***Herrera v. Wyoming*, ___ S. Ct. ____, 2019 WL 2166394 (U.S. May 20, 2019)**

Summary written by Clay Smith, Chief Editor, AILD & WAGLAC

A member of the Crow Tribe (Herrera) was convicted in state court of taking elk in the Big Horn National Forest in violation of Wyoming law. Sitting in an appellate capacity, the state district court rejected, citing *Ward v. Race Horse*, 163 U. S. 504, 516 (1896), Herrera's reliance on Article IV of the 1868 Fort Laramie Treaty that reserved to the Tribe "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists ... on the borders of the hunting districts." *Race Horse* addressed an identically worded provision in another 1868 treaty and held that (1) the hunting right terminated at Wyoming statehood conflicted with the right of States to regulate such activities within their borders and (2) no evidence existed in the treaty "that Congress intended the treaty right to continue in 'perpetuity.'" The state district court also held that a Tenth Circuit decision issued almost a century after *Race Horse*, *Crow Tribe v. Repsis*, 73 F. 3d 982, 985 (10th Cir. 1995), had issue preclusion effect on Herrera's defense. There, the Tribe raised, and lost, its preemption challenge to application of Wyoming law to its members' hunting within the Big Horn National Forest. *Repsis* also concluded summarily that the National Forest was categorically "occupied" for treaty purposes when created by President Cleveland in 1897. The Supreme Court granted *certiorari* after the Wyoming Supreme Court denied review.

The Court reversed in a 5-4 decision, with Justice Sotomayor writing for the majority. The majority first held that the *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. … "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood."

It thus "formalize[d] what is evident in *Mille Lacs* itself. While *Race Horse* 'was not expressly overruled' in *Mille Lacs*, 'it must be regarded as retaining no vitality' after that decision." As such, the later decision embodied "a change in law justif[ying] an exception to preclusion in this case."

Second, on the merits, the majority applied *Mille Lacs*'s reasoning to find the absence of the requisitely clear Congressional intent to abrogate the 1868 treaty right. "Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act 'makes no mention of Indian treaty rights' and 'provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act.'" The treaty itself, moreover, contained

> no suggestion … that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found thereon"; and (4) the Tribe and non-Indians are no longer at "peace ... on the borders of the hunting districts." … Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood.

In sum, "[a]pplying *Mille Lacs*, this is not a hard case."

The majority lastly considered "the question whether the 1868 Treaty right, even if still valid after Wyoming's statehood, does not protect hunting in Bighorn National Forest because the forest lands are 'occupied.'" It began this aspect of the opinion with a lengthy footnote rejecting the State's argument "that the judgment below should be affirmed because the Tenth Circuit held in *Repsis* that the creation of the forest rendered the land 'occupied,' … and thus Herrera is precluded from raising this issue." On this point, the majority determined that the state district court gave preclusive effect to *Repsis* only on the "*Race Horse* ground" and "not the 'occupation' ground." As to the meaning of the term "unoccupied," it relied on a textual analysis of the treaty and historical analysis to establish a "tie between the term 'unoccupied' and a lack of non-Indian settlement" and the corollary conclusion

> 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." … The proclamation gave "[w]arning ... to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." … If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

The majority, however, stressed its holding that the Big Horn National Forest was not categorically "occupied" did not determine "that all areas within the forest are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was 'occupied' within the meaning of the 1868 Treaty." The majority further recognized that on remand "the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation."

Justice Alito, speaking for the remaining Justices, dissented. The dissent contended that "Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies" since "the *Repsis* judgment was based on a second, independently sufficient ground that has nothing to do with *Race Horse*, namely, that the Bighorn National Forest is not 'unoccupied'"—i.e., the issue-preclusion ground that the majority concluded that the state district court had not relied upon. The dissent disputed the majority's reading of the state court decision and also rejected Herrera's reliance of the *Second Restatement of Judgments* position "that a judgment based on the determination of two independent issues 'is not conclusive with respect to either issue standing alone.'" It would have deemed, as a matter of first impression, the First Restatement's position—"a judgment based on alternative grounds 'is determinative on both grounds, although either alone would have been sufficient to support the judgment'"—as the proper federal-common-law preclusion rule.