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May 24, 2010

James B. Martin, Regional Administrator
Region 8
United States Environmental Protection Agency
8OC-EISC1595
Wynkoop Street
Denver, CO 80202-1129

Re: Eastern Shoshone Tribe and Northern Arapaho Tribe of the Wind River Reservation Treatment As A State Application Under The Clean Air Act

Dear Regional Administrator Martin:

On behalf of the Eastern Shoshone Tribe and Northern Arapaho Tribe of the Wind River Reservation, I am submitting the Tribes' RESPONSE TO COMMENTS REGARDING THE TRIBES' APPLICATION FOR TREATMENT IN A MANNER SIMILAR TO A STATE UNDER THE CLEAN AIR ACT FOR PURPOSES OF SECTION 105 GRANT PROGRAM, AFFECTED STATE STATUS, AND OTHER PROVISIONS FOR WHICH NO SEPARATE TRIBAL PROGRAM IS REQUIRED.

To facilitate processing, I am sending a copy of this submission to Steve Tuber, Acting Deputy Regional Administrator, and Kimi Matsumoto, Office of Regional Counsel.

The Tribes appreciate your consideration of their request.

Sincerely,

WHITE & WHITE, P.C.

John C. Schumacher

Enc.

cc: Steve Tuber
Kimi Matsumoto
Pilar Thomas, Deputy Solicitor
Jane Smith, Attorney Advisor - Div. Of Indian Affairs
John H. Turner, Assistant Chief - Indian Resources, US Department of Justice
Shoshone Attorney General
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EASTERN SHOSHONE TRIBE
AND
NORTHERN ARAPAHO TRIBE
OF THE
WIND RIVER RESERVATION

RESPONSE TO COMMENTS REGARDING THE TRIBES' APPLICATION FOR TREATMENT IN A MANNER SIMILAR TO A STATE UNDER THE CLEAN AIR ACT FOR PURPOSES OF SECTION 105 GRANT PROGRAM, AFFECTED STATE STATUS, AND OTHER PROVISIONS FOR WHICH NO SEPARATE TRIBAL PROGRAM IS REQUIRED

MAY 21, 2010

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RESPONSE OF NORTHERN ARAPAHO TRIBE AND EASTERN SHOSHONE TRIBE TO COMMENTS ON TAS APPLICATION

The Northern Arapaho and Eastern Shoshone Tribes (the "Tribes") respectfully submit this response to comments submitted by the State of Wyoming (the "State") and other parties on the Tribes' "Application for Treatment in a Manner Similar to a State under the Clean Air Act for Purposes of Section 105 Grant Program, Affected State Status, and Other Provisions for Which No Separate Tribal Program Is Required" ("TAS Application").[1] As discussed herein, none of the comments provides a sound legal or factual basis for the Environmental Protection Agency (the "EPA") to deny the Tribes' application.

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

The bulk of the State's comments and the comments of other interested parties are devoted to arguing that the Act of March 3, 1905 (33 Stat. 1016) ("1905 Act") permanently altered the boundaries of the Wind River Reservation. *See e.g.* Wyoming Comments at 2-38; City of Riverton Comments at 5-11; Fremont County Commissioners Comments. As the Tribes discuss in Part II, *infra*, these arguments are inconsistent with and precluded by the result 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), *cert. denied Wyoming v. United States*, 492 U.S. 406 (1989) (hereinafter "*Big Horn I*"). But even if Wyoming and others were free to reargue matters previously decided in *Big Horn I*, the State's analysis should be rejected. The comments disregard the legal standards applicable to analysis of statutes affecting Indian reservations and misconstrue the intent of Congress in enacting the 1905 Act. Properly understood, the 1905 Act

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[1] A copy of Joint Business Council Resolution No. 2009-10093 memorializing each individual Tribe's approval of the TAS Application is attached as BATES SH25370.

merely opened portions of the Reservation to non-Indian settlement while retaining federal trust supervision and control over the opened area. The 1905 Act and its surrounding circumstances do not provide "substantial and compelling evidence" of a congressional intent to disestablish the Wind River Reservation. Therefore, in light of the standard and the federal government's "traditional solicitude" for the Tribes, EPA must conclude that no disestablishment was intended and that the Reservation's boundaries were unchanged by the opening.

A. Wyoming Employs the Wrong Legal Standards When Analyzing the 1905 Act.

As discussed in the Tribes' Statement of Legal Counsel (pages 7-9), "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Thus, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual parcels within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* To overcome the presumption against a finding of reservation disestablishment, the law requires "substantial and compelling evidence" that Congress intended that an area opened by statute would be "divested of all Indian interests." *Id.* at 468, 472. Furthermore, it is well-established that an act's language is not sufficient evidence of intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation – e.g. making reservation lands "subject to settlement, entry and purchase." *Mattz v. Arnett*, 412 U.S. 481, 495 (1973).

The familiar rule that ambiguities in statutes and agreements relating to Indian lands must be resolved in favor of Indian tribes is given "the broadest scope possible" in reservation disestablishment cases. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 447 (1975). Hence, any ambiguous statutory language or other equivocal evidence of congressional intent will not suffice to support a finding of reservation disestablishment. *Mattz*, 412 U.S. at 481. The crucial question in reservation disestablishment cases is whether the statute unambiguously resulted in "a complete cession of tribal interests in the opened area." *Solem*, 465 U.S. at 478.

As demonstrated in its comments, the State would have EPA disregard the canons of construction and set aside the "substantial and compelling evidence" standard. The State contends that the plain language of the 1905 Act is unambiguous and embodies congressional intent to disestablish the reservation boundary. The State fails to acknowledge ambiguities in both the statutory language and the circumstances surrounding the enactment of this legislation, and it fails to present any argument about how the law of disestablishment should be applied to resolve these ambiguities.[2] Furthermore, the State fails to produce anything close to "substantial" or "compelling" evidence that Congress intended to divest the areas opened by the 1905 Act of "all Indian interests," a necessary prerequisite to a finding of Reservation disestablishment; mere recitation of such position does not make disestablishment so. Because the showing by the State and others is insufficient, each on its own grounds, EPA must reject their interpretation of the 1905 Act and adhere to the result that the federal government fought for and established in *Big Horn I*[3]: that the boundaries of the Wind River Reservation were unaffected by the 1905 Act.

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[2] This failure is properly understood as a concession that, if the 1905 Act is found to be ambiguous, the State cannot meet its burden of proof and cannot surmount the presumption against a finding of disestablishment.

[3] *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988), *cert. denied Wyoming v. United States*, 492 U.S. 406 (1989) (hereinafter "*Big Horn I*").

B. The "Plain Language" of the 1905 Act Does Not Establish a Clear Intent to Disestablish the Reservation.

As explained in the Tribes' Statement of Legal Counsel (pages 46-53), while the 1905 Act opened a large portion of the Wind River Reservation to non-Indian settlement, the language of the 1905 Act does not evince a clear intent to divest these opened areas of "all Indian interests." *Solem*, 465 U.S. at 468. Unlike earlier legislation ratifying the Lander and Thermopolis Purchases, the 1905 Act does not contain language of absolute and unconditional conveyance and it does not provide the Tribes with sum certain compensation. Furthermore, the 1905 Act does not provide that the opened area would be restored to the public domain or otherwise treated as public lands. To the contrary, the 1905 Act provides that the area would merely be "opened to entry" and that the Tribes would retain a beneficial interest in the opened area until the lands were sold by the government to non-Indians. Until such sales occurred, the government would act as a "trustee" over the opened area managing the lands for the Tribes' benefit.

The State deliberately ignores the trust arrangement provided for in Article IX of the 1905 Act. Indeed, the State's comments, which purport to reproduce the 1905 Act *verbatim*, actually leave out the following critical language from Article IX:

> It being the understanding that *the United States shall act as trustee for said Indians to dispose of said lands* and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

Compare Wyoming Comments at 7 *with* 33 Stat. at 1020-21 (emphasis added) (BATES SH11655).

The State's omission is telling. In prior cases, the Supreme Court has held that similar statutory language did *not* demonstrate the intent to disestablish a reservation. In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 352, 355-56 (1962), the Court held that the boundaries of the Colville Reservation were unaffected by 1906 legislation authorizing the government to "sell or dispose of unallotted lands in the diminished Colville Indian Reservation." 34 Stat. 80 (Mar. 22, 1906) (BATES SH01592). As with the 1905 Act, the 1906 legislation at issue in *Seymour* provided that its purpose was "merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided." *See* 34 Stat. at 82 (BATES SH01592). The Court held that this legislation did "no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356.[4]

Likewise, in *Solem*, 465 U.S. at 476, the Court held that 1908 legislation authorizing the government to "sell and dispose" of certain lands within the Cheyenne River Sioux Reservation did not disestablish that reservation. As with the 1905 Act at issue here, the 1908 legislation at issue in *Solem* provided that it was Congress's "intention . . . that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided." *See* 35 Stat. 464 (1908) (BATES SH12429). The Court held that the legislation "read as a whole" required the

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[4] In the *Big Horn I* adjudication, Special Master Roncalio relied on the holding in *Seymour* in reaching his determination that the 1905 Act created a "trust mechanism" that opened certain portions of the Wind River Reservation, rather than disestablishing reservation lands. *See* Roncalio Report at 42.

government to act as the tribe's "sales agent" and did not "present an explicit expression of congressional intent to diminish the . . . Reservation." *Solem*, 465 U.S. at 476 n. 19.

Similar trust language was found in the 1904 statute opening the Crow Reservation construed by the Supreme Court in *Ash Sheep Co v. United States*, 252 U.S. 159 (1920). As with the 1905 Act, the statute at issue in *Ash Sheep* provided that Congress intended that the United States would "act as trustee for said Indians" in the sale and disposition of the ceded lands. The Court held that under this language the Indians "relinquished their possessory right to the government . . . so that as their trustee, it could make perfect title to purchasers." *Id.* at 164. Thus, the Court held these lands were not "public lands" subject to sale under the general land laws, and any benefits from use of the lands "would belong to the beneficiaries and not the trustee." *Id.* at 166. Because the 1905 Act did not divest the opened area of "all Indian interests," under the test employed by the Supreme Court, it did not disestablish the Reservation. *See Solem*, 465 U.S. at 468; *see also Clarke v. Boysen*, 39 F.2d 800, 814 (10th Cir. 1930) (holding that lands opened under 1905 Act were not public lands, but were "lands reserved for other purposes in connection with the Indian service").

A similar trust arrangement was contemplated by the Nelson Allotment Act, 25 Stat. 642 (1889) (BATES SH22419), which opened reservation lands in Minnesota. *See Minnesota v. Hitchcock*, 185 U.S. 373, 394 (1902); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 509 (1913). The Courts have consistently found that, notwithstanding language in which the Indians ceded reservation land to the federal government for disposition under the terms of this statute, such cessions did not disestablish these Minnesota reservations. *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980); *State v. Forge*, 262

N.W.2d 341, 345-47 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1002-03 (D. Minn. 1971).

Similar trust language was found in the 1904 statute at issue in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), 33 Stat. 254 (BATES SH33963). However, as the Court later observed, the outcome in *Rosebud* was rooted in the idiosyncratic circumstances surrounding that statute. *Solem*, 465 U.S. at 469 n. 10. Though the *Rosebud* statute was found to be ambiguous, the Court found intent to disestablish in the history that led up to the 1904 Act. In contrast with *Rosebud*, the 1905 Act did not provide for payment for school lands, used cession language different from earlier cession acts for the Wind River Reservation, and the Tribes were never paid for all the lands opened to settlement. *See* 33 Stat. at 1018 (BATES SH11655) *contrast* 33 Stat. 254 (1904) (Rosebud Act) (BATES SH33963). Moreover, in the *Big Horn I* adjudication, Special Master Roncalio explicitly rejected the State's argument that Rosebud controlled the interpretation of the 1905 Act – a decision which was subsequently affirmed at each stage of appellate review. *See* Roncalio Report at 42*; Big Horn I*, 753 P.2d at 93, 96. The State should not be allowed to revive its theory of *Rosebud* here. As discussed in the next section, the circumstances surrounding the 1905 Act and the circumstances in *Rosebud* were very different.[5]

In addition to ignoring the critical trust language from Article IX of the 1905 Act, the State distorts the plain meaning of those provisions that it does discuss. For example, the State makes the remarkable claim that the 1905 Act provided the Tribes with "sum certain" consideration in return for an unconditional land conveyance. On its face, however, the 1905

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[5] In the *Big Horn I* adjudication, the Wyoming Supreme Court declined to follow *Rosebud* with respect to the Wind River Reservation. *See Big Horn I*, 753 P.2d at 93, 96.

Act did not provide the Tribes with a sum certain in any shape or form. Articles III, IV, V, VI, VII and VIII of the 1905 Act all specify that any payment to the Tribes would come from "moneys derived from the sale of said lands." Further, Article IX provides that nothing "shall in any manner bind the United States to purchase any portion of the lands . . . or to guarantee to find purchasers for said lands or any portion thereof." The 1905 Act specifically rejected the certainty of payment of any sum at all, let alone a sum certain. As discussed above, Article IX provides that the United States would act as the Tribes' trustee in selling unallotted lands and would be obligated to pay over to the Tribes the proceeds from land sales "only as received." This arrangement was very different from the outright "sum certain" payments provided for in the Thermopolis and Lander Purchase agreements and similar legislation held to have disestablished other reservations. *See e.g. South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 338 (1998) (tribe agreed to sell all unallotted lands within reservation to the United States in return for a single payment of $600,000); *DeCoteau*, 420 U.S. at 441-42 (Indians agreed to sell all unallotted land within the reservation in return for a payment of $2.50 per acre).

The State makes much of the fact that in Article IX, Section 3, Congress appropriated $145,000 for the alleged benefit of the Tribes. However, of this sum, $35,000 went for surveys of the opened lands, a necessary precursor to opening of the Reservation. 33 Stat. at 1021-22 (BATES SH11655). Furthermore, the remaining $110,000 amounts to only 7 cents per acre, plainly only a fraction of the total value of the opened area and Congress's overly optimistic projection of the likely proceeds from land sales.[6] Like the provisions discussed in the previous

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[6] Indeed, Congress anticipated that at least 150,000 acres of the opened area would be taken up under the homestead laws at $1.50 an acre, another 150,000 would be taken at $1.25 an acre, and most of the rest of the 1.44 million acre opened area would "unquestionably" sell for $1.00 an acre. H.R. Rep. No. 2355, 58th Cong., 2d Sess., at 4 (1904) (BATES SH00721); *see also* S. Rep. No. 2621, 58th Cong., 2d Sess., at 4 (1904) (BATES SH00743).

paragraph, this amount also was "to be reimbursed from the proceeds of the sale of said lands." 33 Stat. at 1021-1022 (BATES SH11655). As described by the House Committee Report accompanying the 1905 Act, these modest sums appropriated for the Tribes were an "advance" on anticipated proceeds of land sales in the opened area, not a "sum certain" payment for an outright land cession.[7] To this day, there has never been a full accounting of the funds the Tribes should have received from the opening of the 1905 Act area, and, not surprisingly, the State fails to identify a certain sum that the Tribes actually received as consideration for these land sales. Under these circumstances, the EPA should reject the State's argument that the Tribes received a "sum certain."

Wyoming also mistakenly characterizes the "cession" language in the 1905 Act as "the present and total surrender of tribal interests." Wyoming Comments at 21 (quoting *Yankton Sioux*, 522 U.S. at 344). The State's characterization ignores well-established precedent which provides that "an act's language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation – *e.g.* making reservation lands 'subject to settlement, entry and purchase.'" *Mattz*, 412 U.S. at 498, 497). The operative language of Article I ("cede, grant and relinquish to the United States, all right, title and interest which they may have to" the opened area) must be understood in light of the key portions of the 1905 Act which describe the trust mechanism created for the sale of opened lands. This operative language is very different from the language used in the Thermopolis Purchase Agreement in which the Tribes agreed to "cede, convey, transfer, relinquish and surrender forever and absolutely all their right, title, and interest of every kind and character in

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[7] *See* H.R. Rep. No. 3700, Part 1, 58th Cong., 3d Sess., at 7, 8 (1905) (BATES SH00763).

and to the lands and the water rights appertaining thereunto" in return for a fixed payment of $60,000.[8] 30 Stat. 62, 93 (1897) (emphasis added) (BATES SH18511). The language is also different from the operative language in other statutes that have been held to disestablish reservations. *See Yankton*, 522 U.S. at 338 (1998) ("cede, sell, relinquish, and convey"); *DeCoteau*, 420 U.S. at 437 (same); *Rosebud*, 430 U.S. at 597 ("cede, surrender, grant, and convey"); *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (all unallotted lands within reservation "shall be restored to the public domain"). Because the State's discussion fails to acknowledge the differences between the language in the 1905 Act and statutes that have been held to disestablish reservations, and completely ignores the unique features of the 1905 Act that courts have previously identified important to a finding of no disestablishment, the State's characterization of the statutory language is fundamentally flawed.

In summary, the language of the 1905 Act neither provides for an unconditional and permanent surrender of all tribal interests in return for sum certain consideration, nor does it "restore" any reservation lands to the "public domain." Like the Crow Reservation statute at issue in *Ash Sheep*, 252 U.S. at 164, the language of the 1905 Act merely relinquished the Indians' "possessory right to the government . . . so that as their trustee, it could make perfect title to purchasers," but preserved the Tribes' beneficial interest in these lands. Such language does not amount to the "present and total surrender of tribal interests" or the divestiture of "all Indian interests" that the Supreme Court requires to disestablish a reservation. *Solem*, 465 U.S. at 468, 470.

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[8] McLaughlin himself emphasized this difference in the 1904 Council and again when he met in council with the Tribes in 1922. 1904 Minutes at 3-4 (BATES SH01367); Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming at Fort Washakie, Wyoming (Aug. 14, 1922) at 5 ("1922 Minutes") (BATES SH08429).

Finally, the State reads too much into the use of the term "diminished reserve" or "diminished reservation" in the 1905 Act to describe the portion of the Reservation *not* opened to non-Indian settlement.[9] When balanced against the 1905 Act's operative provisions discussed above, these "isolated phrases . . . cannot carry the burden of establishing an express congressional purpose to diminish." *Solem*, 465 U.S. at 475 (use of the phrase "the reservation thus diminished" to refer to unopened portion of a reservation not "dispositive"). As the Supreme Court has observed, at the time of the 1905 Act, the word "diminished" was "not a term of art in Indian law." *Id.* at 468, 475, n. 17. The notion that reservation status of lands might not be coextensive with tribal ownership was unfamiliar at the turn of the 20th century. *Id.* at 468. Only in 1948 did Congress uncouple reservation status from Indian ownership and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. *Id.* (citing 18 U.S.C. § 1151). The pre-1948 approach to reservation status persisted with respect to the Wind River Reservation at least until the late 1930s. For example, the Acting Secretary of Interior when recommending to Congress purchase of fee lands in the Arapaho area in 1938 described the lands as "formerly part of the Indian Reservation" even though the lands were clearly in the area unaffected by the 1905 Act.[10] Thus, when Congress spoke of the "diminished reservation" in the 1905 Act, it was likely "alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers," rather than "the reduction that a complete cession of tribal interests in the opened area would precipitate." *Id.* at 478. Because

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[9] As will be discussed later in this document, for over 100 years the federal government has talked about both the "ceded portion" and "diminished portion" as being part of the same reservation. The same goes for the Wyoming Supreme Court. *Bighorn I*, 753 P.2d at 114 ("because all the reacquired lands on the ceded portion of the reservation are reservation lands, the same as lands on the diminished portion, the same reserved water rights apply").

[10] H.R. Rep. No. 2658, 75th Cong., 3d Sess., at 1 (June 8, 1938) (BATES SH02646).

it is clear that the portion of the Reservation opened by the 1905 Act was not "divested of all Indian interests," *see Ash Sheep*, 252 U.S. at 164, *Clarke*, 39 F.2d at 814, the use of the term "diminished reserve" to refer to the unopened portion of the Reservation is legally insufficient to disestablish the Reservation boundaries.

C. The Legislative History and Other Circumstances Surrounding Passage of the 1905 Act Do Not Unequivocally Reveal a Contemporaneous Understanding that the Reservation Would Be Disestablished.

As shown above, the 1905 Act lacks "explicit language of cession and unconditional compensation." *Solem*, 465 U.S. at 471. Instead, the Act creates a trust mechanism which preserved equitable title for the benefit of the Tribes. The events surrounding the passage of the 1905 Act are relevant to a determination of whether they "unequivocally reveal a widely-held, contemporaneous understanding" that the Reservation would shrink as a result of the Act. *Id.* Those circumstances overwhelmingly establish that the understanding was that the 1905 Act area remained part of the Reservation.

As discussed in the Tribes' Statement of Legal Counsel (at 53-57), the negotiations and legislative history of the 1905 Act fail to reveal a congressional intent to disestablish the Wind River Reservation through a divestiture of all Indian interests. In contrast to previous agreements, 1905 Act legislative history demonstrates that Congress did not intend that the areas opened by the Act would become "public lands." Furthermore, Congress expressly refused to entertain a sum certain payment for the ceded lands and insisted upon an arrangement whereby the Tribes would be paid only when individual parcels were actually sold to settlers. *See Decoteau*, 420 U.S. at 425, and *Mattz*, 412 U.S. at 481. According to the record of negotiations, the Tribes were told that the Act would open the Reservation for settlement and that the government would act as the Tribes' trustee in disposing of the lands. Finally, the legislative history establishes that Congress understood that some lands within the 1905 Act area would probably never be sold to non-Indians. Taken as a whole, this legislative history and negotiating record do not "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink" as a result of the 1905 Act. *Solem*, 465 U.S. at 471.

The State maintains that resort to legislative history is unnecessary because the language of the 1905 Act is unambiguous. Wyoming Comments at 36. However, the 1905 Act is only as clear as the State maintains if key provisions are ignored. As discussed above, those 1905 Act key provisions have been held to mean that the Tribes retained beneficial interests in the opened area until the lands were sold. The legislative history of the 1905 Act, particularly the floor debate in the House of Representatives, confirms and supports the Tribes' reading of these provisions. That debate centered on whether Asmus Boysen, a non-Indian lessee, should be allowed to select a preferential right to acquire up to 640 acres of coal or mineral land within "said Reservation."[11] The opponents of this provision – chiefly Representative Fitzgerald – argued that the Boysen proviso was unnecessary because a clause in Boysen's lease provided that it would terminate automatically when the Indian title to the land was "extinguished with the consent of the Indians."[12] Rep. Fitzgerald contended that because the legislation would extinguish Indian title to the opened lands, Boysen no longer had any rights under the lease.[13] In response to Rep. Fitzgerald's argument, the Chairman of the House Indian Affairs Committee, Rep. Marshall, explained:

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[11] 33 Stat. 1016, 1020 (1905); *see* Cong. Rec. H1942 (Feb. 6, 1905) (BATES SH11655).

[12] Cong. Rec. H1943 (Feb. 6, 1905) (BATES SH08543).

[13] Cong. Rec. H1942 (Feb. 6, 1905); *see also* H.R. Rep. No. 3700, Part 2, 58th Cong., 3d Sess., at 3 (1905) (Minority Report) (BATES SH08543, SH00782).

> The gentleman from New York [Mr. Fitzgerald] says that Mr. Boysen's lease was canceled when the title passed from the Indians. True, there was a clause to the effect that when the lands were restored to the public domain this lease was canceled. The difficulty is, however, that *these lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians*, and the clause which the gentleman speaks of does not apply. . . .[14]

This passage elucidates how Congress understood the essential terms of the 1905 Act and makes plain that the legislation's sponsors understood that it would not divest all of the Tribes' interests in the opened area. It is thus entirely appropriate for EPA to consider this legislative history.[15]

The State selectively quotes a House Committee Report for the 1904 "Mondell Bill" (which failed to pass Congress) and Inspector McLaughlin's letter to the Commissioner of Indian Affairs to create the misimpression that Congress intended that the 1905 Act would divest the Tribes of all their interests in the opened area in return for a sum certain payment. *See* Wyoming's Comments at 22-23. However, the House Committee Report for the Mondell Bill also makes clear that the bill was "carefully drawn in all respects to guard the interests of the Indians" and followed "the now established rule of the House in paying to the Indians the sums received from the sale of the ceded territory under the provisions of the bill." That is, the bill did not provide for sum certain consideration in return for a "present and total surrender of tribal interests," the essential prerequisites for a finding of reservation disestablishment. *See Solem*, 465 U.S. at 472.

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[14] Cong. Rec. H1945 (Feb. 6, 1905) (emphasis added) (BATES SH08543).

[15] This passage from the Congressional Record is not merely the "passing comments of one member of Congress" or a "casual statement" from a floor debate, as Wyoming contends. *See* Wyoming Comments at 36. The comments cited were spoken by the Chairman of the House Committee on Indian Affairs which carefully considered the bill. The Chairman's comments provide an authoritative reading of what the committee intended.

Indeed, when Inspector McLaughlin met in council with the Tribes, he emphasized that Congress would not approve an agreement that provided for a lump sum consideration:

> 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.[16]

McLaughlin then explained the payment arrangement in Article IX of the Mondell Bill as follows:

> My friends, that you may understand better and more clearly, the government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement.[17]

Some years later, when McLaughlin again met with the Tribes in council, he explained that unlike the 1896 Thermopolis Purchase, in the 1904 Agreement "the government simply acted as trustee for the disposal of the land north of the Big Wind River and could not force homesteaders to go upon lands which they did not desire under the provisions of the Act opening them to settlement."[18] Thus, notwithstanding the State's attempt to distort the historical record, the contemporaneous understanding of those most directly involved was that the 1905 Act was not a garden-variety purchase and sale transaction. Instead, it was generally understood that the United States would act as the Tribes' agent in managing and disposing of the discrete parcels for the Tribes' benefit.

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[16] 1904 Minutes at 3 (BATES SH01367).

[17] 1904 Minutes at 3-4 (BATES SH01367).

[18] 1922 Minutes (BATES SH08429).

Finally, the State selectively quotes statements from various Arapaho and Shoshone representatives at the 1904 council to create the misimpression that the Tribes believed that the terms of the 1905 Act were similar to those of the Thermopolis Purchase Act. Wyoming Comments at 31-35. The State's characterization of the Tribes' approach to the 1904 Council is historically self-serving and inaccurate.

Contrary to the State's interpretation, the statements of Northern Arapaho representatives that the State quotes actually express disagreement with the basic terms of the Mondell Bill and were attempting to make a counter-proposal under which lands on the north side of the Big Wind River would not be subject to homestead entry. As McLaughlin later summarized, during the negotiations, the Northern Arapahos "desired to retain a strip averaging about 10 miles wide by 20 miles in length up along the north side of the Big Wind River from its junction with the Little Wind or Big Popo-Agie River" (including present-day Riverton, Kinnear and Pavillion) and "demanded $2.50 per acre" for the rest of the proposed cession area.[19] McLaughlin disregarded these proposals.[20] Ultimately, only 80 out of 237 adult male Northern Arapahos actually signed the 1904 Agreement, far short of a majority.[21] Many who did sign were under 30 years old and would not have been considered "adults" by the Arapahos.[22] The Northern Arapaho statements quoted by the State thus demonstrate a *lack of agreement* between the parties and do not support the State's suggestion that the Northern Arapaho Tribe consented to the terms of the 1905 Act.

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[19] Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) *quoted in* H.R. Rep. No. 3700, Part 1, 58th Cong., 3d Sess., at 18 (1905) (BATES SH00763); *see also* 1904 Minutes at 8-13 (BATES SH01367).

[20] Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) *quoted in* H.R. Rep. No. 3700, Part 1, 58th Cong., 3d Sess., at 18 (1905) (BATES SH00763); *see also* 1904 Minutes at 13-14 (BATES SH01367).

[21] Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) *quoted in* H.R. Rep. No. 3700, Part 1, 58th Cong., 3d Sess., at 18 (1905) (BATES SH00763).

[22] L. Fowler, *Arapahoe Politics 1851-1978* (Univ. of Neb. Press 1982) at 95 (BATES SH33975).

Furthermore, the quoted statements of Eastern Shoshone representative George Terry show merely that, in the early stages of the negotiations that led to the 1904 Agreement, Mr. Terry may have misunderstood the legal significance of the payment arrangement in the Mondell Bill.[23] Indeed, Inspector McLaughlin conceded at the outset that the Indians did not understand the payment arrangement provided for in the Mondell Bill, but would "like it when they come to fully understand it."[24] During this time, the leadership of the Shoshone Tribe was fractious. Chief Washakie, whose leadership was dominant and controlling, had passed away. So great was Washakie's influence that after his death in 1900, Agent H. E. Wadsworth noted that the Tribe broke into factions, "each of which wishes to be considered the head and to dominate in all things pertaining to tribal matters."[25] As recognized by the Supreme Court, the Shoshone Tribe's understanding of the 1905 Act provisions was limited.[26]

McLaughlin's own description of his negotiations with the Indians indicates the asserted agreement by the Tribes was more a matter of style than substance. "It is true that I have generally succeeded in making the agreements that I have offered the Indians, but this success was rather due to the manner of the negotiations than because the agreements were desired by the

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[23] *See* 1904 Minutes at 17 (BATES SH01367).

[24] 1904 Minutes at 4 (BATES SH01367).

[25] H.R. Rep. No. 5, 58th Cong., 2d Sess., at 362 (BATES SH01240).

[26] "At the time of the making of the Treaty of 1868 the [Shoshone] tribe of Indians were full-blood blanket Indians, unable to read, write, speak, or understand English, with little previous contact with whites; but in all their contacts with the white people they had always been friendly. They lived mostly by hunting wild game and fishing. The affairs of the tribe were handled almost entirely by and under the advice of Chief Washakie until his death in 1900, and thereafter by the chief men and members of the tribal council. The same condition existed in 1872 and in 1896 when agreements were made under which the tribe ceded portions of the reservation to the United States. Practically the same condition as to their education existed at the time the agreement of 1904, hereinafter mentioned, was made." *Shoshone Tribe v. United States*, 85 Ct.Cl. 331, Finding ¶3 (1937), *affirmed United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

Indians."[27] In short, the scattered scraps from the legislative history and negotiating record presented in the State's comments are taken out of context and fail to "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink" as a result of the 1905 Act. *Solem*, 465 U.S. at 470. To the contrary, while there was some confusion about the legal consequences of the 1905 Act, the most probative contemporaneous understanding was that the 1905 Act merely authorized the government to act as the Tribes' trustee in selling portions of the opened area to settlers under the Act's terms and conditions, but did not result in a "present and total surrender of tribal interests." *Id.* at 472. Under these circumstances, the State's argument should be rejected as both counter to the law and to the historical record.

D. Post-Enactment Events Strongly Support the Tribes' Position.

The Tribes' Statement of Legal Counsel (pages 57-68) demonstrates that the federal government, as well as state and local officials, immediately after passage of the 1905 Act treated the opened lands in a manner consistent with Congress's intent to maintain the existing boundaries of the Reservation. Although these post-enactment events are of "lesser" significance than those surrounding the enactment of the 1905 Act, they nevertheless strongly support the Tribes' position that the 1905 Act did not disestablish the Reservation. *Solem*, 465 U.S. at 471.

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[27] McLaughlin, "My Friend the Indian" (Houghton Mifflin Company 1910), p. 291 (BATES SH24891). McLaughlin described negotiations at the Wind River Reservation as "delicate" because they required "the assent and signatures of a majority of all the male adults of *each* tribe." *Id.* at 293-294 (emphasis added) (BATES SH24891). McLaughlin explained that his "method of procedure in treaty-making [was] nearly always the same, the argument being adapted to the local conditions." *Id.* at 295 (BATES SH24891).

1. **Congressional Action.**

The Tribes' Statement of Legal Counsel (pages 57-60) recounts the numerous post-1905 congressional enactments that recognized the continued existence of Indian interests in the area opened by the 1905 Act. By contrast, the State's comments focus on one isolated instance (1907 Act discussed below) of Congress referring to the opened area as land "formerly" within the Reservation. The State's only other congressional citation is to the 1953 Act, a congressional enactment that actually supports the Tribes' position. Significantly, the State's comments fail to respond to or even address the substantial body of legislation discussed by the Tribes unmistakably showing that Congress did not intend that the 1905 Act would change the Reservation status of the opened area. *Solem*, 465 U.S. at 471.

Wyoming's analysis of subsequent congressional treatment of the opened area is largely limited to a 1907 statute extending the time for entrymen to establish residency on opened lands. Wyoming Comments at 24. This statute, unlike all other statutes addressing the lands opened by the 1905 Act, used the words "formerly embraced" to refer to the opened portion of the Reservation.[28] However, both before and after the 1907 entrymen statute, Congress referred to the opened area as being a "portion of the . . . Reservation."

For example, in 1906 legislation extending the time period for settlement of the 1905 Act area lands, Congress referred to the opened area as the ceded "portion of the Shoshone or Wind River Indian Reservation."[29] Similarly, in 1912, when Congress extended the time for patents, it again described the opened area as a portion of and within the Reservation.[30]

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[28] 34 Stat. 849 (1907) (BATES SH18926).

[29] 34 Stat. 825 (1906) (BATES SH18924).

[30] 37 Stat. 91 (1912) (BATES SH19116).

Congress's treatment of the opened lands as Reservation lands, in contrast to public lands, is illustrated by the enactment of two laws in 1909 addressing mineral entry in Wyoming.[31] As described in the Statement of Legal Counsel (page 57-58), one act extended the deadline of mineral entry within the opened area of the Reservation, and the other provided clarification for mineral entry rights on public lands. Both bills were introduced by Representative Mondell – the sponsor of the 1905 Act legislation.[32] The report accompanying the Reservation bill explained that the lands opened by the 1905 Act had to be addressed through separate legislation because they were *not* public lands:

> Formerly when Indian reservations were opened which contained lands supposed to contain mineral[s], the mining laws were extended over such areas without any limitation or modification, so that such lands were taken and held on such reservations as elsewhere on the public lands.[33]

As explained in the report, the 1905 Act lands were different because the United States had assumed the responsibility of acting as a trustee for the Indians over the sale of these lands.[34] If Congress had understood that the 1905 Act changed the Reservation boundaries and restored the opened area to the public domain, there would have been no need to have separate statutory provisions extending the time for mineral entries in Wyoming.

As described in the Statement of Legal Counsel (pages 57-60), in many other instances after the passage of the 1905 Act Congress treated the opened lands as Reservation lands. For example, Congress authorized leases for the benefit of the Tribes in the opened area in 1908 and

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[31] 35 Stat. 844 (1909) (public land) (BATES SH33970); 35 Stat. 650 (1909) (reservation land) (BATES SH18928).

[32] Interestingly, the two bills were reported in the same edition of the local paper. Wind River Mountaineer (Jan 14, 1909) (BATES SH25422).

[33] H.R. Rep. No. 2041, 60th Cong., 2d Sess., at 1 (1909) (BATES SH00835).

[34] H.R. Rep. No. 2041, 60th Cong., 2d Sess., at 1 (1909) (BATES SH00835).

authorized oil and gas leasing for the Tribes' benefit in 1916.[35] In numerous appropriation acts, Congress appropriated funds for the Indian Office to construct and improve irrigation works on lands described as "conditionally ceded." The State simply ignores this long list of subsequent legislative enactments in favor of the single enactment that appears to support its position.

Although Congress used the term "formerly embraced" in the 1907 Act, that use does not support the State's position that Congress viewed the entire 1905 Act area as being disestablished. The substance of the 1907 Act extends the time for establishing residency on lands already entered and occupied by non-Indians.[36] The language "formerly embraced," as applied to lands that had already been entered by non-Indians, is entirely consistent with the contemporaneous use of the term "reservation" to refer to individual parcels of trust land. *Solem*, 465 U.S. at 468. Indeed, similar language was subsequently used to describe non-Indian fee lands within the portions of the Reservation that were unaffected by the 1905 Act. For example, in 1938, the Acting Secretary of Interior recommended purchase of fee lands within the Reservation then occupied by Tribal members (between the Big Wind and Popo Agie Rivers) and described these lands as "formerly part of the Indian Reservation" even though the lands were clearly not within the area opened by the 1905 Act.[37] The use of a similar term in the 1907 statute thus does not establish that Congress intended to shrink the boundaries of the Reservation. Its use merely reflects the contemporaneous ownership of certain entered lands and the fact that the entrymen lands affected by this statute were no longer owned by the Tribes.

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[35] 35 Stat. 70, 97 (1908) (BATES SH18931); 39 Stat. 519 (1916) (BATES SH19219).

[36] 34 Stat. 849 (1907) (BATES SH18926).

[37] H.R. Rep. No. 2658, 75th Cong., 3d Sess., at 1 (June 8, 1938) (BATES SH02646).

In addition to the 1907 Act, the State also cites to a provision from the 1953 Reclamation Act which provides the Tribes with compensation for "past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905." Wyoming Comments at 23 (citing 67 Stat. 613); *see also* Thompson Comment at 1, Ryan Comment at 1, Fremont County Attorney Comment at 2, Fremont County Commissioners Comment at 1. The State's position regarding the 1953 Reclamation Act misrepresents the purpose of the Act. As discussed in the Tribes' Statement of Legal Counsel (pages 35-37), prior to passage of the 1953 Act, the Department of the Interior had held that reclamation project lands within the opened area had not been lawfully withdrawn from the Reservation and that unpatented reclamation project lands and minerals remained tribal property pursuant to *Ash Sheep*, 252 U.S. 159 (1920).[38] As of 1953, only about a third of the lands withdrawn for the Riverton reclamation project had been lawfully disposed of to settlers under the 1905 Act.[39] Nevertheless, many miles of canals, roads and other infrastructure had been illegally constructed on the unsold lands, unsold lands had been flooded by project waters, and various entities extracted tons of sand, gravel and other building materials from these unsold lands. The Tribes had not been compensated for these unauthorized uses.[40] The 1953 Act's purpose was to compensate the Tribes for these trespasses and unauthorized takings and to provide authorization for the sale of additional lands within the reclamation project to non-Indians.[41]

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[38] *See* II Op. Sol. on Indian Affairs 1607 (U.S.D.I. 1979) (BATES SH11702).

[39] H.R. Rep. No. 2453, 85th Cong., 2d Sess., at 2 (1958) (BATES SH03338).

[40] Letter, O. Lewis to Hon. A. L. Miller (Mar. 31, 1953), *reprinted in* H.R. Rep. No. 269, 83rd Cong., 1st Sess., at 3 (1953); Letter, O. Lewis to Hon. H. Butler (July 22, 1953), *reprinted in* S. Rep. No. 644, 83rd Cong., 1st Sess., at 9 (1953) (BATES SH03293, SH03156).

[41] *Id.* (BATES SH03293, SH03156).

Instead of supporting the State's position that the 1905 Act disestablished the Reservation, the 1953 Act actually supports the Tribes' position that the 1905 Act merely opened portions the Reservation to opportunity for non-Indian settlement while preserving the Reservation status of those areas. If the 1905 Act had extinguished the Reservation and returned the opened areas to the public domain, as the State argues, the Tribes would not have been entitled to compensation for unauthorized use of lands within the "cession" area, nor would further legislation have been necessary to authorize the sale of these "ceded" lands to non-Indians. Because the 1953 Act recognized that the Tribes still retained vested property interests within the area opened by the 1905 Act (including the mineral estate), the State's citation to the 1953 Act does not help its case.

2. Executive Action.

The Tribes' Statement of Legal Counsel (pages 60-66) describes numerous Executive Branch actions that consistently treated the area opened by the 1905 Act as an Indian reservation. These actions included land surveys conducted in 1905 and 1906 showing the Reservation boundaries remained intact (pages 60-61), the early issuance of grazing and mineral leases and rights-of-way under Indian lands statutes (pages 62-64), and the decision in 1913 to halt land sales after only 7.4% of the opened acreage had been sold because the Indians could derive greater revenues from these grazing and mineral leases (pages 63-64).

There are some additional executive actions taken in the years immediately after the 1905 Act that also bear mentioning. The 1906 report of Commissioner of Indian Affairs noted that 308 allotments had been made in the ceded "part of the Shoshoni Reservation."[42] The 1906

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

Commissioner's report also describes authority being granted to construct the Big Wind River ditch "on the Shoshoni Reservation" as a part of the responsibilities of the Indian office.[43] The Tribes established the Big Wind River ditch, which also serves the LeClair irrigation project in the opened area of the Reservation.[44] The LeClair project is still operating today – a fact which demonstrates the continuing Indian presence in the 1905 Act area. During this same time period, the General Land Office, responsible for lands in the public domain, stated that "the matter [of granting access on the Reservation] is entirely within the jurisdiction of the Indian Office."[45]

One of the most important actions of the Executive Branch was to conduct land surveys to implement the opening of the 1905 Act area as intended by Congress. Along with its comments, the State provides two compilation maps generated by the General land Office in an attempt to convince EPA that Executive Branch actions support the State's incorrect view that the 1905 Act disestablished the Reservation.[46]

Compilation maps are neither persuasive nor entitled to any evidentiary weight in disestablishment matters.[47] The maps on their face state they are a compilation of information from various sources. Such maps are not "official acts" for purposes of making a boundary determination. *United States v. Morrison*, 240 U.S. 192, 210-211 (1916) (it is not an "official act" until land is surveyed, approved by Surveyor General, and approved by Commissioner).

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

[44] *See* Statement of Legal Counsel, at 21.

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

[46] Wyoming Comments at 25-26, Ex. 5 and 6.

[47] The limited interpretive value of compilation maps is highlighted by a circa 1906 compilation map of coal lands in Wyoming (BATES SH35066). This map, like the maps submitted by the State, was compiled partly from General Land Office records and partly from "other sources." However, the coal lands map shows the correct boundary of the Reservation, which further undermines the State's reliance on compilation maps.

Compilation maps are prepared for a variety of purposes which may have nothing to do with fixing reservation boundaries. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998), the U.S. Supreme Court found that the scores of documents and maps submitted by the parties had limited interpretive value. Importantly, none of the documents which the Supreme Court found problematic in *Yankton Sioux Tribe* were official acts like the official plats prepared to implement the 1905 Act. *Yankton Sioux Tribe*, 522 U.S. at 355, n.6. Consistent with *Yankton Sioux Tribe*, the 9th Circuit in *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 116 (9th Cir. 1980), determined the boundary between Hopi and Navajo lands based on a 1965 survey completed for purposes of establishing the official boundary and approved through the official process. *Sekaquaptewa*, 626 F.2d at 115. The 9th Circuit rejected the Navajo Tribe's attempt to rely on an incorrect map done in 1914 that was never approved through the process for official government surveys. *Id.* at 116.

Only official plats made by the federal government under "competent authority" are acceptable evidence in disputes about intergovernmental boundaries. *See e.g. State of Louisiana v. State of Mississippi*, 202 U.S. 1, 55, 56 (1906) (decision relied on official General Land Office township plats prepared from detailed survey); *see also State of New Jersey v. State of Delaware*, 295 U.S. 694 (1935) (a compilation map is different from an official plat). Only maps prepared as part of official survey duties constitute official acts of the federal government. *Morrison*, 240 U.S. at 210-211. In contrast, compilation maps prepared by lower government officials for purposes other than fixing boundaries have no evidentiary value for a boundary determination. *See Yankton*, 522 U.S. at 355; *Sekaquaptewa*, 626 F.2d at 118.

The official 1905 Act plats show the Reservation boundary unchanged after passage of the Act. The official plats were surveyed pursuant to the 1905 Act and the special authorities for surveying Indian reservations.[48] The plats were completed as official acts – contracted by the Office of the Surveyor General, approved by the Surveyor General, and accepted by the Commissioner.[49] *Morrison*, 240 U.S. at 210-211.

The official plats demonstrate that the Executive Branch of the federal government understood the 1905 Act did not terminate the reservation status of the opened area. Along the outer boundary of the opened area not bordering rivers, the official plats bear legends such as "North Boundary Shoshone Indian Reservation," "East Boundary Shoshone Indian Reservation," and "South Boundary Shoshone Indian Reservation.[50] Along the Big Wind River and Popo Agie River (the incorrect boundary asserted by the State), the official plats contain no legend distinguishing Reservation land in the unopened area separate from Reservation land in the opened area; in other words, the 1905 Act did not change the reservation status on lands north of the Big Wind River.[51]

Review of the Executive Branch's implementation of the Thermopolis Purchase confirms Tribes' position. Before the Thermopolis Purchase, the land had been officially surveyed as part

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[48] 33 Stat. 1017, 1012 (1905 Act appropriating funds for survey of opened lands); 43 U.S.C. § 751 (surveys of public lands must stop at the line of an Indian reservation,); 25 U.S.C. § 176 (separate authority for surveys of Indian lands. *See* White: Initial Points of the Rectangular Survey System (1996), at 421 (noting that Wind River Meridian surveyed pursuant to special corps of surveyors for reservations) (BATES SH08377).

[49] Examples of the official plats containing the approvals of the Surveyor General and the Commissioner can be found at BATES SH08860, SH08862, SH08865, SH08866, SH08869, SH08871 for the northern boundary, BATES SH08868, SH08867, SH08871, SH08876, SH08884, SH08898, SH08896, SH08897 for the eastern boundary, BATES SH08899, SH08890, SH08898 for the southern boundary, and BATES SH08852, SH08853 along the Big Wind River.

[50] *See* BATES SH08860, SH08862, SH08865, SH08866, SH08869, and SH08871 for the northern boundary, BATES SH08868, SH08867, SH08871, SH08876, SH08884, SH08898, SH08896, and SH08897 for the eastern boundary, and BATES SH08899, SH08890, and SH08898 for the southern boundary.

[51] *See* BATES SH08852 and SH08853 for areas along the Big Wind River.

of both the Reservation and the Wind River Meridian.[52] After the Thermopolis Purchase, the purchased land was surveyed like the 1905 Act as an official act. *Morrison*, 240 U.S. at 210-211 (it is not an "official act" until land is surveyed, approved by Surveyor General, and approved by Commissioner). The Thermopolis Purchase plats show the land as no longer belonging to the Reservation or the Wind River Meridian (Indian reservation land), but belonging to the 6th Principle Meridian (public lands).[53] This is consistent with Congress's intent that the lands in the Thermopolis Purchase were removed from the Reservation and declared to be public lands. The 1906 opened area plats, in contrast, show Congress never intended such lands to be removed from the Reservation.

The official acts contained on the 1906 official plats are binding on all landowners within the Reservation which includes the State and the City of Riverton. "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features are written out on the face of the deed or the grant itself." *Craigen v. Powell*, 128 U.S. 691, 696 (1888); *M. H. French, Administrator v. United States*, 49 Ct.Cl. 337 (1914) (applying *Craigen* holding to Indian reservation). In sum, Wyoming errs in suggesting that EPA should "presume" the two compilation maps the State presents reflect the intent of Congress. In fact, the official plats control the question, and those plats belie the State's position on the reservation boundary.

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[52] Plat of Township 43 North, Range 94 West, 6th Principle Meridian (approved Apr. 28, 1900) (BATES SH07370); Plat of Exterior Lines of Township 43 North, Range 96 West to 93 West, 6th Principle Meridian (approved May 21, 1892) (BATES SH08906).

[53] Plat of Township 42 North, Range 94 West (approved Feb. 16, 1900) (BATES SH35070); Plat of Township 42 North, Range 96 West – Township Exteriors (approved Apr. 28, 1900) (BATES SH35128).

Both the State's and the Fremont County Commissioners' comments attempt to support their position with the language used in several restoration orders issued in the 1940s and 1970s pursuant to the 1939 Restoration Act. Wyoming Comments at 30, Fremont County Commissioners at Attachment p. 3. However, the State concedes that "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." Wyoming Comments at 30-31. The State fails to provide any argument or distinguishing factors that the restoration orders they cite are anything more than errant pronouncements of executive branch officials made from forty to seventy years after the enactment of the 1905 Act, which by the State's concession, are not persuasive.

Moreover, the language used in the restoration orders did not reflect the actual authorizing language found in the 1939 Restoration Act. Nothing in the 1939 Restoration Act authorized the Secretary to "add to" the Wind River Reservation; the Act simply authorized the Secretary to "restore to tribal ownership"[54] all surplus or ceded lands on the Reservation.[55] The same incorrect language used in the Wind River restoration orders also was used in a series of orders issued under the IRA restoring lands to the Cheyenne River Sioux Reservation.[56] Notwithstanding the language used in these orders, the Supreme Court subsequently held that the opened portion of the Cheyenne River Sioux Reservation had *not* been disestablished. *See Solem*, 465 U.S. at 463.

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[54] The 1939 Act clarified that unsold portions of lands opened by the 1905 Act remained within the reservation and were no longer subject to homestead entry. As the 1905 Act gave the powers of sale to the United States as trustee, so the 1939 Act retroceded that power of sale. During the period 1905-1939, the Tribes retained equitable title to unentered lands in the 1905 Act area. *See Clarke v. Boysen*, 39 F.2d 800 (10th Cir. 2010); *Shoshone II*, 304 U.S. at 117 (discussed *infra* at 38 *et seq.*).

[55] 53 Stat. 1128, 1129 (July 27, 1939) (BATES SH02675).

[56] 6 Fed. Reg. 3300 (July 8, 1941) (BATES SH33973); 17 Fed. Reg. 1065 (Feb. 2, 1952) (BATES SH33960).

The State also attempts to discount the analysis conducted by Commissioner of Indian Affairs John Collier in 1934 regarding the IRA's land restoration provision.[57] Wyoming Comments at 30-31. Commissioner Collier's analysis distinguished between reservations, such as Wind River, where the federal government assumed ownership of Tribal lands "only as trustee for the Indians" and outright land sales that disestablished reservations.[58] The State points out that at least two of the reservations mentioned in Collier's analysis were later found by the Supreme Court to have been disestablished. *Id.* at 31. Significantly, however, several other reservations grouped in the same category as the Wind River Reservation were later found to have remained intact. *Solem*, 465 U.S. at 478 (Cheyenne River and Standing Rock Sioux Reservations); *Mattz*, 412 U.S. at 504 (Klamath River Reservation); *Seymour*, 368 U.S. at 355-56 (Colville Reservation); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977) (Leech Lake Reservation); *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 at *8 (D. Minn. 1998) (Grand Portage Reservation). While Commissioner Collier's letter is certainly not definitive on the legal question of reservation disestablishment, his letter shows that executive branch officials understood that the Tribes retained significant interests in the opened area of the Wind River Reservation, and that the legal status of this area was different from disestablished reservations where all Indian interests had been extinguished.

Finally, the State cites to a 1943 letter/memo by Department of the Interior Solicitor Warner Gardner who opined that Wyoming had jurisdiction to regulate hunting and fishing in those portions of the opened area that were not restored to Tribal ownership by orders adopted

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[57] Letter, John Collier, Commissioner, to Secretary of Interior (Aug. 10, 1934) (BATES SH00924).

[58] Letter, John Collier, Commissioner, to Secretary of Interior (Aug. 10, 1934) at 2-3 (BATES SH00924).

pursuant to the 1939 Restoration Act.[59] Wyoming Comments at 28. Of course, Solicitor Gardner's opinion has no relevance in divining Congress's intent – the opinion was proffered almost forty years after the passage of the 1905 Act. The opinion likewise has limited relevance to the Reservation status of or Tribal jurisdiction over the opened area today, since the opinion was issued prior to the enactment of the Indian country statute in 1948 and does not address the existing Supreme Court precedents Congress relied on when enacting the statute.[60] As discussed previously, the Indian country statute codified the concept of reservation status as distinct from land ownership. *See Solem*, 465 U.S. at 468. Significantly, the opinion does make clear that based on the Supreme Court's decision in *Ash Sheep*, the Interior Department "has always held that Indian lands ceded in trust are 'Indian lands,' in the sense that the Indians have an *equitable interest* in the proceeds derived from their disposition."[61] Solicitor Gardner's opinion thus is consistent with the view that the 1905 Act did not divest the Tribes of all of their interests in the opened area.

3. Tribal Views.

Regardless of the misunderstandings that occurred during the negotiations that preceded the 1905 Act, it is clear that soon after passage of the 1905 Act, both Tribes gained a clear understanding of the impact of the Act's terms and the nature of the equitable interest retained by the Tribes in the 1905 Act area. In 1908, a Shoshone delegation wrote to the Commissioner of Indian Affairs that they had been told by Inspector McLaughlin that within the area opened under the 1905 Act, "unsold lands would belong to" the Tribes until they were "all sold" by the

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[59] Regulation of Hunting and Fishing on Wind River Reservation in Wyoming, 58 Int. Dec. 331, 1943 WL 4325 (Feb. 12, 1943) (BATES SH07814).

[60] See current position of United States on authority of State over wildlife in Tribes' Statement of Legal Counsel at 72.

[61] 58 Int. Dec. at 338 (emphasis added) (BATES SH07814).

government.[62] At the same time, the Arapaho delegation expressed the view that the "Government should take care of the ceded part of our reservation."[63] The Arapaho delegation explained:

> [M]uch of the lands have not been settled on in that country, and it is covered with horses, sheep and cattle belonging to white men. Before this land was opened we received pay for this pasture. We believe we should now get pay on the lands until they are settled up. The lands are still ours and the feed is ours. We should be paid for it by the white men who use it.[64]

For these reasons, the Tribes insisted that under the 1905 Act they were to continue receiving income from grazing, timber, and mineral resources in the opened area.[65] The Tribes also asserted that the Wyoming Central Irrigation Company was improperly "permitted to secure a monopoly of the water on the ceded part of the Shoshoni Reservation, to the detriment of the Indians thereof."[66] These statements, written only three years after the passage of the 1905 Act demonstrate that both Tribes understood that the area opened by the 1905 Act would not become "public lands," but were to be managed by the United States as the Tribes' trustee, for the benefit and *exclusive use* of the Tribes, until sold to actual settlers. Tellingly, the Wind River Superintendent Haas corroborated the Tribes' view, stating, "You still have an equitable right because the agreement has not been fulfilled in full."[67]

4. State and Local Views.

The Tribes' Statement of Legal Counsel (pages 66-67) demonstrates that state and local entities recognized the continued Reservation status of the opened area in the years immediately

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[62] Letter, Shoshoni Delegation to Commissioner of Indian Affairs (Mar. 10, 1908) at 1 (BATES SH52192).

[63] Letter, Arapahoe Delegation to Commissioner of Indian Affairs (Mar. 9, 1908) at 4 (BATES SH52182).

[64] *Id.* (BATES SH52182).

[65] Letter from Arapaho Delegation to Commissioner Leupp (Mar. 3, 1908), at 4 (BATES SH52182); Letter from Shoshone Delegation to Commissioner Leupp (Mar. 10, 1908), at 1 (BATES SH52192).

[66] Letter from Shoshone Delegation to Commissioner Leupp (Mar. 10, 1908), at 2 (BATES SH52192).

[67] 1922 Minutes at 10 (BATES SH08429).

subsequent to the passage of the 1905 Act. In support, the Tribes cited a 1907 book published by the Wyoming State Immigration Commission at the direction of the Legislature, several contemporaneous newspaper accounts, and statements by the Wyoming State Engineer and the local Sheriff.

Consistent with these sources, Governor Brooks in a 1906 newspaper interview described towns immediately adjacent to the Reservation as Lander, Thermopolis and Shoshoni.[68] All these towns are just outside the boundary of the Reservation, as described in the Tribes' TAS Application. In the interview, Governor Brooks asked the Commissioner of Indian Affairs to delay the opening of the 1905 Act area so that surveys of "irrigable areas in the reservation" could be completed prior to settlement.[69] If the opened lands were "public lands" instead of Reservation lands, there would have been no need for Wyoming to request permission from the Commissioner of Indian Affairs to survey for irrigation ditches in the opened area.[70] Shortly after passage of the Act, the Press of Riverton News talked extensively about the opened area being part of the Reservation.[71]

The State does not deny that Wyoming recognized that the status of lands in the opened area of the Reservation was different than public lands elsewhere within the state,[72] but instead is notably silent on its own contemporaneous views of the boundaries of the Reservation at the time of the 1905 Act. The only document submitted reflecting the State's position on the Reservation boundaries is a map prepared by the Wyoming Board of Control more than a century after

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[68] Wind River Mountaineer (Jan. 19, 1906) (BATES SH25404).

[69] Wind River Mountaineer (Jan. 19, 1906) (BATES SH25404).

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

[71] Press of Riverton News (circa 1908) (BATES SH08552).

[72] *See* Tribes' Statement of Legal Counsel, at 66-67.

passage the 1905 Act. The most contemporaneous map prepared locally was that published in The Shoshone Pathfinder[73] in 1906. That map shows the Reservation boundary in 1906 as asserted by the Tribes with opened area demarked "Shoshone Reservation – portion to be thrown open" and the unopened area as "Shoshone Reservation – portion allotted to the Indians." The absence of any similar state map produced in the years immediately after the 1905 Act demonstrates the lack of factual support for the State's revisionist view of history.[74]

5. Demographic and Land Use History.

The City of Riverton and other comments ignore the subsequent demographics element of the analytical framework and opine instead on current demographics. The only legally significant subsequent demographic history is the character and pace of settlement in years immediately following when land on a particular reservation was opened to non-Indian settlers. *Solem*, 465 U.S. at 472. Where the "opening of [a reservation] was a failure" and "few homesteaders perfected claims on the lands," the facts on the ground support the continued existence of a reservation. *Id.* at 480.

A review of the actual patents issued under the 1905 Act shows that the opening of the reservation to non-Indian settlement was a failure. The following table shows the number of acres patented in fee or patented to Indians in each year from 1906 to 1919 and the cumulative percentage by year of the total opened acres patented in fee or retained by the Tribes and/or tribal members:[75]

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[73] The Shoshone Pathfinder (Smith & Wynn), 1906 (BATES SH35263). The Shoshone Pathfinder was compiled as a guidebook for pilgrims to the 1905 Act area, and provided an ethnocentric view of the locale.

[74] The State also omits other modern maps compiled by Wyoming agencies that show the boundary intact. *See* Wyoming Department of Revenue map of the Reservation submitted with the TAS Application.

[75] Source: Data compiled by Premier Data Services from U.S. Bureau of Land Management and other sources. (BATES SH35247 to SH35260) (maps of patented lands by year from 1906 through 1919).

Year	Opened Acres Patented in Fee per Year	Cumulative Percentage of 1,438,633 Opened Acres Patented in Fee	Opened Acres Patented by Indians per Year	Cumulative Percentage of Opened Acres Retained by Tribe and/or Owned by Individual Indians
1906	-	0.0%	160.00	100.0%
1907	840.30	0.1%	11,360.61	99.9%
1908	20,652.03	1.5%	528.58	98.5%
1909	16,601.85	2.6%	821.48	97.4%
1910	11,033.03	3.4%	320.00	96.6%
1911	15,232.79	4.5%	1,356.70	95.5%
1912	35,219.40	6.9%	-	93.1%
1913	37,352.07	9.5%	1,155.38	90.5%
1914	12,289.31	10.4%	1,788.16	89.6%
1915	4,129.87	10.7%	1,183.16	89.3%
1916	3,783.24	10.9%	5,999.73	89.1%
1917	6,314.60	11.4%	1,609.64	88.6%
1918	4,609.11	11.7%	1,054.83	88.3%
1919	3,561.48	11.9%	7,368.46	88.1%

The data shows that in the first two years after passage of the act, Indians patented 1,352% more lands than the non-Indians. The biggest rush to settlement was by individual Indians who applied for and received allotments in the 1905 Act area – a fact which indicates the contemporaneous understanding that the 1905 Act area remained Reservation land. While there was a brief spike in settlement by non-Indians from 1908 to 1914, this occurred on scattered parcels collectively constituting only about 10% of the opened area.[76] As time went on, individual Indian patents in the opened area were increasing while the issuance of fee patents decreased. From 1916 to 1919, the amount of acres patented in fee shows a steady decrease from prior years. In contrast, the acres patented to Indians show a marked increase during this same time period. This is inconsistent with an understanding that the lands were no longer

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[76] *See* BATES SH35247 to SH35260 for scattered settlement pattern.

Indian Reservation. From 1905 to the present, the overwhelming majority of the opened area has remained in Tribal or individual Indian ownership. *See Solem*, 465 U.S. at 480.

While current surface ownership map of the Reservation shows some concentration of fee lands in the eastern portion of 1905 Act area, this concentration was a result of the events occurring long after the 1905 Act. BATES SH34820 (current surface ownership). Importantly, this concentration occurred as the result of establishment of the reclamation project in 1920, the 1939 Act's land consolidation plans, and revamping the reclamation project in the 1950s and 1970s – not actions that help to determine the intent of Congress in 1905. The actual development of the opened area by non-Indians was dispersed throughout the opened area and intermingled with individual Indian lands and tribal lands. Maps showing development of the opened area by year are attached as BATES SH35247 to SH35260. Importantly, even in areas of current fee ownership, the subsurface under a significant portion of those lands is owned by the Tribes or individual tribal members. BATES SH34819 (current mineral ownership).

Throughout the early history and to this day, the vast majority of the opened area has been managed by the federal government for the Tribes' benefit.[77] Even today, less than 17% of the lands opened for potential settlement have been patented to non-Indians pursuant to the 1905 Act, the 1939 Act, and the 1953 Act combined.

Significantly, a large percentage of these lands sold under the 1905 Act were held by absentee land speculators and not actually settled until much later. When the Wyoming Central Irrigation Company attempted to secure a free right-of-way for an irrigation ditch, two settlers,

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[77] *Id.* at 1, 3 (BATES SH08201).

both living outside the Reservation in Lander and Casper, refused to grant the right-of-way.[78] When the Midvale Irrigation District was organized in 1920, 68% of the landowners did not live in Fremont County – with 63% living out of state.[79]

Similarly, there was little population change within the Reservation compared to elsewhere in Wyoming shortly after passage of the 1905 Act. Combining the town of Riverton with the rural areas of the Reservation, there was only a 4% increase in population from 1900 to 1910.[80] In contrast, during this same time period, Wyoming as a whole had a population increase of 57.7%. Lander had a population increase of 59%.[81] The Indian population in 1900 was 86% of the total Reservation population in 1900. In 1910, it was still 72% of the total Reservation population after the very limited influx of non-Indians.[82]

The State attempts to counter this clear failure of the 1905 Act to achieve even the limited settlement anticipated by Congress by presenting argument about the current demographics of the City of Riverton. Wyoming Comments at 26. The State's information is largely irrelevant since the analytical framework set up by the Supreme Court requires analysis of the demographics of settlement shortly after passage of the 1905 Act, not the number of non-Indians who currently live in the limited portions of the opened area that were transferred to non-Indians. It is hardly surprising that non-Indian owned lands in the City of Riverton are now largely populated by non-Indians. However, the 1905 Act area, as a whole, still retains its Indian

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[78] Hoopengarner, at 121 (BATES SH11253).

[79] Hoopengarner, at 204 *citing* Project History, Riverton Project (1918), Vol. III, at 38-40 (BATES SH11253).

[80] Sources: Thirteenth Census of the United States: 1910 – V.3 – Population, Wyoming, Chapter 1 (BATES SH34375); Twelfth Census of the United States -- 1900, Census Reports Volume I – Population Part 1, Table 5, Population of States and Territories by Minor Civil Divisions, 1800 and 1900, at 424 (BATES SH34419).

[81] *Id.* (BATES SH34375, SH34419).

[82] *Id.* (BATES SH34375, SH34419).

character as it is owned, occupied and managed by the Tribes and their members[83] – a fact which the U.S. District Court for the District of Wyoming has recently scrutinized and detailed in the context of voting rights.[84] Importantly, a significant portion of the economy of the Reservation today is attributable to the Reservation status of the lands and the presence of the Tribes.[85]

The Wind River Reservation stands in marked contrast to cases where the "demographics signify a diminished reservation." *Cf. Yankton Sioux*, 522 U.S. at 356 (fewer than 10% of opened lands remained in Indian hands shortly after the cession). The Wind River Reservation demographics demonstrate that immediately after the 1905 Act, and for the next 20 years, the Tribes retained equitable title in approximately 90% of the opened lands. The 1905 Act area is predominantly owned by the Tribes or its members with only a few pockets of non-Indian ownership. Most of the 1905 Act remains in Indian ownership, and Indians remain a significant portion of the total population.[86] In short, demographic and land use patterns are consistent with the continued existence of the 1905 Act area as part of the Wind River Reservation.[87]

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[83] *See* surface and subsurface ownership maps (BATES SH34819 and SH34820).

[84] See *Large, et al. v. Fremont County, Wyoming*, U.S. District Court for the District of Wyoming, Case No. 05-CV-0270, Memorandum of Opinion, April 29, 2010 (Johnson, J.) at 5 ("The Indian population in Fremont County grew between 1980 and 2000, even as the overall population declined.") (BATES SH52589).

[85] *See* The Economic Impact of the Wind River Reservation on Fremont County, Cooperative Extension Service, University of Wyoming and U.S. Department of Agriculture Cooperating (Nov. 1997): Federal Lands Dependent Sectors in the Fremont County Economy, Cooperative Extension Service, University of Wyoming and U.S. Department of Agriculture Cooperating (Feb. 1998) (BATES SH34806).

[86] United States Census, Table DP-1. Profile of General Demographic Characteristics: 2000 -- Geographic area: Wind River Reservation and Off-Reservation Trust Land, WY. http://censtats.census.gov/data/WY/280564610.pdf.

[87] This observation is illustrated by land ownership and demographic data for reservations that have not been disestablished or diminished. *See e.g. Cass County v. Leech Lake Band*, 524 U.S. 103, 108 (1998) (in 1977 Leech Lake Band and its members owned less than 5% of "Leech Lake Reservation land"); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 193 n. 1 (1978) (reservation population comprised 2,928 non-Indians and only 50 tribal members); *Moe v. Confederated Salish and Kootenai Tribe*, 425 U.S. 463, 466 (1976) (tribal members comprised only 19% of total reservation population).

6. Judicial Opinions.

Continuing its pattern of relying on documents many decades removed from the passage of the 1905 Act, the State attempts to rely on a number of judicial opinions as "subsequent events" allegedly supporting its assertion that Congress intended to disestablish the Reservation. Wyoming Comments at 24-27. The cases the State cites shed no light on Congress's intent in 1905, and in any event do not support the State's position that the Reservation was disestablished.

Excluding *Big Horn I* which is discussed in Section II and State cases discussed in Section III, comments from Wyoming, Fremont County Attorney, Fremont County Commissioner, and City of Riverton cite three cases: (1) *Shoshone Tribe v. United States*, 82 Ct.Cl. 23 (1935) *("Shoshone I")*; (2) *Clarke v. Boysen*, 39 F.2d 800 (10th Cir. 1930); and (3) *United States v. Hubenka*, 438 F.3d 1026, 1029 (10th Cir. 2006).

The first case cited, *Shoshone Tribe v. United States*, 82 Ct.Cl. 23 (1935) *("Shoshone I")*, arose pursuant an act of Congress authorizing a suit for damages by the Shoshone Tribe related to the settlement of the Northern Arapaho Tribe at the Wind River Reservation without the consent of the Shoshone Tribe. Here again, the State's reliance on the term "diminished" is misplaced. As discussed throughout, the term was not used as a term of art in the law until much later. *Solem*, 465 U.S. at 475 ("diminished" was "not a term of art in Indian law"). Importantly, however, the Court of Claims decision acknowledged the differences between the Lander and Thermopolis Purchases and the 1905 Act. 82 Ct.Cl. at 12-13, ¶¶ 12, 14, and 15. The paragraph from the Court of Claims decision relied on in the State's comments recognized that 1905 lands were held by the government "in trust for the Indians." 82 Ct.Cl. at 30, ¶ 4. On remand, the

Court again contrasted the Lander and Thermopolis Purchases with the 1905 Act. *Shoshone Tribe v. United States*, 85 Ct.Cl. 331, ¶ 16 (1937) ("*Shoshone II*") ("Certain portions of the original reservation defined by the 1868 Treaty were ceded to the United States by agreements in 1872, 1896, and 1904 – the last cession being in trust for the purpose of sale or lease."). Clearly, the Court recognized that the important distinction between an outright sale with full compensation to the Tribes and an opening where the United States would serve as trustee to collect proceeds from land sales for the benefit of the Tribes.

The Supreme Court's discussion of the 1905 Act in *Shoshone II* was limited. However, even that limited discussion contemplated a continuing interest (equitable title or beneficial ownership) of the Tribes in the opened area: "In 1904 the Shoshones and Arapahoes ceded to the United States 1,480,000 acres to be held by it in trust for the sale of such timber lands, timber, and other products, and for the making of leases for various purposes." *Shoshone Tribe v. United States*, 304 U.S. 111, 113 (1938); *see also Shoshone II*, 85 Ct.Cl. 331, ¶ 7; *Shoshone I*, 82 Ct.Cl. 23, p. 13, ¶ 15. The Supreme Court further described the ongoing interest of the Tribes in the opened area as identical to the Tribes' interest in the lands under the 1868 Treaty establishing the Reservation as a whole:

> The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them. The words of the grant, coupled with the government's agreement to exclude strangers, negative the idea that the United States retained beneficial ownership. The grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggest *beneficial ownership in the tribe*. As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe. The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's

> claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Shoshone II, 304 U.S. at 117 (emphasis added). The Supreme Court's decision thus is inconsistent with the State's theory that the 1905 Act extinguished all Indian interests in the 1905 Act area. In fact, the United States Supreme Court's discussion of the "beneficial ownership" that the Tribes retained fully supports the Tribes' position on the Indian Country status of the 1905 Act area.

Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930), discussed on pages 62-63 of the Tribes' Statement of Legal Counsel, likewise does not support the State's disestablishment argument. In that case, the Tenth Circuit recognized that the statute authorizing rights-of-way across Indian lands still applied to the opened lands after passage of the 1905 Act. In reaching its conclusion, the Court held that the lands opened for settlement were "reserved" or "set apart or set aside" for the Tribes for entry and sale at a future date – a holding that is thoroughly inconsistent with divestiture of all Indian interests in the opened area. *Clarke*, 39 F.2d at 814.

The State's final citation to *United States v. Hubenka*, 438 F.3d 1026, 1029 (10th Cir. 2006), is similarly misleading. The only jurisdictional issue in *Hubenka* was whether the waters at issue were waters of the United States – not whether the lands were Reservation lands. In the decision, the Court describes the Wind River as flowing southeast "through the Wind River Indian Reservation," rather than as a boundary stream. *Hubenka*, 438 F.3d at 1028. Even the defendant's brief stated that Mr. Hubenka's "farms and ranches [are] along the Big Wind River within the Wind River Indian Reservation." *Hubenka*, Appellant's Brief at 6. Thus, far from supporting the State's position, *Hubenka* supports the Tribes' view that the Reservation boundaries were unaffected by the 1905 Act.

In sum, the State's discussion of subsequent events does not support its position. The examples the State provides are largely remote in time to the 1905 Act and inconsistent with the weight of the evidence, which demonstrates the Tribes retained substantial interests in the area opened by the 1905 Act. The State's discussion of the events immediately subsequent to the 1905 Act, and for several decades following, thus fails to "unequivocally reveal a widely held, contemporaneous understanding that the [Wind River Reservation] would shrink as a result of the [1905 Act]." *Solem*, 465 U.S. at 471. Accordingly, EPA should uphold the Tribes' position that the 1905 Act did not disestablish the boundaries of the Reservation.

II. The State is Precluded by the Decision in *Big Horn I* From Arguing that the 1905 Act Disestablished the Reservation Boundaries.

The Tribes' Statement of Legal Counsel explains that the Wind River Reservation boundary has been litigated and decided with finality 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), *cert. denied Wyoming v. United States*, 492 U.S. 406 (1989) (hereinafter "*Big Horn I*"). In *Big Horn I*, the Court squarely rejected the State's contention that the 1905 Act disestablished the portion of the Reservation opened by the 1905 Act.[88]

In *Big Horn I*, the State sued the United States as the Tribes' trustee, alleging that any Indian water rights reserved by the

W.R.C.P. 52(a) and 53(e)(2).[144] Judge Johnson noted that the Report was "the cornerstone of the case" and that "ample evidence appears in the record to support the findings of the Special Master and the Court."[145]

The District Court thus clearly accepted the Special Master's findings on the merits that Reservation lands within the 1905 Act area were not disestablished. These findings were the essential factual predicate to an award of an 1868 Treaty-reserved water right for such lands. *See Winters*, 207 U.S. at 577; Cohen, §19.03.

The Wyoming Supreme Court also necessarily decided the disestablishment issue on the merits. The Supreme Court began its analysis of the Tribes' reserved water right by quoting in full W.R.C.P. 53(e)(2) as establishing the standard of review for the Court. *Big Horn I*, 753 P.2d at 88-89. The Rule requires the Court to accept the master's findings of fact unless clearly erroneous. *Id.* The disestablishment decision by the Master and the District Court were squarely before the Supreme Court, and the decision was affirmed.

The Wyoming Supreme Court rejected Wyoming's position that the 1905 Act "disestablished" a portion of the Reservation and "that any reserved right associated with lands that passed out of Indian ownership or reservation status ceased to exist on that date."[146] The Wyoming Supreme Court specifically recognized that Congress in the Thermopolis Purchase had a different intent than with the 1905 Act:

> Congress also knew how to express a relinquishment of reserved water rights. See First McLaughlin Agreement, or Thermopolis Purchase, supra, Article I (Tribes surrender "all their right, title, and interests of every kind and character"

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

[145] *Big Horn Adjudication*, Order Ruling On Motions to Alter or Amend the Decision of May 10, 1983 ("Order to Alter or Amend"), at 5 and 7 (BATES SH03907).

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

> to water rights appurtenant to ceded lands). It is well established that Congress must use such explicit statutory language in order to abrogate treaty rights [citations omitted].

Big Horn I, 753 P.2d at 76. The Court awarded federally reserved water rights with a Treaty-based priority date for the 1905 Act area. The Wyoming Supreme Court recognized that its ruling was final and conclusive. *Id.* at 100. In subsequent proceedings, the Court held that "*Big Horn I*, having been affirmed by the United States Supreme Court, is final and controlling." *Big Horn III*, 835 P.2d at 278.

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

Finally, if more were needed, Wyoming's own petition for certiorari agreed that the judgment in *Big Horn I* would be final and conclusive, unless reversed by the Supreme Court.[147] In characterizing the jurisdiction of the United States Supreme Court to take certiorari, Wyoming referenced 28 U.S.C. § 1257, which creates jurisdiction for "*final judgments or decrees* rendered by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question." (emphasis added). Wyoming maintained that "the judgment of the Wyoming Supreme Court was final on its face."[148] Furthermore, Wyoming contended the "decision on the federal issue is conclusive . . . regardless of the outcome of future state-court proceedings."[149] Given that the United States Supreme Court accepted jurisdiction based on Wyoming's representations, the State is precluded from arguing that *Big Horn I* was not a final

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

[148] Petition for Certiorari (BATES SH34398).

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

decision on the merits. *New Hampshire*, 532 U.S. at 749. Accordingly, the second element of preclusion has been met.

E. The State Was a Party to *Big Horn I* and Had a Full and Fair Opportunity to Litigate Its Position that the 1905 Act Disestablished the Reservation.

The third and fourth elements of preclusion have been met. The State was a party to the *Big Horn I* decision and had a full and fair opportunity to litigate its position that the 1905 Act stripped away the reservation status of all lands within the opened area. Indeed, the State initiated the *Big Horn* adjudication in its chosen forum – the Wyoming state court system – to press its theory of the 1905 Act in an attempt to deprive the Tribes of federal reserved water rights. Wyoming did so pursuant to a state statute passed expressly to confer state court jurisdiction over water rights held by the United States in trust for the Tribes and notwithstanding the strong and active opposition of the United States. Having successfully subjected the federally reserved rights of the Tribes and their members to adjudication in the state court system, the State can hardly maintain that it was denied a full and fair opportunity to present and fully litigate its position that the 1905 Act disestablished the opened portion of the Reservation.[150] Accordingly, the final two elements of preclusion have been met.

F. Conclusion.

Remarkably, in its comments to EPA, the State completely denies any nexus between the *Big Horn I* proceeding and the reservation status of the 1905 Act area. The State now disavows the characterization of *Big Horn I* that its own Attorney General submitted to the United States Supreme Court in its petition for certiorari. Wyoming Comments at 30 (disestablishment

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[150] The State has occasionally suggested that the Stipulation serves to limit the preclusive effect of the boundary determination in *Big Horn I*. Yet, the Stipulation expressly recites that it does not affect jurisdiction over lands within the boundaries of the Reservation.

question "not central" to *Big Horn I*). The State would have EPA ignore the history of, and the record from, the *Big Horn I* proceedings. EPA should not be led astray. The doctrine of *res judicata* exists to protect the integrity of the civil justice system, ensuring that disputes are resolved with finality and certainty necessary to maintain the rule of law.

These considerations are heightened in McCarran Amendment proceedings because of the complexity of the general stream adjudications, the multiplicity of parties, the central role of water in the western economy, and the enormous measure of reliance that is placed on the outcome of these proceedings. Courts have been especially protective of the final judgments in McCarran Amendment proceedings for these reasons. *See In re Green River Adjudication v. U.S.*, 404 P.2d 251, 252 (Utah 1965) (*res judicata* prevents the United States from ignoring the judgment in McCarran Amendment proceedings because re-litigation would make "a shambles of" adjudicated water rights); *U.S. v. Hennen*, 300 F.Supp. 256, 264 (D.Nev. 1968) (accord); and *Nevada v. U.S.*, 463 U.S. 110 (1983) (*res judicata* prevents the United States and the Tribes from re-litigating treaty-based water rights determined in prior adjudication.). Re-litigation of the status of the 1905 Act area would uproot settled expectations and undermine the legal principles that have been applied to allocate water rights across the west, where reliance on such rights is a matter "of life and death importance." *See Colorado River*, 424 U.S. at 825-826.

In short, the State is bound for all time by the judgment of its Supreme Court affirming the decisions of Special Master Roncalio, Judge Joffe, and Judge Johnson with regard to the 1905 Act area. The principles of *res judicata*, preclusion, and estoppel by judgment bar the State from contesting the Reservation status of the 1905 Act area. All of the elements of preclusion are satisfied: (1) the question whether the 1905 Act disestablished the reservation is identical to

Wyoming's core contention in *Big Horn I*; (2) the decree entered in that case was a final judgment on the merits; (3) the United States, both Tribes and the State of Wyoming were all parties to the *Big Horn I* proceedings; and (4) the State had a full and fair opportunity to litigate the 1905 Act. *Big Horn I* decided the reservation status of the 1905 Act area. EPA cannot allow the State to reinvigorate this dispute.[151]

III. Other Decisions by the Wyoming Supreme Court Cannot Reduce the Preclusive Effect of *Big Horn I*.

Wyoming and other commenters maintain that the Wyoming Supreme Court has decided that the 1905 Act disestablished the Wind River Reservation. Wyoming Comments at 27. But the State's characterization of the Court's treatment of the 1905 Act issue is incomplete and misleading, in part because it ignores the preclusive effect of *Big Horn I*.

The State fails to account for the key factor that distinguishes *Big Horn I* from other cases where the Wyoming Supreme Court touched on the boundary issue – identity of parties. Only *Big Horn I* involved the Tribes, the United States, and the State of Wyoming as parties. Because of this identity of parties, *res judicata* applies and the State is bound by the result in *Big Horn I*. Because of its preclusive effect, *Big Horn I* is not just another case that EPA can weigh along with other conflicting rulings of the Wyoming Supreme Court.

The State's comments fail to accurately characterize the interrelationship between the cases where the Wyoming Supreme Court has touched on the reservation boundary issue.

Excluding *Big Horn I*, the Wyoming Supreme Court has approached the 1905 Act issue in six instances: (1) *Merrill v. Bishop*, 237 P.2d 186 (Wyo. 1951) ("*Merrill I*") and *Merrill v.*

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[151] As an agency of the United States, which was a party in the *Big Horn I* adjudication, EPA is also bound by the boundary determination in *Big Horn I*. Principles of preclusion bar the EPA from reaching a conclusion on the reservation boundary that is inconsistent with the outcome in *Big Horn I*. *See In re Green River Adjudication v. U.S.*, 404 P.2d 251, 253 (Utah 1965).

Bishop, 287 P.2d 620 (Wyo. 1955) ("*Merrill II*") (successors to allottees in 1905 Act area not entitled to treaty-based water rights); (2) *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960) (upholding criminal conviction of an Indian in state court for a crime committed in the Riverton Reclamation Area, a subset of the 1905 Act area); (3) *State v. Moss*, 471 P.2d 333 (Wyo. 1970) (crime occurred on former allotment within the 1905 Act area and therefore was not "Indian country."); (4) *Geraud v. Schrader*, 531 P.2d 872 (Wyo. 1975) (ruling that a proposed consolidated "Indian Reservation District" improperly excluded the 1905 Act area), *cert. denied*, 423 U.S. 904 (1975); (5) *Stagner v. Wyoming State Tax Commission*, 682 P.2d 326 (Wyo. 1984) (Indian owner of smoke shop north of the Big Wind River not subject to licensure by State of Wyoming); and (6) *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008) (murder on former allotment land within the current boundaries of Riverton did not occur within Indian country).

The first five of these cases were decided before *Big Horn I.* Two of the first five cases – *Geraud* and *Stagner* – are entirely consistent with the conclusion reached in *Big Horn I.* *Blackburn* did not even deal with the 1905 Act, but addressed (erroneously) the Indian country status of a specific location within the Reclamation Project Area. 357 P.2d at 177; *see also* *Moss*, 471 P.2d at 337. The Tribes address the remaining cases below.

In *Merrill*, the Wyoming Supreme Court denied a request for an injunction by holders of Treaty-based reserved water rights in the 1905 Act area against the holders of junior State water rights. The State's attempt to rely on *Merrill* is surprising considering the Wyoming Supreme Court already rejected the State's efforts to rely on that case when it opposed the Reservation status of the opened area as a basis for water rights in *Big Horn I.* In *Big Horn I*, 753 P.2d at 113, the Wyoming Supreme Court held that everything in *Merrill I* other than denial of the injunction was *dicta*. *Big Horn I*, 753 P.2d at 91, 113 ("The holding of that case is narrow and does not prevent relitigating what was not necessary to the decision.") [citations omitted]. The Wyoming Supreme Court went further and stated "[t]o the extent that *Merrill v. Bishop* indicates otherwise, it is overruled." *Big Horn I*, 753 P.2d at 113. Importantly, in *Big Horn I*, the Wyoming Supreme Court contrasted *Merrill* with *United States v. Hampleman*, No. 753, (June 26, 1916), a case that recognized the Reservation status of lands in the 1905 Act area in support of reserved water rights. *Big Horn I*, 753 P.2d at 91-92; *see also* Statement of Legal Counsel at 25.

The State's reliance on *Moss* and *Blackburn* likewise is misplaced. As discussed previously, in *Big Horn I*, all levels of the Wyoming court system rejected the State's arguments (expressly relying on *Moss* and *Blackburn*) that the 1905 Act and/or the 1953 Act disestablished the Reservation and destroyed the 1868 Treaty priority date for water rights in the 1905 Act area. As Justice Thomas recognized in his dissent, the holding in *Big Horn I* simply cannot be reconciled with the holding in *Moss* and *Blackburn*. *Big Horn I*, 753 P.2d at 120-122; *see also* Statement of Legal Counsel at 74-75.

Finally, *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008), which held that the 1905 Act area is no longer Indian country, reached an erroneous conclusion on the merits based on an incorrect, revisionist view of *Big Horn I*. While citing to numerous cases establishing the standards for review of disestablishment issues, the decision provides little analysis of the specific factual and legal history of the Wind River Reservation and not one citation to the record established in the trial court. Instead, the Court's analysis of the disestablishment question largely tracks the arguments in the State's present comments on the Tribes' TAS application. As discussed in Part I above, these arguments misapply the Supreme Court's reservation disestablishment precedents, ignore key provisions of the 1905 Act, and misconstrue important parts of the historical record. Indeed, the Court's analysis of the disestablishment question has numerous glaring errors and inconsistencies. The Court: (1) failed to address the distinctions between the 1905 Act and the Lander and Thermopolis Purchase Acts, (2) failed to address the differing implementation of the survey language in the 1905 Act (cited at paragraph 24 of the opinion) as compared to the language in the Lander and Thermopolis Purchase Acts, and (3) erroneously characterized the per capita, survey, and irrigation construction payments in the 1905 Act as part of a "sum certain" consideration. The *Yellowbear* decision also fails to address the 1909 Act, the 1916 Act, and the proper interpretation of the restoration orders – facts and issues in the record before the Court and presented by the Tribes in their application to EPA. The Court also failed to respect the presumption against disestablishment and observe the "traditional solicitude for Indian Tribes" that is at the heart of the United States Supreme Court disestablishment analysis.

Equally important, the *Yellowbear* decision cites to select statements in *Big Horn I* taken out of the context of decision, *i.e.*, the requirements for a Treaty-based reserved water right. The Court did not analyze the extensive record in *Big Horn I* discussed in the previous section nor apply the elements of *res judicata* to that record. The Court simply made the inaccurate conclusory observation that "while they disagreed over whether reserved water rights continued to exist in the ceded lands, the majority and dissent in *Big Horn I* agreed that the reservation had been diminished." *Yellowbear*, 174 P.3d at 1283 (citing *Big Horn I*, 753 P.2d at 84, 112, 114, 119-35). As shown in the previous section, this remarkable observation fails to appreciate that the *Big Horn I* majority affirmed the District Court's award of reserved water rights which required a finding of Reservation status for the 1905 Act lands to which the rights are appurtenant.

The Supreme Court's citations to *Big Horn I* do not support the Court's statement that the *Big Horn I* majority "agreed that the reservation had been disestablished." *Yellowbear*, 174 P.3d at 1283 (citing *Big Horn I*, 753 P.2d at 84, 112, 119-35). Page 84 of *Big Horn I* merely summarizes the historical background of the Reservation without any analysis or legal conclusions. On page 112 of *Big Horn I*, also cited in support, the Court awarded water with a Treaty-based priority date for lands within the 1905 Act area, and specifically awarded Treaty-priority water for Indian-owned and non-Indian *fee* lands in the opened area. The citation to page 114 states that the "reacquired lands on the ceded portion of the reservation are reservation lands," a statement that supports the Tribes' position. As the Tribes have discussed at some length in the previous section, the Court's award of water rights with an 1868 Treaty priority to fee lands in the 1905 Act area was a complete *rejection* of the State's position that the 1905 Act disestablished the Reservation. Finally, the Court's citation to pages 119-135 is the dissenting opinion which repeatedly takes the majority to task for affirming the lower court's decision that the 1905 Act did not disestablish the Reservation.

In sum, given its myriad inaccuracies and inconsistencies, *Yellowbear* has no precedential value. The policy of keeping Indian interests "free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168

(1973), *quoting Rice v. Olson*, 324 U.S. 786, 789 (1945). In promoting the rationale of the Wyoming Supreme Court in *Yellowbear*, the State disregards this deeply rooted policy.[152]

IV. The State's Interpretation of the Indian Country Definition is Erroneous.

The State maintains that certain lands within the Wind River Reservation do not fall with the definition of "Indian country" set forth in 18 U.S.C. § 1151, which includes "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." Wyoming Comments at 38 (citing 18 U.S.C. § 1151(a)). The Wyoming Ag-Business Association, Wyoming Farm Bureau Federation, and City of Riverton comments contend that the issuance of individual fee patents removes such lands from the Reservation. These comments reflect a lack of appreciation for the history of the Indian Country statute and an incomplete understanding of how jurisdiction aligns within Indian Country.

The intent of Congress in adopting the definition of "Indian country" was to "designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection." *Okla. Tax Comm'n v. Sac & Fox Nation,* 508 U.S. 114, 125 (1993). The words "all land" and "notwithstanding the issuance of any patent" were added to the "Indian country" definition in 1948 in order to codify existing United States Supreme Court precedent holding that lands patented to non-Indians within the exterior boundaries of an Indian reservation

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[152] Three of the Justices who decided that *Big Horn I* had no effect on the *Yellowbear* case represented *parties* in the Big Horn adjudication. Justice Barton Voight, author of the *Yellowbear* decision, represented "private water users" in the boundaries and dates trial before Special Master Roncalio (*see* Transcript of Proceedings before The Honorable Teno Roncalio, Special Master, Presiding - June 23-24, 1980) (BATES SH34516). Justice William U. Hill represented "Retlaw Interprises [sic], Inc. and a number of private citizens, Fremont County, Wyoming water users" in the same trial. *Id.* (BATES SH34516). In addition, as Wyoming Attorney General in 1998, Justice Hill took the position before the U.S. Environmental Protection Agency that the 1905 Act had disestablished that part of the Wind River Reservation. Justice Kite served as Senior Assistant Attorney General for the State of Wyoming from 1974 through 1978 – the period when the State prepared and commenced the *Big Horn I* litigation (State's petition filed January 24, 1977).

are still within "Indian country." *Seymour*, 368 U.S. at 358-59; *see also United States v. Celestine*, 215 U.S. 278, 285 (1909) (once a reservation is established, "all tracts included within it remain a part of the reservation until separated therefrom by Congress"); Cohen, *supra*, § 3.04[2][c] at 190. The reference to "patents" in the Indian country statute includes the patenting of town sites like Riverton. *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir.) *cert. denied,* 459 U.S. 977 (1982); *United States ex rel. Condon v. Erickson,* 478 F.2d 684, 689 (8th Cir.1973); *Security State Bank v. Pierre,* 162 Mont. 298, 511 P.2d 325, 329 (1973); *Colorado River Indian Tribes v. Town of Parker*, 705 F.Supp. 473 (D.Ariz. 1989).

The State insists that lands on the Wind River Reservation that are owned or regulated by Wyoming are not within "Indian country" because, the State contends, they are not "under the jurisdiction of the United States Government." Wyoming Comments at 38-39. Other comments assert that regulation by the State obviates the need for the Tribes to duplicate such actions. Ryan Comment at 1, Fremont County Attorney Comment at 5, Fremont County Commission Comment at 1, Sen. Bebout Comment at 2. The modifying phrase in 18 U.S.C. § 1151(a) upon which the State relies, "under the jurisdiction of the United States Government," originated with a 1932 amendment to the Indian Major Crimes Act, and was added to "exclude from the scope of the statute Indian reservations governed by certain states and thus not under federal protection." Cohen, *supra*, § 3.04[2][c] at 190. There is no doubt that the Wind River Reservation was established by federal government pursuant to the 1868 Treaty and remains "under federal protection." The fact that the State may own lands or exercise certain forms of state regulatory jurisdiction over lands or individuals within the boundaries of the Reservation certainly does not remove those lands from "the jurisdiction of the United States government." *Celestine*, 215 U.S. at 285.

The State's argument is based on the false premise that state, federal, or tribal jurisdiction are mutually exclusive. The State simply ignores the well-established principle of concurrent jurisdiction. *See e.g. Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176-187 (1989) (concurrent jurisdiction of state and tribal governments to impose severance taxes on oil and gas production by nonmembers); *Rice v. Rehner,* 463 U.S. 713 (1983) (concurrent jurisdiction of federal and state governments to issue liquor licenses for transactions on reservations); *United States v. Mazurie*, 419 U.S. 544 (1975) (concurrent tribal jurisdiction to issue liquor licenses for transactions on reservations); *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980) (concurrent jurisdiction of state and tribal governments to tax cigarette purchases by nonmembers). Because the state, federal, and tribal governments can and do exercise concurrent jurisdiction over the same parcels of land in Indian country, an "Indian country" determination cannot depend on whether a state owns or exercises regulatory jurisdiction over a particular area or parcel of land. The State's interpretation of 18 U.S.C. § 1151(a) is inconsistent with the plain language of the statute and must be rejected.

The State also expresses concern that if EPA approves the Tribes' TAS application as submitted, more than 300 minor sources currently permitted by DEQ in the 1905 Act area will be unregulated – that is, not covered by any federal, state or tribal air quality permits. Wyoming Comments at 39-40. This argument appears to be entirely unrelated to the "Indian country" argument addressed above. In any event, the State's concerns are premature and not ripe for consideration. EPA does not currently regulate minor sources of air contaminants in Indian country. Likewise, the Tribes are not currently seeking a delegation of authority from EPA to administer a minor source program on the Reservation. By the same token, the City of Riverton's comments which question the Tribes' regulatory authority under the operating permit program delegation are premature.

In another unrelated argument, the State contends that because various state agencies own lands in the disputed area, a determination that the Tribes have jurisdiction over the disputed area will place Wyoming in the "untenable position" of violating either federal or state law in trying to administer the Wyoming statutes relating to environmental quality and air quality. Wyoming Comments at 40-41. The State cites *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008) to support its claim of a "conflict" between state and federal law. The holding in *Yellowbear*, however, involved purely a question of federal law – *viz.* whether the 1905 Act disestablished Reservation boundaries established by an 1868 Treaty – and therefore does not present a conflict between state and federal law.

Furthermore, the State's concerns over a conflict between state and federal law are premature because the Tribes have not sought a delegation of any regulatory authority over air quality on the Reservation. If and when such delegations are actually sought, the State will have an opportunity to present objections to specific delegations of federal authority to the Tribes as well as the Tribes' proposed exercise of that delegated authority.

Finally, the State asserts that W.S. § 35-11-1103, which provides an ad valorem tax exemption for equipment "designed, installed and utilized primarily for the elimination, control or prevention of air . . . pollution," may not apply if EPA grants the Tribes' TAS application. Wyoming Comments at 41. The State's assertion is puzzling since the statute in question simply provides industries with an exemption from a state tax for investments made for pollution control technology. Nothing in the statute facially precludes the application of the tax exemption to sources subject to tribal or federal regulatory jurisdiction. Rep. Miller's Comment also questions the impact of EPA's decision on state tax collections and revenues for schools. The vast majority of funding for schools comes from ad valorem taxes on the mineral industry. The collection of those taxes within the Reservation is governed by cases such as *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Under these decisions, both the State and the Tribes have collected such taxes in the area opened by the 1905 Act for decades. EPA's decision will not alter the collection of ad valorem taxes.

V. An EPA Decision on the Tribes' TAS Application Will Not Decide Issues Relating to the State's Criminal or Civil Jurisdiction.

The State and the Fremont County Commissioners present an argument contending that EPA's approval of the Tribes' application for treatment as a state under the Clean Air Act would have far-reaching consequences on the State's ability to exercise civil and criminal jurisdiction in the so-called "disputed area." Wyoming Comments at 42-48, Fremont County Commissioners Comments at 2. The State misconstrues the Tribes' application and misstates the legal effect that an EPA determination of the Reservation boundaries would have on state criminal and civil jurisdiction in areas unrelated to air quality.

A federal administrative agency may exercise only those powers provided by Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S.120, 161 (2000); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Under Section 301(d)(1) of the Clean Air Act, EPA has the authority to "treat Indian tribes as States under this chapter" subject to regulations adopted under Section 301(d)(2) of the Act. 42 U.S.C. § 7601(d)(1). Section 301(d)(2) directs EPA to adopt regulations and provides that treatment as a state for the purposes of the Clean Air Act is authorized where the functions exercised by the tribe "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B).

It is evident from these provisions that EPA is not tasked with making a general determination of the limits of state criminal, civil, regulatory or taxing jurisdiction within the exterior boundaries of an Indian reservation. Rather, EPA only has the authority under Section 301(d) to make a determination of the exterior boundaries of a reservation and tribal jurisdiction for the purposes of administering those Clean Air Act provisions for which tribal application has been made. While EPA's tribal authority regulations may require the Regional Administrator to make a determination regarding the exterior boundaries of the Reservation, the regulations also specify that this determination is applicable only to future Clean Air Act applications from that tribe.[153] 40 C.F.R. § 49.9(f).

The State and the City of Riverton also contend that EPA lacks the authority to make boundary determinations based on treaties and statutes relating to Indian affairs. Wyoming Comments at 52; City of Riverton Comments at 2-5. Under Section 301(d) of the Clean Air Act, EPA is authorized to treat Indian tribes as states for certain purposes under the Act where the functions to be exercised by the tribe "pertain to the management and protection of air resources within the exterior boundaries of the reservation." 42 U.S.C. § 7601(d)(2)(B). To administer

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[153] EPA's determination of the Reservation boundary question may be afforded significant weight by the courts in future cases and controversies involving state and tribal jurisdiction on the Reservation. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (rulings, interpretations and opinions of the [agency] . . . while not controlling upon the courts by reason of their authority, . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

this provision, EPA logically must be able to make an administrative determination of the "exterior boundaries of the reservation." In doing so, EPA must necessarily base its determination on relevant treaties, statutes, executive orders and, in this case, the Judgment and Decree that was entered in *Big Horn I.*

In *Michigan v. EPA*, 268 F.3d 1075, 1088-89 (D.C. Cir. 2001), the D.C. Circuit concluded that EPA had both the authority and the duty to make jurisdictional determinations relating to reservation or Indian country status when administering the Clean Air Act. There is thus no doubt that for the purposes of administering federal environmental statutes like the Clean Air Act, EPA has the power to determine the jurisdictional status of particular land areas. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1254 (10th Cir. 2000) ("EPA did not exceed its statutory authority or abuse its discretion in determining that [certain] lands constitute Indian country").

VI. EPA Should Not Defer its Decision Pending the Outcome of *Harnsberger* and *Yellowbear.*

The Wyoming, Dickenson, Thompson, Fremont County Commissioners, Rep. Miller, City of Riverton, and Ryan comments maintain that EPA should defer action on the Tribes' TAS application pending final decisions of the federal courts in *Harnsberger* and *Yellowbear.* This contention ignores EPA's independent obligation to make determinations for purposes of administering Section 301(d) of the Clean Air Act, 42 U.S.C. § 7601(d). *See* Part V *supra.*

A. *Northern Arapaho Tribe v. Harnsberger.*

The State maintains in its comments that EPA should defer action on the TAS application pending resolution of *Harnsberger.* The State's, County's and City's motions to dismiss the Northern Arapaho Tribe's Complaint in *Harnsberger* were granted by the Court's Order of

October 6, 2009. This decision is on appeal to the 10th Circuit Court of Appeals, where the Court will review the decision under a *de novo* standard.

It is noteworthy that the State's comments to EPA are totally inconsistent with the representation it made to the Court in *Harnsberger*, where the State argued that the administrative TAS process underway before EPA provided an adequate alternative forum for resolution of the Reservation boundary question. *See* Doc. #109 at 26-27 (attorney general assures court that EPA proceedings provide alternative forum and adequate remedy). The State's suggestion that EPA should defer its statutory and regulatory duty to await the outcome in *Harnsberger* is disingenuous at best. Nothing in the *Harnsberger* case requires that EPA defer its responsibilities under the Clean Air Act.

B. *Yellowbear v. Attorney General.*

Yellowbear is a *habeas* proceeding brought in the U.S. District Court for Wyoming seeking federal court review of the state court decision in *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008). While *Yellowbear* was wrongly decided (see discussion *infra* at p. 74), a *habeas* action may not provide an opportunity for review of the merits of that decision.

The appeal is governed by 28 U.S.C. § 2254(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, which created standards and procedures that are not designed for addressing matters of federal Indian law or the rights of Tribes.

Because federal court proceedings in *Yellowbear* may not decide the merits of the Reservation boundary issue or the preclusive effect of *Big Horn I*, there is no reason for EPA to reserve judgment on the Tribes' TAS application pending a final appellate decision on Mr. Yellowbear's *habeas* petition.[154]

VII. The Tribes Have Made an Adequate Showing of Capacity.

The City of Riverton maintains that the Tribes fail to meet the minimum eligibility criteria set out in Section 301(d)(2) of the Clean Air Act. Riverton Comments at 11-14. The City asserts that the Tribes must have a fully developed air quality program, including air quality standards and a tribal implementation plan, before they are eligible for treatment as a state under the Act. *Id.* at 13. The City misreads EPA's regulations and misconstrues the scope of the Tribes' application. The Tribes are not seeking treatment as a state for the purposes of administering an operating permits program, a tribal implementation plan, or any other regulatory program provided for under the Clean Air Act. Rather, the Tribes are simply seeking a jurisdictional determination and a finding of eligibility to participate in certain non-regulatory programs provided for under the Act. The Tribes' showing of capacity is more than adequate in light of the limited scope of the program authority sought.

The Dickinson, Thompson, and Rogers comments question the Tribes' ability to manage finances and assert that no audits have been completed since 1980. The TAS application details the institutional capabilities of the Wind River Environmental Quality Commission (WREQC), a joint program of the Tribes. The Tribes' joint programs, including WREQC, have completed audits through the 2008 fiscal year. A copy of the 2008 audit was provided to EPA as part of the Tribes' grant management. The Tribes have a long history of managing finances for EPA grants.

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

A careful review of the materials provided with the TAS application shows that the comments of Dickinson, Thompson, and Rogers lack merit.

EPA regulations permit Indian tribes to build their air quality programs gradually and seek treatment as a state on a program-by-program basis as they develop these programs. For example, the regulations require TAS applications to include a "narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval." 40 C.F.R. § 49.7(a)(4). Under this regulation, a tribe must demonstrate administrative capacity only for the program for which the tribe is seeking approval, but need not demonstrate capacity to administer all programs for which the tribe might conceivably seek approval in the future. Indeed, the regulations even allow a tribe to seek approval for "partial elements" of a Clean Air Act program if those elements are "reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal." *Id.* § 49.7(c). Thus, the Tribes in this case need not demonstrate the capability to administer a full-blown tribal implementation plan to obtain the very limited delegation of non-regulatory authority they are seeking in their application.

VIII. Other Comments.

The Wyoming Farm Bureau raises a number of issues, most of which are premature because the Tribes' application is not seeking a delegation of authority to administer any regulatory programs. For example, the Farm Bureau asks what process the Tribes will use to allow for input into tribal regulatory programs, whether the Tribes have an agency similar to Wyoming's Environmental Quality Council to oversee the rules and regulations for air quality,[155]

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[155] Even a cursory reading of the Application would disclose that WREQC is the agency of the Tribes for the administration of these programs.

whether the Tribes have procedures that will allow interested parties to contest regulatory actions pertaining to air quality, and whether interested parties will have the opportunity to comment on future requests from the Tribes for additional or separate delegations of programs under the Clean Air Act. These issues may become relevant only when at some future date the Tribes decide to seek authority to administer regulatory programs under the Clean Air Act. If the Tribes do decide to seek regulatory authority under the Clean Air Act in the future, their application may have to address these and other questions pertaining to the exercise of regulatory authority. *See* 40 C.F.R. § 49.9(h) (tribes seeking a delegation of authority to administer regulatory programs under the Act must meet the same statutory and regulatory criteria as a state must meet). EPA regulations allow interested parties such as the Wyoming Farm Bureau an opportunity for comment on all future requests for regulatory program authority under the Clean Air Act. *See* 40 C.F.R. § 49.9(b).

Several comments oppose the TAS application on the basis that nonmembers do not vote in tribal elections and that there are no remedies against the Tribes. While the TAS application does not seek regulatory authority, the U.S. Supreme Court long ago rejected the notion that inability to participate in Tribal government was a basis to limit tribal authority. In a case involving the Wind River Reservation, the U.S. Supreme Court stated "It is immaterial that respondent is not an Indian. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservation." *United States v. Mazurie*, 419 U.S. 544, 557-558 (1975); *Williams v. Lee*, 358 U.S. 217, 223 (1959). Tribal environmental law provides a remedy to both members and nonmembers who seek to challenge an individual tribal action. Section 11-2-5 of the Law and Order Code provides that "[a]ny interested or affected party may seek judicial review of any final action or decision of the Commission" in the Wind River Tribal Court. The Law and Order Code also provides for appellate review of trial court decisions. S&A LOC Title XV – Appeals and Habeas Corpus.

The Rogers and Wyoming Ag-Business Association comments assert that granting the TAS application will cause a loss in property value. This comment is rooted in a backward, red-lining rationale that Congress and all other branches of federal government have rejected on policy grounds. *See e.g.* 42 U.S.C.A. §§ 3601-3631. Furthermore, this is the same argument that was made with respect to awarding of the Tribes' reserved water rights and Tribal regulation of water. No evidence has ever been presented to show that comparable lands in the opened and unopened areas of the Reservation have different values based on their location in such areas.

A number of comments suggest that additional notice of the TAS application should be provided by EPA or that the comment period should be extended. Several of those comments urge individual notice to all counties that are within fifty miles of the Reservation's boundaries. Pursuant to 40 C.F.R. § 49.9(b) and (c), EPA is to provide notice to appropriate government entities. EPA's direct notice to the State of Wyoming, Hot Springs County, and Fremont County with publication in local newspapers more than meets this requirement. The EPA regulations only allow for extending the comment period once, which EPA has done at the request of the State of Wyoming. 40 C.F.R. § 49.9(c). No further comment period should be provided in that the Tribes' response is anticipated by 40 C.F.R. § 49.9(d). This response does not raise any new issues, but simply responds to comments.

IX. The Tribes Have Provided an Adequate Description of the Reservation Boundaries.

The State's Comments assert that the Tribes failed to comply with 40 C.F.R. § 49.7 which requires an adequate legal description of the Reservation.[158] Wyoming Comments at 51-52. The Rogers' Comment incorrectly contends the area which the Tribes assert is Indian Country includes eight counties.

The Tribes' Application provides the following description of the Reservation:

> This area includes the lands and waters reserved under the 1868 Treaty of Fort Bridger, 15 Stat. 655, less those areas conveyed by the Tribes under the Lander Purchase Act, 18 Stat. 291, and Thermopolis Purchase Act, 30 Stat. 93. It also includes certain lands found outside these original boundaries that were added to the Reservation under subsequent legislation. *See* Act of June 27, 1940, 54 Stat. 628.

TAS Application, p. 4. The application also included a map of the Reservation. The regulations require either a map or a legal description, but not both. The area covered by the TAS application includes land in only two counties, Hot Springs County and Fremont County.

To the extent a more detailed description is needed for an accurate decision document by EPA, the Tribes provide the following:

Wind River Meridian
    All Lands

6th Principal Meridian – Lands added pursuant to Act of June 27, 1940.

Padlock Ranch
Township 43 North, Range 97 West

Section 2:	SW¼
Section 3:	NE¼SE¼, S½SE¼, SE¼SW¼, SW¼SW¼

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[158] The State's comments here are remarkably similar to its unsuccessful attempt in *Big Horn I* to challenge the federal government's use of treaty and statutory descriptions to define the Reservation boundaries in its Statement of Geographic Boundaries. *See* discussion *supra* at 48 *et seq*.

Section 4: NW¼SE¼, S½SE¼, S½NW¼, NE¼SW¼, NW¼SW¼, S½, SW¼
Section 5: N½NE¼, S½NE¼, NW¼NW¼, NE¼NW¼, Lots 1, 2, 3, 4 and 5, NE¼SE¼, SE¼NW¼
Section 6: Lots 1, 2, 3 and 4, NE¼NE¼
Section 8: Lot 1
Section 9: Lot 1, NE¼NW¼, NW¼NE¼, NE¼NE¼
Section 10: N½NE¼, N½NW¼
Section 11: N½NW¼

Township 43 North, Range 98 West
Section 1: Lots 1, 2, 3 and 4
Section 2: Lots 1 and 2

Township 44 North, Range 97 West
Section 31: SW¼S½SE¼
Section 32: S½SW¼

Township 44 North, Range 98 West
Section 23: S½S½
Section 26: N½, NW¼SW¼, SE¼
Section 27: E½NE¼, NE¼SE¼
Section 35: N½, N½S½, Lots 1, 2, 3, SW¼SW¼
Section 36: E½SE¼

Nostrum Property
Township 42 North, Range 95 West
Section 26: N½SE¼, SW¼, Lot 1 except lands described as follows: All that part of Lot1, being the NE¼NE¼ Sec. 26, Township 42 North, Range 95 West, 6th P.M. lying and being east of a line drawn 150 ft. west of and parallel to the center line of the railroad of said company as now located over and across the land above described, also a strip of land 250 ft. wide along the north side of said Lot 1 extending from a line drown 150 feet west of and parallel to said center line of the railroad to said west line of said Lot 1 in Section 26 all in Township 42 North of Range 95 West of the Sixth Principal Meridian.

Township 42 North, Range 96 West
Section 23: E½NE¼, SE¼, E½SW¼, Lots 3 and 4
Section 26: Lots 1, 2, 3 and 4, NE¼NW¼, N½NE¼

The above description includes parcels of land outside the Wind River Meridian previously owned by the Padlock Ranch or Alfred and Helen Nostrum. The 1939 Act authorized the purchase of fee lands within the existing Reservation. When implementing the 1939 Act, the United States identified additional lands contiguous with the Reservation that were owned by holders of Reservation grazing permits. Because the 1939 Act only applied to lands within the then existing Reservation, the Secretary of the Interior obtained Congressional authorization to purchase the two parcels of land outside that boundary. In the Supplemental Appropriations Act of 1940, 54 Stat. 628 (1940), Congress authorized the purchases and appropriated $150,000. Congress directed the purchases would be made pursuant to Section 6 of the 1939 Act. Section 6 of the Act provides that fee lands were to be acquired "in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation."[159]

Maps of the land covered by the foregoing legal description are attached as BATES SH34819 and SH34820. BATES SH34820 is a map of current surface ownership. BATES SH34819 is a map of current subsurface ownership.

CONCLUSION

For the reasons set out herein, the comments of the State of Wyoming and others opposing approval of the Tribes' TAS Application fail to offer any persuasive basis upon which EPA could deny the application. In light of the result in *Big Horn I*, the presumption against disestablishment that exists as a matter of law, the Supreme Court analytical framework, and the

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[159] *See* BATES SH24889 and SH24886 for copies of the deeds.

record that is before the agency, EPA can only conclude that the 1905 Act area is Indian Country. Accordingly, EPA should grant the Tribes' TAS Application.

Respectfully submitted this 21st day of May, 2010.

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