United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 26 2011

Honorable Scott C. Fulton
General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

Dear Mr. Fulton:

On April 13, 2009, your office requested an opinion on the boundary of the Wind River Indian Reservation (Reservation) in west-central Wyoming in connection with the Environmental Protection Agency's (EPA's) consideration of the Northern Arapaho and Eastern Shoshone's (Tribes') application for Treatment as a State (TAS) under the Clean Air Act. As part of the TAS application, the Tribes were required to identify the exterior boundaries of their Reservation. According to the Tribes, the exterior boundaries of their Reservation are those established by the 1868 Treaty of Fort Bridger,[1] less the areas ceded in the 1874 Lander Purchase and the 1897 Thermopolis Purchase. The State of Wyoming disagrees, contending that the Act of March 3, 1905, 33 Stat. 1016 (the 1905 Act), diminished and altered the exterior boundaries of the Reservation. Following additional research and analysis, the Department of the Interior (Department) concludes that neither the 1905 Act nor any other statute diminished and altered the exterior boundaries of the Reservation.

This letter first provides an overview of Supreme Court jurisprudence concerning diminishment or disestablishment of Indian reservations. Next is a summary of the factual history surrounding the Wind River Indian Reservation, followed by an analysis of the relevant Acts, legislative history, factual circumstances, and legal framework that provide the basis for my determination.

I. Supreme Court Jurisprudence on Reservation Diminishment

The Supreme Court has established a "fairly clean analytical structure" for determining whether a particular congressional act diminished or disestablished a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Several governing principles instruct this analysis. First, "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470. "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, 285 (1909)). Moreover, "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed." *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish

[1] 15 Stat. 673 (1868).

must be "clear and plain") (citation omitted); *Solem,* 465 U.S. at 470 (intent to diminish must be "clearly evince[d]"); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) (intent to disestablish must be "clear"). Therefore, diminishment "will not lightly be inferred." *Solem*, 465 U.S. at 470. And any ambiguities in a statute are resolved in favor of the Indians. *Yankton Sioux*, 522 U.S. at 344 (citations omitted).

Solem and its progeny have established a three-prong test for analyzing whether a given statute diminished and altered a reservation's boundaries or simply offered non-Indians the opportunity to purchase land within the reservation. *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the language of the statute itself. *Id.* Next, the court will look at the circumstances surrounding the passage of the act. *Id.* Third, but to a lesser extent, the court will look to events that occurred after the passage of the act to decipher Congress's intent. *Id.* at 471.

The analysis begins with the statutory language. Although the Supreme Court has never required a particular form of words, *Hagen v. Utah*, 510 U.S. 399, 411 (1994), when there is explicit reference to a cession or total surrender of all tribal interests in the land coupled with an unconditional commitment from Congress to pay the tribe for its land, there is an "almost insurmountable presumption" that Congress intended to disestablish the reservation. *Solem*, 465 U.S. at 470-71. Even with cession language coupled with sum certain compensation, however, courts also look to the legislative history and surrounding circumstances to determine congressional intent. *DeCoteau*, 420 U.S. at 445.

For example, the Supreme Court has found that language to "cede, sell, relinquish and convey" in exchange for a sum certain payment, and considering its surrounding circumstances and legislative history, terminated the boundaries of the Lake Traverse Reservation. *DeCoteau*, 420 U.S. at 425. In contrast, language that simply authorized the Secretary of the Interior "to sell or dispose of" unallotted lands with the proceeds from the sale of those lands to be distributed to the tribe was deemed insufficient to completely divest the Indian interest in the lands, and thus did not diminish the Colville Reservation boundaries. *Seymour v. Superintendent*, 368 U.S. 352 (1962), *see also Mattz v. Arnett*, 412 U.S. 481, 499 (1973) (reservation not terminated by discretionary allotment act that opened land for settlement).

The Supreme Court next turns to the circumstances surrounding the passage of the act, including its relevant legislative history to determine congressional intent. The Court has expressly "decline[d] to abandon [its] traditional approach to diminishment cases, which requires [an examination of] all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. The reasons are deeply rooted in history. As explained in *Yankton Sioux*, 522 U.S. at 343, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation because the notion that reservation status may not be equal to tribal ownership was unfamiliar." Therefore, the courts have reviewed surrounding circumstances to determine congressional intent on a case-by-case basis. Indeed, "congressional intent must be clear, to overcome the general rule that doubtful expressions are to be resolved in favor of . . . the wards of the nation, dependent upon its protection and good faith." *DeCoteau*, 420 U.S. at 444. 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." *Solem*, 465 U.S. at 471. Nevertheless, the Supreme Court has never been willing to extrapolate a specific congressional purpose to disestablish a reservation in a particular case from the general expectations in the allotment era. *Solem*, 465 U.S. at 468; *Mattz*, 412 U.S. at 499 (rejecting general congressional hostility to the reservation system as supporting termination of boundaries).

Lastly, but to a lesser extent, the Court looks to events that occurred after the passage of the act to determine congressional intent. *Solem* at 471. As part of this prong, the Court will look to subsequent demographics on a more "pragmatic level." *Solem*, 465 U.S. at 471. "Where non-Indian settlers flooded into the open portion of the reservation and the area has long-since lost its Indian character," the Court has acknowledged disestablishment may have occurred. *Id.* "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation." *Id.* at n.13. Moreover, "[t]here are . . . limits to how far we will go to decipher Congress' intent in any surplus land Act. When both the Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish 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* at 472 (citations omitted).

II. History 1868 - 1905

A. Establishment of the Reservation & the Lander Purchase

The United States and the Shoshone Indians established the Wind River Reservation in 1868 by the Treaty of Fort Bridger. 15 Stat. 673. The Reservation boundary was described as follows:

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

Id. The treaty reserved "the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." *Id.* In 1878, the United States placed the Arapaho Indians on the Reservation. The Arapaho and the Shoshone have equal property rights to the Reservation. *See Shoshone Tribe v. United States*, 299 U.S. 476, 486-89 (1937).

On December 15, 1874, Congress ratified the Lander Purchase. 18 Stat. 291 (1874). Under the Lander Purchase, the Tribes agreed to an outright sale of all their interests in Reservation lands generally south of the 43rd parallel in exchange for a lump sum payment of $25,000. The express purpose of the Act ratifying the Lander Purchase was "to change the southern limit of said reservation." *Id.* at 292; *see also* 18 Stat. 291, 292 (1874). There is no dispute that pursuant to the Lander Purchase, Congress intended to diminish and alter the boundary of the Reservation to forever exclude those lands.

B. The 1891 and 1893 Failed Agreements

On March 3, 1891, Congress appointed a commission to negotiate for additional cessions of portions of the Reservation the Tribes "may choose to dispose of." 26 Stat. 989, 1009 (1891). The commission negotiated, and the Tribes agreed to, a proposed cession to an area lying north of the Big Wind River, together with a strip on the eastern side thereof, by 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."[2] In consideration for the lands sold, the United States proposed to pay the Tribes $600,000.[3] Congress did not ratify this agreement.

In 1893, Congress sent another commission to negotiate with the Tribes. 27 Stat. 120, 138 (1892). The commissioners proposed a cession of all Reservation land lying north of the Big Wind River, as well as lying south and east of the Popo Agie/Little Wind River, in exchange for $750,000. The Tribes refused to consider any cession of lands on the southeastern side of the Reservation and no agreement was reached.[4]

C. The 1897 Thermopolis Purchase

In 1896, the United States negotiated with the Tribes for the sale of land around the Big Horn Hot Springs near the present town of Thermopolis. Indian Inspector James McLaughlin, the same federal agent who subsequently negotiated the agreement ratified by the 1905 Act, represented the United States. In April 1896, the United States and the Tribes entered into an

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[2] H.R. Ex. Doc. No. 70, 52d Cong., 1st Sess. (Jan. 11, 1892), "Shoshone and Arapaho Indians of the Shoshone or Wind River Reservation, Message from the President of the United States," BATES SH00578 at BATES SH00579, 00592. The land proposed to be ceded was north of the mid-channel of the Big Wind River to Wood Flat Crossing, then directly east to the Big Horn River, then directly south to the southern boundary of the Reservation. The Tribes refused to sell land on the southern border of the reservation. *Id.* at 4-5. *See also* H.R. Ex. Doc. No. 51, 53d Cong., 2d Sess. (Jan. 3, 1894), "Negotiations with Shoshone and Arapahoe Indians," BATES SH00644, and H.R. Rep. No. 58-2355, 58th Cong., 2d Sess. (April 11, 1904), "Indians On the Shoshone or Wind River Indian Reservation, Wyo.," BATES SH00721 at BATES SH00723 (the 1891 agreement proposed to cede an area in the northern and eastern part of the reservation).

[3] H.R. Ex. Doc. No. 70 at 3, 30. The agreement provided further that lands around the hot springs in the northeast corner of the Reservation should "be reserved from entry as public lands." *Id.* at 26. This language implies that the remainder of the ceded lands also would be subject to entry as public lands, which would be consistent with the intent of the Assistant Attorney General of the Department of the Interior when he requested legislative language to designate the sold lands as public lands. Congress rejected the proposed amendment. *Id.* at 15-16, 41-42.

[4] H.R. Ex. Doc. 51, 53d Cong., 2d Sess., at BATES SH00649, SH00654. The lack of agreement focused on a 5-mile strip on the south side of the Reservation. *Id.* at BATES SH00658-59.

agreement, known as the "Thermopolis Purchase," in which the Tribes agreed to "cede, convey, transfer, relinquish and surrender, forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunto" with respect to a tract surrounding the Big Horn Hot Springs. Congress ratified the agreement on June 7, 1897. 30 Stat. 93 (1897), *see* S. Rep. No. 54-247, 54th Cong., 1st Sess., (May 8, 1896).[5] The sold lands were to be "set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public." *Id.* at 4. The Indians were "allowed to enjoy the advantages of the conveniences that may be erected thereat with the public generally." *Id.* "[I]n consideration for the lands ceded, sold, relinquished and conveyed," the United States agreed to pay a lump sum of $60,000. *Id.* After the Thermopolis Purchase, the General Land Office surveyed the lands acquired under the Act as public lands under the 6th Principal Meridian (the pre-existing eastern boundary of the Reservation had been surveyed as part of the Reservation's meridian – the Wind River Meridian.").[6] There is no dispute that pursuant to the Thermopolis Purchase, Congress intended to diminish and alter the boundary of the Reservation to forever exclude those lands.

D. 1905 Act

In March 1904, Representative Frank Mondell from Wyoming introduced a bill to open the Reservation under homestead, town-site, and coal and mineral land laws. The bill was based loosely on the 1891 and 1893 negotiations but included some important key differences.[7] The bill enlarged the area proposed to be ceded, used different cession language and, instead of providing for sum certain payment as proposed during the prior negotiations, the Tribes would be paid as the land was sold. H.R. Rep. No. 58-2355 at 4.[8] The report explained that "the bill provides that the land shall be opened to entry under the homestead, town-site, coal and mineral laws . . . ." *Id.* The Office of Indian Affairs reported favorably on the bill. *Id.* at 5.[9]

A month later, the Mondell bill was presented to the Tribes. *Id.* at 10.[10] It was McLaughlin who returned to the Reservation "to present to [the Tribes] a proposition for the opening of certain portions of [their] reservation for settlement by the whites."[11] McLaughlin did not, however, refer to the 1891 agreement in explaining the purposes of the agreement to the Tribes. Rather, he informed the Tribes that the United States would *not* pay a lump sum amount and described the agreement as "having the surplus lands of your reservation open to settlement

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[5] BATES SH00664 at BATES SH00680.

[6] *See* Letter, Thos. P. Smith, Acting Commissioner to Secretary (May 5, 1896), *reprinted in* S. Doc. No. 247, 54th Cong., 1st Sess., 15 (1896); H.R. Rep. 344, 59th Cong., 1st Sess., 2 (1906).

[7] The H.R. Rep. No. 58-2355 (1904) at 5, BATES SH00726. The Committee Report rejected a suggestion from the Department to reduce the ceded area by including in the proposed diminished reservation lands southeast of the Popo-Agie River where there were several Indian allotments. Instead, Article XI was amended to allow the Indians to take allotments in the ceded territory and confirm them prior to its being opened. It also was 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." *Id.* at 2, BATES SH00722.

[8] BATES SH00721 at BATES SH00725.

[9] *Id.* at BATES SH00726.

[10] BATES SH01367 at BATES SH01370-72.

[11] Minutes of council held at Shoshone Agency, Wyoming (April 19, 1904), BATES SH01367 at BATES SH01368.

and realizing money from the sale of that land, which will provide you with the means to make yourselves comfortable upon your reservation."[12]

McLaughlin also described the boundaries of the "diminished reservation"[13] and the fact that natural water boundaries would be respected to prevent trespass into the exclusive tribal area.[14] When the Tribes wanted 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 come within the Reservation, 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 in the diminished reservation.[15]

Contemporaneous correspondence from the Tribes shows their reliance and understanding of McLaughlin's assurance "that the unsold lands would belong to [the Tribes]" until they were sold. Letter Arapahoe Delegation to Commissioner of Indian Affairs (March 9, 1908).[16]

On April 21, 1904, the Tribes signed an agreement containing language similar to the proposed bill ("1904 Agreement").[17] Congress ratified the 1904 Agreement with modification

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[12] *Id.* at 3-4, BATES SH01370-71.

[13] McLaughlin described the boundaries of the Reservation (*id.* at 6, BATES SH01373) as thus:

> 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 . . . 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.

[14] *Id.* at 14, BATES SH01381.

[15] *Id.*.

[16] BATES SH52182 at BATES SH52186.

[17] H.R. Rep. No. 58-3700, "Agreement with Indians Residing on the Shoshone Indian Reservation, Etc." 58th Cong., 3d Sess. at 15 (Jan. 19, 1905). As reported by McLaughlin to the Department:

> 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

by the Act of March 3, 1905, 33 Stat. 1016.[18] In Article I of the 1905 Act, the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest . . . to all lands embraced within" the portion of Reservation located north of the Wind River, as well as the portion located southeast of the Popo Agie River. It 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.*

In Article II, the United States agreed to dispose of the lands "ceded, granted, relinquished, and conveyed by Article I," amounting to approximately 1,480,000 acres, "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash." *Id.* at 1019. The Act did not provide for a sum-certain payment. Rather, the United States agreed to pay to the Indians the proceeds derived from the sales of the lands. The Act also did not guarantee to find purchasers for the lands, but rather the United States agreed to "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." Article IX, *id.* at 1020-21.[19]

III. Analysis

A. The 1905 Act

1. *Language of the 1905 Act*

The most probative evidence of congressional intent is the language of the statute itself. *Solem*, 465 U.S. at 470. The 1905 Act does not contain any of the hallmark language evincing clear congressional intent to sever the land addressed by that Act from Reservation status.

First, the 1905 Act does not utilize "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. When

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> irrigable land, allows 490 acres each for the 1,650 Indians now on the reservation. I gave this question a great deal of thought and considered every phase of it very carefully and became convinced that the reservation boundary, as stipulated in the agreement was ample for the needs of the Indians belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement and the Indians would be eventually compelled to give it up.

Id. at 17.

[18] *Id.* at 4-9; H.R. Rep. Rep. No. 58-4884, "Agreement with Indians on the Shoshone Reservation in Wyoming, Etc." 58th Cong., 3d Sess. (March 1, 1905).

[19] Article III of the 1905 Act, amending the 1904 Agreement, provided that of the amount to be derived from sales of the opened area, $85,000 shall be used to make per capita cash payments of $50 dollars to each Indian. 33 Stat. 1020. In Article IX, Section 3, Congress ended up appropriating the $85,000, however, the money was not intended to be a lump sum payment, but was to be reimbursed as the land was sold. *Id.* Any balance remaining of the $85,000 was to be used for "survey and marking of the out boundaries of the diminished reservation where the same is not a natural water boundary," and for construction of an irrigation system on the diminished reserve. *Id.* at 1022. The survey was requested by the Tribes who believed that the south and southwestern boundaries under the 1868 Treaty at Fort Bridger were not correctly marked. BATES SH01367 at BATES SH01383, 01387.

contrasted to the text of the 1891 agreement and the 1897 Thermopolis Purchase, the operative language of the 1905 Act is remarkably more limited. The 1891 agreement provided 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" lying north of the Big Wind River. H.R. Ex. Doc. No. 70;[20] *see also DeCoteau*, 420 U.S. at 438-40; *Yankton Sioux*, 522 U.S. at 337; *Rosebud*, 430 U.S. at 591-92. Similarly, the Thermopolis Purchase 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" with respect to a tract surrounding the Big Horn Hot Springs. 30 Stat. 93.[21] These prior actions illustrate Congress's legislative acumen in using words to permanently sever land from an Indian reservation. Importantly, Congress did not ratify the 1891 Agreement and did not use the more expansive, operative words in enacting the 1905 Act. Indeed, the language of the 1905 Act is devoid of any language conveying, transferring, or surrendering forever and absolutely any portion of the Wind River Reservation to the United States. Rather it "cede[s], grant[s], and relinquish[es]" the lands "embraced *within*" the Reservation to the United States. 33 Stat. 1016 (Art. I) (emphasis added). *Compare DeCoteau*, 420 U.S. at 438-40; *Yankton Sioux*, 522 U.S. at 337; *Rosebud*, 430 U.S. at 591-92.

Second, unlike the language in the previous failed agreements (1891 and 1893) and the Thermopolis Purchase, there was no sum certain compensation in the 1905 Act.[22] The Tribes would be compensated only as the lands were sold and, significantly, the Tribes continued to hold an interest in the lands unless sold. *See Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); 54 I.D. 559.[23] Additionally, nothing in the Act "shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands . . . ." 33 Stat. 1020 (Art. IX). Thus, there is simply no express language in the 1905 Act that severs the opened area from the Reservation.

Third, the 1905 Act did not restore the ceded land to the public domain. In fact, members of Congress disclaimed any intent to do so.[24] In contrast, the Thermopolis Purchase, which re-

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[20] BATES SH00578 at BATES SH00592.

[21] BATES SH00664 at BATES SH00667.

[22] *See supra* note 20. Although the Supreme Court has found diminishment of reservation boundaries in the absence of a sum certain, *see, e.g., Rosebud*, 430 U.S. 584, it has done so only after review of the surrounding circumstances and concluding those circumstances evidenced a clear intent to diminish and permanently sever land from the reservation. As discussed in Section III.A.2 below, however, the surrounding circumstances here do not reflect such congressional intent. Moreover, it is important to the analysis that the operative cession language in the 1905 Wind River Act is different and more limited than the language in *Rosebud*. *See infra* text at pg. 11-13.

[23] The Supreme Court characterized this cession to the United States as land "to be held by it in trust for the sale of such timber lands, timber and other products, and for the making of leases for various purposes." *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 114 (1938).

[24] For example, in a discussion in the House of Representatives on an amendment to protect a non-Indian coal lessee, Asmus Boysen, a question was raised as to whether the lease would terminate automatically if the bill were passed. The Chairman of the House Indian Affairs Committee Representative Marshall objected to the protection as unnecessary as the land was not being restored to the public domain.

> [Rep. 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 the lands were restored to the public domain this lease was canceled. The difficulty is, however, that these lands are not restored

designated the land for the public's use as a national park, is inconsistent with that land's continued use as an Indian reservation. The Supreme Court has found that language which "'restored to the public domain portions of a reservation would result in diminishment.'" *Hagen*, 510 U.S. at 414 (holding that restoration of unallotted lands to the public domain "evidences a congressional intent with respect to those lands inconsistent with reservation status") *citing Rosebud*, 430 U.S. at 589, and n.5. Thus, the limited and conditional commitment of the United States, coupled with the absence of explicit hallmark language of permanent surrender of the lands, reveal that the 1905 Act did not express a clear intent by Congress to permanently sever the opened lands and forever alter the exterior boundaries of the Reservation.

There are several references in the Act to a "diminished reserve" and in the legislative history to "reduce the reservation."[25] But as noted by the Supreme Court, such "isolated phrases . . . are hardly dispositive." *Solem*, 465 U.S. at 476. Moreover, at the time of the 1905 Act, the term "diminished" was not a legal term of art utilized in the manner as it is today. As the Supreme Court noted in *Solem*, "[w]hen Congress spoke of the 'reservation thus diminished' it may well have been referring to diminishment in common [tribal] lands and not diminishment of reservation boundaries." *Id.* at n.17 (citations omitted). Indeed as used in relation to the 1905 Act, it appears that the term is used merely as shorthand for that portion of the Reservation that the Tribes retained for their exclusive use.[26] Finally, there is no question that the Tribes retained an interest in the ceded lands until sold. The fact that the 1905 Act used the term "diminished" several times, therefore, is not dispositive; nor does it evince a clear intent by Congress to permanently alter the exterior boundaries of the Reservation. As discussed above, Congress knew how to explicitly express its intent and it did not do so here.

This conclusion that the language of the 1905 Act does not evince a clear congressional intent to diminish the boundary of the Wind River Reservation is consistent with the position of the United States in *In Re Rights to Use Water in Big Horn River*, 753 P.2d 76, 127, *aff'd by Wyoming v. U.S.*, 492 U.S. 406 (1989) (*Big Horn I*) involving the Tribes' water rights. There, the United States maintained that the 1905 Act did not diminish the boundary of the Reservation. In arguments before the Wyoming Supreme Court, the United States contended that the 1905 Act fails under both prongs of the *Solem* diminishment analysis:

> (1) where there is explicit language of cession or language evidencing the present and total surrender of all tribal interests and the Agreement gives an indication of an unconditional commitment of the United States to compensate the Indians, or (2) where "events surrounding the passage of the surplus land act, particularly the manner in which the transaction was negotiated with the

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> to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians, and the clause which the gentlemen speaks of does not apply, and I think he knows it, as it was discussed in committee.

H. Cong. Rec. 1945 (Feb. 6, 1905), BATES SH08347.

[25] H.R. Rep. No. 58-2355 at 3 explained the purposes of the bill as "propos[ing] to reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891 . . . The bill in question still leaves the Indians with 808,500 acres in the diminished reserve." *But see Solem*, 465 U.S. at 476 n.17.

[26] *See supra* notes 15 and 16 with accompanying text.

> tribe involved and the tenor of the legislative reports presented to Congress – unequivocally reveal a widely held contemporaneous view that the affected reservation would shrink as a result of the proposed legislation."

U.S. Brief at 96 (emphasis in original).[27] Consistent with the requirement that the Act be read as a whole,[28] the United States pointed out in its brief that the Act contains several provisions that indicate no 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 land was sold; (2) in Article III, the United States recognized the right of Indians to remain in the ceded area;[29] (3) in Article III, the United States authorized payments to establish water rights for the Indians remaining 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. *Id.* Moreover, receipts from the land sales under the 1905 Act did not go to the general fund of the United States Treasury. U.S. Brief at 98.

These distinctions are in direct contrast with the Thermopolis Purchase in which: (1) the United States committed to pay the Tribes a fixed amount; (2) the Indians retained no rights to occupy the ceded area; (3) there is no retention of treaty rights in the ceded lands; and (4) the Thermopolis Purchase used the word "convey." *Id.* The Wyoming Supreme Court ruled that Congress intended to reserve water for the Wind River Reservation and emphasized that lands ceded under the 1905 Act held the same reservation status and reserved water rights as reservation lands not affected by the 1905 Act. *Big Horn I*, 753 P.2d at 114. Significantly, in the *Big Horn I* litigation, the Special Master heard arguments on whether the 1905 Act disestablished the Reservation boundaries and squarely rejected them, concluding instead that the language of the 1905 Act "clearly indicates that the intent of th[e] Act was to establish a trust relationship, with the United States acting as trustee for the sale of certain Indian lands to the settlers."[30] Because the unsold opened lands did not lose their Indian status, they acquired the same reserved water rights priority dates as lands within the unopened portion of the Reservation.[31] The State District Court upheld this finding by the Special Master.[32]

The 1905 Act contains none of the hallmark language signifying Congress's intent to alter the exterior boundaries of the Wind River Reservation. This position is consistent with the long-standing position of the United States and with applicable case law, including the court's finding in the *Big Horn* adjudication. It is clear that the 1905 Act did not disestablish or otherwise alter the exterior boundaries of the Reservation.

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[27] Today, the *Solem* test is referred to most frequently as a 3-part test. *Hagen*, 510 U.S. at 411.
[28] *Solem*, 465 U.S. at 476.
[29] Tribal members could obtain allotments in the 1905 Act area before it was opened to non-Indians. In *Solem*, the Court found such a provision to be inconsistent with intent to diminish. *Id.* at 474. *See also* text surrounding fn. 20, *supra.*
[30] Report of Special Master Roncalio, Concerning Reserved Water Right Claims by and on behalf of the Tribes of the Wind River Indian Reservation, Wyoming, 39 ("Master's Report"), BATES SH04101 at BATES SH04152.
[31] *Id.* at 37.
[32] *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, CIV No. 4493, Op. at 23 (Wyo. D. Ct. May 10, 1983), BATES SH04484 at BATES SH04507.

2. *Surrounding Circumstances*

According to the *Solem* framework, congressional intent also may be gleaned from circumstances surrounding the particular statute, including its legislative history. *Solem*, 465 U.S. at 471. In conducting this analysis, courts consider that "[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." *Solem*, 465 U.S. at 471.

The surrounding circumstances of the 1905 Act do not support a conclusion that Congress intended the 1905 Act to diminish the exterior boundaries of the Reservation. At first glance the 1905 may look similar to the act at issue in *Rosebud*, in which the Supreme Court concluded that the boundaries of the Rosebud Reservation were diminished. However, the 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 at issue in *Rosebud* fall between the extremes of legislation that clearly intend to diminish reservation boundaries and those that clearly intend not to diminish boundaries. Thus the surrounding circumstances take on additional importance here. *Solem*, 465 U.S. at 469 n.10.

In *Rosebud*, McLaughlin negotiated and obtained an agreement (by majority vote) from the Tribe in 1901 to cede a portion of its Reservation. 430 U.S. at 590. Under the 1901 agreement the Tribe agreed to "cede, surrender, grant, and convey . . . all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now unallotted situated within the boundaries of Gregory County, South Dakota." *Id.* at 591. In describing the agreement to the Tribe, McLaughlin explained that "'[t]he cession of Gregory County' by ratification of the Agreement 'will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.'" *Id.* The 1901 agreement was not ratified by Congress at the time because concerns were raised in Congress about obtaining the money needed upfront for the land cession. *Id.* at 591-92 and note 10 ("The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money.") (internal citations and quotations omitted). The intent of the agreement, however, was clearly described by McLaughlin, who said its purpose was to shrink the size of and change the shape of their Reservation. *See Solem* at 471. Had the agreement been ratified, the Court noted "it would have disestablished that portion of the Rosebud Reservation that lay in Gregory County." *Id.* at 591.

In 1903, Congress requested that McLaughlin go back to the tribe and seek the same agreement with the one exception: rather than a lump sum payment, the Tribe would receive payment as the lands were sold. *Id.* 592-93. In discussing this agreement with the 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 again discussed the agreement as

affecting the boundaries and 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. *Id.* at 592. Indeed the Court noted that "in examining the congressional intent, there is no indication that Congress intended to change anything other than the form of, and responsibility for payment." *Id.* at 594-95.

The Wind River negotiations present an entirely different scenario than in *Rosebud.* As in *Rosebud*, McLaughlin was responsible for obtaining the Tribes' consent. Before McLaughlin went to negotiate with the Tribes, the House Committee on Indian Affairs submitted a report stating that the purpose of the proposed legislation was to "reduce the reservation, as suggested by Mr. Woodruff at the time of the making of the agreement of 1891."[33] Although Mondell's bill was said to be modeled in part on the un-ratified 1891 Agreement, it was in fact and effect significantly different: the 1904 Agreement did not include the same broad cession language as the 1891 Agreement; it changed the method of payment from a sum certain to payment only when the lands were sold; and it enlarged the area to be ceded to include additional lands north of the mid-channel of the Big Wind River and lands southeast of the Popo Agie River, among other things.

Moreover, in stark contrast to McLaughlin's negotiations in *Rosebud*, here McLaughlin did not refer back to the 1891 Agreement when he presented the Tribes with the 1904 Agreement. Additionally, in describing the new agreement, McLaughlin explained it as opening surplus lands of the Reservation, but he did not describe it as "cutting off" any portion of the Reservation.[34] And, while McLaughlin described the opened area in his meetings with the Tribes, he did so in contrast to the "diminished" or unopened portion Reservation that would remain for the exclusive use of the Tribes.[35] Correspondence from the Tribes also reflected an understanding that they were retaining an interest in the opened lands within the Reservation until sold and not a complete severance and "cutting off" of the opened part of the Reservation.[36] Had McLaughlin wanted the Tribes to understand that the exterior boundaries of their Reservation were being "cut off," he would have explained the Agreement using similar words and descriptions as he did in *Rosebud.* For these reasons, the Act and surrounding circumstances as a whole are factually and historically distinguishable from the circumstances in *Rosebud.*

This case is similarly distinguishable from *DeCoteau.* In *DeCoteau*, the negotiations leading to the agreement by which the tribe ceded the land "show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." 420 U.S. at 445. The operative language in *DeCoteau* was much broader than the narrower and more limited cession language used in the 1905 Act. And, unlike in *DeCoteau*, the United States' commitment to pay the Tribes was limited and conditioned in the 1905 Act. Additionally, in *DeCoteau*, the Court found unambiguous evidence that the Tribe did not expect

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[33] H.R. Rep. No. 58-2355, 58th Cong., 2d Sess., BATES SH00721 at BATES SH00723.
[34] *See* Minutes of council held at Shoshone Agency, Wyoming (April 19, 1904), BATES SH01367 at BATES SH01369-70.
[35] *Id.* at 12, 14.
[36] Letter Shoshone Delegation to Commissioner of Indian Affairs (March 10, 1908) BATES SH08402; letter Arapahoe Delegation to Commissioner of Indian Affairs (March 9, 1908), BATES SH52182 at BATES SH52186.

to maintain its reservation boundaries intact. Here, however, the Tribes understood that they would continue to have an interest in the 1905 Act lands until they were sold.

Based on the circumstances surrounding the 1905 Act, there was no clear understanding by the Tribe or the United States that the purpose of the 1905 Act was to permanently sever and alter the boundaries of the opened portion of the Reservation. Moreover, when compared to *DeCoteau* and *Rosebud*, here the legislative history and surrounding circumstances do not provide the kind of clear evidence of congressional intent that the Supreme Court requires to diminish or disestablish a reservation's boundaries. *See Solem*, 465 U.S. at 472. The circumstances surrounding the 1905 Act, therefore, do not unequivocally reflect a "widely-held contemporaneous understanding" that the Reservation boundaries would be altered.[37]

3. *Subsequent Treatment*

To a lesser extent, the Court has looked to events that occurred after the passage of the statute to decipher Congress's intentions, including Congress's own treatment of the area and that of the BIA and local judicial authorities. *Solem*, 465 U.S. at 471. The evidence from the years immediately after the 1905 Act indicates some inconsistent treatment of the 1905 area, but the record on the whole more reasonably supports a conclusion that Congress did not intend to diminish the boundaries of the Reservation. Therefore, the subsequent treatment and demographics further confirm that the 1905 Act did not evince an intent to diminish the boundaries of the Reservation.

a. Congressional and Departmental Actions

The 1905 Act called for the United States to survey the boundaries of the opened area. The surveys for these plats were completed by December 1905 and approved by the General Land Office in 1906. Significantly, the surveys were done using the Wind River Meridian, not a Principal Meridian, as was used for public lands. Moreover, the resulting plats identify the "North Boundary Shoshone Indian Reservation" as the northern boundary of the ceded area and the "East Boundary Shoshone Indian Reservation" as the eastern boundary of the ceded area. These surveys confirm that although the 1905 opened a portion of the Reservation to settlement, nothing in the Act changed or diminished the boundaries of the Reservation. *See, e.g., State of Louisiana v. State of Mississippi*, 202 U.S. 1, 55, 56 (1906) (relying on official General Land Office township plats prepared from detailed survey because only official plats by the federal government are acceptable in boundary disputes).

References to the 1905 Act area following its enactment, continued to describe the ceded area as being "opened" to settlement and as part of the Wind River Reservation. For example, in 1906, Congress passed a joint resolution extending the time for "opening to public entry the

[37] At best, the surrounding circumstances of the 1905 Act are equivocal, but that is insufficient to demonstrate that Congress intended to diminish the Reservation boundaries. *See Solem*, 465 U.S. at 471; *Yankton Sioux*, 522 U.S. at 355 (finding as unpersuasive a "mixed record" that "reveals no consistent or dominant approach"); *see also Solem*, 465 U.S. at 478 (rejecting a few scattered, isolated, and ambiguous phrases). Moreover, to the extent that there are any ambiguities in the language of the 1905 Act, they are to be resolved in favor of the Tribes. *DeCoteau*, 420 U.S. at 444.

ceded portion of the Shoshone or Wind River Indian Reservation in Wyoming." 34 Stat. 825 (1906). In the Department's report to Congress, the opened lands are described as "the ceded portion of the Shoshone or Wind River Reservation" and the land as being opened to settlement. H.R. Doc. No. 59-601, 59th Cong., 1st Sess. (1906). A Presidential Proclamation of June 2, 1906, which merely recited the cession language from the 1905 Act, formally opened the unallotted portion of the Reservation to settlement. In conjunction with the Presidential Proclamation, a map delineating the area opened for settlement, and showing Indian allotments in the opened area, is titled "Map of that part of the Wind River or Shoshone Indian Reservation, Wyoming, to be opened for settlement, August 15, 1906 Under Presidents [sic] Proclamation."

In addition, a Senate Report from 1909 on a statute to extend the time for miners making mineral claims "within the Shoshone and Wind River Reservation" referred to the claims as being within the Reservation and more specifically "within the ceded portion of the Shoshone Reservation." S. Rep. 60-980, 60th Cong., 2d Sess. (1909). The next year, another Senate Report referred to "desert lands formerly in the Shoshone or Wind River Indian Reservation." S. Rep. 61-303, 61st Cong., 2d Sess. (1910). 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.* Yet another Senate Report simply referred to "the ceded portion of the Wind River Reservation." S. Rep. 62-543, 62nd Cong., 2d Sess. (1912). Also in 1916, the Indian Appropriation Act, 39 Stat. 123-158 (1916), provided $5,000 to pay for plans and cost estimates for "irrigation of all of the irrigable lands of the Shoshone or Wind River Reservation, including the ceded lands of said reservation." *Id.* at 158. The Secretary of the Interior forwarded to Congress a "Report on Wind River Project, Wyoming" that described the ceded lands as "formerly included" in the Reservation and the Reservation as "[o]n the south or southwest side of the Wind River." Importantly, however, it also recognized the continued interest "retained by the Indians in the 'ceded-land' portion of the reservation." H.R. Doc. No. 1767, 64th Cong., 2d Sess. (1916) at 9, 18.[38] The Indian Service also distinguished the "diminished reservation" from "the ceded part of the former reservation." H.R. Doc. No. 1478, 64th Cong., 2d Sess. (1916). Thus, although the history subsequent to the 1905 Act references the "ceded" or "open" lands, the entire record shows that the 1905 Act area as a whole continued to be within the exterior boundaries of the Reservation. Such distinctions appear to be made to contrast the opened (ceded) portion of the Reservation with the unopened (diminished) portion of the Reservation.

Some references to and maps of the Wind River Reservation made shortly after the enactment of the 1905 Act appear to be less clear in terms of whether the Act changed the boundaries of the Reservation. In 1907, after the President proclaimed the lands opened for settlement, Congress passed an Act extending the time for entry in the 1905 Act area in which it referred to "lands formerly embraced in the Wind River or Shoshone Indian Reservation, in Wyoming, which were opened to entry." Act of January 17, 1907, 34 Stat. 849. This appears to be a limited instance in which Congress used the words "formerly embraced in the . . .

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[38] The Report at 9 described the Reservation as the diminished area:

> The project under consideration is within the "ceded lands" portion of what was formerly included in the Wind River or Shoshone Indian Reservation. On the south or southwest side of Wind River is the Indian reservation, now sometimes referred to as diminished reservation.

Reservation" and is not by itself sufficient to evidence a strong congressional intent that the Reservation boundaries had changed. *See supra* note 38.

Similarly, a map from 1907 of the State of Wyoming and a 1912 map produced by the General Land Office show the Wind River Reservation to be the unopened portion of the Reservation only.[39] The 1907 map, however, is a compilation of maps created by the State and is not an official map of the United States; nor does it purport to be an official map of the Wind River Reservation. *See United States v. Morrison*, 240 U.S. 192, 210-211 (1916) (it is not an "official act" until land is surveyed, approved by the Surveyor General, and approved by Commissioner); *State of New Jersey v. State of Delaware*, 295 U.S. 694 (1935) (a compilation map is different than an official plat). Additionally, the 1912 map is a road map of the Wind River Reservation, Wyoming, created by the Department's Office of Indian Affairs. H. Doc. No. 516, 63d Cong., 2d Sess. The 1912 map does not purport to be a Reservation Boundary Map, but rather its expressly stated purpose is to show roads and was intended only to do so within the unopened portion of the Reservation.[40]

In addition, a map accompanying the 1914 Annual Report of the Commissioner of Indian Affairs to the Secretary labeled the area south of the Big Wind River and west of the Popo Agie as "Reservation," and the area north and east of those rivers as "Opened." These designations, however, are consistent with statements made after enactment of the 1905 Act, as discussed above, in which part of the Reservation was considered to be "opened" and part was solely reservation lands for the exclusive use of the Tribes. None of these references or maps, either by themselves or collectively, supports a conclusion that the 1905 altered the Reservation boundaries. These references are ambiguous and inconsistent at best, and under the Indian canons of construction are to be resolved in favor of the Tribes. *Yankton Sioux*, 522 U.S. at 344; *DeCoteau*, 420 U.S. at 444. Thus, while Congress was at times inconsistent in its reference to the 1905 Act area and sometimes referenced them as "former reservation," overall, subsequent treatment of the opened area evidences a view that the lands were part of the Reservation, most commonly referring to the Reservation as encompassing two parts, a ceded or opened area and a diminished or exclusive tribal area.

More significantly, there was no rush of non-Indian settlers into the open area and Congress's modest expectation for the ceded land never materialized. As of 1909, only 113,743.68 acres or 7.91 percent of the 1,438,633.66 acres opened were actually sold. By 1914, only 128,986.58 acres or 8.97 percent had been sold. During this time the United States also granted 50,000 acres of allotments in the ceded area to members of the Tribes.[41] Ultimately, only 196,360 acres were alienated, substantially less than the acreage later restored to tribal ownership within the opened area.[42] And in 1913, the Department concluded that the remaining

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[39] *See* Exhibits 5 & 6, State's Comments.
[40] Act of Aug. 24, 1912, 37 Stat. 518, 539.
[41] Letter dated June 12, 1914, Assistant Commissioner Indian Affairs to Hon. C.O. Lobeck, House of Representatives, BATES SH08201 at BATES SH08404, 08203. 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 Committee on Indian Affairs, U. S. Senate, September 12, 13, and 14, 1932, Part 27 at 14467 ("*Survey*").
[42] Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol. on Indian Affairs* 1185, 1191 n.7 (U.S.D.I. 1979).

lands need not be sold "until it is thought best to do so."[43] In August 1915, the Secretary further advised the Commissioner of the General Land Office to postpone all sales in the opened area indefinitely.[44] A letter from the Commissioner of Indian Affairs in 1930 indicates the primary reason for halting the sales so early after enactment of the 1905 Act was that the Tribes were realizing significant amounts of money from leasing the land within the opened area for grazing.[45] The short period of time that the opened area was actually available for purchase by settlers hardly indicates an intent to permanently affect the boundaries of the Reservation and, in fact, supports the opposite conclusion. Thus, although lands in the opened area were available for settlement for a short period of time, those lands were still held for the benefit of the Tribes and the United States continued to manage those lands as the Tribes' trustee.[46]

During congressional hearings in 1932, the Reservation was referred to as a "quadrangular area approximately 65 miles by 55 miles," encompassing approximately 2,238,633 acres, in a "ceded portion" and a "diminished portion." The opened portion was again referenced as being used as tribal lands.[47] And, on November 2, 1934, Commissioner of Indian

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[43] As referenced in letter dated January 27, 1930, Commissioner C.J. Rhoads to E.O. Fuller. BATES SH00920.

[44] *Id. See also* Solicitor's Opinion, M-31480 (February 12, 1943), 2 *Op. Sol. on Indian Affairs* 1185, 1188, 1191 (U.S.D.I. 1979).

[45] *Id.* In 1916, Congress adopted a statute directing the Secretary of the Interior to issue oil and gas leases for the benefit of the Indians. Act of Aug. 21, 39 Stat. 519 (1916 Act). A dispute arose as to whether the oil and gas reserves under the ceded lands were subject to lease under the general land laws or under an 1891 law governing leases in the 1905 Act area. Representative Clark of Wyoming responded affirming the continuing status of the opened lands as Indian land:

> This is land upon the ceded portion of an Indian reservation which was subject to homestead entry under the law which ceded it, but the time for homestead entry has been exhausted so that this Indian land which was not taken is interspersed among other lands. It is still Indian land and the Indians are entitled to it.

53 Cong. Rec. 12,159 (1916). The 1905 Act area, therefore, clearly was not public land. It was ceded land within the Reservation, temporarily opened for settlement, but unless and until sold, it remained Indian land. Additionally, in a letter dated June 21, 1923, Commissioner of Indian Affairs Burke 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." BATES SH08207. He concluded that land office could dispose of the lands, the proceeds of sales to go to the credit of the Indians. *Id.* The 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;" 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. BATES SH08209.

[46] Additionally, McLaughlin's action in the years following the 1905 Act provide further evidence that the Reservation boundaries were intended to remain intact. In 1922, seventeen years after 1905, McLaughlin met with the Tribes again and explained the Thermopolis Agreement as separate and distinct 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 Council Minutes, August 14, 1922, BATES SH08429 at BATES SH08433. McLaughlin recognized that "[i]t is ceded land under the control of the government, entirely," further affirmed that the Indians "still have an equitable right because the agreement has not been fulfilled in full." *Id.* at 10. As to obtaining allotments within the 1905 Act area, McLaughlin pointed out that as opened lands, parcels in that area could only be homesteaded during the period after it was officially opened for settlement, but allotments could be taken on the diminished reservation. *Id.* at 11.

[47] *Survey*, at 14428, 14467.

Affairs John Collier issued an opinion discussing the newly enacted Indian Reorganization Act (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). Of particular relevance here is Collier's explanation that around 1890, the Government started opening up to entry and sale, lands of reservations that were not needed for allotment, "the Government taking over the lands only as trustee for the Indians," and that "[u]ndisposed of lands of this class remain[ed] the property of the Indians until disposed of as provided by law." *Id.* at 560. 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 IRA. *Id.* at 562, 563. On June 15, 1935, the Shoshone and Arapahoe Tribes voted to exclude themselves from the Act. 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 for eight reservations, including the Wind River, as those tribes had voted to exclude themselves from the Act.[48]

Even though the Tribes did not vote to accept the IRA, in 1939, Congress directed the Secretary of the Interior to restore to tribal ownership significant acreage within the Reservation opened under the 1905 Act. Act of July 27, 1939, 53 Stat. 1128 ("Restoration Act"). This Act provided for the creation of land use districts for the consolidation of the respective Indian and non-Indian land holdings and authorized the restoration to the Tribes of "all undisposed-of surplus or ceded lands . . . which are not at present under lease or permit to non-Indians." *Id.* at 1129-30. It further restored to tribal ownership the "balance of said lands progressively as and when the non-Indian owned lands . . . are acquired by the Government for Indian use pursuant to the provisions of this Act." *Id.*

The Department proceeded with a series of land restorations consistent with this Act, restoring substantial acreage to tribal ownership, "adding" and "making" it part of the existing Reservation.[49] One illustrative example is in 1944, when the Secretary's order, published in the *Federal Register*, restored to the Tribes and the Reservation enumerated ceded lands that settlers had not acquired, 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

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[48] *To Provide Compensation to the Shoshone and Arapahoe Tribes of Indians for Certain Lands of the Riverton Reclamation Project Within the Ceded Portion of the Wind River Indian Reservation, and for Other Purposes*, Hearing on H.R. 4483 Before the Committee on Interior and Insular Affairs, U.S. Senate, 83rd Cong. at 5-6 (May 6, 1953).

[49] *See* 5 Fed. Reg. 1805 (May 17, 1940); 7 Fed. Reg. 7458 (Sept. 22, 1942), as corrected by 7 Fed. Reg. 9439 (1943); 7 Fed. Reg. 11,100 (Dec. 30, 1942); 8 Fed. Reg. 6857 (May 25, 1943); 9 Fed. Reg. 9749 (Aug. 10, 1944); 10 Fed. Reg. 2254 (Feb. 27, 1945); 10 Fed. Reg. 2812 (Mar. 14, 1945); 10 Fed. Reg. 7542 (Jun. 22, 1945); 13 Fed. Reg. 8818 (Dec. 30, 1948); 21 Fed. Reg. 5067 (Jul. 7, 1956); 39 Fed. Reg. 27,561 (Jul. 30, 1974), as amended by 40 Fed. Reg. 42553 (September 15, 1975); 58 Fed. Reg. 32856 (June 14, 1993).

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. 9,754 (Aug. 10, 1944). Pursuant to the 1939 Act, and in a series of Orders like the 1944 Order, the Secretary restored to tribal ownership the majority of the lands opened under the 1905 Act and "added" those lands to and/or "made them a part of" the Reservation. These restoration orders included lands on the eastern boundary of the Reservation – in particular land underlying what is now the Boysen Reservoir.

Any doubt as to the integrity of the Reservation's boundaries under the 1905 Act thus disappeared when the Secretary expressly closed the Reservation and returned the balance of lands within the existing Reservation to Indian ownership. Moreover, 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 an interpretation is an over-simplification of the purpose of the Restoration Act and fails to comprehend the status of the ceded lands. Undisposed of ceded lands remained a part of the Reservation and were administered by the Federal Government in its capacity as trustee. 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. That is, even if the 1905 Act diminished the reservation, which it did not, the orders issued under the 1939 Act expressly restored significant acreage to tribal ownership and reinforced the Reservation's status – including lands along the eastern boundary of the Reservation.

Subsequent history further reinforces 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 and located within the 1905 Act area for purposes of oil lessees. 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.[50] 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. Moreover, the 1940 opinion addressed parcels of land within the 1905 area and not the actual exterior boundaries of the Reservation. Likewise, in 1943, legal questions arose concerning the authority of the Tribes and the State to regulate hunting and fishing on the diminished reservation and lands within the opened portion of the reservation. The Solicitor's 1943 opinion dealt only with jurisdictional issues within the previously opened portion of the Reservation and expressly did not address the exterior boundaries of the Reservation. *Id.* at 1193 n.8 (expressly

[50] Solicitor's Opinion, M-30923 (December 13, 1940), 1 *Op. Sol. on Indian Affairs* 1011, 1016 (U.S.D.I. 1979).

declining to opine on the boundaries of the Reservation).[51] Thus, neither the 1940 Marigold 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.

In 1952, Congress passed an act to vest the United States with title to "certain lands and interests in lands of the Shoshone and Arapaho Indian Tribes of the Winder River Reservation." *See* Act of July 18, 1952, 66 Stat. 780; *see also* S. Rep. No. 82-1980, 82d Cong., 2d Sess. (1952) (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 Winder River Indian Reservation . . .") (emphasis added).[52] The 1952 Act authorized the Secretary to provide the Tribes with "reasonable consideration" in exchange for tribal "property and rights . . . *needed . . . for the construction and operation and maintenance* of the Boysen Unit of the Missouri River Basin project."[53] Act of July 18, 1952, 66 Stat. 780. (emphasis added). The 1952 Act incorporated and ratified a Memorandum of Understanding (MOU) between the Bureau of Reclamation (BOR) and the Bureau of Indian Affairs (BIA) (acting on behalf of the Tribes).[54] Pursuant to the terms of 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 Wind River Reservation to the BOR for construction and operation of the Boysen Unit. However, the Tribes retained all of the oil, gas, and minerals rights to the land. In addition, the MOU provided that, where the Tribes only conveyed the surface, they retained certain rights of occupancy, access, and/or grazing on lands surrounding and on the shores of the reservoir.[55] Significantly, neither the 1952 Act nor the MOU refer to the boundaries of the Reservation, to the return of any land to the public domain, or to the 1905 Act. *Cf. Solem*, 465 U.S. at 470 (Congress must "clearly evince an intent to change boundaries before diminishment will be found") (additional quotation and citation omitted).

The 1952 Act falls far short of utilizing language that contains an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. The 1952 Act does not use words of permanence such as "forever and

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[51] 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. 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 1190.

[52] The 1953 Reclamation Act (67 Stat. 592 (1953)), which provided compensation to the Shoshone and Arapahoe Tribes for certain lands of the Riverton reclamation project, addresses only lands located within the exterior boundaries of the Wind River Reservation. It neither mentions nor in any way affects the exterior boundaries of the Reservation. As such, the 1953 Reclamation Act is not relevant to the question presented here. Therefore, this opinion does not discuss or address the 1953 Reclamation Act in detail.

[53] *See* S. Rep. No. 82-1980 at 2 (stating that the "board of appraisers recommend $458,000 as a fair price for the Indian lands and rights to be acquired for the Boysen Dam and Reservoir").

[54] 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.

[55] *See, e.g., id.* at 3, 6, 9, 50, 52. Section 4(b) of the MOU identifies the tracts of land (generally lands on and surrounding the shores 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 occupancy rights" of the Tribes. *Id.* at 3, 9, 50. Section 4(c) describes the lands where the Tribes retained the 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.

absolutely" but, rather, makes clear that significant tribal interests in the land were retained notwithstanding the conveyance of the surface right.[56] The MOU demonstrates that the Tribes (a) conveyed only the surface estate of the land for the reservoir and specifically retained their mineral rights;[57] (b) retained an exclusive right of access to portions of the Boysen Reservoir shoreline so long as adjacent lands remained subject to Indian occupancy rights;[58] (c) retained dual access to certain areas on the southeastern portion where those areas abut land still subject to Indian occupancy; and (d) retained certain grazing rights. All of these retained rights are clearly inconsistent with "the present and total surrender of all tribal interests" required in order to evidence congressional intent to alter the boundaries of the Reservation.[59] *Solem*, 465 U.S. at 470. Similarly, the circumstances surrounding the passage of the 1952 Act do not indicate such a congressional intent.[60] Thus, the 1952 Act did not alter the Reservation boundaries.[61] Moreover, the purpose of the 1952 Act, to facilitate the construction of a dam and reservoir on the Tribe's Reservation, is consistent with the Tribes' continued use and occupancy of its Reservation. In fact, the 1952 Act and MOU between BIA and BOR specifically recognizes the Tribes' right to utilize and graze on the shoreline and lands surrounding the reservoir notwithstanding the conveyance of certain lands within the Wind River Reservation for the Boysen unit. This recognition demonstrates that Congress understood that the Tribes would continue to inhabit their Reservation, which remained intact, and benefit from the use of the land surrounding the reservoir.

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[56] The Tribes conveyed approximately 366 acres in fee for the dam itself. Given the *de minimus* nature of this portion in comparison to the conveyance as a whole (approximately 26,000 acres), this fact does not demonstrate an intent to diminish. The 1952 Act must be read as a whole, and there is no reference to changing the exterior boundaries of the Reservation, or intent to do so.

[57] *Crow Tribe of Indians v. Mont.*, 819 F.2d 895, 898 (9th Cir. 1987) (mineral estate underlying reservation is "component of the reservation land itself"), *aff'd by* 523 U.S. 696 (1998).

[58] The fact that, in 1952, Congress recognized a retained right to exclusive tribal use, notwithstanding the Tribes' conveyance of the surface right, indicates that Congress understood that the Reservation was not eviscerated by the 1905 Act. *See Solem*, 465 U.S. at 471-72 ("Congress' own treatment of the [lands affected by a surplus land act], particularly in the years immediately following the opening, has some evidentiary value . . .").

[59] *Compare* Act of July 18, 1952, 66 Stat. 780, *with* discussion of the Lander Purchase, *supra.* at 3-4 (concluding that the Lander Purchase, 18 Stat. 291, diminished the boundary of the Reservation because the Tribes agreed to an outright sale of all their interests in Reservation lands generally south of the 43rd parallel in exchange for a lump sum payment of $25,000 and the express purpose of the Act ratifying the Lander Purchase was "to change the southern limit of said reservation"), *and* discussion of the Thermopolis Purchase, *supra.* at 5 (finding that the Thermopolis Purchase diminished the boundary of the Reservation because, among other things, "the Tribes agreed to 'cede, convey, transfer, relinquish and surrender, forever and absolutely all their right, title, and interest of every kind and character in and to the lands and the water rights appertaining thereunto' with respect to a tract surrounding the Big Horn Hot Spring . . . [and] [t]he sold lands were to be 'set apart as a national park or reservation, forever reserving [the hot springs] for the use and benefit of the general public' . . . 'in consideration for the lands ceded, sold, relinquished and conveyed,' the United States agreed to pay a lump sum of $60,000").

[60] The 1951 MOU was the product of extensive negotiations between the Tribes and the United States which resulted in the Tribes' retention of significant interests in lands conveyed. S. Rep. No. 82-1980, 82d Cong., 2d Sess. (1952). The Tribes passed a resolution approving the conveyance contingent on retention of those rights by the Tribes. *Id.* at 4.

[61] This legal position is consistent with the holding in *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 (1983), *cert. denied*, 464 U.S. 1042 (1984), that neither the Fort Randall nor Big Bend Acts disestablished the boundaries of the Lower Brule Reservation. There, the Circuit Court also opined that continued Indian control of land taken for the dams and reservoirs was not inconsistent with the Federal Government's purpose in acquiring the property, as might be the case if the land were acquired for settlement. *Id.* at 817-818, 820.

Furthermore, congressional enactment of the 1952 Act demonstrates that Congress recognized that the Tribes had a surface interest in the 25,500 acres conveyed, as well as a mineral estate and other interests in that land. Indeed, 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 and establish an MOU between BOR and BIA.

In sum, these facts illustrate that Congress and the Department never disclaimed the Tribes' continuing interest in the ceded lands and that those lands were considered as being within the Reservation boundaries. The official survey approved by the General Land Office confirmed that the 1905 Act opened the lands for settlement but did not change the exterior boundaries of the Reservation. To the extent there are inconsistent references made with respect to the Reservation, those must be interpreted in favor of the Tribes and reflect the unique nature of the Act as opening, but not conveying, the lands immediately. It is significant that the opening of the Reservation failed and was soon halted by 1915 when the Tribes were permitted to lease the lands for grazing instead. The Restoration Act and two Solicitor's opinions further confirmed the unchanged Reservation status and that the exterior boundaries remained intact. Under the 1905 Act, the Tribes' cession was more of a "cession in trust," and not an outright conveyance of all their interest in the land. *Id.* at 100. Since the ceded lands did not become public lands or part of the public domain, they retained their reservation status. *Id.* at 100-102.[62]

b. Demographics of the Opened Area

The demographics of the ceded area are least probative of congressional intent. *Solem*, 465 U.S. at 471-472. The record contains virtually no evidence of the demographic makeup of the 1905 Act area. What is clear from the record, however, is that the opening of the ceded portion of the Reservation did not succeed in generating sales to non-Indians for the benefit of the Tribes. As stated above, there was no rush of non-Indian settlers into the area and Congress's modest expectation for the ceded land never materialized. As of 1909, only 7.91 percent of the acres opened were actually sold. By 1914, only 128,986.58 acres or 8.97 percent had been sold. All told only a little more than 11 percent of the ceded lands were sold to non-Indians. During this time, the United States also granted 50,000 acres of allotments in the ceded area to members of the Tribes.

Ultimately, only 196,360 acres were alienated, substantially less than the acreage restored to the Tribes pursuant to the 1939 and other Acts. There is a concentration of non-Indian fee land in and around the City of Riverton, patented in 1907. But Riverton was comprised of only 160 acres then and did not develop immediately following the 1905 Act. Nor is it representative of the 1905 area. Demographic changes far removed from 1905 provide an unreliable method of statutory interpretation. *Solem*, 465 U.S. at 471, n.13. Thus, the demographics of the 1905 area do not support a finding that the 1905 intended to diminish the Reservation boundaries to permanently sever or "cut off" that area from the Reservation.

[62] *See also* discussion regarding public domain, *supra* notes 19 and 36.

4. *Review of State Supreme Court Decision in Yellowbear*

The State points to *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008), in which the court held that crimes committed within the 1905 Act area did not occur on the Reservation.[63] It argues that decision supports a conclusion that the 1905 Act diminished the boundaries of the Reservation. While the *Yellowbear* case is not binding precedent, it is considered here to determine whether it is persuasive. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 391 (1944).

Yellowbear is the only case to consider the 1905 Act since the Supreme Court established the relevant precedent. The case involved federal *habeas corpus* relief for Mr. Yellowbear's state conviction of the first degree murder of his infant daughter. In affirming the district court's denial of relief, the Circuit Court concluded that Mr. Yellowbear had failed to explain how the Wyoming Supreme Court failed to apply objectively U.S. Supreme Court precedent to his jurisdictional arguments that the Reservation had been diminished or that the decision was otherwise incorrect. Thus, the Circuit Court's opinion is not a decision on the merits of the reservation diminishment, but rather a decision on the burden of showing that the State Supreme Court erred. In addition, its reasoning is unpersuasive for several reasons. The *Yellowbear* court did not thoroughly analyze the 1905 Act in light of the unique facts surrounding the Reservation. Rather the court only looked at and found the operative words of the 1905 Act to be "indistinguishable" from the language in *DeCoteau* in which the Court found diminishment. 174 P.3d 1270, 1282 (Wyo. 2008). But, as discussed above, there are significant ways in which the two statutes differ and, moreover, any such similarity is not determinative.

The *Yellowbear* court failed to consider whether any of the provisions of the 1905 Act were contrary to diminishment. Additionally, the court mistakenly found a sum certain payment because the 1905 Act provided specified amounts of money for per capita payments, a survey, schools, and an irrigation project. *Id.* But these funds were to be paid out of the proceeds of future land sales and, as discussed above footnote 15, did not substitute for the sum certain payment in the 1891 unratified Agreement. Rather, they parallel other provisions of that 1891 Agreement. The Tribes were not paid a sum certain for the land. The United States obligation to pay was conditional – the Tribes were paid only when the lands were sold. Thus, the court's analysis amounts to an enumeration of the 1905 Act's reference to "diminished reserve" and "diminished reservation," despite precedent that cautions against conflating casual references to geography with express intent to diminish. *Solem*, 465 U.S. at 476.

Importantly, the court did not have before it, and thus did not examine, the evidence of the legislative history and circumstances surrounding the 1905 Act. *Yellowbear* was a criminal

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[63]The State also points to *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960), and *State v. Moss*, 471 P.2d 333 (Wyo. 1970), to support its position. Importantly, however, the Wyoming Supreme Court decided *Blackburn* before the Supreme Court established any precedent for determining whether a reservation was diminished by a congressional act. Accordingly, it did not apply the relevant precedent and its reasoning is not persuasive. The court also based its decision on the fact that the crime occurred in the 1905 Act area that was part of a 1953 reclamation project. But, as pointed out in footnote 53, the 1953 Act dealt with lands within the exterior boundaries of the Reservation. Similarly, when *Moss* was decided, the U.S. Supreme Court had decided just one diminishment case, *Seymour v. Superintendent*, 368 U.S. 351 (1962), and had not yet established the standard for determining reservation diminishment.

proceeding, which lacked a fully developed record and expert historical reports relating to the Reservation's boundaries. The court simply referred to the recitation of facts in the dissenting opinion in *Big Horn I* by Justice Thomas and concluded, "while [the majority and dissent] disagreed over whether reserved water rights continued to exist in the ceded lands, [they]. . . agreed that the reservation had been diminished." *Id.* at 1283. The dissent is not controlling, but, more importantly, it mistakenly concluded that the 1905 Act diminished the Reservation based on a belief that the 1905 Act "approved" the 1891 Agreement. 753 P.2d at 128.

Finally, in considering subsequent treatment and demographics, the court focused on the City of Riverton, noting that 92 percent of the population of Riverton is non-Indian and that Riverton and the State provide sanitation, street maintenance, water and sewer service, planning and zoning, and law enforcement. *Id.* The demographics of Riverton tell us nothing about the demographics of the ceded area as a whole. Although modern demographics may be considered on a pragmatic level, they are potentially unreliable and cannot on their own provide a basis for finding diminishment. *Solem*, 465 U.S. at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351 (1962)).

V. Conclusion

Under Supreme Court precedent and consistent with the United States' longstanding position on this issue, the original boundaries of a reservation remain intact unless Congress clearly evidences an intention to diminish that reservation. Unlike the Lander Purchase and Thermopolis Purchase, the language of the 1905 Act, its legislative history, and the circumstances surrounding its enactment do not reveal clear congressional intent to diminish and alter the exterior boundaries of the Wind River Reservation.

Please do not hesitate to contact me or Patrice H. Kunesh, (202-208-4549), Deputy Solicitor of Indian Affairs, if we can be of further assistance.

Sincerely,

Hilary C. Tompkins
Solicitor