Nos. 14-9512 and 14-9514 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, and WYOMING FARM BUREAU FEDERATION,

Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

NORTHERN ARAPAHO TRIBE, and EASTERN SHOSHONE TRIBE,

Intervenors.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF ANDREW YELLOWBEAR IN SUPPORT OF RESPONDENT

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INTRODUCTION

Pursuant to Fed. R. App. P. 27 and 29(a) and Tenth Circuit Rule 27.3, Andrew Yellowbear requests leave to file the accompanying *amicus curiae* brief in support of Respondent (Environmental Protection Agency). The State of Wyoming and the United States Environmental Protection Agency consented to the filing of the brief. Wyoming Farm Bureau Federation takes no position on the filing of the brief. Fremont County, the City of Riverton, Northern Arapaho Tribe, and Eastern Shoshone Tribe oppose the filing of the brief.

INTEREST AND IDENTITY OF *AMICUS CURIAE*

The *Amicus Curiae* is Andrew Yellowbear, an enrolled member of the Northern Arapaho Tribe (NAT). Mr. Yellowbear's interest in the case arises from a studied conclusion by the Environmental Protection Agency (EPA) that locates Riverton, Wyoming within the Wind River Reservation (Reservation).[1]

Mr. Yellowbear was convicted in a Wyoming state court of felony murder and other crimes, all occurring within Riverton, Wyoming. He is currently being

[1] Pursuant to Fed. R. App. P. 29(c)(5), neither a party nor party's counsel authored the brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amicus curiae*, or its counsel) contributed money that was intended to fund its preparation or submission. Pursuant to Fed. R. App. P. 29(a), Mr. Yellowbear has consented to the filing of the brief.

held in state custody on a life sentence. Whether Riverton is in "Indian Country" is crucial to the determination of whether Wyoming had jurisdiction to prosecute Mr. Yellowbear or whether the United States has exclusive jurisdiction.

The Wyoming Constitution has been interpreted to bar State jurisdiction when the federal government claims jurisdiction over any events on land within the boundaries of the Indian reservation or held by Indians. *See In re General Adjudication of All Water Rights in the Big Horn River*, 753 P.2d 76 (Wyo. 1988); *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 561-62 (1983); *see* Wyo Const. Art. 21, §26 (disclaimer provision).

Consequently, if the 1905 Act did not diminish the exterior boundaries of the Reservation, Riverton is still "Indian country." If this is the case, the State presumably does not have authority to imprison him.[2] As such, Mr. Yellowbear

[2] Any change in criminal jurisdiction likely will have a retroactive effect, regardless of the decision in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). In *Cuch*, this Court concluded that a Supreme Court ruling, that land on which the petitioners committed crimes, was not part of an Indian reservation, did not apply retroactively. *Id*. at 988. The Court stated, "The Court may in the interest of justice make the rule prospective … where the exigencies of the situation require such application." *Id*. at 995. The exigencies in the current case arguably do not necessitate a prospective application of criminal jurisdiction. The current case is more in line with *Covey v. United States*, 109 F. Supp. 2d 1135, 1140 (D.S.D. 2000), in which the retroactive application of a criminal jurisdiction change affected 56 cases. Wyoming Department of Corrections currently incarcerates 45 self-reported tribal members for crimes committed in the disputed area, a similar number as in *Covey*. [WYO-WR-270].

has an interest in the Court's diminishment determination, which is central to the principal case on appeal.

I. AUTHORITY TO FILE ANDREW YELLOWBEAR'S BRIEF

Motions under Rule 29(b) must explain the movant's interest and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that "[t]he amended [Rule 29(b)] … requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

> An amicus brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (quoting Sup. Ct. R. 37.1).

Andrew Yellowbear brings relevant matter to the Court which has not been brought to its attention by the parties. Accordingly, Andrew Yellowbear should be permitted to file his *amicus* brief by leave of court.

II. FILING ANDREW YELLOWBEAR'S BRIEF WILL SERVE THE COURT'S DIMINISHMENT DETERMINATION, WHICH IS CENTRAL TO THE PRINCIPAL CASE ON APPEAL

Before approving the Northern Arapaho and Eastern Shoshone tribes' application for Treatment as a State (TAS) status under Sec. 301(d) of the Clean Air Act (CAA), the EPA-relying on the opinion of the Solicitor for the Department of Interior-concluded that the Wind River Indian Reservation was not diminished by the 1905 Surplus Land Act (1905 Act). The State of Wyoming appealed this decision claiming the 1905 Act diminished the Reservation and now the matter is before the Court. For the specific substantive reasons highlighted below, Andrew Yellowbear's brief will aid this Court in its determination of the diminishment question by raising an issue not yet considered by the parties.

Congressional purpose, or Congressional intent, is considered the "touchstone" for determining whether an act of Congress diminished a reservation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The parties in the case have conducted a thorough analysis of the 1905 Act, analyzed from the perspective of Congressional intent. Yet, tribal intent is absent from all parties analysis.

Congress intended the tribes' consent to diminishment under the 1905 Act. The 1905 Act was to "ratify and amend an *agreement* with the Indians

residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect." 1905 Act, 33 Stat. 1016 (emphasis added). The agreement was to "take effect and be in force when signed by U.S. Indian Inspector James McLaughlin *and by a majority of the male adult Indians parties hereto*, and when accepted and ratified by the Congress of the United States." *Id*. at 1018 (emphasis added).

The agreement explicitly required the tribes' consent. Despite the requirement of consent in the agreement which led to the 1905 Act, this was never obtained from the Northern Arapaho Tribe (NAT). Andrew Yellowbear's brief discusses in detail how a majority of NAT adult male members did not sign off on the agreement. The brief further discusses how many of those who did sign off on the agreement did not have authority to do so. Because a majority of adult male NAT members did not sign the agreement, the Reservation cannot be said diminished.

Even if NAT's less-than-a-majority vote is not determinative of the tribal intent question, tribal intent to diminish the Reservation cannot be ascertained. There is simply a lack of proof in the record to declare that both tribes intended that the Reservation be diminished. The brief discusses in detail the lack of proof in the record to indicate tribal intent to diminish the

Reservation. The lack of discernable tribal intent to diminish provides a further reason why the Reservation cannot be said diminished.

Congress has the power to diminish reservations unilaterally. *Solem v. Bartlett*, 465 U.S. 463, 470-72 (1984), citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). While tribal consent normally is unnecessary, this is different in the case of the 1905 Act because Congress specifically placed consent on the table. Congress, however, did not obtain tribal consent. Yet, the requirement of Congress in obtaining tribal consent prior to a conclusion of diminishment has not yet been discussed.

CONCLUSION

WHEREFORE, for the foregoing reasons, movant Andrew Yellowbear respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted this 13th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. The ECF submission was scanned for viruses using the most recent version of Microsoft System Center Endpoint Security, last updated on April 13, 2015 and, according to the program is free of viruses.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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NORTHERN ARAPAHO TRIBE, and EASTERN SHOSHONE TRIBE,

Intervenors.

BRIEF OF *AMICUS CURIAE* ANDREW YELLOWBEAR IN SUPPORT OF RESPONDENTS' POSITION THAT THE 1905 ACT OF CONGRESS DID NOT DIMINISH THE WIND RIVER INDIAN RESERVATION

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STATEMENT OF IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The *Amicus Curiae* is Andrew Yellowbear, an enrolled member of the Northern Arapaho Tribe (NAT). Mr. Yellowbear's interest in the case arises from a studied conclusion by the Environmental Protection Agency (EPA) that locates Riverton, Wyoming within the Wind River Reservation (Reservation).[1]

Mr. Yellowbear was convicted in a Wyoming state court of felony murder and other crimes, all occurring within Riverton, Wyoming. He is currently being held in state custody on a life sentence. Whether Riverton is in "Indian Country" is crucial to the determination of whether Wyoming had jurisdiction to prosecute Mr. Yellowbear or whether the United States has exclusive jurisdiction.

The Wyoming Constitution has been interpreted to bar State jurisdiction when the federal government claims jurisdiction over any events on land within the boundaries of the Indian reservation or held by Indians. *See In re General Adjudication of All Water Rights in the Big Horn River*, 753 P.2d 76 (Wyo. 1988); *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 561-62 (1983); *see* Wyo Const. Art. 21, §26 (disclaimer provision).

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[1] Pursuant to Fed. R. App. P. 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amicus curiae*, or its counsel) contributed money that was intended to fund its preparation or submission. Pursuant to Fed. R. App. P. 29(a), Mr. Yellowbear has consented to the filing of this brief.

Consequently, if the 1905 Act did not diminish the exterior boundaries of the Reservation, Riverton is still "Indian country." If this is the case, the State presumably does not have authority to imprison him.[2] As such, Mr. Yellowbear has an interest in the Court's diminishment determination, which is central to the principal case on appeal.

SUMMARY OF ARGUMENT

Before approving the Northern Arapaho and Eastern Shoshone tribes' application for Treatment as a State (TAS) status under Sec. 301(d) of the Clean Air Act (CAA), the EPA-relying on the opinion of the Solicitor for the Department of Interior- concluded that the Wind River Indian Reservation was not diminished by the 1905 Surplus Land Act (1905 Act). The State of Wyoming appealed this

[2] Any change in criminal jurisdiction likely will have a retroactive effect, regardless of the decision in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996). In *Cuch*, this Court concluded that a Supreme Court ruling, that land on which the petitioners committed crimes, was not part of an Indian reservation, did not apply retroactively. *Id*. at 988. The Court stated, "The Court may in the interest of justice make the rule prospective … where the exigencies of the situation require such application." *Id*. at 995. The exigencies in the current case arguably do not necessitate a prospective application of criminal jurisdiction. The current case is more in line with *Covey v. United States*, 109 F. Supp. 2d 1135, 1140 (D.S.D. 2000), in which the retroactive application of a criminal jurisdiction change affected 56 cases. Wyoming Department of Corrections currently incarcerates 45 self-reported tribal members for crimes committed in the disputed area, a similar number as in *Covey*. [WYO-WR-270].

decision claiming the 1905 Act diminished the Reservation and now the matter is before this Court.

Congressional purpose, or Congressional intent, is typically considered the touchstone for determining whether an act of Congress diminished a reservation. While Congressional intent generally answers any diminishment question, under the 1905 Act, tribal intent is equally important.

Congress required tribal consent (intent) to diminishment before ratification was possible; additionally, Congress intended the 1905 Act to be an agreement that required consideration.

Yet, no measure of a tribal intent to diminish their reservation is provided to the Court by the parties. Without such evidence, no basis exists to reverse the EPA's determination that the Reservation was never diminished or to rule for the State of Wyoming.

ARGUMENT

I. Intent of the Tribes Must Be Ascertained Before the Court can Conclude Diminishment

Congressional intent is at the heart of any diminishment analysis. The "touchstone" for determining whether an act of Congress diminished a reservation is "Congressional purpose." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). While Congressional intent must be determined, under the 1905 Act, so too must tribal intent.

In this case, Congress intended the tribes' consent to diminishment under the 1905 Act. The 1905 Act was to "ratify and amend an *agreement* with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect." 1905 Act, 33 Stat. 1016 (emphasis added). The agreement was to "take effect and be in force when signed by U.S. Indian Inspector James McLaughlin *and by a majority of the male adult Indians parties hereto*, and when accepted and ratified by the Congress of the United States." *Id*. at 1018 (emphasis added). The 1905 Act was based on an "agreement" which required a majority of the tribal members to consent to the agreement before it could be ratified.

Congress has the power to diminish reservations unilaterally. *Solem v. Bartlett*, 465 U.S. 463, 470-72 (1984), citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). However, by requiring the tribes' consent for ratification, Congress specifically placed tribal intent on the table. Because Congress required approval, tribal intent becomes paramount in order to effectuate Congress' purpose.

Congress intended the 1905 Act to operate as a contract whereby the tribes must consent to the surrender of certain property rights in exchange for proceeds from the sale of lands in the area so that structural projects, such as an irrigation system and the construction of schools could be funded on the undisputed portion of the reservation. 33 Stat. 1016, 1018. Article II of the amended 1905 Act states,

"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 …" *Id.* at 1019.

It is not a novel rule of law that the parties must consent to their contract and there can be no contract or modification without mutual consent. *Whiteside v. United States*, 93 U.S. 247 (1876); *Utley v. Donaldson*, 94 U.S. 29 (1876); *Dexter v. Hall*, 82 U.S. 9 (1872); *Mut. Life Ins. Co. of New York v. Young's Adm'r*, 90 U.S. 85 (1874); *United States v. Bostwick*, 94 U.S. 53 (1876). Because Congress intended the 1905 Act to operate as a contract for the tribes to surrender certain property rights from their Reservation, the agreement required mutual consent to the exchange of property rights.

The 1905 Act required a majority of the adult male members of the tribes parties to the agreement to sign on to its terms before it could be ratified. 33 Stat. 1016, 1018. The Act required mutual consideration. *Id*. at 1018. Because the 1905 Act required that the tribes consent to diminishment of their Reservation, tribal intent is key to answering whether the 1905 Act diminished the Reservation.

Tribes are afforded a great deal of respect when analyzing whether a particular Congressional Act diminished a Reservation. 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). The traditional solicitude for 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. Tribal intent must be considered to effectuate the 1905 Act, and if intent amongst the tribes to diminish the Reservation cannot be ascertained, the Reservation cannot be said diminished.

II. The Northern Arapaho Tribe Did Not Consent To Diminishment

Before it could be ratified, the 1905 Act required tribal consent, in the form of a majority of the adult male tribal members' signatures. 33 Stat. 1016, 1016. For reasons discussed below, United States Indian Inspector James McLaughlin did not obtain majority consent from NAT. Because a majority did not consent, the tribal consent required by Congress to ratify the 1905 Act is missing.

On April 22, 1904, Inspector McLaughlin, as well as 282 of the 484 male adult Indians, over eighteen years of age, belonging on the Reservation signed the agreement. 33 Stat. 1016, 1019. Of 247 Shoshone men, 202 signed. LORETTA FOWLER, ARAPAHO POLITICS, 1851-1978 95 (University of Nebraska Press, 1982). Yet, McLaughlin succeeded in collecting only 80 out of 237 signatures from adult

male members of NAT. Letter from Inspector J. McLaughlin (Apr. 25, 1904) quoted in H.R. Rep. No. 3700, Part 1, 58th Cong. 3d. Sess. at 18.

Inspector McLaughlin conflated the signatures of the two tribes in reaching a majority. FOWLER, *supra* at 95. A majority of adult male Shoshone members signed the agreement but a majority of NAT adult males did not. *Id*.

Furthermore, many NAT members who signed would not have been considered adults and were not acting on behalf of the NAT government. *Id*. Thirty-three of the Northern Arapahos who signed were under 30 years of age, which was not considered adult from the Arapaho point of view. *Id*.

McLaughlin also ignored the hierarchical system of NAT. NAT functioned based on a complicated system of chieftainship. *Id*. at 68-69. Council chiefs, who could participate when Arapahos met to discuss matters affecting the tribe, gained recognition through war exploits and by demonstrating level-headedness, generosity, and the ability to establish one's credentials with government representatives. *Id*. Yet, many of the council chiefs withdrew from council during the discussions and did not sign. *Id*. at 95. Not only did McLaughlin fail to obtain signatures from a majority of adult male NAT members, but many of those who signed lacked authority to make decisions on behalf of NAT.

Congress mandated consent of the tribes in the 1905 Act. Congress specified that consent was to be reflected by obtaining the signatures of "a majority

of the male adult Indians parties hereto." 33 Stat. 1016, 1018. Because Congress mandated consent, it must attain consent by the process mandated, not a glossed-over substitute. Here, Inspector McLaughlin failed to accord the procedure Congress required. Rather than obtain a majority from each of the tribes, McLaughlin simply conflated votes from both tribes to declare tribal consent. That conflation provides no evidence that NAT consented to the diminishment of their Reservation, as otherwise required by Congress' purpose to the 1905 Act.

III. Tribal Intent to Diminish the Reservation Cannot Be Established

Even if NAT's less-than-a-majority vote is not determinative of the lack of tribal intent, tribal intent to diminish the Reservation cannot be ascertained. There is simply a lack of proof in the record to declare that both tribes intended that the Reservation be diminished.

Commenters supporting diminishment point to specific quotes made by some tribal members present during the negotiations which led to the 1905 Act, to argue that both tribes understood the agreement to diminish the Reservation. In discussing the sale price of the land, many tribal members countered the United States' proposal, which started at $1.50 per acre for the first two years, to set the price at $2.50. *See generally*, 1904 Minutes of Council Meeting (EPA-WR-000423-50). The commenters use this to argue both tribes understood they were forever ceding their interests in the lands, and hence the boundaries of the

Reservation would change. ENVIRONMENTAL PROTECTION AGENCY, EPA-WR-0012603, LEGAL ANALYSIS OF THE WIND RIVER INDIAN RESERVATION BOUNDARY, at 36 (2012). Discussion of sales price, however, does not indicate tribal consent to diminishment of their Reservation. *Id*. Portions of the disputed area were to be sold whether the Reservation was diminished or not. Historical discussions of sales price does not come close to determining that a majority of both tribes consented to their Reservation being diminished. *Id*.

Commenters also assert the tribes understood the 1905 Act agreement to be similar to the Thermopolis Purchase, which did change the boundaries of the Reservation. *Id*. at 37. Without more, however, that Inspector McLaughlin negotiated both the Thermopolis agreement and the 1905 Act is without analytic significance as to Congressional intent to require tribal consent under the 1905 Act.[3] Even Inspector McLaughlin understood that. As Inspector McLaughlin explained to the tribes, "[t]he two agreements are entirely distinct and separate from each other, and [under the 1905 Act] the government simply acted as trustee for disposal of the land north of the Big Wind River . . ." Minutes of Council of Inspector McLaughlin with the Shoshone and Arapaho Indians of the Wind River

[3] Reverend Sherman Coolidge, an Arapaho tribe member: "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 Arapaho's and Shoshones." *Id*. at 12.

Reservation, Wyoming at Fort Washakie, Wyoming (Aug. 14, 1922) at 5 (EPA-WR-001681).

The handful of quotes by some individual tribal members supposedly indicating their beliefs that the Reservation would be diminished, do not establish tribal consent to diminishment.[4] The quotes do not discuss whether the agreement was to diminish the Reservation or simply open it for homesteading. As the EPA has previously concluded, "the tribal references … do not indicate a clear understanding that the exterior boundaries of their Reservation would be altered." LEGAL ANALYSIS OF THE WIND RIVER INDIAN RESERVATION, *supra* at 37. None of the quotes of tribal members indicate a clear understanding the boundaries of the Reservation would forever change instead of simply being opened for homesteading.

[4] 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 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-000439). Reverend Sherman Coolidge, Arapaho: "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 Arapahos 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 is something we are parting with forever, and can never recover again." *Id*. at 17 (EPA-WR-000439).

The position of the majority of the tribal members reveals they likely did not understand the agreement to be as the State of Wyoming argues today. During turn of the century negotiations, most tribal members were not fluent in English. *Id*. at 30. The tribes admit that the Eastern Shoshone Tribe's understanding of the 1905 Act provisions was limited. "At the time of the making of the Treaty of 1868 the [Shoshone] tribe of Indians were full-blood blanket Indians, unable to read, write, speak, or understand English, with little previous contact with whites . . . Practically the same condition as to their [English] 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. CI. 331, Findings ¶3, (1937), aff'd, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938). Because many tribal members did not understand the agreement, they could not have possessed the intent to diminish.

The payment provision of the 1905 Act evinces a lack of tribal intent to diminish the Reservation, as well. The 1905 Act did not provide for a fixed sum certain payment to the tribes in exchange for the lands in the disputed area. 33 Stat. 1016, 1019-20. Instead, the 1905 Act predicated payment to the tribes on prospective sales to homesteaders, and the United States expressly declined to commit to conduct any such sales. *Id*. at 1020-21. The EPA Legal Analysis argues, in regard to the payment, "Given these provisions, an interpretation of 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." LEGAL ANALYSIS OF THE WIND RIVER INDIAN RESERVATION BOUNDARY, *supra* at 32-33. The legal analysis argues that such an interpretation is 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 Tribe of Indians of Oklahoma v. State of Kansas*, 862 F.2d 1415, 148 (1988), citing *Choctaw Nation of Indians v. U.S.*, 318 U.S. 432 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85(1942)).

If the payment provision of the 1905 Act evinces a lack of Congressional intent to diminish the Reservation, it also evinces a lack of intent to diminish the Reservation amongst the tribes for much the same reason. Tribal intent could not have been to reduce the Reservation without any certainty of payment. This would infer the tribes intended to surrender portions of the Reservation without compensation.

Following the 1905 Act, non-Indian settlement in the area was generally unsuccessful. LEGAL ANALYSIS OF THE WIND RIVER INDIAN RESERVATION

BOUNDARY, *supra* at 53. Only approximately 196,360 of the 1,438,633.66 acres in the disputed area were disposed of to non-Indians (or approximately 13.6%). *Id.* Subsequent history confirmed the payment provision was not a good deal for the tribes. It is doubtful the tribes intended to enter into an agreement which did not guarantee compensation, especially considering large portions of the disputed area ultimately were not sold.

Viewing the payment provision in the terms the tribes understood them, tribal intent to diminish the Reservation without payment cannot be inferred. The record does not indicate an identifiable intent on the part of the tribes to diminish the Reservation in the agreement which led to the 1905 Act. If anything, the payment provision indicates the tribes intended that the boundaries of the Reservation remain undiminished. It seems quite likely in hindsight, that the majority of the tribal members simply did not understand the agreement.

In the absence of evidence the majorities of both tribes intended the 1905 Act to diminish their Reservation, Congress' purpose cannot be properly said to have intended diminishment of the Reservation. The Court should uphold the EPA's boundary determination.

CONCLUSION

Congress placed tribal intent at issue by requiring a majority of both tribes to sign off on the Act. Because the tribal intent of both tribes is woven into the very

fabric of Congress' intent, the Court's determination of their intent to diminish the Reservation is required before the purpose of Congress can be determined.

Tribal intent to diminish cannot be established because a majority of adult male NAT members did not sign the agreement and because the record simply does not establish a tribal intent to diminishment. Because tribal intent to diminish is lacking, the Reservation should not be diminished and the decision of the EPA should be upheld.

Respectfully submitted this 13th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 3,825 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The Brief of Appellant was filed using the CM/ECF electronic filing system. The ECF submission was scanned for viruses using the most recent version of Microsoft System Center Endpoint Security, last updated on April 13, 2015 and, according to the program is free of viruses.

By /s/ *Diane E. Courselle*
Diane E. Courselle
Faculty Director, Defender Aid Program
Attorney for *Amicus Curiae* Andrew Yellowbear

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By /s/ *Diane E. Courselle*
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Attorney for *Amicus Curiae* Andrew Yellowbear