THE *RACE HORSE* THAT WOULDN'T DIE: ON *HERRERA V. WYOMING*

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INTRODUCTION

Should Native Americans be able to reclaim the hunting right guaranteed to them by an 1868 treaty based on advantageous developments in how the Supreme Court interprets such treaties? Or should past precedents denying that right deprive them of a chance to re-litigate the issue? In *Herrera v. Wyoming*,[1] the Supreme Court is considering how to reconcile the Crow Tribe's hunting right with Wyoming's sovereignty. This endeavor requires examining nineteenth-century treaties and precedents to decipher the intents of the Crow Tribe and the United States government. If the Court's decision includes a clear articulation of whether Native American treaty rights may be truncated by mere implication, tribes nationwide may be at risk of losing treaty rights they have enjoyed for centuries.

In making its decision, the Supreme Court will also have to weigh the advantages and disadvantages of overturning precedent and of undermining its underlying rationale. In this Commentary, I argue that the lower courts erred in applying issue preclusion and in relying on the outdated *Race Horse* doctrine.

I. FACTS & PROCEDURAL HISTORY

A. Facts

Clayvin Herrera is an enrolled member of the Crow Tribe of Indians; he lives on the Crow Reservation in St. Xavier, Montana.[2]

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1. Herrera v. Wyoming, 138 S. Ct. 2707 (NO. 17-532) (2018).

2. Joint Appendix at 185, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (NO. 17-532), 2018 WL 4928044, at *185 [hereinafter Joint Appendix].

Herrera and other Tribe members went hunting on the Crow Reservation in January 2014.[3] While pursuing a herd of elk, Herrera and his companions left the Crow Reservation and crossed into Wyoming's Bighorn National Forest, where they shot three elk.[4] The party then returned to the Reservation with the meat.[5] Herrera was cited for two criminal misdemeanors: one for taking an antlered big game animal without a license or during a closed season, and the other for being an accessory to the same offense.[6]

B. Procedural History

In July 2015, Herrera filed a motion to dismiss with the Wyoming Circuit Court, arguing that he had a right to hunt off the Reservation under Article Four of the Second Treaty of Fort Laramie, a treaty between the Crow Tribe and the United States.[7] The Court denied the motion, reasoning that the Crow Tribe did not have an off-reservation treaty hunting right pursuant to the Tenth Circuit's holding in *Repsis*.[8] The Wyoming Supreme Court denied Herrera's petition for review in November 2015, and the Wyoming District Court dismissed his interlocutory appeal in April 2016.[9] Both the Wyoming Supreme Court and the United States Supreme Court denied Herrera's requests for a stay.[10]

At trial in April 2016, a jury convicted Herrera of both misdemeanor charges.[11] Herrera appealed to the district court, contesting the circuit court's pretrial decision on the treaty right's validity.[12] The district court affirmed the conviction.[13] Herrera next filed a petition for review with the Wyoming Supreme Court, which denied review without explanation.[14] The United States Supreme Court then granted certiorari.[15]

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3. *Id.*
4. *Id.* at *186.
5. *Id.*
6. *Id.* at *255 (citing WYO. STAT. ANN. § 23-3-102(d), 23-6-205 (2018)).
7. Brief for Petitioner at 14, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (NO. 17-532), 2018 WL 4293381, at *14 [hereinafter Brief for Petitioner].
8. *Id.*
9. Brief for Petitioner, *supra* note 7, at *15.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at *16.
14. *Id.* at *17.
15. *Wyoming*, 138 S. Ct. 2707.

II. LEGAL BACKGROUND

Herrera's claims rely on treaties, statutes, and precedents. These sources of law are susceptible to conflicting interpretations and resolving these conflicts is essential to determining whether the Crow Tribe has a right to hunt on the disputed land. To understand the roles these sources play in this dispute it helps to consider the origin and text of each.

A. The Second Treaty of Fort Laramie

In May 1868, the Crow Tribe and the United States signed the Second Treaty of Fort Laramie (Crow Treaty).[16] The Crow Treaty established the Crow Reservation in present-day Montana.[17] In exchange, the Tribe ceded the remainder of its land to the United States.[18] The Crow Treaty provided, however, that the Tribe would retain certain rights in the ceded land.[19] Specifically, the Crow Treaty stated that the Tribe "shall have the right to hunt on 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."[20]

B. Wyoming's Statehood

In 1890, Congress formally admitted Wyoming to the Union "on an equal footing with the original States in all respects whatever."[21] The Statehood Act granted to Wyoming only those public lands expressly provided for therein.[22] The Act did not mention the Crow Treaty.[23]

C. Forest Reserve Act & Bighorn National Forest

In 1891, Congress enacted the Forest Reserve Act, which authorized the President to "set apart and reserve" certain tracts of

16. Treaty Between the United States of America and the Crow Tribe of Indians, US-Crow, May 7, 1868, 15 Stat. 649 [hereinafter Crow Treaty].

17. *See* Montana v. United States, 450 U.S. 544, 547–48 (1981) (describing how the Crow Treaty provided for the establishment of the Crow Reservation).

18. *See* Crow Treaty, art. IV ("The Indians . . . will make said reservation their permanent home, and they will make no permanent settlement elsewhere.").

19. *Id.*

20. *Id.*

21. Wyo. Act of Admission, ch. 664, § 1, 26 Stat. 222 (1890) [hereinafter Statehood Act].

22. *See id.* at § 12 ("The state of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act.").

23. *See generally id.*

public lands as "public reservations."[24] The Forest Reserve Act provides:

> "[N]othing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements."[25]

In 1897, President Grover Cleveland exercised his authority under the Forest Reserve Act in issuing a proclamation that established the "Big Horn Forest Reserve" (Bighorn) in northern Wyoming.[26] The land on which this forest was later established was located within the tract of land that the Crow Tribe ceded in the Treaty.[27]

D. Race Horse, Repsis, *and* Mille Lacs

In *Ward v. Race Horse*,[28] the United States Supreme Court considered a treaty between the United States and the Bannack Indians that contained a provision identical to a provision of the Crow Treaty.[29] The Court noted a conflict between the Bannack's treaty hunting right and the equal footing doctrine, which mandates that Wyoming have the same ability to regulate hunting within its borders as any of the other states existing at the time Wyoming was created.[30] In resolving the conflict, the Court determined that the Bannack's treaty hunting right was a "temporary and precarious" right, terminated when Wyoming became a state.[31] The Court reasoned that the right was temporary because Congress had the power to unilaterally terminate it by selling the land.[32]

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24. Act of Mar. 3, 1891, § 24, 26 Stat. 1103, as amended, 16 U.S.C. § 471 (repealed 1976).
25. *See id.* at § 10.
26. Presidential Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The forest's name was changed from "Big Horn" to "Bighorn" in 1908. *See The National Forests of the United States*, FOREST HISTORY SOCIETY, https://foresthistory.org/wp-content/uploads/2017/01/National-Forests-of-the-U.S.pdf.
27. Crow Tribe of Indians v. Repsis, 73 F.3d 982, 985 (10th Cir., 1995).
28. Ward v. Race Horse, 163 U.S. 504 (1896).
29. S*ee* Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, art. IV, July 3, 1868, 15 Stat. 674–75, (the Treaty reserved for the Bannack Tribe the right to hunt on the "unoccupied lands of the United States").
30. *Race Horse*, 163 U.S. at 514–15.
31. *Id.*
32. *Id.* at 510.

Nearly a century after *Race Horse* was decided, a Crow tribal member was charged and convicted for hunting in Bighorn in *Crow Tribe of Indians v. Repsis*.[33] The Crow Tribe disputed the district court's finding that *Race Horse* foreclosed the Tribe's hunting right.[34] The Crow Tribe argued that the Supreme Court had since rejected several of the legal doctrines applied in *Race Horse*.[35] The Tenth Circuit disagreed, concluding that *Race Horse* remained "compelling, well-reasoned, and persuasive."[36] The Tenth Circuit issued an "alternative basis for affirmance" to buttress its decision.[37] According to the court, the Crow Tribe's hunting right was abrogated when "the creation of the Big Horn National Forest resulted in the 'occupation' of the land [that they had ceded]."[38]

Four years later in 1999, the Supreme Court revisited the *Race Horse* doctrine in *Minnesota v. Mille Lacs*.[39] Unlike in *Race Horse*, the Court concluded that Minnesota's admission to the Union did not terminate the Indian treaty rights at issue.[40] The Court explained that it had "consistently rejected" the "conclusion undergirding the *Race Horse* Court's equal footing holding."[41] The Court subsequently declared, "because treaty rights are reconcilable with state sovereignty . . . statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."[42]

Despite repudiating the equal footing doctrine, the Court still preserved the outcome of *Race Horse*, determining that it contained an "alternative holding" that remains good law.[43] The Court found that the analysis under *Race Horse* requires determining "whether Congress . . . intended the rights secured by the . . . [t]reaty to survive statehood."[44] The Court distinguished the treaty in *Race Horse* from

33. Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir., 1995).
34. *Id.* at 986.
35. *See id.* at 988 (included among the *Race Horse* legal doctrines that the Tribe argues the Supreme Court has altered are: state plenary control over game, the equal footing doctrine, treaty construction, and reconciliation of state regulatory authority and Indian off-reservation hunting rights).
36. *Id.* at 994.
37. *Id.* at 993.
38. *Id.*
39. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203–08 (1999).
40. *Id.*
41. *Id.* at 205.
42. *Id.*
43. *Id.* at 207.
44. *Id.*

that in *Mille Lacs* by highlighting how only the former tied the "duration of the rights to the occurrence of some clearly contemplated event."[45] The Court concluded that unlike the one in *Mille Lacs*, the treaty in *Race Horse* thus clearly demonstrated Congress's intent for the tribe's hunting rights to expire upon statehood.[46]

III. HOLDING

The Wyoming District Court upheld Herrera's conviction.[47] The court found that *Repsis*, involving similar facts and legal arguments, precluded Herrera's arguments.[48] Herrera had argued that *Mille Lacs* called for an exception to issue preclusion because it "constitute[d] an intervening change in the applicable legal context."[49] Although the court recognized this as a legitimate exception to the doctrine, it rejected its application because "the legal framework [was] unchanged."[50] Finally, the court decided it was proper to deem the treaty right terminated even if issue preclusion was inapplicable.[51] According to the court, Wyoming's statehood and the creation of Bighorn, which resulted in the land's occupation, abrogated the Crow Tribe's hunting right. This is significant because the Treaty only provided a right to hunt on "unoccupied lands" and therefore no longer applied to Bighorn.[52]

IV. ARGUMENTS

A. Petitioner's Arguments

1. The Crow Tribe Still Have a Hunting Right in Bighorn

Herrera argues that his hunting right under the Crow Treaty has not been abrogated.[53] According to Herrera, the parties did not

45. *Id.* at 207–08.
46. *Id.*
47. Brief for Petitioner, *supra* note 7, at *16.
48. *See id.* (noting the court's conclusions that (1) the issue here was identical to the one decided in *Repsis*; (2) the finding that the treaty hunting right was temporary in *Repsis* was necessary to that judgment; (3) Herrera was in privity with one of the parties in *Repsis*—the Crow Tribe; and (4) the Crow Tribe had a full and fair opportunity to litigate in *Repsis*).
49. *Id.*
50. *Id.*
51. *Id.* at *16–17.
52. *See* Crow Treaty, art. IV, *supra* note 16 (stating that the Crow Tribe "shall have the right to hunt on *unoccupied* lands of the United States") (emphasis added).
53. *See* Brief for Petitioner, *supra* note 7, at *22–45.

contemplate Wyoming's statehood terminating the hunting right because such an event was not included in the Crow Treaty's list of events that could extinguish the right.[54] Herrera notes that *Mille Lacs* repudiated the concept of statehood's impliedly terminating Indian rights.[55]

The Crow Treaty did contemplate "the lands becom[ing] occupied."[56] Herrera argues that both parties understood "occupied" to be synonymous with "settled" because the Crow Treaty has elements linking the two terms.[57] For example, the Crow Treaty provides for tribal occupation of the land by simultaneously declaring that others could not "settle upon" the land.[58]

Herrera further argues that the use of the phrase "settlement" in President Cleveland's proclamation illustrates that the land was not then and is not now occupied.[59] Herrera cites contemporaneous dictionary definitions of the terms "occupy" and "settle" to show that the Tribe and the United States government understood the terms to be synonymous.[60] Since the proclamation barred "entry or settlement," it follows that the proclamation, according to the parties' understandings of its terms, barred occupation and thus classified the land as unoccupied.[61]

2. Issue Preclusion Does Not Bar Herrera From Addressing the Hunting Right's Validity

Herrera next claims that issue preclusion does not bar his claim because *Mille Lacs* represented a change from *Repsis* of the applicable legal context.[62] Herrera illustrates both how *Repsis* relied

54. *See id.* at *24 ("Wyoming's statehood is conspicuously absent from that list.").

55. *See id.* at *28 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999)) ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.").

56. Crow Treaty, art. IV, *supra* note 16.

57. *See* Brief for Petitioner, *supra* note 7, at *33–34 (citing Washington v. Wash. St. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979)) (arguing that the Indians' limited command of English lends weight to the conclusion that they understood the terms to be synonymous).

58. *See id.* at *33 (quoting Crow Treaty, art. II, *supra* note 16).

59. *Id.* at *36–37.

60. *Id.* at *36.

61. *See id.* at *37 ("[I]t is difficult to imagine how the proclamation could have rendered the land any more *unoccupied* than by prohibiting anyone from 'enter[ing] or mak[ing] settlement upon' it.") (alterations in original).

62. *Id.* at *47–48.

heavily on *Race Horse*[63] and how the reasoning of *Race Horse* was subsequently repudiated in *Mille Lacs*.[64] According to Herrera, the Supreme Court's repudiation of *Race Horse* qualifies as a mere change in the legal context.[65]

Herrera responds to Wyoming's contention that he is bound by the conclusion in *Repsis* that Bighorn is occupied by emphasizing that this was only an "alternative basis for affirmance" and therefore should not be entitled to preclusive effect.[66] First, the Restatement (Second) of Judgments[67] provides that "a judgment [that] . . . is based on determinations of two issues . . . is *not* conclusive with respect to *either* issue."[68] Second, the Crow Tribe lacked a full and fair opportunity to litigate whether Bighorn was "occupied" because, inter alia, the state did not address this issue in its opening brief.[69]

B. Respondent's Arguments

1. *Repsis* Precludes Herrera From Asserting a Hunting Right

Wyoming argues that all three elements of issue preclusion are met in this case.[70] First, the matter was actually and necessarily determined.[71] Second, neither party disputes that federal courts are of competent jurisdiction for interpreting Indian treaties.[72] Third, Herrera's membership in the Crow Tribe binds him to the *Repsis*

63. *See id.* at *47 (citing Crow Tribe of Indians v. Repsis, 73 F.3d 982, 994 (10th Cir., 1995).)) (noting the Tenth Circuit's description of *Race Horse* as "compelling, well-reasoned, and persuasive").

64. *See id.* at *48 (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 219 (1999)) (noting how Justice Rehnquist, writing in dissent, described *Mille Lacs* as a decision that "effectively overruled" *Race Horse*).

65. *Id.* (citing Comm'r v. Sunnen, 333 U.S. 591, 599 (1948)).

66. *See id.* at *49 (citing *Repsis*, 73 F.3d at 993) ("[I]t bears noting that the Wyoming District Court did not base its issue preclusion ruling on that ground, which is hardly surprising given that the state made no such argument before it.").

67. A source that Herrera notes the Supreme Court routinely consults; *see id.* at *50 (citing various cases supporting this proposition).

68. *Id.* at *50 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. *i* (1982)).

69. *See id.* at *52 (describing how the state offered no argument about the "occupation" of Bighorn in the *Repsis* district court and how the *Repsis* district court did not address the question either).

70. *See* Brief for Respondent at 23, Herrera v. Wyoming, 138 S. Ct. 2707 (2018) (NO. 17-532), 2018 WL 6012360, at *23 (quoting Montana v. United States, 440 U.S. 147, 153 (1979)) ("[O]nce an issue is [1] actually and necessarily determined [2] by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving [3] a party to the prior litigation.").

71. *See id.* (explaining that *Repsis* actually resolved that Crow tribal members are subject to Wyoming law and that it necessarily did so because the Tribe's Complaint initiated the case).

72. *Id.*

interpretation of the Crow Treaty.[73]

Next, Wyoming questions the notion that *Mille Lacs* represents a change in the legal context from *Repsis*.[74] Wyoming interprets *Mille Lacs* to stand for the proposition that statehood does not automatically extinguish tribal hunting rights.[75] The *Mille Lacs* holding therefore does not, according to Wyoming, represent a total repudiation of *Race Horse*.[76] Instead, *Mille Lacs* preserves the "narrow alternative holding" of *Race Horse*, which was that the specific treaty rights at issue in that case did expire upon statehood.[77] Since the treaty provision in this case is identical to the one in *Race Horse*, the applicable legal context has not changed.[78]

In responding to Herrera's issue preclusion argument, Wyoming questions the Restatement's approach to issue preclusion altogether.[79] Wyoming asserts that the Supreme Court's approach to issue preclusion has been much narrower than the approach called for by the Restatement.[80] Adopting a broader understanding of the exception, Wyoming argues, would undermine judicial finality.[81]

Wyoming further contends that Herrera is precluded from challenging the Tenth Circuit's conclusion that Bighorn is occupied.[82] First, in addressing Herrera's attempt to undermine the "alternative holding" of *Repsis*, Wyoming argues that an alternative holding is as valid as any other.[83] Second, Wyoming characterizes the Tenth Circuit's conclusion as a reason underlying the decision rather than as an "alternative holding."[84]

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73. *See id.* at *23–24 (concluding that Herrera's membership in the Crow Tribe binds him to the *Repsis* decision).

74. *Id.* at *25–34.

75. *Id.* at *28.

76. *See id.* (stating that "the *Race Horse* decision survived *Mille Lacs*").

77. *Id.*

78. *See id.* at *29 (arguing that *Race Horse* "has direct application for . . . the Treaty with the Crows").

79. *See id.* at *30 ("[T]he Court should not enshrine the Restatement's approach here.").

80. *Id.* at *31.

81. *Id.* at *33–34.

82. *Id.* at *36–38.

83. *See id.* at *37 (quoting United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924)) ("[W]here there are two grounds . . . each is the judgment of the court and of equal validity with the other." (alteration in original)).

84. *See id.* at *37–38 (stating that Herrera's argument conflates the *Repsis* judgment with its reasoning and determining that the Tenth Circuit's conclusion about the forest's being occupied was an explanation for the ruling rather than a separate judgment).

2. The Crow Treaty Does Not Grant a Permanent Right to Hunt in Bighorn

Next, Wyoming argues that the Crow Treaty only granted the Crow Tribe the right to hunt until non-Indians began to occupy the land ceded in the Treaty.[85] The Crow Treaty's use of the term "hunting districts," Wyoming contends, provides strong evidence that the right was intended to be only temporary.[86] The contemporary context of the government's reservation policy and the imminent westward expansion of non-Indians support the inference that both parties understood the temporary nature of the right.[87]

Wyoming strengthens its argument by emphasizing that the Supreme Court already examined Congress's intent with respect to the Crow Treaty in *Race Horse*.[88] Honoring the doctrine of *stare decisis* would require sustaining the Court's original interpretation.[89]

V. ANALYSIS

Neither *Race Horse* nor *Repsis* should preclude Herrera's claims because of the flawed reasoning underlying both decisions. The Supreme Court has declared that a "change in the applicable legal context" may suffice to defeat issue preclusion.[90] In *Bobby v. Bies*, the Supreme Court unanimously concluded that a legal development that merely altered a party's litigation strategy was enough to defeat issue preclusion.[91] Here, the relevant legal development was a repudiation of the entire foundation of the precedent at issue. The contrast between the Tenth Circuit's describing *Race Horse* as "compelling, well-reasoned, and persuasive"[92] and the Supreme Court's stating that "*Race Horse* rested on a false premise"[93] is stark. Given this significant legal development, Herrera's claims should not be precluded.

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85. *Id.* at *40.

86. *See id.* at *43 ("The hunting districts were wilderness that had not yet seen the march of advancing civilization.") (internal quotations omitted).

87. *See id.* at *44 (contending that the very purpose of the Crow Treaty was to mandate a separation between Indians and incoming non-Indians).

88. *See id.* at *53 (arguing that "Wyoming and its citizens have relied on the interpretation from *Race Horse* for 122 years").

89. *Id.*

90. Bobby v. Bies, 556 U.S. 825, 834 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. *c*)).

91. *Id.* at 836–37.

92. Crow Tribe of Indians v. Repsis, 73 F.3d 982, 994 (10th Cir., 1995).

93. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

The prominence of "alternative holdings" in *Race Horse* and *Repsis* further weakens their precedential value in this case. First, the Supreme Court's choice not to overturn *Race Horse* while repudiating its foundation created the confusion that currently surrounds the doctrine. One problem with the Court's decision to preserve the "alternative holding"[94] of *Race Horse* is that it neglects the way in which this holding was informed by the since-repudiated equal footing doctrine.

Underlying the Court's decision in *Race Horse* was the assumption that Congress would not enter into a treaty that might hamper the autonomy of a future state.[95] Since the lands ceded by the Crow Tribe would eventually be engulfed by a newly formed state, the parties must have known that the right to hunt on that land would expire upon statehood.[96] To presume otherwise would "render necessary the assumption that congress [sic] . . . created a provision . . . irreconcilably in conflict with the powers of the states."[97] This line of reasoning led to the Court's inference in *Race Horse* that the hunting right was "temporary and precarious,"[98] an inference that was subsequently rejected in *Mille Lacs*.[99] The outdated equal footing doctrine substantially influenced the "alternative holding" of *Race Horse*.

The Tenth Circuit's "alternative basis for affirmance" in *Repsis* also played a substantial role in the outcome of that dispute.[100] The limited support the Tenth Circuit provided for concluding that Bighorn was occupied, thus abrogating the hunting right,[101] demonstrates that the alternative holding in *Repsis* should not preclude Herrera's claims. Further reasons for deciding against issue preclusion include the state's initially not offering any argument about this issue in the lower court[102] and the Tenth Circuit's

94. *Id.* at 206.
95. Ward v. Race Horse, 163 U.S. 504, 509 (1896).
96. *Id.* at 508–10.
97. *Id.* at 509.
98. *Id.* at 510, 515.
99. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206–07 (1999) ("[T]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not.").
100. *See* Crow Tribe of Indians v. Repsis, 73 F.3d 982, 993 (10th Cir., 1995).
101. *See id.* (noting that the creation of Bighorn National Forest resulted in the "occupation" of the land because "these lands were no longer available for settlement").
102. Brief for Petitioner, *supra* note 7, at *52.

determination not being subject to plenary appellate review.[103] Allowing a decision based on a limited analysis to serve as the basis for issue preclusion would be inconsistent with a key premise of the preclusion doctrine: "an underlying confidence that the result achieved in the initial litigation was substantially correct."[104] Only well-reasoned conclusions should be determinative in resolving future similar disputes.

Even though *Race Horse* and *Repsis* squarely apply to the issues in this case, they should not dictate the outcome here. Wyoming's attempt to rely on precedent is based, in part, on appealing to the Supreme Court's characterization of honoring *stare decisis* as "a foundation stone of the rule of law."[105] The *stare decisis* doctrine embraces the theory that it is often "more important that the applicable rule of law be settled than that it be settled right."[106]

It is important to recognize, however, that adhering to *stare decisis* "is not an inexorable command."[107] In 2018, the Supreme Court articulated five factors that should be considered when deciding whether a precedent should dictate the outcome of a future case.[108] The first (and perhaps most important) factor is the quality of the applicable precedent's reasoning.[109] The extent to which the Supreme Court disparaged the reasoning of *Race Horse* in *Mille Lacs* demonstrates that honoring *stare decisis* does not mandate concluding that *Race Horse* determines the outcome of this case. The minimal rationale supporting the alternative holding in *Repsis* indicates that said holding should not command the outcome here.

CONCLUSION

Examining this case on the merits is necessary in light of the substantial legal developments that have occurred since the last dispute involving the Crow Tribe's treaty right nearly twenty-five years ago. The Supreme Court's decision in *Mille Lacs* to partially

103. *Id.* at *51.

104. Bravo-Fernandez v. United States, 137 S. Ct. 352, 358 (2016) (quoting Standefer v. United States, 447 U.S. 10, 23, n. 18 (1980)).

105. Michigan v. Bay Mills, 572 U.S. 782, 798 (2014).

106. Kimble v. Marvel, LLC, 135 S. Ct. 2401, 2409 (2015) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

107. Payne v. Tennessee, 501 U.S. 808, 809 (1991).

108. *See* Janus v. American Federation of State, County, and Mun. Employees, Council 31, et al., 138 S. Ct. 2448, 2478–79 (2018) (listing the five factors).

109. *Id.*

preserve the *Race Horse* holding while repudiating its reasoning warrants a full reconsideration of the doctrine. *Herrera v. Wyoming* provides an opportunity for the Court to clarify its framework for resolving conflicts between Native American treaty rights and state sovereignty.