

## MEMORANDUM

**TO:** DAOGTL  
**FROM:** Sarah Sorum  
**DATE:** March 6, 2017  
**RE:** Wyoming Update

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*Wyoming v. U.S. E.P.A.*, Nos. 14-9512, 2017 WL 694481 (10th Cir. Feb. 22, 2017)

This case deals with tribal jurisdiction on historic reservation land north of the Wind River. The dispute stemmed from an application by the Eastern Shoshone and Northern Arapaho Tribes for joint authority to administer certain non-regulatory programs under the Clean Air Act. The application described the Wind River Reservation using the original boundaries as set in 1868, and did not account for a subsequent Act of Congress in 1905 which opened Reservation land for sale to non-Indians. The EPA granted the application and the State of Wyoming appealed the boundary determination directly to the Tenth Circuit.

At issue was whether or not the 1905 Act was intended to diminish the size of the Reservation. Using a “well-settled approach” to the issue as outlined in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), Judge Tymkovich (writing on behalf of the majority) held that it was, such that the land at issue now belongs to the State of Wyoming rather than the Tribes. The *Solem* analysis requires the court to look to 1) the text of the statute, 2) the circumstances surrounding the passage of the act, and 3) to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement.

Under the first factor, the court noted that the 1905 Agreement states that the Tribes “hereby cede, grant, and relinquish to the United States, all right, title, and interest” in the lands. EPA argued that because the federal government retained trusteeship over the lands on behalf of the Tribes until the parcels were sold, the 1905 Agreement effected no change to the Reservation’s boundaries until the land was sold. The court did not agree, holding that prior case law shows that “it is clear trust status can exist even if a reservation has been diminished.” EPA also pointed to the fact that the 1905 Act did not specify a lump-sum payment, but rather provided for payment only as parcels were sold. The court again disagreed, finding that the mechanism of payment was irrelevant.

Under the second factor, the court recited the lengthy history of federal government dealings with Native American Tribes, and specifically the legislative history and negotiations leading up

to the 1905 Act. The court found that numerous statements in the legislative history referring to the diminishment of the Reservation supported its holding.

Finally, under the third factor, the court looked at subsequent treatment of the area, both by inhabitants and by Congress, and found that “on balance the subsequent treatment of the ceded lands neither bolsters nor undermines our conclusion that the 1905 Act diminished the Wind River Reservation.”

Judge Lucero dissented and called the opinion a “new low-water mark in diminishment jurisprudence.” Using the same three-step *Solem* analysis, he argued that because the 1905 Act did not provide for a certain-sum payment, and because the lands remained held in trust, they remained Indian lands. He also commented on the “irrationality” of the third factor, noting that “[t]he demographic makeup of an area decades or more following the passage of a statute cannot possibly tell us anything about the thinking of a prior Congress.”

The Northern Arapaho Tribe has stated that it will appeal the decision to the full Tenth Circuit.