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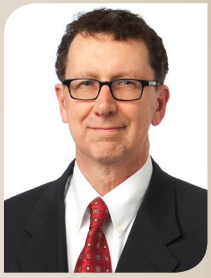

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Supreme Court Upholds Crow Tribe's Treaty-Reserved Off-Reservation Hunting Rights

By a 5-4 decision Monday, the Supreme Court handed a down a major treaty rights decision in favor of the Crow Tribe. In *Herrera v. Wyoming*, the Crow Tribe had entered into a Treaty with the United States in 1868, ceding most of its aboriginal territory but retaining a portion for the establishment of the Crow Reservation and retaining hunting rights in the ceded territory: "The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

In *Ward v. Race Horse*, 163 U.S. 504 (1896), the Supreme Court, construing the language in 1869 Fort Bridger Treaty with Bannock Shoshone Indians identical to the language in the Crow Treaty, held that the Shoshone Tribe's hunting rights had been "repealed" because the treaty "clearly contemplated the disappearance of the conditions therein specified," was of a "temporary and precarious nature." According to the Court, "the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as co-existing."

Relying on *Race Horse*, the Tenth Circuit in 1995 had held that the Crow Tribe's reserved hunting rights were "repealed" by the act admitting Wyoming to the union in 1890 or, alternatively, because the establishment of the Bighorn National Forest in 1897 meant the forest was no longer "unoccupied." In 1999, however, in *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the upheld Chippewa off-reservation treaty rights and characterized *Race Horse's* assumption that reserved treaty rights were incompatible with statehood as a "false premise."

In 2015, Herrera, a Crow member, challenged his prosecution by Wyoming officials for hunting elk in the Bighorn National Forest, arguing that *Repsis* was no longer good law after *Mille Lacs*. The Wyoming Supreme Court disagreed and, holding that Herrera's claims were precluded by *Repsis*, affirmed his conviction. Herrera appealed to the U.S. Supreme Court.

In a May 20, 2019 opinion authored by Justice Sotomayor and joined by Justices Ginsburg, Breyer, Kagan and Gorsuch, the U.S. Supreme Court, by a 5-4 vote, reversed the Wyoming Supreme Court. The Court repudiated *Race Horse* and held that (i) statehood did not imply termination of reserved hunting rights, (ii)

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establishment of a national forest did not render an area "occupied" and (iii) *Repsis* did not preclude Herrera's challenge:

> The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve. …
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> *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U. S., at 207. "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood."
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> To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. … Because this Court's intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis, Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood. …
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> We conclude that a change in law justifies an exception to preclusion in this case. There is no question that the Tenth Circuit in *Repsis* relied on this Court's binding decision in *Race Horse* to conclude that the 1868 Treaty right terminated upon Wyoming's statehood. See 73 F. 3d, at 994. When the Tenth Circuit reached its decision in *Repsis*, it had no authority to disregard this Court's holding in *Race Horse* and no ability to predict the analysis this Court would adopt in *Mille Lacs*. *Mille Lacs* repudiated *Race Horse's* reasoning. Although we recognize that it may be difficult at the margins to discern whether a particular legal shift warrants an exception to issue preclusion, this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force.
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> Here it is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence of settlement by non-Indians.
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> Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not "occupy" that area within the treaty's meaning. To the contrary, the President "reserved" the lands "from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning ... to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." Id., at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Justice Alito filed an aggressive dissent, disputing the majority's treatment of the claim preclusion issue. The meaning of his curious statement that "today's decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judgment binds all members of the Crow Tribe who hunt within the Bighorn National Forest" is unclear.

The Court's decision is especially welcome to Chippewa tribes whose treaty-reserved, off-reservation hunting and fishing rights were upheld in the *Mille Lacs* case. Because Herrera based his appeal largely on *Mille Lacs*, an adverse ruling might have raised new and unwelcome issues. The Alito dissent in Herrera poses no threat to Chippewa treaty rights because the claim preclusion issue raised by the *Repsis* decision is absent.

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