

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

No. 14-9512

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL

PROTECTION AGENCY, *et al.*,

Respondents,

and

THE NORTHERN ARAPAHO TRIBE, *et al.*,

Intervenors.

No. 14-9514

WYOMING FARM BUREAU FEDERATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL

PROTECTION AGENCY, *et al.*,

Respondents,

and

THE NORTHERN ARAPAHO TRIBE, *et al.*,

Intervenors.

Petition for Review of Final Action of the
United States Environmental Protection Agency

**REPLY BRIEF
OF INTERVENORS FREMONT COUNTY AND CITY OF RIVERTON,
WYOMING
Preliminary Brief (Deferred Appendix Appeal)
ORAL ARGUMENT REQUESTED**

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GLOSSARY

1905 Act:	33 Stat. 1016
Br.:	Brief
City:	City of Riverton, Wyoming
County:	Fremont County, Wyoming
EST:	Eastern Shoshone Tribe
Prof.	Law Professors
NAT:	Northern Arapaho Tribe
Reservation:	Wind River Indian Reservation
S&A LOC:	Shoshone and Arapaho Law & Order Code
State:	State of Wyoming
TERO:	Tribal Employment Rights Office
Tribal Code:	Shoshone & Arapaho Law & Order Code
Tribal Court:	Shoshone & Arapaho Tribal Court
Tribes:	Eastern Shoshone Tribe & Northern Arapaho Tribe
UCC:	Uniform Commercial Code
WRIR:	Wind River Indian Reservation

ARGUMENT

The City and County Intervenors concur in the briefs filed by the State of Wyoming and Farm Bureau.

I. Big Horn I is not dispositive regarding the issue of the WRIR boundaries.

Claim preclusion, applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) the parties must be identical or in privity; and (3) identical causes of action in both suits. *Wilkes v. Wyo. Dep't of Employment Div. of Labor Standards*, 314 F.3d 501, 504 (10th Cir.2003). If these requirements are met, res judicata is appropriate unless the party seeking to avoid preclusion did not have a “full and fair opportunity” to litigate the claim in the prior suit. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n. 4 (10th Cir.1999).

The State and Farm Bureau both extensively argued the issue of whether *Big Horn I* rendered the reservation boundary issue res judicata. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P. 2d 76 (Wyo. 1988). The County and City concur in those arguments and offer only a few additional comments on that subject.

The issue in *Big Horn I* was establishment of priority dates to determine water rights for reservation lands. Indian Country status of those lands was not

determined in *Big Horn I*. No identity in issues exists, therefore res judicata does not preclude the present case.

Additionally, Res judicata does not apply because there has been a change in law during the interim between *Big Horn I* and subsequent cases. The test for diminishment of a reservation has broadened since *Big Horn I* was decided and now courts must examine events occurring subsequent to a legislative act regarding diminishment of a reservation. (However, as both Appellants have previously noted, the language of the 1905 Act was unambiguous, clearly indicating Congressional intent to diminish the WRIR, and not requiring additional analysis for Congressional intent.)

The issues of reservation boundaries and reservation status of the 1905 Act area were not fully fleshed out in *Big Horn I*. First, the boundaries themselves were stipulated by the parties. [EPA-WR-003078, EPA-WR-003091.] An issue is not actually fully litigated when it is the subject of a stipulation between the parties, unless the parties have manifested an intention to that effect. RESTATEMENT (SECOND) OF JUDGMENTS § 27 Cmt. e (2011). Thus the final test for claim preclusion is not met.

In *Big Horn I*, the parties expressly manifested their intention not to bind themselves regarding other issues, stating on the face of the stipulation that it was:

For the purposes of determining the reserved or other rights to the use of water, if any, which may exist with respect to the Wind River Indian Reservation, the exterior boundaries of the Wind River Indian Reservation are set forth in the United States Statement of Geographic Boundaries filed herein...

CTY-WR-000063. The parties also stated later in the stipulation that, “**This stipulation shall not affect the jurisdiction of any parties over lands within the exterior boundaries of the Reservation.**” [Emphasis added.] CTY-WR-000064.

This demonstrates a clear intent that the parties did not intend to be bound in future proceedings, at least with respect to the boundaries determined in *Big Horn I*, and that the boundaries were stipulated merely for the purpose of determining water rights.

The Wyoming Supreme Court made no formal scrutiny of the Indian country status of the 1905 Act area, especially outside the realm of water rights determination. The Court touched on the 1905 Act and diminishment of the WRIR a few times throughout its decision, strictly in a historic context or with regard to water right priority dates. *See, e.g., Big Horn I at 13, 84, 92, and 112.* However, no formal test was employed regarding diminishment or status of that area.

II. The Tribal Code Assumes Broad Jurisdiction.

The Law Professors argued in their *amicus* brief that the City and County fear that reservation status means that the disputed area is no longer part of Wyoming. *Prof. Br.* at 4. This specious comment ignores the fact that the Tribal Code, in clear and unambiguous language, reserves broad jurisdiction of the Tribal Court over residents of the WRIR, without distinguishing race or tribal affiliation, and without regard to state or federal case law such as that established in *Montana V. United States*, 450 U.S. 544 (1981).

While the general proposition that the sovereign powers of an Indian tribe do not extend to non-members was cited in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981) created two exceptions, as cited by the Professors. *Prof. Br.* at 5. These exceptions include

- 1) tribal regulation through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements and
- 2) civil authority over the conduct of non-Indians on fee lands within the reservation when the conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe. *Montana, Supra*, at 565-66.

The Tribal Code, however, takes a broader stance regarding the extent of its jurisdiction. Section 1-2-2(1) extends Tribal Court jurisdiction to “the territory within the Wind River Indian Reservation and to such other lands without such boundaries as may have been or may hereafter be added to the reservation or held in trust for the tribes under any law of the United States or otherwise.” Personal jurisdiction is claimed under § 1-2-3(2) of the Tribal Code over

- a) Any person residing, located or present within the reservation for any civil cause of action;
- b) Any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action;
- c) Any person who owns, uses or possesses any property within the reservation for any civil cause of action;
- d) Any person who commits tortious conduct within the reservation, either in person or by an agent or representative, for any civil cause of action arising from such act, conduct or omission;

“Person” is defined in S&A LOC §1-2-3(1) as inclusive of any individual, firm, company, association, corporation or tribe.” The Code applies to any person meeting these criteria, and does not merely apply to Indians. Section 1-2-1 of the Code states that Tribal interests demand that the Tribes provide all individuals living within the Reservation with an effective means of redress against “members, nonenrolled members, and other person who through their residence, presence,

business dealings other acts or failures to act, or other significant minimum contacts with this reservation and/or its residents commit criminal offenses against the tribes or incur civil obligations to the persons or entities entitled to the tribes' protection.”

While the Tribal Code states that its general subject matter jurisdiction over all civil causes of action and prohibited offenses arising on the WRIR is subject to any contrary exceptions or limitations contained in federal or applicable tribal law, it does not mention exceptions or limitations contained in state law. S&A LOC § 1-2-5. Instead, the Tribal Code only claims concurrent jurisdiction with state laws. S&A LOC §1-2-6.

The Tribal Court has already claimed jurisdiction over a civil matter within the boundaries of the ceded portion of the Reservation, with regard to the suit involving the *Amicus* herein, Riverton Memorial Hospital. *Armajo v. Riverton Memorial Hospital, LLC*, No. CV-11-2015 (Shoshone & Arapaho Tribal Court, February 15, 2015). As NAT argued in its *Opposition to the Hospital's Motion for Leave to file an Amicus Curiae Brief*, Doc. #01019441822 at 6-7, the Tribal Court has adopted the position that the 1905 Act did not diminish the Reservation, and thus the Tribes have criminal and civil jurisdiction over the area. The Tribes have adopted a minimum contacts standard of jurisdiction with regard to non-Tribal

members, rather than the more stringent “consensual relationship” standard adopted in *Montana. Supra*, at 565-566.

While it may be quite simple to academically postulate that Tribal law will apply to very few interactions involving non-Indians on fee land, real-world application of Tribal jurisdiction plays out differently, in that the Tribal Code assumes broader jurisdiction than that contemplated by the string of cases argued by the Law Professors. Individuals and entities will have to expend time and money in the court system trying to sort out the true jurisdictional reach of the Tribal Court, when the Tribal Code is applied as it appears on its face, just as the parties are now in *Armejo*.

III. The Tribal Code differs from federal law.

In several areas, the Tribal Code appears to attempt to supersede the federal laws.

A. Liquor Licensing

The Law Professors claim that reservation status does not undermine state or local liquor regulation, and that federal law excludes fee-patented lands in non-Indian communities or rights-of-way through Indian reservations (*Prof. Br.* at 6, 18 U.S.C. § 1154). However, that argument ignores the fact that the Tribal Code states that “No person shall engage in the sale of intoxicating beverages within the Indian

country under the jurisdiction of the tribes unless duly licensed by the tribes and, in the case of nonIndians, by the tribes and the State of Wyoming.” S&A LOC § 14-12-3. The Tribes have not asserted the dual licensing requirement in the past. This is due to the fact that the licensee’s businesses were not located within the Reservation boundary. If the diminished area is now determined to be within the Reservation there is no reason to believe that imposition of the dual licensing requirement will not follow, thereby adversely affect local businesses in the ceded area.

B. Criminal Jurisdiction

The Professors claim that it is untrue that law enforcement will not be able to arrest or ticket Indians on fee land, since tribes may make agreements with local law enforcement. *Prof. Br.* at 9. While it is true that several tribes have agreements for cross-deputization of law enforcement, such efforts have not been successful at the city, county or state level in Wyoming. Absent such an agreement, the proposition becomes true.

C. Commercial and Business Regulation

The Professors’ arguments that tribal regulation of the activities of non-members can only be achieved through consensual relationships with the tribes or their members are misguided. *Prof. Br.* at 10. While this type of relationship is the

second exception espoused in *Montana*, the Tribes on the WRIR have still reserved the right to tax any business within the boundaries of the Reservation. S&A LOC §10-1-2(7). The Professors' statement that there is no reason to believe that the Tribes will enforce their existing TERO laws in Riverton is completely without basis. *Prof. Br.* at 11. The Tribes have not enforced the TERO code or tax in Riverton in the past. Presumably this was due to the area not being within the Reservation boundaries. If it is now determined that the diminished area is within the reservation boundaries, then such tax and regulation would become available to the tribes under tribal law and the second *Montana* exception. There is certainly nothing preventing them from doing so if this Court finds that cession did not occur in the disputed area.

D. Liens

The City and County maintain that priority of existing liens may be affected because the Wyoming Secretary of State's office does not currently accept UCC filings from the WRIR. The Professors' argument that most entities lending within Indian Country make UCC filings with the local tribe, the Secretary of State, and in the Office of the Recorder of Deeds in Washington, D.C. is without support. *Id.* at 11. Three such filings would be cumbersome. In Wyoming, it would be even more burdensome, as there would have to be four filings, as two different

sovereign tribes are involved and the Joint Business Council has been dissolved. The argument that tribes have signed compacts to alleviate this burden is also unsupported, without proof that both EST and NAT would be willing to make such an agreement, and nothing exists which can compel them to sign one. *Id.* at 12.

E. Zoning and Building

The claim that there is no precedent to uphold tribal zoning laws in a primarily non-Indian area may be true, (*Id.* at 13) but the Tribal Code language clearly and unambiguously assumes zoning authority over all lands within the Reservation boundaries, “whether held in trust by the United States for the benefit of the individual Indians, or for the Shoshone and Arapaho Tribes or held in fee by Indians or non-Indians.” S&A LOC §11-5-3.

F. Cooperation Between Governments

The Professors point out that, rather than litigating jurisdictional issues, many tribes have resolved their differences through intergovernmental agreements with states, counties, and municipalities. *Prof. Br.* at 16. While that is a comforting notion in theory, the reality is that currently the WRIR Tribes are not cooperating efficiently with each other enough to agree on the dissolution of their joint business council. Additionally, while several states may have adopted legislation

authorizing state agencies to enter into inter-governmental agreements with the resident tribes, there is no guarantee of that happening in Wyoming, and past efforts have failed.

CONCLUSION

Big Horn I was not dispositive of the Reservation boundary issue. The Tribal Code assumes broad jurisdiction over both Indians and non-Indians on the Reservation, in clear, unambiguous language, despite any case law to the contrary. For these reasons and the reasons stated previously by all the Appellants and Appellant-Intervenors, the City of Riverton and Fremont County respectfully request that this Court reaffirm that the 1905 Act diminished the WRIR and vacate and set aside the EPA's treatment as a state jurisdictional determination and remand the action back to the EPA for further proceedings consistent with the Court's opinion and involving all affected parties.

SUBMITTED this 2nd day of July, 2015.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the digital submission of the foregoing *Reply Brief Of Intervenors Fremont County And City Of Riverton* has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, Version 12/1.671.4791, with weekly definitions update and scanned nightly, and according to the program, is free of viruses. I additionally certify that all required privacy redactions have been made, and that the ECF submission of this document is an exact replica of the hard copies submitted to the Court.

s/ Jodi A. Darrough
Deputy Fremont County Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation in the Court's July 8, 2014 Order, and any subsequent Orders, as this Brief is comprised of 2,318 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in 14 point Times New Roman font.

s/ Jodi A. Darrough
Deputy Fremont County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2015, a true and correct copy of the foregoing *Reply Brief Of Intervenors Fremont County And City Of Riverton*, the Clerk of Court through the Court's CM/ECF system on all attorneys of record.

s/ Jodi A. Darrough
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Index to Addenda

Title I, Chapters 1 & 2, S&A LOC

**TITLE I
GENERAL PROVISIONS**

CHAPTER 1 PRELIMINARY PROVISIONS

Section 1-1-1 Inherent Tribal Authority

The power to legislate for the administration of justice for an Indian tribe extends back to time immemorial if not limited by Congress or itself. This exercise of inherent tribal sovereignty provides the basis upon which this Code is enacted. It is a general act intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if it can be reasonably avoided.

Section 1-1-2 Name of Code

This law and order code shall be known as the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation and may be referred to as the Code and abbreviated as S&A LOC. Subcodes and rules included herein may be cited by the name given in the Subcode or rule heading.

Section 1-1-3 Prior Inconsistent Resolutions and Ordinances Repealed

Any and all resolutions and ordinances of the Joint Business Council, Shoshone and Arapaho Tribes which conflict in any way with the provisions of this Law and Order Code are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this Law and Order Code. Those which do not conflict will remain in effect.

Section 1-1-4 Enforcement of Code; Service of Notices, Orders; Warrants

(1) The Indian Police of the Bureau of Indian Affairs (BIA) shall carry out the orders of the Shoshone and Arapaho Tribal Courts and in the community enforce the letter and spirit of this Code in an impartial manner until the Shoshone and Arapaho Tribes create their own police department.

(2) The Indian Police of the BIA shall also promptly serve all notices which the courts request.

(3) Warrants of arrest and for search and seizure based on probable cause are to be executed to insure justice by the Indian police and carried out in a manner that promotes fairness to all parties.

Section 1-1-5 Amendment of Code

(1) This Law and Order Code may be amended by the Joint Tribal Business Council and amendments shall be made a part thereof for all purposes and shall be certified and incorporated herein in a manner consistent with the numbering and organization thereof.

(2) No amendment shall be effective until published by the tribes.

CHAPTER 2 JURISDICTION

Section 1-2-1 Jurisdiction; Tribal Policy

It is hereby declared as a matter of tribal policy and legislative determination, that the public and tribal interests demand that the tribes provide all individuals living within the Wind River Indian Reservation with an effective means of redress for both civil and criminal conflicts against members, non-enrolled members, and other persons who through their residence, presence, business dealings, other acts or failures to act, or other significant minimum contacts with this reservation and/or its residents commit criminal offenses against the tribes or incur civil obligations to persons or entities entitled to the tribes' protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the tribes, their members, and other residents of the reservation and other persons and entities over which the tribes have not previously elected to exercise jurisdiction. The jurisdictional provisions of this Law and Order Code, to insure maximum protection for the tribes, their members and other residents of the reservation, should be applied equally to all persons.

Section 1-2-2 Territorial Jurisdiction

(1) The jurisdiction of the Tribal Courts of the Shoshone and Arapaho Tribes shall extend to the territory within the Wind River Indian Reservation and to such other lands without such boundaries as may have been or may hereafter be added to the reservation or held in trust for the tribes under any law of the United States or otherwise.

(2) The jurisdiction of the Tribal Courts of the Shoshone and Arapaho Tribes shall extend beyond the territorial limitation set forth above, to effectuate the jurisdictional provisions set forth below, to the greatest extent permissible by law.

Section 1-2-3 Personal Jurisdiction

(1) As used in these jurisdictional provisions the word "person" shall include any individual, firm, company, association, corporation or tribe.

(2) The Tribal Courts of the Shoshone and Arapaho Tribes shall have personal jurisdiction over the following persons:

a) Any person residing, located or present within the reservation for any civil cause of action;

b) Any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action;

c) Any person who owns, uses or possesses any property within the reservation for any civil cause of action;

d) Any person who commits tortious conduct within the reservation, either in person or by an agent or representative, for any civil cause of action arising from such act, conduct or omission; and

e) Any enrolled or non-enrolled member of any indigenous Indian tribe who commits a criminal offense prohibited by this Code or other law of the tribes by his or her conduct or the conduct of another for which they are legally accountable, if:

i) the conduct occurs either wholly or partly within the reservation;

ii) the conduct which occurs outside the reservation constitutes an attempt, solicitation, or conspiracy to commit an offense within the reservation, and an act in furtherance of the attempt or conspiracy occurs within the reservation; or

iii) the conduct which occurs within the reservation constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited by this Code, tribal law or such other jurisdiction.

(3) None of the foregoing bases of jurisdiction is exclusive, and jurisdiction over a person may be established upon any one or more of them as applicable.

Section 1-2-4 Jurisdiction Over Property

Subject to any contrary provisions, exceptions, or limitations contained in either federal laws and regulations, the Courts of the Shoshone and Arapaho Tribal Court shall have jurisdiction over any real or personal property located on the reservation to determine the ownership thereof or rights therein or to determine the application of such property to the satisfaction of a claim for which the owner of the property may be liable.

Section 1-2-5 General Subject Matter Jurisdiction Limitations

Subject to any contrary exceptions, or limitations contained in either federal or applicable tribal law the Wind River Tribal Court shall have general subject matter jurisdiction over all civil causes of action, arising on the reservation and over all offenses prohibited by this Code which occur within the exterior boundaries of the Wind River Indian Reservation to adjudicate and determine the rights and responsibilities of all parties.

Section 1-2-6 Concurrent Jurisdiction

The jurisdiction invoked by this Code over any person, cause of action, or subject shall be concurrent with any valid jurisdiction over the same of the courts of the United States, any state, or any subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any other governmental entity in which jurisdiction does not otherwise exist in law.

Section 1-2-7 Exclusive Original Jurisdiction

(1) The Shoshone and Arapaho Tribal Court shall have exclusive original jurisdiction in all matters in which the Shoshone and Arapaho Tribes or their officers, employees, or agents are parties in their official capacity.

(2) Nothing in this code shall be construed as a waiver of sovereign immunity of the tribes, their employees, officer and agents unless specifically denominated as such.

CHAPTER 3 ESTABLISHMENT OF COURTS: JUDGES AND OTHER COURT PERSONNEL

Section 1-3-1 Courts Established

(1) There is hereby established a Shoshone and Arapaho Tribal Court to handle all matters of a judicial nature within the jurisdiction of the Shoshone and Arapaho Tribes as provided in this Code. It shall be a court of general civil and criminal jurisdiction and shall hear appeals from administrative bodies of the Shoshone and Arapaho Tribes. It shall consist of one (1) chief judge and three (3) associate judges. Each tribe may appoint two (2) as mutually agreeable.

(2) There is hereby established a Shoshone and Arapaho Tribal Appellate Court to handle all appeals from the Children's and Tribal Courts. It shall consist of three (3) judges.