No. 17-532

In The Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF OF THE CROW TRIBE OF INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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CASES

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Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995).....*passim*

El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) 28

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 21

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).....21

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).....*passim*

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Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).....28

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Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).....21

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State v. Cutler, 708 P.2d 853 (Idaho 1985).....18

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Act of April 27, 1904, 33 Stat. 352.....27

Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897)..... 23

TRIBAL AUTHORITIES

Constitution and Bylaws of the Crow Tribe of Indians (2001).....1

Crow Tribe Joint Action Resolution No. 13-09 (May 7, 2013)..... 14, 30, 31, 34

Crow Tribe Joint Action Resolution No. 13-12 (May 7, 2013).....30, 31

OTHER AUTHORITIES

Associated Press, *Crow Indian Cites Treaty in Game Rap*, *in* The Daily Plainsman, Oct. 13, 1972 (Huron, S.D.).....13

Charles Crane Bradley, Jr., *The Handsome People: A History of the Crow Indians and the Whites* (Council for Indian Education 1991).....5

Charlene Compher, *The Nutrition Transition in American Indians*, 17 J. Transcultural Nursing (2006).....12

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Cong. Globe, 40th Cong., 3d Sess. (1869) 18

Emerson Lee Bull Chief, *Belief Ways of the Apsaalooke: Development of a Culture Through Time and Space* (May 2016) (unpublished Ph.D. dissertation, Montana State University) 5, 6

Frederick E. Hoxie, *The Crow* (1989) 6, 9

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Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* (1975) 8, 9, 18, 25, 26

2 Charles Kappler, *Indian Affairs: Laws and Treaties* 594 (1904) 5, 8, 16

Rudolph Kurz, *Journal of Rudolph Friederich Kurz: An Account of His Experiences Among Fur Traders and American Indians on the Mississippi and the Upper Missouri Rivers During the Years 1846 to 1852* (J.N.B. Hewitt ed., Myrtis Jarrell trans. 1937) 6

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Frank B. Linderman, *Plenty-Coups: Chief of the Crows* (new ed. 2002) 20

Robert H. Lowie, *The Crow Indians* (2d ed. 1958) 6, 7

Peter Nabokov, *Two Leggings: The Making of a Crow Warrior* (1967) 20

U.N. Decl. on the Rights of Indigenous Peoples, art. 26.3 21

U.N. Decl. on the Rights of Indigenous Peoples, art. 46.2 22

U.S. Dep't of State, *Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples* (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm 22

Wyoming Game Charges Dropped for Crow Man, Char-Koosta News, Jan. 1, 1973 (Pablo, MT).....13

Wyoming Statewide Hunting Season Forecast Revised 9-12-2017, Wyo. Game & Fish Dep't, https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast (last visited Sept. 5, 2018).....19

Thomas Yellowtail, *Yellowtail: Crow Medicine Man and Sun Dance Chief, An Autobiography* (Michael Oren Fitzgerald ed., 1991).....7

INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae, the Crow Tribe of Indians ("the Tribe" or "Crow"),[2] is a sovereign, federally-recognized Indian tribe with more than 14,000 enrolled citizens. More than 9,000 of those tribal citizens reside on the Crow Indian Reservation ("Reservation"), which is located in southern Montana, adjacent to the Northern Cheyenne Indian Reservation (to the east) and the State of Wyoming ("Wyoming") (to the south). The Tribe is governed by the Crow Tribal General Council, consisting of all adults of the Tribe, through an elected tripartite government with executive, legislative, and judicial branches. Crow Tribe of Indians Const. and Bylaws, art. I (*available at* http://www.crow-nsn.gov/constitutions-and-bylaws.html).

Petitioner Clayvin B. Herrera ("Mr. Herrera") is an enrolled citizen of the Tribe. This case arises from Mr. Herrera's exercise of his off-reservation hunting rights, as expressly reserved by the Tribe in treaties

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[1] The parties have filed blanket consents to the filing of *amicus* briefs in this matter. In accordance with Rule 37.6, *amicus* and its counsel represent that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. This brief is submitted pursuant to Rule 37.3(a), the consent of all parties having been granted.

[2] The name of the Tribe, in its own language, is Apsaalooke. Apsaalooke and Crow are interchangeable and refer to the same indigenous tribal people and its present-day federally-recognized tribal government.

negotiated with the United States, and reaffirmed in negotiated statutes enacted by Congress.

This case is of critical importance to the Tribe. More than 150 years after the Fort Laramie Treaties were executed, subsistence hunting remains vital and necessary to the Tribe's citizens, who hunt both on the Reservation and off-reservation, including in national forest lands adjacent to the Reservation. In the view of the Tribe, the hunting right reserved by the Tribe in the Fort Laramie Treaties, including the 1868 Treaty, has not been abrogated; in particular, the admission of Wyoming to the Union did not abrogate the right, and the creation of the Bighorn National Forest did not render that land "occupied" so as to abrogate the right. In wrongly holding otherwise, the decision below significantly curtails both the lands upon which the Tribe's citizens may exercise the treaty right, and the game available for their subsistence. It is imperative that this Court reverse the decision below.

SUMMARY OF ARGUMENT

The Second Treaty of Fort Laramie executed on May 7, 1868, 15 Stat. 649 ("1868 Treaty"), between the Crow Tribe and the United States established the terms of agreement between two sovereigns, and resulted in a dramatic reduction of the Tribe's land base. Key to that agreement, and to the very significant concessions made by the Tribe therein, was the Tribe's reservation of a continued right to hunt on ceded lands, so

long as certain conditions persisted. The ongoing ability to draw sustenance from those lands was undeniably the understanding held by the Tribe, through the eleven chiefs and headmen who signed the 1868 Treaty, and continues to be the understanding of the elected leadership of the Tribe and Tribal citizens today. Under the legal framework set forth by this Court, that understanding is the basis for interpreting the terms of the 1868 Treaty and its ongoing viability.

The Tribe fully supports the arguments of Mr. Herrera in his brief, and offers this brief to advance two additional arguments. First, the distinctive history of the Crow demonstrates why the Tribe expressly reserved an off-reservation hunting right in the 1868 Treaty, and why that right continues today. The 1868 Treaty, itself, enumerates the only circumstances under which that treaty right might end: the settlement of former Crow lands, the extermination of game, or warfare between the Crow and the United States. However, none of these conditions has come to pass in the Bighorn National Forest. And the condition urged by Wyoming as terminating the Tribe's off-reservation treaty hunting right – Wyoming's statehood – is a condition that this Court, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and others have repeatedly rejected, finding it insufficient to terminate a treaty right.

Second, other interpreters of the 1868 Treaty, including the Tribe itself and the United States, have concluded that the Tribe's off-reservation treaty hunting right continues in force, and courts addressing

similar treaties have upheld treaty rights in those agreements. Wyoming, however, believes otherwise and builds its argument upon the bones of two demonstrably wrong cases: *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). This Court's decision in *Mille Lacs*, however, provides the correct legal analysis to determine the ongoing viability of precisely the type of treaty provision at issue here. Under that analysis, Article IV of the 1868 Treaty remains in effect, and Wyoming's effort to prevent citizens of the Tribe such as Mr. Herrera from exercising treaty hunting rights in the Big Horn National Forest must fail.

As discussed in greater depth in the brief filed by *amici* McCleary, Pease, Swank, and Wynne, the Tribe's citizens still require access to big game, such as elk, for basic nourishment, and, beyond mere survival, to build a healthy and sustainable future. The 1868 Treaty secures the Tribe's hunting right on unoccupied lands of the United States, including the Bighorn Forest, and Congress has not abrogated that right. Therefore, this Court should reverse the decision below.

HISTORICAL BACKGROUND

1. The traditional homelands of the Crow Tribe around the period of initial contact with non-Indians encompassed an area that now comprises parts of Montana, Wyoming, and the Dakotas. *Montana v. United States*, 450 U.S. 544, 547 (1981); First Treaty of

Fort Laramie with the Crow Tribe, Sept. 17, 1851, 11 Stat. 749 ("1851 Treaty") and 2 Charles Kappler, *Indian Affairs: Laws and Treaties* 594 (1904).[3]

The Bighorn Mountains, including the lands encompassed today by the Bighorn National Forest, historically made up both the geographic and the spiritual heart of Crow territory. Tribal oral history includes the story of Big Metal, a Crow Indian hero whose life was saved by seven bighorn sheep, who in return required that the mountains where they lived and the great river flowing through henceforth be known by their name: Bighorn. Emerson Lee Bull Chief, *Belief Ways of the Apsaalooke: Development of a Culture Through Time and Space* 98-105 (May 2016) (unpublished Ph.D. dissertation, Montana State University) (*available at* https://scholarworks.montana.edu/xmlui/bitstream/handle/1/13778/BullChiefE0816.pdf?sequence=4); Charles Crane Bradley, Jr., *The Handsome People: A History of the Crow Indians and the Whites* 42 (1991). Cloud Peak, in the Wyoming portion of the Bighorn Mountains, holds tremendous spiritual

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[3] The 1851 Treaty identified the Tribe's territory as follows:

> [C]ommencing at the mouth of the Powder River on the Yellowstone; thence up [the] 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.

1851 Treaty, art. V; Kappler, *supra*, at 595.

significance to the Tribe as a site where many Tribal leaders and heroes fasted. It is also the location where the Tribe believes the Creator gave a sacred tobacco plant to the Tribe after a long migration to show that this region was where they were meant to remain. Bull Chief, *supra*, at 75-76; *see also* Frederick E. Hoxie, *Parading Through History: The Making of the Crow Nation in America, 1805-1935* 84 (1995) ("Hoxie, *Parading*") ("tobacco planting among the Crow was universally associated with the group's special claim to the area immediate surrounding the Bighorn Mountains"). The Bighorn Mountains have remained a source of sustenance – both physical and spiritual – to the Tribe since that very early time, despite the many dramatic changes on the land since then.

2. Prior to contact with non-Indians, the Crow were a nomadic people who depended on buffalo, elk, antelope, and deer for food, shelter, clothing, and many other uses. Frederick E. Hoxie, *The Crow* 24 (1989) ("Hoxie, *The Crow*"); Robert H. Lowie, *The Crow Indians* xiv, 72 (2d ed. 1958). Although the Tribe was best known for hunting buffalo, the Crow have always held elk in high esteem and had many uses for elk meat and other parts of the animal.[4] For the Crow,

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[4] Dresses decorated with the two ivory teeth from each elk are the quintessential Crow Indian woman's formal attire, with a dress decorated by hundreds of ivory elk teeth demonstrating esteem, as well as the hunting prowess of the wearer's spouse and/or relatives. *See* Photographs, Appendix to Crow *Amicus* Brief ("Crow App.") 1a-7a. In 1852, Swiss explorer Rudolph Kurz noted during his visit to the Crow the high value of these elk teeth. Rudolph Kurz, *Journal of Rudolph Friederich Kurz: An Account of*

hunting "was almost an everyday occupation." Thomas Yellowtail, *Yellowtail: Crow Medicine Man and Sun Dance Chief, An Autobiography* 45 (Michael Oren Fitzgerald ed., 1991). Children learned the skills essential for hunting and cleaning game from an early age, and soon were engaged in hunting rabbits and other small game around the camp. Lowie, *supra*, at 35-36, 72. A successful hunt provided much more than meat: "Without it there would have been no horn cups or spoons, no rawhide or leather, hence no robes or tipi covers or containers, not even for the boiling of food." *Id.* at 72, *see also id.* at xv. Little wonder, then, that the hunt carried great religious significance to the Crow. Yellowtail, *supra*, at 37 ("Each major hunt started with the purification of a sweat bath and a prayer. In every case, the offering of a smoke and a prayer was always present. . . . We are given animals for a purpose, and through our knowledge of animals and Nature, we come closer to the Maker of All Things Above.").

3. "In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged

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His Experiences Among Fur Traders and American Indians on the Mississippi and the Upper Missouri Rivers During the Years 1846 to 1852 80, 251-52 (J.N.B. Hewitt ed., Myrtis Jarrell trans. 1937). ("Among the Crow Indians originated that singular style of trimming, for women doeskin garments, with rows on rows of elk's teeth placed horizontally across front and back . . . one hundred of them cost as much as a pack horse[.]"). Modern day dresses are made using a combination of some real elk teeth and replica elk teeth carved from bone or molded from other materials.

various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48 (citing 1851 Treaty). In delineating their individual territories, however, the 1851 Treaty's signatory tribes "[did] not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty, art. V; Kappler, *supra*, at 595.

4. The United States and the Tribe met again at Fort Laramie in 1867 to negotiate a new treaty. *See generally* Inst. for the Dev. of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* (1975) ("*Proceedings*"). On November 12, 1867, Commissioner of Indian Affairs N.G. Taylor explained to the Tribe's representatives the United States' purpose:

> We desire to set apart a tract of your country as a home for yourselves and your children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you, however, the right to hunt upon it as long as the game lasts*.

Id. at 86 (emphasis added). Three representatives of the Tribe, Bear's Tooth, Black Foot, and Wolf Bow, each expressed their desire for peace with the United States, but also the importance of maintaining their way of life, including the hunt. *See, e.g.*, *id.* at 88 (quoting Bear's Tooth: "You talk about farming for me and raising stock. I don't like to hear that. I was raised on

game and I would like to live as I was raised. . . . We want to kill our own game and be glad. All of the Crows feel as I do.").[5] The following day, Bear's Tooth told the treaty commissioners that he would bring the United States' offer to the Tribe. *Id.* at 91.

The following spring, the Tribe and the United States executed the Treaty Between the United States of America and the Crow Tribe of Indians, which set forth the boundaries of the Tribe's original Reservation on the southern border of the Montana Territory. 1868 Treaty, art. II. In that treaty, the Tribe reserved for itself "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.* art. IV.

5. After the signing of the 1868 Treaty and the establishment of the Reservation, the Tribe suffered hunger as the United States failed to deliver rations as promised, and access to big game on the Reservation was limited with the decline of the buffalo herds. Letter from Lewis H. Carpenter, Indian Agent ("Agent Carpenter"), to J.Q. Smith, Comm'r of Indian Affairs

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[5] *See also* Hoxie, *The Crow*, *supra*, at 71 ("Sits in the Middle of the Land, a powerful 70-year-old Mountain Crow leader, spoke for the tribe at these proceedings. Fearing that his people would eventually lose all of their land otherwise, he accepted a substantial reduction in the tribe's territory on the condition that the U.S. government establish a permanent Crow homeland *and guarantee them the right to hunt in unoccupied areas of the Plains*.") (emphasis added).

(Feb. 10, 1877), Crow App. 8a ("These Indians have not the rations called for under the schedule of articles contained in the letter referred to, having only beef and flour, and none of the latter for several weeks prior to the 7th last [sic]."); Letter from H.J. Armstrong, Indian Agent ("Agent Armstrong"), to General Hatch of Fort Custer ("Gen. Hatch") (July 17, 1882), Crow App. 8a ("[T]here is nothing on their reservation to subsist them and our supplies for this agency will subsist them over four months in the year."). Federal representatives, including the U.S. agent on the Reservation, Henry Armstrong, were largely indifferent to the Tribe's plight. Hoxie, *Parading*, *supra*, at 139 ("Even when crop failure left the tribe 'pretty hungry,' Armstrong insisted there was no need for expanded government support, . . . [writing to the Commissioner of Indian Affairs that] 'A little starving will be good for them.'").

As a result, Crow hunters depended on the Article IV off-reservation hunting rights to survive. Most of the Tribe hunted big game "in the sheltered valleys and river bottoms to the south and east" of the Reservation, in the lands that today make up the Bighorn National Forest. *Id.* at 20. In the early 1880s, Armstrong wrote to his superiors in Washington to describe this state of affairs: "[i]t is a mistake . . . to suppose that there is any game on this reservation for the Crows to hunt. There is none and they have to go outside to get elk and deer." Letter from Agent Armstrong to Hon. Hiram Price, Commissioner of Indian Affairs ("Comm'r Price") (Nov. 20, 1883), Crow App. 15a; Hoxie,

Parading, *supra*, at 18, 282; *see also id.* at 115 ("Agent Armstrong reported during the winter of 1883-84 that 'the only way' the tribe had survived in recent years had been by leaving the reservation to hunt.").

Federal officials at the Crow Agency also frequently acknowledged the Tribe's legal right under Article IV of the 1868 Treaty to engage in off-reservation hunting. In 1881, Indian Agent A.R. Keller ("Agent Keller") wrote to Comm'r Price, discussing candidly the 1868 Treaty's provision on off-reservation hunting:

> [T]he Treaty of 1868 not only did not forbid the Indians from hunting off the reserve but went so far as to guarantee them that right, and it will be seen that they have just cause of serious complaints. Of these facts, the Indians are not ignorant and it presents the Government in the light of not only acting unjustly but unlawfully as well. Our Government is certainly too great, too powerful, and too just to merit such a verdict. If we would civilize the Indians, let us by all means be fair and just to him, and ourselves observe the law we would enforce upon him.

Letter from Agent Keller to Comm'r Price (Sept. 3, 1881), Crow App. 17a. The following year, Agent Armstrong wrote to Gen. Hatch, describing the need for the Crows to hunt off-reservation and acknowledging their right to do so:

> [T]here is nothing on their reservation to subsist them[.] . . . By the terms of the 4th article of the treaty of 1868, the Crows have the right

> to hunt upon the unoccupied lands of the United States, so long as game may be found thereon, and the land where the buffalo roam at large can hardly be called occupied, so that I really think that my Indians have the right to go outside their own country after buffalo, although I have been careful not to tell them so, but always the contrary.

Letter from Agent Armstrong to Gen. Hatch (July 17, 1882), Crow App. 12a-13a. Even as Armstrong professed his belief to other U.S. officials that the Crows had a right to hunt off-reservation, he admonished them for doing so. Hoxie, *Parading*, *supra*, at 139 (Armstrong "lectured the tribal headmen to keep their people at home and at work [farming]. He believed those who left the reservation [to hunt] should be jailed and punished.").

6. The continued importance of the Tribe's off-reservation treaty hunting right is demonstrated by the need of the Tribal citizens residing on or near the Reservation for reliable, healthy, and accessible sources of food.[6] Since the execution of the 1868 Treaty, the Tribe has exercised the right to hunt outside of the Reservation on unoccupied lands of the United States,

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[6] Traditional foods and subsistence lifestyles are important to improving the health and well-being of Native Americans. *See generally* Charlene Compher, *The Nutrition Transition in American Indians*, 17 J. Transcultural Nursing 217, 217-22 (2006) ("To improve [American Indian] health and survival, the obesity epidemic must be approached in a concerted, culturally appropriate manner with encouragement of traditional foods and safe opportunities for physical activity."); *see also* Br. for *Amici* McCleary, Pease, Swank, Wynne, and Neelon.

including in the Bighorn National Forest, sometimes encountering opposition from Wyoming state law enforcement. In the early 1970s, Paul Bad Horse, Sr. was cited for hunting on the Wyoming side of the Bighorns by Wyoming state officials. The court dismissed the charges when the U.S. Department of Interior intervened on Mr. Bad Horse's behalf, asserting that he was entitled, under Article IV of the 1868 Treaty, to hunt on unoccupied lands of the United States such as the Bighorn National Forest. Associated Press, *Crow Indian Cites Treaty in Game Rap*, *in* The Daily Plainsman, Oct. 13, 1972 (Huron, S.D.), at 9; *Wyoming Game Charges Dropped for Crow Man*, Char-Koosta News, Jan. 1, 1973 (Pablo, MT), at 6.

Another documented incident of challenge by Wyoming state or local law enforcement to the exercise of the Article IV right occurred in 1989, when Crow citizen Thomas L. Ten Bear was cited by Wyoming State authorities and convicted for killing an elk in the Bighorn National Forest without a state hunting license. *Repsis*, 73 F.3d at 985. The Tribe and Ten Bear unsuccessfully sought declaratory judgment that the Tribe and its citizens had a continuing right to hunt off-reservation on unoccupied lands of the United States, including the Bighorn National Forest. *Id.* at 982. Relying on this Court's opinion in *Race Horse*, the Tenth Circuit concluded that "[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." *Repsis*, 73 F.3d at 992. The Tenth Circuit stated in the alternative that, as a result of the creation of the

Bighorn National Forest, the Forest's lands were no longer "unoccupied lands of the United States" upon which the Tribe's citizens could exercise their treaty-guaranteed off-reservation hunting right. *Id.* at 993.

7. The viability of *Ward* and *Repsis* was fatally undermined when this Court decided *Mille Lacs*. 526 U.S. 172 (1999). In rejecting Minnesota's reliance on *Race Horse*, this Court held in *Mille Lacs* that "*Race Horse* rested on a false premise," and clarified that "Indian treaty rights can coexist with state management of natural resources." *Id.* at 204.

8. In light of this repudiation of *Race Horse* (and, by extension, of *Repsis*), and in commemoration of the 145th anniversary of the 1868 Treaty, the Tribe adopted a resolution reaffirming the policy of the Tribe to fully exercise the off-reservation hunting rights reserved by the 1868 Treaty, including in the Bighorn National Forest. Crow Tribe Joint Action Resolution No. 13-09 (May 7, 2013)[7] ("JAR 13-09" or the "Resolution"), https://www.ctlb.org/wp-content/uploads/2015/09/JAR-13-09-Excercising-Off-Reservation-Hunting-Rights.pdf.

9. As set forth in greater detail by Mr. Herrera, *see* Petitioner's Brief for Certiorari at 13-17, in January, 2014, Mr. Herrera went hunting with a group of other tribal citizens in order to provide food for their

[7] The full title of the Resolution is "A Joint Action Resolution of the Crow Tribe to Enact and Declare Official Crow Tribal Policy of Fully Exercising Off-Reservation Hunting Rights Pursuant to the 1868 Fort Laramie Treaty."

families and others in the tribal community. The group sighted a small group of elk on the Reservation; followed it across the Montana-Wyoming state line into the Bighorn National Forest; killed, quartered, and packed three elk; and carried them back to their homes and families. Subsequently, Mr. Herrera was cited for taking antlered big game during a closed-hunting season and for being an accessory to the same. Mr. Herrera moved to dismiss on the grounds that his treaty-guaranteed off-reservation hunting right allowed him to hunt in the Bighorn National Forest. The Wyoming Circuit Court denied the motion, holding that it was "bound by" the Tenth Circuit's decision in *Repsis*. The Wyoming court concluded that this Court's *Mille Lacs* opinion "had no effect on the *Repsis* decision," and barred Mr. Herrera from asserting his treaty right at trial. Mr. Herrera was convicted on both charges, was fined $8,000, given a one-year suspended jail sentence, and had his State of Wyoming hunting privileges suspended for three years. In April 2017, a single judge on the Wyoming District Court, acting in an intermediate appellate capacity, affirmed the Wyoming Circuit Court. Mr. Herrera timely appealed to the Wyoming Supreme Court, which denied review without explanation in a one-page order. Mr. Herrera filed his Petition for Writ of Certiorari to this Court on October 5, 2017. Herrera Pet. for Cert. On June 28, 2018, this Court granted Certiorari.

ARGUMENT

In the Fort Laramie Treaties, the Crow Tribe reserved for its citizens their inherent right to hunt on unoccupied lands within the Tribe's traditional territory, including those lands that today constitute the Bighorn National Forest. That fact is undisputed. And the historical record leaves no question that this off-reservation hunting right remains in effect: the conditions spelled out in the 1868 Fort Laramie Treaty for the continuation of that right remain in place, and no act of Congress has clearly and unequivocally abrogated that right.

I. THE CROW TRIBE'S OFF-RESERVATION HUNTING RIGHT IS CLEARLY RESERVED IN THE FORT LARAMIE TREATIES.

There is no question that the Tribe, in both the 1851 Treaty and the 1868 Treaty, reserved its right to hunt on lands outside the present-day Reservation. 1851 Treaty and Kappler, *supra*, 594; 1868 Treaty; *see also United States v. Winans*, 198 U.S. 371 (1905) (describing treaties as "not a grant of right to the Indians, but a grant of rights from them – a reservation of those not granted"). The right retained in the 1851 Treaty was sweeping: the Crow (and other signatory Tribes) "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty and Kappler, *supra*, 595; *Montana*, 450 U.S. at 548. The 1868 Treaty provides that the 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." 1868 Treaty, art. IV. Even Wyoming does not dispute that the 1868 Treaty established this right. Resp't Opp. for Cert. 3.

II. THE CROW TRIBE'S OFF-RESERVATION HUNTING RIGHT CONTINUES IN FORCE TODAY.

A. The Treaty Conditions Continue to this Day.

The 1868 Treaty provides that the Tribe's off-reservation hunting right persists so long as four conditions are met: (1) the United States retains the lands; (2) the lands are unoccupied; (3) game may be found on those lands; and (4) there is peace between the United States and the Tribe. 1868 Treaty, art. IV. Each of those conditions continues to this day.

1. The United States retains unoccupied lands, including the Bighorn National Forest, *see* Pet'r Br. for Cert. 21-24, within the territory ceded by the Tribe. The 1868 Treaty provides that citizens of the Tribe may hunt on "unoccupied lands of the United States," but does not define the term "unoccupied." 1868 Treaty, art. IV. As Petitioner has explained, however, the text of the 1868 Treaty demonstrates that both the Tribe and the United States understood "unoccupied" to mean not settled by non-Indians. *See* Pet'r Br. for Cert. 33-34. That understanding is consistent with the negotiations between Commissioner Taylor and the Tribe's

representatives, where the parties discussed how "the white people are rapidly increasing . . . and occupying all the valuable lands" – thereby suggesting that the Tribe would have deemed lands lacking "the white people" and white settlements to be "unoccupied lands." Proceedings at 86; *see also* Pet'r Br. for Cert. 34-35. The historical record similarly shows that the United States understood the Crow's treaty hunting right to extend to those lands not "occupied by settlements," as demonstrated by Sen. James Harlan's explanation on the floor of the Senate:

> There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements. So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game.

Cong. Globe, 40th Cong., 3d Sess. 1348 (1869); *see also State v. Cutler*, 708 P.2d 853, 863 (Idaho 1985) (quoting Sen. Harlan).[8] Thus, there is no support in the Treaty or the historical record for Wyoming's argument that the creation of the Bighorn National Forest resulted in the "occupation" of the Forest and the termination of

[8] The fact that the Crow continued to hunt off-reservation in ceded lands throughout this period is further evidence of their understanding, as is the continued off-reservation hunting that continues through the present day. *See supra*, pp. 8-13. In addition, JAR 13-09, discussed in further detail at III, *infra*, states the current understanding of the Tribe as to the import and duration of Article IV of the 1868 Treaty, and is informed by the views of the Tribe's leadership, passed through several generations.

the Tribe's off-reservation hunting right on those lands.

2. Game is found on those lands – in fact, elk in particular are abundant. Wyoming's own Game & Fish Department reports that elk are abundant in the region. *Wyoming Statewide Hunting Season Forecast Revised 9-12-2017*, Wyo. Game & Fish Dep't, https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast (last visited Sept. 5, 2018) (elk populations in Sheridan Region, which encompasses Bighorn National Forest, "exceed[] management objectives").

3. Finally, there has been peace between the United States and the Tribe since the 1868 Treaty was executed. In fact, the Crow have been staunch allies of the United States both before and after that Treaty.

In 1825, the Tribe and the United States entered into treaty "[f]or the purpose of perpetuating the friendship which has heretofore existed" between the parties. Treaty with the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In the 1860s, the Crow refused entreaties to join Red Cloud's war against the United States. Hoxie, *Parading*, *supra*, 89. In the 1870s, the Tribe allied with the United States against the Sioux, Cheyenne, and Arapaho. As the Crow Chief Plenty-Coups explained, the Tribe provided scouts for the United States at the Little Bighorn for the purpose of preserving peace with the United States and preserving their territorial rights: "Our decision was reached, not because we loved the white man who was already crowding other tribes into our country, or because we hated the Sioux,

Cheyenne, and Arapahoe, but because we plainly saw that this course was the only one which might save our beautiful country for us." Frank B. Linderman, *Plenty-Coups: Chief of the Crows* 85 (new ed. 2002); *see also* Peter Nabokov, *Two Leggings: The Making of a Crow Warrior* 187 (1967) ("We helped the white man so we could own our land in peace.").

The decision below failed to examine these express conditions in the 1868 Treaty which continue to this day, and instead concluded without any evidence that the treaty "clearly contemplated" that the Tribe's treaty-guaranteed off-reservation hunting right would terminate upon Wyoming's admission to the Union or the creation of the Bighorn National Forest.

B. Congress Has Not Abrogated the Tribe's Off-Reservation Hunting Right.

The decision below identifies no act of Congress that clearly and expressly abrogates the Tribe's off-reservation treaty hunting right, because there is no such act of Congress. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). And once an Indian tribe reserves by treaty a right for itself, only Congress may abrogate that right, and Congress must clearly express its intent to do so. *Mille Lacs*, 526 U.S. at 202; *see also United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to

abrogate Indian treaty rights be clear and plain."); *Fishing Vessel*, 443 U.S. at 690 ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) ("While the power to abrogate [hunting and fishing] rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (internal quotation and citations omitted)).[9] Moreover, "[t]here 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.'" *Mille Lacs*, 526 U.S. at 202-03 (quoting *Dion*, 476 U.S. at 740).[10]

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[9] Although each of the preceding cases concerned tribal hunting and fishing rights, this Court has applied this "clear intent" standard to any number of contexts, including reservation diminishment, *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." (internal quotation and citation omitted)); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); and tribal sovereign immunity, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (" 'To abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose' " (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).

[10] The cases cited are consistent with current international legal standards on indigenous peoples' rights, including treaty rights. *See, e.g.*, U.N. Decl. on the Rights of Indigenous Peoples,

Rather than identifying the requisite "clear[] express[ion]" of Congress to abrogate the Tribe's off-reservation hunting right, the decision below merely cites *Repsis* for the proposition that the Tribe's off-reservation hunting right "was repealed by the act of admitting Wyoming into the Union," Cert. Pet. App. B 22 (quoting *Repsis*, 73 F.3d at 992). *Repsis*, in turn, identified no provision of the act admitting Wyoming in which Congress "clearly expressed its intent" to abrogate the Tribe's off-reservation hunting right, but instead relied only upon this Court's decision in *Race Horse*, 163 U.S. 504, that the equal footing doctrine created an "irreconcilable" conflict between the Tribe's off-reservation hunting right and the "power of a State to control and regulate the taking of game." *Repsis*, 73 F.3d at 990 (quoting *Race Horse*, 163 U.S. at 507, 514). In *Mille Lacs*, this court expressly repudiated that aspect of *Race Horse* (and, necessarily, of *Repsis*):

> But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian

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art. 26.3 (states are to recognize, respect, and protect indigenous rights to lands, territories, and resources traditionally owned, occupied, or otherwise used or acquired by indigenous peoples), art. 46.2 (rights of indigenous peoples are not lightly to be limited). The United States has stated its support for these standards. *See* U.S. Dep't of State, *Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples* (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

> treaty rights can coexist with state management of natural resources.

Mille Lacs, 526 U.S. at 204 (internal citations omitted); *see also State v. Buchanan*, 978 P.2d 1070, 1082-83 (Wash. 1999) (noting the reliance of *Repsis* on *Race Horse*, and that "the United States Supreme Court effectively overruled *Race Horse* in [*Mille Lacs*]").

C. The Tribe's Treaty Right is Entirely Consistent with Wyoming Statehood.

Contrary to Wyoming's assertions, the Tribe's off-reservation treaty hunting right is entirely consistent with Wyoming's statehood. The act admitting Wyoming to the Union did not mention, let alone abrogate, the Tribe's off-reservation treaty right. *See generally* an act to provide for the admission of the State of Wyoming into the Union, and for other purposes, Act of July 10, 1890, 26 Stat. 222.[11] Moreover, in the years following the admission of Wyoming to the Union, Congress expressly reaffirmed that the Tribe's treaties continued in full force and effect. Some eight months after Wyoming was admitted to the Union, in a negotiated agreement enacted as part of an Indian appropriations act, Congress expressly provided that "all

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[11] Nor did President Cleveland's proclamation creating the Bighorn National Forest. *See generally* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). Moreover, as Petitioner demonstrates, the President could not have abrogated the Tribe's treaty rights unless expressly authorized to do so by Congress, which he was not. Pet. Br. 32-40.

existing provisions" of the 1868 Treaty "shall continue in force." 26 Stat. at 1042 (1891).

Both the State of Wyoming's argument and the lower court's conclusion are at odds with how this Court analyzes Indian treaties. A guiding principle of this Court's Indian law jurisprudence is that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citing *Fishing Vessel*, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81); *see also United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, . . . but are to be construed in the sense in which naturally the Indians would understand them"); *Worcester v. Georgia*, 31 U.S. 515, 551-54 (1832) (interpreting treaty as the Cherokee would have understood its meaning).

Neither the decision below, nor the *Repsis* decision upon which it relies, contains any indication that the Tribe, when it entered the 1868 Treaty, understood that that treaty "clearly contemplated" the expiration of the off-reservation hunting right upon Wyoming's admission to the Union. The decision below merely (and erroneously) concludes that *Repsis* remains good law. Cert. Pet. App. B 24 ("*Mille Lacs* did not overturn *Race Horse* or *Repsis*."). And it wrongly affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a "clearly contemplated event"; *id.* at 24 n.6 ("the *Mille Lacs* Court held that courts should

look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* court had done.").

The *Repsis* court acknowledged its obligation to interpret the 1868 Treaty as the Tribe would have understood it. 73 F.3d at 992 (collecting cases). Nevertheless, *Repsis* concluded that Wyoming's statehood constituted the "clearly contemplated event" that terminated the Tribe's treaty-guaranteed off-reservation hunting right, while pointing to no evidence whatsoever that the Tribe understood that its hunting right would terminate upon statehood (of Wyoming or any other state). *See generally id.* In the alternative, the *Repsis* court stated that the creation of the Bighorn National Forest rendered the lands contained therein no longer "unoccupied" and, therefore, extinguished the Tribe's treaty-guaranteed off-reservation hunting right on those lands. *Id.* at 986.

The historical record demonstrates, instead, that both the Tribe *and* the United States understood that the Tribe would be allowed to hunt on ceded lands so long as there was game to hunt, and so long as doing so would not interfere with non-Indian settlement. In welcoming the Tribe to the negotiations, Commissioner Taylor told the Tribe's representatives that the United States hoped to settle most of the Tribe's territory, but that the Tribe nonetheless would retain "the right to hunt upon it as long as the game lasts." *Proceedings* at 86. In response, all three of the Tribe's representatives emphasized the importance of hunting to the Tribe's

way of life. *Id.* at 88-89. The following day, Commissioner Taylor reassured the Tribe's representatives that even upon accepting a reservation, "[y]ou will still be free to hunt as you are now." *Id.* at 90. Thus, both the Tribe and the United States understood that the Tribe, even if it accepted a reservation, intended to preserve its right to hunt throughout its territory.

Ultimately, the 1868 Treaty provided that the Tribe could continue 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.

D. The Bighorn National Forest is Unoccupied, and is Subject to the Tribe's Off-Reservation Hunting Right.[12]

Congress enacted the Act of March 3, 1891 to repeal timber-culture laws, and for other purposes (commonly referred to as the "Forest Reserve Act"), well over a year after Wyoming's statehood, in which it both authorized the Executive to create National Forests and expressly provided "[t]hat nothing in this act shall change, repeal or modify any agreements or treaties made with any Indian tribes for the disposal of their

[12] For a more detailed examination of the history of the National Forests generally, and of the Bighorn National Forest specifically, in relation to Indian treaty hunting rights, *see generally* Br. of *Amici Curiae* Natural Resource Law Professor in Support of Petitioner.

lands, or of land ceded to the United States to be disposed of for the benefit of such tribes. . . ." An act to repeal timber culture laws, and for other purposes, 26 Stat. 1095, 1099 § 10 (1891). Another negotiated agreement enacted by Congress in 1904 provided that "existing provisions of all former treaties with the Crow tribe [sic] of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect." An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, Act of April 27, 1904, 33 Stat. 352, 355.[13] Far from containing express language abrogating the Tribe's Article IV hunting right, Congress acted to preserve it.

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[13] Similarly, neither the decision below, nor the opinion in *Repsis* upon which the decision below relied, identifies any statute "clearly expressing [Congress's] intent" to remove the Big Horn National Forest from the category of "unoccupied lands of the United States." Although the *Repsis* court noted that "Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber," 73 F.3d at 993 (citing 16 U.S.C. § 475), it identified no evidence that Congress considered the conflict between these purposes and the Tribe's exercise of its treaty rights and resolved the conflict by abrogating the treaty, as required by *Mille Lacs*. 526 U.S. at 202-03. As Petitioner demonstrates, the creation of the Big Horn National Forest did not, in fact, abrogate the Tribe's off-reservation hunting right on those lands. Pet'r Br. for Cert. 21-24.

III. TRIBAL OFF-RESERVATION HUNTING RIGHTS ARE NOT IMPLIEDLY ABROGATED AND HAVE CONTINUING VIABILITY.

The construction of Indian treaties is a federal question, upon which this Court has the final say. *Fishing Vessel*, 443 U.S. at 693. However, this Court has also recognized that it benefits from the considered decisions of other interpreters of federal law; and when the federal law in question concerns Indian interests, Indian tribes are among those interpreters. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (requiring exhaustion of tribal court remedies before presenting federal courts with federal question of tribal court jurisdiction over non-Indians). On the question before this Court, every interpreter except Wyoming has concluded that the off-reservation hunting right described in the 1868 Treaty remains intact.

A. The Tribe and the United States Recognize that the Tribe's Treaty Right Continues in the Bighorn National Forest.

"In interpreting any treaty, '[t]he opinions of our sister signatories' . . . are 'entitled to considerable weight.'" *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)). Here, the Tribe has concluded that the off-reservation hunting right reserved in the 1868 Treaty remains intact. On May 7, 2013, the Tribe's Executive and Legislative Branches enacted Joint Action Resolutions, concluding that the right continues in full

force and effect to the present day, and indicating the contemporary understanding of the Tribe as to the 1868 Treaty, informed by the lengthy history of the Tribe and its citizens living pursuant to and within the terms of those Treaties. Just as the Court gives weight to the federal executive branch's interpretation of a treaty's terms, the interpretation of a tribal executive branch also merits consideration. *See Abbott*, 560 U.S. at 15 ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.' ") (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("deferring to the Executive's interpretation of a treaty as memorialized in a brief before this Court")).

Moreover, in this case, both the United States and the Tribe agree that Article IV of the 1868 Treaty remains in effect, and that Mr. Herrera was exercising his valid right, as a citizen of the Tribe, to hunt in the Bighorn National Forest. *See generally* U.S. *Amicus* Br. (in Support of Pet'r). Thus, in this instance, the parties' understanding of the treaty is entitled to particular deference. *Sumimoto*, 475 U.S. at 185 ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

The Tribe, through its contemporary form of elected government, continues to identify the centrality of the Bighorn Mountain region, including the Bighorn National Forest and the game therein, to Crow

lifeways. In JAR 13-09, the Tribe expressed its conclusion that "the United States Congress has never abrogated" the Tribe's off-reservation treaty hunting right. JAR 13-09, cl. 8. The Resolution resolves that "[t]he policy of the Crow Tribe shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States which are located within the traditional Crow homeland as set out in the 1851 Fort Laramie Treaty, along with all such lands as located in traditional Crow territory according to tribal oral history." JAR 13-09 § 1. The Resolution further authorizes the Crow Tribe Executive Branch to "negotiate with any and all federal and state governmental authorities regarding any terms or conditions the Legislature should consider in the adoption of treaty hunting regulations in the Tribal Fish and Game Code." JAR 13-09 § 6. Thus, as a matter of Crow Tribal law, the Crow Tribe is authorized and stands ready to work with the State of Wyoming, as well as other state and federal governmental entities, to determine mutually beneficial ways of regulating tribal treaty hunting, and common-sense solutions for managing elk and other game that ranges along the border between the Crow Indian Reservation and the Big Horn National Forest in Wyoming.

Also on May 7, 2013, the Crow Legislative Branch enacted Joint Action Resolution No. 13-12 ("JAR 13-12," https://www.ctlb.org/wp-content/uploads/2015/09/JAR-13-12-Treaty-Commemoration-Days.pdf),[14] recognizing

[14] The full title of JAR No. 13-12 is "A Joint Action Resolution of the Crow Tribe to Establish Crow National Days of Commemoration Honoring the Signing of the 1825 Treaty With the United

the eleven chiefs and headmen who were signatories to the 1868 Fort Laramie Treaty and establishing September 17 of each year as the Crow National Day of Commemoration Honoring the Signing of Treaties with the United States, to be observed as a holiday by the Crow Tribal government and employees. JAR 13-12 at 2.

The historical record demonstrates the importance of the off-reservation treaty hunting right to the Crow, not only as a matter of subsistence, but also as an expression of Crow culture and religion. *See supra* pp. 6-12; n.4, 6. Through JAR 13-09 and JAR 13-12, modern-day Crow Tribal law underscores the contemporary importance of the treaties, in particular the off-reservation hunting right preserved in Article IV of the 1868 Treaty, and further demonstrates how the Crow Tribe, as a signatory to that treaty, interprets that right today.

Because the State of Wyoming has repeatedly and unflinchingly taken the position that the Tribe, and thus individual Tribal citizens, have no right to hunt off-reservation pursuant to Article IV of the 1868 Treaty, the Crow Tribe today continues to look to the United States to uphold the terms of those agreements which are protected by the United States Constitution. These rights remain fundamental to the survival and well-being of the Tribe and its citizens – past, present, and future.

States, the 1851 Fort Laramie Treaty, and the 1868 Fort Laramie Treaty."

B. State Courts, Except for Wyoming's, Recognize the Continuing Applicability of Off-Reservation Treaty Hunting Rights.

Although no state, aside from Wyoming, has seen its courts rule on the continued vitality of the Crow Tribe's off-reservation treaty hunting right, a number of state courts have upheld the validity of tribal off-reservation hunting rights arising from similar treaties.

In *State v. Tinno*, the Idaho Supreme Court affirmed the continuing validity of the Shoshone-Bannock Tribes' off-reservation hunting and fishing rights. 497 P.2d 1386 (Idaho 1972). Gerald Cleo Tinno, a Shoshone-Bannock Tribes citizen, was charged with taking fish out of season in the Challis National Forest. *Id.* at 1387, 1391. Interpreting language in the Shoshone-Bannock Tribes' treaty that is identical to that in the Crow Tribe's 1868 Treaty,[15] the court concluded that "the mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold." *Id.* at 1393.[16]

In *State v. Stasso*, the Montana Supreme Court affirmed the continuing vitality of the Confederated Salish and Kootenai Tribes' ("CSKT") off-reservation

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[15] *Compare* 1868 Treaty, art. IV; *with* Treaty with the Eastern Band of Shoshonees and the Bannock Tribe of Indians, art. IV, 15 Stat. 673, 674-75 (1868).

[16] The court further held that the State of Idaho had failed to demonstrate any conservation necessity that would justify its regulation of the Tribes' off-reservation hunting and fishing. *Id.* at 1393-94.

hunting and fishing rights. 563 P.2d 562 (Mont. 1977). Lasso Stasso, a CSKT citizen, was charged with killing deer out of season on U.S. Forest Service lands outside of the CSKT reservation. *Id.* at 562-63. The Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, 12 Stat. 975 (1855), at Article III "secured to said Indians," *inter alia*, "the privilege of hunting . . . upon open and unclaimed lands." *Id.* at 976. The State of Montana argued that the Montana Territorial Act had abrogated Article III. *Stasso*, 563 P.2d at 564. The Stasso court rejected that argument, and further held that "the National Forest lands involved herein are open and unclaimed lands" for purposes of the treaty. *Id.* at 565.

And in *State v. Miller*, the Washington Supreme Court reversed the convictions of two citizens of the Skokomish Indian Tribe for taking elk out of season in the Olympic National Forest. 689 P.2d 81 (Wash. 1984). In the Treaty between the United States of America and the S'Klallam Indians, 12 Stat. 933 (1859), the Indians in Article III reserved for themselves, *inter alia*, "the privilege of hunting . . . on open and unclaimed lands." *Id.* at 934. The *Miller* court concluded that this right still had purchase, and that the trial court erred in requiring the defendants to prove that the state's regulations were not necessary for conservation, when the burden should have been on the state to demonstrate the necessity of its regulations and of enforcing them against Indians exercising treaty rights. 689 P.2d at 82, 85-87.

While none of these cases specifically concerned the Crow Tribe's off-reservation hunting right, each concerned a tribal off-reservation hunting right articulated in terms identical or similar to that of the Tribe's 1868 Treaty, and each concerned a state's attempt to regulate such off-reservation hunting on National Forest lands. And in each case, the appropriate state court found the tribal right was preserved from treaty days to the present. Against the weight of these cases, and of the Crow Tribe's JAR 13-09, stands only the decision below – an outlier built upon the demonstrably wrong decisions in *Repsis* and *Race Horse*. The decision below cannot stand.

CONCLUSION

The Crow Tribe has served as an unflinching ally of the United States. Crow Tribal citizens have fought and died side-by-side with, and as members of, the United States Military, while at the same time fighting to preserve the rights lawfully retained in exchange for the peaceful cession of most of our lands. One of those rights, expressly reserved by the Crow in the 1868 Treaty, is the right to hunt on unoccupied lands of the United States, such as the Bighorn National Forest. No act of Congress has abrogated that right; and the United States "is certainly too great, too powerful, and too just to merit such a verdict." Letter from Agent Keller to Comm'r Price, *supra*.

The judgment of the Wyoming district court should be reversed.

Respectfully submitted,

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