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Uncircle the Wagons: Reconciling Wyoming’s Regulatory Tradition with the Eastern Shoshone’s Treaty-Based Off-Reservation Hunting Rights

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UNCIRCLE THE WAGONS: RECONCILING WYOMING’S REGULATORY TRADITION WITH THE EASTERN SHOSHONE’S TREATY-BASED OFF-RESERVATION HUNTING RIGHTS

Erick J. Franz Hughes*

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I. Introduction

Two years after Frederick Jackson Turner, standing before a room of academics at the Chicago World Fair, announced the close of the western frontier, a posse of armed Wyomingites rode out into the outskirts of Jackson with intent to regulate tribal hunting rights. The posse murdered two Bannock Indians, but a trial was never held. One year later, in 1896, the United States Supreme Court, echoing the tenor of Turner’s 1893 “Frontier Thesis,” held Wyoming statehood had extinguished treaty-based off-reservation hunting rights reserved by the Eastern Shoshone and Shoshone-Bannock Indian tribes. This convergence of extralegal regulatory action and a historical narrative of western expansion joined

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2 Brief of Amicus Curiae Shoshone-Bannock Tribes of the Fort Hall Reservation in Support of Petitioner at 5–6, 15–16, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) [hereinafter Brief of Amicus Curiae Shoshone-Bannock Tribes]. The U.S. Attorney for the District of Wyoming reported the incident was a “premeditated and prearranged plan to kill some Indians and thus stir up sufficient trouble to . . . ultimately have the Indians shut out from Jacksons Hole.” U.S. Dep’t of the Interior, Annual Report of the Commissioner of Indian Affairs 77 (1895), https://www.doi.gov/sites/doi.gov/files/T-21927.pdf [https://perma.cc/VJ2E-A5KZ]. The U.S. Attorney continued that “[i]t would, however, be but an act of simple justice to bring the men who murdered the Indian, Timega, to trial. I would state, however, in this connection that there are no officials in Jacksons Hole—county, State, or national—who would hold any of [the] posse for trial.” Id.

3 See infra Parts II.B, II.C.
together to buck the Indian jurisprudence that respected Indian treaty rights. The resulting current institutionalized Wyoming's police power, or regulatory tradition, disregarding treaty-based off-reservation hunting rights. This channel stayed its course for over a century.

Wyoming has enthusiastically exercised its police power in regulating off-reservation tribal hunting rights since that power was judicially granted in Ward v. Race Horse in 1896. In fact, Wyoming's exercise of its police power is practically synonymous with its regulatory tradition. “Tradition” is defined as “past customs and usages that influence or govern present acts or practices.” This definition readily applies to Wyoming's practices. Indeed, tradition is a hallmark of Wyoming identity. The state's traditions are wrapped in the power of its western symbols and industry, and its politics of individualism and property rights. Relatedly, Wyoming zealously guards its management of wildlife and, in turn, its tradition of regulating tribal hunting. Wyoming, and its citizens, have done so—sometimes illegally—since it was a territory. To be sure, Race Horse did not require Wyoming to regulate tribal hunting. It merely declared the state's ability to do so legally. As a result, Wyoming customarily exercised this regulatory power.


7 See infra Part IVA.

8 See infra notes 9–17 and accompanying text.


10 See infra notes 11–18 and accompanying text.


12 See id.

13 See infra Parts III.A, IV.A.

14 See infra Part II.C.

15 See Ward v. Race Horse, 163 U.S. 504 (1896).

16 Id.

17 See infra Part IVA.
Notably, Wyoming is the only state to zealously guard its alleged police power to regulate tribal off-reservation hunting.\footnote{18} Race Horse, the defendant in the case, was a Bannock Indian who lived on the Fort Hall Reservation in Idaho, and today his tribe exercises their treaty-based off-reservation hunting rights thanks to holdings by the Idaho Supreme Court.\footnote{19} Similarly, Colorado cooperates with the Ute Mountain Ute and Southern Ute tribes to allow tribal regulation of off-reservation hunting.\footnote{20} These precedents offer an alternative to Wyoming’s regulatory tradition.\footnote{21}

The Eastern Shoshone Tribe on the Wind River Indian Reservation is currently in a unique position.\footnote{22} The tribe is a non-party to litigation between Wyoming and Clayvin Herrera, a member of the Crow Tribe.\footnote{23} Despite 	extit{Herrera v. Wyoming} being actively litigated on remand from the United States Supreme Court, the Eastern Shoshone’s treaty-based hunting rights hinged on 	extit{Race Horse}, a case that 	extit{Herrera} repudiated.\footnote{24} Wyoming has downplayed the repudiation of 	extit{Race Horse}, seeking instead to retain the primacy of its regulatory authority through the “conservation necessity doctrine.”\footnote{25} Nevertheless, while the Crow Tribe litigates the force of applicable treaty text nearly identical to that in the treaty creating the Wind River Indian Reservation, the Second Treaty of Fort Bridger, the Eastern Shoshone appear to be free to begin self-regulating treaty-based off-reservation hunting rights.\footnote{26} Thus, in the absence of finality, there is uncertainty with regard to Wyoming’s traditional regulatory power over tribal hunting rights.\footnote{27} While tradition

\begin{thebibliography}{99}
\bibitem{18} Tribes exercising their treaty-based off-reservation hunting rights on land such as wildlife management property, state public lands, and national forest lands have been upheld by state and federal courts in Idaho, Montana, and Oregon. Kyle Anne Gray & Hadassah (Dessa) Reimer, 	extit{When is a Forest Open for Hunting? Indian Treaty Hunting Rights on National Forests and Other Public Lands}, ABA SECTION ENV’T ENERGY & RES., 13 NATIVE AM. RES. COMM. NEWSL. 1, 4 (June 2017).
\bibitem{19} See infra Part IV.B.1.
\bibitem{20} See infra Part IV.B.2.
\bibitem{21} See infra Part IV.B.
\bibitem{23} Id.
\bibitem{26} Wyo. 65th Legislature, Select Committee on Tribal Relations Meeting, at 0:09:00 (Oct. 14, 2019), [hereinafter 2019 Select Committee on Tribal Relations Meeting], https://www.wyoleg.gov/InterimCommittee/2019/STR-14Oct2019PM1.mp3 [https://perma.cc/4V9D-TF4N].
\bibitem{27} Reimer, supra note 22, at 22.
\end{thebibliography}
may influence or govern the present, there exists an opportunity to start a better tradition that is of mutual benefit.

This Comment argues that Wyoming should engage in proactive, mutually beneficial development of a cooperative agreement with the Eastern Shoshone Tribe and federal agencies regarding off-reservation hunting. Part II explores the history of the Eastern Shoshone, the tribe’s ancestral hunting rights, and the reservation of those rights through the Second Treaty of Fort Bridger. It considers the facts that actually precipitated the litigation in Race Horse and provides an overview of the dominance of Frederick Jackson Turner’s Frontier Thesis in the historiography of the American West. In particular, Race Horse and its progeny show how ideas surrounding the Frontier Thesis have retained their force for over a century, especially in Wyoming. Part III demonstrates how Herrera v. Wyoming and its precedent represent a realignment in Indian jurisprudence. It reveals that the conservation necessity doctrine is not determinative of Wyoming’s ability to manage wildlife and supports efforts for a cooperative agreement. Part III also examines and applies the interpretive treaty analysis in Herrera to the Second Treaty of Fort Bridger, concluding that the Eastern Shoshone’s tribal hunting rights are valid. Part IV, in turn, takes into account Wyoming’s traditional interests in regulating hunting, and follows up by examining the Eastern Shoshone’s history of hunting on the Wind River Indian Reservation. It surveys similarly situated tribes, offering their efforts as guides for Wyoming and the Eastern Shoshone in entering a cooperative agreement. Finally, this Comment suggests a path forward to meet this end.

II. The Genesis of Wyoming’s Regulatory Tradition

At the center of historical and current legal conflicts between the federal government, states, and the Eastern Shoshone, Shoshone-Bannock, and Crow tribes, is treaty language. In 1868, the tribes signed two separate treaties, nearly two months apart. The treaties were some of the last to be entered into by Indian
tribes and the United States.\(^{41}\) Identical text in these treaties, providing that the tribes “have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon,” is the focus of a century-old conflict between the State of Wyoming and the tribes.\(^{42}\) It is the actions of humans that lay bare the consequence of those words.\(^{43}\) Indeed, the Race Horse Court’s decision resulted from extralegal regulatory action committed by Wyomingites against Shoshone-Bannock Indians.\(^{44}\) This action converged in the Court with the then-predominant historical interpretation of the history of the American West, as articulated by Frederick Jackson Turner, providing the intellectual foundation for Wyoming’s tradition of regulating treaty-based off-reservation hunting rights.\(^{45}\)

Accordingly, this Part first explores the histories of the Eastern Shoshone and Shoshone-Bannock tribes, and considers historical milestones leading up to the signing of the Second Treaty of Fort Bridger.\(^{46}\) Though for the sake of clarity, because the Shoshone-Bannock Tribes selected a separate area for their own reservation in present-day Idaho and have their own off-reservation hunting agreement with that state, this Comment focuses primarily on the off-reservation hunting rights of the Eastern Shoshone Tribe of the Wind River Indian Reservation in Wyoming.\(^{47}\) This Part also places into sharper historical context the conflict between Wyomingites and tribes that led to Ward v. Race Horse.\(^{48}\) The discussion demonstrates that the origin of Wyoming’s regulatory tradition coincided with a shift in Indian jurisprudence, reflecting contemporary attitudes, and was emblematic of Turner’s Frontier Thesis.\(^{49}\)

A. The Eastern Shoshone reserved off-reservation hunting rights in the Second Treaty of Fort Bridger.

Before primarily occupying central Wyoming and southern Idaho in the 1800s, Shoshone lands extended into Montana, southern Idaho, and northern Utah.\(^{50}\) The Shoshone comprised many separate bands, sharing a linguistic bond


\(^{42}\) Second Treaty of Fort Bridger, supra note 40, art. IV (emphasis added).

\(^{43}\) See infra Part II.B.

\(^{44}\) See infra Part II.B.

\(^{45}\) See infra Parts II.B, II.C.

\(^{46}\) See infra Part II.A.

\(^{47}\) See infra Part IV.B.1.

\(^{48}\) See infra Part II.B.

\(^{49}\) See infra Part II.C.

\(^{50}\) D.B. Shimkin, Wind River Shoshone Ethnogeography, 5 Anth. Rec. 245, 247 (1947).
and loose political connection.\textsuperscript{51} Being one of the first tribes to acquire the horse from the Spanish allowed the Shoshone to control large swaths of land when they followed the buffalo herds.\textsuperscript{52} It also allowed for more efficient hunting and the Shoshone prospered.\textsuperscript{53} Smallpox and tribal warfare decimated the tribe at the turn of the 19th century, but the Eastern Shoshone and Shoshone-Bannock tribes endured, relying on hunting buffalo for their food.\textsuperscript{54} Westward migration by Euro-Americans led the federal government to negotiate with the Eastern Shoshone for the migrants’ safe passage, resulting in the First Treaty of Fort Bridger in 1863.\textsuperscript{55} Following the Civil War, aided by mountainous geography and the leadership of Chief Washakie, the Eastern Shoshone stayed out of the subsequent Indian Wars of the 1860s and 1870s.\textsuperscript{56} And hunting remained the primary food source for the Shoshone.\textsuperscript{57}

Increasing westward migration, driven by mining and construction of the transcontinental railroad, led Congress to anxiously debate the “Indian question.”\textsuperscript{58} One senator argued the Indian must “accept the march of civilization” or accept “his destiny that awaits him, which is extinction.”\textsuperscript{59} In the alternative, another senator explained it is a choice between war or “having a proper regard for his rights as a human being” and negotiating with the Indians to place them on reservations in return for promises of security.\textsuperscript{60} Choosing primarily the latter course in 1867, Congress created the Indian Peace Commission “to establish Peace with certain Hostile Indian Tribes.”\textsuperscript{61} Congress empowered the Commission to sign treaties with Indian tribes reserving “permanent homes” in exchange for relinquishment of claims to their ancestral lands.\textsuperscript{62} The federal government hoped this would “insure civilization for the Indians and peace and safety for the whites.”\textsuperscript{63}

\textsuperscript{52} Shimkin, supra note 50, at 246, 266.
\textsuperscript{54} Trenholm \& Carley, supra note 51, at 20–21.
\textsuperscript{55} Treaty Between the United States of America and the Eastern Bands of Shoshonee Indians, E. Shoshonee-U.S., July 2, 1863, 18 Stat. 685.
\textsuperscript{56} Trenholm \& Carley, supra note 51, at 214; see also Shoshone Tribe of Indians of Wind River Rsv. v. United States, 299 U.S. 476, 486 (1937) (“The loyalty of the Shoshone tribe to the people of the United States has been conspicuous and unaltering. A fidelity at least as constant and inflexible was owing in return.”).
\textsuperscript{58} Cong. Globe, 40th Cong., 1st Sess. 681 (1867).
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 672.
\textsuperscript{61} An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, § 1, 15 Stat. 17, 18 (1867).
\textsuperscript{62} Id. § 2.
\textsuperscript{63} Id. § 1.
The Indian Peace Commission, comprised predominantly of veteran Civil War officers, set out to perform treaty making in earnest.\(^64\) Shortly after signing the Second Treaty of Fort Laramie with the Crow Tribe, the Commission sent a representative to Fort Bridger to negotiate a treaty with the tribes of that area.\(^65\) On July 3, 1868, the Eastern Shoshone and Shoshone-Bannock tribes signed the Fort Bridger Treaty of 1868 (Second Treaty of Fort Bridger) with the United States.\(^66\) The Eastern Shoshone agreed to relinquish much of their ancestral lands to the United States in exchange for a reservation and retention of various tribal rights, including the right to hunt off-reservation.\(^67\) The text of the treaty contains explicit references to these terms:

\[\text{[T]hey 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 so long as peace subsists among the whites and Indians on the borders of the hunting districts.}\(^68\)

The Eastern Shoshone reserved land in the Wind River valley for their “absolute and undisturbed use and occupation.”\(^69\) The treaty also prohibited unauthorized persons from passing over, settling upon, or residing in the reservation.\(^70\) The reservation, moreover, was created just weeks before the creation of the Wyoming Territory.\(^71\) In 1890, twenty-two years after the treaty was signed, Congress admitted Wyoming into the Union.\(^72\) Before turning to the events of the 1890s challenging the validity of that treaty language, however, attention must be given to the legal landscape of established Indian jurisprudence at the time.\(^73\)


\(^65\) Id. at 112–13. The immediate impetus for negotiations with these tribes was the construction of the Union Pacific Railroad through their ancestral lands. Id.

\(^66\) Second Treaty of Fort Bridger, supra note 40.

\(^67\) Id. arts. II, IV. The treaty right to hunt off-reservation “was not a grant of rights to Indians, but a grant of right from them—a reservation of those not granted.” United States v. Winans, 198 U.S. 371, 381 (1905).

\(^68\) Second Treaty of Fort Bridger, supra note 40, art. IV (emphasis added).

\(^69\) Id. art. II (emphasis added).

\(^70\) Id.


\(^72\) An Act to Provide for the Admission of the State of Wyoming into the Union, ch. 664, § 1, 26 Stat. 222 (1890).

\(^73\) See infra Part II.B.

The Marshall Trilogy established the foundations of Indian jurisprudence and, in turn, recognized tribal sovereignty.\(^{74}\) In *Johnson v. M’Intosh*, the United States Supreme Court declared the federal government has sole authority over Indian affairs.\(^{75}\) It did so by adopting the “doctrine of discovery,” conferring title of land to the discovering nation-state.\(^{76}\) While Indian tribes kept a right of occupancy, they were permitted to convey the land only to that nation-state.\(^{77}\) The exclusive nature of this relationship was reaffirmed in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.\(^{78}\) In *Cherokee Nation*, the Court declared Indian tribes to be “domestic dependent nations” whose relationship with the United States “resemble[s] that of a ward to his guardian.”\(^{79}\) Tribes look to the government “for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants . . . .”\(^{80}\) This established the federal government’s “trust responsibility” to Indian tribes.\(^{81}\) In theory, the United States’ trust responsibility requires the federal government to exhibit utmost loyalty in its dealings with Indian tribes.\(^{82}\) With regard to treaty interpretation, the *Worcester* Court introduced, for the first time, the Indian canons of construction: treaty text must be interpreted as the Indians would have understood it at the time of the treaty’s formation and “[t]he language used in treaties with the Indians should never be construed to their prejudice.”\(^{83}\)

The Marshall Trilogy was established precedent in the 1890s.\(^{84}\) But the forces that the Marshall Court was keenly aware of and seemingly attempted, in part, to legally hold at bay were eventually unleashed onto the West.\(^{85}\) These

\(^{74}\) 1982 COHEN’S HANDBOOK, supra note 41, at 220.

\(^{75}\) *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

\(^{76}\) Id. at 573–74.

\(^{77}\) Id.


\(^{79}\) *Cherokee Nation*, 30 U.S. at 11.

\(^{80}\) Id.

\(^{81}\) 1982 COHEN’S HANDBOOK, supra note 41, at 220.

\(^{82}\) See id.

\(^{83}\) *Worcester*, 31 U.S. at 582 (McLean, J., concurring) (“How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”).

\(^{84}\) See id. at 515; *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation*, 30 U.S. at 1.

\(^{85}\) See *Worcester*, 31 U.S. at 580 (McLean, J., concurring). These forces can be adequately understood through the prism of states’ rights, that, of the supremacy of state power over the federal government and Indian tribes. See FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 76–77 (abr. ed. 1986). In *Worcester*, Justice Marshall described the appropriate relationship between the three sovereigns:

The Cherokee nation, then, is a distinct community occupying its own territory, with
forces—Euro-Americans’ physical migration with its attendant intellectual thought and attitudes—brought to bear the value of the legal guardrails protecting tribal sovereignty represented by the Trilogy. This was especially so for the Indian canons of construction and, as will be further discussed below, is best encapsulated in Ward v. Race Horse. What Race Horse legally applied to the Eastern Shoshone and Shoshone-Bannock tribes had already been championed for decades, reaching past the Marshall Trilogy of the early 1800s to its distant roots in the Crusades. Indeed, colonization of the land now known as the United States was believed to be a matter of natural law. A variation of this theme described in Race Horse is best expressed by Frederick Jackson Turner’s “Frontier Thesis” as articulated in his 1893 seminal work, “The Significance of the Frontier in American History.”

The origins of the Frontier Thesis can be traced back to when newspapermen, in the 1840s, justified American westward expansion through a nationalistic doctrine grounded in natural law. Proclaiming it their “manifest destiny” to spread liberty and self-governance across the continent, the United States eagerly turned westward. Looking beyond the land encompassing the Louisiana Purchase, and to the land holdings of Mexico, the United States went to war. The Mexican-American War and its subsequent treaties placed western lands securely within the boundaries of the United States. Although the United States was secure from international actors, there still existed the Indian tribes within its borders. Its acquisitions included the homeland of the Eastern Shoshone, territory that eventually became Wyoming. But the doctrine of manifest destiny relegated the position of Indians already occupying the land, like those in what would become

boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.


86 See, e.g., Ward v. Race Horse, 163 U.S. 504 (1896).
87 See infra Part II.C.
89 See infra notes 187–204 and accompanying text.
92 Id. at 73.
93 Id.
94 Id. at 79–84.
95 Id. at 74.
96 See id. at 62, 80.
Wyoming, to the fringe.97 Euro-Americans largely considered these lands to be “wilderness” or the “frontier.”98 Of course, the presence of diverse Indian tribes in western lands since time immemorial was incontrovertible proof exposing the falsity of these concepts.99 Notwithstanding, this attitude persisted for well over a century and became the dominating current in the historiography of the American West.100

Within Turner’s historical narrative, Indian tribes like the Eastern Shoshone had a trivial place in the Americanizing experience of Euro-Americans moving westward.101 The Frontier Thesis was a process-based telling of the history of American West.102 It centered on the wilderness, and Easterners’ interaction with it, as the exceptional element of American history, emphasizing Western symbols as waypoints in the evolution and birth of American exceptionalism, or “a new product that [was] American.”103 That product embodied American virtue, described as “[t]hat coarseness and strength . . . that practical, inventive turn of mind, quick to find expedients.”104 Foremost at the center of the American product was “that dominant individualism, working for good and for evil, and withal that buoyancy and exuberance which comes with freedom.”105 Thus, Euro-American ethnocentrism and its individualist ethic spread across the West in earnest.106

The vanguard of Americanization purportedly happened at the “frontier line” separating “wilderness” from “civilization.”107 The frontier, Turner stated, could be defined elastically as “including the Indian country and outer margin of the ‘settled area’ of the census reports.”108 Settled area was defined by the census reports “as the margin of that settlement which has a density of two or more to the square mile.”109 The 1890 census report commented that “the unsettled area has been so broken into by isolated bodies of settlement that there can hardly be said

97 Id. at 73.
99 Id. at 21.
100 Id.
102 Id.
103 See Turner, supra note 90, at 200–01. The story of America was one of conquering wilderness, yet the result of this process was not an America that resembled “old Europe.” Id. at 201. For an in-depth chronicling of evolving ideas around the wilderness throughout the American experience, see Roderick Frazier Nash, Wilderness & the American Mind (2014).
104 Turner, supra note 90, at 226–27 (emphasis added).
105 Id. at 227.
106 See infra notes 107–16 and accompanying text.
108 Id.
109 Id.
to be a frontier line."\textsuperscript{110} This declaration was the impetus for Turner’s paper.\textsuperscript{111} It would also provide the intellectual thrust in \textit{Race Horse} six years later.\textsuperscript{112} By Turner’s telling, when Americans advanced west they pushed the frontier line to “the outer edge of the wave—the meeting point between savagery and civilization.”\textsuperscript{113} Indians represented savagery.\textsuperscript{114} Euro-Americans represented civilization.\textsuperscript{115}

Understandably, Turner’s thesis has been called an ethnocentric and nationalistic story of the West.\textsuperscript{116} It utterly dominated the field and, more broadly, the collective imagination of Americans with regard to the West.\textsuperscript{117} Turner, however, did not render his thesis from nothing.\textsuperscript{118} “The doctrine of manifest destiny was just one idea that presaged the articulation of its principles into academic terms.”\textsuperscript{119} Theodore Roosevelt made this connection when he said Turner “put into shape a good deal of thought that has been floating around rather loosely.”\textsuperscript{120} The Court’s reasoning in \textit{Race Horse} adopted these contemporary currents of historical thought that, in turn, marginalized tribes and treaty rights.\textsuperscript{121}

\textbf{C. Ward v. Race Horse institutionalized Frederick Jackson Turner’s Frontier Thesis.}

To understand Wyoming’s ability to regulate treaty-based off-reservation hunting rights, an examination of the facts outside the four corners of the Court’s \textit{Race Horse} opinion is necessary.\textsuperscript{122} It begins with the land, the game thereon, and the construction of state regulatory authority.\textsuperscript{123} Wyoming’s failure to enforce laws

\begin{itemize}
\item \textsuperscript{110} Id. at 199.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See infra notes 196–210 and accompanying text.
\item \textsuperscript{113} Turner, supra note 90, at 200.
\item \textsuperscript{114} See id. at 207.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Limerick, The Legacy of Conquest supra note 98, at 21.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} See Richard White, When Frederick Jackson Turner and Buffalo Bill Cody Both Played Chicago in 1893, in Frontier and Region: Essays in Honor of Martin Ridge 201, 204 (Robert C. Ritchie & Paul Andrew Hutton eds., 1997).
\item \textsuperscript{119} In his newspaper writings, John O’Sullivan articulated manifest destiny: “The American claim is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us.” White, supra note 91, at 73.
\item \textsuperscript{120} White, supra note 118, at 204. Relatedly, in 1900 Roosevelt employed the popular imagery used in the Frontier Thesis, stating that “the settler and pioneer have at bottom had justice on their side; this great continent could not have been kept as nothing but a game preserve for squalid savages.” Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 23 (2012).
\item \textsuperscript{121} Mills, supra note 4.
\item \textsuperscript{122} Brief of Amicus Curiae Shoshone-Bannock Tribes, supra note 2, at 5–6.
\item \textsuperscript{123} See infra notes 124–210 and accompanying text.
\end{itemize}
against overhunting by Euro-Americans allowed its citizens—who believed in their own superiority as well as wildlife as an individual property right—to violently incite a legal battle over the legitimacy of the Eastern Shoshone and Shoshone-Bannock tribes’ treaty-based off-reservation hunting rights.124

In 1866, two years before the signing of the Second Treaty of Fort Bridger, the Dakota territorial legislature passed a single hunting regulation, prohibiting hunting on private land other than by its owner.125 After Wyoming became a territory, its legislature passed a game law that prohibited the sale of big game animals, including elk, between February 1 and August 15.126 This law did not regulate subsistence hunting, but applied instead to hunting as a commercial endeavor.127 Enforcement of the law was virtually non-existent; contemporaries described the consequences as slaughter.128 The territorial legislature responded in 1882 by defining the hunting season, targeting commercial hunting, and ultimately prohibiting the purchase or possession of untanned hides by “any corporation, company, person or persons.”129 This law regulated subsistence hunting to the extent that it limited the killing of game to what a person “can use or dispose of for food,” and could take place no farther than ten miles away from the hunter’s residence.130 Five years after becoming a state, in 1895, the Wyoming legislature established the use of game wardens to enforce hunting regulations.131

While non-Indian Wyomingites and visiting hunters engaged in mass slaughter of big game, blame and political pressure bore down on tribal hunting rights.132 In 1883, the Wyoming Stock Growers Association—the most powerful political organization in Wyoming at the time—complained about the loss of cattle.133 The Association blamed Indian tribes, including the Shoshone and Crow, and lobbied the Wyoming governor for protection “against reservation Indians acting under semi-official sanction.”134 The Indian agent on the Wind River Indian

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124 See infra notes 125–210 and accompanying text.
127 Id.
128 One Wyoming newspaper reported a hunting party from Laramie returned from a hunting trip after “having committed immense slaughter among the elk and deer.” Local Brevities, Cheyenne Daily Sun, Sept. 12, 1877, at 4.
129 Id. §§ 7, 9.
131 Id. §§ 7, 9.
132 See infra notes 133–46 and accompanying text.
133 Agnes Wright Spring, Seventy Years: A Panoramic History of the Wyoming Stock Growers Association 9, 75 (1942).
134 Id.
Reservation dispelled this notion, reporting that “there is no evidence that they committed any outrages on cattle or other property last winter for they had all the buffalo and other game they could consume, and were peaceable and quiet.”

A pattern thus emerged: non-Indian Wyomingsites antagonizing via treaty-based hunting rights and, in turn, federal Indian agents coming to the tribes’ defense. The Eastern Shoshone hunted off-reservation for decades, until certain non-Indian Wyomingsites jeopardized the tribe’s rights with false accusations of poaching. The Bureau of Indian Affairs received reports containing these allegations from non-Indian Wyomingsites and powerful figures, including the governor. The acting agent of the Shoshone Agency, however, reported “not a single case of wanton destruction of wild animals” over the period the Eastern Shoshone “availed themselves of the privilege” of exercising their tribal rights.

The agent further emphasized that the Eastern Shoshone exercised their rights through subsistence hunting, noting “the present ration for Indians on this reservation (one-half pound of flour and three-fourths pound beef, net) is not sufficient to ward off the pangs of hunger . . . .”

Despite receiving more reports of wanton destruction of game by the Eastern Shoshone and Shoshone-Bannock, the Bureau of Indian Affairs determined the tribes had been “[un]justly complained of.” The agency concluded that the allegations "were either altogether false or grossly exaggerated, sometimes willfully so,” and that “[i]t is a well-known and admitted fact that the extermination of the buffalo and other large game in the West was the work of the whites.” But the Bureau’s conclusion did not alleviate brewing tension around Jackson Hole, whose community depended on wild game to sustain its tourism-based economy. Wyoming Governor William A. Richards addressed a letter to the Bureau of Indian Affairs complaining of tribal members hunting off-reservation. He enclosed a copy of the State of Wyoming Fish and Game Laws with a request “that action be taken which would restrict Indians from leaving their respective reservations for

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136 See infra notes 137–46 and accompanying text.


138 Id.

139 Id.

140 Id.

141 Id.

142 Id.

143 Id. at 67 (“[T]he settlers looking upon big game as their exclusive property and considering every elk killed by an Indian a source of so much revenue lost to them.”).

144 Id. at 63.
the purpose of hunting in Wyoming.”145 Tension on the ground came to a head on July 13, 1895.146

Fearing the loss of game that was, in fact, a result of overhunting by non-Indian guides, or “dude” hunters, Jackson Hole constable William Manning gathered a posse of 26 deputized settlers.147 It had been decided the previous season “to keep the Indians out of the region.”148 With “carefully prepared plans,” they headed to the outskirts of Jackson Hole with intent to violently regulate the treaty-based off-reservation hunting rights of the Eastern Shoshone and Shoshone-Bannock Indians.149 The posse surrounded a large party of Shoshone-Bannock Indians, closed in with guns, and arrested them.150 The posse collected their names and addresses and began to march them back toward town.151 En route, constable Manning and other posse members told the prisoners they would be hanged or sent to jail.152 The prisoners tried to escape, gunfire ensued, and two Shoshone-Bannock Indians perished.153 When asked why he fired at the party when he had their names and addresses in his possession, constable Manning replied: “The [Indian] agent would probably refuse to give up the Indians if any demand were made for them.”154

The yawning gap between the extralegal action of the Euro-American Wyomingites and the Shoshone-Bannock Indians’ virtual lack of access to justice is best articulated by the United States Attorney for the District of Wyoming: “It would, however, be but an act of simple justice to bring the men who murdered the Indian, Timega, to trial. I would state, however, in this connection that there are no officials in Jacksons Hole—county, State, or national—who would hold any of [the] posse for trial.”155 To try to close the gap, the United States Indian Service sent an

145 Id.
146 See infra notes 147–54 and accompanying text.
147 1895 Annual Report, supra note 137, at 67. Constable Manning later expressed a consciousness of purpose:

We knew very well when we started in on this thing that we would bring matters to a head. We knew some one was going to be killed, perhaps some on both sides, and we decided the sooner it was done the better, so that we could get the matter before the courts.

Id. at 76.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id. at 77.
154 Id.
155 Id. The Attorney General of the United States stated that “he was not aware of any law under which the Department of Justice could assist in obtaining redress for the Indians who had paid their fines, or in punishing, civilly or criminally, the persons who have done them injury, even the murderers.” Id. at 74–75. The Posse Comitatus Act, passed after Reconstruction and allowing
inspector, Province McCormick, to Wyoming to meet with Governor Richards.\textsuperscript{156} If the governor refused to acknowledge the treaty-based off-reservation hunting rights, the Secretary of the Interior instructed Inspector McCormick to propose a test case.\textsuperscript{157} The proposal consisted of the arrest of a tribal member for hunting, followed by “an application brought by the United States attorney for Wyoming for a writ of habeus corpus for the release of such prisoner.”\textsuperscript{158} The ensuing case would hopefully reconcile the dispute between Wyoming’s asserted regulatory authority and treaty-based off-reservation hunting rights.\textsuperscript{159}

Governor Richards refused to acknowledge tribal off-reservation hunting rights under the Second Treaty of Fort Bridger.\textsuperscript{160} He agreed to the test case and stated he would accept the ultimate decision.\textsuperscript{161} Inspector McCormick then went to the Eastern Shoshone and Shoshone-Bannock tribes.\textsuperscript{162} After much discussion, during which the inspector pledged that “no effort would be spared to restore to them guaranteed rights and also the punishment of their murderers,” the tribes agreed to the test case.\textsuperscript{163} While Inspector McCormick had confidence the courts would uphold the treaty rights, he lamented that only “one point will be gained, a principle will be established, and that is all.”\textsuperscript{164} The establishment of the right to hunt on unoccupied lands “does not protect them in that right.”\textsuperscript{165} Thus, any meaningful sense of justice seemed elusive.\textsuperscript{166} Not only were the vigilantes not going to be tried for their crimes, the subsequent test case of \textit{Ward v. Race Horse} would be framed by facts and legal issues that obfuscated this hard reality.\textsuperscript{167}


\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{See id.}

\textsuperscript{160} \textit{Id. at 58.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id. at 58–59.}

\textsuperscript{164} \textit{Id. at 59.}

\textsuperscript{165} \textit{Id.} Inspector McCormick further suggested, respectfully, “that means or steps be taken to treat with these Indians for the relinquishment of their treaty rights to hunt upon unoccupied land.” \textit{Id.}

\textsuperscript{166} \textit{See infra} notes 167–69 and accompanying text.

\textsuperscript{167} \textit{See infra} notes 170–210 and accompanying text.
and legal arguments presented in *Race Horse* would primarily address Wyoming’s interest in regulating off-reservation tribal hunting. That issue, moreover, would be decided in “the Courts of the conqueror.”

Race Horse, a Shoshone-Bannock Indian, stood before the Circuit Court of the District of Wyoming because he had killed seven elk on unoccupied land outside his reservation. Race Horse argued he was lawfully exercising his treaty-based hunting right despite Wyoming’s law “for the preservation of game and fish,” enacted in 1895. Wyoming argued otherwise, stating that upon its admission into the Union the tribes’ hunting rights had been extinguished. This was so, reasoned the state, because the “equal footing doctrine” passed to Wyoming the police power, equal to every other state, to regulate hunting. Applying the Indian canons of construction, however, the court determined Race Horse had killed the elk on unoccupied land. The court also rejected the state’s police-power argument, citing the supremacy of federal law in the form of the Second Treaty of Fort Bridger.

On appeal, the United States Supreme Court did not consider whether the area in which Race Horse hunted elk was unoccupied. Rather, the Court changed focus and addressed whether Wyoming statehood had extinguished the Eastern Shoshone and Shoshone-Bannock tribes’ treaty-based hunting rights to hunt on unoccupied, off-reservation land. Writing for the majority, Justice Edward Douglass White concluded that Wyoming’s statehood did so. The Court reasoned the hunting rights were “temporary and precarious” against the “progress of the white settlements westward.” The formation of the Second Treaty of Fort Bridger, moreover, occurred during Wyoming’s territorial period. Consequently,

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168 See infra notes 170–210 and accompanying text.
171 *Id.* at 599–600.
172 *Id.* at 609. Wyoming was represented by Willis Van Devanter, who would serve as chief justice of the Wyoming Supreme Court and later, an associate justice of the United States Supreme Court. Van Devanter is also remembered for representing and securing the dismissal of the case against the cattle barons and gunslingers who murdered homesteaders in the Johnson County War. Neil Gorsuch, *A Republic if You Can Keep It* 238–40 (2019).
173 See *In re Race Horse*, 70 F. at 609. The equal footing doctrine stands for the proposition that states admitted into the Union after the original 13 states be on “equal-footing” with them in sovereignty and jurisdiction. Pollard v. Hagan, 44 U.S. (3 How.) 212, 228–29 (1845).
174 See *In re Race Horse*, 70 F. at 605–06.
175 *Id.* at 605–06, 611–13.
177 *Id.*
178 *Id.* at 515.
179 *Id.* at 509–10.
180 See *id.* at 515.
the hunting rights conferred to the tribes were “essentially perishable, and intended to be of limited duration.”\textsuperscript{181}

The Court also examined congressional intent within the Enabling Act admitting Wyoming into the Union, holding that the equal footing doctrine extinguished the treaty rights.\textsuperscript{182} Congress intended, reasoned the Court, for every state entering the Union to be on equal footing with every other state, and this included having equal police power to regulate hunting.\textsuperscript{183} If the Court accepted Race Horse’s argument that the treaty-based hunting rights existed in perpetuity, this would be “irreconcilably in conflict” with Wyoming’s police power to regulate hunting within its boundaries.\textsuperscript{184} It would also run against congressional intent.\textsuperscript{185} Consequently, the Court reversed the lower court’s judgment.\textsuperscript{186}

The Court’s decision in \textit{Race Horse} was emblematic of a shift in Indian jurisprudence away from the doctrine set forth in the Marshall Trilogy recognizing tribal sovereignty.\textsuperscript{187} On the one hand, Justice Marshall had emphasized historical context and the sovereign relationship between tribes and the United States Government.\textsuperscript{188} On the other hand, the \textit{Race Horse} Court engaged in judicial activism, interpreting congressional intent in the absence of explicit expressions of it.\textsuperscript{189} It paid no regard to tribal sovereignty.\textsuperscript{190} The Court did so, in part, by refusing to apply the Indian canons of construction, instead applying a Eurocentric interpretive analysis that treated westward expansion as a rule of natural law; with the westward movement of superior Euro-Americans and their establishment of state and local governments, the elimination of treaty-based off-reservation hunting rights happened naturally, and legally.\textsuperscript{191} The Court suggested that the treaty was a mere placeholder during the transition between wilderness and civilization.\textsuperscript{192} According to the Court, treaty-based off-reservation hunting rights rested on the mistaken assumption “that there was a perpetual right conveyed by the treaty, when

\textsuperscript{181} Id. (emphasis added).
\textsuperscript{182} Id. at 511–12, 514–16.
\textsuperscript{183} Id. at 511–14.
\textsuperscript{184} Id. at 509, 514–15.
\textsuperscript{185} Id. at 516.
\textsuperscript{186} Id.
\textsuperscript{188} Getches, \textit{Beyond Indian Law}, supra note 4, at 305 n.149.
\textsuperscript{189} See supra notes 176–86 and accompanying text; 1982 Cohen’s Handbook, supra note 41, at 268 n.73.
\textsuperscript{190} See \textit{Race Horse}, 163 U.S. at 504–19.
\textsuperscript{191} See infra notes 192–204 and accompanying text.
\textsuperscript{192} \textit{Race Horse}, 163 U.S. at 515–16.
in fact the privilege given was temporary and precarious.”

To be sure, the Court asserted that treaty language should not be distorted to the extent it confers illusory rights that conflict with congressional action and are “destructive of the rights of one of the States.” Thus, *Race Horse* stood for the proposition that treaty rights diminished in the face of states’ rights; treaty rights were essentially secondary to state law.

The interpretative analysis employed in *Race Horse* is an intellectual variation of the Frontier Thesis. It leaned on a process-based telling of American civilization filling the western wilderness. When the federal government entered into the Second Treaty of Fort Bridger with the Eastern Shoshone and Shoshone-Bannock, the *Race Horse* Court explained, “the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation.” Further settlement brought with it laws and, according to the Court, Congress did not intend to enter into a treaty that was “not only detrimental to [new states’] future well-being, but also irreconcilably in conflict with the powers of the states already existing.” Treaty-based off-reservation hunting rights were to expire upon the arrival of Euro-Americans.

The *Race Horse* Court also emphasized inevitability—a hallmark of the doctrine of manifest destiny—in its characterization of tribal rights as “temporary and precarious.” In terms reverberating notions of natural law, the Court declared how the “march of advancing civilization foreshadowed the fact that the wilderness . . . was destined to be occupied and settled by the white man.” This, of course, constituted acceptable interference “with the hitherto untrammeled right of occupancy of the Indian.” *Race Horse* proceeded to institutionalize the second-rate status of Shoshone-Bannock and Eastern Shoshone rights in American society.

It must be repeated that the foundation of the *Race Horse* Court’s reasoning is false. There was never a wilderness. Indian civilization existed in the land that

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193 Id. at 515.
194 Id. at 516.
195 See id. at 515–16; infra notes 419–26 and accompanying text.
196 See supra notes 107–16 and accompanying text.
197 See infra notes 198–200 and accompanying text.
198 *Race Horse*, 163 U.S. at 508.
199 Id. at 509.
200 See id.
201 Id. at 510.
202 Id. at 508–09.
203 Id. at 509.
204 See id. at 515.
205 See supra Parts II.A, II.B.
became Wyoming before Euro-Americans arrived. Although Turner’s Frontier Thesis has since been discredited by historians, his emphasis on the “frontier” and “wilderness” is seared in Wyoming’s regulatory tradition and interpretation of the state’s history. Its fire burns, consuming Wyoming Indian tribes’ valid treaty-based off-reservation hunting rights. The United States Supreme Court, however, poured water on the erroneous interpretation when it overturned Race Horse in the Herrera decision.

III. Reinvigorating the Eastern Shoshone’s Treaty-Based Off-Reservation Hunting Rights

Race Horse has been described as “an anomaly” in Indian jurisprudence, and “probably the only case where the Court has held an Indian Treaty right [to be] extinguished based on doubtful and ambiguous expressions of Congressional intent.” But for over a century, this anomaly became the linchpin in Wyoming’s tradition of regulating tribal hunting rights. Turner’s Frontier Thesis as manifest in Race Horse provided Wyoming an argumentative framework in subsequent litigation of Crow Tribe of Indians v. Repsis and Herrera v. Wyoming. But the Supreme Court eventually began to turn away from Race Horse. This Part examines Wyoming’s adherence to the historical narrative adopted in Race Horse, while Herrera and other precedent shifts back to the foundations of Indian jurisprudence. It then applies the interpretive analysis in Herrera to the Second Treaty of Fort Bridger, ultimately concluding that the Eastern Shoshone retain their off-reservation hunting rights.

A. Herrera’s precedent and the Court’s realignment of treaty interpretation returns to the foundations of Indian jurisprudence.

In 1995, Wyoming prevailed in Crow Tribe of Indians v. Repsis. A Crow tribal member, Ten Bear, was cited for taking an elk within the Big Horn National

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207 Id.
208 In the 1980s, an intellectual movement critical of Turner’s Frontier Thesis gained traction. “New Western History”—led by historians Patricia Nelson Limerick, Richard White, William Cronon, and Donald Worster—rejected the idea of a “frontier” and examined the West as a region that continues into the present, the cost of American conquest on the environment, and the agency of minority groups living in the West. David M. Wrobel, Introduction: “What on Earth Has Happened to the New Western History?”, 66 Historian 3, 437–41 (2004).
210 Id.
211 1982 COHEN’S HANDBOOK, supra note 41, at 268 n.73.
212 See infra notes 213–66 and accompanying text.
213 See supra Part II.B.
214 See infra Part III.A.
215 See infra Part III.B.
216 See infra Part III.C.
217 Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995).
Forest in contravention of state law. Notwithstanding Ten Bear’s treaty-based defense—the Second Treaty of Fort Laramie states that “they shall have the right to hunt on the unoccupied lands of the United States”—he was convicted of violating state game law. The Crow Tribe, along with Ten Bear, filed an action seeking declaratory judgment. Because the text of the Second Treaty of Fort Laramie was identical to the Second Treaty of Fort Bridger at issue in Race Horse, the district court dismissed the action.

On appeal, the Tenth Circuit held the language in the Second Treaty of Fort Laramie was identical to the Second Treaty of Fort Bridger, and therefore Race Horse controlled. First, Wyoming statehood extinguished the Crow’s treaty-based off-reservation hunting rights. Alternatively, when the Bighorn National Forest was created, the court reasoned, it became occupied. Notably, the Tenth Circuit fully adopted and endorsed the Race Horse reasoning that declined to follow the Indian canons of construction set forth in Worcester v. Georgia. Rather than interpreting a treaty as it would be understood by the tribe at the time of formation and construing any textual ambiguities in favor of the tribe, the court approached treaty interpretation, in effect, to favor states’ rights. Thus, nearly 100 years after Race Horse, the Tenth Circuit declared the linchpin of Wyoming’s regulatory tradition of treaty-based off-reservation hunting rights “alive and well.”

The Supreme Court’s 1999 decision Minnesota v. Mille Lacs Band of Chippewa Indians, however, shook the precedential force of Race Horse and Repsis. In 1837, the Mille Lacs Band of Chippewa Indians signed a treaty ceding land to the federal government in present-day Minnesota and Wisconsin. Twenty-one years later, Minnesota became a state. In 1990, the Chippewa filed suit seeking

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218 Id. at 985.
219 Id. at 985–86.
220 Id. at 986.
221 Id.
222 Id. at 994.
223 Id. at 992–93.
224 Id. at 993.
225 Id. at 992; Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832).
226 See Repsis, 73 F.3d at 992; Ward v. Race Horse, 163 U.S. 504, 516 (1896) (reasoning that treaties “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 its language and in conflict with an act of Congress, and also destructive of the rights of one of the States”).
227 Repsis, 73 F.3d at 994.
229 Id. at 176. The treaty included text securing the “privilege of hunting, fishing, and gathering the wild right, upon the lands, the rivers and the lakes included in the territory ceded . . .” Treaty with the Chippewa, U.S.-Chippewa, art. V, July 29, 1837, 7 Stat. 536.
230 An Act for the Admission of the State of Minnesota into the Union, ch. 31, 11 Stat. 285 (1858).
a declaratory judgment and injunctive relief with regard to its treaty-based hunting and fishing rights. The federal district court, Eighth Circuit, and Supreme Court all found in favor of the Chippewa: Minnesota statehood did not extinguish the tribe’s treaty-based hunting and fishing rights.

Similar to Race Horse, the Court examined Minnesota’s Enabling Act to determine whether it contained clear evidence of Congress’s intent to abrogate treaty-based hunting and fishing rights. Unlike Race Horse, the Court did not find such evidence. It rejected Minnesota’s reliance on Race Horse, stating that it “rested on a false premise.” In particular, the Court declared that “Indian treaty rights can coexist with state management of natural resources.” This does not mean though that Indians have “absolute freedom from state regulation,” because the conservation necessity doctrine affirms “state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.” Equally true is that, according to the Court, the conservation necessity doctrine is not dispositive on states’ authority over regulating hunting and gathering rights. In the end, it accommodates both state and tribal interests.

The Mille Lacs Court declined to overturn Race Horse outright. The Court held the “temporary and precarious” reasoning of Race Horse was overly broad, and noted “there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood.” This is so

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231 Mille Lacs, 526 U.S. at 185.
232 Id. at 176, 195–97.
233 Id. at 203.
234 Id.
235 Id. at 204.
236 Id.
237 Id. at 204–05 (quoting Oregon Dep’t of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 765, n.16 (1985)); see also Dep’t of Game v. Puyallup Tribe (Puyallup I), 414 U.S. 44, 49 (1973) (“The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.”).
238 See Mille Lacs, 526 U.S. at 205; Puyallup Tribe v. Dep’t of Game (Puyallup II), 391 U.S. 392, 398 (1968) (holding state conservation by regulation is permissible as long as it meets “appropriate standards and does not discriminate against the Indians”).
239 Mille Lacs, 526 U.S. at 205.
241 Mille Lacs, 526 U.S. at 207.
despite *Race Horse* holding to the contrary.\(^{242}\) Importantly, *Mille Lacs* signaled a shift away from the *Race Horse* and *Repsis* Frontier Thesis analysis, and a turn back toward the principles of tribal sovereignty set forth in the Marshall Trilogy.\(^{243}\) The Court recognized and applied the Indian canons of construction, and effectively rejected an argument that states’ rights were paramount to treaty rights.\(^{244}\) To be sure, the Court suggested that “[u]nder this line of reasoning, any right created by operation of federal law could be described as ‘temporary and precarious,’ because Congress could eliminate the right whenever it wished.”\(^{245}\) Indeed, *Mille Lacs* rejected the historical narrative that treated tribal rights as secondary.\(^{246}\)

B. The Herrera Court rejected Wyoming’s reliance on *Race Horse* and the Frontier Thesis.

The *Mille Lacs* decision stirred up legal complexity when Clayvin Herrera, a member of the Crow Tribe, was convicted of hunting elk out of season in the Bighorn National Forest in violation of Wyoming law.\(^{247}\) At the time, of course, Wyoming’s police power regulating off-reservation hunting rights was propped up, albeit tenuously, by *Race Horse.*\(^{248}\) Herrera appealed and the state appellate court upheld his conviction under three lines of reasoning.\(^{249}\) First, *Race Horse* survived *Mille Lacs,* and *Repsis* remained good law.\(^{250}\) Second, the court held *Repsis* prevented Herrera, by issue preclusion, from raising a treaty-based defense: Herrera is a member of the Crow Tribe, the tribe was a party in *Repsis,* and it fully litigated the issue “on behalf of itself and its members.”\(^{251}\) Third, the appellate court held that the Bighorn National Forest became categorically occupied upon its creation.\(^{252}\) On appeal, the Wyoming Supreme Court declined to review the case.\(^{253}\) The United States Supreme Court granted certiorari.\(^{254}\)

\(^{242}\) *Id.*

\(^{243}\) *See infra* notes 244–46 and accompanying text.

\(^{244}\) *Mille Lacs*, 526 U.S. at 200, 207.

\(^{245}\) *Id.* at 207.

\(^{246}\) *See id.* at 206–07.


\(^{248}\) *See supra* notes 228–46 and accompanying text.

\(^{249}\) *Herrera,* slip op. at 1, 2 (Wyo. Dist. Ct. Apr. 25, 2017).

\(^{250}\) *Id.* at 13.


\(^{252}\) *Herrera,* slip op. at 17.

\(^{253}\) *Herrera,* 139 S. Ct. at 1694.

\(^{254}\) *Id.*
When it advocated to protect its regulatory tradition before the United States Supreme Court, Wyoming rooted its argumentative framework in Turner’s Frontier Thesis, as represented in *Race Horse* and affirmed in *Repsis.* Wyoming couched its argument in terms of the purportedly “temporary and precarious” nature of the tribal rights espoused in *Race Horse.* In particular, Wyoming honed in on the idea of the frontier and its subsequent disappearance by the arrival of Euro-American civilization. In Turnerian fashion, Wyoming argued that “once the advance of civilization reached Crow reservation boundaries, the wilderness that had once surrounded the reservation disappeared and the land became occupied.” It further contended that “[t]his march of civilization ended at statehood,” which “was not just a legal event” but rather “a recognition the once wild frontier was no more.” According to Wyoming, the frontier closed in 1890, the same year the Census Bureau declared it closed—and three years before Turner announced his Frontier Thesis. Thus, by ignoring the fact the area had been inhabited by Indian tribes since time immemorial, Wyoming argued that the “frontier” closed, extinguishing treaty-based off-reservation hunting rights. This ahistorical interpretation as legal doctrine, having over century-long force in the Court, was finally rejected in *Herrera.*

The Court, in a 5–4 decision, stated that Herrera’s treaty-based defense was not barred by issue preclusion. The Court’s decision resulted in two holdings: (1) Wyoming statehood did not extinguish tribal hunting rights, and (2) the Bighorn National Forest, the land on which Herrera took the elk, did not become categorically occupied based on the text of the Second Treaty of Fort Laramie. In doing so, the Court soundly rejected the Frontier Thesis as an interpretive current of treaty rights. Before turning to a discussion on each holding, however, the proceedings on remand must first be examined as it tells an integral part of the story.

When the *Herrera* Court remanded the case, it directed the state court to determine the meaning of “occupied” under the 1868 treaty and suggested that

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255 *See infra* notes 256–62 and accompanying text.
257 *Id.* at 20–21.
258 *Id.*
259 *Id.* at 21, 47.
260 *See id.*
261 *See id.; Limerick, The Legacy of Conquest, supra note 98, at 322–23.*
262 *See Ward v. Race Horse, 163 U.S. 504, 508 (1896); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Herrera, 139 S. Ct. 1686.*
263 *Herrera, 139 S. Ct. at 1697–98.*
264 *Id.* at 1694, 1700–01.
265 *See infra* Parts III.B.1, III.B.2.
266 *See infra* notes 267–88 and accompanying text.
the state could argue it can regulate tribal hunting under the conservation necessity doctrine. Inexplicably, the Wyoming state circuit court ignored the Supreme Court’s directives in *Herrera*. The circuit court instead followed the dissenting opinion of *Herrera*, falling back on issue preclusion—the issues have already been decided in *Repsis*, and this prevents Herrera from relitigating them. It was a stunning rebuke of the highest court in the land to follow, quite literally, the losing side of the argument. In turn, Herrera appealed. The state district court reversed the circuit court, stating that even if the court was permitted to consider the doctrine and prerequisites for its application were met, issue preclusion did not apply to this case. The state district court remanded the case back to the circuit court to conduct evidentiary hearings on site-specific occupation and conservation necessity issues. Yet Wyoming has chosen not to pursue the determination of site-specific occupation, suggesting that within the context of *Herrera*, all federal lands are subject to treaty-based off-reservation hunting rights. This will be discussed further below. In the meantime, Wyoming seeks to maintain its regulatory tradition through the conservation necessity doctrine. Wyoming has wrapped
itself entirely with this issue, playing both sides of the same coin. Although Wyoming has alleged that the conservation necessity doctrine will not adequately address wildlife management, it argues that conservation necessity precludes the exercise of off-reservation hunting rights entirely.

At first glance, the judge-made conservation necessity doctrine represents a wrinkle in the ability of Indian tribes to regulate treaty-based off-reservation hunting. Upon closer examination, however, any doubt is ironed out by the high bar the state must meet in order to invoke conservation necessity. First, any law passed out of conservation necessity must be reasonable and necessary. “Conservation” is defined narrowly to include the perpetuation of certain species, and not broadly to include the maintenance of wildlife. Second, state regulations impacting tribal game harvest under a treaty must be necessary. Only if the state cannot meet its conservation goals by targeting only non-tribal members can it turn to regulating the tribal game harvest. Third, the state regulation must not be discriminatory on its face or in its effect against tribal members. Any attempt to satisfy these elements would almost certainly be carried out in costly

issues oftentimes returns results traditionally associated with liberal politics. But Justice Barrett may provide the decisive fifth vote for the conservative bloc. David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CALIF. L. REV. 1573, 1575 (1996); NATIVE AMERICAN RIGHTS FUND, MEMORANDUM: THE NOMINATION OF AMY CONEY BARRETT TO THE SUPREME COURT OF THE UNITED STATES: AN INDIAN LAW PERSPECTIVE 2–4 (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurisprudence/amy_coney_barrett_indian_law.pdf?_ga=2.1999090.276203187.1608558057-1798804853.1608264607 [https://perma.cc/E4UY-9YNZ] (quoting an academic article in which Justice Barrett stated that “twentieth century courts perhaps overstated the case when they described the [Indian canons of construction] as ‘well-settled law’ and a ‘rule of construction that [has] been recognized, without exception, for more than a hundred years’”).

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277 See infra note 278 and accompanying text.
281 2019 COHEN’S HANDBOOK, supra note 279, § 18.04(3)(b).
282 Id.
283 Id.
284 Id.
285 Id.
litigation underwritten by Wyoming taxpayers. And because wildlife populations are not uniform across the landscape, Wyoming would arguably have to satisfy these elements piecemeal, on a case-by-case basis. This is already happening in Herrera on remand: Wyoming must show that the state regulations, as they applied to the specific hunting zone in which Clayvin Herrera hunted in 2014, satisfied the conservation necessity doctrine.

1. Wyoming Statehood: No Extinguishment of Tribal Hunting Rights

The Herrera Court held that Wyoming statehood did not extinguish tribal off-reservation hunting rights, thereby overturning Race Horse. The Herrera Court dismissed Wyoming’s reliance on Race Horse and definitively held that Mille Lacs controlled. That case upset both lines of reasoning of Race Horse, the “equal footing” theory as well as the purported “temporary and precarious” nature of tribal treaty rights. Importantly, Mille Lacs set forth the “crucial inquiry for treaty termination analysis,” which calls for examining whether express congressional action terminated treaty rights or the treaty text itself contains a “termination point” of a right. As applied to the Second Treaty of Fort Laramie, the Herrera Court noted Wyoming’s concession that statehood, under the equal footing doctrine, does not impliedly extinguish reserved treaty rights. Wyoming’s Organic Act, moreover, contained no evidence of congressional intent to eliminate the Crow Tribe’s treaty-based hunting rights. In the alternative, the actual treaty “identifies four situations that would terminate” the off-reservation hunting rights. None of these situations consisted of Wyoming statehood, or were implicated by statehood. The Court further reasoned that at the treaty negotiations federal agents “had every

See infra note 370 and accompanying text.


Id. at 8.


Id. at 1694.

Id. at 1696.

Id.

Id. at 1697.

Id. at 1698.

Id. at 1699.

Id.
reason to bring up statehood if they intended it to extinguish the Tribe’s hunting rights.” But they did not. Finally, the Court rebuked Wyoming’s assertion that “civilization,” practically speaking, effectively occupied the lands of Wyoming. In total, the Court refused to accept Wyoming’s ahistorical legal theory based on Race Horse, an iteration of Turner’s obsolete Frontier Thesis, to subvert Mille Lacs’s “instruction that treaty-protected rights are not impliedly terminated upon statehood.”

2. Bighorn National Forest: Not Categorically “Occupied”

The Herrera Court turned next to the issue of whether the Bighorn National Forest became categorically “occupied” at its inception. In doing so, the Court returned to the foundations of Indian jurisprudence as set forth in the Marshall Trilogy, reaffirming tribal sovereignty, by examining the Second Treaty of Fort Laramie in its historical context and applying the Indian canons of construction. In the majority opinion, Justice Sotomayor stated that interpretive analysis of a treaty “begins with the text, and treaty terms are construed as they would naturally be understood by the Indians.” The Court did not lay out a definitive test to evaluate how the Indians would have understood the treaty terms. Instead, the Court turned to “several cues” in the text that placed the meaning of “unoccupied” and “occupied” into bold relief.

First, the Court examined the geographical implications of the treaty language. In Article IV of the Second Treaty of Fort Laramie, the hunting rights would survive “as long as peace subsists among the whites and Indians on the borders

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297 Id.
298 Id. (“This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade.”).
299 See id. at 1700–02.
300 Id. at 1700 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999)).
301 Id.
302 See id. at 1699; Getches, Beyond Indian Law, supra note 4, at 305 n.149.
304 See Herrera, 139 S. Ct. at 1701; Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 428 (1993) (stating that “[c]anons are mere formulations,” but their spirit within Indian law is flexible to “promote the ongoing sovereign-to-sovereign relationship of the tribe and federal government; to keep the judiciary out of the business of imposing new forms of colonialism . . .”).
305 Herrera, 139 S. Ct. at 1701–02.
306 See id.
This sentence distinguished two separate geographical entities, unoccupied hunting districts and areas containing white settlement. In effect, it provided the Court an initial interpretive framework, as understood by the Crow Tribe, consisting of two categories: (1) “occupied land” comprised of area containing white settlement, and (2) “unoccupied land” comprised of area within the hunting districts, or land free of white settlement.

The Court further examined the operative word “occupation” throughout the Second Treaty of Fort Laramie. Viewed more broadly, “occupation” is not exclusively qualified by “white” settlement. The treaty characterized “occupation” as being manifested also by the residences of Indian “settlers” on the reservation. Although the Court did not explain the significance of this association, the tribe’s inclusion in the concept of settlement impliedly informs an awareness of their role in and, consequently, understanding of settling—or occupying—an area.

The Crows were to make “no permanent settlement” aside from their designated reservation. They could, however, hunt on “unoccupied land,” or land without settlement. Taken together, the Court concluded that there is textual and contextual evidence in the Second Treaty of Fort Laramie of an inextricable link between the operative variations of “settle” and “occupation”—“unoccupied” land is marked by the absence of “settlement.”

Using interpretive tools, the Court concluded contemporaneous definitions also support “a link between occupation and settlement.” William Anderson’s A Dictionary of Law from 1889 defines “occupy” as “[t]o hold in possession; to hold or keep for use,” and makes note that the word “[i]mplies actual use, possession or cultivation by a particular person.” It also defines “settle” as “[t]o establish one’s self upon; to occupy, reside upon.” Finally, historical evidence underscores the link between “settlement” and “occupied land.” The Court looked to the Crow’s treaty negotiations with the Indian Peace Commission and to the Annual Report...
of the Commissioner of Indian Affairs. At the negotiations of the Second Treaty of Fort Laramie, the Commissioner commented that "settlements ha[d] been made upon [Crow tribal] lands," and that "white people [were] rapidly increasing and . . . occupying all the valuable lands." And in his Annual Report, one Indian commissioner stated that the Second Treaty of Fort Laramie allowed the tribe to hunt in districts "as long as there are any buffalo, and as long as the white men are not [in that area] with farms." Again, "settlement" and "occupied" are characterized by the physical presence of white people and their structures.

Applying the Indian canon of construction, the Court showed how the Crow Tribe would have naturally understood the terms of the treaty at its signing. Its examination of the words "occupied" and "settlement" revealed that the link between them was not only associated with white settlement, but also with Indian settlement on the reservation. Taken together, this evidences how the Crow Tribe understood "settlement" and "occupied," because it applied equally to them at the time of the treaty signing. In the end, the analysis reached the conclusion that as long as there is game and an absence of white settlement, the Crow have treaty-based rights to hunt off-reservation.

The same can be said about the Eastern Shoshone. Months after signing the Second Treaty of Fort Laramie with the Crow Tribe, the Indian Peace Commission brought identical language, and arguably an understanding of "unoccupied" land, about 400 miles west to Fort Bridger and to the Shoshone-Bannock and Eastern Shoshone tribes.

C. Applying Herrera to the Second Treaty of Fort Bridger leads to a similar result.

Applying the Herrera analysis to the Second Treaty of Fort Bridger, as the Eastern Shoshone of the Wind River Indian Reservation would have understood it, leads to a similar result reached by the Court in its interpretation of the Second Treaty of Fort Laramie. First, neither congressional intent nor the historical record mark Wyoming statehood as a condition terminating the Eastern Shoshone's off-reservation hunting rights. Second, the Eastern Shoshone "would have

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321 Id.
322 Id.
323 Id.
324 See id.
325 Id. at 1701–02.
326 Id.
327 See id.
328 Id. at 1702–03.
329 See infra Part III.C.
330 See Great Peace Commission, supra note 64, at 150–51.
331 See infra Part III.C.
332 See infra Part III.C.1.
understood the word ‘unoccupied’ to denote an area free of residence or settlement by non-Indians.” To be sure, because the Second Treaty of Fort Bridger contains nearly identical text and because it was negotiated and signed only two months after the Second Treaty of Fort Laramie, application of Herrera’s interpretive analysis to this Treaty would “not [be] a hard case.”

1. Treaty Text and Historical Record: Statehood not a Condition of Termination

Under the Wyoming Statehood Act, Congress did not clearly express its intent to extinguish the Second Treaty of Fort Bridger’s off-reservation hunting rights. Turning to the text of the treaty, it resembles the Second Treaty of Fort Laramie, containing four conditions upon which the off-reservation hunting rights would be terminated. None of these conditions involve statehood. Also, the historical record does not support the conclusion that statehood terminated the hunting rights reserved in the Second Treaty of Fort Bridger. The Indian Peace Commission sent General Augur to Fort Bridger to negotiate a treaty with the area tribes “on the same basis” as with the Crow Tribe. General Augur assured the Eastern Shoshone and Shoshone-Bannock tribes that a reservation would be theirs on a permanent basis along “with permission to hunt wherever you can find game.” While General Augur encouraged the tribes to begin preparation for farming because game inevitably would become scarce, he did not mention statehood as a condition that would terminate their hunting rights. Finally, an analysis of whether “civilization” extinguished the treaty right is unnecessary because it is invalid. It acts merely as a proxy for occupation” and thereby “subverts this Court’s clear instruction that treaty-protected rights are not impliedly terminated upon statehood.” Therefore, neither statehood nor the language of the treaty terminated the off-reservation hunting rights reserved in the Second Treaty of Fort Bridger.

333 See infra Part III.C.2; Herrera, 139 S. Ct. at 1701.
334 Herrera, 139 S. Ct. at 1700.
335 See id. at 1698–99 (“There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the ‘clear evidence’ this Court’s precedent requires.” (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999))).
336 Id. at 1699; see also Second Treaty of Fort Bridger, supra note 40, art. IV.
337 See Herrera, 139 S. Ct. at 1699.
338 See infra notes 339–44 and accompanying text.
339 See Great Peace Commission, supra note 64, at 151.
340 Id. at 152.
341 See id.
342 See Herrera, 139 S. Ct. at 1700.
343 Id. (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999)).
344 See supra notes 335–43 and accompanying text.
2. “Several Cues” in Treaty Text: A Similar Interpretation of “Unoccupied”

Applying the Indian canons of construction, there are “several cues” within the text of the Second Treaty of Fort Bridger that help inform how the Eastern Shoshone would have understood the document at its signing.\(^{345}\) Similar to the Second Treaty of Fort Laramie, there is an inextricable link in the Second Treaty of Fort Bridger between “settlement” and “occupied.”\(^{346}\) With inconsequential variation, the similarly worded Article IV states the Eastern Shoshone have the right to hunt on unoccupied lands if there is game, “and so long as peace subsists among the whites and Indians on the borders of the hunting districts.”\(^{347}\) Again, this clause distinguishes between two geographical categories that would have been understood by, in this case, the Eastern Shoshone: (1) unoccupied hunting districts, and (2) areas containing white settlement.\(^{348}\)

Examining the Second Treaty of Fort Bridger as a whole also informs the Eastern Shoshone’s likely understanding of the words “occupy” and “settlement” to include themselves.\(^{349}\) The treaty set apart a reservation of land for the “undisturbed use and occupation” by the Eastern Shoshone.\(^{350}\) The Eastern Shoshone would make the reservation their “permanent home” and pointedly agreed it would “make no permanent settlement elsewhere.”\(^{351}\) Interestingly, one textual deviation from the nearly identical language shared by both treaties strengthens Herrera’s assertion that settlement also included Indian settlers.\(^{352}\) While the Herrera Court construed the Crow Tribe as being settlers through broader statutory context, the Second Treaty of Fort Bridger textually refers to the Eastern Shoshone as “Indian settlers.”\(^{353}\) This supports an inextricable link between the concepts of “occupy” and “settlement” and, in turn, would have likely been understood by the Eastern Shoshone when the treaty was signed.\(^{354}\)

Turning outward from the text, contemporaneous definitions give the words “settle” and “occupy” in the treaty operative effect.\(^{355}\) Circumstances surrounding the treaty negotiations support an understanding by the Eastern

\(^{345}\) See Herrera, 139 S. Ct. at 1701; infra notes 346–68 and accompanying text.

\(^{346}\) See supra Part III.B.2; infra notes 347–68 and accompanying text.

\(^{347}\) Second Treaty of Fort Bridger, supra note 40, art. IV.

\(^{348}\) Herrera, 139 S. Ct. at 1701.

\(^{349}\) See infra notes 350–68 and accompanying text.

\(^{350}\) Second Treaty of Fort Bridger, supra note 40, art. II.

\(^{351}\) Id. art. IV.

\(^{352}\) See Herrera, 139 S. Ct. at 1701–02; Second Treaty of Fort Bridger, supra note 40, art. VI.

\(^{353}\) See Herrera, 139 S. Ct. at 1701–02; Second Treaty of Fort Bridger, supra note 40, art. VI (emphasis added).

\(^{354}\) See supra Part III.B.2; notes 347–53 and accompanying text.

\(^{355}\) See supra Part III.B.2; infra notes 356–68 and accompanying text.
Shoshone of a link between “occupy” and “settlement.” 356 Explaining the purpose of the treaty to the Eastern Shoshone, General Augur described “a great many white men” arriving who, with the support of the U.S. Government, will “wish to remain and make homes” on Indian land. 357 In return for Indian land, the U.S. Government wished to accommodate a reservation for “permanent homes” that “no white men will be permitted to come or settle” on. 358

The record of the negotiations is marked by the conceptual interplay between the words “permanent” and “homes” as well as “settle.” 359 There is, however, no textual evidence of “occupy.” 360 Despite this absence, an inferential reading of the circumstances suggests the Eastern Shoshone arguably would have understood “settlement” to be operatively synonymous with “occupy.” 361 The parties negotiated a quid pro quo: an exchange of Indian lands for setting aside for themselves a reservation and “the privilege of going over the mountains to hunt.” 362 Chief Washakie, on behalf of the Eastern Shoshone, also inquired whether “whites will be allowed to build houses on [the] reservation . . . .” 363 General Augur’s assurance that whites would not be allowed to do so supports a conceptual link between “settlement” and “occupy” from the vantage of the Eastern Shoshone. 364

The association of “settlement” with “occupy” is unique within this context and arguably differs from what the tribe would have considered occupied before Euro-Americans arrived. 365 But the arrival of Euro-Americans introduced a conception of “occupy” linked with that of “settlement” characterized by houses. 366
Importantly, the Indian canons of construction apply; even if there is ambiguity in treaty text, it must be construed in favor of the tribe.\textsuperscript{367} Therefore, the Eastern Shoshone would likely have understood “occupy” to mean the presence of physical “settlement.”\textsuperscript{368}

\textbf{IV. Bucking Tradition: Moving Forward with a Cooperative Agreement Between Wyoming and the Eastern Shoshone}

\textit{Herrera} is being relitigated on remand, but its holding remains.\textsuperscript{369} Wyoming should avoid the possibility of a costly and politically contentious confrontation with the Eastern Shoshone over exercising their valid off-reservation hunting rights.\textsuperscript{370} Wyoming should uncircle the wagons, buck its regulatory tradition, and enter into a cooperative agreement with the Eastern Shoshone and federal agencies.\textsuperscript{371} In short, Wyoming should recognize the facts—the existence of tribal sovereignty and the validity of treaty rights.\textsuperscript{372} The alternative is to engage in the status quo, expending state resources on litigation in return for negative political and public reaction.\textsuperscript{373} This Part aims to show that Wyomingites deserve a better way.\textsuperscript{374} To outline a framework of the fundamental principles and prescriptive elements of such

\begin{itemize}
  \item \textsuperscript{367} Winters v. United States, 207 U.S. 564, 576 (1908); Charles F. Wilkinson & John M. Volkman, \textit{Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time is That?}, 63 Calif. L. Rev. 601, 617 (1975) (“[T]he construction of Indian treaties is akin to the construction of adhesion contracts, in that Indian treaties, like adhesion contracts, are liberally construed in favor of the weaker party, and their terms are given the meaning attached to them by laymen unversed in the law.”).
  \item \textsuperscript{368} See supra notes 345–64 and accompanying text.
  \item \textsuperscript{369} See supra notes 263–88 and accompanying text.
  \item \textsuperscript{371} Wyoming v. Herrera, No. CT-2014-2687; 2688, slip op. at 4 (Wyo. Cir. Ct. June 11, 2020); see also infra Part IV.C.
  \item \textsuperscript{372} Wyoming seemingly still has not recognized the validity of off-reservation hunting treaty rights and at the evidentiary hearing, on remand, hopes to lean on the conservation necessity doctrine to dismiss them outright. State of Wyoming’s Prehearing Memorandum at 1–2, Wyoming v. Herrera, CT-2014-2687; 2688 (Wyo. Cir. Ct. May 31, 2022) (“This evidentiary hearing will have tremendous consequences as it will set the stage for future prosecutions of tribal members seeking to assert treaty-based defenses. In addition to prevailing on the merits, the State hopes to demonstrate that cases raising a treaty-based defense can be resolved simply and efficiently.”).
  \item \textsuperscript{373} See infra notes 419–26 and accompanying text.
  \item \textsuperscript{374} See infra Part IV.C.
\end{itemize}
Reconciling Wyoming’s Regulatory Tradition

an agreement, this Part provides an overview of both sovereigns’ interests in wildlife management. The discussion then examines similarly situated tribes and states as a guide for what the Eastern Shoshone and Wyoming should emulate. Finally, suggestions are made with regard to the formation of a cooperative agreement between the Eastern Shoshone, Wyoming, and federal agencies.

A. The state and tribe have mutual interests in regulating hunting.

Wyoming’s interests in wildlife conservation are not exclusively its own, but rather are mutually shared by Indian tribes. Wyoming has an opportunity to move forward with a mutually beneficial cooperative agreement with the Eastern Shoshone. The discussion below initially considers Wyoming’s traditional interests in regulating hunting, and follows up by examining tribal hunting on the Wind River Indian Reservation. This material attempts to parse Wyoming’s motivations to stick steadfastly to its regulatory tradition, but ultimately lays a foundation for efforts toward a cooperative agreement.

1. Wyoming and its Regulatory Tradition

Wyoming’s regulatory tradition lasted officially from 1896 to 2019. It should now pursue a tradition that fully embraces its interests in wildlife management and one shared by the Eastern Shoshone. For clarification, there is a distinction between Wyoming’s interests in its regulatory tradition and its interests in wildlife management. Wyoming’s regulatory tradition is defined by power—to treat wildlife as an absolute property right exclusive of treaty rights, and to unilaterally legislate and enforce laws regulating hunting.

See infra notes 384–89 and accompanying text.

See generally Ed Goodman, Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right, 30 Env’t L. 279, 342–49 (2000) (providing legal foundation for tribal assertion of right to co-management as an element of off-reservation reserved rights).

See infra Parts IV.A.1, IV.A.2.

See infra Parts IV.A.1, IV.A.2, IV.C.


See infra notes 384–89 and accompanying text.

Wyo. Stat. Ann. § 23-1-103 (2022) (declaring that “all wildlife in Wyoming is the property of the state”). Wyoming’s attitude toward wildlife as an absolute property right should not
above, this is motivated by historical forces as articulated by the Frontier Thesis, but it also includes political and economic forces.\textsuperscript{385} Wyoming’s interests in wildlife management, meanwhile, includes the conservation of species within its borders.\textsuperscript{386} This is also shared by Indian tribes.\textsuperscript{387} Historically, however, Wyoming’s motivations are not solely defined by a noble pursuit of conservation.\textsuperscript{388} Wyoming arguably conflates, seemingly as a matter of institutional self-preservation, the pursuit of conservation with its interest in maintaining power, or its regulatory tradition.\textsuperscript{389}

True, that Wyoming has a conservation interest in all game living within its borders.\textsuperscript{390} Pertinent to off-reservation hunting is Wyoming’s management of the elk population.\textsuperscript{391} Brucellosis, a disease infecting elk and bison that leads to the abortion of their young, continues to be a threat.\textsuperscript{392} Hunters may become infected by handling parts of an infected animal.\textsuperscript{393} In western Wyoming, the prevalence of brucellosis varies between 0–4% south of the Greater Yellowstone Ecosystem and between 1–24% east of that area.\textsuperscript{394} The state documented an outbreak of

\textsuperscript{385} See Brief for Respondent, \textit{supra} note 256, at 54–55.
\textsuperscript{386} Transcript of Oral Argument, \textit{supra} note 278, at 60–61.
\textsuperscript{387} See infra notes 458–63 and accompanying text.
\textsuperscript{388} See \textit{infra} Part II.C; \textit{see also} Tara Righetti et al., \textit{Unbecoming Adversaries: Natural Resources Federalism in Wyoming}, 21 Wyo. L. Rev. 289, 314–16 (“Despite Wyoming’s declaration of complete ownership of wildlife, that ownership is limited by federal law preemption . . . .”).
\textsuperscript{389} See \textit{supra} notes 390–426 and accompanying text.
\textsuperscript{390} Brief for Respondent, \textit{supra} note 256, at 54–55.
\textsuperscript{393} \textit{Id}.
brucellosis in the Bighorn Mountains, the location of Clayvin Herrera’s hunt, in 2012. This was the first documented outbreak outside of the Greater Yellowstone Ecosystem. Of great concern is the potential economic harm of increased rates of brucellosis in cattle. To combat its spread, the Wyoming Game and Fish Department (WGFD) sends blood sample collection kits to hunters with an elk hunting license. Successful hunters take a blood sample from their harvest and return it to the agency for testing.

Wyoming also relies on hunting regulations to maximize the safety of the public. This includes specified hunting seasons that, in addition to being a tool of game management, provide constructive notice to the public that hunters may be in recreation areas. Additionally, regulations set hours of the day in which firearms may be discharged and require hunters to wear fluorescent hunting gear.

There are also economic and institutional self-preservation elements prompting Wyoming to circle the wagons around its regulatory tradition. Hunting is an integral part of Wyoming’s economy. In 2015, big game hunters alone made up $303.6 million of total economic activity in Wyoming. In 2020, big game hunting accounted for $339.2 million of total economic activity. Hunting by non-residents makes an outsized economic contribution and guides political decisions regarding hunting.

See infra notes 404–26 and accompanying text.

WGFD_ANNUALREPORT_2021.pdf [https://perma.cc/ZNV4-GB3Z].

Id.


Veterinary Services, supra note 392.

Id.

Id.

See Transcript of Oral Argument, supra note 278, at 60.

Id. at 60–61.

Id.

See infra notes 404–26 and accompanying text.


Id.


Southwick Assocs., Economic Contributions, supra note 404, at 4–5.
licenses while simultaneously raising their cost.\textsuperscript{408} A similar measure failed in 2015, with opposition arguing that the economic impact would be too great to give resident hunters priority.\textsuperscript{409} This illuminates the sensitive political situation surrounding the hunting industry in Wyoming.\textsuperscript{410}

Off-reservation hunting rights threaten Wyoming’s political and institutional status quo.\textsuperscript{411} For example, because the Eastern Shoshone Tribe has treaty-based hunting rights, it has those rights as a sovereign, independent of Wyoming’s licensing system.\textsuperscript{412} One suggested management policy path would be to allocate hunting licenses out of the state’s pool in proportion to the size of the tribe.\textsuperscript{413} Presumably, this would represent lost income in licensing fees for Wyoming.\textsuperscript{414} The tribe, however, is not in the business of paying Wyoming to exercise its treaty-based rights to hunt off-reservation.\textsuperscript{415} Certainly, the uneasy political situation state agencies find themselves in with regard to influence and money affects their approach to decision-making.\textsuperscript{416} It may help explain why the WGFD has identified “[o]ff-reservation treaty hunting/fishing rights” as an administrative threat.\textsuperscript{417} Still, it must be asked: Why has Wyoming not pursued partnerships with tribal sovereigns to facilitate off-reservation hunting while simultaneously satisfying its stated conservation interests?\textsuperscript{418}

\begin{footnotesize}
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\item \textsuperscript{408} SF0094, 65th Leg., Budget Sess. (Wyo. 2020).
\item \textsuperscript{410} See infra notes 411–26 and accompanying text.
\item \textsuperscript{411} See Matthew L.M. Fletcher, \textit{Retiring the Deadliest Enemies Model of Tribal-State Relations}, 43 Tulsa L. Rev. 73, 81 (2007) (“Modern American Indian law is more a legal and political contest between Indian tribes and states over what is left . . . .”).
\item \textsuperscript{412} United States v. Winans, 198 U.S. 371 (1905) (articulating the reserved rights doctrine); Tulee v. Washington, 315 U.S. 681 (1942) (holding state fishing licensing fees against tribe were invalid).
\item \textsuperscript{413} 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:22:00.
\item \textsuperscript{414} See Tulee, 315 U.S. at 685.
\item \textsuperscript{415} \textit{Id.} (holding that license fees “[a]ct upon the Indians as a charge for exercising the very right their ancestors intended to reserve”).
\item \textsuperscript{416} Compare Brief for Respondent, supra note 256, at 54–55 (“[Wyoming] has earned public support (and investment) with the understanding that [its] authority is unquestioned.”), with Tulee, 315 U.S. at 685 (“[I]t is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair . . . .”).
\item \textsuperscript{418} The WGFD has identified “partnerships with other entities” as opportunities for the agency, \textit{Responsive Mgmt., supra} note 417, at viii. Wyoming statutory law supports creating tribal partnerships. Wyo. Stat. Ann. § 16-1-101 (2023).
\end{itemize}
\end{footnotesize}
For much of Wyoming, the hang-up is an inability to share power. For much of Wyoming, the hang-up is an inability to share power.419 That hang-up is difficult to overcome because off-reservation hunting rights are a political tinderbox.420 The story is often told in a way to distract Wyomingsites from the real issues, particularly through racial stereotypes or as one of a broader struggle between Wyoming and the federal government, emphasizing the primacy of states’ rights.421 One Wyoming politician, for example, commented that Herrera "throws into doubt a lot of fundamental assumptions we have about the state’s ability to manage wildlife and preserve wildlife."422 While this is a legitimate concern, and it should be discussed openly and honestly, the same politician instead leveraged the feelings of Wyomingsites: “There’s a lot of scared people right now who are afraid we won’t have the ability to [manage wildlife and preserve wildlife].”423 In tandem with appealing to emotion, he invoked a variation of states’ rights: “It definitely fits the narrative of the federal government not letting the states competently manage game.”424 Indeed, to assert “states’ rights,” or some attendant form, is a Wyoming tradition of its own.425 Although states’ rights may carry political weight,  

419 Maher, supra note 370 (“Why did Wyoming spend two years trying to get the state courts to follow a Supreme Court dissent instead of a Supreme Court majority? Eight years on, why is it so important for them to continue to prosecute Clayvin?”).

420 See infra notes 421–26 and accompanying text.

421 A cursory reading of American history will reveal the invocation of “states’ rights” as a rhetorical underpinning for states to maintain and use their power against the will of others. The most obvious, of course, is the invocation of states’ rights in the antebellum South to defend slavery and justify seceding from the Union. See James M. McPherson, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 57, 247 (1988) (“[John C.] Calhoun insisted that territories were the ‘common property’ of sovereign states. Acting as the ‘joint agents’ of these states, Congress could no more prevent a slaveowner from taking his human property to the territories than it could prevent him from taking his horses and hogs there.”). Abraham Lincoln called states’ rights a “sophism” deriving “much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a State—to each State of our Federal Union.” Abraham Lincoln, Message to Congress, Second Printed Draft, with Changes in Lincoln’s Hand (July 4, 1861), in ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS: SERIES 1 GENERAL CORRESPONDENCE 17 (1861). “Having never been States, either in substance or in name, outside the Union,” Lincoln inquired, “whence this magical omnipotence of ‘State rights,’ asserting a claim of power to lawfully destroy the Union itself?” Id. at 18. See generally Getches, Beyond Indian Law, supra note 4 (discussing the undercurrent of states’ rights running through Indian law decisions of the Rehnquist Court).


423 Id.

424 Id.

425 See, e.g., HB0212, 67th Leg., Gen. Sess. (Wyo. 2023) (unenacted bill seeking to establish “federal review standing committees” to, among other duties, “[r]eview all federal action to determine if the sovereignty of the state of Wyoming . . . [is] being infringed upon or diminished” while ignoring decisions by the United States Supreme Court in the process); Thomas McNamee, THE RETURN OF THE WOLF TO YELLOWSTONE 42 (1998) (speaking against the reintroduction of wolves in Yellowstone in 1993, the executive director of the Cody Chamber of Commerce described the fight as “a battlefield in a new civil war—the bicoastal areas against the West. Our battles are not Antietam or Gettysburg but the wolf, grazing, timber.”); Rod Miller, Rex Rammell and the
the argument is a distraction from the real issue of cooperative management of wildlife between sovereigns.426

2. The Eastern Shoshone and Wind River Indian Reservation Hunting

The Wind River Indian Reservation has rebounded from the dark days of overhunting on the reservation in the 1980s.427 Although many factors drove that occurrence, they boil down to tribal members guarding their treaty-based rights.428 The situation was compounded by the contentious dynamic existing on the reservation between the Northern Arapaho Tribe and the Eastern Shoshone.429 The Eastern Shoshone's ancestral enemies, the Northern Arapaho, were escorted by the U.S. Military and placed “temporarily” on the reservation in 1878.430 They remain


426 See Transcript of Oral Argument, supra note 278, at 62–63 (statement of Justice Sotomayor) (“You’re forgetting the other side in this discussion, because the tribe has a subsistence right. . . . [T]hat balance is not [the state’s] alone to make. It belongs to the government and it belongs to the Indian tribes as well.”). Under the U.S. Constitution, treaty rights are “the supreme Law of the Land.” U.S. Const. art. VI, cl. 2; Ralph W. Johnson, The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L. Rev. 207, 208 (1972). Judge Riner touched on the issue of states’ rights in Race Horse by way of the equal footing doctrine, getting it right on first impression:

Wyoming was admitted upon the same footing with the original states. Does it put it upon any other or different footing to say that it cannot so exercise this power, that it will affect persons or subjects which are within the treaty-making power conferred upon the United States by the constitution, and which have been, as in the case at bar, the subject of treaty stipulation?

In re Race Horse, 70 F. 598, 612 (C.C. D. Wyo. 1895), rev’d sub nom. Ward v. Race Horse, 163 U.S. 504 (1896). Wyoming’s Constitution enshrines the hunting rights of its citizens. Wyo. Const. art. 1, § 39. Regardless of treaty rights being the supreme law of the land, tribal members’ exercise of their treaty rights would not encroach on Wyomings’ “opportunity to fish, hunt and trap wildlife [as] a heritage that shall forever be preserved.” Id. In short, the hunting rights of citizens of both sovereigns can coexist. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999). It would be unwise, however, if the state pursues state legislation to address the issue of a cooperative agreement, because doing so would bring it into direct conflict the supremacy of treaty rights.

427 See infra notes 444–63 and accompanying text.

428 Bruce L. Smith, Wildlife on the Wind: A Field Biologist’s Journey and an Indian Reservation’s Renewal 189, 194 (2010).

429 Wes Martel, Coordinating Large Landscape Conservation Across the Greater Yellowstone Ecosystem—Panel 3—Yellowstone National Park 150th Symposium, Vimeo 22:55–23:30 (May 19, 2022), https://vimeo.com/showcase/9571468/video/716070146 [https://perma.cc/VR6T-ZDY4] (“That was a real political hot potato on the rez, to go out and say we want to control your hunting now. When we used to go out and have public meetings, I used to dread those meetings. Here’s four more hours of getting cussed out tonight.”).

430 Trenholm & Carley, supra note 51, at 278.
there today. As a non-party to the Second Treaty of Fort Bridger, the Northern Arapaho Tribe arguably does not share treaty-based off-reservation hunting rights with the Eastern Shoshone, and therefore may not hunt off-reservation under the terms of the treaty. But, of course, both tribes can hunt on the reservation.

When the Eastern Shoshone Tribe introduced a game code to address over-hunting on the reservation, it was voted down by the Northern Arapaho Tribe. The dissension was not so much about disbelief in dwindling game populations as it was about opposition to “a perceived abdication of their vested rights.” Then, in 1983, there were reports of mass slaughter of game on the reservation. The Eastern Shoshone worked with the Bureau of Indian Affairs (BIA) on a solution and, in 1984, the BIA imposed a stringent federal game code on the reservation. The Northern Arapaho Tribe filed suit, seeking a restraining order against implementation of the federal code. The Tenth Circuit upheld the district court’s favorable ruling for the Eastern Shoshone and the BIA. Thereafter, enforcement of the code “focused on relatively few individuals—mostly the same cast of characters who had abused reservation resources previously.” In 1988, the Eastern Shoshone assumed authority over the tribal wildlife management program. By 2005, the elk population increased 250%. The statewide increase has been so dramatic that there are now concerns of overpopulation in elk herds.

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433 See infra notes 434–48 and accompanying text.

434 Smith, supra note 428, at 189, 194.

435 Id. at 190.

436 Special to the New York Times, Big Indian Elk Kill Leads to Call for Game Law, N.Y. Times, Dec. 18, 1983, at 42. Bruce Smith, a Fish and Wildlife Biologist who studied wildlife on the reservation at the time, stated that these articles were “sometimes embellished by inflated body counts.” Smith, supra note 428, at 186.

437 Smith, supra note 428, at 189.

438 Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 746, 750 (10th Cir. 1987) (holding “[t]he right to hunt on the reservation is held in common by both tribes, and one tribe cannot claim that right to a point of endangering the resource in derogation of the other tribe’s rights”).

439 Id. at 750.

440 Smith, supra note 428, at 194.

441 Id.

442 Id. at 198.

443 Id. In 2018, the elk population was about 39% above the WGFD’s objective. See 2019 Wyoming Game & Fish Annual Report, supra note 396, at A-3. In its 2019 annual report, WGFD stated that “conditions are such that elk numbers remain difficult to decrease.” Id. Likewise, in 2021, the WGFD reported that “[a]ccess continues to impede obtaining adequate harvest in
Today, hunting on the Wind River Indian Reservation is regulated by a Joint Tribal Fish and Game Code, and is enforced by the Eastern Shoshone and Northern Arapaho tribes.\(^{444}\) The diligent implementation of the tribal code has led to a rebound in wildlife populations on the reservation.\(^{445}\) Though tribal members actively hunt on the reservation, this should not be employed against their desire to exercise their rights to hunt off the reservation.\(^{446}\) That right is provided by the Second Treaty of Fort Bridger, and “like the U.S. Constitution, treaties are not vestiges of history.”\(^{447}\) Thus, in light of Herrera, the tribe has begun exploring how its administrative capacity to regulate hunting may translate to the context of off-reservation hunting.\(^{448}\)

In October 2019, the Eastern Shoshone Tribe announced it had begun to draft regulations to permit tribal members to hunt off-reservation.\(^{449}\) The tribe has taken steps toward setting up a regulatory framework to responsibly exercise its off-reservation hunting rights on unoccupied lands.\(^{450}\) The tribe has also considered the scope of its treaty-based off-reservation hunting rights.\(^{451}\) The right includes the gathering of medicinal and ceremonial plants.\(^{452}\) Sweet sage is used by the Eastern Shoshone during the Sun Dance.\(^{453}\) They gather chokecherries and buffaloberries and dry them to use in ceremonial dishes throughout the year.\(^{454}\) The Eastern Shoshone also require a large center-pole to use during the Sun Dance.\(^{455}\) In the past, when a suitable tree cannot be located on the reservation, the tribe has received informal permission from the U.S. Fish and Wildlife Service to gather one off-reservation.\(^{456}\) This activity falls within the Eastern Shoshone’s interpretation of “hunting” within the language of the Second Treaty of Fort Bridger.\(^{457}\)

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\(^{444}\) Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation §§ 16-1-1 to -8-25 (2004).


\(^{446}\) Id.

\(^{447}\) 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:02:10.

\(^{448}\) See infra notes 449–63 and accompanying text.

\(^{449}\) 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:09:30.

\(^{450}\) Id. at 0:10:15.


\(^{452}\) Id. (“That’s an important thing for us, the medicinal plants we use, it is not just hunting.”).

\(^{453}\) Id.

\(^{454}\) Id.

\(^{455}\) Id.

\(^{456}\) Id.

\(^{457}\) See State v. Tinno, 497 P.2d 1386 (Idaho 1972), overruled on other grounds by State v.
The tribe has cautioned that its exercise of off-reservation hunting treaty rights is “not just a free-for-all.” To be sure, off-reservation hunting would not be allowed until after regulations are drafted and implemented. The tribe has asserted that off-reservation hunting on unoccupied lands is intended to honor the tribe’s ancestors and is not “an individual right for Shoshone people, [but] a tribal right.” Furthermore, the tribe’s interest in conservation is written in the text of the Second Treaty of Fort Bridger. The Eastern Shoshone “have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon.” In other words, if the Eastern Shoshone engage in mass slaughter of game, there will be no game to be found on unoccupied land and the tribe’s treaty-based off-reservation hunting rights will arguably be extinguished.

B. The sovereigns can be guided by similarly situated tribes and states.

While it is yet to be seen what will become of Herrera on remand, the United States Supreme Court has nevertheless decided the matter. In the meantime, Wyoming should look to similarly situated tribes that have been exercising their treaty-based off-reservation hunting rights despite Race Horse, and decades before Herrera. The discussion below initially considers Idaho, where the Eastern Shoshone’s sister tribes, the Shoshone-Bannock Tribes of the Fort Hall Reservation, exercise their treaty-based off-reservation hunting rights. The material then turns to Colorado, where the Southern Ute Indian Tribe and Ute Mountain Ute Tribe negotiated a Memorandum of Understanding (MOU) with the State to exercise their treaty-based off-reservation hunting rights. These tribes,

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Young, 983 P.2d 831 (1999) (reasoning that “special consideration” should be accorded the Second Treaty of Fort Bridger, the court held “gathering of food from open lands . . . in this fashion protect the Indians’ right to maintain essential elements of their way of life”).

458 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:09:50.
459 Id. at 0:09:35.
460 Id. at 0:05:30; see also Amanda Fehring, Eastern Shoshone Tribe Plans Off-Reservation Hunting, CNTY. 10 (Oct. 17, 2019), https://county10.com/eastern-shoshone-tribe-plans-off-reservation-hunting/ [https://perma.cc/N2SZ-7T9F]; United States v. Felter, 546 F. Supp. 1002, 1021 (D. Utah 1982), aff’d, 752 F.2d 1505 (10th Cir. 1985) (holding “[a]n individual Indian’s hunting or fishing right is measured wholly in relation to the nature and extent of the tribe’s right”); 2019 COHEN’S HANDBOOK, supra note 279, §§ 16.01, 18.04.
461 See Second Treaty of Fort Bridger, supra note 40, art. IV.
462 Id. (emphasis added).
463 See id.
464 Wyoming v. Herrera, No. CT-2014-2687; 2688, slip op. at 4 (Wyo. Cir. Ct. June 11, 2020); see also infra Part IV.C.
465 See infra Parts IV.B.1, IV.B.2.
466 See infra Part IV.B.1.
and how they exercise their treaty-based hunting rights, provide models for the Eastern Shoshone in Wyoming.

1. Shoshone-Bannock Tribes of the Fort Hall Reservation

The Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho are signatories of the Second Treaty of Fort Bridger.\(^{468}\) Recall that Race Horse was a Bannock Indian, from whom the 1896 Race Horse Court stripped off-reservation hunting rights.\(^{469}\) But the Shoshone-Bannock have been exercising their treaty-based off-reservation hunting rights since the 1970s.\(^{470}\) The Idaho Supreme Court, in State v. Tinno, held that treaty-based off-reservation hunting rights may be exercised on “unoccupied land of the United States” within national forests in Idaho.\(^{471}\) The court relied on the Indian canons of construction to reach its holding.\(^{472}\) In 1994, the Ninth Circuit reaffirmed the treaty-based off-reservation hunting rights of the Shoshone-Bannock under the Second Treaty of Fort Bridger.\(^{473}\) Today, the Shoshone-Bannock exercise that right in cooperation with the state and the federal government.\(^{474}\) The tribes have also entered into a number of formal collaborative agreements with federal agencies.\(^{475}\) With the U.S. Fish and Wildlife Service, the Shoshone-Bannock have an agreement permitting them to a “limited ceremonial bison hunt on the National Elk Refuge.”\(^{476}\) There is also the Southern Idaho Wildlife Mitigation Agreement, under which the Bonneville Power Administration provides the tribes with funding to buy land that replaces land adversely affected by federal hydropower projects.\(^{477}\) After the tribes purchase the land, they create management plans “designed to protect wildlife and their habitats.”\(^{478}\) The tribes’ off-reservation hunting

\(^{468}\) See Second Treaty of Fort Bridger, supra note 40.

\(^{469}\) See supra Part II.C.


\(^{472}\) Id. at 1391.

\(^{473}\) Shoshone-Bannock Tribes v. Fish & Game Comm’n, 42 F.3d 1278, 1280 (9th Cir. 1994).


\(^{475}\) Brief of Amicus Curiae Shoshone-Bannock Tribes, supra note 2, at 27.

\(^{476}\) Id.

\(^{477}\) Id.

\(^{478}\) Id.
hunting rights may be exercised on the land. In all, these are examples in which off-reservation hunting rights “are reconcilable with State conservation interests.”

2. Ute Mountain Ute Tribe and Southern Ute Indian Tribe of Colorado

The Ute Mountain Ute Tribe and Southern Ute Indian Tribe in Colorado are currently engaged in cooperative game management agreements with Colorado. Separate instances of conflict precipitated cooperative and mutually beneficial solutions. For example, a consent decree between the Ute Mountain Ute Tribe and the Department of the Interior resulted from the arrest of a tribal member. The tribal member was hunting in the Brunot Cession area, a large swath of land in western Colorado ceded by the tribes in the 1800s. In 1978, the entry of a consent decree recognized the tribe’s hunting rights in the ceded land. The consent decree also implemented cooperative management strategies between the tribe and state, including designation of areas for tribal hunting irrespective of the state’s hunting seasons. In 2013, the Ute Mountain Ute Tribe and the state entered into an MOU establishing tribal regulation of tribal hunting rights.

For the Southern Ute Indian Tribe, a different type of conflict initiated a decades-long process toward an MOU with the State of Colorado. The state and the tribe cited a tribal member for hunting on private, non-Indian fee land within the reservation. Such is an example of the legal uncertainty that can exist in the absence of mutual understanding between tribes and states with regard to tribal hunting rights: while the tribe convicted its member for killing three deer in contravention of tribal law, the state pursued unlawful possession of three deer, taken without a valid state hunting license. The parties eventually agreed to a “cease fire” of sorts, a stipulation that ended the state proceedings and initiated

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479 Id.
480 Id. at 28.
482 See id. at 1, 15.
483 Id. at 15–16.
484 Id.
485 Id. at 16.
486 Id.
488 Brief of Amici Curiae Southern Ute Indian Tribe & Ute Mountain Ute Tribe, supra note 481, at 15–16.
489 Id. at 16.
490 Id.; see also Reimer, supra note 22, at 22.
a reckoning with treaty-based off-reservation hunting rights.\textsuperscript{491} In the meantime, the tribe agreed to disallow off-reservation hunting, but did not waive its ability to assert its right at a later date.\textsuperscript{492} This left room for further talks and cooperation between the state and the tribe.\textsuperscript{493} Then, in 2008, the two sovereigns entered into an MOU, allowing for regulation of off-reservation hunting by the tribe.\textsuperscript{494} The tribe requires permits, which are free of charge.\textsuperscript{495} The tribe sets hunting seasons, bag limits, and firearm requirements.\textsuperscript{496} It also has instituted an exemption process for hunting out of season for cultural and ceremonial purposes.\textsuperscript{497} Related conservation measures include required deer and elk harvest reporting, and validation of rare game and mountain lion harvest.\textsuperscript{498} With regard to jurisdiction, the Southern Ute Tribe intends to maintain a presence of tribal law enforcement.\textsuperscript{499} If a tribal member violates tribal regulations, the tribe has jurisdiction to issue citations and prosecute the offender.\textsuperscript{500} Tribal members exercising their hunting rights must be ready to present their hunting permit and tribal identification card to both tribal and state law enforcement.\textsuperscript{501}

Although two separate MOUs exist between the Southern Ute and the Ute Mountain Ute tribes, they are virtually identical.\textsuperscript{502} Each “expresses the intent of both governments to work cooperatively toward long-term conservation of wildlife within the Brunot area.”\textsuperscript{503} The MOUs provide an understanding between Colorado
and the tribes on such issues as wildlife management, law enforcement, technical assistance, education, training and outreach, and finally, dispute resolution.\textsuperscript{504}

C. The Eastern Shoshone and State of Wyoming should move forward with a cooperative agreement.

Notwithstanding Herrera presently being re-litigated, the highest court in the land announced two holdings that directly affect the Eastern Shoshone Tribe on the Wind River Indian Reservation and its ability to exercise treaty-based off-reservation hunting rights.\textsuperscript{505} In light of this truth, Wyoming should unite with the Eastern Shoshone in their mutual interest of conservation.\textsuperscript{506} Because the reservation adjoins tremendous swaths of federal land, moreover, federal agencies should be included in the effort.\textsuperscript{507} This section proposes a path forward.\textsuperscript{508} It discusses internal and external factors culminating in the Eastern Shoshone exercising their treaty-based off-reservation hunting rights.\textsuperscript{509} Because the Eastern Shoshone Tribe is self-determined, these suggestions are merely that and are, in the end, humbly and respectfully provided.

To begin, there is legal footing to support the formation of a cooperative agreement between the Eastern Shoshone, federal agencies, and the State of Wyoming.\textsuperscript{510} The tribe should focus on increasing capacity by exploring federal funding.\textsuperscript{511} Any cooperative agreement should be guided by “site-specific occupation” and conservation.\textsuperscript{512} It should also emphasize collaborative decision making and include dispute resolution mechanisms.\textsuperscript{513} Finally, this section proposes outreach and education to smooth the transition—a metaphorical uncircling of the wagons—to a cooperative future.\textsuperscript{514}

1. Gathering of Sovereigns

The Eastern Shoshone Tribe has signaled a practical starting point for hunting on unoccupied land.\textsuperscript{515} Because hunting within the external boundaries of the reservation is so plentiful, the tribe has suggested “unoccupied land” could be

\begin{itemize}
\item\textsuperscript{504} See 2008 Brunot MOU, supra note 494, at 7.
\item\textsuperscript{505} See supra notes 263–368 and accompanying text.
\item\textsuperscript{506} See supra Part IV.A.
\item\textsuperscript{507} See infra Part IV.C.1.
\item\textsuperscript{508} See infra notes 509–638 and accompanying text.
\item\textsuperscript{509} See infra Part IV.C; 2019 COHEN’S HANDBOOK, supra note 414, § 1.01.
\item\textsuperscript{510} See infra Part IV.C.1.
\item\textsuperscript{511} See infra Part IV.C.1.
\item\textsuperscript{512} See infra Part IV.C.2.
\item\textsuperscript{513} See infra Part IV.C.3.
\item\textsuperscript{514} See infra Part IV.C.4.
\item\textsuperscript{515} 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:31:45.
\end{itemize}
confined only to those areas encompassing federal lands. The Wind River Indian Reservation adjoins an immense area of federal public lands. The Bridger-Teton National Forest and Shoshone National Forest, which are managed by the United States Forest Service (USFS), hug the reservation’s western border and wrap around its northwestern and southwestern boundaries. Bureau of Land Management (BLM) lands adjoin, in checkerboard fashion, the remaining boundaries of the reservation. States, meanwhile, generally retain regulatory authority of hunting and fishing on federal lands. Of course, Herrera represents an exception to this authority and, with Wyoming not pursuing site-specific occupation on remand, paves the way for tribal exercise of off-reservation hunting rights on federal lands. Any cooperative agreement, therefore, should include the three sovereigns—the tribe, the state, and federal agencies. Importantly, a legal framework exists to bring them together.

By quick overview, the Federal Land Policy and Management Act (FLPMA) of 1976 requires both the USFS and BLM to manage wildlife on the agencies’ respective lands under the “multiple use, sustained yield” standard. FLPMA also allows the BLM to enter into “cooperative agreements involving the management [and] protection . . . of public lands.” Such agreements between the BLM and tribes are encouraged by the Department of the Interior.
Multiple Use Sustained Yield Act of 1960 also allows the USFS “to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons” to address forest management when the Secretary of Agriculture “determines that the public interest will be benefited and that there exists a mutual interest.”527 Strong precedent exists supporting such cooperative relationships.528 The U.S. Fish and Wildlife Service and the tribes on the Wind River Indian Reservation have a long and successful relationship working together to conserve wildlife on the reservation.529

Wyoming also has legal footing to enter into cooperative agreements with federal agencies and tribes within its borders.530 Pursuant to the Wyoming Joint Powers Act, state agencies, like the WGFD, “may cooperate with and assist . . . the United States and the Eastern Shoshone and Northern Arapaho tribes of the Wind River Indian Reservation.”531 Although little has been decided on the proper scope and validity of cooperative agreements, courts encourage their use to avoid costly litigation and oftentimes integrate them into court orders resolving conflict over resources.532 There has already been tremendous conflict and litigation regarding treaty-based off-reservation hunting rights between Wyoming and Indian tribes.533 This alone proves the necessity of entering into a cooperative agreement.534
Although a cooperative agreement may be encouraged, its success depends on the capacity of each sovereign to develop and enforce the agreement.\textsuperscript{535} To increase tribal capacity, the Eastern Shoshone should consider calling upon the United States as trustee, a relationship initially articulated in the Marshall Trilogy, to assist in developing institutional capacity to effectively regulate off-reservation hunting.\textsuperscript{536} This could include funding for enforcement and wildlife management.\textsuperscript{537} To do so, the Eastern Shoshone may use the Indian Self-Determination and Education Assistance Act and enter into a self-determination contract with the federal government.\textsuperscript{538} A self-determination contract is a contract between a federally recognized tribe and the federal government “for the planning, conduct, and administration of programs or services that were otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law.”\textsuperscript{539} The Eastern Shoshone has also considered allowing the state and federal governments to enforce hunting regulations off-reservation.\textsuperscript{540} Moving forward, however, the Eastern Shoshone should pursue this source of funding to hire additional game wardens to monitor off-reservation hunting.\textsuperscript{541} In addition to funding for enforcement, federal grants may be used to help fund tribal and state efforts in wildlife management.\textsuperscript{542} For example, combating the spread of brucellosis is of mutual interest to Wyoming and the Eastern Shoshone.\textsuperscript{543} In the past, the tribe has received federal grant money to support efforts in curbing disease among wildlife.\textsuperscript{544}


\textsuperscript{536}See supra notes 78–81 and accompanying text; Goodman, supra note 379, at 344.

\textsuperscript{537}See infra notes 538–44 and accompanying text.


\textsuperscript{539}§ 5304(j).

\textsuperscript{540}Interview with John St. Clair, supra note 451.

\textsuperscript{541}Id. (stating that the U.S. Fish and Wildlife agency has aided the Eastern Shoshone Tribe and provided technical assistance in managing wildlife management on the Wind River Indian Reservation). The average salary for a game warden of the WGFD in 2019 was about $52,000. \textit{How to Become a Fish and Game Warden in Wyoming: Wyoming Wildlife Officer Salary}, GAMEWARDENEDU. org, https://www.gamewardenedu.org/wyoming/#salary [https://perma.cc/DVC9-JUG9] (last visited Jan. 8, 2023).

\textsuperscript{542}See infra note 544 and accompanying text.

\textsuperscript{543}See supra Part IV.A.

\textsuperscript{544}Brodie Farquhar, \textit{Tribes Name New Fish, Game Director}, CASEY STAR TRIB. (Sept. 27, 2005), https://trib.com/news/state-and-regional/tribes-name-new-fish-game-director/
2. Entering a Cooperative Agreement

A cooperative agreement between the three sovereigns should be deliberate and entered with patience. The process should be guided by the two overarching issues the Herrera Court ordered to be addressed on remand: (1) site-specific occupation, and (2) conservation.

Because Wyoming is not pursuing a determination of site-specific occupation during the remand proceedings of Herrera, the issue is left generally unresolved. The three sovereigns should avoid the courts in the future and determine the parameters of the concept themselves. Given the tremendous area of federal lands, determining site-specific occupation would be tedious if the focus encompassed every piece of relevant federal lands. Instead, application of the Herrera analysis to the surrounding federal lands can be refined by tribal priorities and cultural considerations. For example, there may be areas that would be prioritized for plant gathering as opposed to hunting, and vice versa.

An agreement should also be guided by conservation considerations. The sovereigns should focus on an appropriate biological wildlife management policy that is zone specific. Doing so can preclude the invocation of the conservation necessity doctrine in the future. The allocation of wildlife should not be left to courts unequipped to make such consequential and region-specific decisions.

That should be the realm of the three sovereigns.\textsuperscript{556} The tribe has stated that the regulatory thrust of any tribal framework for off-reservation hunting would consist of permits for subsistence hunting subject to conservation and areas of concern.\textsuperscript{557} Such an approach could link the exercise of off-reservation hunting rights proportionally to identified management objectives.\textsuperscript{558} Regarding elk herds, for example, Wyoming has acknowledged that its “[m]anagement strategies will continue to focus on decreasing elk statewide, except in the herds at or below objective.”\textsuperscript{559} The three sovereigns, therefore, should work in good faith using existing mechanisms to coordinate their interests with on-the-ground realities.\textsuperscript{560}

One existing mechanism is the policy of the Department of the Interior requiring the preparation of “fish and wildlife management plans in cooperation with State fish and wildlife agencies and other Federal (non-interior) agencies where appropriate.”\textsuperscript{561} The Eastern Shoshone should participate in preparing these plans and, because it would include all three sovereigns, the substance and methodologies should be more pluralistic.\textsuperscript{562} A cooperative agreement should, in the end, include the coming together of cultures—the Eastern Shoshone's worldview of wildlife as relatives and Wyoming's worldview of wildlife as an economic resource.\textsuperscript{563} Moreover, while tribes have traditional knowledge of land stewardship spanning time immemorial, state and federal agencies operate on hard data using

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{556} See infra 557–638 and accompanying text.
\item \textsuperscript{557} 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:10:30.
\item \textsuperscript{558} See id.
\item \textsuperscript{559} 2021 Wyoming Game & Fish Annual Report, supra note 394, at A-3 (emphasis added).
\item \textsuperscript{560} See infra notes 561–66 and accompanying text.
\item \textsuperscript{561} 43 C.F.R. § 24.4(i)(1) (2022).
\item \textsuperscript{563} See supra Part IV.A. These worldviews also come into tension when considering conservation in general. Compare Baldes, supra note 535, at 51:00–56:20 (“The contemporary reconnection to [the buffalo] will ensure that we will have leaders in the future that will continue our roles, continue our belief systems, about all our relatives and the way that we connect. . . . We are often too focused on the economics and what we can gain from the dollar.”), with J.D. Radakovic, Room to Roam: Yellowstone Wildlife—Panel 5—Yellowstone National Park 150th Anniversary Symposium 56:45–1:05:20 (May 20, 2022), https://vimeo.com/showcase/9571468/video/716076635 [https://perma.cc/LP4N-CVP8] (“I’m going to disagree with Jason here a little bit, economic sustainability—any activity on land has to be supported. If I was strictly managing for conservation . . . I’d say, okay give me the ranch but also give me an endowment, because man is a part of the system, we are not going away. . . . Conservation is costly, there is no getting around it.”).
\end{itemize}
\end{footnotesize}
Western scientific methodologies. The knowledge does not have to be mutually exclusive. The Ute tribes and Colorado, for example, have agreed to “recognize the need to manage wildlife populations based upon the best available science,” and there are numerous instances in which indigenous knowledge fueled successful conservation efforts.

Turning to practical considerations then, the Eastern Shoshone should vigorously reengage in drafting its off-reservation hunting tribal code. The COVID-19 pandemic stalled the progress the Eastern Shoshone Off-Reservation Hunting Committee had made in drafting such a code. Nevertheless, the tribe should focus on developing hunting seasons, as well as bag and possession limits, and the tribe has stated that off-reservation hunting would not include commercial or recreational use, but only subsistence hunting. In addition, both the current Joint Tribal Fish and Game Code and Wyoming’s regulations prohibit the use of certain traps, shining of artificial lights, as well as hunting from aircraft. The Eastern Shoshone Tribe should also emphasize its commitment to safety regulations that it has in common with Wyoming. The tribe should include regulations prohibiting discharging firearms across or from highways and intoxicated hunting. Of particular relevance, the Joint Tribal Fish and Game Code prohibits hunting, trapping, and discharging “firearms upon the private property of another without knowledge and consent of the property owner.” Similarly, Wyoming

564 See Tyler D. Jessen et al., Contributions of Indigenous Knowledge to Ecological and Evolutionary Understanding, 20 Frontiers Ecology & Env’t 93, 93 (2022).

565 See infra note 566 and accompanying text.

566 2008 Brunot MOU, supra note 494, at 3. For a thorough discussion of such efforts and a proposal for tribal co-management of Yellowstone National Park, see Kekek Jason Stark et al., Re-Indigenizing Yellowstone, 22 Wyo. L. Rev. 397 (2022).

567 See infra notes 568–81 and accompanying text.


569 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:09:30. For reference, the Alaska National Interest Lands and Conservation Act defines “subsistence” as:

[T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption; and for the customary trade, barter or sharing for personal or family consumption.


572 Id. § 16-8-13(11)(a).
prohibits knowingly firing “any rifle from the enclosed lands of one person onto or across the enclosed lands of another without the permission of both persons.”574 These commonsense safety regulations again implicate the concept of site-specific occupation, but arguably support confining off-reservation hunting to federal lands unless a tribal hunter has the permission of the private property owner.575

Creating a framework of effective regulations will give the tribe substantive action to bring to a cooperative relationship with state and federal agencies.576 Eastern Shoshone tribal leaders have expressed a willingness to enter into a cooperative agreement, like that between Colorado and the Southern Ute and Ute Mountain Ute tribes, with Wyoming and federal agencies as one instrument to initiate a cooperative agreement.577 The Brunot MOU defines areas open for tribal hunting and identifies wildlife management strategies, and offers additional relevant elements such as enforcement, technical assistance, and training.578 In total, there must be deliberate and patient action toward collaboration and compromise.579 An absolutist attitude of authority has underpinned over a century’s worth of imbalance.580 Wyoming must temper its approach, the Eastern Shoshone must be careful not to commit a similar error of absolutism, and federal agencies can offer resources and presence to help balance interests.581

3. Collaboration and Dispute Resolution

A cooperative agreement between the Eastern Shoshone, Wyoming, and federal agencies must include meaningful collaborative decision making and dispute-resolution mechanisms.582 On its face, perhaps the weakest feature of informal agreement, like an MOU, is that it is not legally binding.583 Leaving open the possibility of termination manifests a virtual veto power.584 In practice, however,

575 Wyoming v. Herrera, No. CT-2014-2687; 2688, slip op. at 4 (Wyo. Cit. Ct. June 11, 2020) (holding on remand that “the issue of occupation was fully litigated and adjudicated in Repis”); see also supra note 25 and accompanying text.
577 2019 Select Committee on Tribal Relations Meeting, supra note 26, at 0:12:10; SELECT COMM. ON TRIBAL REL., WYO. LEG., SUMMARY OF PROCEEDINGS: OCT. 14–15, at 4 (2019). Such an agreement to “cooperate and assist each other” may be informal and “embodied in a written agreement” such as an MOU. Wyo. Stat. Ann. § 16-1-101.
578 2008 Brunot MOU, supra note 494.
579 See infra Part IV.C.3.
580 See supra Part II.
581 See McCorquodale, supra note 555, at 451; Baldes, supra note 535, at 48:00–50:00.
582 Goodman, supra note 379, at 348.
583 See Lauren Goschke, Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest, 27 Colo. Nat. Res. Energy & Env’t L. Rev. 315, 352 (2016) (“MOUs are used to set policy goals, but they are not binding; they are merely informal agreements that indicate that the tribes and the USFS are willing to work together.”).
584 See 2008 Brunot MOU, supra note 494, at 9.
that is its very strength—to serve the primary purpose of avoiding litigation.\footnote{See 2019 Cohen’s Handbook, supra note 279, § 18.08.} Trust is essential.\footnote{See 2013 Brunot MOU, supra note 502, § III.D, at 6.} These agreements are founded on goodwill and faith, a solemn promise between sovereigns.\footnote{Gardner, supra note 545. Jerry Gardner set forth the elements of a cooperative agreement: The elements of the cooperative agreement may also vary depending upon the needs of the specific issue or problem and the agencies involved. There are, however, certain key elements which should be included in virtually all cooperative agreements—or Memorandums of Understanding—between Indian Nations, the federal government, and/or state governments. First, the agreement should clearly identify the issue or problem to be addressed by the cooperative agreement. Second, most cooperative agreements set out a brief history of the collaborative relationship between the parties and/or the underlying philosophy or purpose of the agreement. Third, the agreement should provide definitions of any terms used in the agreement which may be subject to confusion or differing interpretations. Fourth, the agreement should clearly state the roles and responsibilities of each of the agencies/governments involved in the agreement. Finally, and perhaps most importantly, the agreement must be signed and dated by officials with the authority to bind their agency/government to the agreement—it is this critical component (the binding agreement of all parties) which makes it a Memorandum of Understanding and not just a proposal, confirming letter, or some other form of non-binding agreement. Id.} The Brunot MOU between the Southern Ute Indian Tribe and Colorado states simply that each party shall attempt “in good faith” a resolution to any dispute relating to their agreement and if mutual resolution is untenable, then the MOU may be terminated.\footnote{2008 Brunot MOU, supra note 494, at 3.} The consequences of failure are serious and, therefore, any agreement between the Eastern Shoshone, Wyoming, and federal agencies should include meaningful dispute resolution mechanisms.\footnote{Cf. id. § II.B(1), at 3.}

Collaborative decision-making must be paramount.\footnote{See infra notes 590–608 and accompanying text.} Proposed regulations drafted should be agreed upon and, like the Ute Tribes and Colorado, the parties should “meet on a periodic basis to discuss the setting of regulations and any differences that may arise.”\footnote{Id.; see also infra notes 604–19 and accompanying text.} To accommodate the demand on the capacity of each party, discussions should be held every three to five years.\footnote{See infra notes 628–638 and accompanying text.} In the event of compelling circumstances, of course, more frequent discussions may be prompted.\footnote{Cf. 2008 Brunot MOU, supra note 494, § II.F, IV, at 3; 2013 Brunot MOU, supra note 502, § II.B(1), at 3.} Information sharing and transparency are also necessary elements of cooperative decision-making.\footnote{Id.} This includes sharing biological data and appropriate tribal knowledge.\footnote{Id.}
In the absence of sufficient biological data, the Brunot MOU includes a provision that “prudent management is one designed to err in favor of the wildlife resource.”\(^{596}\) In effect, this operates to preclude reactive regulations that may trigger a legal battle between the parties on the merits of the conservation necessity doctrine.\(^{597}\) It represents a truce of sorts on the issue of conservation necessity.\(^{598}\) It cannot be emphasized enough that the purpose of cooperative agreements is to avoid litigation.\(^{599}\) The Brunot MOU recognizes this: “Such prudent management, however, shall not be evidence of the existence or non-existence of a conservation necessity.”\(^{600}\) In other words, prudent management that errs in favor of wildlife resources should not be construed to mean that any cooperative agreement must be congruent with Wyoming’s absolutist regulatory tradition.\(^{601}\) More to the point, a lack of understanding of tribal culture and knowledge is not evidence that traditional Western culture and scientific methods are superior.\(^{602}\) Patient collaboration and cooperative decision-making should replace such toxic assumptions.\(^{603}\)

Consideration must be given to resolving disputes.\(^{604}\) Initially, any disputes should be encouraged to be resolved between the state and the tribe.\(^{605}\) If collaboration breaks down and there is a dispute over a material issue, before resorting to termination of a cooperative agreement, the parties should turn to a third-party mediator.\(^{606}\) This could involve a federal agency, such as the U.S. Fish and Wildlife Service or the Regional Native American Liaison.\(^{607}\) Such inclusion of a federal representative would not only provide relevant expertise, but also fulfill the federal trust responsibility.\(^{608}\) As for a framework for dispute resolution mechanisms, regulations promulgated under the Clean Water Act offer suggestions.\(^{609}\) Any disputes arising outside the language of the four corners of the

\(^{596}\) 2008 Brunot MOU, supra note 494, at 3.

\(^{597}\) See id.; supra notes 276–88 and accompanying text.

\(^{598}\) See infra notes 599–603 and accompanying text.

\(^{599}\) See supra notes 585–88 and accompanying text.

\(^{600}\) 2008 Brunot MOU, supra note 494, at 3.

\(^{601}\) See id.

\(^{602}\) See McCorquodale, supra note 555, at 454 (“[T]ribes are likely to be reluctant cooperators in regional management forums if state and federal policies focus on the ecological benefits of tribal cooperation without also recognizing the importance of sustaining harvesting traditions central to tribal culture.”).

\(^{603}\) See supra notes 582–602 and accompanying text.

\(^{604}\) See infra notes 606–19 and accompanying text.

\(^{605}\) See 40 C.F.R. § 131.7 (2022).

\(^{606}\) See infra notes 607–08 and accompanying text.


\(^{608}\) Id. (stating that through co-management the U.S. Fish & Wildlife Service “will consult and collaborate with tribal governments and affected State or local resource management agencies to help meet the objectives of all parties while honoring the Federal trust responsibility”).

\(^{609}\) See infra notes 605–18 and accompanying text.
cooperative agreement could first be attempted to be resolved informally with the federal agency as a mediator.610 Formally, the tribe and state should anticipate and agree upon circumstances, particularly regarding conservation necessity, written into the agreement that may trigger a determination whether formal dispute resolution is required.611 Either the tribe or the state may request the federal agency to make that determination based upon the cooperative agreement.612 Formal dispute resolution may consist of a mediation, facilitated by a federal representative, who may form an advisory group consisting of representatives of the tribe and state.613 Alternatively, the dispute could go to arbitration.614 In such event, the parties would provide the relevant information to the arbitrator, who would then make a recommendation.615 The parties are not bound by the recommendation, unless they agree to be in writing beforehand.616 As a last resort, before termination of the agreement or litigation, if one party refuses to participate in dispute resolution, the federal agency can review all information it has before it and issue a recommendation.617 The state and tribe, however, would not be bound by it.618 If all fails, costly and divisive litigation would likely ensue.619

4. Education and Outreach

Turning away from the politics of power and leaning into mutual interest of conservation can fulfill the Mille Lacs Court’s assertion that “Indian treaty rights can coexist with state management of natural resources.”620 It can also open a future of collaboration and increased cultural understanding.621 The conflict engendered by treaty-based off-reservation hunting rights and Wyoming’s regulatory tradition, as well as competing interpretations of history, operate to preclude such a future.622 Therefore, any collaborative agreement between the sovereigns must include education and outreach that legitimizes the truth of the Eastern Shoshone’s valid treaty-based off-reservation hunting rights in the eyes of non-Indian Wyomingites.623

610 See 40 C.F.R. § 131.7.
611 § 131.7(b).
612 § 131.7(c).
613 § 131.7(f)(1).
614 § 131.7(f)(2).
615 § 131.7(f)(2)(ii).
616 Id.
617 § 131.7(f)(3).
618 Id.
619 See supra Part III.
621 See infra notes 624–38 and accompanying text.
622 See supra Parts II.C, III.
623 See Goodman, supra note 379, at 343–44.
By entering into an agreement with the Eastern Shoshone, Wyoming would recognize the tribe as a sovereign entity rather than as a mere stakeholder in the hunting industry.\(^6\) In doing so, Wyoming would take an important step forward and away from its regulatory tradition founded on a debunked interpretation of history that emphasized ethnocentrism, “progress,” and “civilization.”\(^7\) Indeed, Euro-American “civilization” did not affect the validity of the Eastern Shoshone’s reserved hunting rights.\(^8\) If Wyoming cannot move on from this erroneous interpretation and its attendant stereotypes, the Eastern Shoshone Tribe will struggle to establish itself as a legitimate decision-maker in the eyes of non-Indian Wyomingites with regard to wildlife management.\(^9\) Equally important, the constructive views of non-Indian Wyomingites should not only be heard, but should be made to feel that they have been heard.\(^10\) The Select Committee on Tribal Relations, which the Wyoming legislature only recently made permanent, is one obvious institution to facilitate information sharing with relevant entities and represent the views of all Wyomingites.\(^11\) In the end, a wildlife management agreement between the Eastern Shoshone and Wyoming would fulfill the legislature’s intent to “facilitate and foster communication and robust working relationships among state, tribal, federal and local entities and pursue opportunities encouraging economic growth, nondiscrimination and wellbeing for residents of Wind River Indian Reservation and neighboring communities.”\(^12\)

If the state recognizes the Eastern Shoshone’s treaty-based off-reservation hunting rights, it should support those rights through education.\(^13\) To do so would be to recognize the past, the Eastern Shoshone Tribe within its historical context, and its status as a sovereign.\(^14\) First, this should be represented by acknowledging that the Eastern Shoshone have inhabited and hunted on the land that is now Wyoming since time immemorial, that the tribe signed the Second Treaty of Fort Bridger securing for itself off-reservation hunting rights, and those rights have been reaffirmed by the United States Supreme Court.\(^15\) Second, a cooperative agreement should allocate the burden, relative to the political and cultural resources of each entity, of educating the communities of Wyoming about the Eastern Shoshone’s treaty-based off-reservation hunting rights.

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624 See id.
625 See supra Part III.
626 See supra Part III.C.
627 Goodman, supra note 379, at 345 (“[C]ommunity education concerning the tribal governmental role in decision making [is] an integral part of the comanagement process.”).
628 Id. (stating that co-management agreements “must ensure that the institutional arrangements for such participatory management are structured in a manner that addresses non-Indian concerns, particularly fear that tribal governments will be making decisions affecting non-Indian resource use”).
630 Id.
631 See infra notes 632–38 and accompanying text.
632 Interview with John St. Clair, supra note 451 (“We just want to exert our rights, have our rights recognized, and have something in place that shows they are recognized.”).
633 See supra Parts II, III.
hunting rights. Tribal history, culture, and values should be left to the authority of the Eastern Shoshone. With the permission of the Eastern Shoshone, the state could facilitate the dissemination of this information to politicians, agencies, and local media. Third, Wyoming must educate the public that an agreement will not transfer unilateral authority of wildlife management to the Eastern Shoshone. The Eastern Shoshone is an equal sovereign in the co-management of wildlife and not a rival stakeholder in the pursuit of taking game. Importantly, Wyoming can do this honestly—without compromising its conservation interests—and with the political cover provided by the United States Supreme Court.

V. Conclusion

Wyoming’s tradition of regulating treaty-based off-reservation hunting rights was violently imposed and then formally institutionalized by Ward v. Race Horse. In 2019, the United States Supreme Court overruled Race Horse. Herrera reinvigorated the Eastern Shoshone Tribe’s off-reservation hunting rights the tribe reserved for itself in the Second Treaty of Fort Bridger. Wyoming has an opportunity to push aside the false premise of its regulatory tradition, one articulated by Turner’s Frontier Thesis and captured in Race Horse, and fully recognize the validity of the Eastern Shoshone’s treaty rights. The Eastern Shoshone and Wyoming deserve this better way. Engaging in a proactive, mutually beneficial development of a cooperative agreement that respects the Eastern Shoshone’s treaty rights and addresses shared interests in conservation would allow both parties to walk together, unbroken, into the future.

See 2008 Brunot MOU, supra note 494, at 7 (“Upon request, the Tribe will help the State improve their understanding of Southern Ute history and sovereignty, Southern Ute Traditional values and practices including but not limited to ceremonial harvesting, natural resource values, treaty and other federally reserved rights, and other relevant legal issues.”); Interview with John St. Clair, supra note 451 (“[I]t is a good point to have some of our elders explain all of this to the communities of the state, in different kinds of forms. Perhaps in the museum in Lander.”); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 art. 31, 22–23 (Sept. 13, 2007).

See United Nations Declaration on the Rights of Indigenous Peoples, supra note 634, art. 31.

See Goodman, supra note 379, at 344 (“The emphasis in co-management, however, is not to regulate the non-Indian activities by tribal governments, but rather to bring together the various governmental entities who have authority over a particular resource as equal sovereigns, with each protecting and respecting the interests of their respective constituents.”).

Id. at 343–48.

See supra Parts III, IV.A.

See supra Parts II.B, II.C.

See supra Part III.B.1.

See supra Part III.C.

See supra Parts II.B, II.C, III.

See supra Part IV.C. At the time of printing this Comment, a bill was introduced in the Wyoming legislature that would authorize the Governor to negotiate and enter into an agreement with a tribe relating to off-reservation hunting so long as it conforms with narrowly specified conditions. HB0083, 67th Leg., Gen. Sess. (Wyo. 2023); Mike Koshmrl, Post-Herrera, Wyoming Seeks Hunting Pacts with Tribes, WYOFile (Jan. 13, 2023), https://wyofile.com/post-herrera-wyoming-seeks-hunting-pacts-with-tribes/ [https://perma.cc/AQ6V-T59G].