

Encl.

MHM:md

Governor

Matthew H. Mead



Sincerely,

Having just heard of EPA's proposed action, I want you to know right away that I think the proposal is extremely problematic and I have major concerns about it. I would welcome the opportunity to work with the Tribes and the EPA to further discuss this issue.

The Tribes' application, if granted, has implications for criminal law, civil law, water law and taxation. It also takes away the voice of citizens in Kinnear, Riverton, and Pavillion. On June 9, 2009, Bruce Salzburg, Wyoming's then Attorney General, wrote extensive comments to EPA Region 8 regarding this application by the Tribes to regulate air quality as a state. A copy of those comments is attached.

Shawn McGrath, Regional Administrator for EPA's Region 8, has contacted my office and indicated that the EPA intends to make a decision on the Eastern Shoshone and Northern Arapaho Tribes ("Tribes") for treatment as a state under the Clean Air Act. The Tribes propose that such status extend to the non-tribal communities of Kinnear, Pavillion and Riverton. Wyoming believes the Tribes' application goes outside the boundaries of the Wind River Indian Reservation and has numerous other concerns with the Tribes' proposal.

Dear Administrator McCarthy,

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

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File # 03-001-00
Copy:
Responsible Person:

August 5, 2013

Office of the Governor



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June 9, 2009

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RE: Comments in Response to the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation Statement of Legal Counsel Regarding the Tribes' Authority to Regulate Air Quality and Treatment as State Application

Dear Ms. North:

Thank you for the opportunity to submit the following comments on behalf of the State of Wyoming ("Wyoming" or "State") in response to the Eastern Shoshone and Northern Arapaho Tribes ("Tribes") Statement of Legal Counsel submitted in support of the Tribes' application for treatment as a state ("TAS") pursuant to Section 301(d) of the Clean Air Act ("CAA").

Introduction

As a state sovereign, Wyoming has a significant interest in maintaining its cooperative relationship with the Northern Arapahoe and Eastern Shoshone tribal sovereigns. In achieving

this cooperative relationship, the Wyoming legislature has provided a framework for the state to develop state-tribal intergovernmental relations and communication. See Wyo. Stat. Ann. §§ 9-1-221 (Tribal liaisons), 16-1-101 - 110 (Wyoming Joint Powers Act), and 41-2-1101 (water development projects). However, Wyoming has identified a number of issues with the Tribes' TAS application and statement of legal counsel that must be addressed.

Wyoming believes that the Tribes' proposed exterior boundaries of the Wind River Indian Reservation ("Reservation") are inaccurate. The boundaries, as proposed, include lands which were ceded by the Tribes by Congressional Act in 1905 and not restored to the Tribes by subsequent acts of Congress. The clear language of the applicable treaties, statutes and case law support the State's position that a significant amount of land proposed by the Tribes as within the exterior boundaries is actually outside of the boundaries of the Reservation and under the jurisdiction of Wyoming.

In addition to the clear language of the treaties and applicable law, Wyoming supports its position by providing information on its continued exercise of jurisdiction within the Tribes' proposed boundaries. Wyoming currently operates and manages numerous facilities within this area and is also permitting oil and gas operations under the Wyoming Environmental Quality Act ("WEQA"). Wyoming also notes that the communities located in this disputed area, including Riverton, Pavillion and Kinnear, historically have been, and continue to be, under the jurisdiction of Wyoming. Wyoming believes that the Tribes are attempting to improperly expand their jurisdiction into lands which have not historically been regulated by the Tribes or the United States government.

Wyoming also is concerned with the Tribes' request for the United States Environmental Protection Agency ("EPA") to make the determination of the exterior boundaries of the

Reservation for purposes of the CAA. Specifically, Wyoming believes that the Tribes intend to use the EPA and CAA to expand the exterior boundaries of the Reservation for purposes other than the CAA, including criminal and civil matters. During an April 16, 2009 hearing on a motion to dismiss in *Northern Arapaho Tribe v. Harnsberger et al.*, No. 08-CV-215-B, a case involving the identical boundary dispute presented by the Tribes' TAS application, counsel for the Eastern Shoshone stated that the Tribes intend to use the determination by the EPA on the exterior boundaries of the Reservation for CAA purposes to resolve other jurisdictional questions

raised in that case. See Exhibit 1; *Northern Arapaho Tribe v. Harnsberger, et al.*, U.S. Dist. Ct. (Wyo.) Case No. 2:08-cv-215B, Hearing on Motions to Dismiss (4/16/09), Transcript p. 5; *Id.*,

Hearing on Motions to Dismiss (5/15/09), Transcript p. 6.

Furthermore, the Tribes have failed to provide an adequate description of the exterior

boundaries of the Reservation as required by 40 C.F.R. § 49.7 which would allow for meaningful

and specific comment on the boundaries.

For these reasons, Wyoming requests that that the EPA deny the Tribes' proposed

exterior boundaries as defined in the April 9, 2009 Public Notice. Wyoming requests that EPA

defer decision regarding the exterior boundaries of the Reservation until the Federal Courts

resolve *Harnsberger* and *Yellowbear*. However, should EPA conclude that it is necessary to

determine the exterior boundaries, Wyoming requests that the boundaries exclude all of the

ceded, unrestored lands, including Riverton, Kinnear and Pavillion, which are not "Indian

country." These communities are located in areas ceded from the Reservation and not restored; therefore, including these communities within the exterior boundaries of the Reservation would be erroneous.

Finally, Wyoming requests that any determination of exterior boundaries by EPA should include stipulated language that the boundary determination is applicable solely for, and limited to, the Tribes' administration of the CAA.

I. Background Statutes, Treaties and Case Law Applicable to Determine the Exterior Reservation Boundaries of the Wind River Indian Reservation

A. Statutory definition of "Indian country"

The gravamen of the Tribes' contention is that all lands ceded pursuant to the 1905 Act remain "Indian country." 18 U.S.C. § 1151 defines the term "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Despite the fact that the definition of Indian country is found in the criminal code, the

Supreme Court has applied the definition to questions of civil jurisdiction. See *Decoteau v. Dist.*

County Court, 420 U.S. 425, 427, n.2 (1975).

The term "dependent Indian communities," in subsection (b), "refers to a limited category

of Indian lands that are neither reservations nor allotments, and that satisfy two requirements –

first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.” *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527, (1998). The term “Indian allotments,” in subsection (c), refers to “parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians [.]” *Id.* at 529.

The definition in (a) requires a more thorough discussion of the law and history of Indian reservations in general, and the history of the Wind River Indian Reservation in particular. In the early to mid-19th century, the federal government established reservations for many of the native tribes in the United States. Responding to an increasing population and westward migration, the federal government changed its policies in the latter part of the 19th century. The General Allotment Act of 1887 permitted the federal government to allot tracts of reservation land to individual tribal members and, with tribal consent, to sell the surplus lands to non-Indian settlers. 24 Stat. 388, ch. 119.

B. 1905 Treaty Language

Pursuant to the Second Treaty of Fort Bridger, signed in 1868, the federal government established the Wind River Indian Reservation for the Eastern band of the Shoshone tribe. 15 Stat. 673. Article 11 of the 1868 treaty provides that “[n]o treaty for the cession of any portion of the reservations . . . shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same[.]” In 1878, the federal government settled the Northern Arapaho Tribe on the

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

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

ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: . . . Provided, That any individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash, as hereinafter provided, at the following prices per acre[.]

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

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

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

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

ARTICLE VII. It is further agreed that all moneys received in payment for the **lands hereby ceded and relinquished**, not set aside as required for the various specific purposes and uses herein provided for, shall constitute a general welfare and improvement fund, the interest on which at four per centum per annum shall be annually expended under the direction of the Secretary of the Interior for the benefit of the said Indians [.]

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

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein [.]

Sec. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and six[.]

Sec. 3. That there is hereby appropriated . . . the sum of thirty-five thousand dollars, or so much thereof as may be necessary . . . for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the **outboundaries of the diminished reservation**, where the same is not a natural water boundary; and the sum of twenty-five thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, to be used in the construction and extension of an irrigation system **on the diminished reserve**, as provided in article four of the agreement.

ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE XI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

33 Stat. 1016 (emphasis added) *See also* Exhibit 2. Over half of the adult male tribal members agreed to the treaty, and Congress ratified it – with some changes – in 1905 (the 1905 Act). *Id.* Pursuant to that treaty, the Tribes ceded portion of the Reservation, retaining only the area south of the Big Wind River and west of the Big Popo Agie River.

C. United States Supreme Court Cases Interpreting “Indian Country”

The language used in treaties is crucial to whether courts will determine whether diminishment has occurred on a reservation. In a series of decisions, the U.S. Supreme Court has

established guidelines for determining whether reservation lands opened to settlement have ceased to be "Indian country." Several of those cases are discussed below.

1. *Seymour v. Superintendent of Washington State Penitentiary*

The Colville Indian Reservation in Washington was created in 1872. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962). In 1892, the reservation was diminished by an act of Congress providing that the northern half of the reservation would be "vacated and restored to the public domain." *Id.* A 1906 Act of Congress allotted a parcel of the diminished reservation land to each member of the tribe, and then opened the remainder of the diminished reservation for settlement and entry under the homestead laws. *Id.* at 354-355. That act did not state that the tribe or its members had agreed to cede, sell, or relinquish the land in question, nor did it provide a sum certain payment to the tribe or its members. Rather, the act provided that the proceeds from sales of the opened lands would be deposited into the federal treasury and would be expended for the benefit of the tribal members, under the direction of the Secretary of the Interior. *Act of March 22, 1906*, ch. 1126, Sec. 6, 34 Stat. 80.

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

restore it to the public domain. *Id.* at 355. The Court concluded that the 1906 Act “did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.” *Id.* at 356.

2. *Mattz v. Arnett*

The Klamath River Reservation was established in 1855 in California. *Mattz v. Arnett*, 412 U.S. 481, 487 (1973). An 1891 executive order expanded the nearby Hoopa Valley Reservation to include the land that had originally been the Klamath River Reservation. *Id.* at 493. An 1892 Act of Congress opened the land that had formerly been the Klamath River Reservation to settlement, entry, and purchase. *Id.* at 494-495. The 1892 Act also allowed tribal members residing on the land to receive individual allotments of land. Finally, the 1892 Act provided that the Secretary of the Interior would use the land sale proceeds for the “maintenance and education” of the tribal members. *Id.* at 495. Importantly, the 1892 Act – like the act examined in *Seymour* – did not invoke language of cession or provide a sum certain payment.

Act of June 17, 1892, ch. 120, 27 Stat. 52.

Raymond Mattz, a member of the Klamath tribe, was fishing on unallotted land in what had formerly been the Klamath River Reservation, when a California game warden seized his gill nets, which are illegal under California law. California initiated proceedings to forfeit the nets. Mattz intervened, claiming the area where he was fishing was Indian country, over which the state had no jurisdiction. *Id.* at 484.

The Court again applied the 18 U.S.C. § 1151 definition of "Indian country." In determining whether the 1892 Act dissolved the reservation and the land was no longer Indian country, the United States Supreme Court stated that "[a] congressional determination to terminate [reservation status] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 505. The Court determined that the 1892 Act did not terminate the reservation because it did not expressly provide for termination. Therefore, the reservation land was still Indian country. *Id.* at 504.

3. *DeCoteau v. District County Court*

The Supreme Court examined very different legislative language in *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975). The Lake Traverse Indian Reservation in South Dakota was created in 1867, by a treaty between the federal government and the Sisseton-Wahpeton tribe. *Id.* at 426. An 1891 Act of Congress ratified a treaty by which the tribe agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments [.]". *Id.* at 436-437. In exchange, the federal government agreed to pay the tribe \$2.50 for each acre ceded. *Id.*

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

The Supreme Court looked once again to the federal statutory definition of "Indian

country." The Court distinguished the language of *Seymour* and *Matiz* from that at issue in

DeCoteau, holding that while the Congressional acts at issue in the former cases merely opened

reservation lands to settlement, the treaty in *DeCoteau* was a negotiated agreement that provided

a sum certain payment. *Id.* at 447-448. The Court held that the language of the treaty "was

precisely suited" to disestablishment. *Id.* at 445. The Court also stated that the language of the

treaty was comparable to the following language in other agreements:

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

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

"cede, convey, transfer, relinquish, and surrender forever and absolutely, without
any reservation whatever, express or implied, all their claim, title, and interest of
every kind and character"

"cede, grant, relinquish, and quitclaim to the United States all right, title, and
claim which they now have or every [sic] had"

"cede, sell, and relinquish to the United States all their right, title, and interest. . ."
"agree to dispose of and sell to the Government of the United States, for certain
considerations hereinafter mentioned"

Id. at 439, fn. 22.

4. *Rosebud Sioux Tribe v. Kneip*

The United States Supreme Court revisited the issue of disestablishment with *Rosebud*

Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The *Rosebud* Reservation in South Dakota was

established in 1889, when the Great Sioux Reservation was partitioned into six separate

reservations for different tribes of the Sioux nation. *Id.* at 589. A 1904 Act of Congress ratified a treaty (to which the tribe had not agreed) by which the tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" a specific portion of the reservation lands. *Id.* at 597; *Act of April 23, 1904*, ch. 1484, Art. I, § 3 Stat. 258. The federal government agreed to open the ceded lands for settlement, and to act as the trustee for the tribe in selling the land. The government did not guarantee to find buyers, or promise that the tribe would receive any specific amount of compensation. *Id.* at 596, fn. 18. While the 1904 Act did not guarantee payment of a sum certain, it did provide that part of the proceeds from the sale of the opened lands would be paid to the tribal members in cash, and the balance would be expended for their benefit. *Act of April 23, 1904*, ch. 1484, Art. III.

In 1972, the Rosebud Sioux Tribe brought a federal action seeking a declaratory judgment that the 1904 Act (and two subsequent acts) had not diminished the reservation as established in 1889. As in *DeCoteau*, the Court found the language of the 1904 Act "'precisely suited' to disestablishment." *Id.* at 597. The Court also determined that the lack of a "sum certain" provision was just one of multiple factors to be considered. *Id.* at 598, fn. 20. In addition to the statutory language, the Court also looked to the "jurisdictional history" and said, "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations[.]" *Id.* at 603-605. For those reasons, the Court concluded that the lands ceded in the 1904 Act were no longer Indian country. *Id.* at 614-615.

5. *Solem v. Bartlett*

The Cheyenne River Sioux Reservation was another of the reservations carved out of the Great Sioux Reservation in 1889. In 1908, Congress opened part of that reservation for

settlement. The operative language in that act authorized the Secretary of the Interior to "sell and dispose of" a specified portion of the reservation, and provided that the proceeds from the sale would be deposited in the United States Treasury to the credit of the tribe. *Solem v. Bartlett*, 465 U.S. 463, 472-473 (1984). Unlike the Congressional acts in *DeCoteau* and *Rosebud Sioux*, the 1908 Act did not employ language of cession that was "precisely suited" to diminishment.

Act of May 29, 1908, ch. 218, 35 Stat. 460. Further, it did not provide for a sum certain payment to the tribe or to the tribal members. *Id.*

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

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

Our precedents in the area have established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries. The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an "intent to change boundaries" before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all 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.

As our opinion in *Rosebud Sioux Tribe* demonstrates, however, explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress – unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress's intentions. Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.

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

There are, of course, limits to how far we will go to decipher Congress's intention in any particular surplus land act. When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian

tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Id. at 470-472 (footnotes and internal citations omitted). Applying the standard it articulated, the Court held that the "sell and dispose" language in the 1908 Act, along with the provision to deposit the proceeds in the federal treasury, did not show congressional intent to disestablish. *Id.* at 473. As in *Seymour*, that language merely allowed non-Indian settlers to own land on the reservation. *Id.* The Court also pointed out that, "[n]owhere else in the Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries." *Id.* at 474.

The Court next examined the "events surrounding the passage" of the 1908 Act. In contrast to the act examined in *DeCoteau*, the Court noted that the 1908 Act "did not begin with an agreement between the United States and the Indian Tribes, in which the Indians agreed to cede a portion of their territory to the Federal government." *Id.* at 476. Instead, the Act was a unilateral decision by Congress, without agreement from the tribe. *Id.* at 477. The lack of a bilateral agreement, coupled with the tribe's clear opposition to the 1908 Act, supported the contention that the opened portion of the reservation was still Indian country. Finally, the Court noted that evidence about events occurring after passage of the 1908 Act was so contradictory that it did not support either side. *Id.* at 478-479. After examining the statutory language, the events surrounding its passage, and the subsequent treatment of the lands in question, the Court held that the opened portion of the reservation was still Indian country.

The Supreme Court refined its three-part test to determine whether a reservation had been diminished in *Hagen v. Utah*, 510 U.S. 399 (1994). The Uintah Valley Reservation in Utah was established by Congress in 1864. *Id.* at 402. A 1902 congressional act provided that if a

majority of the adult male tribal members agreed, lands within the reservation would be allotted to each member of the tribe, and the remaining lands would be restored to the public domain and opened for homesteading. The 1902 Act further provided that the proceeds from the land sales would be used by the federal government for the benefit of the tribe. The Act also appropriated about \$70,000, to be paid directly to the tribe after its approval had been obtained. *Id.* at 403, fn. 1. Later in 1902, Congress set aside sufficient land for the grazing needs of the Indians

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

Robert Hagen, a member of the Uintah Tribe, pled guilty in state court to distributing a controlled substance. The crime occurred in Myton, Utah, which lies within the area opened for settlement by the 1905 presidential proclamation. Hagen later sought to withdraw his plea, contending that Myton was Indian country, over which the state courts lacked criminal jurisdiction. *Id.* at 408. In determining whether the opened lands were still Indian country, the

Court looked first to the language of the 1902 Act, which restored the unallotted lands to the public domain. *Id.* at 412. The Court held that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status." *Id.* at 414.

Looking to historical evidence, the Court took note of letters and other statements by government officials demonstrating an understanding that the reservation would be diminished whether the tribe consented or not. *Id.* at 416-419. Similarly, the Court noted that the text of the 1905 presidential proclamation also indicated an understanding that the reservation would be diminished. *Id.* at 419-420. Although it found the subsequent history "less illuminating," the Court noted that the subsequent demographics of the area supported a finding that it was no longer Indian country. *Id.* at 420-421. Specifically, the Court observed that the current population of the opened lands was about 85 percent non-Indian, and the population of the largest city in the opened area was about 93 percent non-Indian. *Id.* at 421. The Court also noted that the seat of the tribal government was not in the opened lands. *Id.* Finally, the Court noted that the State of Utah had exercised jurisdiction over the area in question since the lands were opened. *Id.* Accordingly, the Court held that the reservation had been diminished and the ceded portion was no longer Indian country. *Id.*

7. *South Dakota v. Yankton Sioux Tribe*

The Yankton Sioux Reservation in South Dakota was established by treaty in 1858. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). Federal representatives and the Yankton Tribe agreed in 1892 that the tribe would "cede, sell, relinquish, and convey to the

United States" all of its unallotted lands in return for \$600,000. *Id.* at 336-338; 28 Stat. 314. The 1892 Act also provided a sum certain payment to the tribe. 28 Stat. 315. Congress ratified the agreement in 1894, and non-Indian settlers soon acquired the ceded lands. *Id.* at 339. When state authorities sought to apply state environmental regulations to a solid waste disposal facility on the ceded lands, the tribe sought a declaratory judgment that the site of the facility remained Indian country, and was not subject to state environmental laws. *Yankton Sioux*, at 340-341. The United States Supreme Court held that state environmental regulations applied to the ceded land because it was no longer Indian country. *Id.* at 358. The Court based that holding primarily on the plain language of the 1894 Act, which clearly demonstrated congressional intent to diminish the reservation. *Id.* at 357. Citing *DeCoteau*, the Court held that the phrase "cede, sell, relinquish, and convey," along with the sum-certain payment of \$600,000, was "precisely suited" to diminishing the reservation. *Id.* at 344. The Court went on to examine the events surrounding passage of the 1894 Act, and found nothing that could overcome the strong presumption of diminishment arising from the plain language of the Act. *Id.* at 351-354. Finally, the Court looked to the current status of the ceded lands. *Id.* at 357. Although acknowledging that this is the least compelling of its considerations, the Court noted that the population of the ceded area was over two-thirds non-Indian, and municipalities had been incorporated under state law within the ceded lands. *Id.* Those demographic factors, the Court said, "signify a diminished reservation." *Id.* at 356-357.

Summary of Supreme Court Cases

The United States Supreme Court cases discussed above show that the Court has

developed a clear method for determining whether a reservation was diminished when all or part of it was opened for settlement by non-Indians. The first and most important consideration is congressional intent as manifested by the language Congress used. Language showing a clear intent to diminish the reservation, coupled with a sum-certain payment, creates an almost irrefutable presumption of diminishment. *Yankton Sioux*, 522 U.S. at 344. The Court will also consider events surrounding, and subsequent to, passage of the act, but those considerations are less important. *See Hagen*, 510 U.S. at 421.

II. The Reservation Has Been Diminished by the 1905 Act

Applying the standards discussed above leads to the conclusion that the Reservation has been diminished. The language used by Congress in the 1905 Act repeatedly states its intention to cede and diminish the Reservation. Additionally, the events surrounding and subsequent to the passage of the 1905 Act also support the determination that Reservation was diminished.

A. The Plain Language of the 1905 Act Demonstrates Congressional Intent to Diminish the Reservation

As stated by the Supreme Court, no precise language is necessary, so long as congressional intent to diminish the reservation is clear. *Hagen*, 510 U.S. at 411. Article I of the 1905 Act contains unmistakable language of diminishment; it provides that the tribes "do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation,["] Similarly, Article II begins, "In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this

agreement[.]” That language is indistinguishable from the language the United States Supreme Court held was “precisely suited” to disestablishment in *DeCoteau*. 420 U.S. at 445.

In Article IX, Sec. 3 of the 1905 Act, Congress appropriated \$145,000 to be used for the benefit of the tribes. Although that money was to be repaid out of the proceeds from land sales, there was no guarantee that sufficient land would be sold to cover the appropriations, nor was there any provision for reimbursement if the land sale proceeds were insufficient for that purpose. Thus, the tribes were unconditionally guaranteed a sum-certain, even if none of the ceded lands were sold. The situation at hand, therefore, fits the description provided in *Yankton Sioux*:

[W]hen a surplus land Act contains both explicit language of cession, evidencing “the present and total surrender of all tribal interests,” and a provision for a fixed-sum payment, representing “an unconditional commitment from Congress to compensate the Indian tribe for its opened land,” a “nearly conclusive,” or “almost insurmountable,” presumption of diminishment arises.

522 U.S. at 344. In addition to the language of cession and the sum-certain payment, the 1905 Act provides other clues to Congress’ intent to diminish the reservation. In no less than six

places, the act refers to the portion of the reservation not ceded as the “diminished reservation” or “diminished reserve.” Article I allows tribal members who have received allotments of land within the ceded areas to “select other lands within the diminished reserve.” Article III deals with water rights and draws a clear distinction between the ceded territory and the “diminished reserve.” Article IV provides for construction of an irrigation system “within the diminished reservation.” Article VI provides for construction of schools on the “diminished reservation.”

Article IX, Section 3 appropriates funds for “the survey and marking of the outboundaries of the

diminished reservation" and "construction and extension of an irrigation system on the fund projects on the diminished reservation for the benefit of the tribes. No such funding was allocated for projects on the ceded portion.

B. Events Surrounding the Passage of the 1905 Act Show Congressional Intent to Diminish the Reservation

Events surrounding passage of the 1905 Act further demonstrate Congress' intent to

diminish the reservation. Many of those events are presented in Justice Thomas' dissent from

the Wyoming Supreme Court's decision in *In Re Rights to use Water in Big Horn River*, 753

P.2d 76 (Wyo. 1988), *aff'd by Wyoming v. U.S.*, 492 U.S. 406 (1989) (*Big Horn I*). Justice

Thomas noted that in 1904, Representative Mondell of Wyoming introduced H.R. 13481 to ratify

an earlier agreement by which the Shoshone and Arapaho tribes agreed to cede over one million

acres. The Committee on Indian Affairs, commenting on H.R. 13481, said:

The bill in question still leaves the Indians with 808,500 acres. A careful estimate by the General Land Office gives the area of the lands proposed to be ceded by the above bill at 1,480,000 acres, leaving 808,500 in the diminished reserve. There are 1,650 Indians on the reservation at this time, so that the diminished reserve leaves about 500 acres per Indian man, woman, and child, on the reservation.

Id. at 125-126. The Committee clearly understood that the reservation would be diminished.

After Congress amended H.R. 13481 to require consent of the tribes, Indian Inspector

James McLaughlin was sent to the Wind River Reservation to negotiate with them. *Big Horn I*,

at 126. In a subsequent letter to the Secretary of the Interior, Inspector McLaughlin reported:

The diminished reservation leaves the Indians the most desirable and valuable portion of the Wind River Reservation and the garden spot of that section of the country. It is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River, which, being never failing streams carrying a considerable volume of water, give natural boundaries with well-defined lines; and the diminished reservation, approximately 808,000 acres, about three-fourths of which is irrigable land, allows 490 acres each for the 1,650 Indians now belonging on the reservation. I gave this question a great deal of thought and considered every phase of it very carefully and became convinced that the reservation boundary, as stipulated in the agreement, was ample for the needs of the Indians belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement, and the Indians would be eventually compelled to give it up. Furthermore, with the exception of about 20 families (mixed bloods and white men who are intermarried into the tribes) there are no Indians occupying lands outside of the diminished reservation.

Id. at 127. Here again, Inspector McLaughlin unambiguously understood that the Reservation

would be diminished. Taking into consideration the Committee on Indian Affairs' comments on

H.R. 13481 and Inspector McLaughlin's report to the Secretary of the Interior, there can be no

doubt that both Congress and the executive branch intended that the Wind River Reservation

would be diminished by the 1905 Act.

A subsequent act of Congress also demonstrates its understanding that the 1905 Act

diminished the reservation. In 1953, Congress provided a cash payment to the Shoshone and

Arapaho tribes which:

shall be deemed to constitute full, complete, and final compensation . . . for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to 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).

Id. 67 Stat. 613. (emphasis added). Again, this language leaves no doubt that Congress has extinguished the Tribes' proprietary and sovereign interests in the ceded area.

C. Events Subsequent to the 1905 Act Demonstrate Diminishment

Although such events are of less importance, events subsequent to the 1905 Act are relevant to the question of diminishment. *Yankton Sioux*, at 356-357. Several such events

unequivocally demonstrate that the reservation was diminished. In 1907, Congress passed an act in which it referred to the ceded portion of the reservation as "lands *formerly* embraced in the

Wind River or Shoshone Indian Reservation." 34 Stat. 849, Ch. 151. (emphasis added). In the

1930's, the Shoshone Tribe sued the United States for damages arising from the government's

act of settling the Arapahoe Tribe on the Wind River Reservation without the Shoshone Tribe's

permission. *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. The United*

States, 82 Ct.Cl. 23 (1935), *remanded on other grounds*, 299 U.S. 476 (1937). In deciding that

case, the United States Court of Claims referred to the portion of the reservation that was not

ceded as the "diminished reservation." *Id.* at p. 23. That decision also included a map that

identified the area north of the Big Wind River as "ceded by agreement of April 21, 1904," and

identified the area south of the river as the "present Wind River or Shoshone Indian

Reservation." *Id.* at p. 30. The United States Supreme Court granted the parties' cross-petitions

for certiorari, and it too referred to the lands not ceded as the diminished reservation. *Shoshone*

Tribe of Indians of the Wind River Reservation in Wyoming v. United States, 299 U.S.

476, 489 (1937). Following the Supreme Court's remand, the Court of Claims again referred to

the lands not ceded as the "diminished reservation." *Shoshone Tribe of Indians of the Wind*

River Reservation in Wyoming v. The United States, 85 Ct.Cl. 331, p. 10 (1937), *aff'd* 304 U.S. 111 (1938).

The Tenth Circuit Court of Appeals has also recognized that the ceded area is no longer part of the Wind River Reservation. *Clarke v. Boyesen*, 39 F.2d 800 (10th Cir. 1930). Among the many issues in that case, the appellate court considered a claim that a railroad right of way through the ceded area had been acquired unlawfully. The court looked to 25 U.S.C. § 312, which provided for rights of way through: (1) any Indian reservation in any state or territory, excepting Oklahoma; (2) any lands reserved for an Indian agency; and (3) any lands reserved "for other purposes in connection with the Indian service." The court determined that the area ceded by the 1905 Act fell within the third category. *Id.* at 814. Had the court believed the ceded area continued to be part of the reservation, it would have relied on the first category. More recently, the Tenth Circuit again opined that land in the ceded area was no longer part of the reservation. *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006). The court noted that John Hubenka lived "on a ranch near the Wind River approximately eighteen miles west of Riverton. Although the river is not a property boundary, it roughly separates Hubenka's land on the north from the Wind River Indian Reservation to the South." *Id.* at 1029. The location of Mr. Hubenka's ranch, west of Riverton and north of the river, is within the ceded area. The Tenth Circuit clearly described the ranch as something separate from the reservation and implicitly recognized the river as the northern border of the reservation. *Id.*

Federal maps made in the years shortly before and after the 1905 Act also support a finding of diminishment. Exhibits 3 and 4 are copies of 1892 and 1900 maps of Wyoming

produced by the General Land Office of the United States Department of the Interior. Those maps show the borders of the Wind River Indian Reservation as they existed before the 1905 Act. Exhibits 5 and 6 are copies of 1907 and 1912 maps of Wyoming produced by the same agency. They show the reservation as it was diminished by the 1905 Act. The 1912 map is especially probative. Had the 1907 map been contrary to Congressional intent, Congress presumably would have taken corrective action. Since it did not do so, and allowed the 1912 map to show the same diminished reservation, we may presume that the reservation boundaries show on the 1907 map, and again on the 1912 map were consistent with Congress' understanding of the 1905 Act.

Current demographic facts about the ceded area also show diminishment. Riverton, Wyoming is the largest municipality in the ceded area. At a hearing on this issue in *Yellowbear*, a criminal case, Riverton Police Chief John Snell testified that his department provides law enforcement for the city of Riverton. See Exhibit 7, January 23, 2006, Motion Hearing, p. 164. He further testified that criminal charges arising from conduct occurring in Riverton are disposed of in the state or municipal courts. (*Id.* at 165). At that same hearing, Carter Napier, the Riverton city administrator, testified that the Riverton city government provides police, sanitation, street maintenance, water, and sewer service within the city limits. (*Id.* at 175). He also testified that the city government was responsible for enforcing zoning and building codes in Riverton. (*Id.* at 175-176). In addition, about 92% of the population of Riverton is non-Indian, and the seat of tribal government is in the diminished reservation. See Exhibit 8, District Court Record, Vol. II, p. 963. Thus, all three of the demographic factors prescribed by the United

States Supreme Court demonstrate that the Wind River Reservation was diminished by the 1905

Act.

D. The Wyoming Supreme Court Held that the 1905 Act Diminished the Reservation

Decisions of the Wyoming Supreme Court also support a conclusion that the 1905 Act diminished the Wind River Reservation. In 1949, the owners of land in the ceded area sued the State over water rights. In describing the facts of the case, the court explained:

Under the Treaty of 1905 all the lands of the reservation from Owl Creek on the north and the Wind River on the south – many miles distant from each other – were ceded by the Indians as part of their reservation established in 1868. The lands of plaintiffs originally allotted to Indians, are located in the portion thus ceded.

Merrill v. Bishop, 237 P.2d 186, 189 (Wyo. 1951). The court went on to say that, “no Indian

Reservation any longer exists so far as the lands of the plaintiffs are concerned[.]” *Id.* at 193.

The Wyoming Supreme Court addressed the question of criminal jurisdiction over the

ceded lands in *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960). John Blackburn, a member of the

Arapahoe tribe, was convicted in state district court of multiple crimes committed in the ceded

area north of Riverton. He later contended that the state court had no jurisdiction over his crimes

because the crime scene was Indian country. The court determined that the land ceded in the

1905 Act is not within the Reservation. *Id.* at 177. The court also cited 67 Stat. 613, which is

discussed above.

The Wyoming Supreme Court also addressed the criminal jurisdiction issue in *State v.*

Moss, 471 P.2d 333 (Wyo. 1970). John Moss, a member of the Arapahoe tribe, killed a woman

in the ceded area, on land that had once been part of an allotment held by an Arapahoe. At the

time of the murder, the land was owned by a non-Indian. The trial court determined that it

lacked jurisdiction because the crime scene was in Indian country, but the Wyoming Supreme Court disagreed. It held that the ceded lands were not Indian country, and the state courts,

therefore, had jurisdiction over criminal offenses committed there. *Id.* at 339.

The United States of America filed an amicus curiae brief in support of the State's

position in *Moss*. See Exhibit 9. In this amicus brief, the United States urged the Wyoming

Supreme Court to hold that the reservation had been diminished by the 1905 Act, and that the

ceded area was no longer Indian country. *Id.* at 10-11.

The amicus brief includes references to a February 12, 1943 Opinion issued by the

Solicitor of the United States Department of the Interior, Warner W. Gardner. *Id.* at 3-4. See

Exhibit 10, Warner W. Gardner, *Jurisdiction-Hunting and Fishing on the Wind River*

Reservation (Feb. 12, 1943) available at [http://thorpe.ou.edu/sol_opinions/p1181-](http://thorpe.ou.edu/sol_opinions/p1181-1200.html#m-31480)

[1200.html#m-31480](http://thorpe.ou.edu/sol_opinions/p1181-1200.html#m-31480). Mr. Gardner issued the opinion in response to an inquiry from the

Secretary of the Interior regarding regulation of hunting and fishing. He concluded that the

tribes had authority to regulate hunting and fishing on the diminished reservation, but not in the

ceded area. *Id.* at 1194. On page 1186, Mr. Gardner noted that "[a]fter 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 Wyoming Game and Fish Commission appears also to have assumed

full control over big game on the ceded lands." While acknowledging that the federal

government held the ceded lands in trust for the tribes, Mr. Gardner concluded that the tribes had

surrendered their sovereignty over the ceded lands. *Id.* at 1189.

Most recently, the Wyoming Supreme Court addressed the question in *Yellowbear v.*

State, 174 P.3d 1270 (Wyo. 2008). One of the questions squarely before the court was whether a crime scene in the ceded area was Indian country. The court presented an extensive analysis of the treaty and the relevant decisions of the United States Supreme Court, and unanimously held that the area ceded by the tribes in 1905 is not Indian country. *Id.* at 1284. The court also discussed its *Big Horn I* decision saying, “[s]uffice it to say that, while they disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn River agreed that the reservation had been diminished*.” *Id.* at 1283 (emphasis added).

The test set forth by the United States Supreme Court leads to the conclusions that the 1905 Act diminished the Wind River Indian Reservation. Those portions of the ceded area that have not been restored to the Reservation are no longer Indian country.

The Wyoming Supreme Court addressed *Big Horn I* in its *Yellowbear* opinion, stating, “[s]uffice it to say that, while they disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn River agreed that the*

reservation had been diminished.” *Id.* at 1283 (emphasis added). That simple, unambiguous statement undercuts the Tribes’ contention that *Big Horn I* has preclusive effect and requires a decision in their favor on the question of diminishment.

The Tribes contend that the litigation culminating in the Wyoming Supreme Court’s decision in *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) (*Big Horn I*), decided the issue in their favor and precludes argument to the contrary. That contention ignores the limited nature of the

Big Horn I litigation. The subject matter of the case was water rights. While it is true that the special master in *Big Horn I* opined that the reservation had not been diminished, that opinion was not central to the case.

E. Subsequent Restorations to the Reservation Support a Finding of Diminishment

The federal government has periodically restored lands to the Reservation. See 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (Nov. 17, 1942); 7 Fed. Reg. 11100 (Dec. 30, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812; 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 22, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); 39 Fed. Reg. 27561 (July 30, 1974) as amended by 40 Fed. Reg. 42553 (Sept. 15, 1975) and 40 Fed. Reg. 43732 (Sept. 23, 1975). After describing the lands to be restored, each restoration states that those lands "are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights." *Id.* (emphasis added). Clearly, land cannot be "added to and made a part of the existing" Reservation if it already is part of the Reservation. Therefore, the restored lands must not have been part of the reservation prior to their restoration.

The Tribes contend that the language making the restored areas part of the existing Reservation is superfluous. (Tribes' Statement of Legal Counsel at 30). The Tribes support this with language taken from a 1934 letter from the Commissioner of Indian Affairs to the Secretary of the Interior. *Available at* BATES SH00924. A letter between executive branch officials,

however, does not overcome clear statutory language of cession in the 1905 Act. Further,

pronouncements of executive branch officials opining thirty years after the fact are not

persuasive on the question of Congressional intent, which remains the most important factor.

More importantly, United States Supreme Court decisions clearly contradict the Tribes'

argument. The letter upon which the Tribes rely places the Rosebud Sioux Reservation in South

Dakota and the Uintah Reservation in Utah in the same category as the Wind River Reservation.

Id. Thus, if the letter means that the Wind River Reservation was not diminished, it must also

mean that the Rosebud Sioux and Uintah Reservations must also remain undiminished. The U.S.

Supreme Court, however, has found that both of those reservations were diminished by the very

Congressional Acts cited in the 1934 letter. *See, Rosebud Sioux Tribe*, 430 U.S. at 605 (Act of

April 23, 1904 diminished the reservation); *Hagen*, 510 U.S. at 421 (Act of May 27, 1902

diminished the reservation). Since those unambiguous decisions disprove the basis of the Tribes'

argument with regard to restoration, that argument must fail.

Finally, Exhibit 11 is a map produced by the Wyoming Board of Control, which is a

graphical representation of the cession pursuant to the 1905 Act, along with the subsequent

restorations. This map is not intended to define the boundaries of the Reservation but is included

to be a representation of how unrestored lands, including Riverton, Kinnear and Pavillion, have

not been restored to the Reservation and therefore are not Indian country.

F. The Tribes Believed They Were Forever Ceding Their Interests to the Lands Located North of the Big Wind River

The Tribes provide an extensive Statement of Legal Counsel Regarding the Tribes'

Authority to Regulate Air Quality ("Statement"), which total 87 pages. The document contains

Wyoming's Comments in Response to the

Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation

Statement of Legal Counsel and TAS Application

279 footnote citations, many of which are cited to argue that the boundaries of the Wind River Reservation encompass lands reserved under the 1868 Treaty of Fort Bridger, less only those areas removed from the Reservation under the Lander and Thermopolis Purchase Acts, plus those lands acquired in Hot Springs County, Wyoming pursuant to 54 Stat. 628, 642 (1940). On page five of the Statement, the Tribes note that the Supreme Court has held that only Congress can disestablish a reservation, and that Congress' intent must be clear and plain. Further, the Tribes argue that under the canons of construction in Indian law, that "words of agreements must be construed in the manner that the Indians would have understood them and ambiguities in statutes and agreements must be resolved in the Indians' favor." (Statement at 9). However, many of the citations provided by the Tribes do little to illustrate Congress' clear intent and, importantly, indicate that the Tribes believed they were forever ceding their interests to the lands located north of the Big Wind River.

One of the Tribes' arguments attempts to distinguish the 1905 Act from the Lander Purchase Act, 17 Stat. 214 (1872) and Thermopolis Purchase Act 30 Stat. 62 (1897). (Statement at 10, 13). On April 19, 1904, Inspector McLaughlin visited the Reservation to present the tribes with a proposal for the opening of certain portions of the Reservation. *Id.* at 15; (the Tribes cite minutes of a council hearing held at the Shoshone Agency, Wyo. (April 19, 1904) ("1904 Minutes") *available at* BATFES SH01367). These minutes illustrate that the Tribes understood the 1905 Act to be similar to the Thermopolis Purchase Act.

Inspector McLaughlin addressed the Tribes, in part, as follows:

My friends, I am very glad, indeed, to meet you here today and see so many of you present. We do not meet as strangers, as it is just eight years ago since I

visited your Agency and concluded agreement for the purchase of Hot Springs [Thermopolis Purchase Act], situated in the northeastern part of your Reservation . . . My friends, I am sent here at this time by the Secretary of the Interior to present to you a proposition for opening of certain portions of your reservation for settlement by the whites. It is believed that it will be to the best interests of you two tribes to cede to the United States the portions referred to.

BATES SH 01367-1368. Inspector McLaughlin also provided an explanation of how the

negotiations would differ from the previous practices which led to the Lander Purchase Act and

Thermopolis Purchase Act. He explained:

It may be proper for me to say to you, before entering upon a full explanation of the boundaries of the tract which you are desired to cede, that the policy formerly employed in negotiating with Indians for many years past, has been changed since I was here/last (sic). Up until a little over a year ago (About a year and three months) no Indian reservation has been opened to settlement without first consulting the Indians, but it is not now deemed necessary by Congress that such negotiations should be conducted with Indians for opening their surplus lands. A few months ago, the Supreme Court of the United States, which is the Court of last resort, decided a case, known as the Lone Wolf case, that Congress has the right to legislate for the opening of Indian reservations without consulting Indians or obtaining their consent thereto. In other/words (sic), it was held, that the Indians are wards of the government, the government is the guardian, and, as such guardian, has the right to do that which is deemed best for the ward, and the government being the guardian to you people, the President and Secretary of the Interior are very desirous that you shall be protected in your rights in every respect. The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the government. For several years past there has been a sentiment in Congress, and one that is growing stronger each succeeding year, opposed to paying the Indians a lump sum consideration for their lands. Instead of stipulating, or providing in the agreement, a lump sum consideration for any tract of land, they have determined upon giving the Indians the full benefit of the land by paying the Indians from the proceeds of the sale of the land as whitemen settle upon it. Several agreements with tribes of Indians that provided for a lump

sum consideration which were presented to Congress the past two years have not been ratified, for the reason that Congress has refused to act upon any such agreements, and the said agreements have had to be changed before they could be carried out. I have made this explanation that you may know my reasons for not being able to entertain a proposition from you people for a lump sum consideration. Understand that anything you may receive for these lands will be paid [to] you from the proceeds of sales of same to whitemen.

Id. at SH 01368-1369. Inspector McLaughlin proceeded to describe the terms of the "Mondell Bill," which authorized the sale of the lands north of the Big Wind River as well as providing for cash payment to the Tribes for purchase of livestock, construction and maintenance of an irrigation system, funds for educational purposes, and a cash sum to be distributed among the members. *Id.* at SH 01369-1372. Inspector McLaughlin stated, "The tract to be ceded to the United States, as proposed by the 'Mondell Bill', is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation." *Id.* at SH 01372.

Chief Lone Bear and other members of the Arapahos indicated that they understood the purpose of the Mondell Bill to provide for a cessation of lands through a sale, similar to the sale of lands provided for in the Thermopolis Purchase Act. Chief Long Bear of the Arapaho stated, "There sits my good friend. *He is the man who treated with us for the Hot Springs.* I understand what he comes for, and I will let him know what I think of it, and I will tell what part of the *Reservation I want to sell.*" *Id.* at SH 01375 (emphasis added). Runs-across-the-River, another member of the Arapaho Tribe, similarly added, "You are the man who bought the Hot Springs, and when you ask me to sell, I do so, right away." *Id.* at SH 01376. Several other Arapaho tribal members made similar comments, including Rev. Sherman Coolidge who stated:

I am glad that Major McLaughlin has come to us to purchase a portion of our reservation. The proposed ceded portion has not been used by us except for grazing purposes, and I think the cash money will be of more value among the Arapahoes and Shoshones. I am in favor of the 'Mondell Bill' along the lines, with slight changes that we discussed with the Shoshones last night. We need the money that we will get from the sale of these lands for improvements on the uncaded portion, and to feed and clothe our poor people and children. I think the sooner the deal is made and completed, the better for all.

Id. at SH 01378. After the Arapahos spoke on the matter, the Shoshones had an opportunity to speak. First to respond to Inspector McLaughlin was George Terry, Chief Councilman of the

Shoshone, who remarked:

Major McLaughlin, our worthy Agent, Ladies and Gentlemen: *This is no little bargain we are entering into. It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and can never recover again.* These lands that we are about to dispose of have been our lands for ages. They have been our lands by inheritance for many, many years before the whiteman came this way. These same lands have been our lands by conquest. Our fathers fought with every nation that came near them and came off victorious, and from that day to this, they held this land as their own. These lands are our lands by treaty stipulation. We have given up vast tracts for the little tract of land called the Wind River Reservation. Now, we are glad our Arapahoe friends came in, and we will join hands with them and endeavor to pass a measure here that will follow the lines of this 'Mondell Bill.'

Id. at SH 01383, 1393. These excerpts illustrate that both Tribes understood the Mondell Bill, cumulating in the passage of the 1905 Act, would result in the Tribes forever ceding their

interests in the lands north of the Big Wind River and east of the Popo Agie River. Therefore, the canons of construction in Indian law in the present case support Wyoming's argument that the Tribes were aware that they were forever ceding their lands to the United States by agreeing to the provisions of the 1905 Act.

G. Citations Provided by Tribes Fail to Support Their Position that the Reservation was not Diminished

Based on Inspector McLaughlin's discussions with the tribes, Rep. Mondell presented H.R. 17994 before Congress in 1905. The Tribes provide excerpts of individual congressmen from the congressional debates and statements made by congressional members to infer that the Congress merely intended to open the lands for settlement. (Statement at fns. 40, 43, 44, 45, 49). However, a canon of statutory construction is based on interpreting the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language of the statute must ordinarily be regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous[.]" *Garcia v. United States*, 469 U.S. 70, 76 (1984).

The U.S. Supreme Court considers congressional intent, as found in Committee Reports of bills, which "represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969). By contrast, "[f]loor debates reflect at best the understanding of individual Congressmen." *Id.* Further, the Court has avoided relying on the passing comments of one member of Congress, *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), and casual statements from floor debates. *United States v. O'Brien*, 391 U.S. 367, 385 (1968). Committee Reports are "more authoritative" than comments made during congressional debate. *O'Brien*, 391 U.S. 385. The Court has stated, "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact

is to substitute ourselves for the Congress in one of its important functions." *Garcia*, 469 U.S. at

76.

In the present case, the Tribes have offered excerpts from congressional debates to argue that Congress did not intend to diminish the Reservation, but rather, to simply open certain lands for settlement. The Tribes have also provided numerous citations, including references to pamphlets, letters, and newspaper articles, and other miscellaneous documents to suggest that the disputed lands were open. However, these types of citations are not relied on by the U.S. Supreme Court for determining congressional intent in reservation diminishment cases. Further, many of these documents also contain language that referring to the "diminished reserve" or "ceded area."

It is important to remember, however, that the federal government still retained a trust obligation to individual Indian allottees located in the ceded area under the definition of 18

U.S.C. § 1151(c). As described in these comments and in the Tribes' Statement, several

individual Indians selected allotments located in the ceded area, extending the federal

government's trust obligation to these individuals in the ceded area. Thus, a blanket statement made by a Department of the Interior official, member of Congress, or any other individual for that matter, may have referred to the continuing trust obligation for these individual Indian

allottees located in the ceded area. Further, once these areas had been restored to the Reservation through the various restoration acts, the United States would have regained its trust responsibility over these lands. Accordingly, many of the citations provided by the Tribes to support their argument that Congress did not intend to diminish the Reservation do not prove their claims.

Rather than rely on congressional debates and other extraneous material, the EPA should follow the U.S. Supreme Court's analytical framework and look to the four corners of the 1905 Act which unambiguously demonstrates that Congress intended to diminish the Tribes' Reservation.

Based on the above arguments, the Tribes' proposed exterior boundaries should be denied and EPA should defer on deciding the issues of the disputed area until *Harnsberger* and *Yellowbear* are resolved. However, should EPA conclude that it is necessary to determine the exterior boundaries, Wyoming requests that the boundaries exclude all of the ceded, unrestored lands, including Riverton, Kinnear and Pavillion, which are not Indian country.

III. The Tribe Does Not Have Jurisdiction Over Lands in the Disputed Area Because the United States Government Has Not Exercised Jurisdiction

The Tribes attempt to justify expanding the boundaries of the Reservation to areas where jurisdiction has not historically been exercised by applying 18 U.S.C. § 1151 to the CAA. While the definition of "Indian country" may apply to some lands within the disputed area, many of the disputed parcels do not meet this definition and cannot be regulated by the Tribes according to the language of 18 U.S.C. § 1151.

Congress defines the term "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." The plain meaning of this language compels the conclusion that lands within the Indian reservation which are not under the jurisdiction of the United States Government may not be considered to be "Indian Country."

Wyoming, rather than the Tribes or EPA, has exercised primary jurisdiction over the many parts of the disputed areas. The City of Riverton, the Town of Pavillion and community of

Kinnear are located in this disputed area and have historically been under the jurisdiction of the State of Wyoming rather than the jurisdiction of the Tribe or the United States. These are incorporated municipalities and an unincorporated community under State jurisdiction and are not "Indian country."

Other areas in the disputed area are owned and operated or regulated by Wyoming state agencies and are not under the jurisdiction of the United States government. For example, the Wyoming Department of Environmental Quality ("DEQ") has exercised jurisdiction since the inception of the Wyoming Environmental Quality Act in 1973. DEQ Air Quality Division ("DEQ/AQD") permits and regulates over 300 facilities within the disputed area. See Exhibit 12, AQD Permitted Facilities 4-16-2009; Exhibit 13, DEQ Map for Water, Oil, Gas Wells and AQD permits 4-21-09; DEQ Notices of Violation including but not limited to Docket Nos. 3237-00

(Dave's Asphalt, Permit CT-878, Issued 12/4/2000), 3779-05 (EnCana, Pavillion, Issued 7/25/05), 7121-07 (EnCana, Pavillion Compressor Station, Issued 7/23/07), 3630-04 (Wind River Ready Mix, Permit CT-622, Issued 12/15/04); and 3831-05 (Wind River Mushroom, Shoshoni, Issued 11/30/05). Wyoming also sent EPA a letter in 1998 setting forth Wyoming's understanding of the Reservation boundaries and Wyoming has continued to administer air quality programs in accordance with the letter. See Exhibit 14, 6-26-1998 Memo to EPA; Exhibit 15, 7-7-00 Geringer Letter to EPA regarding Ozone designation areas.

Wyoming is concerned that if the EPA approves the Tribes' TAS application as submitted, more than 300 minor sources currently permitted by DEQ in the disputed area will be unregulated -- that is, not covered by any federal, state or tribal air quality permits. The

DEQ/AQD has issued construction and modification permits to more than 300 minor sources in

the disputed area. See Exhibit 16, DEQ list of sources; Wyo. Stat. Ann. § 35-11-801; 6 WAQSR § 2. The EPA does not have a minor source permitting program. See EPA's Review of New

Sources and Modifications in Indian Country (Proposed Rule), 71 Fed. Reg. 48696 (8/21/06); see also *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1120 (10th Cir. 2009) (noting that after

EPA's determination that the power plant previously permitted by New Mexico was on Navajo land, the "plant's emissions remained officially unregulated, although the plant voluntarily

complied with the New Mexico [state implementation] plan for over 9 years (1999-2008) until EPA promulgated a source-specific federal implementation plan for the plant). Rather than

having over 300 unregulated sources instantaneously operating in the disputed area and risking possible impacts to the health and welfare of Wyoming citizens and tribal members residing in or

near the disputed area, Wyoming respectfully requests EPA deny the Tribes' TAS Application as to the disputed area.

The Wyoming Game and Fish Department ("Game and Fish") and Wyoming Board of

Land Commissioners and Office of State Lands and Investments also hold significant interest in

the disputed area. Game and Fish manages three Wildlife Management Areas and one Public

Access Area. See Exhibit 17. The Office of State Lands and Investments currently holds

approximately 6,725 acres of surface estate and 2,778 acres of state owned mineral estate. See

Exhibit 18.

A determination by EPA granting the Tribes' TAS Application jurisdiction over the

disputed area could place Wyoming in the untenable position where Wyoming will risk violating

either federal or state law in trying to administer the Wyoming Environmental Quality Act and Wyoming Air Quality Standards and Regulations in accordance with such a determination. See *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008) (Wyoming Supreme Court decision that the area covered by the 1905 Act is not within the reservation boundaries, and is therefore not "Indian country"); CAA §§ 110 (SIP), 113 (federal enforcement); 304 (Citizen Suit). Additional issues will likely arise if the determination is made over the disputed area in the tax arena. WYO. STAT. ANN. § 35-11-1103 provides an ad valorem tax exemption for equipment "designed, installed and utilized primarily for the elimination, control or prevention of air . . . pollution." Basically, upon TAS approval, the Wyoming Environmental Quality Act ("WEQA") air quality provisions may no longer apply, yet the jurisdiction of county assessor and Wyoming Dept. of Revenue remains unchanged. Given the plain language of § 35-11-1103, if the WEOA air quality provisions no longer apply, then the ad valorem tax exemption for equipment "designed, installed and utilized primarily for the elimination, control or prevention of air . . . pollution" arguably vanishes. *Id.*

It is apparent from the above described examples that the United States and Tribes have not asserted jurisdiction over activities within the disputed areas in the past. These examples also show that historically it has been Wyoming that has asserted jurisdiction over the disputed area and has established a significant interest in continuing to do so. Because the United States has not exercised jurisdiction over the disputed area, they are prohibited from claiming that the disputed area is "Indian country" and should deny the Tribes' exterior boundaries as proposed and recognize the State's jurisdiction in the disputed areas.

IV. The Tribes' Claims of Jurisdiction Could Infringe Upon Wyoming's Sovereignty and Confuse Criminal and Civil Issues

Wyoming respectfully requests that the EPA defer on a decision regarding the exterior bounds of the Reservation until the Federal Courts settles the matter in *Harnsberger* and *Yellowbear*. The Tribes confessed their intent to use the determination by the EPA on the exterior bounds of the Reservation to resolve other jurisdictional questions. On April 16, 2009, counsel for the Eastern Shoshone Tribe when asked why it was not in the Eastern Shoshone's best interest to pursue a boundary determination through the Federal Court system stated:

Well, number one, Your Honor, we have together, both the Eastern Shoshone Tribe and the Northern Arapaho Tribe, has jointly pursued another avenue that is actually going to determine the exterior boundary of the reservation. We looked into and agreed to proceed forward with the EPA TAS process, the treatment as a state process, under the Clean Air Act.

See Exhibit 1 at 5. Allowing the Tribes to use EPA for such a determination could infringe upon Wyoming's sovereignty and confuse jurisdictional issues.

A. Criminal Jurisdictional Issues

The status of land located within a tribe's reservation determines whether the federal government, state government, or tribal government has jurisdiction over certain matters. In criminal matters, an Indian tribe's jurisdiction has been defined through statute and U.S. Supreme Court precedent. First, tribes do not have jurisdiction to try Indians committing "major crimes" against other Indians in "Indian country." §§18 U.S.C. 1151, 1153. The term "Indian country" includes:

"Major crimes" include murder, manslaughter, kidnapping, maiming rape and related offenses, incest, assault resulting in serious bodily injury, assault against an individual under the age of sixteen, arson, burglary, robbery and certain theft crimes defined in 18 U.S.C. § 661. § 1153.

(a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of any patent, and, including right-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the U.S. whether within the original or subsequently acquired territory thereof and within or without the limits of a state; and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. The federal government has jurisdiction over such major crimes. *Id.* If the EPA determines that the disputed area is "Indian country," Wyoming could lose jurisdiction to prosecute crimes committed by Indians against Indians in the disputed area.

Second, tribes do not have jurisdiction over federal crimes committed by non-Indians

against Indians and federal crimes committed by Indians against non-Indians, in Indian country. § 18 U.S.C. 1152. In 1812, Congress extended federal criminal law into Indian Country by

passing the Indian Country Crimes Act,² which applies federal statutes to federal enclaves, such as military installations, national parks and Indian reservations, unless the reservation was

created by one of the few treaties that protected exclusive tribal jurisdiction. *Id.* Again, the

federal government has jurisdiction over such crimes. *Id.* However, a tribe may have concurrent jurisdiction to prosecute an Indian for committing a crime against a non-Indian. *Id.*; see *United*

States v. Wheeler, 435 U.S. 313 (1978) (Court held that the Double Jeopardy Clause of the Fifth Amendment does not bar the prosecution of an Indian in federal district court under the Major

Crimes Act and tribal court for a lesser offense arising out of the same incident). The statute

² This Act is also referred to as the Interracial Crime Provision, the General Crimes Act, or the Federal Enclaves Act.

explicitly does not cover crimes committed by an Indian against another Indian. *Id.* Further, the court has held that this statute implicitly does not apply to crimes committed by non-Indians against non-Indians in Indian Country. *United States v. McBratney*, 104 U.S. 621 (1881). If the EPA determines that the disputed area is "Indian country," the federal government could gain jurisdiction to prosecute federal crimes committed by Indians against non-Indians and crimes committed by non-Indians against Indians in the disputed area. Such an outcome could affect Wyoming's jurisdiction to prosecute these activities, which may also violate state criminal statutes.

Third, tribes do not have jurisdiction over state law violations committed by an Indian against a non-Indian, or by a non-Indian against an Indian which occur in Indian country.

Williams v. United States, 327 U.S. 711 (1946). The Assimilative Crimes Act allows for federal prosecution of violations of state statutes. 18 U.S.C. § 13. Congress enacted this law to fill in the gaps of criminal law created by Congress's failure to pass specific criminal statutes. *Id.* Under the Act, state criminal codes supplement the federal criminal code to the extent that a specific federal law does not exist. *Id.* In a sense, the Act transforms a crime against a state into a crime against the federal government. *Id.* Combined with the Indian Country Crimes Act described above, a violation of a state law by an Indian against a non-Indian, or by a non-Indian against an Indian, in Indian country, can be prosecuted by the federal government. *Williams v. United States*, 327 U.S. 711 (1946). If the EPA determines that the disputed area is "Indian country," Wyoming could lose jurisdiction to prosecute state crimes committed by Indians against non-Indians and state crimes committed by non-Indians against Indians in the disputed area.

Finally, tribes do not have jurisdiction over non-Indians in tribal court, even for crimes committed against tribal members in Indian Country. See *United States v. McBratney*, 104 U.S. 621 (1881), *Oliphan v. Suquamish Indian Tribe*, 436 U.S. 191 (1978). If the EPA determines that the disputed area is "Indian country," this could be the only class of crimes where Wyoming would retain jurisdiction to prosecute such crimes.

These statutory and court-defined rules on criminal jurisdiction depend on whether the crime occurred in "Indian country" as defined in 18 U.S.C. § 1151. If the EPA were to decide that the disputed area is considered "Indian country," the criminal jurisdiction framework could result in a significant loss of jurisdiction for Wyoming. Further, the federal government may need to assume the role (and costs) that Wyoming has provided in prosecuting such crimes. Thus, in the present case, Wyoming requests that that EPA defer on deciding the exterior bounds of the Reservation until the Federal Courts settle the matter in *Harnsberger* and *Yellowbear*.

B. Civil and Regulatory Jurisdictional Issues

In terms of civil or regulatory matters, the U.S. Supreme Court has ruled that after allotted land has been conveyed to a non-Indian pursuant to the General Allotment Act, the Indian tribe loses "the right of absolute use and occupation of lands so conveyed" and no longer has "the incidental power to regulate the use of the lands by non-Indians." *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993). The Court explained that although Congress repudiated the policy behind the General Allotment Act, "it defie[s] common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal

jurisdiction.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (quoting *Montana v. United*

States, 450 U.S. 544, 559 n.9 (1981)).

United States Supreme Court precedent establishes the existence of a presumption against tribal jurisdiction over non-members. *See Montana v. United States*, 450 U.S. 544 (1981). The Court has established two exceptions to this general rule. *Atkinson Trading Co.*, 532 U.S. 651. First, a tribe can regulate non-members on non-Indian fee land that is within the reservation if Congress expressly confers or delegates that power to a tribe. *Id.* at 649; *State v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (Justice White) (plurality opinion); *Montana*, 450 U.S. 564 (emphasis added). Second, if Congress did not expressly confer jurisdiction to a tribe, a tribe must demonstrate its “inherent sovereignty” to regulate non-members on non-Indian fee land located within that tribe’s reservation. *Atkinson Trading Co.* at 649-640 (emphasis added). A further explanation of the “expressly delegated power” exception is provided below.

1. Tribal Regulation of Non-Members

The question of whether Congress actually delegated authority can be a difficult question because the United States Supreme Court has only rarely discussed the issue. In *United States v. Mazurie*, 419 U.S. 544 (1975), at issue was whether non-Indian defendants, who operated a bar on non-Indian land near Fort Washakie located within the Wind River Reservation were required to obtain a tribal liquor license. Prior to 1953, federal law generally prohibited the introduction of alcoholic beverages into Indian country. *Id.* at 547; *see also* 18 U.S.C. § 1154(a). The term “Indian country” was

defined by 18 U.S.C. § 1151 to include non-Indian held lands "within the limits of any Indian reservation." *Id.* In 1949, however, this term was given a narrower meaning in terms of the liquor prohibition to *exclude* both fee-patented lands within "non-Indian communities" and rights-of-way through reservations. 18 U.S.C. § 1154(c)

In 1953, Congress passed legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, as long as no state law would be violated. *Id.*; see also 18 U.S.C. § 1161. The Tribes responded by adopting an ordinance which allowed liquor sales on the Reservation if such sales were made in

accordance with Wyoming law. *Id.* at 547-48. When the Blue Bull bar originally opened, the owners, the Mauzurie family, obtained a liquor license from Fremont County, Wyoming, and their operation was therefore consistent with that tribal ordinance. *Id.* at 548. However, in 1971 the Tribes adopted a new liquor ordinance, which required that retail liquor outlets within Indian country obtain both tribal and state licenses. *Id.* The Mauzuries were unable to obtain a tribal liquor license and the Mauzuries closed the Blue Bull for a brief period of time. *Id.* After three weeks, the Mauzuries reopened the Blue Bull, prompting federal officers to seize its alcoholic beverages and initiate criminal proceedings. *Id.*

The primary issue in *Mauzurie* was whether the bar was located in "Indian country" under 18 U.S.C. § 1151. *Id.* at 548-49. The Supreme Court looked extensively at the location of the Blue Bull, and explained:

The evidence showed that the bar was located on the outskirts of Fort Washakie, Wyo., Fort Washakie is the location of the Wind River Agency of the Bureau of Indian Affairs, and of the Tribal Headquarters of the Wind River Tribes The evidence also showed that of the 212 families living within a 20-square-mile

area roughly centered on the Blue Bull, 170 were Indian families, 41 were non-Indians, and one was mixed. . . . The evidence also established that the state school serving Fort Washakie, and located about two and one-half miles from the Blue Bull, had a total enrollment of 243 students, 223 of whom were Indian. . . . There was no testimony that the Blue Bull was in a non-Indian community.

Id. at 551. The Court explained that given the nature of the Blue Bull's location and surrounding population, the statute was sufficient to advise the Maizuries that their bar was not exempt from tribal regulation because it was located in an Indian community. *Id.* at 553. The Court held that federal government had expressly delegated power to tribes to regulate non-Indians on lands held in fee by non-Indians in this circumstance. *Id.* at 554.

If the EPA determines that the disputed area is "Indian country," Wyoming could lose, and the Tribes would gain, jurisdiction to regulate the introduction of liquor into the disputed areas, including Riverton, Wyoming. However, the factual differences between *Maizurie* and the present case are significant. In *Maizurie*, the Court discussed the location of the Blue Bull bar and found that bar was located near Fort Washakie which is within the diminished reserve and not the disputed area. Riverton, by contrast, is located within the disputed area and not the diminished reserve. Further, in *Maizurie*, the Court found that the vast majority of families located within a 20-square mile radius of the Blue Bull were Indian families. The vast majority of families living in Riverton, on the other hand, are non-Indian. Given the nature of Riverton's location, liquor licensees would not have any reason to suspect that they would be subject to tribal regulation because Riverton is not an Indian community. Thus, Wyoming respectfully requests that that the EPA defers on deciding the exterior bounds of the Reservation until the Federal Courts settles the matter in *Harnsberger* and *Yellowbear*.

Additionally, although the U.S. Supreme Court has not had an opportunity to review the CAA to determine whether the Act authorizes a similar express delegation of power to tribes to administer the CAA, the Circuit Court of Appeals for the District of Columbia has held that the CAA contains such an express delegation. See *Arizona Public Service Company v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000). This will be discussed in further detail below.

2. Tribal Regulation of the Clean Air Act and Clean Water Act

In 1970, Congress passed the Clean Air Act ("CAA") which authorized the development of comprehensive federal and state regulations to limit emissions from both stationary and mobile sources. 42 U.S.C. §7401 *et seq.* Congress passed the Clean Water Act ("CWA") two years later. 33 U.S.C. §1251 *et seq.* (1972).

In 1990, Congress passed a series of amendments to the CAA defining the ability of tribes to implement air quality regulations under the Act. 42 U.S.C. § 7601(d). The EPA promulgated regulations to implement the 1990 Amendments in 1998, including a Tribal Authority Rule. ("TAR") 63 Fed. Reg. 7254 (1998).

In *Arizona Public Service Company v. EPA*, a state public utility challenged the TAR,

arguing that the rule conferred too much authority to tribes. 211 F.3d 1280, 1283 (D.C. Cir.

2000). The court disagreed and further explained that a tribe's authority to regulate under the

CAA is derived from the "express congressional intent" to grant tribal jurisdiction over non-

member owned fee lands within a reservation without needing to determine whether a tribe

possesses "inherent sovereign power" under the *Montana* test. *Id.* at 1288. By contrast, under

the CWA, a tribe's authority to regulate non-members depends on a tribe's ability to demonstrate

its "inherent sovereign authority" by utilizing the *Montana* test. See *Wisconsin v. EPA*, 266, F.3d 741 (7th Cir. 2001).

Wyoming objects to strict application of the broad principles set forth in *Arizona Public Service Co.* in the present case because of important factual differences. First, *Arizona Public Service Co.* dealt with a challenge to the EPA's promulgation of the TAR, and not with a specific TAS application. 211 F.3d 1283-84. In *Arizona Public Service Co.*, the petitioners expressed concern that the Navajo Nation would be allowed to regulate the operation of the Four Corners Power Plant, which would contradict the terms of a prior lease agreement. *Id.* at 1296. The court explained that although the EPA believed that the CAA would supersede pre-existing treaties or binding agreements, the EPA would consider "consider on a *case-by-case* basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation." *Id.* (citations omitted). Further, the court noted that if the Navajo Nation agreed that it would not regulate the Four Corners, that there would be no controversy in need of a court resolution. *Id.*

The facts in the present case differ from *Arizona Public Service Co.* because Wyoming's concerns arise not from the promulgation of a rule, nor from a hypothetical dispute. The Tribes and the State of Wyoming specifically disagree concerning the exterior bounds of the Wind River Reservation based on unique facts that span the last century.

Further, in *Arizona Public Service Co.*, the court explained that the EPA had correctly

interpreted 42 U.S.C. § 7601(d) as containing an "express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation without the need to determine,

on a case-specific basis, whether a tribe possesses 'inherent sovereign power' under *Montana*," *Id.* at 1288. Otherwise, the court explained, the tribal regulation scheme "would result in a 'checkerboard' pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the [CAA]." *Id.* However, the disputed area on the Wind River Reservation does not represent a true "checkerboard." Rather, the majority of lands located in disputed area are, for the most part, contiguous.

Therefore, Wyoming respectfully disagrees with strict application of *Arizona Public Service Co.* to support a decision which would allow the Tribes to regulate a clean air program on lands in the disputed area.

V. The Tribes Failed to Provide an Adequate Description of the Proposed Boundaries

The Tribes have failed to provide an adequate description of what they assert as the exterior boundaries of the Reservation. According to the implementing regulations, tribal applications "must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area." 40 C.F.R. §49.7(a)(3).

"Legal description" means "[a] formal description of real property, including a description of any party subject to an easement or reservation, complete enough that a particular piece of land can be located and identified." *BLACKS LAW DICTIONARY*, (8th Ed.) 912-913 (2007). The description of the exterior boundaries as provided by the Tribes is overbroad and does not provide enough description to identify a particular piece of property.

Furthermore, EPA is also required to "specify the geographic boundaries of the

reservation" for tribal applications addressing air resources within their exterior boundaries. 40

3/28/2009 (a)(1). The boundaries of the reservation are not specified in the application and the map provided offers little assistance. As the map provided by the Tribes states, it is intended to be "an aid in graphic representation of the Wind River Indian Reservation only."

Given the Tribes' inadequate description of the exterior boundaries of the Reservation, Wyoming requests that EPA deny the Tribes' application and request additional information including an adequate legal description on the boundaries of the Reservation.

VI. EPA is an Improper Forum to Determine Boundary Disputes

Wyoming is justifiably concerned that the Eastern Shoshone may attempt to use EPA's determination outside of the CAA context. See Exhibit 1 *Northern Arapaho Tribe v.*

Harnsberger, et al., U.S. Dist. Ct. (Wyo.) Case No. 2:08-cv-215B, Hearing on Motions to Dismiss (4/16/09), Transcript p. 11; *Id.*, Hearing on Motions to Dismiss (5/15/09), Transcript p. 13. Counsel for the Eastern Shoshone stated in the *Harnsberger* case that it was their intention to use the TAS application as the appropriate forum to determine the boundary dispute. *Id.*

Federal agencies owe fiduciary duties to Indian tribes. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998). Congress has delegated the CAA administrative

authority to EPA, not "Indian country" administrative authority. "EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1242 (10th Cir. 2000). Wyoming is concerned that EPA's fiduciary duty owed to the Tribes will influence its decision and that the boundary determination will be based on bias rather than evidence in the record.

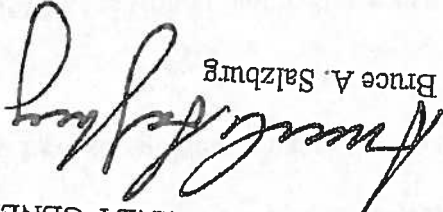
in order to avoid this Congressionally unintended result. Wyoming requests that the TNS be treated as proposed and deter a decision regarding the disputed area until *Harnsberger* and *Yellowbear* are resolved.

VII. EPA Should Limit Any Boundary Determination Only for Application of the CAA

As mentioned above, Congress has delegated the CAA administrative authority to EPA, not "Indian country" administrative authority. "EPA does not have the power to change the Indian country status of land -- that is a status conferred by Congress." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1242 (10th Cir. 2000). For this reason, Wyoming requests that any determination of exterior boundaries by EPA should be limited to the Tribes' administration of the CAA.

VIII. Conclusion

The test set forth by the United States Supreme Court leads to the conclusions that the 1905 Act diminished the Wind River Indian Reservation. The language of the 1905 Act, the events surrounding passage of that Act, and the subsequent demographic history of the ceded area all show that the reservation was diminished. Further, pertinent decisions of the Tenth Circuit Court of Appeals and the Wyoming Supreme Court also support a finding of diminishment. For the reasons set forth above, Wyoming requests that the EPA deny the Tribes' proposed exterior boundaries as defined in the April 9, 2009 Public Notice. Wyoming requests that EPA defer decision regarding the exterior boundaries of the Reservation until the Federal Courts resolve *Harnsberger* and *Yellowbear*. However, should EPA conclude that it is unnecessary to determine the exterior boundaries, Wyoming requests that the boundaries exclude all of the ceded, unreturned lands, including Riverton, Kinnear and Pavillion, which are not "Indian country." These communities are located in areas ceded from the Reservation and not

WYOMING ATTORNEY GENERAL

Bruce A. Salzburg

Regards,

CAA.
boundary determination is applicable solely for, and limited to, the Tribes' administration of the
determination of exterior boundaries by BIA should include stipulated language in use
boundaries of the Reservation would be erroneous. Finally, Wyoming requests that any
determination which includes these communities within the exterior