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Shawn McGrath
Region 8 Administrator
U.S. Environmental Protection Agency
1595 Wynkoop Street
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Re: Petition for Reconsideration and Stay of Approval of Eastern Shoshone and Northern Arapaho Tribes' Application for Treatment as a State

Dear Administrators McCarthy and McGrath:

The State of Wyoming hereby petitions the United States Environmental Protection Agency (EPA) to reconsider and stay its approval of the Eastern Shoshone and Northern Arapaho Tribes' application for treatment as a state under Section 301(d) of the Clean Air Act. *See* 78 Fed. Reg. 76829 (Dec. 19, 2013). As explained in detail below, EPA's decision depends on a host of faulty factual and legal conclusions. The legal opinion offered in support of EPA's decision presents a selective history of the Wind River Indian Reservation more akin to advocacy for a predetermined outcome than to the objective analysis required for this complicated issue. The plain language of the 1905 Act of Congress, the 1891 and 1904 treaties, the legislative history and other contemporaneous historical evidence, decisions of the United States Supreme Court in

analogous cases, and the State's pervasive exercise of civil and criminal jurisdiction over the territory in dispute for more than one hundred years—especially when coupled with the disavowal of federal jurisdiction and the absence of tribal jurisdiction—demonstrate conclusively that EPA's reservation boundary determination is wrong.

EPA not only reached the wrong conclusion, but the agency also employed a fundamentally unfair and skewed process, to the detriment of the State and its citizens, in pursuit of its predetermined objective. EPA's process allowed the Tribes all of the time they desired to prepare their analysis of the reservation boundary. By contrast, EPA initially proposed to allow the State just thirty days to comment. Only after the State objected did EPA allow the State a total of sixty days to gather its comments and more than a century of historical records and legal authorities. EPA allowed itself five years to analyze the boundary question, collaborate and negotiate with tribal officials to the exclusion of the State, and to rationalize its foregone conclusion. EPA's process was wholly inadequate for the purpose of adjudicating the paramount question of Wyoming's sovereign right to exercise its plenary jurisdiction over lands rightly within its control. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

At the end of EPA's five-year review period, the Tribes altered their initial request and sought a new adjudication by EPA that excludes more than 300,000 acres of land covered by a 1953 Act of Congress. These lands conveniently happen to be the lands that most clearly refute EPA's finding of non-diminishment. Just two days later, EPA approved the Tribes' application, with a protracted legal analysis and a new reservation boundary that EPA never shared with the State, even though EPA's rules require the agency to give the State an opportunity to comment on reservation boundaries.

Indeed, the State still lacks a complete list of the documents that EPA considered, although it is has become clear that EPA's decision failed to even review a number of dispositive documents. In the short time since EPA issued the decision, Wyoming has assembled a more complete data set from various sources for EPA's review on reconsideration that would need to be considered in any rational adjudication. That information is attached hereto in electronic format. *See* Ex. 15. Some of the more important pieces of evidence are specifically discussed below, and provided as hard copy attachments to this Petition for your convenience. *See* Exs. 1-14.

In light of the procedural unfairness of EPA's process and the basic underlying substantive errors explained below, EPA should immediately stay the legal effect of its decision, reopen its fundamentally flawed process, incorporate all of the available

evidence, give all interested parties adequate time to respond to the facts and arguments of others, and conduct further review of the Tribes' application in a transparent and equitable manner.

PETITION FOR RECONSIDERATION

EPA's determination that the 1905 Act did not diminish the Reservation is clearly erroneous and should be reconsidered. The Supreme Court has "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." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The Court's role in such inquiries is merely to ascertain the intent of Congress. Accordingly, the most probative evidence of congressional intent is the statutory language itself. *Id.* If the intent of Congress is not clear from the language of the statute, the Court will look to the circumstances surrounding the passage of the act and the subsequent treatment of the area. *Id.* at 471-72.

In this case, Congress's intent to diminish the Reservation is unambiguous, and EPA ignored and distorted the plain language of the 1905 Act to reach a predetermined result. Moreover, the circumstances both before and after passage of the Act show that Congress intended to diminish the Reservation. Finally, for the last one hundred years, the uniform understanding of all parties has been that the Reservation was diminished and that Riverton is not in Indian Country. Indian Inspector James McLaughlin (who negotiated with the Tribes for the cession of their lands), the majority non-Indian inhabitants in the area, every Wyoming state agency asserting jurisdiction in this area, and the actions of the United States Department of Justice show agreement on this fact. The universal and unchallenged exercises of jurisdiction by the State over the disputed territory and the wholesale settlement of the area by non-Indians demonstrate that *de facto*, if not *de jure*, diminishment occurred. *Id.* at 471. Accordingly, EPA's decision must be stayed, reconsidered, and corrected immediately.

I. Standard of Review.

Inherent in an administrative agency's authority to make a decision "is its power to reconsider that decision." *See, e.g., ConocoPhillips Co. v. U.S. Envtl. Prot. Agency*, 612 F.3d 822, 832 (5th Cir. 2010) (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)). While neither the Clean Air Act nor EPA's regulations provide a clear standard of review for petitions for reconsideration, it would seem appropriate for EPA to

reconsider its determination if that determination would not withstand judicial scrutiny. Courts will assess EPA's decision utilizing the familiar standard of review set forth in the Administrative Procedure Act (APA).

Under the APA, a reviewing court must set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although a court's review under the APA is narrow, the agency must nonetheless "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations and citations omitted). Courts will set aside an agency decision if the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

II. The 1905 Act Plainly and Unambiguously Demonstrates that Congress Diminished the Reservation.

In 1905, Congress ratified an agreement with the Wind River Reservation Tribes to cede a substantial portion of their reservation. 33 Stat. 1016 (1905). The Act provided that the Tribes would "cede, grant, and relinquish to the United States, all right, title, and interest which they may have" to the lands. *Id.* art. I. The Supreme Court has observed that these terms are "precisely suited" to the purpose of diminishing a reservation. *See, e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592 (1977). Coupled with a sum-certain payment to a tribe for its lands, these words create a "nearly conclusive, or almost insurmountable, presumption of diminishment[.]" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (internal citations and quotations omitted).

On at least six occasions, the Act describes the remainder of the Reservation as "diminished." *See, e.g.*, 33 Stat. 1016-17 arts. IV and VI. EPA dismisses the repeated use of this term by referring to *Solem v. Bartlett*. *See* EPA Decision Document, Attachment 1 at 29 (hereinafter Dec. Att. 1). But, that case concluded only that the use of the term "diminished" is "hardly dispositive." *Id.* at 475. Contrary to EPA's suggestion, *Solem* does not stand for the proposition that the term "diminish" is meaningless. Though EPA asserts that in 1905 the term "diminish" was not a term of art in Indian Law, it nonetheless carried a familiar meaning: "to make smaller or less." *See Webster's Common Sense Dictionary* 134 (J.T. Thompson ed. 1902). As explained in more detail in

Section III below, Indian Inspector James McLaughlin's explicit and unambiguous description to the Tribes of the new boundaries of the smaller reservation confirms that Congress's repeated use of the word "diminish" was neither meaningless nor ambiguous as EPA alleges.

In exchange for the cession of their lands, the Tribes received payment in multiple forms. First, the Act provided the Tribes with $85,000 in sum-certain per capita payments, as well as $25,000 to construct an irrigation system on the diminished reservation. Through the settlement of lands in the ceded area, the Tribes also received payment for the nearly 200,000 acres EPA acknowledges were settled by non-Indians. And, in 1953, Congress appropriated more than $1,000,000 to compensate the Tribes for 161,500 acres in the ceded area that the Riverton Reclamation Project encompassed. 67 Stat. 592 (1953). That payment also compensated the Tribes for "any and all past and future damages arising out of the cession to the United States ... of that part of the former Wind River Indian Reservation" covered by the 1905 Act. *Id.* These payments exceed the inflation adjusted price per acre of the $25,500 that Congress paid the Eastern Shoshone for the cession of more than 700,000 acres under the Lander Purchase, 18 Stat. 291 (1874), which EPA agrees diminished the Reservation, Dec. Att. at 4-5.

EPA believes the 1905 Act is ambiguous with respect to diminishment. *See, e.g.*, Dec. Att. at 40. In support, EPA cites to the savings clause contained in Article X of the 1905 Act. *Id.* The Yankton Sioux Tribe argued precisely this claim before the Supreme Court. *See Yankton Sioux Tribe*, 522 U.S. at 349. But, as the Supreme Court observed, the rule that "ambiguities are resolved to the benefit of Indian tribes is not ... a license to disregard clear expressions of tribal and congressional intent." *Id.* (internal citations and quotations omitted). Stated simply, EPA may not manufacture ambiguity out of a savings clause simply to set aside Congress's plainly expressed intent.

In addition, had Congress not diminished the Reservation, the Department of Interior would have had no reason to restore lands to the Reservation through a series of restoration orders. *See, e.g.*, 9 Fed. Reg. 9749, 9754 (Aug. 10, 1944) (certain lands "are added to and made a part of the existing Wind River Reservation"). EPA dismisses this language in the restoration orders on the grounds that these terms were "standard, generic language[.]" Dec. Att. at 66. Yet, the Ninth Circuit Court of Appeals found the very same language in an analogous restoration order to indicate prior diminishment. *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976). EPA does not explain why it is free to adopt its preferred interpretation over the contrary understanding of the courts from a case in which the United States was a party.

The unambiguous language of the 1905 Act, precisely suited to the purpose of diminishment, coupled with not only the sum-certain cash payments provided in the Act and the payments to the Tribes for lands settled by homesteaders, but also the sum-certain payment provided in the 1953 Act relating back to the 1905 Act, demonstrate Congress's intent to diminish the Wind River Reservation. EPA was wrong to conclude otherwise.

III. This Case Is Indistinguishable from *Rosebud Sioux Tribe v. Kneip.*

In support of its conclusion that the 1905 Act did not diminish the Reservation, EPA strenuously attempts to distinguish the facts of this case from *Rosebud Sioux Tribe v. Kneip*, in which the Supreme Court found that, under analogous facts, Congress had diminished the Rosebud Sioux reservation. *See* Dec. Att. 1 at 47-51. EPA advances four arguments in its attempt to distinguish this case from *Rosebud*. Each is unavailing.

The thrust of each of EPA's arguments is that, unlike in *Rosebud*, there was not a continuity of purpose connecting the 1891 unratified agreement—which indisputably would have diminished the reservation—to the 1905 Act. Dec. Att. 1 at 47-51. The historical record directly contradicts this assertion. The purpose memorialized in the 1891 agreement and ratified in the 1905 Act was the Tribes' intent to sell their lands located north of the Big Wind River and accordingly reduce their Reservation. As the Tribes explained in a January 12, 1889, letter to the Commissioner of Indian Affairs, they desired that the "**reservation be reduced** by a sale of the portion beyond the Big Wind River," as the Tribes had previously requested in July of 1888. Ex. 3 at WY000018 (Letter from the Northern Arapaho and Eastern Shoshone Tribes to the Commissioner of Indian Affairs (Jan. 12, 1889)) (emphasis added). The Tribes stated that the lands they desired to sell "yields them nothing," and requested the "speedy . . . **reduction of this Reservation**[.]" *Id.* (emphasis added); *see also* Ex. 12 at WY000305-07 (Telegram from Chief Washakie to Commissioner of Indian Affairs (Nov. 14, 1888)); Ex. 13 at WY000309-11 (Letter from the Shoshone Agency, Wyo. (May 8, 1888)).

As EPA explains, in March of 1904, Representative Mondell introduced H.R. 13481, Dec. Att. at 8, which would become the 1905 Act, *see* Ex. 4 at WY000032 (H.R. Rep. no. 3700 (Jan. 19, 1905)). The purpose of the bill, according to the Committee on Indian Affairs, was "to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Reservation in the State of Wyoming[.]" Ex. 5 at WY000046 (H.R. Rep. no. 2355 (Apr. 11, 1904)). The agreement the Mondell Bill proposed to ratify was not the 1904 treaty, which McLaughlin would negotiate after introduction of the bill, but rather the 1891 agreement. The Committee made clear that the Mondell Bill "follows

as closely as is possible, under the changed conditions and the present policy of Congress relative to payment for lands purchased from Indians, **the agreement of 1891** and the bill prepared at that time for carrying out the provisions of that agreement." *Id.* at 4. (emphasis added). The Committee amended the bill to require a majority of the adult males of the Tribes to agree to its terms, which, in turn, led to the substitute bill that became the 1905 Act. *Id.* at WY000047; *see also* Ex. 4 at WY000032.

On April 1, 1904, Secretary of the Interior E.A. Hitchcock dispatched Inspector McLaughlin with specific instructions to negotiate for the cession of the Tribes' land. Consistent with Congress's understanding of the Mondell Bill, Secretary Hitchcock's instructions opened with explicit reference to the 1891 unratified agreement, and noted his understanding "that the Indians are still willing to cede **practically the same territory**[.]" Ex. 1 at WY000003 (Memorandum from Secretary of Interior E.A. Hitchcock for U.S. Indian Inspector James McLaughlin (April 1, 1904)) (emphasis added). Hitchcock then explained that, if McLaughlin could reach an agreement with the Tribes, the "diminished reserve" would be as described in the 1905 Act. *Id.* With respect to payment to the Tribes for the land cession, Hitchcock explained that "it is not thought that Congress would appropriate a lump sum for payment for the lands, and it should be made clear in the agreement that any cash payment agreed to be made to the Indians would be made only after the necessary amount shall have been derived from sales of lands." *Id.*; *see also* Ex. 5 at WY000049. Hitchcock then described "some of the features of an amended bill proposed by the Indian Office **for the ratification of the old agreement**," plainly referring to the 1891 agreement. Ex. 1 at WY000004 (emphasis added). McLaughlin's negotiations with the Tribes to ratify the old agreement for practically the same territory, pursuant to his instructions from the Secretary and consistent with Congress's plainly expressed intent, resulted in the 1905 Act.

EPA's analysis never mentions these facts. EPA's failure even to acknowledge, let alone assess, such strong evidence demonstrating a clear continuity of congressional purpose from the 1891 agreement to the 1905 Act reveals EPA's desire to reach a predetermined result, rather than fairly adjudicate the true reservation boundary. Ignoring such important facts was arbitrary, capricious, and an abuse of discretion. Even setting aside EPA's ignorance of the history of the legislation it purports to interpret, each of EPA's arguments attempting to distinguish *Rosebud* nonetheless fails on the merits.

First, EPA acknowledges that Inspector McLaughlin discussed with the Tribes "the boundaries of the reservation and the residue of land that will remain in your diminished reservation," and that McLaughlin explained to the Tribes the description of

the diminished reservation set forth in the 1905 Act. *Cf.* Dec. Att. 1 at 37 ("McLaughlin also described the 'boundaries' "). Early in its analysis, EPA claims, without support, that McLaughlin's description of the boundaries of the diminished reservation is "best understood as a description of the area over which the Tribes would retain exclusive use," assuming the very point EPA claims to prove. *Id.* at 38. Later, EPA claims that McLaughlin never described the agreement "as 'cutting off' any portion of the Reservation," *id.* at 50, even though McLaughlin clearly explained to the Tribes that the agreement would result in new reservation boundaries, *id.* at 38. EPA fails to explain why McLaughlin's geographic description in this case is meaningfully different than McLaughlin's analogous description of the diminished Rosebud Sioux Reservation. *See Rosebud*, 430 U.S. at 591-92. According to EPA's theory, McLaughlin did not describe a diminished reservation to the Rosebud Sioux either. While that might be the explanation EPA prefers, it was not the interpretation of the Supreme Court in *Rosebud*. *Id.*

Second, EPA alleges that the differences in the operative language of the 1891 agreement and 1905 Act show that "Congress retreated" in the later Act and that, therefore, "Congress did not intend to diminish the lands from the Reservation in 1905." Dec. Att. 1 at 49. The 1891 agreement provided that the Tribes would "cede, **convey**, **transfer**, relinquish, and **surrender**, **forever and absolutely** ... all their right, title, and interest, **of every kind and character**, in and to the lands[.]" Agreement with the Eastern Shoshone and Northern Arapaho art. I (Oct. 2, 1891) (emphasis added). By contrast, the 1905 Act provides that the Tribes would "cede, grant, and relinquish to the United States, all right, title, and interest which they may have" to the lands. EPA argues that the omission of the above emphasized words evidence so substantial a retreat by Congress as to defeat the 1891 intent to diminish the reservation. Dec. Att. 1 at 49.

EPA reads too much into these terms. In place of the 1891 agreement words "convey" and "transfer," Congress added to the 1905 Act the synonymous term "grant," which was not present in the 1891 agreement. Although Congress omitted from the 1905 Act the 1891 agreement terms "of every kind and character," Congress nonetheless retained in the 1905 Act the inclusive term "all" to make clear the totality of the interests the Tribes conveyed. EPA further ignores the fact that the Supreme Court has concluded that the terms used in the 1891 agreement and 1905 Act are "virtually identical." *See DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 439 n.22 (1975). While EPA might believe the terms of the 1891 Agreement and the 1905 Act to be meaningfully different, the Supreme Court disagrees.

Third, EPA notes that, although the lands at issue in the unratified Rosebud agreement and the Rosebud Act were identical, the lands described in the 1891 Wind River Reservation unratified agreement were different than the lands at issue in the 1905 Act. Dec. Att. 1 at 49-50. EPA argues that, because the land bases at issue in the two agreements were different, "the intent surrounding the 1891 agreement is not logically attributable to the 1905 Act." *Id.* at 50. Contrary to EPA's assertion, the United States understood the 1891 agreement and 1905 Act to address "practically the same territory[.]" Ex. 1 at WY000003. To the extent that the lands covered by the 1891 agreement were different from those addressed in the 1905 Act, this was primarily because the Indian Department had underestimated the size of the Reservation by nearly one-half million acres in 1891. *See* Ex. 2 at WY000009 (H.R. Rep. no. 2621 at 3 (Apr. 27, 1904)); *see also* Ex. 14 at WY000312. Congress's intent, as expressed in the ratification of the agreement that McLaughlin negotiated under the Secretary's direction, not EPA's preferred "logic," matters most for purposes of reservation diminishment.

Fourth, EPA observes that the Rosebud Act committed the United States to purchase sections 16 and 36 of each township, which the United States would convey to the State of South Dakota for school purposes, and the Supreme Court interpreted this fact in support of finding diminishment. Dec. Att. 1 at 50. Because the 1905 Act does not include an analogous provision, EPA concludes that Congress must not have intended to diminish the reservation. *Id.* EPA's inversion of the proposition, however, is logically erroneous. It does not follow that, because inclusion of a school section provision suggests diminishment, omission of a school section clause counsels against diminishment. As the Supreme Court has observed, the disposition of school section lands in a reservation cession statute "implies nothing about the presence of state civil and criminal jurisdiction over the remainder of the ceded lands." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 350 (1998) (internal citation omitted).

IV. EPA's Comparison of Settlement in the Ceded Territory to Settlement on the Ceded Portion of the Yankton Sioux Reservation Is Mistaken.

EPA states that "non-Indian settlement in the opened area was not successful and with a relatively small percentage of lands actually settled in the first decade, it was not a circumstance where 'non-Indian settlers flooded into the opened portion' of the Reservation or where 'the area has long since lost its Indian character.'" Dec. Att. 1 at 53 (citing *Solem*, 465 U.S. at 471-72). In support of these conclusions, EPA notes that "approximately 196,360 acres or 13.6% of the 1,438,633.66 acres opened to settlement were disposed of to non-Indians." *Id.* Accordingly, EPA concludes that "[t]he Wind

River Indian Reservation settlement history stands in marked contrast to cases where the 'demographics signify a diminished reservation' such as with the Yankton Sioux Reservation which was opened to settlement in 1895 and '[b]y the turn of the century, 90 percent of the unallotted tracts had been settled' by non-Indians." *Id.* at 54 (citing *Yankton*, 522 U.S. at 339). EPA's comparisons to *Yankton Sioux* are misguided, and EPA's assessment of the success of settlement ignores the thoroughly documented expectations at the time the Reservation was diminished.

The original Yankton Sioux Reservation was located immediately north of the Missouri River, which not only provided a reliable water supply, but also acted as a channel of commerce and transport to bring steamboats and passengers to the area. *See Yankton Sioux Tribe v. United States*, 623 F.2d 159, 169-70 (Ct. Cl. 1980). At the time Congress opened the Yankton Sioux Reservation, rail lines abutted both the northern and eastern boundaries of the ceded area, providing yet two more avenues for settlers and goods to reach the lands opened for settlement. *Id.* at 169. The Yankton Sioux Reservation also was located in close proximity to Yankton, the territorial seat. As a result, non-Indian settlers already essentially surrounded the Reservation. And, unlike in arid western Wyoming, crops could easily be grown in the area, even without irrigation. *Id.* In fact, the Yankton Sioux Reservation was "one of the finest tracts of land held by Indians in the northwest of the United States," *id.*, and "nearly all of the [ceded] lands were arable and of good quality for crop-production farming and stockraising purposes," *id.* The land rush that followed the opening was therefore fully expected, especially given the limited supply of roughly 200,000 acres of opened lands. *Id.* These facts stand in stark contrast to the ceded portion of the Wind River Reservation.

When the United States opened the nearly 1.5 million acres of Wind River Reservation lands to non-Indian settlement, no one, including Congress, expected non-Indian settlement to come close to the ninety percent non-Indian settlement that occurred on the Yankton Sioux Reservation. The Committee on Indian Affairs understood that none of the ceded lands "are of any value for agriculture without irrigation," and that probably no more than "200,000 to 300,000 acres of the ceded lands will be irrigated." H.R. Rep. no. 2621 at 5 (1904). The Commissioner of Indian Affairs also recognized this reality in 1904, following ratification of the cession agreement, explaining that "lands in that section of the country without irrigation are worthless for agricultural purposes." Ex. 6 at WY000069 (Letter from A.C. Tonner, Acting Commissioner of Indian Affairs, to Walter B. Hill, Superintendent of Irrigation, Wind River Reservation (Aug. 11, 1904)). James McLaughlin, in his report to the Secretary of Interior after negotiating the 1904 agreement, explained that at best only two-fifths of the ceded land was suitable to

agricultural use, and then only after it was brought under irrigation at a cost of up to five dollars per acre at the time. Ex. 4 at WY000041-42 (Letter from James McLaughlin, Indian Inspector, to E.A. Hitchcock, Secretary of the Interior (April 25, 1904)).

Clarence T. Johnston, Wyoming's State Engineer, communicated to Secretary Hitchcock the need for irrigation infrastructure on the opened lands, explaining that "parties who expect to occupy lands there are somewhat exercised as to the manner in which the reclamation is to be brought about." Ex. 7 at WY000094 (Letter from Clarence T. Johnston, Wyoming State Engineer, to E.A. Hitchcock, Secretary of the Interior (Aug. 8, 1905) (reprinted in *Eighth Biennial Report of the State Engineer to the Governor of Wyoming 1905-1906* at 30 (Nov. 30, 1906) (*Eighth Biennial Report*)). Johnston continued to bring this concern to the attention of the United States, explaining to the Commissioner of Indian Affairs "that it will be impossible for settlers to maintain themselves upon these lands unless irrigation works are provided." Ex. 7 at WY000099 (Letter from Clarence T. Johnston, Wyoming State Engineer, to Commissioner of Indian Affairs (Jan. 23, 1906)). The aim of Johnston's communications was to obtain authorization from the United States for the State to enter the Reservation, prior to its opening, for the purpose of surveying and engineering the irrigation infrastructure necessary to support the homesteaders.

Ultimately, Johnston prevailed and obtained authorization from Secretary Hitchcock to enter the portion of the Reservation that was about to be ceded before its opening. *See* Ex. 7 at WY000099 (Letter from E.A. Hitchcock, Secretary of Interior, to Clarence E. Johnston, Wyoming State Engineer (Feb. 5, 1906)). Johnston, in turn, dispatched a team of state engineers and surveyors to the Reservation to develop plans for an irrigation system in the ceded area, an effort that ultimately cost the State approximately $6,500. *See* Ex. 7 at WY000102-104.

With irrigation plans in hand, the State solicited bids from private enterprises to develop the infrastructure on the ceded lands. *Id.* at WY000106-110. The State accepted the bid of the Wyoming Central Irrigation Company, and entered into a contract to provide the Company with water rights to supply its irrigation system, which in turn would deliver water to settlers in exchange for payment. *Id.* at WY000107-112. Johnston commended the Company for its efforts, noting that "the settler's welfare is bound up in [the Company's] success." *Id.* at WY000113. Because settlement in the ceded area had already begun, the State granted the Company a water right for a short ditch to serve about 12,000 acres of settled lands. *Id.*

While the absence of irrigation infrastructure inhibited non-Indian settlement in the ceded area, so too did the tardy completion of a rail line into the area. As Congress observed in 1904, the railroad nearest the Reservation was located eighty miles from the extreme northern boundary of the Reservation and 120 miles from the area expected to be settled first. Ex. 2 at WY000010. Supply points for the Reservation were 160 miles distant. *Id.* As Reservation Superintendent Wadsworth accordingly reported three years later, "the success of the opening was materially affected by the fact that the extension of the Chicago and North-Western Railroad building to and thru the reservation was not at the time completed[.]" Ex. 8 at WY000169 (Report of H.E. Wadsworth, Superintendent, Wind River Reservation (Aug. 15, 1907)). As a result, Wadsworth explained:

> the prospective entrymen who did not penetrate the country beyond the end of the railway track received a most unfavorable impression of the country and its character. Great numbers returned to their homes without even remaining long enough to register for the opening. Many hundreds of others failed to make entry even after this drawing had taken place and they were notified by the land officials to appear for that purpose.

Id. But, Wadsworth noted, the rail line was eventually completed, "result[ing] in a steady stream of newcomers, who are rapidly filing upon this magnificent body of land." *Id.* at WY000170.

In 1910, the Wyoming State Engineer remarked that "a grave mistake was made when Congress opened these lands, subject to the homestead act only. The lands are not capable of supporting a population without irrigation. Irrigation is impossible except by the construction of a large system of canals and storage reservoirs." Ex. 9 at WY000190 (*Tenth Biennial Report of the State Engineer to the Governor of Wyoming 1909-1910* (Nov. 30, 1910)). Recognizing the need to reclaim the ceded lands in order to encourage non-Indian settlement, Congress in 1910 authorized the State to designate lands in the ceded area under the Carey Act, 28 Stat. 422. *See* S. Rep. 303, 61st Congress, 2d. sess. (March 2, 1910). In 1912, the State segregated 335,908 acres in the ceded area pursuant to the Carey Act. *See* Carey Act List No. 74 (Sept. 13, 1912); *see also* Ex. 10 at WY000222 (*Report of the Reclamation Service on the Wind River, Wyoming Project* (Dec. 18, 1916)). The State had hoped that the Carey Act designation would aid the Wyoming Central Irrigation Company to carry out its commitment to develop irrigation infrastructure. The Company failed to do so.

Congress took over the effort in 1916, setting aside $5,000 for the Secretary of Interior to study and plan for the construction of irrigation in both the diminished reservation and the ceded area. 39 Stat. 123-158 (1916). The Secretary responded with a report summarizing a project covering 130,000 acres at a cost of forty-four dollars per acre. *See* Ex. 10 at WY000256, WY000276. In what would become the Riverton Reclamation Project, roughly thirty percent of the lands had already been settled, and the remainder had to be withdrawn from entry until irrigation water was available. *See* Ex. 11 at WY000304 (U.S. Department of the Interior, Reclamation Service, *Riverton Project*). Accordingly, on September 18, 1918, the Secretary of Interior withdrew those lands pursuant to the Reclamation Act of 1902. *See* Order of the Secretary of Interior Withdrawing Riverton Project Lands (Sept. 18, 1918).

By the time the Reclamation Service had completed the Riverton Project, Congress had again shifted its policy on Indian tribes, returning to support for tribal self-determination as opposed to assimilation. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* 127-51 (1982 ed.). As a result, consistent with the Indian Reorganization Act, the United States began to restore the unsettled portions to the diminished reservation.

Because no one ever expected settlement in the ceded portion of the Wind River Reservation to be on par with settlement in the opened portion of the Yankton Sioux Reservation, EPA's comparison of the two is misguided. At the time the reservation lands were ceded, Congress expected that at most, 300,000 acres of the ceded area would be settled, and then only with irrigation infrastructure to support agricultural homesteads. That infrastructure materialized only partially and not until nearly fifty years later, after Congress had shifted its policy in favor of restoring Indian reservations. Nonetheless, even in spite of these substantial hurdles to settling in the ceded area, non-Indians settled nearly all of the area expected to be settled. Within the smaller section of irrigable lands eventually served by the Riverton Reclamation Project, non-Indians settled a majority of the lands. Although this is less proportional non-Indian settlement of the total ceded area than occurred on the Yankton Sioux Reservation, the lands ceded in Wyoming were far less susceptible to settlement than the lands ceded in South Dakota. This fact, not some difference in congressional intent, is the reason for the disparities in the extent of non-Indian settlement. EPA's analysis ignores historical reality, and it is accordingly arbitrary, capricious, and an abuse of discretion.

V. EPA Arbitrarily Dismisses Wyoming's Continuous and Complete Exercise of Jurisdiction over the Ceded Area.

In its prior comments on the Tribes' application, the State provided EPA with numerous examples in which State has exercised exclusive jurisdiction over the ceded portion of the former reservation. EPA fails even to respond to the State's exercise of jurisdiction over the incorporated municipalities of Riverton and Pavillion and the unincorporated community of Kinnear, as well as the City of Riverton's provision of law enforcement and municipal services. In response to the State's comment noting the numerous environmental permits that the State has issued in the ceded area, EPA asserts that "states are generally not approved by EPA to implement regulatory programs in Indian Country" and that "EPA has not approved the State of Wyoming's authority to regulate in Indian Country." Dec. Att. 1 at 74. EPA's reasoning is circular. EPA presumes that these lands are Indian Country and then uses this assumption to prove that EPA has never accepted the State's jurisdiction, *id.*, rather than objectively evaluate the fact that state exercise of jurisdiction is a strong indication of diminishment.

A. Extensive and Unquestioned State Jurisdiction.

1. The Wyoming Department of Environmental Quality.

As noted in the attached tables and maps, the State has exercised its environmental regulatory jurisdiction alone on hundreds, if not thousands, of occasions in the ceded area. For example, the Water Quality Division of the Department of Environmental Quality (DEQ) has undertaken at least 650 regulatory actions in the disputed area. *See* Parfitt Aff. at 3, ¶ 13. Those actions included eighty-four permits issued under Section 402 of the Clean Water Act and seventy underground injection control permits issued under Part C of the Safe Drinking Water Act. *Id.* For every one of these more than one hundred permits the State issued, EPA had the opportunity to assert that the State lacked jurisdiction. *See* 33 U.S.C. § 1342(d) (requiring notice of Section 402 permit applications to EPA and providing EPA authority to reject permits); Memorandum of Agreement Between State of Wyoming and EPA Region VIII at 2, § I (C) (April 12, 1983) (providing for EPA review of and comment on state Part C permits). But EPA did not. In fact, only once did EPA object to a Water Quality Division permitting action on jurisdictional grounds and that permit, tellingly, was for a facility located south of the Big Wind River within the diminished reservation, an area that the State agrees is within Indian Country. Similarly, on May 11, 2000, and again on January 25, 2002, EPA

approved the State's surface water quality standards, which expressly covered water bodies in the ceded area, without questioning the State's jurisdiction.

In a manner similar to the Water Quality Division, the Air Quality Division of DEQ has permitted fifteen facilities in the disputed area under the Clean Air Act. *See* Parfitt Aff. at 4, ¶ 14. Here, again, EPA had the opportunity to object to these permits on jurisdictional grounds, but failed to do so. The Land Quality Division of DEQ also has historically exercised jurisdiction in the ceded portion of the former reservation. *Id.* at ¶ 15. In the ceded portion, the Division has more than forty active mine permits, has conducted more than one hundred regulatory inspections of those mines, and has pursued multiple enforcement actions as a result of those inspections. *See id.*

DEQ's Storage Tank Program also regulates 135 storage tank facilities and a total of 362 storage tanks in the disputed territory. *See id.* at 4, ¶ 16. The Solid and Hazardous Waste Division regulates thirty-six facilities in the ceded area under the Resource Conservation and Recovery Act, each of which DEQ has inspected in the last three years, and thirteen of which have been subject to DEQ enforcement actions in the same time period. *See id.* And the Abandoned Mine Lands Division has inventoried thirty-five abandoned mines in the disputed area. *See id.* at 5, ¶ 16. The United States Office of Surface Mining, Reclamation, and Enforcement, the entity charged with reclaiming abandoned mines in Indian Country, like the Tribes, has not exercised jurisdiction over these abandoned mine sites.

2. Other Civil Regulatory Agencies.

The State has similarly exercised many other facets of civil regulatory jurisdiction in the ceded portion of the former Reservation. The Secretary of State, for example, in his capacity as Chief Election Officer, has overseen elections in Riverton since its establishment. *See* O'Brien Arp Aff. at 1, ¶ 3. The Secretary of State has also served as the filing agency for Uniform Commercial Code liens in Riverton, and as the registrar of corporations sited in Riverton. *Id.* at 2, ¶ 5. The Wyoming Business Council, which oversees multiple grant and loan programs, has administered those programs in Riverton to support community development. *See* Spangler Aff. at 2, ¶ 6.

The Wyoming Game and Fish Department and its predecessor agencies have enforced state wildlife law in the ceded area since 1905. *See* Talbott Aff. at 5, ¶ 22. From 1998 to present, the Department has exercised jurisdiction over nearly 1,200 boating and fishing regulatory violations in the South Riverton and North Riverton warden districts,

which include the ceded area, in addition to approximately 350 wildlife violations in the disputed territory. *Id.* at 5, ¶ 26-27. The Department has also compensated fifteen property owners for wildlife-caused damages in the disputed area since 1999. *Id.* at ¶ 30. The Department owns and operates the following wildlife habitat management areas, which comprise approximately 45,000 acres in the disputed area: Spence and Moriarty Wildlife Habitat Management Area; Ocean Lake Wildlife Habitat Management Area; and Sand Mesa Wildlife Habitat Management Area. *Id.* at ¶ 31-34.

The Game and Fish Department additionally has historically exercised jurisdiction over each of the following water bodies located within the ceded portion of the former Reservation: Cottonwood Drain, Middle Depression Reservoir, Lake Cameahwait, Muddy Ridge Reservoir, Pilot Butte Reservoir, Boysen Reservoir, East Fork Wind River (excluding Bear Creek and Wiggins Fork), Pilot Canal, Wind River (below Boysen Reservoir, Section 1), Ocean Lake, Kinnear Pond, Sand Mesa #1, and Sand Mesa #2. *Id.* at ¶ 35. The Department's records from 1927 through the present date show the following exercises of Department jurisdiction over these water bodies: 406 fish stocking events; 339 population monitoring events; 162 angler interviews and program creel surveys; sixty-four research events related to fish health, diet, movement, and life history; fourteen forage investigations related to zooplankton and beach seines; 157 habitat improvement projects involving aeration systems, revetments, and water quality; nineteen rehabilitation projects; five transplanting events; thirty-six fish salvage events; seven fish passage projects involving barrier removal and screening; five access projects involving development or improvement of recreational access; and various disease and parasite monitoring events. *Id.* at ¶ 36.

The Wyoming Department of Revenue has historically enforced its personal property, fuel license, and cigarette taxes in the disputed area. *See* Noble Aff. at 1, ¶ 3-4. Its exercise of regulatory jurisdiction entails comprehensive licensing and reporting requirements, as well as audits, inspections, and civil enforcement actions. *Id.* at ¶ 9-11. The Department also enforces statutes related to contractors and subcontractors, many of which are related to tax reporting and withholding and bonding, in addition to the State's liquor licensing program in Riverton. *Id.* at ¶ 11.

Each of the following State civil regulatory agencies has also exercised jurisdiction in the ceded territory:

- The Wyoming Department of Family Services has maintained an office in Riverton since 1971. It currently has twenty employees who provide

residents in the ceded area with child and adult protective services, supplemental nutrition assistance, child care assistance, the Low Income Energy Assistance Program, and the Personal Opportunities with Employment Responsibilities Program and also certify foster homes, day care facilities, and a substitute care facility in Riverton. *See* Corsi Aff. at 1-2, 6 ¶¶ 5-6, 18.

- The Wyoming Department of Agriculture ensures the safety of food establishments, including restaurants, grocery stores, school cafeterias, and food processors; regulates aerial hunting, apiaries, nursery stock salesmen, seed dealers, aircraft registration, and grain warehouses; oversees weed and pest control; and conducts rangeland health assessments. *See* Finkenbinder Aff. at 1, ¶ 2; *see also* Uhden Aff.

- The Wyoming Department of Health regulates healthcare facilities and providers, and oversees numerous public health programs, including Medicaid, Early Childhood Education, Mental Health Services, immunization, Emergency Medical Service licensing, and public health event reporting and investigations. *See* Forslund Aff. at 2, ¶ 7.

- The Wyoming Livestock Board regulates brand inspections and reporting; livestock vaccination, health tests, markets, and dealers; and also investigates livestock disease and provides loan repayment assistance for veterinarians. *See generally* Correll Aff.

- The Professional Licensing Boards of the State of Wyoming license and regulate the professional conduct of dentists, optometrists, psychologists, architects, chiropractors, dieticians, athletic trainers, enbalmers, hearing aid specialists, mental health professionals, midwives, physical therapists, podiatrists, radiologic technicians, respiratory caregivers, speech and audiology pathologists, and veterinarians throughout Wyoming, including in the ceded area. *See, e.g.*, Lamorie Aff.; Bohnenblust Aff.; LaBonde Aff.

- The Wyoming Office of State Lands and Investments manages state-owned lands in the ceded area for the benefit of public schools, coordinates with law enforcement agencies to ensure the legal use of state lands, supervises

state forestry, and administers loans and grants to support local agriculture and political subdivisions of the State. *See* Hill Aff.; *see also* Crasper Aff.

- The Wyoming Department of Administration and Information's Risk Management Division implements the State's self-insurance program, providing insurance to state employees, local law enforcement, and select employees of the University of Wyoming against liability claims arising from their professional conduct. *See* Hooper Aff.

- The Wyoming Department of Homeland Security oversees the development and implementation of homeland security programs created by political subdivisions of the State, including the City of Riverton; implementation of the National Flood Insurance and Emergency Management Performance Grant programs in Wyoming; state disaster declarations; and Regional Emergency Response Teams. *See generally* Cameron Aff.

- The Wyoming Department of Transportation, among other activities, collects and distributes fuel taxes in Riverton, *see* Loftin Aff. at 1, ¶ 4-5, and administers business licensing and fee collection for retail vehicle dealers, salvage yards, and vehicle rental agencies in Riverton, *see* Stauffacher Aff. at 1, ¶ 4-5.

- The Wyoming Department of Workforce Services administers the following programs: Worker's Compensation, Unemployment Insurance, Employment Tax, Occupational Safety and Health, Fair Labor Standards, Vocational Rehabilitation, and Employment and Workplace Training. *See* Evans Aff. at 1, ¶ 2.

- The Wyoming Insurance Department regulates 118 licensed insurance providers that list Riverton as their place of residence and the Davis Funeral Home in Riverton. *See* Hirsig Aff. at 1, ¶¶ 2-3, 8.

3. State Exercise of Criminal Jurisdiction

The State has exercised criminal jurisdiction throughout the ceded area, while federal law enforcement has not. *See, e.g.*, Crank Aff. at 1, ¶ 4 ("The municipal boundaries of Riverton, Wyoming were never considered by the United States Attorney

for the District of Wyoming to be an area within Indian Country or the Wind River Indian Reservation"). The Wyoming Division of Criminal Investigation accordingly has an office in Riverton and has exercised jurisdiction in the disputed area, *see* Woodson Aff. at 1, ¶ 2, much in the same manner as has the Wyoming Highway Patrol, *see generally* Butler Aff. The Wyoming State Public Defender has also exercised its responsibilities in Riverton, representing indigent defendants in state criminal proceedings. *See* Lozano Aff.

Consistent with the State's exercise of criminal jurisdiction in the ceded portion, the Wyoming Department of Corrections has operated the Wyoming Honor Farm correctional facility in Riverton since 1931. *See* Lindly Aff. at 1, ¶ 3. The Honor Farm has a capacity of 283 inmates and currently houses 233 individuals. *Id.* at 2, ¶ 6. The Wyoming Board of Parole, whose jurisdiction is concomitant with the State's criminal jurisdiction, conducts parole hearings at the Honor Farm and has executed parole violation warrants in the ceded area. *See* Anderson Aff. at 1, ¶¶ 2, 4.

The Department of Corrections currently has forty-five inmates incarcerated who committed crimes in the ceded portion of the former Reservation and who also self-reported as tribal members: fifteen for homicide; two for attempted murder; eighteen for assault or battery; five for theft or larceny; four for driving under the influence; three for felonious restraint; four for burglary or criminal entry; two for child endangerment; two for possession of controlled substance; two for possession of a controlled substance with intent to deliver; one for delivery of controlled substance; three for interference with a police officer; one for possession of deadly weapon with unlawful intent; and four for sexual assault or abuse of a minor. *See* Lindly Aff. at 2, ¶ 8. The Department also supervises eighty-three individuals on parole or probation for crimes committed in the ceded area who also self-reported as registered tribal members: two for homicide; seventeen for assault or battery; four for theft or larceny; twenty-four for driving under the influence; six for burglary or criminal entry; seven for child endangerment; sixteen for possession of a controlled substance; five for interference with a police officer; one for child abuse; and one for possession of a deadly weapon with unlawful intent. *Id.* at 3, ¶ 13.

As is apparent from the foregoing, the State exercises plenary jurisdictional control over the disputed territory consistent with the totality of the State's sovereign authority. EPA's dismissive rejection of the State's pervasive regulation of the ceded area was arbitrary, capricious, and an abuse of discretion.

B. A Noteworthy Absence of Federal and Tribal Jurisdiction.

By contrast, exercises of federal and Tribal jurisdiction in the ceded area are virtually non-existent. For example, the United States Department of Justice has never asserted criminal jurisdiction over the ceded portion commensurate with its jurisdiction over the diminished Reservation. Indeed, the United States expressly disavowed criminal jurisdiction more than fifty years ago. *See* Brief of United States of America as Amicus Curiae, at 3, *Wyoming v. Moss*, 471 P.2d 333 (Wyo. 1970) ("It is clear ... that by the Act of March 3, 1905 ... the intent of the Indian tribes and of the Congress of the United States was to remove from the organized reservation that area ceded to the United States for disposal"); *see also* Crank Aff. at 1, ¶ 4. Consistent with this historical fact, EPA has exercised jurisdiction only in the diminished reservation and areas restored to the reservation. It is quite remarkable for EPA to assert that, the State now lacks jurisdiction to carry out EPA administered environmental programs in this area, after decades have passed and the State has taken hundreds of regulatory actions.

Similarly, the Tribes can point to little more than a fifty year old economic development plan as evidence of their historical exercise of jurisdiction in this area. In fact, the Tribes have failed to point to a single instance where they have exercised or attempted to exercise jurisdiction in the ceded area. *See generally* Application for Treatment in a Manner Similar to a State (Dec. 17, 2008). The Tribes otherwise do nothing more than generically describe their governmental organization and the general activities they carry on within the diminished reservation.

From all of these facts, EPA arbitrarily concludes, against the weight of the evidence, that "in recent years, the Northern Arapaho and Eastern Shoshone Tribes and the State of Wyoming have asserted jurisdiction in the 1905 Act opened area." Dec. Att. at 73. The Tribes have not exercised jurisdiction in the ceded area. The State unquestionably has, and, therefore, EPA's decision runs directly counter to the evidence.

VI. EPA's Failure to Act on the 1953 Act Lands Is Unlawful.

In its approval of the Tribes' application, EPA elected not to take action on the portion of the application addressing lands covered by the 1953 Act, ostensibly at the behest of the Tribes. Because EPA's decision redraws the boundaries of the reservation to include lands that the State has historically regulated for environmental and other purposes, EPA has cast substantial doubt over which entity—the State or EPA—has jurisdiction to regulate lands covered by the 1953 Act. However, as in *Michigan v. EPA*,

268 F.3d 1075 (D.C. Cir. 2001), EPA's dereliction of its duty to determine its jurisdiction cannot stand.

In *Michigan v. EPA*, EPA refused to make a jurisdictional determination for disputed areas, to the detriment of both tribes and states. *Id.* at 1080, 1085. The Court rejected EPA's approach, because "there either is jurisdiction or there isn't, but either way EPA must decide[.]" *Id.* at 1086. EPA's refusal to act on the 1953 Act lands ignores this reality—that tribal jurisdiction exists or it does not—and fails to accept Congress's command that EPA determine jurisdiction. EPA's refusal to act, coupled with EPA's newly discovered belief that State issued environmental permits in the disputed area are invalid, calls into question the validity of state permits in the area covered by the 1953 Act.

Moreover, EPA's refusal to act on the 1953 Act lands creates a reservation boundary substantially different than the boundary the Tribes proposed in their application and on which the State commented. It was not until December 4, 2013—five years after the original request for EPA to declare a new reservation boundary and two days before EPA signed its decision—that the Tribes asked EPA to eliminate the 1953 Act lands from their request. EPA made its decision without giving the State or local governments any notice or opportunity to comment on the latest boundary. In fact, when EPA officials presented the State with this new decision, they were unable to provide any map of the affected area because the precise boundaries were still under negotiation between EPA, the Tribes and the United States Department of the Interior. EPA's rules require it to provide governmental entities the opportunity to comment on reservation boundaries. 40 C.F.R. § 49.9(c). Because the newly proposed boundary is not a logical outgrowth of the comments EPA received in response to the application, EPA must provide the State with the opportunity to comment on EPA's newly redefined boundary. EPA's decision to ignore its own regulations and approve the new, substantially revised boundary without notifying the State is not in accordance with the law. *See, e.g., Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) (agency failure to follow its own regulations is arbitrary and capricious).

MOTION FOR STAY

Since EPA released its decision, the Tribes have publicly expressed their belief that EPA's determination affects all facets of jurisdiction, both criminal and civil, and not just Clean Air Act administration. *See* Letter from Darrell O'Neal, Sr., Chairman, Northern Arapaho Business Council, to Ronald O. Warpness, Mayor, City of Riverton

(Dec. 9, 2013) (claiming criminal jurisdiction in Riverton and proposing transfer of prisoners); *see also* Wyoming Gov. Mead: State Won't Honor EPA Ruling on Reservation, *Casper Star-Trib.* (Dec. 20, 2013) (EPA's "determination was made for all jurisdictional purposes") (quoting Mark Howell, lobbyist for the Northern Arapaho). As a result, regardless of whether EPA elects to reconsider its decision, EPA should immediately stay the effectiveness of this decision pending reconsideration or judicial review because the decision risks upending the settled status quo with respect to criminal and civil jurisdiction in the disputed territory. *See* 5 U.S.C. § 705 (authorizing agency stay when "justice so requires" and "to prevent irreparable injury"); *see also Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J.) (preventing enforcement of state statutes constitutes irreparable harm); *Singh v. Ashcroft*, 375 F.3d 1007, 1008 (10th Cir. 2004) (reinstating the status quo prior to decision is preferred when competing harms present); *Wash. Met. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) (stay is proper when ruling on difficult legal question and the equities of the case favor maintaining the status quo prior). The status quo consists of "the reality of the existing status and relationship between the parties," *Schrier v. University of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005), which, in this case, means the exercise of state jurisdiction in the disputed area. Staying the effectiveness of EPA's approval of the Tribes' application will preserve the status quo, prevent irreparable harm, and serve the public's interest in jurisdictional certainty while this issue is adjudicated in court.

As demonstrated above, the status quo in the disputed territory is that the State, not the Tribes, exercises plenary jurisdictional control consistent with the full extent of the State's sovereign authority. EPA's decision casts a shadow of uncertainty over the transactions and day-to-day operations of state agencies, courts, businesses, and individuals within the disputed territory. The decision has already caused significant controversy and has the potential to undermine the orderly course of business within the disputed territory to the detriment of all concerned parties. While it would be nearly impossible to predict all of the potential negative impacts caused by changing the status quo, the State offers the following sample of potential impacts to the State, its agencies, and the public of a relocation of the State's ninth-largest city to Indian Country:

- Forty-five self-reported tribal members incarcerated for crimes committed in the disputed area, including fifteen murderers, could potentially challenge their convictions on jurisdictional grounds, *see* Lindly Aff. at 2, ¶ 8;

- Eighty-three self-reported tribal members on parole or probation for crimes committed in the disputed area could also potentially challenge their convictions and subsequent supervision, *see id.* at at 2, ¶ 13;

- According to EPA, hundreds of environmental permits and regulatory actions are invalid, rendering ongoing State regulatory actions null and leaving multiple previously permitted facilities without valid permits, *see* Parfitt Aff. at 5, ¶ 21-22, thereby creating risks to environmental health;

- Almost 200 food service and processing facilities within Riverton could operate without regulation, *see* Finkenbinder Aff. at 1, ¶¶ 4-5, thereby creating a serious risk to human health;

- Numerous Uniform Commercial Code Filings from Riverton will be invalidated, *see* O'Brien Arp Aff. at 2, ¶ 5, placing at risk the investments of secured interest holders;

- The preschool education of 284 children will be disrupted and transferred outside their home community to a separate regional program, Forslund Aff. at 5, ¶ 26; and

- The Wyoming Highway Patrol will lose authority to enforce criminal laws in the ceded area, *see* Butler Aff. at 2-3, ¶ 4-6.

There exists no dispute as to the status quo of firmly entrenched exercise of state jurisdiction over the ceded territory. EPA's decision threatens to upend that status quo. Because the balance of the equities strongly favors preserving the status quo, EPA should stay the effectiveness of its decision pending reconsideration or judicial review.

CONCLUSION

Congress indisputably diminished the Wind River Reservation in 1905. "Much has changed since then, and if Congress had it to do over again it might well have chosen a different course." *Rosebud*, 430 U.S. at 615. That said, EPA "cannot remake history," and it must reconsider and correct this fundamental flaw in its approval of the Tribes' application. *Id.* Even if EPA refuses to do so, it should nonetheless stay the effectiveness of its decision until a final judicial decision has been rendered on the merits of EPA's

approval of the Tribes' application. A failure to do so will likely lead to civil and criminal jurisdictional turmoil, irreparably harming the public interest.

Submitted this 6th day of January, 2014.

FOR THE STATE OF WYOMING

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Wyoming Attorney General

cc: Chairman Doug Thompson
Mayor Ron Warpness