

Public Land & Resources Law Review

Volume 0 *Case Summaries 2019-2020*

Article 2

October 2019

Herrera v. Wyoming

Dylan M. Jaicks

Alexander Blewett III School of Law at the University of Montana, dylan.jaicks@umontana.edu

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>



Part of the [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), [Land Use Law Commons](#), [Natural Resources Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jaicks, Dylan M. (2019) "Herrera v. Wyoming," *Public Land & Resources Law Review*. Vol. 0 , Article 2.
Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss10/2>

This Case Summary is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

***Herrera v. Wyoming*, 139 S. Ct. 1686 (2019)**

Dylan M. Jaicks

Stemming from the conviction of a Crow tribal member for illegal hunting, *Herrera v. Wyoming* reignited long-running questions concerning treaty abrogation and precedent. In an effort to clarify conflicting case law, the Supreme Court upheld the Crow Tribe’s reserved hunting rights and rejected the argument that statehood extinguished such rights.

I. INTRODUCTION

In *Herrera v. Wyoming*, the petitioner, Clayvin Herrera (“Herrera”), raised the question of whether the Crow Tribe’s (“Tribe”) rights under the 1868 Treaty (“Treaty”) were abrogated by Wyoming’s admission to the Union, the creation of the Bighorn National Forest, or the operations within the forest, and whether the doctrine of issue preclusion barred Herrera from using this argument as a defense to his criminal conviction.¹ The Supreme Court of the United States determined there was no abrogation of the Treaty from Wyoming’s statehood, but it did not determine whether the location where Herrera took elk in the Bighorn National Forest was “occupied” within the meaning of the Treaty.² The Court remanded the case for factual determinations regarding the possible occupation of the forest, thus leaving open the possibility of affirming Herrera’s conviction.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1868, the Tribe entered into the Treaty with the United States, ceding 30 million acres of its lands in Montana and Wyoming, while reserving “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.”⁴ This provision demonstrated the importance of the Tribe’s hunting traditions to its culture.⁵

Months after the Treaty’s signing, the United States established Wyoming as a territory with the stipulation that there would be no “impair[ment of] the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain

1. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691 (2019).
2. *Id.* at 1700–03.
3. *Id.* at 1694, 1703.
4. *Id.* at 1691–93 (quoting Treaty Between the United States of American and the Crow Tribe of Indians art. IV, Crow-U.S., May 7, 1868, 15 Stat. 650 [hereinafter 1868 Treaty]).
5. *Id.* at 1692.

unextinguished by treaty.”⁶ Congress then admitted Wyoming to the Union in 1890 on equal footing to other states.⁷ The congressional act granting Wyoming statehood did not mention the Tribe’s reserved treaty rights.⁸ Subsequently, in 1897, President Grover Cleveland established the Bighorn National Forest within the Tribe’s historic territories as land “reserved from entry or settlement.”⁹

In 2014, Herrera, a member of the Tribe, shot several bull elk inside the Bighorn National Forest and took the meat back to his residence in Montana.¹⁰ Following an investigation, Wyoming charged Herrera for illegally taking elk and accessory to the same.¹¹ Herrera moved to dismiss the charges based on his hunting rights under the Treaty; however, the state trial court rejected the motion, and Herrera’s attempts to stay the trial court’s order were unsuccessful.¹² A jury convicted Herrera on both counts; he received a suspended jail sentence, a fine, and a 3-year suspension of hunting privileges.¹³ On appeal, the state appellate court affirmed the conviction, relying on *Crow Tribe of Indians v. Repsis*, which held that the rights under the Treaty expired upon Wyoming’s statehood.¹⁴ The state appellate court rejected Herrera’s argument that the reserved off-reservation hunting rights under the Treaty were still valid based on *Minnesota v. Mille Lacs Band of Chippewa Indians* and its repudiation of *Ward v. Race Horse*, the case that *Repsis* drew its reasoning from.¹⁵ Additionally, the appellate court held that *Repsis* precluded Herrera’s treaty defense because the validity of the Treaty had already been litigated on behalf of the Tribe and its members, and that the Bighorn National Forest was categorically “occupied” upon its creation.¹⁶ Herrera petitioned for and was granted a writ of certiorari by the United States Supreme Court.¹⁷

6. *Id.* at 1693 (quoting An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178).

7. *Id.* at 1693 (quoting An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222).

8. *Id.*

9. *Id.* (quoting Presidential Proclamation No. 30, 29 Stat. 909 (1897)).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* (citing *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992–93 (10th Cir. 1995)).

15. *Id.* (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Ward v. Race Horse*, 163 U.S. 504 (1896)).

16. *Id.* at 1694.

17. *Herrera v. Wyoming*, 138 S. Ct. 2707 (2018).

III. ANALYSIS

The Court analyzed two core issues on review: (1) the effect of Wyoming's statehood on the Tribe's hunting rights under the Treaty, and (2) whether the Bighorn National Forest had become "occupied" within the meaning of the Treaty.¹⁸

A. *Validity of Reserved Treaty Rights Following Statehood*

The Court first assessed whether its decision in *Race Horse* rendered the hunting rights under the Treaty invalid.¹⁹ It agreed with Herrera, clarifying that "*Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood."²⁰

In *Race Horse*, which Wyoming argued should control, the Court considered reserved hunting rights under a treaty with the Shoshone-Bannock Tribe, which was signed the same year and contained nearly identical language as the 1868 Treaty.²¹ The Court held that Wyoming's statehood extinguished the Treaty based on: (1) the equal footing doctrine, vesting the States with the power to regulate hunting which would have conflicted with the treaty rights; and (2) the lack of intent in the treaty for the "right to continue in 'perpetuity,'" instead noting the "temporary and precarious" nature of those rights.²²

Upon review, however, the Court turned to the rationale of *Mille Lacs* instead. Although the treaty in *Mille Lacs* was not identical to the 1868 Treaty, the case concerned a similar question of whether the Chippewa's treaty rights continued after Minnesota became a state. The *Mille Lacs* Court explained that the equal footing doctrine would not necessarily conflict with reserved treaty rights where "reasonable and nondiscriminatory regulations" could be imposed by states on Indian tribes to ensure conservation, and thus that "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood."²³ Instead, *Mille Lacs* clarified that abrogation of treaty rights may only be found where Congress has clearly expressed its intent to do so, and Minnesota's statehood act contained no such language.²⁴ Further, the opinion stated that the reserved hunting rights in the treaty were not "temporary and precarious" because this language

18. *Herrera*, 139 S. Ct. at 1694, 1700–01.

19. *Id.*

20. *Id.* at 1697.

21. *Id.* (citing Treaty Between the United States of America and the Eastern Band of Shoshonees [sic] and the Bannack [sic] Tribe of Indians, Shoshone-Bannock-U.S., July 3, 1868, 15 Stat. 674-75).

22. *Id.* at 1694 (citing *Race Horse*, 163 U.S. at 514–15).

23. *Id.* at 1695 (emphasis in original) (citing *Mille Lacs*, 526 U.S. at 204, 207).

24. *Id.*

was too broad and there was no “termination point identified in the treaty itself [that had] been satisfied.”²⁵

In *Herrera*, the Court concluded that the logic underlying *Mille Lacs* had repudiated the rationales employed in *Race Horse*.²⁶ This was true even in spite of the fact that the treaty in *Race Horse* provided for a temporal end to its treaty rights unlike the treaty in *Mille Lacs*.²⁷ The Court made clear, however, that “the treaty termination analysis turns on the events enumerated in the ‘Treaty itself.’”²⁸

Having distinguished *Race Horse* from *Mille Lacs*, the Court then addressed the effect of issue preclusion on *Herrera*’s claim.²⁹ Because the circuit court had affirmed on the basis of issue preclusion, relying on *Repsis*’s previous determination of the Tribe’s reserved rights under the Treaty, the Court’s destruction of the underlying reasoning of *Repsis* allowed it to reverse on this basis as well.³⁰ The Court relied on the exception to the issue preclusion doctrine that allows for successive litigation of an issue when there is “an intervening ‘change in [the] applicable legal context’” because the “changed circumstances may not ‘advance the equitable administration of the law.’”³¹ The Court noted that the circumstances in this case deserved application of the exception because they were not “marginal.”³²

Following the Court’s clarification of the law and assurance that the issue preclusion would not apply, it proceeded with its analysis regarding the abrogation of reserved treaty rights as set out in *Mille Lacs*. As it defined the rule in *United States v. Dion*, the Court noted that abrogation of treaty rights requires “clear evidence” that Congress had such an intent based on its consideration and weighing of the abrogation against another action.³³ The Court echoed its findings in *Mille Lacs* that there was no such intent evidenced in the Wyoming Statehood Act because it lacked any mention of Indian treaty rights—let alone any indication that this effect was considered.³⁴ Based on the canons of construction for Indian treaties,³⁵ the Court determined that the Treaty did not require expiration of reserved rights at statehood because there was no such circumstance defined in it, nor any indication that the circumstances

25. *Id.*

26. *Id.* at 1695, 1697.

27. *Id.* at 1695.

28. *Id.* at 1695–96 (quoting *Mille Lacs*, 526 U.S. at 207).

29. *Id.* at 1697.

30. *Id.* at 1698.

31. *Id.* at 1697 (internal citations omitted).

32. *Id.* at 1698 (stating that “[a]t a minimum, a repudiated decision does not retain preclusive force”).

33. *Id.*; *United States v. Dion*, 476 U.S. 734, 740 (1986).

34. *Herrera*, 139 S. Ct. at 1698–99.

35. The Court has applied a special rule for interpreting Indian treaties, often labeled as the canons of construction. This rule requires that treaties be interpreted based on the parties’ intentions at the time of the treaty, with all ambiguities resolved in the tribe’s favor. *Id.* at 1699.

defined under the Treaty “would necessarily be satisfied at statehood.”³⁶ The Court supported its analysis with references to the historical record, specifically treaty negotiations in which the Tribe discussed the high priority of including the reserved rights, and the absence of any discussion of those rights ending at statehood.³⁷

Finally, the Court addressed Wyoming’s argument that the practical effect of statehood was to render all lands within it “occupied” due to the “arrival of ‘civilization’” into the territory and the “disappearance of the wild frontier.”³⁸ Setting aside the accuracy of the region’s historical account, the Court found Wyoming’s argument cut directly against the rule of *Mille Lacs*.³⁹ It emphasized that abrogation cannot be implicit or found as a practical effect, and that “by using statehood as a proxy for occupation,” Wyoming subverted the Court’s “clear instruction that treaty-protected rights ‘are not impliedly terminated upon statehood.’”⁴⁰

B. Occupation of Big Horn National Forest

Finding the Tribe’s treaty rights unaffected by statehood, the Court turned to Wyoming’s arguments that the treaty rights could not be supported within the Bighorn National Forest because of its categorical occupation at the time of its creation, its occupation following the federal government’s regulation of it, or its occupation following the exploitative industries operating within it.⁴¹

Using the canons of construction as a guidepost for determining the occupancy status of the Bighorn National Forest, the Court stated that “unoccupied” could only have been interpreted by the Tribe “to denote an area free of residence or settlement” by non-Indians.⁴² This was because of the Treaty’s juxtaposition of the terms “occupation” and “settlers” in several instances, in addition to this juxtaposition in the treaty negotiations and in subsequent interpretations by the government.⁴³ Relying on this reasoning, the Court held that the Bighorn National Forest’s creation did not render it “occupied,” but rather “‘reserved’ the lands from . . . settlement[,]” thus making it “more hospitable, not less, to the Tribe’s exercise of the 1868 Treaty right.”⁴⁴

The Court concluded its opinion by rejecting Wyoming’s final arguments that either the federal regulatory scheme imposed within the

36. *Id.* at 1699 (citing *Mille Lacs*, 526 U.S. at 207); *see also* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n.*, 443 U.S. 658, 675 (1979).

37. *Herrera*, 139 S. Ct. at 1699.

38. *Id.* at 1699–1700.

39. *Id.*

40. *Id.*

41. *Id.* at 1700–01.

42. *Id.* at 1701.

43. *Id.* at 1701–02.

44. *Id.* at 1702.

Bighorn National Forest or the exploitative mining and logging operations within it should have rendered it occupied within the meaning of the Treaty.⁴⁵ Relying again on the canons, the Court noted that the phrase “unoccupied lands” would have meant lack of settlement to the Tribe.⁴⁶ Thus, as neither the government’s regulations nor the mining and logging operations would have satisfied this understanding, neither circumstance could render the lands occupied.⁴⁷

IV. DISSENT

The dissent solely addressed the issue preclusion argument.⁴⁸ Despite the Court’s application of this exception to *Repsis*, the dissent argued that *Repsis* should still apply and that, in effect, the majority’s analysis of the treaty-interpretation issue “is likely, in the end, to be so much wasted ink.”⁴⁹ The dissent cautioned future application of the issue preclusion exception, noting that the Court has “never actually held that a prior judgment lacked preclusive effect on [the ground of issue preclusion]” and that “[i]f the exception is applied too aggressively, it could dangerously undermine the important interests served by issue preclusion.”⁵⁰ Based on this cautious approach, the dissent’s opinion that it would be a “questionable interpretation” to find *Mille Lacs* overruled *Race Horse*, and *Repsis*’s alternative ground that the Bighorn National Forest was already occupied, the dissent would have affirmed on the ground of issue preclusion and not proceeded on the treaty-interpretation issue.⁵¹

V. CONCLUSION

Herrera clarified the effect of statehood on reserved treaty rights by repudiating *Race Horse* and by adopting the reasoning underlying *Mille Lacs*. The Court found that statehood does not automatically render the expiration of treaty rights and that, instead, abrogation requires clear evidence of such intent from Congress.⁵² This holding clarified the impact of *Race Horse*, which has been a source of difficulty in the field of Indian law.⁵³ Further, the Court relied upon the canons to find that the Bighorn National Forest had not become categorically occupied within the meaning of the Treaty.⁵⁴ Thus, the Court found *Herrera*’s hunting rights

45. *Id.* at 1702.

46. *Id.* at 1702–03.

47. *Id.*

48. *Id.* at 1703 (Alito, J., dissenting).

49. *Id.* (Alito, J., dissenting).

50. *Id.* at 1707–08 (Alito, J., dissenting).

51. *Id.* at 1708, 1710.

52. *Id.* at 1700.

53. *Id.* at 1695, 1697.

54. *Id.* at 1702–03.

under the Treaty to be valid.⁵⁵ However, the Court specifically limited its holding to allow the possibility of two arguments on remand: (1) that some areas of the forest, including the site where Herrera took the elk, may indeed be occupied by specific circumstances—as opposed to categorical occupation; and (2) that Wyoming may have the ability to regulate the Tribe’s treaty rights for conservation purposes.⁵⁶

55. *Id.* at 1700, 1703.

56. *Id.* at 1703.