No. 17-532

In the Supreme Court of the United States

Clayvin Herrera,
Petitioner,

v.

State of Wyoming,
Respondent.

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

AMICI CURIAE BRIEF OF WYOMING STOCK GROWERS ASSOCIATION, WYOMING FARM BUREAU FEDERATION, WYOMING WOOL GROWERS ASSOCIATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, COLORADO FARM BUREAU FEDERATION, AND SOUTH DAKOTA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENT

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November 20, 2018

QUESTION PRESENTED

The *amici curiae* file this brief in support of the State of Wyoming to focus on an important aspect of the Question Presented to the Court, namely:

If neither Wyoming's admission to the Union nor the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty hunting rights, are federally managed lands that are leased or permitted to private third parties "[]occupied" by function of those leases or permits and thereby not subject to the hunting rights established in the 1868 Crow Tribe Treaty?

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IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

Amici curiae represent farming and ranching interests across the western United States—including over 175,000 members in six separate states. Among these groups, the *amici curiae* fall into three broad categories. First, a number of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to the treaty hunting right contained in the Crow Tribe Treaty at issue in this case. Second, a number of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to different treaties that use identical language to the Crow Tribe Treaty at issue in this case. Finally, the remainder of the *amici curiae* operate in and represent members who occupy federally managed land pursuant to leases and permits in areas subject to other treaty hunting rights, based on different language than the Crow Tribe Treaty.

Federal lease and permit holders, like those represented by *amici curiae*, pay the United States for the privilege of grazing livestock on federally managed lands, including national forest lands. *See* Appendix A, USDA Forest Service: Term Private Land

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[1] The parties have consented to the filing of this *amici curiae* brief. *See* Supreme Court Rule 37.3(a). Additionally, pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Grazing Permit. These lessees and permittees do so under a number of conditions imposed by the United States, such as managing, protecting, and improving (when necessary) the lands subject to the permit. *See id.* In exchange, federal permit and leaseholders have the right to be present on the subject lands, graze their livestock on those lands, and exert a level of control over the lands. *See id.*

I. *AMICI CURIAE* IN THE GEOGRAPHIC AREA AFFECTED BY THE CROW TRIBE TREATY

Wyoming Stock Growers Association ("WSGA") is a non-profit membership organization founded in 1872 and incorporated under the laws of the State of Wyoming. WSGA represents over 1,200 livestock producers across the state and advocates for the interests and advancement of the livestock industry, Wyoming agriculture, rural community living, and the livestock-related interests of its members. As part of its mission, WSGA also informs and educates the public regarding the role of the livestock industry in the community, in partnership with the state and federal government. WSGA has approximately 475 members who hold grazing permits from either the Bureau of Land Management or the United States Forest Service, some of whom operate in the national forests in the State of Wyoming. WSGA and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Wyoming Farm Bureau Federation ("WYFB") is a non-profit membership organization founded in 1920 and incorporated under the laws of the State of Wyoming. WYFB represents more than 13,000 members in all 23 counites in the state, including over 2,600 agricultural producers. WYFB's mission is to protect, promote, and represent the economic, social, and educational interests of its members at the local, state, and national levels, as well as to protect private property rights and help its members achieve an equitable return on their investments. WYFB has members who operate in the national forests in the State of Wyoming. WYFB and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Wyoming Wool Growers Association ("WWGA") is a non-profit membership organization founded in 1903 and incorporated under the laws of the State of Wyoming. WWGA represents over 300 members across the state, and works to protect, preserve, and enhance the lamb and wool industry and the ranching community. As part of its mission, WWGA is an active partner with the state, its citizens, and the federal government in caring for, enhancing, and adding value to the renewable resources in the state. WWGA has members who operate in the national forests in the State of Wyoming. WWGA and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

Montana Farm Bureau Federation ("MTFB") is a non-profit membership organization founded in 1919 and incorporated under the laws of the State of Montana. MTFB represents over 21,000 member-families in the state and works to enhance both the reputation and the viability of the agricultural industry. MTFB's mission is to promote, protect, and represent the economic, social, and educational interests of its farmer and rancher members. MTFB has members who operate in the national forests in the State of Montana. MTFB and its members operate in the geographic area subject to the Crow Tribe Treaty and will be bound and affected by the decision of this Court.

II. *AMICI CURIAE* IN GEOGRAPHIC AREAS SUBJECT TO INDIAN TREATIES WITH IDENTICAL LANGUAGE AS THE CROW TRIBE TREATY

Idaho Farm Bureau Federation ("IDFB") is a non-profit membership organization founded in 1939 and incorporated under the laws of the State of Idaho. IDFB represents over 80,000 member-families, who farm and ranch in all 44 counties within the state. IDFB's mission is to strengthen agriculture locally and to protect the rights, values, and property of its members and all producers in the state. IDFB works at a local, county, state, and national level to analyze problems and formulate action to achieve educational improvement, economic opportunity, and social advancement. IDFB has members who operate in the national forests in the State of Idaho. IDFB and its members operate in the geographic area subject to the

Bannock and Eastern Shoshone Tribe Treaty, which, while not directly at issue in this case, provides those tribes with an identical hunting right to that contained in the Crow Tribe Treaty.[2] Any decision of this Court may be applied to the Bannock and Eastern Shoshone Tribe Treaty, which will directly affect IDFB and its members.

Utah Farm Bureau Federation ("UTFB") is a non-profit membership organization founded in 1916 and incorporated under the laws of the State of Utah. UTFB represents over 34,000 members in all 29 counties in the state. UTFB works to support its producer-members through legislative lobbying, leadership development programs, commodity associations, rural health and safety programs, insurance products, and agricultural supplies and marketing. UTFB actively works at the local, state, national, and international level to represent the interests of its members and the agricultural industry. UTFB has members who operate in the national forests in the State of Utah. UTFB and its members operate in the geographic area subject to the

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[2] "Article 4 – 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 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." *Treaty with the Eastern Band Shoshoni and Bannock, 1868*, July 3, 1868, 15 Stat. 673 (emphasis added) ("Bannock and Eastern Shoshone Tribe Treaty").

Navajo Tribe Treaty, which, while not directly at issue in this case, provides the Navajo Tribe with a nearly identical hunting right as contained in the Crow Tribe Treaty.[3] Any decision of this Court may be applied to the Navajo Tribe Treaty, which will directly affect UTFB and its members.

III. *AMICI CURIAE* IN GEOGRAPHIC AREAS SUBJECT TO INDIAN TREATIES WITH HUNTING RIGHTS SIMILAR TO THE CROW TRIBE TREATY

Colorado Farm Bureau Federation ("COFB") is a non-profit membership organization founded in 1919 and incorporated under the laws of the State of Colorado. COFB represents nearly 25,000 members in all 64 counties in the state. COFB's mission is to preserve and protect the future of agriculture and rural values and to protect the Colorado way of life. COFB represents its members' interests in areas such as property rights, water rights, use of public lands, the environment, and education. COFB has members who operate in the national forests in the State of Colorado. COFB and its members operate in the

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[3] "Article 9 – In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, *but retain the right to hunt on any unoccupied lands contiguous to their reservation*, so long as the large game may range thereon in such numbers as to justify the chase . . .." *Treaty with the Navaho* [sic]*, 1868*, June 1, 1868, 15 Stat. 667 (emphasis added) ("Navajo Tribe Treaty").

geographic area subject to the Ute Tribe Treaty, which, while not directly at issue in this case, provides the Ute Tribe with a tribal hunting right.[4] Any decision of this Court may be applied to the Ute Tribe Treaty, which would directly affect COFB and its members.

South Dakota Cattlemen's Association ("SDCA") is a non-profit membership organization founded in 1948 and incorporated under the laws of the State of South Dakota. SDCA represents over 800 members across the state. SDCA is a producer-oriented organization that is actively involved advocating for its members' interests in agricultural policy, property rights, environmental management, and federal land use at a local, state, and national level. SDCA has members who operate in the Black Hills National Forest in South Dakota. SDCA and its members operate in the geographic area subject to the Sioux Treaty of 1868, which, while not directly at issue in this case, provides various Sioux Tribes, including the Oglala Lakota Tribe, with a tribal hunting right.[5] Any

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[4] "Article 2 – The United States shall permit the Ute Indians to hunt upon [the ceded] lands so long as the game lasts and the Indians are at peace with the white people." *Treaty with the Ute, 1874*, Apr. 29, 1874, 18 Stat. 36 ("Ute Tribe Treaty").

[5] "Article 11 – In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase." *Treaty with the Sioux - - Brule,*

decision of this Court may be applied to the Sioux Treaty of 1868, which would directly affect SDCA and its members.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

In May 1868, the United States and the Crow Tribe of Indians ("Crow Tribe") entered into the Second Treaty of Fort Laramie, which was ratified by the Senate and signed by President Andrew Johnson on May 7, 1868. *Treaty Between the United States and the Crow Tribe of Indians*, May 7, 1868, 15 Stat. 649 ("Crow Tribe Treaty"). The Crow Tribe Treaty resulted in the creation of the Crow Reservation, located in present-day southern Montana, and the tribe's sale of the remainder of its historical territory, which had been partially established by the First Treaty of Fort Laramie, to the United States.[6] *First*

Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee - - and Arapaho, 1868, Apr. 29, 1868, 15 Stat. 635 ("Sioux Treaty of 1868").

[6] "The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth." *First Treaty of Fort Laramie*, Sept. 17, 1851, 11 Stat. 749, Art. 5.

Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749. Pursuant to treaty negotiations, the Crow Tribe Treaty provided 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 as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow Tribe Treaty, Art. 4 (emphasis added).[7]

II. FACTUAL BACKGROUND

In January 2014, Petitioner Clayvin Herrera, an enrolled member of the Crow Tribe who resides on the Crow Reservation in Montana, went on an elk hunt with a group of other enrolled tribe members. Pet. Br. 1, 13. The group tracked a heard of elk off of the Crow Reservation and crossed the Wyoming state line, entering into the Bighorn National Forest. *Id.* When entering the Bighorn National Forest, the hunting group crossed a fence that is maintained by a federal permit holder and crossed lands that are subject to a grazing permit possessed by the same, independent third-party. Pet. App. 5; JA 54, 68–70, 74–75. The group "shot, quartered, and packed" "three elk" out of the Bighorn National Forest and brought the harvest back to their residences on the Crow Reservation in

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[7] "Article 4 – The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, 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 as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow Tribe Treaty, Art. 4.

Montana. JA 256. Upon learning of and connecting Herrera to the hunt, Wyoming authorities cited Herrera for two criminal misdemeanors under Wyoming law: (1) taking an antlered big game animal without a license or during a closed season; and (2) being an accessory to the same. Pet. App. 5, 36; JA 117, 165.

III. PROCEDURAL HISTORY

After being formally charged, Herrera moved to dismiss the charges based on the Crow Tribe Treaty provision, contained in Article 4, which he claimed granted him the right, as a registered Crow Tribe member, to hunt in the Bighorn National Forest. Pet. App. 6; Crow Tribe Treaty, Art. 4.

The State of Wyoming opposed, relying in part on the cases *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Pet. App. 37–39. In *Race Horse*, this Court held that Wyoming's admission into the Union "on equal terms with the other states" abrogated the Bannock Indian Tribe's treaty hunting rights and that Wyoming's statehood terminated what the Court deemed a "temporary and precarious," rather than a "perpetual" hunting right. 163 U.S. at 508–15. The Bannock Indian Tribe's treaty hunting right is based on identical language to that used in the Crow Tribe Treaty. *See* Bannock and Eastern Shoshone Tribe Treaty, Art. 4. In *Repsis*, the Tenth Circuit, following *Race Horse*, held that the "Tribe's right to hunt reserved in [the Crow Tribe Treaty was] repealed by the act admitting Wyoming into the Union." 73 F.3d

at 992. The Tenth Circuit also indicated in an "alternative basis for affirmance" that the Crow Tribe's hunting rights were abrogated by the establishment of the Bighorn National Forest because when "Congress created the Big Horn National Forest," the land therein was "no longer available for settlement," thereby "result[ing] in the 'occupation' of the land." *Id*. at 993. According to the Tenth Circuit, the Bighorn National Forest "ha[s] been 'occupied' since the creation of the national forest in 1887 [sic]." *Id*. at 994. This Court declined to grant certiorari in *Repsis*. 116 S.Ct. 1851 (1996) (mem.).

Herrera, in response, argues that *Race Horse* and *Repsis* are no longer good law, as this Court, in 1999, held that the principal theory upon which *Race Horse* rested was no longer binding precedent. Pet. App. 39–41; s*ee Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–07 (1999). Herrera argues that "[t]he Court also rejected *Race Horse*'s 'temporary and precarious' language as 'too broad to be useful in distinguishing rights that survive statehood from those that do not,' explaining that rights reserved in Indian treaties should continue in force unless a terminating event defined in the treaty has occurred." Pet. Br. 13 (*citing Mille Lacs*, 526 U.S. at 206-07). Finally, Herrera cites to the dissent in *Mille Lacs* to support the proposition that "[t]reaty rights are not impliedly terminated upon statehood." Pet. Br. 13 (*citing Mille Lacs*, 526 U.S. at 207 and *Mille Lacs*, 526 U.S. at 219 (Rehnquist, C.J., dissenting)).

Here, the Wyoming State Circuit Court followed *Repsis* in both holdings and denied Herrera's motion

to dismiss the charges brought against him by the State of Wyoming. Pet. App. 3–35; 36–43. Herrera was convicted on both counts. Pet. App. 9. The Wyoming District Court affirmed the Circuit Court and the Wyoming Supreme Court denied Herrera's petition for a writ of review. Pet. App. 3–35; 1–2.

SUMMARY OF THE ARGUMENT

The arguments presented by Herrera and *amicus curiae* the United States overlook those people who regularly use and work on federally managed lands. Federal permit and lease holders, such as ranchers and farmers, enter into an agreement with the federal government in order to graze livestock on vast swaths of federally managed lands, including lands located in today's many national forests. *Amici curiae* request that this Court recognize that those permitted and leased lands are occupied by the permittees and lessees who are regularly present on those lands and who work, use, and exercise a level of control over those lands. The Crow Tribe's treaty hunting rights, whether applicable in Wyoming or in the Big Horn National Forest, do not apply to federally permitted and leased lands.

The term "unoccupied," as used in the Crow Tribe Treaty, has a clear and unambiguous meaning. To occupy means to take up space; to reside in, as an owner or tenant; or to hold in possession. This understanding of the term "occupy" has not varied in over a century. Federal permit and lease holders,

such as those represented by *amici curiae*, occupy the federally managed lands for which they have permits and leases. Federal permit and lease holders are physically present on the lands subject to their agreements, have possession of those lands, and exercise a level of control over them. Federal permits and leaseholds are, therefore, not "unoccupied" as contemplated in the Crow Tribe Treaty.

Furthermore, the plain meaning of the term "occupy" was the same when the Crow Tribe Treaty was written and ratified as it is today. Courts and legal dictionaries throughout the late nineteenth and early twentieth centuries recognized that "occupy" included possessing, holding or keeping for use, exercising control over, and putting property to a use appropriate to its general character. Federal permit and lease holders not only exert a level of possession and control over these lands, but also quite clearly put them to a use that is appropriate to the lands' character, such as grazing.

Finally, even if this Court decides to examine the subjective intent of the parties behind the hunting rights contained in the Crow Tribe Treaty, the intent was to limit conflict between the Crow Tribe members and settlers moving West, as asserted by the United States in its brief. U.S. Br. 25. That intent encompasses a limitation on tribal members' hunting rights on lands regularly and legally maintained and worked—occupied—by settlers, such as the settlers' grazing and farming lands. Petitioner and the United States both affirmatively acknowledge that farm lands were considered occupied in the time

contemporaneous to signing the Crow Tribe Treaty. Pet. Br. 35; U.S. Br. 26. Those lands are nearly identical to the current federally permitted and leased lands occupied by *amici curiae's* members.

Practically speaking, if this Court were to allow for an unfettered tribal hunting right on lands subject to legal use and possession by permits or leases, instead of limiting the hunting rights to all "unoccupied" lands of the United States, ranchers and farmers would be forced to contend with out-of-season, unmanaged, tribal hunting on their federal allotments, potentially endangering the ranchers' and farmers' operations, livestock, their own personal safety, and the safety of those out-of-season Indian hunters. If out-of-season and unlicensed hunting were allowed, the ranchers and farmers would have no way of knowing when the hunting will occur on their leased or permitted lands, would have no ability to prepare for those hunts, and may be unexpectedly confronted with armed persons on their permit and leaseholds. In addition, this Court's holding could then easily be applied to a number of different Indian tribe treaties that contain identical language to the Crow Tribe Treaty, including, but not limited to: the Bannock and Eastern Shoshone Tribe Treaty and the Navajo Tribe Treaty. Further, there are a number of Indian treaties that, while containing slightly different language, could be analogized to the Crow Tribe Treaty in this matter, including, but not limited to: the Sioux Treaty of 1868 and the Ute Tribe Treaty. *Amici curiae* wish to make the Court acutely aware

that any decision in this case will almost certainly not be limited to the Crow Tribe Treaty.[8]

ARGUMENT

In order to determine the bounds of the hunting right granted to the Crow Tribe in the Crow Tribe Treaty, this Court must first look to the plain meaning of the words used. If—and only if—the language is ambiguous, should the Court then look to evidence surrounding the execution of and intent behind the treaty:

> All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used—the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room to doubt what the parties intended, they must be interpreted according to their natural and ordinary significance. If the words are ambiguous, then resort may be

[8] Not only could any opinion in this case be applied to the numerous Indian treaties in the West, which confer identical or similar hunting rights, this Court, in *Seufert Bros. Co. v. United States*, has already held that rights conferred upon a tribe under a treaty apply beyond the historically ceded territory of the tribe in question. 249 U.S. 194 (1919). Thus, the definition of "unoccupied" will extend to smaller tracts of federally managed lands throughout the United States.

> had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted.

United States v. Choctaw Nation, 179 U.S. 494, 531 (1900) (on interpretation of the agreement entered into between the United States and the Wichita and Affiliated Bands of Indians).

I. THE PLAIN LANGUAGE OF THE CROW TRIBE TREATY DOES NOT PROVIDE TRIBE MEMBERS A RIGHT TO HUNT ON FEDERALLY PERMITTED OR LEASED LANDS BECAUSE THEY ARE NOT "UNOCCUPIED"

The plain meaning of the term "unoccupied" in the Crow Tribe Treaty does not allow Crow Tribe members to hunt on federally managed lands that have been permitted or leased to private parties, given that those lands are occupied by the federal permit and lease holders.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (*citing United States v. First Nat. Bank*, 234 U.S. 245,

258 (1914); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1895); *Lake County v. Rollins*, 130 U.S. 662, 670, 671 (1889)). The same is true of Indian treaties. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (rejecting other canons of interpretation when the plain meaning of the treaty was clear); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices."); *Jones v. United States*, 846 F.3d 1343, 1352 (Fed. Cir. 2017) ("The Treaty was written in English, however, and we must honor any unambiguous language in the treaty."). This Court does not have any additional duty of interpretation when the language of a treaty is "plain and admits of no more than one meaning." *Caminetti*, 242 U.S. at 485 (*citing Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)); *see Chickasaw Nation*, 534 U.S. at 94; *Choctaw Nation*, 179 U.S. at 531.

The word "occupy," as defined by MERRIAM-WEBSTER means: "to take up (a place or extent in space)" or "to reside in as an owner or tenant." *Occupy*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/occupy (last visited Nov. 18, 2018). BLACK'S LAW DICTIONARY defines "occupy" as: "To hold possession of; to be in actual possession of." *Occupy*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, BLACK'S LAW DICTIONARY defines "unoccupied" as "(Of a building) not occupied; vacant." *Unoccupied*, BLACK'S LAW DICTIONARY (10th ed. 2014).

This plain meaning of the term "occupy" has not varied in over a century. The first BLACK'S LAW DICTIONARY, published in 1891, defined "occupy" as: "To hold in possession; to hold or keep for use." *Occupy*, BLACK'S LAW DICTIONARY (1st ed. 1891). ANDERSON'S DICTIONARY OF LAW, published in 1889, defined "occupy" as: "To hold in possession; to hold or keep for use," and further explained that occupy "[i]mplies actual use, possession or cultivation by a particular person." *Occupy*, ANDERSON'S DICTIONARY OF LAW (1st ed. 1889).

While the definition of "possession" may be less obvious, MERRIAM-WEBSTER, in relevant part, defines the term as: "the act of having or taking into control," "control or occupancy of property without regard to ownership," or "something owned, occupied, or controlled." *Possession*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/possession (last visited Nov. 18, 2018). BLACK'S LAW DICTIONARY defines the term as: "The fact of having or holding property in one's power; the exercise of dominion over property." *Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, dating back to the nineteenth century, "[i]n common speech a man is said to possess or be in possession of anything of which he has the apparent control." *Id.* (*citing* FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 1–2 (1888)). Further, land that is lawfully possessed by a party not holding title is considered derivatively possessed. *Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014).

All of these definitions lead to the understanding that there are certain indices of occupation: presence, possession, use, control (actual or apparent), and cultivation.

The United States Forest Service ("Forest Service") and the Bureau of Land Management ("BLM") administer over 24,500 grazing permits and leases in 16 western states. *BLM and Forest Service Announce 2018 Grazing Fees*, Bureau of Land Management, https://www.blm.gov/press-release/blm-and-forest-service-announce-2018-grazing-fees (last visited Nov. 18, 2018). These lessees and permittees pay for the privilege to graze livestock on federally managed lands, sometimes referred to as "public lands," pursuant to their agreements with the United States. *See* App. A. The grazing lands are considered to be part of the permit, and the lessee or permittee is responsible for managing, protecting, and improving (when necessary) the lands subject to the permit, in conjunction with the Forest Service or BLM and its authorized officer. *See id.* The Forest Service defines a grazing permit as "a document authorizing livestock to use [National Forest Service] lands or other lands under Forest Service control for livestock production." Forest Service Manual 2200, *et seq.*, at 2230.5, https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2200 (last visited Nov. 18, 2018) ("FSM 2200"). Permits can be cancelled for non-use. *Id.* at 2231.62a. When calculating the grazing fees for a grazing permit, the Forest Service bases the calculation off of a "head month," which is "a month's *use and occupancy* of range by one weaned or adult cow with or without calf, bull, steer, heifer, horse,

burro, or mule, or 5 sheep or goats." *Id.* at 2230.5 (emphasis added).

Essentially, federal permit and lease holders have provided consideration for and entered into an agreement with the United States to graze their livestock on specific portions of federally managed lands. In turn, the permit and lease holders have the right to be present on, use, cultivate, and exert a level of control over those lands.[9] This is a partnership between the United States and the lessee or permittee, both of whom benefit from the relationship. Lessees and permittees receive the benefit of operating on federally managed lands and the Forest Service and BLM use the lessees and permittees to maintain the land and to achieve the "resource management objectives" and "to best serve the public's long-term economic and social needs." *E.g.*, FSM 2200, at 2230.2.

Under the plain meaning of "unoccupied," federally permitted and leased lands are occupied by the private parties who possess those permits and leases. The Forest Service acknowledges, in its own manual, that permittees use the permitted lands and that permittees' livestock occupy the lands. *See* FSM 2200, at 2230.5. The permit holders have the right to hold, use, control, cultivate, and operate upon those lands. Indeed, the Forest Service's agent in this case testified that the fence Petitioner crossed at the

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[9] This right is subject to the terms and conditions outlined in the specific permit or lease. Additionally, the right is subject to termination by the authorizing agency, as described in the permit or lease. *See*, App. A.

Wyoming state line was maintained by the federal permit holder who held the grazing permit to those lands. JA 75, 131. While the leases and permits may be subject to some conditions, the federal government grants lessees and permittees the right to put those lands to use, and to exert a level of control over those lands, and in turn, expects them to maintain and protect those lands for the benefit of the United States.

Some form of extraordinary evidence would be required to demonstrate that another, differing or conflicting meaning of the term "occupy" exists or has existed in over a century. *See Northwestern Bands of Shoshone Indians*, 324 U.S. at 353; *Chickasaw*, 534 U.S. at 94; *Jones*, 846 F.3d at 1352. When the plain meaning is apparent, this Court should not differ from that meaning. *Id.* Federal lessees and permittees exhibit all of the indices of occupation, as understood by lawyers and laypersons alike, of their leased and permitted lands. The Court's holding in this matter, therefore, should not allow tribal hunting on federal permit and leaseholds pursuant to the Crow Tribe Treaty.

II. THE CONTEMPORANEOUS MEANING OF "UNOCCUPIED" DEMONSTRATES THAT FEDERALLY PERMITTED AND LEASED LANDS ARE INHERENTLY OCCUPIED

The historical understanding of the word "[]occupied," as used in the Crow Tribe Treaty—as in other contemporaneous uses—contemplated

occupation by possession, control, and/or use, not simply a perpetual, physical presence.

"When congress used the word 'occupied,' it could have meant no more than possession of the country." *United States v. Rogers*, 23 F. 658, 666 (W.D. Ark. 1885). The BLACK'S LAW DICTIONARY definition of "occupy," is, in part, based on this Court's 1883 decision in *Missionary Soc. of M.E. Church v. Dalles City*, which states "[t]o occupy means to hold in possession; to hold or keep for use." 107 U.S. 336 (1883); *see also Occupy*, BLACK'S LAW DICTIONARY (10th ed. 2014). A variety of courts in the late nineteenth and early twentieth centuries understood the term "occupied" to include property that is "subject[] to the will and control" of a party or "put to a use appropriate to its general character." *Horton v. Moore*, 38 Cal. App. 623, 628 (2nd Dist. 1918) ("It is also held that the terms 'occupation,' 'possession pedis,' 'subjection to the will and control,' are synonymous; that property is possessed and occupied when it is put to a use appropriate to its general character.") (*citing Andrus v. Smith*, 133 Cal. 78 (1901); *Webber v. Clarke*, 74 Cal. 11 (1887); *Rogers*, 23 F. 658 (W.D. Ark. 1885); *Lawrence v. Fulton*, 19 Cal. 683 (1862)); *see Bailey v. Irby*, 2 Nott & McC. 343, 345 (S.C. Const. App. 1820) (equating "actual occupancy" with "possession," and "a *pedia possessio*"); *accord Jackson ex dem. Gilliland v. Woodrudd*, 1 Cow. 276 (N.Y. Sup. Ct. 1823); *see also Territory v. Stone*, 2 Dakota 155, 4 N.W. 697 (1880) (equating the words 'occupy' and 'use'). This understanding of "occupy" even extended, specifically, to lands that were used for

cultivation and grazing. *Collier v. Bartlett*, 175 P. 247, 248 (Okla. 1918).

Particularly important to this Court's inquiry, are a number of state court opinions interpreting Indian treaty rights. These courts long understood "occupied lands" to include, among other things, lands used for subsistence—including agricultural activities. *See State v. Coffee*, 97 Idaho 905, 907 (1976) ("The area occupied by the Idaho Kootenai was used primarily for residence and subsistence. The tribe gained sustenance mainly from fishing, although hunting, berry picking, trapping and root digging were also impotant [*sic*].") Further, when analyzing the language granting the Nez Perce Tribe the right to hunt on "open and unclaimed land," the Idaho Supreme Court stated the phrase "was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership." *State v. Arthur*, 74 Idaho 251, 256 (1953).

This Court, when examining the treaty between the United States and Yakima Tribe, stated "the object of the treaty was to limit the *occupancy* [of the Indian tribe] to certain lands, and to define rights outside of them." *United States v. Winans*, 198 U.S. 371, 379 (1905). While it was clear that the tribe would settle and reside on a portion of the land, this Court reasoned that the entirety of the land reserved for the tribe, which the tribe exercised a particular level of control over, was thereby occupied by the tribe in its entirety. *Id.* at 379, 381. Justice Brown, in his dissent from the Court's majority opinion in *Race*

Horse, understood that "the words 'unoccupied lands of the United States' [] refer, not only to lands which have not been patented, but also to those [lands] which have not been settled upon [or] fenced . . .." *Race Horse*, 163 U.S. at 520. As this Court has previously recognized, the Court should refrain from interpreting a treaty against its plain meaning, especially when the historical context weighs against that interpretation. *Id.* at 516. ("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.")

Federal permittees and lessees are required to take responsibility for the use and maintenance of the land they graze. Their permits require them to actually use the land. *See* FSM 2200, at 2231.62a. Their permits require them to put the lands to a beneficial use that is appropriate to the land's character—namely, grazing. *See, e.g.*, FSM 2200, at 2230.3, 2231.02, 2231.03. They fence and maintain the property subject to their permits. *See* JA 54, 68–70, 74–75; *see also* App. A.[10] This does not differ from

[10] While the United States is not required to fence federally managed lands in compliance with state "fence laws," *see Light v. United States*, 220 U.S. 523, 534–537 (1911), many federal permits are conditioned on the maintenance or construction of fencing to contain grazing to the permitted area and prevent livestock from entering non-permitted areas. *See* 43 U.S.C.

lands that were grazed by settlers in the nineteenth century, with the exception that the lands today are much more clearly demarcated, because they are legally required to be under the federal permit and leasing system. *See* FSM 2200, at 2231.2, *et seq*. Federally managed lands, in their entirety, are much more clearly denoted on maps than they were in 1868. *See, e.g. Federal Lands and Indian Reservations*, USGS, https://nationalmap.gov/small_scale/printable/fedlands.html (last visited Nov. 18, 2018). In addition, federal permits and leases are required to give specific definitions of their borders, including maps which are attached to those permits. *See* App. A. If anything, lands that are occupied by federal permit holders are much more obvious and apparent today than the lands used for grazing by settlers in 1868.

Additionally, "[t]o have possession does not require actual residence." *Rogers*, 23 F. at 666. Even though federal permit holders do not live on the federally managed lands in question, that does not mean those lands are not occupied—as courts have made clear for decades. *See Winans*, 198 U.S. at 379,

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§ 315c ("Fences . . . and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary."); *see also Western Watershed Project v BLM*, No. 10-cv-266-S, 2011 WL 13135784, at *3 (D. Wyo. Dec. 14, 2011) (evidencing BLM's offer of a ten year grazing permit conditioned on maintenance of existing fences); *Johnson v. Almida Land & Cattle Company, LLC*, 241 P.3d 673 (Ariz. 2016) (evidencing a Forest Service grazing permit in the Prescott National Forest requiring the permitholder to erect a fence).

381; *Race Horse*, 163 U.S. at 520; *Coffee*, 97 Idaho at 907; *Horton*, 38 Cal. App. at 628; *Collier*, 175 P. at 248. While permit and lease holders do not reside on the permitted lands, they certainly exercise a level of control over the lands in question. *See* App. A; *see also* FSM 2200, at 2231. Permit and lease holders are required to abide by the terms of their agreement with the United States, but that agreement grants them very specific interests in the permitted lands. These interests include the right to access the land, the right to be present on the land, the right to hold the land as separate from surrounding lands (including other permitted lands), and most importantly, the right to put the land to a used that is appropriate to its general character. *See* App. A; *see also* FSM 2200, at 2231. In every contemporaneous understanding of the word "unoccupied," it is clear that permit and lease holders occupy their permitted and leased federal lands.

The meaning of "unoccupied," as used in the Crow Tribe Treaty, does not include federally managed lands that are occupied by federal permit and leaseholders. Those permittees and lessees not only exhibit the indices of occupation, as we understand them today, but as they were understood dating back to the time of the signing and ratification of the Crow Tribe Treaty. Federal permit and leaseholders are not only physically present on the land and have their livestock physically present on the land, but also the permitted and leased lands are subject to a level of control by their permittees and lessees, are put to a beneficial use appropriate to their general character, and are more clearly demarcated than they would have been 150 years ago. Federally

permitted and leased lands are not "unoccupied" as that term was meant by the Crow Tribe Treaty.

III. THE INTENT BEHIND THE CROW TRIBE TREATY ALSO SUPPORTS THE UNDERSTANDING THAT FEDERALLY PERMITTED AND LEASED LANDS ARE NOT "UNOCCUPIED"

Even if this Court goes beyond the plain meaning and looks to the intent behind the Crow Tribe Treaty, the overwhelming evidence indicates that the intent was to reduce conflict between the Indian tribes and the settlers moving West. Accordingly, federally permitted and leased lands should not be considered "unoccupied" since farming and grazing lands, which were possessed, held, and used by early settlers just as they are possessed, held, and used by federal permit and lease holders today, would have been seen as high-conflict areas.

Importantly, it is highly likely that the Crow Tribe knew that the term "unoccupied" would apply to lands that were regularly possessed, held, and used by settlers for agricultural purposes. First, the tribe understood that the term "occupied" encompassed lands that were possessed, used, and controlled by a person, not just settled by residence. "Under the [Shoshone-Bannock] treaty a relatively few Indians were to 'occupy' millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an "unoccupied" to an occupied

status." *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985). The same is true of the Crow Tribe Treaty in this matter. The Crow Tribe Reservation established in the Crow Tribe Treaty comprised of about eight million acres. FREDERICK E. HOXIE, PARADING THROUGH HISTORY: THE MAKING OF THE CROW NATION IN AMERICA, 1805-1935 92 (Cambridge, 1995). No matter the size of the Crow Tribe in 1868, nowhere near every acre would be physically settled by tribe members, yet the entire reservation was "occupied." Crow Tribe Treaty, Art. 2 (the Crow Tribe Reservation is "set apart for the absolute and undisturbed use and *occupation* of the Indians herein named." (emphasis added)). Second, the United States explicitly informed the Crow Tribe that its hunting right would not apply on agricultural lands, which Petitioner acknowledges. Pet. Br. 35. In 1873, when discussing the treaty, a representative of the United States told the Crow Tribe that the tribe members were allowed to hunt on the lands "as long as there are any buffalo, and as long as the white men are not here . . . *with farms*." Pet. Br. 35; U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 132 (1874). There was no misunderstanding—agricultural lands were occupied by the settlers.

Similarly, if, as the United States argues in its brief, the intent behind the Crow Tribe Treaty, from its perspective, was to reduce conflict between the Indian tribes and the settlers moving West, U.S. Br. 25–26, then the term "unoccupied" should be understood to prohibit hunting on agricultural lands where settlers were often present and where they had

showed occupation by using, maintaining, and often fencing or otherwise demarcating those lands. *See supra*, Argument, Sections I & II; *see, e.g.*, *Buford v. Houtz*, 133 U.S. 320, 328 (1890) ("Nearly all states in early days had what was called the 'Fence Law,'-a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals . . . was prescribed."). First, this interpretation is supported by the definition of "occupy" applied by courts through the end of the nineteenth and the beginning of the twentieth centuries, as demonstrated above. *See supra*, Argument, Section II. Second, like Petitioner, the United States acknowledges that agricultural lands were not considered "unoccupied" at the time contemporaneous with ratification. U.S. Br. 26 (*citing* U.S. Office of Indian Affairs, *Annual Report* at 132).

As understood by both the Crow Tribe and the United States, lands used for agricultural activities were explicitly excluded from the Crow Tribe's treaty hunting right, because they are inherently occupied. If the purpose of the term "unoccupied" was to keep the tribes and the settlers from coming into conflict, that conflict would not only occur where the settlers resided, but also in any areas that were regularly and consistently occupied by settlers, like their agricultural lands. *See* Crow Tribe Treaty, Art. 4; U.S. Br. 25. The West, as we know it today, was founded on a robust and prosperous agricultural trade. *See* ALEXANDER MAJORS, SEVENTY YEARS ON THE FRONTIER: ALEXANDER MAJORS' MEMOIRS OF A LIFETIME ON THE BORDER 224 (Rand, McNally, 1893) ("Cattle-raising on the rich, nutritious bunch grass of

the broad valleys of the Territory also soon grew to be a very lucrative business, to supply the numerous placer-mining towns of Montana."); CHRISTOPHER KNOWITON, CATTLE KINGDOM: THE HIDDEN HISTORY OF THE COWBOY WEST 118 (Houghton Mifflin Harcourt 2017) ("Wyoming was all about cattle. . . Fortuitously located at the center of the open range, with Colorado Kansas, and Nebraska to the south and the Montana and Dakota territories to the north, Cheyenne was ideally situated for shipping cattle east by rail."). Both the Crow Tribe and the United States recognized that when settlers moved West and established settlements, they would also establish agricultural operations, and those lands would then be considered "occupied."

The permittees and lessees of today operate more transparently and under more regulation than the ranchers and farmers of the Old West. *See* App. A; *see generally* FSM 2200. Not only that, the lands they occupy are specifically permitted or leased from the federal government and must be explicitly defined by a map. *See* App. A. Both the Crow Tribe and the United States understood that agricultural lands, like those of federal permitted and leased lands, were occupied by those who used, cultivated, and maintained the lands.

In addition to its historic interpretation, the United States also acknowledges that certain lands in today's national forests are "occupied" because they are put to a beneficial use by the United States or its people. U.S. Br. 28 ("[T]he U.S. Forest Service may construct roads, campsites, or administrative

buildings on particular tracts of National Forest land. Where the Forest Service has done so, those areas may be considered occupied under the 1868 Treaty. . ..."). The United States asserts that the federal government can administer "a particular tract of National Forest land in such a way that render that land occupied within the meaning of the 1868 Treaty." U.S. Br. 28 (*citing Cutler*, 708 P.2d at 856). The tracts that are occupied, are "those that the signatory Indians to treaties would have understood [] to be claimed, settled or occupied." *Cutler*, 708 P.2d at 856; U.S. Br. 28. Essentially, by administering a tract in such a way that would potentially have people present, that tract becomes "occupied." The United States offers, as corroborating evidence, 36 C.F.R. 261.10(d)(1), which prohibits discharging a firearm "within 150 yards of a residence, building, campsite, developed recreation sit *or occupied area*." U.S. Br. 28 (emphasis added). By its plain language, the regulation indicates there is occupation beyond the listed uses in the regulation, when the lands are put to a beneficial use. Much like the intent of "unoccupied" as used in the Crow Tribe Treaty, the intent behind prohibiting the discharge of firearms near "occupied area[s]" is safety.

There can be no argument that lands that regularly have people and livestock present would be of concern when discharging a firearm today or when trying to keep the tribes and settlers separate in the nineteenth century. Federal permit and leaseholders are regularly present on the lands, in order to conduct their agricultural operations. Further, the federal government is the party that designates what lands

can be permitted or leased to private parties. By doing so, the United States is putting those lands to a beneficial use which renders that land occupied under the meaning of the Crow Tribe Treaty. *See* U.S. Br. 28; *see also Cutler*, 708 P.2d at 856. Federally permitted and leased lands both, regularly have people present and are designated by the United States for a beneficial use, fulfilling both of the United States' established criteria for occupation of land within the national forests.

Even when interpreting the intent behind the Crow Tribe Treaty, federally permitted and leased lands are not "unoccupied" as was understood and intended by both parties signing the Crow Tribe Treaty.

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The holding in this case should not reduce the meaning of the word "unoccupied" in the Crow Tribe Treaty. The plain meaning of "occupied," along with the meaning contemporaneous to the signing and ratification of the Crow Tribe Treaty, indicates that lands where people are regularly present, and lands that are possessed, held, and used, are occupied. Federal permit and leaseholds exhibit all of these indices of occupation. Even looking to the intent and understanding of the parties over a century ago, it is evident that both the Crow Tribe and the United States understood grazing lands were occupied by the settlers moving West, using those lands to support their newly formed settlements. The United States intended to reduce conflict between the tribes and

settlers moving West, and intentionally excluded tribal hunting, not only from the lands where the settlers lived, but also from where the settlers were regularly present, exercised a particular control over the land, and worked the land for a beneficial purpose.

CONCLUSION

Regardless of if this Court determines that the Crow Tribe's hunting rights survived Wyoming's admission into the Union or whether the creation of the Big Horn National Forest abrogates those rights, *amici curiae* request that this Court make clear that federally managed lands that are leased or permitted to private parties are not subject to an Indian treaty hunting right that only exists on the "unoccupied lands of the United States."

Respectfully submitted,

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