

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

ATTACHMENT 1

LEGAL ANALYSIS OF THE
WIND RIVER INDIAN RESERVATION BOUNDARY

APPROVAL OF APPLICATION SUBMITTED BY THE
EASTERN SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
FOR TREATMENT IN A SIMILAR MANNER AS A STATE
FOR PURPOSES OF CLEAN AIR ACT
SECTIONS 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184

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LEGAL ANALYSIS OF WIND RIVER INDIAN RESERVATION BOUNDARY

This legal analysis of the Wind River Indian Reservation boundary accompanies the EPA Region 8 Decision Document approving the application submitted by the Northern Arapaho and Eastern Shoshone Tribes (Tribes) for treatment in a similar manner as a state (TAS) pursuant to section 301(d) of the Clean Air Act (CAA) for purposes of CAA §§ 105 grant funding, 505(a)(2) affected state status, and other provisions for which no separate tribal program is required, specifically sections 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. None of the provisions for which the Tribes are seeking TAS eligibility would entail the exercise of Tribal regulatory authority under the CAA. The Tribes' application did not request, nor does EPA's decision approve, Tribal authority to implement any CAA regulatory programs or to otherwise exercise Tribal regulatory authority under the CAA.

The Region 8 Decision Document sets forth EPA's determination with regard to the TAS eligibility criteria enumerated in CAA § 301(d)(2) and 40 C.F.R. § 49.6. The third TAS criterion at 40 C.F.R. § 49.6(c), which specifies that "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" entails a determination of the exterior boundaries of the Wind River Indian Reservation. EPA has prepared this legal analysis because objections were raised with respect to the Reservation boundary description included in the Tribes' TAS application.

In determining the Reservation boundaries, EPA exercised its discretion to consult with the United States Department of the Interior (DOI), which has expertise in such matters. In particular, EPA requested and the Solicitor of DOI provided a written opinion on the exterior boundaries of the Reservation. EPA also analyzed the Tribes' description of the Reservation boundaries, comments received on the Tribes' boundary description, the Tribes' subsequent response to those comments and other relevant information. Generally, commenters objecting to the Tribes' Reservation boundary description asserted that a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act), which opened the Wind River Indian Reservation to homesteading, also had the legal effect of altering and diminishing the exterior boundaries of the Reservation. The DOI Solicitor's opinion dated October 26, 2011 (2011 DOI Solicitor's Opinion) analyzes the exterior boundaries of the Reservation, including a detailed analysis of the 1905 Act, and concludes that the 1905 Act did not diminish the exterior boundaries of the Wind River Indian Reservation.

This document provides the legal analysis in support of EPA's determination, based on all pertinent information, including the 2011 DOI Solicitor's Opinion, that the 1905 Act did not effect a diminishment of the exterior boundaries of the Reservation. EPA's decision concludes that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). On December 4, 2013, the Tribes requested that EPA not address the lands described in Section 1 of a statute enacted in 1953, 67 Stat. 592 (1953) (1953 Act) until such time, if any, that they notify EPA otherwise. This opinion, therefore, does not analyze those lands in detail nor are they included in the geographic scope of approval for this TAS decision.

A. History of the Wind River Indian Reservation

1. Eastern Shoshone Tribe and Establishment of the Reservation

The Shoshone Indian Tribe's occupation of the Wind River country well preceded the formal establishment of the Wind River Indian Reservation by treaty in 1868. The Shoshone Tribe historically hunted game and gathered food throughout an 80-million acre territory that now comprises the States of Colorado, Idaho, Nevada, Utah and Wyoming. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340 (1945).¹ The California Gold Rush and the Mormon westward migration in the 1840's brought an increasing number of travelers and settlers to this territory. The influx of settlers led to competition for game and resulted in inevitable conflicts among the settlers and Indians, impeding travel and settlement as well as the overland mail system and the establishment of new telegraph lines. *Id.* at 341. By the time of the outbreak of the Civil War, the Commissioner of Indian Affairs and other agencies of the United States recognized a need for peaceful travel and settlement in the area, and the bands of Shoshone Tribes were reportedly inclined towards accepting

¹ See also *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642 (1942); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Shoshone Tribe of Indians v. United States*, 85 Ct. Cl. 331 (1937).

support on limited reservations. *Id.* The 1862 Homestead Act, 12 Stat. 392 (1862) further encouraged settlement in western territories. The United States negotiated a series of treaties with the various bands of Shoshone, including the 1863 Treaty of Fort Bridger, 18 Stat. 685 (1863) with the Eastern Shoshone. This (First) Fort Bridger Treaty between the United States and the Eastern Shoshones established routes for safe travel for people emigrating west as well as for communications and railroad passage, and described the boundaries of "Shoshonee country" as an area encompassing approximately 44,672,000 acres of land located in what are now the States of Colorado, Utah, Idaho and Wyoming. *See Shoshone*, 304 U.S. at 113.

The end of the Civil War in 1865 led to further western migration and the United States negotiated a new treaty that would restrict the area of Shoshone occupancy. In the Second Fort Bridger Treaty of 1868, the Tribe ceded to the United States its right to occupy the 44 million acres described in the First Fort Bridger Treaty in exchange for exclusive occupancy of a far smaller Reservation in the Wind River region. The 1868 Treaty set apart a 3,054,182-acre Reservation for "the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians" 15 Stat. 673, 674. *See also Shoshone*, 304 U.S. at 113. Thus, the Wind River Indian Reservation was established by the Second Fort Bridger Treaty of 1868, among the United States, the Eastern Band of the Shoshonee and the Bannack Tribe of Indians.² Article 2 of the 1868 Treaty set forth the Wind River Indian Reservation boundaries:

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

² The Wind River Indian Reservation was established for the Eastern Shoshone, while the Bannack Tribe (today formally known as the Shoshone-Bannock Tribes of the Fort Hall Reservation) selected a Reservation in southeastern Idaho. *See Swim v. Bergland*, 696 F.2d 712, 714 (9th Cir. 1983).

15 Stat. 673, 674.

The treaty further states “no treaty for the cession of any portion of the reservations herein described . . . shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI of this treaty.” *Id.* at 676.

1871 marked the end of the formal treaty-making era, although existing treaties continued to be valid. Indian Appropriation Act, 16 Stat. 544 (1871). The United States continued to establish reservations by Congressional Acts and Executive Orders. Agreements between the United States and Indian tribes regarding land cessions had to be approved by both houses of Congress rather than established by treaties ratified by just the Senate. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.04 at 76 (2005 ed.) (Cohen’s Handbook).

2. The 1874 Lander Purchase

In 1872, Congress authorized the President to negotiate with the Shoshone Indians for the relinquishment of lands in the southern portion of the Reservation in exchange for lands to the north. 17 Stat. 214 (1872). On September 26, 1872, Felix Brunot, commissioner for the United States, entered into an agreement with the Shoshone Indians for lands within the southern portion of the Reservation where white settlers were actively mining. Rather than an exchange for additional lands to the north, the Shoshone Tribe agreed to relinquish approximately 700,000 acres for a fixed sum payment of \$25,000 to be paid over five years for the purchase of cattle and a \$500 annual payment to the Chief for five years. Report of the Secretary of the Interior at 512 (Oct. 31, 1872) (EPA-WR-001735-37). On December 15, 1874, Congress ratified the agreement, also known as the “Lander Purchase.” 18 Stat. 291 (1874). The purpose of the 1874 Lander Purchase Act, as expressly set forth in the statute, was to sell lands south of the 43rd parallel for \$25,000 in order “to change the southern limit of said reservation.” *Id.* at 292.

Considering the express language of the statute to change the Reservation boundaries, the fixed sum certain manner of payment and the fact that the statute made no provision for any retained Indian interest in the lands sold, there is no dispute that by passing the 1874 Lander Purchase Act, Congress intended to

alter and diminish the southern boundary of the Reservation to exclude those lands.

3. 1878 Northern Arapaho Tribe

The Northern Arapaho Tribe of Wyoming is one of four groups of Arapaho that originally occupied parts of Colorado, Kansas, Montana, Nebraska, and Wyoming. See Loretta Fowler, *Arapaho*, in HANDBOOK OF NORTH AMERICAN INDIANS VOLUME 13, PART 2 OF 2, 840-41 (Raymond J. DeMallie, vol. ed., 2001). By 1811, the Arapaho occupied an area that ranged primarily along the North Platte River and as far south as the Arkansas River. *Id.* Buffalo hunting was a primary means of subsistence and of cultural significance to the Tribe. *Id.* at 842, 847-48. In 1851, the Arapaho was one of a number of tribes that signed the Treaty of Fort Laramie. 11 Stat. 749 (1851). Pursuant to the 1851 Treaty, the Arapaho and Cheyenne Tribes' territory encompassed areas of southeastern Wyoming, northeastern Colorado, western Kansas and western Nebraska. Fowler, *supra* at 842. Despite the 1851 treaty, entry by settlers began to occur in Arapaho territory. *Id.* As a result of game disturbance and other factors, the Northern Arapaho Tribe began to withdraw north of the Platte River into Wyoming and Montana. *Id.* In 1868, the Northern Arapaho Tribe and the United States entered into another treaty whereby the Tribe agreed to accept either some portion of Medicine Lodge Creek, an area on the Missouri River near Ft. Randall, or the Crow Agency near Otter Creek on the Yellowstone River. 15 Stat. 655, 656 (1868). Between 1870 and 1877, the Northern Arapaho Tribe was not settled upon any defined reservation and continued to negotiate with the United States for a separate reservation. Fowler, *supra* at 843. In 1878, following a visit to Washington, D.C. by a delegation of the Northern Arapaho Tribe, as recognized by the United States executive branch the Northern Arapaho Tribe settled on the Wind River Indian Reservation. *Id.*

4. 1887 General Allotment Act and 1890 Wyoming Statehood

In 1887, Congress passed the General Allotment Act or Dawes Act, which, among other provisions, authorized the federal government to allot tracts of reservation land (typically 160-acre lots) to individual tribal members and, with tribal consent, sell the surplus lands to non-Indian settlers. General Allotment Act of 1887, 24 Stat. 388 (1887), as amended 26 Stat. 794 (1891). As described by Felix Cohen, an expert on Indian law and policy, "[t]ribal members under the Act surrendered their undivided interest in the tribally owned common or trust estate for a personally assigned divided interest, generally held in trust for a

limited number of years, but 'allotted' to them individually. . . . Reservations became checkerboards as the sale of surplus land to whites isolated individual Indian allotments." Cohen's Handbook at 77-78.

Wyoming was admitted to the Union as the 44th State on March 27, 1890. Wyoming Enabling Act, 26 Stat. 222, ch. 664 (1890). With regard to Indian tribes, the State Constitution includes the following:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . .

Wyo. Const. Art. 21, § 26

5. The 1891 and 1893 Failed Agreements

On March 3, 1891, Congress passed an Appropriations Act that included a provision, "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations, any agreements thus negotiated being subject to subsequent ratification by Congress, \$15,000, or so much thereof as may be necessary." 26 Stat. 989, 1009 (1891). Pursuant to this Act, the Secretary of the Interior appointed a commission to negotiate with the Indians of the Wind River or Shoshone Reservation for the "surrender of such portion of their reservation as they may choose to dispose of" Instruction of July 14, 1891, reprinted in H.R. DOC. NO. 52-70, at 42 (1892) (EPA-WR-000266). The commission negotiated a proposed cession of an area 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" Articles of agreement, October 2, 1891, reprinted in H.R. DOC. NO. 52-70, at 29 (1892) (EPA-WR-000259) (1891 Articles of Agreement). The lands at issue generally included the area north of the Big Wind River, together with a strip on the eastern side of the Reservation.³ The commission had made an unsuccessful

³ 1891 Articles of Agreement, H.R. DOC. NO. 52-70, at 29 (EPA-WR-000259). The land proposed to

effort to secure a strip of land of about 60,000 acres on the southern border of the Reservation. *Id.* at 26. In consideration for the land, the United States proposed to pay the Tribes \$600,000. *Id.* at 30. The agreement expressly stated it "shall not be binding upon either party until ratified by the Congress of the United States." *Id.* at 32. Congress did not ratify the 1891 agreement.

In 1892, pursuant to a similar Appropriations Act provision, the Secretary of the Interior authorized another commission to negotiate with the Tribes: 27 Stat. 120, 138 (1892). In 1893, the commission attempted to reach an agreement with the Tribes, proposing to purchase all Reservation land lying north of the Big Wind River, as well as land lying south and east of the Popo Agie/Little Wind River and along the southern border of the entire Reservation, in exchange for \$750,000.⁴ The Tribes refused to consider any cession of lands on the southern portion of the Reservation, rejecting three different proposals, and ultimately no agreement was reached. H.R. DOC. NO. 53-51, at 4-6 (1894) (EPA-WR-000280-82).

6. The 1897 Thermopolis Purchase

In 1896, the United States negotiated with the Tribes for the sale of approximately 55,040 acres of land at and around the Big Horn Hot Springs, near the present town of Thermopolis.⁵ On April 21, 1896, United States Indian

be ceded included the portion of the Reservation lying north and east of the following lines: "[b]eginning in the mid-channel of the Big Wind River at a point where the river crosses the western boundary line of the reservation; thence in a southeasterly direction, following the mid-channel of the Big Wind River to a point known as the Wood Flat Crossing, thence in a line due east to the eastern boundary of the reservation; then, beginning where the line run due east from Wood-Flat Crossing intersects the Big Horn River, thence in a line due south to the southern boundary of the reservation." *Id.*

⁴ The commission's first proposal involved the following boundaries: "Commencing at a point in the mid-channel of the Big Wind River, where the same crosses the west boundary line of the reservation, thence down the mid-channel of said Big Wind River to the confluence of said Big Wind River with the Popo Agie River; thence up the mid-channel of said Popo Agie river to its intersection with the north boundary line of township 2 south, range 3 east, thence west, with said line, to the western boundary line of said reservation; thence north on said western boundary line to the point or place of beginning." H.R. DOC. NO. 53-51, at 4 (EPA-WR-000280). After this first proposal was rejected by the Tribes, the commissioners made two more proposals, to which the Tribes did not agree. *Id.* at 4-5 (EPA-WR-000280-81).

⁵ The negotiations were conducted pursuant to the Indian Appropriations Act of March 3, 1893, 27 Stat. 633 (1893). See S. DOC. NO. 54-247, at 11 (1896) (EPA-WR-000306).

Inspector James McLaughlin entered into an agreement with the Tribes known as the "Thermopolis Purchase." Pursuant to the agreement, the lands at issue were to be "set apart as a national park or reservation, forever reserving the said Big Horn Hot Springs for the use and benefit of the general public, the Indians to be allowed to enjoy the advantages of the convenience that may be erected thereat with the public generally." Articles of Agreement (April 21, 1896), *reprinted in S. DOC. NO. 54-247 (1896) at 4 (EPA-WR-000299) (1896 Articles of Agreement)*. On June 7, 1897, Congress ratified the agreement including the following provision:

For the consideration hereinafter named the said Shoshone and Arapaho tribes of Indians hereby 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 the tract of land] embracing the Big Horn Hot Springs . . .

30 Stat. 62, 94 (1897).

With regard to payment for the land, the Act ratified the agreement provision that, "[i]n consideration for the lands sold, relinquished and conveyed" the United States would pay the Tribes \$60,000. *Id.* Rather than establishing the entire area as a national park or reserve as agreed upon, the Act provided that of the lands ceded, sold, relinquished and conveyed to the United States, one square mile at and about the hot springs would go to the State of Wyoming and the remainder of the lands were "declared to be public lands of the United States" subject to entry under homestead and town-site laws. *Id.* at 96.

Considering the express language of the statute, the fixed sum certain manner of payment and the fact that the Act made no provision for any retained Indian interest in the lands sold, there is no dispute that by passing the 1897 Thermopolis Purchase Act, Congress intended to alter and diminish the boundary of the Reservation to exclude those lands.

7. The 1904 Agreement and 1905 Act

In March of 1904, U.S. Representative Frank Mondell of Wyoming introduced H.R. 13481 to provide for opening portions of the Reservation under homestead, town-site, and coal and mineral land laws. H.R. REP. NO. 58-2355, at 5 (1904) (EPA-WR-000321). The bill was based loosely on the 1891 and 1893 negotiations but included some important differences. For instance, as discussed in detail in

Section B.3(a) of this document, the geographic scope of the 1904 bill was different from the earlier negotiations, enlarging the area proposed to be opened; the 1904 bill included significantly different cession language; the manner of payment was completely changed so that instead of providing for a fixed sum certain payment in consideration of the land as proposed during the prior negotiations, the Tribes would be paid only if and when parcels of land were sold; and the 1904 bill included a provision for the United States to act as a trustee for the Tribes regarding the sale of and payment for the lands.

The House Report on H.R. 13481 explained that “the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral land laws” *Id.* at 4 (EPA-WR-000320). On April 19, 1904, Indian Inspector McLaughlin met with the Eastern Shoshone and Northern Arapaho Tribes to present H.R. 13481 and negotiate the terms of an agreement. Shortly thereafter, on April 21, 1904, the Tribes and McLaughlin entered into an agreement. 1904 Agreement, reprinted in H.R. REP. NO. 58-3700, pt. 1 (1905) (EPA-WR-004675).⁶ On February 6, 1905, a new bill, H.R. 17994, was presented to Congress to ratify and amend the 1904 Agreement and replace H.R. 13481. 39 Cong. Rec. H1940 (Feb. 6, 1905) (EPA-WR-0010068). Representative Mondell explained that the bill would provide for “the opening to homestead settlement and sale under the town-site, coal-land, and mineral-land laws of about a million and a quarter acres in the Wind River Reservation in central western Wyoming.” *Id.* at H1942. House Report 17994, with the adoption of a committee resolution, was ultimately ratified by Congress by the Act of March 3, 1905. 33 Stat. 1016 (1905 Act).⁷

Since the 1905 Act and the issue of whether it altered and diminished the exterior boundaries of the Wind River Indian Reservation is the focal point of the comments objecting to the Tribes’ Reservation boundary description, the next section includes a detailed legal analysis of the 1905 Act, including further discussion of the 1904 Agreement.

⁶ The Tribes note that only 80 out of 237 adult male members of the Northern Arapaho Tribe actually signed the 1904 Agreement and that many who did sign would not have been considered “adults” by the Arapahos. Tribes’ Response to Comments Regarding the Tribes’ TAS Application at 16 (May 24, 2010), citing Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) quoted in H.R. REP. NO. 58-3700, pt. 1, at 18 (1905) (EPA-WR-004675-93).

⁷ H.R. REP. NO. 58-3700, pt. 1 (1905) (EPA-WR-004675-93); H.R. REP. NO. 58-3700, pt. 2 (1905) (EPA-WR-000337-49); S. REP. NO. 58-4263 (1905) (EPA-WR-0010048-49); H.R. REP. NO. 58-4884 (1905) (EPA-WR-0010050-51).

B. Legal Analysis of the 1905 Act

1. Supreme Court Jurisprudence Regarding Surplus Land Acts

The United States Supreme Court has recognized that Congress has plenary and exclusive authority over Indian affairs, identifying the Indian Commerce Clause of the United States Constitution, which empowers Congress to regulate commerce “with foreign nations, and among the several states, and with the Indian tribes” and the Treaty Clause as sources of that power. See U.S. CONST., Art. I, § 8, cl. 3; Art. II, § 2, cl. 2; *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979). Congress has recognized the self-determination, self-reliance and inherent sovereignty of Indian tribes. Indian Tribal Justice Act, 25 U.S.C. §§ 3601(3) (“Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes”) and 3601(2) (“Congress finds and declares that . . . the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government”). The Supreme Court has reinforced that the “Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read.” *McClanahan v. State Tax Comm’n*, 411 U.S. 164, 172 (1973). “It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.” *Id.*

For much of the Nation’s history, treaties and legislation made pursuant to those treaties governed relations between the federal government and the Indian tribes.⁸ The Supreme Court has held that only Congress can alter the terms of an Indian treaty. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). In several instances, the Court has addressed whether particular Congressional Acts opening Indian reservations to homesteading (commonly called “surplus land acts”) did so while maintaining the existing reservation boundaries or whether the Acts also had the effect of altering and diminishing the reservation boundaries established by treaty. Whether a specific Congressional Act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis. *Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984).

⁸ Cohen’s Handbook at 109-11 (1982 ed.).

The Court has established a “fairly clean analytical structure” for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries.⁹ *Solem*, 465 U.S. at 470. “The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” *Id.* (citing *United States v. Celestine*, 215 U.S. 278 (1909)). Moreover, Congress must “clearly evince” an “intent to change boundaries” and the evidence must be “substantial and compelling” before diminishment will be found. *Id.* at 470-72.

The Supreme Court has articulated legal canons of construction for analyzing whether a particular Congressional Act had the effect of diminishing reservation boundaries. The canons of construction are rooted in the unique trust relationship between the United States and the Indians. *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985) (*Oneida*) (“[i]t is well established that treaties should be construed liberally in favor of the Indians The Court has applied similar canons of construction in nontreaty matters”). “Relying on the strong policy of the United States ‘from the beginning to respect the Indian right of occupancy,’” the Court has concluded that it “[c]ertainly’ would require ‘plain and unambiguous action to deprive the [Indians] of the benefits of that policy’”¹⁰ Throughout the analysis of diminishment cases, courts resolve any ambiguities in favor of the Indians, and will not lightly find diminishment. *Solem*, 465 U.S. at 470-72.¹¹ While clear congressional and tribal intent must be recognized, the rule that “legal

⁹ Although it was once thought that Indian consent was necessary to diminish a reservation, it has long been held that Congress has the power to diminish reservations unilaterally. *Id.* at 470 n.11, citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

¹⁰ *Oneida*, 470 U.S. at 247-48 (citations omitted). Generally, courts construe Indian treaties sympathetically to Indian interests to compensate for their unequal bargaining positions in the treaty-making process. *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1220 (10th Cir. 2005).

¹¹ See also *South Dakota v. Bourland*, 508 U.S. 679, 687 (1990) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”), quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) and *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

ambiguities are resolved for the benefit of the Indians" is accorded "the broadest possible scope." *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975). The traditional solicitude for the Indian tribes favors the survival of reservation boundaries in the face of opening up reservation land to settlement and entry by non-Indians. *Solem*, 465 U.S. at 472.

Solem and its progeny have established a three-part test for analyzing whether a specific statute opening a reservation to homesteading altered and diminished a reservation's boundaries or simply allowed non-Indians to purchase land without affecting the established reservation boundaries. *Id.* at 470-72. First, the most probative evidence of congressional intent is the statutory language itself. *Id.* The second part of the inquiry centers on the circumstances surrounding the passage of the surplus land act. *Id.* at 471. Finally, and to a lesser extent, the court will consider the subsequent treatment of the area in question and the pattern of settlement. *Id.* at 471-72; *see also Yankton*, 522 U.S. at 344 ("[t]hus, although '[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands,' we have held that we will also consider 'the historical context surrounding the passage of the surplus land Acts,' and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there" (citations omitted)), *Hagen*, 510 U.S. at 410-13.

The first prong of the analysis focuses on the statutory language as the most probative of Congressional intent. Although the Court has never required a particular form of words to find diminishment,¹² "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470 (citing *DeCoteau*, 420 U.S. at 444-45; *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962)). When such language of cession evidencing the present and total surrender of all tribal interests is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *See Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470); *see also Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48. In addition to the language opening the land to settlement and the manner of payment set forth in the statute, the Court will examine other relevant statutory provisions to discern Congressional intent. While the express

¹² *Hagen*, 510 U.S. at 411.

statutory language is the most probative evidence of Congressional intent, the Supreme Court has affirmed that it must examine “all the circumstances surrounding the opening of a reservation.” *Hagen*, 510 U.S. at 412.

The second part of the inquiry examines the circumstances surrounding the passage of the specific surplus land act. This inquiry includes consideration of the historical context surrounding the passage of the statute, legislative history, the manner in which the transaction was negotiated, and the contemporaneous understanding of the effect of the act. As a backdrop to this analysis, the Court has discussed the broad historical context of the allotment era and its effect on diminishment considerations. “Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because ‘the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar’, *Solem*, 465 U.S. at 468, and in part because Congress then assumed that the reservation system would fade over time.” *Yankton*, 522 U.S. at 343. Nonetheless, the Supreme Court has stated that it has never been willing to extrapolate a specific congressional purpose of diminishing a reservation in a particular case from the general expectations of the allotment era. “Rather, it is settled law that some surplus land acts diminished reservations . . . and other surplus land acts did not” *Solem*, 465 U.S. at 468-69. The Court has described that in order to discern Congressional intent to diminish based on surrounding circumstances, the information must “unequivocally” reveal a “widely-held, contemporaneous” understanding that the area would be severed from the reservation. As summarized in *Solem*, “[w]hen events surrounding the passage of a surplus land act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.” *Id.* at 471. Thus, the courts review surrounding circumstances to determine Congressional intent on a case-by-case basis.

Third, and to a lesser extent, courts have looked to events that occurred after the passage of a surplus land act to determine Congressional intent. “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.* The Court has also recognized, on a more “pragmatic” level, that who actually moved onto opened reservation lands is relevant to deciding whether a surplus land act diminished a reservation, noting that where “non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character” diminishment may have occurred. *Id.* “Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation.” *Id.* at 472, n.13. Ultimately, the Court has stated, “[t]here are, of course, limits to how far we will go to decipher Congress’ intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” *Solem*, 465 U.S. at 472, (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962)).

In conclusion, the Supreme Court has articulated several important principles guiding the analysis of whether a particular surplus land act altered the boundaries of an Indian reservation established by treaty. Since each Indian reservation has a unique history, analysis of a particular surplus land act and its effect on a reservation is conducted on a case-by-case basis. The Court has also established legal canons of statutory construction that apply throughout the analysis. Reservation diminishment is not lightly inferred and will not be found unless analysis of the Congressional Act at issue reveals substantial and compelling evidence of a clear Congressional intent to diminish the boundaries.

2. 1905 Act Language

The first prong of the Court’s three-part analysis to determine whether a reservation is diminished by a given surplus land act focuses on the statutory language as the most probative evidence of Congressional intent. *Solem*, 465 U.S. at 470. Based on the “strong policy of the United States from the beginning to respect the Indian right of occupancy” established by treaties and historical relations between the United States and Indian tribes, the Supreme Court has held that any finding of diminishment must be supported by “plain and unambiguous” congressional intent to deprive the Indians of the benefits of that policy.¹³ While the Supreme Court has never required a particular form of words

¹³ *Oneida*, 470 U.S. at 247 (citations omitted).

to find diminishment,¹⁴ where a surplus land act contains “both explicit language of cession, evidencing ‘the present and total surrender of all tribal interests’ and a provision for a fixed-sum payment, representing ‘an unconditional commitment from Congress to compensate the Indian tribe for its opened land,’” there is a nearly conclusive or almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. See *Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470, *Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48). In addition to the language opening the land to settlement and manner of payment set forth in the statute, the Court will examine other relevant statutory provisions to discern Congressional intent.

a. Operative Language

The 1905 Act's operative language opening the Wind River Indian Reservation to homesteading in Article I provides that the Tribes “cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation” except lands described by the statute, generally lands south of the mid-channel of the Big Wind River and west of the mid-channel of the Popo Agie River. 33 Stat. 1016. Article I also permitted those Indians who had previously selected a tract within “the portion of said reservation hereby ceded” to “have the same allotted and confirmed to him or her” or to select other lands “within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry.” *Id.*

The 1905 Act must be analyzed in consideration of this specific statute and the circumstances underlying its passage. *Solem*, 465 U.S. at 468-69. The history of other Congressional Acts affecting the lands of this Reservation subsequent to its establishment by the 1868 Treaty is also relevant to the analysis. The Supreme Court has recognized that differences in operative language in prior statutes regarding the same Reservation are important to understanding Congressional intent with regard to the specific Act at issue. For example, in *Seymour*, the Court contrasted the operative language in an 1892 Act, which was held to diminish the northern half of the Colville Reservation, from that in a 1906 Act, which the Court held did not diminish the southern half of the Reservation. *Seymour*, 368 U.S. at 355-56.

¹⁴ *Hagen*, 510 U.S. at 411.

On the Wind River Indian Reservation, between the Second Fort Bridger Treaty of 1868 and the 1905 Act, there were two Congressional Acts affecting the Reservation lands. In contrast to the 1905 Act, the operative language in each of these statutes, together with the fixed sum certain payment for the lands as well as the surrounding circumstances and subsequent treatment of the lands, clearly and unambiguously established Congressional intent to diminish the boundaries of the Reservation. For example, the purpose of the 1874 Lander Purchase Act, as expressly set forth in the statute, was to alter and diminish the southern boundary of the Reservation in exchange for a sum certain payment of \$25,000:

[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.*

18 Stat. 291, 292 (1874) (emphasis added).

Further evidencing Congressional intent to alter the boundaries, Article III of the 1874 statute refers to the line north of the ceded lands as “the southern line of the Shoshone reservation.” *Id.*

Similarly, in 1897, the Thermopolis Purchase Act included language evincing clear Congressional intent to remove the tract of land embracing the Big Horn Hot Springs from the Reservation in exchange for \$60,000:

For the consideration hereinafter named the said Shoshone and Arapaho tribes of Indians hereby 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. 93, 94 (1897) (emphasis added).

In contrast to the clear operative language and fixed sum certain payment expressing intent to absolutely sever certain lands from the Reservation used in the 1874 Lander Purchase Act and the 1897 Thermopolis Purchase Act, Congress chose to use significantly different language and manner of payment when it

opened the Reservation to settlement in 1905. The operative language of the 1905 Act states that the Tribes, “cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation.” 33 Stat. 1016. Unlike the 1897 Thermopolis Purchase Act, in the 1905 Act, Congress omitted language that would “convey” or “surrender” “forever and absolutely” all their right, title and interest “of every kind and character in and to the lands.”¹⁵ Likewise, in contrast to the 1874 Lander Purchase Act, the 1905 Act does not include express language to “change the southern limit of said reservation” or to establish a new “southern line of the Shoshone reservation.” Rather, the 1905 Act refers to the lands at issue as “embraced *within the said reservation*.” *Id.* (emphasis added). The fact that in 1905 Congress retreated from the clear statutory language and intent found in previous statutes addressing the same Reservation, and referenced the Reservation as continuing apart from land sales, provides strong evidence that Congress did not intend to effect the same absolute diminishment of the lands at issue in the 1905 Act.¹⁶

Furthermore, as noted in the 2011 DOI Solicitor’s Opinion, the 1905 Act does not include language designating the opened lands as “public domain,” terminology the Supreme Court has found to indicate Congressional intent inconsistent with reservation status. *Hagen*, 510 U.S. at 414, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 and n.5 (1977). For example, the 1897 Thermopolis Purchase Act stated that the majority of the opened lands “are hereby declared to be public lands of the United States, subject to entry, however, only under the homestead and townsite laws of the United States.” 30

¹⁵ It is also important to note that James McLaughlin represented the United States in negotiating both the 1896 agreement that led to the Thermopolis Purchase Act of 1897 and the 1904 agreement that led to the 1905 Act. As McLaughlin later described, “the two agreements [1896 Thermopolis Agreement and the 1904 agreement] are entirely distinct and separate from each other, and [under the 1904 agreement] the government simply acted as trustee for disposal of the land north of the Big Wind River.” Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming at Fort Washakie, Wyoming, at 5 (Aug. 14, 1922) (EPA-WR- 001681).

¹⁶ In addition, the 1891 Agreement that was never ratified by Congress stated that the Tribes would, “cede, convey, transfer, relinquish and surrender, forever and absolutely . . . all their right title and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto . . .” 1891 Articles of Agreement, H.R. Doc. No. 52-70, at 29 (EPA-WR-000259). This language is similar to the operative language in the 1897 Thermopolis Purchase Act discussed above, but was not included in the 1905 Act.

Stat. 93, 96 (1897). By contrast, the legislative history of the 1905 Act indicates that Congress understood the land at issue would not be made part of the public domain due to the continuing Tribal interest in the opened lands: "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 . . ." 39 Cong. Rec. H1945 (Feb. 6, 1905) (EPA-WR-0010073) (statement of Rep. Marshall).

In comparison to the earlier Congressional Acts addressing areas of land on this Reservation, the 1905 Act is devoid of express language clearly indicating Congressional intent to change the boundary of the Reservation. As the Supreme Court observed in *Mattz*, "Congress has used clear language of express termination when that result is desired." *Mattz*, 412 U.S. at 505, n.22, citing as examples: 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("and is hereby, vacated and restored to the public domain"); and 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished").

Under the 1905 Act, the Tribes agreed to "cede, grant and relinquish to the United States all right, title and interest" in certain lands "embraced within" the Wind River Indian Reservation. 33 Stat. 1016. This grant of right, title and interest to the United States was necessary for the United States to be able to transfer clear title to prospective homesteaders. However, to achieve the purpose of opening the lands to settlement, it was not necessary, nor did the express language of the Act indicate intent, to alter the exterior boundaries of the Reservation.¹⁷

¹⁷ The U.S. Court of Appeals for the 8th Circuit has held that, "cede, surrender, grant and convey to the United States all their claim, right, title and interest . . ." language of a 1904 surplus land Act, standing alone, did not evidence a clear congressional intent to disestablish the Spirit Lake Reservation. *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987), *vacated in part on other grounds on rehearing en banc*, 683 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990). Recognizing that similar statutory language was present in at least three cases in which the Supreme Court found diminishment or disestablishment (*Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), *Rosebud and DeCoteau*), the court stated, "[a] careful reading of these cases, however, reveals that the Court did not rely solely upon this language of cession in reaching its conclusions. It also considered other important factors such as payment of a lump sum upon surrender of the lands, express agreement by the tribe of its intent to disestablish the reservation, and surrounding circumstances." *Id.* at n.5.

Article I also contains phrases indicating Congressional understanding that the 1905 Act would allow for settlement upon lands within an existing Reservation. For example, the operative language refers to lands “embraced within the said reservation” and the allotment language refers to individuals who have selected a tract of land “within the portion of said reservation hereby ceded.” The operative language is properly interpreted to reference a cession of *land* and not of *reservation* status, and both phrases indicate an understanding and intent that the lands ceded were on a “portion” of a larger, existing Reservation – not that they were severed from the Reservation. The 1905 Act does not include the type of language the United States knew how to use, had in fact used in earlier Congressional Acts and an agreement with respect to this specific Reservation, and could have easily inserted into the 1905 Act if the intent was to alter the boundary and sever the lands forever and absolutely from the Reservation. Similar to the situation in *Mattz*, “Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.” *Mattz*, 412 U.S. at 504.

Commenters¹⁸ assert that the operative language in Article I and the language at the beginning of Article II, “[i]n consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement . . .” is indistinguishable from the language the Supreme Court held was “precisely suited” to disestablishment in *DeCoteau*.¹⁹ Such limited comparisons, however, fail to account for key differences between the two statutes and their distinct circumstances.

First, the Supreme Court has reinforced that it is improper to assume that “similar language in two treaties between different parties has precisely the same meaning” and that individualized “review of the history and the negotiations of the agreement is central to the interpretation of treaties.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); see also *United States v. Webb*,

¹⁸ Throughout the document, the term “Commenters” refers to any comments received when EPA provided an opportunity for appropriate governmental entities and the public to comment on the Tribes’ description of the Reservation boundaries. Comments can be found in the EPA administrative record at EPA-WR-004031-004554R.

¹⁹ State of Wyoming, Office of the Attorney General, “Comments in Response to the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation Statement of Legal Counsel Regarding the Tribes’ Authority to Regulate Air Quality and Treatment as a State Application,” June 9, 2009 at 20-21 (State Comments).

219 F.3d 1127, 1133 (9th Cir. 2000); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999). Along the same lines, whether a specific Congressional Act was intended to extinguish some or all of an existing reservation requires an analysis specific to that statute and reservation. *Solem*, 465 U.S. at 468-69. Thus, the commenter's comparison to the Lake Traverse surplus land act analyzed in *DeCoteau* is substantially less relevant than the discussion above comparing the operative language in the previous Thermopolis and Lander Purchase Acts to that within the 1905 Act, since those particular statutes involve the Wind River Indian Reservation.

Secondly, EPA notes that the term "convey" is not in the 1905 Act's operative language as was the case in *DeCoteau*. Rather, the term "conveyed" appears in Article II of the 1905 Act addressing the manner of payment. The Supreme Court has explained that terms found outside the operative language of a surplus land act are of less importance in addressing the diminishment question. For instance, in discussing the Court's non-diminishment finding in *Solem* despite statutory language granting the Indians permission to harvest timber on the opened lands "as long as the lands remained in the public domain," the *Hagen* court noted, "the reference to the public domain did not appear in the operative language of the statute opening the reservation lands for settlement, which is the relevant point of reference for the diminishment inquiry." *Hagen*, 510 U.S. at 413. Thus, the term "conveyance" is not contained within the 1905 Act operative language opening the lands to settlement and as such, is distinguishable from *DeCoteau*.

Third, the Supreme Court in *DeCoteau* relied heavily not on the operative language alone, but on the fact that it was coupled with a fixed sum certain payment provision in finding that the Lake Traverse Reservation was disestablished.²⁰ No such payment exists in the 1905 Act.

Finally, the Supreme Court has consistently held that there is no set formula for assessing whether the operative language of a surplus land act supports a diminishment finding. As discussed above, the 1905 Act includes language that was necessary to allow the United States to subsequently transfer clear title to

²⁰ "The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in unallotted lands." *DeCoteau*, 420 U.S. at 445-46 (emphasis added). "This language is virtually indistinguishable from that used in other sum certain, cession agreements" *Id.* (emphasis added). We would also note that in the *Yankton Sioux* case, the Supreme Court articulated that it was both the cession language and the sum certain manner of payment that was "precisely suited" for diminishment. *Yankton*, 522 at 791- 92.

prospective homesteaders. However, and especially considering the specific statutory history pertinent to this Reservation, the 1905 Act does not include operative language that would support a finding of clear and unambiguous intent to alter and diminish the boundaries of the Wind River Indian Reservation.

b. Manner of Payment

In addition to the specific language opening a reservation to settlement, the Supreme Court's analysis focuses on the manner of payment established by the statute as a key indicator of Congressional intent. Where a surplus land act contains both explicit language of cession evidencing a present and total surrender of all tribal interests, and an "unconditional commitment from Congress to compensate the Indian tribe for its opened land," there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *Yankton*, 522 U.S. at 344. The Court has also noted that while a provision for definite payment can provide additional evidence of diminishment, the lack of such a provision does not necessarily lead to the contrary conclusion. *See Rosebud*, 430 U.S. 584, 598 n.20.

Article II of the 1905 Act establishes the manner of payment in consideration for the lands ceded:

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

33 Stat. 1016.

Generally, the statute then describes the following timeframe and payment amounts for the years following the passage of the Act:

- Within two years from opening, lands entered under the homestead law shall be paid for at the rate of \$1.50 per acre;

- Within the next three years (between two and five years after opening), lands entered under the homestead law shall be paid for at the rate of \$1.25 per acre;
- Within the next three years (between five to eight years after opening), lands shall be sold to the highest bidder at not less than \$1.00 per acre;
- After eight years, lands may be sold to the highest bidder without a minimum price.

Id. at 1016-17.

Clearly this provision does not constitute a fixed sum certain in consideration for the land, but establishes a schedule to pay the Tribes various rates and ultimately an indeterminate sum if and when lands were sold. Article II concludes, “and the *United States agrees to pay the said Indians the proceeds derived from the sales of said lands*, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.” *Id.* at 1017 (emphasis added). In contrast to both the Lander Purchase Act (fixed sum certain payment of \$25,000) and the Thermopolis Purchase Act (fixed sum certain payment of \$60,000), under the 1905 Act, the United States’ financial commitment in consideration for the lands was to pay the Tribes an indeterminate amount from the proceeds of sales to prospective buyers. Article II does not establish a fixed sum certain payment, nor do any Commenters assert that it does.

This interpretation is also consistent with the legislative history of the Act²¹ and Indian Inspector McLaughlin’s statement to the Tribes that the United States would not offer a fixed sum certain payment to the Tribes in exchange for the lands:

Several agreements with tribes of Indians that provided for a lump sum consideration which were presented to Congress the past two years have not been ratified, for the reason that Congress has refused to act upon any such agreements, and the said agreements have had to be changed before they could be carried out. *I have made this*

²¹ The legislative history reinforces that the Tribes were to be paid according to the amounts received from prospective buyers. H. REP. NO. 58-2355, at 2 (1904) (EPA-WR-000318) (describing the bill as “follow[ing] the now established rule of the House of paying to the Indians the sums received from the sale of the ceded territory under the provisions of the bill”).

explanation that you may know my reasons for not being able to entertain a proposition from you people for a lump sum consideration. Understand that anything you may receive from these lands will be paid to you from the proceeds of sales of same to white men.

Minutes of Council Held at Shoshone Agency, Wyoming, at 3 (April 19, 1904) (EPA-WR-000425) (1904 Minutes of Council Meeting) (emphasis added).

Commenters assert that Article IX, Section 3 of the 1905 Act constitutes an unconditional guaranteed sum certain payment of \$145,000 to be used for the benefit of the Tribes. As is the case with surplus land acts generally, there are multiple provisions for various amounts of money allocated for certain purposes. The 1905 Act is no different, and Articles III, IV, V, VI, VII and VIII address various payments for surveys, irrigation, livestock, general welfare fund, etc. Each of these sections includes the proviso that all payments are to be derived from the sale of the lands at issue.

Article IX, Section 3 addresses three payments, each appropriated out of any money in the U.S. Treasury not otherwise appropriated and each to be reimbursed from the proceeds of the sales of the land. 33 Stat. 1016, 1020-21. This section appropriated \$35,000 for a survey and examination of certain lands and \$25,000 for an irrigation system. In addition, \$85,000 was appropriated to make the payments provided for in Article III, which establishes a per capita payment of \$50 "within 60 days of the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available" with any balance remaining to be used for various surveying and mapping purposes. The 1904 agreement had included in Article III a provision that the \$85,000 "shall be from the proceeds of the sale of sections sixteen and thirty-six or an equivalent of two sections in each township within the ceded territory, and which sections are to be paid for by the United States at the rate of one dollar and twenty-five cents per acre." H.R. REP. NO. 58-3700, pt. 1, at 2 (1905) (EPA-WR-004676). That provision and other similar provisions committing the United States to purchasing the two sections for State school lands were deleted from the agreement prior to enactment and are thus not found in the 1905 Act. The \$85,000 provision in the agreement was intended to direct certain per capita payments from the actual sales of two sections per township to the United States. Deletion of that provision left no established fund from which to make the per capita payments within the contemplated 60 days. Therefore, Congress added Article IX, Section 3 to the Act, appropriating the funds to cover the per capita commitment but requiring reimbursement from the "first money received" from the sale of the

lands. Article IX, Section 3 does not establish a fixed sum certain payment in consideration for the lands opened by the 1905 Act.²² The \$85,000 in this section was merely added to replace a fund which had, by agreement, been established from prospective sales of two sections of each township to the United States.

Finally, Article IX is explicit in stating that the United States would not be bound “in any manner . . . to purchase any portion” of the opened lands or to guarantee to find purchasers for the land, “it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and *pay over to them the proceeds received from the sale thereof only as received*, as herein provided.” 33 Stat. 1016, 1018 (emphasis added). Thus, under the Act, the Tribes would only be paid by proceeds from prospective sales, and the United States explicitly disclaimed any commitment to actually conduct any sales.

The statutory language does not establish an unconditional commitment by the United States to pay the Tribes a fixed sum certain payment in consideration for the lands opened to settlement. Article II sets forth a process to pay the Tribes varying amounts based upon the prospective sales that might occur in years *subsequent to* the 1905 Act. The Tribes were not guaranteed payment for the lands, rather the United States explicitly stated it would not be bound in any manner to purchase any portion of the land or to guarantee purchasers for the land. Thus, there was no fixed sum nor was there any certainty of payment in consideration for the lands opened to settlement.

²² For purposes of analyzing the legal effect of a surplus land act on Reservation boundaries, the relevant inquiry with regard to manner of payment is not whether a tribe would receive any sum of money at all, but whether the tribe would receive a fixed sum certain in consideration for the lands at issue. As set forth by the Supreme Court, the proper inquiry is whether the statute contains “a provision for a fixed-sum payment representing ‘an unconditional commitment from Congress to compensate the Indian tribe for its opened land’” *Yankton*, 522 U.S. at 344. It is implausible that \$85,000 or even \$145,000 could constitute a fixed sum payment for the opened lands, considering the 1891 and 1893 failed agreements involved \$600,000 and \$750,000 respectively (while the acreages of land were not identical, they were not different enough to reflect such a significantly lower payment). In addition, an interpretation that Article IX, Section 3 constituted a fixed sum payment for the lands would render obsolete the entire payment structure set forth in Article II and referenced throughout the Act.

c. Trustee Provisions

Article IX of the 1905 Act expressly established an ongoing trust relationship between the United States and the Tribes with respect to the lands opened to settlement:

... 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.

33 Stat. 1016, 1018.

Consistent with the trust relationship, Article VIII provides:

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

Id. at 1018.

The Supreme Court has described this type of provision as one that “did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.” *Seymour*, 368 U.S. at 356.²³

The United States’ negotiations with the Northern Arapaho and Eastern Shoshone Tribes in 1904 reinforced the trust relationship with respect to the opened lands:

²³ The statutory language at issue in *Seymour* stated the proceeds from the disposition of the lands affected by the Act shall be “deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation” *Id.* at 355. The Court contrasted this text with language that appropriated the net proceeds from the sale and disposition of land for the general public use. *Id.* at 355-56.

My friends, that you may understand better and more clearly, the government as guardian is trustee for the Indians . . . selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians.

1904 Minutes of Council Meeting at 3-4 (EPA-WR-000425-26).

This trust relationship is an important factor in discerning Congressional intent with respect to the opened lands. Article IX makes it clear that while the 1905 Act allowed the United States to sell the opened lands, the United States maintained federal responsibility over the lands consistent with their status as Reservation. As discussed further in Section B.4 of this document, the 1905 Act reinforced the trust relationship between the federal government and the Tribes with regard to the opened lands, and the United States acted as trustee for the Tribes not only with respect to the proceeds from individual parcels sold, but with respect to management of the opened area in general.

d. Survey Provisions

The 1905 Act includes a provision allocating funding for the “survey and field and office examination of the unsurveyed portions of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary . . . ” 33 Stat. 1016, 1022. The \$35,000 allocation of funds for the survey is “to be reimbursed from the proceeds of the sale of said lands . . . ” *Id.* Under the Act, proceeds from the sales of the lands were to be paid to the Tribes or expended on their account. The first part of this provision establishes a survey and examination of portions of the ceded lands. Directing the utilization of proceeds from the sales which were to belong to the Tribes, for surveying activities in the opened portion of the Reservation indicates that Congress recognized an ongoing Tribal interest in that area. This provision further indicates Congressional understanding that the Reservation would not be diminished.

The second part of the survey provision directs demarcation of the non-natural water boundaries of the “diminished reservation,” terminology that, as discussed below, distinguished the area that remained under exclusive Tribal use from the area opened to settlement by non-Indians. While one might assume that this survey provision was intended to demark the boundaries of a newly diminished Reservation, examination of the geography of the area clarifies that

this was not the case. Under the 1905 Act, the unopened area that remained under exclusive Tribal use was bordered to the north and east by the Big Horn and Popo Agie rivers, respectively. Thus, the focus of this survey provision, to demark the outboundaries of the diminished reserve “where the same is not a water boundary,” is on the southern and western boundaries of the area, which were not affected by the 1905 Act under any interpretation. During the 1904 agreement negotiations, one of the Tribal representatives stated that the southwestern and western boundary lines described in the Act were incorrect and did not reflect the Treaty of 1868, and requested that they be correctly established.²⁴ Thus, this part of the survey provision in Article IX, Section 3 was not intended to demark a newly diminished Reservation boundary line, but rather to address concerns about certain boundaries of the Reservation that were, without dispute, unaffected by the 1905 Act.

Finally, Article III of the 1905 Act also contains a survey provision:

... that upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

33 Stat. 1016, 1017.

In the *Big Horn I* case²⁵ regarding adjudication of water rights, the Special Master’s Report addressed this Article 3 survey provision, finding, “[t]his

²⁴ George Terry from the Shoshone Tribe stated, “In Article I of the bill, we do not believe that the boundary lines on the southwest and west of the reservation are correct and we ask that these lines be correctly established, and that this be done at an early date. According to our old treaty these lines are not correct, and we ask that they be made to conform to the ‘Treaty of 1868’ made at Fort Bridger.” 1904 Minutes of Council Meeting at 17 (EPA-WR-000439).

²⁵ *In Re The General Adjudication of All Rights to Use Water in Big Horn River Systems and All Other Sources*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*), *aff’d by an equally divided court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam).

language clearly demonstrates the intent of the parties to the Agreement that certain of the lands within the ceded portion, excepting those lands disposed of by the United States on behalf of the Tribes under the provisions of the Agreement, would remain the property of the Indians.” Report of Special Master Roncalio, Concerning Reserved Water Rights Claims by and on behalf of Tribes of the Wind River Indian Reservation, Wyoming, at 38 (December 15, 1982) (EPA-WR-000777) (*Big Horn I*, Special Master’s Report).

e. Boysen Provision

After much debate in the House and Senate, Congress inserted the following provision into the 1905 Act concerning the lease rights of an individual named Asmus Boysen:

And provided, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands *in said reservation*; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled . . .

33 Stat. 1016, 1020 (emphasis added).

Section B.3 of this document discusses the Boysen provision and its legislative history in more detail. Generally, in 1899, Mr. Boysen had entered into a ten-year lease with the Tribes, under which he was given the right to prospect for minerals throughout 178,000 acres of the Reservation for two years. The legislative history indicates the Boysen provision was inserted to provide Mr. Boysen a preferential right to select 640 acres of contiguous mineral or coal lands for purchase *in the opened area* to compensate for the cancellation of his pre-existing lease rights.²⁶ Thus, Congress clearly understood that Mr. Boysen’s

²⁶ The Boysen provision received substantial attention during legislative debate in the House. Congress’ understanding that Mr. Boysen’s selection rights would pertain solely to lands located in the opened area is evident in various places in the legislative history. See, e.g., H.R. REP. NO. 58-3700, pt. 2, at 2, 4 (EPA-WR-000338, 000340) (Minority Report opposing provision providing Boysen a preferential right “to locate any land to be opened to settlement under the bill”; and opposing “any preferences in locating land or any rights over other persons desiring to enter and

preferential rights would be established in the opened area and drafted the statutory provision describing the area as “in said reservation.” This language further supports a view that Congress intended that the ceded lands would remain part of the Reservation.

f. References to a “Diminished Reserve”

As Commenters accurately point out, the 1905 Act uses the terms “diminished reserve” or “diminished reservation” in various provisions throughout the statute. The Supreme Court has considered and rejected the notion that such terms contained within a surplus land act establish Congressional intent that the Reservation boundaries would be altered and diminished as a legal matter. For example, in *Solem*, the Act at issue referred to the unopened territories as “within the respective reservation thus diminished.” *Solem*, 465 U.S. at 474. The Court did not find this language to be dispositive of Congressional intent and reasoned that at the turn of the 20th Century, “diminished” was not yet a term of art in Indian law. “When Congress spoke of the ‘reservation thus diminished,’ it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries.” *Id.* at 475, n.17 (citation omitted). Similarly, in *Mattz*, the Court addressed statutory language referencing “what was (the) Klamath River Reservation,” and determined that referring to a reservation in the past tense was “merely . . . a natural, convenient and shorthand way of identifying the land subject to allotment” and did not indicate “any clear purpose to terminate the reservation directly or by innuendo.” *Mattz*, 412 U.S. at 498-99. Furthermore, with regard to agreements with Indian tribes, the general rule is that ambiguities

to settle upon the lands to be opened for settlement under the provisions of H. R. 17994”); 39 Cong. Rec. H1942 (1905) (EPA-WR-0010070) (statement of Rep. Mondell describing the Boysen provision as affecting “only 640 acres of a million and a quarter acres,” which represents the approximate acreage understood by Congress as being opened for settlement in the 1905 Act); 39 Cong. Rec. H1944 (1905) (EPA-WR-0010072) (statement of Rep. Lacey noting that “the land must be taken either by Boysen or by somebody else,” thus recognizing that Mr. Boysen’s 640 acres were to be located in the area to be opened for settlement and not in the remaining area to be occupied solely by the Tribes). In addition, in a subsequent case addressing whether Mr. Boysen’s preferential right was limited to selecting 640 acres within his existing 178,000 acre lease, the U.S. Court of Appeals for the 8th Circuit carefully reviewed the Boysen provision and confirmed that Congress intended Mr. Boysen’s right to exist solely in the opened area (although not limited to the portion of that area subject to his prior lease). *Wadsworth v. Boysen*, 148 F. 771, 775 (8th Cir. 1906) (Boysen “should be accorded the right to have the preferential selection of 640 acres anywhere in the ceded domain . . .” *Id.* at 777).

or doubtful expressions are to be resolved in favor of the tribes. *McClanahan*, 411 U.S. at 174; *Rosebud*, 430 U.S. at 586 (the legislation of Congress is to be construed in the interest of the Indian), *Celestine*, 215 U.S. at 290.

The Second Fort Bridger Treaty of 1868 establishing the Wind River Indian Reservation stated the lands, “shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.” 15 Stat. 673, 674. When the 1905 Act opened a portion of the Reservation to homesteading, it became necessary to generally distinguish the area where the Tribes retained the exclusive use and occupation, which was diminished in acreage from that guaranteed by the Treaty, from the portion of the Reservation opened to settlement.²⁷ 1868 Treaty, Article 2. The plain meaning of the term “diminished” reserve or reservation at the turn of the Century was a general description of the smaller area of exclusive tribal use; not the legal term of art that developed decades later.

It is a well established legal principle that, “[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.” *Absentee Shawnee Tribe of Indians of Oklahoma v. State of Kansas*, 862 F.2d 1415, 1418 (10th Cir. 1988) (citing *Worcester v. Georgia*, 31 U.S. 515, 582 (1832)); see also *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Kansas Indians*, 72 U.S. 737, 760 (1866)). This principle is derived from the fact that during turn-of-the-century negotiations, most tribal members were not fluent in English, and tribes should thus not be prejudiced by specific terms used in treaties, statutes and agreements. The courts also recognize the unequal bargaining power held by most tribes in reaching surplus land “agreements.” As summarized by the U.S. Court of Appeals for the 10th Circuit, “[w]ith regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation. . . . The diminishment policy recognizes the fact that the terms of an act of Congress

²⁷ Article X of the 1905 Act provides that “nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.” 33 Stat. 1016, 1018.

are often unilaterally imposed, rather than the product of negotiation between the Indians and the United States.” *Absentee Shawnee*, 862 F.2d. at 1417-18.²⁸

Commenters also infer Congressional intent to diminish the Reservation from the allocation of federal money to fund projects on the “diminished reservation” for the benefit of the tribes, stating that no such funding was allocated for projects on the ceded portion. As discussed above, Article IX establishes that “the United States shall act as a trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale.” 33 Stat. 1016, 1018. It is pursuant to this trustee provision that funds received from the sales would be allocated for the benefit of Tribal members. That the structural projects central to Indian society, such as an irrigation system and the construction of schools were funded on the “diminished reserve” recognizes that this was the area where the Tribes retained exclusive use and occupation and would thus receive the most direct benefit, whereas the opened area was intended to be settled by non-Indians. Contrary to the comment that no funds were allocated for the Tribes’ benefit on the opened portion of the Reservation, funds to purchase livestock (33 Stat. 1016, 1017-18); a general welfare and improvement fund to be expended for the purchase of articles as decided by the Tribes (*Id.* at 1018); funds for bridge construction and maintenance needed “on the reservation” (*Id.*); and funds for subsistence of indigent and infirm persons “belonging on the reservation” or other such purposes for the comfort, benefit, improvement, or education of Indians (*Id.*), were not restricted by Congress to the “diminished reserve.”²⁹ Congressional

²⁸ In 1904, the negotiator for the United States opened the discussions with the Northern Arapaho and Eastern Shoshone Tribes by stating that the Supreme Court had recently held that the United States could unilaterally legislate to open reservations without consulting with Indians or obtaining their consent. 1904 Minutes of Council Meeting at 3 (EPA-WR-000425). He further stated that the lands at issue and the manner of payment were non-negotiable. *Id.* at 8 (EPA-WR-000430). So, while the Northern Arapaho and Eastern Shoshone Tribes reached an agreement with the United States, it was conducted in the context of limited options for the Tribes. As described by McLaughlin, “quite a number of the Shoshone Indians signed the petition presented to them concurring in said [Mondell] bill, but did so from having been told by said parties that Congress was going to enact legislation which would open their reservation to settlement anyhow, and that it would be well for the Indians to concur in the provisions of the Mondell bill and thus avoid having legislation enacted which might be more objectionable to them.” Letter from J. McLaughlin to the Secretary of the Interior (Apr. 25, 1904) quoted in H.R. REP. NO. 58-3700, pt. 1, at 18 (1905) (EPA-WR-004692). In addition, the Tribes note that only 80 out of 237 adult male members of the Northern Arapaho Tribe actually signed the 1904 Agreement. See *infra* n.7.

²⁹ In addition, as noted above, Article IX, Section 3 expressly directs funds allocated and to be

intent to maintain the Reservation boundaries is supported by this statutory distinction which allocates funds for permanent structures central to Indian society within the area where the Tribal members would retain exclusive use and occupation; yet allocates funds for activities that would benefit the Tribes wherever they would be expended, on the entire Reservation including in the opened area.

As noted in the 2011 DOI Solicitor's Opinion, there is no question that the Tribes retained an interest in the ceded lands until sold. Thus, the fact that the 1905 Act used the term "diminished" several times is not dispositive, nor does it evince a clear intent by Congress to permanently alter the exterior boundaries of the Reservation.

g. Conclusion

The operative language of the 1905 Act, particularly in comparison with the 1874 Lander and 1897 Thermopolis Purchase Acts, does not indicate Congressional intent to effect a "present and total surrender of all tribal interests"³⁰ or to diminish the Reservation boundaries. The language of the Act states that the Tribes would cede their title, right and interest to the United States, which was, as discussed earlier, necessary for the United States to be able to subsequently transfer clear title to prospective homesteaders. However, the operative language does not evince clear Congressional intent to also alter and diminish the Reservation boundaries, nor was it necessary to do so in order to achieve the Act's main purpose of opening the lands to settlement. Rather, the 1905 Act language indicates Congressional intent that the opened area remained a portion of the Reservation and expressly established a trust relationship between the United States and the Tribes with respect to the opened area, consistent with its status as Reservation land.

The 1905 Act did not provide for a fixed sum certain payment to the Tribes in exchange for the lands. Rather, the Act predicated payment to the Tribes on prospective sales to homesteaders, and the United States expressly declined to commit to conduct any such sales. Given these provisions, an interpretation of

reimbursed from the proceeds of the sales of the opened lands to be expended in part for a survey and field and office examination of the unsurveyed portions of the ceded lands. 33 Stat. 1016, 1020-21.

³⁰ *Yankton*, 522 U.S. at 344 (citing *Solem*, 465 U.S. at 470, *Hagen*, 510 U.S. at 411, *DeCoteau*, 420 U.S. at 447-48).

the 1905 Act as a diminishment of the Reservation would amount to inferring Congressional intent to immediately reduce the Reservation by more than half without any guarantee that the Tribes would ever receive compensation in consideration for those lands. Such an interpretation would be contrary to the long-standing principles that "Indian treaties must be construed 'so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people.'" *Absentee Shawnee*, 862 F.2d at 1418, citing *Choctaw Nation*, 318 U.S. 432 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)).

EPA has carefully considered the 1905 Act provisions and concludes that the statutory language when read as a whole, including the operative language, manner of payment and other statutory provisions as discussed above, does not establish "substantial and compelling evidence" of a "plain and unambiguous" Congressional intent to diminish the Wind River Indian Reservation. As such, the statutory language does not overcome the Supreme Court's premise that "[o]nce 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 (citing *United States v. Celestine*, 215 U.S. 278 (1909)). See also *Yankton*, 522 at 343; *DeCoteau*, 420 U.S. at 444.

EPA's conclusion that the 1905 Act statutory language does not evince clear Congressional intent to diminish the boundary of the Wind River Indian Reservation is consistent with the 2011 DOI Solicitor's Opinion and the position of the United States in previous litigation involving the Tribes' water rights. See generally *Big Horn I*, 753 P.2d 76 (Wyo. 1988). In arguments before the Wyoming Supreme Court, the United States maintained that the 1904 Agreement, as codified with amendment by the 1905 Act, did not diminish the boundaries of the Reservation, pointing out in its brief that the Act contains several provisions in support of non-diminishment: (1) in Article IX, the United States specifically did not commit to compensate the Tribes a fixed amount – the Tribes would be paid as the lands were sold; (2) in Article III, the United States recognized the right of Indians to remain in the ceded area;³¹ (3) in Article III, the United States

³¹ Tribal members could obtain allotments in the 1905 Act area before it was opened to non-Indians. 1905 Act, Article I. In *Solem*, the Court found such a provision to be inconsistent with intent to diminish. *Solem*, 465 U.S. at 474.

authorized payments to establish water rights for such lands as shall remain the property of Indians in the ceded area; (4) in Article X, the United States stated nothing in the Act would deprive the Tribes of their rights under the Treaty; and (5) the Agreement does not use the word “convey” in Article I. Moreover, receipts from the land sales under the 1905 Act did not go to the general fund of the United States Treasury. Brief of appellee the United States at 97-98, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).

3. Circumstances Surrounding the 1905 Act

The second part of the Supreme Court’s framework for analyzing the legal effect of surplus land acts entails examination of the circumstances surrounding the passage of the statute to discern Congressional intent. Considering that the traditional solicitude for Indian rights favors the survival of reservation boundaries in the face of opening reservation land to settlement and entry by non-Indians, the standard for inferring diminishment from surrounding circumstances is quite high. “When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.” *Solem*, 465 U.S. at 471. *See also Shawnee*, 423 F.3d at 1222. Overall, the circumstances surrounding the 1905 Act, including the manner of negotiations and legislative history, do not support a finding of clear Congressional intent that the Act would permanently sever and alter the exterior boundaries of the Reservation.

a. Manner of Negotiations and Legislative History

On March 4, 1904, U.S. Representative Frank Mondell of Wyoming introduced H.R. 13481 to provide for opening portions of the Wind River Indian Reservation under homestead, town-site, and coal and mineral land laws. While the bill may have been based loosely on the 1891 and 1893 negotiations, as discussed in the 2011 DOI Solicitor’s Opinion, it included some very significant differences. For example, the 1891 agreement included operative language and payment terms that stand in stark contrast to the H.R. 13481 provisions. In the 1891 unratified agreement, 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." 1891 Articles of Agreement at 29 (EPA-WR-000259). In return the Tribes would have received a fixed sum certain payment of \$600,000. H.R. 13431 contained none of the aforementioned italicized language nor did it include a fixed sum certain payment. In addition to these important differences in operative language and manner of payment, the geographic scope of the 1904 bill was different from the earlier negotiations, enlarging the area to be opened to settlement, and the 1904 bill included a provision for the United States to act as a trustee for the Tribes regarding the sale of and payment for the lands. *See generally* H.R. REP. NO. 58-2355, at 3 (1904) (EPA-WR-000319). The 1904 House Report in describing H.R. 13481 states, "the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral land laws" *Id.* at 4 (EPA-WR-000320). Where the House Report reflects consideration of reducing the reservation, it does so in the context of discussing the 1891 unratified agreement.³²

On April 19, 1904, Indian Inspector McLaughlin met with the Eastern Shoshone and Northern Arapaho Tribes to present H.R. 13481. Throughout the negotiations, McLaughlin repeatedly referred to the bill as opening the Reservation to settlement by non-Indians, and did not speak in terms of altering the 1868 Treaty terms with respect to the exterior boundaries of the Reservation. McLaughlin's introductory remarks set the tenor of the United States' proposal to open certain portions of the Reservation to settlement:

My friends, I am sent here at this time by the Secretary of the Interior to present to you a proposition for the opening of certain portions of your reservation for settlement by the whites.

1904 Minutes of Council Meeting at 2 (EPA-WR-000424).

McLaughlin discussed the then-recent Supreme Court case, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), asserting that it was no longer deemed necessary to

³² The House Committee on Indian Affairs submitted a report stating the legislation proposes to "reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891, and in this connection it should be remembered that the instructions to the commission in 1891 were to reduce the reservation from 650,000 to 700,000 acres." H.R. REP. NO. 58-2355, at 3 (EPA-WR-000319).

obtain tribal consent for the opening of reservations. Describing the government's role as guardian for the tribes, McLaughlin stated:

... the President and the Secretary of the Interior are very desirous that you shall be protected in your rights in every respect. The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much so as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the government.

1904 Minutes of Council Meeting at 3 (EPA-WR-000425).

McLaughlin further described the 1904 proposal to the Tribes 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." *Id.* at 4 (EPA-WR-000426). He informed the Tribes that the United States would not pay a fixed sum amount in exchange for the land, rather, the agreement would establish an ongoing trust relationship between the government and the Tribes with respect to the opened lands:

My friends, that you may understand better and more clearly, the government as guardian is trustee for the Indians ... selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times and in the manner as may be stipulated in the agreement, and this without any cost to the Indians.

Id. at 3-4 (EPA-WR-000425-26).

The Tribal members present during the negotiations appear to have understood that pursuant to this agreement the United States would subsequently sell the land to non-Indians and the proceeds would go to the Tribes. Many Tribal members stated their desire that the sale price be set at \$2.50 per acre to counter the United States' proposal which started at \$1.50 per acre for the first two years. *See generally*, 1904 Minutes of Council Meeting (EPA-WR-000423-50). Commenters point to these specific quotes to support an assertion that the Tribes understood they were forever ceding their interests in the lands.³³

³³ Long Bear, Arapaho: "I understand what he comes for, and I will let him know what I think of it, and I will tell what part of the Reservation I want to sell. I want [sic] save enough of my land

There is no dispute that the 1905 Act provided for the opening and eventual sale of the surplus lands out of Tribal ownership, to prospective private homesteaders. The Tribal references, however, do not indicate a clear understanding that the exterior boundaries of their Reservation would be altered, which is the inquiry most pertinent to this analysis. Commenters also assert the Tribes understood this agreement to be similar to the Thermopolis Purchase. While McLaughlin and the Tribes understandably acknowledged the fact that McLaughlin had also negotiated the Thermopolis agreement, the meeting minutes do not indicate an understanding by the Tribes that the agreements were similar. In fact, much of the discussion focused on features unique to the 1904 agreement, such as negotiations on the price per acre once the lands were opened and the United States acting as trustee for the Tribes with regard to the sales. Neither of these provisions was at issue in the Thermopolis Purchase agreement. As McLaughlin later explained, “[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 . . .” Minutes of Council of Inspector McLaughlin with the Shoshone and Arapahoe Indians of the Wind River Reservation, Wyoming at Fort Washakie, Wyoming (Aug. 14, 1922) at 5 (EPA-WR-001681).

McLaughlin also described the boundaries of the “diminished reservation”³⁴ and the fact that natural water boundaries would be respected to prevent

for myself, so I can have it. This is my own land. I can sell any part of it I desire and set my own price. I want to cede that portion of the reservation from the mouth of Dry Muddy Gulch in a direct line to the mouth of Dry or Beaver Creek below Stagner’s on Wind River. . . . I think I ought to get about \$2.50 per acre.” *Id.* at 9-10 (EPA-WR-000431-32). Reverend Sherman Coolidge, Arapahoe: “I am glad that Major McLaughlin has come to us to purchase a portion of our reservation. The proposed ceded portion has not been used by us except for grazing purposes, and I think cash money will be of more value among the Arapahoes and Shoshones.” *Id.* at 12 (EPA-WR-000434). George Terry, Shoshone: “[t]his is no little bargain we are entering into. It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and can never recover again.” *Id.* at 17 (EPA-WR-000439). The Tribes point out that the courts have recognized that the Shoshone Tribe’s understanding of the 1905 Act provisions was limited, in finding, “[a]t the time of the making of the Treaty of 1868 the [Shoshone] tribe of Indians were full-blood blanket Indians, unable to read, write, speak, or understand English, with little previous contact with whites . . . Practically the same condition as to their education existed at the time the agreement of 1904, hereinafter mentioned, was made.” Tribes’ Response to Comments at 17, citing *Shoshone Tribe of Indians v. United States*, 85 Ct. Cl. 331, Findings ¶3 (1937), *aff’d*, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

³⁴ McLaughlin stated, “I now wish to talk of the boundaries of the reservation and the residue that will remain in your diminished reservation The tract to be ceded to the United States, as

trespass into the exclusive tribal area. The references to the “diminished” reserve or reservation during McLaughlin’s negotiations and subsequent Congressional Reports, similar to the parallel references in the text of the statute as discussed above, are best understood as a description of the area over which the Tribes would retain exclusive use. The area of the Tribes’ *exclusive use* would, in fact, be diminished by this agreement, from 2,288,500 to 808,500 acres and with the ever-increasing encroachment by non-Indians, the United States sought to define these boundaries so it would be clear which areas of the Reservation would remain under exclusive Tribal use and which areas were being opened to settlement by non-Indians. When the Tribes expressed a desire to have some lands north of the Big Wind River excluded from the ceded area, McLaughlin countered that the allotments in the area could be retained, or cancelled and re-established, but that on the diminished reservation they would be protected from the non-Indians. As stated by McLaughlin:

A little corner of land left north of the Wind River would cause you no end of trouble, as you would be continually over-run by the herds of the whiteman. However, any of you who retain your allotments on the other side of the river can do so, and you will have the same rights as the whiteman, and can hold your lands or dispose of them or lease them, as you see fit. On the reservation, you will be protected by the laws that govern reservations in all your rights and privileges. Furthermore, all of you who may retain your allotments off the reservations [sic] will not lose any of your rights on the reservation, and you have rights the same as if you remained within the diminished reservation.

Id. at 14 (EPA-WR-000436).

It is also apparent that the United States believed that a natural barrier between the exclusive area and the opened area would make the most sense for

proposed by the “Mondell Bill”, is estimated at 1,480,000 acres, leaving 808,500 acres in the diminished reservation. This embraces the lands within the lines described as follows: Commencing where the Wind River crosses your western boundary line, following down the Wind River to its junction with the Popo-Agie; thence up the Popo-Agie to its intersection with your southern boundary line; thence along the southern boundary line to the southwest corner of your reservation thence north along the western boundary to the place of beginning on the Big Wind River.” 1904 Minutes of Council Meeting at 6 (EPA-WR-000428).

practical purposes and to best protect the Tribes' interests. As McLaughlin subsequently reported in a letter to the Secretary of the Interior:

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

H.R. REP. NO. 58-3700, pt. 1, at 17 (1905) (EPA-WR-004691).

Similarly, the Committee on Indian Affairs, commenting on H.R. 13481 stated, "[i]t is believed that these are the most practicable and advantageous boundaries, inasmuch as but few Indians or allotments will be outside of the said boundaries, and it is important that the boundaries of the diminished reserve shall so far as possible remain a water boundary" and "[t]he bill in question still leaves the Indians with 808,500 acres. A careful estimate by the General Land Office gives the area of the lands proposed to be ceded by the above bill at 1,480,000 acres, leaving 808,500 in the diminished reserve. There are 1,650 Indians on the reservation at this time, so that the diminished reserve leaves about 500 acres per Indian man, woman, and child, on the reservation." H.R. REP. NO. 58-2355, at 2-3 (EPA-WR-000318-19).

The Supreme Court addressed the legislative history of the Cheyenne River Act wherein the House and Senate Reports made similar references to a

“reduced reservation” and statements that the “lands reserved for the use of the Indians upon both reservations as diminished . . . are ample . . . for the present and future needs of the respective tribes.” *Solem*, 465 U.S. at 478. The Court found it to be “unclear whether Congress was alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers or to the reduction that a complete cession of tribal interests in the opened area would precipitate” and ultimately held the Reservation to be undiminished. *Id.* In diminishment cases, while clear Congressional and tribal intent must be recognized, the rule that “legal ambiguities are resolved to the benefit of the Indians” is accorded “the broadest possible scope.” *DeCoteau*, 420 U.S. at 447.

The 1868 Treaty established the Wind River Indian Reservation boundaries and among other provisions, in Article VI authorized any head of a family desiring to commence farming to select a 320-acre tract of land anywhere within the Reservation. 15 Stat. 673. The Treaty did not restrict the Reservation to those lands that would be subject to individual settlement, but established a much broader Reservation as a homeland for the Tribes. The intent of Congress in 1904, as evidenced by the McLaughlin negotiations and the Congressional Reports, was to define a confined area from which individual allotments could be chosen and to open the rest of the Reservation to settlement. At no time during the negotiations did McLaughlin state to the Tribes that the bill under consideration was intended to abrogate and diminish the broader Treaty-established boundaries. In fact, the 1905 Act contains a provision expressly preserving the Tribes’ treaty rights: “[i]t is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.” 33 Stat. 1016 (1905), Article X. The continued Reservation status of the 1905 Act opened area was not inconsistent with the statute and its principal purpose to open the lands to settlement.

Following the April 21, 1904 agreement (1904 Agreement) between McLaughlin and the Tribes, a Senate Report proposed amendments to H.R. 13481, which was described as follows: “[i]t is believed that this bill fully protects the present and future interests of the Indians and will open up to beneficial use a considerable area that is now largely unproductive and closed to settlement.” S. REP. NO. 58-2621, at 1 (1904) (EPA-WR-004665). The House and Senate thereafter proposed a new bill, H.R. 17994, to replace H.R. 13481 and to ratify and amend the 1904 Agreement. The new bill contained a number of changes to

the 1904 Agreement, including the addition of a new provision to address the lease rights of Mr. Asmus Boysen and the deletion of a provision contained in the 1904 Agreement for payment by the United States of \$1.25 per acre for sections 16 and 36 of each township within the opened area for State school land purposes.

b. Boysen Provision

The 1905 Act includes a provision that was not in the 1904 Agreement and that addressed Congressional concerns about a lease interest held by Asmus Boysen. The legislative history of the Boysen provision includes statements of principal sponsors of the 1905 Act expressing their understanding that opening areas of the Reservation to non-Indian settlement under the Act's provisions would neither return the opened lands to the public domain, nor divest the Tribes of their interest in such lands as trust beneficiaries of the United States. After substantial debate in the House of Representatives and the Senate, Congress inserted the following provision into the 1905 Act, concerning the lease rights of Mr. Boysen:

And provided, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled; . . .

33 Stat. 1016, 1020.

In 1899, Mr. Boysen had entered into a ten-year lease with the Tribes, under which he was given the right to prospect for minerals throughout 178,000 acres on the Reservation, including in the area to be opened for settlement. After the prospecting period, Mr. Boysen was to file plans for extraction as well as maps of the location of his discoveries. The lease contained a clause stating "[i]n the event of the extinguishment, with the consent of the Indians, of the Indian title to the lands covered by this lease, then and thereupon this lease and all rights thereunder shall terminate." H.R. REP. NO. 58-3700, pt. 2, at 9 (1905) (EPA-WR-000345) (Minority Report).

The effect of the 1905 Act upon Mr. Boysen's lease right was debated by Congress when the Bill was under consideration by the House of Representatives in early 1905.³⁵ Several Congressmen, including Representative Mondell, a principal sponsor of the Bill, and Representative Marshall, who chaired the House Committee on Indian Affairs during its consideration of the Bill, supported the inclusion of the provision providing Boysen a preferential right to enter the opened area and select up to 640 acres of contiguous mineral or coal lands for purchase. As expressed in the Congressional Record, the provision was considered appropriate to compensate Boysen for the surrender and cancellation of his preexisting coal lease under the terms of the Bill. Such cancellation was deemed necessary to eliminate any potential cloud on the title of the opened area that might remain by virtue of Boysen's lease rights.

Those opposing inclusion of the preferential right for Boysen pointed, among other things, to the language in his coal lease providing for termination of the lease and all rights thereunder upon extinguishment, with consent of the Indians, of the Indian title to the relevant lands.³⁶ Noting the "cede, grant, and relinquish" language of the Mondell Bill, the minority opposition in the House Committee on Indian Affairs argued against inclusion of the Boysen preferential right provision because under the lease termination clause, Boysen's lease rights would terminate automatically when Indian title to the land was extinguished, which would, in their view, occur upon passage of the 1905 Act. H.R. REP. NO. 58-3700, pt. 2, at 3 (1905) (EPA-WR-000339). Consequently, the minority believed that passage of the 1905 Act would eliminate any potential cloud on the title to such area and avoid any need to separately cancel the lease, or to provide Boysen with any special compensatory rights, under the Bill.

³⁵ 39 Cong. Rec. H1940-45 (1905) (EPA-WR-0010068-73); 39 Cong. Rec. H2726-30 (1905) (EPA-WR-0010074-78); *see also* H.R. REP. NO. 58-3700, pt. 2, at 2-3 (EPA-WR-000338-39) (Minority Report).

³⁶ *See, e.g.*, 39 Cong. Rec. H1943 (1905) (statement of Rep. Fitzgerald: "The lease itself provides that when the Indian title to this reservation is extinguished with the consent of the Indians all rights cease under this lease. By the passage of this bill the Indian title will be extinguished with the consent of the Indians.") (EPA-WR-0010071); 39 Cong. Rec. H2729 (1905) (statement of Rep. Stephens: "First, the whole matter was to terminate when the Indian title to this land should be extinguished. That will be extinguished by the passage of this bill. Consequently, his lease could not be extended beyond the passage of this bill, for, in my judgment, this would undoubtedly be the legal effect of its passage.") (EPA-WR-0010077).

The legislative history suggests that the Boysen provision was the principal point debated during House consideration of the Bill. The House Committee on Indian Affairs Chairman Marshall specifically explained that enactment of the Bill would not trigger termination of Boysen's lease, and there would thus remain a potential cloud on title to the opened area which should be addressed in a specific statutory provision. As Chairman Marshall explained:

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

39 Cong. Rec. H1945 (1905) (statement of Rep. Marshall) (emphasis added) (EPA-WR-0010073).

The Senate also supported including the Boysen provision. Although acknowledging the existence of a dispute as to the present status of Mr. Boysen's lease, the Senate stated its preference to settle the matter – by providing the preferential land selection opportunity – “rather than cast a cloud over the title of the lands enumerated in said lease.” S. REP. NO. 58-4263, at 2 (1905) (EPA-WR-0010049). These statements indicate a prevailing view within Congress that the 1905 Act would retain a Tribal trust interest in the opened lands and that those lands would not be returned to the public domain.³⁷ The 2011 DOI Solicitor's

³⁷ As Commenters note, legislative history reflecting floor debates is generally best read as expressing views of the individual members of Congress making the cited statements. However, the 1905 Act's history recorded explicit interpretive statements of principal sponsors of the statute (as well as the principal legislators supporting the Boysen provision), including extensive explanation provided by the Chairman of the applicable House Committee on Indian Affairs. In fact, consideration of the Boysen provision appears to have dominated debate on the Bill within the House where the House Majority Committee Report included the Boysen provision notwithstanding the detailed objections of the Committee's Minority. In such circumstances, it is appropriate to look to the relevant prevailing statements as indicative of Congress' understanding of the purpose and effect of the statutory language. The records of debate narrowly focused on the Boysen provision reveal careful consideration at both the Committee and full House levels and clearly indicate that Congress did not view the 1905 Act as restoring the opened lands to the public domain.

Opinion also explicitly notes the House discussion of the Boysen provision as support for DOI's conclusion that the 1905 Act did not restore the opened lands to the public domain or diminish the Reservation.³⁸

c. State School Lands

The legislative history also indicates Congress' understanding that the opened area would retain its Reservation character, in its treatment of the school lands provisions. The 1904 Agreement included a provision for the United States to purchase, for a sum of \$1.25 per acre, sections 16 and 36, or an equivalent of two sections in each township of the ceded lands. 1904 Agreement, Article II. This provision was essentially identical to language initially included in H.R. 13481, which had provided for similar payment from the United States to the Tribes for sections 16 and 36 or equivalent lands and which withheld such sections from settlement, instead directing that they be disposed of for the benefit of the common schools of Wyoming. 38 Cong. Rec. H5246-47 (1904) (EPA-WR-0010056-57). The provision, in turn, parallels the Wyoming Enabling Act, which, similar to the enabling acts of other states, provides that sections 16 and 36 in every township of the State, or if those are sold or otherwise disposed of by Congress, then lands in lieu of those sections, are granted to the State for school purposes.³⁹ Under the 1904 Agreement and H.R. 13481 as initially proposed, the

³⁸ See also *Wadsworth v. Boysen*, 148 F. 771 (8th Cir. 1906). In *Wadsworth*, the court reviewed the legislative history of the Boysen provision and described a Congressional purpose in passing the 1905 Act as, "to open up a part of the vast territory occupied by the Indians to settlement." *Id.* at 778. The court noted that Congress recognized Mr. Boysen's remaining "probable right" in the leased lands, and thus included the Boysen clause "to free the situation from possible litigation." *Id.* The court further stated, "... the debate in Congress, of which the court can take judicial notice, when the proviso in question was under consideration and adopted, clearly shows that it was predicated of the sense of that body, based upon the information presented to the committee having the measure in charge, that it was proper and just ... he should be accorded the right to have the preferential selection of 640 acres anywhere in the ceded domain, for the reason that it was deemed expedient to remove as a cloud on the title to the conceded premises any assertion of his rights under the lease." *Id.* at 777. *Wadsworth* thus recognizes Congress' concern that, notwithstanding the lease termination provision in the Boysen lease, passage of the 1905 Act alone would not eliminate a potential cloud on title to the opened area, which further supports the view that the 1905 Act did not extinguish Tribal title or return the opened area to the public domain.

³⁹ "That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity

United States agreed to pay the Tribes for sections 16 and 36 (or an equivalent of two sections) in each township of the opened area for State school purposes, thus providing compensation to the Tribes for the grant of such lands to Wyoming per the State's Enabling Act.⁴⁰

During debate in the House on H.R. 13481, Rep. Mondell proposed to delete all of the school lands provisions, noting that such provisions in the bill provided that the State would take lands "on the reservation"; whereas by striking the provisions, the State would be authorized under its Enabling Act to take lieu lands elsewhere, which would not involve payment from the United States.⁴¹ Similarly, in the Report accompanying H.R. 17994 (which ultimately became the 1905 Act), the House Committee on Indian Affairs stated its intent to delete from the bill the 1904 Agreement's provision for payment by the United States for the school lands sections. Instead, the Committee expressed its preference that the Tribes should "receive the same rates from settlers for sections 16 and 36 as paid for other lands." H.R. REP. NO. 58-3700, pt. 1, at 7 (1905) (EPA-WR-004681). These statements in the legislative history and the explicit deletion of the school lands provisions (which do not appear in the 1905 Act) indicate Congress'

lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior" Wyoming Enabling Act, 26 Stat. 222 § 4 (1890).

⁴⁰ As noted in the Tribes' application, it appears significant that these provisions were included in the 1904 Agreement and HR 13481 so close in time following the Supreme Court's decision in *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). In that case, the Court held that a cession of tribal lands of the Red Lake Indian Reservation in trust to the United States for sale and deposit of proceeds to the credit of the Indians did not convert the ceded lands to public lands, and thus defeated the State of Minnesota's right to take sections 16 and 36 for school purposes under the grant of its Enabling Act. *Id.* The inclusion of provisions in the 1904 Agreement and H.R. 13481 securing payment to the Tribes for the school sections may have been intended to extinguish the United States' trusteeship over these sections, thereby avoiding a similar outcome to *Hitchcock* and making the sections available to Wyoming under its Enabling Act. That Congress instead decided to delete these provisions evidences its intent to leave the trusteeship and Reservation status of the ceded lands undisturbed and, as Rep. Mondell observed, authorize the State to take lieu lands elsewhere.

⁴¹ "I propose to offer an amendment striking out all the provisions with regard to school lands. That will leave the State with the right under her constitution to take lieu lands; but the Government does not pay for those lands...While the bill originally provided that the State should take lands on the reservation, the amendment which will be offered strikes out those provisions and makes no provision at all with regard to school lands, leaving the State authorized under the enabling act to take lieu lands." 38 Cong. Rec. H5247 (April 21, 1904) (statement of Rep. Modell) (EPA-WR-0010057).

understanding that the opened area would remain Reservation land and that rather than provide payment by the United States to the Tribes for purchase of sections 16 and 36 in each surveyed township, the State should instead take lieu lands elsewhere under its Enabling Act. Because such lieu lands would be taken other than from the Reservation, there would, as Rep. Mondell noted, be no need for the Government to pay the Tribes for such lands, and thus no need for the school lands provisions of the bill. 38 Cong. Rec. H5247 (April 21, 1904) (statement of Rep. Modell) (EPA-WR-0010057).

Congress' treatment of the school lands provisions stands in stark contrast to its disposition of such lands in connection with the opening of the Rosebud and Yankton Sioux Reservations. With regard to both of those Reservations, the Supreme Court found the presence of statutory provisions reserving sections 16 and 36 for state school lands to be indicative of Congressional intent to diminish the respective Reservations. *Rosebud*, 430 U.S. at 599-601; *Yankton*, 522 U.S. at 349-50. In particular, in *Rosebud*, the Court explained that the school lands provision – which provided for payment by the United States to the Tribe for the school sections – was intended to implement the State of South Dakota's Enabling Act, which granted sections 16 and 36 to the State. *Rosebud*, 430 U.S. at 599-601. Because the South Dakota Enabling Act's grant was only effective upon the extinguishment of any prior reservations of such lands that had been made for national purposes, the Court reasoned that the statute opening the Rosebud Reservation must necessarily have been intended to extinguish the prior reservation for Indian purposes, thereby making the school sections available to South Dakota under its Enabling Act. *Id.* By contrast, the Wind River 1905 Act includes no provision for purchase or setting aside of the State school sections; and, as described above, the legislative history demonstrates Congress' deliberate decision to delete such provisions. Like South Dakota, Wyoming has, in its Constitution, disclaimed any interest in Indian lands. Congress' decision not to include the school lands provisions in the 1905 Act, and instead to leave the State to select lieu lands elsewhere, thus stands in direct contrast to its approach to the two Sioux Reservations. Such distinct treatment demonstrates an understanding that the 1905 Act would not serve to implement the Wyoming Enabling Act's school lands provision because it did not extinguish the Reservation status of sections 16 and 36 (or any other part) of the opened area's townships.⁴² Rather, because the Reservation status of those sections remained

⁴² When asked whether the appropriations provisions in H.R. 13481 were intended to carry out the provisions of the Enabling Act admitting Wyoming to the Union, Rep. Mondell responded by explaining that the appropriations were only for surveys and reimbursable per capita payments,

intact, the State was left to select lieu lands elsewhere following surveying of the opened area.⁴³

d. The 1905 Act Surrounding Circumstances Are Distinguishable From Those in the *Rosebud* Case.

At first glance the 1905 Act may appear similar to the 1904 Act primarily at issue in the *Rosebud* case in which the Supreme Court concluded that the boundaries of the Rosebud Reservation were diminished. However, as set forth herein as well as in the 2011 DOI Solicitor's Opinion, the Wind River 1905 Act and its surrounding circumstances are different in several important respects. Moreover, it is noteworthy that the Supreme Court has opined that statutes like the one primarily at issue in *Rosebud* fall between the extremes of legislation that

and that he was proposing an amendment that would remove any appropriations to pay for the school land sections. 38 Cong. Rec. H5247 (1904) (statement of Rep. Modell) (EPA-WR-0010057).

⁴³ The dissenting opinion in the *Big Horn I* decision draws a different conclusion. *Big Horn I*, 753 P.2d at 131. In that opinion, the dissent argues that Congress' decision to delete the school lands provisions must be based on an understanding that because the 1905 Act would have the effect of disestablishing the ceded lands from the Reservation, the State would be entitled to claim sections 16 and 36 under its Enabling Act, with no need for payment by the United States for such sections, or for any lieu lands. *Id.* Thus, Congress deleted the provisions for such payment. *Id.* The dissent's argument appears to assume its key conclusion (diminishment of the Reservation) as fact, rather than considering the more plausible, and better supported, explanation of the legislative history described above. The dissent's attempt to distinguish the importance placed by the Supreme Court on Congress' inclusion of a school lands provision in *Rosebud Sioux* is problematic in that it appears to rely on an element of the respective legislative provisions – the requirement to purchase sections 16 and 36 – that is common to the school lands provisions of both the Rosebud statute and the 1904 Agreement. *Id.* It is also of note that the seeming result of the dissent's reasoning – *i.e.*, that Congress deleted as unnecessary any payment to the Tribes since the State was already entitled to the school lands under its Enabling Act – appears to run afoul of the Supreme Court's decision in *Hitchcock*. As part of the basis for its holding that school land sections in an opened area of the Red Lake Indian Reservation were not granted to the State of Minnesota under its Enabling Act, the Court reasoned that such a result would improperly alter the United States' agreement with the tribe that its ceded lands (without exception for lands that might subsequently be surveyed as sections 16 or 36 of a township) would be used for the purpose of creating a fund for the benefit of the Indians. *Hitchcock*, 185 U.S. 373. The Court was unwilling to accept such an alteration, especially where Minnesota's rights were preserved by its ability to select lieu lands elsewhere. *Id.* An argument that Congress deleted provisions for payment to the Tribes for school sections of the opened area on the Wind River Indian Reservation based on Wyoming's right to such sections under its Enabling Act would appear to result in precisely the same inappropriate effect on the 1904 Agreement that the Court rejected in *Hitchcock*.

clearly intended to diminish reservation boundaries and those that clearly intended not to diminish boundaries. *Solem*, 465 U.S. at 469 n.10. The surrounding circumstances of the Wind River 1905 Act do not alter the conclusion from the statutory analysis that Congress did not intend to diminish the Reservation boundaries.

In *Rosebud*, the Supreme Court held that the exterior boundaries of the Rosebud Reservation were diminished, relying heavily on a prior unratified 1901 agreement which the Court found to establish a chain of intent to diminish that carried over to a subsequent 1904 surplus land act.⁴⁴ In *Rosebud*, Indian Inspector McLaughlin had negotiated an agreement with the Rosebud Sioux Tribe for a cession of 416,000 acres of land in exchange for a fixed sum certain payment. During negotiations with the Tribe, McLaughlin explained that ratification “will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.” *Rosebud*, 430 U.S. at 591-92. The 1901 agreement was not ratified by Congress due to concerns about obtaining the money needed upfront for the land cession. *Id.* at 591-92 and n.10. “The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money” *Id.* at n.10 (citing lower court decision). The Supreme Court noted that all parties to the *Rosebud* case agreed that if ratified, the 1901 agreement would have changed the Reservation boundaries. *Id.* at 591-92. In 1903, Congress requested that McLaughlin return to the Tribe and seek the same agreement with one exception: rather than a fixed sum payment, the Tribe would receive payment as the lands were sold. *Id.* at 592-93.

In discussing this agreement with the Rosebud Sioux Tribe, McLaughlin explained, “I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment. . . . You will still have as large a reservation as Pine Ridge after this is cut off.” *Id.* at 593. Thus, McLaughlin clearly stated the agreement would affect the exterior boundaries, changing the size and shape of the Rosebud Reservation. In examining the legislative processes which resulted in the 1904 Act, the Court was convinced that the purpose of the 1901 Agreement, to change the size, shape and boundaries of the Reservation, was carried forth and enacted in 1904. *Id.* at 592. The Court stated, “[i]n examining congressional intent, there is no indication that Congress

⁴⁴ While there were three surplus land acts at issue in *Rosebud*, the Court’s analysis focused primarily on the 1904 Act and then found “continuity of intent through the 1907 and 1910 Acts.” *Rosebud*, 430 U.S. at 606.

intended to change anything other than the form of, and responsibility for, payment." *Id.* at 594.

As discussed in the 2011 DOI Solicitor's Opinion, the historical facts in *Rosebud* are distinguishable from those at Wind River. In the *Rosebud* circumstance, the only significant feature distinguishing the 1901 Agreement from the 1904 Act was the manner of payment. In contrast, the Wind River 1905 Act was different from the 1891 agreement in several important ways in addition to the change in the manner of payment. First, in *Rosebud*, the Supreme Court relied on the fact that operative language in the agreement and the surplus land Act was identical. *Id.* at 594, n.15. In contrast, the operative language in the 1905 Act is different from that of the unratified 1891 Agreement in a manner that indicates Congress did not intend to diminish the Reservation in 1905. The 1891 Agreement operative language provided that the Tribes would, "cede, convey, transfer, relinquish and surrender, forever and absolutely . . . all their right title and interest, of every kind and character in and to the lands, and the water rights appertaining thereunto" H.R. DOC. NO. 52-70, at 29 (EPA-WR-000259). By contrast, the 1905 Act operative language provided that the Tribes would, "cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation." Congress omitted from the 1905 Act language contained in the 1891 Agreement that would "convey" or "surrender" the lands "forever and absolutely" and omitted the phrase "of every kind and character in and to the lands and the water rights appertaining thereunto." The fact that Congress retreated from the more definitive language in the 1891 Agreement when enacting the 1905 statute is an indication that Congress did not intend to diminish the lands from the Reservation in 1905.

Secondly, while the lands at issue were identical in the *Rosebud* agreement and statute, the land base was different in the Wind River 1891 Agreement and 1905 Act. The Wind River 1891 Agreement was not ratified, primarily because the United States was not satisfied with the land base and wanted additional lands to be included. H.R. DOC. NO. 52-70, at 7-8 (1892) (EPA-WR-000248-49); *see also* H.R. REP. NO. 58-2355 (1904) at 3 (EPA-WR-000319). In 1893, McLaughlin attempted once again to negotiate an agreement with the Tribes but was unsuccessful because they could not agree on the land base that would be opened to settlement. *See* H.R. DOC. NO. 53-51 (1894) (EPA-WR-000276-95). Thus, in 1891 and 1893, either the United States or the Tribes were not satisfied with the land base at issue and as a result, neither agreement culminated in ratification. The land base in the 1904 Agreement was different from *both* the

1891 unratified agreement and the 1893 failed attempt at reaching a new agreement. Where a key feature, such as the land base at issue, was a point of contention preventing enactment of the earlier agreements and in fact was different in the 1905 Act ratified fourteen years later, the intent surrounding the 1891 agreement is not logically attributable to the 1905 Act.

The third important distinction is that, as noted above, there was an intervening failed agreement in the Wind River circumstance. The *Rosebud* Court found the intent of the 1901 agreement to carry over two years later to the 1903 agreement because only the terms of payment changed. In contrast, at Wind River, two years after the 1891 unratified agreement there was a failed attempt to reach agreement on which lands to open to settlement. Thus, whatever chain of intent the Court found in *Rosebud* is distinguishable based on the intervening failed agreement on a significant issue that occurred during the thirteen years between the 1891 and 1904 Agreements at Wind River.

Fourth, the Rosebud surplus land act included language committing the government to purchase sections 16 and 36 of each township for purposes of conveying them to the State of South Dakota, and the Court cited such language as evidence of Reservation diminishment. As discussed above, Congress deleted a similar provision that was present in the Wind River 1904 Agreement when it enacted the Wind River 1905 surplus land act. This deletion of the State school lands provision is consistent with an understanding that the opened area would remain Reservation.

Finally, the manner of negotiations sets the Rosebud 1903 Agreement (that led to the Rosebud 1904 Act) apart from the Wind River 1904 Agreement (that led to the Wind River 1905 Act). When McLaughlin returned to the Rosebud Tribe to negotiate the 1903 Agreement, he explicitly referred back to the 1901 Agreement stating, "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment." *Rosebud*, 430 U.S. at 593. In contrast, the historical record shows that McLaughlin did not refer to the 1891 Agreement when he negotiated with the Wind River Tribes in 1904. Furthermore, in the Rosebud circumstance, McLaughlin clearly expressed the United States' intent stating, "[y]ou will still have as large a reservation as Pine Ridge after this is cut off." *Id.* In contrast, when McLaughlin negotiated the Wind River 1904 agreement, he repeatedly explained that the agreement would open the surplus lands of the Reservation to settlement by non-Indians and never described it as "cutting off" any portion of the Reservation. See 1904 Minutes of Council Meeting (EPA-WR-000423). As the 2011 DOI Solicitor's

Opinion notes, had McLaughlin wanted the Tribes at Wind River to understand that the 1904 Agreement was similar to the 1891 Agreement or that the exterior boundaries of the Reservation were being “cut off,” he would have used express words and descriptions as he did in the Rosebud negotiations.

In *Rosebud*, the Supreme Court relied heavily on a continuity of purpose to find Congressional intent to diminish the Reservation derived from an earlier unratified agreement. In contrast to the surrounding circumstances in *Rosebud*, where the only change from the 1901 Agreement to the 1904 statute was the manner of payment, the Wind River 1904 agreement included significant changes in the operative language; manner of payment; land base; school lands provision; and the manner of negotiations. Thus, unlike the circumstances in *Rosebud*, the 1891 unratified agreement at Wind River carries little weight with regard to Congressional intent in 1905. For purposes of examining surrounding circumstances to discern Congressional intent in enacting the March 3, 1905 Act, it is the April 21, 1904 Agreement and associated negotiations that are most relevant.

e. Conclusion

Overall, the circumstances surrounding the 1905 Act, including the manner of negotiations and legislative history, do not support a finding of clear Congressional intent that the Act would permanently sever and alter the exterior boundaries of the Reservation. While there are isolated historical statements that could be construed as intent to diminish the Reservation, taken as a whole, the surrounding circumstances do not “unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.” *Solem*, 465 U.S. at 471. In this instance, where both the 1905 Act’s statutory language and its surrounding circumstances fail to provide substantial and compelling evidence of Congressional intent to diminish the Wind River Indian Reservation, as stated by the Supreme Court, “we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” *Solem*, 465 at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351 (1962)).

4. Events Subsequent to the 1905 Act

Following examination of the statutory language and surrounding circumstances, the Supreme Court has, to a lesser extent, looked to events that

occurred after the passage of a surplus land act to determine Congressional intent. The inquiry includes consideration of Congress's own treatment of the area and that of the U.S. DOI Bureau of Indian Affairs (BIA) and local judicial authorities. *Yankton*, 522 U.S. at 344; *Solem*, 465 U.S. at 471. The Court has also recognized, on a more "pragmatic" level, that who actually moved onto opened reservation lands is relevant to deciding whether a surplus land act diminished a reservation, noting that where "non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character" diminishment may have occurred. *Solem*, 465 U.S. at 471.

This section examines Congressional and Executive branch treatment of the area opened by the 1905 Act subsequent to enactment. The first part focuses on activities in the opened area for the first 25 years. As the Supreme Court noted in *Solem*, subsequent Congressional and agency actions, "particularly in the years immediately following the opening, [have] some evidentiary value." *Id.* The next section addresses activities from the Restoration Era in the 1930's to the present day. Finally, the remaining sections discuss current activities in the opened area as well as judicial opinions and references.

a. 1905 Through the 1930's

i. The 1905 Act Area Was Available for Homesteading for Approximately Ten Years.

Homesteading under the 1905 Act was generally unsuccessful, resulting in continuous federal management of the vast majority of the opened lands for the benefit of the Tribes consistent with the treatment of the lands as Reservation. In fact, the United States only actively sold the opened lands for homesteading purposes for approximately ten years, from 1905 to 1915. The federal government began discouraging the sales of land in the opened area just eight years after passage of the 1905 Act. As noted in the 2011 DOI Solicitor's Opinion, as of 1909, only 113,743.68 acres or 7.91% of the 1,438,633.66 acres opened were actually sold. By 1913, DOI concluded that parcels in the opened area should not be sold "until it is thought best to do so." Letter from Commissioner C.J. Rhoades to E.O. Fuller (January 27, 1930) (EPA-WR-000407). In 1915, both the Office of Indian Affairs and DOI advised the General Land Office that all sales of land in the opened area be postponed indefinitely.⁴⁵ Government records

⁴⁵ "During 1915 . . . the Commissioner of the General Land Office proposed to sell the remaining undisposed of ceded land. However, on April 29, 1915, this office recommended that the proposed sale be postponed indefinitely, and under date of May 27, 1915 the Secretary of the

indicate that this recommendation was primarily based on the fact that DOI had been leasing the opened lands for grazing purposes and transferring the proceeds from the activities to Tribal accounts, which was generating significant revenue for the Tribes. "The action taken by this office in recommending an indefinite postponement of the sale of the ceded land was based upon reports furnished by the then Superintendent, showing among other things that the tribe was obtaining an annual rental from grazing leases amounting to over \$33,000, and that the lands were probably valuable for oil." Letter from Burke at DOI to Reuben Haas of the Shoshone Agency (March 29, 1929) (EPA-WR-001478).

By 1915, DOI had indefinitely postponed sales in the opened area. *Id.* At the time DOI postponed sales, only 128,986.58 acres or 8.97% of the 1,438,633.66 acres of opened land had been sold to non-Indians. 2011 DOI Solicitor's Opinion at 15. After DOI recommended postponing further sales in 1915, an additional 67,373 additional acres or 4.6% of the opened area was sold, primarily for use by the School District and the Riverton Airport. Ultimately, approximately 196,360 acres or 13.6% of the 1,438,633.66 acres opened to settlement were disposed of to non-Indians. *Id.*, citing, Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol.* On Indian Affairs 1185, 1191 n.7 (U.S.D.I. 1979).

The historical record regarding homesteading is significant for two reasons. First, it is apparent that non-Indian settlement in the opened area was not successful and with a relatively small percentage of lands actually settled in the first decade, it was not a circumstance where "non-Indian settlers flooded into the opened portion" of the Reservation or where "the area has long since lost its Indian character." *Solem*, 465 U.S. at 471-72. In fact, DOI continued to issue allotments to Tribal members in the opened area, a strong indication that the government continued to view the area as Reservation land. Specifically, subsequent to 1905, DOI allotted 35,550 acres of land in the opened area to individual Tribal members.⁴⁶ April 17, 2012 Letter to EPA Region 8 from Acting

Interior notified the Commissioner of the General Land Office that he had approved our recommendation postponing the sale." Letter from Burke at DOI to Reuben Haas of the Shoshone Agency, March 29, 1929 (EPA-WR-001478).

⁴⁶ A June 12, 1914 Letter from Assistant Commissioner of Indian Affairs E.B. Meritt to Representative Lobeck, indicates by 1914, a total of 50,000 acres allotted to Tribal members on the ceded portion of the Reservation: 16,000 acres allotted to the Arapaho and 34,000 acres allotted to the Shoshone (EPA-WR-001480-85). Another publication references that 33,064.74 acres were allotted in the ceded area. *Survey of Conditions of the Indians in the United States, Hearing before a Subcommittee of the Senate Committee on Indian Affairs, 72nd Cong., pt. 27, at 14467 (1932)* (EPA-WR-

Regional Director, BIA Rocky Mountain Regional Office (EPA-WR- 009827). The Wind River Indian Reservation settlement history stands in marked contrast to cases where the “demographics signify a diminished reservation” such as with the Yankton Sioux Reservation which was opened to settlement in 1895 and “[b]y the turn of the century, 90 percent of the unallotted tracts had been settled” by non-Indians. *Yankton*, 522 U.S. at 339. Second, the federal department and agency overseeing Indian affairs continued to assert jurisdiction over the opened area of the Wind River Indian Reservation, consistent with its status as Reservation land. This sets the Wind River ceded portion in further contrast to the Yankton Sioux situation where the Court found that, following the opening of the Yankton Reservation, the state government assumed virtually exclusive jurisdiction over the area. *Id.* at 357. The Secretary of the Interior’s decision to close the Wind River 1905 Act area to further homesteading because the Tribes were benefitting from federal leasing activities indicated that the Tribes’ interests in the opened area remained the federal government’s primary consideration.

ii. The Federal Government Continuously Managed the Land for the Benefit of the Tribes.

As noted above, after passage of the 1905 Act, the United States continuously managed the entire opened area for the benefit of the Tribes, consistent with its status as Reservation land. The United States acted as trustee for the Tribes not only with respect to the proceeds from sales of individual parcels, but with respect to management of the opened area in general.

Subsequent to the passage of the 1905 Act, the opened lands remained under the administration of the Bureau of Indian Affairs and were not placed under the jurisdiction of the General Land Office. For example, the Office of Indian Affairs issued grazing leases within the opened area under regulations applicable to reservation lands and applied the proceeds from the leases for the Tribes’ benefit.⁴⁷ BIA regulations only allowed the agency to issue leases on lands that

010156). The Tribes provide additional data showing the specific acres patented in fee or to Indians each year from 1906 to 1919. Tribes’ Response to Comments at 33-38, including data compiled from the U.S. Bureau of Land Management and other sources.

⁴⁷ Letter from Arapahoe Business Council to Commissioner of Indian Affairs, June 16, 1914 (“About two years ago the Government sent our present Superintendent here . . . soon after he came here, [he] issued grazing permits for nearly all of the ceded part of the reservation”) (EPA-WR-000402-04).

had not been extinguished from their associated reservations.⁴⁸ In addition, during the *Big Horn I* litigation, the United States presented the testimony of Mr. Ivan Penman of the General Accounting Office who tracked all of the receipts recorded by the federal government from the lands covered by the 1905 Act and demonstrated that all of these receipts – not merely the receipts from the sale of land – were turned over to the Indians and were not kept in the general funds of the United States Treasury. Brief of appellee the United States at 98, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).⁴⁹ Also, as noted above, DOI continued to approve allotments to Tribal members in the opened area after 1905.

Congress reinforced DOI's treatment of the opened area as Reservation by passing legislation allocating funds designated for Indian uses, to irrigation and reclamation activities in the 1905 Act opened area. For example, in a 1916 Indian Appropriations Act, Congress allocated \$5,000 to the Bureau of Indian Affairs to pay for "irrigation of all the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." 39 Stat. 123, 158

⁴⁸ A 1912 DOI opinion letter entitled *Regulations Governing Use of Vacant Ceded Indian Lands* further explains the federal understanding regarding Reservation lands that had been opened to disposition, but were still held for the benefit the Indians and were thus not public lands. Letter from Samuel Adams, First Assistant Secretary of the Interior to the Commissioner of Indian Affairs and General Land Office, July 25, 1912. (EPA-WR-001637-38). The DOI opinion notes that Reservation lands that have been opened to settlement fall into two categories: "(1) [t]hose which the United States has purchased from the Indians and paid for, the Indian claim thereto being thus completely extinguished; and (2) those which the United States agrees to dispose of for the benefit of the Indians, without, however, becoming bound to purchase the lands, whereby the claims of the Indians remain unextinguished until the lands are finally sold." *Id.* The Wind River 1905 Act opened lands fall into the second category based on the fact that United States did not pay a sum certain for them and was not bound to purchase or sell the lands.

⁴⁹ The Tribes' application describes several events immediately following passage of the 1905 Act that reinforce federal agency treatment of the lands as Indian country. For example, the Tribes describe that in April of 1905, DOI approved a railroad company's application for a right-of-way through the Wind River Canyon located in the opened portion of the Reservation and that DOI's approval was issued pursuant to an 1899 Act authorizing the Secretary to issue rights-of-way over lands in Indian country. 25 U.S.C. §§ 312 et seq. They also describe that in 1909, DOI issued a subsequent right-of-way in the opened area under the same 1899 Act, including through the opened area to the Town of Hudson. Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909, Vol. II, at 60, 63 (EPA-WR-001630). In addition, the Tribes' application describes that in 1906, DOI allotted lands to Mr. Edmo LeClair in the opened area, (Transcript of sworn testimony of Edmo LeClair before F.C. Campbell, District Superintendent, District No. 4, U.S. Indian Service, at 3 (Oct. 5, 1926) (EPA-WR-001748)) and that the LeClairs irrigated this land until about 1914 when the BIA took over operation of the ditch. *Id.* at 3-4 (EPA-WR-001748-49).

(1916). This language indicates both that Congress deemed it appropriate to fund the irrigation activities in the opened area through an Indian appropriations mechanism and that Congress viewed the ceded lands as being part "of said Reservation."⁵⁰ In subsequent years, Congress made numerous similar allocations of Indian funds for irrigation activities in the entire Reservation, including in the opened area.⁵¹ Similarly, in 1920, Congress allocated nine months of payments from Indian appropriations for reclamation activities in the opened area, describing the area as "within and in the vicinity of the ceded portion of the Wind River . . . reservation." 43 U.S.C. § 597 (1920). Reclamation project orders implementing this legislation withdrew from public entry "the following described lands within the Shoshone Indian Reservation, Wyoming, excepting any title the tract to which has passed out of the United States." Letter from A.P. Davis to Secretary (Jan. 2, 1920) approved by John W. Hollowell, Assistant to the Secretary (Jan. 3, 1920) (EPA-WR-004003).

In 1916 Congress granted access to the oil and gas reserves underlying the opened area only through leases issued by DOI for the benefit of the Tribes, rather than through the public land mineral patent system. 39 Stat. 519 (1916). Congress passed this legislation specifically governing mineral reserves in the opened area of the Wind River Indian Reservation because it viewed leasing under the general leasing laws to be "manifestly unfair to the Indians and not in keeping with the agreement made with them." See Brief of appellee the United States at 99, *Big Horn I*, 753 P.2d 76 (Wyo. 1988) (No. 85-203).

The 1916 statute states:

That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation . . .

⁵⁰ In response to this legislation, the Secretary of the Interior transmitted a report to the Committee on Indian Affairs prepared by the Reclamation Service that references the "'ceded land' portion of the reservation." Letter from Secretary Transmitting Report of the Reclamation Service on the Wind River, Wyoming, Project, (Dec. 18, 1916) reprinted in H.R. DOC. NO. 64-1767 (1916) (EPA-WR-000527).

⁵¹ 39 Stat. 123, 158 (1916); 39 Stat. 969, 993 (1917); 42 Stat. 1174, 1201 (1923); 43 Stat. 390, 404 (1924); 43 Stat. 1141, 1154 (1925); 44 Stat. 453, 467 (1926); 45 Stat. 200, 214 (1928); 45 Stat. 1562, 1576 (1929); 46 Stat. 279, 293 (1930); 46 Stat. 1115, 1129 (1931); 47 Stat. 91, 103 (1932); 47 Stat. 820, 832 (1933); 48 Stat. 362, 371 (1934); 49 Stat. 176, 189 (1935); 49 Stat. 1757, 1771 (1936); 50 Stat. 564, 579 (1937); 52 Stat. 291, 307 (1938); 53 Stat. 685, 702 (1939); 59 Stat. 318, 331 (1945).

and the proceeds or royalties arising from any such leases shall be first applied to the extinguishment of any indebtedness of the Shoshone Indian Tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the [1905 Act].

39 Stat. 519 (1916).

iii. References to the 1905 Act Area in Congressional and Executive Branch Documents.

In addition to considering how Congress and the Executive Branches treated the 1905 Act area as discussed above, this section provides some additional examples of how the government referred to the opened area in documents and maps. It should be noted at the outset that the Supreme Court has stated with regard to documents and maps referencing reservations, "... the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment have limited interpretive value." *Yankton*, 522 U.S. at 355. As noted in the 2011 DOI Solicitor's Opinion, while references to the opened area are inconsistent, overall they reflect a view that after 1905, the Wind River Indian Reservation was comprised of two parts: an unaffected or diminished exclusive Tribal area and the opened or ceded area.

In 1906, Congress passed a joint resolution extending the time for opening to public entry the "ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming." 34 Stat. 825 (1906). In the accompanying DOI report to Congress, the opened lands are described in the same manner, as a portion of the Reservation being opened to settlement. H.R. DOC. NO. 59-601 (1906) (EPA-WR-000378-79). Subsequent legislation in 1907, allowing six months from the date of filing upon the lands to establish residence, referred to the opened lands as "formerly embraced in the Wind River or Shoshone Indian Reservation." 34 Stat. 849 (1907). Subsequently, numerous Congressional Acts and House and Senate Reports referred to the opened area as a ceded part or portion of the Reservation. For instance, a 1909 statute enacted to extend the time for miners making mineral claims "within the Shoshone and Wind River Reservation" referred to the claims in the opened area as being "within the ceded portion of the Shoshone Reservation." 35 Stat. 650-51 (1909). *See also* S. REP. NO. 60-980 (1909) (EPA-WR-000383-85). The following year, a Senate Report referred to "desert lands formerly in the Shoshone or Wind River Indian Reservation." S. REP. NO. 61-303 (1910) (EPA-WR-000386). However, this Report also referred to

the 1905 Act lands as being "within the limits of the ceded portion of the Shoshone or Wind River Indian Reservation." *Id.* Other Senate reports from 1912 to 1915 simply referred to "the ceded portion of the Wind River Reservation." H.R. REP. NO. 62-400 (1912) (EPA-WR-000387-89); S. REP. NO. 62-543 (1912) (EPA-WR-000390-91); S. REP. NO. 64-13 (1915) (EPA-WR-000392). Similarly, legislation addressing patents refers to the opened area as the "ceded portion of the reservation," and the associated House Report refers to the legislation as dealing with the situation of entrymen "within the Wind River Reservation." 37 Stat. 91 (1912); H.R. REP. NO. 62-400 (1912) (EPA-WR-000387-89). In 1916, with regard to oil and gas leasing in the opened area, Rep. Clark of Wyoming stated, "[t]his is not land on an Indian reservation," yet in the same testimony stated, "[i]t is still Indian land and the Indians are entitled to it." 53 Cong. Rec. S12,159 (Aug. 5, 1916) (statement of Rep. Clark) (EPA-WR-000394). As discussed above, a 1916 Indian Appropriations statute described activities on the diminished and ceded portions of the Reservation and provided funding for "irrigation of all of the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." 39 Stat. 123, 158 (1916). In 1920, Congress appropriated funds for a reclamation project in the opened area, describing the lands as within and in the vicinity of the "ceded portion of the Wind River or Shoshone Reservation." 43 U.S.C. § 597.

There are also numerous Executive Branch references to the opened area of the Reservation in documents and maps subsequent to passage of the 1905 Act. The 1905 Act provided for the United States to conduct surveys, including in the opened area. 33 Stat. 1016, 1021-22. The surveys for these plats were completed by December of 1905 and approved by the General Land Office in 1906. As discussed in the 2011 DOI Solicitor's Opinion, the surveys were conducted using the Wind River Meridian, not a Principal Meridian as was used for public lands. This is in contrast, for example, to the maps prepared by the United States subsequent to the 1897 Thermopolis Purchase Act, where the lands at issue were depicted as existing within the 6th Principal Meridian (for public lands), rather than the Wind River Meridian (for Indian Reservation lands).⁵² Moreover, the resulting plats identified the northern boundary of the opened area as the "North Boundary Shoshone Indian Reservation" and the eastern boundary of the opened area as the "East Boundary Shoshone Indian Reservation."⁵³ Thus, the official

⁵² Plat of Township 42 North, Range 94 West (approved Feb. 16, 1900) (EPA-WR-007819); Plat of Township 42 North, Range 96 West – Township Exteriors (approved Apr. 28, 1900) (EPA-WR-007820).

⁵³ Plat of Fractional Township No. 6 North Range No. 6 East of the Wind River Meridian,

United States government surveys conducted immediately after and pursuant to the 1905 Act confirm that while the statute opened a portion of the Reservation to settlement, the Act did not change or diminish the boundaries of the Reservation.

Executive branch references to the opened lands echo the majority of the Congressional references to the lands as “part of” or a “portion of” the Reservation. The June 2, 1906 Presidential Proclamation announcing the 1905 Act reiterated the cession language from the Act without implying any particular interpretation of what that language meant. 34 Stat., Part 3, 3208 (1906). However, the government map that accompanied the Proclamation was labeled: “Map of that part of the Wind River or Shoshone Indian Reservation, Wyoming, to be opened for settlement,” describing the opened area as part of the Reservation. A letter from E.B. Meritt, Assistant Commissioner of Indian Agency in response to questions from Representative C.O. Loebeck contains similar language. June 12, 1914 Letter from E.B. Meritt to Rep. C.O. Loebeck (EPA-WR-001480-85). The Representative referred to the opened area as “that portion of the reservation lying north of the Big Wind River and which is known as the ceded portion.” *Id.* at 4. A BIA grazing permit for 68,360 acres issued January 12, 1914 granted rights to graze on “vacant ceded lands, Shoshone Indian Reservation.” Lease No. 405, Jan. 12, 1914 (EPA-WR-001492). In 1916, a DOI report to the House described the opened lands as “formerly included” in the Reservation and the Reservation as “[o]n the south or southwest side of the Wind River.” H.R. DOC. NO. 64-1767, at 9 (1916) (EPA-WR-000518). However, the same Report also described the continued interest “retained by the Indians in the ‘ceded-land’ portion of the reservation.” (EPA-WR-000527). Also in 1916, the Indian Service distinguished the “diminished reservation” from “the ceded part of the former reservation.” H.R. DOC. NO. 64-1478 (1916) (EPA-WR-000497-510).

In its comments on the Tribes’ TAS application, the State of Wyoming provided two maps from 1907 and 1912 produced by the General Land Office depicting the Wind River Reservation to be the unopened portion of the Reservation only. State Comments, Exhibits 5 & 6. The Tribes, in response, provided a map from 1905 produced by the General Land Office depicting an undiminished Reservation.⁵⁴ All three of the maps are labeled as compilation

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) (EPA-WR-001731-32).

⁵⁴ While the map is labeled 1905, the map key delineates “townships possibly containing coal” Dec. 19, 1906 (EPA-WR-007818).

maps, meaning they are comprised of information from the General Land Office and other sources. A map accompanying the 1914 Annual Report of the Commissioner of Indian Affairs to the Secretary labeled the unopened area as "Reservation" and the area affected by the 1905 Act as maintaining the 1868 exterior boundary and labeled "Opened," indicating that the exterior boundary remained intact. (EPA-WR-009757-58).

When United States Indian Inspector McLaughlin met once again with the Northern Arapaho and Eastern Shoshone Tribes in 1922, he explained the Thermopolis Agreement as "entirely distinct and separate" from the 1905 Act. In particular, McLaughlin pointed out that in the 1905 Act the "government simply acted as trustee for disposal" of the land north of the Big Wind River. Transcription of Council Minutes, August 14, 1922 at 5 (EPA-WR-001681). McLaughlin recognized that "[i]t is ceded land under the control of the government, entirely," and further affirmed that the Indians "still have an equitable right because the agreement has not been fulfilled in full." As discussed in the 2011 DOI Solicitor's Opinion, in 1923, the Commissioner of Indian Affairs informed the Superintendent 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; but the former act, that approved March 3, 1905, provided for the sale of these lands under the provisions of the . . . mineral land laws." *Id.* He concluded that the land office could dispose of the land and the proceeds of the sales would go to the credit of the Indians. *Id.* A map accompanying the 1923 Annual Report of the Commissioner of Indian Affairs labeled the area south of the Big Wind River and west of the Popo Agie as "Reservation" and the area north and east labeled "Former Indian Reservation." On June 15, 1929, however, in response to a request from homesteaders to manage the area for their benefit, the Department reaffirmed its commitment to managing the 1905 Act area for the benefit of the Tribes. 2011 DOI Solicitor's Opinion at 16, citing June 15, 1929 Memo to the Secretary (EPA-WR-001487). During Congressional hearings in 1932, DOI described the Reservation as consisting of an area approximately 65 miles by 55 miles, encompassing approximately 2,238,644 acres (roughly the area of a non-diminished Reservation), and comprised of a "ceded portion" and a "diminished portion." *Survey of Conditions of the Indians in the United States, Hearing before a Senate Subcommittee of the Committee on Indian Affairs, 72nd Cong., pt. 27 at 14428-67 (1932) (EPA-WR-010117-56).* As the 2011 DOI Solicitor's Opinion notes, "[n]one of these references or maps, either by themselves or collectively, supports a conclusion that the 1905 Act altered the Reservation boundaries." 2011 DOI Solicitor's Opinion at 15.

In conclusion, in the years immediately following the passage of the 1905 Act, the vast majority of the opened area was never settled by homesteaders and many of the parcels were allotted to Tribal members. It quickly became apparent to the United States that the Tribes were benefitting more from DOI leasing the land for grazing and oil and gas development, so the federal government ceased pursuing homesteading in the opened area after 1915. The United States continuously managed the 1905 Act opened area under Indian grazing and mineral leasing laws for the benefit of the Tribes and the proceeds were treated as Indian funds. Congress consistently allocated funding for irrigation and reclamation activities in the opened area pursuant to Indian Appropriations statutes. As noted by the 2011 DOI Solicitor's Opinion, while Congressional and Executive Branch references to the opened area were inconsistent, the prevailing overall view indicated an understanding that the Reservation was comprised of both an exclusively Tribal or diminished area, and an opened or ceded area.⁵⁵

b. The Restoration Era to the Present

In 1934, Congress enacted the Indian Reorganization Act (IRA) reflecting a shift in United States' Indian policies away from assimilation and towards fostering tribal self-determination. 48 Stat. 984 (1934). The IRA, among other provisions, generally authorized the Secretary of the Interior to "restore to tribal ownership" the remaining "surplus" lands of any Indian reservation that had been opened for sale or homesteading, subject to existing valid rights or claims. *Id.* § 3. It also gave each participating tribe the right to organize for its "common welfare," as well as the right to adopt a constitution by majority vote of the adult

⁵⁵ The Tribes' TAS application and Response to Comments documents provide information regarding Tribal and State views immediately following passage of the 1905 Act. Tribes' CAA TAS Application at 66-67 and Tribes' Response to Comments at 30-33. The Tribes' submittal includes 1908 letters from the Shoshone and Arapahoe Tribes to the Commissioner of Indian Affairs stating the Tribes had been told by Inspector McLaughlin that the "unsold lands would belong to" the Tribes until they were "all sold," (Letter, Shoshoni Delegation to Commissioner of Indian Affairs (Mar. 10, 1908) (EPA-WR-008018); and that the "Government should take care of the ceded part of our reservation" (Letter, Arapaho Delegation to Commissioner of Indian Affairs (Mar. 9, 1908) at 4 (EPA-WR-008014). The Tribes also provided examples of State views immediately following the 1905 Act that the Tribes assert indicates an understanding by the State that the opened area remained Reservation. Such information includes a Wyoming State Immigration book describing Riverton as "another new town located within the Indian Reservation" and various additional newspaper publications and statements from State officials. Tribes' Statement of Legal Counsel at 22-23. Commenters provide information about State and local activities in the 1905 Act area in more recent years, as discussed further.

members of the tribe and approval by the Secretary of the Interior. *Id.* § 16. Title to any lands or rights acquired under this Act was taken in the name of the United States in trust for the Indian tribe for which the land was acquired. *Id.* § 5. The IRA would not apply to any reservation wherein a majority of the adult Indians would vote against its application. *Id.* § 18.

Commissioner of Indian Affairs John Collier issued an opinion discussing the IRA and its provision granting the Secretary the ability to stop the further withdrawal of Indian lands on reservations that were opened for settlement if the tribe voted to accept the IRA. 54 I.D. 559 (Nov. 2, 1934) (Collier Memo) (EPA-WR-009605-10). In describing United States' federal policies towards Indians and their land interests, Collier distinguished between the pre-1890 policy of full extinguishment of Indian title of certain lands such that they were "separated from a reservation" and "no longer looked upon as being a part of that reservation," versus the post-1890 policy of "opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians." *Id.* at 560. He further stated that "undisposed of lands in this class remain the property of the Indians until disposal as provided by law." *Id.* Collier then concluded that the Wind River was one such Reservation (along with numerous others) and withdrew those lands opened for entry within the Reservation from further disposal of any kind, under the authority granted in the IRA.⁵⁶ *Id.* at 562-63. On June 15, 1935, the Eastern Shoshone and the Northern Arapaho Tribes were among seventy-seven tribes that voted to exclude themselves from the Act. 2011 DOI Solicitor's Opinion at 17, citing Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A., United States Indian Service, 1947*. On October 31, 1935, Secretary Ickes rescinded Collier's memo on further withdrawals with respect to eight reservations, including Wind River, as those tribes had voted to exclude themselves from the Act. *Id.*

Because the Northern Arapaho and Eastern Shoshone Tribes voted to exclude themselves from the IRA, Congress enacted separate legislation to accomplish the land restoration goals of the IRA with respect to the Wind River Indian Reservation. In 1939, Congress directed the Secretary of the Interior to "restore to tribal ownership" significant acreage within the opened portion of the Wind

⁵⁶ While the Collier Memo lists reservations that were subsequently held by the Supreme Court to be both diminished and undiminished, the Memo indicates the view of the Commissioner in 1934 that lands on certain reservations (including Wind River) should be restored to tribal ownership because they were distinct from lands that were separated from a reservation.

River Indian Reservation. 53 Stat. 1128 (1939) ("1939 Act"). Specifically, Section 5 of the Restoration Act states:

That the Secretary of the Interior is hereby directed 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: *Provided*, That no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation.

Id. at 1129-30

In testimony before Congress, the Secretary explained the purpose of the bill:

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.

Letter, H. Ickes to E. Thomas (June 27, 1939), reprinted in S. REP. NO. 76-746, at 4 (1939) (emphasis added) (EPA-WR-000630).

Additional statements in the legislative history of the 1939 Act indicate an understanding that the ceded lands to be restored to Tribal ownership remained a portion of the Reservation. For example, Senator O'Mahoney of Wyoming stated:

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.

Hearing before the Committee on Indian Affairs, 76th Cong., 1st Sess., at 6 (1939) (emphasis added) (EPA-WR-0010227).

The legal effect of the 1939 Act vis-à-vis the 1905 Act reflects Congressional understanding and intent that the Reservation boundaries remained intact throughout the years. In 1905, the Tribes ceded legal title to the opened area to the United States as trustee for the Tribes. Under the Act, consideration would only be paid to the Tribes if and when subsequent sales were made to non-Indians. The United States was under no obligation to sell the land and as such, the Tribes maintained equitable title in the opened lands as trust beneficiaries of the United States. As discussed earlier in the document, Congress did not indicate clear intent in the 1905 Act, to alter the exterior boundaries of the Reservation nor was it necessary to do so to achieve the United States' goal of opening the Reservation to homesteading. The 1939 Act returned to the Tribes, the legal title of the undisposed-of lands within the intact exterior boundaries of the Reservation, specifically directing DOI to "restore" the lands "to tribal ownership." The geographic scope of the 1939 Act indicates continued recognition by Congress of the unaltered exterior boundaries of the Reservation. *See Mattz*, 412 U.S. at 505 ("[a]nd Congress has recognized the reservation's continued existence . . . by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act"). The 1939 Act further provided that all restored lands shall be taken "in the name of the United States in trust for the Shoshone and Arapaho Tribes." 53 Stat. 1128, 1130.

Commenters assert that the 1939 Restoration Act supports their view that the 1905 Act diminished the Reservation. The crux of the argument is that if the 1905 Act had not removed the opened lands from the Reservation, thereby diminishing the boundaries, then the 1939 Act would not have had to "restore" the lands to Reservation status. Specifically, the State of Wyoming notes, "land cannot be 'added to and made part of the existing' Reservation if it is already part

of the Reservation." State Comments, at 30-31. This argument misses a key point: the 1939 Act did not speak in terms of adding the lands to the Reservation but as cited above, restored the lands to "tribal ownership." Neither the 1905 Act nor the 1939 Act explicitly refer to any change, reduction or addition to the Reservation boundaries. In fact, the 1939 Act repeatedly refers to the Reservation as consisting of two parts, directing DOI to establish land use districts "within the diminished and ceded portions of the Wind River Indian Reservation," 53 Stat. 1128, 1129, restricting certain land acquisition rights from "lands on the ceded or opened portion of the reservation," *Id.* and stating that "no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation" *Id.* at 1129-30.

The language upon which commenters rely, that lands are "added to and made a part of the existing Wind River Reservation" is not found in the 1939 Act, but is located in numerous Restoration Orders issued by the DOI for Wind River Reservation lands, including lands on the eastern boundary of the Reservation, in particular land underlying what is now the Boysen Reservoir.⁵⁷ One illustrative example is a 1944 DOI order providing:

Now, Therefore, by virtue of authority vested in the Secretary of the Interior by section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed of, ceded lands of the Wind River Reservation, Wyoming, and which total 625,298.82 acres more or less, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

9 Fed. Reg. 9749, 9754 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812 (March 14, 1945).

⁵⁷ 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. 11,100 (Dec. 30, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944), as amended by 10 Fed. Reg. 2812 (March 14, 1945); 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 7542 (June 22, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); 39 Fed. Reg. 27,561 (July 30, 1974), as amended by 40 Fed. Reg. 42,553 (Sept. 15, 1975); 58 Fed. Reg. 32,856 (June 14, 1993).

This restoration language was standard, generic language used by DOI for reservations nationwide during the Restoration Era, generally from 1936-1945 and is thus not indicative of any specific assessment by DOI of the legal effect of the 1905 Act.⁵⁸ In fact, this identical language was used in at least two restoration orders for the Cheyenne River Sioux Reservation at which the Supreme Court has held that the restored land had never been considered as extinguished from the Reservation. 6 Fed. Reg. 3300 (June 12, 1941); 17 Fed. Reg. 1065 (Feb. 2, 1952), *see also, Solem*, 465 U.S. 463. Similarly, DOI utilized the same language in a restoration order on the Southern Ute Reservation, at which Congress has affirmed that the boundaries remain intact. 2 Fed. Reg. 1348 (July 31, 1937); Act of May 21, 1984, 118 Stat. 1354 (referencing 25 U.S.C. § 668). Since the DOI “added to and made a part of the existing” reservation language was used ubiquitously in restoration orders, it cannot be relied upon to indicate by implication, Congressional intent to have diminished the Wind River Indian Reservation in 1905.⁵⁹

The lands restored to Tribal ownership pursuant to the 1939 Act are Reservation lands not by virtue of having been removed from the Reservation in 1905 and then added back to the Reservation in 1939, but because: (1) they were never removed from Reservation status in 1905 and the effect of the 1939 Act was

⁵⁸ *See*; 1 Fed. Reg. 666 (June 26, 1936) (Flathead Reservation); 1 Fed. Reg. 667 (June 26, 1936) (Pine Ridge Reservation); 1 Fed. Reg. 1503 (Oct. 1, 1936) (Standing Rock Reservation); 2 Fed. Reg. 595 (March 27, 1937) (Colorado River Indian Reservation); 2 Fed. Reg. 1348 (July 31, 1937) (Southern Ute Indian Reservation); 3 Fed. Reg. 5 (Jan. 4, 1938) (Flathead Indian Reservation); 3 Fed. Reg. 343 (Feb. 12, 1938) (Rosebud Reservation); 4 Fed. Reg. 104 (Jan. 10, 1939) (Blackfeet Reservation); 4 Fed. Reg. 522 (Feb. 7, 1939) (Pyramid Lake Reservation); 5 Fed. Reg. 1265 (April 2, 1940) (Umatilla Reservation); 6 Fed. Reg. 3300 (June 12, 1941) (Cheyenne River Reservation); 9 Fed. Reg. 14,019 (Nov. 4, 1944) (Fort McDermitt Reservation); 10 Fed. Reg. 2448 (Mar. 2, 1945) (Red Lake Reservation); 12 Fed. Reg. 849 (Feb. 6, 1947) (Kiowa, Comanche and Apache Lands, Oklahoma); 13 Fed. Reg. 7718 (Dec. 7, 1948) (Stockbridge Indian Reservation); 17 Fed. Reg. 1065 (Feb. 2, 1952) (Cheyenne River Reservation); 21 Fed. Reg. 5015 (June 29, 1956) (Uintah and Ouray Indian Reservation).

⁵⁹ The 2011 DOI Solicitor’s Opinion explains “nothing in the restoration orders requires a conclusion that to be restored to reservation status, the lands must have been severed from the Reservation in 1905. Any such interpretation is an over-simplification of the purpose of the Restoration Act . . . The Restoration Act simply verified that the unsold lands were now removed from their opened status and reverted to full tribal ownership (versus an equitable interest held by the Tribes). Through the Restoration Act, Congress affirmatively and clearly rejected the notion that the Reservation was diminished for all time.” 2011 DOI Solicitor’s Opinion at 18.

to return legal title to the Tribes; and (2) regardless of whether they are located within a formal reservation, lands held in trust by the United States for Indian tribes are reservation lands and Indian country pursuant to 18 U.S.C. § 1151.⁶⁰

As further discussed in the 2011 DOI Solicitor's Opinion, subsequent to the 1939 Restoration Act, historical records reinforce the fact that the Reservation boundaries remained intact. In 1940, Interior Solicitor Nathan Margold was asked to issue an opinion on whether the Secretary had authority to sign a proposed agreement that fixed the boundary lines of certain parcels of land north of and abutting the Wind River water body and located within the 1905 Act area, for purposes of oil leases. Solicitor Margold advised that the Secretary was without authority to fix the boundary lines of the allotted, tribal, and ceded parcels of land for all time as it would change the boundaries of the Wind River Indian Reservation. He further noted that the land covered by the proposed agreement "represents undisposed of ceded land" and is limited by the 1905 Act and by the 1916 Act, neither of which permitted disposition of the lands as proposed in the agreement. 2011 DOI Solicitor's Opinion at 18, citing Solicitor's Opinion, M-30923 (December 13, 1940), 1 *Op. Sol. on Indian Affairs* 1011, 1016 (U.S.D.I. 1979). To resolve this problem, Congress passed an Act granting the Secretary the authority, upon certain conditions, to fix the boundaries of certain parcels of allotted, tribal and ceded lands north of the Wind River in certain specific locations. 55 Stat. 207 (1941). No action, however, was ever taken by the Department pursuant to the Congressional authorization. The 1940 opinion addressed parcels of land within the 1905 Act opened area and not the actual exterior boundaries of the Reservation. 2011 DOI Solicitor's Opinion at 18.

Commenters reference a 1943 Opinion issued by then DOI Solicitor Gardner entitled, "Jurisdiction - Hunting and Fishing on the Wind River Reservation" (February 12, 1943) (EPA-WR-009759-69) (1943 Opinion). Specifically, as Commenters note, the 1943 Opinion says that after the Reservation area as

⁶⁰ *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-96 (D.C. Cir. 2000), *cert. denied sub nom, Michigan v. EPA*, 532 U.S. 970 (2001), *citing, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), *United States v. John*, 437 U.S. 634, 649 (1978), *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000), *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986), *United States v. Sohappay*, 770 F.2d 816, 822-23 (9th Cir. 1985); *see also, Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993), *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000). The State of Wyoming does not assert that restored lands, including those held in trust for the Tribes, should be excluded from "Indian country." State Comments at 53.

established in 1868 “had been diminished by the act of March 3, 1905,” the Wyoming Game and Fish Commission appears to have assumed control over big game on the ceded lands. *Id.* at 1186 (EPA-WR-009761). However, the 1943 Opinion also includes statements indicating a view that there are two portions of the Reservation, describing the Tribes’ regulations as governing fishing on Bull Lake and Ray Lake “which are both within the diminished portion of the reservation” as well as on Ocean Lake “which is on the ceded portion of the reservation”; and describing “the lands comprising what have come to be known as the ‘diminished’ and ‘ceded’ portions of the Shoshone or Wind River Reservation.” *Id.* at 1188 (EPA-WR-009763). The 1943 Opinion also discussed the trust impressed upon the ceded lands.⁶¹ As noted in the 2011 DOI Solicitor’s Opinion, the 1943 Opinion dealt only with regulatory jurisdictional issues in the opened area and “expressly did not address the exterior boundaries of the Reservation. *Id.* at 1193, n.8 (EPA-WR-009768) (expressly declining to opine on the boundaries of the Reservation).” 2011 DOI Solicitor’s Opinion at 18-19. The 2011 DOI Solicitor’s Opinion concludes, “thus, neither the 1940 Margold opinion nor the 1943 Solicitor opinion relating to hunting and fishing rights have any significant relevance to the question of the Reservation’s exterior boundaries.” *Id.* It is the 2011 DOI Solicitor’s Opinion that fully analyzes the exterior boundaries of the Wind River Indian Reservation and it concludes that neither the 1905 Act nor any other statute diminished and altered the exterior boundaries of the Reservation.

In 1940, the United States purchased land in trust for the Tribes within Hot Springs County located adjacent to the northern boundary established by the 1868 Treaty. 54 Stat. 642 (1940). The statute describes the area as “located outside the ceded portion of the Wind River Reservation but adjacent thereto, and owned by holders of grazing permits covering undisposed of surplus or ceded lands within said portion of the reservation.” *Id.* This language indicates that over the decades since passage of the 1905 Act, Congress consistently viewed the opened or ceded lands as a portion of the Reservation. The lands addressed in this 1940 statute are part of the Wind River Indian Reservation.

⁶¹ The 1943 opinion found that the Tribes retained certain property rights in the lands as the beneficial owners of the lands and that a trust was impressed upon the lands to protect those rights. *Id.* at 1188-89 (EPA-WR-009763-64). It also recognized that absent Congressional authorization, the State could not use its regulatory authority merely “as a means of obtaining revenue from the ceded lands.” *Id.* at 1191 (EPA-WR-009766).

In 1952, Congress passed legislation authorizing the United States to acquire, for reasonable consideration, the property and rights of the Tribes needed for construction, operation, and maintenance of the Boysen Unit of the Missouri River Basin project. 66 Stat. 780 (1952) (the 1952 Act); *see also* S. REP. NO. 82-1980 (1952) (EPA-WR-000663-90) (explaining that the purpose of the legislation was “to acquire by the United States approximately 25,880 acres of land which are subject to certain rights of the Shoshone and Arapaho Indian Tribes of the Wind River Indian Reservation . . .”).⁶² The 1952 Act required all conveyances and relinquishments authorized under its terms to be in accord with a Memorandum of Understanding (MOU) between the Bureau of Reclamation (BOR) and the Bureau of Indian Affairs (BIA, acting on behalf of the Tribes).⁶³ Pursuant to the MOU, the Tribes agreed to convey only the surface rights to 25,500 acres located along a portion of the eastern boundary of the Reservation to the BOR for construction and operation of the Boysen Unit. S. REP. NO. 82-1980, at 2, 50 (EPA-WR-000664, 000688). The Tribes retained all of their oil, gas, and mineral rights to such lands. *Id.*⁶⁴ In addition, the MOU provided that where the Tribes conveyed their surface interests, they would retain certain rights of occupancy, access and/or grazing on the shoreline and lands surrounding the reservoir.⁶⁵

As the 2011 DOI Solicitor’s Opinion concludes, the purpose of the 1952 Act, to facilitate the construction of a dam and reservoir on the Reservation, is consistent

⁶² A board of appraisers appointed to consider an appropriate price recommended \$458,000 as a fair price for the Indian lands and rights to be acquired for the Boysen Dam and Reservoir. S. REP. NO. 82-1980, at 2-3 (EPA-WR-000664).

⁶³ The MOU was approved by the Secretary of the Interior on December 29, 1951 and amended with his approval on May 1, 1952. The Senate Report accompanying the Act includes the MOU and lists the tribal and the allotted lands to be acquired for the dam and for the reservoir. S. REP. NO. 82-1980, at 10-54 (EPA-WR-000668-90).

⁶⁴ The Tribes agreed to convey complete title (without mineral reservation) to a small portion (366.75 acres) of the area for the actual site of the Boysen Dam. S. REP. NO. 82-1980, at 2 (EPA-WR-000664).

⁶⁵ S. REP. NO. 82-1980, at 3, 6, 7, 9, 50, 52 (EPA-WR-000664, 000666-67, 000688-89). Section 4(b) of the MOU identifies the tracts of land (generally lands on and surrounding the shore of the reservoir) where the Tribes retained an exclusive right of occupancy so long as the tracts are not inundated by reservoir waters and the abutting lands remain “subject to the occupancy rights” of the Tribes. *Id.* at 50. Section 4(c) describes the lands where the Tribes retained nonexclusive rights of access and grazing when any such tract is not inundated by reservoir waters, so long as the lands abutting the tract remain subject to Indian occupancy rights. *Id.* at 52.

with the Tribes' continued use and occupancy of its Reservation. 2011 DOI Solicitor's Opinion at 20. Furthermore, enactment of the 1952 Act demonstrates that Congress recognized that the Tribes had a surface interest in the covered area, as well as a mineral estate and other interests in the land. *Id.* at 21. The legislative history also reveals Congress' recognition of the continuing Tribal rights in the area. S. REP. NO. 82-1980 at 6 (EPA-WR-000666) (attaching DOI comments on the relevant bill acknowledging Tribal occupancy rights, beneficial rights and rights in acquired lands). The inclusion of continuing mineral and surface occupancy and access rights in the project area provides additional evidence that Congress understood that the Tribes would continue to inhabit this portion of their Reservation and benefit from the use of the land surrounding the reservoir. As the 2011 DOI Solicitor's Opinion recognized, approximately 47 years after Congress enacted the 1905 Act, the terms of the 1952 Act confirm that Congress recognized the Tribes' interests within the Reservation; otherwise there would have been no need to address these particular interests or establish an MOU between BOR and BIA. 2011 DOI Solicitor's Opinion at 21.

In reviewing the subsequent treatment of the opened area, EPA has also considered Congress' provision of compensation to the Tribes for certain uses of ceded, but unsold, lands and the inclusion of the surface estate of such lands in the Riverton Reclamation Project. 67 Stat. 592 (1953). Congress had authorized construction of the Riverton Reclamation Project in the opened area of the Reservation in 1920. Approximately 332,000 acres had been reserved for reclamation purposes by the Act of June 17, 1902, 32 Stat. 388. S. REP. NO. 83-644, at 7 (1953) (EPA-WR-000697). Commenters refer to the 1953 Act as evidence of Congress' understanding that the 1905 Act had diminished the Reservation. In particular, the State Comments note that the 1953 Act included payment to the Tribes of compensation for their interests in the reclamation area. State Comments at 23-24. In quoting the statute, the State then emphasizes language relating such compensation to "the *cession* to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016)." *Id.* (quoting the 1953 Act; emphasis supplied in the State's comments). Congress' reference in this context to the 1905 Act, however, does not reveal any separate understanding of the earlier statute's effect on the Reservation boundaries. Instead, this language appears to relate to compensating the Tribes (and thus extinguishing any potential claim for damages) for otherwise unauthorized prior uses of the area opened by the 1905 Act. Furthermore, it is undisputed that the 1905 Act included a cession by the Tribes of legal title in order to allow transfer of fee title to potential settlers. However, as discussed above, such transfer of legal title does not equate to diminishment of the Reservation boundaries. It is also notable, that by its title,

the 1953 Act refers to the project as being located within the “ceded portion of the Wind River Indian Reservation,” thus appearing to recognize the continued Reservation status of the 1905 Act opened area. 67 Stat. 592. Similar references are also found in the legislative history. See S. REP. NO. 83-644, at 7-8 (EPA-WR-000697-98; H.R. REP. NO. 83-269, at 1-2 (EPA-WR-000691-92).

The 1953 Act and related legislation from 1958, 72 Stat. 935 (1958), are also informative in their recognition of the continuing Tribal interest in the mineral estate of the reclamation area. Prior to passage of the 1953 Act, the DOI Solicitor acknowledged that the 1905 Act established a trustee relationship and that the Tribes retained a beneficial ownership interest (including to minerals) in the opened area. *Ownership Of Minerals On Ceded Portion Of Wind River Reservation*, Solicitor’s Opinion M-36172 (June 18, 1953) (EPA-WR-002105-07). Under section 5 of the 1953 Act, the Tribes were afforded ninety percent of the gross receipts derived from mineral leasing of lands covered by the statute. Congress subsequently declared in 1958 that all right, title, and interest in minerals in the 1953 Act area are to be held by the United States in trust for the Tribes. 72 Stat. 935 (1958).⁶⁶

c. Current Information Regarding Activities in the 1905 Act Area

As part of the “subsequent events” analysis, the Supreme Court has noted that where “non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character” such land and population statistics support a finding of reservation diminishment. *Yankton*, 522 U.S. at 356 (quoting *Solem*, 465 U.S. at 471). “This final consideration is the least compelling for a simple reason: [e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the ‘Indian character’ of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.” *Id.* (citing *Solem*, 465 U.S. at 468-69). As discussed above, homesteading on the Wind River Indian Reservation was largely unsuccessful and as noted in 1943, only 196,360 acres of the 1,438,633 acres (13.6%) opened by the 1905 Act were disposed of to non-Indians.

⁶⁶ EPA notes that by its title, the 1958 statute refers to minerals “on the Wind River Indian Reservation” again expressing recognition that the reclamation project, which is located within the opened area, remains within the Reservation. The legislative history of the 1958 statute includes similar references. See S. REP. NO. 85-1746, at 1-2 (1958) (EPA-WR-0010234-35); S. REP. NO. 85-2453, at 1, 3 (1958) (EPA-WR-004765-66).

Currently, approximately 1,073,766.47 acres of the 1,438,633.66 acres opened to settlement by the 1905 Act are held by the United States in trust for the Tribal government or individual Tribal members. April 17, 2012 and May 31, 2012 Letters to EPA Region 8 from Acting Regional Director, BIA Rocky Mountain Regional Office (EPA-WR-009827 and 009838A).⁶⁷ See also Tribal map depicting Tribal surface ownership (EPA-WR-007817). The Tribes also own a significant amount of the mineral estate in the opened area, including underlying areas owned by non-Indians. See Tribal map depicting the Tribes' current mineral ownership (EPA-WR-007816). These statistics are consistent with cases where courts have found current land ownership statistics to support non-diminishment findings, such as *Mattz*, 412 U.S. at 505 ("[a]nd Congress has recognized the reservation's continued existence . . . by restoring to tribal ownership certain vacant and undisposed-of ceded lands . . .") and *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1419 (10th Cir. 1990) (noting 55% of the land surface is presently either in Navajo fee ownership or held in trust for the Tribe or individual members); and in marked contrast to other cases where the Supreme Court has found land ownership statistics to support diminishment, such as *Yankton* (fewer than 10% of the original reservation lands remained 'in Indian hands' and 'non-Indians constitute over two-thirds of the population' within the original reservation) and *Rosebud*, (over 90% non-Indian in both population and land statistics). The fact that such a significant amount of the 1905 Act opened lands is owned by the Tribal government or Tribal members supports a view that Congress never intended the opened area to be severed from Reservation status.

While there is a concentration of non-Indian fee land in and around the City of Riverton, the City constitutes a relatively small portion of the 1905 Act area. Specifically, the City of Riverton currently encompasses 6,310.40 of the 1,438,633.66 acres opened to settlement under the 1905 Act.⁶⁸ U.S. Census Bureau, 2010 State and County Quick Facts.⁶⁹ Focusing only on the land ownership or

⁶⁷ The United States currently holds 1,065,236.91 acres in trust for the Northern Arapaho and Eastern Shoshone Tribes and 8,529.56 acres of allotted lands in trust for individual members, a total of 1,073,766.47 acres. (EPA-WR-009827; 009838A).

⁶⁸ Riverton was founded in 1906 and patented in 1907 on 160 acres of land. City of Riverton Comments at 2, 8.

⁶⁹ Commenters describe the non-Indian population of Riverton as 92% (State Comments at 26) and 90.4% (City of Riverton Comments at 9). According to the 2010 U.S. Census Bureau, American Indians and Alaska Native persons make up 10.4% of the population of Riverton, which is a significant increase from their representation within the entire State which is 2.4%.

demographics of Riverton or other select areas has little relevance to Congressional intent with respect to whether the entire 1905 Act area remained part of the Reservation. With regard to the 1905 Act opened area in its entirety, approximately 1,073.766.47 acres of the 1,438,633.66 acres opened to settlement by the 1905 Act are currently held by the United States in trust for the Tribes or Tribal members. April 17, 2012 and May 31, 2012 Letters to EPA Region 8 from Acting Regional Director, BIA Rocky Mountain Regional Office (EPA-WR-009827, 009838A). As noted above, the overwhelming tribal trust character of the lands opened by the 1905 Act supports a determination that Congress did not intend in the 1905 Act to diminish or remove the area from Reservation status.⁷⁰

Generally speaking, in recent years, the Northern Arapaho and Eastern Shoshone Tribes and the State of Wyoming have asserted jurisdiction in the 1905 Act opened area. *See generally* Tribes' application and Response to Comments and all Comments received. The Tribes describe their Economic Development Plan of 1963 specifically delineating the Reservation boundaries, BIA's inclusion

U.S. Census Bureau, 2010 State and County Quick Facts. (EPA-WR-009952).

⁷⁰ The jurisdictional status of Riverton has long been in dispute. Immediately following passage of the 1905 Act, an official State publication included a statement that Riverton was "another new town located within the Indian Reservation," State of Wyoming, Book of Reliable Information Published by Authority of the Ninth Legislature (1907) and likewise, an early newspaper account described Riverton as within the Reservation. See, e.g., Riverton Republican (Dec. 28, 1907). The Department of the Interior's Assistant Commissioner described Riverton as part of the Reservation in 1913 and during congressional hearings in 1932, DOI described the Reservation as encompassing approximately 2,238,644 acres in an area approximately 65 miles by 55 miles, which would include the City of Riverton. A Wyoming state district court, in *State v. Moss* held in the late 1960's that Riverton is Indian country. *Moss* involved a murder committed by an Indian within the City of Riverton. That ruling was overturned by the Wyoming Supreme Court in 1970. *State v. Moss*, 471 P.2d. 333 (Wyo. 1970). The United States filed an amicus brief in *Moss* in support of the State's position. In 1972, Rep. Teno Roncalio introduced a bill in the U.S. Congress to authorize federal funds for the construction of an Indian Art and Cultural Center in Riverton. The bill stated that Riverton is "located within the Wind River Indian Reservation." Moreover, the position of the United States in the *Big Horn* adjudication, including before the Wyoming Supreme Court, is instructive. Not only did the U.S. argue that the 1905 Act did not diminish the Reservation (including Riverton), it disagreed with the State's reliance upon *State v. Moss* and agreed with the Special Master's specific finding that the Wyoming Supreme Court had wrongly decided the issue. Finally, a federal district court in 2000, in assessing the legality of a vehicle search by Bureau of Indian Affairs police, found that land to the north of the Wind River near Riverton was within the boundaries of the Reservation. *See United States v. Jenkins*, 2001 WL 694476 at *6 n.1 (10th Cir. 2001). The 10th Circuit, however, affirmed the validity of the search on other grounds without deciding the merits of the boundary issue. *Id.* at *6.

of the opened area as part of its road system in the 1960's, the exercise of Tribal authority over wildlife management and various legislative, executive and judicial references. Commenters describe State permitting of oil and gas operations under the Wyoming Environmental Quality Act; operation and management of numerous facilities within the opened area; exercise of jurisdiction over incorporated municipalities and an unincorporated community; wildlife management; the City of Riverton's law enforcement and municipal services; and various state criminal judicial decisions and concerns about civil regulatory authority. In addition, the seats of the Tribal governments are not located in the opened area of the Reservation.

EPA has issued numerous federal environmental permits or has otherwise regulated facilities on the Reservation, including in the 1905 Act opened area, particularly on lands held by the United States in trust for the Tribes. (EPA-WR-009841-009936). We also note that EPA approved the Tribes' TAS application for Clean Water Act funding in 1989 and pursuant to that decision, has continuously provided grant funding to the Tribes for water quality monitoring and other related activities throughout the Reservation, including within the 1905 Act area. The State of Wyoming's comments describe permits issued by the Wyoming Department of Environmental Quality (DEQ) in the 1905 Act area.⁷¹ However, with regard to federal environmental statutes administered by EPA (e.g., Clean Air Act, Clean Water Act, Safe Drinking Water Act), states are generally not approved by EPA to implement regulatory programs in Indian country as defined at 18 U.S.C. § 1151, unless a state expressly applies for, and EPA explicitly approves, its authority to do so.⁷² EPA has not approved the State of Wyoming's authority to regulate in Indian country.⁷³

⁷¹ The State asserts that the Wyoming DEQ has issued hundreds of permits for minor sources of air pollution in the opened area and indicates concern that if the area is determined by EPA to be Reservation, the facilities would be unregulated and there would be a risk of possible impacts to the health and welfare of citizens in or near the area. The State's concern is premised on the fact that at the time the comments were made, EPA did not have a final rule in place to issue federal Clean Air Act permits to certain minor sources in Indian country. However, on July 1, 2011, EPA promulgated a final rule addressing such sources. Final Rule, Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748 (July 1, 2011).

⁷² "Indian country" is defined by statute and includes as one of three categories:

(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 . . .

5. Judicial Decisions and References to the Opened Area

a. Big Horn I case

In *Big Horn I*, the Wyoming Supreme Court held that Congress intended to reserve water rights for the Wind River Indian Reservation by the 1868 Treaty. *Big Horn I*, 753 P.2d 76 (Wyo. 1988). The Special Master heard arguments by the State and others that the 1868 Treaty priority date should not apply to any water rights on lands ceded under the 1905 Act. The United States argued before the Special Master in the adjudication that the Reservation had not been diminished by the 1905 Act. The Special Master held an extensive hearing on the matter and determined that the water rights reserved by the 1868 Treaty had not been abrogated by the 1904 Agreement, as codified with amendment by the 1905 Act, and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands in the opened area that were never sold to non-Indians pursuant to the 1904 Agreement. Before the Wyoming Supreme Court in 1986, the United States again argued that the Reservation boundaries had not been diminished, citing modern diminishment case law. *See also* Brief of the United States in Opposition to Writ of Certiorari at 4, *Wyoming v. United States*, 488 U.S. 1040 (1989)(Wyo. Nos. 88-309, 88-492, 88-553). The Special Master's Report stated:

The major controversy with regard to this element 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

18 U.S.C. § 1151(a).

The Supreme Court has consistently held that under 18 U.S.C. § 1151(a), all lands within the exterior boundaries of an Indian reservation are Indian country, regardless of the ownership of the lands. *Seymour*, 368 U.S. at 358-59 (“[t]he State urges that we interpret the words ‘notwithstanding the issuance of any patent’ to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest, nor can we find, any adequate justification for such an interpretation”), *citing U.S. v. Celestine*, 215 U.S. at 285, (“when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress”). *See also*, 40 C.F.R. § 49.9(g).

⁷³ In at least two instances, EPA Region 8 sent letters to the Wyoming DEQ reinforcing this position specifically with regard to Wyoming CAA permitting actions in the 1905 Act area. (EPA- WR- 009876; 009922).

priority date for water on those lands which were ceded under the terms of the Agreement [i.e. the 1905 Act]. On the other hand, the United States and the Tribes assert that I must look at the Agreement in its entirety and the circumstances surrounding the transaction in order to make a proper determination of the legal consequences of the conveyance. The U.S. and the Tribes, in that context, argue the Agreement simply provided a type of 'power of attorney' whereunder the United States accepted the ceded lands and held those lands in trust for the Indians for resale to other person, and that the United States maintained a continuing obligation to the Indians with regard to that land. Having given this issue much research and thought, it is my conclusion that the arguments of the United States and the Tribes find significantly greater support in the law than those asserted by the State of Wyoming.

Big Horn I, Special Master's Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation (December 15, 1982) at 35 (EPA-WR-000774).

The state district court accepted most of the recommendations of the Special Master. The Wyoming Supreme Court affirmed most of the rulings of the district court, but found the lower court had erred with respect to the reacquired lands and ruled that "the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership" and the court "agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes." Brief for the United States in Opposition to Writ of Certiorari, October Term, 1988 at 5. The Wyoming Supreme Court stated:

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 1890 Act of Admission and/or the 1905 Act. If the actions are not sufficient evidence to show there never was any intent to reserve water, they are not sufficient to make the even stronger showing that such an established treaty right has

been abrogated. The district court did not err in finding a reserved water right for the Wind River Indian Reservation.

Big Horn I, 753 P.2d at 93-94.

The United States Supreme Court denied the petition for certiorari with respect to these priority dates.

The Tribes assert that the Reservation boundary issue was litigated and resolved in the *Big Horn I* case and that the State of Wyoming is thus precluded under res judicata principles, from arguing that the 1905 Act diminished the Reservation boundaries. The State of Wyoming counters that the subject matter of the *Big Horn I* case was limited to water rights and “while it is true that the special master in *Big Horn I* opined that the reservation had not been diminished, that opinion was not central to the case.” State Comments at 30. EPA has analyzed the 1905 Act pursuant to the Supreme Court’s three-part test as described herein and has determined that the Act did not alter and diminish the Wind River Indian Reservation boundaries. Thus, EPA need not reach the issue of whether the Reservation boundary issue was litigated and resolved in the *Big Horn I* case. EPA also notes that res judicata and other estoppel arguments are judicial doctrines that are most appropriately addressed in judicial rather than administrative proceedings.

b. Yellowbear case

EPA has also considered the Tenth Circuit’s and federal district court’s review of the habeas corpus petition filed by Andrew John Yellowbear, which raised issues relating to an assessment by the Wyoming Supreme Court of the effect of the 1905 Act on the Reservation boundary. *Yellowbear v. Wyoming Attorney General*, 636 F.Supp.2d 1254 (D. Wyo. 2009), *aff’d*, 380 Fed.Appx. 740 (10th Cir. 2010), *cert. denied*, *Yellowbear v. Salzburg*, 131 S. Ct. 1488 (2011). Mr. Yellowbear – an enrolled member of the Northern Arapaho Tribe – was convicted in Wyoming state court of several criminal offenses including murder. *Id.* at 1257. At various points in the criminal proceedings, Mr. Yellowbear challenged the Wyoming state courts’ jurisdiction arguing that the offense, which occurred in the City of Riverton in the Reservation’s opened area, was committed in Indian country, and was thus subject to the exclusive jurisdiction of the federal government. *Id.* at 1257-58. The state courts, including the Wyoming Supreme Court, rejected Mr. Yellowbear’s jurisdictional defense, finding that the location

of the criminal acts had been diminished from the Reservation by the 1905 Act.⁷⁴ *Id.*; *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008). Following conclusion of the state court proceedings, Mr. Yellowbear continued to press his jurisdictional argument in a habeas petition to federal district court under 28 U.S.C. § 2254. *Yellowbear v. Wyoming Attorney General*, 636 F.Supp.2d at 1258.

In considering Mr. Yellowbear's petition, the federal district court repeatedly stressed that its review under the federal habeas statute was limited in nature. *Id.* at 1258-61, 1267, 1271. The court noted that the petition presented significant and difficult questions of law and sovereignty, but found that its reviewing authority was collateral in nature, and that the applicable standard was highly deferential to the state court's decision. *Id.* at 1259, 1261, 1266-67. The district court declined to engage in de novo review of the Reservation boundary issue or conduct an evidentiary hearing. *Id.* at 1258. Instead, the court limited its review to the narrow statutory question of whether the Wyoming Supreme Court had unreasonably applied clearly established federal law. *Id.* at 1259-61, 1266-67. As the court noted, this is a highly deferential standard that requires denial of a habeas petition even where the state court's decision might be incorrect or even clearly erroneous, or where the federal court, if reviewing the issue in the first instance, might reach a different conclusion. *Id.* Under this deferential standard of review, the district court found that the Wyoming Supreme Court's decision on the jurisdictional issue was not unreasonable. *Id.* at 1266-67. The court clearly stated, however, that it was precluded from determining – independent of the Wyoming Supreme Court's decision – whether or not the 1905 Act diminished the exterior boundaries of the Reservation. *Id.* at 1271-72.

On appeal to the Tenth Circuit, Mr. Yellowbear apparently pressed a different rationale, arguing that the federal courts must undertake de novo review of the jurisdictional claim because state courts may not properly rule on the extent of federal jurisdiction. *Yellowbear v. Wyoming Attorney General*, 380 Fed.Appx. at 742. The Tenth Circuit rejected this argument, finding that Mr. Yellowbear had presented no persuasive authority questioning the Wyoming state courts' concurrent jurisdiction to decide whether a federal statute divests them of criminal jurisdiction and, in any event, had not presented to the Tenth Circuit any argument calling into question the correctness of that decision. *Id.* at 743. As

⁷⁴ Mr. Yellowbear had also sought relief in the Shoshone and Arapaho Tribal Court, which, in 2006, found that Wyoming was without jurisdiction over Indians in the City of Riverton. Notwithstanding this decision, the state court criminal case against Mr. Yellowbear proceeded. *Id.* at 1258.

to the merits of the diminishment question, therefore, the Tenth Circuit concluded only that the arguments presented to the Tenth Circuit by Mr. Yellowbear did not show the Wyoming Supreme Court's decision to be in error, leaving open whether a more comprehensive record and analysis might show that the 1905 Act did not diminish the Reservation.⁷⁵ EPA provides such a record and analysis here.

EPA has reviewed the federal court proceedings on Mr. Yellowbear's habeas petition and believes that the court decisions are collateral to the question of the effect of the 1905 Act and, given the highly deferential standard of review, are not probative of how a federal court would address the Reservation boundary upon de novo review of a fully developed administrative record. In addition, although not binding on the federal government, EPA has also considered the Wyoming Supreme Court's decision rejecting Mr. Yellowbear's jurisdictional claims, to determine its persuasive value. Although the state court recited the 1905 Act in its entirety and cited relevant U.S. Supreme Court precedent in describing the analytical framework for reservation diminishment questions, *Yellowbear v. Wyoming Attorney General*, 174 P.3d at 1274-82, it is not apparent from the opinion that the court considered all of the relevant factors or that a fully developed record was available either on the history of the 1905 Act or the subsequent treatment of the opened area. The Wyoming Supreme Court's decision includes no citation to any record material on the boundary question. *Id.* at 1282-84.⁷⁶

⁷⁵ See also *Dewey v. Broadhead*, No. 11-CV-387-J (D. Wyo. April 30, 2012) (following *Yellowbear* without separate analysis or additional record regarding the Reservation boundary).

⁷⁶ The court in *Yellowbear* cites to its prior precedent in two other criminal proceedings: *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960) and *State v. Moss*, 471 P.2d 333 (Wyo. 1970). *Yellowbear*, 174 P.3d at 1283. As the DOI Solicitor's Opinion notes, *Blackburn* (which involved the 1953 Act area, and hence concerns a separate issue) and *Moss* were decided prior to the U.S. Supreme Court's development of the current framework for analyzing reservation diminishment questions. 2011 DOI Solicitor's Opinion at 22 n.63. Thus, neither decision considers the relevant factors to assess reservation boundaries under the applicable test; nor does either indicate the existence of a fully developed record on the boundary issue. *Blackburn* in particular appears to have been reviewed on an extremely limited record, with the court seeming to be persuaded in substantial part by a single map indicating a diminished reservation. *Blackburn*, 357 P.2d at 176-79. Both cases also appear to rely on a misperception that diminishment hinged on extinguishment of tribal title to lands in the area opened for settlement. *Id.*; *Moss*, 471 P.2d at 338-39.

In particular, the Wyoming Supreme Court's decision provides limited analysis of the 1905 Act's language, focusing almost exclusively on the cession language in Article I and separate provisions for certain per capita and other payments, which the court appears to mistakenly analogize to a commitment by the United States to provide the Tribes a sum certain payment in exchange for the ceded area. *Id.* at 1282. The Court does not consider other language (discussed elsewhere in this analysis) suggesting an absence of intent to diminish; nor does the court compare the 1905 Act to federal government actions specific to the history of this Reservation such as the 1874 Lander Purchase Act, 1897 Thermopolis Purchase Act or the unratified 1891 Agreement. The court also declined to engage in any review of the events and circumstances surrounding passage of the 1905 Act, instead simply citing to the dissenting opinion in *Big Horn I* as a sufficient consideration of this element of the boundary analysis. *Id.* at 1282-83. The *Big Horn I* dissent, however, is not controlling precedent and appears, in relevant respects, to be at odds with the majority decision in that case.⁷⁷ In addition, as described elsewhere, the dissent's Reservation boundary analysis is problematic in several respects, none of which is addressed in *Yellowbear*. The Wyoming Supreme Court's consideration in *Yellowbear* of events subsequent to passage of the 1905 Act is equally abbreviated and focuses narrowly on demographics in the City of Riverton (rather than the entire opened area), and selective citations to language referring to the unceded area as the diminished reservation, without consideration of counter examples. *Id.* at 1283-84. In light of the limited analysis and narrow focus presented in *Yellowbear*, EPA does not view the Wyoming Supreme Court's decision as persuasive.⁷⁸

⁷⁷ EPA notes that the Wyoming Supreme Court's assertion that the majority and dissent in *Big Horn I* agreed that the 1905 Act had diminished the Reservation is stated without explanation and appears unsupported by any diminishment analysis in the *Big Horn I* majority decision. *Id.* at 1283.

⁷⁸ Commenters requested that EPA defer its decision regarding the exterior boundaries of the Reservation until the federal courts settle the matter in the *Yellowbear* case and a tax case (*Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264 (D. Wyo. 2009), *aff'd in part, vac. in part*, 697 F.3d 1272 (10th Cir. 2012)). While EPA does not agree that it is necessary to postpone our action pending ongoing litigation, we note that on December 10, 2012 the United States Supreme Court denied Mr. Yellowbear's petition for rehearing (*Yellowbear v. Wyoming*, No. 11-10546, 2012 WL 6097044 (U.S. Dec. 10, 2012)). In *Harnsberger*, the 10th Circuit affirmed the District Court's dismissal of the case, which did not analyze the effect of the 1905 Act on the Reservation boundaries. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012).

c. Additional Judicial References

Numerous federal courts have referenced the Wind River Indian Reservation boundaries in decisions over the years. Commenters discuss a line of cases from the 1930's addressing the Shoshone Tribe's suit for damages arising from the government's act of settling the Northern Arapaho Tribe on the Reservation. The United States Court of Claims and the Supreme Court (in granting the parties' cross-petitions for certiorari) referred to the 1905 Act unopened area as the "diminished reservation." The Court of Claims decision also included a map depicting the area north of the Big Wind River as "ceded by agreement of April 21, 1904" and the unopened area as the "present Wind River or Shoshone Indian Reservation." *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 82 Ct. Cl. 23 (1935), *remanded on other grounds*, 299 U.S. 476 (1937) and *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 85 Ct. Cl. 331 (1937), *aff'd* 304 U.S. 111 (1938) (*Shoshone Tribe*).⁷⁹ In addition, both the State's Comments and the Tribes' TAS application point to *Clarke v. Boysen*, 39 F.2d 800 (10th Cir. 1930) in support of their respective arguments. In this case, land speculators challenged the validity of a right-of-way DOI approved in the opened area pursuant to an 1899 statute authorizing the Secretary to issue rights-of-way over lands in Indian country. The U.S. Court of Appeals for the Tenth Circuit upheld the applicability of the 1899 Act, finding that the ceded lands were within the definition of a subsection of Indian lands set forth by the statute, "lands reserved for other purposes in connection with the Indian service." The Tribes assert that this decision supports their position while the State Comments note that the decision did not base its finding on the subsection addressing "[a]ny Indian reservation"⁸⁰ Finally, Commenters cite

⁷⁹ We note that neither the 1905 Act, the opening of the Reservation pursuant to that Act, nor the size of the Reservation subsequent to 1905, played any role legally or factually in the *Shoshone Tribe* court's determination of the United States' liability. Moreover, the 1905 Act played only a tangential role in the remedy awarded the Shoshone. The key issues before the Court of Claims and the Supreme Court were the following: (1) whether placement of the Arapaho on the Reservation constituted a taking; (2) when the taking took place; (3) the method of valuing the Reservation as of 1878; and (4) whether pre-and post judgment interest should be awarded. None of the issues involved legal analysis of the 1905 Act. Moreover, passing statements by the parties or the Court between 1935 and 1938 provide little insight to the views of the Congress when it enacted legislation in 1905.

⁸⁰ "[The 1899 Act], provides for the acquisition of a railroad right-of-way through three classes of Indian lands. (a) Any Indian reservation in any state or territory, excepting Oklahoma. (b) Any lands reserved for an Indian agency. (c) Any lands reserved 'for other purposes in connection with the Indian service.' It is our opinion that the word 'reserved' here means set apart or set aside; and that the lands ceded to the United States by the Act of March 3, 1905, were set apart for

to *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006) (stating, “[a]lthough the [Big Wind] river is not a property boundary, it roughly separates Hubenka’s land on the north from the Wind River Indian Reservation to the south”), in support of the position that the 1905 Act diminished the exterior boundaries of the Reservation.

There are also a number of federal court references that indicate a view that the Reservation boundaries have not been diminished. For example, in *United States v. Mazurie*, 419 U.S. 544 (1975), the Supreme Court describes the Reservation in the following manner: “[t]he Wind River Reservation was established by treaty in 1868. Located 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.’ [Citation omitted]. It straddles the Wind River, with its remarkable canyon, and lies on a mile-high basin at the foot of the Wind River Mountains . . . As a result of various patents, substantial tracts of non-Indian-held land are scattered within the reservation’s boundaries.” *Id.* at 546. The references to 2,300,000 acres and straddling the Wind River reflect an undiminished Reservation and the Wind River Canyon included in the description is located in the 1905 Act opened area. There are additional federal court decisions that similarly reference an undiminished Reservation, for example, *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 901 (10th Cir. 1982)(“[t]he reservation contains some 2,300,000 acres in west-central Wyoming . . .”); *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh. den.*, 450 U.S. 960 (1981)(“[t]he reservation is large and the town of Riverton and other settlements are within its boundaries.”); *Shoshone and Arapaho Tribes v. United States*, 364 F.3d 1339 (Fed. Cir. 2004)(“[b]oth 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”).

The cases discussed in this section, however, are generally unrevealing regarding the legal effect of the 1905 Act. None of the cases fully analyzed the 1905 Act in light of the applicable Supreme Court criteria; nor did any consider a fully developed record on the Reservation boundary question.

entry and sale at a future date ‘for other purposes in connection with the Indian service,’ and until location and entry by settlers under the Act’.” *Clarke v. Boysen*, 39 F.2d 800, 814 (10th Cir. 1930), *cert. denied*, 282 U.S. 869 (1930). EPA notes that the Court did not appear to address the issue of whether the lands also qualified as Indian lands under subsection (a).

Finally, as noted above, the United States currently holds 1,065,236.91 acres of land in the 1905 Act area in trust for the Northern Arapaho and Eastern Shoshone Tribes. (EPA-WR-009838A). All lands held in trust by the United States for an Indian tribe, regardless of whether they are also located within the formal boundaries of a Reservation, are Indian country as defined at 18 U.S.C. § 1151(a). *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-96 (D.C. Cir. 2000), *cert. denied sub nom, Michigan v. EPA*, 532 U.S. 970 (2001), *citing, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), *United States v. John*, 437 U.S. 634, 649 (1978), *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000), *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986), *United States v. Sohappay*, 770 F.2d 816, 822-23 (9th Cir. 1985); *see also, Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993), *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

C. Reservation Boundary Conclusion

"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, (*citing United States v. Celestine*, 215 U.S. at 278 (1909)). Moreover, Congress must "clearly evince" an "intent . . . to change . . . boundaries" before diminishment will be found. *Id.*, *citing Rosebud*, 430 U.S. at 615. This document provides the legal analysis in support of EPA's determination, which is based upon consideration of all pertinent information, including the 2011 DOI Solicitor's Opinion, that the 1905 Act statutory language, surrounding circumstances and relevant subsequent events do not reveal clear Congressional intent to alter and diminish the exterior boundaries of the Wind River Indian Reservation. Thus, EPA's decision concludes that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). With regard to the lands subject to Section 1 of the 1953 Act, 67 Stat. 592 (1953), consistent with the Tribes' request that EPA's TAS decision not address the lands described in the 1953 Act at this time, the lands are not included in the geographic scope of approval for this decision.