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Case Brief

Case Name and Citation: *Herrera v. Wyoming* 587 U.S. ____ (2019)

Operative Facts: Petitioner Clayvin Herrera is a member of the Crow Tribe and resides on the Crow Reservation in Montana. Herrera was arrested for hunting elk outside the boundary of the reservation by venturing into the Bighorn National Forest in Wyoming. Herrera was charged with hunting without a license, removing elk outside of hunting season, and accessory to same. Herrera asserted that he did not need a license and was permitted to hunt off-season pursuant to the 1868 Treaty which afforded Indians a handful of privileges including hunting on unoccupied land. Because of prior case law, Wyoming stated the treaty was nullified when Wyoming became a state, Herrera was unable to mount that defense. Additionally, the State of Wyoming asserted that even if the 1868 Treaty were still in effect, the Bighorn National Forest became “occupied” land at the time of its creation thereby affording an alternative prohibition to Herrera’s activities.

Procedural History: Herrera’s pretrial motion to dismiss the charges because he had a protected right to hunt on unoccupied land was denied. Herrera was subsequently tried in the Wyoming District Court and barred from asserting the defense that he had a right to hunt on unoccupied land per the Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. A jury convicted him on both charges. The court sentenced him to a suspended jail term, a fine, and a three-year suspension of his hunting privileges. Herrera appealed the verdict to the U.S. Court of Appeals for the Tenth Circuit.

Relying on the same case law the district court had, the Tenth Circuit held that the Treaty of 1868 had expired when Wyoming became a state and that Bighorn National Forest was “occupied” upon its creation. The court denied Herrera’s appeal and affirmed the judgment and sentence. Herrera filed a petition for review with the Wyoming Supreme Court which was denied.

Issue: Was the 1868 Treaty permitting the Crow Tribe to “...hunt on unoccupied land...” abrogated when Wyoming attained statehood in 1890? Additionally, did Bighorn National Forest become categorically “occupied” upon its creation? In turn, did these issues prohibit Herrera from asserting a defense based on those rights?

Rule(s): The State of Wyoming asserted two cases were controlling in their prosecution of Herrera. *Ward v. Race Horse*, 163 U.S. 504 (1896) and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (CA10 1995).

In *Race Horse*, the Treaty between the United States and the Shoshone and Bannock Tribes was extinguished because Wyoming asserted that upon attaining statehood, they were guaranteed “equal footing.” Allowing the tribes to hunt unfettered would violate the state’s right to control the killing of game inside their borders.

In *Repsis*, the Tenth Circuit court relied on the decision in *Race Horse* and ruled that when Wyoming became a state, they entered the union on the same footing as all other states thereby

abrogating the Treaty of 1868. Wyoming should be able to control hunting within their own state like any other state if they are equal.

Herrera asserted that *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) effectively invalidated the ruling in *Race Horse*, thereby making the state's reliance on that case improper. In *Mille Lacs*, the court looked at the reasoning in *Race Horse*, and asserted that in order to extinguish the Treaty of 1868, the state would have to prove that the Congress intended the treaty to end at some point. SCOTUS points to the Wyoming Statehood Act which did not indicate any intent to end the treaty upon gaining statehood nor was there any condition within the treaty itself that would end the agreement upon the gaining of statehood. The argument that attaining statehood made the land "occupied," was shot down by SCOTUS's "clear instruction that treaty-protected rights 'are not impliedly terminated upon statehood.'"

Analysis: The Supreme Court of the United States applied *Mille Lacs* to the issue of whether Herrera had the right to hunt in Bighorn National Forest. SCOTUS asserted that while *Mille Lacs* did not overrule *Race Horse* it did cut ties with the decision. "Because treaty rights are reconcilable with state sovereignty over natural resources,' the *Mille Lacs* court concluded, there is no reason to find statehood itself sufficient 'to extinguish Indian Treaty rights...' In other words, the treaty rights did not interfere with the rights of the state to control their own natural resources. Therefore, the 1868 Treaty was still valid. Several other cases after *Race Horse* concluded that Congress "must clearly express" any intent to end the Indian's treaty rights. No such intent was clearly expressed in the development or final content of the treaties. When *Mille*

Lacs controls, the Wyoming District Court could not prohibit Herrera from asserting the defense that he was hunting lawfully pursuant to the Treaty of 1868.

Conclusion: The Supreme Court of the United States agreed with Herrera that the Treaty of 1868 was not abrogated when Wyoming became a state and that the Bighorn National Forest was not considered to be categorically “occupied” upon its creation. Conversely, Herrera should have been allowed to assert that defense.

Disposition: The Supreme Court of the United States vacated the judgment of the Wyoming District Court and remanded the case for further proceedings that are consistent with that opinion which would allow Herrera to assert the defense that he was allowed to hunt in Bighorn National Forest pursuant to the 1868 Treaty.

Opinion of Decision: I read the entire case, including the dissenting opinion. I had some personal misgivings on the nature of the hunting that Herrera was doing. Hunting elk to only take their heads did not feel like he was hunting for sustenance, which I believe was the original intent of the 1868 Treaty. I realize that his intent is not a matter of law in this issue but definitely left a less than favorable impression on me. Despite my personal feelings, I agree with the decision of the Supreme Court of the United States in this case. *Mille Lacs*’s repudiation of *Race Horse* (which dictated the ruling in *Repsis*), made it clear that Wyoming attaining statehood did not abrogate the 1868 Treaty. Also, declaring the Bighorn National Forest as “occupied” upon its creation wasn’t sound. The understanding of “occupied” when the treaties were made, was if they had been settled and resided upon by newcomers. Vacating the Wyoming District Court’s

judgment and sentence and remanding the case for further proceedings consistent with that ruling was appropriate. Herrera should have been able to assert that defense in his trial. I also feel strongly that the United States still owes a significant debt to the Native Americans. Honoring the treaties that were made in exchange for land is the least we can do and also is supported by law as we saw in this case.