A. 1953 Reclamation Act.

The Act of August 15, 1953, 67 Stat. 592 ("1953 Act") did not alter the exterior boundary of the Wind River Reservation. Application of the U.S. Supreme Court's analytical framework for disestablishment cases establishes the 1953 Act does not demonstrate *substantial and compelling evidence* of a congressional intention to disestablish the size of the reservation. *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984). The "effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Integral to the disestablishment analysis of the 1953 Act is the Act of August 27, 1958, 72 Stat. 935 (1958) ("1958 Act"), which was passed in direct response to 1953 Act's failure to accurately depict Congress's understanding of the agreement with the Tribes.

Under Section 1 of the Act of August 15, 1953, 67 Stat, 592 ("1953 Act"), Congress provided the Tribes with $1,009,500 deemed to constitute full payment, except for mineral interests reserved in Section 5 of the Act, for the Tribes' interests in specific lands within the Riverton Reclamation Project. 67 Stat. at 595. The remainder of Section 1 describes a line which is the new boundary of the reclamation project after passage of the 1953 Act -- not a change to the Reservation boundary. Pursuant to Section 2 of the 1953 Act, "all unentered and vacant lands" within the project boundary were "restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States . . . ." *Id.* at 613. The "unentered and vacant lands" consisted of 161,500 scattered acres which were unpatented at the time of passage of the 1953 Act. In Section 5, Congress directed the Tribes be paid 90 percent of the gross receipts from the lease or other disposition of the minerals on the tract of lands described in Section 1.

1. Factual and Legal Status of Lands Within The Scope of the 1953 Act and the 1958 Act prior to Enactment of the 1953 Act.

The Wind River Reservation was established by the July 3, 1868, Treaty of Fort Bridger, 15 Stat. 673 (1868) ("1868 Treaty"). The 1953 Act and 1958 Act lands are within the area described in the 1868 Treaty. In 1905, Congress passed the Act of March 3, 1905, 33 Stat. 1016 (1905) ("1905 Act") which opened a portion of the Reservation to settlement. The subject lands are within the area opened to settlement under the1905 Act.

Beginning in 1918, the federal government began to make reclamation withdrawals on the Reservation without the appropriate legal authority from Congress. II Op. Sol. on Indian Affairs 1607 (U.S.D.I. 1979). The subject lands of the 1953 Act and 1958 Act lands were within the withdrawal areas inappropriately removed and were placed within the Riverton Reclamation Project by the Act of June 5, 1920, 41 Stat. 874, 915 (1920). From 1920 to the 1940s, the reclamation project withdrawal area expanded and contracted pursuant to various withdrawal orders and revocations of withdrawal. In 1939, Congress formally restored full use and control of the un-disposed Reservation land within the area covered by the 1905 Act to the Tribes, except those lands on the Reservation "within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation." Act of July 27, 1939, 53 Stat. 1128, 1130 (1939) ("1939 Act"). Again, the subject land was within the Riverton Reclamation Project at that time.

As of March 31, 1953, the Riverton Reclamation Project contained approximately 332,000 acres. H.R. Report No. 269, 83rd Cong., 1st Sess. 1 (April 14, 1953). The old boundary of the project is shown on the Bureau of Reclamation map "Proposed Boundary of Riverton Project" dated July 1952. Of those 332,000 acres within the Riverton Project, approximately 70,500 acres were outside the new project boundary that was established by the 1953 Act. Those

approximate 70,500 acres were restored to full tribal use and control by the 1953 Act, and are not the subject of the 1958 Act.[3] Of the remaining approximately 261,500 acres within the new project boundary established by the 1953 Act, about 100,000 acres had been patented prior to the 1953 Act under the terms of the 1905 Act. The Act of March 4, 1921, 41 Stat. 1704 (1921), had provided that lands on the project should be sold for $1.50 per acre and the proceeds of sale delivered to the Tribes pursuant to the 1905 Act; being the Tribes received proceeds *after* sale, not before. The balance of the new project area, approximately 161,500 acres, consisted of scattered tracks of land opened to settlement under the 1905 Act, but never settled. These 161,500 acres of scattered, unentered surface land were the only interest in tribal land that was purchased by a portion of the proceeds of the 1953 Act. The Bureau of Reclamation map "Proposed Boundary of Riverton Project" dated July 1952 shows the specific locations of the patented lands, restored lands, and compensated lands.[4]

Prior to passage of the 1953 Act, the Department of the Interior held that the reclamation project land had not been lawfully withdrawn from the Reservation, and that unpatented reclamation project lands and minerals remained tribal property pursuant to *Ash Sheep Company v. United States*, 252 U.S. 159 (1920) and *Hanson v. United States*, 153 F.2d 162 (10th Cir. 1946). *See* II Op. Sol. on Indian Affairs 1607 (U.S.D.I. 1979).

At the time of the passage of the 1953 Act, Congress understood the reclamation project was wholly within the exterior boundary of the Reservation. In 1936, Congress held lands north of the project were within the Reservation when it validated a homestead entry:

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[3] Section 4 of the 1953 Act provides all withdrawn lands not within the new project boundary were "restored to the ownership of said tribes to the same extent as the ownership provide by the Act of July 27, 1939 (53 Stat. 1128), with respect to vacant lands ceded to the United States under the provisions of the Act of March 3, 1905 (33 Stat. 1016)." Pursuant to the 1953 Act, on November 24, 1956, the Secretary of the Interior formally revoked portions of earlier withdrawal orders reducing the withdrawal area to the boundaries designated by Congress in the 1953 Act and restoring 88,712.43 acres to Tribal ownership.

[4] Exhibit 2.

> The homestead entry, Cheyenne 052273, made by Ruble L. Jenkins on January 21, 1931, for east half of the northeast quarter and northeast quarter of southeast quarter, section 19, and southwest quarter of northwest quarter of section 20, township 6 north, range 2 east, Wind River meridian, Wyoming, within the Shoshone Indian Reservation, is hereby validated . . ."

Act of June 22, 1936, 49 Stat. 2343 (1936). In 1940, Congress held that land west of the reclamation project was within the Reservation when it granted the United States a flowage easement "over tribal and allotted lands of the Wind River or Shoshone Indian Reservation" for the Bull Lake Reservoir. Act of March 14, 1940, 54 Stat. 49 (1940). In 1952, Congress held that lands south of the Riverton Project were within in the Reservation when it forgave irrigation charges of the Episcopal Church in Township 1 South, Range 1 West, Wind River Meridian. 66 Stat. 165 (1952). To the east of the project, Congress approved the acquisition of land for the Boysen Reservoir and Dam incorporating directly an agreement between the Tribes and the Secretary that recognized the lands were on the Reservation. Act of July 18, 1952, 66 Stat. 780 (1952) ("Boysen Act"). The land of the Boysen project is located between the eastern boundary of the Reservation and the reclamation project which was the subject of the 1953 Act. Bureau of Reclamation – Boysen Reservoir Ownership Map (February 1946). Therefore, Congress expressly recognized at the time of the 1953 Act that the reclamation project was entirely within the exterior boundary of the Reservation, specifically recognizing that Reservation lands completely surround the Riverton Project. Moreover, the 1953 Act says the Riverton Project is *within* the ceded portion of the Reservation. (Emphasis added).

B. The Language of the 1953 Is Equivocal On The Question Of Congressional Intent To Disestablish.

Relying on language of the 1953 Act to support a finding of disestablishment of the Reservation is misplaced. The most often cited language to support this misconception is as follows:

> That there is hereby authorized to be transferred in the Treasury of the United States from funds now or hereafter made available for carrying on the functions of the Bureau of Reclamation and to be placed to the credit of the Shoshone and Arapahoe Tribes of Indians of the Wind River Reservation in Wyoming, the sum of $1,009,500, said sum shall be credited to and expended for the benefit of said tribes and their members as provided by the Act of May 19, 1947 (61 Stat. 102), as amended by the act of August 30, 1951 (65 Stat. 208), and by the Act of July 17, 1953 (Public Law 132, Eighty-third Congress), and as may be hereinafter amended, and shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, 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 the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Reservation lying within the following described boundaries:
> * * *
> Sec. 2 Subject only to the existing rights and interests which are not extinguished and terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States.

67 Stat. 592, 612.

1. Section 1 of the 1953 Act Is Ambiguous Regarding Disestablishment.

The first section of the 1953 Act has many unique provisions distinguishing it from what may appear to be other similar Congressional Acts that have been held to disestablish a reservation because of superficial language that the United States purchased the lands for a sum certain. First, the 1953Act provides for transfer of funds "in the Treasury of the United States from funds now or hereafter made available for carrying on the functions of the Bureau of Reclamation" to pay the Tribes under the 1953 Act. This payment from reclamation funds stands in marked contrast to the payment language of statutes held to disestablish a reservation, whereas the Acts that determined disestablishment occurred all provide for payment by the United States' general treasury, not apportionment of funds from those held for a specific purpose, such as:

- 18 Stat. 291, 292 art. II (1874) (Wind River Reservation -- Lander Purchase) ("The United States agrees to pay . . .");
- 22 Stat.148, 149 (1882) (Fort Hall Reservation) ("the United States agrees to pay to the Shoshone and Bannock Indians the sum . . .");
- 30 Stat. 62, 94 (1897) (Wind River Reservation -- Thermopolis Purchase) ("the United States stipulates and agrees to pay to the said Shoshone and Arapahoe tribes of Indians . . .") ;
- 31 Stat. 672, 673 (1900) (Fort Hall Reservation) ("the United States stipulates and agrees to pay and expend for the Indians of the said reservation [Fort Hall Reservation] . . .") ;
- 33 Stat. 254 (1904) (Rosebud Sioux Reservation) "the United States stipulates and agrees to expend for and pay to said Indians . . .") ;
- 33 Stat. 352 (1904) (Crow Reservation) ("the United States stipulates and agrees to pay and expend for the Indians of the said reservation [Crow Reservation] . . ."); and
- 35 Stat. 558, 561 (1908) (Fort Peck Indian Reservation) ("the United States shall pay to the said Indians for the lands in said section sixteen and thirty-six . . .").

In contrast, each time Congress acquired any interest in Reservation lands for reclamation purposes and provided for payment from reclamation funds, Congress's intention was to promote irrigation -- not to make changes to the Reservation boundary. First, the Boysen Act acquired lands for a reclamation reservoir east of the Riverton Reclamation Project and provided payment was from the Missouri River Basin project, a reclamation project. 66 Stat. 780 (1952). The Act incorporated a memorandum of understanding which reserved to the Tribes the mineral interests and surface uses. In *Bourland v. South Dakota*, 949 F.2d 984, 990 (8th Cir. 1991),), *rev'd on other grounds*, 508 U.S. 679 (1993) and *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809 (8th Cir.1983), *cert. denied*, 464 U.S. 1042 (1984), the 8th Circuit held that Congress's purpose in acquiring land with a congressional and statutory history the same as the Boysen Act "was simply to enable the United States to acquire the land needed for the construction of the [project], and to do so with as little disruption as possible to the life of the Tribe." *Bourland,* 949 F.2d at 994. Congress had acquired land for reservoirs on both reservations pursuant to the Flood Control Act, 58 Stat. 887 (1944), which approved the construction of several reservoirs in the Missouri River Basin. The 8th Circuit held the two cases that the Cheyenne River Act did

not disestablish the boundaries of the Reservation. *Bourland,* 949 F.2d at 990; *Lower Brule Sioux Tribe,* 711 F.2 at 821 (holding that two sister taking acts, with language similar to that used in the Cheyenne River Act, did not diminish reservation boundaries).[5]

Second, Congress in 1956 acquired land within the Wind River Indian Reservation for Anchor Dam reclamation reservoir on the Reservation and provided for payment from the Missouri River Basin project with reclamation funds. 70 Stat. 987 (1956) ("Anchor Dam Act"). The Act also reserved mineral rights for the Tribes. *Id.* Congress recognized that the project included "irrigable lands of the Shoshone and Arapahoe Tribes of the Wind River Reservation." On December 3, 1986, thirty (30) years later, the United States recognized that the Anchor Dam Act did not alter the Reservation status of the land when it transferred a portion of the lands back to the Tribes under the Federal Property And Administrative Services Act 40 U.S.C. § 521 *et seq.* formerly 40 U.S.C. 472 *et seq.* ("Excess Property Act"). Letter Order from Charles D. Thomas, GSA Director of Real Estate Sales to Gentlemen (Dec. 3, 1986). The lands were transferred pursuant to 40 U.S.C. § 523 (former § 483) which applies to land "located within the reservation" of a tribe. 40 U.S.C. § 523(a). Therefore, in order for the lands to be transferred to the Tribes through that process required the United States to determine that the lands were within the Reservation.

The 1953 Act is structured in the same way as the Boysen Act and Anchor Dam Act which did not alter the Reservation boundary. The 1953 Act provides that payment shall be from reclamation funds of the Bureau of Reclamation. 67 Stat. 592. The 1953 Act also reserved to the Tribes interest in the minerals: reclamation funds are in full payment, "except as provided in

[5] The Supreme Court recognized this holding in *Bourland v. South Dakota,* 508 U.S. 679, 698 n.1 (1993) (" The District Court found that conveyance of the taken area to the United States did not disestablish the reservation, see App. 96-104, and South Dakota did not appeal that determination. See also 949 F.2d 984, 990 (CA8 1991) (case below) ('[I]t seems clear ... that the Cheyenne River Act did not disestablish the boundaries of the Reservation')").

section 5 of this Act." 67 Stat. 592. Section 5 of the Act contains provisions assuring continual mineral revenues to the Tribes. *See* discussion below on the 1958 Act which declared minerals belong to the Tribes. The Department of the Interior acknowledged that the compensation provided for in the 1953 Act "represented only the value of the surface of the undisposed of, ceded lands" and that the Act preserved the Tribes' mineral rights. S Rep. 1746, 85th Cong., 2d Sess. 4 (June 24, 1958). Therefore, the transfer of less than the full tribal interests to the United States supports a finding of non-disestablishment intent.

Another portion of 1953 Act § 1 that creates ambiguity about Congress's intention is the use of the word "deemed" in describing what was being paid for, *i.e.*, payment for terminating interests in land owned by the Tribes, past damages for use of tribal land and minerals, and unspecified future damages. 67 Stat. 592, § 1. The use of the word "deemed" indicates something less than an unequivocal intent. Black's Law Dictionary (7th ed.) defines "deemed" to mean "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it doesn't have." While the 1953 Act specifies an amount of money, there is no allocation among the various items for which the United States was providing compensation. In statutory drafting, "'deemed' is a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be something it is not or negatively by 'deeming' something not be something which it is. G.C. Thornton, *Legislative Drafting* 83-84 (2d ed. 1979). The word "deemed" creates an artificiality. *Id.* This artificiality runs counter to "*substantial and compelling evidence* of a congressional intention to diminish the size of the reservation." *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

In addition, § 1 of the 1953 Act excepts from its payment language that the future income from the mineral estate was retained by the Tribes in § 5 of the 1953 Act. 67 Stat. 613. Clearly,

the language in § 5 reflects a continuing Tribal interest in the minerals under the lands covered by the Act. Even though the language states it transfers all title to the minerals to the Tribes, that is not what the Tribes understood they had agreed to, and Congress clarified its intention less than five (5) years later, identifying Congress did *not* intend to sever the mineral interest from Tribes.. *See* discussion below about the 1958 Act.

The final provision of § 1 of the 1953 Act that establishes ambiguity regarding Congress's intention is use of the language "former" reservation. The term "former" reservation as used in historical documents relating to Native Americans is not a term of art. For example, the term "formerly a part of the Indian reservation" was used by Congress to describe non-trust lands near the Arapaho subagency located in the "diminished" reservation. H.R. Rep. 2658, 75th Cong., 3rd Sess., 1 (1938). Prior to passage of 1953 Act, the case law was inconsistent in its use of the term "former" reservation to refer to either disestablishment or simple transfer of an individual parcel from trust status. *See, contrast, Johnson v. Gearlds*, 234 U.S. 422, 444 (1914); *Dick v. United States*, 208 U.S. 340, 342 (1908) *with U.S. v. McGowan,* 302 U.S. 535 (1938), following *U.S. v. Sandoval,* 231 U.S. 28, 46 (1913).

2. The Public Domain Language Is Not Dispositive Of Congressional Intent.

The 1953 Act provides in § 2 that "all unentered and vacant lands" within the 161,000-acre tract described in Section 1 are "restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States . . ." does not automatically equate to a finding of disestablishment as to the 161,500 surface acres acquired under the 1953 Act. 67 Stat. at 612. The 1953 Act used the words "restored to the public domain" which in some cases has been held to be evidence in support of disestablishment – but is not *de facto* disestablishment language. However, unlike other statutes where such

language was used, the 1953 Act describes a congressional intention which is much more limited than other acts where disestablishment was found. The legislative history is clear that the purpose of this provision was not to affect the boundaries of the Reservation, but simply to provide authority for the Secretary of the Interior to sell these lands to existing non-Indian farmers and ranchers because settlement under the 1905 Act was no longer permitted. H.R. Rep. No. 269, 83rd Cong., 1st Sess. 3 (1953) (It is proposed "to utilize a large portion of the lands for the enlargement of existing farm units"). The Department itself identifies and explains to Congress 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." Subsequently and accordingly, the Department proposed legislation to remedy this situation by placing the 161,500 acres in the category of "public lands."[6] In *Hagen v. Utah*, 510 U.S. 399, 411 (1994), which discusses use of "restored to the public domain" language in a disestablishment, the Supreme Court rejected a "clear-statement rule in disestablishment cases. The Supreme Court "decline[d] to abandon [its] traditional approach to diminishment cases, which requires us to examine all the circumstances surround the opening of a reservation". *Hagen*, 510 U.S. at 412. Unlike *Hagen*, the 1953 Act did not involve a transfer of the tribe's entire interest, did not involve scattered tracts of land, and was not passed to accomplish a discreet goal – expansion of limited farming units within a reclamation project. The 1953 Ac is not a case where the lands were restored because they were "no longer needed for the purposes for which they were withdrawn from sale and settlement." *Hagen*, 510 U.S. at 412-413. Rather, the Act was passed to facilitate sales that were already withdrawn for reclamation purpose and remained withdrawn after passage of the Act. In fact, the Court

[6] Letter, O. Lewis to Hon. A. L. Miller (Mar. 31, 1953), *reprinted in* H.R. Rep. 269, 83rd Cong, 1st Sess. (Apr. 14, 1953) at 3; Letter O. Lewis to Hon. H. Butler (July 22, 1953), *reprinted in* S Rep. 644,83rd Cong., 1st Sess. (July 28, 1953) at 9.

recognized the use of the words "public domain" in some case was not dispositive. *Hagen*, 510 U.S. at 413 citing *Solem*, 465 U.S. at 475. Consistent with majority's recognition that use of the words "public domain" is not always dispositive, the dissent stated, "[w]e never authoritatively have defined the public domain, and the phrase 'has no official definition. In its most general application a public domain is meant to include all the land owned by a government – any government, anywhere.'" **[Citations omitted]** Most commonly, the public domain and public lands 'have been defined as those lands subject to sale or other disposition under the general land laws." [Citation omitted] *Hagen*, 510 U.S. at 427-428, Blackmun in dissent. Congress's limited intentions with use of the words "public domain" is supported by the fact that the 1953 Act was considered by Congress in conjunction with three other bills whose purpose was to improve farm units – not disestablish the Reservation. H.R. Rep. No. 269, 83rd Cong., 1st Sess. 3 (1953). In fact, the 1953Act's lands retained their withdrawal status for reclamation purposes after its passage.[7] Since the purpose of the public domain provision in Section 2 was solely to provide authority for sale of the surface estate to non-Indians farmers and ranchers, and not to divest the Tribes of all of their interests in the 161,000 acres, inclusion of the public domain language does not support the argument that the 1953 Act disestablished the Reservation because the Tribes maintained mineral interests, rather than third-party beneficiary interests.

3. Section 5 of the Act Evidences U.S. Intent Not To Disestablish

While Section 1 of the 1953 Act speaks to payment for acquisition of the Tribes' mineral interests in the reclamation project's lands, there is a conflict between the cession language in Section 1 and the language in Section 5 that directs the Secretary to credit to the Tribes 90 percent of the revenues derived from the leasing of the minerals underlying same lands.

[7] *See, e.g.*, 21 Fed. Reg. 9195 (Nov. 24, 1956); 22 Fed. Reg. 4732 (April 12, 1957).

Moreover, the Tribes' agreed to the terms of the 1953 based on the understanding that they would retain their interest in the mineral estate with 90% of the proceeds paid directly to the Tribes and 10% covering administrative costs.[8] Absent evidence that the Tribes committed themselves "to cede and relinquish *all interests* in unallotted opened lands" a congressional purpose to disestablish reservation cannot be inferred. *See Solem*, 465 U.S. at 468, 478 (reservation disestablished when land "divested of *all Indian interests*"). Wyoming's congressional delegation held the same understanding as the Tribes that the 1953 Act was not an acquisition of their entire interest. Congressman Thomas stated: "[m]y 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." Letter from Congressman Keith Thomas (Wyoming) to Robert Harris, Chairman, Shoshone Business Council, July 26, 1958. Importantly, the language of the 1953 Act referring to the existing mineral reservations was changed by the Bureau of Reclamation after Tribal consent was obtained. 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."); further, removing this language also created an inconsistency in the language of the statute. Use of the word "bonuses" in the 1953 Act precludes an interpretation that the Indians were divesting themselves of their entire interest. A bonus is the opportunity for the Indian mineral owner to receive compensation in addition to rents and royalties. Contemporaneously to leases issued for tribal minerals in the subject lands, public land leases were issued without competitive bidding and bonuses to the first applicant

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

who paid a $10 filing fee and nominal rental. Therefore, Congress's use of the word "bonuses" is additional evidence not of an understanding the Tribes were not divested of all mineral interest, but rather that interest in the minerals was retained. *See* S. Rep. 1746, 85th Cong., 2d Sess. 3 (June 24, 1958).

C. The Contemporaneous History of the 1953 Act Supports A Finding of Continuing Reservation Status.

The events surrounding the passage of the 1953 Act – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative reports presented to Congress" – are considered relevant to a determination whether there was a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. Without that widely held, contemporaneous understanding, there can be no finding of disestablishment. *Id.* at 472. To the extent that the language of the act and the circumstances underlying its passage are equivocal on the question of congressional intent to disestablish, post-enactment events also may be considered, although they are of "lesser" significance. *Solem*, 465 U.S. at 471. Congress's own treatment of the affected areas, particularly in the years immediately following the opening has evidentiary value. *Id.* at 471.

In letters to the Senate and House Committees, the Interior Department explained that a large portion or the 161,500 acres of the scattered unentered land to be relinquished by the Tribes under the proposed legislation would be used to enlarge existing farm units and the resettlement of project settlers. H.R. Rep. 269, 83rd Cong, 1st Sess. 3 (Apr. 14, 1953); S Rep. 644,83rd Cong., 1st Sess. 9 (July 28, 1953). "[N]o matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. 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." *Id.* The proposed legislation was to remedy this situation for farmers by placing the 161,500 scattered acres in the category of "public lands." *Id.* Again, "public lands" is used here for the limited purpose of allowing specifically for the expansion of individual farms, not to open the lands to the general public for settlement. This is supported by the fact that the lands opened by the 1953 Act were immediately withdrawn from the public domain for reclamation purposes shortly after passage of the Act.

D. The 1958 Act Clarifies Congress Did Not Intend To Disestablish The Reservation In The 1953 Act.

After passage of the 1953 Act, Secretary of the Interior McKay construed the 1953 Act to mean that Congress had intended to convert the minerals, including oil and gas, from Indian status to public land status. The United States proceeded to lease the minerals pursuant to the Mineral Leasing Act of February 25, 1920 without competitive bidding, no bonus, and lower rental. Although their property was at stake, the Tribes were never formally advised of the Department's action. Promptly after the Tribes learned of the situation in 1955, administrative proceedings were instituted protesting the action of the Department. Secretary McKay denied the protest. *Shoshone Tribe, et al. v. Julian H. Zimmerman, et al*, September 22, 1955. Relief was sought from the courts, but the language of the 1953 Act, coupled with the limited right of review of administrative action, precluded judicial intervention with the Secretary's conclusion that title to the minerals had been transferred to the United States. This information was

presented to Congress as the background for Congress's correction of the injustice wrought by the 1953 Act's failure to reflect the agreement of the parties.[9]

The fact that the 1953 Act did not accurately state the intention of Congress is shown by passage of the Act of August 27, 1958, 72 Stat. 935, "A bill relating to minerals on the Wind River Indian Reservation in Wyoming, and for other purposes." The 1958 Act declared 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 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.

Importantly, Congress changed language in the original bill, H.R. 1141, which provided that minerals "shall be and the same are hereby restored to the Shoshone and Arapaho Tribes." House Bill, H.R. 1141, 85th Cong., 2d Sess. 2 (March 4, 1958); Senate Bill S.3203, 85th Cong., 2d Sess. 2 (January 31, 1958) (emphasis added). Instead of restoring the minerals, Congress "declared [the minerals] to be held by the United States in trust for the Shoshone and Arapahoe Tribes." Senate bill S.3203 [Committee Print], 85th Cong., 2d Sess. 2 (June 19, 1958) (emphasis added). "Declare" means to make known, state something officially, state it emphatically, and to reveal. The Random House Dictionary of the English Language (2d Ed. Unabridged) ("Random House"), p. 518. In contrast, the word "restore" means to bring back to a former or original condition. Random House, p. 1641. Congress knew when to use the word "restore" in legislation. In the 1939 Act, Congress restored to certain lands under the 1905 Act which undid

[9] The information in the paragraph was presented to Congress in the Statement of Marvin J. Sonosky and Glen A. Wilkinson, respective attorneys for the Shoshone And Arapahoe Tribes of the Wind River Reservation, Wyoming, before Subcommittee on Indian Affairs House Committee on Interior and Insular Affairs on H.R. 11141 (June 20, 1958).

the conditional transfer rights granted the United States in the 1905 Act, *i.e.*, rescinded the Tribes' 1905 Act release of their possessory right to the government so that, as the trustee, the United States could make perfect title to purchasers. By the intentional use of the word "declare" Congress was making it clear that in the 1953 Act it in fact understood the mineral ownership had remained in the Tribes.

The 1958 Act does far more than make the Tribes passive recipients of the proceeds of government sales or leases of minerals. The statute provides that the minerals "shall be administered and leased in accordance with" the 1938 Indian Minerals Leasing Act (IMLA), 25 U.S.C. §§ 396a *et seq.*, requiring the Tribes' consent to and approve of parties offering to develop the subject tribal minerals. *Id.* The 1958 Act in § 1 makes it clear all leases, irrespective of the original statutory authority under which it was issued, were to be administered under the IMLA. By placing the minerals in trust status, the statute effectively acknowledges both ownership and control over the minerals from the United States government to the Tribes. Furthermore, ownership of the mineral estate gives the Tribes and their lessees significant and superior rights to use and occupy the surface for the purposes of mineral extraction. *See Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505-06 (1928). Under the IMLA, it is *the Tribes*, not the United States, that determine in the first instance whether and on what terms minerals will be leased. *See* 25 U.S.C. § 396(a). Under the IMLA, the role of the Secretary of the Interior is limited to approving tribally issued leases. *Id.*

Importantly, § 2 of the 1958 Act required all leases under the 1953 Act to be subject to renewal at the end of their primary five-year term. Consequently, all parties, by choosing to accept renewal of a lease issued under the 1953 Act, took such action knowing their lease would be administered under the IMLA.

Additionally, Congress's required in the 1958 Act that all funds collected under the 1953 Act, including the 10% administrative fee, be returned to the Tribes. 72 Stat. 935, § 1 (gross proceeds credited to miscellaneous receipts of United States under 1953 Act shall be transferred to the Tribes). This is just one more confirmation that Congress in the 1958 Act was correcting material errors in the 1953 Act.

IV. Montana Analysis Argument

A. General Montana Analysis.

Defendants Encana and DHS ("Defendants") primarily rely on the ruling in *Montana v. United States*, 450 U.S. 544 (1981) ("*Montana*") as the basis to limit tribal adjudicatory jurisdiction of the EST & NAT over Defendant's in this case, however, *Montana's* general limitation on tribal civil jurisdiction over non-Indians is subject to two (2) exceptions, as follows:

> (1) A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
> (2) A tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 566. These are generally referred to as the "consent" or "nexus" exception and the second exception as the "impacts" exception.

Defendants' attempt to apply the ruling in *Montana v. United States*, 450 U.S. 544 (1981) is, however, inapposite. As explained in *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (citations omitted), *Montana's* main rule applies to "conduct of nonmembers on non-Indian [fee] land within a reservation." "The term 'non-Indian fee lands,' as used . . . throughout the *Montana* opinion, refers to reservation land acquired in fee simple by non-Indian owners." *Id.* Defendants' filings show they admit that their presence on the Reservation is pursuant to an oil and gas lease

rather than a circumstance where Defendants acquired ownership interest in the surface lands and its activity pertains solely to surface-land occupancy. Instead, this case is similar to *Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F.Supp.2d 1111 (D.Colo 2000) involving a dispute between two oil companies regarding development on a tribal oil and gas lease. As the District Court stated in *Petrogulf Corp.* "[h]ere, because [Defendant] does not contend that Defendants acquired the property upon which the well sits in fee simple, the Strate exception does not apply." *Petrogulf Corp.*, 92 F.Supp.2d at 1115.

The area here at issue is, however, within the Wind River Reservation. Even so, as indicated there are limitations on tribal jurisdiction over the activity of non-Indians even within the reservation. These include criminal jurisdiction, *Oliphant v. Suquamish Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), and civil adjudicatory jurisdiction on a state right-of-way where the tribe is a stranger to the accident, *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), and over a non-Indian lender in a sale between two non-Indians, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct.2709, 171 L.Ed.2d 457 (2008). The Court has also held that a tribe may not tax non-Indian activity on fee land where there is a minimal nexus with the Tribe *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 Led.2d 889 (2001), or exercise civil regulatory jurisdiction over a non-Indian for the enforcement of tribal preference where there is are minimal contacts or impacts. *Atkinson Trading Co. v. Manygoats*, 2004 WL 5215491 (D.Ariz).

The facts of the present case, however, support tribal jurisdiction within the undiminished Wind River Reservation and meet both of the exceptions under the *Montana* ruling.

1. The Consensual Relationship, or Nexus Exception

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Montana, 450 U.S. at 566

Defendants' arguments center solely on surface land ownership and fail to address the full context and application of *Montana's* support for the EST's jurisdiction. The first *Montana* exception recognizes Tribal jurisdiction over non-Indian activity within the reservation boundary when the non-Indian activity includes a consensual relationship through such things as contracts, leases and other activity. Defendants have such contacts.[10]

Defendants relationships with the Tribes include a long list of such contacts, including: compliance with the Shoshone & Arapaho Law & Order Code ("SA LOC") Tribal Employment Rights Code (TERO or "Title X") for application to and holding of tribally issued business licenses issued pursuant to Title X; compliance with the Tribes' fee assessments issued pursuant to Title X; and long-standing acknowledgment and receipt of the Tribes' production incentive refund of severance taxes the Tribes' imposed on all mineral development that Defendant and its predecessor Tom Brown enjoyed[11]. Defendants concede, moreover, that they have been in compliance with tribal regulations at all times relevant to the underlying activities in this case, specifically on January 1, 2009.

Defendants own filings show they admit that their presence on the Reservation is pursuant to an oil and gas lease. The harm to the deceased Plaintiff Jorgenson allegedly occurred at the well site where there is a lease to develop tribal oil and gas; a lease that is covered by Title

[10] Defendant Encana maintains a long-established consensual relationship with the Tribes, including the following lease agreements: BIA 14-20-0258-1310; BIA 14-20-0258-1311; BIA 14-20-0258-1312; BIA 14-20-0258-1313; BIA 14-20-0258-1318; BIA 14-20-0258-1319; BIA 14-20-0258-1320; BIA 14-20-0258-1321; BIA 14-20-0258-1323; BIA 14-20-0258-1325; BIA 14-20-0258-1578; BIA 14-20-0258-3566; BIA 14-20-0258-3568; BIA 14-20-0258-3569; BIA 14-20-0258-3597; BIA 14-20-0258-3636; BIA 14-20-0258-6300; BIA 14-20-0258-6301; BIA 14-20-0258-6308; BIA 14-20-0258-6508; BIA 14-20-0258-6511; BIA 14-20-0258-6524; BIA 14-20-0258-6558; BIA 14-20-0258-6560; BIA 14-20-0258-6767; BIA 14-20-0258-6886

[11] Exhibit 2: Joint Business Council Resolution No. 7040, issued on March 3, 1993.

X of the Tribal Code and the Lease covenants with the Tribes. The complained of activity took place at the lease cite. Unlike *Strate v. A-1*, the Tribes are not strangers to the activities that led to the harm suffered by Plaintiff, and are directly party the agreements with the Tribe related to those activities.

Defendants admit deceased Plaintiff Jorgenson was an employee, performing his duties at the work site in developing Tribal minerals, and became intoxicated during that time. Defendants' activities were directly related to the regulatory authority of the Tribes reflected in Defendants' consensual and the contractual relationship with the Tribes, consistent with the consensual relationship requirement identified in *Montana* exception #1.

Unlike the facts that were the foundation for the holdings in *Atkinson Trading Co., Nevada v. Hicks,* and *Plains Commerce Bank*, Defendants here concede that they entered into a consensual relationship with the Tribe regarding both performance of their Lease obligations and their Title X obligations, and have done so for years. See, Defendant Encana's Motion for Summary Judgment P.10, ¶ 32&33; Defendant DHS's Motion for Summary Judgment P.5, ¶3.

In *Atkinson v. Manygoats* the court ruled that the Navajo Nation lacked jurisdiction to enforce its employment ordinance on a non-Indian enterprise because that enterprise had carefully and deliberately minimized its contacts with the reservation or the Tribe. By contrast, both DHS and Encana have an express consensual relationship through Defendants' compliance with SA LOC Title X

These are ample contacts that reflect the consensual relationship between the Defendants and the Tribes. The first *Montana* exception is met.

2. Impacts exception

There is no dispute that the subsurface of the lands at issue is held in the trust for the Tribes. There is no dispute that the surface of the land at issue is owned by the United States. These two non-fee interests are under administration of the Bureau of Indian Affairs, the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service. All of these agencies have a trust responsibility on the subject lands arising from the Treaty of July 3, 1868. For example, the Bureau of Reclamation has responsibilities for surface actions. The Indian Policy of the Bureau of Reclamation, www.usbr.gov/native/naao/policies/policy.html, provides: "Reclamation, as a federal executive agency, shares this responsibility." It further provides "Reclamation will carry out its responsibilities in a manner that protects trust assets and avoids impacts when possible." Therefore, in addition to the superior rights of subsurface owner, the federal government recognizes an important tribal interest in implementation of federal actions on the surface, including consent to surface use. Importantly, the Defendants in this case have access to the surface pursuant to a lease of tribal minerals.

B. The Tribes Have The Inherent Power To Exercise Adjudicative Jurisdiction Over A Claim Arising On A Tribal Mineral Lease.

1. Oil and Gas Activities are Central to The Economic Security of the Tribes.

Accepting for sole purpose of responding to Defendants' argument the *Montana* standard applies to the facts of this case, the second basis for Tribal jurisdiction over Defendants under *Montana v. United States*, 450 U.S. 544, 565-566 (1981) identifies a separate nexus for Tribal jurisdiction and supports tribal court jurisdiction. The second basis for jurisdiction under *Montana* is the Tribes' "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation, when that conduct threatens or has some direct effect

on the political integrity, the economic security, or the health and welfare of the tribe." *Montana*, 450 U.S. at 565-566.

A personal injury action arising from Lessee's activity on a tribal well-site has a profound and direct impact on the economic security of the Tribes. The Shoshone and Northern Arapaho Tribes own the oil and gas reserves beneath 1.8 million acres of the Wind River Reservation. For nearly a century, revenue from these reserves has been the lifeblood of tribal government and the principal means of support for the Tribes' members. The Tribes historically have generated approximately 90% of their revenues from oil and gas.

One hundred years of energy development at Wind River demonstrates its central importance to the Tribes. Historically, the Tribes subsisted through hunting and gathering; however, by the 1870s, because the incursion of white settlers largely destroyed the buffalo herds and cut the Tribes off from their most important subsistence resource, the Tribes depended largely on federal rations and annuities provided under the Treaty of July 3, 1868, 15 Stat. 673, and subsequent agreements until the turn of the century.

The discovery of deposits of coal and other valuable minerals in Indian country in general, and specifically including the Wind River Reservation, led to passage of the Indian Mineral Leasing Act of 1891, which permitted mineral leases on Indian land with the consent "of the Council speaking for such Indians." In 1893, both the Eastern Shoshone and Northern Arapaho Tribes established their current six-member Business Council. By the first years of the twentieth century, mineral lease payments replaced treaty rations as the major source of subsistence, a fact which continues to this day. From the inception of the Business Councils, one of their principal functions under tribal and federal law has been to encourage mineral

development, approve leases, seek increased resource revenues, and assure that the revenues benefit tribal members.

In 1905, the portion of the Reservation north of the Big Wind River was opened for settlement. When oil was discovered there, it was unclear whether it was subject to leasing under the 1891 Act, so in 1916 Congress adopted a special leasing law that preserved tribal ownership of the resource, and specified minimum royalties, 10-year renegotiation cycles, and other protections. Only the straight lease form was authorized. The Muddy Ridge area, the site of the facts at issue here, has been an area of oil and gas development for decades. The discovery well was drilled in 1961.

Oil and gas has long been key to the economic security and autonomy of the Tribes. When Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq. (IRA), neither of the Tribes elected to organize under it because a central concern was suspicion over the absence of provisions regarding disposition of the Tribes' mineral resources.

The Business Councils continually pressed for more control of lease revenues due to the little political influence the Tribes had over their minerals and because the Federal Indian agents had tremendous discretion over how lease revenue would be expended - often withholding revenues, or using tribal trust funds to pay for agency operations while tribal members went hungry and lived in tents. Regular written demands by the Business Councils for release of lease revenues date from at least 1908, and many of these focused on the needs of children, the elderly, and others unable to work. To prevent federal overuse of revenues, the Tribes demanded per capita distributions, and in 1927 threatened to bar further leasing unless provisions for per capitas were instituted. Tribal efforts were finally successful in 1947 when Congress required the federal government to remit the lion's share (now 85%) of oil and gas income in per capitas,

with 15% directly funding the tribal governments. Today, the 15% accounts for 1/10th of the Eastern Shoshone tribal government funds, or approximately $1.5million dollars from tribal resources annually to provide government function.

Due to the Tribes' investigation into protecting its oil and gas revenues, there was a nation-wide scandal in the 1980s, which began at Wind River, regarding the integrity of the accounting for Indian oil and gas revenues. Headlines described hidden unmetered pipelines and unauthorized tanker trucks leaving the Reservation full of Indian oil. Until these disclosures, lease enforcement and royalty accounting was performed primarily by United States Geologic Survey. The Tribes' active involvement in monitoring and regulating the resource shows the importance of the resource to the Tribes. The scandal shows the threats to the Tribes' economic security.

In 1982, the Supreme Court held in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), that Indian tribes had the power to tax on-Reservation development. The Tribes had passed a tax ordinance in 1978, but tribal taxes were paid into escrow until the *Merrion* decision. Tribal taxes have since become an essential component of tribal government finances, along with the 15% share of tribal production revenues. Tribal taxes on natural resource production, including assessments on the subject well site of this action, along with the 15% royalty share attributes for approximately 60% of the total tribal government income, with the remaining 40% coming from federal or state grants and/or other appropriations. Oil & Gas production remains the only major tribal revenue generating aspect of all economic development ventures and the Eastern Shoshone Tribe relies heavily on its resource production for both economic security as well as political integrity.

The above background demonstrates the Tribes' longstanding vital concern with and dependence on Reservation energy resources. The only other significant governmental actor in the mineral resource development field has been the federal government. The state has no interest at all in this area, other than its general interest in raising revenues. In *Shoshone and Arapaho Indian Tribe v. Hathaway*, No. 5367 Civ. (U.S.D.C. D.Wyo. 1969), the District Court held the Wyoming Oil and Gas Commission has no jurisdiction over any of the oil and gas wells on the Reservation. The land in *Hathaway* is in the open portion of the Reservation with the same statutory history as the land in this case.

Here, assessing the relevant tribal interest in deciding matters related to oil and gas development on the Reservation is straightforward: Since the 1890s, oil and gas development has been central, overriding, and basic to the survival of the Tribes and their memberships. The historic record outlined above shows that by the turn of the century, mineral revenues became the Tribes' most important source of subsistence, and this remains true today. Development was of central importance in structuring tribal government in 1893 and in rejecting the IRA in 1934.

The Tribes' exercise of sovereignty over development has grown irrespective of periodic shifts in federal policy. The Tribes have played a far more active role in seeking and managing Reservation development than is commonly thought and they expanded their role into the lease approval process, production decisions, disposition of revenues, auditing, taxation, and the structuring of their entrepreneurial participation. Progress in all of these areas has enhanced the sovereignty of the Tribes over their most important resource.

Oil and gas proceeds are the single largest source of tribal revenues. Reductions in these revenues would seriously interfere with the ability of tribal government to govern the Reservation and provide needed services to Reservation residents. Meanwhile, tribal population

is increasing, as is the need for government services as well as employment opportunities. X number of Shoshone and Arapaho tribal members rely on and work on sites within the Wind River Indian Reservation, and allow tribal members to become skilled and earn wages without leaving the reservation Without employment opportunities on these well sites, the Tribes would have less and less members participating in tribal government and traditional culture because people would leave to pursue work and other opportunities. Because per capita real income for tribal members has declined over the past ten years, the percentage of tribal families living in poverty has increased. Many families rely on their oil per capitas to subsist, and these payments are also in deep decline; therefore, without the Tribes' Title X requirements requiring employment and declining per capita the Tribes' economic security would be at high risk due to an increase need in services to more tribal members.

Resolution of the claims between private parties is of particular concern to the Tribes. A determination in favor of the Plaintiffs may have an impact on the Tribes' economic activity by impacting costs of oil and gas development, as well as economic opportunity for individual tribal members. Converse, a determination in favor of Defendants may impact the health and safety of tribal members working in the oil and gas industry. Therefore, position of both parties is of central importance to and a threat to the economic security of the Tribes and the Tribal Court has jurisdiction to hear this case.

2. Regulation of Oil and Gas Activities has a direct impact on the Health and Welfare of the Tribes and their members.

The federal government and the court have long recognized that tribes play an important role in regulating industries that potentially release contaminants into the environment. For example, in 1990, Congress amended the Clean Air Act ("CAA") to expressly delegate to Indian

tribes the authority to implement CAA programs within Indian country. In § 301(d) of the CAA, Congress authorized the EPA Administrator to "treat Indian tribes as States" for the purposes of the CAA and to "provide any such Indian tribe grant and contract assistance to carry out functions provided" for in the CAA. 42 U.S.C. § 7601(d)(1). Similarly, in *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982) cert. denied 459 U.S. 977, the Court held

> The conduct that the Tribes seek to regulate in the instant case-generally speaking, the use of the bed and banks of the south half of Flathead Lake-has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources. Hence the challenged ordinance falls squarely within the exception recognized in Montana.

These same factors are at play in this case. Reservation oil and gas development has impacts on surface and groundwater quality, air quality, waterfowl, birds, and big game species. Each of these in turn impacts the quality of life of tribal members. Court decisions will have an impact on these activities and are appropriately decided by the Tribal Court.

Safety on oil and gas facilities is integral to the health and welfare of tribal members. Serious injury can result in removal of a bread winner from a home, leaving the family to look to the Tribes' for assistance. In *Marathon Oil Company v. Johnston*, U.S.D.C.Wyo Case No. 03-CV-1031-J, Order Granting Motion To Dismiss, p. 18, the court recognized that tribal courts "have an overwhelming interest in the workplace safety of a corporation operating on tribal land because, invariably, significant numbers of tribal members may constitution the relevant workforce. We would miss the forest for the trees were we only to focus on the fact that this particular instance of alleged negligence involved a nonmember employee." Tribes, as with any government with individuals working within its borders, have a significant interest in safety of

nonmembers on Reservation well sites, and as much so when the matter, as is before this Court, concerns an active worksite with a Native American employee involved.

V. Conclusion

Absent that clear Congressional intent to disestablish and/or diminish tribal lands, Congressional history and acts pertaining to the Wind River Indian Reservation support that the reservation exterior boundaries remain and have always been in tact. Further, the historical, factual analysis required pursuant to well-established disestablishment law identifies the Wind River Indian Reservation remains in tact, and all lands within the exterior boundaries are Indian Country. The subsequent congressional acts in 1953 and 1958 further clarify Congressional intent to maintain tribal interest and ownership of the subsurface to all lands identified or subject to this matter. Without Clear congressional intent to completely disestablish the Tribes' interest in the subject lands, the pertinent matter remains unchallenged – all Defendants alleged activity in this matter, occurred in Indian Country and is within this Court's subject matter jurisdiction.

As a secondary analysis, while Indian Country is clearly established regarding the pertinent lands, the Defendants attempt to apply a *Montana* analysis to their underlying activity to further argue against this Court's jurisdiction. However, EST clearly identifies that while *Montana* is inapposite to this issue due to the Indian Country status and the Tribes' ownership of subsurface lands, in entertaining such arguments, the Tribe identifies the Defendants' activity falls within the *Montana* analysis exceptions, whereas the Defendants' activity stems from a direct consensual relationship with the Tribes'. Further, Defendants' subject conduct and activity directly effect the Tribes' economic safety, their health, safety and welfare, as well as its tribal political integrity.

WHEREFORE, the Eastern Shoshone Tribe prays this Court issue an order denying the Defendants' motion for summary judgment for lack of subject matter jurisdiction, and for such other and further relief that this Court deems appropriate and necessary.

RESPECTFULLY SUBMITTED this 7th day of February, 2011.

OFFICE OF ATORNEY GENERAL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of February, 2011, a true and correct copy of the foregoing EASTERN SHOSHONE TRIBES' RESPONSE AND SUPPORTING BRIEF TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION was placed in the United States Mail, postage prepaid, and addressed as follows:

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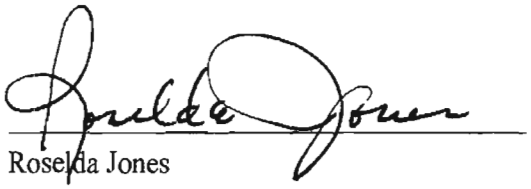

Roselda Jones

CHIEF WASHAKIE

RESOLUTION
OF THE
SHOSHONE AND ARAPAHOE TRIBES
WIND RIVER INDIAN RESERVATION
FORT WASHAKIE, WYOMING 82514

CHIEF BLACK COAL

RESOLUTION NO. 7040
PAGE NO. One (1)

WHEREAS, the Joint Business Council ("JBC") of the Shoshone and Northern Arapaho Tribes ("Tribes") is the governing body duly authorized by the General Council of each Tribe to conduct business on behalf of the Tribes; and

WHEREAS, the JBC, as a means to increase revenues to the Tribes, desires to promote production, exploration, and development of natural gas from wells located on the Wind River Reservation ("Reservation"); and

WHEREAS, Tom Brown, Inc. ("Tom Brown") is engaged in the exploration for and production of natural gas on lands located on the Reservation, which lands are specifically described on Exhibit "A", attached hereto and made a part hereof, and which lands are hereinafter referred to as the "subject lands"; and

WHEREAS, Ordinance No. 39, adopted by the JBC, imposes a severance tax on Tom Brown for the production of natural gas on the Reservation which funds are available for providing governmental operations and services; and

WHEREAS, the JBC expects Tom Brown to engage in production activities in reliance on the continued effectiveness of this resolution during the time periods provided for herein; and

WHEREAS, the JBC finds that if economic incentives are provided to Tom Brown, that Tom Brown will seek to maximize production, exploration, and development of natural gas from wells located on the Reservation, and that this will, in turn, increase long term revenues to the Tribes:

NOW, THEREFORE, BE IT RESOLVED that, for the lands described in Exhibit "A", the Joint Business Council hereby approves a Production Incentive Payment for Tom Brown calculated by multiplying the then current market value at the well or place of production of all reservation natural resources produced, saved and sold, or transported from the field or area where produced ("Current Market Value") by the following rates:

EXHIBIT
2

RESOLUTION

For the period of January 1, 1993 through December 31, 1996:

A. 0.00% for the portion of average daily production from the subject lands for the month over 0 MMCF but not over 5 MMCF, at 14.73 PSIA,

B. 2.50% for the portion of average daily production from the subject lands for the month over 5 MMCF but not over 10 MMCF, at 14.73 PSIA,

C. 4.50% for the portion of average daily production from the subject lands for the month over 10 MMCF but not over 15 MMCF, at 14.73 PSIA,

D. 6.50% for the portion of average daily production from the subject lands for the month over 15 MMCF but not over 20 MMCF, at 14.73 PSIA, and

E. 8.50% for the portion of average daily production from the subject lands for the month over 20 MMCF;

For the period of January 1, 1997 through December 31, 1999:

A. 0.00% for the portion of average daily production from the subject lands for the month over 0 MMCF but not over 10 MMCF, at 14.73 PSIA,

B. 2.50% for the portion of average daily production from the subject lands for the month over 10 MMCF but not over 15 MMCF, at 14.73 PSIA,

C. 4.50% for the portion of average daily production from the subject lands for the month over 15 MMCF but not over 20 MMCF, at 14.73 PSIA,

D. 6.50% for the portion of average daily production from the subject lands for the month over 20 MMCF but not over 25 MMCF, at 14.73 PSIA, and

E. 8.50% for the portion of average daily production from the subject lands for the month over 25 MMCF;

RESOLUTION

BE IT FURTHER RESOLVED that the Joint Budget for the Tribes shall be amended by adding a line item which reads "Production Incentive Payments" in the amount equal to the Production Incentive Payment provided for herein;

BE IT FURTHER RESOLVED that the Production Incentive Payments provided for herein shall not apply to any month of production where the Current Market Value for the natural gas produced from the subject lands exceeds Five Dollars an MCF;

BE IT FURTHER RESOLVED that this resolution shall not be revoked or amended for any month of production in which Tom Brown engages in production activities in reliance on the continued effectiveness of this resolution; and

BE IT FURTHER RESOLVED that the Director of the Wind River Tax Commission is directed and authorized to take the necessary actions to implement this resolution; and

BE IT FURTHER RESOLVED that the provisions of this resolution shall be effective as of January 1, 1993; and

BE IT FINALLY RESOLVED that the Chairmen of the Shoshone Business Council and the Northern Arapaho Business Council are directed and authorized to execute any documents necessary to implement this resolution.

CERTIFICATION

WE THE UNDERSIGNED, as the Chaiman of the Shoshone Business Council and the Chairman of the Northern Arapaho Business Council hereby certify that in a meeting of Joint Session that the Shoshone Business Council is composed of six (6) members and the Northern Arapaho Business Council is composed of six (6) members of whom six (6) members of the Shoshone Tribe and six (6) members of the Northern Arapaho Tribe, constituting a quorum, were present at a meeting duly and regularly called, noticed, convened, and held this 3rd day of March, 1993, that the foregoing resolution was adopted by the affirmative vote of six (6) members of the Shoshone Tribe, 0 members abstaining and six (6) members of the Northern Arapaho Tribe, 0 members abstaining, Chairman voting, and the resolution has not been rescinded or amended in any way.

RESOLUTION

SHOSHONE & ARAPAHOE TRIBES
RESOLUTION NO. 7040
PAGE NO. Four (4)

Done at Fort Washakie, Wyoming this 3rd day of March, 1993.

Chairman, Shoshone Tribe

Chairman, Northern Arapaho Tribe

ATTEST:

Joint Tribal Secretary

Aust/ohn/tbl804

EXHIBIT "A"

Attached to the Tax Agreement
by and between the
Shoshone and Northern Arapaho Tribes
of the
Wind River Reservation
and
Tom Brown, Inc.
dated
February ____, 1993

PAVILLION FIELD
FREMONT COUNTY, WYOMING

Township 3 North, Range 2 East
Section 1: All
Section 2: All
Section 3: All
Section 4: E/2
Section 8: E/2NE/4NE/4
Section 9: All
Section 10: All
Section 11: All
Section 12: All
Section 13: All
Section 14: All
Section 15: All
Section 16: N/2NE/4, SE/4NE/4

Township 3 North, Range 3 East
Section 4: W/2
Section 5: All
Section 6: All
Section 7: All, except S/2SW/4
Section 18: Lots 3, 4, SE/4SW/4, S/2SE/4

Township 4 North, Range 2 East
Section 34: Tracts 3,4
Section 35: Tracts 8,9,10

MUDDY RIDGE FIELD
FREMONT COUNTY, WYOMING

Township 4 North, Range 2 East
Section 12: NW/4, S/2
Section 13: Tracts, 2,5,6,7
Section 24: All
Section 25: All

Township 4 North, Range 3 East
Section 19: All
Section 20: All
Section 30: All

OPTION ACREAGE
PAVILLION NORTH FIELD
FREMONT COUNTY, WYOMING

Township 4 North,Range 2 East
Section 1: Lots 1,2,3,4, S/2N/2, SW/4, N/2SE/4, SE/4SE/4
Section 2: Lots 1,2, Tracts 2,3,4,5,6,7,8,10,11,12, 13,14,15, SE/4NE/4, NE/4SE/4 (ALL)
Section 3: Lot 2,3,4, Tracts 1,2,3,4,5,6, S/2NW/4, SW/4NE/4, SW/4, W/2SE/4 (ALL)
Section 4: Lots 1,2,3,4, S/2N/2, S/2 (ALL)
Section 5: Lots 1,2,3,4, S/2N/2, S/2 (ALL)
Section 8: All
Section 9: All
Section 10: All
Section 11: Tracts 2,3,4,7,9,10,11,12,13,14,15,16, SW/4NW/4, W/2SW/4, SE/4SW/4
Section 14: Tracts 1,2,3,4,5,6, W/2, W/2SE/4, SE/4SE/4 (ALL)
Section 15: All
Section 16: All
Section 17: All
Section 18: E/2
Section 19: E/2
Section 20: All
Section 21: All
Section 22: All
Section 23: All
Section 26: N/2, N/2S/2, S/2SW/4SW/4, SE/4SE/4, NE/4SW/4SE/4, N/2NW/4SW/4SE/4, E/2SE/4SW/4SE/4
Section 27: Tracts 1,2,3,4,5,6,7,8,9,10,11 (ALL)
Section 28: Tracts 1,2,3,4,5,6,7
Section 29: Tracts 1,2,3,4,6,7,21,22
Section 36: Tracts 1,2,4,5,7,8,9, NE/4NE/4, W/2SW/4

NORTH PAVILLION FIELD (Continued)

Township 5 North, Range 2 East
Section 20: All
Section 21: All
Section 22: All
Section 23: All
Section 24: All
Section 25: All
Section 26: All
Section 27: W/2, W/2E/2, SE/4NE/4, E/2SE/4
Section 28: All
Section 29: All
Section 32: All
Section 33: All
Section 34: All
Section 35: All
Section 36: All

Township 4 North, Range 3 East
Section 29: All
Section 31: Tracts 1,2,3,4,6,7,8,10,11
Section 32: All

TRIBAL SEVERANCE TAX
PRODUCTION INCENTIVE PAYMENT
1/93

PAVILLION

MMcfpd	Tax refund %	NET MCF AFTER ROYALTY	NET VALUE AFTER ROYALTY	TRIBAL TAX @ 5% LESS INCENTIVE
		440,884	$695,127	$39,083.80
0 – 5	–0–	115,909	$182,750	–0–
5 – 10	2	115,909	$182,750	($3,655.00)
10 – 15	4	115,909	$182,750	($7,310.00)
15 – 20	6	93,157	$146,877	($8,812.61)
				$39,308.18

MUDDY RIDGE

MMcfpd	Tax refund %	148,690	$247,328	$21,022.88
0 – 5	–0–	39,091	$65,023	–0–
5 – 10	2	39,091	$65,023	($1,300.46)
10 – 15	4	39,091	$65,023	($2,600.92)
15 – 20	6	31,417	$52,259	($3,135.55)
				$13,985.95

TOTAL

MMcfpd	Tax refund %	589,574	$942,455	$60,108.68
0 – 5	–0–	155,000	$247,773	$0.00
5 – 10	2	155,000	$247,773	($4,955.46)
10 – 15	4	155,000	$247,773	($9,910.92)
15 – 20	6	124,574	$199,136	($11,948.16)
> 20	8.5	0	$0	$0.00
TOTAL TRIBAL TAX DUE				$53,294.14

THIS SHOULD TIE

TRIBAL SEVERANCE TAX
PRODUCTION INCENTIVE PAYMENT
1/93

PAVILLION

MMcfpd	Tax refund %	[redacted]	[redacted]	[redacted]
		440,884	$1.58	
0 – 5	–0–	99,980	$157,635	–0–
5 – 10	2	99,980	$157,635	($3,152.69)
10 – 15	4	99,980	$157,635	($6,305.39)
15 – 20	6	99,980	$157,635	($9,458.08)
> 20	8.5 %	40,965	$64,588	($5,490.02)
		440,884		$34,679.62

MUDDY RIDGE

MMcfpd	Tax refund %	[redacted]	[redacted]	[redacted]
		148,690	$1.66	
0 – 5	–0–	33,719	$56,087	–0–
5 – 10	2	33,719	$56,087	($1,121.74)
10 – 15	4	33,719	$56,087	($2,243.47)
15 – 20	6	33,719	$56,087	($3,365.21)
> 20	8.5	13,816	$22,981	($1,953.36)
		148,690		$12,339.10

TOTAL

MMcfpd	Tax refund %	[redacted]	[redacted]	[redacted]
0 – 5	–0–	133,698	$213,721	$0.00
5 – 10	2	133,698	$213,721	($4,274.43)
10 – 15	4	133,698	$213,721	($8,548.86)
15 – 20	6	133,698	$213,721	($12,823.29)
> 20	8.5	54,781	$87,569	($7,443.39)
TOTAL TRIBAL TAX DUE		589,574		$47,018.72

EXHIBIT Q-3

SHOSHONE AND ARAPAHO TRIBAL COURT

Shoshone and Arapaho Tribes
Wind River Indian Reservation
Fort Washakie, Wyoming

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

DEFENDANT ENCANA'S REPLY MEMORANDUM TO NORTHERN ARAPAHO TRIBE'S RESPONSE BRIEF AND IN SUPPORT OF ENCANA'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Encana Oil & Gas (USA) Inc. ("Encana") hereby offers this Reply Brief pursuant to the Court's *Order After Hearing on January 7, 2011* and in support of its December 1, 2010 Motion for entry of an Order granting summary judgment in Encana's favor on subject-matter jurisdiction grounds. The nearly 200-page tome[1] filed by the Northern Arapaho Tribe ("NAT") does nothing to counter Encana's assertion that there are no genuine issues of material fact and Encana is entitled to judgment on all claims as a matter of law because this Court lacks subject-matter jurisdiction to hear any of Plaintiff's claims. As with Plaintiff's Reply Brief, the

[1] The Northern Arapaho Tribe's brief is beyond excessive and comports with no rules of civil procedure, either Federal or Tribal, with respect to the length of a response to a summary judgment motion. Because the filing is so unreasonable, the Court should simply strike it.

Northern Arapaho Tribe cites no evidence to counter what Encana established in its Motion: none of the operative events in this litigation took place in Indian country and there is no legal basis upon which to predicate the exercise of extraterritorial Tribal Court jurisdiction in this case.

The Northern Arapaho Tribe's brief is devoted nearly entirely to arguing that the Wind River Indian Reservation has not been disestablished – a matter wholly irrelevant to Encana's Motion. Encana has never argued that the Wind River Indian Reservation has been disestablished. Rather, Encana has simply pointed to the very clear fact that the 1905, 1953, and 1958 Acts had the practical impact of changing the Reservation's boundaries. Encana posits that Congress diminished, or shrunk, the Reservation. Encana does not argue that Congress disestablished, or terminated, the Reservation.[2] Here, the evidence put forward by Encana establishes that the Tribes ceded lands to the United States, for sum-certain compensation, in support of the creation of the federal enclave that persists with respect to those lands today. Because the operative events of this litigation took place solely within that federal enclave, outside the Reservation's boundaries, there is no predicate for the Court's exercise of extraterritorial jurisdiction.

I. EXTENSIVE FEDERAL RECORDS DEMONSTRATE THAT THE LOCUS UNDERLYING THIS CASE – SECTION 19 OF TOWNSHIP 4 NORTH, RANGE 3 EAST OF FREMONT COUNTY, WYOMING – IS OUTSIDE THE TERRITORIAL BOUNDARIES OF THE WIND RIVER INDIAN RESERVATION.

In Paragraphs 1–33 of its Memorandum in Support of its Motion for Summary Judgment for Lack of Subject-Matter Jurisdiction and in Section III of its December 29, 2010 Reply Brief, Encana set forth the very detailed history of federal law and policy that removed the lease covered lands located in Township 4 North, Range 3 East, Section 19 of Fremont County,

[2] Diminishment occurs when only a portion of a reservation's lands lose reservation status, while disestablishment refers to the termination of an entire reservation. See, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999)(making the distinction).

Wyoming from the boundaries of the Wind River Indian Reservation. As established by the large volume of evidence cited by Encana, since at least 1905, those lands have been continuously out of tribal ownership and civil regulatory authority.

Encana has cited all of that evidence, not to argue disestablishment, but rather to demonstrate the reality that, since its establishment by the Second Treaty of Fort Bridger in 1868, the Wind River Indian Reservation has undergone a long and painful history of forced diminishment. *See Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 487-488 (1937). Recognizing the changes in Reservation boundaries effected by the many lands acts applied to the Reservation over many years does not equate to an argument that the Reservation has ceased to exist. Plainly, that is not the case and the Reservation continues as a vital community subject to the sovereign authority of the Tribes.

The relevant diminishment here began with the 1905 Act detailed in Paragraphs 5–12 of Encana's *Memorandum*. The fact of that diminishment was recognized in numerous federal documents thereafter. *See* Paragraphs 13–14. There is overwhelming support for the fact that it has been the understanding of the United States since 1905 that Township 4 North, Range 3 East, Section 19 is not part of the Wind River Indian Reservation. *See*, 12/29/10 *Reply Brief*. Both Congress and the courts have consistently referenced the "diminished" Reservation when addressing the applicable lands acts. *See e.g., Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476, 489-490 (1937) (holding that the 1905 Act left only 808,500 acres in a "diminished reservation"); *U.S. v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938) (holding that the "cession of 1904" granted the Tribes the title to the timber and mineral interests only within the diminished Reservation); 52 Stat. 1128, 1129 (the "1939 Act") (directing Secretary of the Interior "to establish land-use within the **diminished and ceded portions of the Wind River**

Indian Reservation . . . **no** restoration to tribal ownership shall be made of any lands with any reclamation project, heretofore, authorized within the **diminished or ceded** portions of the reservation") (emphasis added); Warner W. Gardner, *Jurisdiction-Hunting and Fishing on the Wind River Reservation* (Feb. 12, 1943) ("After the reservation area, as established by the treaty of July 3, 1868 (15. Stat. 673), had been **diminished** by the act of March 3, 1905 (33 Stat. 1016)" the State of Wyoming had assumed full control over big game on the 1905 ceded lands) (emphasis added).

Nothing in the many pages of the Northern Arapaho Tribe's regurgitation of irrelevant historical facts about the Reservation (NAT *Brief* at pp. 54-136) in any way counters the legislative history, the statutory text, or the subsequent governmental treatment of the lands at issue. Indeed, NAT's recitation of facts is incredibly loose and unreliable. No witness supports the 'factual' statements by declaration. NAT stretches the statements of legal holdings far beyond the propositions for which cases actually stand. NAT also makes sweeping and unfair generalizations and conclusions about the various historical acts NAT discusses. The apparent aim of NAT's undirected and inaccurate blast of information is simply to overwhelm the Court with paper in hopes that the Court will conclude NAT is correct based on volume of words. Such a tactic should not be countenanced, nor should Encana be forced to respond to each unsubstantiated and grossly inaccurate characterization of history and law in nearly 200 pages in five business days (the time for Encana's Reply Brief as set by the Court). In fact, most of the "facts" and arguments put forth by NAT are so baseless, they do not merit a response. Encana asserts that neither it nor the Court need accept NAT's invitation to venture into the forest of irrelevant weeds NAT's brief presents.[3]

[3] To the extent the Court denies Encana's motion to strike made in Footnote 1 above, Encana respectfully submits that it should be allowed a reasonable amount of time to respond to NAT's 172-page mass. The NAT filed a

Rather, as discussed below, prevailing federal law, as applied to the basic, relevant historical facts established by Encana and unrefuted by Plaintiff or the Northern Arapaho Tribe, support a finding of diminishment.

II. THE DISPOSITION OF THE RIVERTON RECLAMATION PROJECT LANDS DEMONSTRATES THE RESERVATION'S DIMINISHMENT ACCORDING TO UNITED STATES SUPREME COURT AUTHORITY.

The Supreme Court has issued a number of pronouncements to guide lower court interpretations of statutes and executive orders affecting the status of Indian reservations. First, it is well established that Congress has the power to diminish a reservation unilaterally. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Nonetheless, diminishment will not be lightly inferred. *Id.* at 472. Congress must clearly evince the intent to reduce boundaries, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and traditional solicitude for Indian rights favors the survival of reservation boundaries in the face of the opening up of reservation lands to settlement and entry by non-Indians. *Solem*, 465 U.S. at 472. Courts may not, however, "ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (quoting *Wash. v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)).

Here, the language of Congress's operative acts and subsequent federal treatment of the lands at issue require a finding that Congress diminished the Wind River Indian Reservation as to those lands. The Court has developed a three-step inquiry for determining whether Congress

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document that is very far afield from a "response brief," and Encana should not be prejudiced by being burdened in attempting to counter all the Tribe avers in a simple Reply brief. To do so, Encana would be submitting a Reply brief many times longer than its original Motion, requiring vastly more time. If this Court believes it necessary to untangle the 172-page mess NAT has visited upon the Court, Encana should be granted reasonable time and briefing space within which to do so.

intended an act opening a reservation to terminate reservation boundaries, or otherwise diminish the size of the reservation. The inquiry always begins with a review of the statutory language:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.

Solem, 465 U.S. 463 at 470-471.[4] Here, the 1905, 1953 and 1958 Acts unambiguously demonstrate that the Tribes received sums certain for the ceded lands that ultimately became the Riverton Reclamation Project.

Even if the statutes were ambiguous, which they are not, the Court must look to the tenor of legislative reports to the Congress that passed the statute and the manner in which the negotiations were carried out for evidence of the understanding of an intent to diminish the reservation. *Solem*, 465 U.S. 463 at 471; *Rosebud Sioux Tribe*, 430 U.S. at 602-614 (detailing legislative history of land surplus act and finding that, although there was no "sum certain" language, as here, to indicate a surrender of tribal interest in unalloted lands, the surrounding circumstances showed that Congress clearly intended to diminish the reservation). Additionally, the United States Supreme Court has approved review of post-enactment history, noting that actions by Congress, the Bureau of Indian Affairs, and local authorities with regard to the unalloted open lands, "particularly in the years immediately following the opening, has some evidentiary value." *Solem*, 465 U.S. 463 at 471. The Supreme Court has recognized "*de facto,* if

[4] The "unconditional commitment" of compensation is sometimes referred to as "payment of a sum certain," as opposed to a commitment to pay the tribe from proceeds of the sales of land surrendered to the United States. *Compare, e.g., Solem* (statute authorized Secretary to sell), with *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998) (cession for sum certain) and *DeCoteau v. Dist. County Court*, 420 U.S. 425, 445 (1975) (same).

not *de jure,* diminishment" may have occurred in instances in which government and locals have treated lands as if they are outside the reservation. *Id.*

The Supreme Court has followed this approach and found the requisite intent to diminish the size of reservations in both diminishment cases the Court has decided since *Solem*. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (Yankton Sioux Reservation) and *Hagen v. Utah*, 510 U.S. 399, 414 (1994) (Uintah and Ouray Indian Reservation). In both of these cases, the Court found that "unallotted, ceded lands were severed from the reservation" such that the reservation was diminished, but did not hold that reservation boundaries had been terminated. *Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998). On remand, the Court of Appeals in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) held that while reservation boundaries had not been disestablished, Congress intended that allotments that had passed out of trust status also lose their Indian country status, but that land returned to the tribe remained part of the reservation.

Thus, diminishment (what Encana is arguing here) is a much narrower finding than that required for disestablishment. Diminishment is a more nuanced approach. The evidence cited by Encana in its previous briefing firmly establishes diminishment as to the lands relevant to this litigation: the Tribes ceded lands to the United States, received sums certain for those lands, and those lands are now subject to the jurisdiction of the United States. That circumstance resulted from the combination of the 1905, 1953 and 1958 Acts. The change in Reservation boundaries to which Encana points has been recognized for many years by many different entities. For example, the maps of the both the U.S. Bureau of Indian Affairs and the U.S. Bureau of Reclamation, and other government records, show Township 4 North, Range 3 East, Section 19 of Fremont County, Wyoming outside the Reservation's boundaries. See, *Affidavit of Richard*

Inberg dated 11/29/10 at ¶¶ 4-7; *See also*, 2003 BIA Map of the Wind River Indian Reservation, a copy of which is attached hereto as **Exhibit "A"** and incorporated herein by reference, together with BIA Superintendent LoneFight's 1/6/11 transmittal letter to Patrick Murphy. This is the map that hangs on the main wall in the BIA office in Fort Washakie, Wyoming. There are many other examples. Nothing in the Northern Arapaho Tribe's creative historical subterfuge refutes the evidence put forth by Encana. Instead, all the Acts' text and the historical circumstances exclusively support a finding of diminishment.

III. CREATION OF THE FEDERAL ENCLAVE THAT IS THE RIVERTON RECLAMATION PROJECT PRECLUDES TRIBAL REGULATORY AUTHORITY WITH RESPECT THERETO.

In *South Dakota v. Bourland*, 508 U.S. 679 (1993) the Supreme Court held that the tribe could not regulate non-Indian hunting and fishing in an area where Congress had taken reservation land to build a dam, reservoir, and public recreation area. Even though the land remained within reservation boundaries, the Court concluded that, "when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of preexisting Indian rights to regulatory control." *Bourland* requires the same result here, where Congress obtained lands ceded by the Tribes for sums certain and those lands ultimately became part of significant public works.

The rule following *Solem* and *Bourland* is that, when Congress opened a reservation area to nonmember entry, that action had the legal effect of presumptively immunizing nonmembers from tribal authority on those ceded lands, even if the reservation boundaries were not diminished. Under the Supreme Court's precedents, if Congress intruded upon tribal sovereignty in ways that are inconsistent with tribal authority in light of the practical circumstances and settled expectations of nonmembers (such as dedicating the lands to a federal enclave for public works), there can be no tribal regulatory authority with respect thereto, even if the lands

remained within reservation boundaries. Thus, even if the boundaries of the Wind River Indian Reservation had not changed as a result of the 1905, 1953 and 1958 Acts (as the evidence shows they have), and even if the dozens of references to "ceded" lands and the "diminished" Reservation were as meaningless as the Northern Arapaho Tribe contends, the fact of Reclamation's ownership and control of those lands has the same practical effect – divesting the Tribes of any attendant regulatory authority. *Bourland*, 508 U.S. at 679.

IV. *BIG HORN I* IS INAPPOSITE.

Over the course of dozens of pages, NAT argues that *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*") decided the question here of whether the 1905 Act diminished the Wind River Indian Reservation such that the ceded lands are no longer Indian country. NAT asserts that the ruling in *Big Horn I* is *res judicata*, thus precluding Encana from arguing that Congress diminished, or shrunk, the Reservation. NAT Brief at 14-54. As set forth below, NAT's argument that the *Big Horn I* decision has a preclusive effect on Encana's assertion that the 1905 Act diminished the Reservation has been rejected by both the Wyoming Supreme Court as well as the United States District Court for the District of Wyoming. NAT also argues that the Wyoming Supreme Court's recent rulings with respect to the 1905 Act in *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008) must be entirely discounted because the Tribe alleges, without substantiation, that the majority of the Wyoming Supreme Court is self-interested and inappropriately biased based on their varying levels of involvement representing client interests in *Big Horn I* more than 20 years ago and thus ignored various arguments and simply 'got it entirely wrong' as to the 1905 Act. NAT Brief at n. 63, pp. 51-54. Neither of these sweeping assertions has merit.

Big Horn I is not the Wyoming Supreme Court's most recent word on the 1905 Act and it is an opinion from a general stream adjudication. Referencing it, and trying to untangle the attendant contextual complexities, is more complicated than necessary for Encana to prevail on its straight-forward, fact-based Motion. Moreover, the Northern Arapaho Tribe's expansive reading of *Big Horn I* has already been rejected in federal court. *See Northern Arapaho Tribe v. Harnsberger*, No. 08-CV-215-B (Brimmer, J), attached hereto as **Exhibit "B"** at 10:

> *Big Horn I* was limited to the narrow context of reserved water rights and the court did not explicitly base its finding on a determination that the 1905 Act area was Indian country. In fact, the Wyoming Supreme Court has since stated that, in *Big Horn I*, "while they disagreed over whether reserved water rights continued to exist in the ceded lands, **the majority and dissent . . . agreed that the reservation had been diminished**." *Yellowbear v. Wyoming*, 174 P.3d 1270, 1283 (Wyo. 2008)(citing *Big Horn I*, 753 P.2d at 84, 112, 114, 119-35). This Court is in no position to second-guess the Wyoming Supreme Court's interpretation of its own words.

(emphasis added).

Nonetheless, were the Court to consider *Big Horn I*, there is ample support therein for Encana's position:

1. "[This] Court concluded that the Act of March 3, 1905 had the effect of extinguishing Indian title and demonstrated an intent that the land should cease to be a part of the reservation and of Indian country." 753 P.2d at 135-36 (Thomas, J., dissenting).

2. "Examination of other aspects of the 1904 Agreement confirms that it was the intention of Congress to disestablish the ceded portion of an Indian reservation and to leave a diminished reservation for the Shoshone and Arapahoe Tribes." *Id.* at 123-24.

3. "Perhaps 'diminished' was not a word of art in Indian law in 1904. (citing *Solem*). In the context in which it was used in the 1904 Agreement, however, it could indicate only the intent to diminish the boundaries of the then-existing reservation." *Id.* at 124.

4. "There can be no question that the representatives of the Indian peoples understood that the agreement and the {1904} bill contemplated an outright sale of a large portion of the Wind River Indian Reservation." *Id.* at 127.

5. "From the initial negotiation in 1891 to passage of the Act of March 3, 1905, the history of the 1904 Agreement and the legislation demonstrate that Congress intended the

cessation of a large portion of the then-existing Wind River Indian Reservation by disestablishing the ceded portion and recognizing a diminished reservation. The provisions of the Act of March 3, 1905, H.R. 17994, were considered most carefully by Congress." *Id.* at 128.

6. "This legislative and executive history subsequent to passage of the Act of March 3, 1905 supports only one conclusion: a status of an Indian reservation was intended and understood only for the diminished reservation; the Indians corporately would reside on the diminished reservation, and any of those who continued to live on the ceded portion would do so only as private allottees." *Id.* at 132.

7. "After passage of the Act of March 3, 1905, the Department of the Interior of the United States published maps of the Wind River Indian Reservation which reflect an understanding of the executive department that the Indian peoples had not retained a sufficient interest in the ceded portions of those lands to cause the Department of the Interior to consider it an Indian reservation." *Id.* at 132.

Additionally, as set forth in Encana's Motion, *Yellowbear* also recognizes the reality that the Tribes divested lands and were compensated therefore by the 1905, 1953 and 1958 Acts. *Yellowbear*, 174 P.3d at 1284 ("We conclude ... it was the intent of Congress in passing the 1904 Act to diminish the Wind River Indian Reservation and to remove from it the lands 'ceded, granted, and relinquished' thereunder. . . . [T]hose lands are no longer part of the reservation, and are not 'Indian country'"). The Tenth Circuit agrees with the Wyoming Supreme Court. *See Yellowbear v. Attorney General of the State of Wyoming*, No. 09-8069, ORDER AND JUDGMENT at 2 (decided May 25, 2010) ("Ultimately, when the Wyoming Supreme Court took up the question, it explained that a 1905 Act of Congress long ago diminished the Wind River Reservation and that the current boundaries of the reservation do not encompass the site of Mr. Yellowbear's crime"). **Exhibit "C"** at 2. The Tribe's unfortunate, unsubstantiated personal swing at the integrity of the justices of the Wyoming Supreme Court notwithstanding, it is clear that federal courts are unwilling to second guess the Wyoming Supreme Court's interpretation of its own *Big Horn I* words in *Yellowbear*. **Exhibit "B"** at 10, n. 10.

V. NO CONDUCT BY ENCANA COULD CONFER SUBJECT-MATTER JURISDICTION UPON THE COURT.

The Northern Arapaho Tribe attempts to make much ado about Encana's and DHS's TERO payments with respect to the Tribal Muddy 19-24 BM well. But payment of any tribal taxes or fees on off-Reservation properties, whether gratuitous or by mistake, cannot confer subject-matter jurisdiction upon the Court when such jurisdiction does not otherwise exist. No actions by parties can ever vest a court with subject-matter jurisdiction it does not have. See, *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982)("No action of the parties can confer subject matter jurisdiction upon a federal court."); *Smith v. Norwest Financial Wyoming, Inc.*, 964 F. Supp. 327, 331 (D.Wyo. 1996)("Parties cannot consent to nor can they waive subject matter jurisdiction."); *Weller v. Weller*, 960 P.2d 493, 496 (Wyo. 1998)("A lack of subject matter jurisdiction constitutes a fundamental defect in a proceeding which cannot be cured by waiver or consent of the parties.").

CONCLUSION

Encana respectfully moves the Court to grant summary judgment in its favor because United States Supreme Court precedent and the fact that the entirety of litigation-related events in this case took place *outside* the exterior boundaries of the Wind River Indian Reservation and Plaintiff has failed to meet its burden of proof to rebut the facts established by Encana. The Northern Arapaho Tribe's lengthy rebuttal to a disestablishment argument Encana never made does not change that Encana met its burden and summary judgment is warranted. Encana has not made any 'outlier' arguments. The diminishment evidence and law cited by Encana is hornbook law. No matter how much Indian Law scholars and the Northern Arapaho Tribe may lament the state of the Supreme Court's precedents, they remain binding on this Court. This Court should recognize its territorial limits and grant Encana summary judgment.

DATED this 15th day of February 2011.

ENCANA OIL & GAS (USA) INC.
Defendant

By: _____

Patrick J. Murphy, W.S.B. # 5-1779
Scott P. Klosterman, W.S.B. # 6-3081
Williams, Porter, Day & Neville, P.C.
159 North Wolcott, Suite 400
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served this 15th day of February 2011, as follows:

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Aaron J. Vincent
VINCENT LAW OFFICE
301 East Adams
Riverton, Wyoming 82501

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Patrick J. Murphy

EXHIBIT

A

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Wind River Agency
PO Box 158
Fort Washakie, Wyoming 82514

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Real Estate Services

January 6, 2011

Patrick J. Murphy
Williams, Porter, Day and Neville, P.C.
159 North Wolcott, Suite 400
P.O. Box 10700
Casper, WY 82602

Dear Mr. Murphy:

This is in response to your Freedom of Information Act (FOIA) request dated November 18, 2010 and received in this office on November 19, 2010. In your request, you sought records regarding a map of the Wind River Indian Reservation.

On November 29, 2010 we acknowledged your request and assigned it control number BIA-2011-00165 for processing and informed you that we were taking a 10-workday extension in order to properly process your request. We informed you that we would have a response on or before January 5, 2011. We apologize for the delay of this response, due to illness of the staff working on this case.

Please find enclosed a copy of the map that you requested.

We classified you as an "other use" requester, you are expected to pay for the cost of searching for responsive records and the cost of duplication of responsive records released, except that you receive the first 2 hours of search time and the first 100 pages of photocopying before being charged.

The fees for the processing of this request, taking into account your fee category, are as follows:

¼ hour of Professional Search Time	$ 0.00 per ¼ hour
1 copy	5.00 per copy
	$ 5.00

As a matter of policy, however, the Department of Interior does not bill requesters for FOIA fees incurred when their fees do not exceed $30.00 because the cost of collection would be greater than the fee collected. Therefore, we are not billing you for the processing of this request.

This concludes our response to your request on behalf of the Bureau of Indian Affairs.

If you have any questions regarding this letter you may contact Marietta ShortBull, Realty Officer, by phone at 307-332-4583 or by mail at BIA, Wind River Agency, P.O. Box 158, Fort Washakie, Wyoming 82514.

Sincerely,

Edward Lone Fight

Superintendent

Enclosure (1)

EXHIBIT B