NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

ANDREW JOHN YELLOWBEAR, JR.

Petitioner,

v.

ATTORNEY GENERAL OF WYOMING, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
Tenth Circuit Court Of Appeals

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Andrew John Yellowbear, by and through his counsel, James Alexander Drummond, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in applying for a Writ of Certiorari. In support of this request, Petitioner states that he is indigent, and that he is

unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court. His declaration of indigency in support of this motion is attached immediately below.

WHEREFORE, the Petitioner, Andrew John Yellowbear, Jr., respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

_____

JAMES ALEXANDER DRUMMOND
Jim Drummond Law Firm, PLC
220 1/2 E. Main Street, Suite 2
Norman, OK 73069-1350
(405) 310-4040

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PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

JAMES ALEXANDER DRUMMOND
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220 ½ E. Main Street, Suite 2
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(405) 310-4040

QUESTIONS PRESENTED FOR REVIEW

Andrew John Yellowbear, Jr., a member of the Northern Arapaho Tribe, was tried for murder, convicted, and sentenced to life imprisonment without possibility of parole by the State of Wyoming for a crime which occurred within the Wind River Reservation, which has never been disestablished. The federal government has exclusive jurisdiction over major crimes committed by Indians in "Indian country." 18 U.S.C. § 1153. "Indian country" includes "all Indian allotments, the Indian titles to which have not been extinguished" and "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(c), (a).

The Questions Presented are:

1. Whether the rescission and voidance of extradition and the declaratory judgment of the Shoshone and Arapaho Tribal Court of the Wind River Reservation operated to preclude state jurisdiction to try Mr. Yellowbear for murder.

2. Whether the crime was committed in Indian Country because the Wind River Reservation, though opened for settlement, has never been disestablished, such that by Act of Congress, only a federal court had or has jurisdiction to try Mr. Yellowbear for its commission.

3. Whether the doctrine of issue preclusion means that the situs of the crime has been finally adjudicated to be Indian County by the decision of the Supreme Court of Wyoming in *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and all Other Sources*, 753 P.2d 76 (Wyo. 1988) [hereafter "Big Horn I"].

4. Whether the District Court erred in denying an evidentiary hearing on the issue of whether the situs of the crime was Indian Country on the basis of improper deference to the state court ruling, through misapplication of the provisions of 28 U.S.C. § 2254(d)(1) in violation of the Supremacy Clause, and subsequently through a clearly erroneous conclusion that the State Court ruling was "objectively reasonable," such that merits review should have been undertaken rather than precluded.

PARTIES TO THE PROCEEDINGS

In addition to the party named in the caption to the case, Sheriff Jack "Skip" Hornecker, sheriff of Fremont County, Wyoming, was named in the Tenth Circuit proceeding as a party "in his official capacity as Supervisor, Fremont County Detention Center." As Mr. Yellowbear is no longer in Sheriff Hornecker's custody, he is not named here in the case caption.

CORPORATE DISCLOSURE STATEMENT

No corporate entities are parties to this lawsuit.

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PRAYER

Petitioner, Andrew John Yellowbear, Jr., prays that a Writ of Certiorari be issued to review the decision of the Tenth Circuit Court of Appeals in Case No. 09-8069, decided May 25, 2010.

OPINION BELOW

The decision of the Tenth Circuit Court of Appeals, *Yellowbear v. Wyoming Attorney General*, 380 Fed.Appx. 740, 2010 WL 2053516, decided May 25, 2010, is found in the Appendix hereto as A1.

JURISDICTION

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). This petition is being filed by the extended deadline of December 3, 2010, set by Justice Sonia Sotomayor, by order of September 23, 2010 granting Application No. 10A307.

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The following Constitutional provisions and statutes are involved in review of this case:

> **Article VI, Clause 2, United States Constitution.** This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18 U.S.C. § 1151. Indian Country Defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and © all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § **1153**.Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

28 U.S.C. § 2254. State custody; remedies in Federal courts

***

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> ***
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> ***
>
> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Act of Congress on March 3, 1905 (33 Stat. 1016)

Not replicated here due to length of statute; specific provisions cited in petition.

STATEMENT OF THE CASE AND OF FACTS PERTINENT TO ISSUES ON APPEAL

A. State Trial: Mr. Yellowbear was convicted of first degree murder in the death of his daughter on April 1, 2006, and was sentenced to life imprisonment on June 1, 2006. His attorney filed pre-trial motions challenging the State of Wyoming's subject matter and personal jurisdiction in the case, but these motions were denied on January 31, 2006. Mr. Yellowbear petitioned the Wyoming Supreme Court for review and a stay of proceedings, but requested relief was denied.

The Supreme Court of Wyoming affirmed his conviction, in *Yellowbear v. State,*

174 P.3d 1270 (Wyo. 2008). That decision specifically found that Mr. Yellowbear's daughter's death did not occur in Indian country, and that the State of Wyoming thus had jurisdiction rather than the United States pursuant to 18 U.S.C. § 1153.

B. The first pre-trial § 2241 Motion: Ten months before the trial began Mr. Yellowbear, moving *pro se*, challenged the jurisdiction of the State of Wyoming to try him, arguing that only the federal government had jurisdiction. The District Court dismissed his motion because 18 U.S.C. § 2241 pre-conviction relief is available only when State remedies have been exhausted. The Tenth Circuit agreed, in *Yellowbear v. Wyoming Attorney General*, Case No. 04-8120, 130 Fed.Appx. 276 (10th Cir. 2005), stating that even though § 2241 has no explicit exhaustion requirement, its jurisprudence had established exhaustion as a prerequisite.

C. The second pre-trial § 2241Motion: Just before the end of his trial (April 1, 2006) Mr. Yellowbear filed a second motion under § 2241 on March 27, 2006. Doc. 1. Four days later he was convicted. The District Court denied this motion again as unripe, Doc. 35, after denying an intermittent stay of state proceedings, observing that Mr. Yellowbear had not exhausted his state appeal and/or post-conviction relief application. The District Court assumed that Wyoming had the jurisdiction required to determine whether state courts had jurisdiction or were precluded from jurisdiction by 18 U.S.C. §§ 1151 and 1153, and cited certain state court cases holding that

Riverton, Wyoming, was not within the Wind River Reservation. The District Court concluded further that the comity mandated by *Younger v. Harris*, 401 U.S. 37 (1971) required abstention from intervening to suspend state appellate proceedings.

D. The Tenth Circuit Ruling on Mr. Yellowbear's appeal from the Order in Doc. 35: On March 21, 2008, the Tenth Circuit reversed and remanded on appeal from the District Court decision of June 9, 2006, because the Supreme Court of Wyoming in the interim had affirmed Mr. Yellowbear's conviction, 174 P.3d 1270 (Wyo. 2008)(January 14, 2008), and his state appeals were then exhausted. Because the claims of Mr. Yellowbear were now post-conviction, the Tenth Circuit afforded him the opportunity to recharacterize his Petition in the District Court as a § 2254 petition. The mandate was filed in the District Court as Doc. 56 on May 13, 2008. On July 11, 2008, Mr. Yellowbear through counsel filed his § 2254 motion, Doc. 78, with eight (8) attachments.

E. The District Court litigation of the recharacterized § 2254 Petition: On July 23, 2009, the District Court denied Mr. Yellowbear's § 2254 petition and his motion for summary judgment, while granting Respondents' cross-motion for summary judgment. Doc. 147. It entered judgment accordingly. Doc. 148. The District Judge refused to rule *de novo* or hold an evidentiary hearing because it decided the state court could determine whether it has jurisdiction as a matter of state law and

therefore § 2254(d) restrictions on AEDPA[1] review applied; and held that the Supreme Court of Wyoming's decision was entitled to AEDPA deference because it was not an unreasonable application of federal law. The District Court granted its Certificate of Appealability on July 28, 2009, Doc. 152.

F. The Opinion below. The Tenth Circuit affirmed the decision of the District Court of Wyoming in an unpublished option on May 25, 2010. It agreed with the District Court denial of Mr. Yellowbear's claims that (1) review of Mr. Yellowbear's jurisdictional claim is constrained by § 2254(d)(1); (2) Mr. Yellowbear was not entitled to habeas relief under § 2254(d)(1) because the Wyoming Supreme Court's decision was not "an unreasonable application of" Supreme Court case law; and (3) Mr. Yellowbear was not entitled to an evidentiary hearing under § 2254(e).

[1]Abbreviated acronym for the Anti-Terrorism and Effective Death Penalty Act of which § 2254 is a provision.

REASONS FOR GRANTING THE WRIT

The decision of the Panel conflicts with the analysis prescribed by *Hagen v. Utah,* 510 U.S. 399 (1994), for questions of disestablishment of reservations. There was no express language disestablishing the Wind River Reservation, no sum certain was paid for tribal lands, no lands were restored to the public domain, and contemporaneous demographics dd not support disestablishment.[2] The decision also conflicts with holdings in the following cases: *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *Solem v. Barnett*, 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980); *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985).

The decision of the Panel further conflicts with the decisions of other United States Courts of Appeals (a significant Rule 10 factor), including *U.S. v. Webb,* 219 F.3d 1127 (9th Circ. 2000), and the recent decision in *Yankton Sioux Tribe v.*

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[2] In any event, as to current demographics, a recent decision of the United States District Court of Wyoming, Hon. Alan B. Johnson, has found that the Indian population has grown 41.68% between 1980 and 2000, both in numbers and percentage of population, while the majority non-white Hispanic population has declined by 20.97%. *Large v. Fremont County, Wyoming*, 2010 WL 1737640, dec. 4/29/10. This certainly distinguishes this case from *Osage Nation v. Irby, et al.*, 597 F.3d 1117 (10th Cir. 2010), decided by this Court, as do all the other *Hagen* analysis factors.

Podhradsky, 606 F.3d 994, 1007 (8th Cir. 2010) which under similar historical background and facts held:

> Section 1151(a) thus separates the concept of jurisdiction from the concept of ownership. In doing so Congress sought both to resolve inconsistencies in prior case law, see 18 U.S.C. § 1151 Historical and Revision Notes, and to maintain jurisdictional continuity where reservation lands had been patented in fee, see *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Prior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished. See, e.g., *Clairmont v. United States*, 225 U.S. 551, 558, 32 S.Ct. 787, 56 L.Ed. 1201 (1912). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership.

Whether the Wind River Reservation is still Indian Country is hugely implicated in this case. This invokes the Rule 10 factor that a United States Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." In this case the state court decision is that of the Wyoming Supreme Court in *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and all Other Sources*, 753 P.2d 76 (Wyo. 1988)(hereafter "*Big Horn I*"), which held that the Wind River Reservation has never been disestablished. There is a tremendous confusion in the courts between the terms "diminishment" and "disestablishment," such that the opening for settlement has been conflated with disestablishment as Indian Country.

Diminishment refers only to lands alienated to non-Indians. This crucial distinction was noted by the decision of the Eighth Circuit in *Yankton Sioux Tribe v. Podhradsky*, *supra*: "In an earlier stage of the case we held that the Tribe's 1894 cession of certain land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. . . . *Gaffey II*[3] squarely held that the Yankton Sioux Reservation was never disestablished and that, although diminished, the reservation continues to exist." *Podhradsky* at 997, and 1004. The Wyoming Supreme Court conflated the two terms and thus erred.

This case, and the related pending case of *Northern Arapaho Tribe v. Harnsberger,* 10th Circuit Case No. 09-8098 (now under mediation through the Tenth Circuit mediation process), involve that identical issue. Because the issue of disestablishment is fact-intensive as to each Congressional action and each tribal reservation does not diminish the importance of the issue in every situation; and the declination of petitions for certiorari because they are "factbound" should not here apply in a situation of such broad import.

Further, there is strong evidence in this case that there is a "patchwork" exercise of federal jurisdiction depending on the agency or law in play in Indian Country determinations. The Environmental Protection agency certainly plays a large role on

[3] *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999).

the Wind River reservation as to water quality, as does the Secretary of the Interior and the Bureau of Land Management as to mineral rights and exploration. This Court has held that federal jurisdiction to regulate liquor in Indian Country under 18 U.S.C. § 1154(c) exists on the Wind River Reservation even on land held in fee by non-tribal members because the land is within an Indian community. *U.S. v. Masurie*, 419 U.S. 544 (1975). In § 1154(c) Congress specifically exempted fee land in non-Indian communities from the liquor laws, but no such exclusion of non-Indian communities exists here as to criminal proceedings for murder under § 1153. If the Wind River Reservation is Indian Country for one purpose, it should be Indian country for another Congressional purpose unless as in § 1154 Congress acts to delegate authority to the states or the tribes. Congress has not done so as to murders committed in Indian Country. This is a further clarification needed in the precedential law of this Court.

The issue of whether the crime occurred in Indian Country is inextricably bound with the issue of whether 28 U.S.C. § 2254(d)(1) applies when a state court usurps federal jurisdiction exclusively conferred on federal courts in murder cases by 18 U.S.C. § 1153. The Tenth Circuit has confused the issue of § 2254(d) deference by citing a case where Courts of Appeal have been willing to accord AEDPA deference in cases where the question involves which *state* court has jurisdiction according to *state* law. *Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir. 2004) is cited by the

decision below in support of according AEDPA deference to a state decision on whether jurisdiction is reserved to the federal government, but *Lambert* involved deferring to a state court decision on which *state* court had jurisdiction. *Yellowbear* at 742. Similarly, the Tenth Circuit cited *Burgess v. Watters*, 467 F.3d 676, 681 (7th Cir. 2006) as an occasion for AEDPA deference, but this inapposite case involved a Congressional delegation under Public Law 280, , 67 Stat. 588 (1953), of criminal proceedings to the state courts of enumerated States which did not include Wyoming. *Id. Burgess* considered whether the specific Congressional delegation of criminal cases under Public Law 280 included civil commitment of sexually violent offenders. Neither of these cases holds that a state court decision to deprive the federal government of its exclusive jurisdiction under 18 U.S.C. § 1153 absent a specific delegation is entitled to AEDPA deference.

"[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 129 S.Ct. 2108, 2114 -2115 (2009), cited in Opening Brief at 17.

Federal exclusive jurisdiction under § 1153 is a crucial issue and right of tribal members, and there is a presumption against disestablishment in such cases. "Once a block of land is set aside for an Indian reservation and no matter what happens to the

title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Barnett*, 465 U.S. at 470.

The usurpation of exclusive federal jurisdiction by a state should not be allowed to stand based on AEDPA deference. The language of 28 U.S.C. § 2254(b)(1)(B)(ii) provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . ii) circumstances exist that render such [State corrective] process ineffective to protect the rights of the applicant." Because Wyoming had no valid process to protect Mr. Yellowbear's right to be tried under federal jurisdiction pursuant to § 1153, its state processes were always ineffective to protect Mr. Yellowbear's rights under §§ 1151 and 1153. To subject him to state trial with no federal adjudication of his claim under § 1153 eviscerates those provisions if they are subject to AEDPA deference because they may be wrong but reasonable or because this Court has not ruled specifically on that issue.

Although state courts can clearly decide some federal questions, when the issue is exclusive federal jurisdiction, the risk of harm by circumventing the Congressional mandate in §§ 1151 and 1153 should require cession of jurisdiction to the federal courts. Jurisdiction here is a special circumstance and § 2254(b) should be read so as to harmonize § 2254(d) and § 1153. In this sense the supervisory power of this Court

under Rule 10 is also implicated because the Tenth Circuit has departed from judicial proceedings by according deference to such an irremediable state court usurpation of federal court jurisdiction and violation of Article VI, Clause 2, U.S. Constitution – the Supremacy Clause. This usurpation was aggravated further by ignoring the tribal court's rescission of the extradition order, and order sought because of Wyoming recognition of tribal jurisdiction but improvidently granted and later rescinded.

Since only state rulings flowing from competent jurisdiction are entitled to AEDPA deference, such deference is inappropriate unless *federal* court has first determined whether it has preclusive and exclusive jurisdiction under 18 U.S.C. § 1153. Applying AEDPA *before* this exclusivity issue is determined unconstitutionally puts a procedural bar cart before a jurisdictional horse, in violation of the Supremacy Clause and the due process clause. A state court cannot make determinations over the extent of federal jurisdiction where it is properly challenged, as here. And 18 U.S.C. § 1151 *et seq*., applies to questions of civil and criminal jurisdiction; it is universally applicable and falls under the Supremacy Clause analysis as a matter solely to be determined in federal fora.[4]

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[4]*DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 427 at n.2 (1975), *citing McClanahan v. Arizona State Tax Comm'n, supra,* 411 U.S. 164, 177-178, n.17 (1973) *Kennerly v. District Court of Montana,* 400 U.S. 423, 424, n. 1 (1971); *Williams v. Lee,* 358 U.S. 217, 220-222, nn. 5, 6, and 10 (1959).

I. The Wyoming Courts should not have tried Mr. Yellowbear in state court because the order of extradition was rescinded and thereby the tribal court asserted jurisdiction on behalf of Mr. Yellowbear, effectively invoking § 1153.

The Shoshone and Arapaho Tribal Court found that Wyoming was without criminal jurisdiction in Riverton by one order, R.A. Vol. V, at 2829, and on March 29th, 2006, rescinded Mr. Yellowbear's improvidently granted extradition Order of July 7, 2004, with another order, declaring the Order of Extradition void. The Indian Major Crimes Act designates tribal courts as jurisdiction for some crimes, and the federal courts for others. Federal courts handle murder cases, but the tribal court had power to deny extradition, and a part-time judge granted extradition in an order rescinded later because it was improvidently granted. Clearly their was no waiver in the end from the tribe as to the issue of jurisdiction.

This implicates the jurisdiction reserved to federal courts or tribes under § 1153. Wyoming was served with the notice of the March 29, 2006, hearing and did not appear. On December 5, 2005, the State through the Fremont County Attorney, argued it could try Mr. Yellowbear because state law gave Wyoming jurisdiction over the person of Mr. Yellowbear even if extradition was ignored or illegally obtained. This argument however ignores the superlative Congressional exclusive jurisdiction rule in § 1153. After the rescission of extradition Wyoming had no right under § 1153 to

try Mr. Yellowbear. Doing so set a dangerous precedent replete with disregard of both § 1153 and tribal sovereignty.

II. The situs of events alleged to be criminal was Indian Country.

Contrary to the averment of the Tenth Circuit Court of Appeals that Mr. Yellowbear "has not presented to this court any argument calling into question the correctness" of the "Wyoming Supreme Court's rejection of his jurisdictional argument," *Yellowbear* at 743, Mr. Yellowbear demonstrated that the Wind River Reservation was Indian Country utilizing the analysis propounded by this Court in *Hagen v. Utah,* 510 U.S. 399, 410-411 (1994):

> In determining whether a reservation has been diminished, "[o]ur precedents in the area have established a fairly clean analytical structure," [] directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. [] We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. [] Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." [All above references and omitted citations are to *Solem v. Bartlett*, 465 U.S. 463, 465 (1984)] Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. [] (" '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit' "), (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 693, 116 L.Ed.2d 687 (1992) (internal quotation marks omitted)).

Mr. Yellowbear demonstrated in his briefing that there was no statutory language evidencing any Congressional intent to disestablish the Wind River Reservation in the 1905 Act or during the discussion and McLaughlin Agreement contemporaneous with the Act's passage. He demonstrated that there was no sum certain payment to the tribes, but that the land to be opened was held in trust pending sale. In *Hagen* Justice O'Connor looked at the express language of the pertinent Act and then stated that express language to diminish, coupled with compensation. would "establish a nearly conclusive presumption that the reservation had been diminished," though stating that the lack of compensation would not settle the issue. *Hagen* at 411. In *Hagen* there was $70,000+ in compensation paid through the Act's language; in the 1905 Act here, no compensation was paid for the land. There was also no contemporaneous evidence or express language suggestion diminishment or disestablishment. In *Hagen* the Court found that President Theodore Roosevelt in 1902 had announced in 1902 that the lands ceded by the tribe were restored to the public domain. In the Wind River Reservation's 1905 Act, there was no language restoring lands to the public domain.

The Wyoming Supreme Court decision looked only to the third *Hagen* factor – later demographics – "who moved onto the land" – in making its determination. That Court, as well as the Tenth Circuit holding below which adopted the Wyoming

decision in his case, totally ignored the lack of express language of diminishment or disestablishment, and the holding of lands in trust for sale rather than sum certain compensation. Both decisions below also totally failed to look at the historical context surrounding the 1905 Act, and totally ignored the exhaustive report of ex-Congressman Teno Roncalio and holding based on that report in the 1988 Big Horn I case, *supra*, which clearly demonstrates that the Wind River Reservation is Indian Country and that it has never been disestablished. In his briefing Mr. Yellowbear demonstrated meticulously why Wyoming was wrong. The Tenth Circuit did not address his arguments and indeed overlooked the existence of his arguments.

Application of the *Hagen* factors is essential in determining whether a reservation is still Indian Country and whether § 1153 is to be honored and enforced. Mr. Yellowbear's case is an extreme example, perhaps the most extrreme example, of flouting this Court's jurisprudence in *Hagen*, in *Solem*, and in its clearly established jurisprudence in *Mattz v. Arnett*, 412 U.S. 481 [] (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). " 'The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." [*quoting Solem*, 465 U.S., at 469].' " *Hagen*, at 410. Justice O'Connor makes clear tyhat "[i]t is **settled**

law that some surplus land Acts diminished reservations,[5] and other surplus land acts did not. . . .[6] Wind River Reservation clear fits the conclusions of *Solem*, *Seymour*, and *Mattz.*

Thus everything in a case involving Indian Country issues requires a fact-specific determination, and here the Tenth Circuit ruling made an unreasonable determination of the facts and made also an unreasonable ruling contravening the established precedents of this Court. The Tenth Circuit also ignored its own precedents such as *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 683 (10th Cir. 1980), which found that the City of Riverton, where the events here alleged to be criminal occurred, "are within [the reservation's] boundaries." Thus the decision of the U.S. District Court that Wyoming's decision was objectively reasonable is in error under the clearly established precedents of the Supreme Court.[7]

The issue whether Wind River Reservation was disestablished was decided by Wyoming in *Big Horn I*. It is being litigated in the Tenth Circuit in *Northern Arapaho*

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[5] Citing , see., e.g., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

[6] Citing *Mattz v. Arnett* and *Seymour v. Superintendent*, *supra.*

[7] Indeed, the District Judge below in Mr. Yellowbear's case, Hon. Clarence A. Brimmer, found in his Order of January 14, 2004, Doc. 123, in *U.S. v. Jenkins,* 99-CR-105, that "the majority of the City of Riverton is within the boundaries of [the Wind River] reservation."

Tribe v. Harnsberger, No. 09-8098. The issues there dovetail with the issues here, and the Plaintiff in 09-8098 asked to tender an amicus brief in Mr. Yellowbear's case in support of his Indian Country argument. Whether or not AEDPA applies, the decision below should be examined here as a crucial matter not only in the interest of justice for Mr. Yellowbear, but in the interest of the jurisprudence of Indian Country issues and the interest in ensuring that the laws are construed in favor of Indians where an issue arises as to their rights guaranteed by provisions such as § 1153.

III. Issue preclusion, née *res judicata*, mandates that jurisdiction in this case lies with the federal government because the situs was Indian Country.

The Tenth Circuit erred in stating, in Footnote 4, 380 Fed. Appx. at 743, that Mr. Yellowbear never raised the issue of Issue Preclusion in his criminal proceedings. In a state motion hearing conducted February 23, 2006, counsel Marion Yoder, for Mr. Yellowbear, explicitly raised the issue of res judicata and collateral estoppel:

> And I would say that the State has got both a collateral estoppel problem and a res judicata problem on its hands. If they want to come in now, the county . . . their superior sovereign [the State of Wyoming per the Supreme Court in *Big Horn I*] has already beaten them to the punch on this issue. The State has already said, Yep, here is the Wind River Reservation. And I think they are estopped now from trying to have another take at that. . . .
>
> ***
>
> But it's been litigated. . . . and the state lost out on that. . . . It's not like they didn't fight it.

Transcript, Hearing of 2/23/2006, at 105 and 106. Thus the issue was exhausted at the

state level, and indeed the very ruling implicitly exhausted the issue. In the appeal to the Wyoming Supreme Court, the ruling in *Big Horn I* was extensively discussed as controlling precedent.[8] Wyoming is bound by *Big Horn I* because the issue

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[8]"The State in the instant case may argue the parties' stipulation to the Reservation's exterior boundaries in Big Horn I means the issue was not fully litigated and thus cannot be relied upon. While it is true the parties stipulated to the exterior boundaries of the Reservation - which encompassed the City of Riverton . . . the disestablishment issue was fully litigated. It was litigated in hearings before the trial court in 1980. It was argued by the parties in briefs and other filings before the Special Master, the district court, and this Court.[FN6] Furthermore. the purpose of the stipulation was to eliminate the need to argue Indian reserved water rights outside the stipulated boundaries, which this Court recognized. *Big Horn I*, 753 P.2d at 85. Thus the stipulation, the Special Master's Report, and this Court's opinion in Big Horn are applicable to a discussion of the jurisdictional issue in this case.

"In any event, "the question of whether the place where the crime occurred is a part of an Indian reservation and therefore Indian country... depends upon the interpretation and application of federal law...." *Seymour v. Superintendent*, 368 U.S. (1962) [] ("The treaties and laws of the United States are as much a part of the laws of this state as the statutes of this state."). Analysis and application of that law leads to the conclusion the Wind River Indian Reservation has not been diminished, and therefore the State was without jurisdiction to prosecute Mr. Yellowbear.

> "FN6. See generally *Big Horn I*, 753 P.2d 76, Brief of Appellant State of Wyoming (Type One Issues), Statement of the Issues ("Whether, as a matter of law, the ceded portion of the Wind River Reservation was disestablished effecting a termination of off-reservation rights) and pp. 106-21; Brief of the Shoshone and Northern Arapaho Tribes as Appellees (Type One Issues), pp. 88-93; Brief of Appellee the United States of America in Response, pp. 94-102."

preclusion test was clearly met under *Ashe v. Swenson*, 396 U.S. 436, 442 (1970):

> 1) The Indian country issue decided in *Big Horn I*, as has been shown by reference to *Solem* and *Big Horn I*, is **identical** to the issue raised here in Mr. Yellowbear's case.
>
> 2) *Big Horn I* decided **on the merits** that the Riverton land in question remained within Indian country.
>
> 3) The State of Wyoming, of which Respondents are official agents, was a **party** in Big Horn 1.
>
> 4) Wyoming had a **full and fair opportunity to litigate** the Indian country issue in *Big Horn I.*

Preclusion prevents a party to litigation in a case from re-litigating a determination of an issue which is part of the holding in that matter. *Taylor v. Sturgell*, 533 U.S. 880, 892 (2008). Preclusion affects parties similarly to the way *stare decisis* affects courts. In *Big Horn I* the litigants included the U.S. Government, the State of Wyoming and the City of Riverton as well as the Northern Arapaho Tribe to which Mr. Yellowbear belongs.[9] Thus the state decision, based on the exhaustive report of Congressman Roncalio, qualifies as a binding decision under issue preclusion doctrine, an issue Mr. Yellowbear raised in his state criminal proceedings.

Jurisdictionally, *Solem* derived its initial jurisdiction from having been federal litigation in the District Court of South Dakota, and *Big Horn I* derived its jurisdiction

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[9] Certification of Mr. Yellowbear's tribal membership is attached in the Appendix hereto as A8.

by waiver of immunity under the McCarran Act, effectively delegating the issue to Wyoming state courts. Both Courts held "title" to jurisdiction derived by different sorts of Congressional action, and thus the *Big Horn I* determination **retains its federal jurisdictional character** and was not a usurpation of jurisdiction as has occurred in Mr. Yellowbear's case, and as occurred in the apocryphal cases of *Blackburn v. State*, 357 P.2d 174 (Wyo. 1960)[10] and *State v. Moss*, 471 P.2d 333 (Wyo. 1970).

Since *Big Horn I* effectively and implicitly overruled both Blackburn *and* Moss, it is error for any court to hold these cases were authorized *ab initio* to determine whether state courts had jurisdiction under § 1153. Both cases determined that the crimes alleged took place in 1905 Act area and held these areas were no longer Indian country, and both ruled on the same issue as in the later (1988) cases of *Big Horn I*, which thus effectively overruled those determinations on the precise issue. The state courts in *Blackburn* and *Moss* had no competent jurisdiction to determine whether the United States had retained jurisdiction. The goal-oriented intent of the Wyoming

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[10] The Wyoming Supreme Court in affirming Mr. Yellowbear's conviction acknowledged that the facts of *Blackburn* "prevent it from compelling a particular result in the instant case" because "the crime scene . . .was not located within the City of Riverton and . . .subsequent acts of Congress were considered by the Court in determining congressional intent . . . ." *Yellowbear,* 174 P.3d at 1283. The Court in *Moss* also disavowed *Blackburn* as precedent, 471 P.2d at 337.

Supreme Court in *Blackburn* was hardly concealed: "If the contention of counsel for appellants were correct, then the Town of Riverton, with nearly 7,000 population, close to the Indian reservation, and where many Indians congregate, would still be Indian country, *which from the standpoint of law enforcement would be unfortunate. This, we think, may be considered in order to arrive at the intent of Congress." Blackburn* at 178. [Italics supplied] This also anticipated, pre-*Hagen*, the Tenth Circuit error here in looking only at the demographic factor and ignoring express Congressional Language and the issue of compensation, among others. These decisions support self-serving demographic analysis while doing damage to § 1153 protections and presumptions in favor of Indians, and violate the clearly established Supreme Court precedents cited above as well as the spirit of *U.S. v. Kagama* 118 U.S. 375, 383-385 (1886): "[b]ecause of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies." *Kagama* directly concerned whether § 1153 was constitutional. Construction of laws pertaining to Indians are to be interpreted to benefit Indians.[11]

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[11]*South Carolina v. Catawba Indian Tribe*, *Inc.*, 476 U.S. 498, 526 (1986), referring to "the 'eminently sound and vital canon' that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, *quoting Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-656, and FN 7 (1976). The quoted case also noted that " congressional authority, as well as "Congress' unique obligation toward the Indians," []underlies the judicially fashioned canon of construction that these statutes are to be read to reserve

The demographics to be considered are those that existed at the time of the Congressional Act of 1905, when they area was certainly predominantly Indian. *Solem v. Barnett*, 465 U.S. 463, 471 [¶ 5] (1984). Even so, as to current demographics, a recent decision of the United States District Court of Wyoming, Hon. Alan B. Johnson, has found that the Indian population has grown 41.68% between 1980 and 2000, both in numbers and percentage of population, while the majority non-white Hispanic population has declined by 20.97%. *Large v. Fremont County, Wyoming*, 709 F.Supp. 2d 1176 (D. Wy. 2010). This certainly distinguishes this case from *Osage Nation v. Irby, et al.*, 597 F.3d 1117 (10th Cir. 2010), decided by the Tenth Circuit; along with the other two *Hagen* analysis factors, it is clear that Wind River Reservation has never been disestablished.

The holding of the Tenth Circuit effectively is that Wyoming was right in its Yellowbear decision that the situs of events alleged to be criminal was not Indian Country. That decision conflicts with Supreme Court precedents, other circuit holdings, and with the final state court decision in *Big Horn I.* It violates Congressional intent in § 1153 and it ignores the law of issue preclusion. These are compelling and interlocking reasons to grant the writ here.

Congress' powers in the absence of a clear expression by Congress to the contrary. *Chippewa Indians v. United States,* 307 U.S. 1, 5 [] (1939)."

IV. Deference under § 2254(d)(1) should never have been accorded to the state court rulings here because such deference undermines § 1153 unacceptably.

AEDPA was designed to accord a degree of deference to state court decisions, even on federal questions and even if wrong in the view of the reviewing court, unless the error is "unreasonable" or misapplies the clearly established jurisprudence of this Court. But such deference must logically presuppose a state court decision of proper jurisdiction. Allowing a state court to decide that § 1153 jurisdiction does not pertain, where it is challenged, and then requiring deference to that determination, logically eviscerates § 1153 and also undermines § 1151. Only a federal court should determine whether federal congressional intent of § 1153 requires federal jurisdiction. The federal court can determine if land is Indian country but it may not delegate jurisdiction, or abdicate jurisdiction, to a state, because only Congress can do that and Congress must do so specifically and explicitly, as under Public Law 280 or the McCarran Amendment, 43 U.S. § 666.

§ 2254(b)(1)(B)(ii) makes it clear that if there is no state procedure available to remedy an issue, AEDPA deference is inappropriate. Wyoming usurped jurisdiction here, and ignored § 1153 by a flawed decision – against Wyoming precedents in *Big Horn I* and *Dry Creek Lodge*, *supra* – that 900 Forest Drive, Riverton, WY, was not Indian Country.

Mr. Yellowbear raised this issue in Doc. 106 in his U.S. District Court case, and noted in his Opening Brief below, at 19:

> Under *Townsend v. Sain,*[12] case law construing relevant provisions of superseded section 2254(d), and the terms of the new presumption of correctness provision that supersedes former section 2254(d), the court must grant a hearing or alternative procedure to resolve factual disputes if the determinations of fact made by the state courts are for some reason inadequate. A state court determination is inadequate and a federal hearing is *required* [italics supplied here] if, for example:
>
> ***
>
> 5) The state factual determination was not made "by a state court of competent jurisdiction" over either "the subject matter . . . or the person of the applicant. [Emphasis supplied in the Doc. 106 quotation]

Even though § 2254(d) was changed by the AEDPA amendment of 1997, *Townsend v. Sain* is good law in this peculiar situation because of § 2254(b) and the inadequacy of state procedures to prevent circumvention of § 1153 by arbitrary and unreasonable interpretation of whether a situs is Indian Country under § 1151. This was of course echoed in *Lambert v. Blackwell*, 387 F.3d at 238 where the court indicated it need not defer to AEDPA unless the case was "adjudicated by a court of competent jurisdiction."

But even if AEDPA deference were accorded subject to AEDPA limitations, the evidence presented in the hearing on February 23, 2006, reviewed in the federal

[12] 372 U.S. 293 (1963).

proceedings in the District Court of Wyoming, makes clear that the decision of the Wyoming Court was based on an unreasonable determination of the facts in that 2006 hearing and misapplied unreasonably the clearly established precedents of this Court.

Article IX of the 1905 Act language stating that the United States was a trustee and agent of the tribes and that the agreement was not a sale because the United States was not bound to "purchase any portion of the land herein described or to dispose of said land . . . or to guarantee to find purchasers for said lands or any portion thereof, *it being the understanding that the United States shall act as trustee for said Indians to dispose of said land and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received. . . .*"[13]

Under no construction of the law of alienation would this Act have been deemed a fee simple transfer of ownership to the United States, or a ceding of land to the United States such that diminishment could be inferred. This was confirmed also by Inspector McLaughlin's contemporaneous distinction between the 1905 Act and the "Thermopolis Purchase" of 1896. Inspector McLaughlin's signed agreement with the Tribes was cited specifically in the 1905 Act, and thus his contrast of that Act with the Thermopolis Agreement is especially clear contemporaneous evidence against

[13] 33 Stat. at 1020-1021. [Emphasis supplied]

disestablishment.

The Supreme Court of Wyoming in *Yellowbear*[14] relied on the erroneous and objectively unreasonable analysis of *Moss* which went against the clearly established Supreme Court precedent in *U.S. v. Pelican*, 232 U.S. 442 (1914), which held that lands held in trust for Indians is Indian Country. As in *Big Horn I*, the pertinent Act of Congress in *Pelican*[15] was not a sale but held land and money in trust, and Congress did not evidence any intention to diminish or disestablish the reservation. Later some lands were transferred, or restored, back to the tribe. This later transfer was not interpreted to mean that any land in the reservation had ever lost its Indian country character. "The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control." *Id.* at 449.

Yet state courts including Wyoming courts in Mr. Yellowbear's case have repeatedly tried to turn the *Pelican* principle on its head by taking notice of the

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[14] *Yellowbear v. State,* 174 P.3d 1270 (Wyo. 2008).

[15] Act of July 1, 1892, chap. 140, 27 Stat. At L. 62.

predominantly non-Indian character of the population, other demographic data, or by resorting to the fiction that one the land is alienated and title is extinguished, diminishment occurs. An example of another state court usurping jurisdiction and then contorting *Pelican* is *State ex rel. Hollow Horn Bear v. Jameson*. 95 N.W.2d 181 (S.D. 1959). The South Dakota Supreme Court there held that "where land on which offense was committed was originally within Pine Ridge Indian Reservation but was also included in that portion of land subsequently opened to settlement except in so far as it had already been allotted to Indians, and Indian title to land had been extinguished, land was not within 'Indian country' under statute making the general laws of the United States as to punishment of crimes extend to Indian country." *Id.* at 184. Despite rules that alienation of land to non-Indians does not accomplish diminishment, the *Hollow Horn Bear* court, directly after quoting *Pelican*, said congressional intent to diminish was "manifest" because some land was to be sold and other land was to be retained. That court's conclusion that as title was extinguished in parcels those parcels "would cease to serve in furthering any phase if the functions of the government in ministering to its Indian wards," *id.* At 185, ignores the Act's provisions that proceeds were to be held in trust after title transfer was complete, that the United States acted as agent only, and that the Act did not expressly or unambiguously diminish the reservation. There was nothing manifest about the issue.

Even the District Court below acknowledged that the Act was not crystal clear as to Wind River Reservation and Riverton. The District Court knew that these issues were crucial and actually predicted ultimate review by this Court, in Mr. Yellowbear's case. At the conclusion of the proceedings on May 14, 2009, the District Court said that Mr. Yellowbear's case would likely go to the U.S. Supreme Court and that he might "have to use an eenie-meeny-miny-moe system to decide this. . . ." Transcript of Motion for Summary Judgment Proceedings, 5/14/09) , p. 55, l. 20.

CONCLUSION

Because these issues are important and their clarification and resolution have ramifications beyond this case, and because so many of the Rule 10 factors are triggered by the erroneous decisions of the state and federal courts below, a writ of certiorari should be granted here. The provisions of 18 U.S.C. § 1153 and § 1151 are eroded by this decision, and the careful jurisprudence of this Court has been so unreasonably misapplied as to jeopardize adjudication in future cases as to issues necessarily bound up in specifics of Congressional language in settlement acts, necessarily fact bound, and by no means free of recent Circuit Court of Appeals splits in application, as with *Yellowbear* on the one hand and *Yankton Sioux v. Podhradsky* and *U.S. v. Webb* on the other.

Respectfully submitted,

_____

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

ANDREW JOHN YELLOWBEAR, JR.,

Petitioner,

v.

ATTORNEY GENERAL OF WYOMING, et al.,

Respondents.

AFFIDAVIT OF SERVICE

JAMES ALEXANDER DRUMMOND attests that, pursuant to Rule 29, he served the preceding Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent by presenting a copy of these documents, with satisfactory arrangements for payment made, to Federal Express for delivery on Thursday, December 2, 2010, to:

David Louis Delicath
Wyoming Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
Counsel for Respondents

and that he also sent a .pdf version of these documents to Mr. Delicath at ddelic@state.wy.us and further attests that all parties required to be served have been served.

_____
JAMES ALEXANDER DRUMMOND

STATE OF OKLAHOMA)
) SS.
COUNTY OF CLEVELAND)

Subscribed and sworn to before me this the _____ day of December, 2010.

_____

Notary Public

My Commission expires:

_____

APPENDIX

OPINION WHOSE REVIEW IS SOUGHT THROUGH GRANT OF WRIT OF CERTIORARI

****

United States Court of Appeals,
Tenth Circuit.
Andrew John YELLOWBEAR, Jr., Petitioner-Appellant,
v.
ATTORNEY GENERAL OF the State of WYOMING; Skip Hornecker, in his official capacity as Supervisor, Fremont County Detention Center, Respondents-Appellees.
Northern Arapaho Tribe, Amicus Curiae.
No. 09-8069.

May 25, 2010.

Background: Following conviction for first-degree murder, 174 P.3d 1270, petition for writ of habeas corpus was filed. The United States District Court for the District of Wyoming, 636 F.Supp.2d 1254, denied the petition. Petitioner appealed.

Holding: The Court of Appeals, Neil M. Gorsuch, J., held that state-court's determination that crime did not occur on Indian reservation was not an unreasonable application of federal law.
Affirmed.

James Alexander Drummond, Jim Drummond Law Firm, PLC, Norman, OK, for Petitioner-Appellant.

David Louis Delicath, Wyoming Attorney General's Office, Cheyenne, WY, for Respondents-Appellees.

Before O'BRIEN, Circuit Judge, BRORBY, Senior Circuit Judge, and GORSUCH, Circuit Judge.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

NEIL M. GORSUCH, Circuit Judge.

**1 Andrew John Yellowbear, Jr., a Wyoming state prisoner, seeks federal habeas relief under 28 U.S.C. § 2254 from his state conviction for the murder of his daughter. Mr. Yellowbear argues that the Wyoming state courts that heard his case lacked jurisdiction because the crime occurred in a federal Indian reservation. The Wyoming Supreme Court rejected this argument on direct appeal, explaining that the land in question is not within an Indian reservation. Later, a federal district court denied Mr. Yellowbear's § 2254 habeas petition challenging this ruling. Today, we affirm the district court's disposition.

* * *

Mr. Yellowbear was convicted of first degree murder in Wyoming state court after he inflicted "repetitive, abusive, blunt-force injuries" that killed his twenty-two-month-old daughter, Marcella Hope Yellowbear. *Yellowbear v. State,* 174 P.3d 1270, 1273 (Wyo.2008). Throughout his state criminal proceedings, Mr. Yellowbear argued that the events in question occurred in Riverton, Wyoming, within the exterior boundaries of the Wind River Reservation. Accordingly, he submitted *741 that Wyoming had no jurisdiction to try him in state court.

The Wyoming state courts consistently rejected Mr. Yellowbear's jurisdictional argument. Ultimately, when the Wyoming Supreme Court took up the question, it explained that a 1905 Act of Congress long ago diminished the Wind River Reservation and that the current boundaries of the reservation do not encompass the site of Mr. Yellowbear's crime. *Yellowbear,* 174 P.3d at 1282-84.

While his state case was unfolding, Mr. Yellowbear twice sought federal habeas relief, but both petitions were legally defective. First, before his state trial began, Mr. Yellowbear filed a § 2254 petition in federal district court. The district court dismissed the petition because § 2254 relief is not available to pre-conviction prisoners and Mr. Yellowbear had not exhausted his claim in state court. A panel of this court denied Mr. Yellowbear a certificate of appealability for the same reasons. *Yellowbear v. Wyo. Attorney Gen.,* 130 Fed.Appx. 276, 277 (10th Cir.2005).

Second, while his state trial was ongoing, Mr. Yellowbear filed a § 2241 petition in federal district court. Because Mr. Yellowbear still had not exhausted his claim, the district court denied his petition. By the time Mr. Yellowbear's appeal reached this court, however, the Wyoming Supreme Court had finally adjudicated his criminal case, and so Mr. Yellowbear had become a post-conviction prisoner and had exhausted his claim. In light of this, a panel of this court remanded the case to allow Mr. Yellowbear to re-characterize his petition as one under § 2254. *Yellowbear v. Wyo. Attorney Gen.,* 525 F.3d 921 (10th Cir.2008).

Back in the district court for the third time, Mr. Yellowbear pursued his petition anew under § 2254. He urged the court to review his argument that his crime had occurred on an Indian reservation not subject to state jurisdiction, and to do so *de novo* rather than under the more deferential review mandated by § 2254(d)(1). He also requested an evidentiary hearing pursuant to § 2254(e).

****2** The district court, however, rejected both requests, applied § 2254(d)(1), and denied Mr. Yellowbear's petition. The district court explained that under § 2254(d)(1), when a state court has "adjudicated" the petitioner's claim "on the merits," a federal court may grant habeas relief only if the state court's decision "was contrary to, or

involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." Applying this framework, the district court first noted that Mr. Yellowbear had conceded the Wyoming Supreme Court's decision was not "contrary to" the relevant Supreme Court cases; it then proceeded to hold that the Wyoming Supreme Court's application of United States Supreme Court precedents was not "objectively unreasonable." *Williams v. Taylor,* 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Following this decision, Mr. Yellowbear sought and the district court granted him a certificate of appealability to challenge its holdings that: (1) review of Mr. Yellowbear's jurisdictional claim is constrained by § 2254(d)(1); (2) Mr. Yellowbear was not entitled to habeas relief under § 2254(d)(1) because the Wyoming Supreme Court's decision was not "an unreasonable application of" Supreme Court case law; and (3) Mr. Yellowbear was not entitled to an evidentiary hearing under § 2254(e).

* * *

Before this court now, Mr. Yellowbear focuses his appeal on the district court's § 2254(d) holdings, urging us to review *de novo* whether the scene of his crime lies within an Indian reservation and thus outside the reach of state jurisdiction under ***742** 18 U.S.C. §§ 1151(a) and 1153, rather than review the question through § 2254(d)(1)'s deferential lens.[FN1] In doing so, Mr. Yellowbear does not appear to dispute that the Wyoming Supreme Court considered and rejected his jurisdictional arguments. Neither does he dispute that the state supreme court's ruling constitutes an "adjudicat[ion]" of his "claim" on its "merits," such that we would ordinarily be able to overturn it only if one of § 2254(d)(1)'s conditions are satisfied. Instead, Mr. Yellowbear appears to argue that, under the Constitution's Supremacy Clause, "[s]tate courts cannot rule on the extent of federal jurisdiction." Opening Br. at 14. Though it is not entirely clear from his briefing, as best we can tell Mr. Yellowbear seeks to suggest that § 2254(d)(1) is unconstitutional, at least as applied to him in this case, and so his appeal must be reviewed *de novo*.

FN1. When identifying the issues presented for review in his opening brief, Mr.

> Yellowbear fleetingly refers to the district court's denial of his request for an evidentiary hearing under § 2254(e). Beyond that, however, he makes no further mention of the issue and so has waived the right to pursue the question. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir.1994) (White, J., sitting by designation). Relatedly, we deny Mr. Yellowbear's motion asking this court to take judicial notice of a number of items pursuant to Federal Rule of Evidence 201. Granting that motion would essentially afford Mr. Yellowbear the evidentiary hearing the district court denied, without first requiring him to address and overcome the district court's reasons for refusing such a hearing.
>
> Separately pending before this court is a motion by the Northern Arapaho Tribe seeking leave to file an amicus brief. Because the Tribe possesses an adequate interest and presents arguments that are useful to this court, we grant the motion.

On this score, we have our doubts. Mr. Yellowbear has not cited a single case establishing the rule he advances. To the contrary, the cases cited by the parties have reviewed jurisdictional decisions by state courts using § 2254(d)'s deferential standard of review. *See, e.g., Burgess v. Watters*, 467 F.3d 676, 681 (7th Cir.2006); *Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir.2004) (noting that § 2254(d) no longer predicates deference on a federal court's *de novo* finding of state court jurisdiction, and explaining that "a federal habeas court should generally presume that the state court properly exercised its jurisdiction").[FN2] Under our federal system, moreover, there is nothing inherently suspect about state courts deciding questions of federal law. State courts have done just this "regularly and rightly ... throughout our history." *In re C & M Props., L.L.C.*, 563 F.3d 1156, 1167 (10th Cir.2009). Indeed, the Supremacy Clause contemplates that state courts *will* decide questions of federal law, and concurrent jurisdiction has been the norm, not the exception, in our constitutional history. *See* U.S. Const. art. VI, cl. 2 (mandating that the "Judges of every State shall be bound" by federal law); *see also* The Federalist No. 82, at 493 (Alexander Hamilton) ***743** (Clinton Rossiter ed., 1961) ("[T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union."); William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 Wis. L. Rev. 1, 7. For his part, Mr. Yellowbear

advances no persuasive argument or authority before this court suggesting that the Wyoming state courts' concurrent jurisdiction doesn't include the power to decide whether federal statutes divest them of criminal jurisdiction over the land in question.[FN3]

FN2. In deferring to the state court's factual findings, *Lambert* noted that the current version of § 2254(d) superseded a prior regime in which deference to state proceedings *did* depend on an initial finding that the state court had jurisdiction. It acknowledged speculation by some commentators that courts might "read" former requirements like this "back into" the new statute's provisions governing factual deference. *Lambert,* 387 F.3d at 238. But *Lambert* then proceeded to explain that, by its plain terms, § 2254(d) "surely lower[s] the level of scrutiny a federal court is entitled to apply to the issue of state court jurisdiction." *Id.* Thus, *Lambert's* reasoning on *factual* deference appears to support our conclusion on *legal* deference. And, in any event, Mr. Yellowbear offers us no authority permitting us to "read back into" § 2254(d) terms from a prior law that Congress chose to supersede and that are inconsistent with the plain terms of the new law Congress has adopted in its place.

FN3. To the extent that Mr. Yellowbear's argument seems to rest on an assumption that § 2254(d)(1) deprives him of *any* means for obtaining *de novo* federal review of his jurisdictional arguments, it is mistaken for yet another reason. The Supreme Court can generally review state court adjudications of federal questions, *see* U.S. Const. art. III, § 2; 28 U.S.C. § 1257, and this direct review, of course, is not constrained by § 2254(d)(1). So it is that Mr. Yellowbear was free to-but, as far as we can tell, did not-seek *de novo* Supreme Court review of the Wyoming Supreme Court's adverse jurisdictional ruling. *Cf. Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (reviewing Utah Supreme Court's decision that Congress diminished Uintah Indian Reservation). And to the extent that Mr. Yellowbear seems to worry that federal courts might be "bound" by state court jurisdictional decisions, that concern also rests on a mistaken view of our federal system. A state court's decision on a federal question generally does not preclude a federal court from subsequently reaching a contrary conclusion. *See Wilder v. Turner,* 490 F.3d 810, 814 (10th Cir.2007) ("It is beyond cavil that we are not bound by a state

court interpretation of federal law....” (internal quotation marks omitted)).

**3 In the end, however, whether we review the Wyoming Supreme Court's decision using § 2254(d)(1)'s deferential standard or *de novo* makes no difference to the outcome of this case. Not only has Mr. Yellowbear failed to give us any reason to think the Wyoming Supreme Court's rejection of his jurisdictional argument was an objectively unreasonable application of Supreme Court precedent; he has also failed to give us any reason to think that decision was incorrect. Neither, given the thorough and detailed attention the Wyoming Supreme Court committed to the question, can we see anything that might be gained by repeating its analysis here. Instead, we direct the reader to that court's careful exposition of the question, *see* *Yellowbear,* 174 P.3d at 1273-84, and confirm that Mr. Yellowbear has not presented to this court any argument calling into question the correctness of that decision.[FN4]

FN4. Before us, Mr. Yellowbear seeks to raise two new arguments he hadn't pursued before. First, he argues that principles of issue preclusion barred the Wyoming Supreme Court from reaching the conclusion it did. Second, he argues that the site of his crime was an Indian allotment and thus “Indian country” under 18 U.S.C. § 1151(c). Various problems attend each of these arguments. It suffices for current purposes, however, to note that Mr. Yellowbear failed to present either argument to the state courts in his criminal proceedings. Under § 2254(b)(1)(A), the validity of which Mr. Yellowbear does not challenge, federal courts are prohibited from granting writs of habeas corpus where, as here, the applicant has not “exhausted the remedies available in the courts of the State.” Neither has Mr. Yellowbear sought to show that any exception to this exhaustion requirement pertains in his case. *See* 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

* * *

The district court's judgment is affirmed.C.A.10 (Wyo.),2010.

Yellowbear v. Atty. Gen. of Wyoming, 380 Fed.Appx. 740, 2010 WL 2053516 (C.A.10 (Wyo.)) END OF DOCUMENT