UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-9512

STATE OF WYOMING,

Petitioner,

v.

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

Respondents,

and

THE NORTHERN ARAPAHO TRIBE, *et al.*,

Intervenors.

No. 14-9514

WYOMING FARM BUREAU FEDERATION,

Petitioner,

v.

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

Respondents,

and

THE NORTHERN ARAPAHO TRIBE, *et al.*,

Intervenors.

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

PETITIONER STATE OF WYOMING'S REPLY BRIEF
Preliminary Brief (Deferred Appendix Appeal)

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INTRODUCTION

The arguments of the Environmental Protection Agency (EPA), the Eastern Shoshone Tribe, and the Northern Arapaho Tribe in response to Wyoming's Opening Brief are founded on the incorrect assertion that the Act of March 3, 1905, is ambiguous. Relying on that assertion of ambiguity, the EPA and the Tribes focus their arguments on the circumstances surrounding the passage of the 1905 Act and the subsequent treatment of the area. Yet those considerations only become important when the Court is forced to infer what Congress intended by looking at facts outside the four corners of the act under review. Congress's intent in the 1905 Act is unambiguous, so there is no need for the Court to undertake such a review here.

None of the circular logic offered by the EPA and the Tribes undermines the clear cession language Congress used in the operative part of the 1905 Act. The unequivocal cession language in this case aligns perfectly with all of the cession acts that the United States Supreme Court has concluded diminished other reservations. Accordingly, the Court should reverse and vacate the EPA's decision that attempts to remake the boundaries of a reservation that Congress clearly diminished in 1905.

ARGUMENT

I. The operative language in the 1905 Act explicitly ceded the reservation to the United States, surrendering all of the Tribes' interests except over a diminished reserve.

Remarkably, the EPA and the Eastern Shoshone Tribe claim that "the 1905 Act lacks 'explicit language of cession, evidencing the present and total surrender of all tribal interests[.]'" (EPA Br. at 32); (Eastern Shoshone Br. at 4). These arguments ignore the plain cession language in the 1905 Act. [EPA-WR-005366-72]. Ignoring the plain language of the 1905 Act also fundamentally undermines the rest of the Respondents' arguments that attempt to equate the 1905 Act with the surplus land sale acts at issue in *Solem*, *Seymour*, and *Mattz*. (EPA Br. at 26-30, 33-35, 37-40, 43, 57, 63-64, 67, 75, 77); (Eastern Shoshone Br. at 3-4, 7-9, 14, 28); (Northern Arapaho Br. at 15). The 1905 Act could not be more different from the acts in *Solem*, *Seymour*, and *Mattz*. Instead, the 1905 Act is nearly identical to the cession acts found to diminish reservations in *DeCoteau*, *Rosebud*, and *Yankton*. The difference in the operative language between these two species of surplus land acts is dispositive of the question presented in this case.

"The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). While the Supreme Court has never required any particular form of words to find diminishment, it focuses on an act's operative language to find what Congress

intended to accomplish. *Id.* at 411, 413 (explaining that the act's operative language is "the relevant point of reference for the diminishment inquiry"); *Solem v. Bartlett*, 465 U.S. 463, 472 (1984); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990); *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010); (EPA Br. at 33, n.23).

Sorting the acts according to their operative language highlights how the Supreme Court has treated the different kinds of surplus land acts that impacted reservations in the late nineteenth and early twentieth centuries. The acts can be divided into three distinct categories: (a) those that "sell and dispose" of reservation land, merely opening up the land for settlement by non-Indians without diminishing the reservation; (b) those where Congress unilaterally diminished the reservation by restoring the unallotted lands to the public domain; and (c) those that diminished the reservation because the Tribe ceded the land and Congress committed to pay the Tribe for the land outright or from the proceeds of future land sales.

The Supreme Court's diminishment cases have clearly distinguished those surplus land acts that diminish a reservation because the tribe ceded its land to the United States from those where Congress merely authorized the Secretary of the Interior to "sell and dispose" of land within a reservation and those that merely declare a reservation "subject to settlement, entry, and purchase," *Solem*, 465 U.S. at 473; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356

(1962); *Mattz v. Arnett*, 412 U.S. 481, 497-99 (1973). The latter two kinds of land sale acts "do no more than open the way for non-Indian settlers to own land on the reservation[.]" *Seymour*, 368 U.S. at 356. The Supreme Court also has distinguished those surplus land acts that diminished a reservation because the Tribe ceded its land to the United States from those where Congress vacated the reservation and restored the unallotted land to the public domain. *Id.* at 354; *cf. Yazzie*, 909 F.3d at 1398 (distinguishing cases interpreting "open for settlement" language from those interpreting "restore to public domain" language).

A. Acts that opened for settlement but did not diminish a reservation.

The EPA and the Eastern Shoshone Tribe's arguments rely heavily on the Supreme Court's analysis of the "sell and dispose" and "subject to settlement, entry, and purchase" acts in *Solem*, *Seymour*, and *Mattz* to argue that the 1905 Act also fits within this category. (EPA Br. at 26-30, 33-35, 37-40, 43, 57, 63-64, 67, 75, 77); (Eastern Shoshone Br. at 3-4, 7-9, 14, 28). However, the operative language of the acts at issue in the *Solem*, *Seymour*, and *Mattz* is significantly different from the 1905 Act, which is the key point of this Court's analysis.

In *Solem*, the operative language in the act of 1908 provided:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to **sell and dispose** of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries[.]

Act of May 29, 1908, ch. 218, 35 Stat. 460 (emphasis added). Similarly, in *Seymour*, the operative language in the act of 1906 provided:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to **sell or dispose** of unalloted lands in the [previously] diminished Colville Indian Reservation, in the State of Washington.

Act of March 22, 1906, ch. 1126, 34 Stat. 80 (emphasis added). Finally, in *Mattz*, the operative language in the act of 1892 provided:

> That all of the lands embraced in what was the Klamath River Reservation ... are hereby declared to be **subject to settlement, entry, and purchase** under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands[.]

Act of June 17, 1892, ch. 120, 27 Stat. 52 (emphasis added).

In each of these cases, the Supreme Court held that the acts lacked the kind of language that would show Congressional intent to change the boundaries of those reservations. *Solem*, 465 U.S. at 473; *Seymour*, 368 U.S. at 356; *Mattz*, 412 U.S. at 497-99. Thus, "when an act as a whole and its operative language clearly focus on land disposal rather than reservation diminishment, the statute cannot be said to diminish the reservation boundaries." *Yazzie*, 909 F.3d at 1398.

As is evident, none of the surplus land sale acts in *Solem*, *Seymour*, or *Mattz* contain the cession language found in the 1905 Act. As a result, they are easily distinguishable from the 1905 Act and the arguments based on the Supreme Court's

analysis of those land sale acts are just as easily dismissed.[1]

B. Acts that diminish a reservation by restoring unallotted lands to the public domain.

The EPA and the Eastern Shoshone Tribe claim that the 1905 Act did not diminish the reservation because the 1905 Act did not restore the ceded land to the public domain. (EPA Br. at 24, 31-34, 37-38, 42-43, 48, 50, 58, 75-76); (Eastern Shoshone Br. at 7, 12-14). Their arguments miss the distinction between cession acts and acts that restore surplus land to the public domain. While both kinds of acts diminish their respective reservations, Congress uses different language to accomplish that same objective.

Language in the operative section of a surplus land act vacating and restoring unallotted lands to the public domain "indicates that the [a]ct diminished the reservation." *Hagen*, 510 U.S. at 414; *see also*, *Yazzie*, 909 F.2d at 1403, n.20 (explaining that "restored to public domain" acts are considered the most clear

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[1] In *Rosebud*, the Supreme Court focused on a cession act from 1904, but it also looked at two "sell and dispose" acts from 1907 and 1910. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 606 (1977). The Supreme Court found a continuity of purpose between the 1904 cession act that clearly diminished the reservation and the subsequent "sell and dispose" acts from 1907 and 1910. *Id.* at 608-09, 612-15. While the "sell and dispose" operative language was not independently sufficient to diminish the reservation, the additional facts and circumstances demonstrating continuity of purpose showed that Congress intended diminishment. *Id.* This exception to the general rule governing "sell and dispose" acts does not alter the three general categories of surplus land acts, or how the Supreme Court has interpreted the distinct forms of legislation.

expression of Congressional intent to diminish a reservation).

For example, in *Seymour*, the operative language in the act of 1892 provided:

> That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington hereby provided for, all the following described tract or portion of said Colville Reservation ... be, and is hereby, **vacated and restored to the public domain**[.]

Act of July 1, 1892, ch. 140, 27 Stat. 62-63 (emphasis added); *Seymour*, 368 U.S. at 354 (finding act of 1892 diminished reservation). Similarly, in *Hagen*, the operative language in the act of 1902 provided:

> That the Secretary of the Interior [with tribal consent] shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation **shall be restored to the public domain**[.]

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263 (emphasis added); *Hagen*, 510 U.S. at 414 (finding act of 1902 diminished reservation).

Finally, the Court in *Rosebud* provided historical context for the primary cession act at issue in the case by explaining how an act from 1889 diminished half of the Great Sioux Reservation. *Rosebud*, 430 U.S. at 589. The operative language in the surplus land act of 1889 provided:

> That all the lands in the Great Sioux Reservation outside of the separate reservation herein described are **hereby restored to the public domain**[.]

Act of March 2, 1889, ch. 405, 25 Stat. 888, 896 (Section 21); *Rosebud*, 430 U.S. at 589 (describing act from 1889 as diminishing reservation).

Like the "sell and dispose" acts, the operative language contained in the "restore to the public domain" acts do not contain the operative cession language found in the 1905 Act, which easily distinguishes the Supreme Court's analysis of those kinds of acts from the present case.

C. Acts that diminish a reservation because the Tribe cedes the land to the United States.

The third category of surplus land acts analyzed in the Supreme Court's diminishment cases are those that contain cession language, such as the 1905 Act. Unlike acts that merely sell land within an intact reservation, "[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. For each of the eleven surplus land acts containing cession language in the operative section that the Supreme Court has considered in recent history, it has concluded that Congress intended to diminish the relevant reservation. *See Rosebud*, 430 U.S. at 592, 604; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1958); *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985); *DeCoteau v. Dist. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 439, n.22 and 448 (1975). The operative language in each is functionally equivalent to the others.

For example, in *Rosebud,* the operative language in the surplus land act of 1904 provided:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do **hereby cede**, surrender, grant, and convey to the United States **all their claim, right, title, and interest** in and to all that part of the Rosebud Indian Reservation now remaining unallotted ... described more particularly as follows[.]

Act of April 23, 1904, ch. 1484, 33 Stat. 254 (emphasis added); *Rosebud*, 430 U.S. at 597 (finding act of 1904 diminished reservation). In *Rosebud*, the Supreme Court also concluded that an unratified agreement from 1901 containing the exact same operative cession language would have changed the reservation boundaries if ratified. *Id*. at 591, n.8 and 591-92.

Similarly, in *Yankton*, the operative language in the act of 1892 provided:

> The Yankton tribe of Dakota or Sioux Indians **hereby cede**, sell, relinquish, and convey to the United States **all their claim, right, title, and interest** in and to all the unallotted lands within the limits of the reservation to said Indians as aforesaid.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 314 (emphasis added); *Yankton*, 522 U.S. at 344 (finding act of 1892 diminished reservation). In *Klamath*, the operative language in the act of 1901 provided:

> The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do **hereby cede**, surrender, grand, and convey to the United States **all their claim, right, title, and interest** in and to all that part of the Klamath Indian Reservation [described herein.]

Act of June 21, 1906, ch. 3504, 34 Stat. 235, 367 (emphasis added); *Klamath*, 473

U.S. at 760 (finding act of 1901 diminished reservation).

Again, in *DeCoteau*, the operative language in the act of 1891 provided:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians **hereby cede**, sell, relinquish, and convey to the United States **all their claim, right, title, and interest** in and to all the unallotted lands within the limits of the reservation[.]

Act of March 3, 1891, ch. 543, 26 Stat. 989, 1036 (emphasis added); *DeCoteau*, 420 U.S. at 439, n.22 (finding act of 1891 diminished reservation); *see also*, *Osage Nation*, 597 F.3d at 1123 (quoting operative cession language in *DeCoteau* as example of "express termination language"). The Supreme Court in *DeCoteau* also considered similar operative language from a host of different acts and found that each resulted "in a reduction in the size of the affected reservations." *Id.* at 439. Those acts provided:

> '-**cede**, relinquish, and forever and absolutely surrender to the United States **all their claim, title and interest** of every kind and character in and to the following described tract of country[.]' 26 Stat. 1016 (Citizen Band of Pottawatomie Indians).
>
> '-**cede**, relinquish and surrender, forever and absolutely, to the United States**, all their claim, title and interest** of every kind and character in and to the following described tract of country[.]' 26 Stat. 1019 (Absentee Shawnee Indians).
>
> '-**cede**, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, **all their claim, title, and interest** of every kind and character, in and to the lands embraced in the following described tract of country[.]' 26 Stat. 1022 (Cheyenne and Arapahoe Tribes).
>
> '-**cede**, grant, relinquish, and quitclaim to the United States **all right,**

> **title, and claim** which they now have, or every had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho[.]' 26 Stat. 1027 (Coeur d'Alene Indians (I)).
>
> '-**cede**, grant, relinquish, and quitclaim to the United States, **all the right, title, and claim** which they now have, or ever had, to the following-described portion of their reservation[.]' 26 Stat. 1030 (Coeur d'Alene Indians (II)).
>
> '-**cede**, sell, and relinquish to the United States **all their right, title, and interest** in and to all that portion of the Fort Berthold Reservation (as herein described)[.]' 26 Stat. 1032 (Gros Ventres, Mandan, and Arickarees).

Id. at 439, n.22 (emphasis added).

Similar language is found in the Lander Act and the Thermopolis Act, which the EPA and the Tribes admit diminished the Wind River Indian Reservation prior to the 1905 Act. (EPA Br. at 40); (Eastern Shoshone Br. at 2, 9); (Northern Arapaho Br. at 5, 7). The Lander Act's operative language provides:

> The Shoshone band or tribe of Indians (eastern band) **hereby cede** to the United States of America that portion of their reservation in Wyoming Territory [as described].

[EPA-WR-003441] (emphasis added). The Thermopolis Act's operative language provides:

> For the consideration hereinafter named the said Shoshone and Arapahoe tribes of Indians **hereby cede**, convey, transfer, relinquish and surrender forever and absolutely **all their right, title and interest** of every kind and character in and to the lands and the water rights appertaining here to embraced in the following-described tract of country[.]

[EPA-WR-003532] (emphasis added).

The operative language in the 1905 Act falls squarely in line with each of the foregoing cession acts diminishing their respective reservations:

> The said Indians belonging to the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do **hereby cede**, grant, and relinquish to the United States, **all right, title, and interest** which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines[.]

[EPA-WR-005366] (emphasis added).

The Supreme Court has made clear that the various versions of the operative language in the foregoing cession acts are virtually identical. *DeCoteau*, 420 U.S. at 439, n.22, 446; *see also*, *Yazzie*, 909 F.3d at 1399 (describing surplus land Acts with the word "cede" to be "clear language of cession"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1224 (10th Cir. 2005) (finding agreement to "cede and convey" all land was an explicit reference to cession language and a "total surrender" of reservation lands). Thus, the 1905 Act, like these other cession acts, is precisely suited to diminishment. *DeCoteau*, 420 U.S. at 445; *Osage Nation*, 597 F.3d at 1123.

Yet the EPA and the Eastern Shoshone Tribe argue that slightly different language would have been required for the 1905 Act to contain "explicit language of cession, evidencing the present and total surrender of all tribal interests." (EPA Br. at 32); (Eastern Shoshone Br. at 4). That call for magic words has been soundly rejected. *Hagen*, 510 U.S. at 411; *United States v. Dion*, 476 U.S. 734, 739 (1986)

(explaining in the context of a diminishment statute that explicit statements of congressional intent to alter a treaty right is preferable, but not a per se requirement); *Shawnee Tribe*, 423 F.3d at 1222.

This Court should disregard the EPA and the Eastern Shoshone's arguments that attempt to manufacture ambiguity out of clarity. (EPA Br. at 32); (Eastern Shoshone Br. at 4). These arguments are an attempt to import the higher burden the Supreme Court requires when it seeks unequivocal congressional intent to diminish from the surrounding circumstances and subsequent history. (EPA Br. at 24, 29, 31-32, 43-77); (Eastern Shoshone Br. at 3, 8, 15). That higher burden necessarily applies only when Congress has been silent about diminishment in the text of the relevant act. *Yazzie*, 909 F.2d at 1408-09. Contrary to what the EPA and the Eastern Shoshone argue, Congress used what the Supreme Court has long considered to be "express termination language" when it enacted the 1905 Act. *Osage Nation*, 597 F.3d at 1123 (citing operative cession language from act of 1904 in *Rosebud* and act of 1891 in *DeCoteau*). The operative language in the 1905 Act shows Congress intended to diminish the Wind River Indian Reservation. The Court's inquiry should end there.

II. The 1905 Act's secondary provisions confirm diminishment.

While the operative language of a surplus land act "carries more weight than incidental language embedded in secondary provisions of the statute," *Osage Nation*, 597 F.3d at 1122, the secondary provisions found on the face of the act are still more

probative of diminishment than the circumstances surrounding the act's passage or the subsequent history of the area. *Hagen*, 510 U.S. at 411 (explaining that statutory language is the most probative evidence of diminishment); *Yazzie*, 909 F.2d at 1396 (explaining that subsequent events and demographic history cannot stand on their own to support diminishment, just as "they cannot undermine substantial and compelling evidence from an [a]ct and events surrounding its passage"). The secondary provisions of the 1905 Act demonstrate diminishment and confirm the operative cession language.

A. The 1905 Act specifically drew a new reservation boundary for the diminished reserve.

The EPA attempts to add to the diminishment analysis framework when it argues that the 1905 Act must contain language expressly changing the reservation's boundaries before diminishment can occur. (EPA Br. at 27, 38-43 (arguing that 1905 Act did not change the boundaries because Congress did not use words like "hereby discontinued")). The Supreme Court has never required express language discontinuing a reservation before finding diminishment. *Hagen*, 510 U.S. at 411; *Dion*, 476 U.S. at 739. Instead, "a reservation is created—or for that matter retained—when 'from what has been done there results a certain defined tract appropriated for certain purposes.'" *Shawnee Tribe*, 423 F.3d at 1225 (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902) (finding reservation created where Indians ceded large portion of land but left a distinct residual tract reserved

for the Indians' occupation)).

The 1905 Act expressly described the Wind River Indian Reservation's new boundaries in exquisite detail when it said the Tribes ceded "all the lands embraced within the said reservation, except the lands within and bounded by the following described lines:"

> Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River ...; thence up the midchannel of said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation ...; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning[.]

[EPA-WR-005366]; *see also*, (Wyo. Opening Br. at 24 (map of diminished reservation with rivers labeled)). This description changed the Wind River Indian Reservation's boundaries and sets aside a substantial residual piece of the original reservation for the Tribes' occupation. *Hitchcock*, 185 U.S. at 389-90.

Because the 1905 Act redefined where the Wind River Indian Reservation was located by specifically describing the new boundary lines, it was not referring to the diminished reservation in a way that merely implies a loss of common land. *Cf. Solem*, 465 U.S. at 475, n.17 (explaining that when Congress merely spoke of "reservation thus diminished," in a "sell and dispose" act it could have meant a

reduction in common lands and not a reduction in the reservation boundaries). Congress maintained that distinction when it referred to the "diminished reservation" or "diminished reserve" in that newly defined context throughout the remainder of the 1905 Act. [EPA-WR-005366-72].

That the phrase "diminished reservation" was not a term of art in Indian law at the time does not matter. (EPA Br. at 39-40); (Eastern Shoshone Br. at 8-9). In 1905, the word diminish, just as today, meant to make smaller. (Wyo. Opening Br. at 55). More importantly though, the context in which Congress used it in the 1905 Act conveyed the meaning that has been adopted as a term of art in Indian law and confirms Congress's intent to diminish the Wind River Indian Reservation.

B. The provisions in the Act enticing members to relocate from the ceded lands to the new diminished reserve support diminishment.

With the 1905 Act Congress intended to migrate the tribal members from the ceded area to the newly diminished reservation south and west of the Big Wind and the Popo-Agie Rivers. To facilitate that movement, Congress initially funded irrigation projects "on the diminished reserve" and also initially funded the construction of schools "on the diminished reservation[.]" [EPA-WR-005368] (Art. VI), and [EPA-WR-0053672] (Art. IX § 3). For the same reason that encouraging Indians to further establish themselves in the opened area supported non-diminishment in *Solem*, Congress's decision to make improvements in the diminished reservation and draw the Indians to that consolidated location supports a

diminishment finding here. *Solem*, 465 U.S. at 474 (finding "sell and dispose" act that set aside land within opened area for agency, school and religious purposes indicated that Congress did not intend to diminish reservation).

The 1905 Act also allowed Indians with an allotment in the ceded area to trade their allotment for a new allotment "within the diminished reserve" slated to receive the infrastructure improvements funded by Congress. [EPA-WR-005366] (Art. I); *Solem*, 465 U.S. at 474 (finding that "permitting Indians already holding allotment on the opened lands to obtain new allotments ... 'within the respective reservations thus diminished'" indirectly supports a diminishment finding). Those Indians who had started the process of selecting an allotment in the area about to be opened but who had not yet confirmed their selection could obtain the necessary confirmation before the ceded part of the reservation was opened. [EPA-WR-005366] (Art. I). These Indians would then be allowed to turn in this newly perfected allotment for a different allotment "within the diminished reserve" and not be prejudiced because they were only part way through the allotment process. *Id.*

Congress's decision to immediately fund new improvements in the diminished reservation, and to set up a system for allottees to obtain new allotments in the diminished reservation, confirm Congress's intent to diminish the Wind River Indian Reservation.

C. The 1905 Act's payment mechanism supports diminishment.

The EPA and the Eastern Shoshone Tribe rely heavily on the 1905 Act's payment mechanism to argue that Congress did not intend to diminish the Wind River Indian Reservation. (EPA Br. at 36-37); (Eastern Shoshone Br. at 6). Specifically, EPA insists that no diminishment can be found without a contemporaneous sum certain or unconditional commitment from Congress to pay for the land. (*Id.*). The Supreme Court certainly has found an "almost insurmountable presumption" of diminishment when operative cession language is combined with an "unconditional commitment from Congress to compensate the Indian [T]ribe for its opened land" in the act's secondary provision. *Solem*, 465 U.S. at 470-71; (EPA Br. at 36-37); (Eastern Shoshone Br. at 6). The Supreme Court, however, has also explicitly rejected the logic that EPA and the Eastern Shoshone advance here. "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." *Hagen*, 510 U.S. at 412. The absence of a sum certain or unconditional commitment does not create an equally insurmountable presumption of non-diminishment in the opposite direction or, for that matter, any presumption at all.

The payment mechanism and commitments from Congress in the 1905 Act are nearly identical to the 1904 cession act in *Rosebud*. *Compare* [EPA-WR-005369-

72] (Arts. II and IX) *with* 33 Stat. 256-258 (Arts. II and § 2). In both acts, the Tribes were not guaranteed any consideration for the ceded land but were to be paid after the lands were sold. *Id.* And Congress did not guarantee it would find any purchasers. *Id.* Nevertheless, those provisions did not preclude the Supreme Court from finding diminishment in *Rosebud*. 430 U.S. at 597-99. This result is due in part to the fact that the payment mechanism in an act's secondary provision is "one of many factors to be considered" and is not "dispositive one way or the other." *Id.* at 598, n.20 (citation and quotation omitted).

The Eastern Shoshone Tribe today claims that the concept of diminishing a reservation by ceding land to the United States in exchange for compensation from later sales, with no obligation on the part of the United States to purchase the land or find buyers, "contravenes common sense" and "cannot be squared with the policy that diminishment is disfavored." (Eastern Shoshone Br. at 7-8). Yet, the Supreme Court in *Rosebud* was faced with the same bargain and found diminishment. It noted that "[d]espite this 'uncertain sum' proviso, [a separate part of the act] suggests that Congress viewed this land as disestablished immediately[.]" *Rosebud*, 430 U.S. at 596, n.18 (quoting 33 Stat. 258 (Sec. 2)).

That separate part of the cession act cited in *Rosebud*, like the language in the 1905 Act, removes the minimum price per acre by a date certain at which time the Secretary is directed to liquidate the remaining unsold ceded lands. *Compare* 33 Stat.

258 (Sec. 2) ("*And provided further,* That all lands herein ceded and opened to settlement under this Act, remaining undisposed of at the expiration of four years from the taking effect of this Act, shall be sold and disposed of for cash[.]"); *with* [EPA-WR-005371] (Art. IX § 2) ("*Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash[.]"). Thus, following *Rosebud*, the 1905 Act's secondary provision indicates that Congress intended to change the reservation boundaries immediately. *Rosebud*, 430 U.S. at 596, n.18. Congress did not contemplate keeping the reservation intact or ever restoring the land back to the Wind River Indian Reservation; the lands were to be sold eventually no matter the price.

Even if the Court is troubled by the payment terms Congress passed at the beginning of the twentieth century, it cannot today "ignore plain language that, viewed in historical context and given a fair appraisal[,] clearly runs counter to the tribe's later claims." *Yazzie*, 909 F.2d at 1393 (quoting *Klamath*, 473 U.S. at 774). The plain language in the 1905 Act shows that the Tribes ceded certain land and the Act allowed for the sale of everything ceded. With that proviso in the 1905 Act, Congress intended to sever the lands from the reservation. At a later date, Congress changed its mind about selling the ceded land. (Wyo. Opening Br. at 27-28); (Wyo. Pet. for Reconsid., 10-13 (Jan. 6, 2014)). But that hindsight cannot override the Act's plain language demonstrating Congress's intent in 1905 to immediately diminish the

Wind River Indian Reservation boundaries.

D. The absence of secondary provisions restoring the land to the public domain or providing for school section lands cannot override the clear operative cession language.

Obscuring the distinction between cession acts and acts designed to restore reservation land to the public domain, the EPA attempts to argue that the 1905 Act could not diminish the reservation, because it did not purport to restore the land to the public domain. (EPA Br. at 37-38). The EPA first admits the issue is not dispositive and recognizes the conclusion that acts with operative language restoring the land to the public domain diminish reservations. (*Id.*). But the EPA then argues that, in order to diminish the reservation, the secondary provisions in the 1905 Act must contain at least an inference of restoring the land to the public domain. (*Id.*).

The Supreme Court does not require a particular land status in order to find diminishment. Instead, the Supreme Court has said that references to the existence of public domain lands in secondary provisions "'support[ed]' the view that a reservation had been diminished, but that it was 'hardly dispositive.'" *Hagen*, 510 U.S. at 413 (quoting *Solem*, 465 U.S. at 475). The EPA's creative argument that the inverse also is true is incorrect. The 1905 Act does not have to fit within the category of surplus land acts restoring land to the public domain because the Act directly diminishes the Wind River Indian Reservation through cession language.

In the same vein, the EPA and the Tribes attempt to draw distinctions from

the 1905 Act's secondary provisions covering the trust relationship between the United States and the Tribes and the lack of a school section provision. (EPA Br. at 17, 24, 28, 31, 34-36, 38, 42, 48-50); (Eastern Shoshone Br. at 11-14); (Northern Arapaho Br. at 10-11, 17, 28). These arguments are based on the idea that the unsold ceded lands were not "public land" because they retained "Indian character" or would be considered "Indian lands" while held in trust by the United States. (*Id.*). They further argue that, because the Tribes retained an equitable interest in the land, the Act did not sever all of the Tribes' interest in the land. (*Id.*). The EPA and the Tribes claim that this is shown by the fact that Wyoming did not obtain school section lands in the ceded area when the reservation was opened up by the 1905 Act. (*Id.*). All of these arguments rely on two cases, *Minnesota v. Hitchcock* and *Ash Sheep Company v. United States*. (EPA Br. at 34); (Eastern Shoshone Br. at 12); (Northern Arapaho Br. at 17, 28). These cases undermine rather than support their arguments.

In *Minnesota v. Hitchcock*, the Supreme Court addressed whether the State of Minnesota was entitled to school section lands from the area ceded to the United States in an 1863 treaty. *Hitchcock*, 185 U.S. at 389. The facts in *Hitchcock* mirror the facts here. In the 1863 treaty, the Tribes carved out a diminished reservation from the larger reservation and ceded the rest of the unallotted lands to the United States, which held the ceded lands in trust. *Compare Id.* at 377, 389, *with* [EPA-WR-

005366] (Art. I). "The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians." *Compare Hitchcock*, 185 U.S. at 395, *with* [EPA-WR-005368] (Arts. VII, VIII), [EPA-WR-005370-71] (Art. II). The ceded lands then were surveyed, at which point Minnesota believed that its Act of Admission should have granted sections 16 and 36 to the state for school use. *Compare Hitchcock*, 185 U.S. at 390-91, *with* [EPA-WR-000418-19] (Wyoming Admission Act § 4). The treaty itself was silent about school section lands. *Compare Hitchcock*, 185 U.S. at 395, *with* [EPA-WR-005366-72]. Despite these facts, the Supreme Court considered the reservation diminished, leaving the Tribes with a "distinct tract reserved for their occupation." *Hitchcock*, 185 U.S. at 389.

The Supreme Court resolved the conflict between Minnesota's Act of Admission granting the state school section lands and the Tribes' right to occupy the ceded, unalloted lands until they were sold. *Id.* at 389, 399. It recognized that Congress could have entered into a treaty that extinguished the Tribes' right of occupancy, making the ceded land "public lands and within the scope of the school grant." *Id.* at 394. However, Congress also had the power to enter into a treaty with the Tribes that appropriated the ceded lands differently than contemplated by Minnesota's Act of Admission. *Id.* at 393-394. In that instance, Minnesota's Act of Admission allowed the state to acquire different land in lieu of receiving the school

section lands in the ceded area. *Id.* at 402.

The Supreme Court's finding about the state taking in lieu lands, however, did not impact the Court's diminishment conclusion. *Id. Hitchcock* does not support the Respondents because the Supreme Court recognized diminishment by an agreement nearly identical to the 1905 Act. Moreover, the Supreme Court found diminishment in spite of the equitable interest retained by the Tribes while the United States held the unsold land in trust. Further, the case illustrates why the lack of school section lands in the ceded area does not inform whether Congress intended to diminish the reservation. The presence or absence of school section lands in a ceded area only informs whether Congress wanted to provide a state with school section lands in the ceded area or allow a state to pick in lieu lands instead. Congress chose the latter for Wyoming. *See* [EPA-WR-0010057] (Senate floor debate explaining that removing the school section provision from the 1904 Agreement allowed Wyoming to take in lieu lands); [EPA-WR-000419] (Wyoming Admission Act § 4 allowing State to take alternative land in lieu of any section 16 or 36 "sold or otherwise disposed of by or under the authority of any act of congress").

The second case cited by the EPA and the Northern Arapaho Tribe is *Ash Sheep Company v. United States*, 252 U.S. 159 (1920). (EPA Br. at 34); (Northern Arapaho Br. at 17, 28). Again, the cession act in *Ash Sheep Company* is similar to the 1905 Act. *Compare* 252 U.S. at 164-65, *with* [EPA-WR-005366-72]. Because

the United States held the ceded lands in trust, the Supreme Court concluded that the Tribe retained "any benefits which might be derived from the use of the lands" until sold. *Ash Sheep Co.*, 252 U.S. at 166. Therefore, the Supreme Court concluded that unsold ceded lands are considered "Indian lands" and not "public lands" for purposes of a statute precluding grazing on Indian lands without tribal consent. *Id.* But the Supreme Court did not address in *Ash Sheep Company* whether the trust status informed the inquiry about whether Congress intended to diminish the reservation.

"As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem*, 465 U.S. at 467. The *Hitchcock* and *Ash Sheep Company* cases are not helpful in determining whether Congress intended the 1905 Act to change the reservation boundaries. The existence of unsold ceded land held in trust is entirely consistent with diminishment. *See Rosebud*, 430 U.S. at 601, n.24 (analyzing *Hitchcock*, 185 U.S. at 395, 401-402 and citing *United States v. Pelican*, 232 U.S. 442, 449 (1914)). "[T]he fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." *Id.* (citation and quotation omitted). "The question of whether lands become 'public lands' under *Hitchcock* and *Ash Sheep*, is therefore, logically separate from a question of disestablishment." *Id.*

Thus, even if the Court looks beyond the plain language of the 1905 Act, which it need not do, the legislative history and subsequent treatment of the area confirm Congress's intent to diminish the Wind River Indian Reservation. *See* (Wyo. Opening Br. 12-33, 60-73); (Farm Bureau Opening Br. 29-38); (Intervenors Riverton and Fremont County Opening Br. 2-22). Accordingly, the EPA's contrary jurisdictional determination should be set aside.

III. Although *res judicata* does not apply here, the *Big Horn Adjudication* supports diminishment.

The EPA and the Northern Arapaho Tribe claim that the *Big Horn Adjudication* completely rejected Wyoming's argument that the 1905 Act diminished the reservation. (EPA Br. at 35-36); (Northern Arapaho Br. at 15-19, 21-25); *State v. Owl Creek Irrig. Dist. Members (In re General Adjudication of All Rights to Use Water in the Big Horn River System)*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*). The Northern Arapaho Tribe alone takes this argument one step farther by arguing that the doctrine of *res judicata* in the state water rights case precludes Wyoming's challenge in this federal question case. (Northern Arapaho Br. at 21-25). But the *Big Horn Adjudication* merely allocated water rights the parties already knew existed by resolving a dispute over the priority dates for those water rights. *Big Horn I*, 753 P.2d at 85.

The doctrine of *res judicata* extinguishes a plaintiff's right to "all claims or legal theories of recovery that arise from the same transaction, event or occurrence."

Wilkes v. Wyo. Dep't of Emp't, Div. Labor Standards, 314 F.3d 501, 504 (10th Cir. 2002). Accordingly, the doctrine of *res judicata* might prevent Wyoming from attempting to re-adjudicate in this case the water rights already adjudicated to finality in *Big Horn I*. *Nevada v. United States*, 463 U.S. 110, 113 (1983) (finding doctrine of *res judicata* prevented United States from attempting to re-adjudicate water rights already adjudicated to finality). However, Wyoming is not attempting to re-adjudicate any water rights in this case and a finding of diminishment would not impact any water rights at issue in the *Big Horn Adjudication*. The Northern Arapaho Tribe's claim of victory from the *Big Horn Adjudication* obscures why.

The EPA and the Northern Arapaho Tribe claim the Special Master found that the 1905 Act did not diminish the reservation. (EPA Br. at 35); (Northern Arapaho Br. at 15). The Special Master never made that finding. [EPA-WR-000774-83]. Instead, the Special Master only ruled on whether the 1905 Act "resulted in a severance of the 1868 priority date" for water rights attached to the ceded land. [*Id.* at 776]. He found that it did not. [*Id.* at 776, 783].

In reaching his ultimate conclusion on this issue, the Special Master found that: (1) Congressional intent to extinguish a Treaty right must be clear; (2) the Tribes were never told that the 1905 Act would destroy any Treaty based water rights, unless title to the ceded lands passed according to law; (3) the 1905 Act contemplated retaining water rights in the diminished reserve and on Indian

allotments in the ceded area; (4) the 1905 Act retained for the Tribes all Treaty rights not otherwise impacted; and (5) those rights remained with the Tribes while the United States held the ceded land in trust. [*Id.* at 774-83]; *but see*, *supra* at 21-26 (explaining that trust or retained equitable interest does not defeat diminishment). From these conclusions, the Special Master determined that the 1905 Act did not sever the Tribes' implied reserved water right that had arisen from the 1868 Treaty. [EPA-WR-000783]. The trial court likewise ruled that the Tribes retained their reserved water right essentially for the same reasons expressed by the Special Master. [EPA-WR-004913-17]. Thus, the trial court did not rule that the 1905 Act failed to diminish the reservation. [Id.].

The Northern Arapaho Tribe argues that "[t]he Wyoming Supreme Court rejected Wyoming's position, and upheld the trial court's ruling that the 1905 Act did *not* terminate or disestablish the [reservation]." (Northern Arapaho Br. at 17 (emphasis in original)). While the Special Master and the trial court did not expressly rule on whether the 1905 Act diminished the Reservation, the Wyoming Supreme Court presumed that it diminished the Reservation. *Big Horn I*, 753 P.2d at 83 (explaining that when the unsold ceded lands were restored to the reservation "[t]hese lands again became part of the existing Wind River Reservation."). Even so, the Wyoming Supreme Court rejected the State of Wyoming's argument that the diminishment also severed the Tribes' water right priority date from the 1868 Treaty.

Id. at 93-94. Therefore, the Court concluded that an 1868 priority date should apply to land in the diminished reservation; land held in fee by individual Indians in the diminished reservation; land acquired as an Indian allotment, even if sold to a non-Indian successor; and land that was ceded but later restored to the reservation and reacquired by a Tribe or Indian. *Id.* at 112-114. For the last category, the Court reasoned that "[b]ecause all the **reacquired lands** on the ceded portion of the reservation are reservation lands, the same as lands on the diminished portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date." *Id.* at 114 (emphasis added), *see also id.* at 84 (finding ceded, then restored lands part of the reservation).

The dissent in *Big Horn I* took issue with the majority's conclusion that land in the ceded area should receive an 1868 priority date. *Id.* at 119, 135. The dispute was not over whether diminishment occurred. Both the majority and the dissent agreed that the 1905 Act diminished the Wind River Indian Reservation. *Id.* at 84, 112-14, 119-35; *see also Yellowbear v. State*, 174 P.3d 1270, 1283 (Wyo. 2008) (interpreting Court's own prior decision and explaining that "while they disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn River* agreed that the reservation had been diminished." (citing *Big Horn I*, 753 P.2d at 84, 112, 114, 119-35)).

Instead, the dissent would have held "that the ceded lands have not been part

of an Indian reservation since 1905; and, since the reserved rights doctrine relating to an implied reservation of water rights depends upon the existence of reserved federal lands, there are no reserved water rights which attach to the ceded portion of the Wind River Indian Reservation." *Big Horn I*, 753 P.2d at 120. Contrary to the EPA and the Northern Arapaho Tribe's arguments, the Wyoming Supreme Court has not wavered in its conclusion that the 1905 Act diminished the reservation and that the State of Wyoming has unquestionably asserted jurisdiction over the ceded area. *Id.* at 120-23 (discussing cases in which the Wyoming Supreme Court addressed the impacts of the 1905 Act, that "uniformly demonstrate recognition of state jurisdiction over the lands of the ceded portion of the Wind River Indian Reservation.").

Regarding the doctrine of *res judicata*, Wyoming in this litigation is not attempting to re-adjudicate any water rights or priority dates, including the Tribes' implied reserved water rights from the 1868 Treaty. Wyoming might be precluded from raising those **water rights** claims already adjudicated in *Big Horn I*. *Nevada*, 463 U.S. at 113 (finding doctrine of *res judicata* prevented United States from attempting to re-adjudicate **water rights** already adjudicated to finality). Instead, Wyoming is challenging the EPA's jurisdictional determination under the Clean Air Act, 42 U.S.C. § 7601(d), which does not arise from the same transaction, event or occurrence at issue in the *Big Horn I* state water law case. (Pet. for Review at 2 (Feb.

2, 2014)).

Thus, *Big Horn I* does not have a *res judicata* effect on Wyoming. Instead, if the *Big Horn Adjudication* had any preclusive effect on the parties in this case, it would bar the United States and the Tribes from re-litigating the Wyoming Supreme Court's conclusion that the Wind River Indian Reservation was diminished. *See Big Horn I*, 753 P.2d at 84, 112, 114, 119-35; *Yellowbear*, 174 P.3d at 1283.

IV. Respondents myriad other arguments are equally unavailing.

A. Tribal consent was not necessary.

The Northern Arapaho Tribe claims that not enough adult male tribal members signed the 1904 agreement that was the basis for the 1905 Act. (Northern Arapaho Br. at 8, 26-27). Therefore, the 1905 Act lacks the Tribe's formal consent, distinguishing this case from *Rosebud*. (*Id.*). But since 1903 Congress has known that tribal consent was not necessary. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Congress evidently knew that when it unilaterally changed parts of the 1904 agreement to conform the 1905 Act to Congress's contemporaneous policy for surplus land acts [EPA-WR-005366, 5369-72], just like it did in the acts in *Rosebud*, 430 U.S. at 587, 594 (analyzing *Lone Wolf* in conjunction with act found to diminish reservation that lacked tribal ratification).

B. Liquor sales within the City of Riverton.

The EPA claims that the ceded area easily could be Indian country, even if the

United States failed to enforce the Indian country liquor law prohibition. (EPA Br. at 65-66). The EPA's argument is that the Indian country liquor law did not prohibit liquor on lands patented in fee within non-Indian communities such as the City of Riverton. (*Id.*).

The EPA's argument is unpersuasive because the same would be true even if the City of Riverton was not within the reservation. More importantly, it ignores the fact that the United States in the past has disavowed criminal jurisdiction over the ceded area. [EPA-WR-12545-63; *see also* EPA-WR-04316-19]. The EPA has not offered any evidence supporting its speculative explanation for the lack of enforcement by the United States within the ceded area. Certainly, if that choice had been made there should be some record of it, and yet none has been offered by the EPA. Thus, the United States' position in 1970 that it lacked criminal jurisdiction over the ceded area because the reservation was diminished is the more logical explanation for why the United States did not enforce the Indian country liquor law prohibition in the ceded area. [*Id.*]. The prohibition simply did not apply to the ceded area.

C. Current land ownership and population demographics cannot override the 1905 Act's clear intent.

The EPA and the Eastern Shoshone Tribe point out that few acres were sold under the 1905 Act, and seventy-five percent of the land in the ceded area is held in Tribal or individual trust ownership today. (EPA Br. at 20, 51-52); (Eastern

Shoshone Br. at 20). Further, they draw upon the population demographics of the ceded area, which, apart from the City of Riverton, remained largely populated by Indians after the reservation was opened and remains largely the same today. (*Id.*). They argue the lack of non-Indian settlers shows that no diminishment occurred. (*Id.*).

The statistics on the number of acres sold between 1906 and 1915 is misleading because most of the area was not suitable for homesteading. (Wyo. Opening Br. at 27-28); (Wyo. Pet. for Reconsid., 10-13 (Jan. 6, 2014)). Those pieces amenable to settlement were settled and largely remain outside the reservation today. (*Id.*). Conversely, the EPA and the Eastern Shoshone Tribe mostly rely on the ownership pattern and demographics from the area that Wyoming agrees is part of the reservation today, the diminished reserve plus the areas restored to the reservation. Regardless, the current ownership pattern and population makeup cannot override the 1905 Act's plain language. *Yazzie*, 909 F.2d at 1396. This Court has looked at similar ownership patterns and demographics but concluded that it was "not going to 'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary." *Id*. at 1420. The same result should hold in this case.

CONCLUSION

The 1905 Act was a cession law designed by Congress to diminish the Wind River Indian Reservation, just like the other cession acts Congress passed at the time. Admittedly, this clear contemporaneous inertia in Congress to diminish reservations and make way for settling the west cannot provide the sole support for concluding that the 1905 Act diminished the reservation. But the Court does not need to rely on that historical context in which the 1905 Act was passed. The language of the 1905 Act on its face shows a clear intent by Congress to change the boundaries of the reservation, severing the ceded lands from the reservation. This resulted in a diminished reserve set aside for the Tribes. Just because settlement of this rugged part of Wyoming did not occur as hoped for does not change the fact that Congress diminished the reservation with the 1905 Act. Thus, the record in this case can only lead the Court to conclude that the EPA erred in finding that the reservation was not diminished by the 1905 Act.

The State of Wyoming asks that this Court vacate and set aside the EPA's treatment as a state jurisdictional determination and remand the action back to the EPA for further proceedings consistent with the Court's opinion and involving all the affected parties in that process, including the State of Wyoming.

Submitted this 3rd day of June 2015.

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CERTIFICATES OF VIRUS SCANNING AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing *Petitioner State of Wyoming's Reply Brief* has been scanned for viruses with the Symantec™ Endpoint Protection, version 12.1.4112.4156, Virus Definition File dated June 2, 2015, rev. 39 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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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 8,618 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Michael J. McGrady
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2015, a copy of the foregoing *Petitioner State of Wyoming's Reply Brief*, 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.

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