UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

STATE OF WYOMING, and WYOMING FARM BUREAU FEDERATION,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

and

EASTERN SHOSHONE TRIBE, and NORTHERN ARAPAHO TRIBE,
Intervenors.

INDIAN LAW PROFESSORS' AMICUS BRIEF IN SUPPORT OF INTERVENOR EASTERN SHOSHONE TRIBE AND IN FAVOR OF AFFIRMANCE OF AGENCY ACTION

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors who research, write and teach in the field of Indian law. In particular, *amici* are experts in the area of federal, state, and tribal jurisdiction within Indian country. As Indian law is a complex area of jurisprudence, largely rooted in the common law, Indian law scholars have an interest in ensuring consistent and accurate application of legal precedent. This brief is being filed pursuant to Rule 29(a) of the Federal Rules of Civil Procedure.

ARGUMENT

As professors of federal Indian law, we agree with the Intervenor Eastern Shoshone Tribe that the 1905 Act did not diminish the Wind River Reservation. Rather than duplicate those arguments, we write specifically to respond to Petitioners' mistaken fears about what will happen if the EPA's decision is affirmed. Those fears focus on the City of Riverton, the one place in the vast disputed area where land is not overwhelmingly owned by or held in trust for the tribe or its members.

Riverton is not unique. There are 134 predominantly non-Indian cities and towns within Indian country. Many of these--from the artists' mecca of Taos, New

[1] No party's counsel authored this brief in whole or in part. No one other than the *amici* contributed money to fund the preparation or submission of this brief.

Mexico to the classic small town of Mount Pleasant, Michigan--actively benefit from their location within tribal territories, through economic development opportunities, intergovernmental cooperation, and receipt of millions of dollars in tribal and federal funds.

Basic principles of federal Indian law, moreover, ensure that jurisdiction in these municipalities is similar to municipalities outside reservation boundaries. Regardless of reservation status, the disputed lands are part of Wyoming. State laws apply to almost all transactions on fee land involving non-Indians, including liquor, zoning, building, and business regulation, election administration, and crimes between non-Indians. Meanwhile, Tribal law will apply to very few interactions involving non-Indians on fee land. If jurisdictional disputes arise, tribes, states, and municipalities can negotiate intergovernmental agreements allowing them to achieve their mutual goals and further the public interest. In short, straining fact and precedent to manufacture the necessary clear intent to diminish is not necessary to protect the expectations of residents of Riverton or other non-Indian communities on the Reservation.

I. AFFIRMING RESERVATION STATUS IN THE OPENED AREA DOES NOT SIGNIFICANTLY AFFECT JURISDICTIONAL PRACTICES

Riverton seeks to demonstrate the harms of Indian country status with affidavits from various local officials. CTY-WR-000001 to -2; CTY-WR-000036;

CTY-WR-000038 to -47; CTY-WR-000056. These affidavits not only improperly attempt to enlarge the factual record on appeal, they also reveal basic lack of knowledge of federal Indian law.

Reservation status does not significantly affect jurisdiction in the opened area. First, at least three-quarters of the area is considered Indian country irrespective of reservation boundaries, because it is trust land. *See United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (trust land is Indian country). This includes state rights-of-way running over trust land, and therefore includes most rights-of-way in the disputed area. 18 U.S.C. § 1151(c) (rights-of-way over allotments are Indian country); *United States v. Arrieta*, 436 F.3d 1246, 1250 (10th Cir. 2006) (county road on land owned by Pueblo tribe was Indian country).

Bizarrely, however, the Petitioners express fear that reservation status means that the disputed area is no longer part of Wyoming. Notaries, they claim, will lose their commissions because they will not reside in the state, CTY-WR-000040, corporations cannot register as being located in the state, CTY-WR-000039, even State election laws will not apply.[2] *Id*. These concerns are without foundation. It is well-established that "'an Indian reservation is considered part of the territory of

[2] The Deputy Secretary of State's asserted uncertainty on this point is particularly incongruous, as it maintains polling places throughout the unopened portion of the reservation. In fact, this Court recently relied in part on state election law in ordering single member voting districts, one encompassing parts of the unopened area, to remedy a Voting Rights Act violation. *Large v. Fremont County, Wyo.*, 670 F.3d 1133, 1148 (10th Cir. 2012).

the State.'" *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (quoting Felix S. Cohen, Handbook of Federal Indian Law 119 n.32 (1941)). Notaries, corporations, and election officials can continue to rely on these, and many other, everyday applications of state law.

Furthermore, although state jurisdiction over tribal members in Indian country is limited, states have jurisdiction over non-Indians unless such jurisdiction is preempted by federal law or would unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). Under either of these tests, interactions between non-Indians are almost always within state and local jurisdiction, as are many interactions between non-Indians and tribal members. *See, e.g.*, *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1170 (10th Cir. 2012) (applying state laws to tobacco retailers on Indian reservation). Tribal law, in contrast, rarely binds non-Indians on non-Indian fee land. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders . . . . This general rule . . . is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians. . . ." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008).

The extent of state, tribal, and federal jurisdiction vary in different arenas, as discussed below. But these tests all establish that nothing like the parade of

horribles Petitioners suggest will result from affirming the agency's decision. Few practices must change once Wyoming finally acknowledges the area's reservation status, and some substantive areas, particularly criminal law enforcement and environmental regulation, may even improve.

A. Liquor Sales

Petitioners dwell on the fact that Wyoming has long regulated liquor sales in Riverton, while the federal government has not enforced its liquor laws to bolster their case for diminishment. Wyoming Br. at 72; Riverton Br. at 3-5. As noted in the brief filed by the Eastern Shoshone Tribe, this argument reflects confusion about the law. The federal government has always "permitted, and even required, [states] to impose regulations related to liquor transactions" on reservations. *Rice v. Rehner*, 463 U.S. 713, 723 (1983); *see* Eastern Shoshone Tribe Br. at 23-24. Since 1953, moreover, federal law has specifically required liquor sales in Indian country to comply with state law. 18 U.S.C. § 1161; *see Rice*, 463 U.S. at 727-29; *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm'n*, 975 F.2d 1459 (10th Cir. 1992).

Federal liquor prohibitions, in contrast, do not generally apply in non-Indian communities within reservation boundaries. 18 U.S.C. §§ 1154(c), 1156. Additionally, the Supreme Court has concluded that Congress divested Indian tribes of any inherent power to regulate liquor sales, *Rice*, 463 U.S. at 724, and

both the Supreme Court and the Tenth Circuit have suggested in dicta that an establishment serving liquor would be "excepted from tribal regulation by virtue of being located in a non-Indian community." *United States v. Mazurie*, 419 U.S. 544, 553 (1975); *Pittsburg & Midway Coal Min. Co. v. Watchman*, 52 F.3d 1531, 1544 n.13 (10th Cir. 1995). Given this legal landscape, it is not surprising that the Eastern Shoshone Tribe has not regulated liquor sales within Riverton. Reservation status does not undermine state or local regulation.

B. Criminal Jurisdiction

Riverton claims that affirming the EPA's decision "would have a debilitating effect on law enforcement" and "will materially affect the enforcement and adjudication of [criminal] cases." Riverton Br. at 21. Actually, clarifying reservation status will simplify law enforcement within the disputed area, by avoiding the problems of determining jurisdiction according to land ownership.

As an initial matter, Indian country status is irrelevant to jurisdiction over crimes between non-Indians. States have jurisdiction over such crimes, and tribes and the federal government do not. *See New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946) (states have jurisdiction over crimes between non-Indians); *United States v. McBratney*, 104 U.S. 621 (1882) (federal government lacks jurisdiction over crimes between non-Indians on reservations); *Oliphant v. Suquamish Indian*

Tribe, 435 U.S. 191 (1978) (tribes lack criminal jurisdiction over crimes by non-Indians on reservations).

With respect to crimes by or against Indians, jurisdiction does depend on Indian country status. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 599 (1992) (upholding state jurisdiction after determining area was not Indian country); *Arrietta*, 436 F.3d at 1251 (upholding federal jurisdiction after determining land was Indian country). Most of the land in the disputed area is already Indian country for this purpose. While the area in and around Riverton is largely fee land with scattered tracts of trust land, the rest of the area is trust land with scattered tracts of fee land. EPA-WR-007817 (reservation map showing surface ownership); EPA-WR-007816 (reservation map showing subsurface ownership). Petitioners propose, however, that the pockets of fee land in the opened area should not be considered Indian country. This is the worst of all worlds for law enforcement.

The Supreme Court has condemned the impracticality of requiring "law enforcement officers . . . to search tract books in order to determine . . . criminal jurisdiction over each particular offense." *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962). Uncertainty over land status contributes to the culture of impunity for perpetrators of sexual violence against Native women. Amnesty International, Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA 27-28, 33-34 (2007).

Thus while affirming reservation status will not change jurisdiction for most crimes committed in the opened area, it will allow more effective policing by removing uncertainty over jurisdiction.

Riverton protests that reservation status will prevent police from arresting or ticketing Indian offenders on fee land. Riverton Br. at 21. This is simply not true. Hundreds of jurisdictions across the country have entered into agreements for cross-deputization of tribal, municipal, county, and state law enforcement officers. *Hicks*, 533 U.S. at 393 (noting the "host of cooperative agreements between tribes and state authorities . . . to provide law enforcement") (O'Connor, J., concurring); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 (1999). These agreements allow officers to ticket or arrest offenders who would not otherwise be within their jurisdiction and turn them over to the appropriate court for prosecution. *See, e.g.*, Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska at 1-2, *available at* *https://www.walkingoncommonground.org/state.cfm?topic=12&state=NE*.

Riverton's continuing resistance to acknowledging reservation status has been an obstacle to such intergovernmental agreements in the past. Clarifying that status, therefore, will in fact facilitate effective law enforcement in both the fee and trust portions of the opened area.

C. Commercial and Business Regulation

Riverton's Brief notes that the Eastern Shoshone and Northern Arapaho tribes have a Tribal Employment Rights Office Code (TERO) and a Business Licensure Code. Riverton Br. at 5–8. Riverton claims, with no support, that "[n]either TERO nor the S&A Business License Code have ever been enforced" in the disputed area. *Id.* at 7. Supposedly, if this Court finds the City is within Indian country, "it would strike a financial blow to existing businesses, possibly leading some to cease commerce and vacate the ceded area." *Id.* at 8. These statements ignore the limited scope of tribal jurisdiction over non-Indian businesses.

As stated above, tribes may only regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members," or whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). Both of these exceptions have been narrowly interpreted in the context of non-Indian businesses.

In *Atkinson Trading Company v. Shirley*, the Supreme Court held that a tribe could not impose its hotel occupancy tax on guests at a non-Indian hotel operating on fee land within the Navajo Reservation. 532 U.S. 645 (2001). Finding no qualifying consensual relationship, the Court stated that the impact of the non-member activity must be "demonstrably serious" and "imperil" the tribe for

jurisdiction to exist. *Id.* at 659. Similarly, in *Plains Commerce Bank*, the Court held a tribe lacked jurisdiction over a non-Indian bank that had loaned money for decades to an Indian-owned ranch, then foreclosed on the ranch property and sold it to non-Indians. 554 U.S. at 320-21. Rejecting the consensual relationship exception, the Court found the sale of formerly Indian-owned fee land was not within tribal jurisdiction because it was not "catastrophic" and did not "imperil the subsistence or welfare of the Tribe." *Id.* at 341.

As these cases illustrate, the only non-Indian businesses located in Riverton that would likely be subject to the TERO and Business Licensure Codes are those engaged in direct contractual relationships with the Eastern Shoshone or Northern Arapaho Tribes. *See Montana Dep't of Transportation v. King*, 191 F.3d 1108 (9th Cir. 1999) (holding tribe lacked authority to enforce its TERO ordinance against the state for work on reservation highway). It is understandable that the Tribes have not been enforcing their existing laws in Riverton, and there is no reason that non-Indian businesses should fear application of those laws if this Court affirms the EPA's decision.

Riverton also claims that affirming the EPA's decision may affect the priority of existing liens, because the Secretary of State "do[es] not currently accept any UCC filings from the Reservation." CTY-WR-000039. If true, this practice is neither necessary nor common. Most entities lending within Indian

country ensure that their UCC filings are not only recorded with the tribe, but that duplicate financing statements are filed with the Secretary of State and the Office of the Recorder of Deeds for the District of Columbia, which serves as the default location for an entity under Section 9-307(c) of the UCC. Charles B. Congdon & Paul M. McAleer, *General Considerations in Tribal Debt Finance*, Drinker Biddle Tribal Finance Summary 15 (Sept. 2011). Moreover, Indian tribes and states routinely enter into compacts on this subject. *See,* James D. Griffith, *The Model Tribal Secured Transactions Act: Self-Determination and Tribal Economic Development*, 50 Arizona Atty 34, 36 (July/August 2014) (noting that several tribes have signed compacts to allow filing of financing statements with state agencies). Tribal law provisions eschewing self-help remedies authorized under the UCC, *see* Riverton Br. at 14-15, would once again only apply to non-Indian businesses if the tribes possessed regulatory jurisdiction under one of the *Montana* exceptions.

D. Zoning and Building

Contrary to Riverton's assertions, *see* Riverton Br. at 8-10 & 16-17, reservation status does not affect application of ordinary building and zoning requirements to non-Indian fee land in the opened area.

The Supreme Court's plurality decision in *Brendale v. Confederated Bands and Tribes of the Yakima Nation*, 492 U.S. 408 (1989), is instructive. A majority

of justices rejected tribal zoning jurisdiction and affirmed county zoning jurisdiction over a parcel of fee land in a mixed-use "open area" that was about half non-Indian fee land. *Brendale,* 492 U.S. at 432 (opinion of White, J.); *see also Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (rejecting tribal zoning jurisdiction because "[f]or a tribe to have authority over such nonmember conduct, '[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.'") A different majority of five justices held that the tribes did have authority to zone a parcel of fee land in an undeveloped "closed area," which was almost entirely held in trust. *Id.* at 442 (opinion of Stevens, J.). The controlling opinion noted, however, that tribal jurisdiction would not necessarily foreclose concurrent state or local jurisdiction of the parcel. *Id*. at 440 n.3.

A decision by this Court before *Brendale* did uphold tribal zoning jurisdiction over non-Indian fee land in an area that was mostly Indian-owned and occupied, neighbored traditional ceremonial grounds, and was within five miles of the sites of major pow-wows, Indian schools, activity centers, and cemeteries. *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900, 903 (10th Cir. 1982). Neither the city nor county regulated land use in the area; thus, tribal regulation was necessary to prevent exploitation. *Id.* We are aware of no decision that

upholds ordinary tribal zoning laws in a largely non-Indian area such as Riverton, nor would Supreme Court precedent support it.

Although states and local governments can only regulate use of Indian lands in exceptional circumstances, the preemption test does not bar them from regulating non-Indian owned land. *See*, *e.g.*, *Gobin v. Snohomish County*, 304 F.3d 909, 918 (9th Cir. 2002) (county lacked jurisdiction to zone member-owned fee land, but could zone the land if purchased by a non-Indian). Even in the rare cases where tribal jurisdiction exists, the most likely result is concurrent regulation, in which each government could set a regulatory floor, but not a ceiling. *Brendale* at 442 (opinion of Stevens, J.). Affirming reservation status, therefore, will wreak none of the hazards Petitioners fear.

E. Environmental Regulation

Clarification of reservation status will improve environmental regulation for all residents. As the tribes are not seeking regulatory authority, a major benefit of treatment as a state is to qualify the tribe for federal grants. 42 U.S.C.A. § 7405. Such grants will benefit the area as a whole. More important, affirming reservation status will permit unified regulation of all lands in the opened area.

On reservations, states generally lack authority to implement federal environmental programs, and the federal government has primary authority where a tribe does not seek regulatory authority. *Cohen* at 789; *see* 40 C.F.R. § 123.1(h)

(EPA primary administrator of water pollution programs on Indian lands); 40 C.F.R. § 271.1(h) (same as to Resource Conservation and Recovery Act); *see also Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 552 (10th Cir. 1986) (agreeing that Oklahoma "has no power to prescribe an underground injection control program regulating the Osage Indian Reserve.").

Without reservation status, however, environmental regulation in the disputed area would be fragmented: the federal government would have jurisdiction over trust land, while state and local governments would have jurisdiction over its pockets of fee land. The EPA has consistently recognized that given the mobility of pollutants, "a territorial approach to . . . regulation best advances rational, sound" environmental management and condemned "the undesirability of fragmented" environmental management. 59 Fed. Reg. 43,956, 43,959 (1994) (concerning air quality); *see* 56 Fed. Reg. 64,876, 64,878 (1991) ("[A] 'checkerboard' system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments."). Clarifying the reservation status of the disputed area will therefore facilitate effective environmental regulation for all who reside there.

II. EXPERIENCE OF OTHER NON-INDIAN MUNICIPALITIES

The position of the Petitioners – that affirming the Tribes' reservation status will produce a jurisdictional quagmire that would upset the settled expectations of non-Indian residents – is belied by the experience of other cities located throughout Indian country. There are 134 cities and towns within Indian country that are predominately non-Indian in population. *See* Addendum (collected 2010 Census Information). In many of these locations a cooperative atmosphere exists between tribal and city governments. Rather than litigate jurisdictional issues, these communities have resolved their differences and legal ambiguities by developing intergovernmental agreements. Indeed, the Supreme Court has indicated that cooperative agreements are the preferred method of balancing the interests of states and tribes within Indian country. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). Several states have recognized the advantages of these agreements, adopting legislation authorizing states agencies to enter into intergovernmental agreements with tribes. *E.g.*, Ariz. Rev. Stat. § 11-952; Mont. Code Ann. § 18-11-101 *et seq.*; Neb. Rev. Stat. § 13-1502 *et seq.*; Okla. Stat. titl. 74 § 1221; SDCL 10-12A.

For example, in 2010, the Saginaw Chippewa Tribe was able to settle a dispute over the boundaries of its reservation through use of intergovernmental agreements. Michigan recognized the boundaries of the Tribes' reservation, and

the Tribe entered into 13 different intergovernmental agreements with Michigan, Isabella County, and the City of Mount Pleasant. These agreements covered diverse subject areas including law enforcement, taxation, child welfare, zoning, and natural resources and environmental management. *See* *http://www.sagchip.org/council/events/2010/2010-1108-SettlementAgreementRecognizesTreatyBoundaries.htm#.VT94pSFViko* (collecting agreements).

Disputes over reservation boundaries have prevented Wyoming and Riverton from following the path that has already been successfully travelled by so many other governments. Affirming reservation status, however, could facilitate a more cooperative and profitable relationship for both the Tribes and the municipalities within their borders.

CONCLUSION

For the foregoing reasons, the *amici curiae* support affirmance of the EPA's action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word and set in 14-point Times New Roman type style.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 3,477 words, excluding the parts of the brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain this word count.

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

The undersigned hereby certifies that the *Amici Curiae* Brief Filed on Behalf of Indian Law Professors was electronically filed with the U.S. Court of Appeals for the Tenth Circuit on April 30, 2015, by utilizing the appellate CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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APPENDIX

List of *Amici Curiae*

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Sarah Deer is a Professor of Law at William Mitchell College of Law, where she teaches and writes in the areas of Tribal Law, Constitutional Law, and Criminal Law. In 2014 she was named a MacArthur Foundation Fellow for her work to empower Indian tribes to protect Native American women from sexual and domestic violence.

Angelique Townsend EagleWoman is a Professor of Law and James E. Rogers Fellow in American Indian law at University of Idaho College of Law, where she teaches and writes in the areas of Civil Procedure, Federal Indian law, and Natural Resources Law.

Matthew L.M. Fletcher is Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. He is the

Reporter for the American Law Institute's *Restatement, Third, The Law of American Indians*. With David Getches, Charles Wilkinson, and Robert Williams, Professor Fletcher co-authored the sixth edition of *Cases and Materials on Federal Indian Law* (Thomson West 2011). He also authored *American Indian Tribal Law* (Aspen 2011), the first casebook for law students on tribal law.

Kathryn Fort is the Interim Associate Director and Staff Attorney for the Indigenous Law and Policy Center at Michigan State University College of Law, where she teaches and writes in the areas of Federal Indian Law and clinical/skills-based courses.

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ADDENDUM