Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HERRERA *v.* WYOMING

CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

No. 17–532. Argued January 8, 2019—Decided May 20, 2019

An 1868 treaty between the United States and the Crow Tribe promised that in exchange for most of the Tribe's territory in modern-day Montana and Wyoming, its members would "have 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." 15 Stat. 650. In 2014, Wyoming charged petitioner Clayvin Herrera with off-season hunting in Bighorn National Forest and being an accessory to the same. The state trial court rejected Herrera's argument that he had a protected right to hunt in the forest pursuant to the 1868 Treaty, and a jury convicted him. On appeal, the state appellate court relied on the reasoning of the Tenth Circuit's decision in *Crow Tribe of Indians* v. *Repsis,* 73 F. 3d 982—which in turn relied upon this Court's decision in *Ward* v. *Race Horse*, 163 U. S. 504—and held that the treaty right expired upon Wyoming's statehood. The court rejected Herrera's argument that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, repudiated *Race Horse* and therefore undercut the logic of *Repsis*. In any event, the court concluded, Herrera was precluded from arguing that the treaty right survived Wyoming's statehood because the Crow Tribe had litigated *Repsis* on behalf of itself and its members. Even if the 1868 Treaty right survived Wyoming's statehood, the court added, it did not permit Herrera to hunt in Bighorn National Forest because the treaty right applies only on unoccupied lands and the national forest became categorically occupied when it was created.

Held:

1. The Crow Tribe's hunting rights under the 1868 Treaty did not expire upon Wyoming's statehood. Pp. 6–17.

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(a) This case is controlled by *Mille Lacs*, not *Race Horse*. *Race Horse* concerned a hunting right guaranteed in an 1868 treaty with the Shoshone and Bannock Tribes containing language identical to that at issue here. Relying on two lines of reasoning, the *Race Horse* Court held that Wyoming's admission to the United States in 1890 extinguished the Shoshone-Bannock Treaty right. First, the doctrine that new States are admitted to the Union on an "equal footing" with existing States led the Court to conclude that affording the Tribes a protected hunting right lasting after statehood would conflict with the power vested in those States—and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 514. Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* established that the crucial inquiry for treaty termination analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right, 526 U. S., at 202, or whether a termination point identified in the treaty itself has been satisfied, *id.*, at 207. Thus, while *Race Horse* "was not expressly overruled" in *Mille Lacs*, it "retain[s] no vitality," *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361, and is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. Pp. 6–11.

(b) *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood. Even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834. Here, *Mille Lacs*' repudiation of *Race Horse*'s reasoning—on which *Repsis* relied—justifies such an exception. Pp. 11–13.

(c) Applying *Mille Lacs*, Wyoming's admission into the Union did not abrogate the Crow Tribe's off-reservation treaty hunting right. First, the Wyoming Statehood Act does not show that Congress "clearly expressed" an intent to end the 1868 Treaty hunting right. See 526 U. S., at 202. There is also no evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. Nor does the historical record support such a reading of the treaty. The State counters that statehood, as a practical matter, rendered all the lands in the State occupied. Even assuming that Wyoming presents an accurate historical picture, the State, by using statehood as a proxy for occupation, subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Id.*, at 207. To the extent that the State seeks to rely on historical evi-

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dence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. Pp. 13–17.

2. Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created. Construing the treaty's terms as "'they would naturally be understood by the Indians,'" *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, it is clear that the Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians. That interpretation follows from several cues in the treaty's text. For example, the treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," 15 Stat. 650, thus contrasting the unoccupied hunting districts with areas of white settlement. Historical evidence confirms this reading of "unoccupied." Wyoming's counterarguments are unavailing. The Federal Government's exercise of control and withdrawing of the forest lands from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would mining and logging of the forest lands prior to 1897 have caused the Tribe to view the Bighorn Mountains as occupied. Pp. 17–21.

3. This decision is limited in two ways. First, the Court holds that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation," an issue not reached by the appellate court. The Court also does not address the viability of the State's arguments on this issue. Pp. 21–22.

Vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and KAVANAUGH, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 17–532

CLAYVIN HERRERA, PETITIONER *v.* WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

[May 20, 2019]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe "shall have 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." Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve.

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana* v. *United States*, 450 U. S. 544, 547 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming "historically made up both the geographic and the spiritual heart" of the Tribe's territory. Brief for Crow Tribe of Indians as *Amicus Curiae* 5.

The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U. S., at 547–548. The Treaty of Fort Laramie specified that "the tribes did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands in dispute" by entering the treaty. *Id.,* at 548.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, Parading Through History 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that "settlements ha[d] been made" upon the Crow Tribe's lands and that their "game [was] being driven away." Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 86 (1975) (hereinafter Proceedings). He told the assembled tribal leaders that the United States wished to "set apart a tract of [Crow Tribe] country as a home" for the Tribe "forever" and to buy the rest of

the Tribe's land. *Ibid.* Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); *id.*, at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. *Id.*, at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U. S., at 547–548; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, *id.*, at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

> "The Indians . . . shall have 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." *Id.*, at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming "into the Union on an equal footing with the original States in all respects," in an Act that did not mention Indian treaty rights. 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. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land "reserved from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 985 (CA10 1995).

B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014, Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license

and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss. See Nos. CT–2015–2687, CT–2015–2688 (4th Jud. Dist. C. C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U. S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians* v. *Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d, at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward* v. *Race Horse*, 163 U. S. 504, 516 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that *Mille Lacs* had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon Wyoming's statehood. No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against

Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on "unoccupied" lands and that the national forest became categorically "occupied" when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d, at 994. The state appellate court affirmed the trial court's judgment and sentence.

The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U. S. ___ (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid. Relying on this Court's decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting

right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [*sic*] and the Bannack [*sic*] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"). The *Race Horse* Court concluded that Wyoming's admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U. S., at 505, 514–515.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an "equal footing" with existing States. *Id.*, at 511–514 (citing, *e.g.*, *Lessee of Pollard* v. *Hagan*, 3 How. 212 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes' hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be "irreconcilably in conflict" with the power—"vested in all other States of the Union" and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 509, 514.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. *Id.*, at 509. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were "essentially perishable" and afforded the Tribes only a "temporary and precarious" privilege. *Id.*, at 515.

More than a century after *Race Horse* and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* considered an 1837 Treaty that guaranteed to several

bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands "'during the pleasure of the President.'" 526 U. S., at 177 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U. S., at 202–208.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquires roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U. S., at 203. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U. S., at 514. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U. S., at 204. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. *Id.*, at 204–205 (citing *Washington* v. *Washington State Commercial Passenger Fishing Vessel*

Assn., 443 U. S. 658, 682 (1979); *Antoine* v. *Washington*, 420 U. S. 194, 207–208 (1975); *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 398 (1968)). "[B]ecause 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 to hunt, fish, and gather on land within state boundaries." 526 U. S., at 205.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U. S., at 202 (citing *United States* v. *Dion*, 476 U. S. 734, 738–740 (1986); *Fishing Vessel Assn.*, 443 U. S., at 690; *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968)). The Court found no such "'clear evidence'" in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U. S., at 203.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U. S., at 206. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are "'"of such a nature as to imply their perpetuity,"'" rather than "'temporary and precarious.'" 526 U. S., at 206. The Court rejected such an approach. The Court found the "'temporary and precarious'" language "too broad to be useful," given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U. S., at 738—could be described in those terms. 526 U. S., at 206–207. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate "intended the rights secured by the . . . Treaty to survive statehood." 526 U. S., at 207. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the Chippewa bands' treaty rights. The

Chippewa Treaty itself defined the specific "circumstances under which the rights would terminate," and there was no suggestion that statehood would satisfy those circumstances. *Ibid.*

Maintaining its focus on the treaty's language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse*. Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, "tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]"—*i.e.*, to whenever the hunting grounds would cease to "remai[n] unoccupied and owned by the United States." 526 U. S., at 207. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the "Treaty itself." *Ibid.* Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was "impliedly repealed," *Mille Lacs* disavowed that earlier holding. 526 U. S., at 207. "Treaty rights," the Court clarified, "are not impliedly terminated upon statehood." *Ibid.* The Court further explained that "[t]he *Race Horse* Court's decision to the contrary"—that Wyoming's statehood did imply repeal of Indian treaty rights—"was informed by" that Court's erroneous conclusion "that the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.*, at 207–208.

In sum, *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. See 526 U. S., at 207. "[T]here is nothing inherent in the nature of reserved

treaty rights to suggest that they can be extinguished by *implication* at statehood." *Ibid.*

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*' analysis with the Court's prior reasoning in *Race Horse*.[1]

We thus formalize 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. *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361 (1984). To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

B

Because this Court's intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis*, *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood.

Under the doctrine of issue preclusion, "a prior judgment . . . foreclos[es] successive litigation of an issue of

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[1] Notably, the four Justices who dissented in *Mille Lacs* protested that the Court "effectively overrule[d] *Race Horse sub silentio*." 526 U. S., at 219 (Rehnquist, C. J., dissenting). Others have agreed with this assessment. See, *e.g.*, *State* v. *Buchanan*, 138 Wash. 2d 186, 211–212, 978 P. 2d 1070, 1083 (1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota* v. *Mille Lacs*").

fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire* v. *Maine*, 532 U. S. 742, 748–749 (2001). Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28, Comment *c* (1980)); see *Limbach*, 466 U. S., at 363 (refusing to find a party bound by "an early decision based upon a now repudiated legal doctrine"); see also *Montana* v. *United States*, 440 U. S. 147, 155 (1979) (asking "whether controlling facts or legal principles ha[d] changed significantly" since a judgment before giving it preclusive effect); *id.,* at 157–158 (explaining that a prior judgment was conclusive "[a]bsent significant changes in controlling facts or legal principles" since the judgment); *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948) (issue preclusion "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally"). The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U. S., at 836–837.[2]

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[2]The dissent does not disagree outright with this conclusion, noting only that "there is a respectable argument on the other side," *post*, at 12. The dissent argues that the cases cited above are distinguishable, but we do not read them as narrowly as does the dissent. We note, too, that the lower federal courts have long applied the change-in-law exception in a variety of contexts. See, *e.g.*, *Dow Chemical Co.* v. *Nova Chemicals Corp. (Canada)*, 803 F. 3d 620, 627–630 (CA Fed. 2015), cert. denied, 578 U. S. ___ (2016); *Coors Brewing Co.* v. *Mendez-Torres*, 562 F. 3d 3, 11 (CA1 2009), abrogated on other grounds by *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413 (2010); *Ginters* v. *Frazier*, 614 F. 3d 822, 826–827 (CA8 2010); *Faulkner* v. *National Geographic Enterprises Inc.*, 409 F. 3d 26, 37–38 (CA2 2005); *Chippewa & Flambeau Improvement Co.* v. *FERC*, 325 F. 3d 353, 356–357 (CADC 2003); *Spradling* v.

We conclude that a change in law justifies an exception to preclusion in this case. There is no question that the Tenth Circuit in *Repsis* relied on this Court's binding decision in *Race Horse* to conclude that the 1868 Treaty right terminated upon Wyoming's statehood. See 73 F. 3d, at 994. When the Tenth Circuit reached its decision in *Repsis*, it had no authority to disregard this Court's holding in *Race Horse* and no ability to predict the analysis this Court would adopt in *Mille Lacs*. *Mille Lacs* repudiated *Race Horse*'s reasoning. Although we recognize that it may be difficult at the margins to discern whether a particular legal shift warrants an exception to issue preclusion, this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force. See *Limbach*, 466 U. S., at 363.[3]

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly

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Tulsa, 198 F. 3d 1219, 1222–1223 (CA10 2000); *Mendelovitz* v. *Adolph Coors Co.*, 693 F. 2d 570, 579 (CA5 1982).

[3]We do not address whether a different outcome would be justified if the State had identified "compelling concerns of repose or reliance." See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4425, p. 726 (3d ed. 2016). Wyoming here has not done so. The State suggests that public support for its conservation efforts may be jeopardized if it no longer has "unquestioned" authority over wildlife management in the Bighorn Mountains. Brief for Respondent 54. Wyoming does not explain why its authority to regulate Indians exercising their treaty rights when necessary for conservation is not sufficient to preserve that public support, see *infra*, at 22. The State's passing reference to upsetting the settled expectations of private property owners is unconvincing because the 1868 Treaty right applies only to "unoccupied lands of the United States."

express its intent to do so." *Mille Lacs*, 526 U. S., at 202. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.*, at 202–203 (quoting *Dion*, 476 U. S., at 740); see *Menominee Tribe*, 391 U. S., at 412. 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." Cf. *Mille Lacs*, 526 U. S., at 203; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the "'clear evidence'" this Court's precedent requires. *Mille Lacs*, 526 U. S., at 203.[4]

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is "essentially a contract between two sovereign nations." *Fishing Vessel Assn.*, 443 U. S., at 675. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U. S., at 206, and the words of a treaty must be construed "'in the sense in which they would naturally be understood by the Indians,'" *Fishing Vessel Assn.*, 443 U. S., at 676. If a treaty "itself defines the circumstances under which the rights would terminate," it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille*

[4]Recall also that the Act establishing the Wyoming Territory declared that the creation of the Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory" unless a treaty extinguished those rights. Wyoming Territory Act, 15 Stat. 178.

Lacs, 526 U. S., at 207.

Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe 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." Art. IV, 15 Stat. 650. 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. See *Mille Lacs*, 526 U. S., at 207.

The historical record likewise does not support the State's position. See *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432 (1943) (explaining that courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine a treaty's meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, *e.g.*, Proceedings 88, and Commissioner Taylor assured them that the Tribe would have "the right to hunt upon [the ceded land] as long as the game lasts," *id.*, at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota,

May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical matter, marked the arrival of "civilization" in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming's arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members "'wholly within the limits of their respective reservations'"; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting §237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. §492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 495 (1873) (Black Foot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain"). As for the Indian Department

Regulations, there are reports that a group of Crow Tribe members "regularly hunted along the Little Bighorn River" even after the regulation the State cites was in effect. Hoxie, Parading Through History, at 26. In 1889, the Office of Indian Affairs wrote to U. S. Indian Agents in the Northwest that "[f]requent complaints have been made to this Department that Indians are in the habit of leaving their reservations for the purpose of hunting." 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State's mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Mille Lacs*, 526 U. S., at 207.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 19–20. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case's reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U. S., at 514; *Mille Lacs*, 526 U. S., at 207–208.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

III

We turn next to 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." We agree with Herrera and the United States that Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.[5]

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[5] Wyoming argues that the judgment below should be affirmed because the Tenth Circuit held in *Repsis* that the creation of the forest rendered the land "occupied," see 73 F. 3d, at 994, and thus Herrera is precluded from raising this issue. We did not grant certiorari on the question of how preclusion principles would apply to the alternative judgment in *Repsis*, and—although our dissenting colleagues disagree, see *post*, at 13, and n. 6—the decision below did not address that issue.

The Wyoming appellate court agreed with the State that "the primary issue in [Herrera's] case is identical to the *primary issue* in the *Repsis* case." No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 13 (emphasis added). That "primary issue" was the *Race Horse* ground of decision, not the "occupation" ground, which *Repsis* referred to as "an alternative basis for affirmance," *Repsis*, 73 F. 3d, at 993, and which the Wyoming court itself described as an "alternativ[e]" holding, No. 2016–242, App. to Pet. for Cert. 33. Reading the state court's decision to give preclusive effect to the occupation ground as well would not fit with the Wyoming court's preclusion analysis, which, among other things, relied on a decision of the Federal District Court in *Repsis* that did not address the occupation issue. See No. 2016–242, App. to Pet. for Cert. 14, 18; see also *Repsis*, 73 F. 3d, at 993 (explaining that "the district court did not reach [the occupation] issue"). Context thus makes clear that the state court gave issue-preclusive effect only to *Repsis*' holding that the 1868 Treaty was no longer valid, not to *Repsis*' independent, narrower holding that Bighorn National Forest in particular was "occupied" land. The court may not have addressed the issue-preclusive effect of the latter holding because of ambiguity in the State's briefing. See Appellee's Supplemental Brief in No. 2016–242, pp. 4, 11–12.

While the dissent questions whether forfeiture could have played a part in the state court's analysis given that the court invited the parties to submit supplemental briefs on preclusion, *post*, at 13, n. 6, the parties suggest that Wyoming failed adequately to raise the claim even in its supplemental brief. See Brief for Petitioner 49 ("the state made no such argument before" the state court); Brief for United States as *Amicus Curiae* 31 (noting ambiguity in the State's supplemental brief).

Treaty analysis begins with the text, and treaty terms are construed as "'they would naturally be understood by the Indians.'" *Fishing Vessel Assn.*, 443 U. S., at 676. Here it is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty's text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word "occupation" to refer to the Tribe's residence inside the reservation boundaries, and referred to the Tribe members as "settlers" on the new reservation. Arts. II, VI, *id.,* at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make "no permanent settlement" other than on the new reservation, but could hunt on the "unoccupied lands" of the United States. Art. IV, *id.,* at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, A Diction-

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It can be "appropriate in special circumstances" for a court to address a preclusion argument *sua sponte*. *Arizona* v. *California*, 530 U. S. 392, 412 (2000). But because the Wyoming District Court "did not address" this contention, "we decline to address it here." *County of Los Angeles* v. *Mendez*, 581 U. S. ___, ___, n. (2017) (slip op., at 8, n.); see *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005); *Archer* v. *Warner*, 538 U. S. 314, 322–323 (2003). Resolution of this question would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in this litigation, among other matters. These gateway issues should be decided before this Court addresses them, especially given that even the dissent acknowledges that one of the preclusion issues raised by the parties is important and undecided, *post*, at 14, and some of the parties' other arguments are equally weighty. Unlike the dissent, we do not address these issues in the first instance.

ary of Law 725 (1889) (defining "occupy" as "[t]o hold in possession; to hold or keep for use" and noting that the word "[i]mplies actual use, possession or cultivation by a particular person"); *id.,* at 944 (defining "settle" as "[t]o establish one's self upon; to occupy, reside upon").

Historical evidence confirms this reading of the word "unoccupied." At the treaty negotiations, Commissioner Taylor commented that "settlements ha[d] been made upon [Crow Tribe] lands" and that "white people [were] rapidly increasing and . . . occupying all the valuable lands." Proceedings 86. It was against this backdrop of white settlement that the United States proposed to buy "the right to use and settle" the ceded lands, retaining for the Tribe the right to hunt. *Ibid.* A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area "as long as there are any buffalo, and as long as the white men are not [in that area] with farms." Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 500.

Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear 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." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning . . . to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." *Id.*, at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Wyoming's counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government's "exercise of dominion and control"

over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§241.2, 241.3 (Supp. 1941); §261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was "very little" settlement of Bighorn National Forest around the time the forest was created. Dept. of Interior, Nineteenth Ann. Rep. of the U. S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

IV

Finally, we note two ways in which our decision is limited. First, we hold that Bighorn National Forest is not categorically occupied, not 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. See *State* v. *Cutler*, 109 Idaho 448, 451, 708 P. 2d

853, 856 (1985) (stating that the Federal Government may not be foreclosed from using land in such a way that the Indians would have considered it occupied).

Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation." Nos. CT–2015–2687, CT–2015–2688, App. to Pet. for Cert. 39–41; see *Antoine*, 420 U. S., at 207. The appellate court did not reach this issue. No. 2016–242, App. to Pet. for Cert. 14, n. 3. 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. We do not pass on the viability of those arguments today.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–532

CLAYVIN HERRERA, PETITIONER *v.* WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

[May 20, 2019]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE KAVANAUGH join, dissenting.

The Court's opinion in this case takes a puzzling course. The Court holds that members of the Crow Tribe retain a virtually unqualified right under the Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty) to hunt on land that is now part of the Bighorn National Forest. This interpretation of the treaty is debatable and is plainly contrary to the decision in *Ward* v. *Race Horse*, 163 U. S. 504 (1896), which construed identical language in a closely related treaty. But even if the Court's interpretation of the treaty is correct, its decision will have no effect if the members of the Crow Tribe are bound under the doctrine of issue preclusion by the judgment in *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 992–993 (CA10 1995) (holding that the hunting right conferred by that treaty is no longer in force).

That judgment was based on two independent grounds, and the Court deals with only one of them. The Court holds that the first ground no longer provides an adequate reason to give the judgment preclusive effect due to an intervening change in the legal context. But the Court sidesteps the second ground and thus leaves it up to the state courts to decide whether the *Repsis* judgment continues to have binding effect. If it is still binding—and I think it is—then no member of the Tribe will be able

to assert the hunting right that the Court addresses. Thus, the Court's decision to plow ahead on the treaty-interpretation issue is hard to understand, and its discourse on that issue is likely, in the end, to be so much wasted ink.

I

A

As the Court notes, the Crow Indians eventually settled in what is now Montana, where they subsequently came into contact with early white explorers and trappers. F. Hoxie, The Crow 26–28, 33 (1989). In an effort to promote peace between Indians and white settlers and to mitigate conflicts between different tribes, the United States negotiated treaties that marked out a territory for each tribe to use as a hunting district. See 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (2d ed. 1904) (Kappler). The Treaty of Fort Laramie of 1851 (1851 Treaty), 11 Stat. 749, created such a hunting district for the Crow.

As white settlement increased, the United States entered into a series of treaties establishing reservations for the Crow and neighboring tribes, and the 1868 Treaty was one such treaty. 15 Stat. 649; Kappler 1008. It set out an 8-million-acre reservation for the Crow Tribe but required the Tribe to cede ownership of all land outside this reservation, including 30 million acres that lay within the hunting district defined by the 1851 Treaty. Under this treaty, however, the Crow kept certain enumerated rights with respect to the use of those lands, and among these was "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." 1868 Treaty, Art. IV, 15 Stat. 650.

Shortly after the signing of the 1868 Treaty, Congress created the Wyoming Territory, which was adjacent to and

immediately south of the Crow Tribe's reservation. The Act creating the Territory provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." Act of July 25, 1868, ch. 235, 15 Stat. 178. Twenty-two years later, Congress admitted Wyoming as a State "on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. The following year, Congress passed an Act empowering the President to "set apart and reserve" tracts of public lands owned by the United States as forest reservations. Act of Mar. 3, 1891, ch. 561, §24, 26 Stat. 1103. Exercising that authority, President Cleveland designated some lands in Wyoming that remained under federal ownership as a forest reservation. Presidential Proclamation No. 30, 29 Stat. 909. Today, those lands make up the Bighorn National Forest. Bighorn abuts the Crow Reservation along the border between Wyoming and Montana and includes land that was previously part of the Crow Tribe's hunting district.

These enactments did not end legal conflicts between the white settlers and Indians. Almost immediately after Wyoming's admission to the Union, this Court had to determine the extent of the State's regulatory power in light of a tribe's reserved hunting rights. A member of the Shoshone-Bannock Tribes named Race Horse had been arrested by Wyoming officials for taking elk in violation of state hunting laws. *Race Horse*, *supra,* at 506. The Shoshone-Bannock Tribes, like the Crow, had accepted a reservation while retaining the right to hunt in the lands previously within their hunting district. Their treaty reserves the same right, using the same language, as the Crow Tribe's treaty.[1] Race Horse argued that he had the

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[1]The Shoshone-Bannock Treaty reserved "'the right to hunt on the

right to hunt at the spot of his alleged offense, as the nearest settlement lay more than 60-miles distant, making the land where he was hunting "unoccupied lands of the United States." *In re Race Horse*, 70 F. 598, 599–600 (Wyo. 1895).

This Court rejected Race Horse's argument, holding that the admission of Wyoming to the Union terminated the hunting right. 163 U. S., at 514. Although the opinion of the Court is not a model of clarity, this conclusion appears to rest on two grounds.

First, the Court held that Wyoming's admission necessarily ended the Tribe's hunting right because otherwise the State would lack the power, possessed by every other State, "to regulate the killing of game within [its] borders." *Ibid.* Limiting Wyoming's power in this way, the Court reasoned, would contravene the equal-footing doctrine, which dictates that all States enter the Union with the full panoply of powers enjoyed by the original 13 States at the adoption of the Constitution. *Ibid.* Under this rationale, the Act of Congress admitting Wyoming could not have preserved the hunting right even if that had been Congress's wish.

After providing this basis for its holding, however, the Court quickly turned to a second ground, namely, that even if Congress could have limited Wyoming's authority in this way, it had not attempted to do so. *Id.*, at 515. The Court thought that Congress's intention not to impose such a restriction on the State was "conveyed by the express terms of the act of admission," but the Court did not identify the terms to which it was referring. *Ibid.* It did, however, see support for its decision in the nature of the

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unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'" *Race Horse*, 163 U. S., at 507; Kappler 1020, 1021.

hunting right reserved under the treaty. This right, the Court observed, was not "of such a nature as to imply [its] perpetuity" but was instead "temporary and precarious," since it depended on the continuation of several conditions, including at least one condition wholly within the control of the Government—continued federal ownership of the land. *Ibid.*

Race Horse did not mark a final resolution of the conflict between Wyoming's regulatory power and tribal hunting rights. Nearly a century later, Thomas Ten Bear, a member of the Crow Tribe, crossed into Wyoming to hunt elk in the Bighorn National Forest, just as Herrera did in this case. Wyoming game officials cited Ten Bear, and he was ultimately convicted of hunting elk without the requisite license.[2] Ten Bear, like Race Horse before him, filed a lawsuit in federal court disputing Wyoming's authority to regulate hunting by members of his Tribe. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521 (Wyo. 1994). Joined by the Crow Tribe, he argued that the 1868 Treaty—the same treaty at issue here—gave him the right to take elk in the national forest.

The District Court found that challenge indistinguishable from the one addressed in *Race Horse*. The District Court noted that Race Horse had pointed to "identical treaty language" and had "advanced the identical contention now made by" Ten Bear and the Tribe. *Repsis*, 866 F. Supp., at 522. Because *Race Horse* "remain[ed] controlling," the District Court granted summary judgment to the State. 866 F. Supp., at 524.

The Tenth Circuit affirmed that judgment on two independent grounds. First, the Tenth Circuit agreed with the

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[2] Wyoming officials enforce the State's hunting laws on national forest lands pursuant to a memorandum of understanding between the State and Federal Governments. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521, n. 1 (Wyo. 1994).

District Court that, under *Race Horse*, "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 992 (1995). Second, as an independent alternative ground for affirmance, the Tenth Circuit held that the Tribe's hunting right had expired because "the treaty reserved an off-reservation hunting right on 'unoccupied' lands and the lands of the Big Horn National Forest are 'occupied.'" *Id.*, at 993. The Tenth Circuit reasoned that "unoccupied" land within the meaning of the treaty meant land that was open for commercial or residential use, and since the creation of the national forest precluded those activities, it followed that the land was no longer "unoccupied" in the relevant sense. *Ibid.*

B

The events giving rise to the present case are essentially the same as those in *Race Horse* and *Repsis*. During the winter of 2013, Herrera, who was an officer in the Crow Tribe's fish and game department, contacted Wyoming game officials to offer assistance investigating a number of poaching incidents along the border between Bighorn and the Crow Reservation.[3] After a lengthy discussion in which Herrera asked detailed questions about the State's investigative capabilities, the Wyoming officials became suspicious of Herrera's motives. The officials conducted a web search for Herrera's name and found photographs posted on trophy-hunting and social media websites that showed him posing with bull elk. The officers recognized from the scenery in the pictures that the elk had been

[3] Such cooperative law enforcement is valuable because the Crow Reservation and Bighorn National Forest face one another along the border between Montana, where the Crow Reservation is located, and Wyoming, where Bighorn is located. *Supra*, at 3. The border is delineated by a high fence intermittently posted with markers.

killed in Bighorn and were able to locate the sites where the pictures had been taken. At those sites, about a mile south of the fence running along the Bighorn National Forest boundary, state officials discovered elk carcasses. The heads had been taken from the carcasses but much of the meat was abandoned in the field. State officials confronted Herrera, who confessed to the shootings and turned over the heads that he and his companions had taken as trophies. The Wyoming officials cited Herrera for hunting out of season.

Herrera moved to dismiss the citations, arguing that he had a treaty right to hunt in Bighorn. The trial court rejected this argument, concluding that it was foreclosed by the Tenth Circuit's analysis in *Repsis,* and the jury found Herrera guilty. On appeal, Herrera continued to argue that he had a treaty right to hunt in Bighorn. The appellate court held that the judgment in *Repsis* precluded him from asserting a treaty hunting right, and it also held, in the alternative, that Herrera's treaty rights did not allow him to hunt in Bighorn. This Court granted certiorari.

II

In seeking review in this Court, Herrera framed this case as implicating only a question of treaty interpretation. But unless the state court was wrong in holding that Herrera is bound by the judgment in *Repsis*, there is no reason to reach the treaty-interpretation question. For this reason, I would begin with the question of issue preclusion, and because I believe that Herrera is bound by the adverse decision on that issue in *Repsis*, I would not reach the treaty-interpretation issue.

A

It is "a fundamental precept of common-law adjudication" that "an issue once determined by a competent court

is conclusive." *Arizona* v. *California*, 460 U. S. 605, 619 (1983). "The idea is straightforward: Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, ___ (2015) (slip op., at 8) (internal quotation marks, citation, and alterations omitted). Succinctly put, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

Under federal issue-preclusion principles,[4] "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U. S. 147, 153 (1979). That standard for issue preclusion is met here.

In *Repsis*, the central issue—and the question on which the Crow Tribe sought a declaratory judgment—was whether members of the Tribe "have an unrestricted right to hunt and fish on Big Horn National Forest lands." 866 F. Supp., at 521. The Tenth Circuit's judgment settled that question by holding that "the Tribe and its members are subject to the game laws of Wyoming." 73 F. 3d, at 994. In this case, Herrera asserts the same hunting right that was actually litigated and decided against his Tribe in *Repsis*. He does not suggest that either the Federal District Court or the Tenth Circuit lacked jurisdiction to

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[4] The preclusive effect of the judgment of a federal court is governed by federal law, regardless of whether that judgment's preclusive effect is later asserted in a state or federal forum. *Taylor* v. *Sturgell*, 553 U. S. 880, 892 (2008). This means that the preclusive effect of *Repsis*, decided by a federal court, is governed by federal law, not Wyoming law, even though preclusion was asserted in a Wyoming court.

decide *Repsis*. And, because Herrera's asserted right is based on his membership in the Tribe, a judgment binding on the Tribe is also binding on him. As a result, the Wyoming appellate court held that *Repsis* bound Herrera and precluded him from asserting a treaty-rights defense. That holding was correct.

B

The majority concludes otherwise based on an exception to issue preclusion that applies when there has been an intervening "change in the applicable legal context." *Ante*, at 12 (internal quotation marks and alteration omitted). Specifically, the majority reasons that the *Repsis* judgment was based on *Race Horse* and that our subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), represents a change in the applicable law that is sufficient to abrogate the *Repsis* judgment's preclusive effect. There is support in the Restatement (Second) of Judgments for the general proposition that a change in law may alter a judgment's preclusive effect, §28, Comment *c*, p. 276 (1980), and in a prior case, *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009), we invoked that provision. But we have never actually held that a prior judgment lacked preclusive effect on this ground. Nor have we ever defined how much the relevant "legal context" must change in order for the exception to apply. If the exception is applied too aggressively, it could dangerously undermine the important interests served by issue preclusion. So caution is in order in relying on that exception here.

The majority thinks that the exception applies because *Mille Lacs* effectively overruled *Race Horse*, even though it did not say that in so many words. But that is a questionable interpretation. The fact of the matter is that the *Mille Lacs* majority held back from actually overruling *Race Horse*, even though the dissent claimed that it had

effectively done so. See *Mille Lacs*, 526 U. S., at 207 (applying the "*Race Horse* inquiry" but factually distinguishing that case from the facts present in *Mille Lacs*); *id.*, at 219 (Rehnquist, C. J., dissenting) (noting the Court's "apparent overruling *sub silentio*" of *Race Horse*). And while the opinion of the Court repudiated one of the two grounds that the *Race Horse* Court gave for its decision (the equal-footing doctrine), it is by no means clear that *Mille Lacs* also rejected the second ground (the conclusion that the terms of the Act admitting Wyoming to the Union manifested a congressional intent not to burden the State with the right created by the 1868 Treaty). With respect to this latter ground, the *Mille Lacs* Court characterized the proper inquiry as follows: "whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood." 526 U. S., at 207. And the Court then went on to analyze the terms of the particular treaty at issue in that case and to contrast those terms with those of the treaty in *Race Horse*. *Mille Lacs*, *supra*, at 207.

On this reading, it appears that *Mille Lacs* did not reject the second ground for the decision in *Race Horse* but simply found it inapplicable to the facts of the case at hand. I do not claim that this reading of *Mille Lacs* is indisputable, but it is certainly reasonable, and if it is correct, *Mille Lacs* did not change the legal context as much as the majority suggests. It knocked out some of *Race Horse*'s reasoning but did not effectively overrule the decision. Is that enough to eliminate the preclusive effect of the first ground for the *Repsis* judgment?

The majority cites no authority holding that a decision like *Mille Lacs* is sufficient to deprive a prior judgment of its issue-preclusive effect. Certainly, *Bies*, *supra*, upon which the majority relies, is not such authority. In that case, Bies had been convicted of murder and sentenced to death at a time when what was then termed "mental

retardation" did not render a defendant ineligible for a death sentence but was treated as simply a mitigating factor to be taken into account in weighing whether such a sentence should be imposed. When Bies contested his death sentence on appeal, the state appellate court observed that he suffered from a mild form of intellectual disability, but it nevertheless affirmed his sentence. Years later, in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court ruled that an intellectually disabled individual cannot be executed, and the Sixth Circuit then held that the state court's prior statements about Bies's condition barred his execution under issue-preclusion principles.

This Court reversed, and its primary reason for doing so has no relation to the question presented here. We found that issue preclusion was not available to Bies because he had not prevailed in the first action; despite the state court's recognition of mild intellectual disability as a mitigating factor, it had affirmed his sentence. As we put it, "[i]ssue preclusion . . . does not transform final judgment losers . . . into partially prevailing parties." *Bies*, 556 U. S., at 829; see also *id.*, at 835.

Only after providing this dispositive reason for rejecting the Sixth Circuit's invocation of issue preclusion did we go on to cite the Restatement's discussion of the change-in-law exception. And we then quickly noted that the issue addressed by the state appellate courts prior to *Atkins* ("[m]ental retardation as a mitigator") was not even the same issue as the issue later addressed after *Atkins*. *Bies, supra,* at 836 (the two "are discrete legal issues"). So *Bies* is very far afield.[5]

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[5] Nor are the other cases cited by the majority more helpful to the Court's position. *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), and *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353 (1984)—and, indeed, *Montana* v. *United States*, 440 U. S. 147 (1979)—are tax cases that hold, consistent with the general policy against "discriminatory distinctions in tax liability," *Sunnen*, 333 U. S., at 599, that issue preclusion

Although the majority in the present case believes that *Mille Lacs* unquestionably constitutes a sufficient change in the legal context, see *ante*, at 13, there is a respectable argument on the other side. I would not decide that question because Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies.

C

That is so because 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." Herrera and the United States, appearing as an *amicus* in his support, try to escape the effect of this alternative ground based on other exceptions to the general rule of issue preclusion. But accepting any of those exceptions would work a substantial change in established principles, and it is fortunate that the majority has not taken that route.

Unfortunately, the track that the majority has chosen is no solution because today's decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judgment binds all members of the Crow Tribe who hunt within the Bighorn National Forest. And for the reasons I will explain, such a holding would be correct.

1

Attempting to justify its approach, the majority claims that the decision below gave preclusive effect to only the

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has limited application when the conduct in the second litigation occurred in a different tax year than the conduct that was the subject of the earlier judgment. We have not, prior to today, applied *Sunnen*'s tax-specific policy in cases that do not involve tax liability and do not create a possibility of "inequalities in the administration of the revenue laws." *Ibid.*

first ground adopted by the Tenth Circuit in *Repsis*—that is, the ground that relied on *Race Horse*. *Ante*, at 18, n. 5. But nowhere in the decision below can any such limitation be found. The Wyoming appellate court discussed the second ground for the *Repsis* judgment, see App. to Pet. for Cert. 22 ("[T]he creation of the Big Horn National Forest resulted in the 'occupation' of the land, extinguishing the off-reservation hunting right"), and it concluded that *the judgment* in *Repsis*, not just one of the grounds for that judgment, "preclude[s] Herrera from attempting to relitigate the validity of the off-reservation hunting right that was previously held to be invalid," App. to Pet. for Cert. 31.[6]

2

Herrera takes a different approach in attempting to circumvent the effect of the alternative *Repsis* ground. When a judgment rests on two independently sufficient

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[6]The decision below, in other words, held that the issue that was precluded was whether members of the Crow Tribe have a treaty right to hunt in Bighorn. The majority rejects this definition of the issue, and instead asks only whether the first line of reasoning in *Repsis* retains preclusive effect. Such hairsplitting conflicts with the fundamental purpose of issue preclusion—laying legal disputes at rest. If courts allow a party to escape preclusion whenever a decision on one legal question can be divided into multiple or alternate parts, the doctrine of preclusion would lose its value. The majority's "[n]arrower definition of the issues resolved augments the risk of apparently inconsistent results" and undermines the objectives of finality and economy served by preclusion. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4417, p. 470 (3d ed. 2016).

The Court also hints that the state court might have thought that Wyoming forfeited reliance on issue preclusion, *ante*, at 18, n. 5, but there is no basis for that suggestion. The Wyoming appellate court invited the parties to submit supplemental briefs on issue preclusion and specifically held that "it [was] proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues." App. to Pet. for Cert. 10, n. 2.

grounds, he contends, neither ground should be regarded as having an issue-preclusive effect. This argument raises an important question that this Court has never decided and one on which the First and Second Restatements of Judgments take differing views. According to the First Restatement, a judgment based on alternative grounds "is determinative on both grounds, although either alone would have been sufficient to support the judgment." Restatement of Judgments §68, Comment *n* (1942). Other authorities agree. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4421, p. 613 (3d ed. 2016) (noting "substantial support in federal decisions" for this approach).[7] But the Second Restatement reversed this view, recommending that a judgment based on the determination of two independent issues "is not conclusive with respect to either issue standing alone." §27, Comment *i*, at 259.

There is scant explanation for this change in position beyond a reference in the Reporter's Note to a single decision of the United States Court of Appeals for the Second Circuit. *Id.*, Reporter's Note, Comment *i*, at 270 (discussing *Halpern* v. *Schwartz*, 426 F. 2d 102 (1970)). But even that court has subsequently explained that *Halpern* was "not intended to have . . . broad impact outside the [bankruptcy] context," and it continues to follow the rule of the First Restatement "in circumstances divergent from those in *Halpern*." *Winters* v. *Lavine*, 574 F. 2d 46, 67 (1978). It thus appears that in this portion of the Second Restatement, the Reporters adopted a prescriptive rather than a descriptive approach. In such situations, the Restatement loses much of its value. See *Kansas* v. *Nebraska*, 574 U. S.

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[7] See, *e.g., Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 251–257 (CA3 2006) (collecting cases); *In re Westgate-California Corp.*, 642 F. 2d 1174, 1176–1177 (CA9 1981); *Winters* v. *Lavine*, 574 F. 2d 46, 66–67 (CA2 1978); *Irving Nat'l Bank* v. *Law*, 10 F. 2d 721, 724 (CA2 1926) (Hand, J.).

445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

The First Restatement has the more compelling position. There appear to be two principal objections to giving alternative grounds preclusive effect. The first is that the court rendering the judgment may not have given each of the grounds "the careful deliberation and analysis normally applied to essential issues." *Halpern*, *supra*, at 105. This argument is based on an unjustified assessment of the way in which courts do their work. Even when a court bases its decision on multiple grounds, "it is reasonable to expect that such a finding is the product of careful judicial reasoning." *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 254 (CA3 2006).

The other argument cited for the Second Restatement's rule is that the losing party may decline to appeal if one of the two bases for a judgment is strong and the other is weak. §27, Comment *i*, at 259. There are reasons to be skeptical of this argument as well. While there may be cases in which the presence of multiple grounds causes the losing party to forgo an appeal, that is likely to be true in only a small subset of cases involving such judgments.

Moreover, other aspects of issue-preclusion doctrine protect against giving binding effect to decisions that result from unreliable litigation. Issue preclusion applies only to questions "actually and necessarily determined," *Montana*, 440 U. S., at 153, and a party may be able to avoid preclusion by showing that it "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments §28(5)(c). To be sure, this exception should not be applied "without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous." *Id.*, §28, Comment *j*, at 284. This exception provides an important safety valve, but it is narrow and clearly does not apply

here. Not only did the Tribe have an opportunity in *Repsis* to litigate the subject of the alternative ground, it actually did so.[8]

Finally, regardless of whether alternative grounds *always* have preclusive effect, it is sufficient to say that, at least in a declaratory judgment action, each conclusion provides an independent basis for preclusion. "Since the very purpose of declaratory relief is to achieve a final and reliable determination of legal issues, there should be no quibbling about the necessity principle. Every issue that the parties have litigated and that the court has undertaken to resolve is necessary to the judgment, and should be precluded." 18 Wright, Federal Practice and Procedure §4421, at 630; see *Henglein* v. *Colt Industries Operating Corp.*, 260 F. 3d 201, 212 (CA3 2001). Because *Repsis* was a declaratory judgment action aimed at settling the Tribe's hunting rights, that principle suffices to bind Herrera to *Repsis*'s resolution of the occupied-land issue.

D

Herrera and the United States offer a variety of other arguments to avoid the preclusive effect of *Repsis*, but all

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[8] From the beginning of the *Repsis* litigation, Wyoming argued that Bighorn was occupied land, and the Tribe argued that it was not. Wyoming pressed this argument in its answer to the Tribe's declaratory judgment complaint. Record in No. 92–cv–1002, Doc. 29, p. 4. Wyoming reiterated that argument in its motion for summary judgment and repeated it in its reply. *Id.*, Doc. 34, pp. 1, 6; *id.*, Doc. 54, pp. 7–8. The Tribe dedicated a full 10 pages of its summary judgment brief to the argument that "[t]he Big Horn National Forest [l]ands [are] '[u]noccupied [l]ands'" of the United States. *Id.*, Doc. 52, pp. 6–15. Both parties repeated these arguments in their briefs before the Tenth Circuit. Brief for Appellees 20–29 and Reply Brief for Appellants 2–3, and n. 6, in No. 94–8097 (1995). And the Tribe pressed this argument as an independent basis for this Court's review in its petition for certiorari, which this Court denied. Pet. for Cert. in *Crow Tribe of Indians* v. *Repsis*, O.T. 1995, No. 95–1560, pp. i, 22–24, cert. denied, 517 U. S. 1221 (1996).

are unavailing.

Herrera contends that he is not bound by the *Repsis* judgment because he was not a party, but this argument is clearly wrong. Indian hunting rights, like most Indian treaty rights, are reserved to the Tribe as a whole. Herrera's entitlement derives solely from his membership in the Tribe; it is not personal to him. As a result, a judgment determining the rights of the Tribe has preclusive effect in subsequent litigation involving an individual member of the Tribe. Cf. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 106–108 (1938) (judgment as to water rights of a State is binding on individual residents of State). That rule applies equally to binding judgments finding in favor of and against asserted tribal rights.

Herrera also argues that a judgment in a civil action should not have preclusive effect in a subsequent criminal prosecution, but this argument would unjustifiably prevent the use of the declaratory judgment device to determine potential criminal exposure. The Declaratory Judgment Act provides an equitable remedy allowing a party to ask a federal court to "declare [the party's] rights" through an order with "the force and effect of a final judgment." 28 U. S. C. §2201(a). The Act thus allows a person to obtain a definitive *ex ante* determination of his or her right to engage in conduct that might otherwise be criminally punishable. It thereby avoids "putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129 (2007). If the Tribe had prevailed in *Repsis*, surely Herrera would expect that Wyoming could not attempt to relitigate the question in this case and in prosecutions of other members of the Tribe. A declaratory judgment "is conclusive . . . as to the matters declared" when the State prevails just as it would be when the party challenging the State is the winning party. Restatement

(Second) of Judgments §33, at 332.

It is true that we have been cautious about applying the doctrine of issue preclusion in criminal proceedings. See *e.g., Currier* v. *Virginia*, 585 U. S. ___, ___ (2018) (slip op., at 9); *Bravo-Fernandez* v. *United States*, 580 U. S. ___, ___ (2016) (slip op., at 4). But we have never adopted the blanket prohibition that Herrera advances. Instead, we have said that preclusion doctrines should have "guarded application." *Id*., at ___ (slip op., at 4).

We employ such caution because preclusion rests on "an underlying confidence that the result achieved in the initial litigation was substantially correct," and that confidence, in turn, is bolstered by the availability of appellate review. *Standefer* v. *United States*, 447 U. S. 10, 23, n. 18 (1980); see also Restatement (Second) of Judgments §28, Comment *a*, at 274. In *Currier* and *Bravo-Fernandez,* we were reluctant to apply issue preclusion, not because the *subsequent* trial was criminal, but because the *initial* trial was. While a defense verdict in a criminal trial is generally not subject to testing on appeal, summary judgment in a civil declaratory judgment action can be appealed. Indeed, the Crow Tribe did appeal the District Court's decision to the Tenth Circuit and petitioned for our review of the Tenth Circuit's decision. The concerns that we articulated in *Currier* and *Bravo-Fernandez* have no bearing here.[9]

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For these reasons, Herrera is precluded by the judgment

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[9] Nor is that the only distinction between those cases and this one. In both *Currier* and *Bravo-Fernandez* a party sought preclusion as to an element of the charged offense. The elements of the charged offense are not disputed here—Herrera's asserted treaty right is an affirmative defense. And while the State bears the burden of proof as to elements of the offense, under Wyoming law, the defendant asserting an affirmative defense must state a prima facie case before any burden shifts to the State. See *Duckett* v. *State*, 966 P. 2d 941, 948 (Wyo. 1998).

in *Repsis* from relitigating the continuing validity of the hunting right conferred by the 1868 Treaty. Because the majority has chosen to disregard this threshold problem and issue a potentially pointless disquisition on the proper interpretation of the 1868 Treaty, I respectfully dissent.

16 S.Ct. 1076, 41 L.Ed. 244

16 S.Ct. 1076
Supreme Court of the United States

WARD, Sheriff,
v.
RACE HORSE.

No. 841.
|
May 25, 1896.

Synopsis
Appeal from the Circuit Court of the United States for the District of Wyoming.

1076 Proceeding by **Race Horse against John H. **Ward**, sheriff of the county of Uinta, in the state of Wyoming. There was an order discharging appellee from custody (70 Fed. 598), and said sheriff appeals. Reversed.

This appeal was taken from an order of the court below, rendered in a habeas corpus proceeding, discharging the appellee from custody. 70 Fed. 598. The petition for the writ based the right to the relief which it prayed, and which the court below granted, on the ground that the detention complained of was in violation of the constitution and laws of the United States, and in disregard of a right arising from and guarantied by a treaty made by the United States with the Bannock Indians. Because of these grounds the jurisdiction below existed, and the right to review here obtains. Rev. St. § 753; Act March 3, 1891 (36 Stat. 826). The record shows the following material facts: The appellee, the plaintiff below, was a member of the Bannock tribe of Indians, retaining his tribal relations and residing with it in the Ft. Hall Indian reservation. This reservation was created by the United States in compliance with a treaty entered into between the United States and the Eastern band of Shoshonees and the Bannock tribe of Indians, which took effect February 24, 1869. 15 Stat. 673. Article 2 of this treaty, besides setting apart a reservation for the use of the Shoshonees, provided:

'It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the president of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the 'Port Neuf' and 'Kansas Prairie' countries.'

In pursuance of the foregoing stipulation the Ft. Hall Indian reservation was set apart for the use of the Bannock tribe.

Article 4 of the treaty provided as follows:

'The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'

In July, 1868, an act had been passed erecting a temporary government for the territory of Wyoming (15 Stat. 178), and in this act it was provided as follows:

'That nothing in this act shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.'

Wyoming was admitted into the Union on July 10, 1890. 26 Stat. 222. Section 1 of that act provides as follows:

'That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into **1077 the Union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.'

The act contains no exception or reservation in favor of or for the benefit of Indians.

The legislature of Wyoming on July 20, 1895 (Laws Wyo. 1895, p. 225, c. 98), passed an act regulating the killing of game within the state. In October, 1895, the district attorney of Uinta county, state of Wyoming, filed an information against the appellee (**Race Horse**) for having killed in that county seven elk, in violation of the law of the state. He was taken into custody by the sheriff, and it was to obtain a release from imprisonment authorized by a commitment issued under these proceedings that the writ of habeas corpus was sued out. The following facts are unquestioned: (1) That the elk were killed in Uinta county, Wyo., at a point about 100 miles from the Ft. Hall Indian reservation, which is situated in the state of Idaho; (2) that the killing was in violation of the laws of the state of Wyoming; (3) that the place where the killing took place was unoccupied public land of the United States, in the sense that the United States was the owner of the fee of the land; (4) that the place where the elk were killed was in a mountainous region, some distance removed from settlements, but was used by the settlers as a range for cattle, and was within election and school districts of the state of Wyoming.

Mr. Justice Brown dissenting. 70 Fed. 598, reversed.

West Headnotes (1)

[1] Indians
Abrogation, Modification, or Relinquishment in General

The provision in the treaty of February 24, 1869, 15 Stat. 673, with the Bannack tribe of Indians, that they "shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," was intended to confer a privilege of merely limited duration, and was repealed by the subsequent act admitting the territory of Wyoming into the Union with an express declaration that it should have all the powers of the other states, and making no reservation in favor of the Indians.

91 Cases that cite this headnote

Attorneys and Law Firms

***507** Benj. F. Fowler and Willis Van Devanter, for appellant.

Atty. Gen. Harmon, for appellee.

Opinion

Mr. Justice WHITE, after stating the case, delivered the opinion of the court.

It is wholly immaterial, for the purpose of the legal issue here presented, to consider whether the place where the elk were killed is in the vicinage of white settlements. It is also equally irrelevant to ascertain how far the land was used for a cattle range, since the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the state of Wyoming, in violation of its laws. If it gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands than could the passage of the game law. If, on the other hand, the terms of the treaty did not refer to lands within a state, which were subject to the legislative power of the state, then it is equally clear that, although the lands were not in school and election districts, and were not near settlements, the right conferred on the Indians by the treaty would be of no avail to justify a violation of the state law.

The power of a state to control and regulate the taking of game cannot be questioned. Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600. The text of article 4 of the treaty,

relied on as giving the right to kill game within the state of Wyoming, in violation of its laws, is as follows:

'But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'

It may at once be conceded that the words 'unoccupied ***508** lands of the United States,' If they stood alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and the title to or occupancy of which had not been disposed of. But, in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States, wherever situated, but were only lands of that character embraced within what the treaty denominates as 'hunting districts.' This view follows as a necessary result from the provision which says that the right to hunt on the unoccupied lands shall only be availed of as long as peace subsists on the borders of the hunting districts. Unless the districts thus referred to be taken as controlling the words 'unoccupied lands,' then the reference to the hunting districts would become wholly meaningless, and the cardinal rule of interpretation would be violated, which ordains that such construction be adopted as gives effect to all the language of the statute. Nor can this consequence be avoided by saying that the words 'hunting districts' simply signified places where game was to be found, for this would read out of the treaty the provision as 'to peace on the borders' of such districts, which clearly pointed to the fact that the territory referred to was one beyond the borders of the white settlements. The unoccupied lands referred to being therefore contained within the hunting districts, by the ascertainment of the latter the former will be necessarily determined, as the less is contained in the greater. The elucidation of this issue will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being, and of the purposes intended to be by it accomplished.

When, in 1868, the treaty was framed, the progress of the white settlements westward had hardly, except in a very scattered way, ****1078** reached the confines of the place selected for the Indian reservation. While this was true, the march of advancing civilization foreshadowed the fact that the wilderness, ***509** which lay on all sides of the point selected for the reservation, was destined to be occupied and settled by the white man, hence interfering with the hitherto untrammeled right of occupancy of the Indian. For this reason, to protect his rights, and to preserve for him a home where his tribal relations might be enjoyed under the shelter of the authority of the United States, the reservation was created. While confining him to the reservation, and in order to give him the privilege of hunting in the designated districts, so long as the necessities of civilization did not require otherwise, the provision in question was doubtless adopted, care being, however, taken to make the whole enjoyment in this regard dependent absolutely upon the will of congress. To prevent this privilege from becoming dangerous to the peace of the new settlements as they advanced, the provision allowing the Indian to avail himself of it only while peace reigned on the borders was inserted. To suppose that the words of the treaty intended to give to the Indian the right to enter into already established states, and seek out every portion of unoccupied government land, and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that congress, while preparing the way, by the treaty, for new settlements and new states, yet created a provision, not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the states already existing. It is undoubted that the place in the state of Wyoming, where the game in question was killed, was, at the time of the treaty, in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts, and came within the authority and jurisdiction of a state. The right to hunt, given by the treaty, clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right depend on whether the land in the hunting districts was unoccupied ***510** public land of the United States. This, as we have said, left the

whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts. No restraint was imposed by the treaty on the power of the United States to sell, although such sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred. And this view of the temporary and precarious nature of the right reserved in the hunting districts is manifest by the act of congress creating the Yellowstone Park reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of congress on the subject. 17 Stat. 32; 28 Stat. 73. The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that congress had violated the faity of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the territory where it is now asserted there was a contract right to kill game created by the treaty in favor of the Indians.

The argument now advanced in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands within the hunting districts and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance ***511** of its laws. That 'a treaty may supersede a prior act of congress, and an act of congress supersede a prior treaty,' is elementary. Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016; The Cherokee Tobacco, 11 Wall. 621. In the last case it was held that a law of congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course, the settled rule undoubtely is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. 222, and authorities there cited. But, in ascertaining whether both statutes can be maintained, it is not to be considered that any possible theory by which both can be enforced must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction by which both laws can co-exist consistently with the intention of congress. U. S. v. Sixty-Seven Packages Dry Goods, 17 How. 87; District of Columbia v. Hutton, 143 U. S. 18, 12 Sup. Ct. 369; Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532. The act which admitted Wyoming into the Union, as we ****1079** have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty, if it was so construed as to allow the Indians to seek out every unoccupied piece of government land, and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her co-equal rights, was merely declaratory of the general rule.

In Pollard v. Hagan (1845) 3 How. 212, the controversy was as to the validity of a patent from the United States to lands, situate in Alabama, which, at the date of the formation of that state, were part of the shore of the Mobile river between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the constitution to the United States, and hence the jurisdiction exercised thereover by the federal government, before the formation of the new state, was held temporarily ***512** and in trust for the new state to be thereafter created, and that such state, when created, by virtue of its being, possessed the same rights and jurisdiction as had the original states. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the constitution and laws of its own government. The court declared (page 229) that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to 'deny that

Alabama has been admitted into the Union on an equal footing with the original states.' The same principles were applied in Louisiana v. First Municipality, 3 How. 589.

In Withers v. Buckley (1857) 20 How. 84, it was held that a statute of Mississippi, creating commissioners for a river within the state, and prescribing their powers and duties, was within the legitimate and essential powers of the state. In answer to the contention that the statute conflicted with the act of congress which authorized the people of Mississippi territory to form a constitution, in that it was inconsistent with the provision in the act that 'the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the state of Mississippi as to other citizens of the United States,' the court said (page 92):

'In considering this act of congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, further than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee v. Hagan, 3 How. 223.'

***513** A like ruling was made in Escanaba & L. M. Transp. Co. v. City of Chicago (1882) 107 U. S. 678, 2 Sup. Ct. 185, where provisions of the ordinance of 1787 were claimed to operate to deprive the state of Illinois of the power to authorize the construction of bridges over navigable rivers within the state. The court, through Mr. Justice Field, said (page 683, 107 U. S., and page 185, 2 Sup. Ct.):

'But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people.'

And it was further added (page 688, 107 U. S., and page 185, 2 Sup. Ct.):

'Whatever the limitation upon her powers as a government while in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of the constitutional right and power is the condition of all the states of the Union, old and new.'

In Cardwell v. Bridge Co. (1884) 113 U. S. 205, 5 Sup. Ct. 423, Escanaba & L. M. Transp. Co. v. City of Chicago, supra, was followed, and it was held that a clause, in the act admitting California into the Union, which provided that the navigable waters within the state shall be free to citizens of the United States, in no way impaired the power which the state could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (page 212, 113 U. S., and page 423, 5 Sup. Ct.):

'The act admitting California declares that she is 'admitted into the Union on an equal footing with the original states in all respects whatever.' She was not, therefore, shorn, by the clause as to navigable water within her limits, of any of the powers which the original states possessed over such waters within their limits.'

A like conclusion was applied in the case of ***514** Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, where the act admitting the state of Oregon into the Union was construed.

Determining, by the light of these principles, the question whether the provision of the ****1080** treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that state into the Union. The two facts, the privilege

conferred and the act of admission, are irreconcilable, in the sense that the two, under no reasonable hypothesis, can be construed as co-existing.

The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument, advanced at bar, that as the United States, under the authority delegated to it by the constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a state, for nothing in this case shows that this power has been exerted by congress. The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case congress intended to admit ***515** the state of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that congress, in creating the territory, expressly reserved such rights. Nor would this case be affected by conceding that congress, during the existence of the territory, had full authority, in the exercise of its treaty-making power, to charge the territory, or the land therein, with such contractual burdens as were deemed best, and that, when they were imposed on a territory, it would be also within the power of congress to continue them in the state, on its admission into the Union. Here the enabling act not only contains no expression of the intention of congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that, where there are rights created by congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the territory was essentially perishable, and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when, in fact, the privilege given was temporary and precarious. But the argument goes further than this, since it insists that although, by the treaty, the hunting privilege was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue, although the United States parted with its entire authority over the capture and killing of game. Nor is there force in the suggestion that the Cases of the Kansas Indians, 5 Wall. 737, and the New York Indians, Id. 761, are in conflict with these ***516** views. The first case (that of the Kansas Indians) involved the right of the state to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the state to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the state to tax land embraced in an Indian reservation, which existed prior to the adoption of the constitution of the United States. Thus these two cases involved the authority of the state to exert its taxing power on lands embraced within an Indian reservation,-that is to say, the authority of the state to extend its powers to lands not within the scope of its jurisdiction,-while this case involves a question of whether, where no reservation exists, a state can be stripped, by implication and deduction, of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly

inconsistent with its language, and in conflict with an act of congress, and also destructive of the rights of one of the states. To refer to the limitation contained in the territorial act, and disregard the terms of the enabling act, would be to destroy and obliterate the express will of congress.

For these reasons the judgment below was erroneous, and must therefore be reversed, and the case must be remanded to the court below with directions to discharge the writ ****1081** and remand the prisoner to the custody of the sheriff, and it is so ordered.

Mr. Justice BREWER, not having heard the argument, takes no part in this decision.

Mr. Justice BROWN, dissenting.

As the opinion of the court seems to me to imply and to sanction a distinct repudiation by congress of a treaty with the Bannock Indians, I am unable to give my assent to it. The facts are in a nutshell.

***517** On July 3, 1868, the United States entered into a treaty (15 Stat. 673) with the Shoshonees and Bannock tribes of Indians, by which the latter agreed to accept and settle upon certain reservations, and the former agreed that the Indians shoud have 'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'

A few days thereafter, and on July 25, 1868, congress passed an act 'to provide a temporary government for the territory of Wyoming' (15 Stat. 178), within which the Bannock reservation was situated, with a proviso 'that nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.'

So far as it appears, the above treaty still remains in force, but the position of the majority of the court is that the admission of the territory of Wyoming as a state abrogated it pro tanto, and put the power of the Indians to hunt on the unoccupied lands of the United States completely at the mercy of the state government.

Conceding, at once, that it is within the power of congress to abrogate a treaty, or, rather, that the exercise of such power raises an issue, which the other party to the treaty is alone competent to deal with, it will be also conceded that the abrogation of a public treaty ought not to be inferred from doubtful language, but that the intention of congress to repudiate its obligation ought clearly to appear. As we said in Hauenstein v. Lynham, 100 U. S. 483, 'where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Such is the settled rule of this court.' See, also, Chew Heong v. U. S., 112 U. S. 536, 549, 5 Sup. Ct. 255.

It appears from the first article that this treaty was entered into at the close of a war between the two contracting parties; that the Indians agreed to accept certain reservations of land, and the United States, on its part, 'solemnly agreed' that no ***518** persons, with certain designated exceptions, 'shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and * * * they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists between the whites and the Indians on the borders of the hunting districts.' The fact that the territory of Wyoming would ultimately be admitted as a state must have been anticipated by congress, yet the right to hunt was assured to the Indians, not until this should take place, but so long as game may be found upon the lands, and so long as peace should subsist on the borders of the hunting districts. Not only this, but the territory was created with the distinct reservation that the rights of the Indians should not be construed to be impaired so long as they remained unextinguished by further treaty. The right to hunt was not one secured to them for sporting purposes, but as a means of subsistence. It is a fact, so well known that we may take judicial notice of it, that the Indians have never been an industrial people, that even their agriculture was of the rudest description, and that their chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and,

as a result of being deprived of it, they can hardly escape becoming a burden upon the public. It is now proposed to take it away from them, not because they have violated the treaty, but because the state of Wyoming desires to preserve its game. Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a state, and what might have been done in this case might be done in the case of every Indian tribe within our boundaries. There is no limit to the right of the state, which may, in its discretion, prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

***519** I am not impressed with the theory that the act admitting Wyoming into the Union upon an equal footing with the original states authorized them to impair or abrogate rights previously granted by the sovereign power by treaty, or to discharge itself of burdens which the United States had assumed before her admission into the Union. In the Cases of the Kansas Indians, 5 Wall. 737, we held that a state, when admitted into the Union, was bound to respect an exemption from taxation which had been previously granted to tribes of Indians within its borders, because, as the court said, the state of Kansas 'accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary ****1082** abandonment of their tribal organization. As long as the United States recognizes their national character, they are under the protection of the treaties and laws of congress, and their property is withdrawn from the operation of state laws.'

It is true that the act admitting the state of Kansas into the Union contained a proviso similar to that in the act erecting a government for the territory of Wyoming, viz.: 'That nothing contained in this said constitution respecting the boundaries of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty with such Indians.' In this particular the cases differ from each other only in the fact that the proviso in the one case is inserted in the act creating the territory, and in the other in the act admitting the territory as a state; and, unless we are to say that the act admitting the territory of Wyoming as a state absolved it from its liabilities as a territory, it would seem that the treaty applied as much in the one case as in the other. But, however this may be, the proviso in the territorial act exhibited a clear intention on the part of congress to continue in force the stipulation of the treaty, and there is nothing in the act admitting the territory as a state which manifests an intention to repudiate ***520** them. I think, therefore, the rights of these Indians could only be extinguished by purchase, or by a new arrangement with the United States.

I understant the words 'unoccupied lands of the United States' to refer, not only to lands which have not been patented, but also to those which have not been settled upon, fenced or otherwise appropriated to private ownership, but I am quite unable to see how the admission of a territory into the Union changes their character from that of unoccupied to that of occupied lands.

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TRADITIONAL ECOLOGICAL KNOWLEDGE: THE THIRD ALTERNATIVE (COMMENTARY)

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Abstract. Contemporary Western attitudes concerning the management of natural resources, treatment of nonhuman animals, and the natural world emerge from traditions derived from Western European philosophy, i.e., they assume that humans are autonomous from, and in control of, the natural world. A different approach is presented by Traditional Ecological Knowledge (TEK) of indigenous peoples of North America. Although spiritually oriented, TEK converges on Western scientific approaches. TEK is based on close observation of nature and natural phenomena; however, it is combined with a concept of community membership that differs from that of Western political and social thought. TEK is strongly tied to specific physical localities; therefore, all aspects of the physical space can be considered part of the community, including animals, plants, and landforms. As a consequence, native worldviews can be considered to be spatially oriented, in contrast to the temporal orientation of Western political and historical thought. TEK also emphasizes the idea that individual plants and animals exist on their own terms. This sense of place and concern for individuals leads to two basic TEK concepts: (1) all things are connected, which is conceptually related to Western community ecology, and (2) all things are related, which changes the emphasis from the human to the ecological community as the focus of theories concerning nature. Connectedness and relatedness are involved in the clan systems of many indigenous peoples, where nonhuman organisms are recognized as relatives whom the humans are obliged to treat with respect and honor. Convergence of TEK and Western science suggests that there may be areas in which TEK can contribute insights, or possibly even new concepts, to Western science. TEK is inherently multidisciplinary in that it links the human and the nonhuman, and is the basis not only for indigenous concepts of nature, but also for concepts of indigenous politics and ethics. This multidisciplinary aspect suggests that TEK may be useful in resolving conflicts involving a variety of stakeholders and interest groups in controversies over natural resource use, animal rights, and conservation. TEK may also have implications for human behavior and obligations toward other forms of life that are often unrecognized, or at least not emphasized, in Western science. We present examples from community and behavioral ecology where a TEK-based approach yielded unexpected and nonintuitive insights into natural phenomena. Understanding of TEK may be useful in helping scientists respond to the changing public perceptions of science, and new cultural pressures in our society.

Key words: *belief system; conservation; ecology; environment; Indian; indigenous; Native American; resource management; Traditional Ecological Knowledge.*

Capitalism and communism are simply the opposite sides of the same eurocentric coin. What the world needs is not a choice between capitalism and communism, between one aspect of eurocentrism or eurosupremacism and another. What we need is a genuine alternative to the European tradition as a whole.

—Russel Means, Lakota
(quoted in Churchill 1995)

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INTRODUCTION

Over the last 100 years there has been considerable debate over the appropriate way in which Americans, and other peoples, should treat the natural world (Leopold 1948, Dunlap 1988, Wilson 1992, Smith 1996). Some advocate a pro-development extractive approach, in which natural resources are perceived largely in terms of their economic value to humans. This perspective dominated attitudes towards environmental issues and resource management until the 1960s (Dunlap 1988) and is currently exemplified by the "wise-use" movement (Lehr 1992). This viewpoint has been identified with the political right (Smith 1996); however,

exploitative approaches may come from all shades of the political spectrum.

There also exist opposing models, which argue that nature and nonhuman animals must be protected from human interference, and that true conservation means setting aside tracts of land from which human settlements, and even humans themselves, may be excluded (Brinkerhoff Jackson 1994, Owens 1998). For example, the U.S. Wilderness Act of 1964 defines wilderness as space forever untrammeled by man (Owens 1998). This viewpoint has been identified with the political left (Wilson 1992, Smith 1996), but as with pro-development forces, "conservationists" are represented throughout the political spectrum.

Despite apparent differences, all Western attitudes toward nature come from the same European philosophical roots, i.e., Descartes, Bacon, and the Enlightenment (Smith 1996). In the writings of philosophers as different as Aristotle, Descartes, and Kant, it is assumed that humans are autonomous from, and in control of, the natural world (Mayr 1997). For example, John Locke (1952) argued that nature existed primarily for facilitating the comfort and convenience of humans. For our purposes, we assume the viewpoints we describe to be characteristic of the dominant cultures in modern Europe, North America, and Japan, where a large proportion of citizens live in industrialized societies in which nature is viewed as separate and "under control" (Smith 1996). People across the political spectrum in these societies view the natural world as consisting of "resources," which carries the implicit assumption that all of nature can be exploited, regardless of whether it is for economic or aesthetic purposes (e.g., Locke 1952). In addition, citizens of industrialized societies typically adhere to the perspective that nature can be defined as places that are separate from humans (Leopold 1948, Smith 1996, Owens 1998). Consequently, the problem is not lack of knowledge for effectively managing resources, but rather motivating humans to conserve (Anderson 1996).

We do not, however, review and analyze Western attitudes toward nature, since this topic has been extensively treated elsewhere (Smith 1984, 1996, Mander 1991, Deloria 1992, 1995, Jackson 1994). Our intention is instead to discuss the Traditional Ecological Knowledge (henceforth TEK) of Native American peoples (henceforth native), which we believe represents a third alternative, sharing elements with both extractive and conservationist approaches, yet remaining clearly distinct from both (Johannes 1989, Martinez 1994). We emphasize the TEK of Native Americans because of our personal experiences and knowledge, but acknowledge that forms of TEK are found in indigenous peoples throughout the world that share similar themes and approaches.

Some conservationists have contended that the approach they use is in the spirit of Native American or indigenous traditions (Pierotti and Wildcat 1997*a*, *b*). We argue that such associations are based upon false assumptions about the true nature of indigenous belief systems, because unlike Western philosophy, TEK assumes that humans are, and always will be, connected to the natural world, and that there is no such thing as nature that exists independent of humans and their activities (Deloria 1990, Pierotti and Wildcat 1997*b*, Owens 1998).

The connections that are a crucial aspect of TEK are based on a mixture of extraction, e.g., animals are taken as prey, combined with recognition of the inherent value and good of nonhuman lives (sensu Taylor 1992). Traditional knowledge is based on the premise that humans should not view themselves as responsible for nature, i.e., we are not stewards of the natural world, but instead that we are a part of that world, no greater than any other part (Pierotti and Wildcat 1997*b*). In this way TEK deals largely with motivating humans to show respect for nonhumans. The respect for the nonhuman inherent in TEK can constrain natural human tendencies towards overexploitation, because nonhumans are incorporated into the ritual representation of the community, and are considered as members of the community (Anderson 1996, Barsh 1997, Salmon 2000).

Space, Time, and Traditional Knowledge

In recent years there has been considerable discussion of differences between the worldviews and knowledge base of indigenous peoples, and that of the "dominant" or "Western" culture (e.g., Johannes 1989, Mander 1991, Suzuki and Knudtson 1992, Anderson 1996). One major difference between native peoples of North America and Western European immigrants to North America is that the latter look backward and forward in time to get a sense of their place in history, while native peoples look around them to get a sense of their place in history. This difference has been described as thinking temporally in the case of Western culture and as thinking spatially in the case of the native peoples (Deloria 1992).

The idea of human history existing independently of local places and the natural world is foreign to the native peoples of North America, because for them their history cannot be separated from the entire geography, biology, and environment to which they belong. "In the traditional (way of knowing), there is no such thing as isolation from the rest of creation" (Deloria 1990:17). The notion of thinking spatially can be seen in the native tradition of invoking and praying to the four horizontal directions, the sky, and the earth. A person making such prayers is acknowledging the space in which they live, and their understanding that the creative forces that shape their lives exist in the natural world that surrounds them in all of these directions.

We cannot and do not attempt to offer a definitive treatment of all North American indigenous worldviews. The influence of local places upon cultures, and the corresponding diversity of peoples attached to those places, guarantees the existence of variation in the ceremonial and symbolic expressions of native worldviews. Our experience and research suggest, however, that there may exist a shared way of thinking and concept of community common to native peoples of North America, which we define as TEK (see also Anderson 1996). Despite both forced and voluntary relocations, native people have taken their TEK with them, which has allowed them to survive these experiences, and establish sacred places in their new homes (Owens 1998:164). This way of thought includes: (1) respect for nonhuman entities as individuals, (2) the existence of bonds between humans and nonhumans, including incorporation of nonhumans into ethical codes of behavior, (3) the importance of local places, and (4) the recognition of humans as part of the ecological system, rather than as separate from and defining the existence of that system.

Despite dislocations and forced removals, these ideas are part of the shared intellectual property of all native peoples we have studied and lived with during the last 10 years at Haskell Indian Nations University in Lawrence, Kansas. We consider TEK to be an intellectual foundation for an indigenous theory and practice of politics and ethics, centered on natural places and connection to the natural world, which is capable of generating a conservation ethic on the part of those who follow its principles. TEK is based upon empirical observations resulting from patient observation of the natural world and its patterns. TEK is inherently multidisciplinary because it links the human and the nonhuman, and is not only the basis for indigenous concepts of nature but also for concepts of politics and ethics. There are therefore no clearly defined boundaries between philosophy, history, sociology, biology, and anthropology in indigenous thought.

In essence, TEK requires one to be native to a place (see also Jackson 1994), and to live with nature (see also Wilson 1992), in contrast to the dominant Western worldview, which assumes humans live above, separated, or in opposition to nature (Mander 1991, Suzuki and Knudtson 1992, Anderson 1996). To live with the geography and biology of your environment without trying to alter it solely to meet human needs is our concept of what it means to be native to a place. TEK is expressed in the ability to experience a sense of place while casting off the modern Western view that "space" exists to be conquered.

We emphasize that TEK is very different than the comfortable and romantic image of the Rousseauian "noble savage." Living with nature bears little relationship to such concepts as "love of nature," "closeness to nature," "communing with nature," or "conservation of nature," which are statements made by Western conservationists (see below and Anderson 1996). Those who feel that it is within their direct power to conserve nature typically also feel that they are in control of nature, and that nature should be conserved only insofar as it benefits humans, either economically or spiritually (Smith 1984). Within a TEK-based ethical system, nature exists on its own terms, and individual nonhumans have their own reasons for existence, independent of human interpretation. One way to think about this is that those who desire to dance with wolves must first learn to live with wolves as members of their ecological and social community.

Living with nature requires people to rearrange the customs and habits of their daily life. The origins of TEK are based in the knowledge that native societies existed under conditions of constant pressure on the resources upon which they depended, and that a means had to be found to convince communities and families to economize with regard to their use of natural resources (Anderson 1996). This ethic may have arisen from early experiences of Native Americans, as they realized that resources upon which they depended could disappear forever, e.g., local disappearances of species depended upon for food and other products may have led to development of an ethically based system of restraint with regard to hunting.

One such tactic involved representing sound ecological management in strongly ethical (or religious) terms, and developing a view of the environment that stressed specific concrete bonds between nature and the human community (Rappaport 1971, Deloria 1990, Anderson 1996). The cultural diversity of Native Americans reflects their intimate ties to the land and the biology of the places that they call home in specific social codes and institutions, rather than in some misty "union with nature" (Anderson 1996). Thus, TEK encompasses both science and religion, in the sense that religion is the ritual representation of the community, and a device for sanctioning moral and ethical codes (Durkheim 1961). "The task of the tribal religion. . . is to determine the proper relationship that the people must have with other living beings" (Deloria 1992). In TEK, we suggest that religion embodies environmental knowledge; therefore, it is not surprising that TEK is based on and has considerable insight into the workings of nature, and in many ways converges closely upon the Western science of ecology.

Traditional Knowledge and Ecological Concepts

Native peoples lack an immigrant experience within their memories (Deloria 1995). Native stories do not deal with the exact time when events happened, since they happened so long ago that they exist "on the other side of memory" (Marshall 1995:207). The worldviews and cultures of Native American peoples evolved in

the environments of the continents of North and South America. Native peoples depended upon the animals and plants of these environments for food, clothing, shelter, and companionship, and as a result developed strong ties to these nonhuman lives. "Little emphasized, but equally as important for the formation of (Native) personality was the group of other forms of life which had come down over the centuries as part of the larger family" (Deloria 1990:16–17). As these places and beings existed and changed along with them for thousands of years, native peoples developed their sense of place that led them to think spatially, along with their flexible knowledge base. These values have been kept intact through TEK, regardless of whether the people have been forced off their original lands, either by changing ecological conditions or by European immigrants (Owens 1998).

The body of knowledge acquired through careful observation came to constitute much of what Native Americans regard as TEK. One major theme of TEK is that all things are connected, which is not simply a homily or a romanticized cliche, but instead is a realization that no single organism can exist without the web of other life forms that surround it and make its existence possible. This concept is closely related conceptually to the Western discipline of community ecology, and like community ecology, it places emphasis on interrelationships between different species and individuals, and describes these interactions by employing the metaphor of a web. TEK also shares concepts based on connectedness with physiological and biochemical science related to the ecological concept of nutrient cycles (Pierotti and Wildcat 1997*b*). Thus, although the idea of a cycle, or circle, of life is an integral part of Native spiritual beliefs, this is not a mystical concept based upon great mysteries, but a practical recognition of the fact that all living things are literally connected to one another.

As a result of these connections with the nonhuman world, native peoples do not think of nature as "wilderness," but as home. Natives do not leave their "house" to "go into nature," but instead feel that when they leave their shelter and encounter nonhumans and natural physical features that they are just moving into other parts of their home (Reichel-Dolmatoff 1996). "What we call nature is conceived by Native peoples as an extension of biological man, and therefore a (Native) never feels 'surrounded by nature.' A (Native) walking in the forest, or paddling a canoe is not in nature, but he is entirely surrounded by cultural meanings his tradition has given to his external surroundings" (Reichel-Dolmatoff 1996:8–9). Thus, nonhuman elements are incorporated into the ritual representation of the community, establishing a nature-centered belief system (see above). At its roots, Western ecology employs a similar concept since the word "ecology" comes from "oikos," the Greek word for house, thereby acknowledging nature as the house of the human species.

Within TEK the shared ideas of connectedness and nature as home have profound implications for native conceptions of politics and ethics. Unlike dominant Western political and ethical paradigms, which find knowledge of how human beings ought to act imbedded in the life of one's social, i.e., human, relationships, native peoples found within TEK instructions concerning how a person should behave as a member of a community consisting of many nonhuman persons, e.g., four-leggeds, winged-ones, plants, and even landforms (Deloria 1990, 1992, Pierotti and Wildcat 1997*b*).

Western thought has traditionally followed the lead of Aristotle, and defined politics and ethics as exclusively human realms. Aristotle proposed that human values are learned from our fellow community members. From the perspective of TEK, Aristotle's basic reasoning was right, but his notion of community membership was wrong. TEK defines politics and ethics as existing in the realm of ecosystems, and would argue that it makes no sense to limit the notion of politics and ethics only to human beings (see also Salmon 2000). By limiting the definition of "persons" to human beings, however, Aristotle created a false and narrow sense of community and the corresponding spheres of political and moral life.

The inclusion of other living beings and natural objects into the category of persons, which includes human beings, requires politics and ethics that include these other community members. Consideration of nonhuman entities, including landforms, plants, and animals as individual persons who are part of their communities operates to keep humans attending to the specific entity and its particular value (Taylor 1992). This emphasis on individuality (see below) provides a spiritual alternative to overgeneralizing about nonhumans (Anderson 1996). One illustration of how native peoples include many other natural objects and living beings as members of their community is found in clan names and totems, which indicate covenants between certain human families and specific animals (Deloria 1990). These animals are connected to families over prolonged periods of time, and offer their assistance and guidance during each generation of humans. Throughout Native American cultures, there is a broad commonality of beliefs about animals in which human and nonhuman are bonded closely and part of one community involved with one another in terms of empowerment and emotional interactions (Anderson 1996).

It is frustrating to Native Americans to hear others speak romantically of our closeness to nature or love of nature. This relationship is more profound than most people can imagine, and the implications of this relationship carry uncomfortable consequences. To be Eagle, Wolf, Bear, Deer, or even Wasp clan means that

you are kin to these other persons; they are your relations. Ecological connectedness is culturally and ceremonially acknowledged through clan names, totems, and ceremonies. In nearly all native stories animal- and plant-persons existed before human-persons (Pierotti and Wildcat 1997*a*). Thus, these kin exist as our elders and, much as do human elders, function as our teachers and as respected members of our community. Acknowledging nonhumans as teachers and elders requires that we pay careful attention to their lives, and recognize that these lives have meaning on their own terms (see also Taylor 1992).

This recognition of the value of nonhuman lives extends the social world to include animals as well as humans, and led to an ethical system that required proper treatment of the nonhuman. Humans live in mutual aid relationships with the nonhumans. If humans eat or otherwise use nonhumans, they are empowered by that relationship, which leads to mutual respect (Anderson 1996). Many nonhumans had powers far beyond the capabilities of ordinary humans, and were able to move with ease through worlds impassable to humans, e.g., air, water. Since animals were persons, and assumed to have some cognitive abilities, they were also assumed to recognize the danger when they were being hunted by humans. Thus if they were caught, it was also assumed to involve some element of choice on their part (Anderson 1996), hence the concept of the prey "giving itself to you." This presumed gift required gratitude (thanks), as well as respectful treatment of the nonhuman remains on the part of the human who took the life of the nonhuman (see also Tanner 1979).

The relationships of native peoples to nature have often been described in terms like "harmony with nature." Such descriptions project a rather amorphous, sentimental, and romanticized character to this relationship, but overlook the empirical knowledge of the lives of plants and animals that was such a major component of the daily lives of native peoples. The attitudes and relationships of native people to other organisms result from having evolved as distinct cultures in strong association with those other creatures, and experiencing them on a daily basis.

To native peoples, ecology and religion are inseparable, and thus religion serves to code ecological knowledge (Rappaport 1971, Deloria 1992, Anderson 1996). This religion then provides direct emotional involvement with the nonhuman world. For example, Northwest Coast Indians treated nonhuman beings with a combination of a sense of direct personal empowerment, and a healthy respect or even fear (Anderson 1996:66). To these peoples, "Fish, bears, wolves, and eagles were part of the kinship system, part of the community, part of the family structure. Modern urbanite ecologists see these as Other, and romanticize them, but for a Northwest Coast Indian, an alien human was more Other than a local octopus or wolf" (Anderson 1996:66).

Adherents to TEK also recognize that animals existed before humans did. In Rock Cree cosmogony, animals were recognized to have existed before human beings, and humans were known to come from animals during the progression of the earth (Brightman 1993). Thus, adherents to TEK are untroubled by the idea that humans came from nonhuman organisms. "Sungmanitu Tanka Oyate, (wolves), were a nation long before human beings realized and declared themselves a nation" (Manuel Iron Cloud [Oglala Lakota] in McIntyre 1995). Recognition of this similarity and connection between human and nonhumans leads also to the TEK concept that all things are related, a concept that is less than 150 years old in Western thought. Darwin's (1859) demonstration that humans must have evolved from nonhuman ancestors was such a revolutionary concept because it ran counter to prevailing Western philosophy, from Aristotle to Kant. Perhaps the most important consequence of Charles Darwin's theory of common descent was its change in the position of humans from separate from nature to part of nature (Mayr 1997:182). Darwin's accomplishment served to establish in Western thought one of the long-standing tenets of TEK, i.e., humans are related to nonhumans and irrevocably connected to the natural world.

One aspect of TEK often unrecognized is the emphasis that not only are humans dependent upon the nonhuman, but also that the reverse is often true. Activities of humans are often important in shaping the lives and ecology of the nonhuman. Burning practices of the indigenous peoples of both North America and Australia have major effects on local community structure and lead both to increased biodiversity and increased population size of many important species (Lewis 1989). In contrast, both Western science and popular culture have considered "wildfires" to be both "highly disruptive and environmentally destructive," and only very recently has Western science come to realize the value of fire as both an important component of community ecology and as a management tool.

It is also important to emphasize that TEK leads its adherents to identify with predators (Tanner 1979, Buller 1983, Brightman 1993, Marshall-Thomas 1994, Marshall 1995), which means they recognize that they must take lives in order to live themselves. Native people also recognize that they may be potential prey for other large carnivores, which is opposed to the prevailing idea in Western culture that any predator that takes a human life must be killed as if it were a criminal. This knowledge of connectedness and ecological similarity allows native people to respect predators, since they know how difficult it is to take the lives of other individuals (Tanner 1979). It is also recognized that predation is not a hostile act, and that nonhuman predators may feel strongly connected to the prey when

they have taken its life (Marshall-Thomas 1994; R. Pierotti, *unpublished observations*).

All predators were respected for their strength and their weapons, but one predator spoke particularly to many native peoples, e.g., Comanche, Shoshone (Buller 1983), Blackfeet, Lakota (Marshall 1995, McIntyre 1995), and Northwest coastal tribes (Anderson 1996). This was wolf, *Canis lupus,* who was found throughout North America, lived in family groups, and was not strong or swift enough to kill large prey alone. Wolves working cooperatively as a group, however, could bring down even large plant eaters. Their weapons were "formidable, but the first people saw that they were of little use without endurance, patience and perseverance. . . qualities the first peoples could develop in themselves" (Marshall 1995:6). More important, however, was that if people were to emulate the wolf, they also had to exist to serve the environment, and to accept the connectedness of life. *"Understanding this reality made them truly of the earth, because every life ultimately gives itself back to the earth"* (Marshall 1995: 6–7). Western scientists studying wolves have realized that native people have far greater knowledge of the behavior and ecology of wolves than Western science, and have turned to native people to help them in their study of these animals. For example, an Alaskan wolf biologist has described the difficulty he had in locating active dens until he turned to local Inupiaq hunters for help (Stephenson 1982).

As in this last example, employment of TEK and its emphasis on connectedness between organisms can reveal connections between species unknown to, or unrecognized by ecologists. For example, during a study of beluga whales, *Delphinapterus leucas,* in the Bering Sea, it was noted that beluga no longer entered certain rivers. The indigenous people attributed this to the presence of beavers, which confused ecologists involved in the study until it was explained that beaver build dams in streams where salmon spawn, and that since salmon no longer used these rivers, the beluga, which fed upon the salmon, had ceased to use these rivers (Huntington and Myrmin 1996).

Another example comes from the TEK-based idea that badger and coyote were "friends" and hunted together. Western ecology, driven by the idea that competition among species drives community dynamics, categorized the relationship between coyote and badger as competition between these two predators (Minta et al. 1992). Recent study, however, revealed the empirical basis of this story. Coyotes and badgers wander around together, but when they see a squirrel, coyote gives chase. If the squirrel goes into a burrow, badger will dig up the burrow, or both will dig together. If the squirrel stays in the burrow, badger will often get it and have a meal. If the squirrel leaves by another burrow exit, coyote often gets it and has a meal. Food is not shared, but both coyote and badger catch more squirrels when they hunt together than when they hunt alone (Minta et al. 1992).

Our own research (R. Pierotti) into foraging associations between marine birds and mammals was influenced by the native idea that mixed species animal groups actually forage cooperatively, rather than competitively (Pierotti 1988*a*, *b*). The relationship between foraging marine mammals and associated gulls (*Larus*) was assumed to be competition, or at best commensalism in the Western scientific literature. However, we found that sea lions, dolphins, and even large whales use the conspicuous gulls to locate rich concentrations of patchily distributed fish and squid. The foraging activities of the mammals then serve to concentrate the prey at the surface, where the prey is much more accessible to the gulls, and as in the badger–coyote example, both groups experience a higher rate of feeding success as a result of their cooperation.

Similarly, the idea of an intergenerational conflict between adults and juveniles of the same species over care of unrelated offspring by nonrelatives (Pierotti 1988, 1991) was a result of traditional training that stressed recognizing the importance of individuals. The accepted scientific view of this "alloparental care" was that it was a result of either errors on the part of adults, or of kin selection (Riedman 1982). In contrast, by identifying and following individuals of both generations this conflict was recognized as a complex interaction between juveniles and adults. The juveniles sought adequate parental care, even from nonrelatives. Adults, depending upon specific ecological conditions, either (1) readily provided such care, or (2) did not give care when they could avoid it. The outcome of these behavioral interactions varied between years, even for the same individuals, and could not be simply predicted based upon genetic or other deterministic models.

Conclusions

TEK is a constantly evolving way of thinking about the world. Although views covered by TEK are described as "traditional," this should not be taken to mean that they cannot change. The essence of traditional beliefs is that they have existed long enough for long-range consequences to affect them (Anderson 1996). Use of the term traditional implies the repetition of a fixed body of data. Each generation, however, makes observations, compares their experiences with what they have been taught, and conducts experiments to test the reliability of their knowledge (Barsh 1997). TEK is linked to long-range consequences of human action and environmental change; therefore adherents to TEK should always be able to modify their activities and responses if environmental conditions so demand.

This reliance on new information as local conditions change reinforces the spatial orientation of TEK, in contrast to the temporal orientation of Western ethical

systems (Deloria 1992). The spatial orientation of native peoples leads them to recognize that there are always new experiences and knowledge in the world, and transmission of TEK by oral traditions allows them to adjust in response to changing conditions. As a result, ethical and moral instructions for living are fit to the current ecological and historical context. In contrast, Western ethical behavior is derived from unchanging ideas (written words) that are thousands of years old, e.g., ancient Greek philosophers, the Bible, or the Koran. While these concepts may have been of crucial importance when they were first written down, they may be of little relevance to current ecological and social conditions. TEK derives from the physical, biological, and spiritual environment that is part of daily life (Deloria 1992), and the knowledge and experience gained through daily interaction with that environment. In TEK, the Western dichotomies of natural vs. supernatural, physical vs. metaphysical, sacred and profane, nature vs. nurture become largely meaningless. Experience, which emerges from local places, is the basis of both science and spirituality.

What will be gained by placing TEK-based worldviews into a broad-based system of knowledge is the ability to access a large amount of information and experience that has been previously ignored, or treated as mysticism. This additional knowledge, with its empirically derived emphasis on the natural world, can provide us with scientifically testable insights into some of the most pressing problems facing humankind today. The multidisciplinary structure inherent in TEK should make it relatively easy for knowledge and insights gained through TEK to be communicated among members of different disciplines, leading various stakeholders to negotiate more effectively with one another through a shared conceptual framework. As one Western scientist has put it "Imagine people who confidently assume they can best describe and manage the natural resources of an unfamiliar region alone—ignoring local hunters who know every cave and waterhole and the movements and behavior of a host of local species. Such, historically, has been the custom of most scientists and natural resource managers working in unfamiliar environments" (Johannes 1989:5).

To emphasize this point, we would like to close by relating an experience we are sure we share with many biologists, i.e., being asked "What good is the work that you do?" This question contains the hidden assumption that if what we do does not directly benefit human beings in some way it is without value. We often answer that our work teaches us more about the other members of our community and how to live with them, but most people of Western heritage appear confused by this answer, and do not understand this point. In contrast, if we give this answer to Native American elders, they are completely satisfied, for they understand implicitly what we are trying to accomplish, and its significance to humans.

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