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Unoccupied: How a Single Word Affects Wyoming's Ability to Regulate Tribal Hunting Through a Federal Treaty; Herrera v. Wyoming

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Case Note

Unoccupied: How a Single Word Affects Wyoming's Ability to Regulate Tribal Hunting Through a Federal Treaty; *Herrera v. Wyoming*

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* Juris Doctor candidate, University of Wyoming College of Law, Class of 2020; Editor-in-Chief, *Wyoming Law Review*, Volume 20. I am grateful for my extraordinary experience in attending oral argument for *Herrera* at the United States Supreme Court. I would like to extend thanks to family, faculty, and the *Wyoming Law Review* Editorial Board for their willingness to read this thing, and in earnest, for their unwavering and indispensable support.

I. INTRODUCTION

Clayvin Herrera is a registered member of the Crow Tribe of Indians and resides on the Crow Reservation in Montana.[1] In January of 2014, Herrera and his hunting party pursued a herd of elk across a fence, exiting the Montana Crow Reservation and entering the Bighorn National Forest in Wyoming.[2] Without a Wyoming hunting license, Herrera and the party harvested three bull elk during a closed season and transported the meat back to Montana.[3] Under Wyoming law, authorities charged Herrera with two misdemeanor game violations.[4] A jury then criminally convicted Herrera of harvesting the elk within Wyoming in contravention of Wyoming law.[5] Herrera, however, contested his conviction on the ground that he possessed the right to hunt and kill the elk based on his Tribal membership under The Second Treaty of Fort Laramie (Treaty).[6]

The Treaty is a controlling agreement between the Crow Tribe and the United States.[7] Its provisions extend to the Tribe, among other rights, the right to hunt on "unoccupied lands of the United States."[8] In *Herrera v. State of Wyoming*, the Fourth Judicial District Court, Sheridan County, Wyoming, addressed the validity of the usufructuary Treaty right to hunt on unoccupied lands of the United States.[9] Usufructuary rights do not convey ownership in land, but rather allow the use of land which is in possession of another.[10] Ultimately, the district court held that prior caselaw abrogated the Treaty right to hunt and that Herrera

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[1] Herrera v. Wyoming, No. CV 2016-242, at 1, 2 (4th Wyo. Dist. Ct. Apr. 25, 2017), *review denied*, No. S-17-0129 (Wyo. 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf.

[2] *Id.* at 2.

[3] *Id.*

[4] *Id.* at 2–3. Herrera was charged with "Taking an Antlered Big Game Animal Without a License or During a Closed Season" and "Accessory to Taking an Antlered Big Game Animal Without a License or During a Closed Season" pursuant to Wyoming Statutes §§ 23-3-102(d) and 23-6-205 (2019).

[5] *See Herrera*, No. CV 2016-242 at 2–5.

[6] *Herrera*, No. CV 2016-242 at 3.

[7] Treaty with the Crows, U.S.-Crow, May 7, 1868, 15 Stat. 649.

[8] *Id.* art. 4.

[9] *See generally Herrera*, No. CV 2016-242.

[10] A United States District Court has described usufructuary rights as follows: "Usufructuary rights like hunting and fishing imply temporary presence and minimal physical occupation of the land. A person may pass over another's land or use the fruits of that land without asserting any rights to the land. The products taken from the land through hunting, fishing, and harvesting are renewable and will be available on the land for an infinite time as long as those taking the products exercise a certain degree of restraint. Therefore, . . . the exercise of usufructuary activities is not contingent upon actual ownership of land, since the fee owner retains title and can reap the fruits of his land as well." Sokaogon Chippewa Cmty. v. Exxon Corp., 805 F. Supp. 680, 701 (E.D. Wis. 1992).

was collaterally estopped from asserting this right.[11] Herrera appealed the decision of the district court to the United States Supreme Court, which granted his petition for a writ of certiorari and ultimately vacated and remanded the case.[12]

The district court's decision in *Herrera* implicated conflicting Indian, state, and federal law.[13] Among *Herrera's* issues were whether Wyoming's admission into the Union or the creation of the Bighorn National Forest abrogated the Treaty hunting right, and whether the Supreme Court has overruled caselaw which held that the abrogation occurred.[14] Additionally, *Herrera* involved the doctrine of issue preclusion in relation to the Tribe's usufructuary Treaty rights.[15]

This Case Note focuses on the Wyoming district court's determination that the Crow Tribe's hunting rights, as reserved through the Treaty, were abrogated through Wyoming statehood and the creation of the Bighorn National Forest.[16] Despite the decision of the United States Supreme Court to vacate and remand *Herrera*, the Wyoming district court provided a logical basis for its decision.[17] This Case Note first sets the stage for the *Herrera* litigation by outlining the Treaty and precedent dispositive to interpretation of the Treaty.[18] Next, it discusses the district court's reasoning and argues it correctly applied issue preclusion.[19] Then, this Case Note addresses the district court case on its merits to demonstrate that, regardless of issue preclusion, Wyoming statehood and the creation of the Bighorn National Forest abrogated the Treaty hunting right.[20] Lastly, this Case Note cautions that, although the conservation necessity doctrine should apply to Wyoming game regulations, it may be insufficient to protect Wyoming's interests in regulating game within the State.[21]

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[11] *See Herrera*, No. CV 2016-242 at 17.

[12] The Wyoming Supreme Court denied Herrera's Petition for Writ of Review. For the Wyoming Supreme Court *Order Denying Petition for Writ of Review*, see Petition for Writ of Certiorari app. A at App-1 to -2, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-petition.pdf. The United States Supreme Court heard oral argument on January 8, 2019. *See Herrera*, 138 S. Ct. 2707 (mem); *infra* note 98 and accompanying text. The United States Supreme Court vacated the decision of the district court and remanded the case for further proceedings on May 20, 2019. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

[13] *See generally Herrera*, No. CV 2016-242.

[14] *See infra* notes 84–161 and accompanying text.

[15] *See infra* notes 100–46 and accompanying text.

[16] *See Herrera*, No. CV 2016-242 at 18.

[17] *See infra* notes 162–69 and accompanying text.

[18] *See infra* notes 28–83 and accompanying text.

[19] *See infra* notes 100–46, 174–257 and accompanying text.

[20] *See infra* notes 258–98 and accompanying text.

[21] *See infra* notes 299–320 and accompanying text.

II. BACKGROUND

Over three hundred years ago, the Crow Tribe emigrated from Canada to what is now Southern Montana and Northern Wyoming.[22] Hunting had invariably been a way of life for the Tribe, and this lifestyle continued after the Tribe's relocation.[23] Increased conflict with non-Indian settlers in the 19th century led the Tribe to enter into treaties with the United States which affected the Tribe's right to hunt.[24] These treaties reserved designated land for the Tribe, and also extended to the Tribe usufructuary rights to hunt.[25] The Tribe has remained in the area and is now federally recognized as a sovereign nation.[26] The Tribe has over 14,000 members, with 9,000 residing on the Crow Indian Reservation in Southern Montana.[27]

A. The Second Treaty of Fort Laramie

Prior to 1868, the United States identified approximately 38.5 million acres of land in the present-day states of Wyoming and Montana as Crow territory.[28] On May 7, 1868, the United States and the Tribe entered into a treaty ceding thirty million acres of the Tribe's land to the federal government.[29] The far-reaching Treaty includes, among other provisions, a promise of peace, the establishment of the Crow Reservation, and education for Crow children.[30] Article IV of the Treaty establishes the Tribe's hunting right.[31] It reads:

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[22] Brief for Petitioner at 4, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem) (No. 17-532), https://www.supremecourt.gov/DocketPDF/17/17-532/62482/20180904113704523_17-532%20Herrera%20Opening%20Merits%20Brief.pdf (citing Montana v. United States, 450 U.S. 544, 547–48 (1981)). The Tribe's origin is not known with certainty; however, some sources believe the Tribe emigrated from the east in what is now Ohio. NATIVE KNOWLEDGE 360°, https://americanindian.si.edu/nk360/plains-belonging-homelands/crow-nation.cshtml (last visited Apr. 16, 2019); *Montana: Crow Reservation*, PARTNERSHIP WITH NATIVE AMERICANS, http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_Crow (last visited, Apr. 16, 2009).

[23] Brief for Petitioner at 4, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[24] *Id.* at 5. In 1851, the Crow Tribe and the United States executed the First Treaty of Fort Laramie. First Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, 11 Stat. 749. In 1868, the parties executed the Second Treaty of Fort Laramie. *See* Treaty with the Crows.

[25] *See* First Treaty of Fort Laramie, art. 5; Treaty with the Crows, arts. 2, 4.

[26] Brief of the Crow Tribe of Indians as Amicus Curiae in Support of Petitioner at 1, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-cert-tsac-crow-tribe.pdf.

[27] *Id.*

[28] Crow Tribe of Indians v. Repsis (*Repsis II*), 73 F.3d 982, 985 (1995).

[29] Transcript of Oral Argument at 3, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-532_c07e.pdf.

[30] *See* Treaty with the Crows, arts. 1, 2, 7.

[31] *Id.* art. 4.

> The Indians herein named agree . . . they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the *unoccupied* lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.[32]

After the Tribe and the United States executed the Treaty, Congress admitted Wyoming into the Union through an enabling act on July 10, 1890.[33] Seven years later, President Grover Cleveland created the Big Horn National Forest Reserve through a presidential proclamation.[34]

B. Precedent Implicated in the Treaty's Interpretation

Interpreting the scope of Indian treaties has been a task of the United States Supreme Court and other federal and state courts for well over a century.[35] Indian law cases are not uncommon; between 1953 and 2000, the Supreme Court heard an average of two cases involving Indian matters per year.[36] At least one scholar describes this area of law as "confusing, unpredictable, and prone to obfuscation."[37] The following precedent illustrates the complex nature of treaty interpretation pertinent to *Herrera*.[38]

1. Ward v. Race Horse

Twenty-eight years after the Crow Treaty went into effect, the United States Supreme Court decided a case involving treaty language identical to that of the Crow Treaty: *Ward v. Race Horse*.[39] In *Race Horse*, a member of the Bannock Tribe of Indians was arrested for violating Wyoming game laws when he killed seven elk within the state.[40] The defendant argued the right to kill the elk was guaranteed to

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[32] *Id.* (emphasis added).

[33] An Act to Provide for the Admission of the State of Wyoming into the Union, ch. 664, § 1, 26 Stat. 222 (July 10, 1890).

[34] Pres. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897), http://legisworks.org/congress/54/proc-30.pdf.

[35] *See* U.S. CONST. art. III, § 2. *See also* Gloria Valencia-Weber, *American Indian Law and History: Instructional Mirrors*, 44 J. LEGAL EDUC. 251, 251–52 (1994).

[36] Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 579 (2008).

[37] *Id.* at 580.

[38] *See infra* notes 39–83 and accompanying text.

[39] *See* Ward v. Race Horse, 163 U.S. 504 (1896). *See also* Treaty with the Crows, art. 4; Treaty with the Eastern Band Shoshoni and Bannock, art. 4, July 3, 1868, 15 Stat. 673.

[40] *In re* Race Horse, 70 F. 598, 599–600 (C.C.D. Wyo. 1895), *rev'd sub. nom.* Ward v. Race Horse, 163 U.S. 504 (1896).

him under a treaty between the Bannock Tribe and the United States.[41] Identical to the Crow Treaty language, the Bannock Treaty states that the Bannock Tribe "shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[42] The Supreme Court analyzed this language to determine if the treaty rights remained valid.[43]

Under facts nearly indistinguishable from *Herrera*, the Supreme Court in *Race Horse* determined that the hunting right granted by the Bannock Treaty was "essentially perishable and intended to be of limited duration."[44] The Court used the phrase "temporary and precarious" to characterize the treaty hunting right.[45] Through this finding, the Court held Wyoming's admission into the Union was inconsistent with the Bannock Tribe's hunting right, and the right was extinguished upon Wyoming attaining statehood.[46] Because states have the power to regulate hunting, Justice White, writing for the majority, explained that validating the treaty's hunting right would disregard the terms of the Wyoming Statehood Act, and would therefore contravene the express will of Congress.[47]

The *Race Horse* Court ultimately held that the admittance of Wyoming into the Union abrogated the Bannock Tribe's hunting right.[48] In his dissent, Justice Brown was critical of the majority's reasoning that statehood changed land's character from that of *unoccupied* to *occupied*.[49] Instead, Justice Brown stated that

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[41] *Id.* at 600.

[42] *Race Horse*, 163 U.S. at 507; Treaty with the Bannock, art. 4; *see also* Treaty with the Crows, art. 4.

[43] *See Race Horse*, 163 U.S. 504.

[44] *Id.* at 515.

[45] *Id.* at 510. "Temporary and precarious" refers to the idea that treaty rights are not continuous, but rather subject to abrogation upon the occurrence of express conditions contemplated in the agreement. *See id.* In the context of the Bannock and Crow Treaties, conditions necessary to abrogate the hunting right include the "occupation" of land, disruption of peace among the whites and Indians, and Indian settlement outside of reservation boundaries. *See* Treaty with the Crows, art. 4; Treaty with the Bannock, art. 4.

[46] *Race Horse*, 163 U.S. at 516. The *Race Horse* Court based much of its holding on the "equal footing doctrine." *Id.* at 512–13. Under this doctrine, a state must be admitted to the Union on equal footing with all other states, meaning that all states have the same power to legislate their own laws, including game laws. *See id.* at 513–15. The Wyoming District Court in *Herrera* acknowledged that numerous decisions have subsequently rejected the doctrine. Herrera v. Wyoming, No. CV 2016-242, at 11 (4th Wyo. Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf. However, the district court found the "temporary and precarious" doctrine from *Race Horse* remains "alive and well." *Id.*

[47] *Race Horse,* 163 U.S. at 516.

[48] *See id.* at 504.

[49] *Id.* at 520 (Brown, J., dissenting).

nothing in the Wyoming Statehood Act manifested an intention to repudiate treaty rights.[50]

2. Crow Tribe of Indians v. Repsis

More recently, the Tenth Circuit Court of Appeals addressed the same Crow Treaty hunting right implicated by *Herrera* in *Crow Tribe of Indians v. Repsis*.[51] In 1989, Wyoming convicted a Crow Tribe member for hunting and killing an elk within the Bighorn National Forest without a state-issued hunting license.[52] The defendant, together with the Crow Tribe, sought a declaratory judgment and injunctive relief based on alleged violations of the Treaty.[53] The Wyoming federal district court dismissed the action, finding that *Race Horse* foreclosed the Tribe's off-reservation hunting right.[54] On review, the Tenth Circuit held the Tribe's argument was indistinguishable from *Race Horse*, and the "Tribe's right to hunt reserved in the [Treaty] was repealed by the act admitting Wyoming into the Union."[55] The court further held ample evidence in the record supported the State's contentions that its regulations were reasonable and necessary for the conservation of wildlife.[56]

The Tenth Circuit further laid forth an alternative basis for its decision.[57] When the parties executed the Crow Treaty in 1868, lands that are now the Bighorn National Forest were "unoccupied" because they were open for settlement in westward expansion.[58] However, as the court stated, Congress created the Bighorn National Forest in 1887 and mandated that the lands be managed and regulated for specific purposes.[59] Therefore, the court found that these lands were no longer available for settlement, and "the creation of the Big Horn National Forest resulted in the 'occupation' of the land."[60] The court concluded by finding *Race Horse* to be "compelling, well-reasoned, and persuasive" and proclaimed

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[50] *Id.* at 519–20.

[51] *Repsis II*, 73 F.3d 982 (10th Cir. 1995).

[52] *Id.* at 985.

[53] *Id.*

[54] Crow Tribe of Indians v. Repsis (*Repsis I*), 866 F. Supp. 520, 522–25 (D. Wyo. 1994).

[55] *Repsis II*, 73 F.3d at 992 (citing *Race Horse*, 163 U.S. at 514).

[56] *Id.* at 993.

[57] *Id.*

[58] *Id.*

[59] *Id.*; 16 U.S.C. § 475 (2019). The Tenth Circuit stated that an act of Congress created the Bighorn National Forest in 1887. *Repsis II*, 73 F.3d at 993. The court was mistaken, however, as the national forest was created ten years later in 1897 by presidential proclamation and not an act of Congress. Proclamation No. 30, 29 Stat. 909; *About the Bighorn National Forest,* U.S. DEP'T AGRIC. FOREST SERV., https://www.fs.usda.gov/main/bighorn/about-forest (last visited Apr. 21, 2019).

[60] *Repsis II*, 73 F.3d at 993.

that "*Race Horse* is alive and well."[61] Thus, at the time of the *Repsis* decision, courts deemed that the Crow Tribe's hunting right was abrogated by Wyoming statehood, and by the transition from "unoccupied" to "occupied" lands at the creation of the Bighorn National Forest.[62]

3. Minnesota v. Mille Lacs Band of Chippewa Indians

The United States Supreme Court called into question the holdings of *Race Horse* and *Repsis* in *Minnesota v. Mille Lacs Band of Chippewa Indians*.[63] In 1837, the United States and bands of Chippewa Indians executed a treaty whereby the Tribe ceded lands in present-day Wisconsin and Minnesota to the federal government.[64] Similar to the Crow Treaty, the treaty in *Mille Lacs* guaranteed to the Chippewa Indians certain hunting rights.[65] The language of the Chippewa Treaty, however, differed from the Crow Treaty by providing that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."[66] Congress later admitted Minnesota into the Union on May 11, 1858.[67]

Thirty-two years after Minnesota became a state, the Mille Lacs Band of Chippewa Indians sued the State of Minnesota in federal court seeking, among other relief, a declaratory judgment that the Tribe retained its usufructuary rights under the 1837 Treaty.[68] Both the federal district court and the Eighth Circuit Court of Appeals held the Chippewa retained their hunting and fishing rights.[69] The United States Supreme Court granted certiorari, but unlike the *Race Horse* and *Repsis* decisions (which abrogated the Tribes' treaty rights), the *Mille Lacs* Court affirmed that "the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty."[70] The Court held Minnesota statehood did not by itself abrogate any Indian usufructuary rights.[71] To abrogate Indian treaty rights, the Court stated Congress must clearly express its intent to do so.[72] The Court

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[61] *Id.* at 994.

[62] *See id.*

[63] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[64] *Id.* at 175.

[65] *Id.* at 176.

[66] Treaty with the Chippewa, U.S.-Chippewa, art. V, July 29, 1837, 7 Stat. 536.

[67] An Act for the Admission of the State of Minnesota into the Union, ch. XXXI, 11 Stat. 285 (May 11, 1858).

[68] *Mille Lacs*, 526 U.S. at 185.

[69] *Id.* at 187.

[70] *Id.* at 176.

[71] *See id.* at 202–03.

[72] *Id.* at 202 (citing United States v. Dion, 476 U.S. 734, 738–40 (1986)).

looked to Minnesota's Enabling Act and found no clear evidence of congressional intent to abrogate the Chippewa Treaty rights.[73]

Understanding that its *Mille Lacs* holding may conflict with *Race Horse*, the Court attempted to reconcile its decisions.[74] The majority stated that *Race Horse* rested on a "false premise"—namely, that the Crow Treaty rights conflicted with state regulation of natural resources and therefore were an impairment of Wyoming's sovereignty.[75] The *Mille Lacs* Court found that "an Indian tribe's treaty rights to hunt, fish, and gather on state land are *not* irreconcilable with a State's sovereignty over the natural resources in the State."[76] The Court held states have authority to impose reasonable and nondiscriminatory regulations on Indian hunting, and "[t]his 'conservation necessity' standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights."[77] This statement echoed the *Repsis* court, which noted that a state regulation may be upheld if reasonable for conservation purposes.[78]

Mille Lacs further held that the "temporary and precarious" language used in *Race Horse* was "too broad to be useful as a guide to whether treaty rights were intended to survive statehood."[79] However, the Court stated the focus of the *Race Horse* inquiry as applied to *Mille Lacs* was whether Congress intended the rights secured by the Chippewa Treaty to survive statehood.[80] The Court also stated the Crow Treaty contemplated that the rights would continue so long as the land remained unoccupied and that, by contrast, the Chippewa Treaty "does not tie the duration of the rights to the occurrence of some clearly contemplated event."[81] Although *Mille Lacs* held that statehood cannot by itself abrogate Indian treaty rights, the Court stated that analyzing congressional intent behind a treaty should determine if rights were intended to expire upon statehood.[82] *Mille Lacs* ultimately held that, with regard to the Chippewa Treaty, statehood by itself was insufficient to extinguish Indian treaty rights on state land.[83]

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[73] *Mille Lacs*, 526 U.S. at 203.

[74] *See id.* at 203–08.

[75] *Id.* at 204.

[76] *Id.* (citing Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)) (emphasis added).

[77] *Id.* at 205.

[78] *See supra* note 56 and accompanying text.

[79] *Mille Lacs*, 526 U.S. at 206–07.

[80] *Id.* at 207.

[81] *Id.*

[82] *See id.*

[83] *Id.*

III. WYOMING STATE DISTRICT COURT OPINION

A. Procedural Posture

After his arrest, Herrera moved to dismiss his game violation charges in the Fourth Judicial Circuit Court, Sheridan County, Wyoming.[84] He asserted the Crow Treaty reserved to the Tribe the right to hunt on "unoccupied lands of the United States."[85] The State of Wyoming asked the circuit court to prohibit Herrera from making reference to the Treaty at trial, so long as the court concluded that the Treaty rights were no longer valid and provided no defense to Herrera.[86] The circuit court held the Treaty hunting right issue was indistinguishable from *Repsis*, and the court was bound by the precedent that Crow Tribe members do not have off-reservation hunting rights anywhere within Wyoming.[87] The circuit court further held that *Mille Lacs* did not overturn *Repsis* or *Race Horse*.[88] Instead, the court agreed with the *Repsis* court's decision that the intent of the Treaty hunting right was temporary and no longer exists.[89] The circuit court alternatively held that, even if Treaty rights existed, the Wyoming game laws at issue met the conservation necessity standard, and therefore applied to all Crow Treaty hunters.[90]

After the Wyoming Supreme Court and United States Supreme Court denied Herrera's request for a stay of his trial, proceedings commenced, and a jury

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[84] Herrera v. Wyoming, No. CV 2016-242, at 3 (4th Wyo. Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf. Wyoming state courts are organized differently than the federal system. *Compare About the Courts,* WYO. JUD. BRANCH, https://www.courts.state.wy.us/about-the-courts/ (last visited Apr. 17, 2019), *with Offices of the States Attorneys*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts (last visited Apr. 17, 2019). In Wyoming, criminal jurisdiction for all misdemeanors is vested in the circuit courts. WYO. JUD. BRANCH, *supra*. The district courts have jurisdiction over felony criminal matters and also hear appeals from circuit court decisions. *Id.*

[85] *Herrera*, No. CV 2016-242 at 3; Treaty with the Crows, art. 4.

[86] *Herrera*, No. CV 2016-242 at 3.

[87] *Id.* at 4. The district court noted that the circuit court was not, in fact, bound by the Tenth Circuit decision in *Repsis II*, but that the circuit court was free to adopt the *Repsis II* holding. *Id.* at 17–18.

[88] *Id.* at 4.

[89] *Id.*; *see also* Wyoming v. Herrera, Nos. CT-2015-2687, CT-2015-2688 (4th Wyo. Circ. Ct. 16, 2015), *cert. granted sub. nom.* Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), *available at* Petition for Writ of Certiorari apps. C & D at App-36, App-38 to -39, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-petition.pdf.

[90] *Herrera*, No. CV 2016-242 at 4.; *see also infra* note 156 and accompanying text.

convicted Herrera on both misdemeanor charges.[91] Herrera then appealed to the Fourth Judicial District Court, Sheridan County, Wyoming.[92] The district court affirmed Herrera's criminal conviction on April 25, 2017.[93]

Following the district court's holding, Herrera attempted to appeal the decision to the Wyoming Supreme Court.[94] On June 6, 2017, the Wyoming Supreme Court entered an order denying Herrera's petition for review.[95] Herrera then appealed from the district court to the United States Supreme Court on October 5 of the same year.[96] The Court called for the views of the Solicitor General, who advised that, from the perspective of the United States, neither Wyoming's admission to the Union nor the creation of the Bighorn National Forest abrogated the Crow Tribe's hunting right under the Treaty.[97] The Supreme Court granted certiorari on June 28, 2018, heard oral arguments on January 8, 2019, and ultimately vacated and remanded the decision of the district court on May 20, 2019.[98] This Case Note addresses the Wyoming district court's determination regarding the Treaty's abrogation.[99]

B. Issue Preclusion

On appeal from the circuit court, the primary concern of the Wyoming district court was Herrera's ability to litigate the Treaty right because the issue may have been previously decided in *Race Horse* and *Repsis*.[100] The potential for

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[91] *Herrera*, No. CV 2016-242 at 4–5. The circuit court imposed upon Herrera concurrent sentences of one year in jail suspended in lieu of unsupervised probation, three years of suspended hunting privileges, and $8,080 in fines and court costs. *Id.* at 5.

[92] *Id.*

[93] *See id.*

[94] Petition for Writ of Certiorari app. A at App-1, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[95] *Id.* The Wyoming Supreme Court did not provide any reason for its decision to deny Herrera's petition for review. *See id.*

[96] *See* Petition for Writ of Certiorari, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[97] Brief for Petitioner at 17, *Herrera*, 138 S. Ct. 2707 (No. 17-532); Brief for the United States as Amicus Curiae at 8, 12, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.supremecourt.gov/DocketPDF/17/17-532/47755/20180522153509400_17-532%20Herrera.pdf. The United States essentially adopts Herrera's arguments by stating, *inter alia*: (1) Wyoming statehood did not abrogate the Treaty hunting right because the Treaty does not specify statehood as a circumstance under which the right would terminate; (2) Establishment of the Bighorn National Forest did itself not render lands within the Forest "occupied"; and (3) Herrera should not be precluded from litigating the Treaty hunting right because the *Mille Lacs* decision constitutes an intervening change in the applicable legal context. *Id.* at 8–9, 20–21.

[98] See *Herrera*, 138 S. Ct. 2707 (No. 17-532); *Herrera v. Wyoming*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/herrera-v-wyoming/ (last visited Apr. 16, 2019).

[99] *See infra* notes 162–320 and accompanying text.

[100] *Herrera*, No. CV 2016-242 at 5.

issue preclusion prompted the district court to request sua sponte briefing from the parties on the matter.[101] Issue preclusion, also termed collateral estoppel, "bars relitigation of previously litigated issues."[102] Wyoming caselaw sets forth four prerequisites for issue preclusion to apply:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[103]

The district court considered whether these prerequisites applied to the case at hand, which would prevent Herrera from relitigating the Treaty hunting right.[104]

As to the first prerequisite, the State argued the primary issue in *Repsis* (the validity of the Treaty hunting right) was identical to the issue in *Herrera*.[105] Herrera disagreed, and argued the *Repsis* court did not analyze two subsequent congressionally-ratified agreements.[106] The district court concluded the court in *Repsis* was aware of these agreements, and therefore the issue Herrera was attempting to litigate was indistinguishable from *Repsis*.[107] The court found the first prerequisite for the application of issue preclusion was satisfied.[108]

To satisfy the second prerequisite, a prior adjudication in an issue preclusion matter must have resulted in a judgment on the merits.[109] To address this element, the district court cited federal caselaw when it stated "[a]djudication on the merits

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[101] *Id.*

[102] Tozzi v. Moffett, 2018 WY 133, ¶ 16, 430 P.3d 754, 760 (Wyo. 2018) (citing Slavens v. Bd. of Cty. Comm'rs for Uinta Cty., 854 P.2d 683, 686 (Wyo. 1993) (internal citations omitted)).

[103] Polo Ranch Co. v. City of Cheyenne, 2003 WY 15, ¶ 12, 61 P.3d 1255, 1259 (Wyo. 2003); *Herrera*, No. CV 2016-242 at 6. Federal Courts also apply the same four prerequisites. *See*, *e.g.*, Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992); *Herrera*, No. CV 2016-242 at 6.

[104] *Herrera*, No. CV 2016-242 at 7.

[105] *Id.*

[106] *Id.* The district court does not state which subsequently-ratified agreements Herrera refers to, but this information is not relevant considering that the court finds the *Repsis* court was aware of them. *See infra* note 107 and accompanying text.

[107] *Herrera*, No. CV 2016-242 at 7.

[108] *Id.*

[109] *See supra* note 103 and accompanying text.

requires that the adjudication be necessary to the judgment."[110] *Repsis* held that the parties to the Treaty hunting right intended it to be temporary in nature and the right was no longer valid.[111] Because the validity of the hunting right was necessary to the *Repsis* judgment, the court found that a judgment on the merits occurred, and thus the second prerequisite was also satisfied.[112]

The third prerequisite demands that the party against whom issue preclusion is asserted was a party, or is in privity with a party, in the prior action.[113] Privity exists if the party in the present case "was adequately represented by someone with the same interests who [was] a party to the [prior] suit."[114] Herrera was not a party to the *Repsis* adjudication.[115] However, the court found that the Crow Tribe had an equal or greater interest in hunting rights as Herrera, the Tribe was represented by competent legal counsel, the Tribe wanted the right declared valid for all its members, and Herrera's presence in the *Repsis* litigation would not have been necessary to the proceeding.[116] Additionally, the court found that Herrera only possessed a right to hunt if the Tribe possessed that right.[117] In making the above findings, the court determined that Herrera was in privity with the Tribe, which was a party in *Repsis*.[118] The district court, therefore, found that the third prerequisite was satisfied.[119]

The fourth and final prerequisite to issue preclusion necessitates that the party had a full and fair opportunity to litigate the issue in the prior adjudication.[120] The district court stated that a full and fair opportunity to litigate "focuses on whether there were significant procedural limitations in the prior proceeding, whether the party to the prior action had the incentive to litigate the issue fully, and whether effective litigation was limited by the nature or relationship of the parties."[121] Although Herrera did not take part in the *Repsis*

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[110] *Herrera*, No. CV 2016-242 at 7 (citing Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992)).

[111] *See Herrera*, No. CV 2016-242 at 7.

[112] *Id.* at 7–8.

[113] *See supra* note 103 and accompanying text.

[114] *Herrera*, No. CV 2016-242 at 8 (citing Taylor v. Sturgell, 553 U.S. 880, 894 (2008) (internal citations omitted)).

[115] *Id.*

[116] *See id.* at 8–9.

[117] *See id.* at 9.

[118] *Id.*

[119] *Id.*

[120] *See supra* note 103 and accompanying text.

[121] *Herrera*, No. CV 2016-242 at 9 (citing Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992)).

litigation, the Crow Tribe, in privity with Herrera, did participate.[122] Because the Tribe had incentive to litigate the *Repsis* issue fully, and further appealed the decision, the district court found that the Tribe had a full and fair opportunity to litigate the issue in the prior proceeding.[123] Thus, the court deemed that the final prerequisite was satisfied.[124]

The court further examined whether the use of offensive issue preclusion in a criminal case was permissible.[125] The use of issue preclusion in this context is rare, as the district court noted.[126] The court found the applicability of issue preclusion turned on whether it would preclude a defendant from contesting a substantive element of the charged offense.[127] A deprival of due process may arise when a criminal defendant is denied an opportunity to contest elements of the charged crime.[128] The court reasoned that precluding Herrera from litigating his Treaty right did not prevent him from contesting any essential element of his criminal charges.[129] Because the State was still required to prove every element of the game violations, and the Treaty's validity did not present facts for a jury to determine, the court held that Herrera's right to due process was not violated.[130] The district court in *Herrera* concluded that issue preclusion was a legal ground appearing in the record, and it affirmed the circuit court's conviction on this basis.[131]

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[122] *Herrera*, No. CV 2016-242 at 10.

[123] *See id.*

[124] *Id.*

[125] *Id.* at 14.

[126] *Id.* Issue preclusion is most often applied in civil cases. *Id.* The Wyoming Supreme Court has not addressed the issue of offensive issue preclusion in a criminal case, but it has applied the doctrine in a civil action to an issue litigated in a criminal action. *Id.* (citing Bowen v. Wyoming, 2011 WY 1, ¶¶ 11–12, 245 P.3d 827, 830–31 (Wyo. 2011)). The *Herrera* court stated that federal courts are split as to whether offensive issue preclusion in a criminal case violates due process. *Herrera*, No. CV 2016-242 at 14 (*comparing* United States v. Gallardo-Mendez, 150 F.3d 1240, 1244 (10th Cir. 1998), *with* Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975), *and* United States v. Bejar-Matrecios, 618 F. 2d 81, 83–84 (9th Cir. 1980)).

[127] *Herrera*, No. CV 2016-242 at 14–15.

[128] *See id.* at 16.

[129] *Id.* at 16. The essential elements of Herrera's criminal charges are wholly unrelated to the issue of the Treaty's validity. *See* WYO. STAT. ANN. §§ 23-3-102(d), 23-6-205.

[130] *Herrera*, No. CV 2016-242 at 16. The district court reinforced its use of issue preclusion in the criminal context by citing to *Moses v. Department of Corrections*, where the Michigan Court of Appeals held that a previous decision, which held that a swampland where a crime had been committed was not part of the defendant's Indian reservation, precluded the defendant from challenging the court's jurisdiction in his criminal case. *See id.* at 15–16; Moses v. Dep't of Corr., 736 N.W.2d 269, 282–83 (Mich. App. 2007).

[131] *Herrera*, No. CV 2016-242 at 16.

C. Exceptions to the Issue Preclusion Doctrine

If issue preclusion applied to Herrera's case, he argued that an exception to the doctrine should also apply.[132] In district court, Herrera argued that the *Mille Lacs* decision, handed down after *Repsis*, was an "intervening change in the applicable legal context" and thus the issue of Treaty hunting rights required a new determination.[133] The State countered that *Mille Lacs* did not overturn *Race Horse* or *Repsis*, and therefore the exception was inapplicable and required no new determination.[134]

The district court began its inquiry by summarizing the precedent set forth in *Race Horse* and *Repsis*.[135] The court noted that the "temporary and precarious" language used in *Race Horse* and *Repsis* to describe the Treaty hunting right remained "alive and well."[136] Importantly, the court distinguished *Mille Lacs* from *Race Horse* and *Repsis*.[137] It stated that although *Mille Lacs* criticized the "temporary and precarious" language as being too broad to be useful, *Mille Lacs* did not completely reject this language.[138] Instead, the *Mille Lacs* Court attempted to apply the *Race Horse* inquiry to the Chippewa Treaty by stating "[t]he focus of the *Race Horse* inquiry is whether Congress . . . intended the rights secured by the [Chippewa Treaty] to survive statehood."[139] The *Mille Lacs* majority proceeded by explaining that the Crow Treaty hunting right in *Race Horse* extinguished upon a "clearly contemplated event": "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States."[140] Conversely, the Chippewa Treaty in *Mille Lacs* had no such condition, and did not associate the duration of the rights with the occurrence of some "clearly contemplated event."[141]

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[132] *Id.* at 11.

[133] *Id.* at 10–11. The court used the following excerpt from the Restatement (Second) of Judgments: "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . (2) . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

[134] *Herrera*, No. CV 2016-242 at 11.

[135] *Id.* at 11–12.

[136] *Id.* at 11.

[137] *See id.* at 12.

[138] *Id.*

[139] *Id.* (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999)).

[140] *Mille Lacs*, 526 U.S. at 207.

[141] *Id.*

The district court used this distinction to conclude that the Crow Treaty was intended to terminate upon certain conditions and therefore differed from the Chippewa Treaty, where no such "clearly contemplated event" existed.[142] The district court rejected Herrera's argument that *Mille Lacs* overturned *Race Horse* or *Repsis*.[143] Instead, the district court found *Mille Lacs* affirmed the principle that "a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a 'clearly contemplated event.'"[144] Based on this finding, the district court determined that *Mille Lacs* did not constitute an intervening change in the applicable legal context.[145] Absent such a change, the court held that Herrera was unable to successfully assert this issue preclusion exception.[146]

D. Alternative Decision on the Merits

In the event that issue preclusion did not apply, the district court provided an alternative basis for affirming the circuit court's conviction.[147] The court recognized the Supremacy Clause of the United States Constitution, which provides that a federal treaty is binding on the states until Congress abrogates it.[148] The court likened treaties to contracts, where the intent of the parties is essential to interpretation.[149] However, unlike contracts where courts do not consider extrinsic evidence in construing the contract, courts employ certain methods of interpretation to determine the intent of Indian treaties.[150] Specifically, a court should consider "the history of the treaty, the negotiations, and the practical construction adopted by the parties" when determining the purpose and scope of an Indian treaty.[151] The Supreme Court in *Race Horse* applied these interpretive methods to find the Treaty right was temporary in nature, and was not intended to survive Wyoming Statehood.[152] The *Herrera* district court agreed.[153]

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[142] *Herrera*, No. CV 2016-242 at 13.

[143] *Id.*

[144] *Id.*

[145] *See id.* at 13–14.

[146] *Id.*

[147] *See id.* at 16–18.

[148] *See* U.S. CONST. art. VI, cl. 2; *Herrera*, No. CV 2016-242 at 16–17 (citing Antoine v. Washington, 420 U.S. 194, 201–02 (1975)).

[149] *Herrera*, No. CV 2016-242 at 17.

[150] *Id.*

[151] *Id.* (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943)).

[152] *See id.*; *supra* notes 39–50 and accompanying text. For example, the *Race Horse* Court considered the Treaty's history when explaining that, at the time the agreement was executed, "the march of advancing civilization foreshadowed the fact that the wilderness . . . was destined to be occupied. . . ." Ward v. Race Horse, 163 U.S. 504, 508–09 (1896).

[153] *Herrera*, No. CV 2016-242 at 17–18.

The district court also set forth several reasons for following the holding in *Repsis*.[154] First, the *Repsis* decision considered the same interpretive methods as *Race Horse* when it held the Crow Treaty hunting right was abrogated by the Wyoming Statehood Act.[155] The court noted *Repsis* also determined that, because statehood abrogated the Treaty hunting right, Crow members were subject to Wyoming game laws regardless of whether the laws were reasonable and necessary for conservation.[156] Lastly, the court recited the *Repsis* court's alternate holding that the creation of the Bighorn National Forest rendered the lands within the hunting district "occupied."[157] Satisfied that both *Race Horse* and *Repsis* properly utilized treaty interpretation, the district court held that it was appropriate for the circuit court to adopt these prior federal decisions.[158]

The district court concluded by reiterating that *Mille Lacs* did not overrule *Repsis*.[159] Rather, the court stated "*Mille Lacs* reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a 'clearly contemplated' event."[160] Because *Repsis* applied this principle, and its decision was based on what the district court deemed a still-valid holding in *Race Horse*, the court concluded it was proper for the circuit court to bar Herrera from asserting his Treaty right at trial.[161]

IV. ANALYSIS

A good argument exists that the district court correctly recognized the prior abrogation of the Crow Treaty hunting right.[162] For this reason, the doctrine of issue preclusion properly applied to *Herrera*. Contrary to Herrera's contentions, prior courts adjudicated the exact issue that Herrera presented to the district court.[163] To respect the finality of judgments, the district court correctly prohibited Herrera from relitigating the previously-decided Treaty hunting right.[164]

Issue preclusion, however, is not the sole proper basis for the district court's affirmance of Herrera's conviction. The merits of the case also compel the

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[154] *See id.*

[155] *See id.* at 17; *infra* notes 270–71 and accompanying text.

[156] *Herrera*, No. CV 2016-242 at 17.

[157] *Id.*

[158] *Id.* at 18.

[159] *Id.*

[160] *Id.*

[161] *See id.*

[162] *See infra* notes 174–320 and accompanying text.

[163] *See infra* notes 174–209 and accompanying text.

[164] *See infra* notes 174–209 and accompanying text.

conclusion of the Treaty hunting right's abrogation.[165] The Tenth Circuit deemed the tribal right to hunt invalid in *Repsis*, which based its holding on the decision in *Race Horse*.[166] *Mille Lacs* did not explicitly overrule the decisions of *Race Horse* or *Repsis*.[167] Rather, *Mille Lacs* distinguished itself from *Race Horse* and *Repsis*.[168] Therefore, the Treaty hunting right was "temporary and precarious" and both Wyoming statehood and the creation of the Bighorn National Forest abrogated this right by having the effect of "occupying" the land.[169] Despite the Supreme Court's ultimate determination of the case, the Wyoming district court adequately supported the proper outcome of *Herrera*.

Furthermore, the final outcome of *Herrera* has significant implications for Wyoming's right to regulate hunting on public lands.[170] Because abrogation of the Treaty right ensures that Wyoming may regulate all hunting (tribal or otherwise) within the state, regulation serves an important function for Wyoming to protect its related interests.[171] However, if the Treaty rights are valid, Wyoming may be limited in its authority to protect hunting interests.[172] The conservation necessity doctrine may not adequately protect these interests, and because the Supreme Court's final holding in *Herrera* declined to address the doctrine, states' ability to regulate hunting is still unsettled.[173]

A. Issue Preclusion was Properly Applied to Herrera

Procedurally, the doctrine of issue preclusion works to avoid the adjudication of duplicative issues in separate actions.[174] The law prefers that courts generate consistent outcomes when cases involve identical facts or issues.[175] When a legal action attempts to reintroduce an issue that has been decided in a previous case, issue preclusion intervenes to preclude relitigation of that issue and bind parties to

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[165] *See infra* notes 258–98 and accompanying text.

[166] *Repsis II*, 73 F.3d 982, 992–93 (10th Cir. 1995).

[167] *See generally* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[168] *Id.*

[169] *See infra* notes 174–298 and accompanying text.

[170] *See infra* notes 299–320 and accompanying text.

[171] *See infra* notes 299–320 and accompanying text.

[172] *See infra* notes 299–320 and accompanying text.

[173] *See infra* notes 299–320 and accompanying text.

[174] *See* Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753, 754 (2004); *see also supra* note 102 and accompanying text.

[175] *See* Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrine in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 RUTGERS L. REV. 409, 409–10 (2012).

the original result.[176] The Wyoming district court properly determined that issue preclusion applied in *Herrera*.[177]

1. Prerequisites to Issue Preclusion are Satisfied

The district court correctly held that the four prerequisites to issue preclusion were met.[178] First, the court found that the issue decided in *Repsis* was identical to the issue presented by Herrera.[179] The issue in *Repsis* was whether *Race Horse* foreclosed the Crow Tribe's right to hunt on unoccupied lands.[180] The *Repsis* court held the "Tribe's right to hunt . . . was repealed by the act admitting Wyoming into the Union."[181] Herrera attempted to litigate the validity of the off-reservation Treaty hunting right.[182] Herrera acknowledged that *Repsis* ruled on the continued validity of the hunting right in the Crow Treaty.[183] His only argument, that two agreements congressionally-ratified after *Repsis* were not considered by the *Repsis* court, is not persuasive.[184] As the district court noted, the agreements originated in 1891 and 1904, prior to the *Repsis* decision.[185] Therefore, the agreements were available for the *Repsis* court's review at the time the case was decided. Even if the court did not consider the agreements, the ultimate issue of the Treaty's validity is identical to *Repsis*.[186]

Second, the district court properly held that the prior adjudication resulted in a judgment on the merits.[187] In *Repsis*, the federal district court found that the Treaty right was intended to be temporary in nature, and the Tenth Circuit affirmed this determination.[188] Because the validity of the Treaty right was necessary to that judgment, a judgment on the merits occurred.[189] Therefore, the test that "[a]djudication on the merits requires that the adjudication be

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[176] Simon, *supra* note 174, at 754.

[177] *See* Herrera v. Wyoming, No. CV 2016-242, at 18 (4th Wyo. Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf; *see also infra* notes 179–209 and accompanying text.

[178] *See Herrera*, No. CV 2016-242 at 7–10.

[179] *See supra* notes 105–08 and accompanying text.

[180] *Repsis II*, 73 F.3d 982, 986 (10th Cir. 1995).

[181] *Id.* at 992 (citing Ward v. Race Horse, 163 U.S. 504, 514 (1896)).

[182] *Herrera*, No. CV 2016-242 at 5.

[183] *Id.* at 7.

[184] *Id.*

[185] *Id.*

[186] *Repsis II*, 73 F.3d at 986.

[187] *Herrera*, No. CV 2016-242 at 7.

[188] *Id.* at 7–8; *see also Repsis II*, 73 F.3d 982.

[189] *See supra* notes 109–12 and accompanying text.

necessary to the judgment" is satisfied, which in turn satisfies the second issue preclusion prerequisite.[190]

With regard to the third prerequisite to issue preclusion, the district court correctly determined that Herrera was in privity with the Crow Tribe, which was a party to the *Repsis* decision.[191] Privity "signifies that the relationship between two persons is such that a judgment involving one of them is conclusive upon the other, although the other was not a party to the suit."[192] The district court found that privity exists if the party in the present case "was adequately represented by someone with the same interests who [was] a party to the [prior] suit."[193] The Crow Tribe attempted to validate the Treaty hunting right for all members through its suit in *Repsis*.[194] Thus, the Tribe advocated for all of its members, including Herrera.[195] The Tribe was capable of making compelling arguments, as it was represented by competent legal counsel.[196] Herrera's presence was not necessary to the proceedings because the Tribe was already advocating on his behalf.[197] These factors support the finding that the Crow Tribe adequately represented Herrera's interests in *Repsis*.[198] The district court therefore properly held that Herrera was in privity with the Crow Tribe, which satisfies the third issue preclusion prerequisite.[199]

Lastly, the district court properly determined that the Crow Tribe, with whom Herrera is in privity, had a full and fair opportunity to litigate the issue in *Repsis*.[200] The trial court decided *Repsis* on summary judgment.[201] However, because the Tribe had an opportunity to produce evidence on the issue, deciding the case on summary judgment was not a procedural limitation.[202] The Crow Tribe had the incentive to fully litigate the issue in *Repsis* to validate hunting

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[190] Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992); *Herrera*, No. CV 2016-242 at 7.

[191] *See supra* notes 113–19 and accompanying text.

[192] Casiano v. State, 2019 WY 16, ¶ 15, 434 P.3d 116, 121 (Wyo. 2019) (citing Grynberg v. L&R Exploration Venture, 2011 WY 134, ¶ 23, 261 P.3d 731, 737 (Wyo. 2011)).

[193] *Herrera*, No. CV 2016-242 at 8 (citing Taylor v. Sturgell, 553 U.S. 880, 894 (2008)) (internal citations omitted).

[194] *See supra* note 116 and accompanying text.

[195] *See supra* note 116 and accompanying text.

[196] *See supra* note 116 and accompanying text.

[197] *Herrera*, No. CV 2016-242 at 8–9.

[198] *See supra* notes 191–97 and accompanying text.

[199] *See supra* notes 191–97 and accompanying text.

[200] *See supra* notes 120–24 and accompanying text.

[201] *See* Crow Tribe of Indians v. Repsis (*Repsis I*), 866 F. Supp. 520 (D. Wyo. 1994).

[202] *Herrera*, No. CV 2016-242 at 10.

rights for all of its members, including Herrera.[203] Further, the relationship of the parties in *Repsis* did not limit effective litigation.[204] Nowhere in *Repsis* does the Tenth Circuit point to any reasons why the relationship of the parties would limit effective litigation.[205] The district court also used federal caselaw to hold that an opportunity to appeal the prior decision constituted a full and fair opportunity to litigate the issue.[206] In *Repsis*, the Crow Tribe appealed the Wyoming federal court's decision to the Tenth Circuit.[207] When the case was affirmed on appeal, the Tribe also sought a writ of certiorari to the United States Supreme Court.[208] The Tribe's appeal to both the Tenth Circuit and the Supreme Court constitutes a fair opportunity to litigate the issue, satisfying the fourth and final prerequisite for issue preclusion.[209]

2. Offensive Issue Preclusion in a Criminal Case is Proper in this Context

The district court's application of offensive issue preclusion to the criminal context in *Herrera* was appropriate.[210] Courts use offensive issue preclusion to "estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff."[211] In the present case, Herrera was attempting to litigate an issue—the validity of the Treaty hunting right—that the Crow Tribe, whom Herrera was in privity with, previously litigated and lost.[212] The United States Supreme Court grants broad discretion to courts in determining when offensive issue preclusion should apply.[213] However, the Court has not addressed whether this discretion extends to the criminal context.[214] In the absence of guidance from the Supreme Court, lower federal circuits are split on whether offensive issue preclusion is appropriate in the criminal context.[215]

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[203] *Id.*

[204] *Id.*

[205] *See generally Repsis II*, 73 F.3d 982 (10th Cir. 1995).

[206] *Herrera*, No. CV 2016-242 at 10.

[207] *Id.*

[208] *Id.* The United States Supreme Court denied the Tribe's petition for writ of certiorari. *Repsis III*, 116 S. Ct. 1851 (1996) (mem.).

[209] *Herrera*, No. CV 2016-242 at 10.

[210] *Id.* at 14–16.

[211] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).

[212] *See generally Herrera*, No. CV 2016-242.

[213] *Parklane Hosiery Co.*, 439 U.S. at 331.

[214] Simon, *supra* note 174, at 756.

[215] *Id.*; *see also, e.g.*, United States v. Pelullo, 14 F.3d 881, 897 (3d Cir. 1993) (refusing to allow offensive issue preclusion in the criminal context); Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975) (allowing offensive issue preclusion in the criminal context); United

And, as the district court noted, the Wyoming Supreme Court has not addressed the matter, either.[216] Some courts allow the use of issue preclusion when it "affects a judge's pretrial ruling and does not necessarily eliminate a jury's consideration of substantive elements of the indicted offense."[217] Consideration by a jury is necessary to satisfy a criminal defendant's Fifth Amendment right to due process.[218] The district court correctly exercised this reasoning to find the State was still required to prove every element of the game violations at trial, and therefore application of issue preclusion did not violate Herrera's due process rights.[219]

Convincingly, the district court also cited to caselaw applying issue preclusion in a criminal case when the issue was previously adjudicated in a civil case.[220] In *Moses v. Department of Corrections*, the Michigan Court of Appeals held that a previous decision precluded a defendant from challenging the court's jurisdiction in his criminal case.[221] Similar to the present case, the defendant in *Moses* was not a party to the prior adjudication, but rather was claiming "rights as a member of the Indian tribe that was a party."[222] The privity prerequisite for issue preclusion applies in both *Moses* and *Herrera*.[223] The Michigan Court of Appeals held that the use of issue preclusion did not prevent the defendant from contesting an essential element of the criminal charge.[224] The similarities between *Herrera* and *Moses* illustrate that the Wyoming district court was not the first court to use the principles it applied, and the court identified persuasive authority that legitimized its reasoning.[225]

The doctrine of issue preclusion as applied in *Moses* and *Herrera* "promotes the efficient administration of justice and ensures more consistent judicial decisions."[226] It also accords finality to the prior adjudication.[227] Although "wise

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States v. Gallardo-Mendez, 150 F.3d 1240, 1246 (10th Cir. 1998) (refusing to allow offensive issue preclusion in the criminal context); United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980) (allowing offensive issue preclusion in the criminal context).

[216] *Herrera*, No. CV 2016-242 at 14; *see also supra* note 126 and accompanying text.

[217] State v. Hewins, 760 S.E.2d 814, 823 (2014).

[218] Simon, *supra* note 174, at 779–80. "Under the Due Process Clause, a criminal defendant has the right to a determination by a jury of whether the prosecution has proved every element of the crime charged beyond a reasonable doubt." *Id.* at 779.

[219] *See Herrera*, No. CV 2016-242 at 16; *see also supra* note 130 and accompanying text.

[220] *Herrera*, No. CV 2016-242 at 15.

[221] *See id.* at 15–16; Moses v. Dep't of Corr., 736 N.W.2d 269 (Mich. App. 2007); *see also supra* note 130.

[222] Moses, 736 N.W.2d at 283.

[223] *Compare id.*, *with Herrera*, No. CV 2016-242 at 8–9.

[224] *Moses*, 736 N.W.2d at 283 (citing People v. Goss, 521 N.W.2d 312, 316 (Mich. 1994)).

[225] *See supra* notes 125–31 and accompanying text.

[226] *Moses*, 736 N.W.2d at 283.

[227] *See id.*

public policy and judicial efficiency . . . do not have the same weight and value in criminal cases" as they do in civil cases, both the Michigan court and the Wyoming district court gave weight to these concepts of judgment finality.[228] Because the law prefers that courts generate consistent rulings and outcomes, the issue preclusion principles identified by the district court were properly applied and should be adhered to in the criminal context.[229]

3. No "Intervening Change in the Applicable Legal Context" Exists

The law of issue preclusion derives primarily from common law, and several exceptions apply to the doctrine.[230] One of these exceptions occurs when an "intervening change in the applicable legal context" makes new determination of an issue necessary.[231] In perhaps his strongest argument, Herrera contends that the United States Supreme Court altered the applicable legal context through its *Mille Lacs* decision.[232] The Wyoming circuit court's decision (which the district court affirmed) rested primarily on *Repsis*, which borrowed legal reasoning from *Race Horse*.[233] The courts decided these cases in 1995 and 1896, respectively.[234] The Supreme Court decided *Mille Lacs* more recently, in 1999.[235] Because *Mille Lacs* was decided after *Race Horse* and *Repsis*, Herrera argued that the applicable legal context changed, which warranted the application of the issue preclusion exception.[236]

The district court properly found that the exception did not apply to Herrera.[237] The treaty language in *Race Horse* is identical to the treaty language in *Repsis* and *Herrera*.[238] Both the Bannock Treaty in *Race Horse* and the Crow Treaty in *Repsis* and *Herrera* state that the Tribes "shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the

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[228] United States v. Gallardo-Mendez, 150 F.3d 1240, 1244 (10th Cir. 1998) (internal quotations omitted). *Compare Herrera*, No. CV 2016-242 at 15–16, *with Moses*, 736 N.W. 2d at 283.

[229] *See* Poulin, *supra* note 175, at 409.

[230] *See Herrera*, No. CV 2016-242 at 10.

[231] *See id.* (citing RESTATEMENT (SECOND) OF JUDGEMENTS § 28).

[232] *See id.* at 11.

[233] *See generally id.*; *Repsis II*, 73 F.3d 982 (10th Cir. 1995); Ward v. Race Horse, 163 U.S. 504 (1896).

[234] *Repsis II*, 73 F.3d 982; *Race Horse*, 163 U.S. 504.

[235] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[236] *Herrera*, No. CV 2016-242 at 13.

[237] *See id.* at 10–14.

[238] *See supra* note 39 and accompanying text.

hunting districts."[239] Conversely, the *Mille Lacs* treaty states that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."[240] Due to this differing treaty language, the district court properly distinguished *Mille Lacs* from *Race Horse* and *Repsis*.[241]

In *Race Horse*, the Supreme Court found the treaty language was "temporary and precarious."[242] Because the treaty language was identical in *Repsis* and *Race Horse*, the *Repsis* court followed *Race Horse* and again held the treaty language to be "temporary and precarious."[243] In *Mille Lacs*, the Court held that the treaty language "does not tie the duration of the rights to the occurrence of some clearly contemplated event."[244] Because the treaty language differed in *Mille Lacs* and did not extinguish upon a clearly contemplated event, the district court properly held that *Mille Lacs* did not constitute a change in the applicable legal context and did not require a new determination.[245]

Bolstering the district court's reasoning, the *Mille Lacs* decision never expressly overruled *Race Horse*.[246] To the contrary, the Supreme Court in *Mille Lacs* took great care in its attempt to reconcile the differences between *Race Horse* and *Mille Lacs*.[247] The Court explained that the focus of the *Race Horse* inquiry was whether Congress intended treaty rights to survive statehood.[248] The *Race Horse* Court determined that, because of the Crow Treaty language, Congress did not intend the hunting right to survive statehood.[249] The opposite was true in *Mille Lacs*, where the Court ultimately determined that Congress did intend the Chippewa Treaty to survive statehood.[250] This distinction did not change the applicable legal context, but rather illustrated two different outcomes using the same legal reasoning: determining congressional intent at the time of the treaties' execution.[251] If the treaties in *Race Horse* and *Mille Lacs* were identical, this difference in outcomes

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[239] Treaty with the Crows, art. 4; Treaty with the Bannock, art. 4.

[240] *Mille Lacs*, 526 U.S. at 177.

[241] *See supra* note 142 and accompanying text.

[242] Ward v. Race Horse, 163 U.S. 504, 510 (1896).

[243] *Repsis II*, 73 F.3d 982, 988 (10th Cir. 1995).

[244] *Mille Lacs*, 526 U.S. at 207.

[245] *See supra* note 145 and accompanying text.

[246] *See generally Mille Lacs*, 526 U.S. 172.

[247] *See id.* at 206–07.

[248] *Id.* at 207.

[249] Ward v. Race Horse, 163 U.S. 504, 514–16 (1896).

[250] *Mille Lacs*, 526 U.S. at 205.

[251] *See supra* note 148 and accompanying text.

could not stand. However, because the language between the treaties differs, inconsistent outcomes may be expected if congressional intent differs. Because the Crow Treaty was conditioned on the occurrence of a clearly contemplated event and the Chippewa Treaty was not, the act of statehood abrogated one treaty but not the other. The district court in *Herrera* recognized this distinction and held that *Mille Lacs* did not overturn *Race Horse* or *Repsis*, but rather "it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire on the happening of a 'clearly contemplated event.'"[252] Distinguishing *Mille Lacs* from *Race Horse* and *Repsis* in this manner was proper.

At oral argument, Justice Kagan spoke on the portion of *Mille Lacs* that distinguished *Race Horse*.[253] She illustrated the difficulty in parsing out the *Mille Lacs* Court's intentions by stating, "I've read that paragraph three times, and I still really have no idea what it's talking about."[254] Although the *Mille Lacs* Court left much to be determined by courts today with respect to its distinction of *Race Horse*, the Supreme Court should have determined that applicable legal context such as to necessitate a new determination of the Crow Treaty hunting right. If the Court intended to overrule *Race Horse* in *Mille Lacs*, it could have expressly done so.[255] Instead, the majority opted to carve out a section of its decision distinguishing *Mille Lacs* from *Race Horse*.[256] This demonstrates that the Court avoided addressing the legal reasoning of *Race Horse*, which does not disrupt the *Repsis* decision, and therefore does not warrant a new determination of the Crow Treaty rights. Wyoming, therefore, should retain the authority to interpret, as Justice Gorsuch stated during oral argument, its "excellent Wyoming law of issue preclusion."[257]

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[252] Herrera v. Wyoming, No. CV 2016-242, at 13 (4th Wyo. Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf.

[253] Transcript of Oral Argument at 26, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-532_c07e.pdf.

[254] *Id.*

[255] The Supreme Court has stated: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). Because *Race Horse* has direct application to *Herrera*, the district court was correct to follow *Race Horse* even if its decision appears to rest on reasons potentially rejected in *Mille Lacs*. *See id.* The district court properly left to the Supreme Court the prerogative of overruling its own precedent in *Race Horse*. *See id.*

[256] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206–07 (1999).

[257] Transcript of Oral argument at 13, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

B. The Merits of Herrera *Support the District Court's Holding*

Although issue preclusion was at the core of the district court's opinion, the court provided alternative reasons for affirmance.[258] Among them, the court utilized the Indian canon of construction, historical implications, the meaning of "occupied" lands, and discussed states' abilities to regulate game for conservation purposes.[259] These considerations addressed the validity of the Treaty hunting right on its merits.[260]

1. The Indian Canon of Construction and Other Interpretive Methods Support Affirmance

The basic tenet of the Indian canon of construction, as Justice John Marshall described in 1832, is that "[t]he language used in treaties with the Indians should never be construed to their prejudice."[261] Since Justice Marshall first set forth the Indian canon of construction, this framework for interpreting Indian treaties has become a fundamental principle of Indian law.[262]

Recognizing that a special canon of construction applies to Indian treaty interpretation, the district court cited several reasons for its affirmance.[263] The court cited Supreme Court precedent that held "the history of the treaty, the negotiations, and the practical construction adopted by the parties should . . . be

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[258] Herrera v. Wyoming, No. CV 2016-242, at 16–18 (4th Wyo. Dist. Ct. Apr. 25, 2017), *review denied*, No. S-17-0129 (Wyo. 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf.

[259] *See supra* notes 147–61 and accompanying text.

[260] *See id.*

[261] Worchester v. Georgia, 31 U.S. 515, 581 (1832). The United States Supreme Court most recently interpreted an Indian treaty in *Cougar Den*. *See* Wash. State Dep't of Licencing v. Cougar Den, Inc., No. 16-1498, 2019 WL 1245535 (2019). In determining whether an 1855 treaty between the United States and the Yakama Nation forbade the State of Washington from imposing a tax on Yakama Nation fuel importers, the Court applied the same Indian canon of construction and similar interpretive methods as the district court in *Herrera*. *Id.* The Supreme Court stated "the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855." *Cougar Den*, 2019 WL 1245535, at *1005. This statement embodies the Indian canon that "[t]he language used in treaties with the Indians should never be construed to their prejudice." Worchestire v. Georgia, 31 U.S. 515, 581 (1832). Furthermore, the Court recognized that "to interpret the treaty, courts must focus upon the historical context in which it was written and signed." *Cougar Den*, 2019 WL 1245535, at *1012. This language similarly echoes the district court's reliance on the *Repsis* finding regarding the history of the treaty. *See Herrera*, No. CV 2016-242 at 17.

[262] *See Worchester*, 31 U.S. at 551; Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1103 (2013).

[263] *See Herrera*, No. CV 2016-242 at 17.

considered."[264] The district court opined that *Race Horse* applied these interpretive methods when the Court analyzed the Crow Treaty.[265] In so doing, the *Race Horse* Court held:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with the its language, and in conflict with an act of congress, and also destructive of the rights of one of the states.[266]

Race Horse therefore suggests that the Indian canon of construction should not be used to distort the words of a treaty, and also should not be extended to a degree where the canon destroys state rights or congressional intent.[267] Because *Race Horse* found the Bannock Treaty language (which is identical to the Crow Treaty language) to be "temporary and precarious" in nature, the Indian canon of construction and other interpretive methods could not save the Treaty hunting right from the rights and authority of the State of Wyoming and Congress.[268] Although treaty language should never be construed to prejudice an Indian tribe, the history of the Crow Treaty, the negotiations behind the Treaty, and the Treaty's practical meaning as adopted by the parties compelled the Supreme Court to hold that the parties intended the Treaty hunting right to be abrogated by Wyoming statehood.[269] *Repsis* quoted the same Indian canon of construction set forth by Justice Marshall.[270] The Tenth Circuit went on to find that the Supreme Court in *Race Horse* understood this canon of construction and declined to validate the Treaty so as to uphold the rights of Congress and the states.[271]

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[264] *Id.* (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943)).

[265] *Herrera*, No. CV 2016-242 at 17. The district court did not directly state where the Supreme Court utilized canons of construction in *Race Horse*. *See generally id.* However, *Race Horse* stated "[t]he elucidation of this issue will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being, and of the purposes intended to be by it accomplished." Ward v. Race Horse, 163 U.S. 504, 508 (1896).

[266] *Race Horse*, 163 U.S. at 516; *Herrera*, No. CV 2016-242 at 17.

[267] *See Race Horse*, 163 U.S. at 516.

[268] *Id.* at 514–16.

[269] *Id.*

[270] *Repsis II*, 73 F.3d 982, 992 (10th Cir. 1995) ("The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense . . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (quoting Worchester v. Georgia, 31 U.S. 515, 582 (1832))).

[271] *See id.* at 992.

The district court also considered another goal of treaty interpretation: determining the intent of the parties.[272] *Race Horse* and *Repsis* determined that the parties intended for the Treaty to expire upon certain conditions, including upon Wyoming acquiring statehood.[273] *Mille Lacs* expressly stated that "[t]reaty rights are not impliedly terminated upon statehood."[274] However, contrary to Herrera's assertions, *Race Horse* and *Repsis* did not hold that statehood impliedly terminated the Treaty hunting right.[275] Instead, those courts found the parties agreed to the Treaty language without intent to grant perpetual rights, and the language itself was "temporary and precarious."[276] If the parties intended the Treaty rights to be perpetual, the parties would not have employed such "temporary and precarious" language.[277] Thus, Wyoming statehood did not impliedly terminate the usufructuary right, but rather triggered a condition that the parties contemplated when executing the Treaty.[278]

Because the Supreme Court decided *Race Horse* in the 19th century, the precedent provides both legal and historical value.[279] The Crow Treaty was executed almost exactly twenty-eight years before the Supreme Court decided *Race Horse*.[280] Due to this relatively short period of time, the Supreme Court in the 19th century likely possessed a greater sense of the intention of the Treaty parties than the Supreme Court today, which is separated from the Treaty's execution by over 150 years.[281] Not only does *Race Horse* remain binding despite *Mille Lacs*, it provides the clearest evidence of what persons in the 19th century believed the Crow Treaty language to mean.[282] As Justice Cardozo once stated, "[h]istory or custom . . . or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him

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[272] Herrera v. Wyoming, No. CV 2016-242, at 17 (4th Wyo Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf (citing Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979)).

[273] *See Race Horse*, 163 U.S. 504; *Repsis II*, 73 F.3d 982.

[274] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).

[275] *See generally Race Horse*, 163 U.S. 504; *Repsis II*, 73 F.3d 982.

[276] *Race Horse*, 163 U.S. at 515; *Repsis II*, 73 F.3d at 991.

[277] *See supra* notes 135–41 and accompanying text.

[278] *See supra* notes 135–41 and accompanying text.

[279] *See Race Horse*, 163 U.S. 504.

[280] Race Horse was decided on May 25, 1896. *Race Horse*, 163 U.S. 504. The Crow Treaty was executed on May 7, 1868. *See* Treaty with the Crows, May 7, 1868, 15 Stat. 649.

[281] *See* Transcript of Oral Argument at 44, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-532_c07e.pdf; *infra* note 283 and accompanying text. The Crow Treaty was executed on May 7, 1868. *See* Treaty with the Crows, May 7, 1868, 15 Stat. 649.

[282] *See supra* notes 241–52 and accompanying text; Transcript of Oral Argument at 44, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

where to go."[283] In considering historical value, the district court properly gave weight to the Supreme Court's determination in 1896 that the Crow Treaty was "temporary and precarious" in nature, and that Wyoming statehood abrogated the hunting right.[284]

2. The Creation of the Bighorn National Forest "Occupied" Ceded Land

The district court emphasized the Tenth Circuit's alternative finding in *Repsis* that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land."[285] The *Repsis* court stated that, when the national forest was created, the "lands were no longer available for settlement."[286] It found that because the national forest exists, "[n]o longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission."[287] Because the *Repsis* court found the land was no longer "unoccupied," a condition expressly contemplated by the parties to the Crow Treaty occurred and abrogated the Treaty hunting right.[288]

This governmental control is similar to another swath of federal land: Yellowstone National Park. At the time of the Crow Treaty's execution, the area that is now Yellowstone was within the "hunting district" that the Crow ceded to the federal government.[289] Less than four years after the execution of the Treaty, the federal government created Yellowstone.[290] By 1894, Congress passed legislation prohibiting hunting within Yellowstone.[291] By setting this land aside, the federal

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[283] BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS 43 (Yale University Press, 1921).

[284] *See Race Horse*, 163 U.S. 504.

[285] Herrera v. Wyoming, No. CV 2016-242, at 17 (4th Wyo Dist. Ct. Apr. 25, 2017), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), *vacated*, 139 S. Ct. 1686 (2019), https://www.scotusblog.com/wp-content/uploads/2018/01/17-532-opinion-below.pdf (citing *Repsis II*, 73 F.3d 982, 993 (10th Cir. 1995)).

[286] *Repsis II*, 73 F.3d at 993.

[287] *Id.*

[288] The Crow Treaty reads: "[The Crow] shall have the right to hunt on the unoccupied lands of the United States . . . ." Treaty with the Crows, art. 4. Since the land is deemed occupied, this terminating condition of the Treaty is satisfied. *See Repsis II*, 73 F.3d at 993.

[289] Transcript of Oral Argument at 45, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-532_c07e.pdf.

[290] President Ulysses S. Grant created Yellowstone National Park on March 1, 1872 when he signed the Yellowstone National Park Protection Act into law. Yellowstone National Park Protection Act, ch. 72 § 4, 28 Stat. 73 (1894) (codified as amended at 16 U.S.C. § 26 (2006)).

[291] Jessica Almy, *Taking Aim at Hunting on National Park Service Lands*, 18 N.Y.U. ENVTL. L.J. 184, 196 (2010) (citing Yellowstone National Park Protection Act, ch. 72, § 4). Additionally, the federal government dictates what seasons and hours of the day visitors may access Yellowstone National Park. *Yellowstone National Park Operating Hours and Seasons*, NAT'L PARK SERV., https://www.nps.gov/yell/planyourvisit/hours.htm (last update Apr. 2, 2019). The government also regulates fees for all visitors. *Yellowstone National Park Fees & Passes*, NAT'L PARK SERV., https://www.

government's control effectively "occupied" the land.[292] Although the land is not settled by non-Indians and remains primarily wild, the federal government limited its use through control over the land.[293]

Similarly, the federal government exercises control over the Bighorn National Forest.[294] President Cleveland's proclamation creating the national forest explicitly states "the President of the United States may, from time to time, set apart and reserve, in any State . . . public reservations, and . . . *declare the establishment of such reservations and the limits* thereof."[295] The proclamation also states that "[w]arning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation."[296] The proclamation has the effect of occupying the land because the government may control the national forest by dictating the activities and the length of visitors' stay on the land.[297] Because the Treaty requires land to be unoccupied, the terminating condition of occupation was satisfied through Bighorn National Forest's creation, and thereby abrogated the Tribe's usufructuary right to hunt under the Treaty.[298]

3. The Conservation Necessity Doctrine Does Not Adequately Protect State Interests

Although states retain no power to abrogate federal treaties, the Supreme Court has declared that states may regulate game through "an appropriate exercise of the police power of the State."[299] The Supreme Court has recognized

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nps.gov/yell/planyourvisit/fees.htm (last updated Dec. 17, 2018). For more information on park regulations, see *Yellowstone National Park Fees & Passes*, NAT'L PARK SERV., https://www.nps.gov/yell/planyourvisit/rules.htm (last updated Dec. 22, 2017).

[292] Brief for Respondent at 49–53, *Herrera*, 138 S. Ct. 2707 (No. 17-532), https://www.supremecourt.gov/DocketPDF/17/17-532/71707/20181113153510005_Respondent%20Herrera%2017-532.pdf; Transcript of Oral Argument at 46, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[293] Brief for Respondent at 49–51, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[294] *See* Proclamation No. 30, 29 Stat. 909; Petition for Writ of Certiorari app. G at App-47 to -48, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[295] Petition for Writ of Certiorari app. G at App-47, *Herrera*, 138 S. Ct. 2707 (No. 17-532) (Pres. Proclamation No. 30, 29 Stat. 909) (emphasis added).

[296] *Id.* app. G at App-48 (Pres. Proclamation No. 30, 29 Stat. 909).

[297] Transcript of Oral Argument at 48, *Herrera*, 138 S. Ct. 2707 (No. 17-532); *Big Horn National Forest Recreation Rules and Regulation*, U.S. DEP'T AGRIC. FOREST SERV. https://www.fs.usda.gov/detailfull/bighorn/recreation/?cid=stelprdb5312215&width=full (last visited Apr. 17, 2019) (limiting length of stay within the national forest to fourteen days within any twenty-eight-day period).

[298] *See* Treaty with the Crows, art. 4 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States . . . .").

[299] Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 398 (1968). The Supremacy Clause of the United States Constitution provides: "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. . . ." U.S. CONST. art. VI, cl. 2.

that states may regulate certain off-reservation Indian treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[300] Any regulation must also be "reasonable and necessary."[301] When enforcing game regulations through this conservation necessity doctrine, states face a "formidable burden in showing the necessity of such regulation[s]."[302] Federal courts have exhibited inconsistencies in interpreting the scope of the conservation necessity doctrine.[303] States must meet varying standards to satisfy the necessity standard depending on federal jurisdiction.[304] Further complicating the issue, the Supreme Court has not recently decided the scope of the conservation necessity doctrine, and declined to do so in the final determination of *Herrera*.[305] Due to the unsettled nature of the doctrine's scope, Wyoming's interest in regulating game may be in peril if the Supreme Court declares the Treaty right valid. However, the *Repsis* court previously held that Wyoming's game regulations are reasonable and necessary for regulation.[306]

The court in *Repsis* considered Wyoming's right to regulate game for conservation in two ways.[307] First, the court held that, because Wyoming statehood abrogated the Tribe's right to hunt, "the Tribe and its members are subject to Wyoming's game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation."[308] Second, in the event that the Treaty reserved a continuing right which survived statehood, the court held that evidence in the record supported the contention that Wyoming game regulations were reasonable and necessary for conservation.[309]

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[300] *Repsis II*, 73 F.3d 982, 992 (citing *Puyallup I*, 391 U.S. at 398 (emphasis added)). *See also* Transcript of Oral Argument at 57, *Herrera*, 138 S. Ct. 2707 (No. 17-532) (statement of Justice Kavanaugh) ("[T]here is still preserved in the cases a right in the state to regulate in the interest of conservation.").

[301] *See* Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 45 (1973).

[302] Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Evans Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101, 1111 (2003).

[303] *See id.* at 1110.

[304] *See, e.g.*, United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) (holding state regulation valid only if Indian fishing is likely to cause "irreparable harm" to fisheries); Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969) (holding that Oregon may "use its police power only to the extent necessary to prevent the exercise of [a treaty] right in a manner that will imperil the continued existence of the fish resource"); United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) (stating that the purpose of the conservation necessity doctrine is to "forestall the imminence of extinction").

[305] Transcript of Oral Argument at 59, *Herrera*, 138 S. Ct. 2707 (No. 17-532); Herrera v. Wyoming, 139 S. Ct. 1686, 1702–03 (2019).

[306] *See supra* note 56 and accompanying text.

[307] *Repsis II*, 73 F.3d 982, 992–93 (10th Cir. 1995).

[308] *Id.*

[309] *Id.* at 993.

As to the former finding, the *Repsis* court properly determined that if statehood abrogated the Treaty hunting rights, the conservation necessity doctrine did not apply because there were no off-reservation treaty rights to regulate.[310] Considering the court's latter finding, *Repsis* provided that if Treaty rights did exist, state authority properly regulated the rights under the conservation necessity doctrine.[311] Prior to the *Mille Lacs* decision, *Race Horse* determined that the Treaty hunting right and statehood are "irreconcilable."[312] Importantly, *Mille Lacs* rejected this holding, stating that "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State."[313] Therefore, *Mille Lacs* stands for the proposition that if treaty rights exist, they can still be regulated by the state with "reasonable and necessary nondiscriminatory regulations on Indian hunting" if they are in the interest of conservation.[314]

The conservation necessity doctrine's purpose is a means to "forestall the imminence of extinction."[315] Simply forestalling extinction does not contemplate safety concerns or disease management at the level that Wyoming has legislated.[316] Significant gaps exist between what Wyoming wishes to regulate and what the State may be permitted to regulate under the conservation necessity doctrine.[317] The *Repsis* court previously found that Wyoming game laws were reasonable and necessary for conservation.[318] Because of the finding in *Repsis*, Crow Tribe members should be required to abide by current Wyoming hunting regulations when hunting in the State, even if the Treaty hunting right survives.[319] However, if Wyoming regulations are determined not to be reasonable and necessary in the future, the conservation necessity may fail to adequately protect state interests such as hunter safety and mitigation of wildlife and livestock disease.[320]

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[310] *Id.* at 992–93.

[311] *See id.* at 993.

[312] Ward v. Race Horse, 163 U.S. 504, 514 (1896).

[313] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (citing Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)).

[314] *Id.* at 205 (citing Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 398 (1968)).

[315] United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983).

[316] *See id.*; Transcript of Oral Argument at 60, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (mem.) (No. 17-532), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018 17-532_c07e.pdf.

[317] Transcript of Oral Argument at 60, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[318] *See supra* note 309 and accompanying text.

[319] *Repsis II*, 73 F.3d 982, 993 (10th Cir. 1995).

[320] Wyoming possesses several regulatory interests when managing hunting. *See* Transcript of Oral Argument at 60, *Herrera*, 138 S. Ct. 2707 (No. 17-532). One regulatory interest is safety. *Id.* Current regulations limit the duration of hunting seasons. *See generally Regulations,* WYO. GAME

V. CONCLUSION

The Wyoming District Court correctly held *Race Horse* previously adjudicated the validity of the Crow Treaty hunting right, and that issue preclusion applied to *Herrera*.[321] Furthermore, the merits of *Herrera* support the district court's holding that the Treaty hunting right was abrogated.[322] Because *Mille Lacs* merely distinguished itself from *Race Horse* and *Repsis*, the "temporary and precarious" nature of the Treaty language compelled a finding that terminating conditions within the Treaty abrogated the Tribe's hunting right: Wyoming statehood and the establishment of the Bighorn National Forest.[323] These terminating conditions rendered the land "occupied."[324] Because the United States Supreme Court declined to rule on the conservation necessity doctrine, issues are still unsettled regarding Wyoming's ability to regulate hunting under the doctrine.[325] Despite the final determination of the United States Supreme Court, the Wyoming district court properly supported its holding of *Herrera*.

& FISH DEP'T, https://wgfd.wyo.gov/Regulations (last visited Apr. 17, 2019). These defined time periods ensure that all people on lands within Wyoming, whether state of federal, know that no hunting occurs on the lands outside of designated seasons. Transcript of Oral Argument at 60, *Herrera*, 138 S. Ct. 2707 (No. 17-532). Wyoming law requires big game hunters to wear fluorescent orange or pink exterior garments in the name of safety. *Hunting in Wyoming,* WYO. GAME & FISH DEP'T, https://wgfd.wyo.gov/Hunting/What-do-I-need-to-Hunt (last visited Apr. 17, 2019). Further yet, Wyoming requires proof that certain hunters have obtained a certificate of competency and safety in the use of handling firearms to persons born after 1966. *Id.* Also, firearms may only be fired at certain times of day. Transcript of Oral Argument at 61, *Herrera*, 138 S. Ct. 2707 (No. 17-532); 40-2 Wyo. Code R. § 5(a) (LexisNexis 2019). The State additionally employs measures that authorize taking samples from harvested game to determine whether diseases such as Brucellosis exist. Transcript of Oral Argument at 61, *Herrera*, 138 S. Ct. 2707 (No. 17-532).

[321] *See supra* notes 174–257 and accompanying text.

[322] *See supra* notes 258–98 and accompanying text.

[323] *See supra* notes 242–98 and accompanying text.

[324] *See supra* notes 242–98 and accompanying text.

[325] *See supra* notes 299–314 and accompanying text.