded to the lowest and best responsible bidder; the contractor to be allowed a reasonable time in the discretion of the Postmaster General to deliver the article contracted for. Scales for Post-Office Department, appropriation. Advertisement and contract.

Approved, December 15, 1874.

CHAP. 2.—An act to confirm an agreement made with the Shoshone Indians (eastern band) for the purchase of the south part of their reservation in Wyoming Territory. Dec. 15, 1874.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement entered into on the twenty-sixth day of September, in the year of our Lord, eighteen hundred and seventy-two, between Felix R. Brunot, commissioner on the part of the United States, and the chief, head-men, and men of the eastern band of Shoshone Indians, in the words and figures following, be, and the same is hereby, confirmed, satisfied, and approved by the Congress and President of the United States: *Provided*; That the cattle furnished under this agreement shall be good, young American cattle, suitable for breeding purposes. Agreement with Shoshone Indians confirmed. Condition as to cattle.

Articles of a convention made and concluded at the Shoshone and Bannock Indian agency in Wyoming Territory, this twenty-sixth day of September, in the year of our Lord, eighteen hundred and seventy-two, by and between Felix R. Brunot, commissioner on the part of the United States, and the chief, head men, and men of the eastern band of Shoshone Indians, constituting a majority of all the adult male Indians of said band on tribe of Indians, and duly authorized to act in the premises, witnesseth: Date of agreement, parties.

Preamble.

That whereas by article eleven of a treaty with the Shoshone (eastern band) and Bannock tribes of Indians, made the third day of July, eighteen hundred and sixty-eight, at Fort Bridger, Utah Territory, a reservation was set apart for the use and occupancy of said tribes of Indians in the following words: "The United States further agrees that the following district of country, to wit, 'commencing at the mouth of Owl Creek and running, due south, to the crest of the divide between the Sweetwater and the Papo-Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north, to mouth of said Nork Fork, and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek, and, along middle of channel of Owl Creek, to place of beginning,' shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named;"

And whereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties, arising in consequence of said occupancy, to change the southern limit of said reservation:

Cession to the United States of part of reservation.

I. The Shoshone band or tribe of Indians (eastern band) hereby cede to the United States of America that portion of their reservation in Wyoming Territory which is situated south of a line beginning at a point on the eastern boundary of the Shoshone and Bannock reservation, due east to the mouth of the Little Papo-Agie, at its junction with the Papo-Agie, and running from said point west to the mouth of the Little Papo-Agie; thence up the Papo-Agie to the North Fork, and up the North Fork to the mouth of the canyon; thence west to the western boundary of the reservation.

Consideration for cession of land.

II. The United States agree to pay to the Shoshone (eastern band) or tribe the sum of twenty-five thousand dollars; said sum to be expended under the direction of the President for the benefit and use of said Indians in the following manner, viz: On or before the tenth day of August of each year, for the term of five years after the ratification of this agreement, five thousand dollars shall be expended in the purchase of stock-cattle, and said cattle delivered to the Shoshones on their reservation. Second. The salary of five hundred dollars per annum shall be paid by the United States for the term of five years to Wash-a-kie, chief of the Shoshones.

Salary of chief of Shoshones.

Southern line of reservation to be marked.

III. Within the term of six months, and as soon as practicable after the ratification of this agreement, the United States shall cause the southern line of the Shoshone reservation, as herein designated, to be surveyed, and marked at suitable points on the ground, and until said line has been so surveyed and marked, the United States binds itself not to permit the intrusion of any white persons upon any of the agricultural or other lands within the limit of the district proposed to be ceded.

Intrusion of white persons.

Agreement subject to ratification.

IV. This convention or agreement is made subject to the approval of the President and the ratification or rejection of the Congress of the United States.

Approved, December 15, 1874.

Dec. 19, 1874.

CHAP. 4.—An act to re-imburse the city of Boston for certain expenses incurred in the improvement of Chelsea street, (formerly Charlestown,) in connection with the United States navy-yard.

City of Boston re-imbursed for paving Chelsea street, bordering on navy-yard.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of one thousand six hundred and thirty-eight dollars and fifty-three cents, to re-imburse the city of Boston for expenses incurred in

30 Stat. 93 (1897)

Report on employees, etc., to be made annually.

SEC. 8. That the Commissioner of Indian Affairs shall report annually to Congress, specifically showing the number of employees at each agency, industrial, and boarding school, which are supported in whole or in part out of the appropriations in this Act, giving name, when employed, in what capacity employed, male or female, whether white or Indian, amount of compensation paid, and out of what item or fund of the appropriation paid, and whether in the opinion of such Commissioner any of such employees are unnecessary.

Chippewa and Christian Reservation, Kansas.

Commissioner to investigate, etc., title of allottees, etc.

SEC. 9. That the Secretary of the Interior be, and he is hereby, directed to appoint a discreet person as a commissioner, who shall visit the Chippewa and Christian Indian Reservation in Franklin County, Kansas, and make a thorough investigation and full report of the title of the individual members of said bands in and to the several tracts of land therein which have been allotted to said members, for which certificates have been issued by the Commissioner of Indian Affairs, as provided in the first article of the treaty of July sixteenth, eighteen hundred and fifty-nine, with the Swan Creek and Black River Chippewas, and the Munsee or Christian Indians of Kansas.

Vol. 12, p. 1106.

Census of Indians, etc.

That said commissioner shall take a census of said Indians, the enrollment to be made upon separate lists; the first to include all of said bands who hold title to land either by original allotment and certificate, by purchase and approved conveyance, or by inheritance, with a description of the land so held or owned by each, and where any tract is claimed by tenants in common, either as heirs of a deceased allottee or otherwise, the interest of each claimant in such tract to be clearly and distinctly stated, the ownership of lands of deceased allottees to be determined under the laws of Kansas relating to descent; and the second list to embrace all of said bands who have not received an allotment of land, but would, if there were sufficient land, be entitled thereto under the treaty.

Patents in fee.

That upon the approval of said census and the report of said commissioner by the Secretary of the Interior, patents in fee shall issue in favor of those persons found by the Secretary of the Interior to be entitled to the land held by them.

Partition of land, etc.

That where there are several heirs, and partition of land is practicable, the partition shall be made by said commissioner, but if not practicable said land may be appraised and sold as hereinafter directed, and the net proceeds paid to said heirs according to the respective title or share each may have in said land.

Moravian Church, Kansas, patent in fee to, etc.

That the Secretary of the Interior be, and he is hereby, authorized to issue a patent in fee to the Moravian Church, or its constituted authorities, for the northeast quarter of the southwest quarter of section twelve, of township seventeen south, of range eighteen east, in Kansas.

Commission to appraise residue of lands.

Reports.

That the residue of their lands shall be appraised by a commission consisting of said commissioner, the Indian agent, and a person to be selected by the Indians in open council, who shall report the same to the Commissioner of Indian Affairs; that said commission shall place a valuation for purposes hereinafter named on all tracts of land now owned or held by inheritance, and make a separate report thereof.

Inherited lands.

Sale of residue of lands by Land Office, etc.

That upon the approval of said appraisement by the Secretary of the Interior, he shall offer said residue of lands, at the proper land office in Kansas, in such manner and upon such terms as he may deem advisable, except that the time for full and complete payment shall not exceed one year, with clause of absolute forfeiture in case of default: *And provided*, That the same shall be sold to the highest bidder, and at a price not less than the appraised value.

Proviso. Highest bidder.

Lands of allottee who has died without heirs or abandoned his allotment.

That where an allottee has died leaving no heirs or has abandoned his or her allotment, and has not resided thereon or lived within the said reservation for three consecutive years, the lands and improvements of such allottee shall be appraised and sold in like manner as other lands herein described, as provided herein.

Net proceeds from sale of lands, etc.

That the net proceeds derived from the sale of the lands here authorized to be sold, after payment of the expenses of appraisal an

sale thereof, shall be placed in the Treasury for the benefit of those members of said bands of Indians who have not received any land by allotment, and shall be paid per capita to those entitled to share therein who are of age, and to others as they shall arrive at the age of twenty-one years, upon the order of the Secretary of the Interior, or shall be expended for their benefit in such manner as the Secretary of the Interior may deem for their best interest.

That when a purchaser shall have made full payment for a tract of land, as herein provided, patent shall be issued as in case of public lands under the homestead and preemption laws.

Appropriation.

That, for the purpose of carrying out the provisions of this section, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one thousand dollars, or so much thereof as may be necessary, which sum shall be reimbursed as follows: All expenses of appraisal and sale out of the proceeds of such sale, and all other expenses out of the funds of said Chippewa and Munsee or Christian Indians, now held for them by the United States, said sum being on the first day of January, eighteen hundred and ninety-six, forty-two thousand five hundred and sixty dollars and thirty-six cents.

Reimbursement.

Per capita payment of trust funds, etc.

That the Secretary of the Interior be, and he is hereby, authorized to pay over to the said Chippewa and Munsee or Christian Indians, per capita, the remainder of said funds of forty-two thousand five hundred and sixty dollars and thirty-six cents, trust funds now to their credit on the books of the Treasury Department, after deducting the expenses incurred in carrying out the provisions of this section.

Consent.

That no proceedings shall be taken under this section until the said bands of Indians shall file with the Commissioner of Indian Affairs their consent thereto expressed in open council.

Preference to discoverers of coal.

SEC. 10. That section eight of an Act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes, be amended by striking out from the last paragraph of said section the following proviso, to wit: "*Provided, however*, That any person who, in good faith, prior to the passage of this Act, had discovered and opened or located a mine of coal or other mineral shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section."

Vol. 29, p. 353, chap. 398, sec. 8, amended.

Vol. 29, p. 358, chap. 398, sec. 9, amended.

That section nine of said Act be amended by striking out from the last paragraph thereof the following proviso, to wit:

"*Provided, however*, That any person who, in good faith, prior to the passage of this Act, had discovered and opened or located a mine of coal or other mineral shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section."

Insufficiency of specific appropriation, how supplied.

SEC. 11. That hereafter, where funds appropriated in specific terms for a particular object are not sufficient for the object named, any other appropriation, general in its terms, which otherwise would be available may, in the discretion of the Secretary of the Interior, be used to accomplish the object for which the specific appropriation was made.

Agreement with the Shoshone and Arapahoe Indians.

AGREEMENT WITH THE SHOSHONE AND ARAPAHOE TRIBES OF INDIANS IN WYOMING.

SEC. 12. That the following amended agreement with the Shoshone and Arapahoe tribes of Indians in the State of Wyoming is hereby accepted, ratified, and confirmed, and shall be binding upon said Indians when they shall in the usual manner agree to the amendment herein made thereto, and as amended is as follows, namely:

Articles of agreement made and entered into at Shoshone Agency, in the State of Wyoming, on the twenty-first day of April, eighteen

hundred and ninety-six, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Shoshone and Arapahoe tribes of Indians in the State of Wyoming.

ARTICLE I.

Lands relinquished.

For the consideration hereinafter named the said Shoshone and Arapahoe tribes of Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunto embraced in the following-described tract of country, embracing the Big Horn Hot Springs in the State of Wyoming:

All that portion of the Shoshone Reservation described as follows, to wit: Beginning at the northeastern corner of the said reservation, where Owl Creek empties into the Big Horn River; thence south ten miles, following the eastern boundary of the reservation; thence due west ten miles; thence due north to the middle of the channel of Owl Creek, which forms a portion of the northern boundary of the reservation; thence following the middle of the channel of said Owl Creek to the point of beginning.

ARTICLE II.

Consideration.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the said Shoshone and Arapahoe tribes of Indians the sum of sixty thousand dollars, to be expended for the benefit of the said Indians in the manner hereinafter described.

ARTICLE III.

Per capita distribution of portion of consideration money, etc.
Post, p. 581.

Of the said sixty thousand dollars provided for in Article II of this agreement it is hereby agreed that ten thousand dollars shall be available within ninety days after the ratification of this agreement, the same to be distributed per capita, in cash, among the Indians belonging on the reservation. That portion of the aforesaid ten thousand dollars to which the Arapahoes are entitled is, by their unanimous and expressed desire, to be expended, by their agent, in the purchase of stock cattle for distribution among the tribe, and that portion of the beforementioned ten thousand dollars to which the Shoshones are entitled shall be distributed per capita, in cash, among them: *Provided*, That in cases where heads of families may so elect, stock cattle to the amount to which they may be entitled may be purchased for them by their agent.

Proviso.
Stock cattle.

Payment of remainder of consideration.
Post, p. 934.

The remaining fifty thousand dollars of the aforesaid sixty thousand dollars is to be paid in five annual installments of ten thousand dollars each, the money to be expended, in the discretion of the Secretary of the Interior, for the civilization, industrial education, and subsistence of the Indians; said subsistence to be of bacon, coffee, and sugar, and not to exceed at any time five pounds of bacon, four pounds of coffee, and eight pounds of sugar for each one hundred rations.

ARTICLE IV.

Existing annuities.

Nothing in this agreement shall be construed to deprive the Indians of any annuities or benefits to which they are entitled under existing agreements or treaty stipulations.

ARTICLE V.

Ratification.

This agreement shall not be binding upon either party until ratified by the Congress of the United States.

Done at Shoshone Agency, in the State of Wyoming, on the twenty-first day of April, A. D. eighteen hundred and ninety-six.

JAMES MCLAUGHLIN. [SEAL.]
U. S. Indian Inspector.

(Here follow the signatures of Washakie, chief of the Shoshones, Sharp Nose, chief of the Arapahoes, and two hundred and seventy-one other male adult Indians over eighteen years of age, belonging on the Shoshone Reservation.)

I certify that, at the request of Indian Inspector James McLaughlin, I read the foregoing agreement to the Indians in joint council, and that it was explained to the interpreters, paragraph by paragraph.

JOHN S. LOUD,
Captain 9th Cavalry, U. S. Army,
Commanding Fort Washakie, Wyo.

We certify that the foregoing agreement was fully explained in joint council to the Shoshone's and Arapahoe's tribes, that they fully understand the nature of the agreement, and agree to the same.

EDMO. LE CLAIR,
NORKOK, his x mark,
Shoshone Interpreters,
HENRY LEE
WILLIAM SHAKESPEARE
Arapahoe Interpreters.

Witnesses:
THOS. R. BEASON,
JNO. W. TWIGGS, Jr.

I certify that the foregoing names, though in some cases duplicates, in every instance represents different individuals.

EDMO. LE CLAIR,
Special Interpreter.

Witnesses to the foregoing agreement and signatures of the Indians.

JOHN S. LOUD,
Captain 9th Cavalry.
JOHN F. MCBLAIN,
1st Lt. 9th Cavalry.
JNO. W. TWIGGS, Jr.
THOS. R. BEASON.
JNO. W. CLARK,
Allotting Agent.
JOHN ROBERTS,
Missionary of the Protestant Episcopal Church to the Indians.

I certify that the Indians, Shoshones and Arapahoes, numbering two hundred and seventy-three (273) persons, who have signed the foregoing agreement, constitute a majority of all male Indians over eighteen (18) years of age, belonging on the Shoshone Reservation, Wyoming.

RICHARD H. WILSON,
Captain 8th Infty., Acting Ind. Agent.

Appropriation.

That for the purpose of making the payment stipulated for in the first paragraph of article three of the foregoing agreement, the same to be paid to the Indians belonging on the Shoshone Reservation per capita in cash, or expended for them by their agent in the purchase of stock cattle, as in said article provided, the sum of ten thousand dollars be, and the same is hereby, appropriated, out of any money in the Treasury not otherwise appropriated.

One mile square granted to State of Wyoming.

That of the lands ceded, sold, relinquished, and conveyed to the United States by the foregoing agreement herein amended, and accepted, ratified, and confirmed, one mile square at and about the principal hot spring thereon contained, is hereby ceded, granted, relinquished, and conveyed unto the State of Wyoming; said mile square to be determined as follows: Commencing at a point one-fourth mile due east from said main spring, running thence one-half mile north, thence one mile west, thence one mile south, thence one mile east, thence one-half mile north to the point of beginning, and the remainder of the said lands, ceded, sold, relinquished, and conveyed to the United States, by the agreement herein ratified and confirmed, are hereby declared to be public lands of the United States, subject to entry, however, only under the homestead and town-site laws of the United States.

Remainder to be public lands, etc.

Approved, June 7, 1897.

June 7, 1897.

CHAP. 4.—An Act To adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States.

Navigation.
Vol. 26, p. 320.
Vol. 28, pp. 82, 281.
Vol. 29, p. 381.

Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by sea-going vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and

Inland waters.

Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one Act: Therefore,

Regulations to prevent collisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority:

PRELIMINARY.

Meaning of terms. Sailing vessel. Steam vessel.

In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

"Under way."

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground.

Rules concerning lights, etc.

RULES CONCERNING LIGHTS, AND SO FORTH.

Meaning of "visible."

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

Period of compliance.

ARTICLE 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

ART. 2. A steam-vessel when under way shall carry—(a) On or in front of the foremast, or, if a vessel without a foremast, then in the fore

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

ATTACHMENT 1

LEGAL ANALYSIS OF THE WIND RIVER INDIAN RESERVATION BOUNDARY

APPROVAL OF APPLICATION SUBMITTED BY THE
EASTERN SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
FOR TREATMENT IN A SIMILAR MANNER AS A STATE
FOR PURPOSES OF CLEAN AIR ACT
SECTIONS 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184

ATTACHMENT 1

LEGAL ANALYSIS OF WIND RIVER INDIAN RESERVATION BOUNDARY

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LEGAL ANALYSIS OF WIND RIVER INDIAN RESERVATION BOUNDARY

This legal analysis of the Wind River Indian Reservation boundary accompanies the EPA Region 8 Decision Document approving the application submitted by the Northern Arapaho and Eastern Shoshone Tribes (Tribes) for treatment in a similar manner as a state (TAS) pursuant to section 301(d) of the Clean Air Act (CAA) for purposes of CAA §§ 105 grant funding, 505(a)(2) affected state status, and other provisions for which no separate tribal program is required, specifically sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. None of the provisions for which the Tribes are seeking TAS eligibility would entail the exercise of Tribal regulatory authority under the CAA. The Tribes' application did not request, nor does EPA's decision approve, Tribal authority to implement any CAA regulatory programs or to otherwise exercise Tribal regulatory authority under the CAA.

The Region 8 Decision Document sets forth EPA's determination with regard to the TAS eligibility criteria enumerated in CAA § 301(d)(2) and 40 C.F.R. § 49.6. The third TAS criterion at 40 C.F.R. § 49.6(c), which specifies that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction" entails a determination of the exterior boundaries of the Wind River Indian Reservation. EPA has prepared this legal analysis because objections were raised with respect to the Reservation boundary description included in the Tribes' TAS application.

In determining the Reservation boundaries, EPA exercised its discretion to consult with the United States Department of the Interior (DOI), which has expertise in such matters. In particular, EPA requested and the Solicitor of DOI provided a written opinion on the exterior boundaries of the Reservation. EPA also analyzed the Tribes' description of the Reservation boundaries, comments received on the Tribes' boundary description, the Tribes' subsequent response to those comments and other relevant information. Generally, commenters objecting to the Tribes' Reservation boundary description asserted that a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act), which opened the Wind River Indian Reservation to homesteading, also had the legal effect of altering and diminishing the exterior boundaries of the Reservation. The DOI Solicitor's opinion dated October 26, 2011 (2011 DOI Solicitor's Opinion) analyzes the exterior boundaries of the Reservation, including a detailed analysis of the 1905 Act, and concludes that the 1905 Act did not diminish the exterior boundaries of the Wind River Indian Reservation.

This document provides the legal analysis in support of EPA's determination, based on all pertinent information, including the 2011 DOI Solicitor's Opinion, that the 1905 Act did not effect a diminishment of the exterior boundaries of the Reservation. EPA's decision concludes that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). On December 4, 2013, the Tribes requested that EPA not address the lands described in Section 1 of a statute enacted in 1953, 67 Stat. 592 (1953) (1953 Act) until such time, if any, that they notify EPA otherwise. This opinion, therefore, does not analyze those lands in detail nor are they included in the geographic scope of approval for this TAS decision.

A. History of the Wind River Indian Reservation

1. Eastern Shoshone Tribe and Establishment of the Reservation

The Shoshone Indian Tribe's occupation of the Wind River country well preceded the formal establishment of the Wind River Indian Reservation by treaty in 1868. The Shoshone Tribe historically hunted game and gathered food throughout an 80-million acre territory that now comprises the States of Colorado, Idaho, Nevada, Utah and Wyoming. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340 (1945).[1] The California Gold Rush and the Mormon westward migration in the 1840's brought an increasing number of travelers and settlers to this territory. The influx of settlers led to competition for game and resulted in inevitable conflicts among the settlers and Indians, impeding travel and settlement as well as the overland mail system and the establishment of new telegraph lines. *Id.* at 341. By the time of the outbreak of the Civil War, the Commissioner of Indian Affairs and other agencies of the United States recognized a need for peaceful travel and settlement in the area, and the bands of Shoshone Tribes were reportedly inclined towards accepting

[1] *See also Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642 (1942); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Shoshone Tribe of Indians v. United States*, 85 Ct. Cl. 331 (1937).

support on limited reservations. *Id.* The 1862 Homestead Act, 12 Stat. 392 (1862) further encouraged settlement in western territories. The United States negotiated a series of treaties with the various bands of Shoshone, including the 1863 Treaty of Fort Bridger, 18 Stat. 685 (1863) with the Eastern Shoshone. This (First) Fort Bridger Treaty between the United States and the Eastern Shoshones established routes for safe travel for people emigrating west as well as for communications and railroad passage, and described the boundaries of "Shoshonee country" as an area encompassing approximately 44,672,000 acres of land located in what are now the States of Colorado, Utah, Idaho and Wyoming. *See Shoshone*, 304 U.S. at 113.

The end of the Civil War in 1865 led to further western migration and the United States negotiated a new treaty that would restrict the area of Shoshone occupancy. In the Second Fort Bridger Treaty of 1868, the Tribe ceded to the United States its right to occupy the 44 million acres described in the First Fort Bridger Treaty in exchange for exclusive occupancy of a far smaller Reservation in the Wind River region. The 1868 Treaty set apart a 3,054,182-acre Reservation for "the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." 15 Stat. 673, 674. *See also Shoshone*, 304 U.S. at 113. Thus, the Wind River Indian Reservation was established by the Second Fort Bridger Treaty of 1868, among the United States, the Eastern Band of the Shoshonee and the Bannack Tribe of Indians.[2] Article 2 of the 1868 Treaty set forth the Wind River Indian Reservation boundaries:

> Commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to headwaters of Owl creek and along middle channel of Owl creek to place of beginning.

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[2] The Wind River Indian Reservation was established for the Eastern Shoshone, while the Bannack Tribe (today formally known as the Shoshone-Bannock Tribes of the Fort Hall Reservation) selected a Reservation in southeastern Idaho. *See Swim v. Bergland*, 696 F.2d 712, 714 (9th Cir. 1983).

15 Stat. 673, 674.

The treaty further states "no treaty for the cession of any portion of the reservations herein described . . . shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI of this treaty." *Id.* at 676.

1871 marked the end of the formal treaty-making era, although existing treaties continued to be valid. Indian Appropriation Act, 16 Stat. 544 (1871). The United States continued to establish reservations by Congressional Acts and Executive Orders. Agreements between the United States and Indian tribes regarding land cessions had to be approved by both houses of Congress rather than established by treaties ratified by just the Senate. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.04 at 76 (2005 ed.) (Cohen's Handbook).

2. The 1874 Lander Purchase

In 1872, Congress authorized the President to negotiate with the Shoshone Indians for the relinquishment of lands in the southern portion of the Reservation in exchange for lands to the north. 17 Stat. 214 (1872). On September 26, 1872, Felix Brunot, commissioner for the United States, entered into an agreement with the Shoshone Indians for lands within the southern portion of the Reservation where white settlers were actively mining. Rather than an exchange for additional lands to the north, the Shoshone Tribe agreed to relinquish approximately 700,000 acres for a fixed sum payment of $25,000 to be paid over five years for the purchase of cattle and a $500 annual payment to the Chief for five years. Report of the Secretary of the Interior at 512 (Oct. 31, 1872) (EPA-WR-001735-37). On December 15, 1874, Congress ratified the agreement, also known as the "Lander Purchase." 18 Stat. 291 (1874). The purpose of the 1874 Lander Purchase Act, as expressly set forth in the statute, was to sell lands south of the 43rd parallel for $25,000 in order "to change the southern limit of said reservation." *Id.* at 292.

Considering the express language of the statute to change the Reservation boundaries, the fixed sum certain manner of payment and the fact that the statute made no provision for any retained Indian interest in the lands sold, there is no dispute that by passing the 1874 Lander Purchase Act, Congress intended to

alter and diminish the southern boundary of the Reservation to exclude those lands.

3. 1878 Northern Arapaho Tribe

The Northern Arapaho Tribe of Wyoming is one of four groups of Arapaho that originally occupied parts of Colorado, Kansas, Montana, Nebraska, and Wyoming. *See* Loretta Fowler, *Arapaho*, in HANDBOOK OF NORTH AMERICAN INDIANS VOLUME 13, PART 2 OF 2, 840-41 (Raymond J. DeMallie, vol. ed., 2001). By 1811, the Arapaho occupied an area that ranged primarily along the North Platte River and as far south as the Arkansas River. *Id.* Buffalo hunting was a primary means of subsistence and of cultural significance to the Tribe. *Id.* at 842, 847-48. In 1851, the Arapaho was one of a number of tribes that signed the Treaty of Fort Laramie. 11 Stat. 749 (1851). Pursuant to the 1851 Treaty, the Arapaho and Cheyenne Tribes' territory encompassed areas of southeastern Wyoming, northeastern Colorado, western Kansas and western Nebraska. Fowler, *supra* at 842. Despite the 1851 treaty, entry by settlers began to occur in Arapaho territory. *Id.* As a result of game disturbance and other factors, the Northern Arapaho Tribe began to withdraw north of the Platte River into Wyoming and Montana. *Id.* In 1868, the Northern Arapaho Tribe and the United States entered into another treaty whereby the Tribe agreed to accept either some portion of Medicine Lodge Creek, an area on the Missouri River near Ft. Randall, or the Crow Agency near Otter Creek on the Yellowstone River. 15 Stat. 655, 656 (1868). Between 1870 and 1877, the Northern Arapaho Tribe was not settled upon any defined reservation and continued to negotiate with the United States for a separate reservation. Fowler, *supra* at 843. In 1878, following a visit to Washington, D.C. by a delegation of the Northern Arapaho Tribe, as recognized by the United States executive branch the Northern Arapaho Tribe settled on the Wind River Indian Reservation. *Id.*

4. 1887 General Allotment Act and 1890 Wyoming Statehood

In 1887, Congress passed the General Allotment Act or Dawes Act, which, among other provisions, authorized the federal government to allot tracts of reservation land (typically 160-acre lots) to individual tribal members and, with tribal consent, sell the surplus lands to non-Indian settlers. General Allotment Act of 1887, 24 Stat. 388 (1887), as amended 26 Stat. 794 (1891). As described by Felix Cohen, an expert on Indian law and policy, "[t]ribal members under the Act surrendered their undivided interest in the tribally owned common or trust estate for a personally assigned divided interest, generally held in trust for a

limited number of years, but 'allotted' to them individually. . . . Reservations became checkerboards as the sale of surplus land to whites isolated individual Indian allotments." Cohen's Handbook at 77-78.

Wyoming was admitted to the Union as the 44th State on March 27, 1890. Wyoming Enabling Act, 26 Stat. 222, ch. 664 (1890). With regard to Indian tribes, the State Constitution includes the following:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . .

Wyo. Const. Art. 21, § 26

5. The 1891 and 1893 Failed Agreements

On March 3, 1891, Congress passed an Appropriations Act that included a provision, "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations, any agreements thus negotiated being subject to subsequent ratification by Congress, $15,000, or so much thereof as may be necessary." 26 Stat. 989, 1009 (1891). Pursuant to this Act, the Secretary of the Interior appointed a commission to negotiate with the Indians of the Wind River or Shoshone Reservation for the "surrender of such portion of their reservation as they may choose to dispose of . . . ." Instruction of July 14, 1891, reprinted in H.R. DOC. NO. 52-70, at 42 (1892) (EPA-WR-000266). The commission negotiated a proposed cession of an area which 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 and to the lands, and the water rights appertaining thereunto . . . ." Articles of agreement, October 2, 1891, reprinted in H.R. DOC. NO. 52-70, at 29 (1892) (EPA-WR-000259) (1891 Articles of Agreement). The lands at issue generally included the area north of the Big Wind River, together with a strip on the eastern side of the Reservation.[3] The commission had made an unsuccessful

[3] 1891 Articles of Agreement, H.R. DOC. NO. 52-70, at 29 (EPA-WR-000259). The land proposed to

effort to secure a strip of land of about 60,000 acres on the southern border of the Reservation. *Id.* at 26. In consideration for the land, the United States proposed to pay the Tribes $600,000. *Id.* at 30. The agreement expressly stated it "shall not be binding upon either party until ratified by the Congress of the United States." *Id.* at 32. Congress did not ratify the 1891 agreement.

In 1892, pursuant to a similar Appropriations Act provision, the Secretary of the Interior authorized another commission to negotiate with the Tribes. 27 Stat. 120, 138 (1892). In 1893, the commission attempted to reach an agreement with the Tribes, proposing to purchase all Reservation land lying north of the Big Wind River, as well as land lying south and east of the Popo Agie/Little Wind River and along the southern border of the entire Reservation, in exchange for $750,000.[4] The Tribes refused to consider any cession of lands on the southern portion of the Reservation, rejecting three different proposals, and ultimately no agreement was reached. H.R. DOC. NO. 53-51, at 4-6 (1894) (EPA-WR-000280-82).

6. The 1897 Thermopolis Purchase

In 1896, the United States negotiated with the Tribes for the sale of approximately 55,040 acres of land at and around the Big Horn Hot Springs, near the present town of Thermopolis.[5] On April 21, 1896, United States Indian

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be ceded included the portion of the Reservation lying north and east of the following lines: "[b]eginning in the mid-channel of the Big Wind River at a point where the river crosses the western boundary line of the reservation; thence in a southeasterly direction, following the mid-channel of the Big Wind River to a point known as the Wood Flat Crossing, thence in a line due east to the eastern boundary of the reservation; then, beginning where the line run due east from Wood-Flat Crossing intersects the Big Horn River, thence in a line due south to the southern boundary of the reservation." *Id.*

[4] The commission's first proposal involved the following boundaries: "Commencing at a point in the mid-channel of the Big Wind River, where the same crosses the west boundary line of the reservation, thence down the mid-channel of said Big Wind River to the confluence of said Big Wind River with the Popo Agie River; thence up the mid-channel of said Popo Agie river to its intersection with the north boundary line of township 2 south, range 3 east, thence west, with said line, to the western boundary line of said reservation; thence north on said western boundary line to the point or place of beginning." H.R. DOC. NO. 53-51, at 4 (EPA-WR-000280). After this first proposal was rejected by the Tribes, the commissioners made two more proposals, to which the Tribes did not agree. *Id.* at 4-5 (EPA-WR-000280-81).

[5] The negotiations were conducted pursuant to the Indian Appropriations Act of March 3, 1893, 27 Stat. 633 (1893). *See* S. DOC. NO. 54-247, at 11 (1896) (EPA-WR-000306).

Inspector James McLaughlin entered into an agreement with the Tribes known as the "Thermopolis Purchase." Pursuant to the agreement, the lands at issue were to be "set apart as a national park or reservation, forever reserving the said Big Horn Hot Springs for the use and benefit of the general public, the Indians to be allowed to enjoy the advantages of the convenience that may be erected thereat with the public generally." Articles of Agreement (April 21, 1896), *reprinted in* S. DOC. NO. 54-247 (1896) at 4 (EPA-WR-000299) (1896 Articles of Agreement). On June 7, 1897, Congress ratified the agreement including the following provision:

> For the consideration hereinafter named the said Shoshone and Arapaho tribes of Indians hereby cede, convey, transfer, relinquish and surrender, forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunto [with respect to the tract of land] embracing the Big Horn Hot Springs . . .

30 Stat. 62, 94 (1897).

With regard to payment for the land, the Act ratified the agreement provision that, "[i]n consideration for the lands sold, relinquished and conveyed" the United States would pay the Tribes $60,000. *Id.* Rather than establishing the entire area as a national park or reserve as agreed upon, the Act provided that of the lands ceded, sold, relinquished and conveyed to the United States, one square mile at and about the hot springs would go to the State of Wyoming and the remainder of the lands were "declared to be public lands of the United States" subject to entry under homestead and town-site laws. *Id.* at 96.

Considering the express language of the statute, the fixed sum certain manner of payment and the fact that the Act made no provision for any retained Indian interest in the lands sold, there is no dispute that by passing the 1897 Thermopolis Purchase Act, Congress intended to alter and diminish the boundary of the Reservation to exclude those lands.

7. The 1904 Agreement and 1905 Act

In March of 1904, U.S. Representative Frank Mondell of Wyoming introduced H.R. 13481 to provide for opening portions of the Reservation under homestead, town-site, and coal and mineral land laws. H.R. REP. NO. 58-2355, at 5 (1904) (EPA-WR-000321). The bill was based loosely on the 1891 and 1893 negotiations but included some important differences. For instance, as discussed in detail in

Section B.3(a) of this document, the geographic scope of the 1904 bill was different from the earlier negotiations, enlarging the area proposed to be opened; the 1904 bill included significantly different cession language; the manner of payment was completely changed so that instead of providing for a fixed sum certain payment in consideration of the land as proposed during the prior negotiations, the Tribes would be paid only if and when parcels of land were sold; and the 1904 bill included a provision for the United States to act as a trustee for the Tribes regarding the sale of and payment for the lands.

The House Report on H.R. 13481 explained that "the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral land laws . . . ." *Id.* at 4 (EPA-WR-000320). On April 19, 1904, Indian Inspector McLaughlin met with the Eastern Shoshone and Northern Arapaho Tribes to present H.R. 13481 and negotiate the terms of an agreement. Shortly thereafter, on April 21, 1904, the Tribes and McLaughlin entered into an agreement. 1904 Agreement, reprinted in H.R. REP. NO. 58-3700, pt. 1 (1905) (EPA-WR-004675).[6] On February 6, 1905, a new bill, H.R. 17994, was presented to Congress to ratify and amend the 1904 Agreement and replace H.R. 13481. 39 Cong. Rec. H1940 (Feb. 6, 1905) (EPA-WR-0010068). Representative Mondell explained that the bill would provide for "the opening to homestead settlement and sale under the town-site, coal-land, and mineral-land laws of about a million and a quarter acres in the Wind River Reservation in central western Wyoming." *Id.* at H1942. House Report 17994, with the adoption of a committee resolution, was ultimately ratified by Congress by the Act of March 3, 1905. 33 Stat. 1016 (1905 Act).[7]

Since the 1905 Act and the issue of whether it altered and diminished the exterior boundaries of the Wind River Indian Reservation is the focal point of the comments objecting to the Tribes' Reservation boundary description, the next section includes a detailed legal analysis of the 1905 Act, including further discussion of the 1904 Agreement.

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[6] The Tribes note that only 80 out of 237 adult male members of the Northern Arapaho Tribe actually signed the 1904 Agreement and that many who did sign would not have been considered "adults" by the Arapahos. Tribes' Response to Comments Regarding the Tribes' TAS Application at 16 (May 24, 2010), citing Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) quoted in H.R. REP. NO. 58-3700, pt. 1, at 18 (1905) (EPA-WR-004675-93).

[7] H.R. REP. NO. 58-3700, pt. 1 (1905) (EPA-WR-004675-93); H.R. REP. NO. 58-3700, pt. 2 (1905) (EPA-WR-000337-49); S. REP. NO. 58-4263 (1905) (EPA-WR-0010048-49); H.R. REP. NO. 58-4884 (1905) (EPA-WR-0010050-51).

B. Legal Analysis of the 1905 Act

1. Supreme Court Jurisprudence Regarding Surplus Land Acts

The United States Supreme Court has recognized that Congress has plenary and exclusive authority over Indian affairs, identifying the Indian Commerce Clause of the United States Constitution, which empowers Congress to regulate commerce "with foreign nations, and among the several states, and with the Indian tribes" and the Treaty Clause as sources of that power. *See* U.S. CONST., Art. I, § 8, cl. 3; Art. II, § 2, cl. 2; *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979). Congress has recognized the self-determination, self-reliance and inherent sovereignty of Indian tribes. Indian Tribal Justice Act, 25 U.S.C. §§ 3601(3) ("Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes") and 3601(2) ("Congress finds and declares that . . . the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government"). The Supreme Court has reinforced that the "Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *Id.*

For much of the Nation's history, treaties and legislation made pursuant to those treaties governed relations between the federal government and the Indian tribes.[8] The Supreme Court has held that only Congress can alter the terms of an Indian treaty. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). In several instances, the Court has addressed whether particular Congressional Acts opening Indian reservations to homesteading (commonly called "surplus land acts") did so while maintaining the existing reservation boundaries or whether the Acts also had the effect of altering and diminishing the reservation boundaries established by treaty. Whether a specific Congressional Act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis. *Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984).

[8] Cohen's Handbook at 109-11 (1982 ed.).

The Court has established a "fairly clean analytical structure" for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries.[9] *Solem*, 465 U.S. at 470. "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* (citing *United States v. Celestine*, 215 U.S. 278 (1909)). Moreover, Congress must "clearly evince" an "intent to change boundaries" and the evidence must be "substantial and compelling" before diminishment will be found. *Id.* at 470-72.

The Supreme Court has articulated legal canons of construction for analyzing whether a particular Congressional Act had the effect of diminishing reservation boundaries. The canons of construction are rooted in the unique trust relationship between the United States and the Indians. *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985) (*Oneida*) ("[i]t is well established that treaties should be construed liberally in favor of the Indians .... The Court has applied similar canons of construction in nontreaty matters"). "Relying on the strong policy of the United States 'from the beginning to respect the Indian right of occupancy,'" the Court has concluded that it "'[c]ertainly' would require 'plain and unambiguous action to deprive the [Indians] of the benefits of that policy' ...."[10] Throughout the analysis of diminishment cases, courts resolve any ambiguities in favor of the Indians, and will not lightly find diminishment. *Solem*, 465 U.S. at 470-72.[11] While clear congressional and tribal intent must be recognized, the rule that "legal

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[9] Although it was once thought that Indian consent was necessary to diminish a reservation, it has long been held that Congress has the power to diminish reservations unilaterally. *Id.* at 470 n.11, *citing Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[10] *Oneida*, 470 U.S. at 247-48 (citations omitted). Generally, courts construe Indian treaties sympathetically to Indian interests to compensate for their unequal bargaining positions in the treaty-making process. *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1220 (10th Cir. 2005).

[11] *See also South Dakota v. Bourland*, 508 U.S. 679, 687 (1990) ("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'"), *quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) and *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

ambiguities are resolved for the benefit of the Indians" is accorded "the broadest possible scope." *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975). The traditional solicitude for the Indian tribes favors the survival of reservation boundaries in the face of opening up reservation land to settlement and entry by non-Indians. *Solem*, 465 U.S. at 472.

Solem and its progeny have established a three-part test for analyzing whether a specific statute opening a reservation to homesteading altered and diminished a reservation's boundaries or simply allowed non-Indians to purchase land without affecting the established reservation boundaries. *Id.* at 470-72. First, the most probative evidence of congressional intent is the statutory language itself. *Id.* The second part of the inquiry centers on the circumstances surrounding the passage of the surplus land act. *Id.* at 471. Finally, and to a lesser extent, the court will consider the subsequent treatment of the area in question and the pattern of settlement. *Id.* at 471-72; *see also Yankton*, 522 U.S. at 344 ("[t]hus, although '[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands,' we have held that we will also consider 'the historical context surrounding the passage of the surplus land Acts,' and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there" (citations omitted)), *Hagen*, 510 U.S. at 410-13.

The first prong of the analysis focuses on the statutory language as the most probative of Congressional intent. Although the Court has never required a particular form of words to find diminishment,[12] "[e]xplicit 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 unalloted opened lands." *Solem*, 465 U.S. at 470 (citing *DeCoteau*, 420 U.S. at 444-45; *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962)). When such language of cession evidencing the present and total surrender of all tribal interests is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *See Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470); *see also Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48. In addition to the language opening the land to settlement and the manner of payment set forth in the statute, the Court will examine other relevant statutory provisions to discern Congressional intent. While the express

[12] *Hagen*, 510 U.S. at 411.

statutory language is the most probative evidence of Congressional intent, the Supreme Court has affirmed that it must examine "all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412.

The second part of the inquiry examines the circumstances surrounding the passage of the specific surplus land act. This inquiry includes consideration of the historical context surrounding the passage of the statute, legislative history, the manner in which the transaction was negotiated, and the contemporaneous understanding of the effect of the act. As a backdrop to this analysis, the Court has discussed the broad historical context of the allotment era and its effect on diminishment considerations. "Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "'the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar', *Solem*, 465 U.S. at 468, and in part because Congress then assumed that the reservation system would fade over time." *Yankton*, 522 U.S. at 343. Nonetheless, the Supreme Court has stated that it has never been willing to extrapolate a specific congressional purpose of diminishing a reservation in a particular case from the general expectations of the allotment era. "Rather, it is settled law that some surplus land acts diminished reservations . . . and other surplus land acts did not . . . ." *Solem*, 465 U.S. at 468-69. The Court has described that in order to discern Congressional intent to diminish based on surrounding circumstances, the information must "unequivocally" reveal a "widely-held, contemporaneous" understanding that the area would be severed from the reservation. As summarized in *Solem*, "[w]hen events surrounding the passage of a surplus land act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Id.* at 471. Thus, the courts review surrounding circumstances to determine Congressional intent on a case-by-case basis.

Third, and to a lesser extent, courts have looked to events that occurred after the passage of a surplus land act to determine Congressional intent. "Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which

the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.* The Court has also recognized, on a more "pragmatic" level, that who actually moved onto opened reservation lands is relevant to deciding whether a surplus land act diminished a reservation, noting that where "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character" diminishment may have occurred. *Id.* "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation." *Id.* at 472, n.13. Ultimately, the Court has stated, "[t]here are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both 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, (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962)).

In conclusion, the Supreme Court has articulated several important principles guiding the analysis of whether a particular surplus land act altered the boundaries of an Indian reservation established by treaty. Since each Indian reservation has a unique history, analysis of a particular surplus land act and its effect on a reservation is conducted on a case-by-case basis. The Court has also established legal canons of statutory construction that apply throughout the analysis. Reservation diminishment is not lightly inferred and will not be found unless analysis of the Congressional Act at issue reveals substantial and compelling evidence of a clear Congressional intent to diminish the boundaries.

2. 1905 Act Language

The first prong of the Court's three-part analysis to determine whether a reservation is diminished by a given surplus land act focuses on the statutory language as the most probative evidence of Congressional intent. *Solem*, 465 U.S. at 470. Based on the "strong policy of the United States from the beginning to respect the Indian right of occupancy" established by treaties and historical relations between the United States and Indian tribes, the Supreme Court has held that any finding of diminishment must be supported by "plain and unambiguous" congressional intent to deprive the Indians of the benefits of that policy.[13] While the Supreme Court has never required a particular form of words

[13] *Oneida*, 470 U.S. at 247 (citations omitted).

to find diminishment,[14] where a surplus land act contains "both explicit language of cession, evidencing 'the present and total surrender of all tribal interests' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,'" there is a nearly conclusive or almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *See Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470, *Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48). In addition to the language opening the land to settlement and manner of payment set forth in the statute, the Court will examine other relevant statutory provisions to discern Congressional intent.

a. Operative Language

The 1905 Act's operative language opening the Wind River Indian Reservation to homesteading in Article I provides that the Tribes "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 described by the statute, generally lands south of the mid-channel of the Big Wind River and west of the mid-channel of the Popo Agie River. 33 Stat. 1016. Article I also permitted those Indians who had previously selected a tract within "the portion of said reservation hereby ceded" to "have the same allotted and confirmed to him or her" or to select other lands "within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry." *Id.*

The 1905 Act must be analyzed in consideration of this specific statute and the circumstances underlying its passage. *Solem*, 465 U.S. at 468-69. The history of other Congressional Acts affecting the lands of this Reservation subsequent to its establishment by the 1868 Treaty is also relevant to the analysis. The Supreme Court has recognized that differences in operative language in prior statutes regarding the same Reservation are important to understanding Congressional intent with regard to the specific Act at issue. For example, in *Seymour*, the Court contrasted the operative language in an 1892 Act, which was held to diminish the northern half of the Colville Reservation, from that in a 1906 Act, which the Court held did not diminish the southern half of the Reservation. *Seymour*, 368 U.S. at 355-56.

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[14] *Hagen*, 510 U.S. at 411.

On the Wind River Indian Reservation, between the Second Fort Bridger Treaty of 1868 and the 1905 Act, there were two Congressional Acts affecting the Reservation lands. In contrast to the 1905 Act, the operative language in each of these statutes, together with the fixed sum certain payment for the lands as well as the surrounding circumstances and subsequent treatment of the lands, clearly and unambiguously established Congressional intent to diminish the boundaries of the Reservation. For example, the purpose of the 1874 Lander Purchase Act, as expressly set forth in the statute, was to alter and diminish the southern boundary of the Reservation in exchange for a sum certain payment of $25,000:

> [W]hereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties, arising in consequence of said occupancy, *to change the southern limit of said reservation.*

18 Stat. 291, 292 (1874) (emphasis added).

Further evidencing Congressional intent to alter the boundaries, Article III of the 1874 statute refers to the line north of the ceded lands as "the southern line of the Shoshone reservation." *Id.*

Similarly, in 1897, the Thermopolis Purchase Act included language evincing clear Congressional intent to remove the tract of land embracing the Big Horn Hot Springs from the Reservation in exchange for $60,000:

> For the consideration hereinafter named the said Shoshone and Arapaho tribes of Indians hereby cede, convey, transfer, relinquish and surrender, *forever and absolutely all their right, title, and interest of every kind and character in and to the lands* and the water rights appertaining thereunto . . ."

30 Stat. 93, 94 (1897) (emphasis added).

In contrast to the clear operative language and fixed sum certain payment expressing intent to absolutely sever certain lands from the Reservation used in the 1874 Lander Purchase Act and the 1897 Thermopolis Purchase Act, Congress chose to use significantly different language and manner of payment when it

opened the Reservation to settlement in 1905. The operative language of the 1905 Act states that the Tribes, "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." 33 Stat. 1016. Unlike the 1897 Thermopolis Purchase Act, in the 1905 Act, Congress omitted language that would "convey" or "surrender" "forever and absolutely" all their right, title and interest "of every kind and character in and to the lands."[15] Likewise, in contrast to the 1874 Lander Purchase Act, the 1905 Act does not include express language to "change the southern limit of said reservation" or to establish a new "southern line of the Shoshone reservation." Rather, the 1905 Act refers to the lands at issue as "embraced *within the said reservation*." *Id.* (emphasis added). The fact that in 1905 Congress retreated from the clear statutory language and intent found in previous statutes addressing the same Reservation, and referenced the Reservation as continuing apart from land sales, provides strong evidence that Congress did not intend to effect the same absolute diminishment of the lands at issue in the 1905 Act.[16]

Furthermore, as noted in the 2011 DOI Solicitor's Opinion, the 1905 Act does not include language designating the opened lands as "public domain," terminology the Supreme Court has found to indicate Congressional intent inconsistent with reservation status. *Hagen*, 510 U.S. at 414, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 and n.5 (1977). For example, the 1897 Thermopolis Purchase Act stated that the majority of the opened lands "are hereby declared to be public lands of the United States, subject to entry, however, only under the homestead and townsite laws of the United States." 30

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[15] It is also important to note that James McLaughlin represented the United States in negotiating both the 1896 agreement that led to the Thermopolis Purchase Act of 1897 and the 1904 agreement that led to the 1905 Act. As McLaughlin later described, "the two agreements [1896 Thermopolis Agreement and the 1904 agreement] are entirely distinct and separate from each other, and [under the 1904 agreement] the government simply acted as trustee for disposal of the land north of the Big Wind River." Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming at Fort Washakie, Wyoming, at 5 (Aug. 14, 1922) (EPA-WR- 001681).

[16] In addition, the 1891 Agreement that was never ratified by Congress stated that the Tribes would, "cede, convey, transfer, relinquish and surrender, forever and absolutely . . . all their right title and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto . . . ." 1891 Articles of Agreement, H.R. Doc. No. 52-70, at 29 (EPA-WR-000259). This language is similar to the operative language in the 1897 Thermopolis Purchase Act discussed above, but was not included in the 1905 Act.

Stat. 93, 96 (1897). By contrast, the legislative history of the 1905 Act indicates that Congress understood the land at issue would not be made part of the public domain due to the continuing Tribal interest in the opened lands: "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 (Feb. 6, 1905) (EPA-WR-0010073) (statement of Rep. Marshall).

In comparison to the earlier Congressional Acts addressing areas of land on this Reservation, the 1905 Act is devoid of express language clearly indicating Congressional intent to change the boundary of the Reservation. As the Supreme Court observed in *Mattz*, "Congress has used clear language of express termination when that result is desired." *Mattz*, 412 U.S. at 505, n.22, citing as examples: 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("and is hereby, vacated and restored to the public domain"); and 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished").

Under the 1905 Act, the Tribes agreed to "cede, grant and relinquish to the United States all right, title and interest" in certain lands "embraced within" the Wind River Indian Reservation. 33 Stat. 1016. This grant of right, title and interest to the United States was necessary for the United States to be able to transfer clear title to prospective homesteaders. However, to achieve the purpose of opening the lands to settlement, it was not necessary, nor did the express language of the Act indicate intent, to alter the exterior boundaries of the Reservation.[17]

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[17] The U.S. Court of Appeals for the 8th Circuit has held that, "cede, surrender, grant and convey to the United States all their claim, right, title and interest . . ." language of a 1904 surplus land Act, standing alone, did not evidence a clear congressional intent to disestablish the Spirit Lake Reservation. *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987), *vacated in part on other grounds on rehearing en banc*, 683 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990). Recognizing that similar statutory language was present in at least three cases in which the Supreme Court found diminishment or disestablishment (*Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), *Rosebud* and *DeCoteau*), the court stated, "[a] careful reading of these cases, however, reveals that the Court did not rely solely upon this language of cession in reaching its conclusions. It also considered other important factors such as payment of a lump sum upon surrender of the lands, express agreement by the tribe of its intent to disestablish the reservation, and surrounding circumstances." *Id.* at n.5.

Article I also contains phrases indicating Congressional understanding that the 1905 Act would allow for settlement upon lands within an existing Reservation. For example, the operative language refers to lands "embraced within the said reservation" and the allotment language refers to individuals who have selected a tract of land "within the portion of said reservation hereby ceded." The operative language is properly interpreted to reference a cession of *land* and not of *reservation* status, and both phrases indicate an understanding and intent that the lands ceded were on a "portion" of a larger, existing Reservation – not that they were severed from the Reservation. The 1905 Act does not include the type of language the United States knew how to use, had in fact used in earlier Congressional Acts and an agreement with respect to this specific Reservation, and could have easily inserted into the 1905 Act if the intent was to alter the boundary and sever the lands forever and absolutely from the Reservation. Similar to the situation in *Mattz*, "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation." *Mattz*, 412 U.S. at 504.

Commenters[18] assert that the operative language in Article I and the language at the beginning of Article II, "[i]n consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement . . ." is indistinguishable from the language the Supreme Court held was "precisely suited" to disestablishment in *DeCoteau*.[19] Such limited comparisons, however, fail to account for key differences between the two statutes and their distinct circumstances.

First, the Supreme Court has reinforced that it is improper to assume that "similar language in two treaties between different parties has precisely the same meaning" and that individualized "review of the history and the negotiations of the agreement is central to the interpretation of treaties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *see also United States v. Webb*,

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[18] Throughout the document, the term "Commenters" refers to any comments received when EPA provided an opportunity for appropriate governmental entities and the public to comment on the Tribes' description of the Reservation boundaries. Comments can be found in the EPA administrative record at EPA-WR-004031-004554R.

[19] State of Wyoming, Office of the Attorney General, "Comments in Response to the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation Statement of Legal Counsel Regarding the Tribes' Authority to Regulate Air Quality and Treatment as a State Application," June 9, 2009 at 20-21 (State Comments).

219 F.3d 1127, 1133 (9th Cir. 2000); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999). Along the same lines, whether a specific Congressional Act was intended to extinguish some or all of an existing reservation requires an analysis specific to that statute and reservation. *Solem*, 465 U.S. at 468-69. Thus, the commenter's comparison to the Lake Traverse surplus land act analyzed in *DeCoteau* is substantially less relevant than the discussion above comparing the operative language in the previous Thermopolis and Lander Purchase Acts to that within the 1905 Act, since those particular statutes involve the Wind River Indian Reservation.

Secondly, EPA notes that the term "convey" is not in the 1905 Act's operative language as was the case in *DeCoteau*. Rather, the term "conveyed" appears in Article II of the 1905 Act addressing the manner of payment. The Supreme Court has explained that terms found outside the operative language of a surplus land act are of less importance in addressing the diminishment question. For instance, in discussing the Court's non-diminishment finding in *Solem* despite statutory language granting the Indians permission to harvest timber on the opened lands "as long as the lands remained in the public domain," the *Hagen* court noted, "the reference to the public domain did not appear in the operative language of the statute opening the reservation lands for settlement, which is the relevant point of reference for the diminishment inquiry." *Hagen*, 510 U.S. at 413. Thus, the term "conveyance" is not contained within the 1905 Act operative language opening the lands to settlement and as such, is distinguishable from *DeCoteau*.

Third, the Supreme Court in *DeCoteau* relied heavily not on the operative language alone, but on the fact that it was coupled with a fixed sum certain payment provision in finding that the Lake Traverse Reservation was disestablished.[20] No such payment exists in the 1905 Act.

Finally, the Supreme Court has consistently held that there is no set formula for assessing whether the operative language of a surplus land act supports a diminishment finding. As discussed above, the 1905 Act includes language that was necessary to allow the United States to subsequently transfer clear title to

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[20] "The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, *for a sum certain*, all of their interest in unallotted lands." *DeCoteau*, 420 U.S. at 445-46 (emphasis added). "This language is virtually indistinguishable from that used in other *sum certain*, cession agreements . . . ." *Id.* (emphasis added). We would also note that in the *Yankton Sioux* case, the Supreme Court articulated that it was both the cession language and the sum certain manner of payment that was "precisely suited" for diminishment. *Yankton*, 522 at 791- 92.

prospective homesteaders. However, and especially considering the specific statutory history pertinent to this Reservation, the 1905 Act does not include operative language that would support a finding of clear and unambiguous intent to alter and diminish the boundaries of the Wind River Indian Reservation.

b. Manner of Payment

In addition to the specific language opening a reservation to settlement, the Supreme Court's analysis focuses on the manner of payment established by the statute as a key indicator of Congressional intent. Where a surplus land act contains both explicit language of cession evidencing a present and total surrender of all tribal interests, and an "unconditional commitment from Congress to compensate the Indian tribe for its opened land," there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *Yankton*, 522 U.S. at 344. The Court has also noted that while a provision for definite payment can provide additional evidence of diminishment, the lack of such a provision does not necessarily lead to the contrary conclusion. *See Rosebud*, 430 U.S. 584, 598 n.20.

Article II of the 1905 Act establishes the manner of payment in consideration for the lands ceded:

> 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, under the provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash, as hereinafter provided, at the following prices per acre . . .

33 Stat. 1016.

Generally, the statute then describes the following timeframe and payment amounts for the years following the passage of the Act:

- Within two years from opening, lands entered under the homestead law shall be paid for at the rate of $1.50 per acre;

- Within the next three years (between two and five years after opening), lands entered under the homestead law shall be paid for at the rate of $1.25 per acre;

- Within the next three years (between five to eight years after opening), lands shall be sold to the highest bidder at not less than $1.00 per acre;

- After eight years, lands may be sold to the highest bidder without a minimum price.

Id. at 1016-17.

Clearly this provision does not constitute a fixed sum certain in consideration for the land, but establishes a schedule to pay the Tribes various rates and ultimately an indeterminate sum if and when lands were sold. Article II concludes, "and the *United States agrees to pay the said Indians the proceeds derived from the sales of said lands*, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided." *Id.* at 1017 (emphasis added). In contrast to both the Lander Purchase Act (fixed sum certain payment of $25,000) and the Thermopolis Purchase Act (fixed sum certain payment of $60,000), under the 1905 Act, the United States' financial commitment in consideration for the lands was to pay the Tribes an indeterminate amount from the proceeds of sales to prospective buyers. Article II does not establish a fixed sum certain payment, nor do any Commenters assert that it does.

This interpretation is also consistent with the legislative history of the Act[21] and Indian Inspector McLaughlin's statement to the Tribes that the United States would not offer a fixed sum certain payment to the Tribes in exchange for the lands:

> Several agreements with tribes of Indians that provided for a lump sum consideration which were presented to Congress the past two years have not been ratified, for the reason that Congress has refused to act upon any such agreements, and the said agreements have had to be changed before they could be carried out. *I have made this*

[21] The legislative history reinforces that the Tribes were to be paid according to the amounts received from prospective buyers. H. REP. NO. 58-2355, at 2 (1904) (EPA-WR-000318) (describing the bill as "follow[ing] the now established rule of the House of paying to the Indians the sums received from the sale of the ceded territory under the provisions of the bill").

explanation that you may know my reasons for not being able to entertain a proposition from you people for a lump sum consideration. Understand that anything you may receive from these lands will be paid to you from the proceeds of sales of same to white men.

Minutes of Council Held at Shoshone Agency, Wyoming, at 3 (April 19, 1904) (EPA-WR-000425) (1904 Minutes of Council Meeting) (emphasis added).

Commenters assert that Article IX, Section 3 of the 1905 Act constitutes an unconditional guaranteed sum certain payment of $145,000 to be used for the benefit of the Tribes. As is the case with surplus land acts generally, there are multiple provisions for various amounts of money allocated for certain purposes. The 1905 Act is no different, and Articles III, IV, V, VI, VII and VIII address various payments for surveys, irrigation, livestock, general welfare fund, etc. Each of these sections includes the proviso that all payments are to be derived from the sale of the lands at issue.

Article IX, Section 3 addresses three payments, each appropriated out of any money in the U.S. Treasury not otherwise appropriated and each to be reimbursed from the proceeds of the sales of the land. 33 Stat. 1016, 1020-21. This section appropriated $35,000 for a survey and examination of certain lands and $25,000 for an irrigation system. In addition, $85,000 was appropriated to make the payments provided for in Article III, which establishes a per capita payment of $50 "within 60 days of the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available" with any balance remaining to be used for various surveying and mapping purposes. The 1904 agreement had included in Article III a provision that the $85,000 "shall be from the proceeds of the sale of sections sixteen and thirty-six or an equivalent of two sections in each township within the ceded territory, and which sections are to be paid for by the United States at the rate of one dollar and twenty-five cents per acre." H.R. REP. NO. 58-3700, pt. 1, at 2 (1905) (EPA-WR-004676). That provision and other similar provisions committing the United States to purchasing the two sections for State school lands were deleted from the agreement prior to enactment and are thus not found in the 1905 Act. The $85,000 provision in the agreement was intended to direct certain per capita payments from the actual sales of two sections per township to the United States. Deletion of that provision left no established fund from which to make the per capita payments within the contemplated 60 days. Therefore, Congress added Article IX, Section 3 to the Act, appropriating the funds to cover the per capita commitment but requiring reimbursement from the "first money received" from the sale of the

lands. Article IX, Section 3 does not establish a fixed sum certain payment in consideration for the lands opened by the 1905 Act.[22] The $85,000 in this section was merely added to replace a fund which had, by agreement, been established from prospective sales of two sections of each township to the United States.

Finally, Article IX is explicit in stating that the United States would not be bound "in any manner . . . to purchase any portion" of the opened lands or to guarantee to find purchasers for the land, "it being the understanding 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." 33 Stat. 1016, 1018 (emphasis added). Thus, under the Act, the Tribes would only be paid by proceeds from prospective sales, and the United States explicitly disclaimed any commitment to actually conduct any sales.

The statutory language does not establish an unconditional commitment by the United States to pay the Tribes a fixed sum certain payment in consideration for the lands opened to settlement. Article II sets forth a process to pay the Tribes varying amounts based upon the prospective sales that might occur in years *subsequent to* the 1905 Act. The Tribes were not guaranteed payment for the lands, rather the United States explicitly stated it would not be bound in any manner to purchase any portion of the land or to guarantee purchasers for the land. Thus, there was no fixed sum nor was there any certainty of payment in consideration for the lands opened to settlement.

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[22] For purposes of analyzing the legal effect of a surplus land act on Reservation boundaries, the relevant inquiry with regard to manner of payment is not whether a tribe would receive any sum of money at all, but whether the tribe would receive a fixed sum certain in consideration for the lands at issue. As set forth by the Supreme Court, the proper inquiry is whether the statute contains "a provision for a fixed-sum payment representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land' . . . ." *Yankton*, 522 U.S. at 344. It is implausible that $85,000 or even $145,000 could constitute a fixed sum payment for the opened lands, considering the 1891 and 1893 failed agreements involved $600,000 and $750,000 respectively (while the acreages of land were not identical, they were not different enough to reflect such a significantly lower payment). In addition, an interpretation that Article IX, Section 3 constituted a fixed sum payment for the lands would render obsolete the entire payment structure set forth in Article II and referenced throughout the Act.

c. Trustee Provisions

Article IX of the 1905 Act expressly established an ongoing trust relationship between the United States and the Tribes with respect to the lands opened to settlement:

> . . . it being the understanding that the United States shall act as trustee for said Indians to dispose of such 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. 1016, 1018.

Consistent with the trust relationship, Article VIII provides:

> It is further agreed that the proceeds received from the sales of said lands, in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement.

Id. at 1018.

The Supreme Court has described this type of provision as one that "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356.[23]

The United States' negotiations with the Northern Arapaho and Eastern Shoshone Tribes in 1904 reinforced the trust relationship with respect to the opened lands:

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[23] The statutory language at issue in *Seymour* stated the proceeds from the disposition of the lands affected by the Act shall be "deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation . . . ." *Id.* at 355. The Court contrasted this text with language that appropriated the net proceeds from the sale and disposition of land for the general public use. *Id.* at 355-56.

> My friends, that you may understand better and more clearly, the government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians.

1904 Minutes of Council Meeting at 3-4 (EPA-WR-000425-26).

This trust relationship is an important factor in discerning Congressional intent with respect to the opened lands. Article IX makes it clear that while the 1905 Act allowed the United States to sell the opened lands, the United States maintained federal responsibility over the lands consistent with their status as Reservation. As discussed further in Section B.4 of this document, the 1905 Act reinforced the trust relationship between the federal government and the Tribes with regard to the opened lands, and the United States acted as trustee for the Tribes not only with respect to the proceeds from individual parcels sold, but with respect to management of the opened area in general.

d. Survey Provisions

The 1905 Act includes a provision allocating funding for the "survey and field and office examination of the unsurveyed portions of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary . . . " 33 Stat. 1016, 1022. The $35,000 allocation of funds for the survey is "to be reimbursed from the proceeds of the sale of said lands . . . " *Id.* Under the Act, proceeds from the sales of the lands were to be paid to the Tribes or expended on their account. The first part of this provision establishes a survey and examination of portions of the ceded lands. Directing the utilization of proceeds from the sales which were to belong to the Tribes, for surveying activities in the opened portion of the Reservation indicates that Congress recognized an ongoing Tribal interest in that area. This provision further indicates Congressional understanding that the Reservation would not be diminished.

The second part of the survey provision directs demarcation of the non-natural water boundaries of the "diminished reservation," terminology that, as discussed below, distinguished the area that remained under exclusive Tribal use from the area opened to settlement by non-Indians. While one might assume that this survey provision was intended to demark the boundaries of a newly diminished Reservation, examination of the geography of the area clarifies that

this was not the case. Under the 1905 Act, the unopened area that remained under exclusive Tribal use was bordered to the north and east by the Big Horn and Popo Agie rivers, respectively. Thus, the focus of this survey provision, to demark the outboundaries of the diminished reserve "where the same is not a water boundary," is on the southern and western boundaries of the area, which were not affected by the 1905 Act under any interpretation. During the 1904 agreement negotiations, one of the Tribal representatives stated that the southwestern and western boundary lines described in the Act were incorrect and did not reflect the Treaty of 1868, and requested that they be correctly established.[24] Thus, this part of the survey provision in Article IX, Section 3 was not intended to demark a newly diminished Reservation boundary line, but rather to address concerns about certain boundaries of the Reservation that were, without dispute, unaffected by the 1905 Act.

Finally, Article III of the 1905 Act also contains a survey provision:

> . . . that upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

33 Stat. 1016, 1017.

In the *Big Horn I* case[25] regarding adjudication of water rights, the Special Master's Report addressed this Article 3 survey provision, finding, "[t]his

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[24] George Terry from the Shoshone Tribe stated, "In Article I of the bill, we do not believe that the boundary lines on the southwest and west of the reservation are correct and we ask that these lines be correctly established, and that this be done at an early date. According to our old treaty these lines are not correct, and we ask that they be made to conform to the 'Treaty of 1868' made at Fort Bridger." 1904 Minutes of Council Meeting at 17 (EPA-WR-000439).

[25] *In Re The General Adjudication of All Rights to Use Water in Big Horn River Systems and All Other Sources*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*), *aff'd by an equally divided court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam).

language clearly demonstrates the intent of the parties to the Agreement that certain of the lands within the ceded portion, excepting those lands disposed of by the United States on behalf of the Tribes under the provisions of the Agreement, would remain the property of the Indians." Report of Special Master Roncalio, Concerning Reserved Water Rights Claims by and on behalf of Tribes of the Wind River Indian Reservation, Wyoming, at 38 (December 15, 1982) (EPA-WR-000777) (*Big Horn I*, Special Master's Report).

e. Boysen Provision

After much debate in the House and Senate, Congress inserted the following provision into the 1905 Act concerning the lease rights of an individual named Asmus Boysen:

> And provided, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands *in said reservation*; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled . . .

33 Stat. 1016, 1020 (emphasis added).

Section B.3 of this document discusses the Boysen provision and its legislative history in more detail. Generally, in 1899, Mr. Boysen had entered into a ten-year lease with the Tribes, under which he was given the right to prospect for minerals throughout 178,000 acres of the Reservation for two years. The legislative history indicates the Boysen provision was inserted to provide Mr. Boysen a preferential right to select 640 acres of contiguous mineral or coal lands for purchase *in the opened area* to compensate for the cancellation of his pre-existing lease rights.[26] Thus, Congress clearly understood that Mr. Boysen's

[26] The Boysen provision received substantial attention during legislative debate in the House. Congress' understanding that Mr. Boysen's selection rights would pertain solely to lands located in the opened area is evident in various places in the legislative history. *See, e.g.*, H.R. REP. NO. 58-3700, pt. 2, at 2, 4 (EPA-WR-000338, 000340) (Minority Report opposing provision providing Boysen a preferential right "to locate any land to be opened to settlement under the bill"; and opposing "any preferences in locating land or any rights over other persons desiring to enter and

preferential rights would be established in the opened area and drafted the statutory provision describing the area as "in said reservation." This language further supports a view that Congress intended that the ceded lands would remain part of the Reservation.

f. References to a "Diminished Reserve"

As Commenters accurately point out, the 1905 Act uses the terms "diminished reserve" or "diminished reservation" in various provisions throughout the statute. The Supreme Court has considered and rejected the notion that such terms contained within a surplus land act establish Congressional intent that the Reservation boundaries would be altered and diminished as a legal matter. For example, in *Solem*, the Act at issue referred to the unopened territories as "within the respective reservation thus diminished." *Solem*, 465 U.S. at 474. The Court did not find this language to be dispositive of Congressional intent and reasoned that at the turn of the 20th Century, "diminished" was not yet a term of art in Indian law. "When Congress spoke of the 'reservation thus diminished,' it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries." *Id.* at 475, n.17 (citation omitted). Similarly, in *Mattz*, the Court addressed statutory language referencing "what was (the) Klamath River Reservation," and determined that referring to a reservation in the past tense was "merely . . . a natural, convenient and shorthand way of identifying the land subject to allotment" and did not indicate "any clear purpose to terminate the reservation directly or by innuendo." *Mattz*, 412 U.S. at 498-99. Furthermore, with regard to agreements with Indian tribes, the general rule is that ambiguities

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to settle upon the lands to be opened for settlement under the provisions of H. R. 17994"); 39 Cong. Rec. H1942 (1905) (EPA-WR-0010070) (statement of Rep. Mondell describing the Boysen provision as affecting "only 640 acres of a million and a quarter acres," which represents the approximate acreage understood by Congress as being opened for settlement in the 1905 Act); 39 Cong. Rec. H1944 (1905) (EPA-WR-0010072) (statement of Rep. Lacey noting that "the land must be taken either by Boysen or by somebody else," thus recognizing that Mr. Boysen's 640 acres were to be located in the area to be opened for settlement and not in the remaining area to be occupied solely by the Tribes). In addition, in a subsequent case addressing whether Mr. Boysen's preferential right was limited to selecting 640 acres within his existing 178,000 acre lease, the U.S. Court of Appeals for the 8th Circuit carefully reviewed the Boysen provision and confirmed that Congress intended Mr. Boysen's right to exist solely in the opened area (although not limited to the portion of that area subject to his prior lease). *Wadsworth v. Boysen*, 148 F. 771, 775 (8th Cir. 1906) (Boysen "should be accorded the right to have the preferential selection of 640 acres anywhere in the ceded domain . . . ." *Id.* at 777).

or doubtful expressions are to be resolved in favor of the tribes. *McClanahan*, 411 U.S. at 174; *Rosebud*, 430 U.S. at 586 (the legislation of Congress is to be construed in the interest of the Indian), *Celestine*, 215 U.S. at 290.

The Second Fort Bridger Treaty of 1868 establishing the Wind River Indian Reservation stated the lands, "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article." 15 Stat. 673, 674. When the 1905 Act opened a portion of the Reservation to homesteading, it became necessary to generally distinguish the area where the Tribes retained the exclusive use and occupation, which was diminished in acreage from that guaranteed by the Treaty, from the portion of the Reservation opened to settlement.[27] 1868 Treaty, Article 2. The plain meaning of the term "diminished" reserve or reservation at the turn of the Century was a general description of the smaller area of exclusive tribal use; not the legal term of art that developed decades later.

It is a well established legal principle that, "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Absentee Shawnee Tribe of Indians of Oklahoma v. State of Kansas*, 862 F.2d 1415, 1418 (10th Cir. 1988) (citing *Worcester v. Georgia*, 31 U.S. 515, 582 (1832)); *see also Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Kansas Indians*, 72 U.S. 737, 760 (1866)). This principle is derived from the fact that during turn-of-the-century negotiations, most tribal members were not fluent in English, and tribes should thus not be prejudiced by specific terms used in treaties, statutes and agreements. The courts also recognize the unequal bargaining power held by most tribes in reaching surplus land "agreements." As summarized by the U.S. Court of Appeals for the 10th Circuit, "[w]ith regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation. . . . The diminishment policy recognizes the fact that the terms of an act of Congress

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[27] Article X of the 1905 Act provides that "nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." 33 Stat. 1016, 1018.

are often unilaterally imposed, rather than the product of negotiation between the Indians and the United States." *Absentee Shawnee*, 862 F.2d. at 1417-18.[28]

Commenters also infer Congressional intent to diminish the Reservation from the allocation of federal money to fund projects on the "diminished reservation" for the benefit of the tribes, stating that no such funding was allocated for projects on the ceded portion. As discussed above, Article IX establishes that "the United States shall act as a 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." 33 Stat. 1016, 1018. It is pursuant to this trustee provision that funds received from the sales would be allocated for the benefit of Tribal members. That the structural projects central to Indian society, such as an irrigation system and the construction of schools were funded on the "diminished reserve" recognizes that this was the area where the Tribes retained exclusive use and occupation and would thus receive the most direct benefit, whereas the opened area was intended to be settled by non-Indians. Contrary to the comment that no funds were allocated for the Tribes' benefit on the opened portion of the Reservation, funds to purchase livestock (33 Stat. 1016, 1017-18); a general welfare and improvement fund to be expended for the purchase of articles as decided by the Tribes (*Id.* at 1018); funds for bridge construction and maintenance needed "on the reservation" (*Id.*); and funds for subsistence of indigent and infirm persons "belonging on the reservation" or other such purposes for the comfort, benefit, improvement, or education of Indians (*Id.*), were not restricted by Congress to the "diminished reserve."[29] Congressional

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[28] In 1904, the negotiator for the United States opened the discussions with the Northern Arapaho and Eastern Shoshone Tribes by stating that the Supreme Court had recently held that the United States could unilaterally legislate to open reservations without consulting with Indians or obtaining their consent. 1904 Minutes of Council Meeting at 3 (EPA-WR-000425). He further stated that the lands at issue and the manner of payment were non-negotiable. *Id.* at 8 (EPA-WR-000430). So, while the Northern Arapaho and Eastern Shoshone Tribes reached an agreement with the United States, it was conducted in the context of limited options for the Tribes. As described by McLaughlin, "quite a number of the Shoshone Indians signed the petition presented to them concurring in said [Mondell] bill, but did so from having been told by said parties that Congress was going to enact legislation which would open their reservation to settlement anyhow, and that it would be well for the Indians to concur in the provisions of the Mondell bill and thus avoid having legislation enacted which might be more objectionable to them." Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) quoted in H.R. REP. NO. 58-3700, pt. 1, at 18 (1905) (EPA-WR-004692). In addition, the Tribes note that only 80 out of 237 adult male members of the Northern Arapaho Tribe actually signed the 1904 Agreement. *See infra* n.7.

[29] In addition, as noted above, Article IX, Section 3 expressly directs funds allocated and to be

intent to maintain the Reservation boundaries is supported by this statutory distinction which allocates funds for permanent structures central to Indian society within the area where the Tribal members would retain exclusive use and occupation; yet allocates funds for activities that would benefit the Tribes wherever they would be expended, on the entire Reservation including in the opened area.

As noted in the 2011 DOI Solicitor's Opinion, there is no question that the Tribes retained an interest in the ceded lands until sold. Thus, the fact that the 1905 Act used the term "diminished" several times is not dispositive, nor does it evince a clear intent by Congress to permanently alter the exterior boundaries of the Reservation.

g. Conclusion

The operative language of the 1905 Act, particularly in comparison with the 1874 Lander and 1897 Thermopolis Purchase Acts, does not indicate Congressional intent to effect a "present and total surrender of all tribal interests"[30] or to diminish the Reservation boundaries. The language of the Act states that the Tribes would cede their title, right and interest to the United States, which was, as discussed earlier, necessary for the United States to be able to subsequently transfer clear title to prospective homesteaders. However, the operative language does not evince clear Congressional intent to also alter and diminish the Reservation boundaries, nor was it necessary to do so in order to achieve the Act's main purpose of opening the lands to settlement. Rather, the 1905 Act language indicates Congressional intent that the opened area remained a portion of the Reservation and expressly established a trust relationship between the United States and the Tribes with respect to the opened area, consistent with its status as Reservation land.

The 1905 Act did not provide for a fixed sum certain payment to the Tribes in exchange for the lands. Rather, the Act predicated payment to the Tribes on prospective sales to homesteaders, and the United States expressly declined to commit to conduct any such sales. Given these provisions, an interpretation of

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reimbursed from the proceeds of the sales of the opened lands to be expended in part for a survey and field and office examination of the unsurveyed portions of the ceded lands. 33 Stat. 1016, 1020-21.

[30] *Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470, *Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48).

the 1905 Act as a diminishment of the Reservation would amount to inferring Congressional intent to immediately reduce the Reservation by more than half without any guarantee that the Tribes would ever receive compensation in consideration for those lands. Such an interpretation would be contrary to the long-standing principles that "Indian treaties must be construed 'so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people.'" *Absentee Shawnee*, 862 F.2d at 1418, citing *Choctaw Nation*, 318 U.S. 432 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)).

EPA has carefully considered the 1905 Act provisions and concludes that the statutory language when read as a whole, including the operative language, manner of payment and other statutory provisions as discussed above, does not establish "substantial and compelling evidence" of a "plain and unambiguous" Congressional intent to diminish the Wind River Indian Reservation. As such, the statutory language does not overcome the Supreme Court's premise that "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (citing *United States v. Celestine*, 215 U.S. 278 (1909). *See also Yankton*, 522 at 343; *DeCoteau*, 420 U.S. at 444.

EPA's conclusion that the 1905 Act statutory language does not evince clear Congressional intent to diminish the boundary of the Wind River Indian Reservation is consistent with the 2011 DOI Solicitor's Opinion and the position of the United States in previous litigation involving the Tribes' water rights. *See generally Big Horn I*, 753 P.2d 76 (Wyo. 1988). In arguments before the Wyoming Supreme Court, the United States maintained that the 1904 Agreement, as codified with amendment by the 1905 Act, did not diminish the boundaries of the Reservation, pointing out in its brief that the Act contains several provisions in support of non-diminishment: (1) in Article IX, the United States specifically did not commit to compensate the Tribes a fixed amount – the Tribes would be paid as the lands were sold; (2) in Article III, the United States recognized the right of Indians to remain in the ceded area;[31] (3) in Article III, the United States

[31] Tribal members could obtain allotments in the 1905 Act area before it was opened to non-Indians. 1905 Act, Article I. In *Solem*, the Court found such a provision to be inconsistent with intent to diminish. *Solem*, 465 U.S. at 474.

authorized payments to establish water rights for such lands as shall remain the property of Indians in the ceded area; (4) in Article X, the United States stated nothing in the Act would deprive the Tribes of their rights under the Treaty; and (5) the Agreement does not use the word "convey" in Article I. Moreover, receipts from the land sales under the 1905 Act did not go to the general fund of the United States Treasury. Brief of appellee the United States at 97-98, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).

3. Circumstances Surrounding the 1905 Act

The second part of the Supreme Court's framework for analyzing the legal effect of surplus land acts entails examination of the circumstances surrounding the passage of the statute to discern Congressional intent. Considering that the traditional solicitude for Indian rights favors the survival of reservation boundaries in the face of opening reservation land to settlement and entry by non-Indians, the standard for inferring diminishment from surrounding circumstances is quite high. "When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress - unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471. *See also Shawnee*, 423 F.3d at 1222. Overall, the circumstances surrounding the 1905 Act, including the manner of negotiations and legislative history, do not support a finding of clear Congressional intent that the Act would permanently sever and alter the exterior boundaries of the Reservation.

a. Manner of Negotiations and Legislative History

On March 4, 1904, U.S. Representative Frank Mondell of Wyoming introduced H.R. 13481 to provide for opening portions of the Wind River Indian Reservation under homestead, town-site, and coal and mineral land laws. While the bill may have been based loosely on the 1891 and 1893 negotiations, as discussed in the 2011 DOI Solicitor's Opinion, it included some very significant differences. For example, the 1891 agreement included operative language and payment terms that stand in stark contrast to the H.R. 13481 provisions. In the 1891 unratified agreement, the parties proposed 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.*" 1891 Articles of Agreement at 29 (EPA-WR-000259). In return the Tribes would have received a fixed sum certain payment of $600,000. H.R. 13431 contained none of the aforementioned italicized language nor did it include a fixed sum certain payment. In addition to these important differences in operative language and manner of payment, the geographic scope of the 1904 bill was different from the earlier negotiations, enlarging the area to be opened to settlement, and the 1904 bill included a provision for the United States to act as a trustee for the Tribes regarding the sale of and payment for the lands. *See generally* H.R. REP. NO. 58-2355, at 3 (1904) (EPA-WR-000319). The 1904 House Report in describing H.R. 13481 states, "the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral land laws . . . ." *Id.* at 4 (EPA-WR-000320). Where the House Report reflects consideration of reducing the reservation, it does so in the context of discussing the 1891 unratified agreement.[32]

On April 19, 1904, Indian Inspector McLaughlin met with the Eastern Shoshone and Northern Arapaho Tribes to present H.R. 13481. Throughout the negotiations, McLaughlin repeatedly referred to the bill as opening the Reservation to settlement by non-Indians, and did not speak in terms of altering the 1868 Treaty terms with respect to the exterior boundaries of the Reservation. McLaughlin's introductory remarks set the tenor of the United States' proposal to open certain portions of the Reservation to settlement:

> 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 portions of your reservation for settlement by the whites.

1904 Minutes of Council Meeting at 2 (EPA-WR-000424).

McLaughlin discussed the then-recent Supreme Court case, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), asserting that it was no longer deemed necessary to

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[32] The House Committee on Indian Affairs submitted a report stating the legislation proposes to "reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891, and in this connection it should be remembered that the instructions to the commission in 1891 were to reduce the reservation from 650,000 to 700,000 acres." H.R. REP. NO. 58-2355, at 3 (EPA-WR-000319).

obtain tribal consent for the opening of reservations. Describing the government's role as guardian for the tribes, McLaughlin stated:

> . . . the President and the Secretary of the Interior are very desirous that you shall be protected in your rights in every respect. The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much so as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the government.

1904 Minutes of Council Meeting at 3 (EPA-WR-000425).

McLaughlin further described the 1904 proposal to the Tribes as, "having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with the means to make yourselves comfortable upon your reservation." *Id.* at 4 (EPA-WR-000426). He informed the Tribes that the United States would not pay a fixed sum amount in exchange for the land, rather, the agreement would establish an ongoing trust relationship between the government and the Tribes with respect to the opened lands:

> My friends, that you may understand better and more clearly, the government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians.

Id. at 3-4 (EPA-WR-000425-26).

The Tribal members present during the negotiations appear to have understood that pursuant to this agreement the United States would subsequently sell the land to non-Indians and the proceeds would go to the Tribes. Many Tribal members stated their desire that the sale price be set at $2.50 per acre to counter the United States' proposal which started at $1.50 per acre for the first two years. *See generally*, 1904 Minutes of Council Meeting (EPA-WR-000423-50). Commenters point to these specific quotes to support an assertion that the Tribes understood they were forever ceding their interests in the lands.[33]

[33] Long Bear, Arapaho: "I understand what he comes for, and I will let him know what I think of it, and I will tell what part of the Reservation I want to sell. I want [sic] save enough of my land

There is no dispute that the 1905 Act provided for the opening and eventual sale of the surplus lands out of Tribal ownership, to prospective private homesteaders. The Tribal references, however, do not indicate a clear understanding that the exterior boundaries of their Reservation would be altered, which is the inquiry most pertinent to this analysis. Commenters also assert the Tribes understood this agreement to be similar to the Thermopolis Purchase. While McLaughlin and the Tribes understandably acknowledged the fact that McLaughlin had also negotiated the Thermopolis agreement, the meeting minutes do not indicate an understanding by the Tribes that the agreements were similar. In fact, much of the discussion focused on features unique to the 1904 agreement, such as negotiations on the price per acre once the lands were opened and the United States acting as trustee for the Tribes with regard to the sales. Neither of these provisions was at issue in the Thermopolis Purchase agreement. As McLaughlin later explained, "[t]he two agreements are entirely distinct and separate from each other, and [under the 1905 Act] the government simply acted as trustee for disposal of the land north of the Big Wind River . . . " Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming at Fort Washakie, Wyoming (Aug. 14, 1922) at 5 (EPA-WR-001681).

McLaughlin also described the boundaries of the "diminished reservation"[34] and the fact that natural water boundaries would be respected to prevent

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for myself, so I can have it. This is my own land. I can sell any part of it I desire and set my own price. I want to cede that portion of the reservation from the mouth of Dry Muddy Gulch in a direct line to the mouth of Dry or Beaver Creek below Stagner's on Wind River. . . . I think I ought to get about $2.50 per acre." *Id.* at 9-10 (EPA-WR-000431-32). Reverend Sherman Coolidge, Arapahoe: "I am glad that Major McLaughlin has come to us to purchase a portion of our reservation. The proposed ceded portion has not been used by us except for grazing purposes, and I think cash money will be of more value among the Arapahoes and Shoshones." *Id.* at 12 (EPA-WR-000434). George Terry, Shoshone: "[t]his is no little bargain we are entering into. It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and can never recover again." *Id.* at 17 (EPA-WR-000439). The Tribes point out that the courts have recognized that the Shoshone Tribe's understanding of the 1905 Act provisions was limited, in finding, "[a]t the time of the making of the Treaty of 1868 the [Shoshone] tribe of Indians were full-blood blanket Indians, unable to read, write, speak, or understand English, with little previous contact with whites . . . Practically the same condition as to their education existed at the time the agreement of 1904, hereinafter mentioned, was made." Tribes' Response to Comments at 17, citing *Shoshone Tribe of Indians v. United States*, 85 Ct. Cl. 331, Findings ¶3 (1937), *aff'd*, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

[34] McLaughlin stated, "I now wish to talk of the boundaries of the reservation and the residue that will remain in your diminished reservation . . . . The tract to be ceded to the United States, as

trespass into the exclusive tribal area. The references to the "diminished" reserve or reservation during McLaughlin's negotiations and subsequent Congressional Reports, similar to the parallel references in the text of the statute as discussed above, are best understood as a description of the area over which the Tribes would retain exclusive use. The area of the Tribes' *exclusive use* would, in fact, be diminished by this agreement, from 2,288,500 to 808,500 acres and with the ever-increasing encroachment by non-Indians, the United States sought to define these boundaries so it would be clear which areas of the Reservation would remain under exclusive Tribal use and which areas were being opened to settlement by non-Indians. When the Tribes expressed a desire to have some lands north of the Big Wind River excluded from the ceded area, McLaughlin countered that the allotments in the area could be retained, or cancelled and re-established, but that on the diminished reservation they would be protected from the non-Indians. As stated by McLaughlin:

> A little corner of land left north of the Wind River would cause you no end of trouble, as you would be continually over-run by the herds of the whiteman. 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 or lease them, as you see fit. On the reservation, you will be protected by the laws that govern reservations in all your rights and privileges. Furthermore, all of you who may retain your allotments off the reservations [sic] will not lose any of your rights on the reservation, and you have rights the same as if you remained within the diminished reservation.

Id. at 14 (EPA-WR-000436).

It is also apparent that the United States believed that a natural barrier between the exclusive area and the opened area would make the most sense for

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proposed by the "Mondell Bill", is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation. This embraces the lands within the lines described as follows: Commencing where the Wind River crosses your western boundary line, following down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line; thence along the southern boundary line to the southwest corner of your reservation thence north along the western boundary to the place of beginning on the Big Wind River." 1904 Minutes of Council Meeting at 6 (EPA-WR-000428).

practical purposes and to best protect the Tribes' interests. As McLaughlin subsequently reported in a letter to the Secretary of the Interior:

> The diminished reservation leaves the Indians the most desireable 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 808,000 acres, about three-fourths of which is irrigable land, allows 490 acres each for the 1,650 Indians now belonging on 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 belonging thereto; that by including any portion of the lands north or the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement, and the Indians would be eventually compelled to give it up. Furthermore, with the exception of about 20 families (mixed bloods and white men who are intermarried into the tribes) there are no Indians occupying lands outside of the diminished reservation.

H.R. REP. NO. 58-3700, pt. 1, at 17 (1905) (EPA-WR-004691).

Similarly, the Committee on Indian Affairs, commenting on H.R. 13481 stated, "[i]t is believed that these are the most practicable and advantageous boundaries, inasmuch as but few Indians or allotments will be outside of the said boundaries, and it is important that the boundaries of the diminished reserve shall so far as possible remain a water boundary" and "[t]he bill in question still leaves the Indians with 808,500 acres. A careful estimate by the General Land Office gives the area of the lands proposed to be ceded by the above bill at 1,480,000 acres, leaving 808,500 in the diminished reserve. There are 1,650 Indians on the reservation at this time, so that the diminished reserve leaves about 500 acres per Indian man, woman, and child, on the reservation." H.R. REP. NO. 58-2355, at 2-3 (EPA-WR-000318-19).

The Supreme Court addressed the legislative history of the Cheyenne River Act wherein the House and Senate Reports made similar references to a

"reduced reservation" and statements that the "lands reserved for the use of the Indians upon both reservations as diminished . . . are ample . . . for the present and future needs of the respective tribes." *Solem*, 465 U.S. at 478. The Court found it to be "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" and ultimately held the Reservation to be undiminished. *Id.* In diminishment cases, while clear Congressional and tribal intent must be recognized, the rule that "legal ambiguities are resolved to the benefit of the Indians" is accorded "the broadest possible scope." *DeCoteau*, 420 U.S. at 447.

The 1868 Treaty established the Wind River Indian Reservation boundaries and among other provisions, in Article VI authorized any head of a family desiring to commence farming to select a 320-acre tract of land anywhere within the Reservation. 15 Stat. 673. The Treaty did not restrict the Reservation to those lands that would be subject to individual settlement, but established a much broader Reservation as a homeland for the Tribes. The intent of Congress in 1904, as evidenced by the McLaughlin negotiations and the Congressional Reports, was to define a confined area from which individual allotments could be chosen and to open the rest of the Reservation to settlement. At no time during the negotiations did McLaughlin state to the Tribes that the bill under consideration was intended to abrogate and diminish the broader Treaty-established boundaries. In fact, the 1905 Act contains a provision expressly preserving the Tribes' treaty rights: "[i]t is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." 33 Stat. 1016 (1905), Article X. The continued Reservation status of the 1905 Act opened area was not inconsistent with the statute and its principal purpose to open the lands to settlement.

Following the April 21, 1904 agreement (1904 Agreement) between McLaughlin and the Tribes, a Senate Report proposed amendments to H.R. 13481, which was described as follows: "[i]t is believed that this bill fully protects the present and future interests of the Indians and will open up to beneficial use a considerable area that is now largely unproductive and closed to settlement." S. REP. NO. 58-2621, at 1 (1904) (EPA-WR-004665). The House and Senate thereafter proposed a new bill, H.R. 17994, to replace H.R. 13481 and to ratify and amend the 1904 Agreement. The new bill contained a number of changes to

the 1904 Agreement, including the addition of a new provision to address the lease rights of Mr. Asmus Boysen and the deletion of a provision contained in the 1904 Agreement for payment by the United States of $1.25 per acre for sections 16 and 36 of each township within the opened area for State school land purposes.

b. Boysen Provision

The 1905 Act includes a provision that was not in the 1904 Agreement and that addressed Congressional concerns about a lease interest held by Asmus Boysen. The legislative history of the Boysen provision includes statements of principal sponsors of the 1905 Act expressing their understanding that opening areas of the Reservation to non-Indian settlement under the Act's provisions would neither return the opened lands to the public domain, nor divest the Tribes of their interest in such lands as trust beneficiaries of the United States. After substantial debate in the House of Representatives and the Senate, Congress inserted the following provision into the 1905 Act, concerning the lease rights of Mr. Boysen:

> *And provided*, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, whi ch has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled; . . .

33 Stat. 1016, 1020.

In 1899, Mr. Boysen had entered into a ten-year lease with the Tribes, under which he was given the right to prospect for minerals throughout 178,000 acres on the Reservation, including in the area to be opened for settlement. After the prospecting period, Mr. Boysen was to file plans for extraction as well as maps of the location of his discoveries. The lease contained a clause stating "[i]n the event of the extinguishment, with the consent of the Indians, of the Indian title to the lands covered by this lease, then and thereupon this lease and all rights thereunder shall terminate." H.R. REP. NO. 58-3700, pt. 2, at 9 (1905) (EPA-WR-000345) (Minority Report).

The effect of the 1905 Act upon Mr. Boysen's lease right was debated by Congress when the Bill was under consideration by the House of Representatives in early 1905.[35] Several Congressmen, including Representative Mondell, a principal sponsor of the Bill, and Representative Marshall, who chaired the House Committee on Indian Affairs during its consideration of the Bill, supported the inclusion of the provision providing Boysen a preferential right to enter the opened area and select up to 640 acres of contiguous mineral or coal lands for purchase. As expressed in the Congressional Record, the provision was considered appropriate to compensate Boysen for the surrender and cancellation of his preexisting coal lease under the terms of the Bill. Such cancellation was deemed necessary to eliminate any potential cloud on the title of the opened area that might remain by virtue of Boysen's lease rights.

Those opposing inclusion of the preferential right for Boysen pointed, among other things, to the language in his coal lease providing for termination of the lease and all rights thereunder upon extinguishment, with consent of the Indians, of the Indian title to the relevant lands.[36] Noting the "cede, grant, and relinquish" language of the Mondell Bill, the minority opposition in the House Committee on Indian Affairs argued against inclusion of the Boysen preferential right provision because under the lease termination clause, Boysen's lease rights would terminate automatically when Indian title to the land was extinguished, which would, in their view, occur upon passage of the 1905 Act. H.R. REP. NO. 58-3700, pt. 2, at 3 (1905) (EPA-WR-000339). Consequently, the minority believed that passage of the 1905 Act would eliminate any potential cloud on the title to such area and avoid any need to separately cancel the lease, or to provide Boysen with any special compensatory rights, under the Bill.

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[35] 39 Cong. Rec. H1940-45 (1905) (EPA-WR-0010068-73); 39 Cong. Rec. H2726-30 (1905) (EPA-WR-0010074-78); *see also* H.R. REP. NO. 58-3700, pt. 2, at 2-3 (EPA-WR-000338-39) (Minority Report).

[36] *See, e.g.*, 39 Cong. Rec. H1943 (1905) (statement of Rep. Fitzgerald: "The lease itself provides that when the Indian title to this reservation is extinguished with the consent of the Indians all rights cease under this lease. By the passage of this bill the Indian title will be extinguished with the consent of the Indians.") (EPA-WR-0010071); 39 Cong. Rec. H2729 (1905) (statement of Rep. Stephens: "First, the whole matter was to terminate when the Indian title to this land should be extinguished. That will be extinguished by the passage of this bill. Consequently, his lease could not be extended beyond the passage of this bill, for, in my judgment, this would undoubtedly be the legal effect of its passage.") (EPA-WR-0010077).

The legislative history suggests that the Boysen provision was the principal point debated during House consideration of the Bill. The House Committee on Indian Affairs Chairman Marshall specifically explained that enactment of the Bill would not trigger termination of Boysen's lease, and there would thus remain a potential cloud on title to the opened area which should be addressed in a specific statutory provision. As Chairman Marshall explained:

> The gentleman from New York [Mr. Fitzgerald] says that Mr. Boysen's lease was canceled when the title to these lands passed from the Indians. True, there was a clause to the effect that when these lands were restored to the public domain this lease was canceled. *The difficulty is, however, that these lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians, and the clause which the gentleman speaks of does not apply,* and I think he knows it, as it was discussed in committee.

39 Cong. Rec. H1945 (1905) (statement of Rep. Marshall) (emphasis added) (EPA-WR-0010073).

The Senate also supported including the Boysen provision. Although acknowledging the existence of a dispute as to the present status of Mr. Boysen's lease, the Senate stated its preference to settle the matter – by providing the preferential land selection opportunity – "rather than cast a cloud over the title of the lands enumerated in said lease." S. REP. NO. 58-4263, at 2 (1905) (EPA-WR-0010049). These statements indicate a prevailing view within Congress 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.[37] The 2011 DOI Solicitor's

[37] As Commenters note, legislative history reflecting floor debates is generally best read as expressing views of the individual members of Congress making the cited statements. However, the 1905 Act's history recorded explicit interpretive statements of principal sponsors of the statute (as well as the principal legislators supporting the Boysen provision), including extensive explanation provided by the Chairman of the applicable House Committee on Indian Affairs. In fact, consideration of the Boysen provision appears to have dominated debate on the Bill within the House where the House Majority Committee Report included the Boysen provision notwithstanding the detailed objections of the Committee's Minority. In such circumstances, it is appropriate to look to the relevant prevailing statements as indicative of Congress' understanding of the purpose and effect of the statutory language. The records of debate narrowly focused on the Boysen provision reveal careful consideration at both the Committee and full House levels and clearly indicate that Congress did not view the 1905 Act as restoring the opened lands to the public domain.

Opinion also explicitly notes the House discussion of the Boysen provision as support for DOI's conclusion that the 1905 Act did not restore the opened lands to the public domain or diminish the Reservation.[38]

c. State School Lands

The legislative history also indicates Congress' understanding that the opened area would retain its Reservation character, in its treatment of the school lands provisions. The 1904 Agreement included a provision for the United States to purchase, for a sum of $1.25 per acre, sections 16 and 36, or an equivalent of two sections in each township of the ceded lands. 1904 Agreement, Article II. This provision was essentially identical to language initially included in H.R. 13481, which had provided for similar payment from the United States to the Tribes for sections 16 and 36 or equivalent lands and which withheld such sections from settlement, instead directing that they be disposed of for the benefit of the common schools of Wyoming. 38 Cong. Rec. H5246-47 (1904) (EPA-WR-0010056-57). The provision, in turn, parallels the Wyoming Enabling Act, which, similar to the enabling acts of other states, provides that sections 16 and 36 in every township of the State, or if those are sold or otherwise disposed of by Congress, then lands in lieu of those sections, are granted to the State for school purposes.[39] Under the 1904 Agreement and H.R. 13481 as initially proposed, the

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[38] *See also Wadsworth v. Boysen*, 148 F. 771 (8th Cir. 1906). In *Wadsworth*, the court reviewed the legislative history of the Boysen provision and described a Congressional purpose in passing the 1905 Act as, "to open up a part of the vast territory occupied by the Indians to settlement." *Id.* at 778. The court noted that Congress recognized Mr. Boysen's remaining "probable right" in the leased lands, and thus included the Boysen clause "to free the situation from possible litigation." *Id.* The court further stated, ". . . the debate in Congress, of which the court can take judicial notice, when the proviso in question was under consideration and adopted, clearly shows that it was predicated of the sense of that body, based upon the information presented to the committee having the measure in charge, that it was proper and just . . . he should be accorded the right to have the preferential selection of 640 acres anywhere in the ceded domain, for the reason that it was deemed expedient to remove as a cloud on the title to the conceded premises any assertion of his rights under the lease." *Id.* at 777. *Wadsworth* thus recognizes Congress' concern that, notwithstanding the lease termination provision in the Boysen lease, passage of the 1905 Act alone would not eliminate a potential cloud on title to the opened area, which further supports the view that the 1905 Act did not extinguish Tribal title or return the opened area to the public domain.

[39] "That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity

United States agreed to pay the Tribes for sections 16 and 36 (or an equivalent of two sections) in each township of the opened area for State school purposes, thus providing compensation to the Tribes for the grant of such lands to Wyoming per the State's Enabling Act.[40]

During debate in the House on H.R. 13481, Rep. Mondell proposed to delete all of the school lands provisions, noting that such provisions in the bill provided that the State would take lands "on the reservation"; whereas by striking the provisions, the State would be authorized under its Enabling Act to take lieu lands elsewhere, which would not involve payment from the United States.[41] Similarly, in the Report accompanying H.R. 17994 (which ultimately became the 1905 Act), the House Committee on Indian Affairs stated its intent to delete from the bill the 1904 Agreement's provision for payment by the United States for the school lands sections. Instead, the Committee expressed its preference that the Tribes should "receive the same rates from settlers for sections 16 and 36 as paid for other lands." H.R. REP. NO. 58-3700, pt. 1, at 7 (1905) (EPA-WR-004681). These statements in the legislative history and the explicit deletion of the school lands provisions (which do not appear in the 1905 Act) indicate Congress'

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lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior . . . ." Wyoming Enabling Act, 26 Stat. 222 § 4 (1890).

[40] As noted in the Tribes' application, it appears significant that these provisions were included in the 1904 Agreement and HR 13481 so close in time following the Supreme Court's decision in *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). In that case, the Court held that a cession of tribal lands of the Red Lake Indian Reservation in trust to the United States for sale and deposit of proceeds to the credit of the Indians did not convert the ceded lands to public lands, and thus defeated the State of Minnesota's right to take sections 16 and 36 for school purposes under the grant of its Enabling Act. *Id.* The inclusion of provisions in the 1904 Agreement and H.R. 13481 securing payment to the Tribes for the school sections may have been intended to extinguish the United States' trusteeship over these sections, thereby avoiding a similar outcome to *Hitchcock* and making the sections available to Wyoming under its Enabling Act. That Congress instead decided to delete these provisions evidences its intent to leave the trusteeship and Reservation status of the ceded lands undisturbed and, as Rep. Mondell observed, authorize the State to take lieu lands elsewhere.

[41] "I propose to offer an amendment striking out all the provisions with regard to school lands. That will leave the State with the right under her constitution to take lieu lands; but the Government does not pay for those lands...While the bill originally provided that the State should take lands on the reservation, the amendment which will be offered strikes out those provisions and makes no provision at all with regard to school lands, leaving the State authorized under the enabling act to take lieu lands." 38 Cong. Rec. H5247 (April 21, 1904) (statement of Rep. Modell) (EPA-WR-0010057).

understanding that the opened area would remain Reservation land and that rather than provide payment by the United States to the Tribes for purchase of sections 16 and 36 in each surveyed township, the State should instead take lieu lands elsewhere under its Enabling Act. Because such lieu lands would be taken other than from the Reservation, there would, as Rep. Mondell noted, be no need for the Government to pay the Tribes for such lands, and thus no need for the school lands provisions of the bill. 38 Cong. Rec. H5247 (April 21, 1904) (statement of Rep. Modell) (EPA-WR-0010057).

Congress' treatment of the school lands provisions stands in stark contrast to its disposition of such lands in connection with the opening of the Rosebud and Yankton Sioux Reservations. With regard to both of those Reservations, the Supreme Court found the presence of statutory provisions reserving sections 16 and 36 for state school lands to be indicative of Congressional intent to diminish the respective Reservations. *Rosebud*, 430 U.S. at 599-601; *Yankton*, 522 U.S. at 349-50. In particular, in *Rosebud*, the Court explained that the school lands provision – which provided for payment by the United States to the Tribe for the school sections – was intended to implement the State of South Dakota's Enabling Act, which granted sections 16 and 36 to the State. *Rosebud*, 430 U.S. at 599-601. Because the South Dakota Enabling Act's grant was only effective upon the extinguishment of any prior reservations of such lands that had been made for national purposes, the Court reasoned that the statute opening the Rosebud Reservation must necessarily have been intended to extinguish the prior reservation for Indian purposes, thereby making the school sections available to South Dakota under its Enabling Act. *Id.* By contrast, the Wind River 1905 Act includes no provision for purchase or setting aside of the State school sections; and, as described above, the legislative history demonstrates Congress' deliberate decision to delete such provisions. Like South Dakota, Wyoming has, in its Constitution, disclaimed any interest in Indian lands. Congress' decision not to include the school lands provisions in the 1905 Act, and instead to leave the State to select lieu lands elsewhere, thus stands in direct contrast to its approach to the two Sioux Reservations. Such distinct treatment demonstrates an understanding that the 1905 Act would not serve to implement the Wyoming Enabling Act's school lands provision because it did not extinguish the Reservation status of sections 16 and 36 (or any other part) of the opened area's townships.[42] Rather, because the Reservation status of those sections remained

[42] When asked whether the appropriations provisions in H.R. 13481 were intended to carry out the provisions of the Enabling Act admitting Wyoming to the Union, Rep. Mondell responded by explaining that the appropriations were only for surveys and reimbursable per capita payments,

intact, the State was left to select lieu lands elsewhere following surveying of the opened area.[43]

d. The 1905 Act Surrounding Circumstances Are Distinguishable From Those in the *Rosebud* Case.

At first glance the 1905 Act may appear similar to the 1904 Act primarily at issue in the *Rosebud* case in which the Supreme Court concluded that the boundaries of the Rosebud Reservation were diminished. However, as set forth herein as well as in the 2011 DOI Solicitor's Opinion, the Wind River 1905 Act and its surrounding circumstances are different in several important respects. Moreover, it is noteworthy that the Supreme Court has opined that statutes like the one primarily at issue in *Rosebud* fall between the extremes of legislation that

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and that he was proposing an amendment that would remove any appropriations to pay for the school land sections. 38 Cong. Rec. H5247 (1904) (statement of Rep. Modell) (EPA-WR-0010057).

[43] The dissenting opinion in the *Big Horn I* decision draws a different conclusion. *Big Horn I*, 753 P.2d at 131. In that opinion, the dissent argues that Congress' decision to delete the school lands provisions must be based on an understanding that because the 1905 Act would have the effect of disestablishing the ceded lands from the Reservation, the State would be entitled to claim sections 16 and 36 under its Enabling Act, with no need for payment by the United States for such sections, or for any lieu lands. *Id.* Thus, Congress deleted the provisions for such payment. *Id.* The dissent's argument appears to assume its key conclusion (diminishment of the Reservation) as fact, rather than considering the more plausible, and better supported, explanation of the legislative history described above. The dissent's attempt to distinguish the importance placed by the Supreme Court on Congress' inclusion of a school lands provision in *Rosebud Sioux* is problematic in that it appears to rely on an element of the respective legislative provisions – the requirement to purchase sections 16 and 36 – that is common to the school lands provisions of both the Rosebud statute and the 1904 Agreement. *Id.* It is also of note that the seeming result of the dissent's reasoning – *i.e.*, that Congress deleted as unnecessary any payment to the Tribes since the State was already entitled to the school lands under its Enabling Act – appears to run afoul of the Supreme Court's decision in *Hitchcock*. As part of the basis for its holding that school land sections in an opened area of the Red Lake Indian Reservation were not granted to the State of Minnesota under its Enabling Act, the Court reasoned that such a result would improperly alter the United States' agreement with the tribe that its ceded lands (without exception for lands that might subsequently be surveyed as sections 16 or 36 of a township) would be used for the purpose of creating a fund for the benefit of the Indians. *Hitchcock*, 185 U.S. 373. The Court was unwilling to accept such an alteration, especially where Minnesota's rights were preserved by its ability to select lieu lands elsewhere. *Id.* An argument that Congress deleted provisions for payment to the Tribes for school sections of the opened area on the Wind River Indian Reservation based on Wyoming's right to such sections under its Enabling Act would appear to result in precisely the same inappropriate effect on the 1904 Agreement that the Court rejected in *Hitchcock*.

clearly intended to diminish reservation boundaries and those that clearly intended not to diminish boundaries. *Solem*, 465 U.S. at 469 n.10. The surrounding circumstances of the Wind River 1905 Act do not alter the conclusion from the statutory analysis that Congress did not intend to diminish the Reservation boundaries.

In *Rosebud*, the Supreme Court held that the exterior boundaries of the Rosebud Reservation were diminished, relying heavily on a prior unratified 1901 agreement which the Court found to establish a chain of intent to diminish that carried over to a subsequent 1904 surplus land act.[44] In *Rosebud*, Indian Inspector McLaughlin had negotiated an agreement with the Rosebud Sioux Tribe for a cession of 416,000 acres of land in exchange for a fixed sum certain payment. During negotiations with the Tribe, McLaughlin explained that ratification "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." *Rosebud*, 430 U.S. at 591-92. The 1901 agreement was not ratified by Congress due to concerns about obtaining the money needed upfront for the land cession. *Id.* at 591-92 and n.10. "The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money . . . ." *Id.* at n.10 (citing lower court decision). The Supreme Court noted that all parties to the *Rosebud* case agreed that if ratified, the 1901 agreement would have changed the Reservation boundaries. *Id.* at 591-92. In 1903, Congress requested that McLaughlin return to the Tribe and seek the same agreement with one exception: rather than a fixed sum payment, the Tribe would receive payment as the lands were sold. *Id.* at 592-93.

In discussing this agreement with the Rosebud Sioux Tribe, McLaughlin explained, "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment. . . . You will still have as large a reservation as Pine Ridge after this is cut off." *Id.* at 593. Thus, McLaughlin clearly stated the agreement would affect the exterior boundaries, changing the size and shape of the Rosebud Reservation. In examining the legislative processes which resulted in the 1904 Act, the Court was convinced that the purpose of the 1901 Agreement, to change the size, shape and boundaries of the Reservation, was carried forth and enacted in 1904. *Id.* at 592. The Court stated, "[i]n examining congressional intent, there is no indication that Congress

[44] While there were three surplus land acts at issue in *Rosebud*, the Court's analysis focused primarily on the 1904 Act and then found "continuity of intent through the 1907 and 1910 Acts." *Rosebud*, 430 U.S. at 606.

intended to change anything other than the form of, and responsibility for, payment." *Id.* at 594.

As discussed in the 2011 DOI Solicitor's Opinion, the historical facts in *Rosebud* are distinguishable from those at Wind River. In the *Rosebud* circumstance, the only significant feature distinguishing the 1901 Agreement from the 1904 Act was the manner of payment. In contrast, the Wind River 1905 Act was different from the 1891 agreement in several important ways in addition to the change in the manner of payment. First, in *Rosebud*, the Supreme Court relied on the fact that operative language in the agreement and the surplus land Act was identical. *Id.* at 594, n.15. In contrast, the operative language in the 1905 Act is different from that of the unratified 1891 Agreement in a manner that indicates Congress did not intend to diminish the Reservation in 1905. The 1891 Agreement operative language provided that the Tribes would, "cede, convey, transfer, relinquish and surrender, forever and absolutely . . . all their right title and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto . . . ." H.R. DOC. NO. 52-70, at 29 (EPA-WR-000259). By contrast, the 1905 Act operative language 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." Congress omitted from the 1905 Act language contained in the 1891 Agreement that would "convey" or "surrender" the lands "forever and absolutely" and omitted the phrase "of every kind and character in and to the lands and the water rights appertaining thereunto." The fact that Congress retreated from the more definitive language in the 1891 Agreement when enacting the 1905 statute is an indication that Congress did not intend to diminish the lands from the Reservation in 1905.

Secondly, while the lands at issue were identical in the Rosebud agreement and statute, the land base was different in the Wind River 1891 Agreement and 1905 Act. The Wind River 1891 Agreement was not ratified, primarily because the United States was not satisfied with the land base and wanted additional lands to be included. H.R. DOC. NO. 52-70, at 7-8 (1892) (EPA-WR-000248-49); *see also* H.R. REP. NO. 58-2355 (1904) at 3 (EPA-WR-000319). In 1893, McLaughlin attempted once again to negotiate an agreement with the Tribes but was unsuccessful because they could not agree on the land base that would be opened to settlement. *See* H.R. DOC. NO. 53-51 (1894) (EPA-WR-000276-95). Thus, in 1891 and 1893, either the United States or the Tribes were not satisfied with the land base at issue and as a result, neither agreement culminated in ratification. The land base in the 1904 Agreement was different from *both* the

1891 unratified agreement and the 1893 failed attempt at reaching a new agreement. Where a key feature, such as the land base at issue, was a point of contention preventing enactment of the earlier agreements and in fact was different in the 1905 Act ratified fourteen years later, the intent surrounding the 1891 agreement is not logically attributable to the 1905 Act.

The third important distinction is that, as noted above, there was an intervening failed agreement in the Wind River circumstance. The *Rosebud* Court found the intent of the 1901 agreement to carry over two years later to the 1903 agreement because only the terms of payment changed. In contrast, at Wind River, two years after the 1891 unratified agreement there was a failed attempt to reach agreement on which lands to open to settlement. Thus, whatever chain of intent the Court found in *Rosebud* is distinguishable based on the intervening failed agreement on a significant issue that occurred during the thirteen years between the 1891 and 1904 Agreements at Wind River.

Fourth, the Rosebud surplus land act included language committing the government to purchase sections 16 and 36 of each township for purposes of conveying them to the State of South Dakota, and the Court cited such language as evidence of Reservation diminishment. As discussed above, Congress deleted a similar provision that was present in the Wind River 1904 Agreement when it enacted the Wind River 1905 surplus land act. This deletion of the State school lands provision is consistent with an understanding that the opened area would remain Reservation.

Finally, the manner of negotiations sets the Rosebud 1903 Agreement (that led to the Rosebud 1904 Act) apart from the Wind River 1904 Agreement (that led to the Wind River 1905 Act). When McLaughlin returned to the Rosebud Tribe to negotiate the 1903 Agreement, he explicitly referred back to the 1901 Agreement stating, "I am here 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 contrast, the historical record shows that McLaughlin did not refer to the 1891 Agreement when he negotiated with the Wind River Tribes in 1904. Furthermore, in the Rosebud circumstance, McLaughlin clearly expressed the United States' intent stating, "[y]ou will still have as large a reservation as Pine Ridge after this is cut off." *Id.* In contrast, when McLaughlin negotiated the Wind River 1904 agreement, he repeatedly explained that the agreement would open the surplus lands of the Reservation to settlement by non-Indians and never described it as "cutting off" any portion of the Reservation. *See* 1904 Minutes of Council Meeting (EPA-WR-000423). As the 2011 DOI Solicitor's

Opinion notes, had McLaughlin wanted the Tribes at Wind River to understand that the 1904 Agreement was similar to the 1891 Agreement or that the exterior boundaries of the Reservation were being "cut off," he would have used express words and descriptions as he did in the Rosebud negotiations.

In *Rosebud*, the Supreme Court relied heavy on a continuity of purpose to find Congressional intent to diminish the Reservation derived from an earlier unratified agreement. In contrast to the surrounding circumstances in *Rosebud*, where the only change from the 1901 Agreement to the 1904 statute was the manner of payment, the Wind River 1904 agreement included significant changes in the operative language; manner of payment; land base; school lands provision; and the manner of negotiations. Thus, unlike the circumstances in *Rosebud*, the 1891 unratified agreement at Wind River carries little weight with regard to Congressional intent in 1905. For purposes of examining surrounding circumstances to discern Congressional intent in enacting the March 3, 1905 Act, it is the April 21, 1904 Agreement and associated negotiations that are most relevant.

e. Conclusion

Overall, the circumstances surrounding the1905 Act, including the manner of negotiations and legislative history, do not support a finding of clear Congressional intent that the Act would permanently sever and alter the exterior boundaries of the Reservation. While there are isolated historical statements that could be construed as intent to diminish the Reservation, taken as a whole, the surrounding circumstances do not "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. In this instance, where both the 1905 Act's statutory language and its surrounding circumstances fail to provide substantial and compelling evidence of Congressional intent to diminish the Wind River Indian Reservation, as stated by the Supreme Court, "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 at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351 (1962)).

4. Events Subsequent to the 1905 Act

Following examination of the statutory language and surrounding circumstances, the Supreme Court has, to a lesser extent, looked to events that

occurred after the passage of a surplus land act to determine Congressional intent. The inquiry includes consideration of Congress's own treatment of the area and that of the U.S. DOI Bureau of Indian Affairs (BIA) and local judicial authorities. *Yankton*, 522 U.S. at 344; *Solem*, 465 U.S. at 471. The Court has also recognized, on a more "pragmatic" level, that who actually moved onto opened reservation lands is relevant to deciding whether a surplus land act diminished a reservation, noting that where "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character" diminishment may have occurred. *Solem*, 465 U.S. at 471.

This section examines Congressional and Executive branch treatment of the area opened by the 1905 Act subsequent to enactment. The first part focuses on activities in the opened area for the first 25 years. As the Supreme Court noted in *Solem*, subsequent Congressional and agency actions, "particularly in the years immediately following the opening, [have] some evidentiary value." *Id.* The next section addresses activities from the Restoration Era in the 1930's to the present day. Finally, the remaining sections discuss current activities in the opened area as well as judicial opinions and references.

a. 1905 Through the 1930's

i. The 1905 Act Area Was Available for Homesteading for Approximately Ten Years.

Homesteading under the 1905 Act was generally unsuccessful, resulting in continuous federal management of the vast majority of the opened lands for the benefit of the Tribes consistent with the treatment of the lands as Reservation. In fact, the United States only actively sold the opened lands for homesteading purposes for approximately ten years, from 1905 to 1915. The federal government began discouraging the sales of land in the opened area just eight years after passage of the 1905 Act. As noted in the 2011 DOI Solicitor's Opinion, as of 1909, only 113,743.68 acres or 7.91% of the 1,438,633.66 acres opened were actually sold. By 1913, DOI concluded that parcels in the opened area should not be sold "until it is thought best to do so." Letter from Commissioner C.J. Rhoades to E.O. Fuller (January 27, 1930) (EPA-WR-000407). In 1915, both the Office of Indian Affairs and DOI advised the General Land Office that all sales of land in the opened area be postponed indefinitely.[45] Government records

[45] "During 1915 . . . the Commissioner of the General Land Office proposed to sell the remaining undisposed of ceded land. However, on April 29, 1915, this office recommended that the proposed sale be postponed indefinitely, and under date of May 27, 1915 the Secretary of the

indicate that this recommendation was primarily based on the fact that DOI had been leasing the opened lands for grazing purposes and transferring the proceeds from the activities to Tribal accounts, which was generating significant revenue for the Tribes. "The action taken by this office in recommending an indefinite postponement of the sale of the ceded land was based upon reports furnished by the then Superintendent, showing among other things that the tribe was obtaining an annual rental from grazing leases amounting to over $33,000, and that the lands were probably valuable for oil." Letter from Burke at DOI to Reuben Haas of the Shoshone Agency (March 29, 1929) (EPA-WR-001478).

By 1915, DOI had indefinitely postponed sales in the opened area. *Id.* At the time DOI postponed sales, only 128,986.58 acres or 8.97% of the 1,438,633.66 acres of opened land had been sold to non-Indians. 2011 DOI Solicitor's Opinion at 15. After DOI recommended postponing further sales in 1915, an additional 67,373 additional acres or 4.6% of the opened area was sold, primarily for use by the School District and the Riverton Airport. Ultimately, approximately 196,360 acres or 13.6% of the 1,438,633.66 acres opened to settlement were disposed of to non-Indians. *Id.*, citing, Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol.* On Indian Affairs 1185, 1191 n.7 (U.S.D.I. 1979).

The historical record regarding homesteading is significant for two reasons. First, it is apparent that non-Indian settlement in the opened area was not successful and with a relatively small percentage of lands actually settled in the first decade, it was not a circumstance where "non-Indian settlers flooded into the opened portion" of the Reservation or where "the area has long since lost its Indian character." *Solem*, 465 U.S. at 471-72. In fact, DOI continued to issue allotments to Tribal members in the opened area, a strong indication that the government continued to view the area as Reservation land. Specifically, subsequent to 1905, DOI allotted 35,550 acres of land in the opened area to individual Tribal members.[46] April 17, 2012 Letter to EPA Region 8 from Acting

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Interior notified the Commissioner of the General Land Office that he had approved our recommendation postponing the sale." Letter from Burke at DOI to Reuben Haas of the Shoshone Agency, March 29, 1929 (EPA-WR-001478).

[46] A June 12, 1914 Letter from Assistant Commissioner of Indian Affairs E.B. Meritt to Representative Lobeck, indicates by 1914, a total of 50,000 acres allotted to Tribal members on the ceded portion of the Reservation: 16,000 acres allotted to the Arapaho and 34,000 acres allotted to the Shoshone (EPA-WR-001480-85). Another publication references that 33,064.74 acres were allotted in the ceded area. *Survey of Conditions of the Indians in the United States, Hearing before a Subcommittee of the Senate Committee on Indian Affairs*, 72nd Cong,, pt. 27, at 14467 (1932) (EPA-WR-

Regional Director, BIA Rocky Mountain Regional Office (EPA-WR- 009827). The Wind River Indian Reservation settlement history stands in marked contrast to cases where the "demographics signify a diminished reservation" such as with the Yankton Sioux Reservation which was opened to settlement in 1895 and "[b]y the turn of the century, 90 percent of the unallotted tracts had been settled" by non-Indians. *Yankton*, 522 U.S. at 339. Second, the federal department and agency overseeing Indian affairs continued to assert jurisdiction over the opened area of the Wind River Indian Reservation, consistent with its status as Reservation land. This sets the Wind River ceded portion in further contrast to the Yankton Sioux situation where the Court found that, following the opening of the Yankton Reservation, the state government assumed virtually exclusive jurisdiction over the area. *Id.* at 357. The Secretary of the Interior's decision to close the Wind River 1905 Act area to further homesteading because the Tribes were benefitting from federal leasing activities indicated that the Tribes' interests in the opened area remained the federal government's primary consideration.

ii. The Federal Government Continuously Managed the Land for the Benefit of the Tribes.

As noted above, after passage of the 1905 Act, the United States continuously managed the entire opened area for the benefit of the Tribes, consistent with its status as Reservation land. The United States acted as trustee for the Tribes not only with respect to the proceeds from sales of individual parcels, but with respect to management of the opened area in general.

Subsequent to the passage of the 1905 Act, the opened lands remained under the administration of the Bureau of Indian Affairs and were not placed under the jurisdiction of the General Land Office. For example, the Office of Indian Affairs issued grazing leases within the opened area under regulations applicable to reservation lands and applied the proceeds from the leases for the Tribes' benefit.[47] BIA regulations only allowed the agency to issue leases on lands that

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010156). The Tribes provide additional data showing the specific acres patented in fee or to Indians each year from 1906 to 1919. Tribes' Response to Comments at 33-38, including data compiled from the U.S. Bureau of Land Management and other sources.

[47] Letter from Arapahoe Business Council to Commissioner of Indian Affairs, June 16, 1914 ("About two years ago the Government sent our present Superintendent here . . . soon after he came here, [he] issued grazing permits for nearly all of the ceded part of the reservation") (EPA-WR-000402-04).

had not been extinguished from their associated reservations.[48] In addition, during the *Big Horn I* litigation, the United States presented the testimony of Mr. Ivan Penman of the General Accounting Office who tracked all of the receipts recorded by the federal government from the lands covered by the 1905 Act and demonstrated that all of these receipts – not merely the receipts from the sale of land – were turned over to the Indians and were not kept in the general funds of the United States Treasury. Brief of appellee the United States at 98, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).[49] Also, as noted above, DOI continued to approve allotments to Tribal members in the opened area after 1905.

Congress reinforced DOI's treatment of the opened area as Reservation by passing legislation allocating funds designated for Indian uses, to irrigation and reclamation activities in the 1905 Act opened area. For example, in a 1916 Indian Appropriations Act, Congress allocated $5,000 to the Bureau of Indian Affairs to pay for "irrigation of all the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." 39 Stat. 123, 158

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[48] A 1912 DOI opinion letter entitled *Regulations Governing Use of Vacant Ceded Indian Lands* further explains the federal understanding regarding Reservation lands that had been opened to disposition, but were still held for the benefit the Indians and were thus not public lands. Letter from Samuel Adams, First Assistant Secretary of the Interior to the Commissioner of Indian Affairs and General Land Office, July 25, 1912. (EPA-WR-001637-38). The DOI opinion notes that Reservation lands that have been opened to settlement fall into two categories: "(1) [t]hose which the United States has purchased from the Indians and paid for, the Indian claim thereto being thus completely extinguished; and (2) those which the United States agrees to dispose of for the benefit of the Indians, without, however, becoming bound to purchase the lands, whereby the claims of the Indians remain unextinguished until the lands are finally sold." *Id.* The Wind River 1905 Act opened lands fall into the second category based on the fact that United States did not pay a sum certain for them and was not bound to purchase or sell the lands.

[49] The Tribes' application describes several events immediately following passage of the 1905 Act that reinforce federal agency treatment of the lands as Indian country. For example, the Tribes describe that in April of 1905, DOI approved a railroad company's application for a right-of-way through the Wind River Canyon located in the opened portion of the Reservation and that DOI's approval was issued pursuant to an 1899 Act authorizing the Secretary to issue rights-of-way over lands in Indian country. 25 U.S.C. §§ 312 et seq. They also describe that in 1909, DOI issued a subsequent right-of-way in the opened area under the same 1899 Act, including through the opened area to the Town of Hudson. Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, at 60, 63 (EPA-WR-001630). In addition, the Tribes' application describes that in 1906, DOI allotted lands to Mr. Edmo LeClair in the opened area, (Transcript of sworn testimony of Edmo LeClair before F.C. Campbell, District Superintendent, District No. 4, U.S. Indian Service, at 3 (Oct. 5, 1926) (EPA-WR-001748)) and that the LeClairs irrigated this land until about 1914 when the BIA took over operation of the ditch. *Id.* at 3-4 (EPA-WR-001748-49).

(1916). This language indicates both that Congress deemed it appropriate to fund the irrigation activities in the opened area through an Indian appropriations mechanism and that Congress viewed the ceded lands as being part "of said Reservation."[50] In subsequent years, Congress made numerous similar allocations of Indian funds for irrigation activities in the entire Reservation, including in the opened area.[51] Similarly, in 1920, Congress allocated nine months of payments from Indian appropriations for reclamation activities in the opened area, describing the area as "within and in the vicinity of the ceded portion of the Wind River . . . reservation." 43 U.S.C. § 597 (1920). Reclamation project orders implementing this legislation withdrew from public entry "the following described lands within the Shoshone Indian Reservation, Wyoming, excepting any title the tract to which has passed out of the United States." Letter from A.P. Davis to Secretary (Jan. 2, 1920) approved by John W. Hallowell, Assistant to the Secretary (Jan. 3, 1920) (EPA-WR-004003).

In 1916 Congress granted access to the oil and gas reserves underlying the opened area only through leases issued by DOI for the benefit of the Tribes, rather than through the public land mineral patent system. 39 Stat. 519 (1916). Congress passed this legislation specifically governing mineral reserves in the opened area of the Wind River Indian Reservation because it viewed leasing under the general leasing laws to be "manifestly unfair to the Indians and not in keeping with the agreement made with them." *See* Brief of appellee the United States at 99, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).

The 1916 statute states:

> That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation . . .

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[50] In response to this legislation, the Secretary of the Interior transmitted a report to the Committee on Indian Affairs prepared by the Reclamation Service that references the "'ceded land' portion of the reservation." Letter from Secretary Transmitting Report of the Reclamation Service on the Wind River, Wyoming, Project, (Dec. 18, 1916) reprinted in H.R. DOC. NO. 64-1767 (1916) (EPA-WR-000527).

[51] 39 Stat. 123, 158 (1916); 39 Stat. 969, 993 (1917); 42 Stat. 1174, 1201 (1923); 43 Stat. 390, 404 (1924); 43 Stat. 1141, 1154 (1925); 44 Stat, 453, 467 (1926); 45 Stat. 200, 214 (1928); 45 Stat. 1562, 1576 (1929); 46 Stat. 279, 293 (1930); 46 Stat. 1115, 1129 (1931); 47 Stat. 91, 103 (1932); 47 Stat. 820, 832 (1933); 48 Stat. 362, 371 (1934); 49 Stat. 176, 189 (1935); 49 Stat. 1757, 1771 (1936); 50 Stat. 564, 579 (1937); 52 Stat. 291, 307 (1938); 53 Stat. 685, 702 (1939); 59 Stat. 318, 331 (1945).

> and the proceeds or royalties arising from any such leases shall be first applied to the extinguishment of any indebtedness of the Shoshone Indian Tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the [1905 Act].

39 Stat. 519 (1916).

iii. References to the 1905 Act Area in Congressional and Executive Branch Documents.

In addition to considering how Congress and the Executive Branches treated the 1905 Act area as discussed above, this section provides some additional examples of how the government referred to the opened area in documents and maps. It should be noted at the outset that the Supreme Court has stated with regard to documents and maps referencing reservations, ". . . the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment have limited interpretive value." *Yankton*, 522 U.S. at 355. As noted in the 2011 DOI Solicitor's Opinion, while references to the opened area are inconsistent, overall they reflect a view that after 1905, the Wind River Indian Reservation was comprised of two parts: an unaffected or diminished exclusive Tribal area and the opened or ceded area.

In 1906, Congress passed a joint resolution extending the time for opening to public entry the "ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming." 34 Stat. 825 (1906). In the accompanying DOI report to Congress, the opened lands are described in the same manner, as a portion of the Reservation being opened to settlement. H.R. DOC. NO. 59-601 (1906) (EPA-WR-000378-79). Subsequent legislation in 1907, allowing six months from the date of filing upon the lands to establish residence, referred to the opened lands as "formerly embraced in the Wind River or Shoshone Indian Reservation." 34 Stat. 849 (1907). Subsequently, numerous Congressional Acts and House and Senate Reports referred to the opened area as a ceded part or portion of the Reservation. For instance, a 1909 statute enacted to extend the time for miners making mineral claims "within the Shoshone and Wind River Reservation" referred to the claims in the opened area as being "within the ceded portion of the Shoshone Reservation." 35 Stat. 650-51 (1909). *See also* S. REP. NO. 60-980 (1909) (EPA-WR-000383-85). The following year, a Senate Report referred to "desert lands formerly in the Shoshone or Wind River Indian Reservation." S. REP. NO. 61-303 (1910) (EPA-WR-000386). However, this Report also referred to

the 1905 Act lands as being "within the limits of the ceded portion of the Shoshone or Wind River Indian Reservation." *Id.* Other Senate reports from 1912 to 1915 simply referred to "the ceded portion of the Wind River Reservation." H.R. REP. NO. 62-400 (1912) (EPA-WR-000387-89); S. REP. NO. 62-543 (1912) (EPA-WR-000390-91); S. REP. NO. 64-13 (1915) (EPA-WR-000392). Similarly, legislation addressing patents refers to the opened area as the "ceded portion of the reservation," and the associated House Report refers to the legislation as dealing with the situation of entrymen "within the Wind River Reservation." 37 Stat. 91 (1912); H.R. REP. NO. 62-400 (1912) (EPA-WR-000387-89). In 1916, with regard to oil and gas leasing in the opened area, Rep. Clark of Wyoming stated, "[t]his is not land on an Indian reservation," yet in the same testimony stated, "[i]t is still Indian land and the Indians are entitled to it." 53 Cong.Rec. S12,159 (Aug. 5, 1916) (statement of Rep. Clark) (EPA-WR-000394). As discussed above, a 1916 Indian Appropriations statute described activities on the diminished and ceded portions of the Reservation and provided funding for "irrigation of all of the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." 39 Stat. 123, 158 (1916). In 1920, Congress appropriated funds for a reclamation project in the opened area, describing the lands as within and in the vicinity of the "ceded portion of the Wind River or Shoshone Reservation." 43 U.S.C. § 597.

There are also numerous Executive Branch references to the opened area of the Reservation in documents and maps subsequent to passage of the 1905 Act. The 1905 Act provided for the United States to conduct surveys, including in the opened area. 33 Stat. 1016, 1021-22. The surveys for these plats were completed by December of 1905 and approved by the General Land Office in 1906. As discussed in the 2011 DOI Solicitor's Opinion, the surveys were conducted using the Wind River Meridian, not a Principal Meridian as was used for public lands. This is in contrast, for example, to the maps prepared by the United States subsequent to the 1897 Thermopolis Purchase Act, where the lands at issue were depicted as existing within the 6th Principal Meridian (for public lands), rather than the Wind River Meridian (for Indian Reservation lands).[52] Moreover, the resulting plats identified the northern boundary of the opened area as the "North Boundary Shoshone Indian Reservation" and the eastern boundary of the opened area as the "East Boundary Shoshone Indian Reservation."[53] Thus, the official

[52] Plat of Township 42 North, Range 94 West (approved Feb. 16, 1900) (EPA-WR-007819); Plat of Township 42 North, Range 96 West – Township Exteriors (approved Apr. 28, 1900) (EPA-WR-007820).

[53] Plat of Fractional Township No. 6 North Range No. 6 East of the Wind River Meridian,

United States government surveys conducted immediately after and pursuant to the 1905 Act confirm that while the statute opened a portion of the Reservation to settlement, the Act did not change or diminish the boundaries of the Reservation.

Executive branch references to the opened lands echo the majority of the Congressional references to the lands as "part of" or a "portion of" the Reservation. The June 2, 1906 Presidential Proclamation announcing the 1905 Act reiterated the cession language from the Act without implying any particular interpretation of what that language meant. 34 Stat., Part 3, 3208 (1906). However, the government map that accompanied the Proclamation was labeled: "Map of that part of the Wind River or Shoshone Indian Reservation, Wyoming, to be opened for settlement," describing the opened area as part of the Reservation. A letter from E.B. Meritt, Assistant Commissioner of Indian Agency in response to questions from Representative C.O. Loebeck contains similar language. June 12, 1914 Letter from E.B. Meritt to Rep. C.O. Loebeck (EPA-WR-001480-85). The Representative referred to the opened area as "that portion of the reservation lying north of the Big Wind River and which is known as the ceded portion." *Id.* at 4. A BIA grazing permit for 68,360 acres issued January 12, 1914 granted rights to graze on "vacant ceded lands, Shoshone Indian Reservation." Lease No. 405, Jan. 12, 1914 (EPA-WR-001492). In 1916, a DOI report to the House described the opened lands as "formerly included" in the Reservation and the Reservation as "[o]n the south or southwest side of the Wind River." H.R. DOC. NO. 64-1767, at 9 (1916) (EPA-WR-000518). However, the same Report also described the continued interest "retained by the Indians in the 'ceded-land' portion of the reservation." (EPA-WR-000527). Also in 1916, the Indian Service distinguished the "diminished reservation" from "the ceded part of the former reservation." H.R. DOC. NO. 64-1478 (1916) (EPA-WR-000497-510).

In its comments on the Tribes' TAS application, the State of Wyoming provided two maps from 1907 and 1912 produced by the General Land Office depicting the Wind River Reservation to be the unopened portion of the Reservation only. State Comments, Exhibits 5 & 6. The Tribes, in response, provided a map from 1905 produced by the General Land Office depicting an undiminished Reservation.[54] All three of the maps are labeled as compilation

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Wyoming (approved April 10, 1906) (eastern boundary); Plat of Fractional Township No. 7 North Range No. 6 East of the Wind River Meridian (approved April 6, 1906) (EPA-WR-001731-32).

[54] While the map is labeled 1905, the map key delineates "townships possibly containing coal" Dec. 19, 1906 (EPA-WR-007818).

maps, meaning they are comprised of information from the General Land Office and other sources. A map accompanying the 1914 Annual Report of the Commissioner of Indian Affairs to the Secretary labeled the unopened area as "Reservation" and the area affected by the 1905 Act as maintaining the 1868 exterior boundary and labeled "Opened," indicating that the exterior boundary remained intact. (EPA-WR-009757-58).

When United States Indian Inspector McLaughlin met once again with the Northern Arapaho and Eastern Shoshone Tribes in 1922, he explained the Thermopolis Agreement as "entirely distinct and separate" from the 1905 Act. In particular, McLaughlin pointed out that in the 1905 Act the "government simply acted as trustee for disposal" of the land north of the Big Wind River. Transcription of Council Minutes, August 14, 1922 at 5 (EPA-WR-001681). McLaughlin recognized that "[i]t is ceded land under the control of the government, entirely," and further affirmed that the Indians "still have an equitable right because the agreement has not been fulfilled in full." As discussed in the 2011 DOI Solicitor's Opinion, in 1923, the Commissioner of Indian Affairs informed the Superintendent that the public land mineral leasing Act of February 25, 1920, 41 Stat. 437 (1920) "gave the General Land Office no jurisdiction over the leasing of coal mining lands on the ceded portion of [the] Shoshone Reservation; but the former act, that approved March 3, 1905, provided for the sale of these lands under the provisions of the . . . mineral land laws." *Id.* He concluded that the land office could dispose of the land and the proceeds of the sales would go to the credit of the Indians. *Id.* A map accompanying the 1923 Annual Report of the Commissioner of Indian Affairs labeled the area south of the Big Wind River and west of the Popo Agie as "Reservation" and the area north and east labeled "Former Indian Reservation." On June 15, 1929, however, in response to a request from homesteaders to manage the area for their benefit, the Department reaffirmed its commitment to managing the 1905 Act area for the benefit of the Tribes. 2011 DOI Solicitor's Opinion at 16, citing June 15, 1929 Memo to the Secretary (EPA-WR-001487). During Congressional hearings in 1932, DOI described the Reservation as consisting of an area approximately 65 miles by 55 miles, encompassing approximately 2,238,644 acres (roughly the area of a non-diminished Reservation), and comprised of a "ceded portion" and a "diminished portion." *Survey of Conditions of the Indians in the United States, Hearing before a Senate Subcommittee of the Committee on Indian Affairs*, 72nd Cong., pt. 27 at 14428-67 (1932) (EPA-WR-010117-56). As the 2011 DOI Solicitor's Opinion notes, "[n]one of these references or maps, either by themselves or collectively, supports a conclusion that the 1905 Act altered the Reservation boundaries." 2011 DOI Solicitor's Opinion at 15.

In conclusion, in the years immediately following the passage of the 1905 Act, the vast majority of the opened area was never settled by homesteaders and many of the parcels were allotted to Tribal members. It quickly became apparent to the United States that the Tribes were benefitting more from DOI leasing the land for grazing and oil and gas development, so the federal government ceased pursuing homesteading in the opened area after 1915. The United States continuously managed the 1905 Act opened area under Indian grazing and mineral leasing laws for the benefit of the Tribes and the proceeds were treated as Indian funds. Congress consistently allocated funding for irrigation and reclamation activities in the opened area pursuant to Indian Appropriations statutes. As noted by the 2011 DOI Solicitor's Opinion, while Congressional and Executive Branch references to the opened area were inconsistent, the prevailing overall view indicated an understanding that the Reservation was comprised of both an exclusively Tribal or diminished area, and an opened or ceded area.[55]

b. The Restoration Era to the Present

In 1934, Congress enacted the Indian Reorganization Act (IRA) reflecting a shift in United States' Indian policies away from assimilation and towards fostering tribal self-determination. 48 Stat. 984 (1934). The IRA, among other provisions, generally authorized the Secretary of the Interior to "restore to tribal ownership" the remaining "surplus" lands of any Indian reservation that had been opened for sale or homesteading, subject to existing valid rights or claims. *Id.* § 3. It also gave each participating tribe the right to organize for its "common welfare," as well as the right to adopt a constitution by majority vote of the adult

[55] The Tribes' TAS application and Response to Comments documents provide information regarding Tribal and State views immediately following passage of the 1905 Act. Tribes' CAA TAS Application at 66-67 and Tribes' Response to Comments at 30-33. The Tribes' submittal includes 1908 letters from the Shoshone and Arapahoe Tribes to the Commissioner of Indian Affairs stating the Tribes had been told by Inspector McLaughlin that the "unsold lands would belong to" the Tribes until they were "all sold," (Letter, Shoshoni Delegation to Commissioner of Indian Affairs (Mar. 10, 1908) (EPA-WR-008018); and that the "Government should take care of the ceded part of our reservation" (Letter, Arapaho Delegation to Commissioner of Indian Affairs (Mar. 9, 1908) at 4 (EPA-WR-008014). The Tribes also provided examples of State views immediately following the 1905 Act that the Tribes assert indicates an understanding by the State that the opened area remained Reservation. Such information includes a Wyoming State Immigration book describing Riverton as "another new town located within the Indian Reservation" and various additional newspaper publications and statements from State officials. Tribes' Statement of Legal Counsel at 22-23. Commenters provide information about State and local activities in the 1905 Act area in more recent years, as discussed further.

members of the tribe and approval by the Secretary of the Interior. *Id.* § 16. Title to any lands or rights acquired under this Act was taken in the name of the United States in trust for the Indian tribe for which the land was acquired. *Id.* § 5. The IRA would not apply to any reservation wherein a majority of the adult Indians would vote against its application. *Id.* § 18.

Commissioner of Indian Affairs John Collier issued an opinion discussing the IRA and its provision granting the Secretary the ability to stop the further withdrawal of Indian lands on reservations that were opened for settlement if the tribe voted to accept the IRA. 54 I.D. 559 (Nov. 2, 1934) (Collier Memo) (EPA-WR-009605-10). In describing United States' federal policies towards Indians and their land interests, Collier distinguished between the pre-1890 policy of full extinguishment of Indian title of certain lands such that they were "separated from a reservation" and "no longer looked upon as being a part of that reservation," versus the post-1890 policy of "opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians." *Id.* at 560. He further stated that "undisposed of lands in this class remain the property of the Indians until disposal as provided by law." *Id.* Collier then concluded that the Wind River was one such Reservation (along with numerous others) and withdrew those lands opened for entry within the Reservation from further disposal of any kind, under the authority granted in the IRA.[56] *Id.* at 562-63. On June 15, 1935, the Eastern Shoshone and the Northern Arapaho Tribes were among seventy-seven tribes that voted to exclude themselves from the Act. 2011 DOI Solicitor's Opinion at 17, citing Theodore H. Haas, Ten Years of Tribal Government Under I.R.A., United States Indian Service, 1947. On October 31, 1935, Secretary Ickes rescinded Collier's memo on further withdrawals with respect to eight reservations, including Wind River, as those tribes had voted to exclude themselves from the Act. *Id.*

Because the Northern Arapaho and Eastern Shoshone Tribes voted to exclude themselves from the IRA, Congress enacted separate legislation to accomplish the land restoration goals of the IRA with respect to the Wind River Indian Reservation. In 1939, Congress directed the Secretary of the Interior to "restore to tribal ownership" significant acreage within the opened portion of the Wind

[56] While the Collier Memo lists reservations that were subsequently held by the Supreme Court to be both diminished and undiminished, the Memo indicates the view of the Commissioner in 1934 that lands on certain reservations (including Wind River) should be restored to tribal ownership because they were distinct from lands that were separated from a reservation.

River Indian Reservation. 53 Stat. 1128 (1939) ("1939 Act"). Specifically, Section 5 of the Restoration Act states:

> That the Secretary of the Interior is hereby directed to restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further, to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land use district are acquired by the Government for Indian use pursuant to the provisions of this Act. All such restorations shall be subject to valid existing rights and claims: *Provided,* That no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation.

Id. at 1129-30

In testimony before Congress, the Secretary explained the purpose of the bill:

> The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. *One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white owned lands within the reservation*. The Secretary of the Interior is authorized to restore to the Indians the ceded lands in any land-use district as soon as the white owners have been properly protected, as provided in section 5. Undisposed of ceded lands within land-use districts, if not under lease or permit to non-Indians will be restored at once, but the ceded lands now used by permittees may be restored progressively only as non-Indian-owned lands are acquired by the United States for the benefit and use of the Indians.

Letter, H. Ickes to E. Thomas (June 27, 1939), reprinted in S. REP. NO. 76-746, at 4 (1939) (emphasis added) (EPA-WR-000630).

Additional statements in the legislative history of the 1939 Act indicate an understanding that the ceded lands to be restored to Tribal ownership remained a portion of the Reservation. For example, Senator O'Mahoney of Wyoming stated:

> The Shoshone Reservation – at least a portion of it – has been used for a number of years for grazing by certain white settlers in the vicinity of the reservation. *When a portion of this reservation, known as the ceded portion, was yielded to the Federal Government by the Indians and opened to settlement, settlers came on and had the understanding that they would be permitted to graze their livestock on the reservation.* Permits have been issued during a long period of years to the settlers. The livestock business of the Indian, however, has been fostered by the Indian Office and is being expanded.

Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess., at 6 (1939) (emphasis added) (EPA-WR-0010227).

The legal effect of the 1939 Act vis-à-vis the 1905 Act reflects Congressional understanding and intent that the Reservation boundaries remained intact throughout the years. In 1905, the Tribes ceded legal title to the opened area to the United States as trustee for the Tribes. Under the Act, consideration would only be paid to the Tribes if and when subsequent sales were made to non-Indians. The United States was under no obligation to sell the land and as such, the Tribes maintained equitable title in the opened lands as trust beneficiaries of the United States. As discussed earlier in the document, Congress did not indicate clear intent in the 1905 Act, to alter the exterior boundaries of the Reservation nor was it necessary to do so to achieve the United States' goal of opening the Reservation to homesteading. The 1939 Act returned to the Tribes, the legal title of the undisposed-of lands within the intact exterior boundaries of the Reservation, specifically directing DOI to "restore" the lands "to tribal ownership." The geographic scope of the 1939 Act indicates continued recognition by Congress of the unaltered exterior boundaries of the Reservation. *See Mattz*, 412 U.S. at 505 ("[a]nd Congress has recognized the reservation's continued existence . . . by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act"). The 1939 Act further provided that all restored lands shall be taken "in the name of the United States in trust for the Shoshone and Arapaho Tribes." 53 Stat. 1128, 1130.

Commenters assert that the 1939 Restoration Act supports their view that the 1905 Act diminished the Reservation. The crux of the argument is that if the 1905 Act had not removed the opened lands from the Reservation, thereby diminishing the boundaries, then the 1939 Act would not have had to "restore" the lands to Reservation status. Specifically, the State of Wyoming notes, "land cannot be 'added to and made part of the existing' Reservation if it is already part

of the Reservation." State Comments, at 30-31. This argument misses a key point: the 1939 Act did not speak in terms of adding the lands to the Reservation but as cited above, restored the lands to "tribal ownership." Neither the 1905 Act nor the 1939 Act explicitly refer to any change, reduction or addition to the Reservation boundaries. In fact, the 1939 Act repeatedly refers to the Reservation as consisting of two parts, directing DOI to establish land use districts "within the diminished and ceded portions of the Wind River Indian Reservation," 53 Stat. 1128, 1129, restricting certain land acquisition rights from "lands on the ceded or opened portion of the reservation," *Id.* and stating that "no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation" *Id.* at 1129-30.

The language upon which commenters rely, that lands are "added to and made a part of the existing Wind River Reservation" is not found in the 1939 Act, but is located in numerous Restoration Orders issued by the DOI for Wind River Reservation lands, including lands on the eastern boundary of the Reservation, in particular land underlying what is now the Boysen Reservoir.[57] One illustrative example is a 1944 DOI order providing:

> Now, Therefore, by 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 restoration to tribal ownership of the lands described above, which are classified as undisposed of, ceded lands of the Wind River Reservation, Wyoming, and which total 625,298.82 acres more or less, 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 a part of the existing Wind River Reservation, subject to any valid existing rights.

9 Fed. Reg. 9749, 9754 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812 (March 14, 1945).

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[57] *See*, 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (Nov. 17, 1942); 7 Fed. Reg. 11,100 (Dec. 30, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812 (March 14, 1945); 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 22, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); 39 Fed. Reg. 27,561 (July 30, 1974), as amended by 40 Fed. Reg. 42,553 (Sept. 15, 1975); 58 Fed. Reg. 32,856 (June 14, 1993).

This restoration language was standard, generic language used by DOI for reservations nationwide during the Restoration Era, generally from 1936-1945 and is thus not indicative of any specific assessment by DOI of the legal effect of the 1905 Act.[58] In fact, this identical language was used in at least two restoration orders for the Cheyenne River Sioux Reservation at which the Supreme Court has held that the restored land had never been considered as extinguished from the Reservation. 6 Fed. Reg. 3300 (June 12,1941); 17 Fed. Reg. 1065 (Feb. 2, 1952), *see also, Solem*, 465 U.S. 463. Similarly, DOI utilized the same language in a restoration order on the Southern Ute Reservation, at which Congress has affirmed that the boundaries remain intact. 2 Fed. Reg. 1348 (July 31, 1937); Act of May 21, 1984, 118 Stat. 1354 (referencing 25 U.S.C. § 668). Since the DOI "added to and made a part of the existing" reservation language was used ubiquitously in restoration orders, it cannot be relied upon to indicate by implication, Congressional intent to have diminished the Wind River Indian Reservation in 1905.[59]

The lands restored to Tribal ownership pursuant to the 1939 Act are Reservation lands not by virtue of having been removed from the Reservation in 1905 and then added back to the Reservation in 1939, but because: (1) they were never removed from Reservation status in 1905 and the effect of the 1939 Act was

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[58] *See*; 1 Fed. Reg. 666 (June 26, 1936) (Flathead Reservation); 1 Fed. Reg. 667 (June 26,1936) (Pine Ridge Reservation); 1 Fed. Reg. 1503 (Oct. 1, 1936) (Standing Rock Reservation); 2 Fed. Reg. 595 (March 27, 1937) (Colorado River Indian Reservation); 2 Fed. Reg. 1348 (July 31, 1937) (Southern Ute Indian Reservation); 3 Fed. Reg. 5 (Jan. 4, 1938) (Flathead Indian Reservation); 3 Fed. Reg. 343 (Feb. 12, 1938) (Rosebud Reservation); 4 Fed. Reg. 104 (Jan. 10, 1939) (Blackfeet Reservation); 4 Fed. Reg. 522 (Feb. 7, 1939) (Pyramid Lake Reservation); 5 Fed. Reg. 1265 (April 2, 1940) (Umatilla Reservation); 6 Fed. Reg. 3300 (June 12, 1941) (Cheyenne River Reservation); 9 Fed. Reg. 14,019 (Nov. 4, 1944) (Fort McDermitt Reservation); 10 Fed. Reg. 2448 (Mar. 2, 1945) (Red Lake Reservation); 12 Fed. Reg. 849 (Feb. 6, 1947) (Kiowa, Comanche and Apache Lands, Oklahoma); 13 Fed. Reg. 7718 (Dec. 7, 1948) (Stockbridge Indian Reservation); 17 Fed. Reg. 1065 (Feb. 2, 1952) (Cheyenne River Reservation); 21 Fed. Reg. 5015 (June 29, 1956) (Uintah and Ouray Indian Reservation).

[59] The 2011 DOI Solicitor's Opinion explains "nothing in the restoration orders requires a conclusion that to be restored to reservation status, the lands must have been severed from the Reservation in 1905. Any such interpretation is an over-simplification of the purpose of the Restoration Act . . . The Restoration Act simply verified that the unsold lands were now removed from their opened status and reverted to full tribal ownership (versus an equitable interest held by the Tribes). Through the Restoration Act, Congress affirmatively and clearly rejected the notion that the Reservation was diminished for all time." 2011 DOI Solicitor's Opinion at 18.

to return legal title to the Tribes; and (2) regardless of whether they are located within a formal reservation, lands held in trust by the United States for Indian tribes are reservation lands and Indian country pursuant to 18 U.S.C. § 1151.[60]

As further discussed in the 2011 DOI Solicitor's Opinion, subsequent to the 1939 Restoration Act, historical records reinforce the fact that the Reservation boundaries remained intact. In 1940, Interior Solicitor Nathan Margold was asked to issue an opinion on whether the Secretary had authority to sign a proposed agreement that fixed the boundary lines of certain parcels of land north of and abutting the Wind River water body and located within the 1905 Act area, for purposes of oil leases. Solicitor Margold advised that the Secretary was without authority to fix the boundary lines of the allotted, tribal, and ceded parcels of land for all time as it would change the boundaries of the Wind River Indian Reservation. He further noted that the land covered by the proposed agreement "represents undisposed of ceded land" and is limited by the 1905 Act and by the 1916 Act, neither of which permitted disposition of the lands as proposed in the agreement. 2011 DOI Solicitor's Opinion at 18, citing Solicitor's Opinion, M-30923 (December 13, 1940), 1 *Op. Sol. on Indian Affairs* 1011, 1016 (U.S.D.I. 1979). To resolve this problem, Congress passed an Act granting the Secretary the authority, upon certain conditions, to fix the boundaries of certain parcels of allotted, tribal and ceded lands north of the Wind River in certain specific locations. 55 Stat. 207 (1941). No action, however, was ever taken by the Department pursuant to the Congressional authorization. The 1940 opinion addressed parcels of land within the 1905 Act opened area and not the actual exterior boundaries of the Reservation. 2011 DOI Solicitor's Opinion at 18.

Commenters reference a 1943 Opinion issued by then DOI Solicitor Gardner entitled, "Jurisdiction - Hunting and Fishing on the Wind River Reservation" (February 12, 1943) (EPA-WR-009759-69) (1943 Opinion). Specifically, as Commenters note, the 1943 Opinion says that after the Reservation area as

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[60] *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-96 (D.C. Cir. 2000), *cert. denied sub nom, Michigan v. EPA*, 532 U.S. 970 (2001), *citing, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), *United States v. John*, 437 U.S. 634, 649 (1978), *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000), *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986), *United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985); *see also, Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993), *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000). The State of Wyoming does not assert that restored lands, including those held in trust for the Tribes, should be excluded from "Indian country." State Comments at 53.

established in 1868 "had been diminished by the act of March 3, 1905," the Wyoming Game and Fish Commission appears to have assumed control over big game on the ceded lands. *Id.* at 1186 (EPA-WR-009761). However, the 1943 Opinion also includes statements indicating a view that there are two portions of the Reservation, describing the Tribes' regulations as governing fishing on Bull Lake and Ray Lake "which are both within the diminished portion of the reservation" as well as on Ocean Lake "which is on the ceded portion of the reservation"; and describing "the lands comprising what have come to be known as the 'diminished' and 'ceded' portions of the Shoshone or Wind River Reservation." *Id.* at 1188 (EPA-WR-009763). The 1943 Opinion also discussed the trust impressed upon the ceded lands.[61] As noted in the 2011 DOI Solicitor's Opinion, the 1943 Opinion dealt only with regulatory jurisdictional issues in the opened area and "expressly did not address the exterior boundaries of the Reservation. *Id.* at 1193, n.8 (EPA-WR-009768) (expressly declining to opine on the boundaries of the Reservation)." 2011 DOI Solicitor's Opinion at 18-19. The 2011 DOI Solicitor's Opinion concludes, "thus, neither the 1940 Margold opinion nor the 1943 Solicitor opinion relating to hunting and fishing rights have any significant relevance to the question of the Reservation's exterior boundaries." *Id.* It is the 2011 DOI Solicitor's Opinion that fully analyzes the exterior boundaries of the Wind River Indian Reservation and it concludes that neither the 1905 Act nor any other statute diminished and altered the exterior boundaries of the Reservation.

In 1940, the United States purchased land in trust for the Tribes within Hot Springs County located adjacent to the northern boundary established by the 1868 Treaty. 54 Stat. 642 (1940). The statute describes the area as "located outside the ceded portion of the Wind River Reservation but adjacent thereto, and owned by holders of grazing permits covering undisposed of surplus or ceded lands within said portion of the reservation." *Id.* This language indicates that over the decades since passage of the 1905 Act, Congress consistently viewed the opened or ceded lands as a portion of the Reservation. The lands addressed in this 1940 statute are part of the Wind River Indian Reservation.

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[61] The 1943 opinion found that the Tribes retained certain property rights in the lands as the beneficial owners of the lands and that a trust was impressed upon the lands to protect those rights. *Id.* at 1188-89 (EPA-WR-009763-64). It also recognized that absent Congressional authorization, the State could not use its regulatory authority merely "as a means of obtaining revenue from the ceded lands." *Id.* at 1191 (EPA-WR-009766).

In 1952, Congress passed legislation authorizing the United States to acquire, for reasonable consideration, the property and rights of the Tribes needed for construction, operation, and maintenance of the Boysen Unit of the Missouri River Basin project. 66 Stat. 780 (1952) (the 1952 Act); *see also* S. REP. NO. 82-1980 (1952) (EPA-WR-000663-90) (explaining that the purpose of the legislation was "to acquire by the United States approximately 25,880 acres of land which are subject to certain rights of the Shoshone and Arapaho Indian Tribes of the Wind River Indian Reservation . . ."). [62] The 1952 Act required all conveyances and relinquishments authorized under its terms to be in accord with a Memorandum of Understanding (MOU) between the Bureau of Reclamation (BOR) and the Bureau of Indian Affairs (BIA, acting on behalf of the Tribes). [63] Pursuant to the MOU, the Tribes agreed to convey only the surface rights to 25,500 acres located along a portion of the eastern boundary of the Reservation to the BOR for construction and operation of the Boysen Unit. S. REP. NO. 82-1980, at 2, 50 (EPA-WR-000664, 000688). The Tribes retained all of their oil, gas, and mineral rights to such lands. *Id.* [64] In addition, the MOU provided that where the Tribes conveyed their surface interests, they would retain certain rights of occupancy, access and/or grazing on the shoreline and lands surrounding the reservoir. [65]

As the 2011 DOI Solicitor's Opinion concludes, the purpose of the 1952 Act, to facilitate the construction of a dam and reservoir on the Reservation, is consistent

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[62] A board of appraisers appointed to consider an appropriate price recommended $458,000 as a fair price for the Indian lands and rights to be acquired for the Boysen Dam and Reservoir. S. REP. NO. 82-1980, at 2-3 (EPA-WR-000664).

[63] The MOU was approved by the Secretary of the Interior on December 29, 1951 and amended with his approval on May 1, 1952. The Senate Report accompanying the Act includes the MOU and lists the tribal and the allotted lands to be acquired for the dam and for the reservoir. S. REP. NO. 82-1980, at 10-54 (EPA-WR-000668-90).

[64] The Tribes agreed to convey complete title (without mineral reservation) to a small portion (366.75 acres) of the area for the actual site of the Boysen Dam. S. REP. NO. 82-1980, at 2 (EPA-WR-000664).

[65] S. REP. NO. 82-1980, at 3, 6, 7, 9, 50, 52 (EPA-WR-000664, 000666-67, 000688-89). Section 4(b) of the MOU identifies the tracts of land (generally lands on and surrounding the shore of the reservoir) where the Tribes retained an exclusive right of occupancy so long as the tracts are not inundated by reservoir waters and the abutting lands remain "subject to the occupancy rights" of the Tribes. *Id.* at 50. Section 4(c) describes the lands where the Tribes retained nonexclusive rights of access and grazing when any such tract is not inundated by reservoir waters, so long as the lands abutting the tract remain subject to Indian occupancy rights. *Id.* at 52.

with the Tribes' continued use and occupancy of its Reservation. 2011 DOI Solicitor's Opinion at 20. Furthermore, enactment of the 1952 Act demonstrates that Congress recognized that the Tribes had a surface interest in the covered area, as well as a mineral estate and other interests in the land. *Id.* at 21. The legislative history also reveals Congress' recognition of the continuing Tribal rights in the area. S. REP. NO. 82-1980 at 6 (EPA-WR-000666) (attaching DOI comments on the relevant bill acknowledging Tribal occupancy rights, beneficial rights and rights in acquired lands). The inclusion of continuing mineral and surface occupancy and access rights in the project area provides additional evidence that Congress understood that the Tribes would continue to inhabit this portion of their Reservation and benefit from the use of the land surrounding the reservoir. As the 2011 DOI Solicitor's Opinion recognized, approximately 47 years after Congress enacted the 1905 Act, the terms of the 1952 Act confirm that Congress recognized the Tribes' interests within the Reservation; otherwise there would have been no need to address these particular interests or establish an MOU between BOR and BIA. 2011 DOI Solicitor's Opinion at 21.

In reviewing the subsequent treatment of the opened area, EPA has also considered Congress' provision of compensation to the Tribes for certain uses of ceded, but unsold, lands and the inclusion of the surface estate of such lands in the Riverton Reclamation Project. 67 Stat. 592 (1953). Congress had authorized construction of the Riverton Reclamation Project in the opened area of the Reservation in 1920. Approximately 332,000 acres had been reserved for reclamation purposes by the Act of June 17, 1902, 32 Stat. 388. S. REP. NO. 83-644, at 7 (1953) (EPA-WR- 000697). Commenters refer to the 1953 Act as evidence of Congress' understanding that the 1905 Act had diminished the Reservation. In particular, the State Comments note that the 1953 Act included payment to the Tribes of compensation for their interests in the reclamation area. State Comments at 23-24. In quoting the statute, the State then emphasizes language relating such compensation to "the *cession* to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016)." *Id.* (quoting the 1953 Act; emphasis supplied in the State's comments). Congress' reference in this context to the 1905 Act, however, does not reveal any separate understanding of the earlier statute's effect on the Reservation boundaries. Instead, this language appears to relate to compensating the Tribes (and thus extinguishing any potential claim for damages) for otherwise unauthorized prior uses of the area opened by the 1905 Act. Furthermore, it is undisputed that the 1905 Act included a cession by the Tribes of legal title in order to allow transfer of fee title to potential settlers. However, as discussed above, such transfer of legal title does not equate to diminishment of the Reservation boundaries. It is also notable, that by its title,

the 1953 Act refers to the project as being located within the "ceded portion of the Wind River Indian Reservation," thus appearing to recognize the continued Reservation status of the 1905 Act opened area. 67 Stat. 592. Similar references are also found in the legislative history. *See* S. REP. NO. 83-644, at 7-8 (EPA-WR-000697-98; H.R. REP. NO. 83-269, at 1-2 (EPA-WR-000691-92).

The 1953 Act and related legislation from 1958, 72 Stat. 935 (1958), are also informative in their recognition of the continuing Tribal interest in the mineral estate of the reclamation area. Prior to passage of the 1953 Act, the DOI Solicitor acknowledged that the 1905 Act established a trustee relationship and that the Tribes retained a beneficial ownership interest (including to minerals) in the opened area. *Ownership Of Minerals On Ceded Portion Of Wind River Reservation*, Solicitor's Opinion M-36172 (June 18, 1953) (EPA-WR-002105-07). Under section 5 of the 1953 Act, the Tribes were afforded ninety percent of the gross receipts derived from mineral leasing of lands covered by the statute. Congress subsequently declared in 1958 that all right, title, and interest in minerals in the 1953 Act area are to be held by the United States in trust for the Tribes. 72 Stat. 935 (1958).[66]

c. Current Information Regarding Activities in the 1905 Act Area

As part of the "subsequent events" analysis, the Supreme Court has noted that where "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character" such land and population statistics support a finding of reservation diminishment. *Yankton*, 522 U.S. at 356 (quoting *Solem*, 465 U.S. at 471). "This final consideration is the least compelling for a simple reason: [e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.* (citing *Solem*, 465 U.S. at 468-69). As discussed above, homesteading on the Wind River Indian Reservation was largely unsuccessful and as noted in 1943, only 196,360 acres of the 1,438,633 acres (13.6%) opened by the 1905 Act were disposed of to non-Indians.

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[66] EPA notes that by its title, the 1958 statute refers to minerals "on the Wind River Indian Reservation" again expressing recognition that the reclamation project, which is located within the opened area, remains within the Reservation. The legislative history of the 1958 statute includes similar references. See S. REP. NO. 85-1746, at 1-2 (1958) (EPA-WR-0010234-35); S. REP. NO. 85-2453, at 1, 3 (1958) (EPA-WR-004765-66).

Currently, approximately 1,073,766.47 acres of the 1,438,633.66 acres opened to settlement by the 1905 Act are held by the United States in trust for the Tribal government or individual Tribal members. April 17, 2012 and May 31, 2012 Letters to EPA Region 8 from Acting Regional Director, BIA Rocky Mountain Regional Office (EPA-WR-009827 and 009838A).[67] *See also* Tribal map depicting Tribal surface ownership (EPA-WR-007817). The Tribes also own a significant amount of the mineral estate in the opened area, including underlying areas owned by non-Indians. *See* Tribal map depicting the Tribes' current mineral ownership (EPA-WR-007816). These statistics are consistent with cases where courts have found current land ownership statistics to support non-diminishment findings, such as *Mattz*, 412 U.S. at 505 ("[a]nd Congress has recognized the reservation's continued existence . . . by restoring to tribal ownership certain vacant and undisposed-of ceded lands . . .") and *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1419 (10th Cir. 1990) (noting 55% of the land surface is presently either in Navajo fee ownership or held in trust for the Tribe or individual members); and in marked contrast to other cases where the Supreme Court has found land ownership statistics to support diminishment, such as *Yankton* (fewer than 10% of the original reservation lands remained 'in Indian hands' and 'non-Indians constitute over two-thirds of the population' within the original reservation) and *Rosebud*, (over 90% non-Indian in both population and land statistics). The fact that such a significant amount of the 1905 Act opened lands is owned by the Tribal government or Tribal members supports a view that Congress never intended the opened area to be severed from Reservation status.

While there is a concentration of non-Indian fee land in and around the City of Riverton, the City constitutes a relatively small portion of the 1905 Act area. Specifically, the City of Riverton currently encompasses 6,310.40 of the 1,438,633.66 acres opened to settlement under the 1905 Act.[68] U.S. Census Bureau, 2010 State and County Quick Facts.[69] Focusing only on the land ownership or

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[67] The United States currently holds 1,065,236.91 acres in trust for the Northern Arapaho and Eastern Shoshone Tribes and 8,529.56 acres of allotted lands in trust for individual members, a total of 1,073,766.47 acres. (EPA-WR-009827; 009838A).

[68] Riverton was founded in 1906 and patented in 1907 on 160 acres of land. City of Riverton Comments at 2, 8.

[69] Commenters describe the non-Indian population of Riverton as 92% (State Comments at 26) and 90.4% (City of Riverton Comments at 9). According to the 2010 U.S. Census Bureau, American Indians and Alaska Native persons make up 10.4% of the population of Riverton, which is a significant increase from their representation within the entire State which is 2.4%.

demographics of Riverton or other select areas has little relevance to Congressional intent with respect to whether the entire 1905 Act area remained part of the Reservation. With regard to the 1905 Act opened area in its entirety, approximately 1,073.766.47 acres of the 1,438,633.66 acres opened to settlement by the 1905 Act are currently held by the United States in trust for the Tribes or Tribal members. April 17, 2012 and May 31, 2012 Letters to EPA Region 8 from Acting Regional Director, BIA Rocky Mountain Regional Office (EPA-WR-009827, 009838A). As noted above, the overwhelming tribal trust character of the lands opened by the 1905 Act supports a determination that Congress did not intend in the 1905 Act to diminish or remove the area from Reservation status.[70]

Generally speaking, in recent years, the Northern Arapaho and Eastern Shoshone Tribes and the State of Wyoming have asserted jurisdiction in the 1905 Act opened area. *See generally* Tribes' application and Response to Comments and all Comments received. The Tribes describe their Economic Development Plan of 1963 specifically delineating the Reservation boundaries, BIA's inclusion

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U.S. Census Bureau, 2010 State and County Quick Facts. (EPA-WR-009952).

[70] The jurisdictional status of Riverton has long been in dispute. Immediately following passage of the 1905 Act, an official State publication included a statement that Riverton was "another new town located within the Indian Reservation," State of Wyoming, Book of Reliable Information Published by Authority of the Ninth Legislature (1907) and likewise, an early newspaper account described Riverton as within the Reservation. See, e.g., Riverton Republican (Dec. 28, 1907). The Department of the Interior's Assistant Commissioner described Riverton as part of the Reservation in 1913 and during congressional hearings in 1932, DOI described the Reservation as encompassing approximately 2,238,644 acres in an area approximately 65 miles by 55 miles, which would include the City of Riverton. A Wyoming state district court, in *State v. Moss* held in the late 1960's that Riverton is Indian country. *Moss* involved a murder committed by an Indian within the City of Riverton. That ruling was overturned by the Wyoming Supreme Court in 1970. *State v. Moss*, 471 P.2d. 333 (Wyo. 1970). The United States filed an amicus brief in *Moss* in support of the State's position. In 1972, Rep. Teno Roncalio introduced a bill in the U.S. Congress to authorize federal funds for the construction of an Indian Art and Cultural Center in Riverton. The bill stated that Riverton is "located within the Wind River Indian Reservation." Moreover, the position of the United States in the *Big Horn* adjudication, including before the Wyoming Supreme Court, is instructive. Not only did the U.S. argue that the 1905 Act did not diminish the Reservation (including Riverton), it disagreed with the State's reliance upon *State v. Moss* and agreed with the Special Master's specific finding that the Wyoming Supreme Court had wrongly decided the issue. Finally, a federal district court in 2000, in assessing the legality of a vehicle search by Bureau of Indian Affairs police, found that land to the north of the Wind River near Riverton was within the boundaries of the Reservation. *See United States v. Jenkins*, 2001 WL 694476 at *6 n.1 (10th Cir. 2001). The 10th Circuit, however, affirmed the validity of the search on other grounds without deciding the merits of the boundary issue. *Id.* at *6.

of the opened area as part of its road system in the 1960's, the exercise of Tribal authority over wildlife management and various legislative, executive and judicial references. Commenters describe State permitting of oil and gas operations under the Wyoming Environmental Quality Act; operation and management of numerous facilities within the opened area; exercise of jurisdiction over incorporated municipalities and an unincorporated community; wildlife management; the City of Riverton's law enforcement and municipal services; and various state criminal judicial decisions and concerns about civil regulatory authority. In addition, the seats of the Tribal governments are not located in the opened area of the Reservation.

EPA has issued numerous federal environmental permits or has otherwise regulated facilities on the Reservation, including in the 1905 Act opened area, particularly on lands held by the United States in trust for the Tribes. (EPA-WR-009841-009936). We also note that EPA approved the Tribes' TAS application for Clean Water Act funding in 1989 and pursuant to that decision, has continuously provided grant funding to the Tribes for water quality monitoring and other related activities throughout the Reservation, including within the 1905 Act area. The State of Wyoming's comments describe permits issued by the Wyoming Department of Environmental Quality (DEQ) in the 1905 Act area.[71] However, with regard to federal environmental statutes administered by EPA (*e.g.*, Clean Air Act, Clean Water Act, Safe Drinking Water Act), states are generally not approved by EPA to implement regulatory programs in Indian country as defined at 18 U.S.C. § 1151, unless a state expressly applies for, and EPA explicitly approves, its authority to do so.[72] EPA has not approved the State of Wyoming's authority to regulate in Indian country.[73]

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[71] The State asserts that the Wyoming DEQ has issued hundreds of permits for minor sources of air pollution in the opened area and indicates concern that if the area is determined by EPA to be Reservation, the facilities would be unregulated and there would be a risk of possible impacts to the health and welfare of citizens in or near the area. The State's concern is premised on the fact that at the time the comments were made, EPA did not have a final rule in place to issue federal Clean Air Act permits to certain minor sources in Indian country. However, on July 1, 2011, EPA promulgated a final rule addressing such sources. Final Rule, Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748 (July 1, 2011).

[72] "Indian country" is defined by statute and includes as one of three categories:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . .

5. Judicial Decisions and References to the Opened Area

a. *Big Horn I* case

In *Big Horn I*, the Wyoming Supreme Court held that Congress intended to reserve water rights for the Wind River Indian Reservation by the 1868 Treaty. *Big Horn I*, 753 P.2d 76 (Wyo. 1988). The Special Master heard arguments by the State and others that the 1868 Treaty priority date should not apply to any water rights on lands ceded under the 1905 Act. The United States argued before the Special Master in the adjudication that the Reservation had not been diminished by the 1905 Act. The Special Master held an extensive hearing on the matter and determined that the water rights reserved by the 1868 Treaty had not been abrogated by the 1904 Agreement, as codified with amendment by the 1905 Act, and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands in the opened area that were never sold to non-Indians pursuant to the 1904 Agreement. Before the Wyoming Supreme Court in 1986, the United States again argued that the Reservation boundaries had not been diminished, citing modern diminishment case law. *See also* Brief of the United States in Opposition to Writ of Certiorari at 4, *Wyoming v. United States*, 488 U.S. 1040 (1989)(Wyo. Nos. 88-309, 88-492, 88-553). The Special Master's Report stated:

> The major controversy with regard to this element of the adjudication centers around the Second McLaughlin Agreement, which is more commonly referred to as the 1905 Act. . . . The State of Wyoming contends that the language and the transaction created a disestablishment of certain lands from the body of the 1868 Reservation in such a manner as to preclude the granting of an 1868

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18 U.S.C. § 1151(a).

The Supreme Court has consistently held that under 18 U.S.C. § 1151(a), all lands within the exterior boundaries of an Indian reservation are Indian country, regardless of the ownership of the lands. *Seymour*, 368 U.S. at 358-59 ("[t]he State urges that we interpret the words 'notwithstanding the issuance of any patent' to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest, nor can we find, any adequate justification for such an interpretation"), *citing U.S. v. Celestine*, 215 U.S. at 285, ("when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress"). *See also*, 40 C.F.R. § 49.9(g).

[73] In at least two instances, EPA Region 8 sent letters to the Wyoming DEQ reinforcing this position specifically with regard to Wyoming CAA permitting actions in the 1905 Act area. (EPA- WR- 009876; 009922).

> priority date for water on those lands which were ceded under the terms of the Agreement [i.e. the 1905 Act]. On the other hand, the United States and the Tribes assert that I must look at the Agreement in its entirety and the circumstances surrounding the transaction in order to make a proper determination of the legal consequences of the conveyance. The U.S. and the Tribes, in that context, argue the Agreement simply provided a type of 'power of attorney' whereunder the United States accepted the ceded lands and held those lands in trust for the Indians for resale to other person, and that the United States maintained a continuing obligation to the Indians with regard to that land. Having given this issue much research and thought, it is my conclusion that the arguments of the United States and the Tribes find significantly greater support in the law than those asserted by the State of Wyoming.

Big Horn I, Special Master's Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation (December 15, 1982) at 35 (EPA-WR-000774).

The state district court accepted most of the recommendations of the Special Master. The Wyoming Supreme Court affirmed most of the rulings of the district court, but found the lower court had erred with respect to the reacquired lands and ruled that "the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership" and the court "agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes." Brief for the United States in Opposition to Writ of Certiorari, October Term, 1988 at 5. The Wyoming Supreme Court stated:

> What we have said above disposes of the contention that even if the treaty did reserve water for the Wind River Indian Reservation in 1868, the right to water was abrogated by the 1890 Act of Admission and/or the 1905 Act. If the actions are not sufficient evidence to show there never was any intent to reserve water, they are not sufficient to make the even stronger showing that such an established treaty right has

> been abrogated. The district court did not err in finding a reserved water right for the Wind River Indian Reservation.

Big Horn I, 753 P.2d at 93-94.

The United States Supreme Court denied the petition for certiorari with respect to these priority dates.

The Tribes assert that the Reservation boundary issue was litigated and resolved in the *Big Horn I* case and that the State of Wyoming is thus precluded under res judicata principles, from arguing that the 1905 Act diminished the Reservation boundaries. The State of Wyoming counters that the subject matter of the *Big Horn I* case was limited to water rights and "while it is true that the special master in *Big Horn I* opined that the reservation had not been diminished, that opinion was not central to the case." State Comments at 30. EPA has analyzed the 1905 Act pursuant to the Supreme Court's three-part test as described herein and has determined that the Act did not alter and diminish the Wind River Indian Reservation boundaries. Thus, EPA need not reach the issue of whether the Reservation boundary issue was litigated and resolved in the *Big Horn I* case. EPA also notes that res judicata and other estoppel arguments are judicial doctrines that are most appropriately addressed in judicial rather than administrative proceedings.

b. *Yellowbear* case

EPA has also considered the Tenth Circuit's and federal district court's review of the habeas corpus petition filed by Andrew John Yellowbear, which raised issues relating to an assessment by the Wyoming Supreme Court of the effect of the 1905 Act on the Reservation boundary. *Yellowbear v. Wyoming Attorney General*, 636 F.Supp.2d 1254 (D. Wyo. 2009), *aff'd*, 380 Fed.Appx. 740 (10th Cir. 2010), *cert. denied, Yellowbear v. Salzburg*, 131 S. Ct. 1488 (2011). Mr. Yellowbear – an enrolled member of the Northern Arapaho Tribe – was convicted in Wyoming state court of several criminal offenses including murder. *Id.* at 1257. At various points in the criminal proceedings, Mr. Yellowbear challenged the Wyoming state courts' jurisdiction arguing that the offense, which occurred in the City of Riverton in the Reservation's opened area, was committed in Indian country, and was thus subject to the exclusive jurisdiction of the federal government. *Id.* at 1257-58. The state courts, including the Wyoming Supreme Court, rejected Mr. Yellowbear's jurisdictional defense, finding that the location

of the criminal acts had been diminished from the Reservation by the 1905 Act.[74] *Id.*; *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008). Following conclusion of the state court proceedings, Mr. Yellowbear continued to press his jurisdictional argument in a habeas petition to federal district court under 28 U.S.C. § 2254. *Yellowbear v. Wyoming Attorney General*, 636 F.Supp.2d at 1258.

In considering Mr. Yellowbear's petition, the federal district court repeatedly stressed that its review under the federal habeas statute was limited in nature. *Id.* at 1258-61, 1267, 1271. The court noted that the petition presented significant and difficult questions of law and sovereignty, but found that its reviewing authority was collateral in nature, and that the applicable standard was highly deferential to the state court's decision. *Id.* at 1259, 1261, 1266-67. The district court declined to engage in de novo review of the Reservation boundary issue or conduct an evidentiary hearing. *Id.* at 1258. Instead, the court limited its review to the narrow statutory question of whether the Wyoming Supreme Court had unreasonably applied clearly established federal law. *Id.* at 1259-61, 1266-67. As the court noted, this is a highly deferential standard that requires denial of a habeas petition even where the state court's decision might be incorrect or even clearly erroneous, or where the federal court, if reviewing the issue in the first instance, might reach a different conclusion. *Id.* Under this deferential standard of review, the district court found that the Wyoming Supreme Court's decision on the jurisdictional issue was not unreasonable. *Id.* at 1266-67. The court clearly stated, however, that it was precluded from determining – independent of the Wyoming Supreme Court's decision – whether or not the 1905 Act diminished the exterior boundaries of the Reservation. *Id.* at 1271-72.

On appeal to the Tenth Circuit, Mr. Yellowbear apparently pressed a different rationale, arguing that the federal courts must undertake de novo review of the jurisdictional claim because state courts may not properly rule on the extent of federal jurisdiction. *Yellowbear v. Wyoming Attorney General*, 380 Fed.Appx. at 742. The Tenth Circuit rejected this argument, finding that Mr. Yellowbear had presented no persuasive authority questioning the Wyoming state courts' concurrent jurisdiction to decide whether a federal statute divests them of criminal jurisdiction and, in any event, had not presented to the Tenth Circuit any argument calling into question the correctness of that decision. *Id.* at 743. As

[74] Mr. Yellowbear had also sought relief in the Shoshone and Arapaho Tribal Court, which, in 2006, found that Wyoming was without jurisdiction over Indians in the City of Riverton. Notwithstanding this decision, the state court criminal case against Mr. Yellowbear proceeded. *Id.* at 1258.

to the merits of the diminishment question, therefore, the Tenth Circuit concluded only that the arguments presented to the Tenth Circuit by Mr. Yellowbear did not show the Wyoming Supreme Court's decision to be in error, leaving open whether a more comprehensive record and analysis might show that the 1905 Act did not diminish the Reservation.[75] EPA provides such a record and analysis here.

EPA has reviewed the federal court proceedings on Mr. Yellowbear's habeas petition and believes that the court decisions are collateral to the question of the effect of the 1905 Act and, given the highly deferential standard of review, are not probative of how a federal court would address the Reservation boundary upon de novo review of a fully developed administrative record. In addition, although not binding on the federal government, EPA has also considered the Wyoming Supreme Court's decision rejecting Mr. Yellowbear's jurisdictional claims, to determine its persuasive value. Although the state court recited the 1905 Act in its entirety and cited relevant U.S. Supreme Court precedent in describing the analytical framework for reservation diminishment questions, *Yellowbear v. Wyoming Attorney General*, 174 P.3d at 1274-82, it is not apparent from the opinion that the court considered all of the relevant factors or that a fully developed record was available either on the history of the 1905 Act or the subsequent treatment of the opened area. The Wyoming Supreme Court's decision includes no citation to any record material on the boundary question. *Id.* at 1282-84.[76]

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[75] See also *Dewey v. Broadhead*, No. 11-CV-387-J (D. Wyo. April 30, 2012) (following *Yellowbear* without separate analysis or additional record regarding the Reservation boundary).

[76] The court in *Yellowbear* cites to its prior precedent in two other criminal proceedings: *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960) and *State v. Moss*, 471 P.2d 333 (Wyo. 1970). *Yellowbear*, 174 P.3d at 1283. As the DOI Solicitor's Opinion notes, *Blackburn* (which involved the 1953 Act area, and hence concerns a separate issue) and *Moss* were decided prior to the U.S. Supreme Court's development of the current framework for analyzing reservation diminishment questions. 2011 DOI Solicitor's Opinion at 22 n.63. Thus, neither decision considers the relevant factors to assess reservation boundaries under the applicable test; nor does either indicate the existence of a fully developed record on the boundary issue. *Blackburn* in particular appears to have been reviewed on an extremely limited record, with the court seeming to be persuaded in substantial part by a single map indicating a diminished reservation. *Blackburn*, 357 P.2d at 176-79. Both cases also appear to rely on a misperception that diminishment hinged on extinguishment of tribal title to lands in the area opened for settlement. *Id.*; *Moss*, 471 P.2d at 338-39.

In particular, the Wyoming Supreme Court's decision provides limited analysis of the 1905 Act's language, focusing almost exclusively on the cession language in Article I and separate provisions for certain per capita and other payments, which the court appears to mistakenly analogize to a commitment by the United States to provide the Tribes a sum certain payment in exchange for the ceded area. *Id.* at 1282. The Court does not consider other language (discussed elsewhere in this analysis) suggesting an absence of intent to diminish; nor does the court compare the 1905 Act to federal government actions specific to the history of this Reservation such as the 1874 Lander Purchase Act, 1897 Thermopolis Purchase Act or the unratified 1891 Agreement. The court also declined to engage in any review of the events and circumstances surrounding passage of the 1905 Act, instead simply citing to the dissenting opinion in *Big Horn I* as a sufficient consideration of this element of the boundary analysis. *Id.* at 1282-83. The *Big Horn I* dissent, however, is not controlling precedent and appears, in relevant respects, to be at odds with the majority decision in that case.[77] In addition, as described elsewhere, the dissent's Reservation boundary analysis is problematic in several respects, none of which is addressed in *Yellowbear*. The Wyoming Supreme Court's consideration in *Yellowbear* of events subsequent to passage of the 1905 Act is equally abbreviated and focuses narrowly on demographics in the City of Riverton (rather than the entire opened area), and selective citations to language referring to the unceded area as the diminished reservation, without consideration of counter examples. *Id.* at 1283-84. In light of the limited analysis and narrow focus presented in *Yellowbear*, EPA does not view the Wyoming Supreme Court's decision as persuasive.[78]

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[77] EPA notes that the Wyoming Supreme Court's assertion that the majority and dissent in *Big Horn I* agreed that the 1905 Act had diminished the Reservation is stated without explanation and appears unsupported by any diminishment analysis in the *Big Horn I* majority decision. *Id.* at 1283.

[78] Commenters requested that EPA defer its decision regarding the exterior boundaries of the Reservation until the federal courts settle the matter in the *Yellowbear* case and a tax case (*Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264 (D. Wyo. 2009), *aff'd in part, vac. in part*, 697 F.3d 1272 (10th Cir. 2012)). While EPA does not agree that it is necessary to postpone our action pending ongoing litigation, we note that on December 10, 2012 the United States Supreme Court denied Mr. Yellowbear's petition for rehearing (*Yellowbear v. Wyoming*, No. 11-10546, 2012 WL 6097044 (U.S. Dec. 10, 2012)). In *Harnsberger*, the 10th Circuit affirmed the District Court's dismissal of the case, which did not analyze the effect of the 1905 Act on the Reservation boundaries. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012).

c. Additional Judicial References

Numerous federal courts have referenced the Wind River Indian Reservation boundaries in decisions over the years. Commenters discuss a line of cases from the 1930's addressing the Shoshone Tribe's suit for damages arising from the government's act of settling the Northern Arapaho Tribe on the Reservation. The United States Court of Claims and the Supreme Court (in granting the parties' cross-petitions for certiorari) referred to the 1905 Act unopened area as the "diminished reservation." The Court of Claims decision also included a map depicting the area north of the Big Wind River as "ceded by agreement of April 21, 1904" and the unopened area as the "present Wind River or Shoshone Indian Reservation." *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 82 Ct. Cl. 23 (1935), *remanded on other grounds*, 299 U.S. 476 (1937) and *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 85 Ct. Cl. 331 (1937), *aff'd* 304 U.S. 111 (1938) (*Shoshone Tribe*).[79] In addition, both the State's Comments and the Tribes' TAS application point to *Clarke v. Boysen*, 39 F.2d 800 (10th Cir. 1930) in support of their respective arguments. In this case, land speculators challenged the validity of a right-of-way DOI approved in the opened area pursuant to an 1899 statute authorizing the Secretary to issue rights-of-way over lands in Indian country. The U.S. Court of Appeals for the Tenth Circuit upheld the applicability of the 1899 Act, finding that the ceded lands were within the definition of a subsection of Indian lands set forth by the statute, "lands reserved for other purposes in connection with the Indian service." The Tribes assert that this decision supports their position while the State Comments note that the decision did not base its finding on the subsection addressing "[a]ny Indian reservation . . . ."[80] Finally, Commenters cite

[79] We note that neither the 1905 Act, the opening of the Reservation pursuant to that Act, nor the size of the Reservation subsequent to 1905, played any role legally or factually in the *Shoshone Tribe* court's determination of the United States' liability. Moreover,the 1905 Act played only a tangential role in the remedy awarded the Shoshone. The key issues before the Court of Claims and the Supreme Court were the following: (1) whether placement of the Arapaho on the Reservation constituted a taking; (2) when the taking took place; (3) the method of valuing the Reservation as of 1878; and (4) whether pre-and post judgment interest should be awarded. None of the issues involved legal analysis of the 1905 Act. Moreover, passing statements by the parties or the Court between 1935 and 1938 provide little insight to the views of the Congress when it enacted legislation in 1905.

[80] "[The 1899 Act], provides for the acquisition of a railroad right-of-way through three classes of Indian lands. (a) Any Indian reservation in any state or territory, excepting Oklahoma. (b) Any lands reserved for an Indian agency. (c) Any lands reserved 'for other purposes in connection with the Indian service.' It is our opinion that the word 'reserved' here means set apart or set aside; and that the lands ceded to the United States by the Act of March 3, 1905, were set apart for

to *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006) (stating, "[a]lthough the [Big Wind] river is not a property boundary, it roughly separates Hubenka's land on the north from the Wind River Indian Reservation to the south"), in support of the position that the 1905 Act diminished the exterior boundaries of the Reservation.

There are also a number of federal court references that indicate a view that the Reservation boundaries have not been diminished. For example, in *United States v. Mazurie*, 419 U.S. 544 (1975), the Supreme Court describes the Reservation in the following manner: "[t]he Wind River Reservation was established by treaty in 1868. Located in a rather arid portion of central Wyoming, at least some of its 2,300,000 acres have been described by Mr. Justice Cardozo as 'fair and fertile.' [Citation omitted]. It straddles the Wind River, with its remarkable canyon, and lies on a mile-high basin at the foot of the Wind River Mountains . . . As a result of various patents, substantial tracts of non-Indian-held land are scattered within the reservation's boundaries." *Id.* at 546. The references to 2,300,000 acres and straddling the Wind River reflect an undiminished Reservation and the Wind River Canyon included in the description is located in the 1905 Act opened area. There are additional federal court decisions that similarly reference an undiminished Reservation, for example, *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 901 (10th Cir. 1982)("[t]he reservation contains some 2,300,000 acres in west-central Wyoming . . ."); *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh. den.*, 450 U.S. 960 (1981)('[t]he reservation is large and the town of Riverton and other settlements are within its boundaries."); *Shoshone and Arapaho Tribes v. United States*, 364 F.3d 1339 (Fed. Cir. 2004)("[b]oth Tribes continue to occupy the Wind River Reservation, which consists primarily of the reservation lands created by the Treaty of 1868, minus certain lands sold to the United States in 1872 and 1896").

The cases discussed in this section, however, are generally unrevealing regarding the legal effect of the 1905 Act. None of the cases fully analyzed the 1905 Act in light of the applicable Supreme Court criteria; nor did any consider a fully developed record on the Reservation boundary question.

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entry and sale at a future date 'for other purposes in connection with the Indian service,'and until location and entry by settlers under the Act'." *Clarke v. Boysen*, 39 F.2d 800, 814 (10th Cir. 1930), *cert. denied*, 282 U.S. 869 (1930). EPA notes that the Court did not appear to address the issue of whether the lands also qualified as Indian lands under subsection (a).

Finally, as noted above, the United States currently holds 1,065,236.91 acres of land in the 1905 Act area in trust for the Northern Arapaho and Eastern Shoshone Tribes. (EPA-WR-009838A). All lands held in trust by the United States for an Indian tribe, regardless of whether they are also located within the formal boundaries of a Reservation, are Indian country as defined at 18 U.S.C. § 1151(a). *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-96 (D.C. Cir. 2000), *cert. denied sub nom, Michigan v. EPA*, 532 U.S. 970 (2001), *citing, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), *United States v. John*, 437 U.S. 634, 649 (1978), *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000), *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986), *United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985); *see also, Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993), *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

C. Reservation Boundary Conclusion

"Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470, (*citing United States v. Celestine*, 215 U.S. at 278 (1909)). Moreover, Congress must "clearly evince" an "intent . . . to change . . . boundaries" before diminishment will be found. *Id.*, citing *Rosebud*, 430 U.S. at 615. This document provides the legal analysis in support of EPA's determination, which is based upon consideration of all pertinent information, including the 2011 DOI Solicitor's Opinion, that the 1905 Act statutory language, surrounding circumstances and relevant subsequent events do not reveal clear Congressional intent to alter and diminish the exterior boundaries of the Wind River Indian Reservation. Thus, EPA's decision concludes that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). With regard to the lands subject to Section 1 of the 1953 Act, 67 Stat. 592 (1953), consistent with the Tribes' request that EPA's TAS decision not address the lands described in the 1953 Act at this time, the lands are not included in the geographic scope of approval for this decision.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

OCT 26 2011

Honorable Scott C. Fulton
General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

Dear Mr. Fulton:

On April 13, 2009, your office requested an opinion on the boundary of the Wind River Indian Reservation (Reservation) in west-central Wyoming in connection with the Environmental Protection Agency's (EPA's) consideration of the Northern Arapaho and Eastern Shoshone's (Tribes') application for Treatment as a State (TAS) under the Clean Air Act. As part of the TAS application, the Tribes were required to identify the exterior boundaries of their Reservation. According to the Tribes, the exterior boundaries of their Reservation are those established by the 1868 Treaty of Fort Bridger,[1] less the areas ceded in the 1874 Lander Purchase and the 1897 Thermopolis Purchase. The State of Wyoming disagrees, contending that the Act of March 3, 1905, 33 Stat. 1016 (the 1905 Act), diminished and altered the exterior boundaries of the Reservation. Following additional research and analysis, the Department of the Interior (Department) concludes that neither the 1905 Act nor any other statute diminished and altered the exterior boundaries of the Reservation.

This letter first provides an overview of Supreme Court jurisprudence concerning diminishment or disestablishment of Indian reservations. Next is a summary of the factual history surrounding the Wind River Indian Reservation, followed by an analysis of the relevant Acts, legislative history, factual circumstances, and legal framework that provide the basis for my determination.

I. Supreme Court Jurisprudence on Reservation Diminishment

The Supreme Court has established a "fairly clean analytical structure" for determining whether a particular congressional act diminished or disestablished a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Several governing principles instruct this analysis. First, "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Moreover, "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed." *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish

[1] 15 Stat. 673 (1868).

must be "clear and plain") (citation omitted); *Solem*, 465 U.S. at 470 (intent to diminish must be "clearly evince[d]"); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) (intent to disestablish must be "clear"). Therefore, diminishment "will not lightly be inferred." *Solem*, 465 U.S. at 470. And any ambiguities in a statute are resolved in favor of the Indians. *Yankton Sioux*, 522 U.S. at 344 (citations omitted).

Solem and its progeny have established a three-prong test for analyzing whether a given statute diminished and altered a reservation's boundaries or simply offered non-Indians the opportunity to purchase land within the reservation. *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the language of the statute itself. *Id.* Next, the court will look at the circumstances surrounding the passage of the act. *Id.* Third, but to a lesser extent, the court will look to events that occurred after the passage of the act to decipher Congress's intent. *Id.* at 471.

The analysis begins with the statutory language. Although the Supreme Court has never required a particular form of words, *Hagen v. Utah*, 510 U.S. 399, 411 (1994), when there is explicit reference to a cession or total surrender of all tribal interests in the land coupled with an unconditional commitment from Congress to pay the tribe for its land, there is an "almost insurmountable presumption" that Congress intended to disestablish the reservation. *Solem*, 465 U.S. at 470-71. Even with cession language coupled with sum certain compensation, however, courts also look to the legislative history and surrounding circumstances to determine congressional intent. *DeCoteau*, 420 U.S. at 445.

For example, the Supreme Court has found that language to "cede, sell, relinquish and convey" in exchange for a sum certain payment, and considering its surrounding circumstances and legislative history, terminated the boundaries of the Lake Traverse Reservation. *DeCoteau*, 420 U.S. at 425. In contrast, language that simply authorized the Secretary of the Interior "to sell or dispose of" unallotted lands with the proceeds from the sale of those lands to be distributed to the tribe was deemed insufficient to completely divest the Indian interest in the lands, and thus did not diminish the Colville Reservation boundaries. *Seymour v. Superintendent*, 368 U.S. 352 (1962), *see also Mattz v. Arnett*, 412 U.S. 481, 499 (1973) (reservation not terminated by discretionary allotment act that opened land for settlement).

The Supreme Court next turns to the circumstances surrounding the passage of the act, including its relevant legislative history to determine congressional intent. The Court has expressly "decline[d] to abandon [its] traditional approach to diminishment cases, which requires [an examination of] all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. The reasons are deeply rooted in history. As explained in *Yankton Sioux*, 522 U.S. at 343, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation because the notion that reservation status may not be equal to tribal ownership was unfamiliar." Therefore, the courts have reviewed surrounding circumstances to determine congressional intent on a case-by-case basis. Indeed, "congressional intent must be clear, to overcome the general rule that doubtful expressions are to be resolved in favor of . . . the wards of the nation, dependent upon its protection and good faith." *DeCoteau*, 420 U.S. at 444. As summarized in *Solem*, "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the

transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471. Nevertheless, the Supreme Court has never been willing to extrapolate a specific congressional purpose to disestablish a reservation in a particular case from the general expectations in the allotment era. *Solem*, 465 U.S. at 468; *Mattz*, 412 U.S. at 499 (rejecting general congressional hostility to the reservation system as supporting termination of boundaries).

Lastly, but to a lesser extent, the Court looks to events that occurred after the passage of the act to determine congressional intent. *Solem* at 471. As part of this prong, the Court will look to subsequent demographics on a more "pragmatic level." *Solem*, 465 U.S. at 471. "Where non-Indian settlers flooded into the open portion of the reservation and the area has long-since lost its Indian character," the Court has acknowledged disestablishment may have occurred. *Id.* "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation." *Id.* at n.13. Moreover, "[t]here are . . . limits to how far we will go to decipher Congress' intent in any surplus land Act. When both the Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish 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* at 472 (citations omitted).

II. History 1868 - 1905

A. Establishment of the Reservation & the Lander Purchase

The United States and the Shoshone Indians established the Wind River Reservation in 1868 by the Treaty of Fort Bridger. 15 Stat. 673. The Reservation boundary was described as follows:

> Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie [sic] Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to headwaters of Owl Creek and along middle channel of Owl Creek to place of beginning.

Id. The treaty reserved "the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." *Id.* In 1878, the United States placed the Arapaho Indians on the Reservation. The Arapaho and the Shoshone have equal property rights to the Reservation. *See Shoshone Tribe v. United States*, 299 U.S. 476, 486-89 (1937).

On December 15, 1874, Congress ratified the Lander Purchase. 18 Stat. 291 (1874). Under the Lander Purchase, the Tribes agreed to an outright sale of all their interests in Reservation lands generally south of the 43rd parallel in exchange for a lump sum payment of $25,000. The express purpose of the Act ratifying the Lander Purchase was "to change the southern limit of said reservation." *Id.* at 292; *see also* 18 Stat. 291, 292 (1874). There is no dispute that pursuant to the Lander Purchase, Congress intended to diminish and alter the boundary of the Reservation to forever exclude those lands.

B. The 1891 and 1893 Failed Agreements

On March 3, 1891, Congress appointed a commission to negotiate for additional cessions of portions of the Reservation the Tribes "may choose to dispose of." 26 Stat. 989, 1009 (1891). The commission negotiated, and the Tribes agreed to, a proposed cession to an area lying north of the Big Wind River, together with a strip on the eastern side thereof, by which 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 and to the lands, and the water rights appertaining thereunto."[2] In consideration for the lands sold, the United States proposed to pay the Tribes $600,000.[3] Congress did not ratify this agreement.

In 1893, Congress sent another commission to negotiate with the Tribes. 27 Stat. 120, 138 (1892). The commissioners proposed a cession of all Reservation land lying north of the Big Wind River, as well as lying south and east of the Popo Agie/Little Wind River, in exchange for $750,000. The Tribes refused to consider any cession of lands on the southeastern side of the Reservation and no agreement was reached.[4]

C. The 1897 Thermopolis Purchase

In 1896, the United States negotiated with the Tribes for the sale of land around the Big Horn Hot Springs near the present town of Thermopolis. Indian Inspector James McLaughlin, the same federal agent who subsequently negotiated the agreement ratified by the 1905 Act, represented the United States. In April 1896, the United States and the Tribes entered into an

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[2] H.R. Ex. Doc. No. 70, 52d Cong., 1st Sess. (Jan. 11, 1892), "Shoshone and Arapaho Indians of the Shoshone or Wind River Reservation, Message from the President of the United States," BATES SH00578 at BATES SH00579, 00592. The land proposed to be ceded was north of the mid-channel of the Big Wind River to Wood Flat Crossing, then directly east to the Big Horn River, then directly south to the southern boundary of the Reservation. The Tribes refused to sell land on the southern border of the reservation. *Id.* at 4-5. *See also* H.R. Ex. Doc. No. 51, 53d Cong., 2d Sess. (Jan. 3, 1894), "Negotiations with Shoshone and Arapahoe Indians," BATES SH00644, and H.R. Rep. No. 58-2355, 58th Cong., 2d Sess. (April 11, 1904), "Indians On the Shoshone or Wind River Indian Reservation, Wyo.," BATES SH00721 at BATES SH00723 (the 1891 agreement proposed to cede an area in the northern and eastern part of the reservation).

[3] H.R. Ex. Doc. No. 70 at 3, 30. The agreement provided further that lands around the hot springs in the northeast corner of the Reservation should "be reserved from entry as public lands." *Id.* at 26. This language implies that the remainder of the ceded lands also would be subject to entry as public lands, which would be consistent with the intent of the Assistant Attorney General of the Department of the Interior when he requested legislative language to designate the sold lands as public lands. Congress rejected the proposed amendment. *Id.* at 15-16, 41-42.

[4] H.R. Ex. Doc. 51, 53d Cong., 2d Sess., at BATES SH00649, SH00654. The lack of agreement focused on a 5-mile strip on the south side of the Reservation. *Id.* at BATES SH00658-59.

agreement, known as the "Thermopolis Purchase," in which 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 and to the lands and the water rights appertaining thereunto" with respect to a tract surrounding the Big Horn Hot Springs. Congress ratified the agreement on June 7, 1897. 30 Stat. 93 (1897), *see* S. Rep. No. 54-247, 54th Cong., 1st Sess., (May 8, 1896).[5] The sold lands were to be "set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public." *Id.* at 4. The Indians were "allowed to enjoy the advantages of the conveniences that may be erected thereat with the public generally." *Id.* "[I]n consideration for the lands ceded, sold, relinquished and conveyed," the United States agreed to pay a lump sum of $60,000. *Id.* After the Thermopolis Purchase, the General Land Office surveyed the lands acquired under the Act as public lands under the 6th Principal Meridian (the pre-existing eastern boundary of the Reservation had been surveyed as part of the Reservation's meridian – the Wind River Meridian.").[6] There is no dispute that pursuant to the Thermopolis Purchase, Congress intended to diminish and alter the boundary of the Reservation to forever exclude those lands.

D. 1905 Act

In March 1904, Representative Frank Mondell from Wyoming introduced a bill to open the Reservation under homestead, town-site, and coal and mineral land laws. The bill was based loosely on the 1891 and 1893 negotiations but included some important key differences.[7] The bill enlarged the area proposed to be ceded, used different cession language and, instead of providing for sum certain payment as proposed during the prior negotiations, the Tribes would be paid as the land was sold. H.R. Rep. No. 58-2355 at 4.[8] The report explained that "the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral laws . . . ." *Id.* The Office of Indian Affairs reported favorably on the bill. *Id.* at 5.[9]

A month later, the Mondell bill was presented to the Tribes. *Id.* at 10.[10] It was McLaughlin who returned to the Reservation "to present to [the Tribes] a proposition for the opening of certain portions of [their] reservation for settlement by the whites."[11] McLaughlin did not, however, refer to the 1891 agreement in explaining the purposes of the agreement to the Tribes. Rather, he informed the Tribes that the United States would *not* pay a lump sum amount and described the agreement as "having the surplus lands of your reservation open to settlement

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[5] BATES SH00664 at BATES SH00680.
[6] *See* Letter, Thos. P. Smith, Acting Commissioner to Secretary (May 5, 1896), *reprinted in* S. Doc. No. 247, 54th Cong., 1st Sess., 15 (1896); H.R. Rep. 344, 59th Cong., 1st Sess., 2 (1906).
[7] The H.R. Rep. No. 58-2355 (1904) at 5, BATES SH00726. The Committee Report rejected a suggestion from the Department to reduce the ceded area by including in the proposed diminished reservation lands southeast of the Popo-Agie River where there were several Indian allotments. Instead, Article XI was amended to allow the Indians to take allotments in the ceded territory and confirm them prior to its being opened. It also was believed that "these are the most practicable and advantageous boundaries inasmuch as but few Indians or allotments will be outside of the said boundaries and it is important that the boundaries of the diminished reserve shall so far as possible remain a water boundary." *Id.* at 2, BATES SH00722.
[8] BATES SH00721 at BATES SH00725.
[9] *Id.* at BATES SH00726.
[10] BATES SH01367 at BATES SH01370-72.
[11] Minutes of council held at Shoshone Agency, Wyoming (April 19, 1904), BATES SH01367 at BATES SH01368.

and realizing money from the sale of that land, which will provide you with the means to make yourselves comfortable upon your reservation."[12]

McLaughlin also described the boundaries of the "diminished reservation"[13] and the fact that natural water boundaries would be respected to prevent trespass into the exclusive tribal area.[14] When the Tribes wanted some lands north of the Big Wind River excluded from the ceded area, McLaughlin countered that the allotments in the area could be retained, or cancelled and come within the Reservation, but that on the diminished reservation, they would be protected from the non-Indians. As stated by McLaughlin:

> A little corner of land left north of the Wind River would cause you no end of trouble, as you would be continually over-run by the herds of the whiteman. 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 or lease them, as you see fit. On the reservation, you will be protected by the laws that govern reservations in all your rights and privileges. Furthermore, all of you who may retain your allotments off the reservations [sic], will not lose any of your rights on the reservation, and you have rights the same as if you remained in the diminished reservation.[15]

Contemporaneous correspondence from the Tribes shows their reliance and understanding of McLaughlin's assurance "that the unsold lands would belong to [the Tribes]" until they were sold. Letter Arapahoe Delegation to Commissioner of Indian Affairs (March 9, 1908).[16]

On April 21, 1904, the Tribes signed an agreement containing language similar to the proposed bill ("1904 Agreement").[17] Congress ratified the 1904 Agreement with modification

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[12] *Id.* at 3-4, BATES SH01370-71.

[13] McLaughlin described the boundaries of the Reservation (*id.* at 6, BATES SH01373) as thus:

> I now wish to talk of the boundaries of the reservation and the residue that will remain in your diminished reservation. * * * The tract to be ceded to the United States . . . is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation. This embraces the lands within the lines described as follows: Commencing where the Wind River crosses your western boundary line, following down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line; thence along the southern boundary line to the southwest corner of your reservation; thence north along the western boundary to the place of beginning on the Big Wind River.

[14] *Id.* at 14, BATES SH01381.

[15] *Id.*.

[16] BATES SH52182 at BATES SH52186.

[17] H.R. Rep. No. 58-3700, "Agreement with Indians Residing on the Shoshone Indian Reservation, Etc." 58th Cong., 3d Sess. at 15 (Jan. 19, 1905). As reported by McLaughlin to the Department:

> 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 808,000 acres about three-fourths of which is

by the Act of March 3, 1905, 33 Stat. 1016.[18] In Article I of the 1905 Act, the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest . . . to all lands embraced within" the portion of Reservation located north of the Wind River, as well as the portion located southeast of the Popo Agie River. It also permitted those Indians who had previously selected a tract within "the portion of said reservation hereby ceded" to "have the same allotted and confirmed to him or her" or to select other lands "within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry." *Id.*

In Article II, the United States agreed to dispose of the lands "ceded, granted, relinquished, and conveyed by Article I," amounting to approximately 1,480,000 acres, "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash." *Id.* at 1019. The Act did not provide for a sum-certain payment. Rather, the United States agreed to pay to the Indians the proceeds derived from the sales of the lands. The Act also did not guarantee to find purchasers for the lands, but rather the United States agreed to "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." Article IX, *id.* at 1020-21.[19]

III. Analysis

A. The 1905 Act

1. *Language of the 1905 Act*

The most probative evidence of congressional intent is the language of the statute itself. *Solem*, 465 U.S. at 470. The 1905 Act does not contain any of the hallmark language evincing clear congressional intent to sever the land addressed by that Act from Reservation status.

First, the 1905 Act does not utilize "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. When

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> irrigable land, allows 490 acres each for the 1,650 Indians now on the reservation. I gave 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 belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement and the Indians would be eventually compelled to give it up.

Id. at 17.

[18] *Id.* at 4-9; H.R. Rep. Rep. No. 58-4884, "Agreement with Indians on the Shoshone Reservation in Wyoming, Etc." 58th Cong., 3d Sess. (March 1, 1905).

[19] Article III of the 1905 Act, amending the 1904 Agreement, provided that of the amount to be derived from sales of the opened area, $85,000 shall be used to make per capita cash payments of $50 dollars to each Indian. 33 Stat. 1020. In Article IX, Section 3, Congress ended up appropriating the $85,000, however, the money was not intended to be a lump sum payment, but was to be reimbursed as the land was sold. *Id.* Any balance remaining of the $85,000 was to be used for "survey and marking of the out boundaries of the diminished reservation where the same is not a natural water boundary," and for construction of an irrigation system on the diminished reserve. *Id.* at 1022. The survey was requested by the Tribes who believed that the south and southwestern boundaries under the 1868 Treaty at Fort Bridger were not correctly marked. BATES SH01367 at BATES SH01383, 01387.

contrasted to the text of the 1891 agreement and the 1897 Thermopolis Purchase, the operative language of the 1905 Act is remarkably more limited. The 1891 agreement provided the Tribes would "cede, convey, transfer, relinquish, and surrender, forever and absolutely . . . all their right, title, and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto" lying north of the Big Wind River. H.R. Ex. Doc. No. 70;[20] *see also DeCoteau*, 420 U.S. at 438-40; *Yankton Sioux*, 522 U.S. at 337; *Rosebud*, 430 U.S. at 591-92. Similarly, the Thermopolis Purchase provided that the Tribes would "cede, convey, transfer, relinquish and surrender, forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunto" with respect to a tract surrounding the Big Horn Hot Springs. 30 Stat. 93.[21] These prior actions illustrate Congress's legislative acumen in using words to permanently sever land from an Indian reservation. Importantly, Congress did not ratify the 1891 Agreement and did not use the more expansive, operative words in enacting the 1905 Act. Indeed, the language of the 1905 Act is devoid of any language conveying, transferring, or surrendering forever and absolutely any portion of the Wind River Reservation to the United States. Rather it "cede[s], grant[s], and relinquish[es]" the lands "embraced *within*" the Reservation to the United States. 33 Stat. 1016 (Art. I) (emphasis added). *Compare DeCoteau*, 420 U.S. at 438-40; *Yankton Sioux*, 522 U.S. at 337; *Rosebud*, 430 U.S. at 591-92.

Second, unlike the language in the previous failed agreements (1891 and 1893) and the Thermopolis Purchase, there was no sum certain compensation in the 1905 Act.[22] The Tribes would be compensated only as the lands were sold and, significantly, the Tribes continued to hold an interest in the lands unless sold. *See Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); 54 I.D. 559.[23] Additionally, nothing in the Act "shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands . . . ." 33 Stat. 1020 (Art. IX). Thus, there is simply no express language in the 1905 Act that severs the opened area from the Reservation.

Third, the 1905 Act did not restore the ceded land to the public domain. In fact, members of Congress disclaimed any intent to do so.[24] In contrast, the Thermopolis Purchase, which re-

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[20] BATES SH00578 at BATES SH00592.

[21] BATES SH00664 at BATES SH00667.

[22] *See supra* note 20. Although the Supreme Court has found diminishment of reservation boundaries in the absence of a sum certain, *see, e.g., Rosebud*, 430 U.S. 584, it has done so only after review of the surrounding circumstances and concluding those circumstances evidenced a clear intent to diminish and permanently sever land from the reservation. As discussed in Section III.A.2 below, however, the surrounding circumstances here do not reflect such congressional intent. Moreover, it is important to the analysis that the operative cession language in the 1905 Wind River Act is different and more limited than the language in *Rosebud*. *See infra* text at pg. 11-13.

[23] The Supreme Court characterized this cession to the United States as land "to be held by it in trust for the sale of such timber lands, timber and other products, and for the making of leases for various purposes." *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 114 (1938).

[24] For example, in a discussion in the House of Representatives on an amendment to protect a non-Indian coal lessee, Asmus Boysen, a question was raised as to whether the lease would terminate automatically if the bill were passed. The Chairman of the House Indian Affairs Committee Representative Marshall objected to the protection as unnecessary as the land was not being restored to the public domain.

> [Rep. Fitzgerald] says that Mr. Boysen's lease was canceled when the title to these lands passed from the Indians. True, there was a clause to the effect that when the lands were restored to the public domain this lease was canceled. The difficulty is, however, that these lands are not restored

designated the land for the public's use as a national park, is inconsistent with that land's continued use as an Indian reservation. The Supreme Court has found that language which "'restored to the public domain portions of a reservation would result in diminishment.'" *Hagen*, 510 U.S. at 414 (holding that restoration of unallotted lands to the public domain "evidences a congressional intent with respect to those lands inconsistent with reservation status") *citing Rosebud*, 430 U.S. at 589, and n.5. Thus, the limited and conditional commitment of the United States, coupled with the absence of explicit hallmark language of permanent surrender of the lands, reveal that the 1905 Act did not express a clear intent by Congress to permanently sever the opened lands and forever alter the exterior boundaries of the Reservation.

There are several references in the Act to a "diminished reserve" and in the legislative history to "reduce the reservation."[25] But as noted by the Supreme Court, such "isolated phrases . . . are hardly dispositive." *Solem*, 465 U.S. at 476. Moreover, at the time of the 1905 Act, the term "diminished" was not a legal term of art utilized in the manner as it is today. As the Supreme Court noted in *Solem*, "[w]hen Congress spoke of the 'reservation thus diminished' it may well have been referring to diminishment in common [tribal] lands and not diminishment of reservation boundaries." *Id.* at n.17 (citations omitted). Indeed as used in relation to the 1905 Act, it appears that the term is used merely as shorthand for that portion of the Reservation that the Tribes retained for their exclusive use.[26] Finally, there is no question that the Tribes retained an interest in the ceded lands until sold. The fact that the 1905 Act used the term "diminished" several times, therefore, is not dispositive; nor does it evince a clear intent by Congress to permanently alter the exterior boundaries of the Reservation. As discussed above, Congress knew how to explicitly express its intent and it did not do so here.

This conclusion that the language of the 1905 Act does not evince a clear congressional intent to diminish the boundary of the Wind River Reservation is consistent with the position of the United States in *In Re Rights to Use Water in Big Horn River*, 753 P.2d 76, 127, *aff'd by Wyoming v. U.S.*, 492 U.S. 406 (1989) (*Big Horn I*) involving the Tribes' water rights. There, the United States maintained that the 1905 Act did not diminish the boundary of the Reservation. In arguments before the Wyoming Supreme Court, the United States contended that the 1905 Act fails under both prongs of the *Solem* diminishment analysis:

> (1) where there is explicit language of cession or language evidencing the present and total surrender of all tribal interests and the Agreement gives an indication of an unconditional commitment of the United States to compensate the Indians, or (2) where "events surrounding the passage of the surplus land act, particularly the manner in which the transaction was negotiated with the

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> to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians, and the clause which the gentlemen speaks of does not apply, and I think he knows it, as it was discussed in committee.

H. Cong. Rec. 1945 (Feb. 6, 1905), BATES SH08347.

[25] H.R. Rep. No. 58-2355 at 3 explained the purposes of the bill as "propos[ing] to reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891 . . . The bill in question still leaves the Indians with 808,500 acres in the diminished reserve." *But see Solem*, 465 U.S. at 476 n.17.

[26] *See supra* notes 15 and 16 with accompanying text.

> tribe involved and the tenor of the legislative reports presented to Congress – unequivocally reveal a widely held contemporaneous view that the affected reservation would shrink as a result of the proposed legislation."

U.S. Brief at 96 (emphasis in original).[27] Consistent with the requirement that the Act be read as a whole,[28] the United States pointed out in its brief that the Act contains several provisions that indicate no diminishment: (1) in Article IX, the United States specifically did not commit to compensate the Tribes a fixed amount – the Tribes would be paid as the land was sold; (2) in Article III, the United States recognized the right of Indians to remain in the ceded area;[29] (3) in Article III, the United States authorized payments to establish water rights for the Indians remaining in the ceded area; (4) in Article X, the United States stated nothing in the Act would deprive the Tribes of their rights under the Treaty; and, (5) the Agreement does not use the word "convey" in Article I. *Id.* Moreover, receipts from the land sales under the 1905 Act did not go to the general fund of the United States Treasury. U.S. Brief at 98.

These distinctions are in direct contrast with the Thermopolis Purchase in which: (1) the United States committed to pay the Tribes a fixed amount; (2) the Indians retained no rights to occupy the ceded area; (3) there is no retention of treaty rights in the ceded lands; and (4) the Thermopolis Purchase used the word "convey." *Id.* The Wyoming Supreme Court ruled that Congress intended to reserve water for the Wind River Reservation and emphasized that lands ceded under the 1905 Act held the same reservation status and reserved water rights as reservation lands not affected by the 1905 Act. *Big Horn I*, 753 P.2d at 114. Significantly, in the *Big Horn I* litigation, the Special Master heard arguments on whether the 1905 Act disestablished the Reservation boundaries and squarely rejected them, concluding instead that the language of the 1905 Act "clearly indicates that the intent of th[e] Act was to establish a trust relationship, with the United States acting as trustee for the sale of certain Indian lands to the settlers."[30] Because the unsold opened lands did not lose their Indian status, they acquired the same reserved water rights priority dates as lands within the unopened portion of the Reservation.[31] The State District Court upheld this finding by the Special Master.[32]

The 1905 Act contains none of the hallmark language signifying Congress's intent to alter the exterior boundaries of the Wind River Reservation. This position is consistent with the long-standing position of the United States and with applicable case law, including the court's finding in the *Big Horn* adjudication. It is clear that the 1905 Act did not disestablish or otherwise alter the exterior boundaries of the Reservation.

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[27] Today, the *Solem* test is referred to most frequently as a 3-part test. *Hagen*, 510 U.S. at 411.
[28] *Solem*, 465 U.S. at 476.
[29] Tribal members could obtain allotments in the 1905 Act area before it was opened to non-Indians. In *Solem*, the Court found such a provision to be inconsistent with intent to diminish. *Id.* at 474. *See also* text surrounding fn. 20, *supra*.
[30] Report of Special Master Roncalio, Concerning Reserved Water Right Claims by and on behalf of the Tribes of the Wind River Indian Reservation, Wyoming, 39 ("Master's Report"), BATES SH04101 at BATES SH04152.
[31] *Id.* at 37.
[32] *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, CIV No. 4493, Op. at 23 (Wyo. D. Ct. May 10, 1983), BATES SH04484 at BATES SH04507.

2. *Surrounding Circumstances*

According to the *Solem* framework, congressional intent also may be gleaned from circumstances surrounding the particular statute, including its legislative history. *Solem*, 465 U.S. at 471. In conducting this analysis, courts consider that "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471.

The surrounding circumstances of the 1905 Act do not support a conclusion that Congress intended the 1905 Act to diminish the exterior boundaries of the Reservation. At first glance the 1905 may look similar to the act at issue in *Rosebud*, in which the Supreme Court concluded that the boundaries of the Rosebud Reservation were diminished. However, the 1905 Act and its surrounding circumstances are different in several important respects. Moreover, it is noteworthy that the Supreme Court has opined that statutes like the one at issue in *Rosebud* fall between the extremes of legislation that clearly intend to diminish reservation boundaries and those that clearly intend not to diminish boundaries. Thus the surrounding circumstances take on additional importance here. *Solem*, 465 U.S. at 469 n.10.

In *Rosebud*, McLaughlin negotiated and obtained an agreement (by majority vote) from the Tribe in 1901 to cede a portion of its Reservation. 430 U.S. at 590. Under the 1901 agreement the Tribe agreed to "cede, surrender, grant, and convey . . . all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now unallotted situated within the boundaries of Gregory County, South Dakota." *Id.* at 591. In describing the agreement to the Tribe, McLaughlin explained that "'[t]he cession of Gregory County' by ratification of the Agreement 'will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.'" *Id.* The 1901 agreement was not ratified by Congress at the time because concerns were raised in Congress about obtaining the money needed upfront for the land cession. *Id.* at 591-92 and note 10 ("The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money.") (internal citations and quotations omitted). The intent of the agreement, however, was clearly described by McLaughlin, who said its purpose was to shrink the size of and change the shape of their Reservation. *See Solem* at 471. Had the agreement been ratified, the Court noted "it would have disestablished that portion of the Rosebud Reservation that lay in Gregory County." *Id.* at 591.

In 1903, Congress requested that McLaughlin go back to the tribe and seek the same agreement with the one exception: rather than a lump sum payment, the Tribe would receive payment as the lands were sold. *Id.* 592-93. In discussing this agreement with the Tribe, McLaughlin explained, "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment. . . . You will still have as large a reservation as Pine Ridge after this is cut off." *Id.* at 593. Thus, McLaughlin again discussed the agreement as

affecting the boundaries and changing the size and shape of the Rosebud Reservation. In examining the "legislative processes which resulted in the 1904 Act," the Court was convinced that the purpose of the 1901 Agreement (to change the size, shape and boundaries of the Reservation) was carried forth and enacted. *Id.* at 592. Indeed the Court noted that "in examining the congressional intent, there is no indication that Congress intended to change anything other than the form of, and responsibility for payment." *Id.* at 594-95.

The Wind River negotiations present an entirely different scenario than in *Rosebud*. As in *Rosebud*, McLaughlin was responsible for obtaining the Tribes' consent. Before McLaughlin went to negotiate with the Tribes, the House Committee on Indian Affairs submitted a report stating that the purpose of the proposed legislation was to "reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891."[33] Although Mondell's bill was said to be modeled in part on the un-ratified 1891 Agreement, it was in fact and effect significantly different: the 1904 Agreement did not include the same broad cession language as the 1891 Agreement; it changed the method of payment from a sum certain to payment only when the lands were sold; and it enlarged the area to be ceded to include additional lands north of the mid-channel of the Big Wind River and lands southeast of the Popo Agie River, among other things.

Moreover, in stark contrast to McLaughlin's negotiations in *Rosebud*, here McLaughlin did not refer back to the 1891 Agreement when he presented the Tribes with the 1904 Agreement. Additionally, in describing the new agreement, McLaughlin explained it as opening surplus lands of the Reservation, but he did not describe it as "cutting off" any portion of the Reservation.[34] And, while McLaughlin described the opened area in his meetings with the Tribes, he did so in contrast to the "diminished" or unopened portion Reservation that would remain for the exclusive use of the Tribes.[35] Correspondence from the Tribes also reflected an understanding that they were retaining an interest in the opened lands within the Reservation until sold and not a complete severance and "cutting off" of the opened part of the Reservation.[36] Had McLaughlin wanted the Tribes to understand that the exterior boundaries of their Reservation were being "cut off," he would have explained the Agreement using similar words and descriptions as he did in *Rosebud*. For these reasons, the Act and surrounding circumstances as a whole are factually and historically distinguishable from the circumstances in *Rosebud*.

This case is similarly distinguishable from *DeCoteau*. In *DeCoteau*, the negotiations leading to the agreement by which the tribe ceded the land "show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." 420 U.S. at 445. The operative language in *DeCoteau* was much broader than the narrower and more limited cession language used in the 1905 Act. And, unlike in *DeCoteau*, the United States' commitment to pay the Tribes was limited and conditioned in the 1905 Act. Additionally, in *DeCoteau*, the Court found unambiguous evidence that the Tribe did not expect

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[33] H.R. Rep. No. 58-2355, 58th Cong., 2d Sess., BATES SH00721 at BATES SH00723.
[34] *See* Minutes of council held at Shoshone Agency, Wyoming (April 19, 1904), BATES SH01367 at BATES SH01369-70.
[35] *Id.* at 12, 14.
[36] Letter Shoshone Delegation to Commissioner of Indian Affairs (March 10, 1908) BATES SH08402; letter Arapahoe Delegation to Commissioner of Indian Affairs (March 9, 1908), BATES SH52182 at BATES SH52186.

to maintain its reservation boundaries intact. Here, however, the Tribes understood that they would continue to have an interest in the 1905 Act lands until they were sold.

Based on the circumstances surrounding the 1905 Act, there was no clear understanding by the Tribe or the United States that the purpose of the 1905 Act was to permanently sever and alter the boundaries of the opened portion of the Reservation. Moreover, when compared to *DeCoteau* and *Rosebud*, here the legislative history and surrounding circumstances do not provide the kind of clear evidence of congressional intent that the Supreme Court requires to diminish or disestablish a reservation's boundaries. *See Solem*, 465 U.S. at 472. The circumstances surrounding the 1905 Act, therefore, do not unequivocally reflect a "widely-held contemporaneous understanding" that the Reservation boundaries would be altered.[37]

3. *Subsequent Treatment*

To a lesser extent, the Court has looked to events that occurred after the passage of the statute to decipher Congress's intentions, including Congress's own treatment of the area and that of the BIA and local judicial authorities. *Solem*, 465 U.S. at 471. The evidence from the years immediately after the 1905 Act indicates some inconsistent treatment of the 1905 area, but the record on the whole more reasonably supports a conclusion that Congress did not intend to diminish the boundaries of the Reservation. Therefore, the subsequent treatment and demographics further confirm that the 1905 Act did not evince an intent to diminish the boundaries of the Reservation.

a. Congressional and Departmental Actions

The 1905 Act called for the United States to survey the boundaries of the opened area. The surveys for these plats were completed by December 1905 and approved by the General Land Office in 1906. Significantly, the surveys were done using the Wind River Meridian, not a Principal Meridian, as was used for public lands. Moreover, the resulting plats identify the "North Boundary Shoshone Indian Reservation" as the northern boundary of the ceded area and the "East Boundary Shoshone Indian Reservation" as the eastern boundary of the ceded area. These surveys confirm that although the 1905 opened a portion of the Reservation to settlement, nothing in the Act changed or diminished the boundaries of the Reservation. *See, e.g., State of Louisiana v. State of Mississippi*, 202 U.S. 1, 55, 56 (1906) (relying on official General Land Office township plats prepared from detailed survey because only official plats by the federal government are acceptable in boundary disputes).

References to the 1905 Act area following its enactment, continued to describe the ceded area as being "opened" to settlement and as part of the Wind River Reservation. For example, in 1906, Congress passed a joint resolution extending the time for "opening to public entry the

[37] At best, the surrounding circumstances of the 1905 Act are equivocal, but that is insufficient to demonstrate that Congress intended to diminish the Reservation boundaries. *See Solem*, 465 U.S. at 471; *Yankton Sioux*, 522 U.S. at 355 (finding as unpersuasive a "mixed record" that "reveals no consistent or dominant approach"); *see also Solem*, 465 U.S. at 478 (rejecting a few scattered, isolated, and ambiguous phrases). Moreover, to the extent that there are any ambiguities in the language of the 1905 Act, they are to be resolved in favor of the Tribes. *DeCoteau*, 420 U.S. at 444.

ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming." 34 Stat. 825 (1906). In the Department's report to Congress, the opened lands are described as "the ceded portion of the Shoshone or Wind River Reservation" and the land as being opened to settlement. H.R. Doc. No. 59-601, 59th Cong., 1st Sess. (1906). A Presidential Proclamation of June 2, 1906, which merely recited the cession language from the 1905 Act, formally opened the unallotted portion of the Reservation to settlement. In conjunction with the Presidential Proclamation, a map delineating the area opened for settlement, and showing Indian allotments in the opened area, is titled "Map of that part of the Wind River or Shoshone Indian Reservation, Wyoming, to be opened for settlement, August 15, 1906 Under Presidents [sic] Proclamation."

In addition, a Senate Report from 1909 on a statute to extend the time for miners making mineral claims "within the Shoshone and Wind River Reservation" referred to the claims as being within the Reservation and more specifically "within the ceded portion of the Shoshone Reservation." S. Rep. 60-980, 60th Cong., 2d Sess. (1909). The next year, another Senate Report referred to "desert lands formerly in the Shoshone or Wind River Indian Reservation." S. Rep. 61-303, 61st Cong., 2d Sess. (1910). However, this Report also referred to the 1905 Act lands as being "within the limits of the ceded portion of the Shoshone or Wind River Indian Reservation." *Id.* Yet another Senate Report simply referred to "the ceded portion of the Wind River Reservation." S. Rep. 62-543, 62nd Cong., 2d Sess. (1912). Also in 1916, the Indian Appropriation Act, 39 Stat. 123-158 (1916), provided $5,000 to pay for plans and cost estimates for "irrigation of all of the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." *Id.* at 158. The Secretary of the Interior forwarded to Congress a "Report on Wind River Project, Wyoming" that described the ceded lands as "formerly included" in the Reservation and the Reservation as "[o]n the south or southwest side of the Wind River." Importantly, however, it also recognized the continued interest "retained by the Indians in the 'ceded-land' portion of the reservation." H.R. Doc. No. 1767, 64th Cong., 2d Sess. (1916) at 9, 18.[38] The Indian Service also distinguished the "diminished reservation" from "the ceded part of the former reservation." H.R. Doc. No. 1478, 64th Cong., 2d Sess. (1916). Thus, although the history subsequent to the 1905 Act references the "ceded" or "open" lands, the entire record shows that the 1905 Act area as a whole continued to be within the exterior boundaries of the Reservation. Such distinctions appear to be made to contrast the opened (ceded) portion of the Reservation with the unopened (diminished) portion of the Reservation.

Some references to and maps of the Wind River Reservation made shortly after the enactment of the 1905 Act appear to be less clear in terms of whether the Act changed the boundaries of the Reservation. In 1907, after the President proclaimed the lands opened for settlement, Congress passed an Act extending the time for entry in the 1905 Act area in which it referred to "lands formerly embraced in the Wind River or Shoshone Indian Reservation, in Wyoming, which were opened to entry." Act of January 17, 1907, 34 Stat. 849. This appears to be a limited instance in which Congress used the words "formerly embraced in the . . .

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[38] The Report at 9 described the Reservation as the diminished area:

> The project under consideration is within the "ceded lands" portion of what was formerly included in the Wind River or Shoshone Indian Reservation. On the south or southwest side of Wind River is the Indian reservation, now sometimes referred to as diminished reservation.

Reservation" and is not by itself sufficient to evidence a strong congressional intent that the Reservation boundaries had changed. *See supra* note 38.

Similarly, a map from 1907 of the State of Wyoming and a 1912 map produced by the General Land Office show the Wind River Reservation to be the unopened portion of the Reservation only.[39] The 1907 map, however, is a compilation of maps created by the State and is not an official map of the United States; nor does it purport to be an official map of the Wind River Reservation. *See United States v. Morrison*, 240 U.S. 192, 210-211 (1916) (it is not an "official act" until land is surveyed, approved by the Surveyor General, and approved by Commissioner); *State of New Jersey v. State of Delaware*, 295 U.S. 694 (1935) (a compilation map is different than an official plat). Additionally, the 1912 map is a road map of the Wind River Reservation, Wyoming, created by the Department's Office of Indian Affairs. H. Doc. No. 516, 63d Cong., 2d Sess. The 1912 map does not purport to be a Reservation Boundary Map, but rather its expressly stated purpose is to show roads and was intended only to do so within the unopened portion of the Reservation.[40]

In addition, a map accompanying the 1914 Annual Report of the Commissioner of Indian Affairs to the Secretary labeled the area south of the Big Wind River and west of the Popo Agie as "Reservation," and the area north and east of those rivers as "Opened." These designations, however, are consistent with statements made after enactment of the 1905 Act, as discussed above, in which part of the Reservation was considered to be "opened" and part was solely reservation lands for the exclusive use of the Tribes. None of these references or maps, either by themselves or collectively, supports a conclusion that the 1905 altered the Reservation boundaries. These references are ambiguous and inconsistent at best, and under the Indian canons of construction are to be resolved in favor of the Tribes. *Yankton Sioux*, 522 U.S. at 344; *DeCoteau*, 420 U.S. at 444. Thus, while Congress was at times inconsistent in its reference to the 1905 Act area and sometimes referenced them as "former reservation," overall, subsequent treatment of the opened area evidences a view that the lands were part of the Reservation, most commonly referring to the Reservation as encompassing two parts, a ceded or opened area and a diminished or exclusive tribal area.

More significantly, there was no rush of non-Indian settlers into the open area and Congress's modest expectation for the ceded land never materialized. As of 1909, only 113,743.68 acres or 7.91 percent of the 1,438,633.66 acres opened were actually sold. By 1914, only 128,986.58 acres or 8.97 percent had been sold. During this time the United States also granted 50,000 acres of allotments in the ceded area to members of the Tribes.[41] Ultimately, only 196,360 acres were alienated, substantially less than the acreage later restored to tribal ownership within the opened area.[42] And in 1913, the Department concluded that the remaining

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[39] *See* Exhibits 5 & 6, State's Comments.
[40] Act of Aug. 24, 1912, 37 Stat. 518, 539.
[41] Letter dated June 12, 1914, Assistant Commissioner Indian Affairs to Hon. C.O. Lobeck, House of Representatives, BATES SH08201 at BATES SH08404, 08203. Another publication references that 33,064.74 acres were allotted in the ceded area, *Survey of Conditions of the Indians in the United States*, Hearing before a Subcommittee of the Committee on Indian Affairs, U. S. Senate, September 12, 13, and 14, 1932, Part 27 at 14467 ("*Survey*").
[42] Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol. on Indian Affairs* 1185, 1191 n.7 (U.S.D.I. 1979).

lands need not be sold "until it is thought best to do so."[43] In August 1915, the Secretary further advised the Commissioner of the General Land Office to postpone all sales in the opened area indefinitely.[44] A letter from the Commissioner of Indian Affairs in 1930 indicates the primary reason for halting the sales so early after enactment of the 1905 Act was that the Tribes were realizing significant amounts of money from leasing the land within the opened area for grazing.[45] The short period of time that the opened area was actually available for purchase by settlers hardly indicates an intent to permanently affect the boundaries of the Reservation and, in fact, supports the opposite conclusion. Thus, although lands in the opened area were available for settlement for a short period of time, those lands were still held for the benefit of the Tribes and the United States continued to manage those lands as the Tribes' trustee.[46]

During congressional hearings in 1932, the Reservation was referred to as a "quadrangular area approximately 65 miles by 55 miles," encompassing approximately 2,238,633 acres, in a "ceded portion" and a "diminished portion." The opened portion was again referenced as being used as tribal lands.[47] And, on November 2, 1934, Commissioner of Indian

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[43] As referenced in letter dated January 27, 1930, Commissioner C.J. Rhoads to E.O. Fuller. BATES SH00920.

[44] *Id. See also* Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol. on Indian Affairs* 1185, 1188, 1191 (U.S.D.I. 1979).

[45] *Id.* In 1916, Congress adopted a statute directing the Secretary of the Interior to issue oil and gas leases for the benefit of the Indians. Act of Aug. 21, 39 Stat. 519 (1916 Act). A dispute arose as to whether the oil and gas reserves under the ceded lands were subject to lease under the general land laws or under an 1891 law governing leases in the 1905 Act area. Representative Clark of Wyoming responded affirming the continuing status of the opened lands as Indian land:

> This is land upon the ceded portion of an Indian reservation which was subject to homestead entry under the law which ceded it, but the time for homestead entry has been exhausted so that this Indian land which was not taken is interspersed among other lands. It is still Indian land and the Indians are entitled to it.

53 Cong. Rec. 12,159 (1916). The 1905 Act area, therefore, clearly was not public land. It was ceded land within the Reservation, temporarily opened for settlement, but unless and until sold, it remained Indian land. Additionally, in a letter dated June 21, 1923, Commissioner of Indian Affairs Burke informed the Superintendent that the public land mineral leasing act of February 25, 1920, 41 Stat. 437 (1920), "gave the General Land Office no jurisdiction over the leasing of coal mining lands on the ceded portion of [the] Shoshone Reservation; but the former act, that approved March 3, 1905, provided for the sale of these lands under the provisions of the . . . mineral land laws." BATES SH08207. He concluded that land office could dispose of the lands, the proceeds of sales to go to the credit of the Indians. *Id.* The map accompanying the 1923 Annual Report of the Commissioner of Indian Affairs, labeled the area south of the Big Wind River and west of the Popo Agie as "Reservation;" the area north and east labeled "Former Indian Reservation." On June 15, 1929, however, in response to a request from homesteaders to manage the area for their benefit, the Department reaffirmed its commitment to managing the 1905 Act area for the benefit of the Tribes. BATES SH08209.

[46] Additionally, McLaughlin's action in the years following the 1905 Act provide further evidence that the Reservation boundaries were intended to remain intact. In 1922, seventeen years after 1905, McLaughlin met with the Tribes again and explained the Thermopolis Agreement as separate and distinct from the 1905 Act. In particular, McLaughlin pointed out that in the 1905 Act the "government simply acted as trustee for disposal" of the land north of the Big Wind River. Transcription Council Minutes, August 14, 1922, BATES SH08429 at BATES SH08433. McLaughlin recognized that "[i]t is ceded land under the control of the government, entirely," further affirmed that the Indians "still have an equitable right because the agreement has not been fulfilled in full." *Id.* at 10. As to obtaining allotments within the 1905 Act area, McLaughlin pointed out that as opened lands, parcels in that area could only be homesteaded during the period after it was officially opened for settlement, but allotments could be taken on the diminished reservation. *Id.* at 11.

[47] *Survey*, at 14428, 14467.

Affairs John Collier issued an opinion discussing the newly enacted Indian Reorganization Act (IRA) and its provision granting the Secretary the ability to stop the further withdrawal of Indian lands on reservations that were opened for settlement if the Tribe voted to accept the IRA. 54 I.D. 559 (Nov. 2, 1934). Of particular relevance here is Collier's explanation that around 1890, the Government started opening up to entry and sale, lands of reservations that were not needed for allotment, "the Government taking over the lands only as trustee for the Indians," and that "[u]ndisposed of lands of this class remain[ed] the property of the Indians until disposed of as provided by law." *Id.* at 560. Collier then concluded that the Wind River was one such reservation (along with numerous others) and withdrew those lands opened for entry within the reservation from further disposal of any kind under the authority granted in IRA. *Id.* at 562, 563. On June 15, 1935, the Shoshone and Arapahoe Tribes voted to exclude themselves from the Act. Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.*, United States Indian Service, 1947. On October 31, 1935, Secretary Ickes rescinded Collier's memo on further withdrawals for eight reservations, including the Wind River, as those tribes had voted to exclude themselves from the Act.[48]

Even though the Tribes did not vote to accept the IRA, in 1939, Congress directed the Secretary of the Interior to restore to tribal ownership significant acreage within the Reservation opened under the 1905 Act. Act of July 27, 1939, 53 Stat. 1128 ("Restoration Act"). This Act provided for the creation of land use districts for the consolidation of the respective Indian and non-Indian land holdings and authorized the restoration to the Tribes of "all undisposed-of surplus or ceded lands . . . which are not at present under lease or permit to non-Indians." *Id.* at 1129-30. It further restored to tribal ownership the "balance of said lands progressively as and when the non-Indian owned lands . . . are acquired by the Government for Indian use pursuant to the provisions of this Act." *Id.*

The Department proceeded with a series of land restorations consistent with this Act, restoring substantial acreage to tribal ownership, "adding" and "making" it part of the existing Reservation.[49] One illustrative example is in 1944, when the Secretary's order, published in the *Federal Register*, restored to the Tribes and the Reservation enumerated ceded lands that settlers had not acquired, providing:

> Now, Therefore, by 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 restoration to tribal ownership of the lands described above, which are classified as undisposed of, ceded lands of the Wind River Reservation, Wyoming, and which total 625,298.82 acres more or less, will be in the tribal interest, and they

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[48] *To Provide Compensation to the Shoshone and Arapahoe Tribes of Indians for Certain Lands of the Riverton Reclamation Project Within the Ceded Portion of the Wind River Indian Reservation, and for Other Purposes*, Hearing on H.R. 4483 Before the Committee on Interior and Insular Affairs, U.S. Senate, 83rd Cong. at 5-6 (May 6, 1953).

[49] *See* 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (1943); 7 Fed. Reg. 11,100 (Dec. 30, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944); 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 2812 (Mar. 14, 1945); 10 Fed. Reg. 7542 (Jun. 22, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); 21 Fed. Reg. 5067 (Jul. 7, 1956); 39 Fed. Reg. 27,561 (Jul. 30, 1974), as amended by 40 Fed. Reg. 42553 (September 15, 1975); 58 Fed. Reg. 32856 (June 14, 1993).

> 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 a part of the existing Wind River Reservation, subject to any valid existing rights.

9 Fed. Reg. 9,754 (Aug. 10, 1944). Pursuant to the 1939 Act, and in a series of Orders like the 1944 Order, the Secretary restored to tribal ownership the majority of the lands opened under the 1905 Act and "added" those lands to and/or "made them a part of" the Reservation. These restoration orders included lands on the eastern boundary of the Reservation – in particular land underlying what is now the Boysen Reservoir.

Any doubt as to the integrity of the Reservation's boundaries under the 1905 Act thus disappeared when the Secretary expressly closed the Reservation and returned the balance of lands within the existing Reservation to Indian ownership. Moreover, nothing in the restoration orders requires a conclusion that to be restored to reservation status, the lands must have been severed from the Reservation in 1905. Any such an interpretation is an over-simplification of the purpose of the Restoration Act and fails to comprehend the status of the ceded lands. Undisposed of ceded lands remained a part of the Reservation and were administered by the Federal Government in its capacity as trustee. The Restoration Act simply verified that the unsold lands were now removed from their opened status and reverted to full tribal ownership (versus an equitable interest held by the Tribes). Through the Restoration Act, Congress affirmatively and clearly rejected the notion that the Reservation was diminished for all time. That is, even if the 1905 Act diminished the reservation, which it did not, the orders issued under the 1939 Act expressly restored significant acreage to tribal ownership and reinforced the Reservation's status – including lands along the eastern boundary of the Reservation.

Subsequent history further reinforces the fact that the Reservation boundaries remained intact. In 1940, Interior Solicitor Nathan Margold was asked to issue an opinion on whether the Secretary had authority to sign a proposed agreement that fixed the boundary lines of certain parcels of land north of and abutting the Wind River and located within the 1905 Act area for purposes of oil lessees. Solicitor Margold advised that the Secretary was without authority to fix the boundary lines of the allotted, tribal, and ceded parcels of land for all time as it would change the boundaries of the Wind River Indian Reservation. He further noted that the land covered by the proposed agreement "represents undisposed of ceded land" and is limited by the 1905 Act and by the 1916 Act, neither of which permitted disposition of the lands as proposed in the agreement.[50] To resolve this problem, Congress passed an Act granting the Secretary the authority, upon certain conditions, to fix the boundaries of certain parcels of allotted, tribal and ceded lands north of the Wind River in certain specific locations. 55 Stat. 207 (1941). No action, however, was ever taken by the Department pursuant to the congressional authorization. Moreover, the 1940 opinion addressed parcels of land within the 1905 area and not the actual exterior boundaries of the Reservation. Likewise, in 1943, legal questions arose concerning the authority of the Tribes and the State to regulate hunting and fishing on the diminished reservation and lands within the opened portion of the reservation. The Solicitor's 1943 opinion dealt only with jurisdictional issues within the previously opened portion of the Reservation and expressly did not address the exterior boundaries of the Reservation. *Id.* at 1193 n.8 (expressly

[50] Solicitor's Opinion, M-30923 (December 13, 1940), 1 *Op. Sol. on Indian Affairs* 1011, 1016 (U.S.D.I. 1979).

declining to opine on the boundaries of the Reservation).[51] Thus, neither the 1940 Marigold opinion nor the 1943 Solicitor opinion relating to hunting and fishing rights have any significant relevance to the question of the Reservation's exterior boundaries.

In 1952, Congress passed an act to vest the United States with title to "certain lands and interests in lands of the Shoshone and Arapaho Indian Tribes of the Winder River Reservation." *See* Act of July 18, 1952, 66 Stat. 780; *see also* S. Rep. No. 82-1980, 82d Cong., 2d Sess. (1952) (explaining that the purpose of the legislation was "to acquire by the United States approximately 25,880 acres of land which are *subject to certain rights* of the Shoshone and Arapaho Indian Tribes of the Winder River Indian Reservation . . .") (emphasis added).[52] The 1952 Act authorized the Secretary to provide the Tribes with "reasonable consideration" in exchange for tribal "property and rights . . . *needed . . . for the construction and operation and maintenance* of the Boysen Unit of the Missouri River Basin project."[53] Act of July 18, 1952, 66 Stat. 780. (emphasis added). The 1952 Act incorporated and ratified a Memorandum of Understanding (MOU) between the Bureau of Reclamation (BOR) and the Bureau of Indian Affairs (BIA) (acting on behalf of the Tribes).[54] Pursuant to the terms of the MOU, the Tribes agreed to convey only the surface rights to 25,500 acres located along a portion of the eastern boundary of the Wind River Reservation to the BOR for construction and operation of the Boysen Unit. However, the Tribes retained all of the oil, gas, and minerals rights to the land. In addition, the MOU provided that, where the Tribes only conveyed the surface, they retained certain rights of occupancy, access, and/or grazing on lands surrounding and on the shores of the reservoir.[55] Significantly, neither the 1952 Act nor the MOU refer to the boundaries of the Reservation, to the return of any land to the public domain, or to the 1905 Act. *Cf. Solem*, 465 U.S. at 470 (Congress must "clearly evince an intent to change boundaries before diminishment will be found") (additional quotation and citation omitted).

The 1952 Act falls far short of utilizing language that contains an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. The 1952 Act does not use words of permanence such as "forever and

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[51] The 1943 opinion found that the Tribes retained certain property rights in the lands as the beneficial owners of the lands, and that a trust was impressed upon the lands to protect those rights. *Id.* at 1188-89. It also recognized that absent congressional authorization, the State could not use its regulatory authority merely "as a means of obtaining revenue from the ceded lands." *Id.* at 1190.

[52] The 1953 Reclamation Act (67 Stat. 592 (1953)), which provided compensation to the Shoshone and Arapahoe Tribes for certain lands of the Riverton reclamation project, addresses only lands located within the exterior boundaries of the Wind River Reservation. It neither mentions nor in any way affects the exterior boundaries of the Reservation. As such, the 1953 Reclamation Act is not relevant to the question presented here. Therefore, this opinion does not discuss or address the 1953 Reclamation Act in detail.

[53] *See* S. Rep. No. 82-1980 at 2 (stating that the "board of appraisers recommend $458,000 as a fair price for the Indian lands and rights to be acquired for the Boysen Dam and Reservoir").

[54] The MOU was approved by the Secretary of the Interior on December 29, 1951 and amended with his approval on May 1, 1952. The Senate Report accompanying the Act includes the MOU and lists the tribal and the allotted lands to be acquired for the dam and for the reservoir. S. Rep. No. 82-1980.

[55] *See, e.g., id.* at 3, 6, 9, 50, 52. Section 4(b) of the MOU identifies the tracts of land (generally lands on and surrounding the shores of the reservoir) where the Tribes retained an exclusive right of occupancy so long as the tracts are not inundated by reservoir waters and the abutting lands remain "subject to occupancy rights" of the Tribes. *Id.* at 3, 9, 50. Section 4(c) describes the lands where the Tribes retained the rights of access and grazing when any such tract is not inundated by reservoir waters, so long as the lands abutting the tract remain subject to Indian occupancy rights. *Id.* at 52.

absolutely" but, rather, makes clear that significant tribal interests in the land were retained notwithstanding the conveyance of the surface right.[56] The MOU demonstrates that the Tribes (a) conveyed only the surface estate of the land for the reservoir and specifically retained their mineral rights;[57] (b) retained an exclusive right of access to portions of the Boysen Reservoir shoreline so long as adjacent lands remained subject to Indian occupancy rights;[58] (c) retained dual access to certain areas on the southeastern portion where those areas abut land still subject to Indian occupancy; and (d) retained certain grazing rights. All of these retained rights are clearly inconsistent with "the present and total surrender of all tribal interests" required in order to evidence congressional intent to alter the boundaries of the Reservation.[59] *Solem*, 465 U.S. at 470. Similarly, the circumstances surrounding the passage of the 1952 Act do not indicate such a congressional intent.[60] Thus, the 1952 Act did not alter the Reservation boundaries.[61] Moreover, the purpose of the 1952 Act, to facilitate the construction of a dam and reservoir on the Tribe's Reservation, is consistent with the Tribes' continued use and occupancy of its Reservation. In fact, the 1952 Act and MOU between BIA and BOR specifically recognizes the Tribes' right to utilize and graze on the shoreline and lands surrounding the reservoir notwithstanding the conveyance of certain lands within the Wind River Reservation for the Boysen unit. This recognition demonstrates that Congress understood that the Tribes would continue to inhabit their Reservation, which remained intact, and benefit from the use of the land surrounding the reservoir.

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[56] The Tribes conveyed approximately 366 acres in fee for the dam itself. Given the *de minimus* nature of this portion in comparison to the conveyance as a whole (approximately 26,000 acres), this fact does not demonstrate an intent to diminish. The 1952 Act must be read as a whole, and there is no reference to changing the exterior boundaries of the Reservation, or intent to do so.

[57] *Crow Tribe of Indians v. Mont.*, 819 F.2d 895, 898 (9th Cir. 1987) (mineral estate underlying reservation is "component of the reservation land itself"), *aff'd by* 523 U.S. 696 (1998).

[58] The fact that, in 1952, Congress recognized a retained right to exclusive tribal use, notwithstanding the Tribes' conveyance of the surface right, indicates that Congress understood that the Reservation was not eviscerated by the 1905 Act. *See Solem*, 465 U.S. at 471-72 ("Congress' own treatment of the [lands affected by a surplus land act], particularly in the years immediately following the opening, has some evidentiary value . . .").

[59] *Compare* Act of July 18, 1952, 66 Stat. 780, *with* discussion of the Lander Purchase, *supra.* at 3-4 (concluding that the Lander Purchase, 18 Stat. 291, diminished the boundary of the Reservation because the Tribes agreed to an outright sale of all their interests in Reservation lands generally south of the 43rd parallel in exchange for a lump sum payment of $25,000 and the express purpose of the Act ratifying the Lander Purchase was "to change the southern limit of said reservation"), *and* discussion of the Thermopolis Purchase, *supra.* at 5 (finding that the Thermopolis Purchase diminished the boundary of the Reservation because, among other things, "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 and to the lands and the water rights appertaining thereunto' with respect to a tract surrounding the Big Horn Hot Spring . . . [and] [t]he sold lands were to be 'set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public' . . . 'in consideration for the lands ceded, sold, relinquished and conveyed,' the United States agreed to pay a lump sum of $60,000").

[60] The 1951 MOU was the product of extensive negotiations between the Tribes and the United States which resulted in the Tribes' retention of significant interests in lands conveyed. S. Rep. No. 82-1980, 82d Cong., 2d Sess. (1952). The Tribes passed a resolution approving the conveyance contingent on retention of those rights by the Tribes. *Id.* at 4.

[61] This legal position is consistent with the holding in *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 (1983), *cert. denied*, 464 U.S. 1042 (1984), that neither the Fort Randall nor Big Bend Acts disestablished the boundaries of the Lower Brule Reservation. There, the Circuit Court also opined that continued Indian control of land taken for the dams and reservoirs was not inconsistent with the Federal Government's purpose in acquiring the property, as might be the case if the land were acquired for settlement. *Id.* at 817-818, 820.

Furthermore, congressional enactment of the 1952 Act demonstrates that Congress recognized that the Tribes had a surface interest in the 25,500 acres conveyed, as well as a mineral estate and other interests in that land. Indeed, approximately 47 years after Congress enacted the 1905 Act, the terms of the 1952 Act confirm that Congress recognized the Tribes' interests within the Reservation otherwise there would have been no need to address these particular interests and establish an MOU between BOR and BIA.

In sum, these facts illustrate that Congress and the Department never disclaimed the Tribes' continuing interest in the ceded lands and that those lands were considered as being within the Reservation boundaries. The official survey approved by the General Land Office confirmed that the 1905 Act opened the lands for settlement but did not change the exterior boundaries of the Reservation. To the extent there are inconsistent references made with respect to the Reservation, those must be interpreted in favor of the Tribes and reflect the unique nature of the Act as opening, but not conveying, the lands immediately. It is significant that the opening of the Reservation failed and was soon halted by 1915 when the Tribes were permitted to lease the lands for grazing instead. The Restoration Act and two Solicitor's opinions further confirmed the unchanged Reservation status and that the exterior boundaries remained intact. Under the 1905 Act, the Tribes' cession was more of a "cession in trust," and not an outright conveyance of all their interest in the land. *Id.* at 100. Since the ceded lands did not become public lands or part of the public domain, they retained their reservation status. *Id.* at 100-102.[62]

b. Demographics of the Opened Area

The demographics of the ceded area are least probative of congressional intent. *Solem*, 465 U.S. at 471-472. The record contains virtually no evidence of the demographic makeup of the 1905 Act area. What is clear from the record, however, is that the opening of the ceded portion of the Reservation did not succeed in generating sales to non-Indians for the benefit of the Tribes. As stated above, there was no rush of non-Indian settlers into the area and Congress's modest expectation for the ceded land never materialized. As of 1909, only 7.91 percent of the acres opened were actually sold. By 1914, only 128,986.58 acres or 8.97 percent had been sold. All told only a little more than 11 percent of the ceded lands were sold to non-Indians. During this time, the United States also granted 50,000 acres of allotments in the ceded area to members of the Tribes.

Ultimately, only 196,360 acres were alienated, substantially less than the acreage restored to the Tribes pursuant to the 1939 and other Acts. There is a concentration of non-Indian fee land in and around the City of Riverton, patented in 1907. But Riverton was comprised of only 160 acres then and did not develop immediately following the 1905 Act. Nor is it representative of the 1905 area. Demographic changes far removed from 1905 provide an unreliable method of statutory interpretation. *Solem*, 465 U.S. at 471, n.13. Thus, the demographics of the 1905 area do not support a finding that the 1905 intended to diminish the Reservation boundaries to permanently sever or "cut off" that area from the Reservation.

[62] *See also* discussion regarding public domain, *supra* notes 19 and 36.

4. *Review of State Supreme Court Decision in Yellowbear*

The State points to *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008), in which the court held that crimes committed within the 1905 Act area did not occur on the Reservation.[63] It argues that decision supports a conclusion that the 1905 Act diminished the boundaries of the Reservation. While the *Yellowbear* case is not binding precedent, it is considered here to determine whether it is persuasive. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 391 (1944).

Yellowbear is the only case to consider the 1905 Act since the Supreme Court established the relevant precedent. The case involved federal *habeas corpus* relief for Mr. Yellowbear's state conviction of the first degree murder of his infant daughter. In affirming the district court's denial of relief, the Circuit Court concluded that Mr. Yellowbear had failed to explain how the Wyoming Supreme Court failed to apply objectively U.S. Supreme Court precedent to his jurisdictional arguments that the Reservation had been diminished or that the decision was otherwise incorrect. Thus, the Circuit Court's opinion is not a decision on the merits of the reservation diminishment, but rather a decision on the burden of showing that the State Supreme Court erred. In addition, its reasoning is unpersuasive for several reasons. The *Yellowbear* court did not thoroughly analyze the 1905 Act in light of the unique facts surrounding the Reservation. Rather the court only looked at and found the operative words of the 1905 Act to be "indistinguishable" from the language in *DeCoteau* in which the Court found diminishment. 174 P.3d 1270, 1282 (Wyo. 2008). But, as discussed above, there are significant ways in which the two statutes differ and, moreover, any such similarity is not determinative.

The *Yellowbear* court failed to consider whether any of the provisions of the 1905 Act were contrary to diminishment. Additionally, the court mistakenly found a sum certain payment because the 1905 Act provided specified amounts of money for per capita payments, a survey, schools, and an irrigation project. *Id.* But these funds were to be paid out of the proceeds of future land sales and, as discussed above footnote 15, did not substitute for the sum certain payment in the 1891 unratified Agreement. Rather, they parallel other provisions of that 1891 Agreement. The Tribes were not paid a sum certain for the land. The United States obligation to pay was conditional – the Tribes were paid only when the lands were sold. Thus, the court's analysis amounts to an enumeration of the 1905 Act's reference to "diminished reserve" and "diminished reservation," despite precedent that cautions against conflating casual references to geography with express intent to diminish. *Solem*, 465 U.S. at 476.

Importantly, the court did not have before it, and thus did not examine, the evidence of the legislative history and circumstances surrounding the 1905 Act. *Yellowbear* was a criminal

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[63]The State also points to *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960), and *State v. Moss*, 471 P.2d 333 (Wyo. 1970), to support its position. Importantly, however, the Wyoming Supreme Court decided *Blackburn* before the Supreme Court established any precedent for determining whether a reservation was diminished by a congressional act. Accordingly, it did not apply the relevant precedent and its reasoning is not persuasive. The court also based its decision on the fact that the crime occurred in the 1905 Act area that was part of a 1953 reclamation project. But, as pointed out in footnote 53, the 1953 Act dealt with lands within the exterior boundaries of the Reservation. Similarly, when *Moss* was decided, the U.S. Supreme Court had decided just one diminishment case, *Seymour v. Superintendent*, 368 U.S. 351 (1962), and had not yet established the standard for determining reservation diminishment.

proceeding, which lacked a fully developed record and expert historical reports relating to the Reservation's boundaries. The court simply referred to the recitation of facts in the dissenting opinion in *Big Horn I* by Justice Thomas and concluded, "while [the majority and dissent] disagreed over whether reserved water rights continued to exist in the ceded lands, [they]. . . agreed that the reservation had been diminished." *Id.* at 1283. The dissent is not controlling, but, more importantly, it mistakenly concluded that the 1905 Act diminished the Reservation based on a belief that the 1905 Act "approved" the 1891 Agreement. 753 P.2d at 128.

Finally, in considering subsequent treatment and demographics, the court focused on the City of Riverton, noting that 92 percent of the population of Riverton is non-Indian and that Riverton and the State provide sanitation, street maintenance, water and sewer service, planning and zoning, and law enforcement. *Id.* The demographics of Riverton tell us nothing about the demographics of the ceded area as a whole. Although modern demographics may be considered on a pragmatic level, they are potentially unreliable and cannot on their own provide a basis for finding diminishment. *Solem*, 465 U.S. at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351 (1962)).

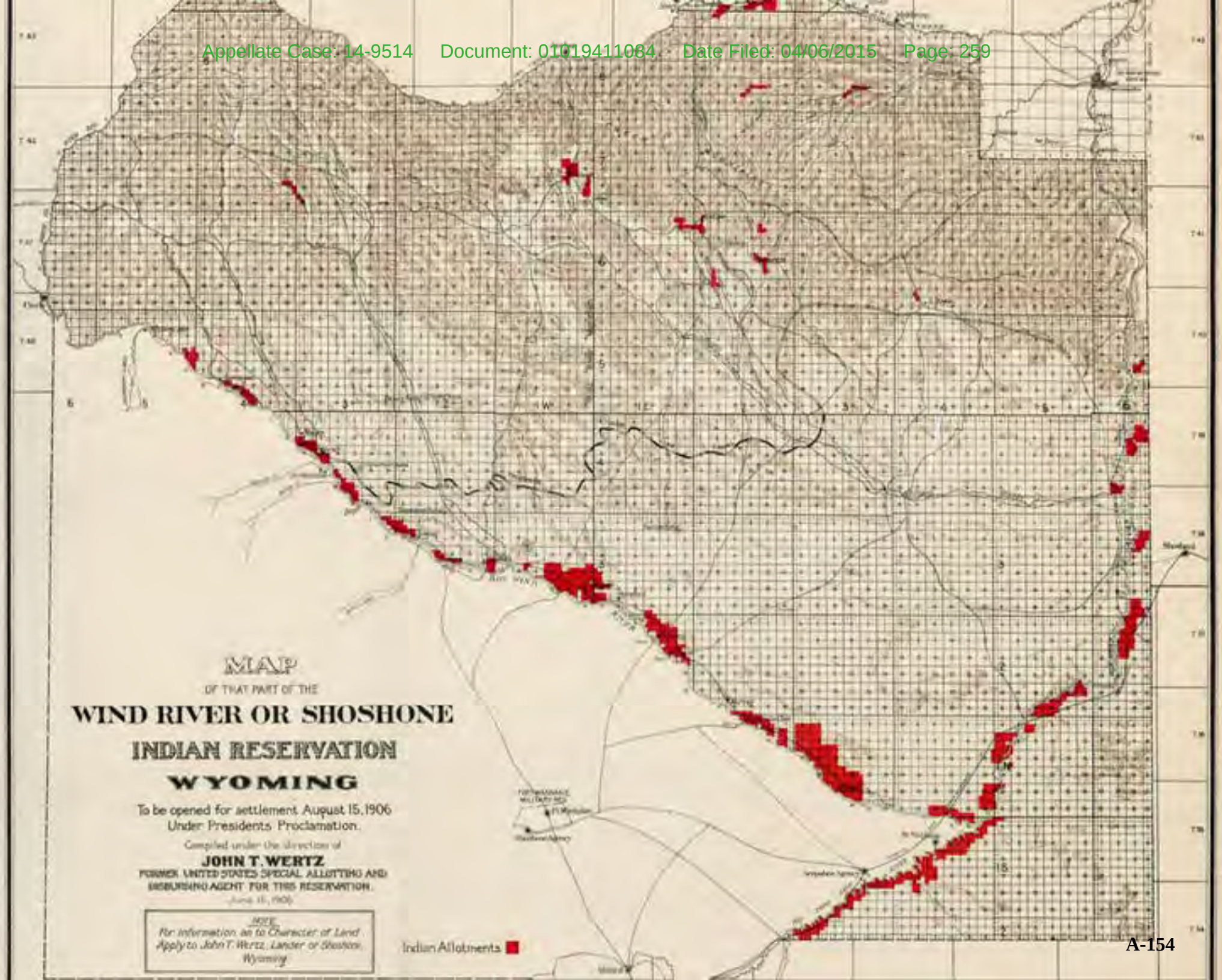
V. Conclusion

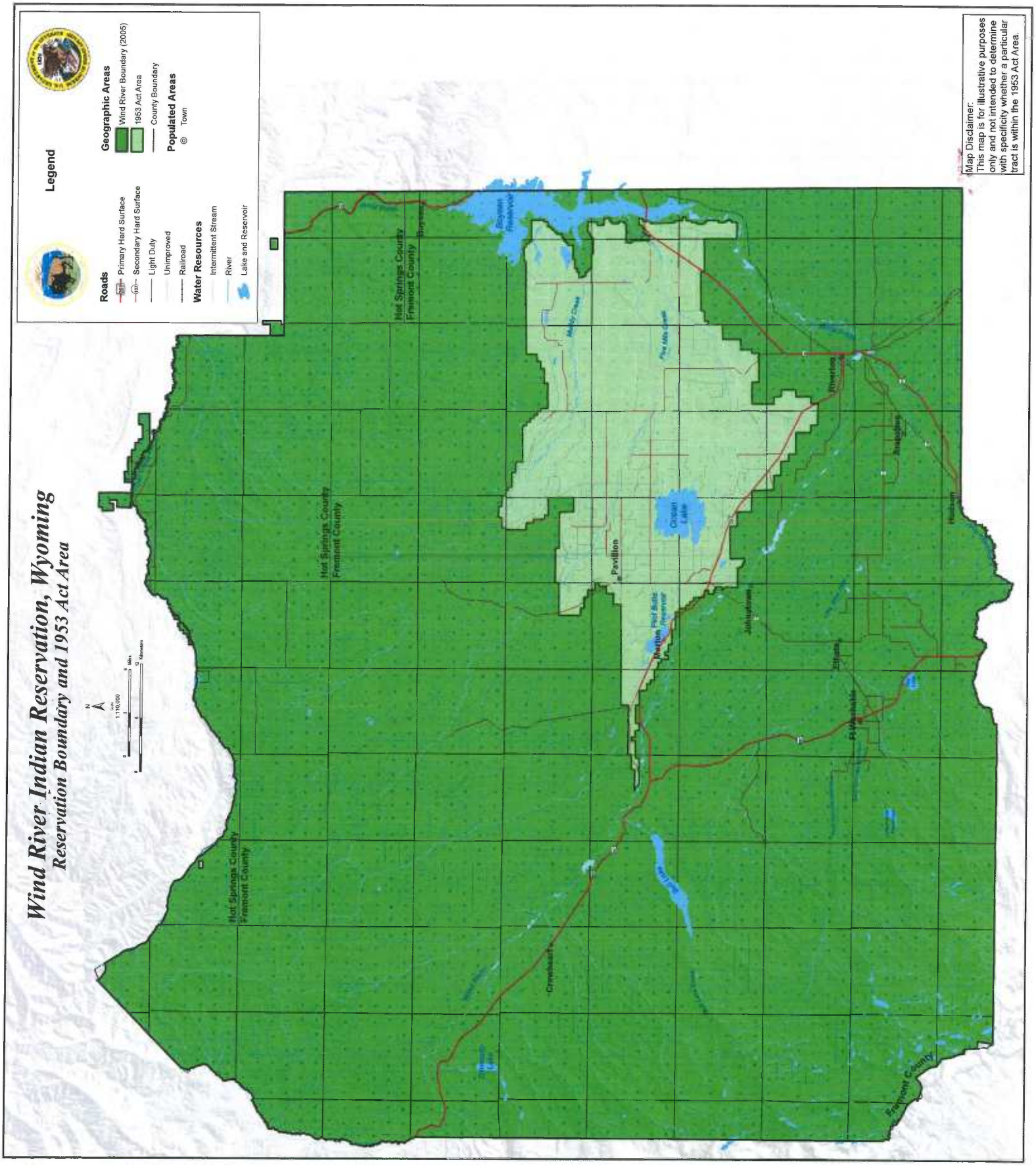
Under Supreme Court precedent and consistent with the United States' longstanding position on this issue, the original boundaries of a reservation remain intact unless Congress clearly evidences an intention to diminish that reservation. Unlike the Lander Purchase and Thermopolis Purchase, the language of the 1905 Act, its legislative history, and the circumstances surrounding its enactment do not reveal clear congressional intent to diminish and alter the exterior boundaries of the Wind River Reservation.

Please do not hesitate to contact me or Patrice H. Kunesh, (202-208-4549), Deputy Solicitor of Indian Affairs, if we can be of further assistance.

Sincerely,

Hilary C. Tompkins
Solicitor


MAP
OF THAT PART OF THE
WIND RIVER OR SHOSHONE
INDIAN RESERVATION
WYOMING
To be opened for settlement August 15, 1906
Under Presidents Proclamation.
Compiled under the direction of
JOHN T. WERTZ
FORMER UNITED STATES SPECIAL ALLOTTING AND
DISBURSING AGENT FOR THIS RESERVATION.
June 15, 1906.
NOTE
For information as to Character of Land
Apply to John T. Wertz, Lander or Shoshoni,
Wyoming
Indian Allotments


Wind River Indian Reservation, Wyoming
Reservation Boundary and 1953 Act Area
Legend
Geographic Areas
Wind River Boundary (2005)
1953 Act Area
County Boundary
Populated Areas
Town
Roads
Primary Hard Surface
Secondary Hard Surface
Light Duty
Unimproved
Railroad
Water Resources
Intermittent Stream
River
Lake and Reservoir
Map Disclaimer:
This map is for illustrative purposes only and not intended to determine with specificity whether a particular tract is within the 1953 Act Area.
Hot Springs County
Fremont County
Boysen Reservoir
Riverton
Pavillion
Ocean Lake
Johnstown
Arapahoe
Hudson
Crowheart
Fremont County