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.

No. 14-9515

DEVON ENERGY PRODUCTION COMPANY, L.P.,

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

PETITIONER STATE OF WYOMING'S OPENING BRIEF

Preliminary Brief (Deferred Appendix Appeal)

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

The following prior cases relate to this matter:

- *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012);
- *Yellowbear v. Wyo. Atty. General*, 380 F. App'x 740 (10th Cir. 2010);
- *N. Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264 (D. Wyo. 2009);
- *Yellowbear v. Wyo. Atty. General*, 636 F. Supp. 2d 1254 (D. Wyo. 2009);
- *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008); and
- *State v. Moss*, 471 P.2d 333 (Wyo. 1970).

STATEMENT OF JURISDICTION

On December 19, 2013, EPA published notice in the *Federal Register* that it approved the Eastern Shoshone and Northern Arapaho Tribes' application for treatment as a state under the Clean Air Act. 78 Fed. Reg. 76,829 (Dec. 19, 2013). Wyoming petitioned this Court to review EPA's action on February 14, 2014. This Court has jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

1. In 1905, Congress ratified an agreement with the Eastern Shoshone and Northern Arapaho in which the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands" in the reservation, except those within a "diminished reserve," in exchange for "consideration." [EPA-WR-005366]. The United States Supreme Court has held

such terms to be "precisely suited" to diminishing a reservation, and the facts confirm Congress intended just that for the Wind River Reservation in 1905. Was EPA's determination that the 1905 Act did not diminish the Wind River Reservation boundary contrary to law?

2. Interpreting whether an act of Congress diminished a reservation may require evaluating contemporaneous evidence of congressional intent. Although EPA conducted its own independent investigation of evidence contemporaneous to the 1905 Act, EPA failed to consider or explain numerous publicly available records contradicting its boundary determination. Was EPA's failure to consider and explain those authorities arbitrary and capricious?

3. EPA's regulations require EPA to ensure that tribal consortiums have contingency plans for a failure of the consortium. The Tribes' application relied on a consortium, but did not establish contingency plans for a dissolution of the consortium. Was EPA's approval of the Tribes' incomplete application arbitrary, capricious, or contrary to law?

4. EPA's regulations require notice and comment on reservation boundaries associated with tribal Clean Air Act applications. EPA approved the Tribes' application based on reservation boundaries different from those EPA publicly noticed for comment, but did not notice or invite comment on the new

boundaries. Was EPA's failure to notice and invite comment on the new boundary arbitrary, capricious, or contrary to law?

STATEMENT OF THE CASE

This case arises from the United States' historical relations with its native peoples. As westward expansion marched forward, the United States confined the country's indigenous inhabitants to defined reservations, and then sought cessions of those lands to facilitate non-Indian settlement. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). The story holds true for the Wind River Reservation, which the United States established in 1868 and subsequently diminished through three different acts of Congress in 1876, 1897, and 1905. [EPA-WR-001739, -003440, -005425, -008185]. Together, those acts, coupled with later orders restoring lands to the reservation, form the reservation boundaries today.

In December 2008, the Tribes applied to EPA for treatment as a state under the Clean Air Act. [EPA-WR-000002]. They asserted that the 1905 act of Congress did not diminish the reservation boundaries. Therefore, the Tribes claimed jurisdiction over the lands ceded under the acts, even though Wyoming has pervasively exercised jurisdiction over those lands since Congress severed them from the reservation in 1905. EPA allowed Wyoming sixty days to comment on the Tribes' boundary assertion.

Over the next five years, EPA conducted an incomplete historical investigation without public participation. Using this investigation, EPA approved the Tribes' application in December 2013. EPA agreed with the Tribes that the 1905 Act left the reservation intact, notwithstanding the contrary status quo over the prior century. At the Tribes' request, EPA modified the Tribes' application, resulting in a different reservation boundary than the Tribes originally proposed. EPA's closed-door historical investigation failed to uncover a multitude of readily available documents that directly contradict EPA's conclusions.

The plain language of the statute, contemporaneous evidence, and subsequent treatment of the ceded lands show that Congress intended to change the reservation's boundaries in 1905, just as in 1876 and 1897. Despite all the evidence of Congress's purpose for the 1905 Act, EPA mired itself in comparisons of inconsequential facts, misconstrued binding precedent on reservation diminishment, and, when faced with irrefutable evidence of congressional intent to diminish, invented novel fictions with no basis in law or fact. EPA's flawed determination of the reservation boundaries is unlawful, arbitrary, and capricious, and should be set aside.

I. Westward expansion and the Wind River Reservation

The Shoshone historically occupied an 80-million acre territory across the current States of Colorado, Idaho, Nevada, Utah, and Wyoming. *N.W. Bands of*

Shoshone Indians v. United States, 324 U.S. 335, 340 (1945). Chasing the gold rush, emigrants traversed and settled the Shoshone domain. *Id.* at 341. To settle conflicts, the United States and the Eastern Shoshone, under Chief Washakie's leadership, entered into a treaty on July 2, 1863. [EPA-WR-008155]. The treaty established among the parties "amicable relations" and a "perpetual peace," and set aside as "Shoshone Country" nearly 45 million acres of the Eastern Shoshone's ancestral domain. [EPA-WR-008155-56].

A. The 1868 treaty: the continued influx of settlers and the reservation of a homeland

Before the peace treaty's ink dried, the United States began designing plans to "set[] apart, by suitable legislation, portions of the public domain for the exclusive use of the Indians." 1864 Comm'r Rep. 5.[1] Seeing what the future held,

[1] Beginning as early as 1848, the Indian Affairs Commissioner submitted an annual report and policy recommendations to the Secretary of the Interior, who, in turn, provided the report to Congress. *See White Mtn. Apache Tribe v. United States*, 11 Cl. Ct. 614, 631 (1987). Because the Commissioner "framed much of the federal government's Indian policy," the annual reports shed light on the meaning of the policy. David H. Getches et al., *Cases and Materials on Federal Indian Law* 144 (5th ed. 2005). The Tribes relied on the 1872, 1906, 1909, and 1914 reports in their

However, the Court may rely on the Commissioner's reports from other years: the contents of the reports are legislative facts that "have relevance to legal reasoning and the lawmaking process," and "are established … pronouncements that do not change from case to case but apply universally." *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998) (quotations omitted). The Supreme Court treats the reports as contemporaneous evidence of Congress's intent. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 354 (1998) (quoting 1895 Comm'r Rep. 450-52); *see also Hackford v. Babbitt*, 14 F.3d 1457, 1460 (10th Cir.

Chief Washakie urged the United States to reserve the Wind River Valley, his Tribe's historic buffalo hunting grounds, as the Eastern Shoshone's permanent homeland. 1866 Comm'r Rep. 123; 1867 Comm'r Rep. 11. He feared that, with the growing influx of emigrants, those lands would be settled and forever lost to the Tribe. 1867 Comm'r Rep. 176.

The Interior Department agreed, urging Congress to provide the Eastern Shoshone "a permanent and exclusive reservation in the valley of the Wind River[.]" 1866 Comm'r Rep. 127. Congress obliged, sending the Indian Peace Commission to negotiate with the Eastern Shoshone. [EPA-WR-008118]. In a second treaty signed July 3, 1868, the Eastern Shoshone relinquished their rights under the 1863 treaty to Shoshone Country. [EPA-WR-008119]. In exchange, the United States set aside roughly 3 million acres along the Wind River in central Wyoming as the Tribe's permanent and exclusive homeland. [EPA-WR-008119].

The Tribe spent the winter on the new reservation, but land conflicts soon developed. 1869 Comm'r Rep. 271. Settlers in the Sweetwater Mining District on the reservation's southern border angled for the Tribe's agricultural lands south of the Wind River. *Id*. And, the Eastern Shoshone's historical foe, the Northern Arapaho, urged the United States to settle them on the Wind River Reservation. *Id*.

1994). Because each annual report spans hundreds of pages that do not bear directly on this case, Wyoming has excerpted relevant portions and included them in the addendum to this brief.

at 272. The Indian Affairs Superintendent in the Wyoming Territory embraced both ideas, advocating to open the southern reservation lands to non-Indian settlement and to "do all in [his] power" to settle the Northern Arapaho on the Wind River Reservation. *Id*. at 272-73.

B. The 1874 Lander Purchase ceding southern reservation lands to make room for settlement

The Northern Arapaho persisted in their desire to settle on the reservation, and through the United States Army sought an agreement with the Eastern Shoshone. 1870 Comm'r Rep. 176. The Tribes concluded "a treaty of peace," and the Eastern Shoshone allowed the Northern Arapaho "to remain on the reservation temporarily until some permanent disposition could be made of them." *Id.* Within months of the Northern Arapaho's arrival, conflict with settlers drove the Northern Arapaho from the area. *Id*.

Two years after the Eastern Shoshone settled on the reservation, the United States followed through on all but one of its treaty obligations. 1871 Comm'r Rep. 550. The United States developed the reservation's infrastructure, erecting a schoolhouse, a store, buildings for grist and sawmills, a fort stockade, and employee housing, and began to develop agricultural lands. *Id*. The United States and Chief Washakie viewed these steps toward agriculture as critical to the Tribe's survival because the wild game that the Tribe had historically hunted was rapidly disappearing. *Id*.; *see also* 1870 Comm'r Rep. 175, 179-80. The Eastern Shoshone,

in turn, resolved to settle permanently on the reservation, pursue an agricultural lifestyle, and send children to school. 1873 Comm'r Rep. 244; 1874 Comm'r Rep. 270.

Still, the United States failed to keep settlers off the reservation. 1871 Comm'r Rep. 551; 1873 Comm'r Rep. 245. Because settlers in the Sweetwater Mining District persisted in their desire for southern reservation lands, the reservation superintendent believed it "necessary for the peace and good of the service that an agreement be made with the Indians to move the southern boundary of this reservation to a definite point north of the Sweetwater Mines, as it will be, and now is, impossible to observe the treaty in regard to white men encroaching upon the reservation." 1873 Comm'r Rep. 245. He did not view this as problematic because the reservation contained more than enough arable lands to sustain the Eastern Shoshone. 1870 Comm'r Rep. 174-75.

Soon thereafter, Congress authorized the President to negotiate with the Eastern Shoshone for cession of a southern portion of the reservation in exchange for an equal amount of land north of the reservation. [EPA-WR-008152]. Under that authority, Felix Brunot was appointed to negotiate with the Tribe "for a change in their reservation[.]" [WYO-WR-001][2]; 1872 Comm'r Rep. 90. In his

[2] The records cited as WYO-WR-____ are subject to Wyoming's pending May 9, 2014, motion to supplement and complete the record. Pursuant to the Court's order, Wyoming submits these records in a separate addendum.

instructions to Brunot, the Indian Affairs Commissioner explained that the lands to be ceded were "understood to be of considerable value as mineral lands. It is the policy of the government to segregate such lands from Indian reservations as far as may be consistent with the faith of the United States, and throw them open to entry and settlement[.]" [WYO-WR-003].

On September 26, 1872, Brunot and the Eastern Shoshone entered into an agreement to cede the southern lands of the reservation. 1874 Comm'r Rep. 126. The agreement provided that the Eastern Shoshone "hereby cede to the United States of America" approximately 700,000 acres in the southern portion of the reservation. [EPA-WR-003441]; 1874 Comm'r Rep. 126.

The consideration Brunot offered in return differed, however, from Congress's terms because the Tribe refused Congress's offer of an equal amount of lands north of the reservation. 1872 Comm'r Rep. 90. As a result, Brunot offered, and the Tribe accepted, five annual payments of $5,000 worth of cattle and $500 in salary to Chief Washakie in return for the 700,000 acres. [EPA-WR-003441]. Brunot believed this consideration superior to a land exchange because "there is more land in the present reservation belonging to the Shoshones than they need[.]" 1872 Comm'r Rep. 101. On December 15, 1874, Congress ratified the agreement. [EPA-WR-003440].

C. The Allotment Act and settlement of the Northern Arapaho

Following the land cession, the United States and the Eastern Shoshone continued to develop agriculture on the reservation. 1872 Comm'r Rep. 269; 1873 Comm'r Rep. 244. Nonetheless, challenges persisted. Settlers living around the reservation illegally sold alcohol to the Eastern Shoshone. 1877 Comm'r Rep. 210; 1885 Comm'r Rep. 213; *see also* An Act to regulate Trade and Intercourse with the Indian Tribes, ch. 33, 13 Stat. 29 (1864) (prohibiting alcohol sales to Indians). Other settlers illegally grazed cattle north of the Wind River on the reservation, despite repeated efforts to force their departure. 1886 Comm'r Rep. 261; 1887 Comm'r Rep. 233; 1889 Comm'r Rep. 244.

During this same period, the Northern Arapaho continued to roam, much to the United States' frustration. 1874 Comm'r Rep. 11. In 1877, however, the President granted the Northern Arapaho "permission … to join the Shoshones on the Wind River reserve in Wyoming." 1877 Comm'r Rep. 19. In April 1878, 938 Northern Arapaho arrived at the reservation. 1878 Comm'r Rep. 152, 155. The reservation superintendent committed to "endeavor from the beginning to induce these people to improve each one his own farm," just as he had the Eastern Shoshone. *Id*. at 155.

While the United States established agriculture on the reservation, it also formulated a parallel policy to allot jointly-owned reservation lands into individual tracts. *See, e.g.*, 1877 Comm'r Rep. at 1. The Indian Affairs Commissioner

endorsed this policy, asserting that it has "the effect of creating individuality, responsibility, and a desire to accumulate property. It teaches the Indians habits of industry and frugality, and stimulates them to look forward to a better and more useful life, and, in the end, it will relieve the government of large annual appropriations." 1882 Comm'r Rep. at xliii.

The Commissioner implemented this policy at particular reservations while urging Congress to adopt it universally. 1885 Comm'r Rep. at iv; 1886 Comm'r Rep. at xix. In 1887, Congress responded with the Dawes Act, also known as the General Allotment Act, which authorized the President to appoint special agents to allot reservation lands to individual tribal members. [EPA-WR-008160]. Following allotment of a reservation's lands, the Act empowered the Interior Secretary to negotiate for the purchase of remaining surplus lands, and provided that after allottees received land patents, they would "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside[.]" [EPA-WR-008161-62].

Based on these terms, the United States understood that Congress wanted "to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship." 1887 Comm'r Rep. at viii. "The logic of events demands the absorption of the Indians into our national life, not as Indians, but as American

citizens." 1889 Comm'r Rep. at 3 ("The reservation system belongs to a 'vanishing state of things' and must soon cease to exist.").

D. The 1891 unratified agreement and the United States' desire for cessions of northern reservation lands

In 1890, Wyoming became the 44th state and the United States began surveying the lands on the reservation "with a view to their early allotment." [EPA-WR-008164]; 1890 Comm'r Rep. at XLVII. According to the reservation superintendent, the Eastern Shoshone "regard[ed] the allotting of land in severalty favorably." *Id*. at 244. Consistent with this view, Chief Washakie, with the support of the Tribes, urged that the "reservation be reduced by a sale of the portion beyond the Big Wind River," because that northern portion of the reservation "yields them nothing[.]" [WYO-WR-020]; *see also* [WYO-WR-007-12].

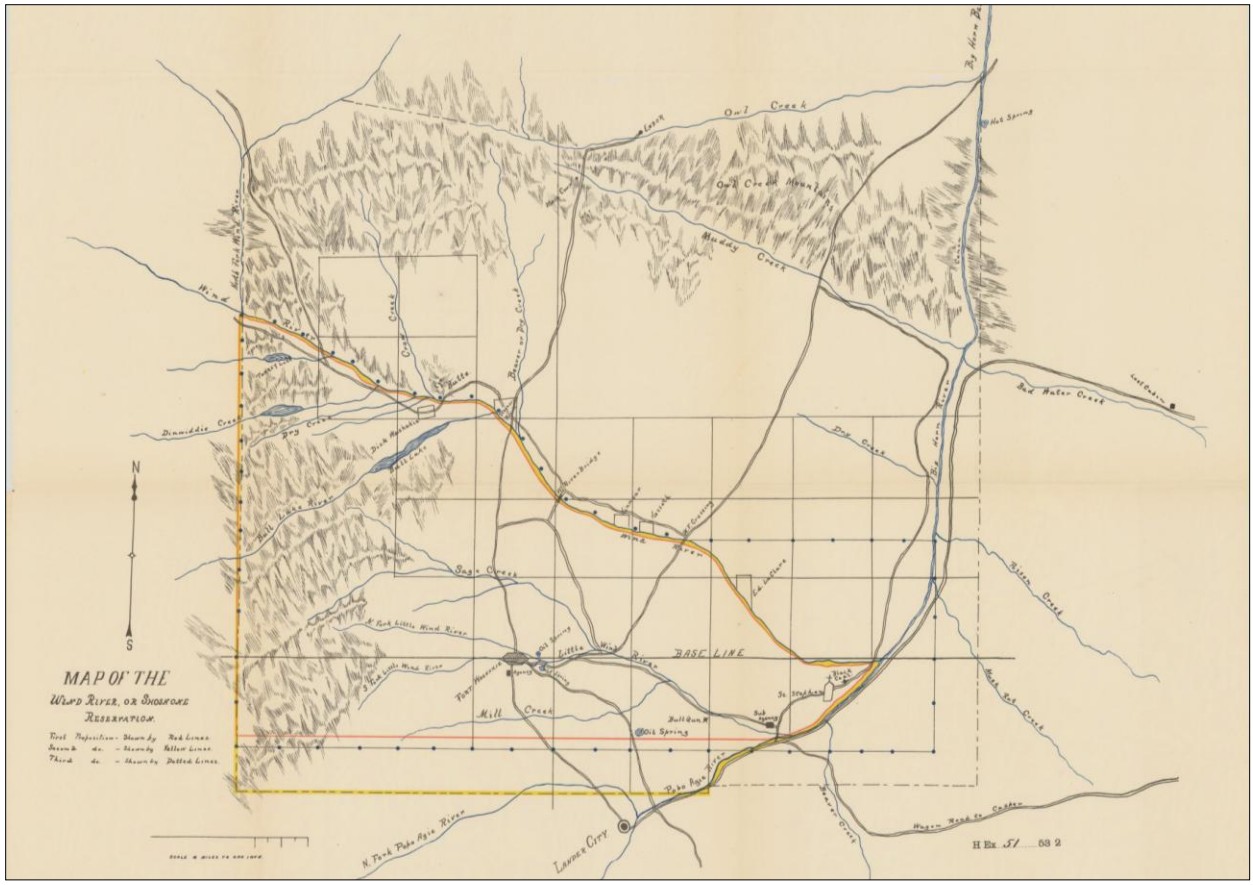
The next year, Congress authorized the Interior Secretary "to negotiate with any Indians for the surrender of portions of their respective reservations[.]" [EPA-WR-003463]. Ostensibly due to the Tribes' request to sell the lands north of the Big Wind River, the United States directed its attention to the Wind River Reservation and instructed three commissioners to negotiate land cessions from the Tribes. 1891 Comm'r Rep. Pt. 1 at 45 (describing plans for "Negotiations for Further Reductions"). As a result of these "pending negotiations for a reduction of the reservation," the United States paused reservation allotment efforts. 1892 Comm'r Rep. 68.

On October 2, 1891, the commissioners and the Tribes agreed to cede reservation lands to the United States, consistent with the Tribes' earlier requests. 1892 Comm'r Rep. 74. Under the agreement, the Tribes would cede "about 1,100,000 acres … embracing nearly all of the same lying north of the Big Wind River, together with a strip on the eastern side thereof, and leaving the **diminished reservation with natural boundaries** as far as practicable." [EPA-WR-00246] (emphasis added). The United States would open the lands to settlement, except for the hot springs near Owl Creek, which would be dedicated to public use. [EPA-WR-00246].

In return for the cession, the United States agreed to pay the tribes $600,000, slightly more than fifty cents per acre. [EPA-WR-00246]. Of that amount, $50,000 was for per capita payments to tribal members within sixty days and the remainder was to be set aside as four separate funds: $170,000 for cattle, $80,000 for irrigation, $50,000 for schools, and $250,000 for general welfare. [EPA-WR-00246]. The agreement allowed Indians who had selected allotments in the ceded lands to maintain those allotments, even though they would be outside the reservation. [EPA-WR-00246].

However, Congress did not ratify the agreement, allegedly due to "scheming parties" that held "the avowed intention of defeating the ratification of the agreement[.]" 1893 Comm'r Rep. 351. As a result of the ratification failure,

Congress authorized the Interior Secretary to reopen negotiations with the Tribes. 1892 Comm'r Rep. 74. On March 20, 1893, three different commissioners attempted to renegotiate the agreement with the Tribes, but those efforts failed. 1893 Comm'r Rep. 30, 351. The following map shows the lands the United States sought in the 1891 agreement, with the Wind River and the Popo-Agie forming the northern reservation boundary and the Popo-Agie River forming the eastern boundary. *See* H.R. Doc. No. 51, Map (Jan. 8, 1894).



E. The 1897 hot springs purchase

In 1894, Congress renewed its effort to obtain more reservation land. 1894 Comm'r Rep. 31-32 (discussing appropriation "[f]or the purpose of conducting negotiations with the Shoshone and Arapaho Indians for the sale and relinquishment of certain portions of their reservation"). However, unlike the 1891 negotiations, which focused on all of the lands north of the Big Wind River, the renewed effort focused only on the hot springs identified in the 1891 agreement.

The Interior Secretary dispatched Inspector James McLaughlin with instructions to renegotiate a cession of the reservation lands encompassing the hot springs. [WYO-WR-023]. The Secretary suggested McLaughlin offer $50,000 for the lands, but directed that "in no event" should he pay more than $1.25 per acre. [WYO-WR-029].

On April 21, 1896, McLaughlin and the Tribes agreed to the cession of approximately 55,000 acres. [EPA-WR-003531, -0012620]. The agreement 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 … embracing the Big Horn Hot Springs in the State of Wyoming." [EPA-WR-003532]. In exchange, the United States agreed to pay the Tribes $60,000 ($1.09/acre), of which $10,000 was to be paid within ninety days and the remainder to be paid in five annual installments of $10,000. [EPA-WR-

003532]. The following year, Congress ratified the agreement and appropriated $10,000 dollars for the per capita payments. [EPA-WR-005458].

F. The 1905 Act ratifying the remainder of the 1891 agreement ceding the reservation lands north of the Wind River

In 1900, Congress funded two irrigation superintendents, with one appointed to the Wind River Reservation. 1900 Comm'r Rep. 58. The irrigation superintendent reported that the infrastructure necessary to irrigate the reservation would cost at least $760,000. 1901 Comm'r Rep. 64. Desiring a second opinion, the Indian Affairs Commissioner sent an agent "to visit the Wind River Reservation and to report as to the advisability of **reducing its size**" because "a considerable portion might be ceded by the Indians and the proceeds applied to furnishing irrigation[.]" *Id*. (emphasis added).

The agent reported that "[a]t some future time much of the land north of the Big Wind River can be sold." *Id*. He cautioned, however, that "[t]his should not be done … until their irrigation system is established and the Indians are on their allotments. The surplus can then be disposed of to advantage." *Id*. The Commissioner did not agree because, at the current rate of appropriations, three decades would pass before completion of the irrigation system. *Id*. As a result, Congress could either increase appropriations or not wait for irrigation infrastructure to seek a cession of lands for settlement. *Id*.

Adopting the latter approach, the Commissioner explained "that any system of irrigation constructed upon that reservation should be confined to lands south of the Big Wind River, and that the Indians should be negotiated with for the cession of their lands north of that river, since they were willing to make such a cession to the United States [in 1891]." 1904 Comm'r Rep. 124.

1. A bill "to reduce the reservation"

On April 11, 1904, the House Indian Affairs Committee reported favorably on H.R. 13481, known as the Mondell Bill, "to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation[.]" [EPA-WR-004668]. The bill's purpose was "to reduce the reservation," consistent with the 1891 agreement. [EPA-WR-004669]. The Indian Affairs Commissioner asked the Committee to redefine the reservation boundary in the bill because "some lands south and southeast of the Popo-Agie River had been included in allotments, and … therefore the boundaries of the diminished reserve should be increased to take in this territory." [EPA-WR-004667].

The Committee rejected this request and determined that "the boundaries of the diminished reserve remain as provided for in the bill [because 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." *Id*. (emphasis added). Accordingly, the bill took the same approach to allotments outside the new boundaries as did the 1891 agreement—tribal members could keep their allotments, though they would be outside the reservation. [EPA-WR-00246]. The Committee explained also that, unlike the 1891 agreement, the bill "follows the now established rule of the House of paying to the Indians sums received from the sale of the ceded territory under the provisions of the bill." [EPA-WR-004667].

The Committee believed that "[t]he diminished reserve is by all means the best portion of it[.]" [EPA-WR-004668]. It also noted that the Indian Office had instructed the reservation's allotting agent "to **make no allotments north of the Wind River**, or, in other words, to **make the allotments within the proposed diminished reserve**[.]" [EPA-WR-004669] (emphases added). The Committee understood that "**the bill in question follows as closely as is possible**, under the changed conditions and the present policy of Congress relative to payments for lands purchased from Indians, **the agreement of 1891**[.]" [EPA-WR-004669] (emphases added). Because Congress understood the bill to ratify the 1891 agreement, the Committee amended the bill to require tribal consent to the amendments. [EPA-WR-004667].

2. McLaughlin obtains another land cession.

While the Committee worked the bill, the Interior Secretary dispatched James McLaughlin, who negotiated the 1896 hot springs purchase agreement for the United States, to the reservation to obtain the Tribes' consent. [WYO-WR-032]. The Indian Affairs Commissioner prepared negotiation instructions for McLaughlin, which began by explaining the general nature of the unratified 1891 agreement. [WYO-WR-037]. The Commissioner "understood that the Indians are still willing to cede practically the same territory[.]" [WYO-WR-037].

The instructions proposed new reservation boundaries ensuring "the diminished reservation shall embrace the lands already irrigated as well as those most easily subject to future irrigation[.]" [WYO-WR-037]. The Commissioner also reiterated Congress's payment policy change from the 1891 agreement: "it is not thought that Congress would appropriate a lump sum for payment for the lands, and it should be made clear in the agreement that any cash payment agreed to be made to the Indians would be made only after the necessary amount shall have been derived from sales of lands." [WYO-WR-038].

Within weeks of receiving his instructions, McLaughlin arrived at the reservation and held council with the Tribes. [EPA-WR-000423]. McLaughlin made clear from the outset that he was there "to present to you an agreement for disposing of the lands that you do not need." [EPA-WR-0000426.]

When McLaughlin introduced the cession, he took time "to talk of the boundaries of the reservation and the residue of land that will remain in your diminished reservation." [EPA-WR-0000428]. He explained "[t]he tract to be ceded to the United States … is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation." He then described the new reservation boundaries as mostly unchanged on the west and southwest, but changing on the north and the east to "follow[] down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line." [EPA-WR-0000428] (describing approximately a right triangle, with the Wind River hypotenuse running from northwest to southeast); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591-92 (1977) (McLaughlin analogously describing the diminished boundary of the Rosebud reservation). McLaughlin told the Tribes that "a large reservation is not to your interest," and explained he could not change the new "boundary line" Congress wanted. [EPA-WR-0000429-30].

Members of both Tribes understood McLaughlin's description of the new reservation boundaries. George Terry, Chief Councilman of the Shoshone, aptly stated: "This 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 we can never recover again …. The lands that we are about to dispose of have been our lands for ages." [EPA-WR-0000439].

Northern Arapaho members concurred, repeatedly expressing their understanding that McLaughlin's purpose was analogous to his purpose in negotiating the Thermopolis Purchase. [EPA-WR-0000431] (Chief Long Bear stating that "He is the man who treated with us for the Hot Springs. I understand what he comes for … and I will tell what part of the Reservation I want to sell."); [EPA-WR-0000432] (Runs-across-the-River: "You are the man who bought the Hot Springs, and when you ask me to sell, I do so, right away."). McLaughlin himself noted the consistency in his purposes: "We concluded a very satisfactory agreement at that time … and it is my hope that the agreement which we make at this time will still be of greater benefit to you." [EPA-WR-0000424]. The Eastern Shoshone similarly analogized the 1904 agreement to the Thermopolis Purchase when the Tribe later sued the United States for settling the Northern Arapaho on the reservation. [WYO-WR-208].

Chief Long Bear, however, desired to retain lands north of the Big Wind River, despite McLaughlin's caution that he could not change the new boundary Congress wanted. [EPA-WR-0000431]. McLaughlin acknowledged that "in regard to the reservation boundaries … you evidently do not agree," but he held steadfast that Congress's boundary could not change. [EPA-WR-0000435]. He explained that natural water boundaries (the Big Wind River and Popo-Agie River) "are best for you" because "everybody will respect" them. [EPA-WR-0000435]

("Everybody knows it and there will be no uncertain lines."). McLaughlin noted his belief that "[t]he lands embraced within the diminished reservation" are among "the finest in this section of the country," and that retaining reservation lands "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." [EPA-WR-0000435]. Notwithstanding the objection, the Tribes agreed to the new boundaries. [EPA-WR-000449].

In his explanation of the agreement's allotment provision, McLaughlin expressly distinguished lands south of the Wind River as "on the reservation" and those north of the River as "on the public domain." [EPA-WR-0000436]. McLaughlin stated that "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." [EPA-WR-0000436] (stating those allotments will "be on the **public domain**") (emphases added). By contrast, McLauglin explained, "**On the reservation**, you will be protected by the laws that govern reservations in **all your rights and privileges**." [EPA-WR-0000436] (emphases added).

The Tribes agreed to McLaughlin's proposal, and he immediately reported this success to Washington. [WYO-WR-041]. He explained that: "**The diminished reservation** leaves the Indians the most desirable and valuable portion of the Wind

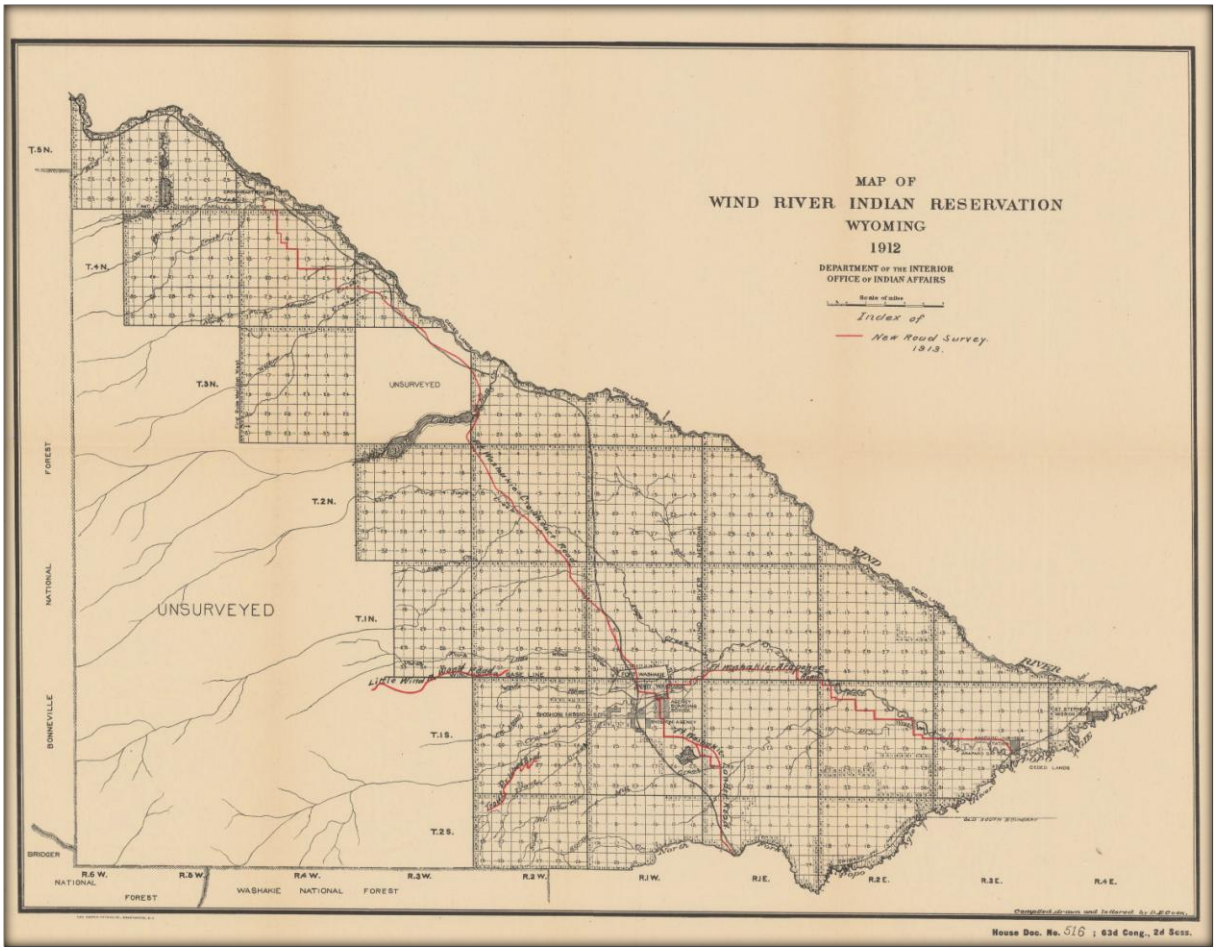
River Reservation and the garden spot of that section of country. It **is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River**[.]" [WYO-WR-047-48] (emphasis added); *see also* [WYO-WR-041] (stating the agreement follows the Mondell Bill). He advised that, for tribal members holding allotments north of the Wind River, the United States should "make other allotments to them south of the Big Wind River, which will be within the diminished reservation." [WYO-WR-049].

In his letter relaying the agreement to the Interior Secretary, the Indian Affairs Commissioner reiterated McLaughlin's understanding, explaining that the "the Indians have consented to the surrender of the lands north of the Big Wind River and south of the Big Popo-Agie River[.]" [WYO-WR-076]. He stated that "[t]he diminished reserve covers the lands of the original Wind River or Shoshone reservation lying south of the Big Wind River and north of the Big Popo-Agie River to the point of their conjunction." [WYO-WR-072-73]. He also reiterated McLaughlin's belief that:

> the reservation boundary as stipulated in the agreement embraces lands ample for the needs of the Indians belonging thereto; that in case any of the lands north of the Big Wind River or east of the Big Popo-Agie River should be included in the diminished reservation it would not be long until the whites would be clamoring to have such lands opened to settlement and the Indians would eventually be compelled to give them up.

[WYO-WR-076].

The map reproduced below shows the diminished boundaries of the reservation with the Wind River forming the northern boundary and the southeastern boundary following the Popo-Agie River upstream. *See* H.R. Doc. No. 516, Map (Jan. 12, 1914).



While the agreement was pending congressional ratification, the Indian Affairs Commissioner directed the reservation irrigation superintendent "to survey and plan a system of irrigation **south of Big Wind River** sufficient to irrigate the lands already allotted there and the allotments to be made, including the extension

of ditches already constructed[.]" 1904 Comm'r Rep. 125 (emphasis added). Then, after minor amendments, Congress ratified the agreement in the Act of March 3, 1905. [EPA-WR-005366].

The 1905 Act provided that the "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" south of the Big Wind River and west of the Big Popo-Agie River. [EPA-WR-005366] (emphases added). Consistent with newly redrawn boundaries, Congress repeatedly referred to the reservation as "diminished" in the Act. [EPA-WR-005367-68, -005372]. Congress distinguished "the diminished reserve" from "the territory intended to be ceded" and required "the survey and marking of the outboundaries of the diminished reservation." [EPA-WR-005367, -005372].

In exchange for the Tribes' land cession, Congress agreed, consistent with the terms of the 1891 agreement, to establish funds for irrigation, livestock, schools, general welfare, and per capita payments. *Compare* [EPA-WR-005367-68] *with* [EPA-WR-00246]. But, due to Congress's change in payment policy since 1891, Congress agreed to provide those funds only from the proceeds of land sales and it did not commit itself to buy any of the lands. [EPA-WR-004667, -005370]. Nonetheless, Congress immediately appropriated funds for the per capita

payments, just as it had in the 1897 Thermopolis Purchase. *See* [EPA-WR-005371, -005458].

The Act also arguably involved a slightly different area than the 1891 agreement. To the extent such a difference existed, it was due to the facts that: (1) the United States had already obtained in 1897 the hot springs in the northeastern corner of the reservation to be ceded under the 1891 agreement; and (2) the United States had underestimated the reservation's size by nearly 500,000 acres in 1891. H.R. Rep. No. 2621 at 3 (April 27, 1904); [WYO-WR-032]. Regardless, the United States understood the two agreements to address "practically the same territory[.]" [WYO-WR-037].

In response to Congress's ratification of the agreement, the United States "expedited" efforts to complete allotments on the diminished reservation in preparation for the opening of the ceded lands to settlement. 1905 Comm'r Rep. 154. The Indian Affairs Commissioner explained that "it is the policy of the Office to make new allotments within the diminished reservation, and to encourage Indians who have received allotments north of Big Wind River to relinquish them and agree to take other lands in lieu thereof within their diminished reservation." *Id*. at 155.

Consistent with its effort to concentrate Indians within the newly diminished reservation, the Commissioner reiterated that "any system of irrigation planned

should be within the diminished reservation[.]" *Id*.; *see also* [WYO-WR-061-62] (citing 1904 agreement as reason to confine to diminished reservation). The United States, in turn, began work on an "immense and comprehensive irrigation system … for the Indian lands of the diminished reservation." [WYO-WR-175].

3. Settlement of the ceded lands

On June 2, 1906, President Theodore Roosevelt proclaimed the nearly 1.5 million acres of ceded lands open to settlement. [EPA-WR-000370]. In doing so, he stated that the "tribes ceded, granted, and relinquished to the United States all the right, title, and interest which they may have had to all of the unallotted lands embraced within said reservation, except the lands within and bounded by the [diminished boundaries]." [EPA-WR-008193].

Immediately upon opening, settlers founded the town of Riverton north of the Big Wind River, just outside the diminished reservation. [EPA-WR-0012685 n.68]. Among the town's first laws was *Ordinance No. 22 Concerning Intoxicating Liquors* (Dec. 11, 1906), authorizing alcohol sales within town limits under town-issued permits. [WYO-WR-107]. At the same time, by contrast, federal law prohibited alcohol on the reservation side of the Wind River. *See* Act of July 23, 1892, ch. 234, 27 Stat. 260 (1892).

Notwithstanding Riverton's founding, settlement of ceded lands started slowly due to a lack of irrigation infrastructure and rail access. [WYO-WR-174].

Wyoming surveyed and engineered an irrigation system and segregated 335,908 acres of the ceded lands under the Carey Act, ch. 301, § 4, 28 Stat. 422 (1894). [EPA-WR-000386]. Wyoming's irrigation development efforts ultimately failed, and the United States Bureau of Reclamation took over the project, which ultimately became the Riverton Reclamation Project. H.R. Doc. No. 1767 at 9 (Dec. 18, 1916) (explaining that the Riverton Reclamation Project is on lands "formerly included in the Wind River or Shoshone Indian Reservation").

Once railroads reached the area and irrigation systems took form, settlement progressed and non-Indians homesteaded almost 200,000 acres of the lands ceded under the 1905 Act, including Riverton (now the ninth largest city in Wyoming) and the Town of Pavillion. [EPA-WR-009747-48]. Although only a fraction of the total ceded lands were settled, the actual settlement under the 1905 Act met Congress's expectations. [EPA-WR-00332].

With the 1934 passage of the Indian Reorganization Act, Congress dramatically shifted policy away from diminishing reservations and assimilating Indians into non-Indian culture and toward tribal self-determination. [EPA-WR-008227]. The 1934 Act authorized the Interior Secretary to "restore to tribal ownership" previously ceded but unsold reservation lands. [EPA-WR-008227]. Because the Tribes rejected the Indian Reorganization Act, Congress enacted special legislation to accomplish the land restoration objective on the Wind River

Reservation. [EPA-WR-008237]. The special legislation compensated the Eastern Shoshone for the United States' violation of the 1868 Treaty (by settling the Northern Arapaho on the reservation without Shoshone consent), and authorized the Interior Secretary to "restore to tribal ownership all undisposed-of" lands ceded under the 1905 Act that settlers had not purchased. [EPA-WR-008238].

Over the next three decades, the Secretary issued a series of orders restoring unsettled lands to the reservation. *See, e.g.*, [EPA-WR-009647]. Each order provided that the lands "are hereby restored to tribal ownership … **and are added to and made a part of the existing Wind River Reservation**." *See* [EPA-WR-009634] (emphasis added); *see also* [EPA-WR-009638, -009642, -009645, -009653, -009660, -009662, -009665, -009675].

Meanwhile, the Bureau of Reclamation finished the Riverton Reclamation Project, which overlaid Wyoming's 1914 Carey Act land segregation and encompasses a substantial concentration of the lands settled by non-Indians under the 1905 Act. H.R. Doc. No. 1767 at 17 (Dec. 18, 1916). Though in 1905 Congress expressly disavowed any obligation to compensate the Tribes for the lands ceded, in the 1953 Act Congress paid the Tribes $1,009,500 for the ceded lands in the reclamation project. [EPA-WR-008248]. The Act provided that the payment constituted "full, complete, and final compensation … for terminating and extinguishing all of the right, title, estate, and interest … of said Indian tribes … in

and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of **that part of the former Wind River Indian Reservation** lying within [the reclamation project]." [EPA-WR-008248] (emphasis added).

G. Wyoming and the United States have treated the ceded lands as separate from the Wind River Reservation since 1905.

Since the Tribes ceded the lands in 1905, Wyoming has pervasively exercised both criminal and civil jurisdiction in the areas that Congress did not subsequently restore to the reservation. For example, Wyoming has undertaken more than 1,000 environmental regulatory actions in the area. [WYO-WR-291-292]. Numerous other Wyoming state agencies have exercised civil regulatory jurisdiction in the ceded area to the fullest extent of their authority, especially in and around Riverton. [WYO-WR-275-79, -282, -286].

Like Riverton, Wyoming implemented liquor sales laws on the ceded lands. In 1935, following the repeal of alcohol prohibition, Wyoming enacted a comprehensive liquor licensing regime. *See* Wyo. Stat. Ann. § 12-4-201. Under that regime, Wyoming licensed five different applicants for liquor sales on the ceded lands (in the towns of Riverton and Pavillion) in the first year. [WYO-WR-247]. At the same time, the United States continued to prohibit alcohol on the reservation. *See* 25 U.S.C. § 241-250 (repealed June 25, 1948). Wyoming cannot locate any evidence that any federal official ever attempted to challenge liquor

sales in Riverton, even though: (1) alcohol sales were a persistent problem on the reservation, 1917 Comm'r Rep. 89; and (2) the United States vigorously prosecuted liquor traffic on the reservation during this same time period, 1909 Comm'r Rep. 10 (four convictions); 1912 Comm'r Rep. 217 (eight prosecutions); 1913 Comm'r Rep. 185 (nine prosecutions); 1917 Comm'r Rep. 89 (twenty-four prosecutions).

Wyoming has also exercised expansive criminal jurisdiction in the ceded area to the notable exclusion of federal criminal jurisdiction. In fact, the United States has expressly disclaimed Indian Country criminal jurisdiction over Riverton. *See* [EPA-WR-0012545]; *see also* [WYO-WR-266]. Consistent with Wyoming's exercise of criminal jurisdiction, the Wyoming Department of Corrections currently incarcerates forty-five self-reported tribal members for crimes committed on the ceded lands. [WYO-WR-270]. The Department also supervises eighty-three individuals on parole or probation for crimes committed in the ceded area who self-reported as tribal members. [WYO-WR-271].

As a result of Wyoming's wide-ranging criminal law enforcement irrespective of tribal membership on the ceded unrestored lands, the Wyoming Supreme Court has several times addressed the question before the Court. Most recently, in *Yellowbear v. State*, a member of the Northern Arapaho challenged Wyoming's jurisdiction to prosecute him for a murder committed in Riverton, just

north of the Wind River. [EPA-WR-009410]. Yellowbear argued, as the Tribes did in their application to EPA, that the 1905 Act did not diminish the reservation boundary and, therefore, Riverton, which lies north of the Wind River, remained within the reservation. [EPA-WR-009411].

The Court evaluated United States Supreme Court diminishment precedent and three prior Wyoming Supreme Court cases addressing jurisdictional questions related to the 1905 Act lands. [EPA-WR-009416-21]. The Court unanimously found that the language in the 1905 Act is "indistinguishable from the language of *Decouteau*," which the U.S. Supreme Court found "precisely suited to disestablishment[.]" [EPA-WR-009418, -009420]. The Court also noted subsequent congressional treatment of the reservation and the orders restoring lands to the reservation, which indicated a diminished reservation. [EPA-WR-009420-21]. And, finally, the Court observed that, analogous to *South Dakota v. Yankton Sioux Tribe* and *Hagen v. Utah*: "(1) the seat of tribal government on the Wind River Indian Reservation is not within the ceded lands; (2) about 92% of the population of … Riverton is non-Indian; and (3) Riverton and … Wyoming provide sanitation, street maintenance, water and sewer service, planning and zoning, and law enforcement." [EPA-WR-009421].

The *Yellowbear* decision is consistent with the Wyoming Supreme Court's prior decision in *Wyoming v. Moss*, 471 P.2d 333 (Wyo. 1970). There, Wyoming

charged a member of the Northern Arapaho with a murder in Riverton. *Id*. at 334. The state district court dismissed the charge, at Moss's urging, on the ground that Riverton is within the Wind River Reservation and, therefore, Wyoming lacked jurisdiction. *Id*. The State filed a bill of exceptions to the Wyoming Supreme Court, arguing that Riverton is not located in the reservation because the 1905 Act diminished the reservation boundaries. 471 P.2d at 334.

The United States appeared in the case as a friend of the court, arguing on Wyoming's behalf. [EPA-WR-0012545]. In its brief, the United States asserted that it "could not sustain a claim to criminal jurisdiction over the ceded portion of Wind River Indian Reservation if it attempted to assert jurisdiction." [EPA-WR-0012549]. Elaborating, the United States stated: "It is clear … that **by the Act of March 3, 1905** … **the intent of the Indian tribes and of the Congress of the United States was to remove from the organized reservation that area ceded to the United States**[.]" [EPA-WR-0012551] (emphases added).

II. The Eastern Shoshone and Northern Arapaho Tribes apply to EPA for treatment as a state under the Clean Air Act.

In December 2008, the Tribes applied to EPA for treatment as a state under Section 301 of the Clean Air Act. [EPA-WR-0012591]. Four months later, EPA notified Wyoming of the Tribes' application. [EPA-WR-004054]. The notice explained that the Tribes' "application describes the Reservation boundary as areas described in the 1868 Treaty of Fort Bridger, less those areas conveyed by the

Tribes under the Lander and Thermopolis Purchase Acts, plus lands subsequently added to the Reservation under the Act of June 27, 1940, 54 Stat. 628" and provided an electronic link to a map and the Tribes' statement of legal counsel. [EPA-WR-004054]. In other words, the Tribes asserted in their application that neither the 1905 Act nor the 1953 reclamation act altered reservation boundaries.

The notice provided Wyoming thirty days to comment on the Tribes' boundary assertions, which required review of thousands of legal and factual records, many of which dated to the late 1800s and early 1900s. At Wyoming's request, EPA extended the comment period by thirty days. [EPA-WR-004054]; *see also* [EPA-WR-0012592]. EPA did not provide Wyoming an opportunity comment on its boundary decision or the evidence supporting its proposal.

A. The Tribes claim the 1905 Act did not diminish the reservation.

In their application, the Tribes asserted that the 1905 Act language, McLaughlin's negotiations, legislative history, and the subsequent treatment of the area show that Congress did not intend the Act to change the reservation boundaries. [EPA-WR-000076]. The Tribes also asserted that the 1953 reclamation project statute did not diminish the reservation.

The Tribes claimed that "[t]he language of the 1905 Act lacks a plain and unambiguous intent to disestablish. It is not the kind of absolute and unconditional

language found in Congressional enactments held to effect disestablishment."[3] [EPA-WR-000077] (citing *Solem v. Bartlett*, 465 U.S. 463, 469 (1984)). The Tribes then contended that "[t]he record of the 1904 negotiations lacks evidence that the Tribes were told that the 1905 Act would result in disestablishment of their reservation." [EPA-WR-000086].

The Tribes did not acknowledge McLaughlin's references in the negotiations to the new "boundaries" of the "diminished reservation." *Compare* [EPA-WR-000086] *with* [EPA-WR-0000428, -435, -436]. Nor did the Tribes explain the repeated acknowledgements from tribal members that they were entertaining forever relinquishing their lands. *See, e.g.* [EPA-WR-0000439] ("it is something we are parting with forever, and we can never recover again …. The lands that we are about to dispose of have been our lands for ages.").

The Tribes also stated that the subsequent history showed that Congress did not in 1905 change the reservation boundaries. [EPA-WR-000088]. The Tribes stated that "Congress has always treated the lands opened by the 1905 Act differently from public lands." [EPA-WR-000088]. The Tribes also referred to the lackluster ceded land sales and the United States' efforts to generate revenues from

[3] The terms "disestablishment" and "diminishment" are often used interchangeably. *United States v. Dupris*, 612 F.2d 319, 320 n.3 (8th Cir. 1979), *vacated on other grounds* 446 U.S. 980 (1980).

those lands as evidence that the United States did not believe the Act changed the reservation boundaries. [EPA-WR-000089-90].

Further, the Tribes claimed the 1905 Act is distinguishable from the statute at issue in *Rosebud*, 430 U.S. 584, which diminished the Rosebud reservation. [EPA-WR-000110]. In support, the Tribes asserted a break in the chain of implied Congressional purpose from the previously unratified 1891 agreement to the 1905 Act. [EPA-WR-000110].

Finally, the Tribes argued that a Wyoming Supreme Court decision in the Big Horn River adjudication resolved the boundary question in the Tribes' favor. [EPA-WR-000103]. The Tribes recognized at the outset of their argument that the adjudication decided only a narrow question of water law in relation to the 1905 Act—that the Act did not undo the 1868 water rights. [EPA-WR-000103].

Despite this recognition, the Tribes asserted the adjudication definitely resolved the diminishment question, even though the Wyoming Supreme Court has held that "the majority and the dissent in *Big Horn River* agreed that the reservation had been diminished." *Yellowbear*, 174 P.3d at 1283; *see also Yellowbear v. Atty. Gen. of Wyoming*, 380 F. Appx. 740, 743 (10th Cir. 2010) (describing the Wyoming court's analysis as a "thorough and detailed" and "a careful exposition of the question"); *N. Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1271 (D. Wyo. 2009).

B. Wyoming comments opposing the Tribes' boundary assertions.

Wyoming opposed the Tribes' boundary claims because the 1905 Act and diminishment precedent showed that the Tribes' application erroneously claimed jurisdiction over non-reservation lands, including Riverton. [EPA-WR-004280]. Wyoming explained that the 1905 Act language is "precisely suited" to diminishment, Congress compensated the Tribes for the lands, and the legislative history and subsequent treatment of the area show that Congress intended the Act to change the reservation boundaries. [EPA-WR-004299-309].

Wyoming noted that the Tribes disregarded evidence of Congress's plain meaning in order to create ambiguity and that the authorities they relied on did not support their position. [EPA-WR-004310-16]. Finally, Wyoming demonstrated its pervasive exercise of jurisdiction over the ceded lands and the absence of federal attempts to exercise authority over that area. [EPA-WR-004316-19]. Accordingly, Wyoming urged EPA to find "that the boundaries exclude all of the ceded, unrestored lands, including Riverton, Kinnear and Pavillion, which are not 'Indian Country.'" [EPA-WR-004331].

C. EPA agrees with the Tribes' reservation boundary claim.

Five years after the Tribes' submitted their application, EPA decided Wyoming's ninth largest city is now located within Indian Country. *See* 78 Fed. Reg. 76,829 (Dec. 19, 2013). During the five years since Wyoming had last heard

of the Tribes' application, EPA created its own independent record and analyses of the reservation boundary. In 2011, EPA obtained from the Interior Department's Solicitor a 24-page opinion agreeing with the Tribes' interpretation of the 1905 Act. [EPA-WR-009733]. EPA then crafted its own 83-page opinion reaching the same conclusion. [EPA-WR-0012603]. EPA's decision incorporated both legal opinion and an additional 4,400 pages of records that produced the different reservation boundary than the one proposed in the Tribes' application. However, EPA never allowed Wyoming an opportunity to comment on any of these materials or otherwise show that the EPA's historical analyses are defective.

Like the Tribes, EPA concluded the 1905 Act language did not evidence congressional intent to diminish the reservation because the Act used different language than the Thermopolis and Lander purchase statutes. [EPA-WR-0012628-34]. Though EPA agreed with the Tribes' interpretation of the 1905 Act, EPA withheld action on the Riverton Reclamation Project lands, based on the Tribes' request just days before EPA approved the application. [EPA-WR-0011527]. The Tribes' late request led EPA to approve a reservation boundary different than the boundary in the Tribes' application.

Notwithstanding EPA's independent historical investigation, EPA did not consider multiple readily available contrary authorities. All of those authorities are public records in the possession of the United States and, in some cases, in the

possession of EPA. For example, EPA did not look at the Indian Affairs Commissioner's December 8, 1904 report to the Interior Secretary on the agreement. [WYO-WR-072]. It explained the Tribes' "cession of a portion of their reservation" as follows: that (1) "the Indians have consented to the surrender of the lands north of the Big Wind River and south of the Big Popo-Agie River"; (2) "[t]he diminished reserve covers the lands of the original Wind River or Shoshone reservation lying south of the Big Wind River and north of the Big Popo-Agie River to the point of their conjunction"; and (3) "the reservation boundary as stipulated in the agreement embraces lands ample for the needs of the Indians belonging thereto; that in case any of the lands north of the Big Wind River or east of the Big Popo-Agie River should be included in the diminished reservation it would not be long until the whites would be clamoring to have such lands opened to settlement and the Indians would eventually be compelled to give them up." [WYO-WR-072-73, -076].

EPA did not consider the Interior Secretary's April 1, 1904 negotiating instructions to McLaughlin, which: (1) set forth boundaries for "the diminished reservation"; and (2) showed Congress's express purpose to carry forward the 1891 agreement. *See* [WYO-WR-037]. Nor did EPA evaluate the Commissioner's 1904 report explaining "that any system of irrigation construction upon that reservation should be confined to lands south of the Big Wind River, and that the Indians

should be negotiated with for the cession of their lands north of that river, since they were willing to make such a cession to the United States [in 1891].” 1904 Comm’r Rep. 124.

EPA did not evaluate the Commissioner’s 1905 report, which: (1) explained “the policy of the Office to make new allotments within the diminished reservation, and to encourage Indians who have received allotments north of Big Wind River to relinquish them and agree to take other lands in lieu thereof within their diminished reservation”; and (2) advised that “any system of irrigation planned should be within the diminished reservation.” 1905 Comm’r Rep. 155. Likewise, EPA did not review the Commissioner’s 1901 report explaining the dispatch of an agent “to visit the Wind River Reservation and to report as to the advisability of reducing its size” because “a considerable portion might be ceded by the Indians and the proceeds applied to furnishing irrigation[.]” 1901 Comm’r Rep. 64.

EPA did not consider the Commissioner’s annual reports describing the persistent problem of trespassers on reservation lands north of the Wind River, which show why, in 1904, the United States repeatedly emphasized the importance of establishing new natural water boundaries for the reservation. *See, e.g.*, 1886 Comm’r Rep. 261; 1887 Comm’r Rep. 233; 1890 Comm’r Rep. 244. EPA’s historical investigation also omitted the Tribes’ early requests that the “reservation

be reduced by a sale of the portion beyond the Big Wind River," because that section of land "yields them nothing." [WYO-WR-007-12, -020].

EPA also did not meaningfully review Wyoming's extensive exercise of jurisdiction over the unrestored ceded lands. EPA was fully aware that Wyoming has pervasively exercised jurisdiction over the area, and that the United States expressly disavowed Indian Country criminal jurisdiction in Riverton. [EPA-WR-004316-19, -0012545]; [WYO-WR-257-65]. Although the Tribes, by contrast, did not identify any meaningful exercise of tribal jurisdiction over the ceded area, EPA concluded that "the Northern Arapaho and Eastern Shoshone Tribes and the State of Wyoming have asserted jurisdiction in the 1905 Act opened area." [EPA-WR-0012686].

EPA dismissed the United States' renunciation of jurisdiction in 1970 as mere evidence that the "jurisdictional status of Riverton has long been in dispute." [EPA-WR-0012686 n.70]. While EPA did not deny that Wyoming had undertaken hundreds of regulatory actions incident to environmental programs that EPA oversees, such as the Clean Water Act, EPA responded with the conclusory statement that "EPA has not approved the State of Wyoming's authority to regulate in Indian Country." [EPA-WR-0012687].

Because EPA's decision upset the status quo of more than a century, Wyoming asked EPA to reconsider and stay the effect of its decision pending

judicial review. After both Tribes similarly asked EPA to stay its decision, the agency agreed to do so. EPA has not acted on Wyoming's reconsideration petition.

STANDARD OF REVIEW

Courts review challenges to agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). The APA requires courts to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(A), (F).

Courts "afford deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care." *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145 (10th Cir. 2010) (*en banc*). Courts "do not, however, afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer." *Id*. at 1146; *see also Ibarra v. Holder*, 736 F.3d 903, 918 n.19 (10th Cir. 2013) (quoting *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004) (deference is "not required where the interpretation of a particular statute does not implicate agency expertise in a meaningful way.").

This Court does not defer to EPA's interpretation of the 1905 Act because it "quite clearly does not fall within EPA's particular expertise[.]" *Hydro Res.*, 608 F.3d at 1146. Nothing in the Clean Air Act or its legislative history indicates

Congress intended to empower EPA to be the expert administrator of the 1905 Act. *See* 42 U.S.C. § 7601(d); H.R. Rep. No. 101-952 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 3867; S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385. Instead, Congress merely authorized EPA to treat tribes like states. *See* 42 U.S.C. § 7601(d)(1)(A); 1990 U.S.C.C.A.N. 3385, 3465 (the "purpose" of the tribal program "is to improve the environmental quality of air within Indian country" and the "support of Tribal self-government").

Therefore, EPA's authority under the Clean Air Act to allow tribes to implement air pollution programs does not upset the settled judicial framework for review of reservation diminishment statutes. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"); *United States v. Mead Corp*., 533 U.S. 218, 231-32 (2001) (denying deference absent a clear congressional delegation of authority). Under the diminishment framework, the Court reviews *de novo* the three-factor diminishment hierarchy to determine Congress's intent in the 1905 Act. *Rosebud*, 430 U.S. at 586-87; *Osage Nation*, 597 F.3d at 1122 (holding that because the diminishment analysis "primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate") (citation omitted). Because the Court reviews *de novo* Congress's intent in the 1905 Act, the Court does not defer to EPA's diminishment determination.

This Court also does not defer to EPA's findings of fact concerning congressional intent in the 1905 Act because: (1) those findings concern purely legal principles, *Osage Nation*, 597 F.3d at 1122; and (2) EPA's findings are the product of an inadequate fact-finding process, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

The second and third factors of the diminishment analysis require this Court to evaluate the circumstances contemporaneous to Congress's action and the subsequent jurisdictional treatment of the lands at issue. *Rosebud*, 430 U.S. at 587, 604. Both factors involve mixed questions of law and fact concerning the core diminishment concern—congressional intent. *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010). Because that analysis "primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Id*. (citation omitted). Therefore, this Court does not defer to EPA's factual findings of Congress's intent.

The Court likewise does not defer to EPA's factual findings because they are the product of a deficient and unreliable fact-finding process. Section 706(2)(F) of the APA authorizes *de novo* review of an agency action "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." *Citizens to Preserve Overton Park*, 401 U.S. at 415; *see also Camp v. Pitts*, 411 U.S. 138, 141-42 (1973); *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d

908, 922-23 (D.C. Cir. 1982) (holding that *Vermont Yankee's* "dictum … that courts may not add to the procedural requirements of the APA" does not apply to informal adjudications). To ensure adequate fact-finding procedures in an informal adjudication, an agency must, at a minimum, provide interested parties an opportunity "to be informed of and comment upon the relevant evidence before the agency." *Indep. U.S. Tanker Owners*, 690 F.2d at 923; *see also Sec'y of Labor v. Farino*, 490 F.2d 885, 891 (7th Cir. 1973).

EPA did not inform Wyoming of the two legal opinions forming the bases for its decision or the additional 4,400 pages of records it assembled on its own initiative. In fact, Wyoming learned of the opinions and additional historical records only after EPA released its decision. Because EPA withheld its opinions and the records it relied on, EPA shielded its findings from the public scrutiny that ensures the reliability of agency decisions. This is particularly problematic, given EPA's decision *sua sponte* to conduct its own independent historical investigation into a subject well outside its expertise. Due to these deficiencies in EPA's fact-finding process, this Court owes no deference to EPA's interpretation of facts indicating congressional intent in the 1905 Act.

Finally, this Court does not defer to inconsistently applied agency interpretations. *New Mexico Dep't of Human Servs. v. Dep't of Health & Human Servs.*, 4 F.3d 882, 884 (10th Cir. 1993); *see also Bowen v. Georgetown University*

Hosp., 488 U.S. 204, 212 (1988); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). For the last three decades, Wyoming has implemented the Clean Water Act, Clean Air Act, and Safe Drinking Water Act on the 1905 Act ceded lands. [WYO-WR-291-93]. Though EPA supervised Wyoming's implementation of those programs, not once did EPA claim Wyoming lacked jurisdiction to carry out those programs on the ceded lands, including within Riverton. [WYO-WR-293]. Because EPA's present interpretation of the 1905 Act directly conflicts with its longstanding position that Wyoming has jurisdiction over the ceded lands, the Court should not defer to the agency now. *Watt*, 451 U.S. at 273.

SUMMARY OF THE ARGUMENT

Congress left no doubt about its intent for the 1905 Act. Congress used language precisely suited to diminishing the reservation and compensated the Tribes for the lands they ceded. If any uncertainty remained, the negotiation of the underlying agreement between the United States and the Tribes irrefutably confirms that all understood the 1905 Act would change the reservation boundaries. That is why, for more than a century, Wyoming and the United States have understood that Riverton, the first settlement on the ceded lands, is outside the reservation.

Yet, in EPA's eyes, the plain language in the 1905 Act, the unequivocal negotiations, and the indisputable subsequent treatment of the ceded lands are

ambiguous. EPA's analysis created ambiguity where none exists, omitted publicly available United States records contrary to EPA's conclusion, and failed to reckon with contrary evidence before EPA. From these errors, EPA reasoned to a conclusion of ambiguity. And because ambiguities are resolved in favor of the tribes, EPA asserted that Congress must not have intended the 1905 Act to diminish the reservation.

This Court should not endorse EPA's effort to manufacture ambiguity. When the plain language of the 1905 Act and the undeniable contemporaneous circumstances and subsequent history are read in light of the Supreme Court's precedent, only one result can be supported: diminishment. Congress's unequivocal intent to change the reservation boundaries gave rise to settled expectations that Riverton and the rest of the ceded unrestored lands are outside the reservation. This Court should set aside EPA's effort to rewrite that history.

ARGUMENT

Some acts of Congress ceding reservations lands changed reservation boundaries, while others did not. Where an act of Congress freed land of its reservation status, it "thereby diminished the reservation boundaries." *Yankton*, 522 U.S. at 343 (quotation omitted). But, where an act instead "simply offered non-Indians the opportunity to purchase land within established reservation

boundaries," *Solem*, 465 U.S. at 470, the lands opened to settlement remained reservation lands, *Yankton*, 522 U.S. at 343.

The "touchstone" for determining whether an act of Congress diminished a reservation is "congressional purpose." *Id.*; *see also Osage Nation*, 597 F.3d at 1122. To determine congressional intent, courts apply a three part hierarchical test. First, and most important, is the language of the statute. *Yankton*, 522 U.S. at 344. When Congress used language indicating a permanent cession of tribal land interests and provided the tribe sum-certain consideration, an almost irrefutable presumption of diminishment arises. *Id*. at 344.

If doubt remains, contemporaneous evidence of congressional intent, such as legislative history and surrounding circumstances, is most dispositive. *Rosebud*, 430 U.S. at 587 (citation omitted). "The Court will infer diminishment … despite language that would otherwise suggest unchanged reservation boundaries when events surrounding passage of the act unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Osage Nation*, 597 F.3d at 1122 (quotation and alteration omitted). And if Congress's intent still remains unclear, subsequent treatment of the lands in question can provide persuasive evidence of congressional intent. *Rosebud*, 430 U.S. at 603-04 (citation omitted).

I. Congress plainly expressed its intent to diminish the reservation.

An act of Congress that uses language of "cession" and provides a "sum certain" payment is "'precisely suited' to terminating reservation status.'" *Yankton*, 522 U.S. at 344 (quoting *DeCoteau*, 420 U.S. at 445). Indeed, when an act includes language "evidencing 'the present and total surrender of all tribal interests,'" and provides "for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly conclusive,' or 'almost insurmountable,' presumption of diminishment arises." *Id*. (quoting *Solem*, 465 U.S. at 470).

A. Congress used language in the 1905 Act "precisely suited" to diminish the Wind River Reservation.

The 1905 Act provides that the Tribes, for consideration:

> 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 [in the diminished reservation.]

[EPA-WR-002058] (emphases added). Congress described the reservation as "diminished" at least six different times in the Act. *See, e.g.*, [EPA-WR-002059] (distinguishing "the diminished reserve" from "the territory intended to be ceded" and describing the irrigation system to be built "within the diminished reservation"); [EPA-WR-002060] (setting aside funds to build and maintain schools "on the diminished reservation"); [EPA-WR-002063] (distinguishing

"ceded lands" from "the diminished reservation" and requiring "the survey and marking of the outboundaries of the diminished reservation").

While not identical, the language of cession in the 1905 Act is equivalent to cession language used in other statutes that the Supreme Court determined diminished reservation boundaries. In *Yankton*, the act at issue provided that the tribe would:

> **cede**, sell, **relinquish**, and convey to the United States **all** their claim, **right, title, and interest**[.]

522 U.S. at 344 (emphases added). Likewise, in *Rosebud*, Congress used similar terms: the

> Indians belonging on the Rosebud Reservation … do hereby **cede**, surrender, **grant**, and convey to the United States **all** their claim, **right, title, and interest**[.]

Rosebud, 430 U.S. at 597 (emphases added). The Supreme Court treats these two iterations of cession language as functionally equivalent. 522 U.S. at 344-45 (citing *Hagen*, 510 at 412).

By contrast, statutory language that makes reservation lands "subject to settlement, entry, and purchase," or that merely authorizes the United States to "sell and dispose" of reservation lands, do not, on their own, indicate diminishment. *Osage*, 597 F.3d at 1123 (citations omitted). The 1905 Act, however, does not contain this language. [EPA-WR-002058]. Rather, it plainly sets forth language of permanent cession. [EPA-WR-002058].

Notwithstanding the fact that the language in the 1905 Act establishes "an unmistakable baseline purpose of disestablishment," 430 U.S. at 492, EPA concluded that the language in the 1905 Act did not indicate an intent "to alter and diminish the boundaries of the Wind River Indian Reservation," [EPA-WR-0012634]. To support its conclusion, EPA advanced four rationales, not one of which withstands scrutiny.

First, rather than follow the Supreme Court's precent and look first to statutory language, EPA went first to legislative history and compared language in the 1905 Act to the 1868 treaty, the 1874 Lander Purchase, and the 1897 Thermopolis Purchase. [EPA-WR-0012628-29]. With this comparison, EPA creates a new standard for clarity, deciding that the language in the 1905 Act is not a permanent surrender of tribal interests because Congress used different language in the 1905 Act than in prior years when it reduced the reservation. [EPA-WR-0012634].

Without question, Congress used different language in four different statutes enacted over a period of nearly four decades in which Congress's Indian policy rapidly changed. But, that point is immaterial. The Supreme Court unmistakably identified words "precisely suited" to diminishment. *See, e.g.*, *Yankton*, 522 U.S. at 344. Correspondingly, this Court held that the statutory terms to "cede and relinquish all claim, title, and interest" demonstrate diminishment. *Ellis v. Page*,

351 F.2d 250, 252 (10th Cir. 1965) (stating that it is "one thing" to open a reservation to non-Indian settlement, but "[i]t is quite another to agree by treaty to **cede and relinquish all claim, title, and interest** in the lands") (emphasis added). Congress used these very words of permanent cession in the 1905 Act. [EPA-WR-002058]. EPA's effort to alter the Supreme Court's test and create ambiguity through legislative history does not change this fact.

Second, EPA noted that "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." [EPA-WR-0012630] (citing *Hagen*, 510 U.S. 414). Thus, according to EPA, the 1905 Act provides less evidence of intent to diminish than the statute at issue in *Hagen*. [EPA-WR-0012630].

But by pointing to the absence of "public domain" language and citing to *Hagen*, EPA turned the Supreme Court's view of diminishment language on its head. In *Yankton*, the statute at issue contained language essentially identical to the 1905 Act. *Compare* [EPA-WR-002058] *with Yankton*, 522 U.S. at 344. The Court said that **this language** "**more clearly indicates diminishment than did the surplus land Act at issue in *Hagen***, which we concluded diminished reservation lands even though it provided only that 'all the unallotted lands within said reservation shall be restored to the public domain.'" *Yankton*, 522 U.S. at 344-45

(citing *Hagen*, 510 U.S. at 412) (emphasis added). EPA thus relied on the 1905 Act's absence of the term "public domain," which the Supreme Court said is less indicative of diminishment, while ignoring language that the Court said "more clearly indicates diminishment[.]" *Id*. at 344.

Third, EPA observed that the 1905 Act "contains phrases indicating Congressional understanding that the 1905 Act would allow for settlement upon lands within an existing Reservation." [EPA-WR-0012632]. For example, EPA noted that "the operative language refers to lands 'embraced within the said reservation[.]'" [EPA-WR-0012632]. According to EPA, this shows "that the lands ceded were on a 'portion' of a larger, existing Reservation – not that they were severed from the Reservation." [EPA-WR-0012632].

This interpretation cannot be reconciled with the plain language of the Act. EPA plucked five words from the statute—"embraced within the said reservation"—and said that those words show Congress intended to maintain "a larger, existing Reservation[.]" [EPA-WR-0012632]. However, read in the context, the terms show nothing of the sort. The sentence EPA partially quotes provides that the Tribes "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**.**" *See* [EPA-WR-002058]. Contrary to EPA's claim, the phrase "embraced within the said reservation" identifies not what Congress intended to

maintain as part of the reservation, but, rather, that which Congress intended to sever from the reserve.

EPA's interpretation of this phrase also cannot be reconciled with the Supreme Court's interpretations of analogous diminishment statutes. The statute at issue in *Yankton* provided that the tribe did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in … lands within the limits of the reservation[.]" *Yankton*, 522 U.S. at 344. According to EPA's logic, Congress's reference in the Yankton statute to "lands within the limits of the reservation" indicated Congress's intent to maintain "a larger, existing Reservation." [EPA-WR-0012632]. But, when the Supreme Court interpreted the Yankton statute, it reached the opposite conclusion. *Yankton*, 522 U.S. at 344. Instead, the Court said that the statutory language, notwithstanding its reference to "the reservation," was "precisely suited to terminating reservation status." *Id*. (quotation omitted).

Finally, EPA dismissed Congress's repeated descriptions of the reservation as "diminished" on the grounds that: (1) the term diminishment was not a technical term of art in Indian law in 1905; and (2) ambiguities must be construed in favor of the tribes. [EPA-WR-0012642]. EPA is mistaken.

EPA might be right that, at the turn of the 20th Century, the term "diminished" was "not yet a term of art in Indian law." [EPA-WR-0012642] (citing

Solem, 465 U.S. at 474). But, that fact does not render the term meaningless or ambiguous. As the Court explained in *Solem*, Congress's use of the word "diminished" to describe the residual reservation "supports" the "view that the Reservation was diminished." *Solem*, 465 U.S. at 475. The Court's approach in *Solem* is consistent with the fact that the word "diminished" had a plain and ordinary meaning in 1905: "to make smaller or less." *See Webster's Common Sense Dictionary* 134 (J.T. Thompson ed. 1902).

EPA claimed that "diminished" was not a legal term of art, is thus ambiguous, and must accordingly be construed in favor of the Tribes. That claim cannot be reconciled with either the Supreme Court's position in *Solem* or the simple and ordinary meaning of the word. When Congress described the reservation as "**diminished**," it communicated its intent to make the reservation "smaller" and, therefore, to change the reservation boundaries. *Yankton*, 522 U.S. at 800-01 ("The principle according to which ambiguities are resolved to the benefit of Indian tribes is not … a license to disregard clear expressions of tribal and congressional intent.") (quotation omitted).

Additionally, Congress's use of the word "cede" could not more clearly represent "language of cession." *Yankton*, 522 U.S. at 344. As now, the meaning of that word at the time was "[t]o yield or surrender, give up." *Webster's Practical Dictionary* 58 (1906). Insofar as EPA tries to distinguish or explain away

Congress's used of the word "cede" as inadequate or less than clear, Congress's use of that word can only mean one thing—a diminished reservation.

EPA has ignored the straightforward terms in the 1905 Act and the relevant Supreme Court precedent using inconsistent rules to support its preferred position. EPA concluded, for example, that the 1905 Act cannot be compared to other diminishment statutes and then compared the 1905 Act to other diminishment statutes in the very next paragraph. [EPA-WR-0012632-33].

Contrary to EPA's conclusion, the Supreme Court has definitively stated that explicit language of cession, as contained in the 1905 Act, demonstrates Congress's intent to diminish a reservation. *Solem*, 465 U.S. at 470 ("Explicit reference to cession … strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.") (citation omitted). Congress did not simply intend to allow settlers to take up residence within the existing reservation, as EPA claimed. Congress meant to remove completely the reservation status of the ceded lands opened for settlement after the 1905 Act.

B. Congress paid the tribes a sum-certain for the cession of their lands.

In addition to using language evidencing a permanent surrender of the Tribes' interests in the lands, Congress committed in the 1905 Act to compensate the Tribes' for the land cession. The 1905 Act devoted $150,000 to "the construction and extension of an irrigation system within the diminished

reservation," $50,000 for "the purchase of live stock for issue to said Indians," $85,000 to a per capita cash payment fund, and $50,000 "as a school fund." [EPA-WR-005367-68]. The Act provides, however, that those funds would be established with the proceeds from sales of ceded lands and that the United States would not be obligated to purchase any of the lands. [EPA-WR-005367, -005370]. Congress nonetheless immediately appropriated the $85,000 in per capita payments as unconditional, fixed-sum compensation. [EPA-WR-005371].

Based on the fact that some of the payments in the 1905 Act would be funded from land sales without a purchase commitment from the United States, EPA concluded that "there was no fixed sum nor was there any certainty of payment in consideration for the lands opened to settlement." [EPA-WR-0012637]. Thus, according to EPA, interpreting the 1905 Act to diminish the reservation "would amount to inferring [c]ongressional 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." [EPA-WR-0012646]. To EPA, that would be unacceptable: "Such an interpretation would be contrary to the long-standing principle that 'Indian treaties must be constructed 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.'" [EPA-WR-0012646] (citations omitted).

EPA's conclusion that conditional payment is inconsistent with diminishment is wrong: the Supreme Court saw no such obstacle in *Rosebud*. The statutes in that case diminished a reservation from 3.2 million acres to approximately 900,000 acres, or more than 70%. 430 U.S. at 586, 612. Each of those statutes had the same payment mechanism as the 1905 Act—payment of the proceeds from the ceded land sales as they occurred. *Id*. at 587. Even so, the court in *Rosebud* "inferr[ed] [c]ongressional intent to immediately reduce the Reservation by more than half without any guarantee that the Tribe[] would ever receive compensation in consideration for those lands." [EPA-WR-0012646]; *see also Hagen*, 510 U.S. at 412 ("While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion."). What matters most is not the payment mechanism, but the "language of immediate cession[.]"*Rosebud*, 430 U.S. at 597.

EPA also ignored the fact that the United States paid the Tribes multiple lump sums irrespective of actual land sales. As a result, Congress's compensation to the Tribes under the 1905 Act was functionally equivalent to an unconditional payment system. Within one year of the ceded lands opening to settlement, Congress funded the irrigation, schools, and per capita payment funds. *See* 1907 Comm'r Rep. 58 (explaining that full amount of $150,000 irrigation fund had been

appropriated); *id*. at 54 (noting $75,000 appropriated for school fund "in fulfillment of agreements").

All told, in the first five years following opening of the ceded lands, Congress paid the Tribes more than $200,000 pursuant to the payment commitments in the 1905 Act, even though sales proceeds from the ceded lands were less than half that amount. 1911 Comm'r Rep. 116 (noting total land sales receipts of $98,413.15). In fact, Congress continued advancing payments to the Tribes, even as land sales dwindled. *See, e.g.*, 1914 Comm'r Rep. at 193 (appropriating $50,000 in "reimbursable" funds for irrigation on the "Wind River Diminished Reservation"); 1915 Comm'r Rep. 212-13 ($35,000 in "reimbursable" appropriations to the "Wind River Diminished Reservation").

Congress used plain words of cession in the 1905 Act because it unequivocally intended to reduce the reservation. That language, coupled with Congress's sum-certain, fixed per capita payment to the Tribes, as well as the additional payments irrespective of land sales, irrefutably portray a diminished reservation. Accordingly, the diminishment analysis ends at step one of the test because Congress made its intent plain. EPA's boundary determination cannot survive in the face of the plain language of the statute and is, therefore, contrary to law. This Court should set that unlawful decision aside.

II. Contemporaneous evidence confirms Congress intended to change the reservation boundaries.

If Congress left doubt about its intentions, courts look to contemporaneous circumstances to shed light on Congress's design. *Rosebud*, 430 U.S. at 587 (citation omitted). Though not as probative as the statute itself, contemporaneous facts can show whether Congress understood an act to change reservation boundaries. *Id*.

The circumstances surrounding the 1905 Act confirm what Congress's plain language and certain payments already establish. The negotiation transcripts repeatedly reference new "boundaries" of the "diminished reservation," irrefutably demonstrating the United States intended to reduce the reservation. *See, e.g.*, [EPA-WR-0000428-30]. Those records are entirely devoid of evidence undermining Congress's intent to diminish the reservation. If any doubt remained about whether the ceded lands retained reservation status, government-sanctioned sales of alcohol on the ceded lands immediately following their opening reaffirm Congress's intent to diminish the reservation. [WYO-WR-100] (noting payment to Town of Riverton for liquor license). These facts "unequivocally reveal a widely-held, contemporaneous understanding that the … reservation would shrink as a result of the [1905 Act]." *Osage Nation*, 597 F.3d at 1122.

A. Negotiation transcripts show the United States and the Tribes understood that the 1905 Act would diminish the reservation.

When McLaughlin negotiated with the Tribes for the agreement underlying the 1905 Act, he repeatedly confirmed that Congress's intended to establish new "boundaries" of the "diminished reservation. For example, he explained "the boundaries of the reservation and the residue of land that will remain in your diminished reservation." [EPA-WR-0000428]. He stated that "[t]he tract to be ceded to the United States … is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation." [EPA-WR-0000428]. He described the new diminished reservation boundaries as remaining mostly unchanged on the west and southwest, but changing on the north and the east to "follow[] down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line." *Id*.; *see also Rosebud*, 430 U.S. at 591-92 (showing McLaughlin used similar language to describe the diminished boundary of the Rosebud Sioux reservation).

If these descriptions of new reservation boundaries left any doubt about Congress's intentions, McLaughlin resolved that uncertainty by telling the Tribes that "a large reservation is not to your interest," and made clear that he was not at liberty to change the new "boundary line" Congress proposed for the diminished reservation. [EPA-WR-0000429, -430]. He explained that natural water boundaries (the Big Wind River and Popo-Agie River) "are best for you" because "everybody

will respect" them. [EPA-WR-0000435] ("Everybody knows it and there will be no uncertain lines."). McLaughlin noted his belief that "[t]he lands embraced within the diminished reservation" are among "the finest in this section of the country," and that retaining reservation lands "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." [EPA-WR-0000435].

McLaughlin's repeated, unambiguous distinctions between lands north of the Wind River and lands south of the river drive this point home. [EPA-WR-0000436] (describing south of the Wind River as "on the reservation" and lands north of the river as "on the public domain"); *see also Hagen*, 510 U.S. at 413 ("Congress considered Indian reservations as separate from the public domain.") (citation omitted). Thus, McLaughlin elaborated, "on the other [north] side of the river … you will have the same rights as the whiteman[.]" [EPA-WR-0000436]. But, by contrast, on the south side of the river, McLaughlin explained to the Tribes, "you will be protected by the laws that govern reservations in all your rights and privileges." [EPA-WR-0000436].

The Tribes understood that McLaughlin was describing new reservation boundaries. George Terry, Chief Councilman of the Shoshone Council, recognized that "This 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 we can never recover again …. The lands that we are about to dispose of have been our lands for ages." [EPA-WR-0000439]. The Northern Arapaho concurred, repeatedly expressing their understanding that McLaughlin's purpose was analogous to his purpose in negotiating the Thermopolis Purchase, which the EPA agrees diminished the reservation. *See* [EPA-WR-0000431]; *supra* at 21. McLaughlin himself noted the consistency in his purposes. [EPA-WR-0000424].

According to EPA, McLaughlin's straightforward explanations and the Tribes' understandings of the new boundaries of the diminished reservation "are best understood as a description of the area over which the Tribes would retain exclusive use." [EPA-WR-0012651]. EPA thus concluded that "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." [EPA-WR-0012651].

What EPA does not comprehend is that the "area over which the Tribes … retain exclusive use" **is** the reservation. *See Yankton*, 522 U.S. at 335 (describing reservations as "territories … set aside as permanent and exclusive homes for Indian tribes"); *Russ v. Wilkins*, 624 F.2d 914, 926 (9th Cir. 1980) ("the intent of Congress was to provide the Indians with a separate reserve where they would be secure from non-Indian encroachment"); Felix S. Cohen, *Federal Indian Law* 34 (1982 ed.) (defining "the modern meaning of Indian reservation" as "land set aside

under federal protection for the residence of tribal Indians"); [EPA-WR-008119] (establishing the Wind River Reservation exclusively "for the absolute and undisturbed use and occupation of the Shoshonee Indians"). EPA was correct that the United States defined new boundaries for an area of exclusive tribal use. That "area of exclusive tribal use" is the reservation. While the ceded lands contained a limited number of parcels owned by tribal members, the United States made clear that, on these soon-to-be off-reservation lands, tribal members would be treated no differently than non-Indian settlers.

The Indian Affairs Commissioner confirmed this understanding in his report to the Interior Secretary. He reported the agreement "for the cession of a portion of their reservation," explained "the surrender of the lands north of the Big Wind River and south of the Big Popo-Agie River," and noted that "[t]he diminished reserve covers the lands of the original Wind River or Shoshone reservation lying south of the Big Wind River and north of the Big Popo-Agie River to the point of their conjunction." [WYO-WR-072-73, -076]. Like McLaughlin's explanation of the 1904 agreement, the Commissioner's report unequivocally shows that the purpose of the 1905 Act was to reduce the reservation boundaries. *See supra* at 23-24. The Tribes confirmed this when they met with McLaughlin again in 1907. *See* [WYO-WR-156] (stating that "We gave you the land north of the Big Wind River").

McLaughlin's numerous descriptions of new reservation boundaries, based on natural water courses, and his unambiguous, repeated distinctions between the ceded lands and the diminished reservation show irrefutably that the United States and the Tribes understood the 1905 Act to diminish the reservation boundaries. The Commissioner's report corroborates this fact. Save for its failing "area of exclusive" use argument, EPA provided no other analysis. EPA would have the Court dismiss these unequivocal contemporaneous understandings in favor of its newly rewritten history.

B. The United States allowed liquor sales to occur on the ceded lands immediately after opening to settlement.

Immediately after President Roosevelt opened the ceded lands to entry, the Town of Riverton was established north of the Big Wind River, near its confluence with the Popo-Agie River, just outside the diminished reservation. Within the first year, the Town issued liquor sales permits and sales began immediately. [WYO-WR-100, -107]. On the reservation, by contrast, federal law prohibited alcohol sales at that time. *See* 27 Stat. 260.

The United States undertook diligent efforts to eradicate alcohol from Indian Country, including the Wind River Reservation, but the U.S. did nothing about liquor sales in Riverton. This is but one disparity demonstrating "a jurisdictional distinction between reservation and ceded land." *Yankton*, 522 U.S. at 350. Like McLaughlin's description of the diminished reservation, the contemporaneous fact

of government sanctioned alcohol sales on the ceded lands confirms Congress's plainly stated intent to diminish the reservation.

III. The express positions of the United States and Wyoming's exercises of jurisdiction over the ceded lands confirm Congress's intent to diminish the reservation in 1905.

The subsequent treatment of ceded lands can demonstrate diminishment, though not with as much force as the plain language of the act and contemporaneous circumstances. *Yankton*, 522 U.S. at 344 (citation omitted). On this point, "the single most salient fact is the unquestioned actual assumption of state jurisdiction" over the ceded lands. *Rosebud*, 430 U.S. at 604. When the United States has not sought to exercise its authority over ceded lands, or to challenge a state's exercise of jurisdiction over that area, those facts are "entitled to weight as a part of the 'jurisdictional history.'" *Id*.

The United States' and Wyoming's treatment of the ceded lands subsequent to the 1905 Act confirms that Congress altered the reservation boundaries. Time and again, the United States described the reservation according to diminished boundaries. And it did so across an array of contexts, from an Office of Indian Affairs map entitled "Wind River Indian Reservation" to the United States' express disavowal of Indian Country criminal jurisdiction in Riverton. At the same time, Wyoming pervasively exercised civil and criminal jurisdiction over ceded lands. Thus, like both the Act and the contemporaneous circumstances, the subsequent

treatment of the ceded lands shows Congress intended the Act to diminish the reservation.

A. The United States repeatedly recognized that the 1905 Act changed the reservation boundaries.

On multiple occasions since 1905, the United States has confirmed its understanding that the 1905 Act diminished the reservation boundaries. The 1912 official map of the reservation and subsequent maps, as well as McLaughlin, Congress, the Bureau of Indian Affairs, and the Department of Justice, all unequivocally confirm that Congress changed the boundaries of the reservation in 1905.

First, the 1912 United States Department of the Interior Office of Indian Affairs "Map of Wind River Indian Reservation Wyoming" shows, consistent with McLaughlin's and the Tribes' understandings, that the 1905 Act diminished the boundaries of the reservation. *See* H.R. Doc. No. 516, Map (Jan. 12, 1914). In 1913 and 1919, the United States Geological Survey published maps showing the same thing—a diminished reservation. [WYO-WR-189-89, -198, -211-19]. While EPA concluded that the existence of conflicting maps made it impossible to conclude much from the maps, not all maps are created equal. [EPA-WR-0012673]. These contemporaneous maps, created by Interior employees most likely to have a firsthand understanding of Congress's intent, are the best representations of the effect of the 1905 Act.

Second, when McLaughlin visited the reservation again in 1922, he reiterated that the 1905 Act diminished the reservation. [WYO-WR-224]. In his report on the visit, he explained that he "visited the principal settlements of that reservation, as diminished by the agreement concluded with the Shoshone and Arapahoe Indians under date of April 21, 1904, whereby they ceded all of their surplus lands lying north of the Big Wind River." [WYO-WR-224]. He reported that "the Arapahoe settlements extend along the Little Wind River from a point about four miles east of Fort Washakie through to the Arapahoe substation and St. Stephens Mission which are situated near the eastern boundary of the diminished reservation." [WYO-WR-224]. The maps the United States published just a few years earlier show that the Arapaho substation and St. Stephens Mission are, consistent with McLaughlin's description, located just within the eastern boundary of the diminished reservation. *See, e.g.*, H.R. Doc. No. 516, Map. If the 1905 Act had not altered the reservation boundary, both the Mission and the substation would have been many miles from the reservation's eastern boundary.[4]

Third, when Congress took up legislation to clarify the reservation boundary in 1941, the Chairman of the House Indian Affairs Committee expressly described the 1905 Act as diminishing the reservation. He explained that the lands at issue were first surveyed in 1890, and that "[a]t that time the lands on both sides of the

[4] EPA's record includes the transcript of McLaughlin's meeting with the Tribes, but not his report on the meeting. [EPA-WR-001681].

river **were** within the Wind River Indian Reservation." H.R. Rep. No. 334 at 2 (March 26, 1941) (emphasis added). But, "[b]y an agreement with the Indians dated April 21, 1904, ratified March 3, 1905 (33 Stat. 1016), the lands north of the main channel of the river were opened to settlement." *Id*. As a result of that agreement, the Chairman continued, "**The north boundary of the reservation is the center of the main channel of the Big Wind River as it existed April 21, 1904**[.]" *Id*. (emphasis added). EPA acknowledged that Congress passed this bill, but not the Chairman's description of the boundary. [EPA-WR-0012680].

Fourth, the United States expressly stated that the 1905 Act diminished the reservation in *Wyoming v. Moss*, 471 P.2d 333 (Wyo. 1970). *See* [EPA-WR-0012551] ("It is clear … that **by the Act of March 3, 1905**, 33 Stat. 1016, which amended and approved the agreement of April 21, 1904, **the intent of the Indian tribes and of the Congress of the United States was to remove from the organized reservation that area ceded to the United States**") (emphases added). EPA does not reconcile its contradictory conclusion with this express position of the United States. Instead, EPA simply mentions the brief in one sentence in support of its claim that the "jurisdictional status of Riverton has long been in dispute." [EPA-WR-0012686 n.70].

Fifth, the United States' orders restoring lands to the reservation show that the 1905 Act removed the reservation status from the ceded lands. Every one of

those orders provided that the lands "are hereby restored to tribal ownership … and **are added to and made a part of the existing Wind River Reservation**." *See* [EPA-WR-009634] (emphasis added); [EPA-WR-009638, -009642, -009645, -009653, -009660, -009662, -009665, -009675]. Of course, it would not be necessary to restore ceded lands to the reservation if the lands had not been removed from the reservation in the first place.

Recognizing that this would be inconsistent with its conclusion, EPA dismissed the restoration orders as "standard, generic language[.]" [EPA-WR-0012679]. But, in *United States v. Southern Pacific Transport Company*, the Ninth Circuit Court of Appeals held that identical language in an order restoring lands to a different reservation was evidence that Congress had previously diminished reservation boundaries. 543 F.2d 676, 696 (9th Cir. 1976) (quoting order providing that lands "are hereby added to and made a part of the Walk River Reservation"); *see also Bundrick v. United States*, 7 Cl. Ct. 532, 536, 541 (Ct. Cl. 1985) (understanding analogous order to restore ceded lands both to ownership **and** reservation status), *rev'd on other grounds*, 785 F.2d 1009 (Fed. Cir. 1986). EPA did not explain why the Ninth Circuit's reasoning in a case in which the United States was a party should not also control here.

The United States' repeated confirmations that the 1905 Act changed the reservation boundaries verify what the plain language of the Act and surrounding

circumstances already show—that Congress intended the Act to diminish the reservation.

B. Wyoming's pervasive exercise of jurisdiction over the ceded lands indicates that the 1905 Act removed lands from the reservation.

Since Congress removed the ceded lands from the reservation in 1905, Wyoming has consistently exercised pervasive jurisdictional control over that area. Wyoming has, for example, undertaken hundreds, if not thousands, of environmental regulatory actions on the ceded lands. [WYO-WR-291] (noting at least 600 water pollution control actions on the ceded lands). EPA had the opportunity to assert that Wyoming lacked jurisdiction to take these actions on the ceded lands. *See, e.g.*, 33 U.S.C. § 1342(d) (requiring notice of Section 402 permit applications to EPA and providing EPA authority to reject permits); *see also* [WYO-WR-257-62] (EPA database printout identifying state-issued permit in Riverton).[5] EPA did not. If, as EPA recently decided, the 1905 Act did not change the reservation boundaries, Wyoming would not have the authority to carry out these programs, under EPA's supervision, in the ceded area.

Wyoming has likewise exercised its full criminal jurisdiction over the ceded lands, including Riverton, to the exclusion of the United States. *See supra* at 31-34

[5] *See also* Wyo. Dep't Envtl. Quality, NPDES Permits Issued to City of Riverton, http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_PNs_and_appr_permits/Company/Riverton,%20City%20of/Riverton,%20City%20of.html (last visited Oct. 6, 2014).

(noting tribal members incarcerated for crimes committed on ceded lands). If Congress had not diminished the reservation, as EPA claims, all of these convicts would have been subject to federal, not state, prosecution. But, the Wyoming Supreme Court has held, at the United States' urging, that the Act did change the reservation boundaries and that, therefore, Wyoming has jurisdiction to prosecute tribal member crimes committed on the unrestored ceded lands. *See, e.g.*, [EPA-WR-009410].

As yet another example, Wyoming has implemented its liquor licensing regulatory program over the ceded lands. *See* Wyo. Stat. Ann. § 12-4-201. While alcohol remained illegal on the reservation, Wyoming issued liquor sales licenses to vendors on the ceded lands. [WYO-WR-247]. Here again, if the 1905 Act had not changed the reservation boundaries, every ounce of alcohol sold under those licenses for over one hundred years violated federal law. Yet, not once did the United States attempt to enforce that law against the liquor vendors on the ceded lands.

Wyoming's exercises of environmental, liquor, and criminal jurisdiction are merely representative examples of Wyoming's much broader sovereign control over the ceded lands. *See, e.g.*, [EPA-WR-009421]. Only EPA's cursory, selective review of these facts could support its conclusion that jurisdiction in the City of Riverton has long been in "dispute." [EPA-WR-0012686 n.70].

Wyoming's longstanding control of the ceded lands "has created justifiable expectations which should not be upset" by EPA's "strained" reading of the 1905 Act. *Rosebud*, 430 U.S. at 605. Wyoming's expansive, unquestioned, and longstanding jurisdictional control of the ceded lands without federal objection demonstrates unequivocally, like the plain language of the Act, the contemporaneous circumstances, and the United States' own admissions, that the 1905 Act diminished the reservation boundaries. EPA's conclusion to the contrary is wrong as a matter of law and should be vacated.

IV. EPA's boundary determination is arbitrary and capricious because EPA failed to consider relevant facts, did not rationally evaluate the facts before it, and violated its own regulations.

"An agency decision may be arbitrary and capricious if it fails to consider important relevant factors." *Woods Petroleum Corp. v. Dep't of Interior*, 47 F.3d 1032, 1037 (10th Cir. 1995) (quotation omitted). An agency decision may also be set aside if there is "no rational connection between the facts found and the choice made." *Id*. (quotation omitted). A "searching and careful" review of EPA's decision-making process in this case reveals a failure to comply with either of these hallmark principles of administrative law. *Volpe*, 401 U.S. at 416.

A. EPA failed to consider multiple sources of readily available public records directly contradicting its conclusion.

"The proper exercise of discretionary authority necessarily requires that the decision be based upon adequate information. To act without the collection of the

necessary facts is to abuse discretion." *Xytex Corp. v. Schliemann*, 382 F. Supp. 50, 53 (D. Colo. 1974); *see also Rutherford v. United States*, 438 F. Supp. 1287, 1291 (W.D. Okla. 1977).

Among many notable omissions from the EPA's independent historical analysis, EPA did not consider numerous documents critical to understanding the events and negotiations that precipitated the 1905 Act, including: (1) the Commissioner of Indian Affairs' and McLaughlin's reports on the 1904 agreement; (2) the instructions to McLaughlin to negotiate the 1904 agreement; (3) or the 1904 and 1905 annual reports of the Indian Affairs Commissioner. *See* [WYO-WR-036, -041, -072]. EPA did not consider the annual reports demonstrating the long-running problem of non-Indian trespassers on the reservation and the United States' corresponding desire to reduce the reservation to encompass more manageable natural water boundaries. *See, e.g.*, 1886 Comm'r Rep. 261; 1887 Comm'r Rep. 233. EPA did not evaluate the Tribes' early requests to part with the lands north of the Wind River, which the 1905 Act achieved. [WYO-WR-007-12, -020]. All of these sources of evidence contemporaneous to the 1905 Act are publicly available, United States records that EPA should have considered in its diminishment analysis. *See Rosebud*, 430 U.S. at 590-91 (evaluating McLaughlin's negotiating instructions); *Yankton*, 522 U.S. at 354 (relying Commissioner's annual report); *see also Hackford v. Babbitt*, 14 F.3d

1457, 1460 (10th Cir. 1994) (citing annual reports as evidence of context in which Congress acted).

If this were a normal administrative action in which an agency sought to vet its decision through public input, EPA would have provided the "complete" record to interested stakeholders for notice and comment. *See Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 130 n.9 (3d Cir. 1993) ("a regulated party automatically suffers prejudice when members of the public who may submit comments are denied access to the complete public record"). Instead, EPA's guarded process allowed the agency "to play hunt the peanut" with core record materials and prohibited the public from a full and meaningful opportunity to participate in the decision-making process. *Hanover Potato*, 989 F.2d at 130 n.9 (quotation omitted).[6]

Because EPA chose to reach its boundary determination in secret and without the benefit of public input, EPA reached its decision based on a historically incomplete, selective record. *Am. Relay Radio League v. FCC*, 543 F.3d 227, 237 (D.C. Cir. 2008) (stating that there is "no APA precedent allowing an agency to 'cherry-pick'" records to support its action). EPA's failure to consider

[6] Wyoming's pending motion to complete and supplement the record provides this Court with an opportunity to halt EPA's ongoing shell game and review the agency's boundary determination with the benefit of a full and complete record. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) ("Even the possibility that there is here one administrative record for the public and this court and another for the [agency] and those 'in the know' is intolerable.").

these critical facts render its boundary determination arbitrary and capricious. *Woods Petroleum Corp*, 47 F.3d at 1037. This Court should, therefore, hold unlawful and set aside EPA's action. *Id*.

B. EPA's findings cannot be rationally connected to the facts.

To survive arbitrary and capricious review, an agency action must rationally connect the facts before the agency to the decision made. *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1076-77 (10th Cir. 2014). EPA's decision, however, cannot be rationally connected to the facts before it.

EPA was fully aware that both Wyoming and the United States have historically treated the ceded lands as separate from the reservation. [EPA-WR-004316-19, -0012545]. EPA knew that Wyoming had undertaken hundreds, if not thousands, of environmental regulatory actions alone on the ceded lands. [EPA-WR-004316-19]; *see also* [WYO-WR-257-64].[7] If, as EPA now claims, the ceded lands are part of the reservation, then EPA has failed for the last three decades to carry out its responsibility to implement environmental programs on the reservation, deferring instead to Wyoming's efforts. EPA was also fully aware that the United States had expressly disavowed Indian Country criminal jurisdiction in the City of Riverton and that, as a result, Wyoming has always exercised criminal jurisdiction over the area. [EPA-WR-009385, -009410, -0012545]. The Tribes, by

[7] EPA's record includes no evidence of Wyoming's environmental regulatory actions on the ceded lands, even though those records are in EPA's possession.

contrast, failed to show EPA even one historical instance of their exercise of jurisdiction over the ceded lands. A fifty-year old economic plan, unconnected to action, does not count. [EPA-WR-000070-74].

From these facts, EPA reached an irrational conclusion: the "jurisdictional status of Riverton has long been in dispute" and "the Northern Arapaho and Eastern Shoshone Tribes and the State of Wyoming have asserted jurisdiction in the 1905 Act opened area." [EPA-WR-0012686]. EPA identified no factual bases for the supposed "dispute," nor for the proposition that the Tribes have asserted jurisdiction over the ceded unrestored lands. As such, EPA's conclusions lack a rational connection to the facts before it. EPA's decision is, therefore, arbitrary and capricious and should be set aside. *Conservation Alliance*, 762 F.3d at 1076-77.

EPA similarly failed to establish a rational connection between the facts before it and its analysis of *Rosebud*. EPA strenuously attempted to distinguish this case from *Rosebud* in its diminishment analysis. [EPA-WR-0012660-64]. The thrust of EPA's arguments was that, unlike in *Rosebud*, there was not an implied continuity of purpose connecting an unratified agreement—which indisputably would have diminished the reservation—to the 1905 Act. [EPA-WR-0012660-64].

EPA did not consider that, in this case, Congress expressly declared its continuity of purpose. *See supra* at 17-18; *see also* [EPA-WR-004655, -004669] (expressly stating that bill ratifies 1891 agreement). Though this express

declaration of congressional intent was before the agency, [EPA-WR-004655], EPA failed entirely to consider its import, perhaps because it could not. EPA's conspicuous silence renders EPA's boundary determination arbitrary and capricious. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (an agency is arbitrary and capricious if it "offered an explanation for its decision that runs counter to the evidence before the agency").

C. EPA's approval of the Tribes' application violates EPA's regulations.

An agency action that fails to follow the agency's own regulations is arbitrary and capricious. *Cmty. Action of Laramie Cnty., Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) (citation omitted); *see also Ghaly v. I.N.S.*, 48 F.3d 1426, 1437 (7th Cir. 1995). EPA's approval of the Tribes' application must be set aside because it violates two components of EPA's tribal authority regulations.

EPA's regulations allow a consortium of tribes, such as the Eastern Shoshone and Northern Arapaho, to jointly administer the Clean Air Act. 40 C.F.R. § 49.7(a)(5); *see also* 40 C.F.R. § 49.2(d) (defining "*Tribal Consortium* [to mean] a group of two or more Indian tribes"). If tribes elect to implement the Clean Air Act through a consortium, they must provide "reasonable assurances that [they have] responsibility for carrying out necessary functions in the event the consortium fails to." 40 C.F.R. § 49.7(a)(5). Although the Tribes relied on a consortium to jointly implement the Clean Air Act—the Wind River

Environmental Quality Commission, which the Tribes jointly control through the Joint Business Council—the Tribes provided no assurances that they could individually carry out the functions of the Clean Air Act if the Wind River Environmental Quality Commission failed to do so. [EPA-WR-000002-22]. Even though the Tribes failed to meet this requirement of EPA's rules, EPA approved the application. [EPA-WR-0012697-704, 707].[8]

EPA's tribal program regulations also require EPA to allow state and local governments the opportunity to comment on reservation boundaries. 40 C.F.R. § 49.9(c). EPA's reservation boundary determination was substantially different than the boundary the Tribes asserted in their application because, at the eleventh hour, the Tribes asked EPA to modify the application and omit the 1953 Act lands. [EPA-WR-0011527]. EPA acted without allowing Wyoming or impacted local governments any opportunity to comment on the new boundary.

The effect of EPA's redefined reservation boundary and refusal to act on the 1953 Act lands is to place those lands in jurisdictional limbo. In *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001), the Court rejected EPA's refusal to make a

[8] The Northern Arapaho recently disbanded the Joint Business Council, highlighting the significance of EPA's failure to ensure the Tribes' application complied with the regulatory requirements. *See* Trevor Graff, *Eastern Shoshone Reject Northern Arapaho Dissolution of Joint Business Council*, Casper Star-Trib., http://trib.com/news/state-and-regional/eastern-shoshone-reject-northern-arapaho-dissolution-of-joint-business-council/article_1e8a23ff-b86a-51c7-9530-a3ae5854a2b5.html (Oct. 1, 2014).

jurisdictional determination for disputed reservation areas because "there either is jurisdiction or there isn't, but either way EPA must decide[.]" *Id.* at 1086. EPA's refusal to act on the 1953 Act lands ignores this reality—that tribal jurisdiction exists or it does not. EPA's refusal to act, coupled with EPA's newly discovered belief that state-issued environmental permits in the disputed area are invalid, casts an unlawful cloud of jurisdictional uncertainty over those permits.

Because the newly proposed boundary is not a logical outgrowth of the application or the comments EPA received in response, EPA's regulations require the agency to provide Wyoming an opportunity to comment on EPA's newly redefined boundary. EPA's decision to ignore its own regulations and approve the new, substantially revised boundary without comment is arbitrary and capricious, and must be set aside. *See, e.g.*, *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) (agency failure to follow its own regulations is arbitrary and capricious)

CONCLUSION

"The problems before the Congress at the turn of the century with respect to the western lands permitted no easy solutions. The choices were difficult but they were made by the representatives of the people, and it is not our function to fashion a wiser course under the guise of interpretation." *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 114 (8th Cir. 1975); *Rosebud*, 430 U.S. at 615 (it is not the court's job to "remake history"). Congress clearly stated its intent, and both the Tribes and

everyone else involved understood that the 1905 Act would change the reservation boundaries. That fact remains true, regardless of how that policy aligns with current views.

Rather than recognizing this historical reality, incongruous as it might be with current policy, EPA tried to rewrite history. EPA endeavored to create ambiguity out of clarity, so that it could employ the Indian canon of construction, in support of present preferences, as "a license to disregard clear expressions of tribal and congressional intent." *Decouteau*, 420 U.S. at 447.

EPA's boundary determination is wrong in law and fact. The Court should, therefore, vacate EPA's erroneous decision, apply the plain language of cession Congress used to express its intent in 1905, and hold that the 1905 Act diminished the Wind River Reservation. Such relief will preserve the status quo Congress created more than a century ago.

STATEMENT REGARDING ORAL ARGUMENT

This case requires the Court to review EPA's adjudication of the respective sovereign authorities of Wyoming and the Tribes. Because of the paramount importance of this issue, Wyoming urges the Court to hold argument in this matter.

Submitted this 6th day of October 2014.

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CERTIFICATES OF VIRUS SCANNING AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing *State of Wyoming's Opening Brief* has been scanned for viruses with the Symantec™ Endpoint Protection, version 12.3.5.3, Virus Definition File dated October 6, 2014, rev. 1 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Jeremiah I. Williamson
Wyoming Attorney General's Office

CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation in the Court's July 8, 2014 Order because this brief contains 17,987 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Jeremiah I. Williamson
Wyoming Attorney General's Office

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2014, a copy of the foregoing *State of Wyoming's Opening Brief*, as well as Wyoming's *Rule 28(f) Addendum* and *Supplemental Record Addendum*, as submitted in digital form via the Court's ECF system, are exact copies of the written documents filed with the Clerk, and were served by the Clerk of Court through the Court's CM/ECF system on all attorneys of record.

s/ Jeremiah I. Williamson
Wyoming Attorney General's Office

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 29, 2013.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG14–14–000.
Applicants: New AERG, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 11/29/13.
Accession Number: 20131129–5025.
Comments Due: 5 p.m. ET 12/20/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–255–001.
Applicants: NV Energy, Inc.
Description: Transmission Rate Case—NPC Settlement to be effective 1/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5174.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–489–000.
Applicants: Northern States Power Company, a Minnesota Corporation.
Description: 2013–11–27–SMMPA Byron TR9 Repl Meter—565–0.0.0 to be effective 11/28/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5146.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–490–000.
Applicants: Hatchet Ridge Wind, LLC.
Description: Hatchet Ridge Category 2 to be effective 11/28/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5160.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–491–000.
Applicants: Spring Valley Wind LLC.
Description: Spring Valley Category 2 to be effective 11/28/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5164.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–492–000.
Applicants: Ocotillo Express LLC.
Description: Ocotillo MBR Revisions to be effective 11/28/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5167.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–493–000.
Applicants: SU FERC, L.L.C.
Description: Cancellation to be effective 1/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5175.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–494–000.
Applicants: South Bay Energy Corp.
Description: South Bay Energy Corp. Market Based Rate Tariff to be effective 1/15/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5190.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–495–000.
Applicants: California Independent System Operator Corporation.
Description: OATT Order No. 764 Compliance Filing to be effective 4/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5193.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–496–000.
Applicants: NV Energy, Inc.
Description: OATT Order No. 784—Regulation and Frequency Response Service to be effective 12/27/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5212.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–497–000.
Applicants: New England Power Pool Participants Committee.
Description: December 2013 Membership Filing to be effective 11/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5224.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–498–000.
Applicants: Pacific Gas and Electric Company.
Description: Western WDT November 2013 Biannual Filing to be effective 2/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5232.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–499–000.
Applicants: Pacific Gas and Electric Company.
Description: Western IA November 2013 Biannual Filing to be effective 2/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5235.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–500–000.
Applicants: New York Independent System Operator, Inc.
Description: NYISO tariff revision re: ICAP Demand Curve Reset to be effective 1/28/2014.
Filed Date: 11/29/13.
Accession Number: 20131129–5000.
Comments Due: 5 p.m. ET 12/20/13.

Docket Numbers: ER14–501–000.
Applicants: Pacific Gas and Electric Company.
Description: Notice of Termination for Pristine Sun Fund 10 Fresno PGE, LLC, Service Agreement No. 191, Tariff Volume No. 4 of Pacific Gas and Electric Company.
Filed Date: 11/27/13.
Accession Number: 20131127–5242.
Comments Due: 5 p.m. ET 12/18/13.

Docket Numbers: ER14–502–000.
Applicants: Pacific Gas and Electric Company.
Description: Notice of Termination for Yuba City Solar Millennium Fund, Service Agreement Nos. 212 and 213, Tariff Volume No. 4 of Pacific Gas and Electric Company.
Filed Date: 11/27/13.
Accession Number: 20131127–5243.
Comments Due: 5 p.m. ET 12/18/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–30111 Filed 12–18–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[R08–WR–2013–0007; FRL–9904–28–Region–8]

Approval of Application Submitted by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment in a Similar Manner as a State Under the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This notice announces that the EPA Regional Administrator for Region 8 has approved the December 2008 application submitted by the Northern Arapaho Tribe and Eastern Shoshone Tribe (Tribes) of the Wind River Indian Reservation for treatment in a similar manner as a state (TAS) pursuant to the Clean Air Act and the EPA's implementing regulations for

purposes of certain Clean Air Act provisions. None of the provisions for which the Tribes requested eligibility entails the exercise of Tribal regulatory authority under the Clean Air Act.

DATES: EPA's decision approving the Tribes' TAS application was issued and took effect on December 6, 2013.

ADDRESSES: You may review copies of the Wind River TAS Decision Document, Attachment 1 (Legal Analysis of the Wind River Indian Reservation Boundary), Attachment 2 (Capability Statement), and other supporting information at the EPA Region 8 Office, 1595 Wynkoop Street, Denver, Colorado 80202–1129. If you wish to review the documents in hard copy, EPA requests that you contact the individual listed below to view these documents. You may view the hard copies of these documents Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays. If you wish to examine these documents, you should make an appointment at least 24 hours before the day of your visit. Additionally, these documents are available electronically at: *http://www2.epa.gov/region8/tribal-assistance-program.*

FOR FURTHER INFORMATION CONTACT: Carl Daly, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6416, *daly.carl@epa.gov.*

SUPPLEMENTARY INFORMATION: On December 17, 2008, as supplemented on December 23, 2008, the Tribes submitted their TAS application as authorized by Clean Air Act section 301(d) (42 U.S.C. 7601(d)) and EPA's regulations at 40 CFR part 49. In their application, the Tribes requested TAS eligibility for purposes of Clean Air Act provisions that generally relate to grant funding (e.g., for air quality planning purposes) (section 105 (42 U.S.C. 7405)); involvement in EPA national ambient air quality redesignations for the Reservation (section 107(d)(3) (42 U.S.C. 7407(d)(3)); receiving notices of, reviewing, and/or commenting on certain nearby permitting and sources (sections 505(a)(2) (42 U.S.C. 7661d(a)(2)) and 126 (42 U.S.C. 7426); receiving risk management plans of certain stationary sources (section § 112(r)(7)(B)(iii) (42 U.S.C. 7412(r)(7)(B)(iii)); and participation in certain interstate and regional air quality bodies (sections 169B (42 U.S.C. 7492), 176A (42 U.S.C. 7506a) and 184 (42 U.S.C. 7511c). None of the provisions for which the Tribes requested eligibility entails the exercise of Tribal regulatory authority under the Clean Air Act. The Tribes' TAS application thus does not request, and EPA's decision to approve the application does not approve, Tribal authority to implement any Clean Air Act regulatory programs or to otherwise implement Tribal regulatory authority under the Clean Air Act.

In accordance with EPA's regulations, as part of its review process, EPA notified all appropriate governmental entities and the public of the Tribes' TAS application and in that notice specified the geographic boundaries of the Wind River Indian Reservation as identified in the Tribes' application. EPA afforded the appropriate governmental entities and the public a period totaling 60 days to provide written comments regarding any dispute concerning the boundary of the Reservation. Several commenters disagreed with the Tribes' Reservation boundary description, asserting that a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act), altered and diminished the Reservation boundary. Consistent with established TAS procedures, EPA afforded the Tribes an opportunity to respond to comments received by EPA on the Tribes' application and has previously made all comments received and the Tribes' responses thereto available to the public. In addition, because EPA was aware of existing disagreements regarding the Reservation boundary, EPA exercised its discretion to consult with the U.S. Department of the Interior (DOI), which has expertise on Indian country issues. On October 26, 2011, EPA received an opinion from the DOI Solicitor addressing the Reservation boundary.

On December 4, 2013, the Tribes sent EPA a letter requesting that EPA not address at this time the lands subject to Section 1 of the 1953 Act, 67 Stat. 592 (1953), and stating that the Tribes would notify EPA in writing if and when they decide to request an EPA decision with respect to those lands.

EPA has carefully considered the application materials, the comments received from appropriate governmental entities and the public and the Tribes' responses to those comments, the opinion of the DOI Solicitor, as well as other materials, relevant case law, applicable statutory and regulatory provisions, and relevant EPA guidance.

EPA has determined that the Northern Arapaho and Eastern Shoshone Tribes have met the requirements of CAA § 301(d)(2) and 40 CFR 49.6 and are therefore approved to be treated in a similar manner as a state for purposes of CAA §§ 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. EPA's decision also 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. EPA's TAS decision therefore does not address the 1953 Act area. Thus, EPA approved the Tribes' *Application for Treatment in a Manner Similar to a State Under the Clean Air Act for Purposes of Section 105 Grant Program, Affected State Status and Other Provisions for Which No Separate Tribal Program is Required.*

A detailed explanation of EPA's approval of the Tribes' TAS application is contained within the Decision Document and accompanying attachments referred to in the **ADDRESSES** section of this notice and at *http://www2.epa.gov/region8/tribal-assistance-program.*

Judicial Review: Pursuant to section 307(b)(1) of the Clean Air Act (42 U.S.C. 7607(b)(1)), Petitioners may seek judicial review of this approval in the United States Court of Appeals for the Tenth Circuit. Any petition for judicial review shall be filed within 60 days from the date this notice appears in the **Federal Register**, *i.e.,* not later than February 18, 2014.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 11, 2013.

Howard M. Cantor,

Acting Regional Administrator, Region 8.

[FR Doc. 2013–30248 Filed 12–18–13; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2013–3006]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

DECISION DOCUMENT

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

I. Introduction and Background

This Decision Document provides the basis and supporting information for the United States Environmental Protection Agency (EPA), Region 8's decision to approve the application submitted by the Northern Arapaho and Eastern Shoshone Tribes (Tribes) of the Wind River Indian Reservation (Reservation) for treatment in a similar manner as a state (TAS) pursuant to Clean Air Act (CAA or the Act) section 301(d) (42 U.S.C. § 7601(d)) and implementing regulations for purposes of CAA section 105 (42 U.S.C. § 7405) grant funding, section 505(a)(2) (42 U.S.C. § 7661d(a)(2)) affected state status, and the following other provisions of the CAA for which no separate tribal program is required: sections 107(d)(3) (42 U.S.C. § 7407(d)(3)); 112(r)(7)(B)(iii) (42 U.S.C. § 7412(r)(7)(B)(iii)); 126 (42 U.S.C. § 7426); 169B (42 U.S.C. § 7492); 176A (42 U.S.C. § 7506a); and 184 (42 U.S.C. § 7511c).

The Tribes' application does not request, nor by this decision is the EPA approving, Tribal authority to implement any CAA regulatory programs or to otherwise implement Tribal regulatory authority under the Act. The provisions included in the Tribes' CAA TAS application are generally summarized as follows. CAA § 105 provides that Indian tribes may seek grant funding to support, among other things, air pollution related planning activities. A tribe with CAA § 105 TAS approval may seek a reduced funding match for purposes of section 105 grants. Under CAA § 505(a)(2), an eligible tribe may be treated as an "affected state" for purposes of receiving notice of certain CAA permitting actions. CAA § 505(a)(2) requires a permitting authority to notify all states (or a tribe with "affected state" status) whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of the source, of certain permit applications or proposed permits. Any such state (or tribe with "affected state" status) has an opportunity to submit written recommendations regarding the issuance of the permit and its terms and conditions. If any part of those recommendations is not accepted by the permitting authority, such authority must notify the state (or tribe with "affected state" status) submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.[1] CAA § 107(d)(3) offers

[1] Several commenters raised concerns that EPA would approve a 50-mile "buffer zone" around the Reservation in which the Tribes would assert CAA regulatory authority. These comments appear related to the Tribes' application to be treated in a similar manner as an "affected state" under CAA section 505(a)(2). This function, however, does not entail the exercise of regulatory authority under the CAA. As noted above, this provision provides eligible Indian tribes with certain notice and comment opportunities on nearby permitting actions that may affect their air quality. Although the permitting authority must explain any failure to accept such recommendations, there is no requirement that the permitting authority modify its action in response to comments from an affected state or eligible tribe occupying that role. Following approval of the Tribes' "affected state" status, as documented in this decision, they will receive

eligible tribes the opportunity to receive certain notices and participate in EPA's determinations regarding the status of the tribes' areas with respect to attainment or nonattainment of the national ambient air quality standards promulgated by EPA. Tribal participation under CAA § 112(r)(7)(B)(iii) relates to risk management plans submitted by stationary sources in an eligible tribe's area and requires that such plans be submitted to the tribe, in addition to EPA. Under CAA § 126, eligible tribes would receive notices in the same manner as affected states of the construction of new or modified major stationary sources and of existing major stationary sources which may have certain cross-boundary impacts. CAA § 126 also includes an opportunity to petition EPA in certain circumstances. Eligibility for purposes of CAA §§ 169B, 176A and 184 relates to the establishment of and participation in interstate air pollution and visibility transport regions and commissions, including participation in the development and submission of recommendations to EPA to address interstate air pollution issues. None of the functions for which the Tribes are seeking TAS eligibility would entail the exercise by the Tribes of regulatory authority under the Act.

CAA § 301(d) authorizes EPA to treat eligible Indian tribes in a similar manner as states and directs EPA to promulgate regulations specifying those provisions of the Act for which TAS is appropriate. Section 301(d)(2) of the Act 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.

42 U.S.C. § 7601(d)(2).

Pursuant to this statutory directive, on February 12, 1998, EPA promulgated regulations specifying the provisions of the Act for which it is appropriate to treat

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such notices and opportunities to provide comments. They would not, however, exercise any regulatory authority under the Act; nor would they implement any CAA function or program outside the exterior boundaries of the Reservation (or on the lands subject to Section 1 of the 1953 Act which, as explained below, was excluded from this TAS decision at the request of the Tribes).

eligible Indian tribes in a similar manner as states and establishing the procedures for tribes to apply for TAS eligibility and for EPA to review and act on such applications. "Indian Tribes: Air Quality Planning and Management; Final Rule" (Tribal Authority Rule or TAR), 63 Fed. Reg. 7254 (Feb. 12, 1998). Pursuant to the TAR, EPA determined that it was appropriate to treat eligible Indian tribes in a similar manner as states for all provisions of the CAA and implementing regulations, including those applied for by the Tribes, with the exception of a small number of enumerated provisions generally relating to program submission requirements and deadlines that were not appropriate to impose on tribes. 40 C.F.R. §§ 49.3, 49.4.[2]

Under the TAR, a tribe seeking TAS eligibility submits an application demonstrating that it meets the criteria set forth in CAA § 301(d)(2) and 40 C.F.R. § 49.6. These criteria are:

> (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.

40 C.F.R. § 49.6.

The Tribal Authority Rule also sets forth the application requirements for tribes seeking TAS eligibility under the CAA (40 C.F.R. § 49.7), as well as the procedures for EPA's review of a tribe's application. 40 C.F.R. § 49.9. Under the regulations, the EPA Regional Administrator shall decide the jurisdictional scope of the applicant tribe's

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[2] In the TAR, EPA also set forth its interpretation that CAA § 301(d)(2)(B) includes a Congressional delegation of federal authority to tribes approved by EPA to administer CAA regulatory programs in a similar manner as states, over all air resources within the exterior boundaries of the applicant tribe's reservation. 63 Fed. Reg. at 7254-57. This interpretation was based on the language, structure and intent of the statute. EPA explained: "EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land." *Id.* at 7254.

program. 40 C.F.R. § 49.9(e). If the EPA Regional Administrator determines that a tribe meets the requirements of 40 C.F.R. § 49.6 for purposes of a particular CAA provision, the tribe is eligible for TAS with respect to that provision for all areas within the exterior boundaries of the tribe's reservation and any other areas the EPA Regional Administrator determines to be within the tribe's jurisdiction. 40 C.F.R. § 49.9(g).

II. Appropriate Governmental Entity and Public Review

On December 17, 2008, as supplemented on December 23, 2008, the Tribes submitted their *Application For Treatment In A Manner Similar To A State Under the Clean Air Act For Purposes Of Section 105 Grant Program, Affected State Status, And Other Provisions For Which No Separate Tribal Program Is Required*. This is the first TAS application submitted by the Tribes under the CAA.

Under the TAR, the EPA Regional Administrator notifies all appropriate governmental entities, which EPA defines as states, tribes, and other federal entities located contiguous to the tribe applying for eligibility. 40 C.F.R. § 49.9(b); 63 Fed. Reg. at 7267. In addition, EPA provides notice to the public. 65 Fed. Reg. 1322 (Jan. 10, 2000). For applications addressing air resources within the exterior boundaries of a reservation, such as that submitted by the Tribes, EPA's notification specifies the geographic boundaries of the reservation. 40 C.F.R. § 49.9(b)(1). Under the TAR, appropriate governmental entities and the public have 30 days to provide written comments regarding any dispute concerning the boundary of the reservation. 40 C.F.R. § 49.9(c).[3] Where 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. 40 C.F.R. § 49.9(d).

[3] Consistent with 40 C.F.R. § 49.9(c), EPA's letters to Appropriate Governmental Entities and notices to the public invited comments specifically on the Reservation boundary description included in the Tribes' TAS application. EPA regulations also state, "[i]n 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." 40 C.F.R. § 49.9(d). Thus, EPA's Decision and attached documents address relevant comments EPA received that are specific to the Reservation boundary description included in the Tribes' application.

Pursuant to these regulations, EPA provided notice of the Tribes' application specifying the geographic boundaries of the Reservation as asserted by the Tribes to the following appropriate governmental entities:[4]

- Governor of the State of Wyoming; with copies to the Wyoming Attorney General and the Wyoming Department of Environmental Quality: Letter dated April 7, 2009
- Indian Health Service, U.S. Department of Health and Human Services: Letter dated April 8, 2009
- U.S. Geological Survey: Letter dated April 8, 2009
- Superintendent, Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior: Letter dated April 8, 2009
- Regional Director, Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior: Letter dated April 8, 2009
- Acting Field Manager, Bureau of Land Management, U.S. Department of the Interior: Letter dated April 8, 2009
- Bureau of Reclamation, U.S. Department of the Interior: Letter dated April 8, 2009
- Rocky Mountain Region, U.S. Forest Service, U.S. Department of Agriculture: Letter dated April 8, 2009
- Lander Fish & Wildlife Conservation Office, U.S. Fish & Wildlife Service, U.S. Department of the Interior: Letter dated April 8, 2009
- U.S. Department of Housing and Urban Development: Letter dated April 8, 2009

On April 8, 2009, EPA also published similar notice of the application in the LANDER JOURNAL and the RANGER, and on April 9, 2009, in the WIND RIVER NEWS. Pursuant to the TAR, EPA provided a 30-day opportunity for appropriate governmental entities and the public to provide written comments on the Tribes' Reservation boundary assertion.

Prior to the close of the comment period, at the request of the State of Wyoming and others, EPA extended the comment period for an additional 30 days, until June 10,

[4] EPA also exercised its discretion to provide direct notice of the Tribes' application to the United States Congressional Members from Wyoming.

2009. EPA provided notice of the extended comment period to the following appropriate governmental entities:[5]

- Director, Wyoming Department of Environmental Quality, with copies to the Wyoming Attorney General and the Chief of Staff of the Wyoming Governor's Office: Letter dated May 1, 2009
- Lander Fish & Wildlife Conservation Office, U.S. Fish & Wildlife Service, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Bureau of Reclamation, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Indian Health Service, U.S. Department of Health and Human Services: Facsimile transmission dated May 4, 2009
- Regional Director, Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Superintendent, Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- U.S. Geological Survey: E-mail message dated May 5, 2009
- U.S. Department of Housing and Urban Development: E-mail message dated May 5, 2009
- Rocky Mountain Region, U.S. Forest Service, U.S. Department of Agriculture: E-mail message dated May 5, 2009

EPA also published notice of the extended comment period on May 6, 2009, in the LANDER JOURNAL, the RANGER, and the CASPER STAR-TRIBUNE; and on May 7, 2009, in the THERMOPOLIS RECORD and the WIND RIVER NEWS.

EPA received several comments from appropriate governmental entities and the public concerning the Tribes' assertion regarding the boundaries of the Reservation. Comments were received from the following:

- State of Wyoming Attorney General, June 9, 2009. Supplemental information submitted by Sr. Asst. Attorney General, August 6, 2009, October 16, 2009 and May 27, 2010[6]

[5] EPA also exercised its discretion to provide direct notice of the extension of the comment period to the United States Congressional Members from Wyoming, as well as to certain other individuals who had expressed an interest in the application.

- Deputy Fremont County & Prosecuting Attorney, June 10, 2009
- Fremont County Commissioners, April 21, 2009
- Mayor, City of Riverton, Wyoming, June 10, 2009
- Member, Wyoming House of Representatives, April 17, 2009
- Member, Wyoming Senate, May 29, 2009
- Executive Director, Wyoming Ag-Business Association, May 11, 2009
- Executive Vice President, Wyoming Farm Bureau Federation, May 8, 2009
- Individual commenter, April 13, 2009
- Individual commenter, April 20, 2009
- Individual commenter, April 27, 2009
- Individual commenter, April 30, 2009
- Individual commenter, May 2, 2009
- Individual commenter, May 4, 2009
- Individual commenter, May 7, 2009

EPA also received the following correspondence from U.S. Senators representing Wyoming:[7]

- U.S. Senator Michael B. Enzi: Letter dated November 13, 2008, transmitting inquiry from Chairman of the Fremont County Commissioners
- U.S. Senator John Barrasso's staff: E-mail dated December 19, 2008, transmitting inquiry from Chairman of the Fremont County Commissioners
- U.S. Senator Michael B. Enzi: Letter dated March 4, 2009, transmitting letter from Fremont County Commissioners to EPA
- U.S. Senator Michael B. Enzi: Letter dated May 4, 2009, transmitting comments from individual commenter

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[6] The State of Wyoming Attorney General's supplements transmit judicial opinions decided subsequent to the close of the extended comment period. Although these supplements were submitted subsequent to the available comment period, EPA has exercised its discretion and accepted the supplemental information for consideration.

[7] Although certain correspondence from U.S. Senators transmitting inquiries from their constituents was submitted outside of the comment period, EPA has exercised its discretion to consider such correspondence and inquiries in connection with the Agency's action on the Tribes' application.

- U.S. Senator Michael B. Enzi: Letter dated May 5, 2009, transmitting comments from Chairman, Fremont County Commissioners
- U.S. Senator Michael B. Enzi: Letter dated May 6, 2009, transmitting comments from individual commenter
- U.S. Senator Michael B. Enzi: Letter dated May 6, 2009, transmitting comments from individual commenter
- U.S. Senator Michael B. Enzi: Letter dated June, 26, 2009, transmitting comments from Executive Vice President, Wyoming Farm Bureau Federation

Several of the commenters, including the State of Wyoming, disagreed with the Tribes' Reservation boundary description, asserting that a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act) altered and diminished the Reservation boundary. Consistent with established EPA procedures, by letter dated June 23, 2009, EPA informed the Tribes of the comments received in connection with their TAS application. On May 21, 2010, the Tribes submitted detailed responses to the comments. In October 2010, EPA posted on the EPA Region 8 website, relevant portions of the Tribes' TAS application, all public comments received by EPA on the Tribes' Reservation boundary description, as well as the Tribes' response to those comments.

In addition, because EPA was aware of existing disagreements regarding the Reservation boundary, EPA exercised its discretion to consult with the U.S. Department of the Interior (DOI), which has expertise on Indian country issues. By letter dated April 13, 2009, EPA requested an opinion from the DOI Solicitor regarding the Reservation boundary. On October 26, 2011, the Solicitor provided its written opinion concluding that the 1905 Act did not diminish the Wind River Indian Reservation.

On December 4, 2013, the Tribes sent EPA a letter requesting that EPA not address at this time the lands described in Section 1 of a statute enacted in 1953, 67 Stat. 592 (1953) (1953 Act), and stating that the Tribes would notify EPA in writing if and when they decide to request an EPA decision with respect to those lands.

In reaching its decision, EPA carefully considered the Tribes' TAS application, the comments received from appropriate governmental entities and the public and the Tribes' responses to those comments, the opinion of the Solicitor of the Department of

the Interior, as well as other materials, relevant case law, applicable statutory and regulatory provisions, and relevant EPA guidance.

III. Requirements for TAS Approval

As described above, a tribe seeking TAS eligibility must demonstrate that it meets the criteria set forth in CAA § 301(d)(2) and 40 C.F.R. § 49.6. In particular, a tribe must: (1) be an Indian tribe recognized by the Secretary of the Interior; (2) have a governing body carrying out substantial governmental duties and powers; (3) propose to manage and protect air resources within the exterior boundaries of its reservation or other areas within the tribe's jurisdiction; and (4) be reasonably expected, in the EPA Regional Administrator's judgment, to have the capability to exercise such functions in a manner consistent with the terms and purposes of the CAA and applicable regulations.

A. Federal Recognition

Under 40 C.F.R. §§ 49.6(a) and 49.7(a)(1), applicant tribes must demonstrate that they are federally recognized by the Secretary of the Interior. In their CAA TAS application, the Tribes cite to their respective inclusion on the list of federally recognized Indian tribes maintained by the Secretary of the Interior and published periodically in the Federal Register. The Northern Arapaho Tribe and the Eastern Shoshone Tribe are separate federally recognized Tribes as reflected in the current published version of this list. *See* 78 Fed. Reg. 26384, 26385, 26387 (May 6, 2013). The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(1) and the TAS eligibility criterion of 40 C.F.R. § 49.6(a).

B. Substantial Governmental Duties and Powers

Under 40 C.F.R. §§ 49.6(b) and 49.7(a)(2), applicant tribes must demonstrate that they are currently carrying out substantial governmental duties and powers over a defined area. To meet this requirement, tribes may include statements describing the form of the tribal government, the types of governmental functions currently performed by the tribal governing body, and the source of the tribal government's authority to carry out the governmental functions.

The Tribes' TAS application includes a detailed statement describing their governing bodies as well as the governmental duties and powers they currently carry out over a defined area. In particular, the Tribes have described the form of their respective Tribal governments. The governing body of the Northern Arapaho Tribe is

the Northern Arapaho Business Council, which exercises executive and legislative authority, in consultation with the General Council of the Northern Arapaho Tribe, and which has a Chair selected by the Business Council's members. The supreme governing body of the Eastern Shoshone Tribe is its General Council, which has delegated authority to carry out the Shoshone Tribe's business to the Shoshone Business Council, and which has a Chairman selected by the Business Council's members. The Tribes describe that their respective Business Councils meet collectively on management and administration of certain joint matters in joint sessions as the Joint Business Council. The Joint Business Council has enacted laws and established programs to perform activities and deliver services of common benefit to both Tribes and to Reservation residents. Joint programs include: the Wind River Environmental Quality Commission, Tribal Water Engineer, Fish and Game, Tribal Minerals Department, the Wind River Tax Commission, the Tribal Court, the Tribal Employment Rights Office, and the Division of Transportation. The Joint Business Council has also enacted a law and order code that, among other things, establishes a Tribal Court system exercising civil and criminal jurisdiction on the Reservation. The Tribal Court includes a chief judge and three associate judges appointed by the Joint Business Council. In addition, a Tribal Court of Appeals consists of a three-judge panel of the Tribal Court.

The Tribes have described the types of governmental functions currently carried out by the Tribal government. In particular, the Tribes cite to and provide copies of relevant provisions of their jointly-enacted Law and Order Code, which includes provisions pertaining to water, environment, fish and wildlife, zoning, cultural resources management, building codes, taxation, housing, and employment rights. The Tribes also note their establishment of Joint Programs to manage a variety of governmental services and regulatory oversight, including federal programs delegated to the Tribes under section 638 of the Indian Self-Determination Act. The Tribes provide several examples of joint tribal agencies, including: the Wind River Environmental Quality Commission (WREQC), established in 1988, with authority to develop environmental regulations, administer a pollution permit system, assess fees and penalties, and conduct hearings; the Tribal Water Engineer, which administers the Tribes' reserved water rights; the Tribes' Fish and Game Department, which manages hunting, fishing, and gathering on the Reservation; the Wind River Tax Commission, which administers and enforces a severance tax system governing the extraction of Tribal oil and gas resources and other minerals; and the Tribal Court, which administers and enforces the Law and Order Code. The Tribes also note that the Joint Business Council administers a Head Start program, a Division of Transportation which constructs and maintains Reservation roads, a program to distribute federal funds to local school districts, and a Tribal Employment Rights Office, which implements and enforces the Tribes' employment rights ordinance.

The Tribes describe their authority to carry out governmental functions as deriving from each of the Tribe's inherent sovereignty over their members and Reservation lands and waters as recognized, among other sources, in the 1868 Treaty establishing the Reservation.

EPA has reviewed the information provided by the Tribes, which details the form of the Tribal government, the functions their government carries out, and the source of their governmental authority for such functions, and finds that the Tribes have a governing body carrying out substantial duties and powers. The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(2) and the TAS eligibility criterion of 40 C.F.R. § 49.6(b).

C. Functions Pertaining to Air Resources Within the Exterior Boundaries of the Reservation

Under 40 C.F.R. §§ 49.6(c) and 49.7(a)(3), applicant tribes must demonstrate that the functions they will exercise pertain to the management and protection of air resources within the exterior boundaries of their reservations or other areas within their jurisdiction. The Northern Arapaho and Eastern Shoshone Tribes seek TAS eligibility over their Reservation only. Thus, under the TAR, the application must identify with clarity and precision the exterior boundaries of the Reservation, including, for example, a map or a legal description of the area.

The Tribes' application describes the Wind River Indian Reservation as located in Fremont County in west-central Wyoming. Specifically, the application describes the Reservation as including lands and waters reserved under the 1868 Treaty of Fort Bridger, less those areas conveyed by the Tribes under the 1874 Lander Purchase Act and the 1897 Thermopolis Purchase Act, and including certain lands located outside and adjacent to the original boundaries that were added to the Reservation under subsequent legislation in 1940. The Tribes' application describes the Reservation as encompassing approximately 2.2 million acres, of which approximately 1.8 million acres are owned by the Tribes and their members. The Tribes' 2008 submittal included a map depicting the Reservation's boundaries, as well as a detailed statement of legal counsel setting forth the legal basis supporting the Tribes' Reservation boundary assertion. On December 4, 2013, the Tribes sent EPA a letter requesting that EPA not address at this time the lands described in Section 1 of the 1953 Act, and stating that the Tribes would notify EPA in writing if and when they decide to request an EPA decision with respect to those lands.

Several commenters disagreed with the Tribes' Reservation boundary description, asserting that the 1905 Act altered and diminished the Reservation boundaries.[8] EPA has carefully reviewed the Tribes' application materials, comments received, and other information pertinent to the Tribes' Reservation boundary assertion. As noted above, because EPA was aware of existing disagreements regarding the Reservation boundary, EPA exercised its discretion to consult with the Department of the Interior, which has expertise on Indian country issues. The DOI Solicitor's Opinion, dated October 26, 2011, analyzes the exterior boundaries of the Wind River Indian Reservation, including a detailed analysis of the 1905 Act, and concludes that the Act did not diminish the Wind River Indian Reservation. Based on all pertinent information, including the 2011 DOI Solicitor's Opinion, EPA has prepared a thorough legal analysis of the exterior boundaries of the Wind River Indian Reservation and concludes that the 1905 Act, which opened certain Reservation lands to homesteading, did not diminish the boundaries of the Reservation (Attachment 1). This legal analysis incorporates EPA's responses to comments received pertinent to the 1905 Act's effect on the exterior boundaries of the Reservation.

The Tribes' 2008 submittal included a map of the Reservation, cited the relevant formative treaty and statutes establishing and delineating the Reservation boundaries, and provided their detailed legal analysis supporting the current status and location of those boundaries. EPA has reviewed and considered the Tribes' Reservation boundary description, the map submitted with their application, their legal statement and other supporting information.[9] These materials are sufficient to satisfy EPA's regulatory

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[8] Certain commenters appear to assert that EPA lacks authority to determine the Reservation's boundaries and that questions regarding the boundary are reserved solely to the courts. EPA disagrees. The CAA TAS regulations expressly require EPA to determine the scope of the applicant tribe's eligibility and, where a TAS application covers a reservation, specifically refer to EPA determinations concerning the reservation's boundaries. *See* 40 C.F.R. §§ 49.9(e), (f), (g). These requirements flow from the CAA's TAS eligibility criterion requiring that the functions to be exercised by the applicant tribe pertain to the management and protection of air resources "within the exterior boundaries of the reservation..." CAA Section 301(d)(2)(B). EPA's implementation of this requirement does not affect the jurisdiction of federal courts to adjudicate issues properly raised for their consideration.

[9] One commenter asserted that the Tribes failed to provide an adequate description of the exterior boundaries of the Reservation as required by 40 C.F.R. § 49.7, which would allow for meaningful and specific comment on the boundaries. Notably, the commenter did not identify any specific deficiency in the Tribes' Reservation boundary assertion that would affect its ability to comment; and it is also significant that the commenter did, in fact, submit detailed comments addressing the Reservation boundary. Although not necessary to meet the TAS application requirements set forth in the TAR, the Tribes nevertheless responded to this comment and provided additional information and legal descriptions of the lands included within their asserted Reservation boundaries. Tribes' Response to Comments, May 21, 2010, at 92-94.

application requirements and provided a meaningful basis for other parties to comment. The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(3) and the TAS eligibility criterion of 40 C.F.R. § 49.6(c).[10]

EPA has concluded (as detailed in Attachment 1 to this Decision Document) 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. EPA's TAS decision therefore does not address the 1953 Act area.

D. Capability

Under 40 C.F.R. §§ 49.6(d) and 49.7(a)(4), applicant tribes must demonstrate that they are reasonably expected to be capable, in the EPA Regional Administrator's judgment, to carry out the functions they seek to exercise in a manner consistent with the terms and purposes of the CAA and all applicable regulations. To meet this requirement, tribes may include statements describing their previous management experience, the existing environmental or public health programs they administer, the entity(ies) exercising executive, legislative, and judicial functions of the tribal government, the existing or proposed agency that will assume primary responsibility for administering the CAA functions relevant to the application, and the technical and administrative capabilities of the staff to effectively administer the CAA functions at issue.

The Tribes have included in their application a detailed statement of their resources and capabilities relevant to the particular CAA functions they seek to carry out under their application and have addressed each of the factors identified in 40 C.F.R. § 49.7(a)(4)(i)-(v). EPA also notes that the Tribes have previously been approved for TAS for the purpose of grant funding under section 106 (33 U.S.C. § 1256) of the Clean Water Act. The EPA Region 8 Air and Tribal Programs have carefully reviewed

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[10] EPA considers this decision a locally applicable final action under CAA § 307(b), 42 U.S.C. § 7607(b). Thus, any petition regarding EPA's TAS decision, including EPA's determination of the Reservation boundary, must be brought in the United States Court of Appeals for the Tenth Circuit.

the Tribes' application and considered EPA's prior experience with the Tribes and have recommended in a Memorandum that the Tribes are reasonably expected to be capable of carrying out the functions they seek to administer. (Attachment 2). In consideration of this Memorandum and the Tribes' application, EPA finds that the Tribes have satisfied this requirement. This analysis and conclusion regarding Tribal capability does not apply to CAA regulatory programs, but applies only to the current TAS eligibility determination, as EPA evaluates capability on a program-by-program basis.[11] *See* 59 Fed. Reg. 43956, 43963 (Aug. 25, 1994). The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(4) and the TAS eligibility criterion of 40 C.F.R. § 49.6(d).

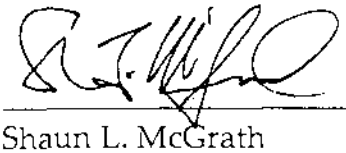
IV. Conclusion

EPA has determined that the Northern Arapaho and Eastern Shoshone Tribes have met the requirements of CAA § 301(d)(2) and 40 C.F.R. § 49.6 and are therefore approved, effective today, to be treated in a similar manner as a state for purposes of CAA §§ 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. EPA's decision also 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

[11] EPA received comments questioning the Tribes' demonstration that they meet the capability criterion for TAS eligibility. Such comments do not address the Tribes' jurisdictional assertion (*i.e.*, their Reservation boundary description) and thus exceed the scope of permissible comment under the TAR. *See* 40 C.F.R. §§ 49.9(b)(1), (c), (d). However, EPA notes that several of the comments appear to be based on the mistaken premise that a tribe seeking TAS eligibility under the CAA must demonstrate its capability to perform all functions pertaining to the management of reservation air resources, including the capability to regulate activities affecting such resources. This is not accurate. Applicant tribes need only demonstrate that they meet the TAS eligibility criteria in the CAA and EPA's implementing regulations – including the capability criterion – for those functions for which they are seeking TAS approval in a particular application. *See, e.g.*, 40 C.F.R. § 49.7(a)(4) (applicant tribe's statement of capability addresses the "program for which the tribe is seeking approval"); 59 Fed. Reg. 43956, 43963 (August 25, 1994) (capability involves a "program-by-program inquiry"). In this case, the Tribes seek eligibility for the purposes of CAA grant funding and certain other functions for which no separate tribal program is required. None of the functions for which the Tribes seek TAS entails the exercise of Tribal regulatory authority under the CAA, and it would be inappropriate for EPA to require a demonstration of capability for regulatory functions at this time.

lands described in the 1953 Act at this time, the lands are not included in the geographic scope of approval for this decision. EPA's TAS decision therefore does not address the 1953 Act area. Thus, EPA approves the Tribes' *Application for Treatment in a Manner Similar to a State Under the Clean Air Act for Purposes of Section 105 Grant Program, Affected State Status and Other Provisions for Which No Separate Tribal Program is Required.*

APPROVED



Shaun L. McGrath
Regional Administrator
EPA Region 8

12/6/13

Date

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

[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

[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.[12] Rather, because the Reservation status of those sections remained

[12] 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.[41] 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

[41] 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.

[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 ENVIRONMENTAL PROTECTION AGENCY
REGION 8

ATTACHMENT 2

CAPABILITY STATEMENT

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
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ATTACHMENT 2

Ref: 8OPRA

SUBJECT: Treatment in a Similar Manner as a State (TAS) for Purposes of the Clean Air Act (CAA) Section 105 Grant Program and other Clean Air Act Provisions that Do Not Entail the Exercise of Tribal Regulatory Authority: Capability Statement for the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation

FROM: Carl Daly, Director, EPA Region 8 Air Program 7/2/2013
Alfreda Mitre, Director, EPA Region 8 Tribal Assistance Program 7/2/13

THROUGH: Derrith Watchman-Moore for 7/3/13
Assistant Regional Administrator
Office of Partnerships and Regulatory Assistance

TO: Shaun L. McGrath
Regional Administrator, EPA Region 8

The EPA Region 8 Air and Tribal Programs have reviewed the Northern Arapaho and Eastern Shoshone Tribes' request for a TAS eligibility determination under CAA § 301(d) and 40 C.F.R. Part 49 (the Tribal Authority Rule or TAR) for purposes of CAA sections 105 and 505(a)(2), and for the following other provisions of the CAA for which no separate tribal program is required: sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184. After careful review of the Tribes' application, which includes a detailed statement describing their capability to administer the functions for which they are seeking eligibility, the Air and Tribal Programs conclude that the Tribes have demonstrated their capability to administer each of those functions

within the meaning of CAA § 301(d)(2)(C) and 40 C.F.R. §§ 49.6(d) and 49.7(a)(4). Therefore, the Air and Tribal Programs recommend that EPA approve the Tribes' capability for purposes of TAS for the CAA provisions described in their application dated December 17, 2008, as amended on December 23, 2008. This analysis and recommendation regarding Tribal capability does not apply to CAA regulatory programs, but applies only to the current TAS eligibility determination for the specific provisions identified above, as EPA evaluates capability on a program-by-program basis. See 59 Fed. Reg. 43956, 43963 (Aug. 25, 1994).

Under 40 C.F.R. §§ 49.6(d) and 49.7(a)(4), applicant tribes must demonstrate that they are reasonably expected to be capable, in the EPA Regional Administrator's judgment, to carry out the functions they seek to exercise in a manner consistent with the terms and purposes of the CAA and all applicable regulations. To meet this requirement, tribes may, among other things, include statements describing their previous management experience; the existing environmental or public health programs they administer; the entity or entities exercising executive, legislative, and judicial functions of the tribal government; the existing or proposed agency that will assume primary responsibility for administering the CAA functions relevant to the application; and the technical and administrative capabilities of the staff to effectively administer the CAA functions at issue. 40 C.F.R. § 49.7(a)(4).

The Northern Arapaho and Eastern Shoshone Tribes are seeking TAS for purposes of CAA sections 105 and 505(a)(2), as well as other provisions of the CAA that do not require a separate tribal program or entail the exercise of tribal regulatory authority. These provisions are, CAA sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. None of these provisions entails the exercise of Tribal regulatory authority under the CAA or implementation of a CAA regulatory program, so the Tribes' capability to regulate air quality under the CAA or administer such a CAA regulatory program is not at issue in this application. Instead, these provisions generally relate to grant funding (*e.g.*, for air quality planning purposes) (section 105); involvement in EPA national ambient air quality redesignations for the Tribes' Reservation (section 107(d)(3)); receiving notices of, reviewing, and/or commenting on certain nearby permitting and sources (sections 505(a)(2) and 126); receiving risk management plans of certain stationary sources (section 112(r)(7)(B)(iii)); and participation in certain interstate and regional air quality bodies (sections 169B, 176A and 184).

The Tribes' TAS application demonstrates that they are capable of performing the functions at issue for each of the specified CAA provisions. The Tribes have included in their application a detailed statement of their resources and capabilities

relevant to the particular CAA functions they seek to carry out pursuant to their application and have addressed each of the factors identified in 40 C.F.R. § 49.7(a)(4)(i)-(v). This information includes a specific demonstration of capability on the part of the Tribes' environmental agency, the Wind River Environmental Quality Commission (WREQC), addressing each of the identified CAA provisions.

Previous Management Experience – 40 C.F.R. § 49.7(a)(4)(i)

40 C.F.R. § 49.7(a)(4)(i) provides that applicant tribes' capability statements may include descriptions of their previous management experience, including their administration of programs and services authorized under other federal statutes such as the Indian Self-Determination and Education Assistance Act.

In their TAS application, the Tribes describe and provide an organizational chart of the Joint Programs managed by their Joint Business Council. The Joint Programs include several public health and environmental elements, including the WREQC, a Tribal Water Engineer's Office, and a Tribal Fish and Game section. Among other things, the Tribes also manage a Transit Authority, a Head Start Program, and Minerals Compliance and Homeland Security functions. In 2006, total revenues for the Joint Programs were $27.7 million. The Tribes also have substantial experience managing programs under agreements with the U.S. Departments of the Interior, Energy, Agriculture, Justice, and Housing and Urban Development, as well as with EPA. The Tribes have a Joint Finance Office that undertakes annual audits for purposes of compliance with federal law. In addition, the Tribes note that each Tribe also manages several of its own separate programs providing services – including social services, health, education and housing services, and utilities – to its members. This information demonstrates significant prior management experience on the part of the Tribes and the WREQC.

Existing Environment and Public Health Programs – 40 C.F.R. § 49.7(a)(4)(ii)

40 C.F.R. § 49.7(a)(4)(ii) provides that applicant tribes' capability statements may include descriptions of any existing environmental or public health programs administered by the tribal governing body. The Tribes' statement notes that their principal Joint Programs addressing environmental and public health issues are managed by WREQC. WREQC is a joint Tribal department established by the Joint Business Council in 1988. Its authorizing statute is found in Chapter 10 of Title XI of the Tribes' Law and Order Code, which the Tribes included with their TAS application. WREQC administers numerous environmental and public health programs, including

programs for air quality, water quality, brownfields, underground storage tanks, and solid waste.

Among other things, WREQC's air quality program has compiled emissions inventories for the Reservation, collects air monitoring data for air quality parameters, and works with EPA on inspections of major air emission sources on the Reservation and enforcement matters. The Tribes' water quality program conducts monitoring at numerous Reservation locations, develops water quality standards for Reservation waters, comments on permits for point source water discharges on the Reservation, develops the Tribes' nonpoint source management plan and assessment reports under section 319 of the federal Clean Water Act, inspects underground injection facilities, samples drinking water wells, and is developing groundwater quality standards. The Tribes' Brownfields program works with federal, state and local agencies on brownfields issues. The program identifies contaminated sites on the Reservation, evaluates risks to human health, and develops site-specific assessments and clean-up plans. The Tribes also operate a Tribal Response Program assisting in emergency situations such as floods, fires, and railroad and highway accidents involving hazardous materials. The Underground Storage Tank Program conducts compliance inspections, provides compliance assistance to facility operators, and assists in the removal of leaking tanks. Finally, the WREQC solid waste program focuses on cleaning up Reservation dump sites and has also developed a 25-year integrated solid waste management plan and proposed solid waste codes and regulations for the Reservation.

In addition to WREQC, the Tribes administer programs related to natural resources pursuant to their Water and Fish and Game Codes and have additional public safety programs administered by their Department of Transportation and pursuant to their Building and Zoning Codes. The Tribes also note that each of the two Tribes manages their own separate programs addressing public health and have Tribal utility departments managing public water and sewer systems.

This information demonstrates that the Tribes have substantial existing programs and capabilities addressing a wide variety of environmental and public health issues on the Reservation.

Entities Exercising Executive, Legislative, and Judicial Functions – 40 C.F.R. § 49.7(a)(4)(iii)

40 C.F.R. § 49.7(a)(4)(iii) provides that applicant tribes' capability statements may include descriptions of the entity or entities exercising the executive, legislative, and judicial functions of the tribal government. The Tribes' application includes relevant

information describing the governing bodies of the individual Tribes as well as the manner in which the Tribes jointly administer governmental functions. The application states that the governing body of the Northern Arapaho Tribe is the Northern Arapaho Business Council, which exercises executive and legislative authority, in consultation with the General Council of the Northern Arapaho Tribe, and which has a Chair selected by the Business Council's members. The supreme governing body of the Eastern Shoshone Tribe is its General Council, which has delegated authority to carry out the Shoshone Tribe's business to the Shoshone Business Council, which itself has a Chairman selected by the Business Council's members. The Tribes describe that their respective Business Councils meet collectively on management and administration of joint matters in a joint session as the Joint Business Council. The Joint Business Council enacts laws and establishes programs to perform activities and deliver services of common benefit to both Tribes and Reservation residents. Joint programs include: WREQC, the Tribal Water Engineer, Fish and Game, Tribal Minerals Department, the Wind River Tax Commission, the Tribal Court, the Tribal Employment Rights Office, and the Division of Transportation. The Joint Business Council has also enacted a Law and Order Code that, among other things, establishes a Tribal Court system exercising civil and criminal jurisdiction on the Reservation. The Tribal Court includes a chief judge and three associate judges appointed by the Joint Business Council. In addition, a Tribal Court of Appeals consists of a three-judge panel of the Tribal Court.

The Northern Arapaho Tribe and the Eastern Shoshone Tribe are each separate federally-recognized Tribes. The Tribes note that each Tribe, through its respective governing body, exercises a variety of inherent governmental functions, including: negotiating with federal, state, and local governments, managing Tribal economic affairs and enterprises; levying and collecting taxes and fees; promulgating and enforcing laws; and regulating the conduct of trade on the Reservation.

The Tribes' application is very informative regarding their individual and joint governmental structures, including their various executive, legislative and judicial bodies. The Tribes' governmental organizations are clearly established so as to be capable of administering the CAA functions specified in their TAS application.

Tribal Agency Administering CAA Program – 40 C.F.R. § 49.7(a)(4)(iv)

40 C.F.R. § 49.7(a)(4)(iv) provides that applicant tribes' capability statements may include descriptions of the agency that will administer a CAA program. The Tribes' application states that WREQC has primary responsibility for developing and administering the Tribes' air quality program. WREQC was established in 1988 by Resolution of the Tribes' Joint Business Council, which enacted WREQC's authorizing

statute found in the Tribes' Law and Order Code. The Tribes supplied a copy of the WREQC authorizing statute with their application. The Tribes describe that WREQC is managed by an Executive Director and WREQC's final actions and decisions are subject to review in Tribal Court. As of the date of the application, WREQC operated on an annual budget of approximately $1.5 million.

The Tribes describe WREQC's principal authorities as including, among other things: developing environmental laws and procedures (subject to approval of the Joint Business Council); administering a water discharge permitting system; establishing rules and procedures governing its agency activities (including providing for public participation); applying for and receiving federal financial assistance (with the consent of the Joint Business Council); and establishing a schedule of fines and penalties for violations of Tribal environmental regulations. WREQC administers a variety of environmental programs described above in this memo and detailed in the Tribes' application – including air quality, water quality, brownfields, underground storage tank, and solid waste programs – and receives funding through several EPA grant authorities, as well as U.S. Department of Energy and Department of Agriculture programs.

In describing their Environmental Quality Commission, the Tribes state:

> Protecting the natural resources of the Wind River Indian Reservation is, and has been, a way of life, and remains one of the major priorities of the Shoshone and Northern Arapaho Tribes. The Tribes believe that the earth, water, and sky together sustain us as a people and that we are related to all the animals and other living things such as plants, trees, rocks, and soils. What effects all living things will also affect us. Therefore, our lives must revolve around and be dedicated to the protection of all the natural resources.
>
> http://www.wreqc.com/

The Tribes have also included a detailed statement addressing the specific functions of each of the CAA provisions for which they are seeking TAS. The statement is summarized below and clearly demonstrates WREQC's capability to administer these functions.

1. <u>Grant Funding (CAA Section 105)</u>

Under CAA § 105, eligible tribes may apply for grant funding at a reduced match requirement for purposes of, among other things, air quality planning for their

reservations. The Tribes currently receive funding for their air quality program under CAA § 103. Their program has focused on developing air emissions inventories and air quality monitoring. In 2002, the Tribes completed an air quality assessment and air emissions inventory providing an estimate of air pollution emissions within the Reservation. The Tribes have been conducting air quality monitoring since 2003. In 2006, a Tribal Representative participated in two EPA inspections of CAA, Part 71, Title V permitted facilities located within the exterior boundaries of the Reservation. In, 2012, the Tribes updated an air monitoring shelter and added new air monitoring equipment. The application describes the development of plans for possible future activities, including, among other things, eventually developing air quality standards and a Tribal Implementation Plan, and establishing additional air quality monitoring stations. The Tribes also receive grant funding from EPA under a variety of other federal environmental programs as well as funding from other federal agencies.

The Tribes describe WREQC's procedures for accounting and reporting on the use of funds obtained under CAA § 103. The Tribes included personnel and procurement policies as part of their application, and also describe their Joint Finance Office's roles and responsibilities regarding expenditures of federal grant funds. WREQC provides work plans and budgets to the Joint Finance Office for each federal grant WREQC receives. The Tribes continue to update their policies and procedures to ensure that WREQC's accounting and grants management systems include itemized posting and reporting of expenditures and otherwise meet the federal grants management requirements referenced in 40 CFR Part 31.

WREQC's experience administering grants under CAA § 103 – as well as other grants provided by EPA and other federal agencies – demonstrates the necessary capacity to administer grants under CAA § 105 at a reduced match. They have a proficient air quality program undertaking important air monitoring activities on the Reservation, which will be enhanced through additional opportunities facilitated by CAA § 105 funding.

2. Notification and Comment Provisions - CAA Sections 505(a)(2), 107(d)(3), 126

Several of the provisions for which the Tribes seek TAS involve receiving notices of, and providing Tribal input on, air quality issues in and around the Reservation. For instance, under CAA § 505(a)(2), eligible tribes receive notices of, and have an opportunity to comment on, certain permits for sources in nearby areas. More specifically, CAA § 505(a)(2) requires a permitting authority to notify all states (or a tribe with "affected state" status) whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of

the source, of certain permit applications or proposed permits. Any such state (or tribe with "affected state" status) has an opportunity to submit written recommendations regarding the issuance of the permit and its terms and conditions. If any part of those recommendations is not accepted by the permitting authority, such authority must notify the state (or tribe with "affected state" status) submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor. Under CAA § 107(d)(3), eligible tribes participate in EPA's process for redesignating the status of their areas with respect to attainment or nonattainment of the national ambient air quality standards promulgated by EPA. Under CAA § 126, eligible tribes would receive notices in the same manner as affected states of the construction of new or modified major stationary sources and of existing major stationary sources which may have certain cross-boundary impacts. CAA § 126 also includes an opportunity to petition EPA in certain circumstances.

As described above, WREQC has developed an air quality program that already participates in review of facility operations and relevant air quality issues on the Reservation. WREQC has periodically worked with EPA on air inspections of major sources on the Reservation as well as in air permit enforcement actions conducted by EPA. WREQC has participated as a cooperating agency in reviews of significant projects affecting Reservation air quality under the National Environmental Policy Act. The Tribes also corresponded with EPA regarding air and water quality concerns at the U.S. ChemTrade Logistics Inc. (ChemTrade) sulfuric acid production facilities on the Reservation. The Northern Arapaho Tribe was a plaintiff-intervenor and party to a consent decree involving Clean Air Act violations at the facility.

As demonstrated by its various activities, WREQC's air quality program is capable of receiving air quality related notices and if it so chooses, providing informative comments or other information and analysis to EPA and other relevant authorities.

3. Risk Management Plans - CAA Section 112(r)(7)(B)(iii)

Under CAA § 112(r)(7)(B)(iii), eligible tribes receive risk management plans (RMPs) prepared by certain stationary sources. The Tribes state that these plans would be received by WREQC's Director and the coordinator of the Tribal Response Program. As described above, the Tribal Response Program assists emergency workers and Reservation residents with respect to a variety of emergency situations, including accidents involving releases of hazardous materials. The Program has already developed experience responding to emergencies, including chemical spills and railroad derailments and a flash flood causing thousands of tires from an illegal dump

to be washed onto the Tribes' lands. As the Tribes note, receiving risk management plans will be valuable to Tribal first responders in the event of release of hazardous materials from a stationary source. The Tribes have developed important experience in emergency response and have demonstrated capability as appropriate entities to receive relevant risk management plans under this provision of the CAA.

Under the EPA's authority in CAA § 112(r)(7)(B)(iii), the Agency has established a central point of submittal for all RMPs. The electronic submission system and database of RMPs is the form and method of complying with the requirement to submit an RMP to a state and to each of the other points of compliance under CAA § 112(r)(7)(B)(iii). 40 CFR § 68.150(a). Each state and other point of compliance may access the RMP database through the CDX system. Submission to this system will be deemed submission to the Tribes. Upon this TAS approval, the Tribes' WREQC Director and coordinator may establish access to this system in a similar manner as states.

4. **Participation in Air Pollution Regions and Commissions - CAA Sections 169B, 176A and 184**

Under CAA §§ 169B, 176A, and 184, eligible tribes participate in the same manner as states in various air pollution regions and commissions, including participation in the development and submission of recommendations to EPA to address interstate air pollution issues. The Tribes note that WREQC air program staff already interact with several federal and state agencies on air quality issues of mutual interest and have participated in a variety of groups and meetings addressing interstate air pollution issues, including:

- Western Regional Air Partnership (WRAP) EPA Regions 6, 8, 9 and 10
- Western Governors Conference
- Southwest Wyoming Technical Air Forum (modeling studies)
- Greater Yellowstone Air Corridor Coalition
- Wyoming Southwestern Air Partnership Region 8 Intertribal Air Coordinators Coalition

The Tribes' prior experiences and the various activities and capacities of their Air Quality Program demonstrate their capability to participate in air pollution regions and commissions.

Technical and Administrative Capabilities – 40 C.F.R. § 49.7(a)(4)(v)

40 C.F.R. § 49.7(a)(4)(v) provides that applicant tribes' capability statements may include descriptions of their technical and administrative capabilities to administer an effective air quality program. The descriptions provided above and detailed in the Tribes' application, of the various programs administered by WREQC, and in particular by the Air Quality Program, support the Tribes' technical and administrative capability to administer the functions under the CAA for which they seek TAS. WREQC has gained environmental program implementation experience, including important activities involving inventory development, assessments and monitoring of air quality. The Tribes have submitted an organizational chart for WREQC indicating appropriate staffing and available technical consulting resources. The Tribes have also provided resumés of WREQC personnel involved in the Air Quality Program – including their air quality coordinator and data analysis personnel – demonstrating a depth of relevant experience and training. We find that the Tribes' application describes technical and administrative resources that clearly support their capability to administer the CAA functions for which they seek TAS.

Conclusion

After careful review of the Tribes' submission, our understanding of the Tribal programs as set forth above and consultation with relevant Regional staff and programs, the EPA Region 8 Air and Tribal Programs find that the Tribes have demonstrated that they are capable, within the meaning of CAA § 301(d)(2)(C) and sections 49.6(d) and 49.7(a)(4) of the TAR, of administering each of the CAA provisions identified in their TAS application. The Region 8 Air and Tribal Programs recommend that the EPA Region 8 Regional Administrator approve the Tribes' capability for TAS purposes as part of EPA's overall determination regarding their TAS eligibility.

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Ref: 8P-AR

Honorable Matt Mead, Governor
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State Capitol, 200 West 24th Street
Cheyenne, Wyoming 82002-0010

Honorable Darwin St. Clair, Jr., Chairman
Shoshone Business Council
P.O. Box 538
Fort Washakie, Wyoming 82514

Honorable Darrell O'Neal, Sr., Chairman
Northern Arapaho Business Council
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Dear Governor Mead, Chairman St. Clair and Chairman O'Neal:

On January 6, 2014, the State of Wyoming requested that the Environmental Protection Agency administratively stay its decision approving the Northern Arapaho Tribe and the Eastern Shoshone Tribe of the Wind River Indian Reservation (the Tribes) for treatment in a similar manner as a state (TAS) under the Clean Air Act (CAA), pending agency reconsideration or judicial review. On February 6, 2014, the Northern Arapaho Tribe requested that the EPA administratively stay its TAS decision, so long as the stay does not delay or restrict the federal funding sought by the Tribes in their TAS application and reserves the legal rights of the Tribe and other affected governments. On February 12, 2014, the Eastern Shoshone Tribe requested a partial stay of the EPA's decision pending the outcome of litigation. In consideration of these requests, the EPA has decided to stay in part its TAS decision as described below. The State's request that the EPA reconsider its TAS decision remains pending.

Background

On December 6, 2013, the Regional Administrator for Region 8 of the EPA approved the Tribes' application under CAA section 301(d) and the EPA's regulations at 40 CFR Part 49 for TAS with respect to certain non-regulatory provisions of the CAA. *See* 78 Fed. Reg. 76829 (Dec. 19, 2013). As required by EPA regulations, the EPA's decision included a determination of the geographic scope of

the Tribes' TAS approval. As part of that determination, the EPA concluded that the boundaries of the Wind River Indian Reservation were not altered by a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act). In addition, the Tribes requested that the EPA not address at this time the lands subject to Section 1 of a 1953 Congressional Act, 67 Stat. 592 (1953), which include the towns of Pavillion and Kinnear. Thus, the EPA's TAS decision did not address those lands, and they were not included in the geographic scope of the EPA's approval.

On January 6, 2014, the State of Wyoming submitted to the EPA its Petition for Reconsideration and Stay of Approval of the EPA's TAS decision pending agency reconsideration or judicial review. On February 6, 2014, the Northern Arapaho Tribe submitted its request for an administrative stay of the EPA's TAS decision. On February 12, 2014, the Eastern Shoshone Tribe submitted its request for a partial stay of the EPA's decision. As described below, and in consideration of the State's and the Tribes' views, the EPA has decided to stay the effect of its TAS decision with regard to the geographic area of the Reservation included in the decision that is disputed by the State. During the administrative review process on the Tribes' TAS application, the State disputed the Reservation status of lands opened for homesteading by the 1905 Act that have not since been restored to Tribal trust status pursuant to Secretarial Orders of the U.S. Department of the Interior (DOI) implementing a 1939 statute, 53 Stat. 1128 (1939) (1939 Restoration Act). The stay applies to all such disputed lands within the scope of the EPA's decision.

During the administrative review process, the State did not dispute the Reservation status of lands that were either unopened to homesteading by the 1905 Act or opened but since restored to Tribal trust status pursuant to DOI orders implementing the 1939 Restoration Act. The EPA's TAS decision will remain in effect for all of these undisputed Reservation lands that were included in the geographic scope of the decision. With regard to these areas, the Tribes may perform all of the non-regulatory functions covered by the EPA's TAS decision, including, for example, applying for grants under CAA section 105 at a reduced matching share, and participating in air quality planning and management issues.

Due to the unique circumstances of this case, the EPA is granting this stay to allow for orderly implementation of the EPA's TAS decision pending resolution of the Reservation boundary issue through agency reconsideration or through the State's anticipated appeal to the Tenth Circuit. The EPA remains committed to continuing communications among the Tribes, the State and across the federal government, and is hopeful that granting this stay with regard to the area disputed by the State will be conducive to further inter-governmental discussions regarding any jurisdictional concerns.

The EPA believes that staying the effect of its TAS decision with regard to the area disputed by the State should further all of the governments' mutual interest in orderly implementation of the EPA's TAS decision pending resolution through administrative or judicial review of the area disputed by the State, including the City of Riverton, while allowing the Tribes to administer the EPA's TAS approval with regard to the undisputed areas of the Reservation.

Stay

The EPA is today staying the effect of its TAS decision with regard to all lands opened for homesteading by the 1905 Act that were included in the geographic scope of the TAS decision and that have not since been restored to Tribal trust status pursuant to DOI Secretarial Orders implementing the 1939 Restoration Act, pending agency reconsideration or issuance of the mandate by the Tenth Circuit in the State's anticipated challenge to the EPA's TAS decision, whichever is later. Thus, the scope of the stay includes, *inter alia*, the City of Riverton. The TAS decision remains in effect for all other lands included in the geographic scope of the TAS decision.

As part of this stay, the EPA's underlying legal and factual analysis concerning the effect of the 1905 Act on the Wind River Indian Reservation boundaries ("Legal Analysis of the Wind River Indian Reservation Boundary," Attachment 1 to the EPA's Wind River TAS Approval Decision Document) is stayed pending agency reconsideration or issuance of the Tenth Circuit's mandate, whichever is later. In granting this stay, the EPA is not agreeing with or adopting the State's legal or factual arguments concerning the effect of the 1905 Act on the Wind River Indian Reservation boundaries or the potential effects of the EPA's TAS approval decision.

Sincerely,

Shaun L. McGrath
Regional Administrator

cc: Peter K. Michael, Wyoming Attorney General
Kimberly D. Varilek, Eastern Shoshone Attorney General
Baldwin, Crocker & Rudd, P.C., Counsel for Northern Arapaho Tribe