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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ANDREW JOHN YELLOWBEAR, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 06-CV-82-B
	)	
SHERIFF, SKIP HORNECKER,	)	
and	)	
THE ATTORNEY GENERAL OF THE STATE OF WYOMING,	)	
	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Respondents, by and through the Office of the Wyoming Attorney General, respectfully respond as follows to Petitioner's Pro Se Motion for Summary Judgment on

Petition for Relief Pursuant to 28 U.S.C. 2254 to Vacate, or Set Aside Conviction and Sentence (Petitioner's Motion).

Facts and Procedural History

Petitioner, Andrew J. Yellowbear, Jr., was arrested following the July 2, 2004 death of his 22-month-old daughter, Marcella Hope Yellowbear in Riverton, Wyoming, and was charged with first-degree murder in the Wyoming District Court. On September 2, 2004, while awaiting trial, Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. The docket number of that case was 04-CV-243-B. Petitioner challenged the state court's jurisdiction, alleging that Riverton, Wyoming is "Indian country" over which the federal courts have exclusive jurisdiction for serious crimes pursuant to federal statute. This Court dismissed that petition sua sponte, finding that Petitioner was not entitled to relief under § 2254 because 1) he was a pre-conviction prisoner, and 2) he had not exhausted his claims. The Court also noted that relief under § 2241 was unavailable due to non-exhaustion and the Younger abstention doctrine. Petitioner appealed to the Tenth Circuit Court of Appeals. The docket number of that appeal was 04-8120. The Tenth Circuit declined to grant a certificate of appealability, holding that § 2254 relief was unavailable because Petitioner was a pre-conviction prisoner and had not exhausted his

claims in the state courts. The Tenth Circuit also held that § 2241 relief was unavailable due to non-exhaustion.

In November, 2005 – while still awaiting trial – Petitioner filed Defendant's Motion E-5, Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction, in the trial court. (A copy of that motion is included as Exhibit 1 to this Brief). Motion E-5 again argued that the state court lacked jurisdiction because Riverton is Indian country. The prosecutor filed a response opposing the motion. (A copy of that response is included as Exhibit 2 to this Brief). The state district court heard argument on the motion on January 23, 2006, ruled from the bench, and issued its order dismissing the motion on January 31, 2006. (The transcript of the January 23, 2006 motion hearing is included as Exhibit 3 to this Brief, the court's reasoning and decision on the issue at hand appears at pages 151-55 of that transcript; a copy of the court's order is included as Exhibit 4 to this Brief).

Petitioner petitioned the Wyoming Supreme Court for a writ of review and a stay of the trial court proceedings. (A copy of that petition is included as Exhibit 5 to this Brief). The Wyoming Attorney General's Office responded on behalf of the State, and the Court denied both requests in a February 28, 2006 order. (A copy of the State's response is included as Exhibit 6 to this Brief; a copy of the order is included as Exhibit 7 to this Brief).

Petitioner filed a second petition for habeas corpus relief (this time pursuant to 28 U.S.C. § 2241) with this Court on March 27, 2006, while his trial was underway. He again contended that Riverton is Indian country, and the state courts therefore have no jurisdiction over his crime. The Court issued an Order Requiring Service and Response on March 28, and Respondents were served with the petition on March 31. This Court appointed counsel for Petitioner on April 17, 2006. Respondents filed their Answer, Motion for Summary Judgment, and supporting brief on May 12, 2006.

Meanwhile, a Hot Springs County, Wyoming jury found Petitioner guilty of first-degree murder on April 1, 2006. The trial court sentenced Petitioner to life without parole. Petitioner appealed his conviction and sentence to the Wyoming Supreme Court.

On June 9, 2006, this Court denied and dismissed Petitioner's petition. The Court did not reach the merits of the petition. Instead, it dismissed the petition pursuant to the exhaustion requirement and the Younger abstention doctrine, to allow the state courts the first opportunity to address Petitioner's federal claim. Petitioner appealed this Court's decision to the United States Circuit Court of Appeals for the Tenth Circuit.

On January 14, 2008, the Wyoming Supreme Court affirmed Petitioner's conviction in a unanimous opinion. Yellowbear v. State, 174 P.3d 1270 (Wyo. 2008). Petitioner did not petition the United States Supreme Court for a writ of certiorari from that decision.

The Tenth Circuit issued its opinion in Petitioner's appeal on March 21, 2008. Yellowbear v. Wyo. Atty. Gen., 525 F.3d 921(10th Cir. 2008). That court determined that Petitioner's jurisdictional claim had become exhausted, subsequent to this Court's dismissal, when the Wyoming Supreme Court decided it on direct appeal. The appellate court stated that "the comity considerations which are the basis of Younger abstention . . . are no longer applicable." Id. at 923.

This Court appointed counsel to represent Petitioner, and Petitioner subsequently re-characterized his petition as one brought pursuant to 28 U.S.C. § 2254. (Petition for Relief Pursuant to 28 U.S.C. §2254 to Vacate, or Set Aside Conviction and Sentence [Petition], Document 78 in this Court's docket). Petitioner raised three issues in that Petition, but later abandoned two of them because he had not exhausted them in the state courts. (Notice of Voluntary Dismissal of Claims 2 and 3, Document 89 in this Court's docket). The remaining claim challenges the Wyoming Supreme Court's determination that the crime scene is not Indian country. (Petition, pp. 3-7).

During scheduling conferences, Petitioner urged this Court to proceed *de novo*, without the statutorily mandated deference to the state court decision. He also expressed his desire to have an evidentiary hearing. (Petition, ¶ 31). In this Court's October 21, 2008 Order on Third Scheduling Conference to Set Discovery Schedule and Set Date for

Evidentiary Hearing, the Magistrate gave Respondents until November 21, 2008 to submit a motion to proceed without *de novo* review or an evidentiary hearing. Respondents submitted such a motion, and this Court heard argument on December 22, 2008. This Court has not yet ruled on the motion.

On October 23, 2008, both of the attorneys appointed to represent Petitioner filed motions to withdraw. This Court denied those motions, without prejudice, on the same day. Counsel renewed their withdrawal motions on January 6 and 7, 2009. Petitioner filed his Pro Se consent to their withdrawal on January 13, 2009. The motions are currently pending.

Petitioner, acting Pro Se, filed his instant motion and supporting brief in this Court on January 13, 2009.

Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is available if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." This Court has explained that it evaluates summary judgment motions in habeas corpus cases in this way:

> In considering a party's motion for summary judgment, the court must examine all evidence in the light most favorable to the nonmoving party. Barber v. General Elec. Co., 648 F.2d 1272, 1276 n. 1 (10th Cir. 1981). Summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P 56(c). Under this rule, the initial burden is on the moving party to show the court "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317 [106 S.Ct. 2548] (1986). The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. at 323 [106 S.Ct. at 2552].
>
> Once the moving party has met these requirements, the burden shifts to the party resisting the motion. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex at 322 [106 S.Ct. at 2552];see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 [106 S.Ct. 2505, 2510] (1986). The party resisting the motion "may not rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. Anderson, 477 U.S. at 248 [106 S.Ct. at 2510]. The mere existence of a scintilla of evidence will not avoid summary judgment; there must be sufficient evidence on which a jury could reasonably find for the nonmoving party. Id. at 251 [106 S.Ct. at 2511].

Osborn v. Shillinger, 803 F.Supp. 371, 373 (D.Wyo. 1992), aff'd, 997 F.2d 1324 (10th Cir. 1993), citing Manders v. Okl. ex rel. Dept. of Mental Health, 875 F.2d 263, 265 (10th Cir. 1989).

By filing a summary judgment motion, Petitioner has asserted that no material issues of fact exist. Respondents agree. Because the parties are in accord that no further factual development is necessary, this Court need not hold an evidentiary hearing.

28 U.S.C. § 2254 Standard

Petitioner filed his Petition after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which amended 28 U.S.C. § 2254. Accordingly, he is entitled to relief only if the Wyoming Supreme Court's decision affirming his conviction was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or if it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Petitioner contends the Wyoming Supreme Court's determination that the crime scene is not Indian country "should be reviewed under 28 U.S.C. § 2254(d)(1) that provides that the writ of habeas corpus shall not be granted unless the adjudication of the claim: 'Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.' " (Petition, p. 5, ¶19). Respondents will therefore limit their discussion to the "contrary to" and "unreasonable application" clauses.

This Court may grant relief under the "contrary to" clause only if the state court reached a conclusion opposite to that reached by the United States Supreme Court on a question of law, or if the state court decides a case differently than the high Court has on a set of materially indistinguishable facts. Harris v. Poppell, 411 F.3d 1189, 1195 (10th Cir.

2005). A state court decision is not contrary to clearly established federal law merely because it does not include a discussion of relevant U.S. Supreme Court cases. Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 365 (2002).

The Tenth Circuit has explained its approach to the "unreasonable application" clause in this way:

> Under the "unreasonable application" clause, relief is provided only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Thus we may not issue a habeas writ simply because we conclude in our independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Charlton v. Franklin, 503 F.3d 1112, 1115 (10th Cir. 2007) (citing Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004)).

Discussion

18 U.S.C. § 1152 provides in relevant part that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1151 defines the term "Indian country" as:

> (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,
>
> (b) all dependent Indian communities within the borders of the Untied States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The City of Riverton clearly does not fall within the definitions contained in 18 U.S.C. § 1151(b) or (c). The term "dependent Indian communities" "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527, 118 S.Ct. 948, 953 (1998). The term "Indian allotments" refers to "parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians . . . ." Id. at 529, 118 S.Ct. at 953. Clearly, neither of those definitions apply here.

The definition in (a) requires a more thorough discussion of the law and history of Indian reservations in general, as well as the history of the Wind River Reservation. In the early to mid 19th century, the federal government established reservations for many of the

native tribes in the United States. Responding to an increasing population and westward migration, the federal government changed its policies in the latter part of the 19th century. The General Allotment Act (also called the Dawes Act) of 1887 permitted the government to allot tracts of reservation land to individual tribal members and, with tribal consent, to sell the surplus lands to non-Indian settlers. 24 Stat. 388, ch. 119.

> Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy).

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335, 118 S.Ct. 789, 794 (1998)

To prevail on his claim, Petitioner must show that the Wyoming Supreme Court's decision affirming his conviction was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or if it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). The phrase "clearly established Federal law" refers to the holdings, not the dicta, of United States Supreme Court decisions as of the time of the relevant state court decision. Carey v. Musladin, 549 U.S. 70, 74, 127 S.Ct. 649, 653 (2006). Through a series of opinions, the

United States Supreme Court has established criteria to be used in evaluating a claim that a particular place is, or is not, Indian country.

Seymour v. Superintendent of Washington State Penitentiary

The Colville Indian Reservation in Washington was created in 1872. Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 354, 82 S.Ct. 424, 426 (1962). In 1892, the reservation was diminished by an act of Congress providing that the northern half of the reservation would be "vacated and restored to the public domain." A 1906 act of Congress allotted a parcel of the diminished reservation land to each member of the tribe, and then opened the remainder of the diminished reservation for settlement and entry under the homestead laws. Id. at 354-55, 82 S.Ct. at 426-27.

Paul Seymour, a member of the Colville tribe, was convicted in state court of attempted burglary, committed on unallotted land in the diminished reservation. Seymour, at 352, 82 S.Ct. at 425. In federal habeas corpus proceedings, Seymour contended that the state court had no jurisdiction over his offense because it was committed in Indian country. The Supreme Court looked to the 18 U.S.C. § 1151 definition of "Indian country," and determined that the 1906 act did not dissolve the reservation because, unlike the 1892 act, it did not expressly vacate the land and restore it to the public domain. The Court concluded

that the 1906 act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." Id. at 356, 82 S.Ct. at 427.

Mattz v. Arnett

The Klamath River Reservation in California was established in 1855. Mattz v. Arnett, 412 U.S. 481, 487, 93 S.Ct. 2245, 2249 (1973). An 1891 executive order expanded the nearby Hoopa Valley Reservation to include the land that had originally been the Klamath River Reservation. Id. at 493, 93 S.Ct. at 2252. An 1892 act of Congress opened the land that had formerly been the Klamath River Reservation to settlement, entry, and purchase. Id. at 494-495, 93 S.Ct. at 2253. The 1892 act also allowed tribal members residing on the land to receive individual allotments of land. Finally, the 1892 act provided that the federal government would use the land sale proceeds for the "maintenance and education" of the tribal members. Id. at 495, 93 S.Ct. at 2253.

Raymond Mattz, a member of the Klamath tribe, was fishing on unallotted land in what had formerly been the Klamath River Reservation, when a California game warden seized his gill nets, which are illegal under California law. When California initiated

proceedings to forfeit the nets, Mattz claimed the area where he was fishing was Indian country, over which the state had no jurisdiction. Mattz, at 484, 93 S.Ct. at 2247-48.

The Court again applied the 18 U.S.C. § 1151 definition of "Indian country." In determining whether the 1892 act dissolved the reservation and the land was no longer Indian country, the United States Supreme Court stated that "[a] congressional determination to terminate [reservation status] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz, at 505, 93 S.Ct. at 2258. The Court determined that the 1892 act did not terminate the reservation because it did not expressly provide for termination. Therefore, the reservation land was still Indian country. Id. at 506, 93 S.Ct. at 2258.

DeCoteau v. District County Court

The Supreme Court examined very different legislative language in DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082 (1975). The Lake Traverse Indian Reservation in South Dakota was created in 1867, by a treaty between the federal government and the Sisseton-Wahpeton tribe. Id. at 426, 95 S.Ct. at 1084. An 1891 act of Congress ratified a treaty by which the tribe agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments

. . . ." Id. at 437, 95 S.Ct. at 1089. In exchange, the federal government agreed to pay the tribe $2.50 for each acre ceded. Id.

Cheryl Spider DeCoteau, a member of the Sisseton-Wahpeton tribe, lived on unallotted land within the area ceded to the United States in the 1891 act. Decoteau instituted state habeas corpus proceedings after state authorities removed her children from her home due to neglect. She contended the state lacked authority to remove her children because the place where she lived was Indian country. DeCoteau, at 428-429, 95 S.Ct. at 1085.

The Supreme Court looked once again to the statutory definition of "Indian country." The Court distinguished the language of Seymour and Mattz from that at issue in DeCoteau, holding that while the Congressional acts in the former cases merely opened reservation lands to settlement, the treaty in DeCoteau was a negotiated agreement that provided a sum certain payment. DeCoteau, at 447-448, 95 S.Ct. at 1094. The Court held that the language of the treaty "was precisely suited" to disestablishment. Id. 445, 95 S.Ct. at 1093. The Court also stated that the language of the treaty was comparable to the following language in other agreements:

> "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character . . . ."

> "cede, relinquish and surrender, forever and absolutely, to the United States, all their claim, title and interest of every kind and character . . . ."
>
> "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 . . . ."
>
> "cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have or every [sic] had . . . ."
>
> "cede, sell, and relinquish to the United States all their right, title, and interest . . . ."
>
> "agree to dispose of and sell to the Government of the United States, for certain considerations hereinafter mentioned . . . ."

Id. at 439, 95 S.Ct. at 1090, n. 22.

Rosebud Sioux Tribe v. Kneip

The United States Supreme Court revisited the issue in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361 (1977). The Rosebud Reservation in South Dakota was established in 1889, when the Great Sioux Reservation was partitioned into six separate reservations for different tribes of the Sioux nation. Id. at 589, 97 S.Ct. at 1364. A 1904 act of Congress ratified a treaty (to which the tribe had not agreed) by which the tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" a specific portion of the reservation lands. Id. at 597, 97 S.Ct. at 1368.

The federal government agreed to open the ceded lands for settlement, and to act as the trustee for the tribe in selling the land. The government did not guarantee to find buyers, or promise that the tribe would receive any specific amount of compensation. Id. at 596, 97 S.Ct. at 1368, fn. 18.

In 1972, the Rosebud Sioux Tribe brought a federal action seeking a declaratory judgment that the 1904 act (and two subsequent acts) had not diminished the reservation as established in 1889. As in DeCoteau, the Court found the language of the 1904 act " 'precisely suited' to disestablishment." Rosebud Sioux, at 597, 97 S.Ct. at 1368. The Court also determined that the lack of a "sum certain" provision was just one of multiple factors to be considered. Id. at 598, 97 S.Ct. at 1369, n. 20. In addition to the statutory language, the Court also looked to the "jurisdictional history" and said, "The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations . . . ." Id. at 603-05, 97 S.Ct. at 1371-1372. For those reasons, the Court concluded that the lands ceded in the 1904 Act were no longer Indian country.

Solem v. Bartlett

The Cheyenne River Sioux Reservation was another of the reservations carved out of the Great Sioux Reservation in 1889. In 1908, Congress opened part of that reservation for settlement. The operative language in that act authorized the Secretary of the Interior to "sell and dispose of" a specified portion of the reservation, and provided that the proceeds from the sale would be deposited in the United States Treasury to the credit of the tribe. Solem v. Bartlett, 465 U.S. 463, 472-73, 104 S.Ct. 1161, 1167 (1984).

John Bartlett, a member of the Cheyenne River Sioux Tribe, was convicted in state court of attempted rape. The crime scene was within the area opened for settlement by the 1908 act. Bartlett filed a federal habeas corpus petition, alleging that the state lacked jurisdiction because the crime occurred in Indian country. Solem, at 465, 104 S.Ct. at 1163.

In Solem, the Court clearly explained its method for determining whether ceded reservation land ceases to be Indian country:

> Our precedents in the area have 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. 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.

Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an "intent to change boundaries" before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit 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. When such language of cession 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.

As our opinion in Rosebud Sioux Tribe demonstrates, however, explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. 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. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress's intentions. 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 unalloted open lands.

On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what

> Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.
>
> There are, of course, limits to how far we will go to decipher Congress's 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.

Id. at 470-72, 104 S.Ct. at 1166-1167 (footnotes and internal citations omitted).

Applying the standard it articulated, the Court held that the "sell and dispose"language in the 1908 act, along with the provision to deposit the proceeds in the federal treasury, did not show congressional intent to disestablish. As in Seymour, that language merely allowed non-Indians to own land on the reservation. Solem, at 473, 104 S.Ct. at 1167. The Court also noted that, "[n]owhere else in the Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries." Id. at 474, 104 S.Ct. at 1168.

The Court next examined the "events surrounding the passage" of the 1908 act. In contrast to the act examined in DeCoteau, the Court noted that the 1908 act "did not begin with an agreement between the United States and the Indian Tribes, in which the Indians agreed to cede a portion of their territory to the Federal government." Solem, at 476, 104 S.Ct. at 1169. Instead, the act was a unilateral decision by Congress, without agreement from

the tribe. Id. at 477, 104 S.Ct. at 1169. The lack of a bilateral agreement, coupled with the tribe's clear opposition to the 1908 Act, supported the contention that the opened portion of the reservation was still Indian country. Finally, the Court looked at events occurring after passage of the 1908 act. That evidence, however, was so contradictory that it did not support either side. Id. at 478-79, 104 S.Ct. at 1170. After examining the statutory language, the events surrounding its passage, and the subsequent treatment of the lands in question, the Court held that the opened portion of the reservation was still Indian country.

Hagen v. Utah

The Supreme Court refined its three-part test in Hagen v. Utah, 510 U.S. 399, 114 S.Ct. 958 (1994). The Uintah Valley Reservation in Utah was established by Congress in 1864. Id. at 402, 114 S.Ct. at 961. A 1902 congressional act provided that if a majority of the adult male tribal members agreed, lands within the reservation would be allotted to each member of the tribe, and the remaining lands would be restored to the public domain and opened for homesteading. The 1902 act further provided that the proceeds from the land sales would be used by the federal government for the benefit of the tribe. The act also appropriated about $70,000, to be paid directly to the tribe after its approval had been obtained. Id. at 403, 114 S.Ct. at 961, n. 1. Later in 1902, Congress set aside sufficient land

for the grazing needs of the Indians remaining on the reservation, and clarified that the $70,000 appropriated in the 1902 act was to be paid without waiting for the tribe to approve the allotment and cession. Id. at 404, 962. In 1903, Congress directed the Secretary of the Interior to allot the reservation lands unilaterally if the tribe did not consent. Id. The tribe had not yet consented in 1905, when President Roosevelt issued a proclamation opening the unallotted lands and restoring them to the public domain. Id. at 407, 114 S.Ct. at 963.

Robert Hagen, a member of the Uintah Tribe, pled guilty in state court to distributing a controlled substance. The crime occurred in Myton, Utah, which lies within the area opened for settlement by the 1905 presidential proclamation. Hagen later sought to withdraw his plea, contending that Myton was Indian country, over which the state courts lacked criminal jurisdiction. Hagen, at 408, 114 S.Ct. at 964. In determining whether the opened lands were still Indian country, the Court looked first to the language of the 1902 act, which restored the unallotted lands to the public domain. Id. at 412, 114 S.Ct. at 966. The Court held that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status." Id. at 414, 114 S.Ct. at 967.

Looking to contemporary historical evidence, the Court took note of letters and other statements by government officials demonstrating an understanding that the reservation

would be diminished whether the tribe consented or not. Hagen, at 416-19, 114 S.Ct. at 968-69. Similarly, the Court noted that the text of the 1905 presidential proclamation also indicated an understanding that the reservation would be diminished. Id. at 419-20, 114 S.Ct. at 969-70. Although it found the subsequent history "less illuminating," the Court did note that the subsequent demographics of the area supported a finding that it was no longer Indian country. Id. at 420-21, 114 S.Ct. at 970. Specifically, the Court observed that the current population of the opened lands was about 85 percent non-Indian, and the population of the largest city in the opened area was about 93 percent non-Indian. Id. at 421, 114 S.Ct. at 970. The Court also noted that the seat of the tribal government was not in the opened lands. Finally, the Court noted that the State of Utah had exercised jurisdiction over the area in question since the lands were opened. Id. Accordingly, the Court held that the reservation had been diminished and the ceded portion was no longer Indian country.

South Dakota v. Yankton Sioux Tribe

The Yankton Sioux Reservation in South Dakota was established by treaty in 1858. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333, 118 S.Ct. 789, 793 (1998). Federal representatives and the Yankton Tribe agreed in 1892 that the tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands in return for $600,000.

Id. at 336-38, 118 S.Ct. at 794-95. Congress ratified the agreement in 1894, and non-Indian settlers soon acquired the ceded lands. Id. at 339, 118 S.Ct. at 796.

When state authorities sought to apply state environmental regulations to a solid waste disposal facility on the ceded lands, the tribe sought a declaratory judgment that the site of the facility remained Indian country, and was not subject to state environmental laws. Yankton Sioux, at 340-41, 118 S.Ct. at 796-97. The United States Supreme Court held that state environmental regulations applied to the ceded land because it was no longer Indian country. The Court based that holding primarily on the plain language of the 1894 act, which clearly demonstrated congressional intent to diminish the reservation. Citing DeCoteau, the Court held that the phrase "cede, sell, relinquish, and convey," along with the sum-certain payment of $600,000, was "precisely suited" to diminishing the reservation. Id. at 344, 118 S.Ct. at 798.

The Court went on to examine the events surrounding passage of the 1894 act, and found nothing that could overcome the strong presumption of diminishment arising from the plain language of the act. Yankton Sioux, at 351-54, 118 S.Ct. at 802-03. Finally, the Court looked to the current status of the ceded lands. Although acknowledging that this is the least compelling of its considerations, the Court noted that the population of the ceded area was over two-thirds non-Indian, and municipalities had been incorporated under state law within

the ceded lands. Those demographics, the Court said, "signify a diminished reservation." Id. at 356-57, 118 S.Ct. at 804.

The United States Supreme Court cases discussed above show that the Court has developed a clear method for determining whether a reservation was diminished when all or part of it was opened for settlement by non-Indians. The first and most important consideration is congressional intent as manifested by the language Congress used. Language showing a clear intent to diminish the reservation, coupled with a sum-certain payment, creates an almost irrefutable presumption of diminishment. The Court will also consider the events surrounding passage of the act and events subsequent to passage of the act, but those considerations are less important.

Riverton, Wyoming is not Indian country

Pursuant to the Second Treaty of Fort Bridger, signed in 1868, the federal government established the Wind River Indian Reservation for the Shoshone tribe. 15 Stat. 673. Article 11 of the 1868 treaty provides that "[n]o treaty for the cession of any portion of the reservations . . . 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 . . . ." In 1878, the federal government settled the Northern Arapahoe tribe on the

Reservation. *See* Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States, 299 U.S. 476, 487-88, 57 S.Ct. 244, 247 (1937).

The federal government and the tribes entered into another treaty in 1904. Over half of the adult male tribal members agreed to the treaty, and Congress, with some changes, ratified it in 1905. 33 Stat. 1016. In the final form approved by Congress, the Treaty states in its entirety:

> ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, **do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have** to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west, thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: Provided, That any individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the

diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry.

ARTICLE II. In consideration of the lands **ceded, granted, relinquished, and conveyed** by Article I of this agreement, the United States stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash, as hereinafter provided, at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law within three years therefrom shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited and the entry shall be held for cancellation and canceled, and all lands, except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior; *And provided*, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that

said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled; *Provided further*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

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

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

ARTICLE V. It is agreed that at least fifty thousand dollars of the moneys derived from the sale of the ceded lands shall be expended, under the direction of the Secretary of the Interior, in the purchase of live stock for issue to said Indians, to be distributed as equally as possible among the men, women and children of the Shoshone or Wind River Reservation.

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

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

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

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

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

All homestead entrymen who shall make entry of lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid, payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid. Upon all entries the usual fees and commissions shall be paid

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

Sec. 3. That there is hereby appropriated, out of money in the Treasury of the United States not otherwise appropriated, the sum of eighty-five thousand dollars to make the per capita payment provided in article three of the agreement herein ratified, the same to be reimbursed from the first money received from the sale of the lands herein ceded and relinquished. And the sum of thirty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the outboundaries of the **diminished reservation**, where the same is not a natural water boundary; and the sum of twenty-five thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the

> sale of said lands, to be used in the construction and extension of an irrigation system on the **diminished reserve**, as provided in article four of the agreement.
>
> ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.
>
> ARTICLE XI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the Untied States.

(emphasis added). The City of Riverton lies north of the Big Wind River, on land that was ceded in the 1905 act.

The plain language of the act demonstrates congressional intent to diminish the reservation

No precise language is necessary, so long as congressional intent to diminish the reservation is clear. Hagen, 510 U.S. at 411, 114 S.Ct. at 965. Article I of the act contains unmistakable language of diminishment where it 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, except . . . ." Similarly, Article II begins, "In consideration of the lands ceded, granted, relinquished, and conveyed by Article

I of this agreement . . . ." Those phrases are indistinguishable from the language the United States Supreme Court held was "precisely suited" to disestablishment in DeCoteau. 420 U.S. at 445, 95 S.Ct. at 1093.

In Article IX, Sec. 3, the act appropriated $145,000 to be used for the benefit of the tribes. Although that money was to be repaid out of the proceeds from land sales, there was no guarantee that sufficient land would be sold to cover the appropriations, nor was there any provision for reimbursement if the land sale proceeds were insufficient for that purpose. Thus, the tribes were unconditionally guaranteed a sum-certain, even if none of the ceded lands were sold. The situation at hand, therefore, fits the description provided in Yankton Sioux:

> [W]hen 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," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises.

522 U.S. at 344, 118 S.Ct. at 798.

The act also provides other clues to Congress' intent to diminish the reservation. In no fewer than six places, the act refers to the portion of the reservation not ceded as the "diminished reservation" or "diminished reserve." Article I allows tribal members who have

received allotments of land within the ceded areas to "select other lands within the diminished reserve." Article III deals with water rights and draws a clear distinction between the ceded territory and the "diminished reserve." Article IV provides for construction of an irrigation system "within the diminished reservation." Article VI provides for construction of schools in the "diminished reservation." Article IX, Section 3 appropriates funds for "the survey and marking of the outboundaries of the diminished reservation" and "construction and extension of an irrigation system on the diminished reserve." While those references may, individually, be unconvincing, Congress' repeated reference to the diminished reserve or reservation clearly shows its intent.

Events surrounding passage of the act show congressional intent to diminish the reservation

Events surrounding passage of the 1905 act further demonstrate Congress' intent to diminish the reservation. Many of those events are presented in the dissent to the Wyoming Supreme Court's decision in In Re Rights to use Water in Big Horn River, 753 P.2d 76 (Wyo. 1988), aff'd by Wyoming v. U.S., 492 U.S. 406, 109 S.Ct. 2994 (1989) (Big Horn I). The dissent noted that in 1904, Representative Mondell of Wyoming introduced H.R. 13481 to ratify an earlier agreement by which the Shoshone and Arapahoe tribes agreed to cede over one million acres. The Committee on Indian Affairs, commenting on H.R. 13481, said:

> The 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.

Id. at 125-26.

After Congress amended H.R. 13481 to require consent of the tribes, James McLaughlin was sent to the Wind River Reservation to negotiate with them. Big Horn I, at 126. In a subsequent letter to the Secretary of the Interior, Mr. McLaughlin reported:

> The diminished reservation leaves the Indians the most desirable and valuable portion of the Wind River Reservation and the garden spot of that section of the country. It is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River, which, being never failing streams carrying a considerable volume of water, give natural boundaries with well-defined lines; and the diminished reservation, approximately 808,000 acres, about three-fourths of which is irrigable land, allows 490 acres each for the 1,650 Indians now belonging on the reservation. I gave this question a great deal of thought and considered every phase of it very carefully and became convinced that the reservation boundary, as stipulated in the agreement, was ample for the needs of the Indians belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement, and the Indians would be eventually compelled to give it up. 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.

Id. at 127. Taking into consideration the Committee on Indian Affairs' comments on H.R. 13481 and Mr. McLaughlin's report to the Secretary of the Interior, there can be little doubt that both Congress and the executive branch intended that the Wind River Reservation would be diminished by the 1905 act.

Events subsequent to the 1905 act demonstrate diminishment

Although such events are of less importance, this Court may also consider events subsequent to the 1905 act. Several such events strongly indicate that the reservation was diminished. In 1907, Congress passed an act in which it referred to the ceded portion of the reservation as "lands formerly embraced in the Wind River or Shoshone Indian Reservation." 34 Stat. 849, Ch. 151.

In the 1930's, the Shoshone Tribe sued the United States for damages arising from the government's act of settling the Arapahoe Tribe on the Wind River Reservation without the Shoshones' permission. Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. The United States, 82 Ct.Cl. 23 (1935), *remanded on other grounds*, 299 U.S. 476, 57 S.Ct. 244 (1937). In its decision in that case, the United States Court of Claims referred to that portion of the reservation that was not ceded as the "diminished reservation." Id. at p. 23. That decision also included a map that identified the area north of the Big Wind

River as "ceded by agreement of April 21, 1904," and identified the area south of the river as the "present Wind River or Shoshone Indian Reservation." Id. at p. 30. The United States Supreme Court granted the parties' cross-petitions for certiorari, and it too referred to the lands not ceded as the diminished reservation. Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States, 299 U.S. 476, 489, 57 S.Ct. 244, 248 (1937). Following the Supreme Court's remand, the Court of Claims again referred to the lands not ceded as the "diminished reservation." Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. The United States, 85 Ct.Cl. 331, p. 10 (1937), *aff'd* 304 U.S. 111, 58 S.Ct. 794 (1938).

The federal government periodically restored lands to the reservation.[1] An example of such restorations appears in the August 10, 1944 Federal Register, at pages 9749-9754. After describing the lands to be restored, the declaration states that those lands "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." Id. at 9754. Clearly, land cannot be "added to and made a part of the existing" reservation if it already is part of

[1] None of the restored lands included any portion of the City of Riverton.

the reservation. Therefore, the restored lands must not have been part of the reservation prior to their restoration.

Current demographic facts about the ceded area also show diminishment. Riverton Police Chief John Snell testified that his department provides law enforcement for the city of Riverton. (January 23, 2006, Motion Hearing, p. 164). He further testified that criminal charges arising from conduct occurring in Riverton are disposed of in the state or municipal courts. (Id. at 165). Carter Napier, the Riverton city administrator, testified that the Riverton city government provides police, sanitation, street maintenance, water, and sewer service within the city limits. (Id. at 175). He also testified that the city government was responsible for enforcing zoning and building codes in Riverton. (Id. at 175-176). In addition, about 92% of the population of Riverton is non-Indian, and the seat of tribal government is in the diminished reservation. (District Court Record, Vol. II, p. 963).

Conclusion

Petitioner has failed to demonstrate that the Wyoming Supreme Court's decision upholding his conviction is "contrary to" or " an unreasonable application of" federal law as determined in the holdings of the United States Supreme Court. In fact, the overwhelming weight of the Supreme Court holdings, which the Wyoming Supreme Court discussed at

length, support the determination that the Riverton, Wyoming crime scene is not Indian country. Accordingly, Petitioner is not entitled to habeas corpus relief. Therefore, this Court should deny Petitioner's motion for summary judgment, and should grant summary judgment in favor of Respondents.

Respectfully submitted this 28th day of January, 2009.

/s/ David L. Delicath
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT**, upon the hereinafter named person by depositing the same in the United States Mail, postage prepaid, this 28th day of January, 2009, addressed as follows:

W. Keith Goody
P.O. Box 23
Cougar, WA 98616

Andrew J. Yellowbear, Jr., #24244
Wyoming State Penitentiary
Post Office Box 400
Rawlins, WY 82301

s/Wyoming Attorney General's Office
Wyoming Attorney General's Office