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# Herrera v. Wyoming

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**PETITIONER**

Clayvin Herrera

**RESPONDENT**

Wyoming

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**DOCKET NO.**

17-532

**DECIDED BY**

[Roberts Court \(/courts?court=Roberts Court\)](/courts?court=Roberts Court)

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**LOWER COURT**

State trial court

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**CITATION**

[587 US \\_\\_ \(2019\)](https://supreme.justia.com/cases/federal/us/587/17-532)  
(<https://supreme.justia.com/cases/federal/us/587/17-532>)

**ADVOCATES**

[George W. Hicks, Jr. \(advocates/george\\_w\\_hicks\\_jr\\_\)](advocates/george_w_hicks_jr_)  
*for the petitioner*

[Frederick Liu \(advocates/frederick\\_liu\)](advocates/frederick_liu)  
*Assistant to the Solicitor General, Department of Justice, for the United States, as amicus curiae, supporting the petitioner*

**GRANTED**

Jun 28, 2018

[John G. Knepper \(advocates/john\\_g\\_knepper\)](advocates/john_g_knepper)  
*for the respondent*

**ARGUED**

Jan 8, 2019

**DECIDED**

May 20, 2019

## Facts of the case

Clayvin Herrera is an enrolled member of the Crow Tribe of Indians. Herrera and several other tribal members went elk hunting on the Crow Reservation, and at some point, followed several elk across a fence, thereby leaving the Crow Reservation and entering the Big Horn National Forest

in Wyoming. They shot three bull elk and took the meat with them to Montana. None of the hunters had a license, and it was closed season.

Herrera was cited with two hunting-related misdemeanors under Wyoming law. He moved to dismiss the charges under the Supremacy Clause of the US Constitution and the Laramie Treaty of 1868. He argued that the treaty gave the Crow Tribe the right to hunt off the reservation and that the treaty was still valid and thus preempted state law. Bound by the Tenth Circuit's 1995 decision in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995)

(<https://law.justia.com/cases/federal/appellate-courts/F3/73/982/557379/>), the state court held that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming. Herrera was tried and convicted by a jury on both counts. He appealed the lower court's pretrial determination on the off-reservation treaty hunting right. Reviewing the lower court's conclusions de novo, the state appeals court affirmed the lower court.

## Question

Did Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogate the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day conviction of a Crow member who engaged in subsistence hunting for his family?

## Conclusion

Sort: [by seniority](#) [by ideology](#)

5-4 DECISION FOR HERRERA

MAJORITY OPINION BY SONIA SOTOMAYOR

Wyoming's statehood did not abrogate the Crow Tribe's 1868 federal treaty right to hunt on the "unoccupied lands of the United States," and the lands of the Bighorn National Forest did not become categorically "occupied" when the

forest was created.

Clarence Thomas Stephen G. Breyer Sonia Sotomayor Neil Gorsuch



G. Roberts, Jr. Ruth Bader Ginsburg Samuel A. Alito, Jr. Elena Kagan Brett M. Kavan

Wyoming's admission to the Union did not abrogate the Crow Tribe's 1868 federal treaty right to hunt on the "unoccupied lands of the United States," nor did the lands of the Bighorn National Forest become categorically "occupied" when the forest was created.

Justice Sonia Sotomayor delivered the 5-4 majority opinion.

As to the question whether the Crow Tribe's hunting rights under the 1868 Treaty expired when Wyoming became a state, the Court first found that the lower court erroneously relied on the Tenth Circuit's decision in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995)

(<https://law.justia.com/cases/federal/appellate-courts/F3/73/982/557379/>), which relied on *Ward v. Race Horse*, 163 U.S. 504 (1896)

(<https://supreme.justia.com/cases/federal/us/163/504/>).

In *Race Horse*, the U.S. Supreme Court held that Wyoming's admission to the Union extinguished treaty rights of Indians under the 1868 Treaty. The Court subsequently established in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)

(<https://www.oyez.org/cases/1998/97-1337>) a different

rule for determining whether a treaty right was extinguished. The Court in *Mille Lacs* held that the "crucial inquiry" for interpreting a treaty was whether Congress "clearly expressed" an intent to abrogate an Indian treaty right. Absent such clearly expressed intent, treaty rights cannot be impliedly extinguished at statehood. Thus, while the *Mille Lacs* Court did not expressly overrule *Race Horse*, the logic of that case and its progeny, including *Repsis*, are invalid.

The Court found unpersuasive Wyoming's argument that *Repsis* precludes Herrera from arguing that the 1868 Treaty right survived Wyoming's becoming a state. Even when the requirements for issue preclusion are met, there is an exception if there has been an intervening "change in the applicable legal context." While *Repsis* involved a the same legal question (whether the 1868 Treaty right survived Wyoming's statehood) and essentially the same parties (Wyoming and the Crow Tribe), the Court's decision in *Mille Lacs* constitutes an "intervening change" that triggers an exception to the doctrine of issue preclusion.

Applying *Mille Lacs*, rather than *Repsis*, the Court found that Congress had not "clearly expressed" an intent to abrogate the treaty's right to hunt "unoccupied" lands when admitting Wyoming to the Union. The mere acquisition of statehood did not categorically make the lands "occupied," nor did the creation of the Bighorn National Forest on those lands under any natural understanding of the meaning of the word "occupied."

Justice Samuel Alito filed a dissenting opinion in which Chief Justice John Roberts and Justices Clarence Thomas and Brett Kavanaugh joined. Justice Alito argued that issue preclusion should bar Herrera's claim and that the Court should not reach the merits of interpreting the 1868 Treaty.

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