EASTERN SHOSHONE TRIBE
AND
NORTHERN ARAPAHO TRIBE
OF THE
WIND RIVER RESERVATION

Statement of Legal Counsel
Regarding the Tribes' Authority to Regulate Air Quality

DECEMBER 17, 2008

TABLE OF CONTENTS

I. INTRODUCTION 1

II. TRIBAL AUTHORITY UNDER THE CLEAN AIR ACT 2

III. THE BOUNDARY OF THE WIND RIVER RESERVATION 5

A. Analytical Framework 7

B. Statement of Facts 10
1. Treaty of 1868. 10
2. Lander Purchase Act 10
3. Fruitless 1891 and 1893 Negotiations 12
4. Thermopolis Purchase Act 13
5. 1905 Act 15
6. Implementation of the 1905 Act 19
7. 1939 Restoration Act 29
8. Boysen and Anchor Dam Acts 34
9. The 1953 Act 35
10. Recent Treatment of Opened Areas 39

C. Legal Analysis 43
1. Lander and Thermopolis Purchase Acts 43
2. The 1905 Act Did Not Disestablish the Wind River Reservation 45
a. The Language of the 1905 Act Does Not Evince a Clear Intent to Disestablish the Wind River Reservation 46
b. The Negotiations and the Legislative History Further Demonstrate that Congress Lacked the Intent to Disestablish the Reservation 53
c. Subsequent Events Confirm that the 1905 Act Did Not Diminish the Reservation 57
Congressional Action 57
Executive Action 60
State and Local Views 66
Demographic and Land-Use History 67
d. The Reservation Boundary of 1897 Continues to be Recognized in Recent Times 69
e. The Reservation Status Issue Was Actually Litigated and Resolved in the Tribes' Favor in the *Big Horn Adjudication* 72
Proceedings before the Special Master 73
Special Master's Report 74
District Court Decision 75
Final Disposition by Wyoming Supreme Court 76
f. The Facts Surrounding the 1905 Act Are Distinguishable from *Rosebud Sioux* 79
3. The Boysen Act Did Not Affect the Reservation Boundaries 82

4. The 1953 Act Did Not Affect the Reservation Boundaries 85

IV. CONCLUSION 87

TABLE OF AUTHORITIES

Cases

Arizona Public Service Company v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970 (2001) 4-5
Ash Sheep v. United States, 252 U.S. 159 (1920) 32,34-35,50-51,55,75,81
Bourland v. South Dakota, 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993) 83-84
Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) 47
Carpenter v. Shaw, 280 U.S. 363 (1930) 9
Cass County v. Leech Lake Band, 524 U.S. 103 (1998) 68
Choctaw v. Oklahoma, 397 U.S. 620 (1970) 9,52
Choctaw Nation v. United States, 119 U.S. 1 (1886) 9
Clarke v. Boysen, 39 F.2d 800 (10th Cir.), *cert. denied*, 282 U.S. 869 (1930 21,62
Conoco, Inc. v. Shoshone and Arapaho Tribes, 569 F. Supp. 801 (D. Wyo. 1983) 4
Crow Tribe of Indians v. State of Montana, 819 F.2d 895 (9th Cir. 1987) *aff'd*, 484 U.S. 997 (1988) 70, 86
Decoteau v. District County Court, 420 U.S. 425 (1975) 2,9,44,47,52,81
Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) 42,71
Farmers Insurance Exchange v. Allison Sage, Case No. 02-CV-94-J (D. Wyo. 2003) 71
Geraud v. Schrader, 531 P.2d 872 (Wyo. 1975) 40-41,71
Hagen v Utah, 510 U.S. 399 (1994) 44
Hanson v. United States, 153 F.2d 162 (10th Cir. 1946) 35
In Re The General Adjudication of All Rights to Use Water in the Bighorn River, 753 P.2d 76 (1988) ("*Big Horn I*") 72,78-79
In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming (Civ. No 4993) 75
Jones v. Meehan, 175 U.S. 1 (1899) 9,52
Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928) 86
Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) 4
Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) 49
Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) 83-84
Mattz v. Arnett, 412 U.S. 481 (1973) 7,49
Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 at *8 (D. Minn. 1998) 49
Minnesota v. Hitchcock, 185 U.S. 373 (1902) 50-51,54
Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999) 9,51-52,80
Moe v. Confederated Salish and Kootenai Tribe, 425 U.S. 463 (1976) 68
Montana v. United States, 450 U.S. 544 (1981) 4,5
Northern Arapaho Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987) 42,71
Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 68
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 46,51,79-82
Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) 2,7,9,44,46,48-49,60,75

Shoshone and Arapaho Tribes v. United States, 364 F.3d 1339 (Fed.Cir. 2004).....42,71
Shoshone Indian Tribe and Arapaho Indian Tribe v. Hathaway, Case No. 5367 (D. Wyo. 1969).....40,71
Shoshone Tribe v. United States, 299 U.S. 476 (1937) ("Shoshone Tribe").....10, 30,41
Solem v. Bartlett, 465 U.S. 463 (1984).....6-9,43,46,52-53,56-57,59,67-68,77,80,84-85
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).....8-9,44,46,68
State of Wyoming v. Moss, 471 P.2d 333 (Wyo. 1970).....74-75
State v. Blackburn, 357 P.2d 174 (Wyo. 1960).....85
State v. Clark, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980).....49
State v. Forge, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978).....49
United States v. Board of Com'rs of Fremont County, 145 F.2d 329 (10th Cir. 1944).....33,69
United States v. Celestine, 215 U.S. 278 (1909).....5,9
United States v. Dion, 476 U.S. 734 (1986).....5
United States v. Hampleman, Case No. 753 (D. Wyo. 1916).....63
United States v. Jenkins, 17 Fed.Appx. 769 (10th Cir. 2001).....71
United States v. LaPlant, 200 F. 92 (D.S.D. 1911).....75
United States v. Mazurie, 419 U.S. 544 (1975).....4,41,71
United States v. Mille Lacs Band of Chippewa Indians, 229 U.S. 498 (1913).....50-51
United States v. Webb, 219 F.3d 1127 (9th Cir. 2000).....80
Wyoming v. United States, 492 U.S. 406 (1989).....78
Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999).....80

Federal Statutes

18 U.S.C. § 1151.....2,52
25 U.S.C. § 176.....61
25 U.S.C. § 231.....40
25 U.S.C. §§ 312 *et seq*.....21,62
25 U.S.C. §§ 396a *et seq*.....38,86
Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*
25 U.S.C. § 463.....30,32
25 U.S.C. § 571-581 ("1939 Act").....30,59
25 U.S.C. § 574a.....42-43,59-60,72
25 U.S.C. § 575.....31,60
Clean Water Act, 42 U.S.C. § 7401 *et seq.*
42 U.S.C. § 7405.....1,3
42 U.S.C. § 7407.....1
42 U.S.C. § 7412.....1
42 U.S.C. § 7426.....1
42 U.S.C. § 7492.....1
42 U.S.C. § 7506a.....1
42 U.S.C. § 7511c.....1
42 U.S.C. § 7601.....1,3,5,87
42 U.S.C. § 7602.....3
42 U.S.C. § 7761d.....1
43 U.S.C. § 597.....27,59

15 Stat. 673 (1868) ("1868 Treaty") 10
17 Stat. 214 (1872) 10,11
18 Stat. 291 (1874) ("Lander Purchase Act") 11,43-44
25 Stat. 642 (1889) ("Nelson Act") 49
26 Stat. 222 (1890) 12,18
26 Stat. 989 (1891) 12
27 Stat. 120 (1892) 13
30 Stat. 62 (1897) ("Thermopolis Purchase Act") 14, 43-44,46,48,54
33 Stat. 352 (1904) 50
33 Stat. 1016 (1905) ("1905 Act") 6, 17-19,46-48,51,54,60,81
34 Stat. 78 (1906) 14, 44-45,57
35 Stat. 70 (1908) 57
35 Stat. 650 (1909) 58
37 Stat. 91 (1912) 23,58
39 Stat. 123 (1916) 26
39 Stat. 341 (1916) 24,58
39 Stat. 519 (1916) ("1916 Act") 26,58
39 Stat. 969 (1917) 59
40 Stat. 561 (1918) 59
41 Stat. 3 (1918) 59
41 Stat. 437 (1920) 28
46 Stat. 279 (1930) 27
48 Stat. 984 (1934) ("Indian Reorganization Act or IRA") 30
49 Stat. 176 (1935) 27
53 Stat. 685 (1939) 27
54 Stat. 628 (1940) 1,5,33,69,87
55 Stat. 207 (1941) 33,69
58 Stat. 887 (1944) 34,82
59 Stat. 318 (1945) 27
66 Stat. 780 (1952) ("Boysen Act") 34,82
67 Stat. 592 (1953) ("1953 Act") 35-37,85
70 Stat. 987 (1956) 35,70
72 Stat. 935 (1958) ("1958 Act") 38,86
88 Stat. 1910 (1975) 40

Federal Regulations

Clean Water Act Regulations

40 C.F.R. § 49.6 1
40 C.F.R. § 49.123 2
40 C.F.R. § 62.14351 2
40 C.F.R. § 71.2 2
40 C.F.R. § 122.2 2
40 C.F.R. § 144.3 2
40 C.F.R. § 258.2 2
40 C.F.R. § 350.1 2

40 C.F.R. § 355.20 2
40 C.F.R. § 370.2 2
40 C.F.R. § 372.3 2
Regulations Governing Use of Vacant Indian Lands. (July 25, 1912) 25

Other Authorities

Federal Register Documents
5 Fed. Reg. 1805 (May 17, 1940) 32,60
7 Fed. Reg. 7458 (Sept. 22, 1942) 32,60
7 Fed. Reg. 9439 (Nov. 17, 1942) 32,60
7 Fed. Reg. 1100 (Nov. 12, 1942) 32,60
8 Fed. Reg. 6857 (May 25, 1943) 32,60
9 Fed. Reg. 9749 (Aug. 10, 1944) 32,60
10 Fed. Reg. 2254 (Feb. 27, 1945) 32,60
10 Fed. Reg. 2812 (Mar. 14, 1945) 32,60
10 Fed. Reg. 7542 (June 2, 1945) 32,60
13 Fed. Reg. 8818 (Dec. 30, 1948) 32,60
21 Fed. Reg. 9195 (Nov. 24, 1956) 37
39 Fed. Reg. 27,561 (July 30, 1974) 32,60
53 Fed. Reg. 1854 (Jan. 22, 1988) 70
58 Fed. Reg. 32,856 (Jun. 14, 1993) 32,60
59 Fed. Reg. 43,956 (Aug. 25, 1994) 1
63 Fed. Reg. 7254 (Feb. 12, 1998) 4
73 Fed. Reg. 10,514 (Feb. 27, 2008) 72
Congressional Record
Cong. Rec. E5935 (June 1, 1972) 40,71
Cong. Rec. H1940 (Feb. 6, 1905) 16
Cong. Rec. H1942 (Feb. 6, 1905) 17,54
Cong. Rec. H1943 (Feb. 6, 1905) 17
Cong. Rec. H1945 (Feb. 6, 1905) 17,54,82
Cong. Rec. H5247 (April 21, 1904) 18
Cong. Rec. S12,159 (Aug. 9, 1916) 26,59
Department of Interior Documents
Florence E. Gallivan, 60 Int. Dec. 417 (1950) 69
II Op. Sol. on Indian Affairs 1607 (M-36172) (June 18, 1953) 35,51
Report of the Secretary of the Interior, October 10, 1872 11,44
Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909 20-21,61,63
House of Representatives Documents
H.R. Doc. No. 601, 59th Cong., 1st Sess. (1906) 20,62
H.R. Doc. No. 1274, 63rd Cong., 3d Sess. (1914) 25
H.R. Doc. No. 1478, 64th Cong., 2d Sess. (1916) 27
H.R. Doc. No. 1767, 64th Cong., 2d Sess. (1916) 27,64
H.R. Exec. Doc. No. 51, 53rd Cong., 2d Sess. (1894) 13

H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess. (1892) 12-13,53-54
H.R. Exec. Doc. No. 1870-1871, 41st Cong., 3d Sess. (1870-1871) 44
H.R. Rep. No. 269, 83rd Cong., 1st Sess. (1953) 36
H.R. Rep. No. 344, 59th Cong., 1st Sess. (1906) 14-15
H.R. Rep. No. 400, 62nd Cong., 2d Sess. (1912) 24,26,58,62
H.R. Rep. No. 975, 64th Cong., 1st Sess. (1916) 26
H.R. Rep. No. 2041, 60th Cong., 2d Sess. (1909) 26
H.R. Rep. No. 2355, 58th Cong., 2d Sess. (1904) 15,17,56
H.R. Rep. No. 2453, 85th Cong., 2d Sess. (1958) 36
H.R. Rep. No. 2658, 75th Cong., 3d Sess. (1938) 52
H.R. Rep. No. 3700, Part 2, 58th Cong., 3d Sess. (1905) 17,54-55
H.R. Rep. No. 103-704, 103rd Cong., 2d Sess. (1994) 42,72

Senate Documents

Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess. (1939) 31,60
S. Doc. No. 247, 54th Cong., 1st Sess. (1896) 13-14,44
S. Rep. No. 275, 77th Cong., 1st Sess. (1941) 33
S. Rep. No. 543, 62nd Cong., 2d Sess. (1912) 26
S. Rep. No. 644, 83rd Cong., 1st Sess. (1953) 36,38
S. Rep. No. 712, 64th Cong., 1st Sess. (1916) 26,59
S. Rep. No. 961, 59th Cong., 1st Sess. (1906) 14-15
S. Rep. No. 980, 60th Cong., 2d Sess. (1909) 26,58
S. Rep. No. 1508, 85th Cong., 1st Sess. (1958) 33,60
S. Rep. No. 1607, 82nd Cong., 2d Sess. (1952) 35
S. Rep. No. 1746, 85th Cong., 2d Sess. (1958) 36,38,70,86
S. Rep. No. 1980, 82nd Cong., 2d Sess. (1952) 34-35,51,69-70,82-83
S. Rep. No. 2621, 58th Cong., 2d Sess. (1904) 17,56

The State of Wyoming: A Book of Reliable Information Published by Authority of the Ninth Legislature (The S.A. Bristol Co. 1907) 22,66

White: Initial Points of the Rectangular Survey System (1996) 11,14

Statement of Legal Counsel Regarding the Tribes' Authority to Regulate Air Quality

I. INTRODUCTION

The Northern Arapaho and Eastern Shoshone Tribes (collectively "the Tribes") submit this Statement of Legal Counsel in support of the Environmental Protection Agency's ("EPA") determination that the Tribes meet the eligibility requirements of 40 C.F.R. § 49.6 for Clean Air Act program approval; (2) approval of grant program authority under Section 105 of the Act (42 U.S.C. § 7405); (3) recognition of the Wind River Reservation as an "affected State" for the purposes of Section 505(a)(2) of the Act (42 U.S.C. § 7761d(a)(2)); and (4) approval of treatment as a state for any additional provisions of the Clean Air Act for which no separate Tribal program is required.[1] *See* 59 Fed. Reg. 43,956, 43,964, 43,967-68 (Aug. 25, 1994). The EPA has authority to grant the Tribes' request based on the Act's delegation of federal authority to the Tribes to regulate air quality within the exterior boundary of the Wind River Reservation ("Reservation"). *See* 42 U.S.C. § 7601(d). As discussed herein, the present exterior boundary of the Reservation encompasses those lands reserved under the 1868 Treaty of Fort Bridger, less those areas removed from the Reservation under the Lander and Thermopolis Purchase Acts plus those lands acquired in Hot Springs County, Wyoming pursuant to 54 Stat. 628, 642 (1940).

[1] These additional provisions include: Section 107(d)(3), (42 U.S.C. § 7407(d)(3)), which requires notice of information that an area should be redesignated for purposes of the Act's nonattainment provisions; Section 112(r)(7)(B)(iii), (42 U.S.C. § 7412(r)(7)(B)(iii)), which requires that risk management plans be submitted by stationary sources to the state in which the source is located; Section 126, (42 U.S.C. § 7426), which requires notice to affected states of the construction or new or modified major stationary sources; and Sections 169B, (42 U.S.C. § 7492), 176A, (42 U.S.C. § 7506a) and 184, (42 U.S.C. § 7511c) which govern the establishment of interstate air pollution and visibility transport regions and commissions.

II. TRIBAL AUTHORITY UNDER THE CLEAN AIR ACT

Congress has plenary power to legislate within Indian country. U.S. Const., Art. I, Sec. 8. Congress has defined "Indian country" in 18 U.S.C. § 1151 to mean:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although the definition of Indian country is found in the criminal code, the Supreme Court has applied the definition to questions of civil jurisdiction. *See Decoteau v. District County Court*, 420 U.S. 425, 427, n.2 (1975).

The definition of Indian country is used throughout the federal scheme of environmental regulation in this country. *See* 40 C.F.R. § 49.123 (tribal Clean Air Act authority); 40 C.F.R. § 62.14351 (solid waste); 40 C.F.R. § 71.2 (federal operating permit program); 40 C.F.R. § 122.2 (national pollutant discharge elimination system); 40 C.F.R. § 144.3 (underground injection control); 40 C.F.R. § 258.2 (municipal solid waste landfills); 40 C.F.R. §§ 350.1, 355.20, 370.2, 372.3 (Superfund, emergency planning, community right-to-know). Federal jurisdiction over Reservation lands owned by non-Indians serves pragmatic ends:

> Where the existence or non-existence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land . . . enforcement officers operating in the area will find it necessary to search tract books in order to determine whether . . . jurisdiction over each particular offense . . . is in the State or Federal government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151.

Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962).

In 1990, Congress amended the Clean Air Act ("CAA") to expressly delegate to Indian tribes the authority to implement CAA programs within Indian country. In § 301(d) of the CAA, Congress authorized the EPA Administrator to "treat Indian tribes as States" for the purposes of the CAA and to "provide any such Indian tribe grant and contract assistance to carry out functions provided" for in the CAA. 42 U.S.C. § 7601(d)(1). Congress also required the Administrator to promulgate regulations specifying those provisions of the CAA for which it is appropriate to treat Indian tribes as states. 42 U.S.C. § 7601(d)(2). Congress specified that treatment as a state could be authorized if:

1. the Indian tribe has a governing body carrying out substantial governmental duties and powers;

2. the functions to be exercised by the Indian 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; and

3. the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

42 U.S.C. § 7601(d)(2).

Under § 105(a)(1)(A) of the CAA, the EPA Administrator may "make grants to air pollution control agencies, within the meaning of paragraph (1), (2), (3), (4), or (5) of section 302, in an amount up to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards." 42 U.S.C. § 7405(a)(1)(A). For the purposes of this section, "implementing" means "any activity related to the planning, developing, establishing, carrying-out, improving, or maintaining of such programs." *Id*. Section 302 of the CAA defines "air pollution control agency" to include "[a]n agency of an Indian tribe." 42 U.S.C. § 7602(b)(5). The Tribes' *Application for Treatment in a Manner Similar to a State for Purposes of the Clean Air Act and*

for Program Authority under Section 105 of the Clean Air Act provides a detailed description of the Wind River Environmental Quality Commission as an agency of the Tribes and its program capabilities.

In 1998, EPA published final regulations known as the Tribal Authority Rule ("TAR") which set standards for approving tribal applications for treatment as a state ("TAS") under the CAA. 63 Fed. Reg. 7254 (Feb. 12, 1998). In adopting the TAR, EPA found that the 1990 Amendments to the CAA constitute an *express delegation* to Indian tribes of federal authority to regulate air quality within the exterior boundaries of their reservations, a delegation that applies regardless of whether the land is owned by the tribes. *Id.* at 7254.

EPA's determination that Congress delegated authority to tribes to regulate all sources of air pollution within reservation boundaries differs from its interpretation of the corresponding provisions of the Clean Water Act authorizing EPA to treat tribes as states. In the Clean Water Act regulations, EPA determined that a tribe seeking to regulate the conduct of non-Indians on fee lands within reservation boundaries would have to demonstrate inherent tribal sovereignty to regulate water quality on those lands under the test articulated in *Montana v. United States*, 450 U.S. 544, 564-65 (1981). The *Montana* test is relevant only when a tribe seeks to regulate air quality *off* of its reservation. [2]

In *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1287-92 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970 (2001), the Court of Appeals for the District of Columbia upheld

[2] Although the Tribes' inherent sovereignty is not at issue in this application, the courts have recognized the Tribes' interest in regulating non-Indian lands to achieve governmental goals. In *United States v. Mazurie*, the U.S. Supreme Court held that the Shoshone and Arapaho Tribes had independent authority over the subject matter of their liquor regulation. *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975). The federal courts have upheld the Tribes' authority to regulate non-Indians in the areas of taxation and zoning. *Conoco, Inc. v. Shoshone and Arapaho Tribes*, 569 F. Supp. 801 (D. Wyo. 1983); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982). In *Conoco*, the district court cited with approval *Knight* which "contains abundant language in support of tribal authority to control use of reservation land (even non-Indian land) without delegation of the power of Congress and without Secretarial approval." *Conoco*, 569 F.Supp. at 807.

EPA's interpretation of the 1990 CAA Amendments. The court held that "EPA correctly interpreted [42 U.S.C.] § 7601(d) to express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation without the need to determine, on a case-specific basis, whether a tribe possesses 'inherent sovereign power' under *Montana*." *Id.* at 1288. The court reasoned that the clear distinction made in § 301(d)(2)(B) of the CAA between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" meant that Congress "considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction." *Id.* The Court also reasoned that a contrary result would lead to a "checkerboard" pattern of regulation on reservations that would be contrary to the purpose and provisions of the CAA. *Id.*

Pursuant to § 301(d) of the CAA, the Tribes may exercise delegated authority to regulate air quality in accordance with the CAA and EPA regulations in all areas within the exterior boundary of the Wind River Reservation. This delegation of authority includes eligibility to receive grant and contract assistance under §105 of the Act. As discussed in detail below, the current Reservation boundary encompasses the original reservation reserved under the 1868 Treaty of Fort Bridger, less those areas removed from the Reservation under the Lander and Thermopolis Purchase Acts plus those lands acquired in Hot Springs County, Wyoming pursuant to 54 Stat. 628, 642 (1940).

III. THE BOUNDARY OF THE WIND RIVER RESERVATION.

The Supreme Court has held that only Congress can disestablish a reservation, and its intent must be clear and plain. *United States v. Celestine,* 215 U.S. 278, 285 (1909); *United States v. Dion,* 476 U.S. 734, 738-39 (1986). "Once a block of land is set aside for an Indian

reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). It is presumed that diminishment did *not* take place and that the reservation boundary remains intact, unless the language and legislative history of an act demonstrate *substantial and compelling evidence* of a congressional intention to diminish the size of the reservation. *See Id.* at 472.

Congress enacted several acts to manage non-Indian settlement around the Wind River Reservation, and to administer different land uses. Some acts terminated the reservation status of Tribal lands and thereby reduced the extent of the Tribes' territorial jurisdiction. Other acts did not. At Wind River, Congress demonstrated different intentions with regard to different portions of the Reservation. In some instances, Congress expressed its intent to remove lands from the reservation. In other instances, Congress simply provided a mechanism for opening lands for potential settlement. The Act of March 3, 1905, 33 Stat. 1016 (1905) ("1905 Act") fits the latter description.

As presented in detail below, the 1905 Act does not fall into the category of statutes held to diminish a reservation. Instead, the Act established a "trust" mechanism, by which the United States acted as a trustee charged with the task of selling specific lands to homesteaders and applying the proceeds, if any, for the Tribes' benefit. Congress's understanding that some of the lands might never be sold is instructive that there was no intent to diminish. In characterizing the 1905 Act, it is illustrative to compare and contrast two other cession acts that *did* change the Reservation boundary: the Lander and Thermopolis Purchase Acts. In light of this comparison, and the application of the analysis provided by the United States Supreme Court for

disestablishment questions, it is clear that Congress did not intend the 1905 Act to effect a termination of reservation status over the lands opened for settlement by that Act.

This Statement of Legal Counsel provides the relevant historical facts, along with the legal analysis which shows that the Reservation boundary has not changed since 1897.

A. Analytical Framework.

The U.S. Supreme Court has established an analytical framework to determine whether a reservation has been disestablished or diminished. Disestablishment or diminishment of an Indian reservation does not result merely from changes in ownership of individual parcels. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

The "effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. A detailed inquiry into Congressional intent is required because "Congress seldom detailed whether opened lands retained reservation status or were divested of all Indian interests." *Id.* at 468. The Supreme Court has never been willing to extrapolate a specific congressional purpose of diminishing reservations with the passage of every surplus land act. *Id.* at 468-69. "[I]t is settled law that some surplus land acts diminished reservations . . . and other surplus land acts did not . . . ." *Id.* at 469. For example, in *Seymour*, 368 U.S. at 355, and *Mattz v. Arnett*, 412 U.S. 481, 501-02 (1973), the U.S. Supreme Court held that statutes simply declaring surplus land subject to settlement, entry, and purchase, did not evince an express congressional intention to diminish reservations. In *Solem*, 465 U.S. at 472, the Court held a phrase authorizing the Secretary to

"sell and dispose" of surplus lands lacked an intent to diminish. In contrast, the Court has held a statute that provided for "the total surrender of tribal claims in exchange for fixed payment," was evidence of explicit intent to diminish a reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998) (emphasis added).

In the absence of "explicit language of cession and unconditional compensation," the events surrounding the passage of the act – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative reports presented to Congress" – are considered relevant to a determination whether there was a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. If not, there can be no finding of disestablishment. *Id.* at 472.

To the extent that the language of the act and the circumstances underlying its passage are equivocal on the question of congressional intent to disestablish, post-enactment events also may be considered, although they are of "lesser" significance. *Solem*, 465 U.S. at 471. "Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.* at 471.

If the foregoing steps are not determinative of Congressional intent, one must look to the "subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 472. Who actually moved onto opened reservation lands and the subsequent history provides some guidance in determining Congressional intent. 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. Problems of an

imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country. *See Seymour*, 368 U.S. at 358. Nevertheless, the Court has cautioned that analysis of the subsequent demographic history is a potentially unreliable indicator of congressional intent to disestablish. *Solem*, 465 U.S. at 472 n. 13.

In applying these principles, the words of agreements must be construed in the manner that the Indians would have understood them and ambiguities in statutes and agreements must be resolved in the Indians' favor. *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 200 (1999); *Choctaw v. Oklahoma*, 397 U.S. 620, 631 (1970). These long-applied canons of construction are rooted in the trust relationship between the United States and the Indians, as well as the fact that many agreements and statutes were imposed on Indians who had no choice but to consent. *See, e.g., Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). In reservation diminishment cases, the rule that "legal ambiguities are resolved to the benefit of the Indians" must be given "the broadest possible scope." *DeCoteau*, 420 U.S. at 447; *see also Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Celestine*, 215 U.S. at 290.

In the end, there are limits to how far the courts will go to determine Congress's intent in a surplus land act. "When both an act and its legislative history fail to provide *substantial and compelling evidence* of a congressional intention to diminish Indian lands, [the courts] are bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472 (emphasis added); *accord: Yankton Sioux*, 522 U.S. at 344 (courts will resolve ambiguities in favor of Indians and not lightly find diminishment).

B. Statement of Facts

1. Treaty of 1868.

The Wind River Reservation was established by the July 3, 1868, Treaty of Fort Bridger ("1868 Treaty").[3] The 1868 Treaty reserved "for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."[4] In 1878, the Arapahos were placed on the Reservation and ultimately held to have equal property rights with the Shoshones. *See Shoshone Tribe v. United States*, 299 U.S. 476, 486-89 (1937). The 1868 Reservation boundary was as follows:

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

Notwithstanding the government's promise of "absolute and undisturbed use," individuals and local governments almost immediately sought to gain access to Reservation lands.[5]

2. Lander Purchase Act.

In 1872, Congress authorized negotiations for a cession of the southernmost portion of the Reservation, which was already being occupied by non-Indian gold miners.[6] Congress

---

[3] 15 Stat. 673 (1868).

[4] *Id.* art. 2.

[5] In 1869, the Wyoming Territorial Legislature enacted a memorial asking President Grant to move the Indians elsewhere and to open the Wind River Reservation to white settlement. Larson: History of Wyoming (2d. ed. 1978), p. 76. *See also* M. Hoopengarner, To Make the Desert Bloom: How Irrigation Came to the Ceded Portion of the Wind River Reservation, p. 76 *citing* Council Journal, Territory 1869, p. 17 (Oct. 13, 1869); House Journals 1869 Terr., Vol. 1, pp. 221-245. (BATES SH08398, SH11253)

[6] 17 Stat. 214 (1872); Larson, p. 112 (BATES SH00496)

directed Felix Brunot to negotiate an exchange of tribal lands south of the 43rd parallel in exchange for equal acreage north of the Reservation.[7] On September 26, 1872, the Tribes instead agreed to an outright sale to the United States all of its interests in Reservation lands generally south of the 43rd parallel for a lump sum payment of $25,000 to be expended by the President to acquire cattle for tribal members.[8] This transaction is known as the Lander Purchase.[9]

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

> [W]hereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties, arising in consequence of said occupancy, *to change the southern limit of said reservation*.[10]

Article 3 states that the line north of the ceded lands is "the southern line of the Shoshone reservation," *i.e.*, the new "southern limit of said reservation."[11] The Lander Purchase Act made no provision for any retained Indian interests in the lands sold.

The Lander Purchase Act required the lands to be surveyed.[12] On October 2, 1874, the Commissioner of the General Land Office gave instructions to survey the Reservation. Those instructions described the then reservation boundary as "[t]he limits of the Reservation as per Treaty of July 3rd 1868, Art. II . . . modified by articles of convention with said Indians on

---

[7] 17 Stat. 214 (1872).

[8] *Id.*; the land exchange originally proposed was viewed as impractical, as those lands were viewed as subject to the claims of other tribes. Report of the Secretary of the Interior (Oct. 10, 1872) at 510. (BATES SH08983)

[9] Some historical documents will refer to the Lander Purchase as the "Brunot Purchase." (BATES SH00497)

[10] 18 Stat. 291, 292 (1874) (emphasis added).

[11] *Id.*

[12] Letter, S.S. Burdett, Commissioner, General Land Office, Department of the Interior, to James W. Miller, Esq. (Oct. 2, 1874) *reprinted in* White: Initial Points of the Rectangular Survey System (1996). (BATES SH08377)

September 26, 1872."[13] The State of Wyoming received school lands in the area sold under the Act on the same basis as other states upon admission to the Union.[14] There were no Indian allotments in the Lander Purchase area.

3. Fruitless 1891 and 1893 Negotiations.

In March 3, 1891, a Commission was appointed by Congress with instructions to negotiate a surrender of portions of the Reservation the Indians "may choose to dispose of."[15] The Commission proceeded to negotiate a proposed cession whereby the Tribes agreed to "cede, convey, transfer, relinquish, and surrender, forever and absolutely . . . all their right, title, and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto" lying north of the Big Wind River.[16] In consideration for the lands sold, the proposed outright sale of Tribal lands would have paid the Tribes the sum of $600,000.[17] The proposed agreement further provided that lands around the hot springs in the northeast corner of the Reservation should "be reserved from entry as public lands" contemplating that the remainder of the ceded lands would be opened to settlement as public lands.[18] In light of the clear Congressional intent to acquire all of the Tribes' interest forever and absolutely, the Assistant

[13] *Id*. The instructions for negotiations for disposal of reservations lands issued on July 14, 1891, confirm that the Reservation no longer contained the lands covered by the Lander Purchase Agreement. *See* Instruction of July 14, 1891, *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 42 (1892). (BATES SH00578)

[14] 26 Stat. 222 (1890); *see, e.g.*, lands in §§ 16 & 36 in Township 33 North, Ranges 98, 99, and 100 West, 6th Principal Meridian on the Lander Surface Management Status map prepared by the Bureau of Land Management (1990). (BATES SH01119)

[15] Act of March 3, 1891, 26 Stat. 989, 1009 (1891); Instruction of July 14, 1891, *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 42 (1892). (BATES SH00578)

[16] Articles of Agreement *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 29 (1892). (BATES SH00578)

[17] *Id.* at 29-30. (BATES SH00578)

[18] *Id.* at 16. (BATES SH00578)

Attorney General requested legislative language to designate the lands to be acquired as public lands.[19] Congress considered and rejected the proposed 1891 cession.

A second commission was sent to meet with the Tribes in 1893, but the parties were unable to reach an agreement. [20] During the negotiations, the commissioners proposed to pay the Tribes $750,000 in exchange for a cession of all Reservation land lying north of the Big Wind River as well as lying south and east of the Popo Agie/Little Wind River. The Tribes refused to entertain an agreement selling lands in the southeastern portion of the Reservation.[21] In any event, the negotiations did not lead to an agreement.

4. Thermopolis Purchase Act.

In 1896, the United States, represented by Indian Inspector James McLaughlin, entered into negotiations with the Tribes for the sale of a tract of land around Big Horn Hot Springs, near the present-day town of Thermopolis. McLaughlin explained to the Tribes that he was sent to determine whether the tract was suitable to be "set apart as a national park or reservation to be under Government control."[22] In April 1896, the parties entered into an agreement, known as the "Thermopolis Purchase," in which the Tribes agreed to "cede, convey, transfer, relinquish and surrender, *forever and absolutely* all their right, title, and *interest of every kind and character* in and to the lands and the water rights appertaining thereunto" with respect to a tract embracing the

[19] Letter, Geo. H. Shields, Assistant Attorney General, to Secretary of Interior (Dec. 18, 1891), *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 61 (1892). (BATES SH00578)

[20] 27 Stat. 120, 138 (1892).

[21] Letter, D.M. Browning, Commissioner, to Secretary of the Interior (Nov. 29, 1893), *reprinted in* H.R. Exec. Doc. No. 51, 53rd Cong., 2d Sess., 4-5 (1894). (BATES SH00644)

[22] Articles of Agreement and minutes of meeting with Tribes *reprinted in* S. Doc. No. 247, 54th Cong., 1st Sess., 4 (1896). (BATES SH00664)

Big Horn Hot Springs.[23] The agreement provided that the lands sold would be "set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public," with the Indians "allowed to enjoy the advantages of the conveniences that may be erected thereat with the public generally." The Thermopolis Purchase agreement provided that "in consideration for the lands ceded, sold, relinquished and conveyed," the United States would pay the Tribes $60,000 outright.[24]

Congress ratified the Agreement, but struck portions setting aside the area as a national park and providing the Indians with rights to use the hot springs.[25] Instead of creating a national park, Congress transferred a section of land immediately around the hot springs to the State of Wyoming and declared the remainder of the ceded lands to be "public lands of the United States."[26]

During passage of the Thermopolis Purchase Act, the Acting Commissioner of Indian Affairs told Congress that the boundary of the tract would need to be surveyed. The pre-existing eastern boundary of the Reservation, including the Thermopolis Agreement lands, had been surveyed as part of the Reservation's meridian (the "Wind River Meridian") after passage of the Lander Purchase Act.[27] The General Land Office re-surveyed the lands acquired under the Thermopolis Purchase Act as public lands under the 6th Principal Meridian.[28] The survey was

---

[23] *Id.* at 4 (emphasis added). (BATES SH00664)

[24] *Id*. (BATES SH00664)

[25] 30 Stat. 62, 93 (1897) ("Thermopolis Purchase Act").

[26] *Id.* The lands originally were subject only to the public land laws for homesteading and townsites. In 1906, Congress extended all the public land laws to the ceded area, not just the homestead laws. 34 Stat. 78 (1906). H.R. Rep. No. 344, 59th Cong., 1st Sess., 2 (1906); S. Rep. No. 961, 59th Cong., 1st Sess., 2 (1906). This subsequent action was taken to allow full development of the area by settlers. (BATES SH00695, SH00691)

[27] *See* Letter, Thos. P. Smith, Acting Commissioner to Secretary (May 5, 1896) *reprinted in* S. Doc. No. 247, 54th Cong., 1st Sess., 15 (1896); White: Initial Points of the Rectangular Survey System (1996) at p. 416, 418. (BATES SH08377, SH00664)

[28] Letter, Smith to Secretary at 15. The survey notes refer to the 10 mile section of the east side of the ceded tract as

consistent with Congress's direction that the ceded lands became public lands. The Tribes retained no rights in the ceded area separate from access as members of the general public. There is no record that the federal government ever treated the ceded Thermopolis Purchase area as Indian lands after passage of the Act.

5. 1905 Act.

On March 4, 1904, Wyoming Representative Frank Mondell introduced H.R. 13481 to provide for opening portions of the Reservation to settlement. H.R. 13481 was based loosely on the failed 1891 and 1893 negotiations, but included provisions rejected by the Tribes in 1891 and 1893.[29] The bill proposed to change the sum certain payment to a system in which lands would remain in trust and the Tribes would release their possessory right to the Government so that, as their trustee, it could provide full title to prospective purchasers. After consideration by the House of Representatives, it was agreed to submit the bill to the Tribes for their consideration.[30]

On April 19, 1904, Indian Inspector James McLaughlin returned to the Reservation "to present to [the Tribes] a proposition for the opening of certain portions of [their] reservation for settlement by the whites."[31] McLaughlin described the proposed arrangement as follows:

> [T]he government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians. [32]

---

the "old East boundary of Reservation. Field notes of Edward F. Stahle, Deputy Surveyor (July 17-19, 1899). The survey designating the lands under the 6th principal meridian was filed in Lander, WY on August 10, 1900. H.R. Rep. No. 344, 59th Cong., 1st Sess., 2 (1906); S. Rep. No. 961, 59th Cong., 1st Sess., 2 (1906). (BATES SH00695, SH00691)

[29] *See* H.R. Rep. No. 2355, 58th Cong., 2d Sess., 3 (1904). (BATES SH00721)

[30] H.R. Rep. No. 2355, 58th Cong., 2d Sess., 2 (1904); *see also* Letter, A.C. Tonner to Secretary of the Interior (Mar. 18, 1904), *reprinted in* H.R. Rep. No. 2355 at 10. (BATES SH00721)

[31] Minutes of council held at Shoshone Agency, Wyo. (April 19, 1904) ("1904 Minutes") at 2 (BATES SH01367)

[32] *Id. at* 3-4. (BATES SH01367)

McLaughlin described H.R. 13481 as "having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with the means to make yourselves comfortable upon your reservation."[33]

The Tribes were apparently willing to allow opening of part of the Reservation to settlement because it was used mostly for grazing.[34] The Tribes asked McLaughlin if they could preserve for their exclusive use lands along the north side of the Big Wind River where they had existing homes.[35] McLaughlin responded that it was better to have a water boundary between the opened area and the exclusive tribal area to better prevent trespass problems, but assured the Tribes that they would be free to retain any allotments selected on the north side of the river.[36] The Tribes were told they had no choice on the payment scheme or the boundary of the ceded portion.[37] Ultimately, the document taken back to Congress proposed to open a portion of the Reservation to settlement, defer payment for individual parcels until received by the United States, and to reimburse any funds advanced by the United States from proceeds from the sale of lands. The Tribal members at the negotiation were assured by Inspector McLaughlin when he was there "that the unsold lands would belong to [the Tribes]" until they were sold.[38]

A new bill, H.R. 17994, based on McLaughlin's discussions with the Tribes, was brought before Congress on February 6, 1905.[39] Representative Mondell explained the bill would provide for "the opening to homestead settlement and sale under the town-site, coal-land, and

---

[33] *Id.* at 4. (BATES SH01367)

[34] *Id.* at 12. (BATES SH01367)

[35] *Id.* at 10. (BATES SH01367)

[36] *Id.* at 14. (BATES SH01367)

[37] *Id.* at 8. (BATES SH01367)

[38] *See* Letter, Shoshoni Delegation to Commissioner of Indian Affairs (Mar. 10, 1908) at 1; Letter, Arapahoe Delegation to Commissioner of Indian Affairs (Mar. 9, 1908). (BATES SH08410, SH08402)

[39] Cong. Rec. H1940 (Feb. 6, 1905) (BATES SH08342)

mineral-land laws of about a million and a quarter acres in the Wind River Reservation in central western Wyoming."[40] Congress did not expect immediate, or for that matter full, settlement of the opened Reservation lands.

> It is believed that at least 150,000 acres of this land will be taken up under the homestead law at $1.50 an acre; that possibly 150,000 acres more would be taken at $1.25 an acre; the remaining lands would unquestionably, with the possible exception of about 100,000 acres of very rough, mountainous land, sell for $1 an acre. It is difficult at this time to estimate how much land would be sold under the coal and mineral land laws.[41]

Several members of the House opposed the bill. The principal objection was a provision to give Asmus Boysen, a non-Indian coal lessee, a preferential right to acquire up to 640 acres of coal or mineral land within "said Reservation."[42] The opponents of this provision argued that the Boysen proviso was unnecessary because a clause in Boysen's lease provided that it would terminate automatically when the Indian title to the land was "extinguished with the consent of the Indians."[43] Rep. Fitzgerald argued that because the legislation would extinguish the Indian title to the opened lands, Boysen no longer had any rights under the lease.[44] In response to Fitzgerald's argument, Rep. Marshall, explained:

> The gentleman from New York [Mr. Fitzgerald] says that Mr. Boysen's lease was canceled when the title passed from the Indians. True, there was a clause to the effect that when the lands were restored to the public domain this lease was canceled. The difficulty is, however, that *these lands are not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians*, and the clause which the gentlemen speaks of does not apply, and I think he knows it, as it was discussed in committee.[45]

---

[40] Cong. Rec. H1942 (Feb. 6, 1905) (BATES SH08543)

[41] H.R. Rep. No. 2355, 58th Cong., 2d Sess., 4 (1904); *see also* S. Rep. No. 2621, 58th Cong., 2d Sess., 4 (1904). (BATES SH00721, SH00743)

[42] 33 Stat. 1016, 1020 (1905); *see* Cong. Rec. H1942 (Feb. 6, 1905). (BATES SH11655)

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

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

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

The so-called 1904 "Agreement," was unilaterally modified by Congress on March 3, 1905, and is known as the 1905 Act.[46] The 1905 Act, in part, deleted language in Articles II, III and IX of the 1904 Agreement which had obligated the United States to acquire outright Sections 16 and 36 in each township.[47] These sections are known as "school sections," which are public land granted to Wyoming in Section 4 of its Act of Admission for the funding of schools.[48] The Congressional debate indicates that the language referring to school lands was deleted so that the State could take "lieu lands" - federal lands granted to a state instead of sections within reservations where the state lacked jurisdiction.[49]

Article I of the 1905 Act provides only that the Tribes "cede, grant and relinquish" their interest to Reservation lands north of the Big Wind River and east of the Popo Agie River with the cession subject to the terms and conditions of the 1905 Act. Article II, however, describes the "consideration" as applicable to the "lands ceded, granted, relinquished, *and conveyed* in Article I."[50] Importantly, Article I also provided that any Tribal member who had selected a tract of land "within the portion of said reservation hereby ceded was entitled to have the same allotted and confirmed to him or her."[51] Therefore, the predicate for the word "conveyed" in Article II must be the allotment provisions of Article I, not the opening of the remaining lands for settlement.

Rather than payment of a sum certain as in prior agreements, Article II provides that the United States "stipulates and agrees to dispose" of the land as "provided under the provisions of

---

[46] 33 Stat. 1016 (1905).

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

[48] 26 Stat. 222 (1890).

[49] Cong. Rec. H5247 (April 21, 1904); *see also* 33 Stat. 1016, 1018. (BATES SH11655)

[50] 33 Stat. 1016 (emphasis added).

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

the homestead, town-site, coal, and mineral land laws" at the prices specified in the Act, and to pay the Tribes "the proceeds derived from the sales of said lands."[52] Article IX of the 1905 Act provides that the ceded lands would continue to be held in trust by the United States for the Tribes until the lands were actually sold:

> It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, *it being the understanding that the United States shall act as trustee for said Indians to dispose of such lands* and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.[53]

6. Implementation of the 1905 Act.

Immediately after passage of the 1905 Act, the Office of the U.S. Surveyor General issued a contract for a survey required in the 1905 Act. The direction was to survey the opened lands of the Reservation.[54] Plats produced as the result of the survey bear the legend "North Boundary Shoshone Indian Reservation" on the northern border of the opened area and "East Boundary Shoshone Indian Reservation" on the eastern border of the opened area.[55] The surveys for these plats were completed by December 1905 and approved by the General Land Office in 1906.

In 1906, the Secretary reported to Congress on legislation extending the time for opening the Reservation. The Secretary described the opened lands as "the ceded portion of the

---

[52] 33 Stat. 1016, 1019-20.

[53] 33 Stat. 1016, 1020-21 (1905) (emphasis added).

[54] Special Instructions, Contract No. 300 (May 1, 1905); Special Instructions, Contract No. 301 (May 1, 1905); Special Instructions, Contract No. 302 (May 1, 1905). (BATES SH07623, SH07598, SH07584)

[55] *See, e.g.*, Plat of Fractional Township No. 6 North Range No. 6 East of the Wind River Meridian, Wyoming approved April 10, 1906 (eastern boundary); Plat of Fractional Township No. 7 North Range No. 6 East of the Wind River Meridian approved April 6, 1906. (BATES SH08871, SH08876)

Shoshone or Wind River Indian Reservation."[56] The Secretary's report repeatedly speaks in terms of Reservation land being opened to settlement or entry.[57]

The 1905 Act area was formally opened to homestead entry by a Presidential Proclamation issued June 2, 1906. The publications advertising the availability of land show the opened area as part of the Shoshone or Wind River Reservation.[58] Unlike some disestablished reservations where all or most of the land was quickly acquired by non-Indians or the government, there was no rush of non-Indian settlers to occupy the lands. As of 1909, only 113,743.68 acres or 7.91 percent of the 1,438,633.66 acres opened to settlement were actually sold.[59] By 1914, only 128,986.58 acres or 8.97 percent had been sold.[60] At this same time, in addition to the unsold tribal lands, approximately 16,000 acres in the opened area had been allotted to members of the Northern Arapaho Tribe and 34,000 acres to members of the Eastern Shoshone Tribe.[61]

It was clear even in 1909 that some of the alleged entrymen had not actually settled in the opened area. When the Wyoming Central Irrigation Company attempted to secure a free right-of-way for an irrigation ditch, two settlers, both living outside the Reservation in Lander and Casper, refused to grant the right-of-way.[62] When the Midvale Irrigation District was organized

---

[56] H.R. Doc. No. 601, 59th Cong., 1st Sess., 1 (1906). (BATES SH00828)

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

[58] E.F. Stahle and F.M. Johnson, Shoshone (or Wind River) Indian Reservation Wyoming, The Agricultural and Mineral Resources of the Ceded Area to be opened for settlement (August 15, 1906). (BATES SH00797)

[59] Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, p. 127. (BATES SH08349)

[60] Letter, E.B. Meritt, Assistant Commissioner to Hon. C.O. Lobeck, House of Representatives (Jun. 12, 1914) at 5. (BATES SH08201)

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

[62] Hoopengarner, p. 121. (BATES SH11253)

in 1920, 68 percent of the landowners did not live in Fremont County - with 63 percent living out-of-state.[63]

In January and February 1905, a railroad company applied for a right-of-way through the Wind River Canyon pursuant to the Act of March 2, 1899, 25 U.S.C. §§ 312 *et seq.*[64] Even though the 1905 Act was enacted in March, the right-of-way was filed and approved on April 29, 1905 in accordance with the 1899 Act for rights-of-way across Indian lands.[65] This action was approved by the courts.[66] In 1909, the Department of Interior reaffirmed its position that all rights-of-way across Indian reservations were to be made in accord with the 1899 Act, including another railroad right-of-way through the opened lands to Hudson, Wyoming.[67]

On June 4, 1906, Edmo LeClair, along with other tribal members, was allotted lands in the opened area.[68] They irrigated this land on their own until 1914 when the Bureau of Indian Affairs took over operation of the ditch.[69] At that time, Superintendent Jones advised the homesteaders on the LeClair ditch that "he was looking out for the Indians and the homesteaders could look out for themselves."[70] In 1915, the *Riverton Review* reported that $45,000 was appropriated by Congress "for the completing of the LeClair ditch near Riverton, on the Wind River reservation."[71]

---

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

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

[65] *See id.* at 812.

[66] *See id*.

[67] Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, p. 60, 63. BATES SH08349

[68] Transcript of sworn testimony of Edmo LeClair before F.C. Campbell, District Superintendent, District No. 4, U.S. Indian Service (Oct. 5, 1926), p. 3. (BATES SH11173)

[69] *Id.* at p. 3-4. (BATES SH11173)

[70] *Id.* at p. 5. (BATES SH11173)

[71] Hoopengarner, p. 173, *citing Riverton Review* (Feb. 17, 1915). (BATES SH11253)

In 1907, the Wyoming Department of Immigration published a book entitled "The State of Wyoming: A Book of Reliable Information Published by Authority of the Ninth Legislature."[72] The book describes Riverton as "another new town located within the Indian Reservation."[73] Separate from a discussion of settlement on public lands within the State, the book discusses the opportunity to settle on that "part of the Shoshone or Wind River Reservation [that] was opened for settlement" under the 1905 Act.[74] In that same year, the *Press of the Riverton News* published a pamphlet encouraging settlement on the Reservation. The pamphlet described a portion of the opened area as "350,000 Acres of Virgin Land on the Shoshone Indian Reservation, susceptible of irrigation, opened by the Government to entry."[75] The pamphlet further provided that these irrigable lands were found "in that portion of the Shoshone Indian Reservation, recently opened to settlement."[76]

In 1907, a dispute between the Wyoming Central Irrigation Company and the Settlers' Co-operative Irrigation Company arose concerning development of irrigation in the opened area.[77] The *Riverton Republican* of December 28, 1907, described the case as follows:

---

[72] The Wyoming Legislature established a Department of Immigration composed of the State Geologist, State Engineer, and Commissioner of Public Lands in 1907. The State of Wyoming: A Book of Reliable Information Published by Authority of the Ninth Legislature 25 (The S.A. Bristol Co. 1907). (BATES SH13079)

[73] *Id.* (BATES SH13079)

[74] *Id.* at 120. (BATES SH13079)

[75] Pamphlet entitled "Sweet and Prosperous Home is the Foundation of Happiness – A 160-acre Farm can be Obtained Cheap on 10-years Time – Just Like a Building Association on the Shoshone Reservation Wyoming – 350,000 Acres Opened For Public Entry By the Government – Greatest Irrigation System in the Country Being Built by Wyoming Central Irrigation Co. Under Supervision of the State of Wyoming – Fertile Lands, Mild Climate, Coal, Lubricating and Illuminating Oil, Gold and Copper Mining, Cattle, Sheep, Horses, Hogs, Water Power – Riverton, Wyoming," *Press of Riverton News*, 2 (1906). (BATES SH08552)

[76] According to the pamphlet, the "opened portion" of the reservation embraced 1,150,000 acres, the irrigable portion covered 350,000 acres of this and the remainder of the opened portion was fine grazing, mineral and coal lands. *Id.* at 3. It goes on to say that "[t]he Eastern boundary of the entire tract and Riverton, the initial and distributing point, are on the Chicago & Northwestern Railway." *Id.* at 12. Copper is described as being located in "[t]he Kirwin District and the Washakie Needles Section, situated at the Northwestern corner of the Reservation." *Id.* at 14. (BATES SH08552)

[77] *See* Hoopengarner, p. 111 *Big Wind River, in re Application of Settlers' Co-operative Irrigation Company, in*

"The question involved in this action today before Judge Carpenter is one of vital interest to the Reservation at large. Whether the State Engineer had, at the time of granting the Central Irrigation Company the contract to irrigate the Shoshone Reservation, the right to do so?"[78]

Similarly in 1910, Wyoming State Engineer Clarence T. Johnston told *The Wyoming Tribune* that former Commissioner of Indian Affairs, Mr. Leupp, "saw only the money that was due the Indian. He paid no attention to the needs of the settler on the lands to be ceded and would not consent to the application of the Carey Act, because this might make the state responsible for the collection of the Indian money, and he did not seem inclined to trust the state."[79] State Engineer Johnston also stated "The State cannot legislate relative to [the opened lands]."[80] When given permission to survey for an irrigation system in the opened lands in 1906, State Engineer Johnston gave very stringent instructions to the engineers and field workers. He urged that they carefully observe the rules laid down, lest they be ejected by the Indian Police.[81] The *Riverton Republican* in 1911 referred to irrigation development in the opened area as the "Wind River Reservation bugaboo."[82]

In 1912, Congress extended the time to obtain patents on the Reservation. The legislation referred to the lands as the ceded "portion" of the Reservation.[83] In the House Report, the First

---

Water Division Number Three (Appeal From State Board of Control). (BATES SH11253)

[78] Hoopengarner, p. 110 *citing Riverton Republican* (Dec. 28, 1907). (BATES SH11253)

[79] Hoopengarner, p. 98, n.2 *citing The Wyoming Tribune*, 3 (Oct. 20, 1910). (BATES SH11253)

[80] Hoopengarner, p. 99, n. 3 *citing* Edward H. Stearnes, The Wyoming Central Irrigation Company's Side of the Story (Chicago, 1911). (BATES SH11253)

[81] *See* Hoopengarner, p. 102. (BATES SH11253)

[82] Hoopengarner, p. 145 *citing The Riverton Republican* (Jan. 27, 1911) (BATES SH11253)

[83] 37 Stat. 91 (1912).

Assistant Secretary refers to the law as dealing with the "situation of the entrymen within the Wind River Reservation."[84] Congress extended these provisions again in 1916.[85]

After the expiration of the 1905 Act's initial eight-year homestead entry period, the Commissioner of the General Land Office proposed to sell undisposed-of land within the opened area. However, on August 29, 1913, the Department held that "the lands in question need not be sold until it is thought best to do so."[86] On April 29, 1915, the Office of Indian Affairs recommended that the sale be postponed indefinitely.[87] The recommendation was based on reports that the Tribes were obtaining annual rentals of many thousands of dollars from grazing leases and that the lands were probably valuable for oil.[88] On May 27, 1915, the Secretary accepted the recommendation.[89] After this time, no land sales were made under the 1905 Act except for small tracts sold for public purposes, such as school sites and the Riverton airport.[90]

Shortly after passage of the 1905 Act, the Bureau of Indian Affairs began issuing grazing leases which eventually covered most of the opened area.[91] BIA regulations allowed issuance of grazing leases only on reservations where the United States agreed to dispose of the lands for the benefit of the Indians, but not where the United States purchased and paid for the lands, thereby

---

[84] H.R. Rep. No. 400, 62nd Cong., 2d Sess., 12 (1912). (BATES SH00844)

[85] 39 Stat. 341 (1916).

[86] *See* Letter, C.J. Meade to E.O. Fuller (Jan. 27, 1930). (BATES SH00920)

[87] *See* Letter, C. Burke to R.F. Haas (Mar. 29, 1929). (BATES SH08199)

[88] *See* Letter, C.J. Meade to E.O. Fuller (Jan. 27, 1930). (BATES SH00920)

[89] Letter, C. Burke to R.F. Haas (Mar. 29, 1929). In 1929, the Commissioner of Indian Affairs reaffirmed that no general sales of 1905 Act lands be made in order to protect the Indians' interest in grazing leases and oil and gas development. *Id.* at 2. (BATES SH08199)

[90] *See* Letter, C. Burke to R.F. Haas (Mar. 29, 1929). (BATES SH08199)

[91] *See, e.g.*, Lease No. 406 issued to Joseph Vincent for vacant ceded lands, Shoshone Indian Reservation (approved Jan. 22, 1914) for the period from Oct. 1, 1913 to Sept. 30, 1914; Letter, Arapaho Business Council to Commission of Indian Affairs (June 15, 1914), p. 3. (BATES SH08212, SH00899)

completely extinguishing Indian interests.[92] The grazing leases provided that stock of both Indians and settlers may graze on permitted lands, but only the settlers were required to pay a fee.[93]

The United States objected in 1912 to the State interfering with Indian water rights in the opened area.[94] At the time, the Assistant Commissioner of Indian Affairs described the Indians' homes as extending "from Riverton on the east, up all these valleys clear in to the foothills of the mountains."[95] In *United States v. Hampleman*, the United States sought to enjoin the Wyoming State Engineer from trespassing or interfering with water use on individual allotments and other opened Reservation lands.[96] In 1914, the Secretary's report to Congress stated "it is apparent that the department can not expect to properly care for the interests of the Indians if it is to be subject to the State officials."[97] The District Court in *Hampleman* permanently enjoined the State from interfering with Indian diversions and trespassing on lands within the opened area, both off and on individual allotments.[98] In 1919, the State of Wyoming conceded *Hampleman* was still good law.[99]

---

[92] Regulations Governing Use of Vacant Indian Lands. (July 25, 1912). (BATES SH08375)

[93] *Id*. The lease provided "no such fee to be paid by Indians for their stock not in excess of the number for which free range is provided to them under present regulations." (BATES SH08375)

[94] *See* draft complaint, *United States v. Wyoming State Board of Control*, Case No. 753 (D. Wyo. Nov. 11, 1912). (BATES SH08184)

[95] Minutes of meeting Held at the Shoshone Indian Agency with the Shoshone Indians and Arapahoe Indians and Mr. Abbott, Assistant Commissioner (Aug. 28, 1913). (BATES SH08455)

[96] Bill of Complaint, *United States v. Hampleman*, Case No. 753 (D. Wyo., Sept. 5, 1913). (BATES SH07676)

[97] H.R. Doc. No. 1274, 63rd Cong., 3d Sess., 3 (1914). (BATES SH02217)

[98] Decree, *Hampleman*, (Jun. 26, 1916) (BATES SH02132)

[99] Letter, Rerns to Meritt (Jan. 16, 1919); Letter, State Engineer to S. G. Hopkins, Assistant Secretary (Jan. 9, 1919). (BATES SH01984, SH08981)

Congress consistently treated the lands opened by the 1905 Act as Indian lands.[100] Indeed, a controversy arose after passage of the Act about whether oil and gas reserves under 1905 Act lands were subject to lease under the laws applicable to Indian lands, or subject to disposition under the general land laws of the United States.[101] In 1916, Congress resolved the controversy by directing the Secretary to issue oil and gas leases to benefit the Tribes. 39 Stat. 519 (1916) ("1916 Act"). Senator Clark of Wyoming explained that the land covered by the 1916 Act was subject to homestead entry under the 1905 Act, but that the time for homestead entry had been exhausted. According to Senator Clark, "[i]t is *still Indian land and the Indians are entitled to it.*"[102] In passing the 1916 Act, Congress rejected the Department's position that the lands should be developed under a public land leasing law then under consideration by Congress.[103] Leases issued pursuant to the 1916 Act are still in force today.

In 1916, Congress provided funds to enable the Office of Indian Affairs to advance the irrigation of the "Shoshone or Wind River Reservation, including the ceded lands of said reservation, in Wyoming." 39 Stat. 123, 158 (1916). In response, the Secretary transmitted reports prepared by the Reclamation Service and the Indian Service. According to the Reclamation Service report, "[a] certain interest is retained by the Indians in the 'ceded-lands'

---

[100] A 1909 House Report, "Extending Time for Final Entry of Mineral Claims within Shoshone or Wind River Reservation, Wyo." consistently refers to the opened area as part of the Shoshone or Wind River Reservation and describes the 1905 Act as "the bill opening a portion of the Shoshone or Wind River Reservation." H.R. Rep. No. 2041, 60th Cong., 2d Sess. (1909); *see also* S. Rep. No. 980, 60th Cong., 2d Sess. (1909). A 1912 House Report describes the ceded lands as being opened to entry and states that the homestead entries under the 1905 Act were made upon a portion of the reservation. H.R. Rep. No. 400, 62nd Cong., 2d Sess., 2 (1912). A 1912 Senate Report likewise refers to the opened lands as being a portion of the Reservation. S. Rep. No. 543, 62nd Cong., 2d Sess. (1912). (BATES SH11895, SH00835, SH00847, SH00838, SH00844

[101] In 1912, the President attempted to withdraw certain lands from entry as a petroleum reserve. *See* S. Rep. No. 712, 64th Cong., 1st Sess., 2 (1916). However, certain interests objected to the withdrawal on the grounds that authority for such withdrawals only extended to public lands, not to lands held in trust for the benefit of the Indians. *Id.* (BATES SH02423)

[102] Cong. Rec. S12,159 (Aug. 9, 1916) (emphasis added). (BATES SH00851)

[103] H.R. Rep. No. 975, 64th Cong., 1st Sess., 4 (1916). (BATES SH02419)

portion of the reservation."[104] The Indian Service report addressed irrigation projects in both the ceded and diminished portions of the Reservation.[105] In discussing the ceded portion, the Department stated:

> On the ceded portion of the Wind River Reservation are a number of community ditches which were originally constructed by individual Indians, but under which white men have bought and leased land. In looking after the interests of the Indians it is necessary that work be done on some of these ceded reservations ditches in order that they will supply a sufficient quantity of water to irrigate the land."[106]

Continuing into the present, the Bureau of Indian Affairs collects and pays operation and maintenance fees for irrigation in the opened area pursuant to a series of agreements with local irrigation districts.[107]

From 1917 into the 1940s, Congress made Indian appropriations for irrigation works on the "conditionally ceded" or "ceded portion of" the Reservation.[108] Congress directed that a significant portion of such funds were to be reimbursed from Tribal proceeds under the 1905 Act.

In 1920, Congress appropriated funds for the reclamation project in the opened area. Congress described the lands covered by the project as "within and in the vicinity of the ceded portion of the Wind River or Shoshone Reservation."[109] The reclamation project withdrawal orders state "that the following described lands within the Shoshone Indian Reservation,

---

[104] H.R. Doc. No. 1767, 64th Cong., 2d Sess., 16-18 (1916). (BATES SH02343)

[105] *See* H.R. Doc. No. 1478, 64th Cong., 2d Sess. (1916). (BATES SH02329)

[106] *Id.* at 7. (BATES SH02329)

[107] Tripartite Agreement Relating To LeClair Riverton No. 2 Ditch (Aug. 2, 1924); Memorandum of Agreement between LeClair-Riverton Irrigation District and United States (Apr. 15, 1964); Memorandum of Understanding Between United States and LeClair-Riverton Irrigation District (Jan. 5, 1968). (BATES SH08221, SH11179, SH08324)

[108] 39 Stat. 969, 993 (1917). *See, e.g.* 46 Stat. 279, 293 (1930); 49 Stat. 176, 189 (1935); 53 Stat. 685, 702-03 (1939); 59 Stat. 318, 331 (1945).

[109] 43 U.S.C. § 597.

Wyoming, excepting any tract the title to which has passed out of the United States, be withdrawn from public entry."[110] From January to September, 1920, all disbursements for this project were charged against the Indian appropriations. On October 1, 1920, the disbursements were made from the Reclamation fund. The net investment from the Reclamation fund and the Indian fund were combined into one item and carried under G.L. Account No. 190 as Indian investment.[111]

In 1922, Inspector McLaughlin met with the Tribes in Joint Council to discuss outstanding problems. He recognized that the Tribes still retained the opened lands north of the Big Wind River.[112] He contrasted lands opened under the 1905 Act with those covered by the Thermopolis Purchase:

> Our first agreement was in April 1896 [Thermopolis Purchase], and the second in April 1904 [1905 Act]. The two agreements *are entirely distinct and separate from each other*, and the government simply acted as trustee for disposal of the land north of the Big Wind River and could not force homesteaders to go upon lands which they did not desire under the provisions of the Act opening them to settlement."[113]

Superintendent Haas concurred: "You still have an equitable right because the agreement has not been fulfilled in full."[114]

In 1923, the Bureau of Indian Affairs determined that the public land mineral leasing Act of February 25, 1920, 41 Stat. 437 (1920), "gave the General Land Office no jurisdiction over the leasing of coal mining lands on the ceded portion of the Shoshone Reservation."[115]

---

[110] Letter, A.P. Davis to Secretary (Jan. 2, 1920) approved by John W. Hallowell, Assistant to the Secretary (Jan. 3, 1920). (BATES SH22012)

[111] Hoopengarner, p. 250 n. 59 *citing* Project History, Riverton Project Vol. III, p. 6 (1918). (BATES SH11253)

[112] 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). (BATES SH08429)

[113] *Id.* (emphasis added). (BATES SH08429)

[114] *Id*. (BATES SH08429)

[115] Letter, C. Burke to R. Haas (June 21, 1923). (BATES SH08207)

On January 17, 1923, the Tribes resolved that "we have jurisdiction on the ceded portion as we understand that the United States is only acting as trustee for the Indians as provided in article (9) of April 2, 1904."[116]

In 1929, homesteaders asked the Secretary for "inauguration of a new system better adapted to the protection of [the homesteaders'] interests."[117] In response to that request, the Secretary reaffirmed the continuing obligation of the United States to manage grazing lands in the opened area for the benefit of the Indians.[118] A few years later, the BIA took action against trespassers on the unentered opened portion of the Reservation.[119] The sheriff of the Town of Lander agreed that the State did not have jurisdiction in the opened area.[120]

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

> Indian title to the land is not extinguished until it is disposed of and the Indians are paid therefor. The lands involved belong to the Indians and to allow them to be disposed of at this time might seriously interfere with the proposed new land policy for the Indians.[121]

7. 1939 Restoration Act.

As foreshadowed by the above correspondence, a new national policy was implemented in 1934 which stopped further sale of opened lands and restored to Indian tribes full possessory

[116] Minutes of General Council (Jan. 17, 1923). (BATES SH00908)

[117] Letter, Commissioner to O.H. Gibson (circa May 22, 1929).(BATES SH08210)

[118] Memorandum, Commissioner to Secretary (June 15, 1929). (BATES SH08209)

[119] *Id*. (BATES SH08209)

[120] Letter, John Collier, Commissioner, to Acting Superintendent (Sep. 18, 1934). (BATES SH00929)

[121] Memorandum, W. Zimmerman to Secretary (Dec. 8, 1933). (BATES SH00922)

interest in all undisposed-of opened lands within Indian reservations.[122] The policy was implemented through the Indian Reorganization Act ("IRA").[123]

Shortly after the IRA's enactment, the Commissioner of Indian Affairs specifically recognized the Wind River Reservation as one of the reservations where Congress had intended lands to be restored to full tribal ownership.[124] The Commissioner distinguished reservations, like Wind River, where the statute opened land for settlement with the United States holding the lands as trustee, from cessions without such provisions where the exterior boundary of a reservation were reduced.[125] Only lands within existing reservations were to be restored to full tribal ownership.[126]

Restoration of undisposed-of Reservation land was effectuated as part of legislation enacted on July 27, 1939 ("1939 Act"), distributing proceeds from *Shoshone Tribe*, 299 U.S. 476.[127] In testimony before Congress, the Secretary explained the purpose of the legislation was to consolidate and expand Tribal grazing lands on the Wind River Reservation.

> The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white owned lands within the reservation. The Secretary of the Interior is authorized to restore to the Indians the ceded lands in any land-use district as soon as the white owners have been properly protected, as provided in section 5. *Undisposed of ceded lands within land-use districts, if not under lease or permit to non-Indians will be restored at once, but the ceded lands now used by permittees may be restored progressively only as non-Indian-owned lands are acquired by the United States for the benefit and use of the Indians*.[128]

---

[122] *Id.* at 2. (BATES SH00922)

[123] 25 U.S.C. § 461 *et seq.*

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

[125] *Id.* at 2. (BATES SH00924)

[126] *Id.* (BATES SH00924)

[127] Act of July 27, 1939, 25 U.S.C. § 571-581.

[128] Letter, H. Ickes to E. Thomas, (June 27, 1939) (emphasis added), *reprinted in* S. Rep. No. 746, 76th Cong., 1st Sess., 3 (1939). (BATES SH02738)

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

> The Shoshone Reservation - at least a portion of it - has been used for a number of years for grazing by certain white settlers in the vicinity of the reservation. When a portion of this reservation, known as the ceded portion, was yielded to the Federal Government by the Indians and opened to settlement, settlers came on and had the understanding that they would be permitted to graze their livestock on the reservation. Permits have been issued during a long period of years to the settlers. The livestock business of the Indian, however, has been fostered by the Indian Office and is being expanded.[129]

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

> Senator O'MAHONEY. What land is it proposed to purchase?
>
> MR. ZIMMERMAN. It is proposed to purchase principally white-owned lands within the ceded portion of the reservation.
>
> Senator O'MAHONEY. In order words, it is proposed to repurchase for the Indians some of those lands which years ago the Indians *ceded to the Government in trust* for settlement by whites?
>
> MR. ZIMMERMAN. That is correct. . . . The purchase of those white holdings was essential for proper use of the ceded area.[130]

Section 5 of the 1939 Act directed the Secretary to:

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

25 U.S.C. § 575. The restoration to tribal ownership only undid the conditional transfer in the 1905 Act, *i.e.*, rescinded the Tribes' release of their possessory right to the government so that,

---

[129] Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess., 6 (1939). (BATES SH02708)

[130] *Id.* at 7-8 (emphasis added). (BATES SH02708)

as the trustee, it could make perfect title to purchasers. There was nothing else to be restored because until sales were made, any benefits which might be derived from the use of the lands belonged to the Tribes and not to the trustee. [131]

The Secretary included language in the restoration orders implementing the 1939 Act that make clear that the restored lands were part of the Reservation.[132] The Orders contain language paralleling restoration orders issued under the IRA. Section 5 of the 1939 Act is similar to the restoration provision in § 3 of the IRA, 25 U.S.C. § 463. However, the IRA provision applies to a broader range of land cessions than the 1905 Act which only involved a conditional cession of land. The similarity of the two provisions appears to be the basis for the Secretary's including in the Wind River Reservation restorations orders superfluous language making the land part of the Reservation. Clearly, such language was not needed or required by the 1939 Act.

The 1939 Act also parallels the Act of May 19, 1958, 25 U.S.C. § 463 note, which extended IRA benefits to a number of other tribes similarly situated to the Wind River Tribes. The Senate Indian Affairs Committee explained the purposes of the 1958 restoration statute as follows:

> The bill will restore to the five named tribes ownership of the undisposed-of acreages that were ceded to the United States by the listed tribes pursuant to various statutes and agreements. In general, these statutes provided that the Government would dispose of the ceded lands through homesteading or otherwise and deposit the net proceeds in the Federal Treasury to the credit of the tribes concerned. . . . *The Supreme Court of the United States has held that this land continued in the beneficial ownership of the Indians even though they had ceded 'all their right, title, and interest.'* So the net effect of [the Act of May 19, 1958]

---

[131] *See Ash Sheep*, 252 U.S at 166.

[132] The Public Land Orders appear at: 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (Nov. 17, 1942); 7 Fed. Reg. 1100 (Nov. 12, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812; 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 2, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); and 39 Fed. Reg. 27,561 (July 30, 1974), 58 Fed. Reg. 32,856 (Jun. 14, 1993).

> is to *clarify the Indian title* to these lands in order that they may be managed and administered by the tribes. [133]

In 1940, Congress authorized funds from the 1939 Act to be expended to purchase land of the Padlock Ranch crossing the northern border of the Reservation.[134] The Act recognized that some of the lands being purchased were outside of the then existing boundary of the Reservation, thus requiring approval in addition to the 1939 Act. The Act mentions that other lands owned by the sellers were within the opened area of the Reservation.[135]

In 1941, Congress authorized the Secretary to set the boundary of allotted, tribal, and individual Indian lands along the Big Wind River after an oil and gas lessee had requested a boundary determination between Indian and fee lands prior to drilling a well.[136] The legislation was needed because the Solicitor had opined that the Secretary did not have authority to fix permanent boundaries for individual Indian lands.[137] The Act specifically described the opened lands as "ceded Indian lands."[138] The Act provided for consent of all owners, white and Indian, prior to fixing the boundary of the parcels. Importantly, Congress understood that the Tribes had authority over the ceded lands. The Act provided "[t]he consent of the Shoshone and Arapahoe tribes as to tribal and ceded lands may be given by the tribal council."[139] The Department took the position in 1944 that "[u]nder the terms of this Act of March 3, 1905, *supra*, the Indians of this Reservation retained the equity title until such lands were sold and paid for."[140]

---

[133] S. Rep. No. 1508, 85th Cong., 1st Sess. (1958) (emphasis added). (BATES SH12259)

[134] 54 Stat. 628, 642 (1940).

[135] *Id.*

[136] 55 Stat. 207 (1941).

[137] S. Rep. No. 275, 77th Cong., 1st Sess., 3 (1941). (BATES SH02846)

[138] 55 Stat. 207 (1941)

[139] *Id.*

[140] Letter, Superintendent to Superior Oil Company (March 22, 1944). The courts of Wyoming took a consistent position in *United States v. Board of Com'rs of Fremont County*, 145 F.2d 329 (10th Cir. 1944) ("Some of the lands

8. Boysen and Anchor Dam Acts.

In 1944, Congress enacted the Flood Control Act, 58 Stat. 887 (1944), which approved the construction of several reservoirs in the Missouri River Basin including the Boysen Reservoir on the Wind River. In the Act of July 18, 1952 ("Boysen Act"), 66 Stat. 780 (1952) Congress authorized the Secretary of the Interior to "convey and relinquish" to the United States "the property and rights" of the Tribes "needed by the United States for the construction and maintenance and operation" of the Boysen project. According to the Secretary of the Interior, at the time of the Boysen Act, the Tribes had three types of interests in the lands affected by the Act: (1) occupancy rights in tribal lands; (2) beneficial rights in lands conditionally ceded by the 1905 Act as defined by the Supreme Court in *Ash Sheep v. United States*, 252 U.S. 159, 166 (1920); and (3) rights in lands acquired under the 1939 Act.[141] The "conveyances and relinquishments" authorized by the Act were acquired by the United States in accordance with a memorandum of understanding between the Bureau of Reclamation and the BIA approved on December 29, 1951, and amended on May 1, 1952. *See* 66 Stat. 780 (1952). The memorandum of understanding referenced in the Act provides, *inter alia*, that:

1. The dam site lands only (approximately 367 acres) were acquired from the Tribes in fee status.

2. Surface rights only were acquired for the remainder of the Boysen withdrawal area. The Tribes retained the rights to the oil, gas and minerals beneath the surface.

3. The Tribes retained an exclusive right of occupancy over the shoreline area west of the reservoir and north of the Riverton Project withdrawal area, subject to regulation by the United States for project purposes.

---

were ceded back to the United States. They became commonly known as the ceded portion of the reservation and the remaining as the diminished portion. The lands involved in this action are within the ceded portion of the reservation."). (BATES SH05858)

[141] Letter, R.D. Searles to Hon. J.C. O'Mahoney (June 27, 1952), *reprinted in* S. Rep. No. 1980, 82nd Cong., 2d Sess., 6 (1952). (BATES SH03039)

4. The Tribes retained a nonexclusive right of access to and grazing upon a portion of lands on the southwest side of the Reservoir. [142]

The Memorandum of Understanding adopted by Congress specifically provided that a portion of the payment was for power and railroad rights-of-way "over the Wind River reservation lands."[143]

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

9. The 1953 Act.

In 1953, Congress approved payment to the Tribes for past damages and provided for acquisition of the surface estate in the Riverton reclamation project.[144] Prior to passage of the 1953 Act, the Department of the Interior held that reclamation project lands had not been lawfully withdrawn from the Reservation and that unpatented reclamation project lands and minerals remained tribal property pursuant to *Ash Sheep*, 252 U.S. 159 (1920) and *Hanson v. United States*, 153 F.2d 162 (10th Cir. 1946).[145] Congress recognized that the Riverton project was "located on the ceded portion of the Wind River Indian Reservation in Fremont County, Wyo. . . . A large part of the project area was homesteaded shortly after a cession of Indian lands by the Shoshone and Arapahoe Tribe in 1905."[146]

---

[142] Memorandum of Understanding *reprinted in* S. Rep. No. 1980, 82nd Cong., 2d Sess., 10-54 (1952). In 1954, the United States acknowledged that the Tribes had a priority right on the southwest area lands. *See* Memorandum, W.H. Farmer to P. L. Fickenger, (Apr. 22, 1954). (BATES SH14416)

[143] S. Rep. No. 1980, 82nd Cong., 2d Sess., 10 (1952). (BATES SH03039)

[144] 67 Stat. 592 (1953) ("1953 Act").

[145] *See* II Op. Sol. on Indian Affairs 1607 (M-36172) (June 18, 1953). (BATES SH11702)

[146] S. Rep. No. 1607, 82nd Cong., 2d Sess., 7 (1952). (BATES SH03025)

As of March 31, 1953, approximately 332,000 acres were withdrawn for the Riverton reclamation project. Of these 332,000 acres, only about 100,000 acres had been disposed of to settlers.[147] Between 1920 and 1953, many miles of canals, roads and other infrastructure were constructed on the unsold lands. Additionally, unsold lands were flooded by project reservoirs and various entities extracted tons of sand, gravel and other building materials from these lands. The Tribes had not been compensated for any of these unauthorized uses of the unsold land.[148]

In 1953, the Interior Department proposed legislation to compensate the Tribes for these unauthorized takings and to open additional lands within the reclamation project to non-Indian settlement. In letters to the Senate and House Committees, the Interior Department explained that a large portion or the 161,500 acres of land subject to the proposed legislation would be used to enlarge existing farm units and the resettlement of project settlers.

Under Section 1 of the Act of August 15, 1953, 67 Stat. 592 (1953) ("1953 Act"), Congress provided the Tribes with approximately $1 million to "be deemed to constitute full, complete, and final compensation, . . . for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to lands [and] interests in lands."[149] 67 Stat. 592, 595 (1953). The remainder of Section 1 describes an approximately 225,000 acre tract which was the new boundary of the reclamation project within the Reservation. Section 4 provides:

> [A]ll of the lands withdrawn pursuant to the [Reclamation Act] for the development of the Riverton reclamation project, Wyoming, *not included within*

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

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

[149] The Department of the Interior later acknowledged that this compensation "represented only the value of the surface of the undisposed of ceded lands." Letter, R. Ernst to Hon. J. E. Murray (May 27, 1958), *reprinted in* S. Rep. No. 1746, 85th Cong., 2d Sess., 4 (1958). (BATES SH03342)

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

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

Pursuant to these provisions, on November 24, 1956, the Secretary of the Interior formally revoked portions of earlier withdrawal orders reducing the withdrawal area to the boundary designated by Congress in the 1953 Act and restoring 88,712.43 acres to Tribal ownership.[150] Of the 161,000 surface acres of land purchased by the 1953 Act, approximately 105,000 acres remain in federal surface ownership today and consequently are under federal jurisdiction.

While § 1 of the 1953 Act speaks to payment for the Tribes' mineral interests in the reclamation project's lands, there was a conflict between the cession language in § 1 and the language in § 5 which directs the Secretary to credit to the Tribes 90 percent of the revenues derived from the leasing of the minerals underlying same lands. Indeed, the Tribes' agreement to the terms of the 1953 Act was based on the understanding that they would retain their interest in the mineral estate with 90 percent of the proceeds paid directly to the Tribes and 10 percent covering administrative costs.[151] This position was consistent with the understanding of Wyoming's delegation.[152] The language of the 1953 Act referring to the existing mineral

[150] 21 Fed. Reg. 9195 (Nov. 24, 1956).

[151] *See* Joint General Council minutes of July 24, 1952; Tribal Resolution Nos. 325, 355 (attaching specific bill language), and 338 (1952-1953). (BATES SH03293, SH09808, SH14148, SH14152, SH14155)

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

reservations was changed after Tribal consent was obtained.[153] The effect of this change was to allow for disposition of oil and gas leases on a noncompetitive basis under the public land laws, rather than on a competitive basis as provided in the 1938 Indian Minerals Leasing Act.[154]

To resolve these issues arising out of the 1953 Act, Congress passed "A bill relating to minerals on the Wind River Indian Reservation in Wyoming, and for other purposes" on August 27, 1958. 72 Stat. 935 (1958) ("1958 Act"). The 1958 Act declared that the tribes owned "all of the right, title and interests in all minerals, including oil and gas, the Indian title to which was extinguished" by the 1953 Act. The 1958 Act also restored to Tribal ownership those federal minerals reserved by the government when other lands within the project area had been patented under the 1905 Act.[155] The 1958 Act provided that the minerals underlying the Riverton project area would be leased under the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq.*, and that all of the gross proceeds of such leases would be credited to the Tribes, rather than 90 percent as provided for in the 1953 Act. When considering the 1958 Act for passage, the Committee on Interior and Insular Affairs, described the lands as "within the Riverton reclamation project *within the Wind River Indian Reservation . . .*"[156]

---

development and enjoyment of the mineral estate.").

[153] *See* S. Rep. No. 644, 83rd Cong., 1st Sess., 9 (1953) (expressing the Department of Interior's contrary understanding and recommendation of modification of the legislative language, and altering the language approved by the Tribes, by deleting the word "terms of now existing mineral reservations."). (BATES SH03293)

[154] S. Rep. No. 1746, 85th Cong., 2d Sess., 3 (1958). (BATES SH03342)

[155] *Id.* (BATES SH03342)

[156] *Id.* at 1 (emphasis added). (BATES SH003342)

10. Recent Treatment of Opened Area.

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

> Bounded roughly on the north by the South Fork of Owl Creek, with the Arapahoe Ranch lying just north of the stream. The east boundary is a north-south line running about 6 miles east of the Big Wind River. The south line runs just north of Hudson west to the Continental Divide. The west boundary lies approximately north and south from the East Fork of the Wind River, or generally the western boundary of Range 6 West. Contained within the boundaries of the Reservation are the City of Riverton and the Riverton Reclamation Irrigation Project. The Reservation is approximately 70 miles east to west, and 55 miles from north to south. . . . The Wind River Indian Reservation contains 2,268,000 acres.[157]

The Bureau of Indian Affairs included lands with the opened area as part of its road system in the 1960s. For example, the BIA presented the Joint Business Council a plan for the extension of Route 18 which "takes in the School District for Pavillion and there's a school bus goes by this route. The ones in blue [on the map], are all of the ones that we want to have added to the system and they will all serve school buses for these School District."[158] The position of the Tribes and the BIA was consistent with views of the general public at the time. On July 29, 1965, the *Wyoming Eagle* published an article "Wyoming's Wind River Reservation" which listed "Riverton, population 6,845" as the "largest city on the Reservation."[159]

In 1969, the federal courts, enjoined state regulatory authority over tribal oil and gas leases in the 1905 Act opened area. The District Court found that leases from the Tribes embraced oil and gas "underlying lands located on the Wind River Indian Reservation."

---

[157] Overall Economic Development Plan, Wind River Reservation Fremont and Hot Springs Counties, Wyoming (1963); *accord* Wind River Indian Reservation pamphlet (1967).(BATES SH08483)

[158] Minutes of Public Health Meeting, 6-7 (May 26, 1969). (BATES SH08458)

[159] G. Peverley, Wyoming's Wind River Reservation, *Wyoming Eagle* (July 29, 1965). (BATES SH08550)

Shoshone Indian Tribe and Arapaho Indian Tribe v. Hathaway, Case No. 5367 (D. Wyo., Nov. 7, 1969).

In 1972, Rep. Roncalio introduced H.R. 15316, a bill "to construct an Indian Art and Cultural Center in Riverton, Wyoming, and for other purposes."[160] Section 2 of the bill provided that the center would be "established at Central Wyoming College, located within the Wind River Indian Reservation."[161]

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

In 1975, Congress established the American Indian Policy Review Commission.[162] The Commissions duties included "a study and analysis of the Constitution, treaties, statutes, judicial interpretations, and Executive orders to determine the attributes of the unique relationship between the Federal Government and Indian tribes and the land and other resources they possess."[163] In 1976, the Commission issued a report that classified various cession acts into those that involved an outright cession of land and those that simply opened the reservation

---

[160] H.R. 15316, 92nd Cong., 2d Sess. (1972); *see* Cong. Rec. E5935 (June 1, 1972). (BATES SH08466)

[161] *Id*. (BATES SH08466)

[162] 88 Stat. 1910 (1975)

[163] 88 Stat. 1910, 1911 (1975).

for settlement.[164] The 1905 Act is listed as being within the category of statutes that simply opened the reservation to settlement.[165]

In discussing the fact that a proposed consolidated "Indian Reservation District" did not cover the entire Reservation, the Wyoming Supreme Court found "[t]here are a total of 2,947.7 square miles in the entire Indian Reservation (1,886,556 acres divided by 640 acres per square mile)." *Geraud*, 531 P.2d at 882-83. This acreage figure is consistent with the Reservation boundary as asserted by the Tribes.

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

Geraud, 531 P.2d at 883.

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

---

[164] U.S. Senate Select Committee on Indian Affairs, Meetings of the American Indian Policy Review Commission , Vol. 2, Tables B and C (Feb. 20, May 8-9, 1976) (BATES SH12655)

[165] *Id*. at Table C.

In 1980, the federal courts again acknowledged the Reservation boundary as recognized by the Tribes. *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980) ("The reservation is large and the town of Riverton and other settlements are within its boundaries. There are a large number of patented tracts owned in fee by non-Indians not including the property in Riverton.") *cert. denied*, 499 U.S. 1118, *reh'g denied*, 450 U.S. 960 (1981). In 1987, the federal courts found the reservation "encompass[ed] nearly 1.9 million acres and ranges in altitude from 4,200 to over 13,000 feet." *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 744 (10th Cir. 1987). According to the Court, "the lowest point on the Reservation is the Wind River Canyon at 4,200 feet which is at the northernmost border of the Reservation." *Id.*

In 1994, Congress passed legislation providing that fee lands within the Reservation acquired by each Tribe individually could be taken into trust in the name of the Tribe who purchased the land. 25 U.S.C. § 574a. Congress recognized that the fee lands were part of the Reservation and provided that "[a]ny lands acquired . . . within the exterior boundaries of the Wind River Reservation shall remain a part of the Reservation and subject to the joint tribal laws of the Reservation." 25 U.S.C. § 574a(b). The legislative history of the Act reflects Congress's ongoing understanding that lands opened under the 1905 Act were still within the Reservation.[166]

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

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

[166] H.R. Rep. No. 103-704, 103rd Cong., 2d Sess. (1994). (BATES SH12287)

Id. at 1343.

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

C. Legal Analysis

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

1. Lander and Thermopolis Purchase Acts.

In clear contrast to subsequent Acts, there is substantial and compelling evidence that Congress intended to diminish the Reservation when it ratified and amended the Lander and Thermopolis Purchase Agreements. *See Solem*, 465 U.S. at 472. The language of the ratifying Acts and the circumstances surrounding their passage clearly show intent to diminish the Reservation. First, both agreements use language of unconditional cession and provide the Tribes with a sum certain in consideration for the absolute cession of land. For example, in the Thermopolis Purchase Act, the Tribes agreed to "cede, convey, transfer, relinquish and *surrender forever and absolutely* all their right, title, and interest *of every kind and character* in and to the lands and the water rights appertaining thereunto." 30 Stat. 62, 93 (1897) (emphasis added). Likewise, the Lander Purchase Act specifically provided that the southern limit of the Reservation would be changed by passage of the Act. 18 Stat. 291 (1874). Both Acts provided

for the contemporaneous payment of a specific sum as consideration for the immediate acquisition of Reservation lands by the United States. 18 Stat. 291 (Art. II) (1874); 30 Stat. 62, 93 (Art II) (1897); *cf. Yankton Sioux*, 522 U.S. at 345; *DeCoteau*, 420 U.S. at 447-48.

Second, in neither agreement did the Tribes retain interests of any kind in the ceded lands. The Lander Purchase lands were excluded from the survey of Reservation lands in 1875 and settled as part of the public domain within the 6th Principal Meridian. In the Thermopolis Purchase Act, Congress immediately conveyed one section of land to the State of Wyoming and expressly declared the remaining lands to be "public lands of the United States subject to entry."[167] 30 Stat. 62, 96 (1897). Congressional action extinguishing all Indian interests and restoring an area to the public domain is strong evidence of intent to diminish a reservation. *See Hagen v Utah*, 510 U.S. 399, 414 (1994); *Seymour*, 368 U.S. at 354.

Third, the circumstances surrounding the negotiation and ratification of these agreements demonstrate that they were intended to diminish the Reservation's exterior boundaries. The history of the Lander Purchase shows that the initial proposal from the United States was a swap of land south of the Reservation for new land north of the Reservation.[168] Brunot's description of the negotiations clearly indicates that the goal of the negotiations was to eliminate the southern portion of the Reservation due to the significant existing non-Indian encroachment in the area.[169] During negotiations for the Thermopolis Purchase, McLaughlin told the Tribes that the United States government would assume "absolute control" of the ceded lands and that the Indians would only have the "same privileges to use them as the public generally."[170] Thus, in

[167] Originally entry was only allowed under the homestead and town-site laws. In 1906, Congress formally extended the remainder of the public land laws to the ceded lands. 34 Stat. 78 (1906). (BATES SH00699)

[168] Report of the Secretary of the Interior, October 10, 1872, p. 510. (BATES SH08983)

[169] *Id.*; H.R. Exec. Doc. No. 1870-1871, 41st Cong., 3d Sess., 639 (1870-1871). (BATES SH08983, SH11248)

[170] S. Doc. No. 247, 54th Cong., 1st Sess., 8 (1896). (BATES SH00664)

both cases the surrounding circumstances make clear that the intent of Congress was to extinguish all Indian interests and diminish the Reservation.

While of lesser importance than the language of the Act and circumstances surrounding passage of the Act, there is no record that federal, state or tribal governments have ever treated these lands, patented or unpatented, as reservation lands subsequent to enactment. For example, Congress in 1906 extended all the public land laws to the area sold in the Thermopolis Purchase. 34 Stat. 78 (1906). Lands under both Acts were surveyed as part of the public domain, not part of the Reservation.

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

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

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

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

The most probative evidence of Reservation status is the language of the statute. *Solem*, 465 U.S. at 470. The language of the 1905 Act lacks a plain and unambiguous intent to disestablish. It is not the kind of absolute and unconditional language found in Congressional enactments held to effect disestablishment. *Id.* at 469. Article I of the 1905 Act provides that the Tribes would "cede, grant, and relinquish" interests in tribal lands. 33 Stat. 1016 (1905). Article I also provides that individual Indians could have allotments conveyed to them in the ceded or diminished areas of the Reservation.[171] *Id.*

In contrast, the Thermopolis Purchase Act provides for the Tribes to "cede, convey, transfer, relinquish and *surrender forever and absolutely* all their right, title, and *interest of every kind and character* in and to the lands and the water rights appertaining thereunto" in return for a fixed payment of $60,000. 30 Stat. 62, 93 (1897) (emphasis added). *See Yankton Sioux*, 522 U.S. at 345 ("negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment . . . bears the hallmarks of congressional intent to diminish a reservation"); *Solem*, 465 U.S. at 470-71 (explicit language "evidencing the *present and total surrender of all tribal interests* . . . buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land" establishes "almost insurmountable presumption that Congress meant for the Tribe's reservation to be diminished") (emphasis added).

Also unlike the Lander and Thermopolis Purchase Acts, the 1905 Act fails to provide for payment of a sum certain in consideration. *Seymour*, 368 U.S. at 355-356; *cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590-92 (1977) ("baseline purpose of disestablishment" derived

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

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

The differences in the language and structure of the 1905 Act from the Lander and Thermopolis Purchase Acts show that there was no intent to diminish or disestablish in the 1905 Act. When an earlier statute is *in pari materia* with a later one, they are construed together so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. The courts normally presume that, where words differ, "Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). As McLaughlin later told the Tribes, "[t]he two agreements [Thermopolis Purchase and1905 Act] *are entirely distinct and separate from each other*, and [under the 1905 Act] the government simply acted as trustee for disposal of the land north of the Big Wind River."[172]

The specific language used by Congress in the 1905 Act to refer to differing areas of the Reservation further shows that Congress did not intend to disestablish the Reservation. In Article I, Congress describes the cession as applying to "all lands embraced within said reservation," except lands within a set legal description. 33 Stat. 1016 (1905). Article I then sets forth points on the boundary of "said reservation" describing the Reservation as it existed in

[172] 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) (emphasis added). (BATES SH08429)

1905 and exists today. *Id*. Congress also provides for the handling of allotments "within a portion of said reservation hereby ceded," with "said reservation" referring to the entire Reservation. *Id*. Article II then describes the lands in the ceded area set apart for settlement by non-Indians. *Id.* at 1016 to 1017.

Significantly, when Congress enacted the special provisions for Asmus Boysen in Article II, Congress described a survey to be completed of "said lands" referring to the opened area of the Reservation. Congress then gave Boysen a right to select lands within "said reservation" contemplating the continuing reservation status of the entire area, both ceded and diminished. *Id.* at 1017. If Congress had contemplated a reduction in the Reservation, it would have given Boysen a selection right in either the ceded area or the diminished area rather than using the "said reservation" language referring to the entire Reservation.

The 1905 Act lacks any language to provide that the opened lands will be treated as public lands of the United States. *See Seymour*, 368 U.S. at 354 (lack of restoration to public land in contrast to earlier statutes restoring lands indicates lack of intent to diminish); *cf. Hagan*, 510 U.S. at 414; 30 Stat. 62, 96 (1897). Instead, the 1905 Act simply provides that the lands would be "opened to entry" (Art. I) and the government would "act as trustee" for the Indians "to dispose of [the] lands and pay over to the Indians the proceeds received from the sale thereof." (Art. IX). 33 Stat. 1016, 1021 (1905). No language making the lands opened by the 1905 Act public domain lands appears in that Act. Clearly, Congress knew how to terminate the Reservation status of land by declaring it to be public land or restoring it to the public domain as it did in the Thermopolis Purchase, but chose not to use such language in the 1905 Act.

In *Seymour*, 368 U.S. at 355-56, the Court construed 1906 legislation for the Colville Reservation authorizing the sale and disposal of unallotted land with the proceeds from the

disposition of the lands to be "deposited in the Treasury of the United States to the credit of the [Tribes]." The Court held that the 1906 legislation did "no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.* at 356. The Court contrasted the 1906 Act with an 1892 Act providing that the other half of the original Colville reservation should be "vacated and restored to the public domain." *Id.* This is similar to the distinction between the Thermopolis Purchase Act and the 1905 Act.

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

Similar factors were also present in a series of cases construing the 1890 Nelson Act, 25 Stat. 642 (1889). In the Nelson Act, the Indians agreed to cede land to the United States within certain reservations, but the Act authorized the Indians to establish allotments on the subject reservations, established a trust for the disposition of ceded lands, and required that the proceeds of the sale of the lands be used for the Indians' benefit. *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978); *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 at *8 (D. Minn. 1998); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp.

1001, 1002-03 (D. Minn. 1971). In all of these cases, the courts have held that those agreements were insufficient to diminish Indian reservations.

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

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

Id. at 166 (emphasis added). Based on this conclusion, the Court upheld the conviction of a non-Indian on federal trespassing charges because the scene of the crime was Indian country. *Id.*

The decision in *Ash Sheep* relied on the Court's earlier decisions in *Minnesota v. Hitchcock*, 185 U.S. 373, 394 (1902), and *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 509 (1913). In *Hitchcock*, the Court held that despite the "cession" of reservation lands under the 1890 Nelson Act, the ceded lands were not "public lands" and the State of Minnesota was therefore not entitled to a grant of sections of the ceded lands as school lands. The Court explained:

> The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at 5 per cent, and one fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit.

Id. at 394-95. In *Mille Lacs*, 229 U.S. at 509, the Court held that the United States was liable for damages for improperly disposing of lands ceded under the Nelson Act under the public land laws instead of pursuant to the trust established by the Nelson Act.

Similar to both the 1904 Crow Act construed in *Ash Sheep* and the Nelson Act construed in *Hitchcock* and *Mille Lacs*, the cession in the 1905 Act was not "absolute" and the lands opened by the Act were not public lands, but were lands subject to a trust on behalf of the Tribes.[173] Indeed, coming immediately after the 1902 *Hitchcock* decision, it is significant that Congress decided in the 1905 Act to strip from the 1904 Agreement the federal government's obligation to purchase the school lands sections (Sections 16 and 36). *See* 33 Stat. 1016, 1017-18 (1905). The 1904 Agreement language had apparently been intended to respond to the *Hitchcock* decision by immediately extinguishing the trusteeship over these sections, thereby permitting them to be granted to the State of Wyoming under the terms of its Enabling Act. Congress amended the Agreement to eliminate the government's obligation to purchase school lands. *See* 33 Stat. 1016, 1020-21 (1905), *cf. Rosebud Sioux*, 430 U.S. at 599 (Congress's express inclusion of school lands was evidence of disestablishment). Stripping the school land provisions from the agreement shows Congress intended that Reservation status continued over the *entire* 1905 Act area.

[173] Indeed, Congress specifically stated in 1952 that the Wind River Tribes' continuing interest in the lands opened to settlement under the 1905 Act was the same as the interest of the Crow Tribe in *Ash Sheep*. S. Rep. No. 1980, 82nd Cong., 2d Sess., 6 (1952). The Department of the Interior took the same position in 1953. *See* II Op. Sol. on Indian Affairs 1607 (M-36172) (June 18, 1953). (BATES SH03039, SH07832)

The 1905 Act uses the term "diminished reserve" or "diminished reservation" to describe the portion of the Reservation preserved for the exclusive use of tribal members (*see, e.g.,* Arts. III, IV and VI), but when balanced against the 1905 Act's other 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"). Furthermore, at the time of the 1905 Act, "diminished" was "not a term of art in Indian law." *Id.* at 468, 475, n.17. Thus, when Congress spoke of the "diminished reservation," it was probably "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."[174] *Id.* at 478; *see also id.* at 475 n.17. Importantly, for over 100 years Congress and others have talked about both "ceded" and "diminished" areas as being part of the Reservation.

Under long-standing canons of construction, ambiguities in statutes and agreements must be resolved in the Indians' favor. *Mille Lacs Band*, 526 U.S. at 200; *Choctaw*, 397 U.S. at 631. In reservation diminishment cases, the rule that "legal ambiguities are resolved to the benefit of the Indians" must be given "the broadest possible scope." *DeCoteau*, 420 U.S. at 447. These canons of construction should apply with special force here given the fact that the Tribes were told that they could not negotiate the boundary or payment provisions.[175] *Jones*, 175 U.S. at 11

[174] Similarly, the term "former" reservation as used in various documents is not a term of art. For example, the term "formerly a part of the Indian reservation" was used by Congress to describe non-trust lands near the Arapaho subagency located in the "diminished" reservation. H.R. Rep. 2658, 75th Cong., 3rd Sess., 1 (1938). (BATES SH02646). Prior to passage of 18 U.S.C. § 1151 in 1948, the case law was inconsistent in its use of the term "former" reservation to refer to either disestablishment or simple transfer of an individual parcel from trust status. *See* Cohen's Handbook of Federal Indian Law (2005 ed.), § 3.04.

[175] 1904 Minutes at 8. (BATES SH01367)

(agreements and statutes should be interpreted liberally where they were imposed on the Indians without their consent).

Under these canons, the 1905 Act, "when read as a whole, does not present an explicit expression of congressional intent to diminish" the Wind River Reservation. *Solem*, 465 U.S. at 476. Instead, Congress merely authorized the Secretary to act as the Tribes' sales agent in disposing of surplus lands. Because the language of the 1905 Act fails to call for "the present and total surrender of all tribal interests," it lacks the "substantial and compelling evidence of a congressional intention to diminish Indian lands" needed to sustain a determination that the Reservation has been diminished. *Id.* at 470, 472. "Without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish *all interests* in unallotted opened lands," a congressional purpose to diminish the Wind River Reservation cannot be inferred. *Id.* at 478 (emphasis added).

b. The Negotiations and the Legislative History Further Demonstrate that Congress Lacked the Intent to Disestablish the Reservation.

The events leading up to and surrounding passage of the 1905 Act confirm that Congress did not intend to diminish the Reservation in the 1905 Act. In the fruitless 1891 and 1893 negotiations for a portion of the same lands opened by the 1905 Act, the parties proposed to "cede, convey, transfer, relinquish, and surrender, *forever and absolutely* . . . all [the Tribes] right, title, and interest, *of every kind and character*, in and to the lands, *and the water rights appertaining thereunto*."[176] In return the Tribes would have received the sum certain of $600,000.[177] This is the same conveyance language and payment scheme used in the

[176] H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 29 (1892) (emphasis added). (BATES SH00578)

[177] *Id.* at 29-30. (BATES SH00578)

Thermopolis Purchase. 30 Stat. 62, 94 (1897). In addition, the rejected 1891 cession agreement provided that lands around the hot springs should "be reserved from entry as public lands," contemplating that the remainder of the ceded lands would be opened to settlement as public lands.[178] Consequently, the Assistant Attorney General requested language in the proposed approval act designating the ceded lands as public lands.[179]

By contrast, the legislative history of the 1905 Act shows a clear departure from the fruitless 1891 and 1893 negotiations. The legislative history of the 1905 Act explicitly states that the lands affected by the 1905 Act would not become part of the public domain. Article II of the 1905 Act provides Asmus Boysen with a preference right to purchase a 640 acre parcel of land within any portion of "said reservation" in lieu of his leasehold interest. 33 Stat. 1016, 1020 (1905). A number of representatives strongly opposed this provision on the grounds that a preference right was unnecessary because Boysen's lease would be automatically terminated when the Indian title was extinguished.[180] The sponsors of the legislation agreed that, while the lease would be cancelled when the lands were restored to the public domain, "[t]he 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 . . .*"[181] The fact that this debate over the status of the ceded lands occurred two years after the *Minnesota v. Hitchcock* decision, which held that lands opened under the Nelson Act were subject to a trust and were not "public lands," makes it clear that Congress understood the 1905 Act would not divest the Indians of all their interests in the ceded lands and the lands would retain their reservation status.

---

[178] *Id.* at 16. (BATES SH00578)

[179] Letter, Geo. H. Shields, Assistant Attorney General, to Secretary of Interior (Dec. 18, 1891), *reprinted in* H.R. Exec. Doc. No. 70, 52nd Cong., 1st Sess., 61 (1892). (BATES SH00578)

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

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

Moreover, Congress expressly refused to entertain a sum certain payment and insisted upon an arrangement whereby the Indians would be paid for the lands only when they were actually sold to settlers.[182] During the 1904 negotiations, McLaughlin emphasized that the proposed legislation did not provide for a sum certain payment as in previous agreements.[183] Clearly, the Thermopolis Purchase Act shows that McLaughlin knew how to draft an agreement providing for sum certain compensation, but intentionally chose not to do so in the 1904 Agreement. As McLaughlin later told the Tribes, "[t]he two agreements *are entirely distinct and separate from each other*, and [under the 1905 Act] the government simply acted as trustee for disposal of the land north of the Big Wind River."[184]

The record of the 1904 negotiations lacks evidence that the Tribes were told that the 1905 Act would result in disestablishment of their reservation. Rather, as reflected in the negotiation minutes, the Tribes were told that certain lands would be sold by the United States for their benefit. McLaughlin opened the negotiations with "[m]y friends, I am sent here at this time by the Secretary to present to you a proposition for *opening a certain portion of your reservation* for settlement by whites."[185] McLaughlin told the Tribes that the President and the Secretary wanted the Tribes to open their lands to settlement under the system established by Congress where the Tribes only would agree to relinquish possessory rights upon sale and the lands would not be public lands.[186] McLaughlin described the proposed arrangement as follows:

> [T]he government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times

---

[182] H.R. Rep. No. 3700, Part 2, 58th Cong., 3d Sess. (1905). (BATES SH0782)

[183] 1904 Minutes at 3-4. (BATES SH01367)

[184] 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) (emphasis added). (BATES SH08429)

[185] 1904 Minutes at 2 (emphasis added). (BATES SH01367)

[186] *See Ash Sheep*, 252 U.S. at 166.

> and in the manner as may be stipulated in the agreement, and this without any cost to the Indians. [187]

McLaughlin described H.R. 13481 as "having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with the means to make yourselves comfortable upon your reservation."[188]

That Congress never contemplated that all of the opened area would leave Indian ownership supports a lack of intent to diminish the reservation. The explicit language of the 1905 Act provided for Indian allotments in the opened area. Importantly, Congress expected only that a small percentage of the balance of the 1,438,633 acres would be settled in the immediate period after opening. Congress understood that some of the lands would never be settled. House Report No. 2355 describes Congress's understanding of development as follows:

> It is believed that at least 150,000 acres of this land will be taken up under the homestead law at $1.50 an acre; that possibly 150,000 acres more would be taken at $1.25 an acre; the remaining lands would unquestionably, with the possible exception of about 100,000 acres of very rough, mountainous land, sell for $1 an acre. It is difficult at this time to estimate how much land would be sold under the coal and mineral land laws.[189]

In summary, as the Court held in *Solem*, 465 U.S. at 472, "[w]hen both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and the old reservation boundaries survived the opening." The legislative history of the 1905 Act fails to establish congressional intent to diminish. The legislative history actually shows that Congress intended something different from the consequences of the Lander and Thermopolis Purchase Acts. Congress neither

---

[187] 1904 Minutes at 3-4. (BATES SH01367)

[188] *Id.* at 4. (BATES SH01367)

[189] H.R. Rep. No. 2355, 58th Cong., 2d Sess., 4 (1904); *see also* S. Rep. No. 2621, 58th Cong., 2d Sess., 4 (1904). (BATES SH00721, SH00743)

acquired the lands directly nor made the lands part of the public domain, but rather expected that a substantial portion of the opened area would always retain its Indian character.

c. Subsequent Events Confirm that the 1905 Act Did Not Diminish the Reservation.

Immediate post-enactment events may be considered to understand congressional intent, although they are of "lesser" significance. *Solem*, 465 U.S. at 471. In the case of the 1905 Act, the treatment of the opened area after passage of the Act is entirely consistent with Congressional intent to maintain the Reservation. Congress's own treatment of the affected areas, as well as the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with opened lands establish that the ceded area retained its reservation status. *Solem*, 465 U.S. at 471.

Congressional Action. Congress has always treated the lands opened by the 1905 Act differently from public lands. Congress has consistently referred to the ceded and diminished areas as being part of the Reservation. If Congress had understood that the opened area was no longer part of the Reservation, Congress would simply have dealt with the lands as part of the public domain in the same way that it treated the Lander and Thermopolis Purchase lands. For example in 1906, Congress extended the full public land laws to the Thermopolis Purchase area.[190] Congress has never taken such action with respect to the 1905 Act opened area.

In 1908, Congress authorized the leasing of allotted and common lands on the entire Reservation for irrigation for a period of twenty years.[191] In 1909, when extending the time for

[190] 34 Stat. 78 (1906).

[191] 35 Stat. 70, 97 (1908).

mineral entry under the 1905 Act, Congress described the mineral claims as "within the Shoshone or Wind River Reservation" and distinguished the standards for location of mineral claims on the Reservation from those upon public lands.[192] Importantly, Congress distinguished the situation on the Wind River Reservation from other openings of reservations.

> Formerly when Indian reservations were opened which contained land supposed to contain minerals 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 domain.[193]

Congress recognized that by adoption of the role of trustee with respect to opened lands, the United States assumed a special relationship with respect to such lands distinct from the outright acquisition of former reservation lands.[194] Congress continued to act as trustee with regard to the opened area by extending the date for mineral entry to benefit the Indians.[195]

In 1912, Congress extended the time to obtain patents on the Reservation. The legislation referred to the lands as the ceded "portion" of the Reservation."[196] In the House Report, the First Assistant Secretary refers to the law as dealing with the "situation of the entrymen within the Wind River Reservation."[197] Congress extended these provisions again in 1916.[198]

In the 1916 Act, Congress authorized the Secretary to lease 1905 Act lands for oil and gas production for the benefit of the Tribes. 39 Stat. 519 (1916). The 1916 Act resolved a controversy over whether the oil and gas reserves under the opened lands were subject to entry under the public land mineral leasing laws or Indian leasing laws. By authorizing the Secretary

---

[192] 35 Stat. 650 (1909); S. Rep. No. 980, 60th Cong., 2d Sess., 1 (1909). (BATES SH00838, SH11895)

[193] S. Rep. No. 980, 60th Cong., 2d Sess., 1 (1909). (BATES SH00838)

[194] *Id.*at 1-2. (BATES SH00838)

[195] *Id.* at 2. (BATES SH00838)

[196] 37 Stat. 91 (1912).

[197] H.R. Rep. No. 400, 62nd Cong., 2d Sess. (1912). (BATES SH00844)

[198] 39 Stat. 341 (1916).

to lease the oil and gas for the Tribes' use and benefit, Congress clearly and convincingly showed its intention that the ceded area retained its reservation status.[199] Indeed, Senator Clark of Wyoming explained that the land ceded by the 1905 Act is "*still Indian land and the Indians are entitled to it.*"[200] The 1916 Act constitutes clear evidence that Congress recognized that the lands opened by the 1905 Act retained their Reservation status. *See Solem*, 465 U.S. at 474 (legislation exempting coal-bearing lands from allotment or disposal inconsistent with reservation diminishment).

In appropriating funds to plan for the Riverton irrigation project during the later half of the 1910s and 1920s, Congress repeatedly referred to the 1905 Act area as the "*conditionally* ceded lands" of the Wind River Reservation and directed that a portion of the appropriations were reimbursable from the Tribes' proceeds of land sales under the 1905 Act.[201] This legislation recognized the Reservation status of the 1905 Act lands and that irrigation of lands "conditionally ceded" would benefit the Tribes. In 1920, Congress appropriated funds for the Riverton reclamation project. Congress described the lands covered by the project as "within and in the vicinity of the ceded portion of the Wind River or Shoshone Reservation."[202]

Congress formally stopped settlement of lands within the 1905 Act area in the 1939 Act. 25 U.S.C. § 571 *et seq.* The 1939 Act referred to the 1905 Act area as a "portion[] of the Wind River Indian Reservation" and "restore[d] to tribal ownership all undisposed-of surplus or ceded

---

[199] In 1912, the President attempted to withdraw certain lands from entry as a petroleum reserve. *See* S. Rep. No. 712, 64th Cong., 1st Sess., 2 (1916). However, certain interests objected to the withdrawal on the grounds that authority for such withdrawals only extended to public lands, not to lands held in trust for the benefit of the Indians. *Id.* (BATES SH02423)

[200] Cong. Rec. S12,159 (Aug. 9, 1916) (emphasis added). (BATES SH00851)

[201] *See* 39 Stat. 969, 993 (1917); 40 Stat. 561, 590 (1918); 41 Stat. 3, 30 (1919). In the 1920s, Indian Office appropriations include money for the construction of canals and laterals needed to serve allotments on the ceded portion of the Reservation. (BATES SH11925)

[202] 43 U.S.C. § 597.

lands within the land use districts [within the 1905 Act area] which are not at present under lease or permit to non-Indians." 25 U.S.C. §§ 574, 575. In considering this legislation, Congress recognized that the 1905 Act area was still part of the Reservation and that it was necessary to remove the limitations of the 1905 Act to facilitate the development of Indian ranching.[203] The sponsor of the legislation, Senator O'Mahoney, stated the 1905 Act cession was "in trust [to the Government] for settlement by whites" and these non-Indian settlers "have been using *the reservation* for grazing purposes."[204]

Significantly, the Supreme Court has held that this type of restoration legislation constitutes Congressional recognition of the "continued existence" of an opened area "as a federal Indian reservation." *Seymour,* 368 U.S. at 356. In enacting legislation for reservations opened under provisions virtually identical to the 1905 Act, Congress recognized that the lands continued in the beneficial ownership of the Indians even though they had ceded "all their right, title, and interest," and that restoration legislation was needed simply to "*clarify* the Indian title to these lands in order that they may be managed and administered by the tribes."[205]

Executive Action. The Executive Branch likewise treated the 1905 Act area as a continuing part of the Reservation immediately subsequent to passage. Section 3 of Art. IX of the 1905 Act provided for surveys and examination of the unsurveyed ceded lands and the boundaries of the diminished reserve where it was not a natural water body. 33 Stat. 1016

[203] Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess., 6 (1939). (BATES SH02708)

[204] *Id.* at 8 (emphasis added). (BATES SH02708)

[205] S. Rep. No. 1508, 85th Cong., 1st Sess. (1958) (emphasis added). Indeed, while not required by the Act because the lands were already part of the Reservation, each of the restoration orders state that the lands are part of the Reservation. (BATES SH12259) *See* 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (Nov. 17, 1942); 7 Fed. Reg. 1100 (Nov. 12, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812 (Mar. 14, 1945); 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 2, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); and 39 Fed. Reg. 27,561 (July 30, 1974), 58 Fed. Reg. 32,856 (Jun. 14, 1993).

(1905). By law, surveys of Indian reservations were to be made under the direction and control of the General Land Office.[206]

Immediately after passage of the 1905 Act, the Office of the U.S. Surveyor General issued a contract for a survey of lines in the Shoshone Indian Reservation.[207] The lands to be surveyed described in the contracts where the opened lands of the Reservation. Plats produced as the result of the surveys bear the legend "North Boundary Shoshone Indian Reservation" on the northernmost border of the opened area and "East Boundary Shoshone Indian Reservation" on the easternmost border of the opened area.[208] The surveys for these plats were completed by December 1905 and approved by the General Land Office in 1906.

The 1905 Act area was formally opened to entry in 1906. Official publications advertising the availability of land show the opened area as part of the Shoshone or Wind River Reservation.[209] Likewise, early Department correspondence to Congress in 1906 and 1912 referred to the opened areas as the "ceded portion of the . . . Wind River Indian Reservation" or

---

[206] *See* 25 U.S.C. § 176 cited in Report of the Commissioner of Indian Affairs, for the Fiscal Year ended June 30, 1909, Vol. II, p. 118. (BATES SH08349) The BLM currently describes the nature of its work as follows:

> Cadastral surveys deal with one of the oldest and most fundamental facets of human society -- ownership of land. They are the surveys that create, mark, define, retrace, or reestablish the boundaries and subdivisions of the public lands of the United States. They are not like scientific surveys of an informative character, which may be amended due to the availability of additional information or because of changes in conditions or standards of accuracy. Although cadastral surveys employ scientific methods and precise measurements, they are based upon law and not upon science. Cadastral surveys are the foundation upon which rest title to all land that is now, or was once, part of the Public Domain of the United States.

http://www.blm.gov/wo/st/en/prog/more/cadastralsurvey.html.

[207] Special Instructions, Contract No. 300 (May 1, 1905); Special Instructions, Contract No. 301 (May 1, 1905); Special Instructions, Contract No. 302 (May 1, 1905). (BATES SH07623, SH07598, SH07584)

[208] *See, e.g.*, Plat of Fractional Township No. 6 North Range No. 6 East of the Wind River Meridian, Wyoming approved April 10, 1906 (eastern boundary); Plat of Fractional Township No. 7 North Range No. 6 East of the Wind River Meridian approved April 6, 1906. (BATES SH08871, SH08876)

[209] E.F. Stahle and F.M. Johnson, Shoshone (or Wind River) Indian Reservation Wyoming, The Agricultural and Mineral Resources of the Ceded Area to be opened for settlement (August 15, 1906). (BATES SH00797)

simply as "the Wind River Reservation."[210] After passage of the 1905 Act, the Office of Indian Affairs continued to issue grazing leases within the 1905 Act area under regulations applicable to reservation lands and to apply the proceeds of these leases for the Tribes' benefit.

The Department also dealt with rights-of-way in the 1905 Act area based on the principle that such lands remained Indian Country, and was affirmed in doing so by the Federal courts. *See Clarke,* 39 F.2d 800. In 1905, a railroad company applied for and received a right-of-way through the Wind River Canyon pursuant to the Act of March 2, 1899, 25 U.S.C. § 312 (authorizing the secretary to issue rights-of-way over lands in Indian Country). *Id*. Land speculators attacked the validity of the right-of-way, arguing the 1905 Act put the lands at issue beyond the purview of the Indian right-of-way statute. *Clarke*, 39 F.2d at 812. The district court embraced this theory ruling that "the Act of March 3, 1905, had removed the lands involved from the purview of the right-of-way act of March 2, 1899." *Clarke*, 39 F.2d at 813. But, on appeal, the Tenth Circuit overruled the trial court, holding that the 1905 Act did not remove the lands at issue from the purview of the Indian right of way statute, 25 U.S.C. § 312. The Tenth Circuit held that the 1905 Act lands remained Indian lands, and fit the definition of one of three subsections of Indian lands set forth by 25 U.S.C. § 312: "lands reserved for other purposes in connection with the Indian service." Rather than destroying the reservation status of those lands, the Tenth Circuit concluded that the 1905 act merely designated certain lands "for entry and sale at a future date." 39 F.3d at 814. In sum, in *Clarke*, the Tenth Circuit ruled that the 1905 Act did nothing to change the boundaries of the Wind River Reservation. Moreover, after *Clarke*, the Department understood the case to be binding precedent on the point.[211] In 1909, the

[210] H.R. Doc. No. 601, 59th Cong. 1st Sess., 1 (1906); H.R. Rep. No. 400, 62nd Cong., 2d Sess. (1912). (BATES SH00828, SH00844)

[211] *See e.g.*, Letter, First Assistant Secretary to Messrs. Long, Chamberlain and Nyce (June 9, 1931) (BATES SH14145)

Department of Interior reaffirmed its position that rights-of-way across the Reservation were to be made in accord with the 1899 Act in connection with a railroad right-of-way through the opened lands to Hudson, Wyoming.[212]

In 1910, the Commissioner of Indian Affairs acted consistent with Reservation status when he opposed application of the Carey Act to the opened area because it might make the state responsible for collection of proceeds under the 1905 Act and he was not inclined to trust the state.[213] Then, in 1913, the United States filed litigation to enjoin the State from interfering with Indian water rights in the opened area. Bill of Complaint, *Hampleman*. The District Court enjoined the State from interfering with Indian diversions and trespassing off and on individual allotments in the opened area, noting that such lands were beyond the state's jurisdiction. Decree, *Hampleman*, Decree (Jun. 26, 1916).

In 1913 and 1914, the Department of Interior understood that the opened area was part of the Reservation. The Assistant Commissioner described Indian homes extending from Riverton to the mountains.[214] During 1914, the Bureau of Indian Affairs continued its management of the opened areas for irrigation for the benefit of the Indians. The BIA Superintendent told homesteaders that his task was to protect the Indians interests in the opened area and not the interests of the homesteaders.[215]

In 1915, after disposing of only approximately 130,000 acres out of a total of 1,438,633 million acres of land to non-Indian settlers, the Interior Department decided to halt further land

---

[212] Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, p. 60, 63. (BATES SH08349)

[213] Hoopengarner, p 239, n.2 *citing The Wyoming Tribune*, 3 (Oct. 20, 1910). (BATES SH11253)

[214] Minutes of meeting Held at the Shoshone Indian Agency with the Shoshone Indians and Arapahoe Indians and Mr. Abbott, Assistant Commissioner (Aug. 28, 1913). (BATES SH08455)

[215] Transcript of sworn testimony of Edmo LeClair before F.C. Campbell, District Superintendent, District No. 4, U.S. Indian Service (Oct. 5, 1926), p. 5. (BATES SH11173)

sales within the 1905 Act on the grounds that the Indians could derive greater revenues by leasing grazing rights and minerals on those lands. The Department thereafter limited further disposition of unsold lands to public purposes such as schools and the Riverton airport. In 1916 irrigation project reports, the Department acknowledged that "[a] certain interest is retained by the Indians in the 'ceded-lands' portion of the reservation" and recommended that ditches within the opened area be improved for the benefit of the Indians.[216]

In the 1920s, the Department reaffirmed its view that the statutes governing minerals on the public domain did not apply to the 1905 Act area. In 1922, Inspector McLaughlin himself recognized that the Tribes still retained the opened lands north of the Big Wind River.[217] The agency superintendent agreed that the Tribes retained "an equitable right" in the ceded lands.[218]

In the late teens and early 1920s, Reclamation withdrawal orders in the opened area provided that the lands were within the Reservation.[219] Importantly, the funds from reclamation and Indian appropriations for the reclamation project were all combined and accounted for under Indian investments.[220]

During the 1920s and early 1930s, the Interior Department reaffirmed its earlier decision to halt disposition of 1905 Act lands to protect the Indians' interest in grazing, minerals, and oil and gas development.[221] In 1929, the Secretary reaffirmed the government's obligation to

---

[216] H.R. Doc. No. 1767, 64th Cong., 2d Sess., 16-18 (1916). (BATES SH02343)

[217] 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). (BATES SH08429)

[218] *Id*. (BATES SH08429)

[219] Letter, A.P. Davis to Secretary (Jan. 2, 1920) approved by John W. Hallowell, Assistant to the Secretary (Jan. 3, 1920). (BATES SH22012)

[220] Hoopengarner, p. 250 n. 59 *citing* Project History, Riverton Project (1918)Vol. III, p. 6. (BATES SH11253)

[221] Letter, C. Burke to R.F. Haas (Mar. 29, 1929) at 2. (BATES SH08199)

manage grazing lands in the opened area for the benefit of the Indians.[222] In December 1933, the Office of Indian Affairs squarely took the position that "Indian title to [1905 Act] land is not extinguished until it is disposed of and the Indians are paid therefor," and that undisposed-of lands within the 1905 Act area still "belong to the Indians."[223] The Department refused to allow further disposition of Indian lands because it would interfere with the federal policy of consolidating and protecting Indian lands on reservations.[224]

The continued reservation status of the opened area was acknowledged during events surrounding passage of the Indian Reorganization Act. Shortly after the IRA's enactment, the Secretary recognized the Wind River Reservation as one of the reservations where Congress intended lands to be restored to full tribal ownership.[225] The Secretary distinguished between reservations like Wind River that were opened for settlement with the United States's holding the lands as trustee for the Indians versus cessions of reservations without such provisions where the exterior boundaries of a reservation were reduced.[226] Based on this analysis, the Department recommended restoration of lands on the Wind River Reservation part of the 1939 Act, and continued to recognize the Reservation status of the opened lands thereafter.

All of these actions of the Executive Branch in the few decades after passage of the Act further demonstrate that the 1905 Act did not diminish the Reservation. The government's actions demonstrate that the Tribes retained an interest in the opened portion of the Reservation and that the government had a fiduciary obligation to protect those interests. In sum, for

---

[222] *Id.*

[223] Memorandum, W. Zimmerman to Secretary (Dec. 8, 1933). (BATES SH00922)

[224] *Id.* (BATES SH00922)

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

[226] *Id.* at 2. (BATES SH00924)

decades, the Executive Branch's treatment of the 1905 Act area has rested on the fact that that area was simply opened for non-Indian settlement but not disestablished.

State and Local Views. Non-federal entities in the area recognized the continuing Reservation status of the lands immediately subsequent to passage of the 1905 Act.

In 1907, at the direction of the Governor, the Wyoming State Immigration Commission prepared a book entitled "The State of Wyoming: A Book of Reliable Information Published By Authority Of the Ninth Legislature." The book describes Riverton as "another new town located within the Indian Reservation" and states, separate from public domain lands opened to settlement, that "part of the . . . Wind River Reservation was opened for settlement" under the 1905 Act.[227] In the same year, the *Press of the Riverton New*s published a pamphlet encouraging settlement on the Reservation. The pamphlet described the opened area as part of the Reservation.[228] Another paper, the *Riverton Republican* described litigation over development of irrigation in the opened area as "of vital interest to the Reservation."[229]

Shortly after passage of the 1905 Act, the State Engineer acknowledged that Wyoming could not legislate relative to the opened area.[230] The State Engineer also recognized that if his

[227] The State of Wyoming: A Book of Reliable Information Published By Authority Of the Ninth Legislature, 25, 120. (BATES SH13079)

[228] Pamphlet entitled "Sweet and Prosperous Home is the Foundation of Happiness – A 160-acre Farm can be Obtained Cheap on 10-years Time – Just Like a Building Association on the Shoshone Reservation Wyoming – 350,000 Acres Opened For Public Entry By the Government – Greatest Irrigation System in the Country Being Built by Wyoming Central Irrigation Co. Under Supervision of the State of Wyoming – Fertile Lands, Mild Climate, Coal, Lubricating and Illuminating Oil, Gold and Copper Mining, Cattle, Sheep, Horses, Hogs, Water Power – Riverton, Wyoming," *Press of Riverton News*, 2 (1906). (BATES SH08552)

[229] Hoopengarner, p. 110 *citing Riverton Republican* (December 28, 1907). (BATES SH11253)

[230] Hoopengarner, p. 239, n. 2 *citing The Wyoming Tribune*, 3 (Oct. 20,1910) (BATES SH11253)

irrigation surveyors did not follow the rules for surveying on the Reservation they could be ejected by the Indian police.[231]

In 1919, the State of Wyoming conceded that *Hampleman*, enjoining the State from coming on the opened portion of the Reservation to interfere with water rights, was still good law.[232] In the 1920s, the sheriff of the Town of Lander agreed that the State did not have jurisdiction to prosecute trespassers on unpatented land within the opened part of the Reservation.[233] Clearly, the record shows that state and local officials early on did not view the 1905 Act as disestablishing the Reservation.

Demographic and Land-Use History. The demographic and land-use history of the Wind River Reservation does not support the claim that the Reservation was diminished by the 1905 Act. As in *Solem*, 465 U.S. at 480, "the opening of the [Wind River Reservation] was a failure" and "[f]ew homesteaders perfected claims on the lands." By the time land sales were halted by the Secretary only a few years after the 1905 Act was enacted, less than 9 percent of the opened area had been sold. Moreover, of the lands sold many were not inhabited. In 1920, 68 percent of the landowners in the reclamation project did not live on the Reservation, with the vast majority of those not even living within the state.[234] Out of the 1,438,633 acres opened to entry under the 1905 Act, only 128,986.56 acres were sold by the United States as of 1915.[235] Importantly 50,000 acres of the 1905 Act area were settled by individual Indians. The remainder continued

[231] Hoopengarner, p. 102. (BATES SH11253)

[232] Letter, Rerns to Meritt dated Jan. 16, 1919; Letter, State Engineer to S. G. Hopkins, Assistant Secretary dated Jan. 9, 1919. (BATES SH01984, SH08981)

[233] Letter, John Collier, Commissioner, to Acting Superintendent (Sep. 18, 1934). (BATES SH00929)

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

[235] Letter, E.B. Merritt to C.O. Lobeck (Jun. 12, 1914) at 5. (BATES SH08201)

to be managed for the Tribes' benefit.[236] The vast majority of the opened area is owned by the Tribes or tribal members, either as surface estate, mineral estate, or both. *See Solem*, 465 U.S. at 480.

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 percent of opened lands remained Indian hands shortly after the cession). The 1905 Act area is predominantly owned by Indians 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.[237] 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.[238]

In sum, a review of the subsequent history of the 1905 Act, including both Congressional and Executive Branch actions, Tribal, State and local government views, as well as the demographic and land-use changes in the area, indicate that there was no intent to diminish the Reservation. The Tribes have always held an interest in the vast majority of the lands within the 1905 Act area and today own most of the lands in this area outright. Accordingly, the 1905 Act did not diminish the Reservation.

---

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

[237] 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

[238] 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 percent of "Leech Lake Reservation land"); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 193 n.1 (1978) (reservation population comprised 2928 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 percent of total reservation population).

d. The Reservation Boundary of 1897 Continues to be Recognized in Recent Times.

More recent legislation and executive action is consistent with the premise that the 1905 Act did not alter the Reservation's boundaries. In the 1940s, the United States, the Tribes and the State all took positions that the opened area was part of the Reservation. The Tribes acquired the Padlock Ranch located on both sides of the northern boundary of the Reservation as it has existed since 1897. Congress recognized that the lands to be acquired south of the boundary were part of the Reservation.[239] In 1941, Congress passed legislation allowing for the Secretary to establish a boundary between Indian and non-Indian lands.[240] The 1941 Act described the 1905 Act area as "Indian" lands. Importantly, Congress understood the Tribes had authority over the area by requiring consent of the Tribes to any boundary determination. In 1944, the Wyoming federal courts described the opened and diminished areas as being part of the same Reservation. *Board of Com'rs of Fremont County*, 145 F.2d 329.

In a series of acts in the 1950s, Congress continued to recognize that the Tribes had substantial interests in the ceded ands and that the ceded and diminished lands were part of one Reservation. In 1950, the United States took the position that the Mineral Leasing Act of 1920 did not apply to the ceded lands because they were not lands of the United States.[241]

In 1952, the United States acquired Tribal interests in lands for the Boysen Reservoir. A part of the rights acquired were described as beneficial rights in land opened by the 1905 Act.[242]

[239] 54 Stat. 628, 642 (1940).

[240] 55 Stat. 207 (1941).

[241] *Florence E. Gallivan*, 60 Int. Dec. 417 (1950). BATES SH02266)

[242] S. Rep. No. 1980, 82nd Cong., 2d Sess. (1952). (BATES SH03039)

Furthermore, the Tribes retained exclusive access to parts of the Reservoir so long as the lands remained part of the Reservation.[243]

In 1953, Congress approved payment to Tribes for some surface interests within the reclamation project and for past trespass on such lands after 1905. As part of the Act, Congress restored additional acreage to tribal ownership under the provisions of the 1939 Act. Under the 1939 Act, the restoration only applied to lands that were part of the Reservation. If the Reservation had not continued to exist, no mention of the Reservation would have been included.

Congress approved acquisition of lands on the northern boundary of the Reservation in 1956 for construction of Anchor Dam.[244] In the 1956 Act, Congress protected the Tribes' hunting and fishing rights in the area. The United States ultimately returned a portion of the lands to the Tribes as excess property because the lands were within the Reservation.[245]

In the 1958 Act, Congress took action to reaffirm that the Tribes owned and managed the minerals within the Riverton reclamation project. When considering the 1958 Act for passage, the Committee on Interior and Insular Affairs, described the lands as "*within the Riverton reclamation project within the Wind River Indian Reservation . . .*"[246] Ownership of the minerals is consistent with reservation status. In *Crow Tribe*, the Court of Appeals found underlying minerals to be a "component of the reservation land itself." *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 898 (9th Cir. 1987) *aff'd*, 484 U.S. 997 (1988).

---

[243] Memorandum of Understanding *reprinted in* S. Rep. No. 1980, 82nd Cong., 2d Sess., 10-54 (June 27, 1952). In 1954, the United States acknowledged that the Tribes had a priority right on the southwest area lands. *See* Memorandum, W.H. Farmer to P. L. Fickenger, (Apr. 22, 1954). (BATES SH14416)

[244] 70 Stat. 987.

[245] Memorandum, Billings Area Director to Deputy to the Assistant Secretary – Indian Affairs (Nov. 6, 1987); *see* 53 Fed. Reg. 1854 (Jan. 22, 1988). (BATES SH09419)

[246] S. Rep. No. 1746, 85th Cong., 2d Sess., 1 (emphasis added). (BATES SH03342)

From the 1960s to the 2000s, state and federal courts often described the opened area as part of the Reservation. *Hathaway*, Case No. 5367 (D. Wyo. 1969) (enjoined state regulatory actions over minerals in opened area); *Geraud*, 531 P.2d 872 (Reservation school district dispute); *Mazurie*, 419 U.S. at 546 (Reservation liquor regulations); *Dry Creek Lodge*, 623 F.2d at 683 (road access); *Hodel*, 808 F.2d at 744(hunting and fishing); *Tribes v. U.S.*, 364 F.3d at 1343 (breach of trust for mineral mismanagement); *United States v. Jenkins*, 17 Fed.Appx. 769 (10th Cir. 2001) (Reservation criminal proceeding); *Farmers Insurance Exchange v. Allison Sage*, Case No. 02-CV-94-J, Order Denying Plaintiff's Motion for Judgment on the Pleadings, Denying Defendant Sage's Motion to Dismiss and Granting Shoshone and Arapahoe Tribal Court's Motion to Dismiss, (D. Wyo. 2003) (personal injury on Reservation road). Among this category of precedent, the *Big Horn Adjudication* dealt with the issue most extensively. [247] There the Wyoming Supreme Court held that the 1905 Act did not abrogate the Tribes' federally reserved water rights that had been established when the Reservation was reserved in 1868. In coming to this conclusion, the Court conducted a full evidentiary hearing on the Reservation status question and concluded that the 1905 Act did not disestablish the exterior boundary. *See* Part C.2.e, below.

In 1972, Rep. Roncalio introduced H.R. 15316, a bill "to construct an Indian Art and Cultural Center in Riverton, Wyoming, and for other purposes."[248] Section 2 of the bill provides that the center would be "established at Central Wyoming College, located within the Wind River Indian Reservation."[249]

---

[247] *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming* (Civ. No 4993). (BATES SH13992)

[248] H.R. 15316, 92nd Cong., 2d Sess. (1972); *see* Cong. Rec. E5935 (June 1, 1972). (BATES SH08466)

[249] *Id*. (BATES SH08466)

In 1993, the United States restored lands within the Wind River Canyon to the Tribes. The Order noted the lands and mineral interests were "within the Wind River Indian Reservation." 58 Fed. Reg. 32586 (June 14, 1993).

In 1994, Congress recognized that the fee lands acquired by each Tribe were part of the Reservation and provided that "[a]ny lands acquired . . . within the exterior boundaries of the Wind River Reservation shall remain a part of the Reservation and subject to the joint tribal laws of the Reservation."[250] 25 U.S.C. § 574a(b).

In 2007, the State of Wyoming recognized the Reservation boundary as it has existed since 1897. The legislature adopted a wolf management boundary that is defined in part by the Reservation boundary as understood by the Tribes. The United States relied on this position when it accepted the State's plan for management of the wolves. 73 Fed. Reg. 10,514 (Feb. 27, 2008).

The longstanding treatment of the 1905 Act area is inconsistent with the premise that the 1905 Act diminished the Reservation. Instead, the subsequent history establishes that Congress has recognized continuing Reservation status of all lands under the terms of the 1905 Act.

e. The Reservation Status Issue Was Actually Litigated and Resolved in the Tribes' Favor in the *Big Horn Adjudication*.

In the *Big Horn Adjudication*, the Wyoming Supreme Court held that the Tribes' retained water rights with an 1868 priority within the portion of the Reservation "ceded" under the 1905 Act. *In Re The General Adjudication of All Rights to Use Water in the Bighorn River*, 753 P.2d 76 (1988) ("*Big Horn I*"). The entire record of the *Big Horn I* decision, starting with the

[250] The legislative history of the Act reflects Congress's ongoing understanding that lands opened under the 1905 Act were Reservation lands. H.R. Rep. No. 103-704, 103rd Cong., 2d Sess. (1994). (BATES SH12287)

proceedings before the Special Master, continuing through the decisions of the District Court, and culminating in the decision of the Supreme Court, makes clear that lack of Congressional intent to diminish in the 1905 Act was actually litigated by the parties (which included the United States, the Tribes, the State of Wyoming, Fremont County, and the City of Riverton) and essential to the outcome of that case. The alleged "disestablishment" effectuated by the 1905 Act was the key to the State's position in *Big Horn I* and an essential issue which had to be resolved by the court to determine the priority date for the lands within the lands covered by 1905 Act.[251]

Proceedings before the Special Master. Special Master Teno Roncalio convened extensive hearings concerning the claims for the use of water in the Big Horn River system. The United States and the Tribes filed a statement of geographical boundaries, which included the 1905 Act area; and the State of Wyoming filed objections to that statement.[252] On April 15, 1980, the parties entered into a Stipulation.[253] While the Stipulation circumscribed the geographical scope of the Tribes' water rights claim, the Stipulation expressly reserved the

---

[251] The State continued to maintain these arguments in its September 3, 1980, "Wyoming's Brief in Support of its Proposed Findings of Fact and Conclusions of Law Concerning Federal Reservation Boundaries and Establishment Dates," and in its April 12, 1982, "Wyoming's Proposed Master's Report, Proposed Findings of Facts, Conclusions of Law and Decree." (BATES SH14395, SH15398)

[252] *United States' Statement of Geographical Boundaries* , filed September 17, 1979; *Wyoming's Objections to the United States' Statement of Geographical Boundaries*, filed January 15, 1980. (BATES SH14392, SH15392)

[253] *Stipulation Concerning the Boundaries of the Wind River Indian Reservation* (Apr. 15, 1980). The Stipulation provided that:

> For the purposes of determining the reserved water or other rights to the use of water, if any, which may exist with respect to the Wind River Indian Reservation, the exterior boundaries of the Wind River Indian Reservation are as set forth in the United States Statement of Geographic Boundaries filed herein, and are agreed to include the following-described lands: [There follows 14 pages of metes and bounds land description.]
>
> *The parties reserve their rights to challenge the validity, priority date, purposes, quantity of water, and any other characteristic of any water rights which may be claimed in the above-described area.*
>
> This stipulation shall not affect the jurisdiction of any parties over lands within the exterior boundaries of the Reservation.

Stipulation (emphasis added) (BATES SH14180)

State's right to challenge the "validity" and "priority date" of the Tribes' water right claims. The State actively exercised this right to challenge the reservation boundary and the Tribes' rights to an 1868 priority date for lands in the 1905 Act area. Indeed, notwithstanding the Stipulation, the State continued to assert that the 1905 Act "disestablished" the portion of the Reservation "ceded" by the Tribes under that Act. For example, on July 23, 1980 the State submitted a brief conceding that "the priority date for any reserved water right found by the Court to exist for those portions of the Wind River reservation which were never disestablished or patented to non-Indians is July 3, 1868."[254]

Special Master's Report. On December 15, 1982, Special Master Roncalio submitted his report. As noted above, the State continued to assert before the Special Master that the 1905 Act "disestablished" the portion of the Reservation "ceded" by the Tribes under the 1905 Act. In the section of the report titled "Boundaries and Dates," he explained:

> The major controversy with regard to this element (the boundaries) of the adjudication centers around the Second McLaughlin Agreement, which is more commonly referred to as the 1905 Act. . . . The State of Wyoming contends that the language and the transaction created a disestablishment of certain lands from the body of the 1868 Reservation in such a manner as to preclude the granting of an 1868 priority date for water on those lands which were ceded under the terms of the Agreement. . . .
>
> Attorneys for the State of Wyoming contend that this transaction constituted a "disestablishment" of those lands ceded under the 1905 Act and that the disestablishment resulted in a severance of the 1868 priority date from the ceded lands. [255]

The Special Master squarely rejected the State's disestablishment argument, including its reliance on the erroneous holding in *State of Wyoming v. Moss*, 471 P.2d 333, 335 (Wyo.

---

[254] *Wyoming's Brief in Support of its Response to the Claims for Water Rights of the United States and Shoshone and Arapahoe Tribes* (State's Brief re Water Claims) at 52. (BATES SH14365)

[255] *Report of Special Master Roncalio: Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming*, 35-37 ("Master's Report"). (BATES SH04101, SH04200, SH04334)

1970).[256] Instead, the Special Master held that the language of the 1905 Act left the boundary of the Reservation intact because it maintained ownership of the lands in the United States in trust for the Tribes. Citing *Ash Sheep*, the Special Master held that the language of the 1905 Act "clearly indicates that the intent of this Act was to establish a trust relationship, with the United States acting as the trustee for the sale of certain Indian lands to settlers."[257] The Special Master rejected the State's position that the Reservation was disestablished.[258] He concluded:

> Attorneys for the State of Wyoming contend that this transaction constituted a 'disestablishment' of those lands ceded under the 1905 Act and that the disestablishment resulted in a severance of the 1868 priority date from the ceded lands. I think not.[259]

District Court Decision. On May 10, 1983, District Court Judge Harold Joffe issued his opinion addressing the parties' exceptions to the Special Master's report. The District Court upheld the Special Master's award of an 1868 priority for water rights associated with lands opened under the 1905 Act. The court explained:

> [The Court] accepts as law that the Indians have a reserved right with a priority of date of 1868 . . . for all land continuously held by Indians or the U.S. in trust for Indians. . . . That also includes the land ceded to the United States in 1905 but never sold to non-Indians. On this point, the Court concurs with the conclusion of the Special Master that *this land was held in trust for the Tribes by the United States and never lost its Indian status*.[260]

---

[256] *Moss* involved a murder committed by an Indian on former allotment land within the City of Riverton. *Moss*, 471 P.2d at 335. The Court rejected the defendants' argument based on the trust relationship in Article IX of the 1905 Act and *Seymour*, 368 U.S. 351 that the State had no criminal jurisdiction. *Id.* at 336. Erroneously relying on *United States v. LaPlant*, 200 F. 92, 94 (D.S.D. 1911), a case overruled by the 1920 *Ash Sheep* decision, the Court held that there was no jurisdiction because the defendant could not establish that "the Indians retained title to the lands" after the 1905 Act. *Id.*

[257] *Report of Special Master Roncalio: Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming*, 39 ("Master's Report"). (BATES SH04101)

[258] *Id.* at 41. (BATES SH04101)

[259] *Id.* at 37. (BATES SH04101)

[260] *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming* (Civ. No 4993), District Court Opinion at 23 (May 10, 1983) (emphasis added). (BATES SH04484)

The court thus rejected the State's position that lands within the 1905 Area lost their status as Indian country by virtue of the 1905 Act. The court's decree listed an array of lands within the 1905 Act area which enjoyed an 1868 reserved right because those lands were found to be within the Reservation. The inescapable conclusion is that the District Court agreed with the Special Master that the 1905 Act did not disestablish or diminish the Reservation.

Almost immediately following the District Court's decision, the State moved to amend the judgment, asking the court to "[c]larify the Decree's limitation upon off-reservation use of reserved water rights by defining the term 'reservation' to include only trust lands and Indian-owned fee lands." [261] The District Court denied the State's motion and once again upheld the Special Master's report as "*the cornerstone of the case*."[262] The District Court also rejected State efforts to limit the Special Master's determination of the scope of the Reservation.[263] On May 15, 1985, the court entered an amended judgment and decree which expressly "approve[d] and adopt[ed] the Special Master's Report," except as inconsistent with the Court's decision.[264]

Final Disposition by Wyoming Supreme Court. Consistent with its position throughout the litigation, the United States, in its brief before the Wyoming Supreme Court, supported the Special Master and District Court rulings that the 1905 Act did not diminish the Reservation. The United States pointed out that the Special Master's analysis followed the analytical framework required by the United States Supreme Court

---

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

[262] *Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983* at 5 (June 8, 1984) (emphasis added). (BATES SH03907)

[263] *Id.* at 7. (BATES SH03907)

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

in *Solem*.[265] The United States took the position that the language of the 1905 Act, in contrast to the Thermopolis Purchase, "did not contain either words of cession or other language evidencing an intent to surrender of [sic] all tribal interest or a commitment by the government to pay the Indians."[266] Furthermore, the United States asserted that the events surrounding passage of the 1905 Act did not unequivocally reveal a widely held contemporaneous understanding that the reservation would shrink.[267]

The State's opening brief in the Supreme Court continued to insist that the 1905 Act diminished the Reservation.[268] The State's argument was that the loss of reservation status for the 1905 Act area deprived those lands of a reserved water right with an 1868 priority. The Wyoming Supreme Court rejected the State's position.

In the majority decision, the Wyoming Supreme Court upheld the Special Master and District Court rulings that the 1904 Agreement and the 1905 Act did not disestablish the reservation and, therefore, awarded reserved water rights with an 1868 priority date for trust and fee lands within the 1905 act area. The Court explained:

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

Id. at 93-94 (emphasis added). The Court's award of 1868 priority rights extended to both trust and fee land within the 1905 Act area. *Id.* at 112, 114. The Wyoming Supreme

---

[265] Brief of the Appellant the United States in Response at 97, *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming* (Civ. No 4993). (BATES SH07161)

[266] *Id*. at 97 (citations omitted).

[267] *Id*. at 98-99 (citations omitted).

[268] *Brief of Appellant State of Wyoming* at 106 (1988). (BATES SH07183)

Court's decision awarding an 1868 priority for the above lands was later affirmed without opinion by the United States Supreme Court. *Wyoming v. United States*, 492 U.S. 406 (1989).

Justice Thomas's dissent in *Big Horn I* provided a detailed argument in support of Wyoming's failed position that the 1905 Act diminished the Reservation. *Big Horn I*, 753 P.2d at 120-35. Reasoning that disestablishment of a Reservation "abrogates appurtenant [water] rights," Justice Thomas maintained:

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

Id. at 135. The Wyoming Supreme Court's affirmation of an 1868 priority for water rights for lands within the 1905 Act area makes clear that the Court considered and rejected the dissent's argument that the 1905 Act "disestablished" the Reservation. The fact that the Court determined that the 1905 Act did not "abrogate" or otherwise affect the Tribes' 1868 priority water rights necessarily establishes that the 1905 Act did not affect the Reservation status of those lands or diminish the Reservation. The *only* way that Congress conceivably could have "abrogated" the Tribes' reserved waters rights in the 1905 Act was by extinguishing the Reservation status of the lands, *i.e.* by diminishing the Reservation.

Furthermore, by awarding an 1868 priority to 1905 Act area lands, including fee lands, the majority necessarily decided that the 1905 Act had no effect on the Reservation status of those lands. As Justice Thomas' dissent makes clear, the majority could not have affirmed an 1868 priority for the lands within the 1905 Act area without determining that those lands remained within the Reservation.

Significantly, nothing in the majority opinion in any way modified the Special Master's conclusion that the 1905 Act did not disestablish any portion of the Reservation. Affirmation of the 1868 priority for all lands within the 1905 Act area is both an acceptance of the Special Master's conclusion that the 1905 Act did not disestablish the Reservation and a recognition that lands within the 1905 Act area continues to be within the Reservation.

f. The Facts Surrounding the 1905 Act Are Distinguishable from *Rosebud Sioux*.

The Supreme Court's holding in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, does not alter the conclusion that the 1905 Act did not diminish the Wind River Reservation.[269] In *Rosebud Sioux*, 430 U.S. at 590-91, the government and the tribe initially entered into a 1901 agreement in which the tribe ceded a portion of the reservation in return for a lump sum payment. All parties agreed that this agreement, if it had been ratified, would have terminated the reservation. *Id.* at 592. However, instead of ratifying this agreement, in 1904 Congress amended it to remove the lump sum payment and insert language providing compensation only when the lands were actually sold by the United States. *Id.* at 595-96. The Court held that notwithstanding the change in the payment method, the basic intent of Congress to diminish the reservation was the same. *Id.* at 594-95 ("no indication that Congress intended to change anything other than the form of, and responsibility for, payment"). The Court concluded that "[b]ecause of the history of the 1901 Agreement, the 1904 Act cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the Rosebud

[269] In *Big Horn I*, Special Master Roncalio held *Rosebud Sioux* inapplicable to the Wind River Reservation. Master's Report at 42-43. The Special Master distinguished the 1905 Act from the facts and circumstances in *Rosebud Sioux*. *Id.* In his dissent in *Bighorn I*, 753 P.2d at 119-35, Justice Thomas attempted unsuccessfully, based on *Rosebud Sioux*, to argue that the 1905 Act diminished the Wind River Reservation.

Reservation." *Id.* at 592. In short, the holding in Rosebud was rooted in the Tribe's contemporaneous agreement to accept a sum certain.

The differing facts and context of the payment language of the 1905 Act calls for a different conclusion from *Rosebud Sioux*. Indeed, the canons of construction require that Courts guard against indulging in disjunctive comparisons between different treaties. Writing for the Court in *Mille Lacs Band*, Justice O'Connor warned as follows:

> [The] argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction.... Th[e] review of history and the negotiations of the agreement is central to the interpretation of treaties.

526 U.S. at 202; *see also United States v. Webb*, 219 F.3d 1127, 1133 (9th Cir. 2000); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999). In *Solem*, the Supreme Court observed that "some surplus land acts diminished reservations . . . and other surplus land acts did not" and "the effect of any given surplus land act depends on the language of the act *and the circumstances underlying its passage*." 465 U.S. at 469 (emphasis added).

The circumstances surrounding the 1905 Act are very different from those surrounding the 1904 Act at issue in *Rosebud Sioux*. First, there is no contemporaneous agreement in this case like the unratified 1901 agreement in *Rosebud Sioux* that would establish a clear intent to diminish the Wind River Reservation. The most recent agreement to the 1905 Act for a cession of Reservation land was the 1897 Thermopolis Purchase.[270] The 1891 negotiation, which was

[270] The 1905 Act came fourteen years after the failed 1891 and 1893 negotiations and contains multiple material changes from the proposed 1891 agreement, rather then simply a change in payment method. The language of cession in the 1905 Act is far less absolute, the land area changed, provisions for outright purchase of school lands changed, and trust language is included. Furthermore, the 1905 Act did not purport to ratify the 1891 agreement, but approved a completely new agreement negotiated by McLaughlin in 1904. Congress had declined to pass the Mondell Bill which purported to "ratify" the 1891 discussions and directed that an inspector be sent to negotiate with the Tribes. In the 1905 Act, Congress passed a law different not only from the 1891 discussions, but also from the 1904 McLaughlin agreement.

rejected by Congress, did not involve all of the same lands as the 1905 Act. Not only was it rejected by Congress but it antedated the 1905 Act by 14 years.

Unlike the statute in *Rosebud Sioux*, the 1905 Act used much less absolute language of cession. The cession language in the 1905 Act and the Thermopolis Purchase Act were both drafted by McLaughlin. He told the Tribes in the 1904 that he drafted agreements "with such care, that no word will have two meanings, so that it will be plain and easily understood."[271] Given that the two agreements were drafted and negotiated by the same government representative, the lack of absolute cession language in the 1904 McLaughlin Agreement was clearly intentional and reflects the conditional nature of the 1905 Act opening. Under the 1905 Act, the Tribes also retained a substantial interest in the opened lands until they were actually sold to non-Indians under the Act's provisions. Taken in context, the language in the 1905 Act is not "precisely suited" for the diminishment of the Reservation. *DeCoteau*, 420 U.S. at 445.

Also unlike *Rosebud Sioux*, Congress made very clear that the lands opened by the 1905 Act were not restored to the public domain, but rather were made available for the United States to transfer clear title to an individual settler. *See Ash Sheep*, 252 U.S. 159.

In *Rosebud Sioux*, 430 U.S. at 599, Congress expressly included language committing the government to purchase the school sections and convey them to the State as required by South Dakota's Enabling Act. By contrast, in the 1905 Act, Congress stripped very similar language out of the 1904 McLaughlin agreement. *See* 33 Stat. 1016, 1020-21 (1905). The purposeful deletion of the school lands provisions shows that Congress intended that the opened lands would retain their Reservation character. This intent is bolstered by Congress's addition of

[271] 1904 Minutes at 8. (BATES SH01367)

the Boysen lease proviso, which was applicable to the entire Reservation.[272]

The demographics in *Rosebud Sioux* were also very different from those at Wind River. In *Rosebud Sioux*, all but 4,600 acres or 99 percent of the ceded lands were disposed of under the homestead laws. 430 U.S. at 587, n.3, 598; *see* Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II at 126. In contrast, on the Wind River Reservation, less than 10 percent of the approximately 1,438,633 million acres opened by the 1905 Act were actually sold to settlers. The government has continued to manage the lands as the Tribes' trustee for mineral, agricultural, and residential uses. Unlike *Rosebud Sioux*, the vast majority of lands ceded in 1905 were restored to Tribal ownership.

Finally, in contrast to *Rosebud Sioux*, the long-term and continuous status of most of the 1905 Act territory as Indian lands under federal jurisdiction, not only demonstrates a different understanding of the underlying legislation, it has also "created justifiable expectations" which would be upset by a finding that over a 1,438,633 acres of Tribal lands are no longer part of a unified and contiguous Indian reservation. 430 U.S. at 604-05.

3. The Boysen Act Did Not Affect the Reservation Boundaries.

The next statute which took a partial interest in the tribal lands was the Act of July 18, 1952, 66 Stat. 780 (1952). The Boysen Act was adopted to implement the 1944 Flood Control Act, 58 Stat. 887 (1944), and authorized the Interior Department to take Tribal "property and rights . . . needed by the United States for the construction and maintenance and operation" of the Boysen project.[273] The Boysen Act incorporated a

[272] Cong. Rec. H1945 (Feb. 6, 1905). (BATES SH08543)

[273] S. Rep. No. 1980, 82nd Cong., 2d Sess., 10 (1952). (BATES SH03039)

memorandum of agreement between the Bureau of Reclamation and the Bureau of Indian Affairs which preserved significant Tribal interests in the project area.[274]

The Boysen Act, like similar statutes taking interests in Indian lands for Flood Control Act projects, did not diminish the Wind River Reservation. In *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 816-17 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984), the court held that two statutes taking the Tribe's "entire interest" in Reservation land for 1944 Flood Control Act purposes in return for a sum certain did not diminish the Lower Brule Sioux Reservation. The court reasoned that the language of the statutes taking land for project purposes "falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." *Id.* at 817. Furthermore, because reservation land was taken in order to construct a dam and reservoir, "continued Indian control of this land was not inconsistent with the federal government's purpose in acquiring the property." *Id.* at 817-18. Finally, the Court noted that after the project was constructed, Tribal members continued to utilize the land and exploit its resources. *Id.* at 818.

In *Bourland v. South Dakota*, 949 F.2d 984, 990 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993), the Court followed its decision in *Lower Brule* and held that the 1944 Flood Control Act, which took Indian property rights but which expressly *preserved* both tribal hunting and fishing rights, grazing rights, and leasing rights with respect to the taken land, did not diminish the Cheyenne River Sioux Reservation. In its decision, the court noted that "the purpose of the Act was simply to enable the United States to acquire the land needed for the

[274] The Memorandum of Understanding is reprinted in S. Rep. No. 1980, 82nd Cong., 2d Sess., 10-54 (1952). (BATES SH03039)

construction of the [project], and to do so with as little disruption as possible to the life of the Tribe." *Id.* at 994.

Unlike the statutes implementing the 1944 Flood Control Act at issue in *Lower Brule*, the language of the Boysen Act does not divest the Tribes of their "entire interest" in the lands. The Boysen Act is similar to the statute at issue in *Bourland*, which preserved significant Tribal interests in most of the affected lands, including mineral rights, special rights of occupancy and preferential rights of access. As held in both *Lower Brule* and *Bourland*, statutes enacted pursuant to the 1944 Flood Control Act are insufficient to diminish an Indian reservation. *See also Solem*, 465 U.S. at 468 (reservation status extinguished only when land is "divested of all Indian interests").

There is absolutely no indication that Congress intended to alter the boundary of the Wind River Reservation by passing the Boysen Act. The statute and its legislative history show that Congress intended to take those limited interests in Tribal land needed to construct and operate the flood control project and to leave the Tribes with as much of a residual interest in the lands as would be consistent with project construction and operations. *See Bourland*, 949 F.2d at 994 ("purpose of the Act was simply to enable the United States to acquire the land needed for the construction of the [project], and to do so with as little disruption as possible to the life of the Tribe"). As pointed out in *Lower Brule*, "continued Indian control of this land was not inconsistent with the federal government's purpose in acquiring the property." 711 F.2d at 817-18. Because there is no evidence, much less "*substantial and compelling evidence*" of a congressional intention to diminish the Wind River Reservation, the Boysen Act had no effect on its boundaries. *Solem*, 465 U.S. at 472.

4. The 1953 Act Did Not Affect the Reservation Boundaries.

The last statute addressed in this statement is the Act of August 15, 1953, 67 Stat. 592 (1953). It has been argued that the 1953 Act diminished the Reservation because it superficially appears to relinquish Tribal lands in return for sum certain compensation. *See State v. Blackburn*, 357 P.2d 174, 178-79 (Wyo. 1960).[275] However, there are several reasons why this is not the case. First, although the Tribes relinquished ownership of the surface of the lands affected by the Act, the statute preserved the Tribes' beneficial interest in the mineral reserves underlying the surface of these lands. Section 5 of the Act expressly provided the Tribes with a beneficial interest in 90 percent of the proceeds of mineral leases involving these lands. 67 Stat. 592, 614 (1953).

The 1953 Act purported to ratify an agreement in which the Tribes agreed to relinquish ownership of the surface of the lands while retaining their interest in the mineral estate.[276] The Wyoming congressional delegation affirmed that the 1953 Act was intended merely to open the surface estate of certain Tribal lands to non-Indian settlement, not to extinguish the Tribes' mineral interests.[277] Because the 1953 Act preserved the Tribes' beneficial interest in the mineral estate underlying the lands opened to non-Indian settlement, it did not diminish the Reservation. *See Solem*, 465 U.S. at 468 (reservation diminished when land "divested of *all*

[275] *Blackburn* involved a conviction for rape within the area affected by the 1953 Act. The Wyoming Supreme Court rejected the defendants' argument that the state court did not have jurisdiction because the offense occurred in Indian country. The Court wrongly construed the 1953 Act and 1958 Act to find that the only thing reserved for the Tribes in these Act was the proceeds from lease rights. While quoting the sale language in the 1953 Act, the Court never acknowledged the language from the 1958 Act declaring that the minerals belong to the Tribes.

[276] *See* Joint General Council minutes of July 24, 1952; Tribal Resolution Nos. 325, 355, and 338. (BATES SH09808, SH14148, SH14152, SH14155)

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

Indian interests"); *Crow Tribe*, 819 F.2d at 898 (underlying minerals are a "component of the reservation land itself").

Any ambiguity about the Congress's intent in enacting the 1953 Act was resolved by the Act of August 27, 1958, 72 Stat. 935 (1958), which confirmed Tribal ownership of the minerals underlying the lands opened by the 1953 Act.[278] Rather than "restore" the minerals to the Tribes, as was done when there had been a prior transfer of other Tribal interests, the 1958 Act "declares" that the minerals belong to the Tribes. 72 Stat. 935 (1958). The 1958 Act further provides that such minerals "shall be administered and leased in accordance with" the 1938 Indian Minerals Leasing Act (IMLA), 25 U.S.C. §§ 396a *et seq*. *Id.* Under the IMLA, it is *the Tribes*, not the United States, that determine in the first instance whether and on what terms minerals will be leased. *See* 25 U.S.C. § 396a. Under the IMLA, the role of the Secretary of the Interior is limited to approving Tribally issued leases.[279] *Id.*

Finally, even if the 1953 Act had divested the Tribes of interests in the 161,000 acres of lands covered by Section 1, the lands still remain *within the exterior boundaries* of the Reservation. *Crow Tribe*, 819 F.2d at 898. Notably, the lands affected by the 1953 Act are entirely surrounded by Tribally-owned trust lands. Thus, even if the 1953 Act divested the Tribes of interests in these lands, the Act does not affect the delegation of federal authority under Section 301(d) of the CAA because these lands are still within Reservation's *exterior* boundaries.

[278] When considering the 1958 Act for passage Committee on Interior and Insular Affairs, described the lands as *within the Riverton reclamation project within the Wind River Indian Reservation . . .*" S. Rep. No. 1746, 85th Cong., 2d Sess., 1 (1958). (BATES SH03342)

[279] Furthermore, ownership of the mineral estate gives the Tribes and their lessees significant and superior rights to use and occupy the surface for the purposes of mineral extraction. *See Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505-06 (1928). (BATES SH14137)

IV. CONCLUSION

As discussed at length in the foregoing statement, it is the opinion of the undersigned legal counsel that the Tribes are eligible to exercise delegated authority under Section 301(d) of the CAA, 42 U.S.C. § 7601(d) within the exterior boundaries of the Wind River Reservation. Those boundaries are defined by the original boundaries established in the 1868 Treaty, less those areas covered by the Lander and Thermopolis Purchase Agreements plus those lands acquired in Hot Springs County, Wyoming pursuant to 54 Stat. 628, 642 (1940).

Respectfully submitted this 17th day of December, 2008

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM

_/s/_____
John B. Arum
2101 Fourth Avenue, Suite 1230
Seattle, Washington 98121
(206) 448-1230
jarum@zcvbs.com

Attorney for the Northern Arapaho Tribe

ATTORNEY GENERAL
EASTERN SHOSHONE TRIBE

__/s/_____
Kimberly Varilek
Office of Attorney General
P.O. Box 538
Fort Washakie, WY 82514
(307) 335-8249
kvarilek@washakie.net

Attorney for the Eastern Shoshone Tribe