EXHIBIT Q

EXHIBIT Q-1

SHOSHONE AND ARAPAHOE TRIBAL COURT
WIND RIVER INDIAN RESERVATION
FORT WASHAKIE, WYOMING

THE ESTATE OF JEREMY JORGENSON, Plaintiff, NORTHERN ARAPAHO TRIBE and EASTERN SHOSHONE TRIBE, Plaintiffs-Intervenors, v. DHS DRILLING COMPANY, a Colorado Corporation; and ENCANA OIL AND GAS (USA), a Delaware Corporation, Defendants.	)	Civil Action No. CV-09-0012 Consolidated

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NORTHERN ARAPAHO TRIBE'S
BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SEEKING TO DECLARE THAT THIS COURT LACKS JURISDICTION

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I. Introduction.

Defendant Encana Oil and Gas (USA) ("Encana") and DHS Drilling Company ("DHS") have each moved for summary judgment declaring that this Court lacks jurisdiction. This brief is submitted in response.

Encana argues that "none of the operative events [in this litigation] occurred within Indian country." Defendant Encana's Memorandum in Support of Its Motion for Summary Judgment for Lack of Subject Matter Jurisdiction ("Encana's Memorandum") at 10. *See also* Encana's Memorandum at 1, 7, 9, 10-12, 20. Specifically, Encana argues that an Act of Congress in 1905 ("1905 Act") (33 Stat. 1016, 1019) disestablished that part of the Wind River Reservation where such events occurred and that subsequent court rulings bolster Encana's arguments regarding disestablishment. *See* Encana's Memorandum at pp. 3-9. Finally, Encana argues that, even if such events occurred within the exterior boundaries of the Reservation, the Tribal Court would lack jurisdiction under principles of federal law under *Montana v. U.S.*, 450 U.S. 544 (1981) and its progeny ("*Montana*"). *See* Encana's Memorandum, pp. 11-19.

DHS also asserts that none of the incidents giving rise to Plaintiff Jorgenson's claims "occurred within the exterior boundaries of the Wind River Indian Reservation." Defendant DHS's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment Based on Lack of Jurisdiction ("DHS's Memorandum") at 3-4.[1] DHS argues that "[t]he only relevant issue that matters is the location of the well and accident site to the boundaries of the Reservation." *Id.* at 13. *See also* DHS's Memorandum at pp. 2, 7-18. DHS does not argue that

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[1] DHS even asserts that its argument on this point is "undisputed." DHS's Memorandum at 17.

the Northern Arapaho and Eastern Shoshone Tribes ("Tribes") would lack jurisdiction if the relevant events occurred within the Reservation boundaries.

This brief is organized into the following sections. Section II. outlines a long course of dealings between Defendants and the Tribes, including express admissions by Defendants that the minerals subject to the applicable lease belong to the Tribes and are located within the Wind River Reservation. It also addresses the assertion by Defendants that the jurisdictional issue they raise is one of "subject matter" jurisdiction. Section III. addresses the only case which decided the status of the 1905 Act area, and the boundaries of the Reservation, in which all affected governments were parties – *In Re The General Adjudication of All Rights to Use Water in the Bighorn River,* 753 P.2d 76 (1988) ("*Big Horn I*"). It also outlines all other cases which touch on the subject, none of which alter the result in *Big Horn I.* Section IV. presents the federal law of disestablishment, historical facts, and legal analysis which support the ruling in *Big Horn I* that the 1905 Act did not disestablish the Wind River Reservation. The Section includes subsections specifically addressing arguments made and exhibits presented by Defendants. Section V. addresses Defendant Encana's argument regarding *Montana* and its progeny. The conclusion is presented in Section VI.

Citations throughout this brief are to public law and records subject to judicial notice. In addition, where possible, citations to these public records include citations by reference to a BATES number (*i.e.*, BATES SH11655). The BATES documents are attached with this brief on a CD for the convenience of the Court and parties. Exhibits which are not identified with a BATES number are attached in hard copy and identified as Northern Arapaho Tribe Exhibits

"NAT 1.1," "NAT 2," "NAT 3," etc.

II. Defendants are Estopped from Challenging Jurisdiction in the Case at Bar.

A. Defendants Defy Their Own Admissions.

1. The Challenge.

From their initial filings, Defendants have aggressively advanced the position that the Tribal Court lacks jurisdiction to hear this case. The jurisdictional challenge was first raised by each Defendant in a motion to dismiss. Encana put the jurisdictional issue directly before the Court, stating that "[b]ecause of Encana's status as a nonmember and because the location of the well and accident site are not on tribal owned and controlled lands, this Court lacks subject matter jurisdiction to adjudicate this case." Defendant Encana's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Encana's Motion to Dismiss) at p. 2. In support of its Motion to Dismiss, DHS noted that, for purposes of the Motion, the allegations of the Complaint were to be taken as true, but that in fact "[t]he evidence is indisputable that the accident did no (sic) occur on land subject to the control and supervision of the Wind River Indian Reservation, but actually occurred on property belong (sic) to, or the responsibility of Freemont (sic) County, Wyoming. Memorandum of Points and Authorities in Support of Motion to Dismiss at p. 4, n. 4.

In addition to the jurisdictional challenges in Tribal Court, DHS filed a Complaint for Declaratory Relief and For a Writ of Prohibition in the United States District Court for the District of Wyoming. In that Complaint, DHS alleged that as to the Plaintiff's action in Tribal Court, "[a]ll relevant actions of DHS occurred on property not within the boundaries of the Wind River Indian Reservation of the Shoshone and Arapahoe Tribes and on land owned in fee or

maintained and controlled by entities other then (sic) the Shoshone and Arapahoe Tribes." District Court Complaint at p. 3. It asserted that the Tribal Court did not have "personal jurisdiction over . . . DHS Drilling Company" and did not have "subject matter jurisdiction over the wrongful death action alleged against DHS Drilling Company." District Court Complaint at pp. 11-12.

Although the Federal District Court granted Plaintiff's Motion to Dismiss the DHS Complaint, and the Motions to Dismiss were denied in Tribal Court, each Defendant has continued to maintain its jurisdictional argument. In its Answer to the Plaintiff's Complaint, Encana asserted that the "Tribal Court does not have subject matter jurisdiction to hear and adjudicate this wrongful death action" and further asserted that the "Tribal Court lacks *in personam* jurisdiction over Encana." Answer of Defendant Encana Oil and Gas (USA), Inc.. (Encana Answer) at paragraphs 38 and 39, p. 8. Likewise, DHS denied that the Tribal Court has jurisdiction. Defendant DHS Drilling Company's, a Colorado Corporation, Answer to the Plaintiff's Complaint (DHS Answer) at paragraph 1, p. 1. In subsequent filings, each Defendant has consistently argued that the facts of this lawsuit have nothing to do with the Reservation.

2. The Facts and Admissions.

The history and course of conduct between the Tribes and Encana regarding the natural resources exploited by Encana clearly establish that the minerals belong to the Tribes; that the mineral Lease is governed by laws applicable to the exploitation of minerals in Indian country; that Encana's severance of these minerals is subject to the Tribes' severance taxes; and that Encana's and DHS's activities are subject to the Tribes' TERO fees and obligations and business

licensing requirements. A mere sampling of the long history and conduct will illustrate the point.

Encana pays mineral royalties to the Tribes for oil and gas produced in T4N, R3E, W.R.M., Section 19, where Well 19-24 is located. *See* NAT 1.1[2] and NAT 1.2.[3] Obviously, if these minerals were not the property of the Tribes, payments would not be made to them.

Encana also pays mineral severance taxes to the Tribes for oil and gas produced in T4N, R3E, W.R.M., Section 19. *See* NAT 1.3.[4] These taxes are imposed as a matter of tribal law. Shoshone and Arapaho Law & Order Code ("S&A LOC") Title XI, Ch.1. If the Tribes lacked jurisdiction to tax Encana for its activities in this Section, Encana would hardly be expected to pay the tax as a gift.

Encana merged with Tom Brown, Inc. on January 1, 2005. The Certificate of Merger submitted to the Shoshone and Arapaho Tribes included, as attachments, a list of leases affected by the merger, identified as "Tom Brown Inc. *Indian* Leases" (emphasis added.) *See* NAT 1.4. Lease No. 14-20-0258-1318, the Lease involved in the case at bar, is included in the list of

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[2] Exhibits showing Defendants' admissions regarding ownership of the mineral estate, applicable law, and related matters are labeled "NAT 1.1," "NAT 1.2," and so forth, to distinguish them from the remainder of the Tribe's exhibits, which are labeled "NAT 2," "NAT 3," etc.

[3] These Exhibits are sample mineral compliance reports. NAT 1.1 is the report for January, 2009 (date in far left column). NAT 1.2 is the report for May, 2010. Both show reporting wells in Section 19, which are subtotaled at the line labeled "Canwind 7."

[4] Exhibit NAT 1.3 is a sample "Severance Tax Summary" provided by Encana to the Tribes (1st Quarter, 2009). Encana is identified on the top of the page as the taxpayer and the report itself is provided by Ms. Howell, the taxpayer's representative. "Canwind 7" is within the Muddy Ridge Field.

"BIA" leases. *Id.* As a consequence of the merger, Tom Brown, Inc. and Encana are the same corporate entity, and Encana is bound by those admissions and agreements entered into by Tom Brown, Inc. ("TBI"). *See* 19 Am.Jur.2d Corporations § 2254.

TBI, Texaco and the Shoshone and Arapaho Tribes entered into a Communitization Agreement regarding the Mesa Verde formation in all of T4N, R3E, W.R.M., Section 19, within which Well 19-24 is located. *See* NAT 1.5. The Agreement was entered into "pursuant to the Indian Mineral Development Act of 1982." NAT 1.5, second sentence. In addition, the Agreement "shall be made subject to all applicable Federal or Tribal laws or executive orders." NAT 1.5, paragraph 9. The provision against discrimination on the basis of race is "in no way intended to limit the requirements of the Tribes' TERO ordinance (Shoshone & Arapaho Law & Order Code, Title 10). . . ." NAT 1.5, paragraph 16. *See also* Tribes' Joint Business Council Resolution 1995-7370, which refers to Lease No.14-20-0258-1318 (where Well 19-24 is located), approving the Communitization Agreement. NAT 1.6.

TBI was designated as the successor operator of communitization agreement on this tract (T4N, R3E, W.R.M. Section 19) on July 1, 1994. NAT 1.7. The designation was approved by the BIA. The 1994 designation recites a communitization agreement dated August 9, 1963, as also having been approved by the BIA. *Id.*

In 1993, the Tribes approved a Production Incentive Payment for TBI on Reservation lands, including those at T4N, R3E, W.R.M., Section 19. NAT 1.8. The Joint Business Council Resolution (No. 7040) recites that TBI desired to "maximize production, exploration, and development of natural gas from wells located on the Reservation." *Id.* The Production

Incentive Payment for TBI was created by a reduction in the Tribes' severance taxes paid by TBI on the minerals in Section 19.

In 1992, TBI and the Tribes entered into an oil and gas lease for lands in "North Pavillion," an area located just southeast of Well 19-24, but also within the 1905 Act and 1953 Act areas. NAT 1.15.[5] In the lease, TBI agrees to "comply with all Tribal tax and reporting requirements." *Id.* at para. 16.1. Furthermore, "Lessee, its employees, agents, subcontractors, and assigns acknowledge and agree that this lease is entered into and will be performed on the Wind River Reservation; the Tribal Court of the Wind River Reservation has jurisdiction over all civil matters and consensual matters arising or to be performed on the Reservation or which have a proximate effect on persons or property on the Reservation..." *Id.* at para. 20. The laws of the Tribes apply: "[t]his lease shall be governed by the laws of the Shoshone and Arapaho Tribes of the Wind River Reservation..." *Id.* at para. 21. In the event the United States or Wyoming asserts "any claim which may effect, either directly or indirectly, the sovereignty of the Shoshone and Northern Arapaho Tribes, Lessee agrees that it will immediately notify Lessor of such attempts." *Id.* at para. 23. TBI also expressly "agrees to give employment preference to Indians in accordance with the Tribal Employment Rights Ordinance." *Id.* at para. 24. These terms are also used in a number of other agreements between TBI and the Tribes regarding oil

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[5] A scrivener's error in "Exhibit B" to this document refers to the 6th principle meridian instead of to the Wind River Meridian. The 6th P.M. runs north-south through Nebraska and Kansas (*see blm.gov/cadastralsurvey/meridians/6th principal meridian.html.*) "Exhibit B" correctly notes that the leased acreage is in "North Pavillion." *See also* NAT 1.16, the relevant portion of a map produced by Encana which shows the location of the North Pavillion field in relation to the Muddy Ridge field, where Well 19-24 is located.

and gas development in the 1905 Act and 1953 Act areas.

The assignment of the oil and gas Lease to TBI in 1991 was done on the standard BIA assignment form and was approved by the BIA. NAT 1.9.

In a letter from the office of the Commissioner of Indian Affairs in 1964, the Area Director of the BIA was informed that approval of a communitization agreement between the Tribes, California Oil Company and Tidewater Oil Company required the approval of the BIA. NAT 1.10. It recites that leases were issued to these companies by the BLM pursuant to the 1953 Act but that pursuant to the 1958 Act "the minerals underlying the lands involved and also other lands within the Riverton reclamation project were restored to tribal ownership." The Commissioner notes that "The provision for the division of the royalty is not important to the tribes because they are entitled to all of the royalty." *Id.* As a consequence, the U.S. Geological Survey "has no authority to approve the instrument, because under the 1958 Act the tribes succeeded the Government as lessor in these leases and that the approval should be given by this Bureau [BIA]." *Id.* The subsequent BIA approval of this communitization agreement references oil and gas Lease No. 14-20-0258-1318, the Lease at issue in the case at bar. NAT 1.11.

Encana provided three large maps to the Tribes, all of which identify the area and location of Well 19-24 as "Wind River Indian Reservation Encana Leases." They also show substantial tribal minerals and "Pending BIA Leases" in the 1905 Act area. NAT 1.12, 1.13 and 1.14.

DHS "admits that it was authorized to conduct business within the Wind River Indian Reservation, was registered with the Tribal Rights Employment Office [sic] of the Wind River

> 19-24BM was located within the Wind River Indian Reservation. . . . DHS in reliance on this information, complied with the requirement of its Tribal Business License and TERO agreement.

DHS Memorandum at p. 6.

Indeed, DHS goes further, offering the remarkable proposition that the decision of this Court denying the Motions to Dismiss for Lack of Jurisdiction, and the decision of the Federal District Court making an initial ruling on the same point, were premised on a mistake:

> Both the Wyoming Federal District Court's ruling, and this Court's ruling concerning issues related to jurisdiction over this case were premised on the belief that the all [sic] of the incidents giving rise to the Plaintiff's claims occurred within the exterior boundaries of the Wind River Indian Reservation. Both Courts relied on a business license and Tribal Employment Rights Office "TERO" agreement that was entered between the Tribes, TERO and DHS. Included within these agreements was that DHS must comply with and make certain payments to TERO or the Tribes related to its drilling operations. DHS complied with these agreements, and the payments were mistakenly made.
>
> Discovery in this case commenced by the parties subsequent to this Court's ruling on the motions to dismiss for lack of jurisdiction. This discovery has revealed that none of the actions or incidents giving rise to the Plaintiff's claims occurred within the exterior boundaries of the Wind River Indian Reservation.

DHS Memorandum at pp. 3-4.

DHS cites nothing in support of its suggestion that this Court and the Federal District Court misunderstood the facts of the case. Moreover, given that the challenges to jurisdiction rested specifically on the extra-territorial argument, it seems unlikely that the Federal Court misunderstood the allegations, and even more unlikely that this Court failed to grasp the facts of

Indian Reservation, and had entered into a consensual agreement with the tribes of the Wind River Indian Reservation." DHS Answer at paragraph 1, p. 1. Encana likewise concedes that it "complied with tribal business license ordinances, TERO ordinances, and conducted activities that affect the Tribes' economic security". Encana's Motion to Dismiss at pp. 12-13.

These few examples of the long history of BIA regulation, Tribal control and regulation, and admissions by Encana, or its predecessors, make it absolutely clear that the minerals belong to the Tribes and that the Tribes are authorized to regulate and levy taxes on the severance of these minerals and the business activities of Encana and DHS.

3. The Excuse.

Because the reality of compliance with Tribal regulatory requirements is unassailable, the Defendants have devised a novel explanation for those circumstances, characterizing their actions as being either a mistake or merely a gesture of good will. As articulated by Encana, the company was not required to comply with Tribal regulations and therefore the fact of compliance is meaningless:

> Encana's gratuitous off-reservation compliance with TERO does not give rise to extraterritorial tribal jurisdiction. Whether a gesture of good will or mistake, the fact of Encana's TERO payments does not create any obligation to make such payments under Tribal law. Nothing requires Encana to pay TERO fees with respect to the Tribal Muddy 19-24 BM well.

DHS Memorandum at p. 19, n. 7. DHS relies primarily on the theory that its compliance was a mistake, based upon information received from Encana (which had apparently not, at that point, discovered its own mistake as to the location of the well):

> DHS was informed by Encana, the well operator, that Tribal Well

the case.

The reality is that neither Encana nor DHS can with any credibility explain away their compliance with Tribal regulatory requirements, much less their decades-long course of dealing with the Tribes. The simple facts establish beyond any dispute that both Encana and DHS fully acknowledged the jurisdiction of the Shoshone and Arapaho Tribes to regulate their activities in regard to this Well and they are estopped from arguing otherwise.[6]

B. Defendants Cannot Escape the Consequences of Their Conduct.

In an effort to avoid the consequences of decades of admissions, agreements, and course of conduct recognizing the jurisdiction of the Tribes and this Court, Defendants attempt to characterize their challenge to the Court's territorial jurisdiction as one that raises "subject matter" jurisdiction. *See* Encana's Memorandum at p. 1 and DHS's Memorandum at p. 1. Challenges to subject matter jurisdiction of a court cannot ordinarily be waived by parties.

Of course, objections to tribal court jurisdiction may be waived by a party's conduct under *Montana v. U.S.*, 450 U.S. 544 (1981) ("*Montana*") and its progeny, on which Defendants heavily rely. *Montana* restricts tribal court jurisdiction over non-Indian activities on non-Indian fee lands, generally on the ground that tribes have lesser interests than states have in exercising jurisdiction in those instances. (Conversely, tribes generally have greater interests than states in cases involving at least some Indian parties or occurring on or effecting tribal property. *See* Section V. of this brief.) One exception to the *Montana* restriction is when the non-Indians on

[6] Estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has been established by his own deeds or representations, either express or implied. 28 Am.Jur.2d Estoppel and Waiver § 1.

non-Indian fee land have sufficient "consensual relations" with the tribe such that tribal court jurisdiction is not unfair to the non-Indian defendants. Defendants do not explain how they *can* consent and also *cannot* consent to tribal jurisdiction under *Montana.*

"Traditionally, notions of *personal* jurisdiction have been based on the defendant's presence within the *territorial* power of a particular court." 4 Fed. Prac. & Proc. Civ. § 1063 (3d ed.) (emphasis added.) "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him..." *International Shoe Co. v. Washington*, 326 U.S. 310 at 316 (1945). Today, "the earlier concept has given way to a broader and more refined application of the due process requirement; the current philosophy is that the defendant must have sufficient contacts with the forum so that the maintenance of a suit against her in that locale does not offend traditional notions of 'fair play and substantial justice.'" 4 Fed. Prac. & Proc. Civ. § 1063 (3d ed.) Of course, "personal jurisdiction is a waivable individual liberty right." *Azubuko v. Massachusetts Assistant Attorney Gen.* D.C.N.H. 2006, 2006 WL 3511355, *3.

The fact that parties may consent to tribal court jurisdiction under *Montana* is consistent with the principles applicable to *in personam* jurisdiction. As noted above, the concept of *in personam* jurisdiction has always been associated with *territorial* jurisdiction. And now, personal jurisdiction no longer even depends on the presence of a defendant within the territory; personal jurisdiction extends even to cases in which the defendant is *outside* the territory of the court, so long as "he have certain minimum contacts with it such that the maintenance of the suit

does not offend 'traditional notions of fair plan and substantial justice.'. . ." *International Shoe, id.* [7]

Defendants Encana and DHS have consented to Tribal Court jurisdiction through a long history and course of dealings with the Shoshone and Arapaho Tribes. (This consent would be sufficient even if all the parties involved were non-Indian and the relevant property was non-Indian.) Defendants cannot now escape their own conduct by both relying on and ignoring *Montana* or by reinventing the historical and modern connection between *territorial* and *in personam* jurisdiction.

In any event, Defendants are present and their conduct occurred within the exterior boundaries of the Wind River Reservation, as set forth below in Sections III. and IV.

III. *Big Horn I* Correctly Decided that the 1905 Act Did Not Disestablish the Reservation Boundaries.

In the only case in which all interested governments were parties, the Wyoming Supreme Court correctly decided that the 1905 Act did not disestablish the Reservation and, on that basis, awarded 1868 treaty-based water rights to individuals and entities within the 1905 Act area. *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988), *cert. denied Wyoming v. United States*, 492 U.S. 406 (1989) ("*Big Horn I*"). In *Big Horn I*, the Court squarely rejected Wyoming's contention that the 1905 Act disestablished the portion of the Reservation opened by the 1905 Act. DHS's

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[7] The Tribal Court's jurisdiction extends to "the territory within the Wind River Indian Reservation" and "shall extend beyond the territorial limitation set forth above, to effectuate the jurisdictional provisions set forth below [regarding personal jurisdiction], to the greatest extent permissible by law." S&A LOC Sec. 1-2-2.

Memorandum makes no reference to *Big Horn I* at all. Encana's Memorandum cites *Big Horn I* solely to identify its reference to one document that is part of the legislative history of the 1905 Act. Encana's Memorandum at 3. Apparently well aware of *Big Horn I*, Encana makes no effort to present its actual ruling to this Court.

In *Big Horn I*, Wyoming sued the United States as the Tribes' trustee alleging that any Indian water rights reserved by 1868 Treaty establishing the Wind River Reservation had been abrogated by the 1905 Act. Throughout the adjudication, Wyoming maintained that the 1905 Act disestablished the opened portion of the Reservation. After months of proceedings, extended discovery, weeks of trial, and numerous appeals, Wyoming's own courts rejected the State's disestablishment argument and entered a Judgment and Decree which affirmed the continuing reservation status of the 1905 Act area. The court ruled that the 1905 Act merely "opened," and did not disestablish the Reservation as Wyoming had vigorously contended. The status of the 1905 Act area as part of the Wind River Reservation was firmly and finally established in *Big Horn I.* The United States and the Tribes litigated this question against Wyoming in the State's own courts – Wyoming lost.

A. Background and Course of Proceedings in *Big Horn I*.

Big Horn I was part of a general water rights adjudication. The fact that the reservation boundary issue arose and was litigated in the context of water is not surprising. Over the past century, control of scarce water resources has been a prominent economic and political flashpoint pitting the interests of western states like Wyoming against Indian tribes and the federal government. In order to understand why the Indian Country status of the 1905 Act area

was so central the *Big Horn I* adjudication, it is helpful to review the legal history of federal reserved water rights – the kind of rights that were at issue in *Big Horn I*.[8]

1. The Reserved Rights Doctrine.

With water rights in the west, tensions emerged early on between the doctrine of prior appropriation, the rights of Indian Tribes, and the federal government's trust responsibility to the Indians. By 1908, these tensions had made it to the United States Supreme Court. *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court considered the grievances of non-Indian irrigators diverting water from the Milk River near the Fort Belknap Indian Reservation in Montana. Non-Indian irrigators claimed so much water from the Milk River that nothing would have been left to develop the agricultural potential of the Reservation. 207 U.S. at 577. The Court considered this circumstance and concluded that allowing this result would defeat the intent of Congress in setting aside reservations for Indians. *Id.* The Court noted the injustice of forcibly requiring the Indians to abandon a nomadic livelihood centered on buffalo and take up farming instead without providing the water necessary to do so. *Id.* The Court concluded that Congress intended the Indians would have water rights on their reservation lands and that these rights vested on the date the reservation was created. *Id.* The Court reasoned that Congress could not have concluded otherwise, because doing so would deprive the Indians of "the consideration of their grant . . . leaving them a barren waste." *Id.* *Winters* thus affirmed the

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[8] "Historical perspective is of central importance in the field of Indian law." *Cohen's Handbook of Federal Indian Law*, 2005 Ed. ("Cohen") § 1.01. "Only with a full understanding of the relevant historical backdrop can a modern court place a contested transaction in a context appropriate for decision-making." *Id.*

existence of federal reserved water rights – rights that are: (1) reserved for future purposes; (2) appurtenant to Indian reservations; (3) incapable of being lost through non-use; and (4) senior in priority to rights perfected under state law. Cohen, § 19.03.[9]

After *Winters*, non-Indian western water users tended to resent federal reserved water rights because of the perceived potential for those rights to undermine existing uses.[10] From the perspective of a downstream non-Indian irrigator, the existence of an unquantified, upstream, senior priority federal water right was an understandable source of concern. Furthermore, because the federal government enjoyed sovereign immunity, state law mechanisms were largely powerless to manage this uncertainty.

By 1952, these resentments reached a critical mass, and western states prevailed upon Congress to pass 43 U.S.C. § 666 – legislation commonly known as the McCarran Amendment. The statute provided a waiver of sovereign immunity by the United States for the limited purpose of quantifying water rights in general stream adjudications, a species of quiet title action.[11] *See*

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[9] Cases that arose after *Winters* helped further define the contours of federal reserved rights. Federal or Indian reserved water rights exist for "appurtenant lands withdrawn from the public domain for specific federal purposes." *United States v. Arizona*, 438 U.S. 696, 698 (1978) *citing Winters v. U.S.*, 207 U.S. 564 (1908). Reserved water rights of the United States extend to Indian reservations, forest reserves, national parks, and national monuments. *Id.*

[10] *See* McCarran Amendment Adjudications – Problems, Solutions, Alternatives, Michael D. White, Land and Water Review, Vol. XXII, No. 2, p. 621 (1987) (BATES SH34494) (Tribes' effort to exercise sovereignty over water rights "sticks in the craw" of Western States). This article provides a partisan view of the policy issues that arise in McCarran Amendment proceedings. The author, Mr. White, served as Special Assistant Attorney General for the State of Wyoming in the *Big Horn I* case.

[11] The Supreme Court has called these "a quiet title action for the adjudication of water rights." *Nevada v. U.S.*, 463 U.S. 110, 129 (1983).

"Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming," XXI Land and Water L. Rev. 457 (1977) (BATES SH34424).

The McCarran Amendment left many questions unanswered, especially questions about what kind of state court procedures were appropriate where the United States would be a party. Colorado courts played a pioneering role in McCarran Amendment litigation. *See* "McCarran Amendment General Adjudication in Wyoming: Threshold Problems," XVI Land and Water L. Rev. 53 No.1 (1981) (hereinafter "Threshold Problems") (BATES SH34454). With these early lessons in hand, on January 22, 1977, the Wyoming legislature passed a statute authorizing McCarran Amendment proceedings under Wyoming law. Wyo. Stat. Ann. § 1-37-106.

2. Early Stages of *Big Horn I* Adjudication.

Two days later, on January 24, 1977, the Attorney General for the State of Wyoming filed suit in state court against the United States in its proprietary capacity and its capacity as trustee for the two Tribes at the Wind River Reservation. On the same day the suit was filed, the state court ruled that joinder of the United States was proper under the McCarran Amendment. *Big Horn I*, 753 P.2d at 84.

The United States removed the case to federal court, claiming the state court was without jurisdiction in this suit against the United States. However, on June 1, 1977, the federal district court granted the State's motion to remand the case to state court, finding that the McCarran Amendment, and § 1-37-106, W.S.1977, provided for state court jurisdiction. *Big Horn I*, 753 P.2d at 84.

On August 21, 1977, the United States moved to dismiss the state court action, again

contending that the state court was without jurisdiction and that the Tribes were indispensable parties. *Big Horn I*, 753 P.2d at 84. When it became apparent that reservation water would be disputed, and the United States as the Tribes' trustee could not extricate itself from the Big Horn litigation, the Eastern Shoshone and Northern Arapaho Tribes intervened to defend their interests. *Id.* The state court granted intervention on November 21, 1977. *Id.* On December 20, 1977, Judge Harold Joffe denied the United States' motion to dismiss and granted the State of Wyoming partial summary judgment on the United States' jurisdictional defenses. *Id.*

On April 20, 1978, the State moved the court to certify the case to the Wyoming Board of Control pursuant to § 1-37-106(a)(i)(A)(I), W.S.1977. Judge Joffe entered the First Order of Certification and Referral to the Wyoming State Board of Control on August 22, 1978. The United States and the Tribes objected to the certification and moved for the appointment of a special master. These objections were rooted in the fear that Wyoming's control board was not a sufficiently neutral forum for the adjudication of Indian and federal rights.[12] On May 4, 1979, with the agreement of the parties, Judge Joffe appointed former Wyoming Congressman Teno Roncalio as Special Master.

With these preliminary procedural skirmishes concluded, the case was postured to deal directly with the crux of Wyoming's contention – that the Eastern Shoshone and Northern

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[12] Counsel for Wyoming, the United States and the Tribes agreed the Board of Control should not serve as special master because of conflicts. To resolve this problem, the parties agreed to the appointment of Teno Roncalio. *See* "Threshold Problems" at 54, n. 11 (BATES SH34454). Withholding consideration of federal reserved rights from the Board of Control was designed to protect federal interests from any bias on Wyoming's Board of Control. *Id.* at 68 (BATES SH34454).

Arapaho Tribes were entitled to no federally reserved water rights based on the establishment of the Wind River Reservation.[13] Wyoming's contention that the Tribes had no federally reserved water rights was premised on the theory that the 1905 Act disestablished the Reservation, and embodied an intent by Congress to strip all Reservation lands of any federally reserved water rights. Wyoming maintained that the 1905 Act returned the area opened by the Act to the public domain, terminated the "federal enclave" status of those lands, and, therefore, federally reserved water rights could not attach to lands in the 1905 Act area.

Though the Wyoming state courts had opined upon the reservation status of the 1905 Act area previously, until *Big Horn I*, the Eastern Shoshone and Northern Arapaho Tribes had never been parties. With both Tribes, the United States, and the State of Wyoming joined as parties in *Big Horn I*, the stage was set for adjudication of the reservation status of the lands opened by the 1905 Act.[14]

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[13] *See* "Wyoming's Experience With Federal Non-Indian Reserved Rights: The Big Horn Adjudication" XXI Land and Water L. Rev. at 435, No. 2 (1986) (BATES SH34472) (describing Wyoming's position on the existence of federally reserved water rights).

[14] The pendency of state court proceedings involving Wyoming, the United States, and two federally recognized Indian Tribes as parties can only be described as momentous. *See Colorado River*, 424 U.S. at 825-826 (adjudication of water reserved for Indian reservations is a matter "of life-and-death importance to Indians."). Generally, Indian Tribes would be loath to join state court proceedings or to allow their sovereign interests to be adjudicated in a state court forum. *See* Cohen § 2.01[2] ("The field of federal Indian law has been centrally concerned with protecting Indian tribes from illegitimate assertions of state power over tribal affairs."). Typically, Tribes have stayed out of state court proceedings that approach reservation boundary questions, relying instead on the knowledge that they cannot be bound by any judgment rendered in their absence. *Seymour v. Superintendent*, 368 U.S. 351, 353-55 (1962). In *Big Horn I*, because of the unique waiver of United States sovereign immunity created by the McCarran Amendment, the Tribes were effectively forced to join the state court litigation to protect their right to water within the Wind River Reservation.

3. Proceedings Before the Special Master.

Upon his selection by the parties, Special Master Roncalio was broadly authorized by the District Court both to find the necessary facts and to "[a]djudicate any interest in or right to use the water of the Big Horn River System . . . including, but not limited to, any appropriate or reserved rights of the Arapahoe Tribe, Shoshone Tribe, or of the United States. . . ." *Big Horn I*, 753 P.2d at 85; *see also* W.R.C.P. 52(a) ("Findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."); *see also Lutz v. Schmillen*, 899 P.2d 861, 863 (Wyo. 1995). As a prerequisite to quantifying and prioritizing these federal reserved water rights, it was necessary first to determine the geographic area for which the water rights might be asserted. Federally reserved water rights only attach to federal enclaves. Wyoming hotly contested whether the 1905 Act area was a federal enclave. Special Master Roncalio recognized the importance of defining the pertinent geographic areas:

> At the outset, it is important to bear in mind the role which the boundary determinations play in this case. This is a water rights case, not a land case. The acreage of the Wind River Reservation is an issue because practicably irrigable acreage is made the measure of the Reservation's water rights. * * * To use this measuring device, in turn, it is necessary to know the extent of the Reservation, and to measure the latter, the boundaries.[15]

The Special Master's initial work on this project spanned more than fifteen months, beginning in August, 1979. It included a "boundaries and dates trial" which began in April, 1980. It included at least eleven days of trial, several hearings, extensive briefing and argument, submissions of proposed findings of fact, conclusions of law and proposed orders. A primary

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[15] Roncalio Report, pp. 31-32 (BATES SH04101).

dispute in all of these proceedings was the reservation status of the 1905 Act area.

a. Framing the Issue.

The "boundaries and dates" portion of the adjudication began with a first Meeting of Parties, held on August 7, 1979. After that meeting, the Special Master ordered the United States to file a statement of the geographic boundaries of all federal reservations, including the Wind River Reservation, and the dates of establishment and extensions, with supporting documentation.

The United States filed its Statement of Geographical Boundaries on September 17, 1979 (BATES SH24174). The statement contained descriptions of all areas which the United States claimed as federal enclaves within the Big Horn River basin, and it included the dates of establishment for each. As to the Wind River Reservation, the Statement provided a description that was primarily geographic, relying upon references to natural features and monuments, for example: "[c]ommence at the mouth of the Owl Creek and run due south 10 miles. . ." (Statement, p. 2). The Statement narrowed the dispute by removing lands embraced by the Thermopolis and Lander purchases from consideration. In support of the descriptions, the United States provided copies of relevant documents, including treaties and statutes.

The State responded by filing a motion for a more definite statement as to the legal descriptions of the Wind River Reservation, on the grounds that the descriptions provided by the United States were "so vague, indefinite and uncertain that the State of Wyoming cannot determine therefrom the said boundaries by reference to government subdivisions or portion

thereof and, as a result, cannot frame a response thereto as required by the Master."[16] By Order dated October 2, 1979, the United States was required to provide descriptions by "aliquot [fractional] portion of government survey" (BATES SH34371).

The United States responded with an explanation for the method of its descriptions, but did not provide descriptions "by reference to government subdivisions or portion thereof" or by reference to "aliquot portion of government survey." Thereafter, a Stipulation Concerning the Boundaries (BATES SH14180) was crafted ("the stipulation"). In the stipulation, the parties moved for entry of an order "approving the following stipulation for the purposes of this litigation only":

> For the purposes of determining the reserved water or other rights to the use of water, if any, which may exist with respect to the Wind River Indian Reservation, the exterior boundaries of the Wind River Indian Reservation are as set forth in the United States Statement of Geographic Boundaries filed herein, and are agreed to include the following-described lands: [there follow 14 pages of government survey descriptions which encompass all of the 1905 Act area, including the City of Riverton].
>
> The parties reserve their rights to challenge the validity, priority date, purposes, quantity of water, and any other characteristic of any water rights which may be claimed in the above-described area.
>
> This stipulation shall not affect the jurisdiction of any parties over lands within the exterior boundaries of the Reservation.

The first clause of the stipulation adopted the position of the United States as to the "official" boundary description, but also dealt with Wyoming's concern by accepting a description based on government surveys to facilitate precise identification of lands for which a

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[16] Motions of the State of Wyoming for More Definite Statement and for a Continuance (BATES SH33985).

reserved water right might be claimed.

By acknowledging that the Stipulation was only for purposes of the *Big Horn I* adjudication, the parties recognized that the official description of the boundaries would remain unchanged. The Stipulation was not intended to restrict, nor did it purport to restrict, the Court's authority to make the necessary determination about what areas within the stipulated boundaries held federally reserved Indian water rights with an 1868 priority date. Essentially, the Stipulation narrowed the battleground for the upcoming dispute about where federally-reserved rights might exist – a determination that necessarily required a decision about the continuing reservation status of lands within the boundaries set forth in the stipulation. In fact, after reserving the right to litigate the reservation status of the 1905 Act area (that is, to litigate whether 1868 Treaty-based water rights could arise within it), Wyoming immediately embarked on doing so.

b. Wyoming Challenges the Reservation Status of the 1905 Act Area.

With the basic geographic boundaries defined, Wyoming put forth its attack on the reservation status of the 1905 Act area. To establish that this portion of the reservation was not entitled to federal reserved rights, Wyoming contended the 1905 Act embodied Congress's intent to terminate the reservation status of those lands, rather than simply opening them to entry by homesteaders. Wyoming's argument was based on the theory articulated by the dissent in *Big Horn I*, that "disestablishment" of an Indian reservation "abrogates appurtenant rights."[17] *Big*

[17] Wyoming contended that the Reservation was "disestablished." The terms "diminished" and "disestablished" are often used interchangeably in the context of surplus land acts, such as the 1905 Act

Horn I, 753 P.2d at 133. Wyoming contended that no federal reserved rights were available for lands in the 1905 Act area because these lands were disestablished and no longer within a federal enclave.

On March 20, 1980, Wyoming filed a brief asserting that "the major parties have agreed to the exterior boundaries of the Wind River Indian Reservation. However, . . . a genuine issue of material fact exists concerning the proper establishment dates for portions of the Wind River Indian Reservation."[18] Wyoming contended that water rights in the 1905 Act area did not have an 1868 establishment date because the 1905 Act disestablished that portion of the reservation.

Shortly thereafter, on April 7, 1980, the Shoshone and Arapaho Tribes set forth their position on the reservation status of the 1905 Act area:

> [t]he 'open' portion of the Reservation has thus without interruption remained not only part of the Reservation but an important part of the Reservation. Except for the reclamation area, almost all the land in the opened portion is held in trust by the Unites States for the Tribes – remained 'Indian lands' during the opened period from 1905 until restored (citations omitted) – and has never left the tribal-federal trust relationship.[19]

As these filings depict, and as is reflected throughout the whole record leading up to the trial, the major parties had articulated clearly opposing positions as to the effect of the 1905 Act on the date of establishment for federal reserved water rights within the 1905 Act area, and were, moreover, acutely aware that the priority dates for water rights appurtenant to the 1905 Act area

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[18] Wyoming's Memorandum Response Concerning Federal Reservation Boundaries, filed March 20, 1980) (BATES SH34022).

[19] Pretrial Brief of the Shoshone and Arapahoe Tribes with Respect to Purposes and Legal Standards for Measurement of the Tribes' Reserved Water Rights, filed April 7, 1980, p. 5 (BATES SH33992).

depended on the disestablishment issue. Therefore, each of the parties was prepared to, and did, fully present and defend its position on this issue during the boundaries and dates trial.

The critical issue was recognized by the parties and by the Special Master during the first days of the trial. In an exchange about admissibility of documents showing establishment dates for portions of the Reservation, the parties acknowledged the central importance of the disestablishment issue:

> Mr. Facciola: [for the Tribes] That assumes an enormous matter between us. We began a couple of days ago and you [speaking to the Special Master] mentioned "The guts of the lawsuit." That may be it right there. What is the appropriate date for the purposes of protecting the Tribes' rights with regard to the lands we have been talking about for the last several days? I don't mean to argue it now, but there is a lot more than meets the eye.
>
> Mr. White: [for the State] That's correct, Your Honor. The state of Wyoming takes the position that a portion of the Reservation has an 1868 priority date –
>
> The Special Master: The rest has something else.
>
> Mr. White: But the rest is later. . . .
>
> The Special Master: What you're saying, we don't want to fight now, but I see a lot of artillery being pulled up into position.
>
> Mr. Facciola: That is accurate.[20]

The issues concerning the 1905 Act area were subsequently addressed during the April and July trial segments, where the parties presented and argued about historical documents related to Reservation lands.[21] The Tribes relied primarily on their trustee, the United States, to

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[20] Transcript of April 1980 trial, pp. 407-08 (BATES SH23495).

[21] Once the positions of the parties were preliminarily briefed, trial was scheduled to resolve these issues, broken up into several sub-proceedings. Portions of the trial were held from April 15-18, 1980, June 23-24, 1980, and July 14-22, 1980.

put on evidence at the dates and boundaries trial regarding the reservation status of the 1905 Act area. The United States called Dr. Peter Iverson, of Laramie, Wyoming, a specialist in American Indian history. He testified at length to show that the 1905 Act did not disestablish the affected portion of the Wind River Reservation. Dr. Iverson's direct testimony was extensive. He was cross-examined in detail by the State.[22]

The State reiterated its position and summarized its case in its opening statement for the portion of the trial held in July, 1980:

> Mr. White: . . . our position is that while the reservation, the Indian reservation was created in 1868, and a portion of that reservation still exists as created in 1868 being the diminished portion, the remainder of the reservation, commonly known as the ceded or opened portion was taken out of reservation status in 1905 and restored back piece meal through ten restoration orders. . . .
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> * * *
>
> Finally, we will show . . . that after the 1905 act, the land north of and east of the proposal [sic] was no longer part of the reservation.[23]

On July 23, 1980, Wyoming submitted a brief expounding on the disestablishment case it put forward at trial. By this stage of the proceedings, Wyoming had conceded that "the priority date for any reserved water right found by the Court to exist for those portions of the Wind River reservation which were never disestablished or patented to non-Indians is July 3, 1868 [date of

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[22] Transcript of Trial, April 1980, pp. 114-268; 522-598 (BATES SH23872, BATES SH23726); Transcript of Trial, July, 1980, p. 179 (BATES SH23020); *see also Id.* at 41-133 (Testimony of Voeller) (BATES SH23020).

[23] Transcript of Trial, July 1980, pp. 176-179 (BATES SH23020).

treaty establishing the Reservation]."[24] But Wyoming insisted that no federal reserved right existed for the 1905 Act area because the 1905 Act had "disestablished" that portion of the reservation:

> The lands in the ceded portion of the Wind River Reservation . . . were discontinued as part of the reservation from the date of passage of the Act in 1905. . . . When this cession occurred and the lands were discontinued as part of the reservation, the original purposes of the reservation, and therefore any implied reserved water rights for those purposes, clearly ceased to exist.[25]

The alleged "disestablishment" effectuated by the 1905 Act was thus the *key* to the State's position in *Big Horn I* and an essential issue which had to be resolved by the court in order to determine the priority date for any federally reserved water rights within the 1905 Act area. Wyoming doggedly pressed its disestablishment theory throughout this portion of the proceedings.

On September 3, 1980, Wyoming submitted another brief regarding the Reservation boundaries stating that the 1905 Act issue "remain[ed] to be resolved." Wyoming characterized this unresolved issue as follows:

> (1) Wind River Indian Reservation. Whether the 1904 Treaty and 1905 Act disestablished the lands ceded thereby from the WRIR and if so, what are the proper establishment dates for ceded lands.[26]

Wyoming again argued that the 1905 Act area had been disestablished, relying heavily on the

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[24] Brief in Support of its Response to the Claims for Water Rights of the United States and Shoshone and Arapahoe Tribes (State's Brief re: Water Claims) at 52 (BATES SH34031).

[25] *Id.* at 60 (BATES SH34031).

[26] Wyoming's Brief in Support of Its Proposed Findings of Fact and Conclusions of Law Concerning Federal Reservation Boundaries and Establishment Dates ("State's Brief re: Boundaries") at 1 (BATES SH34256).

decision in *Wyoming v. Moss*, 471 P.2d 333 (Wyo. 1970):

> The dispute here focuses on whether the 1904 Treaty, confirmed in 1905, effected a disestablishment of the ceded lands from the Wind River Indian Reservation. As Wyoming has pointed out before, the Wyoming Supreme Court has already settled the issue. . . . In 1970, the Wyoming Supreme Court unanimously held that the 1905 Act effected a disestablishment of the ceded portions of the reservation. . . .[27]

Once again, Wyoming argued that the disestablishment issue barred the Tribes' claim to reserved water rights:

> Priority dates of reserved rights are governed by establishments, disestablishments and restorations of reservations. Both federal and Wyoming case law compel a finding that the ceded portions of the Wind River Indian Reservation was [sic] disestablished by the 1904 Treaty and 1905 Act.[28]

On April 12, 1982, Wyoming filed a proposed report with the Special Master encouraging a conclusion that "would result in the disestablishment of the ceded portion of the reservation."[29] Wyoming's proposal said:

> 9. . . . [T]he United States, the Tribes, and the State of Wyoming, resolved many of their differences concerning reservation boundaries and establishment dates. The most significant agreement, reached on April 15, 1980, concerned the lands encompassed within the present exterior boundaries of the Wind River Indian Reservation, *but this stipulation expressly reserved the rights of the parties to dispute the establishment dates and other attributes of specific lands within the Indian Reservation.*
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> 10. The Special Master conducted hearings during the weeks beginning April 14, July 14 and July 21, 1980 concerning the *still-disputed issues of fact* concerning

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[27] State's Brief re: Boundaries at 3 (BATES SH34256).

[28] State's Brief re: Boundaries at 14-15 (BATES SH34256).

[29] Wyoming's Proposed Master's Report, Proposed Findings of Facts, Conclusions of Law and Decree Covering the Claims By and on Behalf of the Tribes of the Wind River Indian Reservation at 3, ¶2 (BATES SH34506).

reservation boundaries and establishment dates [emphasis added].[30]

The Special Master took this evidence and the related arguments under advisement and deliberated upon the 1905 Act question with care.

c. The Special Master's Report.

After considering all this evidence and argument, the Special Master's Report issued his decision on the disestablishment question. In the section of his December 15, 1982, report titled "Boundaries and Dates," Special Master Roncalio explained:

> The major controversy with regard to this element (the boundaries) of the adjudication centers around the Second McLaughlin Agreement, which is more commonly referred to as the 1905 Act. . . . The State of Wyoming contends that *the language and the transaction* created a disestablishment of certain lands from the body of the 1868 Reservation in such a manner as to preclude the granting of an 1868 priority date for water on those lands which were ceded under the terms of the Agreement. . . .
>
> Attorneys for the State of Wyoming contend that this transaction [the 1904 Agreement] constituted a "disestablishment" of those lands ceded under the 1905 Act[.] . . . I think not.[31]

The Special Master squarely rejected Wyoming's disestablishment arguments. Wyoming argued vigorously that *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584 (1977), a decision resulting in disestablishment on the Rosebud Reservation, should govern the disestablishment question on the Wind River Reservation. Special Master Roncalio concluded otherwise, saying that "this case - and its 1905 Act - differ substantially from the facts and circumstances involved in

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[30] *Id.* at 10-11 (BATES SH34506).

[31] Roncalio Report at 37 (emphasis added) (BATES SH23872).

Rosebud [sic] . . . *Rosebud* should not control the decision here."[32] The Special Master acknowledged that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." Roncalio Report at 37, citing *U.S. v. Celestine*, 215 U.S. 278, 285 (1909). He also recognized that a Congressional determination to disestablish a reservation "must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." Roncalio Report at 38, citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

The Special Master embraced the position of the United States and the Tribes – that the language of the 1905 Act left the boundary of the Reservation intact. Applying the analysis required by *Mattz* and *Seymour*, 368 U.S. 351 (1962), the Special Master held that the language of the 1905 Act "clearly indicates that the intent of this Act was to establish a trust relationship, with the United States acting as the trustee for the sale of certain Indian lands to settlers."[33] He explained:

> The U.S. and the Tribes . . . argue that the [1905] Agreement simply provided a type of 'power of attorney' whereunder the United States accepted the ceded lands and held those lands in trust for the Indians for resale to other persons, and that the United States maintained a continuing obligation to the Indians with regard to that land. Having given the issue much research and thought, it is my conclusion that the arguments of the United States and the Tribes find significantly greater support in the law than those asserted by the State of Wyoming.[34]

Special Master Roncalio elaborated on the rationale underlying this conclusion:

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[32] *Id.* at 43 (BATES SH23872).

[33] *Id.* at 39 (BATES SH23872).

[34] *Id.* at 35 (BATES SH23872).

> [Under the 1905 Act], [a]pproximately 1,480,000 acres of Reservation land north of the Wind River and east of the Popo Agie were opened to disposal to non-Indians[.] . . . [A]ll of the aforesaid opened land, *whether owned by Indians or non-Indians*, is recognized as being *within the boundaries of the Wind River Indian Reservation*. *Id.* at 268-69, ¶2 (emphasis added) (BATES SH23872).
>
> The "cede, grant and relinquish" language of Article I of the 1905 Act as it related to "all right, title and interest" in the opened lands, when interpreted with the rest of the Act and other contemporary documentation, was intended by the Tribes and the United States to give the United States the right to dispose of land by sale or settlement for the benefit of the Tribes, with the United States to act as agent for the Tribes under authority generally associated with a power of attorney. Article IX of the Act established this trusteeship. *Id.* at 270, ¶10) (BATES SH23495).
>
> The extinguishment of Indian property rights must be clearly and plainly provided for by Congress and cannot be implied. The 1905 Act does not extinguish any right to the boundaries and dates granted under this test. *Id.* at 270, ¶11 (emphasis added.) (BATES SH23495).

Accordingly, Special Master Roncalio found that "a retention of the 1868 priority date is a right to which the Indians were entitled under an existing treaty, and is a right which is not inconsistent with the provisions of the 1905 Agreement [sic]."[35]

4. District Court Decision.

Under the applicable procedural rules, Special Master Roncalio's report was presented to the District Court for review and approval. On May 10, 1983, District Court Judge Harold Joffe issued his opinion addressing the parties' exceptions to the Special Master's report. Wyoming had strenuously objected to the report's conclusion regarding the continued reservation status of the 1905 Act area. Although the District Court rejected the Special Master's conclusions of law on several important issues, it upheld the Special Master's award of an 1868 Treaty priority date

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[35] *Id.* at 44 (BATES SH23872).

for water rights associated with lands opened under the 1905 Act. *See* May 10, 1983, District Court Opinion at 23 ("On this point, the Court concurs with the conclusion of the Special Master that [the 1905 Act area] was held in trust for the Tribes by the United States and *never lost its Indian status*.") (emphasis added) (BATES SH04484). Again, the Court squarely rejected Wyoming's claim that lands within the 1905 Act area lost their reservation status.

The Court's decree listed an array of water units within the 1905 Act area which enjoyed an 1868 Treaty-based reserved right because those lands were found within the Reservation. Conversely, the decree *denied* reserved water rights for portions of ranches more recently reacquired by the United States in trust for the Tribes because those lands were determined to be *outside of* the northern boundary of the 1905 Act area.[36] The Court denied reserved water rights for tribal lands located beyond the stipulated boundary even though these lands were held in trust by the United States for the benefit of the Tribes.[37] In sum, the District Court upheld the conclusion of the Special Master that the 1905 Act did not disestablish the Reservation and allocated the priority of water rights accordingly.

Immediately following the District Court's decision, Wyoming sought to amend the judgment, asking the Court to "[c]larify the Decree's limitation upon off-reservation use of reserved water rights by defining the term 'reservation' to include only trust lands and Indian-owned fee lands."[38] The District Court denied the State's motion and, once again, upheld the

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[36] May 10, 1983, District Court Opinion at 69 (BATES SH04484).

[37] *Id.* (BATES SH04484).

[38] Motion to Amend Findings of Fact and Judgment and Decree at 2 with a Brief in Support thereof (May 20, 1983) at 9 (BATES SH14336).

Special Master's decision on the disestablishment question as "the cornerstone of the case."[39] On May 15, 1985, District Judge Alan B. Johnson entered an amended judgment and decree which expressly "approve[d] and adopt[ed] the Special Master's Report," except as inconsistent with the Court's decision.[40]

Review of the District Court proceedings in *Big Horn I* demonstrates that the court determined that the lands opened by the 1905 Act remained within the Reservation and, therefore, water rights in that area retained their 1868 priority date. Displeased by this outcome, Wyoming appealed this judgment to the Wyoming Supreme Court.

5. Wyoming Supreme Court Decision.

Wyoming's opening brief in the Supreme Court insisted again that the 1905 Act "disestablished" that area of the Reservation and "that any reserved right associated with lands that passed out of Indian ownership *or reservation status* ceased to exist on that date."[41] Wyoming argued that the 1905 Act disestablished that area and deprived those lands of a reserved water right with an 1868 priority, regardless of any subsequent Congressional act restoring the Reservation status of these lands. Wyoming argued that the District Court and the Special Master had erred in concluding otherwise.

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[39] Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983 (June 8, 1984) at 5 and 7 (BATES SH03907). The District Court characterized the disestablishment question as "the cornerstone of the case."

[40] Amended Judgment and Decree (May 15, 1985) at 3 (BATES SH04602).

[41] Wyoming Supreme Court Brief of Appellant State of Wyoming (Type One Claims) at 106 (emphasis added) (BATES SH30020).

The Wyoming Supreme Court rejected Wyoming's position, and upheld the trial court's ruling that the 1905 Act did *not* abrogate the Tribes' federally reserved water rights by disestablishing the Reservation. The Wyoming Supreme Court specifically recognized that Congress in the Thermopolis Purchase had a different intent than with the 1905 Act.

> Congress also knew how to express a relinquishment of reserved water rights. See First McLaughlin Agreement, or Thermopolis Purchase, supra, Article I (Tribes surrender "all their right, title, and interests of every kind and character" to water rights appurtenant to ceded lands). It is well established that Congress must use such explicit statutory language in order to abrogate treaty rights. [citations omitted].

Big Horn I, 753 P.2d at 76. Therefore, a senior federally reserved water right with an 1868 priority date vested in the 1905 Act area. The Court explained:

> What we have said above disposes of the contention that even if the treaty did reserve water for the Wind River Indian Reservation in 1868, the right to water was abrogated by . . . the 1905 Act. If the actions are not sufficient to show there never was any intent to reserve water, *they are not sufficient to make the even stronger showing that such an established right has been abrogated.* The district court did not err in finding a reserved water right for the Wind River Indian Reservation.

Big Horn I, 753 P.2d at 93-94 (emphasis added).

Accordingly, the Court affirmed the award of an 1868 treaty date priority, not only for lands south of the Big Wind ("diminished reservation"), but also for lands north of the Big Wind, including fee lands ("Walton rights")[42] within the 1905 Act area:

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[42] Parties have been awarded "Walton" rights on 15,315.57 acres on the Reservation. *See* Wyo. Dist. Ct. Judgment and Decree on Walton Type Claims, *Big Horn* adjudication, and Tabulation attached thereto at 11 (BATES SH05554). "Walton" rights can attach to Indian owned fee lands, reacquired tribal lands, and non-Indian fee lands that were former allotments, but they cannot be awarded outside of Indian country. When a "Walton" right is awarded, any overlapping state water permits are canceled because the right is based on the 1868 treaty, not on state water law.

> A. *Diminished Reservation.* We recognized earlier in this opinion that there was indeed a federal water right impliedly reserved for the Indians when the Wind River Indian Reservation was created by the 1868 Treaty. Therefore, we affirm the rulings below that the tribal diminished-reservation lands have a water right with a priority of 1868. . . .
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> * * *
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> D. *Reacquired Lands.* We have already held that a non-Indian purchaser from an Indian allottee obtains a reserved water right with a treaty date, and that his non-Indian successor would likewise succeed to the treaty priority date ["Walton rights"]. There is no reason then to deny the same priority to an Indian or Tribal purchaser. *Because all the reacquired lands on the ceded portion of the reservation [north of the Big Wind River] are reservation lands, the same as lands on the diminished portion [south of the Big Wind River], the same reserved water rights apply. Thus reacquired lands on both portions of the reservation are entitled to an 1868 priority date.*

Big Horn I, 753 P.2d at 112, 114 (emphasis added).

In ruling that the 1905 Act did not disestablish the reservation status of that area, the Court contrasted the terms of the Thermopolis purchase with those of the 1905 Act. According to the Court, the Thermopolis purchase contained "explicit statutory language in order to abrogate treaty rights." *Id.* at 93. The 1905 Act did not. *Id.*[43]

Justice Thomas's dissent underscored the fact that the Wyoming Supreme Court ruled against Wyoming on the merits of the reservation boundary issue. Justice Thomas disagreed with the ruling of the majority that the 1905 Act did not disestablish the Reservation. *See Big*

Id. at p. 5. A substantial portion of these 1868 treaty-based water rights have been awarded to non-Indian owned fee lands in the 1905 Act area (BATES SH05554).

[43] The fact that the majority opinion in *Big Horn I* contrasts the Thermopolis purchase with the 1905 Act undercuts Wyoming's suggestion that "the majority and dissent agreed that the reservation had been diminished." Wyoming Comments at 29, citing *Yellowbear*, 174 P.3d at 1283. Statements to this effect by the Wyoming Supreme Court in *Yellowbear* are troublingly inaccurate.

Horn I at 119-35. His "most important" point was that he did "not believe that the reserved rights doctrine is applicable to that portion of the lands lying north of the 'Big Wind River. . . .'" Thomas maintained that the opposite result was correct: "I would hold that the ceded lands have not been a 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." *Id.* at 119-20 (emphasis added). Because disestablishment of a Reservation "abrogates appurtenant [water] rights," Justice Thomas argued that federally reserved Indian water rights in the 1905 Act area did not exist:

> [T]he ceded portion has not been an Indian reservation, intended to supply an Indian homeland for the Shoshone and Arapahoe tribes since 1905. Under those circumstances, there is no justification for invoking the reserved rights doctrine with respect to those areas identified as practicably irrigable acreage on the ceded portion and including them in the quantification of water set aside for the Indian peoples.

Id. at 135.

Justice Thomas's dissent makes clear that the Court carefully considered Wyoming's argument that the 1905 Act partially "disestablished" the Reservation. However, Wyoming and Justice Thomas's view did not sway the majority.[44] The majority affirmed the District Court's findings of fact and conclusions of law that the 1905 Act did not disestablish any portion of the

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[44] In *Big Horn III*, Justice Thomas could not get any other justice to agree with his specially concurring opinion restating his position in dissent in *Big Horn I*. *In Re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 283 (Wyo. 1992) ("*Big Horn III*").

Reservation. The Court's ruling disposed of Wyoming's contention that the 1905 Act disestablished the area.

6. United States Supreme Court Proceedings.

After Wyoming lost its appeal on the disestablishment question in the Wyoming Supreme Court, the State filed a petition for certiorari in the United States Supreme Court.[45] In that petition, Wyoming contended that erroneous treatment of the disestablishment question was a core flaw in the general stream adjudication – a flaw that resulted in a judgment that gave too much water to the Tribes, and an improper priority date (1868) to water rights in the 1905 Act area.[46] Wyoming insisted that lands within the 1905 Act area had been terminated and "returned to public domain status."[47] The State argued that, as a result, lands within the 1905 Act area were entitled only to post-1905 water right priority dates (dates on which the lands within the 1905 Act area were later "added to and made a part of" the reservation again).[48]

The State argued in its Supreme Court petition that the Special Master, the District Court,

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[45] *Wyoming v. United States*, Petition for Certiorari, 1988 WL 1094117 (BATES SH34398).

[46] *Id.* (BATES SH34398).

[47] *Id.* at 4 (BATES SH34398).

[48] *Id.* at 28 (BATES SH34398). Wyoming's petition presented three questions: "1. Can a Federal reserved water right exist for a reservation despite an express Congressional requirement that the Reservation's water rights be obtained under state law? If so, 2. In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific Tribe? 3. What priority date should be accorded a reserved water right, if any, for practicably irrigable lands which were ceded by the Reservation's Tribes, if those lands later were restored to and made a part of the reservation by the United States or were reacquired by Indians from non-Indians?"

and the Wyoming Supreme Court all erred in the following respects:

- Special Master Roncalio's decision on the disestablishment question was wrong;[49]
- Judge Joffe erred at the District Court level by affirming the Special Master's decision;[50] and
- The 1905 Act was "an Indian termination act,"[51], and the Wyoming Supreme Court opinion was "in conflict with this Court's decisions regarding the termination of Indian treaty rights."[52]

7. Finality.

Big Horn I constituted a final judgment on the merits of the Reservation disestablishment issue. The Wyoming Supreme Court recognized that its ruling was final and conclusive. *Big Horn I*, 752 P.2d at 100 ("[T]he adjudication of a water right in favor of a claimant shall be final and binding, and . . . finality in this litigation is appropriate") (citing *Campell v. Wyoming Development Co.*, 100 P.2d 124, 137 (1940)).

The Wyoming Supreme Court recognized that its ruling was final and conclusive. *Id.* at 100. In subsequent proceedings, the Court held that "*Big Horn I*, having been affirmed by the United States Supreme Court, is final and controlling." *Big Horn III*, 835 P.2d at 278. Justice

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[49] *Id.* at 8 (Master awarded 1868 water rights "within both the diminished and ceded portions of the reservation."); *Id.* at 17 (BATES SH34398).

[50] *Id.* at 9 (BATES SH34398).

[51] *Id.* at 18 (BATES SH34393).

[52] *Id.* at 17 (BATES SH34393). The State argued that the Wyoming Supreme Court decision was contrary to the U.S. Supreme Court rulings in *U.S. v. Dion*, 476 U.S. 734 (1986) (the high Court's most recent treaty abrogation ruling at the time) and *Rosebud Sioux v. Kniep*, 430 U.S. 584 (1977) (where the Court found an intent to terminate or disestablish after a lengthy inquiry into specific circumstances surrounding that land cession). *Id.* at 27 (BATES SH34398).

Thomas's dissent underscored the fact that the Wyoming Supreme Court ruled on the merits of the Reservation boundary.

The State of Wyoming's petition for certiorari agreed that the judgment in *Big Horn I* would be final and conclusive, unless reversed by the Supreme Court.[53] In characterizing the jurisdiction of the United States Supreme Court to take certiorari, Wyoming referenced 28 U.S.C. § 1257, which creates jurisdiction for "*final judgments or decrees* rendered by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question." (Emphasis added.) Wyoming further allowed that "the judgment of the Wyoming Supreme Court was final on its face."[54] Wyoming contended the "decision on the federal issue is conclusive . . . regardless of the outcome of future state-court proceedings." *Id.*, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (finality is a jurisdictional prerequisite for U.S. Supreme Court review).

Wyoming's petition for certiorari was denied as to two of the three questions it presented, including the disestablishment issue. The Wyoming Supreme Court decision regarding the appropriate method for quantification of treaty-based water rights was affirmed without opinion. With that action by the United States Supreme Court, the reservation status of the area opened by the 1905 Act was permanently decided.

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[53] On the merits, Wyoming continued to maintain that the Special Master's decision on the disestablishment question was wrong, that the 1905 Act was "an Indian termination act, and that the Wyoming Supreme Court opinion was "in conflict with this Court's decisions regarding the termination of Indian treaty rights." Petition for Certiorari at 7-8, 17-18 (BATES SH34398).

[54] Wyoming excepted those matters specified for remand from this characterization, which were narrowly limited to tract-by-tract quantification of 1868 treaty-based reserved water rights ("Walton rights") for allottees' grantees. *Id.* at 10 (BATES SH34398).

B. Court Rulings Other Than *Big Horn I* Have Not Altered the Boundaries of the Reservation.

1. Federal Court Rulings are Consistent with *Big Horn I*.

The governments directly affected by the status of the 1905 Act area – the State of Wyoming, the United States, and the Tribes – are bound by the ruling in *Big Horn I* because of their participation in that litigation. But *Big Horn I* is not the only occasion when courts have approached the reservation boundary question. A review of these cases demonstrates that *stare decisis* also bars re-litigation of the Indian status of lands in the 1905 Act area. *See Taylor*, 128 S.Ct at 2178 ("*Stare decisis* will allow courts swiftly to dispose of repetitive suits . . . based on claims or issues that have already been adversely determined against others."). The federal courts have dealt with or commented directly on the status of the 1905 Act area on at least six occasions.

Clarke v. Boysen, 39 F.2d 800 (10th Cir.), *cert. denied* 282 U.S. 869 (1930), involved a number of real property disputes in what is now the Boysen Dam area of the Wind River Reservation and within the 1905 Act area. More specifically, the case addressed a land patent for 680.31 acres selected by Asmus Boysen pursuant to the 1905 Act, and a railroad right-of-way condemned under the Indian reservation statute (25 U.S.C. § 312). *Clarke*, 39 F.2d at 805. Clarke challenged the validity of a railroad right-of-way established pursuant to the Indian country statute (25 U.S.C. § 312). Clarke contended that the Indian country right-of-way statute was mismatched with the status of the lands (which were owned by a non-Indian) and, therefore, that the right-of-way was invalid. *See* "Right of Way" section of the opinion, 39 F.2d at 812.

The U.S. District Court for the District of Wyoming embraced Clarke's theory and held

that the railroad's title was invalid. *Clarke*, 39 F.2d at 813. The District Court based its decision on the theory that "the Act of March 3, 1905, had removed the lands involved from the purview of the [Indian] right-of-way act of March 2, 1899 [25 U.S.C. § 312]." *Clarke*, 39 F.2d at 813. In other words, the trial court ruled that the 1905 Act disestablished the reservation status of the lands at issue, which were owned by non-Indians and located within the 1905 Act area.

On appeal, the Tenth Circuit overruled the trial court, concluding that the 1905 Act did *not* remove the lands at issue from the purview of 25 U.S.C. § 312. The Tenth Circuit concluded that the 1905 Act lands remained Indian lands, fitting one of the definitions of Indian lands set forth by 25 U.S.C. § 312: "lands reserved for other purposes in connection with the Indian service."[55] Rather than destroying the reservation status of those lands, the Tenth Circuit concluded that the 1905 Act merely designated certain lands "for entry and sale at a future date." *Clarke*, F.3d at 814. Therefore, the railroad right-of-way was properly vested, even though it was perfected after the 1905 Act was passed.

The Tenth Circuit ruled that the lower court's construction of the 1905 Act – that it removed the lands from Indian country – could not be accepted "in the absence of a clear showing that such was the intent of Congress." *Clarke*, F.3d at 814.

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[55] Prior to *Donnelly* (discussed *supra* at p. 6), and the current codified definition of Indian country, the terms "Indian lands," "reservation," "Indian colony," and "Indian country," were used somewhat interchangeably. Certain statutes or rulings referred to "Indian lands" in conformity with the current and long-standing definition, and other times used the term to refer only to the bare title to land (whether it was owned by an Indian). Thus, 18 U.S.C. § 1151 now "consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law." 18 U.S.C. § 1151(historic notes). The definition of "Indian country" is based on the Supreme Court's rulings in *U.S. v. McGowan*, 302 U.S. 535 (1938), following *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913) and *Donnelly*.

The federal cases following *Clarke* are consistent with its treatment of the 1905 Act area as Indian country: they all find, or rely on, the fact that lands within the 1905 Act area are part of the Wind River Indian Reservation.

In *Shoshone Indian Tribe and Arapaho Indian Tribe v. Hathaway*, D. Wyo. Case No. 5367 Civil (Nov. 7, 1969), Gulf Oil had interests in leases located in the 1905 Act area. The court said Gulf's leases from the Tribes embraced oil and gas "underlying lands located on the Wind River Indian Reservation." The U.S. District Court for the District of Wyoming ruled that the State Commission lacked jurisdiction over Gulf's activities.

United States v. Mazurie, 419 U.S. 544 (1975) upheld a conviction for introducing liquor into Indian country in violation of 18 U.S.C. § 1154. In discussing the application of this law at Wind River, the Supreme Court described the Reservation as "[l]ocated in a rather arid portion of central Wyoming, at least some of its 2,300,000 acres have been described by Mr. Justice Cardozo as 'fair and fertile.'. . . It straddles the Wind River, with its remarkable canyon, and lies in a mile-high basin at the foot of the Wind River Mountains." *Id.* at 546. Wind River Canyon is within the 1905 Act area, and the Reservation exceeds two million acres only when the 1905 Act area is included within its boundaries.

Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) ("Dry Creek Lodge II"), *cert. denied* 449 U.S. 1118 (1981) involved a dispute about access to Plaintiff's non-Indian fee lands across allotted lands. The Tenth Circuit noted that "Plaintiffs' land is within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indians in Wyoming. The reservation is large and the town of Riverton and other

settlements are within its boundaries." 623 F.2d. at 683.

Foust v. Lujan, 942 F.2d 712 (10th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992) involved correction of a land patent issued to Mr. Foust within the Wind River Canyon. At the time the patent was issued, the lands in question were part of a federal reserved power site. *Foust*, 942 F.2d at 713. In 1941, the United States restored to tribal ownership all undisposed of land within the same section. *Id.* After the restoration of the lands to the Tribes, Mr. Foust discovered his patent covered the steep sides of the canyon, not the relatively flat land where his house was located. In rejecting the BIA's opposition to the correction, the Court of Appeals stated "[t]he correction would involve an exchange of land roughly equal in acreage, thus not diminishing the overall number of acres within the Wind River Reservation." *Id.* at 717. The lands in question are in the 1905 Act area.

A portion of the District Court decision undisturbed on appeal describes the Reservation lands in 1991 as "encompassing over 2,000,000 acres in west central Wyoming." *Id.* at 718 (McKay dissenting). The size of the Wind River Reservation exceeds two million acres only when the 1905 Act area is included within its boundaries. *See* NAT 2 (Wyoming Department of Revenue map showing Reservation boundaries as including the 1905 Act area and covering "over two-million acres").

Shoshone and Arapaho Tribes v. U.S., 364 F.3d 1339 (Fed.Cir. 2004) is the Tribes' breach of trust case against the United States for mismanagement of mineral resources and trust funds. The Federal Circuit describes the current reservation as follows:

> Both Tribes continue to occupy the Wind River Reservation, which consists primarily of the reservation lands created by the Treaty of 1868, minus certain

lands sold to the United States in 1872 and 1896 [no disestablishment in 1905].

Id. at 1343.

Northern Arapaho Tribe v. Harnsberger is the Tribe's challenge to State taxation of the Tribe and tribal members in the 1905 Act area. The State's, County's and City's motions to dismiss the Northern Arapaho Tribe's Complaint in *Harnsberger* for failure to join indispensable parties were granted by the Court's order of October 6, 2009. This decision is on appeal to the 10th Circuit Court of Appeals.

Yellowbear v. Attorney General is a *habeas* proceeding brought in the United States District Court for Wyoming seeking federal court review of the state court decision in *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008). While *Yellowbear v. State* was wrongly decided (see discussion *infra*), a *habeas* action will not provide an opportunity for review of the merits of that decision.

Under 28 U.S.C. § 2254(d)(1), as amended by Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a writ of *habeas corpus:*

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) 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.

Mr. Yellowbear's *habeas* petition was denied by the District Court on July 23, 2009. As explained in the District Court's order, the "doubly deferential standard" of review required by AEDPA did not allow a full review of the merits of the Wyoming Supreme Court's decision in *Yellowbear v. State*. Dist. Ct. Opinion Denying Petition for *Habeas Corpus* at 7, 14 (while

"Petitioner's underlying legal challenge presents significant and difficult questions of law and sovereignty," the Court "should not and will not independently decide the merits of the underlying legal question answered by the Wyoming Supreme Court"). Accordingly, the Court merely ruled that Petitioner Yellowbear failed to meet his burden under the highly deferential standards of 28 U.S.C. § 2254 as amended by AEDPA. *Id.* at 25-26. Because federal court proceedings in *Yellowbear* cannot and will not decide the merits of the Reservation boundary issue or the preclusive effect of *Big Horn I*, there is no liklihood it will have any significant effect on anyone other than Mr. Yellowbear.[56]

2. State Court Rulings Other Than *Big Horn I* Have No Preclusive Effect.

States lack authority to determine the treaty rights of Indian tribes without an express waiver of federal and tribal sovereign immunity and acquiescence by Congress. Without these special circumstances, State court rulings regarding the scope of "Indian country" are entitled to little deference and neither preclusive nor *stare decisis* effect. *Seymour v. Superintendent*, 368 U.S. 351, 353-55 (1962); *see also Solem*, 465 U.S. at 466 (inconsistent treatment of Indian Country by State courts is properly resolved in federal court).[57]

The Wyoming Supreme Court was competent to determine the 1868 treaty-reserved

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[56] Indeed, Wyoming admitted as much in its submissions in *Harnsberger*. *See* Doc. #119, District Court, at 5 (decision in Yellowbear case in favor of the State "will lack preclusive effect" on question of disestablishment).

[57] Wyoming agrees: "MR. HARDSOCG: * * * * There's no res judicata effect and there certainly isn't a stare decisis effect from the Wyoming Supreme Court to this [Federal District] Court or the Tenth Circuit. It is secondary authority." *Harnsberger*, Transcript of Motion Hearing 1-23-09, Doc. #62, District Court, p. 33. (Mr. Hardsocg's view does not account for the identity of parties in *Big Horn I*.)

water rights of the Tribes only because Congress had acquiesced for the limited purpose of state court general stream adjudications through the McCarran Amendment.[58] 43 U.S.C. § 666. As a result, the court in *Big Horn I* had jurisdiction over the subject matter and over the United States and the Tribes to determine the status of the 1905 Act area in the context of treaty based water rights. In no other case did the Wyoming court have the necessary identity of parties required to bind the Tribes under principles of *res judicata*. In no other case did the Wyoming court have a lawful basis, or the jurisdiction necessary, to address the reservation boundary question and bind the Tribe or its trustee, the United States.[59] In no other case did the Wyoming court decision have even *stare decisis* effect. As a result, state court rulings other than *Big Horn I* have no preclusive or precedential effect.

Excluding *Big Horn I*, the Wyoming Supreme Court has approached the 1905 Act issue in six instances: (1) *Merrill v. Bishop*, 237 P.2d 186 (Wyo. 1951) ("Merrill I") and *Merrill v. Bishop* ("Merrill II") 287 P.2d 620 (Wyo. 1955) (successors to allottees in 1905 Act area not entitled to treaty-based water rights); (2) *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960) (upholding criminal conviction of an Indian in state court for a crime committed in the Riverton

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[58] Federal consent to state court jurisdiction for the purpose of determining federal water rights does not imperil those rights or in some way breach the special obligation of the federal government to protect Indians. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (U.S.Colo. 1976), *rehearing denied* 426 U.S. 912.

[59] The State of Wyoming agrees that Tribes, as sovereigns, are not bound by a judgment in an action in which they were not a party. "Absent joinder, neither the Eastern Shoshone Tribe nor the Federal Government will be bound by this Court's pronouncement if they are not parties to this litigation [citation omitted]." *Northern Arapaho Tribe v. Harnsberger,* U.S.D.C. (Wyo.) No. 08-CV-215, State Defendants' Memorandum of Law in Support of Motion to Dismiss for Failure to Join Required Parties, Doc. #24, p. 9.

Reclamation Project Area, a subset of the 1905 Act area); (3) *State v. Moss*, 471 P.2d 333 (Wyo. 1970) (crime occurred on former allotment within the 1905 Act area and therefore was not "Indian country."); (4) *Geraud v. Schrader*, 531 P.2d 872 (Wyo. 1975), *cert. denied*, 423 U.S. 904 (1975) (ruling that a proposed consolidated "Indian Reservation District" improperly excluded the 1905 Act area); (5) *Stagner v. Wyoming State Tax Commission*, 682 P.2d 326 (Wyo. 1984) (Indian owner of smoke shop north of the Big Wind River not subject to licensure by State of Wyoming); and (6) *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008) (murder on former allotment land within the current boundaries of Riverton did not occur within Indian country).

The first five of these cases were decided *before* the ruling in *Big Horn I*, and are therefore overruled to the extent they are inconsistent with *Big Horn I*.

Two of the first five cases – *Geraud* and *Stagner* – are consistent with the conclusion reached in *Big Horn I*. (It is noteworthy that Wyoming was a party to both these cases.) Of the remaining two, only *Merrill* and *Moss* conflict with the *Big Horn I* ruling. As noted below, *Merrill* was overruled by *Big Horn I*. And despite Wyoming's arguments in *Big Horn I* that *Moss* should have been upheld,[60] *Moss* was also overruled by the Wyoming Supreme Court. *Big Horn I*, 753 P.2d at 84, 92-94, 114; *Id.* at 119-135 (Thomas's dissent). *Blackburn* has occasionally been cited as for the proposition that the 1905 Act area was disestablished, and was

[60] Brief of Appellant State of Wyoming (Type I Claims), filed __/__/85, pp. 108, 120-121 [App. 001401, 001418-001419].

also overruled by *Big Horn I*.[61]

In *Merrill v. Bishop*, 237 P.2d 186 (Wyo. 1951) ("*Merrill I*"), the District Court dismissed the action for failure to join indispensable parties. Merrill and others had brought suit to enjoin Bishop, the State Engineer, from interfering with plaintiffs' headgates, which diverted water from Owl Creek (1905 Act area). Plaintiffs were successors in interest to Indian allottees. The District Court said other water users had to be named in the suit. The Wyoming Supreme Court reversed and remanded, allowing the action to proceed. The Court reviewed other cases which held that water rights could not be adjudicated in a proceeding unless all interested parties were joined. The Court then remarked that "[i]n the case at bar, no Indian Reservation any longer exists so far as the lands of the plaintiffs are concerned, but there may be other parties . . . [who] should be brought in and made parties to this action in order that their rights as well as those of the plaintiffs may be determined herein." *Id.* at 193. The action was remanded to allow such parties to be joined. The Court's statement regarding the Reservation was *dicta*.

After remand in *Merrill I*, the Wyoming Supreme Court in 1955 again took up the issue of water rights for successors to allottees. *Merrill v. Bishop*, 287 P.2d 620 (Wyo. 1955) ("*Merrill II*"), *overruled* by *Big Horn I*. Plaintiffs again asserted that they were entitled to water rights with an 1868 treaty date priority. *Merrill II*, 287 P.2d at 622. The lands at issue went out of trust status from 1916 through 1932. *Id.* The *Merrill II* Court rejected the claims of the

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[61] As discussed previously, in *Big Horn I*, all levels of the Wyoming court system rejected the State's arguments (which expressly relied on *Moss* and *Blackburn*) that the 1905 Act and/or the 1953 Act disestablished the Reservation and destroyed the 1868 Treaty priority date for water rights in the area. As Justice Thomas recognized in his dissent, the holding in *Big Horn I* simply cannot be reconciled with the holdings in *Moss* and *Blackburn*. *Big Horn I*, 753 P.2d at 120-122.

plaintiffs.

The Wyoming Supreme Court limited its holding to lands no longer within an Indian reservation. *Merrill II*, 287 P.2d at 625. Just as it had in *Merrill I*, the *Merrill II* Court, without citation of authority or application of the requisite analysis, stated "[t]he lands involved in this action became a part of the public domain when Congress on March 3, 1905, approved the treaty of 1904." *Id.* The court reached its holding based on the finding that the allotments along the Owl Creek had been issued after passage of the 1905 Act. *Id.*

Importantly, in *Big Horn I*, the Wyoming Supreme Court held that anything in *Merrill II* other than denial of the injunction was *dicta*. *Big Horn I*, 753 P.2d at 113. The Wyoming Supreme Court explained the *Merrill II* decision:

> In *United States v. McIntire,* 101 F.2d 650 (9th Cir.1939), the court held that the state water rights procured by the Indian predecessor conferred no valid water right. Likewise, *Colville Confederated Tribes v. Walton,* supra 647 F.2d at 51, held that the state permits issued for lands carrying a reserved water right were "of no force and effect." We hold that the mere fact that state permits have been issued does not deprive these allottees' successors ["Walton" rights claimants] of a reserved water right with a treaty date priority.
>
> *Merrill v. Bishop,* supra 287 P.2d 620, was a suit by allottees' successors to enjoin the state engineer from interfering with their headgates. *Id.* at 620. The actual holding in the case was that the injunction must be denied because the successors had not proved the facts necessary to allow the courts to tailor an injunction. *Id.* at 626. It is thus apparent that the master [Roncalio] relied only on dicta in *Merrill v. Bishop.* The holding of that case is narrow and does not prevent relitigating what was not necessary to the decision. *Rialto Theatre, Inc. v. Commonwealth Theatres, Inc.*, Wyo., 714 P.2d 328 (1986); *CLS v. CLJ,* Wyo., 693 P.2d 774 (1985). We have already decided that the admission of Wyoming to the Union did not abrogate reserved water rights for the reservation. To the extent that *Merrill v. Bishop* indicates otherwise, it is overruled. *Merrill v. Bishop* is not res judicata of Webber, Jones and Graboski's [Walton rights] claim to a treaty priority date. We have also held that state permits issued for water which has been reserved are invalid. Thus, the administrative proceedings are not res

judicata.

> On remand, appellants must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter.

Big Horn I at 113.

In ruling that successors to allottees *could* prove a "Walton" claim in the 1905 Act area, *Big Horn I* necessarily and expressly overruled any holding in *Merrill I* or *Merrill II* to the effect that the area was not part of the Reservation.

Thus, prior to 2008, whatever tension existed in Wyoming's treatment of the 1905 Act area was resolved by *Big Horn I.*

In 2008, the Wyoming Supreme Court issued its ruling denying Andrew Yellowbear's appeal of his State court murder conviction. Yellowbear alleged that Wyoming lacked jurisdiction to prosecute him because the situs of his crime (Riverton) is Indian Country, and both Yellowbear and his victim were enrolled tribal members. To uphold Yellowbear's conviction, the Wyoming Supreme Court asserted that the 1905 Act area is no longer Indian Country. While citing to numerous cases establishing the standards for review of disestablishment issues, the decision provides little analysis of the specific factual and legal history of the Wind River Reservation and not one citation to the record established by the trial court.[62] The Court references its holdings in *Blackburn* and *Moss*, but ignores the preclusive effect of *Big Horn I.* The Court then reaches a conclusion that the 1905 Act area is no longer

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[62] The half-day hearing on Indian country in *Yellowbear* sits in stark contrast to the 15-month long boundaries and dates proceedings and trial conducted in *Big Horn I.*

Indian country, a decision directly at odds with *Big Horn I*.[63] This decision amounts to an unlawful, *ultra vires* assertion of state authority over sovereign tribal interests and is not binding or even persuasive.[64]

Nor is *Yellowbear* binding on the Tribes or the United States, because they were not parties in that case.

Yellowbear reached an erroneous conclusion on the merits based on a selective and incorrect rewriting of *Big Horn I*. *Yellowbear* misapplies the Supreme Court's reservation diminishment precedents, ignores key provisions of the 1905 Act, and misconstrues important parts of the historical record. Indeed, the Court's analysis of the disestablishment question has numerous glaring errors and inconsistencies. To cite only a few, the *Yellowbear* Court failed to address: (1) the distinctions between the 1905 Act and the Lander and Thermopolis Purchase Acts; (2) the differing implementation of the survey language in the 1905 Act (cited at paragraph

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[63] Three of the Justices who decided that *Big Horn I* had no effect on the *Yellowbear* case represented *parties* in the Big Horn adjudication. Justice Barton Voight, author of the *Yellowbear* decision, represented "private water users" in the boundaries and dates trial before Special Master Roncalio (*see* Transcript of Proceedings before The Honorable Teno Roncalio, Special Master, Presiding - June 23-24, 1980 [App. 000423 - 4]). Justice William U. Hill represented "Retlaw Interprises, [sic] Inc. and a number of private citizens, Fremont County, Wyoming water users" in the same trial (*see* Transcript of Proceedings before The Honorable Teno Roncalio, Special Master, Presiding - April 15-18, 1980 [App. 00420 - 2]. In addition, as Wyoming Attorney General in 1998, Justice Hill took the position before the U.S. Environmental Protection Agency that the 1905 Act had disestablished that part of the Wind River Reservation. Justice Kite served as Senior Assistant Attorney General for the State of Wyoming from 1974 through 1978 - the period when the State prepared and commenced the *Big Horn I* litigation (State's petition filed January 24, 1977).

[64] The *Yellowbear* Court says that it *agreed* with Thomas's *dissent* in *Big Horn I*. *Yellowbear*, 174 P.3d at 1283. The Court cites no authority for the proposition that the judgment from *Big Horn I* might be altered by embracing Thomas's dissent in this manner. The Court's conclusion is barred by principles of finality.

24 of the opinion) as compared to the language in the Lander and Thermopolis Purchase Acts; and (3) erroneously characterize of the per capita, survey, and irrigation construction payments in the 1905 Act as part of a "sum certain" consideration. The *Yellowbear* decision also fails to address the 1909 Act, the 1916 Act, and the proper interpretation of the restoration orders. The Court simply made the inaccurate conclusory observation that "while they disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn I* agreed that the reservation had been diminished." *Yellowbear*, 174 P.3d at 1283 (citing *Big Horn I*, 753 P.2d at 84, 112, 114, 119-35). This remarkable observation fails to appreciate that the *Big Horn I* majority affirmed the district court's award of reserved water rights which included the required finding of Reservation status for the 1905 Act lands to which the rights are appurtenant.

The *Yellowbear* Court's citations to *Big Horn I* do not support the Court's statement that the *Big Horn I* majority "agreed that the reservation had been disestablished." *Yellowbear*, 174 P.3d at 1283 (citing *Big Horn I*, 753 P.2d at 84, 112, 119-35). Page 84 of *Big Horn I* merely summarizes the historical background of the Reservation without any analysis or legal conclusions. On page 112 of *Big Horn I*, also cited in support, the Court awarded water with a Treaty-based priority date for lands within the 1905 Act area, and specifically awarded Treaty-priority water for Indian-owned and non-Indian *fee* lands in the opened area. The citation to page 114 states that the "reacquired lands on the ceded portion of the reservation are reservation lands," a statement that supports the Tribes' position. As the Tribes have previously discussed at some length in the previous section, the Court's award of water rights with an 1868 Treaty

priority to fee lands in the 1905 Act area was a complete *rejection* of the State's position that the 1905 Act disestablished the Reservation. Finally, the citation to pages 119 to 135 is the dissenting opinion, which repeatedly takes the majority to task for not finding that the 1905 Act disestablished the Reservation.

In sum, given its myriad inaccuracies and inconsistencies, *Yellowbear* has no precedential value and should be the limited to the facts of that case.

IV. The Federal Law of Disestablishment Shows that the 1905 Act Did Not Disestablish the Wind River Reservation.

As set forth above, *Big Horn I* disposes of the notion that the 1905 Act disestablished the Wind River Reservation. But even without the ruling in *Big Horn I*, federal law governing the disestablishment of Indian reservations shows unequivocally that the 1905 Act did not terminate that portion of the Wind River Reservation.

Defendants disregard the legal standards applicable to the analysis of statutes affecting Indian reservations and misconstrue the intent of Congress in enacting the 1905 Act. Properly understood, the 1905 Act merely opened portions of the Reservation to non-Indian settlement while retaining federal trust supervision and control over the opened area. The 1905 Act and its surrounding circumstances do not provide "substantial and compelling evidence" of a congressional intent to disestablish the Wind River Reservation. When applying the proper legal standard, the Court must conclude that no disestablishment was intended and, in fact, that Congress intended Reservation boundaries to remain intact.

A review of the historic facts is necessary to a determination of the question. Then, the correct legal analysis must be applied to those facts. The following subsections address each in

turn.

A. Statement of Facts.

1. Treaty of 1868.

The Wind River Reservation was established by the July 3, 1868, Treaty of Fort Bridger ("1868 Treaty").[65] The 1868 Treaty reserved "for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."[66] In 1878, the Arapahos were placed on the Reservation and ultimately held to have equal property rights with the Shoshones. *See United States v. Shoshone Tribe*, 299 U.S. 476, 486-89 (1936). The 1868 Reservation boundary was as follows:

> Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie [sic] Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning.

Notwithstanding the government's promise of "absolute and undisturbed use," individuals and local governments almost immediately sought to gain access to Reservation lands.[67]

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[65] 15 Stat. 673 (1868).

[66] *Id.*, art. 2.

[67] In 1869, the Wyoming Territorial Legislature enacted a memorial asking President Grant to move the Indians elsewhere and to open the Wind River Reservation to white settlement. Larson: History of Wyoming (2d. ed. 1978), p. 76. *See also* M. Hoopengarner, To Make the Desert Bloom: How Irrigation Came to the Ceded Portion of the Wind River Reservation, p. 76 *citing* Council Journal, Territory 1869, p. 17 (Oct. 13, 1869); House Journals 1869 Terr., Vol. 1, pp. 221-245.

2. Lander Purchase Act.

In 1872, Congress authorized negotiations for a cession of the southernmost portion of the Reservation, which was already being occupied by non-Indian gold miners.[68] Congress directed Felix Brunot to negotiate an exchange of tribal lands south of the 43rd parallel in exchange for equal acreage north of the Reservation.[69] On September 26, 1872, the Tribes instead agreed to an outright sale to the United States all of its interests in Reservation lands generally south of the 43rd parallel for a lump sum payment of $25,000 to be expended by the President to acquire cattle for tribal members.[70] This cession is known as the Lander Purchase.[71]

The purpose of the legislation ratifying the Lander Purchase is described as follows:

> [W]hereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties, arising in consequence of said occupancy, *to change the southern limit of said reservation.*[72]

Article 3 states that the line north of the ceded lands is "the southern line of the Shoshone reservation," *i.e.*, the new "southern limit of said reservation."[73] The Lander Purchase Act made no provision for any retained Indian interests in the lands sold.

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[68] 17 Stat. 214 (1872); Larson, p. 112.

[69] 17 Stat. 214 (1872).

[70] *Id.*; the land exchange originally proposed was viewed as impractical, as those lands were viewed as subject to the claims of other tribes. Report of the Secretary of the Interior (Oct. 31, 1872) at 510.

[71] Some historical documents will refer to the Lander Purchase as the "Brunot Purchase."

[72] 18 Stat. 291, 292 (1874) (emphasis added).

[73] *Id.*

The Lander Purchase Act required the lands to be surveyed.[74] On October 2, 1874, the Commissioner of the General Land Office gave instructions to survey the Reservation. Those instructions described the then reservation boundary as "[t]he limits of the Reservation as per Treaty of July 3rd 1868, Art. II . . . modified by articles of convention with said Indians on September 26, 1872."[75] The State of Wyoming received school lands in the area sold under the Act on the same basis as other states upon admission to the Union.[76] There were no Indian allotments in the Lander Purchase area.

3. Failed 1891 Cession

On March 3, 1891, a Commission was appointed by Congress with instructions to negotiate a surrender of portions of the Reservation the Indians "may choose to dispose of."[77] The Commission proceeded to negotiate a proposed cession whereby the Tribes agreed to "cede, convey, transfer, relinquish, and surrender, forever and absolutely . . . all their right, title, and interest, of every kind and character in and to the lands, and the water rights appertaining

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[74] Letter, S. S. Burdett, Commissioner, General Land Office, Department of the Interior, to James W. Miller, Esq. (Oct. 2, 1874) *reprinted in* White: Initial Points of the Rectangular System (1996).

[75] *Id.* The instructions for negotiations for disposal of reservations lands issued on July 14, 1891, confirm that the Reservation no longer contained the lands covered by the Lander Purchase Agreement. *See* Instruction of July 14, 1891, *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 42 (1892).

[76] 26 Stat. 222 (1890); *see, e.g.*, lands in §§ 16 & 36 in Township 33 North, Ranges 98, 99, and 100 West, 6th Principal Meridian on the Lander Surface Management Status map prepared by the Bureau of Land Management (1990).

[77] Act of March 3, 1891 (26 Stat. 1009) (1891); Instruction of July 14, 1891, *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 42 (1892).

thereunto" lying north of the Big Wind River.[78] In consideration for the lands sold, the proposed cession would have paid the Tribes the sum of $600,000.[79] The proposed agreement further provided that lands around the hot springs in the northeast corner of the Reservation should "be reserved from entry as public lands" contemplating that the remainder of the ceded lands would be opened to settlement as public lands.[80] In light of the clear Congressional intent to acquire all of the Tribes' interest forever and absolutely, the Assistant Attorney General requested legislative language to designate the lands to be acquired as public lands.[81]

Congress failed to ratify the proposed 1891 cession. A second commission was sent to meet with the Tribes in 1893, but the parties were unable to reach an agreement.[82] During the negotiations, the commissioners proposed to pay the Tribes $750,000 in exchange for a cession of all Reservation land lying north of the Big Wind River as well as lying south and east of the Popo Agie/Little Wind River. The Tribes refused to entertain an agreement selling lands in the southeastern portion of the Reservation.[83] The principal reason the Tribes were willing to sell areas north of the Big Wind River was because non-Indian cattlemen were trespassing with their

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[78] Articles of Agreement *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 29 (1892).

[79] *Id.*, at 29-30.

[80] *Id.*, at 16.

[81] Letter, Geo. H. Shields, Assistant Attorney General, to Secretary of Interior (Dec. 18, 1891), *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 61 (1892).

[82] 27 Stat. 120, 138 (1892).

[83] Letter, D. M. Browning, Commissioner, to Secretary of the Interior (Nov. 29, 1893), *reprinted in* H.R. Exec. Doc. 51, 53rd Cong., 2d Sess., 4-5 (1894).

stock, and the Indian Service was unable or unwilling to collect grazing fees.[84] In any event, the negotiations did not lead to an agreement.

4. Thermopolis Purchase Act.

In 1896, the United States, represented by Indian Inspector James McLaughlin, entered into negotiations with the Tribes for the sale of a tract of land around Big Horn Hot Springs, near the present-day town of Thermopolis. McLaughlin explained to the Tribes that he was sent to determine whether the tract was suitable to be "set apart as a national park or reservation to be under Government control."[85] In April 1896, the parties entered into an agreement, known as the "Thermopolis Purchase," in which the Tribes agreed to "cede, convey, transfer, relinquish and surrender, *forever and absolutely* all their right, title, and *interest of every kind and character* in and to the lands and the water rights appertaining thereunto" with respect to a tract embracing the Big Horn Hot Springs.[86] The agreement provided that the lands sold would be "set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public," with the Indians "allowed to enjoy the advantages of the conveniences that may be erected thereat with the public generally." The Thermopolis Purchase agreement provided that "in consideration for the lands ceded, sold, relinquished and conveyed," the United States would pay the Tribes $60,000 outright.[87]

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[84] *See Id.*, at 14.

[85] Articles of Agreement and minutes of meeting with Tribes *reprinted in* S. Rep. No. 247, 55th Cong., 1st Sess., 4 (1896).

[86] *Id.*, at 4 (emphasis added).

[87] *Id.*

Congress ratified the Agreement, but struck portions setting aside the area as a national park and providing the Indians with rights to use the hot springs.[88] Instead of creating a national park, Congress "ceded, sold, relinquished, and conveyed" a section of land immediately around the hot springs to the State of Wyoming and declared the remainder of the ceded lands to be "public lands of the United States."[89]

During passage of the Thermopolis Purchase Act, the Acting Commissioner of Indian Affairs told Congress that the boundary of the tract would need to be surveyed. The pre-existing eastern boundary of the Reservation, including the Thermopolis Agreement lands, had been surveyed as part of the Reservation's meridian (the "Wind River Meridian") after passage of the Lander Purchase Act.[90] The General Land Office re-surveyed the lands acquired under the Thermopolis Purchase Act as public lands under the 6th Principal Meridian.[91] The survey was consistent with Congress' direction that the ceded lands became public lands. The Tribes retained no rights in the ceded area separate from access as members of the general public.

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[88] 30 Stat. 62, 93 (1897).

[89] *Id.* The lands originally were subject only to the public land laws for homesteading and townsites. In 1906, Congress extended all the public land laws to the ceded area, not just the homestead laws. 34 Stat. 162 (1906). H.R. Rep. No. 344, 59th Cong., 1st Sess., 2 (1906); S. Rep. No. 961, 59th Cong., 1st Sess., 2 (1906). This subsequent action was taken to allow full development of the area by settlers.

[90] *See* Letter, Thos. P. Smith, Acting Commissioner to Secretary (May 5, 1896) *reprinted in* S. Doc. No. 247, 54th Cong., 1st Sess., 15 (1896); White: Initial Points of the Rectangular System (1996) at p. 416, 418.

[91] Letter, Smith to Secretary at 15. The survey notes refer to the 10 mile section of the east side of the ceded tract as the "old East boundary of Reservation. Field notes of Edward F. Stahle, Deputy Surveyor (July 17-19, 1899). The survey designating the lands under the 6th principal meridian was filed in Lander, WY on August 10, 1900. H.R. Rep. No. 344, 59th Cong., 1st Sess., 2 (1906); S. Rep. No. 961, 59th Cong., 1st Sess., 2 (1906).

There is no record that the federal government ever treated the ceded Thermopolis Purchase area as Indian lands after passage of the Act.

5. 1905 Act.

On March 4, 1904, Wyoming Representative Frank Mondell introduced H.R. 13481 to provide for opening portions of the Reservation to settlement. H.R. 13481 was based loosely on the failed 1891 negotiations, but included provisions rejected by the Tribes in 1891 and 1893.[92] The bill proposed to change the sum certain payment to a system in which lands would remain in trust and the Tribes would release their possessory right to the Government so that, as their trustee, it could provide full title to prospective purchasers. After consideration by the House of Representatives, it was agreed to submit the bill to the Tribes for consideration.[93]

On April 19, 1904, Indian Inspector James McLaughlin returned to the Reservation "to present to [the Tribes] a proposition for the opening of certain portions of [their] reservation for settlement by the whites."[94] McLaughlin described the proposed arrangement as follows:

> [T]he government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians.[95]

McLaughlin described H.R. 13481 as "having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with the means

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[92] *See* H.R. Rep. No. 2355, 58th Cong., 2d Sess., 3 (1904).

[93] H.R. Rep. No. 2355, 58th Cong., 2d Sess., 2 (1904); *see also* Letter, A. C. Tonner to Secretary of the Interior (Mar. 18, 1904), *reprinted in* H.R. Rep. No. 2355 at 10.

[94] Minutes of council held at Shoshone Agency, Wyo. (April 19, 1904) ("1904 Minutes") at 2.

[95] *Id.*, at 3-4.

to make yourselves comfortable upon your reservation."[96]

The Tribes were apparently willing to allow opening of part of the Reservation to settlement because it was used mostly for grazing.[97] The Tribes asked McLaughlin if they could preserve for their exclusive use lands along the north side of the Big Wind River where they had existing homes.[98] McLaughlin responded that it was better to have a water boundary between the opened area and the exclusive tribal area to better prevent trespass problems, but assured the Tribes that they would be free to retain any allotments selected on the north side of the river.[99] The Tribes were told they had no choice on the payment scheme or the boundary of the ceded portion.[100] Ultimately, the Tribes agreed to open a portion of the Reservation to settlement, defer payment for individual parcels until received by the United States, and to reimburse any funds advanced by the United States from proceeds from the sale of lands. This was agreeable because the Tribes were told by Inspector McLaughlin when he was there "that the unsold lands would belong to [the Tribes]" until it was all sold.[101] Following the negotiations, McLaughlin was able to secure the signatures of a majority of the male adult members of the Eastern Shoshone Tribe but was unable to secure the signatures of a majority of the male adult members of the Northern

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[96] *Id.*, at 4.

[97] *Id.*, at 12.

[98] *Id.*, at 10.

[99] *Id.*, at 14.

[100] *Id.*, at 8.

[101] *See* Letter, Shoshoni Delegation to Commissioner of Indian Affairs (Mar. 10, 1908) at 1; Letter, Arapahoe Delegation to Commissioner of Indian Affairs (Mar. 9, 1908).

Arapaho Tribe.[102]

A new bill, H.R. 17994, based on McLaughlin's discussions with the Tribes, was brought before Congress on February 6, 1905.[103] Representative Mondell explained the bill would provide for "the opening to homestead settlement and sale under the town-site, coal-land, and mineral-land laws of about a million and a quarter acres in the Wind River Reservation in central western Wyoming."[104] Congress did not expect immediate, or for that matter full, settlement of the opened Reservation lands.

> It is believed that at least 150,000 acres of this land will be taken up under the homestead law at $1.50 an acre; that possibly 150,000 acres more would be taken at $1.25 an acre; the remaining lands would unquestionably, with the possible exception of about 100,000 acres of very rough, mountainous land, sell for $1 an acre. It is difficult at this time to estimate how much land would be sold under the coal and mineral land laws.[105]

Several members of the House opposed the bill. The principal objection was a provision to give Asmus Boysen, a non-Indian coal lessee, a preferential right to acquire up to 640 acres of coal or mineral land within "said Reservation."[106] The opponents of this provision argued that the Boysen proviso was unnecessary because a clause in Boysen's lease provided that it would terminate automatically when the Indian title to the land was "extinguished with the consent of

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[102] H.R. Rep. 3700, Part 2, 58th Cong., 3d Sess (Jan. 26, 1905) at 17.

[103] Cong. Rec. H1940 (Feb. 6, 1905).

[104] Cong. Rec. H1942 (Feb. 6, 1905).

[105] H.R. Rep. No. 2355, 58th Cong., 2d Sess., 4 (1904); *see also* S. Rep. No. 2621, 58th Cong., 2d Sess., 4 (1904).

[106] 33 Stat. 1016, 1020; *see* Cong. Rec. H1942 (Feb. 6, 1905).

the Indians."[107] Rep. Fitzgerald argued that because the legislation would extinguish the Indian title to the opened lands, Boysen no longer had any rights under the lease.[108] In response to Fitzgerald's argument, Rep. Marshall, explained:

> The gentleman from New York [Mr. Fitzgerald] says that Mr. Boysen's lease was canceled when the title passed from the Indians. True, there was a clause to the effect that when the lands were restored to the public domain this lease was canceled. The difficulty is, however, that *these lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians*, and the clause which the gentlemen speaks of does not apply, and I think he knows it, as it was discussed in committee.[109]

The so-called "1904 Agreement," as unilaterally modified by Congress passed on March 3, 1905, and is known as the 1905 Act.[110] Article I only provides that the Tribes "cede, grant and relinquish" their interest to Reservation lands north of the Big Wind River and east of the Popo Agie River with the cession subject to the terms and conditions of the 1905 Act. Article I also provided that any Tribal member who had selected a tract of land "within the portion of said reservation hereby ceded was entitled to have the same allotted and confirmed to him or her."[111] These dual purposes led to Article II describing the "consideration" as applicable to the "lands ceded, granted, relinquished, *and conveyed* in Article I."[112]

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[107] Cong. Rec. H1943 (Feb. 6, 1905).

[108] Cong. Rec. H1942 (Feb. 6, 1905); *see also* H.R. Rep. No. 3700, Part 2, 58th Cong., 3d Sess., 3 (1905) at 3 (Minority Report).

[109] Cong. Rec.H1945 (Feb. 6, 1905) (emphasis added).

[110] 33 Stat. 1016 (1905).

[111] *Id.* (emphasis added).

[112] 33 Stat. 1016 (emphasis added).

Rather than payment of a sum certain as in prior agreements, Article II provides that the United States "stipulates and agrees to dispose" of the land as "provided under the provisions of the homestead, town-site, coal, and mineral land laws" at the prices specified in the Act, and to pay the Tribes "the proceeds derived from the sales of said lands."[113] Article IX of the 1905 Act provides that the ceded lands would continue to be held in trust by the United States for the Tribes until the lands were actually sold:

> It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described or to dispose of said land 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 such lands* and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.[114]

The 1905 Act deleted language in Articles II, III and IX of the 1904 Agreement which would have obligated the United States to acquire outright Sections 16 and 36 in each township.[115] These sections of a township are known as "school sections," which are *public* lands granted to Wyoming in Section 4 of its Act of Admission for the funding of schools.[116] The Congressional debate indicates that the language referring to school lands was deleted so that the State could take "lieu lands" – federal lands granted to a state *instead of* sections within the Reservation, where the state lacked jurisdiction.[117]

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[113] 33 Stat. 1016, 1019-20.

[114] 33 Stat. 1016, 1020-21 (emphasis added).

[115] *Compare* 33 Stat. 1016, 1017-18, *with Id.*, at 1020-21.

[116] 26 Stat. 222 (1890).

[117] Cong. Rec. H5247 (April 21, 1904); *see also* 33 Stat. 1016, 1018.

6. Implementation of the 1905 Act.

Immediately after passage of the 1905 Act, the Office of the U.S. Surveyor General issued a contract for a survey required in the 1905 Act. The direction was to survey the opened lands of the Reservation.[118] Plats produced as the result of the survey bear the legend "North Boundary Shoshone Indian Reservation" on the northern border of the opened area and "East Boundary Shoshone Indian Reservation" on the eastern border of the opened area.[119] The surveys for these plats were completed by December 1905 and approved by the General Land Office in 1906.

In 1906, the Secretary reported to Congress on legislation extending the time for opening the Reservation. The Secretary described the opened lands as "the ceded portion of the Shoshone or Wind River Indian Reservation."[120] The Secretary's report repeatedly speaks in terms of Reservation land being opened to settlement or entry.[121]

The 1905 Act area was formally opened to homestead entry by a Presidential Proclamation issued June 2, 1906. The publications advertising the availability of land show the

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[118] Special Instructions, Contract No. 300 (May 1, 1905); Special Instructions, Contract No. 301 (May 1, 1905); Special Instructions, Contract No. 302 (May 1, 1905).

[119] *See, e.g.*, Plat of Fractional Township No. 6 North Range No. 6 East of the Wind River Meridian, Wyoming approved April 10, 1906 (eastern boundary); Plat of Fractional Township No. 7 North Range No. 6 East of the Wind River Meridian approved April 6, 1906.

[120] H.R. Doc. No. 601, 59th Cong., 1st Sess., 1 (1906).

[121] Documentation of BIA activities in the open area between passage of the Act and 1907 is limited because there was a fire at the Wind River Agency in 1907 which destroyed historical documentation.

opened area as part of the Shoshone or Wind River Reservation.[122] Unlike some disestablished reservations where all or most of the land was quickly acquired by non-Indians or the government, there was no rush of non-Indian settlers to occupy the lands. As of 1909, only 113,743.68 acres or 7.91 percent of the 1,438,633.66 acres opened to settlement were actually settled.[123] By 1914, only 128,986.58 acres or 8.97 percent were settled.[124] At this same time, in addition to the unsold tribal lands, approximately 16,000 acres in the opened area had been allotted to members of the Northern Arapaho Tribe and 34,000 acres to members of the Eastern Shoshone Tribe.[125]

It was clear even in 1909 that some of the alleged entrymen had not actually settled in the opened area. When the Wyoming Central Irrigation Company attempted to secure a free right-of-way for an irrigation ditch, two settlers, both living outside the Reservation in Lander and Casper, refused to grant the right-of-way.[126] When the Midvale Irrigation District was organized in 1920, 68 percent of the landowners did not live in Fremont County – with 63 percent living out of state.[127]

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[122] E. F. Stahle and F. M. Johnson, Shoshone (or Wind River) Indian Reservation Wyoming, The Agricultural and Mineral Resources of the Ceded Area to be opened for settlement (August 15, 1906).

[123] Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, p. 127.

[124] Letter, E. B. Meritt, Assistant Commissioner to Hon. C. O. Lobeck, House of Representatives (Jun. 12, 1914) at 5.

[125] *Id.*, at 1, 3.

[126] Hoopengarner, p. 121.

[127] Hoopengarner, p. 204 *citing* Project History, Riverton Project (1918), Vol. III, p. 38-40.

In January and February 1905, a railroad company applied for a right-of-way through the Wind River Canyon pursuant to the Act of March 2, 1899, 25 U.S.C. §§ 312 *et seq.*[128] Even though the 1905 Act was enacted in March, the right-of-way was filed and approved on April 29, 1905 in accordance with the 1899 Act for rights-of-way across Indian lands.[129] In 1909, the Department of Interior reaffirmed its position that all rights-of-way across Indian reservations were to be made in accord with the 1899 Act, including another railroad right-of-way through the opened lands to Hudson, Wyoming.[130]

On June 4, 1906, Edmo LeClair, along with other tribal members, was allotted lands in the opened area.[131] They irrigated this land on their own until 1914 when the Bureau of Indian Affairs took over operation of the ditch.[132] At that time, Superintendent Jones advised the homesteaders on the LeClair ditch that "he was looking out for the Indians and the homesteaders could look out for themselves."[133] In 1915, the *Riverton Review* reported that $45,000 was appropriated by Congress "for the completing of the LeClair ditch near Riverton, on the Wind River reservation."[134]

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[128] *See Clarke v. Boysen*, 39 F.2d 800 (10th Cir.) *cert. denied*, 282 U.S. 869 (1930).

[129] *See Id.*, at 812.

[130] Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, pp. 60, 63.

[131] Transcript of sworn testimony of Edmo LeClair before F.C. Campbell, District Superintendent, District No. 4, U.S. Indian Service (Oct. 5, 1926), p. 3.

[132] *Id.*, at p. 3-4.

[133] *Id.*, at p. 5.

[134] Hoopengarner, p. 173, *citing Riverton Review* (Feb. 17, 1915).

In 1907, the Wyoming Department of Immigration prepared a book entitled "The State of Wyoming: A Book of Reliable Information Published by Authority of the Ninth Legislature."[135] The book describes Riverton as "another new town located within the Indian Reservation."[136] Separate from a discussion of settlement on public lands within the State, the book discusses the opportunity to settle on that "part of the Shoshone or Wind River Reservation [that] was opened for settlement" under the 1905 Act.[137] In that same year, the Press of the Riverton News published a pamphlet encouraging settlement on the Reservation. The pamphlet described a portion of the opened area as "350,000 Acres of Virgin Land on the Shoshone Indian Reservation, susceptible of irrigation, opened by the Government to entry."[138] The pamphlet further provided that these irrigable lands were found "in that portion of the Shoshone Indian Reservation, recently opened to settlement."[139]

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[135] The Wyoming Legislature established a Department of Immigration composed of the State Geologist, State Engineer, and Commissioner of Public Lands in 1907. The State of Wyoming: A Book of Reliable Information Published by Authority of the Ninth Legislature at 25.

[136] *Id.*

[137] *Id.*, at 120.

[138] Pamphlet entitled "Sweet and Prosperous Home is the Foundation of Happiness – A 160-acre Farm can be Obtained Cheap on 10-years Time – Just Like a Building Association on the Shoshone Reservation Wyoming – 350,000 Acres Opened For Public Entry By the Government – Greatest Irrigation System in the Country Being Built by Wyoming Central Irrigation Co. Under Supervision of the State of Wyoming – Fertile Lands, Mild Climate, Coal, Lubricating and Illuminating Oil, Gold and Copper Mining, Cattle, Sheep, Horses, Hogs, Water Power – Riverton, Wyoming," *Press of Riverton News*, 2 (1906).

[139] According to the pamphlet, the "opened portion" of the reservation embraced 1,150,000 acres, the irrigable portion covered 350,000 acres of this and the remainder of the opened portion was fine grazing, mineral and coal lands. *Id.*, at 3. It goes on to say that "[t]he Eastern boundary of the entire tract and Riverton, the initial and distributing point, are on the Chicago & Northwestern Railway." *Id.*, at 12. Copper is described as being located in "[t]he Kirwin

In 1907, a dispute between the Wyoming Central Irrigation Company and the Settlers' Co-operative Irrigation Company arose concerning development of irrigation in the opened area.[140] The *Riverton Republican* of December 28, 1907, described the case as follows: "The question involved in this action today before Judge Carpenter is one of vital interest to the Reservation at large. Whether the State Engineer had, at the time of granting the Central Irrigation Company the contract to irrigate the Shoshone Reservation, the right to do so?"[141]

Similarly in 1910, Wyoming State Engineer Clarence T. Johnston told *The Wyoming Tribune* that former Commissioner of Indian Affairs, Mr. Leupp, "saw only the money that was due the Indian. He paid no attention to the needs of the settler on the lands to be ceded and would not consent to the application of the Carey Act, because this might make the state responsible for the collection of the Indian money, and he did not seem inclined to trust the state."[142] State Engineer Johnston also stated "The State cannot legislate relative to [the opened lands]."[143] When given permission to survey for an irrigation system in the opened lands in 1906, State Engineer Johnston gave very stringent instructions to the engineers and field workers. He urged that they carefully observe the rules laid down, lest they be ejected by the

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District and the Washakie Needles Section, situated at the Northwestern corner of the Reservation." *Id.*, at 14.

[140] *See* Hoopengarner, p. 111 *Big Wind River, in re Application of Settlers' Co-operative Irrigation Company, in Water Division Number Three (Appeal From State Board of Control).*

[141] Hoopengarner, p. 110 *citing Riverton Republican* (Dec. 28, 1907).

[142] Hoopengarner, p. 98, n.2 *citing The Wyoming Tribune*, 3 (Oct. 20, 1910).

[143] Hoopengarner, p. 99, n. 3 *citing* Edward H. Stearnes, The Wyoming Central Irrigation Company's Side of the Story (Chicago, 1911).

Indian Police.[144] The *Riverton Republican* in 1911 referred to irrigation development in the opened area as the "Wind River Reservation bugaboo."[145]

In 1912, Congress extended the time to obtain patents on the Reservation. The legislation referred to the lands as the ceded "portion" of the Reservation.[146] In the House Report, the First Assistant Secretary refers to the law as dealing with the "situation of the entrymen within the Wind River Reservation."[147] Congress extended these provisions again in 1916.[148]

After the expiration of the eight-year homestead entry period, the Commissioner of the General Land Office proposed to sell undisposed-of land within the opened area. However, on August 29, 1913, the Department held that "the lands in question need not be sold until it is thought best to do so."[149] On April 29, 1915, the Office of Indian Affairs recommended that the sale be postponed indefinitely.[150] The recommendation was based on reports that the Tribes were obtaining annual rentals of many thousands of dollars from grazing leases and that the lands were probably valuable for oil.[151] On May 27, 1915, the Secretary accepted the

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[144] *See* Hoopengarner, p. 102.

[145] Hoopengarner, p. 145 *citing The Riverton Republican* (Jan. 27, 1911).

[146] 37 Stat. 91 (Apr. 27, 1912).

[147] H.R. Rep. No. 400, 62nd Cong., 2d Sess. (1912).

[148] 39 Stat. 341 (1916).

[149] *See* Letter, C. J. Meade to E. O. Fuller (Jan. 27, 1930).

[150] *See* Letter, C. Burke to R. F. Haas (Mar. 29, 1929).

[151] *See* Letter, C. J. Meade to E. O. Fuller (Jan. 27, 1930).

recommendation.[152] After this time, no land sales were made under the 1905 Act except for small tracts sold for public purposes, such as school sites and the Riverton airport.[153]

Shortly after passage of the 1905 Act, the Bureau of Indian Affairs began issuing grazing leases which eventually covered most of the opened area.[154] BIA regulations allowed issuance of grazing leases only in cases where the United States agreed to dispose of the lands for the benefit of the Indians, but not where the United States purchased and paid for the lands, thereby completely extinguishing Indian interests.[155] The grazing leases provided that stock of both Indians and settlers may graze on permitted lands, but only the settlers were required to pay a fee.[156]

The 1906 report of Commissioner of Indian Affairs noted that 308 allotments had been made in the ceded "part of the Shoshoni Reservation."[157] The 1906 Commissioner's report also describes authority being granted to construct the Big Wind River ditch "on the Shoshoni

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[152] Letter, C. Burke to R. F. Haas (Mar. 29, 1929). In 1929, the Commissioner of Indian Affairs reaffirmed that no general sales of 1905 Act lands be made in order to protect the Indians' interest in grazing leases and oil and gas development. *Id.*, at 2.

[153] *See* Letter, C. Burke to R. F. Haas (Mar. 29, 1929).

[154] *See, e.g.*, Lease No. 406 issued to Joseph Vincent for vacant ceded lands, Shoshone Indian Reservation (approved Jan. 22, 1914) for the period from Oct. 1, 1913 to Sept. 30, 1914; Letter, Arapaho Business Council to Commission of Indian Affairs (June 15, 1914), p. 3.

[155] Regulations Governing Use of Vacant Indian Lands. (July 25, 1912).

[156] *Id.* The lease provided "no such fee to be paid by Indians for their stock not in excess of the number for which free range is provided to them under present regulations."

[157] Annual Reports of the Department of the Interior 1906, H.R. Doc. No. 5, 59th Cong., 2d Sess. p. 77 (BATES SH51912).

Reservation" as a part of the responsibilities of the Indian office.[158] The Big Wind River ditch now serves the LeClair irrigation project in the opened area of the Reservation. It is a ditch established by Indians and with a continuing Indian presence to this day.[159] During this same time period, the General Land Office, responsible for lands in the public domain, stated that "the matter [of granting access on the Reservation] is entirely within the jurisdiction of the Indian Office."[160]

The United States objected in 1912 to the State interfering with Indian water rights in the opened area.[161] At the time, the Assistant Commissioner of Indian Affairs described the Indians homes as extending "from Riverton on the east, up all these valleys clear in to the foothills of the mountains."[162] In *United States v. Hampleman*, the United States sought to enjoin the Wyoming State Engineer from trespassing or interfering with water use on individual allotments and other opened Reservation lands.[163] In 1914, the Secretary's report to Congress stated "it is apparent that the department can not expect to properly care for the interests of the Indians if it is to be

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[158] Annual Reports of the Department of the Interior 1906, H.R. Doc. No. 5, 59th Cong., 2d Sess. p. 88 (BATES SH51912).

[159] *See* Statement of Legal Counsel, p. 21.

[160] *See* Letter from DOI Secretary E. A. Hitchcock to The Commissioner of Indian Affairs (Feb. 5, 1906) (BATES SH51996).

[161] *See* draft complaint, *United States of America v. Wyoming State Board of Control*, U.S. D.C. Dist. Wyo. Case No. 753 (Nov. 11, 1912).

[162] Minutes of meeting Held at the Shoshone Indian Agency with the Shoshone Indians and Arapahoe Indians and Mr. Abbott, Assistant Commissioner (Aug. 28, 1913).

[163] *Id.*, at 10.

subject to the State officials."[164] The District Court enjoined the State from interfering with Indian diversions and trespassing on lands within the opened area, both off and on individual allotments.[165] In 1919, the State of Wyoming conceded *Hampleman* was still good law.[166]

Congress consistently treated the lands opened by the 1905 Act as Indian lands.[167] Indeed, a controversy arose after passage of the Act about whether oil and gas reserves under 1905 Act lands were subject to lease under the laws applicable to Indian lands, or subject to disposition under the general land laws of the United States.[168] In 1916, Congress resolved the controversy by directing the Secretary to issue oil and gas leases to benefit the Tribes. 39 Stat. 519 (1916) ("1916 Act"). Senator Clark of Wyoming explained that the land covered by the 1916 Act was subject to homestead entry under the 1905 Act, but that the time for homestead entry had been exhausted. According to Senator Clark, "[i]t is *still Indian land and the Indians*

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[164] H.R. Rep. No. 1274, 63rd Cong., 3d Sess. 3 (1914).

[165] *United States v. Hampleman*, Decree (D. Wyo. Jun. 26, 1916).

[166] Letter, Rerns to Meritt (Jan. 16, 1919); Letter, State Engineer to S. G. Hopkins, Assistant Secretary (Jan. 9, 1919).

[167] A 1909 House Report, "Extending Time for Final Entry of Mineral Claims within Shoshone or Wind River Reservation, Wyo." consistently refers to the opened area as part of the Shoshone or Wind River Reservation and describes the 1905 Act as "the bill opening a portion of the Shoshone or Wind River Reservation." H.R. Rep. No. 2041, 60th Cong., 2d Sess. (1909); *see also* S. Rep. No. 980, 60th Cong., 2d Sess. (1909). A 1912 House Report describes the ceded lands as being opened to entry and states that the homestead entries under the 1905 Act were made upon a portion of the reservation. H.R. Rep. No. 400, 62nd Cong., 2d Sess., 2 (1912). A 1912 Senate Report likewise refers to the opened lands as being a portion of the Reservation. S. Rep. No. 543, 62nd Cong., 2d Sess. (1912).

[168] In 1912, the President attempted to withdraw certain lands from entry as a petroleum reserve. *See* S. Rep. No. 712, 64th Cong., 1st Sess., 2 (1916). However, certain interests objected to the withdrawal on the grounds that authority for such withdrawals only extended to public lands, not to lands held in trust for the benefit of the Indians. *Id.*

are entitled to it."[169] In passing the 1916 Act, Congress rejected the Department's position that the lands should be developed under a public land leasing law then under consideration by Congress.[170] Leases issued pursuant to the 1916 Act are still in force today.

In 1916, Congress provided funds to enable the Office of Indian Affairs to advance the irrigation of the "Shoshone or Wind River Reservation, including the ceded lands of said reservation, in Wyoming." 30 Stat. 89. In response, the Secretary transmitted reports prepared by the Reclamation Service and the Indian Service. According to the Reclamation Service report, "[a] certain interest is retained by the Indians in the 'ceded-lands' portion of the reservation."[171] The Indian Service report addressed irrigation projects in both the ceded and diminished portions of the Reservation.[172] In discussing the ceded portion, the Department stated:

> On the ceded portion of the Wind River Reservation are a number of community ditches which were originally constructed by individual Indians, but under which white men have bought and leased land. In looking after the interests of the Indians it is necessary that work be done on some of these ceded reservations ditches in order that they will supply a sufficient quantity of water to irrigate the land."[173]

Continuing into the present, the Bureau of Indian Affairs collects and pays operation and maintenance fees for irrigation in the opened area pursuant to a series of agreements with local

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[169] Cong. Rec. S12,159 (Aug. 9, 1916) (emphasis added).

[170] H.R. Rep. No. 975, 64th Cong., 1st Sess., 4 (1916).

[171] H.R. Doc. No. 1767, 64th Cong., 2d Sess., 16-18 (1916).

[172] *See* H.R. Doc. No. 1478, 64th Cong., 2d Sess. (1916).

[173] *Id.*, at 7.

irrigation districts.[174]

From 1917 into the 1940's, Congress made Indian appropriations for irrigation works on the "conditionally ceded" or "ceded portion of" the Reservation.[175] Congress directed that a significant portion of such funds were to be reimbursed from Tribal proceeds under the 1905 Act.

In 1920, Congress appropriated funds for the reclamation project in the opened area. Congress described the lands covered by the project as "within and in the vicinity of the ceded portion of the Wind River or Shoshone Reservation."[176] The reclamation project withdrawal orders state "that the following described lands within the Shoshone Indian Reservation, Wyoming, excepting any tract the title to which has passed out of the United States, be withdrawn from public entry."[177] From January to September, 1920, all disbursements for this project were charged against the Indian appropriations. On October 1, 1920, the disbursements were made from the Reclamation fund. The net investment from the Reclamation fund and the Indian fund were combined into one item and carried under G.L. Account No. 190 as Indian

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[174] Tripartite Agreement Relating to LeClair Riverton No. 2 Ditch (Aug. 2, 1924); Memorandum of Agreement between LeClair-Riverton Irrigation District and United States (Apr. 15, 1964); Memorandum of Understanding Between United States and LeClair-Riverton Irrigation District (Jan. 5, 1968).

[175] 39 Stat. 993 (1917). *See, e.g.* 46 Stat. 279, 293 (1930); 49 Stat. 176, 189 (1935); 53 Stat. 685, 702-03 (1939); 59 Stat. 318, 331 (1945).

[176] Act of June 5, 1920, 41 Stat. 874, 915 (1920), 43 U.S.C. § 597.

[177] Letter, A. P. Davis to Secretary (Jan. 2, 1920) approved by John W. Hallowell, Assistant to the Secretary (Jan. 3, 1920).

investment.[178]

In 1922, Inspector McLaughlin met with the Tribes in Joint Council to discuss outstanding problems. He recognized that the Tribes still retained the opened lands north of the Big Wind River.[179] He contrasted lands opened under the 1905 Act with those covered by the Thermopolis Purchase:

> Our first agreement was in April 1896 [Thermopolis Purchase], and the second in April 1904 [1905 Act]. The two agreements *are entirely distinct and separate from each other*, and the government simply acted as trustee for disposal of the land north of the Big Wind River and could not force homesteaders to go upon lands which they did not desire under the provisions of the Act opening them to settlement."[180]

Superintendent Haas concurred: "You still have an equitable right because the agreement has not been fulfilled in full."[181]

In 1923, the Bureau of Indian Affairs ("BIA") determined that the public land mineral leasing Act of February 25, 1920, 41 Stat. 437, "gave the General Land Office no jurisdiction over the leasing of coal mining lands on the ceded portion of the Shoshone Reservation."[182] On January 17, 1923, the Tribes resolved that "we have jurisdiction on the ceded portion as we understand that the United States is only acting as trustee for the Indians as provided in article

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[178] Hoopengarner, p. 250 n. 59 *citing* Project History, Riverton Project (1918), Vol. III, p. 6.

[179] Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming, at Fort Washakie, Wyoming (Aug. 14, 1922).

[180] *Id.* (emphasis added).

[181] *Id.*

[182] Letter, C. Burke to R. Haas (June 21, 1923).

(9) of April 2, 1904."[183]

In 1929, homesteaders asked the Secretary for "inauguration of a new system better adapted to the protection of [the homesteaders'] interests."[184] The Secretary reaffirmed the continuing obligation of the United States to manage grazing lands in the opened area for the benefit of the Indians.[185] A few years later, the BIA took action against trespassers on the unentered opened portion of the Reservation.[186] The sheriff of Fremont County agreed that the State did not have jurisdiction in the opened area.[187]

In December 1933, the General Land Office proposed to sell certain lands that had been released from the Riverton irrigation project. The Office of Indian Affairs blocked the sale, stating:

> Indian title to the land is not extinguished until it is disposed of and the Indians are paid therefore. The lands involved belong to the Indians and to allow them to be disposed of at this time might seriously interfere with the proposed new land policy for the Indians.[188]

A review of the actual patents issued under the 1905 Act shows that the opening of the reservation was a failure. The following table shows the number of acres patented to non-

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[183] Minutes of General Council (Jan. 17, 1923).

[184] Letter, Commissioner to O. H. Gibson (circa May 22, 1929).

[185] Memorandum, Commissioner to Secretary (June 15, 1929).

[186] *Id.*

[187] Letter, John Collier, Commissioner, to Acting Superintendent (Sep. 18, 1934).

[188] Memorandum, W. Zimmerman to Secretary (Dec. 8, 1933).

Indians in each year from 1906 to 1920 and the cumulative percentage by year of the total opened acres patented.

Year	*Acres per year*[189]	*Cumulative percentage of 1,438,633 opened acres*
1906	0.00	0.00%
1907	680.30	0.05%
1908	8,921.68	0.67%
1909	11,873.24	1.49%
1910	8,630.97	2.09%
1911	12,792.31	2.98%
1912	30,365.45	5.09%
1913	33,132.64	7.40%
1914	10,389.37	8.12%
1915	3,859.76	8.39%
1916	3,460.02	8.63%
1917	4,879.68	8.97%
1918	3,380.55	9.20%
1919	2,286.99	9.36%
1920	1,901.59	9.49%

A cumulative percentage of opened acres never reaches 10.00% until 1929.

7. 1939 Restoration Act.

[189] Source: Compilation prepared from documents located in BLM General Land Office Records Automation web site. www.glorecords.gov.

A new national policy was implemented in 1934 which stopped further sale of opened lands and restored to Indian tribes full beneficial interest in all undisposed-of opened lands within Indian reservations.[190] The policy was implemented through the Indian Reorganization Act (IRA).[191]

Shortly after the IRA's enactment, the Commissioner of Indian Affairs specifically recognized the Wind River Reservation as one of the reservations where Congress had intended lands to be restored to full tribal ownership.[192] The Commissioner distinguished reservations, like Wind River, where the cession opened land for settlement with the United States holding the lands as trustee, from cessions without such provisions where the exterior boundary of a reservation were reduced.[193] Only lands within existing reservations were to be restored to full tribal ownership.[194]

Restoration of undisposed-of Reservation land was effectuated as part of legislation enacted on July 27, 1939 ("1939 Act"), distributing proceeds from *United States v. Shoshone Tribe*, 299 U.S. 476 (1936).[195] In testimony before Congress, the Secretary explained the purpose of the legislation was to consolidate and expand Tribal grazing lands on the Wind River Reservation.

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[190] *Id.*, at 2.

[191] 48 Stat. 984 (1934).

[192] Letter, John Collier, Commissioner, to Secretary of Interior (Aug. 10, 1934).

[193] *Id.*, at 2.

[194] *Id.*

[195] Act of July 27, 1939, 53 Stat. 1128 (1939), 25 U.S.C. § 571-581.

> The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white owned lands within the reservation. The Secretary of the Interior is authorized to restore to the Indians the ceded lands in any land-use district as soon as the white owners have been properly protected, as provided in section 5. *Undisposed of ceded lands within land-use districts, if not under lease or permit to non-Indians will be restored at once, but the ceded lands now used by permittees may be restored progressively only as non-Indian-owned lands are acquired by the United States for the benefit and use of the Indians.*[196]

Senator O'Mahoney of Wyoming expressed his understanding that the ceded lands had remained a part of the Reservation:

> The Shoshone Reservation - at least a portion of it - has been used for a number of years for grazing by certain white settlers in the vicinity of the reservation. When a portion of this reservation, known as the ceded portion, was yielded to the Federal Government by the Indians and opened to settlement, settlers came on and had the understanding that they would be permitted to graze their livestock on the reservation. Permits have been issued during a long period of years to the settlers. The livestock business of the Indian, however, has been fostered by the Indian Office and is being expanded.[197]

Senator O'Mahoney also engaged in a colloquy with Assistant Commissioner of Indian Affairs Zimmerman regarding the land provisions of the 1939 Act:

> Senator O'MAHONEY. What land is it proposed to purchase?
>
> MR. ZIMMERMAN. It is proposed to purchase principally white-owned lands within the ceded portion of the reservation.
>
> Senator O'MAHONEY. In order words, it is proposed to repurchase for the Indians some of those lands which years ago the Indians *ceded to the Government in trust* for settlement by whites?

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[196] Letter, H. Ickes to E. Thomas, (June 27, 1939) (emphasis added), *reprinted in* S. Rep. No. 746, 76th Cong., 1st Sess., 3 (1939).

[197] Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess., 6 (1939).

> MR. ZIMMERMAN. That is correct. . . . The purchase of those white holdings was essential for proper use of the ceded area.[198]

Section 5 of the 1939 Act directed the Secretary to:

> restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land use district are acquired by the Government for Indian use pursuant to the provisions of this Act. All such restorations shall be subject to valid existing rights and claims.

25 U.S.C. § 575. Section 5 of the 1939 Act is identical in all important respects to § 3 of the IRA, 25 U.S.C. § 463. In light of the history of the Reservation and the parallel between § 3 of the IRA and § 5 of the 1939 Act, the Secretary included language in the restoration orders implementing the 1939 Act that make clear that the restored lands were part of the Reservation.[199]

The 1939 Act also parallels the Act of May 19, 1958, 72 Stat. 121, which extended IRA benefits to a number of other tribes similarly situated to the Wind River Tribes. The Senate Indian Affairs Committee explained the purposes of the 1958 restoration statute as follows:

> The bill will restore to the five named tribes ownership of the undisposed-of acreages that were ceded to the United States by the listed tribes pursuant to various statutes and agreements. In general, these statutes provided that the Government would dispose of the ceded lands through homesteading or otherwise and deposit the net proceeds in the Federal Treasury to the credit of the tribes

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[198] *Id.*, at 7-8 (emphasis added).

[199] The Public Land Orders appear at: 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (Nov. 17, 1942); 7 Fed. Reg. 1100 (Nov. 12, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812; 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 2, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); and 39 Fed. Reg. 27,561 (July 30, 1974), 58 Fed. Reg. 32856 (Jun. 14, 1993).

> concerned. . . . *The Supreme Court of the United States has held that this land continued in the beneficial ownership of the Indians even though they had ceded 'all their right, title, and interest.'* So the net effect of [the Act of May 19, 1958] is to *clarify the Indian title* to these lands in order that they may be managed and administered by the tribes.[200]

In 1940, Congress authorized expenditure of funds from the 1939 Act to purchase lands of the Padlock Ranch, which crossed the northern border of the Reservation.[201] The Act recognized that some of the lands being purchased were outside of the then existing boundary of the Reservation, and therefore needed Congressional approval in addition to that provided in the 1939 Act. The 1940 Act mentions that other lands owned by the sellers were within the opened area of the Reservation.[202]

In 1941, Congress authorized the Secretary to set the boundary of allotted, tribal, and individual Indian lands along the Big Wind River after an oil and gas lessee had requested a boundary determination between Indian and fee lands prior to drilling a well.[203] The legislation was needed because the Solicitor had opined that the Secretary did not have authority to fix permanent boundaries for individual Indian lands.[204] The Act specifically described the opened lands as "ceded Indian lands."[205] The Act provided for consent of all owners, white and Indian, prior to fixing the boundary of the parcels. Importantly, Congress understood that the Tribes had

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[200] S. Rep. No. 1508, 85th Cong., 1st Sess. (1958) (emphasis added).

[201] Act of June 27, 1940, 54 Stat. 628 (1940).

[202] *Id.*

[203] 55 Stat. 207 (1941).

[204] S. Rep. No. 275, 77th Cong., 1st Sess., 3 (1941).

[205] Act of May 28, 1941, 55 Stat. 207 (1941).

authority over the ceded lands. The Act provided "[t]he consent of the Shoshone and Arapahoe tribes as to tribal and ceded lands may be given by the tribal council."[206] The Department took the position in 1944 that "[u]nder the terms of this Act of March 3, 1905, *supra*, the Indians of this Reservation retained the equity title until such lands were sold and paid for."[207]

8. Boysen and Anchor Dam Acts.

In 1944, Congress enacted the Flood Control Act, 58 Stat. 887, which approved the construction of several reservoirs in the Missouri River Basin including the Boysen Reservoir on the Wind River. In the Act of July 18, 1952 ("Boysen Act"), 66 Stat. 780, Congress authorized the Secretary of the Interior to "convey and relinquish" to the United States "the property and rights" of the Tribes "needed by the United States for the construction and maintenance and operation" of the Boysen project. According to the Secretary of the Interior, at the time of the Boysen Act, the Tribes had three types of interests in the lands affected by the Act: (1) occupancy rights in tribal lands; (2) beneficial rights in lands conditionally ceded by the 1905 Act as defined by the Supreme Court in *Ash Sheep v. United States*, 252 U.S. 159, 166 (1920); and (3) rights in acquired lands restored under the 1939 Act.[208] The "conveyances and relinquishments" authorized by the Act included approximately 25,880 acres and were taken by

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[206] *Id.*

[207] Letter, Superintendent to Superior Oil Company (March 22, 1944). The courts of Wyoming took a consistent position in *United States v. Board of Com'rs of Fremont County*, 145 F.2d 329 (10th Cir. 1944). ("Some of the lands were ceded back to the United States. They became commonly known as the ceded portion of the reservation and the remaining as the diminished portion. The lands involved in this action are within the ceded portion of the reservation.")

[208] Letter, R. D. Searles to Hon. J. C. O'Mahoney (June 27, 1952), *reprinted in* S. Rep. No. 1980, 82nd Cong., 2d Sess., 6 (1952).

the United States in accordance with a memorandum of understanding between the Bureau of Reclamation and the BIA approved on December 29, 1951, and amended on May 1, 1952. 66 Stat. 780. The memorandum of understanding referenced in the Act provides, *inter alia*, that:

> A. The dam site lands only (approximately 367 acres) were acquired from the Tribes in fee status.
>
> B. Surface rights only were acquired for the remainder of the Boysen withdrawal area. The Tribes retained the rights to the oil, gas and minerals beneath the surface.
>
> C. The Tribes retained an exclusive right of occupancy over the shoreline area west of the reservoir and north of the Riverton Project withdrawal area, subject to regulation by the United States for project purposes.
>
> D. The Tribes retained a nonexclusive right of access to and grazing upon a portion of lands on the southwest side of the Reservoir.[209]

The Memorandum of Understanding adopted by Congress specifically provided that a portion of the payment was for power and railroad rights-of-way "over the Wind River reservation lands."[210]

In 1956, Congress authorized the acquisition of lands for Anchor Dam. The legislation specifically reserved the minerals and hunting and fishing rights for the Tribes. 70 Stat. 987 (1956).

9. The 1953 Act.

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[209] Memorandum of Understanding *reprinted in* S. Rep. No. 1980, 82nd Cong., 2d Sess., 10-54 (June 27, 1952). In 1954, the United States acknowledged that the Tribes had a priority right on the southwest area lands. *See* Memorandum, W. H. Farmer to P. L. Fickenger, (Apr. 22, 1954).

[210] S. Rep. No. 1980, 82nd Cong., 2d Sess., 10 (1952).

In 1953, Congress approved payment to the Tribes for past damages.[211] Prior to passage of the 1953 Act, the Department of the Interior had held that reclamation project lands had not been lawfully withdrawn from the Reservation and that unpatented reclamation project lands and minerals remained tribal property pursuant to *Ash Sheep*, 252 U.S. 159 (1920) and *Hanson v. United States*, 153 F.2d 162 (10th Cir. 1946).[212] Congress recognized that the Riverton project was "located on the ceded portion of the Wind River Indian Reservation in Fremont County, Wyo. . . . A large part of the project area was homesteaded shortly after a cession of Indian lands by the Shoshone and Arapahoe Tribe in 1905."[213]

As of March 31, 1953, approximately 332,000 acres were withdrawn within the Riverton reclamation project area. Of these 332,000 acres, only about 100,000 acres had been disposed of to settlers pursuant to the provisions of the 1905 Act.[214] Between 1920 and 1953, many miles of canals, roads and other infrastructure were constructed on the unsold lands. Additionally, unsold lands were flooded by project reservoirs and various entities extracted tons of sand, gravel and other building materials from these lands. The Tribes had not been compensated for any of these unauthorized uses of the unsold land.[215]

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[211] Act of August 15, 1953, 67 Stat. 592 (1953) ("1953 Act"). These rights are subject to the Tribes' right of transfer back to the BIA under the Excess Lands Act. *See* Section V.A. herein.

[212] *See* II Op. Sol. on Indian Affairs 1607 (U.S.D.I. 1979).

[213] S. Rep. No. 1607, 82nd Cong., 2d Sess., 7 (1952).

[214] H.R. Rep. No. 2453, 85th Cong., 2d Sess., 2 (1958).

[215] Letter, O. Lewis to Hon. A. L. Miller (Mar. 31, 1953), *reprinted in* H.R. Rep. No. 269, 83rd Cong., 1st Sess., 3 (1953); Letter, O. Lewis to Hon. H. Butler (July 22, 1953), *reprinted in* S. Rep. No. 644, 83rd Cong., 1st Sess., 9 (1953).

In 1953, the Interior Department proposed legislation to compensate the Tribes for these unauthorized takings and to open additional lands within the reclamation project to non-Indian settlement. In letters to the Senate and House Committees, the Interior Department explained that a large portion of the 161,500 acres of land subject to the proposed legislation would be used to enlarge existing farm units and the resettlement of project settlers. The Department explained that there was no authority for the sale of such tracts to private parties because existing laws authorizing such sales applied only to public lands "and it has been held that ceded Indian lands do not fall into this category."

Under Section 1 of the Act of August 15, 1953, 67 Stat, 592 ("1953 Act"), Congress provided the Tribes with approximately $1 million to "be deemed to constitute full, complete, and final compensation, . . . for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to lands [and] interests in lands . . . of that part of the former Wind River Indian Reservation lying within the following described boundaries." 67 Stat. 592, 595. The remainder of Section 1 describes an approximately 225,000 acre tract which was the new boundary of the reclamation project within the Reservation. Section 4 provides:

> [A]ll of the lands withdrawn pursuant to the [Reclamation Act] for the development of the Riverton reclamation project, Wyoming, *not included within the boundaries of the tract described in Section 1 . . ., are hereby restored to the ownership of the . . . tribes* to the same extent as the ownership provided by the [1939 Restoration Act], with respect to the vacant lands ceded to the United States under the provisions of the [1905 Act], but not subsequently withdrawn for reclamation purposes.

Id., at 613-14 (emphasis added). In Section 5, Congress directed the Secretary to deposit in the Treasury, to the credit of the Tribes, 90 percent of the gross receipts from the lease or other disposition of the minerals on the tract of lands described in Section 1. *Id.*, at 614.

Pursuant to these provisions, on November 24, 1956, the Secretary of the Interior formally revoked portions of earlier withdrawal orders reducing the withdrawal area to the boundary designated by Congress in the 1953 Act and restoring 88,712.43 acres to Tribal ownership.[216] In addition, many of the lands opened by the 1953 Act were subsequently withdrawn from the public domain by administrative action.[217] Of the 161,000 acres of land restored to the public domain by the 1953 Act, approximately 105,000 acres were never patented to non-Indians (including the surface where Well 19-24 sits) and remain in federal surface ownership today and consequently are under federal jurisdiction.

While § 1 of the 1953 Act speaks to payment for the Tribes' mineral interests in the reclamation project's lands, there was a conflict between the cession language in § 1 and the language in § 5 which directs the Secretary to credit to the Tribes 90 percent of the revenues derived from the leasing of the minerals underlying same lands. Indeed, the Tribes' agreement to the terms of the 1953 Act was based on the understanding that they would retain their interest in the mineral estate with 90 percent of the proceeds paid directly to the Tribes and 10 percent covering administrative costs.[218] This position was consistent with the understanding of

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[216] 21 Fed. Reg. 9195 (Nov. 24, 1956).

[217] *See, e.g.*, 21 Fed. Reg. 9195 (Nov. 24, 1956); 22 Fed. Reg. 4732 (July 4, 1957); 46 Fed. Reg. 49,876 (Oct. 8, 1981).

[218] *See* Joint General Council minutes of July 24, 1952; Tribal Resolution Nos. 325, 355 (attaching specific bill language), and 338 (1952-1953).

Wyoming's delegation.[219] The language of the 1953 Act referring to the existing mineral reservations was changed after Tribal consent was obtained.[220] The initial effect of this change was to allow for disposition of oil and gas leases on a noncompetitive basis under the public land laws, rather than on a competitive basis as provided in the 1938 Indian Minerals Leasing Act.[221]

Perceived ambiguities in the language of the 1953 Act led to confusion about the intent of Congress regarding these lands. Confusion soon blossomed into litigation about whether the Secretary of Interior could lease these lands under the Mineral Leasing Act of 1920, "which is limited to public lands 'owned by the United States'" (leases awarded on a noncompetitive basis) or whether these lands could be leased by the Secretary only under the Indian mineral leasing laws, which apply to minerals held by the United States in trust for Indians (leases awarded through a competitive bidding process). *U.S. ex rel. Shoshone Indian Tribe and Arapaho Indian Tribe v. Seaton*, 248 F.2d 154 (D.C. Cir., 1957). The court ruled that the 1953 Act "made the lands in question part of the public domain and no longer subject to statutes regulating leases of Indian lands." *Id.* at 155. The legal issue centered on the intent of Congress, and the court said

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[219] *See also* Letter, Congressman Keith Thomson (Wyoming) to Robert Harris, Chairman, Shoshone Business Council (July 26, 1958) ("My contention has been that there was a trust at all times as far as the minerals were concerned, even under the provision for 90 percent of the income, and that this carried with it the right to development and enjoyment of the mineral estate.").

[220] *See* S. Rep. No. 644, 83rd Cong., 1st Sess., 9 (1953) (expressing the Department of Interior's contrary understanding and recommendation of modification of the legislative language, and altering the language approved by the Tribes, by deleting the word "terms of now existing mineral reservations.").

[221] S. Rep. No. 1746, 85th Cong., 2d Sess., 3 (1958).

"we cannot ignore the intention of Congress where it is perfectly plain." *Id.* This time, the court got it wrong.

10. The 1958 Act.

Congress acted swiftly to correct the ruling of the Court in *Seaton*. To resolve the ambiguities and the issues arising out of the 1953 Act, Congress passed "A bill relating to minerals on the Wind River Indian Reservation in Wyoming, and for other purposes" on August 27, 1958. 72 Stat. 935. The 1958 Act declared that the tribes owned "all of the right, title and interests in all minerals, including oil and gas, the Indian title to which was extinguished" by the 1953 Act. The 1958 Act also restored to Tribal ownership those federal minerals reserved by the government when other lands within the project area were patented under the 1905 Act.[222] The 1958 Act provided that the minerals underlying the Riverton project area would be leased under the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq.*, and that all of the gross proceeds of such leases would be credited to the Tribes, rather than 90 percent as provided for in the 1953 Act. When considering the 1958 Act for passage, the Committee on Interior and Insular Affairs, described the lands as "within the Riverton reclamation project *within the Wind River Indian Reservation*. . . ."[223] The Act promptly nullified the view of Congressional intent expressed in *Seaton*.

11. Recent Treatment of Opened Areas.

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[222] *Id.*

[223] *Id.*, at 1 (emphasis added).

As in the past, the Tribes have continued to assert their understanding that opened areas are still part of the Reservation. In 1963, the Tribes published an economic development plan that described the Reservation as follows:

> Bounded roughly on the north by the South Fork of Owl Creek, with the Arapahoe Ranch lying just north of the stream. The east boundary is a north-south line running about 6 miles east of the Big Wind River. The south line runs just north of Hudson west to the Continental Divide. The west boundary lies approximately north and south from the East Fork of the Wind River, or generally the western boundary of Range 6 West. Contained within the boundaries of the Reservation are the City of Riverton and the Riverton Reclamation Irrigation Project. The Reservation is approximately 70 miles east to west, and 55 miles from north to south. . . . The Wind River Indian Reservation contains 2,268,000 acres.[224]

The Bureau of Indian Affairs included lands with the opened area as part of its road system in the 1960's. For example, the BIA presented the Joint Business Council a plan for the extension of Route 18 which "takes in the School District for Pavillion and there's a school bus goes by this route. The ones in blue [on the map], are all of the ones that we want to have added to the system and they will all serve school buses for these School District[s]."[225] The position of the Tribes and the BIA was consistent with views of the general public at the time. On July 29, 1965, the *Wyoming Eagle* published an article "Wyoming's Wind River Reservation" which listed "Riverton, population 6,845" as the "largest city on the Reservation."[226]

In 1969, the federal courts enjoined state regulatory authority over tribal oil and gas leases in the 1905 Act opened area. The District Court found that leases from the Tribes

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[224] Overall Economic Development Plan, Wind River Reservation Fremont and Hot Springs Counties, Wyoming (1963); *accord* Wind River Indian Reservation pamphlet (1967).

[225] Minutes of Public Health Meeting, 6-7 (May 26, 1969).

[226] G. Peverley, Wyoming's Wind River Reservation, *Wyoming Eagle* (July 29, 1965).

embraced oil and gas "underlying lands located on the Wind River Indian Reservation." *Shoshone Indian Tribe and Arapaho Indian Tribe v. Hathaway*, D. Wyo. Case No. 5367 (Nov. 7, 1969).

In 1972, Rep. Roncalio introduced H.R. 15316, a bill "to construct an Indian Art and Cultural Center in Riverton, Wyoming, and for other purposes."[227] Section 2 of the bill provided that the center would be "established at Central Wyoming College, located within the Wind River Indian Reservation."[228]

In 1975, the Wyoming Supreme Court reviewed a dispute over consolidation of school districts within Fremont County. *Geraud v. Schrader*, 531 P.2d 872 (Wyo. 1975). A significant portion of the dispute involved school districts serving Native Americans. The Court held that the authority of the state to set up school districts on the Reservation was governed by 25 U.S.C. § 231. *Geraud*, 531 P.2d at 882. Section 231 authorizes states to exercise school jurisdiction on Indian reservations, but only when a duly organized tribe consents to such jurisdiction. 25 U.S.C. § 231. The Court noted "the State is only on the reservation trying to set up a school system by the grace of the two tribes." *Geraud*, 531 P.2d at 882.

In discussing the fact that a proposed consolidated "Indian Reservation District" did not cover the entire Reservation, the Court found "[t]here are a total of 2,947.7 square miles in the entire Indian Reservation (1,886,556 acres divided by 640 acres per square mile)." *Geraud*, 531

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[227] H.R. 15316, 92nd Cong., 2d Sess. (1972); *see* Cong. Rec. E5935 (June 1, 1972).

[228] *Id.*

P.2d at 882-83. This acreage figure is consistent with the Reservation boundary as asserted by the Tribes.

> Those Indians residing on the remaining portion of the reservation will be served for their education by the other three districts. If the arguments of the Wind River Indian Education Association, Inc. and the state committee that there is a unique requirement for a separate Indian school district operated by and for Indians are valid, there is no explanation as to why the same principle should not be applied to the remaining portion of the Indian reservation, in which undisputed court testimony discloses there are several hundred Indian families.

Geraud, 531 P.2d at 883.

In 1975, the U.S. Supreme Court described the Reservation as "[l]ocated in a rather arid portion of central Wyoming, at least some of its 2,300,000 acres have been described by Mr. Justice Cardozo as 'fair and fertile.'. . . It straddles the Wind River, with its remarkable canyon, and lies in a mile-high basin at the foot of the Wind River Mountains." *United States v. Mazurie*, 419 U.S. 544, 546 (1975) *citing Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937). The Court found that "[a]s a result of various patents, substantial tracts of non-Indian land are scattered within the reservation's boundaries." *Mazurie*, 419 U.S. at 546.

In 1980, the federal courts again acknowledged the Reservation boundary as recognized by the Tribes. *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980) ("The reservation is large and the town of Riverton and other settlements are within its boundaries. There are a large number of patented tracts owned in fee by non-Indians not including the property in Riverton.") *cert. denied*, 499 U.S. 1118, *reh'g denied*, 450 U.S. 960 (1981). In 1987, the federal courts found the reservation "encompass[ed] nearly 1.9 million acres and ranges in altitude from 4,200 to over 13,000 feet." *Northern Arapaho Tribe v. Hodel*,

808 F.2d 741, 744 (10th Cir. 1987). According to the Court, "the lowest point on the Reservation is the Wind River Canyon at 4,200 feet which is at the northernmost border of the Reservation." *Id.*

In 1994, Congress passed legislation providing that fee lands within the Reservation acquired by each Tribe individually could be taken into trust in the name of the Tribe which purchased the land. 25 U.S.C. § 574a. Congress recognized that the fee lands were part of the Reservation and provided that "[a]ny lands acquired . . . within the exterior boundaries of the Wind River Reservation shall remain a part of the Reservation and subject to the joint tribal laws of the Reservation." 25 U.S.C. § 574a(b). The legislative history of the Act reflects Congress' ongoing understanding that lands opened under the 1905 Act were still within the Reservation.[229]

Shoshone and Arapaho Tribes v. U.S., 364 F.3d 1339 (Fed.Cir. 2004) is the Tribes' breach of trust case against the United States for mismanagement of mineral resources and trust funds. The Federal Circuit describes the current reservation as follows:

> Both Tribes continue to occupy the Wind River Reservation, which consists primarily of the reservation lands created by the Treaty of 1868, minus certain lands sold to the United States in 1872 and 1896.

Id., at 1343.

The Wind River Reservation today retains its Indian character. Only about 10 percent of the Reservation is owned by non-Indians. Of that 10 percent, approximately 25 percent of the surface is held by the United States with minerals held in trust for the Tribes.

B. Legal Analysis.

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[229] H.R. Rep. No. 103-704, 103rd Cong., 2d Sess. (1994).

When applied to the various Acts affecting the Reservation, the U.S. Supreme Court's analytical framework leads to the conclusion that Congress did not intend any Acts after 1897 to disestablish the Reservation. This is made even clearer when these subsequent Acts are contrasted with the Lander and Thermopolis Purchase Acts.

1. Lander and Thermopolis Purchase Acts.

In clear contrast to subsequent Acts, there is substantial and compelling evidence that Congress intended to diminish the Reservation when it ratified and amended the Lander and Thermopolis Purchase Agreements. *See Solem*, 465 U.S. at 472. The language of the ratifying Acts and the circumstances surrounding their passage clearly show intent to diminish the Reservation. First, both agreements use language of unconditional cession and provide the Tribes with a sum certain in consideration for the absolute cession of land. For example, in the Thermopolis Purchase Act, the Tribes agreed to "cede, convey, transfer, relinquish and *surrender forever and absolutely* all their right, title, and interest *of every kind and character* in and to the lands and the water rights appertaining thereunto." 30 Stat. 62, 93 (emphasis added). Likewise, the Lander Purchase Act specifically provided that the southern limit of the Reservation would be changed by passage of the Act. 18 Stat. 291. Both Acts provided for the upfront payment of a specific sum as consideration for the immediate acquisition of Reservation lands by the United States. 18 Stat. 291 (Art. II); 30 Stat. 62, 93 (Art II); *cf. Yankton Sioux*, 522 U.S. at 345; *DeCoteau*, 420 U.S. at 447-48.

Second, in neither agreement did the Tribes retain interests of any kind in the ceded lands. The Lander Purchase lands were excluded from the survey of Reservation lands in 1875

and settled with other parts of the public domain within the 6th Principal Meridian. In the Thermopolis Purchase Act, Congress immediately conveyed one section of land to the State of Wyoming and expressly declared the remaining lands to be "public lands of the United States subject to entry."[230] 30 Stat. 62, 96. Congressional action extinguishing all Indian interests and also restoring an area to the public domain, without conditions, is strong evidence of intent to diminish a reservation. *See Hagen*, 510 U.S. at 414; *Seymour*, 368 U.S. at 354.

Third, the circumstances surrounding the negotiation and ratification of these agreements demonstrate that they were intended to diminish the Reservation's exterior boundaries. The history of the Lander Purchase shows that the initial proposal from the United States was a swap of land south of the Reservation for new land north of the Reservation.[231] Brunot's description of the negotiations clearly indicates that the goal of the negotiations was to eliminate the southern portion of the Reservation due to the significant existing non-Indian encroachment in the area.[232] During negotiations for the Thermopolis Purchase, McLaughlin told the Tribes that the United States government would assume "absolute control" of the ceded lands and that the Indians would only have the "same privileges to use them as the public generally."[233] Thus, in both cases the surrounding circumstances make clear that the intent of Congress was to extinguish all Indian interests and diminish the Reservation.

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[230] Originally, entry was only allowed under the homestead and town-site laws. In 1906, Congress formally extended the remainder of the public land laws to the ceded lands. 34 Stat. 162 (1906).

[231] Report of the Secretary of the Interior, October 10, 1872, p. 510.

[232] *Id.*; H.R. Exec. Doc. No., 41st Cong., 3d Sess., 639 (1870-1871).

[233] S. Rep. No. 247, 55th Cong., 1st Sess., 8 (1896).

While of lesser importance than the language of the Act and circumstances surrounding passage of the Act, there is no record that federal, state or tribal governments have ever treated these lands, patented or unpatented, as reservation lands subsequent to enactment. For example, Congress in 1906 extended all the public land laws to the area sold in the Thermopolis Purchase. 34 Stat. 162. Lands under both Acts were surveyed as part of the public domain, not part of the Reservation.

There is thus clear evidence that Congress intended to disestablish a portion of the Wind River Reservation when it ratified the Lander and Thermopolis Purchase Agreements and the lands have been so treated since the passage of the ratifying Acts.

2. The 1905 Act Did Not Disestablish the Wind River Reservation.

Application of the Supreme Court's analytical framework to the 1905 Act leads to the conclusion that the Act did *not* diminish the Reservation. The language of the 1905 Act, in fact, indicates an understanding that the Reservation boundaries would be preserved. The negotiations and legislative history bolster this conclusion. The overall subsequent treatment of the area shows that Congress, the Executive Branch, the Tribes, the State and local governments, and the local residents and settlers all understood that the opened lands would remain within the Reservation.

a. The Language of the 1905 Act Does Not Evince a Clear Intent to Disestablish the Wind River Reservation.

The most probative evidence of Reservation status is the language of the statute. *Solem*, 465 U.S. at 470. The language of the 1905 Act lacks a plain and unambiguous intent to disestablish. It is not the kind of absolute and unconditional language found in Congressional

enactments held to effect disestablishment. *Id.*, at 469. Article I of the 1905 Act provides that the Tribes would "cede, grant, and relinquish" interests in tribal lands. 30 Stat. 1016. Article I also provides that individual Indians could have allotments conveyed to them in the ceded or diminished areas of the Reservation.[234] *Id.*

In contrast to Article I of the 1905 Act, the Thermopolis Purchase Act provides for the Tribes to "cede, convey, transfer, relinquish and *surrender forever and absolutely* all their right, title, and *interest of every kind and character* in and to the lands and the water rights appertaining thereunto" in return for a fixed payment of $60,000. 30 Stat. 62, 93 (emphasis added). *See Yankton Sioux*, 522 U.S. at 345 ("negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment . . . bears the hallmarks of congressional intent to diminish a reservation"); *Solem*, 465 U.S. at 470-71 (explicit language "evidencing the *present and total surrender of all tribal interests* . . . buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land" establishes "almost insurmountable presumption that Congress meant for the Tribe's reservation to be diminished") (emphasis added).

Also unlike the Lander and Thermopolis Purchase Acts, the 1905 Act fails to provide for payment of a sum certain in consideration. *Seymour*, 368 U.S. at 355-356; *cf. Rosebud Sioux*, 430 U.S. at 590-92 ("baseline purpose of disestablishment" derived from an agreement

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[234] In addition to repeating the cession language from Article I concerning lands to be opened to settlement, Article II of the Act uses the word "convey" when referring to consideration for the actions in Article I. An examination of Article I in conjunction with the refusal of the United States to commit to the sale of any lands to non-Indians shows that the only lands anticipated to be immediately conveyed by the Act were existing allotments to Indians.

containing a land cession and sum certain compensation); *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) (language of cession combined with payment of sum certain "precisely suited" to termination of Reservation). Instead, the 1905 Agreement makes compensation contingent on actual sales of land to non-Indians and provides that the proceeds of the sales would be credited for the Tribes' benefit. All sums of money mentioned in the 1905 Act are preceded by language stating the payments are to be reimbursed from land sale payments credited to the Tribes. *See* 33 Stat. 1016, Art. III, IV, V, VI, VII, VIII, and IX.

The differences in the language and structure of the 1905 Act from the Lander and Thermopolis Purchase Acts show that there was no intent to diminish or disestablish in the 1905 Act. When an earlier statute is *in pari materia* with a later one, they are construed together so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. The courts normally presume that, where words differ, "Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

The specific language used by Congress in the 1905 Act to refer to differing areas of the Reservation further shows that Congress did not intend to disestablish the Reservation. In Article I, Congress describes the cession as applying to "all lands embraced within said reservation," except lands within a set legal description. 30 Stat. 1016. Article I then sets forth points on the boundary of "said reservation" describing the Reservation as it existed in 1905 and exists today. *Id.* Congress also provides for the handling of allotments "within a portion of said reservation hereby ceded," with "said reservation" referring to the entire Reservation. *Id.*

Article II then describes the lands in the ceded area set apart for settlement by non-Indians. *Id.*, at 1016-1017.

Significantly, when Congress enacted the special provisions for Asmus Boysen in Article II, Congress described a survey to be completed of "said lands" referring to the opened area of the Reservation. Congress then gave Boysen a right to select lands within "said reservation" contemplating the continuing reservation status of the entire area, both ceded and diminished. *Id.*, at 1017. This broader description was appropriate because Boysen had a preexisting lease on the Reservation for 178,000 acres in both the opened and unopened areas described in the 1905 Act.[235] If Congress had contemplated a reduction in the Reservation, it would have given Boysen a selection right in either the ceded area or the diminished area rather than using the "said reservation" language referring to the entire Reservation.

The 1905 Act lacks any language to provide that the opened lands will be treated as public lands of the United States. *See Seymour*, 368 U.S. at 354 (lack of restoration to public domain in contrast to earlier statutes restoring lands indicates lack of intent to diminish); *cf. Hagan*, 510 U.S. at 414; 30 Stat. 62, 96. Instead, the 1905 Act simply provides that the lands would be "opened to entry" (Art. I) and the government would "act as trustee" for the Indians "to dispose of [the] lands and pay over to the Indians the proceeds received from the sale thereof. . . ." (Art. IX). 30 Stat. 1016, 1021. No language making the lands opened by the 1905 Act public domain lands appears in that Act or any subsequent legislation. Clearly, Congress knew how to terminate the Reservation status of land by declaring it to be public land or

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[235] *See Wadsworth v. Boysen*, 148 F. 771, 773 (8th Cir. 1906).

restoring it unconditionally to the public domain as it did in the Thermopolis Purchase, but chose not to use such language in the 1905 Act.

In *Seymour*, 368 U.S. at 355-56, the Court construed 1906 legislation for the Colville Reservation authorizing the sale and disposal of unallotted land with the proceeds from the disposition of the lands to be "deposited in the Treasury of the United States to the credit of the [Tribes]." The Court held that the 1906 legislation 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. The Court contrasted the 1906 Act with an 1892 Act providing that the other half of the original Colville reservation should be "vacated and restored to the public domain." *Id.* This is similar to the distinction between the Thermopolis Purchase Act and the 1905 Act.

In *Mattz*, 412 U.S. at 496-97, the Court held that a statute which provided for the sale of Klamath River reservation lands under the public land laws land did not disestablish a reservation. The Supreme Court noted that while legislation had been proposed to disestablish the Reservation, the version of the bill that actually passed "provided for allotments to the Indians and for the proceeds of sales to be held in trust for the 'maintenance and education,' not the removal, of the Indians." *Id.*, at 504. The situation in *Mattz* parallels the legislative history of the 1905 Act.

Similar factors were also present in a series of cases construing the 1890 Nelson Allotment Act. In the Nelson Act, the Indians agreed to cede land to the United States within certain reservations, but the Act authorized the Indians to establish allotments on the subject

reservations, established a trust for the disposition of ceded lands, and required that the proceeds of the sale of the lands be used for the Indians' benefit. *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980); *State v. Forge*, 262 N.W.2d (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978); *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 at *8 (D. Minn. 1998); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1002-03 (D. Minn. 1971). In all of these cases, the courts have held that those agreements were insufficient to diminish Indian reservations.

The Supreme Court has long held that the trust arrangement in the 1905 Act preserves the Indians' interests in the ceded lands until they are actually sold or otherwise disposed of by the United States. In *Ash Sheep*, 252 U.S. at 164, the Crow Tribe "ceded, granted and relinquished," but did not convey, to the United States all of their "right, title and interest" in certain reservation lands. The government agreed that it would sell the land to settlers and pay the proceeds to the Indians in a prescribed manner. *Id.*, at 165. The *Ash Sheep* agreement also included language that is virtually identical to the "government as trustee" language of Article IX of the 1905 Act. *Id.*, at 165-66. Taking all these provisions together, the Supreme Court held:

> [W]hile the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become 'public lands' in the sense of being subject to sale, or other disposition, under the General Land Laws. They were subject to sale by the government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in Act [of] April 27, 1904 (33 Stat. 352).