

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CLAYVIN HERRERA,)
)
) Petitioner,)
)
) v.) No. 17-532
)
) WYOMING,)
)
) Respondent.)
)

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1 Minnesota v. Mille Lacs Band of Chippewa
2 Indians.

3 And while the treaty does provide that
4 the right would terminate if the lands were no
5 longer unoccupied, President Cleveland's 1897
6 proclamation creating the Bighorn National
7 Forest did not suddenly render all 1.1 million
8 acres of the land comprising the forest
9 occupied as the parties to the treaty
10 understood that term.

11 As a result, the treaty right has not
12 terminated, and Petitioner should have been
13 permitted to invoke that right during his
14 criminal prosecution for hunting in the Bighorn
15 National Forest.

16 Before this Court, Wyoming largely
17 disregards Mille Lacs and urges this Court to
18 rely its 1896 decision in Ward v. Race Horse.
19 But Mille Lacs repudiated the reasoning that
20 led to the outcome in Race Horse. From Race
21 Horse's reliance on the equal footing doctrine
22 to its characterization of treaty rights as
23 temporary and precarious --

24 JUSTICE GORSUCH: But --

25 MR. HICKS: -- to its belief that

1 states --

2 JUSTICE ALITO: Even if you were right
3 about Race Horse, why isn't your client bound
4 by the judgment of the Tenth Circuit in Repsis
5 and, in particular, its disposition of the
6 question whether the land is occupied?

7 MR. HICKS: Justice Alito, a few
8 responses for that. First of all, the -- the
9 issue of whether the Tenth Circuit's
10 alternative determination has preclusive effect
11 was not pressed or passed on below. There is
12 nothing in the decisions of the state courts
13 that address the preclusive effect of that
14 alternative determination.

15 And this Court typically does not
16 address questions from state courts that have
17 not been pressed or passed on.

18 JUSTICE ALITO: So that -- that would
19 be available to the state to argue on remand if
20 you were to prevail on the other issues?

21 MR. HICKS: Well, I think that the --
22 the state has likely forfeited that as a matter
23 of state law, but I also think that there are
24 other reasons why an exception to preclusion
25 would not apply. I mean --

1 JUSTICE ALITO: What's your best
2 reason?

3 MR. HICKS: Primarily, it's that the
4 tribe did not have a full and fair opportunity
5 to litigate this issue in Repsis because it was
6 not raised in the Repsis district court. It
7 was raised for the first time in the court of
8 appeals, and the court of appeals'
9 determination in the first instance was not
10 only one of several alternative determinations;
11 it wasn't subject to plenary appellate review.

12 JUSTICE ALITO: Well, those are
13 several reasons. The -- there was not a fair
14 opportunity to raise the issue in the Tenth
15 Circuit?

16 MR. HICKS: Well, I think that there
17 was not the full and fair opportunity to
18 litigate that question that this Court requires
19 before it gives preclusive effect.

20 JUSTICE ALITO: Why -- why not? Why
21 not in the Tenth Circuit? Why didn't they have
22 a fair -- a full and fair opportunity in the
23 Tenth Circuit?

24 MR. HICKS: Well, to begin with, I
25 don't know if the full --

1 JUSTICE ALITO: They didn't allow
2 briefs? They didn't allow arguments? They
3 didn't want to listen to anything that -- that
4 the tribe had to say?

5 MR. HICKS: Well, primarily because
6 this particular argument, that the creation of
7 the national forest in and of itself rendered
8 the entire land occupied so that the treaty
9 right was terminated, was, I believe, one page
10 of Wyoming's response brief in -- on an issue
11 that was never raised in the district court.

12 And so the only thing that the tribe
13 had to respond to that was limited space in a
14 reply brief where it had to respond to all of
15 the other arguments that Wyoming had made,
16 principally on the issue that the district
17 court had actually addressed.

18 JUSTICE SOTOMAYOR: Could you --

19 JUSTICE KAGAN: Mr. Hicks, are -- are
20 you asking us to decide that issue, or are you
21 asking us to remand on that issue?

22 MR. HICKS: I think there are several
23 reasons why you can decide that there was no
24 preclusive effect to the Tenth Circuit's
25 determination, among them, that it was

1 forfeited; among them, that it was not a full
2 and fair opportunity, so that it qualifies for
3 that exception, but also that that particular
4 determination in the first instance was not
5 subject to the plenary appellate review this
6 Court requires.

7 JUSTICE KAGAN: If -- if -- if your
8 primary argument is that it was forfeited, and
9 I think you -- you have some good grounds for
10 thinking that, but given that that is a state
11 law matter, why wouldn't we remand to the
12 Wyoming courts to decide that forfeiture
13 question?

14 MR. HICKS: Well, because I think
15 typically what this Court does when a -- an
16 issue has not been raised or pressed on below
17 is it -- is it doesn't allow the consideration
18 of it here. So I don't think there's any
19 reason to remand for consideration of that in
20 the first instance.

21 But I think you can go on to address
22 that, you know, as a matter of an exception to
23 preclusion law. I mean, I think that there are
24 several reasons why that wouldn't be given
25 preclusive effect.

1 JUSTICE SOTOMAYOR: I'm a little
2 confused. What was forfeited when? You didn't
3 -- you -- you're arguing you didn't get a fair
4 and full opportunity to litigate this in
5 Repsis? In Repsis, there wasn't a fair
6 opportunity?

7 MR. HICKS: That -- it is that the
8 tribe did not have the required full and fair
9 opportunity, among the reasons, in the Tenth
10 Circuit.

11 JUSTICE SOTOMAYOR: All right. Was
12 that because when the Tenth -- I thought the
13 Tenth Circuit there asked for further briefing,
14 correct?

15 MR. HICKS: No, they did not, Your
16 Honor.

17 JUSTICE SOTOMAYOR: Oh.

18 MR. HICKS: There was no further
19 briefing in --

20 JUSTICE SOTOMAYOR: In the --

21 MR. HICKS: You're thinking of the
22 decision below --

23 JUSTICE SOTOMAYOR: Right.

24 MR. HICKS: -- and the Wyoming state
25 courts asked for supplemental briefing on

1 whether there was issue preclusion.

2 JUSTICE SOTOMAYOR: Oh, okay.

3 MR. HICKS: And in response, the State
4 of Wyoming in this case did not ever raise this
5 as a ground for why there should be preclusive
6 effect given to anything in the Repsis
7 litigation.

8 JUSTICE ALITO: Well, I'll tell you
9 what troubles me about your position here and
10 your argument that we should decide these issue
11 preclusion questions. This is like a little --
12 you know, a couple of classes in law school on
13 issue preclusion, and you and the -- and the
14 government have raised significant issue
15 preclusion arguments that we're going to have
16 to decide in this case involving a misdemeanor
17 criminal conviction.

18 MR. HICKS: Well, Justice Alito, I
19 think those are actually good reasons to find
20 that there are -- you can apply the
21 well-established exceptions. I mean, the full
22 and fair opportunity --

23 JUSTICE ALITO: Well, I don't know
24 that they are well -- I don't know that they
25 are well established. The exception that when

1 a judgment is raised it is based on two
2 alternative grounds, it's not -- there's no
3 issue preclusion on either ground, that's well
4 established? Hasn't that been rejected by six
5 circuits?

6 MR. HICKS: No, Your -- Your Honor,
7 that is incorrect. Actually, if you look at
8 the footnote in our reply brief, seven circuits
9 have actually accepted the Restatement's rule.
10 I know that the State's brief says --

11 JUSTICE ALITO: Well, we haven't
12 accepted it, have we?

13 MR. HICKS: No, this Court has not
14 addressed it, but it actually goes part and
15 parcel with what this Court has said about the
16 -- the critical importance of giving plenary --
17 plenary appellate review to determinations.
18 That is the preface --

19 JUSTICE ALITO: I mean, it seems to me
20 like a significant question, and I was
21 underwhelmed by the reasons given in the
22 comment to the provision of the Restatement on
23 this question.

24 MR. HICKS: Well, I think that --
25 first of all, I don't --

1 JUSTICE ALITO: The first reason they
2 give is that when -- when a court says our
3 judgment, right, is based on two alternative
4 grounds, and either one is independently
5 sufficient, that shouldn't have -- that
6 shouldn't have res judicata -- that shouldn't
7 have issue preclusion effect because, really,
8 the -- the court may not have seriously -- the
9 court may not have been accurate in saying each
10 one is independently sufficient. Do you find
11 that to -- do you find that to be a
12 particularly strong argument?

13 MR. HICKS: Well, I think that it's a
14 -- it's an exception that applies in narrow
15 circumstances. You have to have an alternative
16 determination decided in the first instance.
17 And I think that, frankly, the Tenth Circuit's
18 decision here proves the policy underlying it.

19 I mean, I don't -- there's not a great
20 defense of the Tenth Circuit's determination on
21 the merits. And I think that's demonstrated by
22 the fact that there was such limited briefing.
23 It was only raised in the Tenth Circuit in one
24 page of briefing.

25 The tribe, you know, only had a very

1 limited amount of its reply brief. So I think
2 when you combine, you know, the policies
3 underlying the full and fair opportunity, in
4 addition to the fact that it's an alternative
5 determination in the first instance, I think
6 the Tenth Circuit's determination is, you know,
7 demonstrating why the Restatement exception
8 exists.

9 And, again, it's a very --

10 JUSTICE GORSUCH: Counsel -- counsel,
11 I'll spot you that. I mean, it's a little
12 curious that -- now I don't wish to fault my
13 own court -- but the Tenth Circuit decided that
14 land was occupied by the federal government as
15 an alternative holding without hearing from the
16 federal government, who now disclaims the idea
17 that they occupied the territory.

18 So I -- I -- I take your point. But
19 do we have to get into any of this issue
20 preclusion stuff at all? If this issue wasn't
21 raised by the district, passed on by the
22 district court, relied on by the district
23 court, in this proceeding, why should we enmesh
24 ourselves in the excellent Wyoming law of issue
25 preclusion?

1 MR. HICKS: Well, Justice Gorsuch, I
2 -- I don't think you need to get into that. I
3 think you can advance to the merits and decide
4 the merits questions before you.

5 JUSTICE GORSUCH: Let's do that then.
6 Tell us about that.

7 MR. HICKS: I -- I would be happy to
8 do that, because, you know, if you go back to
9 this Court's decision in Mille Lacs and you
10 look at the reasoning that this Court put
11 forward for the -- for what constitutes
12 termination of Indian treaty rights --

13 JUSTICE KAVANAUGH: But in that -- in
14 that decision, we did not overrule Race Horse.
15 We said that Race Horse meant that statehood
16 did not automatically terminate the prior
17 treaty right, automatically, but that certain
18 language in the Race Horse treaty was still
19 sufficient to terminate the treaty right.

20 And the language in the Race Horse
21 treaty is the exact same language at issue in
22 this treaty.

23 What's -- so why shouldn't we have the
24 same result here that we had in Race Horse, and
25 that's the part of Race Horse that is preserved

1 on page 207 by Mille Lacs?

2 MR. HICKS: Justice Kavanaugh, I -- I
3 don't think you expressly overruled the outcome
4 in Race Horse, but I think that you did reject
5 all the legal reasoning that led to the Race
6 Horse results.

7 I mean, you rejected the equal footing
8 doctrine holding. You rejected the temporary
9 and precarious approach to characterizing
10 treaty rights, which was a premise of that
11 second --

12 JUSTICE KAVANAUGH: But -- but we --
13 sorry to interrupt. We concluded that it was a
14 question of congressional intent, whether the
15 treaty right was terminated by statehood, and
16 we concluded that the language, the right to
17 hunt on unoccupied lands of the United States,
18 was the relevant treaty language, was
19 terminated by Wyoming's statehood, correct?

20 MR. HICKS: I think you concluded that
21 in Race Horse.

22 JUSTICE KAVANAUGH: And that's
23 preserved, explicitly preserved on page 207 of
24 the Mille Lacs opinion. That part is not
25 overruled.

1 And my question is, if that part of
2 Race Horse was not overruled but was explicitly
3 preserved and, in fact, distinguished from the
4 Chippewa treaty, how can we in this case not
5 apply the same result that was applied in Race
6 Horse, with the exact same treaty language?
7 Which part of the reasoning is wrong there?

8 MR. HICKS: A couple of responses.

9 First of all, I don't know that you
10 would be applying the results of a prior case.
11 I think you apply your reasoning. And I think
12 that the reasoning that you adopted in the Race
13 Horse -- I'm sorry, in Mille Lacs was that you
14 did not accept this idea that -- that simply
15 characterizing a treaty right as temporary and
16 precarious, such that it could be impliedly
17 terminated by statehood -- and I recognize that
18 you distinguished --

19 JUSTICE KAVANAUGH: But -- but we said
20 that there were -- we said unlike the treaty at
21 issue in Race Horse, right, and then we said
22 there was a clearly contemplated event in Race
23 Horse, unlike in -- in the Mille Lacs treaty --

24 MR. HICKS: That --

25 JUSTICE KAVANAUGH: -- and the clearly

1 contemplated event was the language said
2 hunting on the unoccupied lands of the United
3 States, that that was terminated by statehood,
4 right?

5 MR. HICKS: No, I don't actually think
6 that you actually went on and said that that
7 particular language was terminated by
8 statehood. You recognized the holding that
9 Congress did not intend for that particular
10 treaty right to -- to survive statehood.

11 But then you went on. When you --
12 when you distinguished that particular treaty,
13 the Race Horse treaty, you actually
14 distinguished it by recognizing the express
15 conditions of termination in that treaty, which
16 is unoccupied land --

17 JUSTICE KAVANAUGH: Do you think --

18 JUSTICE KAGAN: So, Mister --

19 JUSTICE KAVANAUGH: -- Race Horse is
20 overruled or not, the result in Race Horse?

21 MR. HICKS: I think that you did not
22 expressly in haec verba overrule the decision
23 -- the outcome.

24 JUSTICE KAVANAUGH: You think it's
25 still good law as to the tribe at issue in Race

1 Horse?

2 MR. HICKS: I think that if -- if the
3 tribe in Race Horse were here, I think that it
4 would have to be arguing that you explicitly
5 overruled it, but I don't think you need to do
6 that here. I think what you --

7 JUSTICE SOTOMAYOR: Why not? Go back
8 to Judge Kavanaugh's question. The language is
9 nearly identical. Wouldn't we have to say that
10 Race Horse is overruled to come to a different
11 conclusion? How would we distinguish the two?

12 MR. HICKS: Well, I think -- I think
13 that you simply need to apply the reasoning
14 that you set forth, the new reasoning in Mille
15 Lacs, to this Crow Tribe treaty, which has
16 never been before the Court.

17 And now, if that creates, you know, a
18 bit of a situation where you've got, you know,
19 the -- the Shoshone-Bannock treaty that was
20 interpreted using old reasoning having the
21 right terminated and, you know, having a --

22 JUSTICE SOTOMAYOR: You know, Justice
23 -- Chief Justice Rehnquist -- I don't know if
24 he was Chief back then -- said that we had --
25 that the majority had effectively overruled

1 Race Horse, and so have commentators.

2 So should we just say it? And you
3 still haven't told me what factually is
4 different between the two treaty provisions --

5 MR. HICKS: Well, I can --

6 JUSTICE SOTOMAYOR: -- that would
7 distinguish them sufficient for us to say we're
8 applying the new logic and this treaty
9 provision fits that new logic, plus it's
10 different from Race Horse, why? You haven't
11 filled in that blank.

12 MR. HICKS: Sure. And -- and I would
13 say that, you know, first of all, I think it
14 would be far more unusual not to apply your
15 controlling precedent on Indian treaty
16 termination, termination of Indian treaty
17 rights, to a treaty that has never been before
18 this Court simply because there's old reasoning
19 to a treaty that has not been before the Court.

20 But if you're looking for distinctions
21 between the treaties, of course, this Court has
22 said, including in Mille Lacs itself, that you
23 don't just look to the identical text of two
24 treaties. You look at the negotiations. You
25 look at the history. You look at the

1 post-ratification history.

2 And as we've put forward in our brief,
3 there is nothing in either the text or the
4 negotiations or the post-ratification history
5 that gives any indication that statehood would
6 have been a terminating event.

7 JUSTICE KAVANAUGH: What's different
8 about the Crow treaty, which is 1868, and the
9 Shoshone treaty, 1868, in terms of the
10 negotiations or the intent? The language is
11 exactly the same. So what's different about
12 the intent?

13 MR. HICKS: Well, we don't know much
14 about the negotiations or the history of the
15 Shoshone-Bannock treaty because that really
16 wasn't addressed much in the Race Horse
17 decision, but there are -- there are material
18 distinctions between the history in the way
19 that these treaties came about.

20 For example --

21 JUSTICE KAVANAUGH: These two
22 treaties?

23 MR. HICKS: For the -- the -- the Race
24 Horse treaty, the Shoshone-Bannock treaty, and
25 the Crow Tribe treaty.

1 The Shoshone-Bannock were on the
2 complete other side of Wyoming. The treaty
3 came about because of different conflicts with
4 settlers.

5 The -- the Crow Tribe is on the
6 complete other side of Wyoming. It's nowhere
7 near Yellowstone National Park, which was
8 something that the -- the Race Horse Court was
9 looking at as well.

10 I mean, there are material
11 distinctions between the way that these two
12 treaties came to be because of the different
13 histories between the two tribes.

14 JUSTICE KAVANAUGH: But you haven't
15 pointed to anything really specific. My
16 concern just is -- is just that if we end up
17 with agreeing with you on the merits, we'll
18 have a result that the same treaty language
19 creates two different results, one for the
20 Shoshone ends at statehood, the treaty right,
21 and the other does not for this, the Crow, even
22 though it's the exact same treaty language.

23 And I'd like, if we're going to reach
24 that result, to be able to point to something.
25 And what is that something?

1 MR. HICKS: Justice Kavanaugh, I think
2 that if -- if there are different results
3 there, I think that's a consequence of the new
4 reasoning that you set out in Mille Lacs. And
5 I think it would be far more unusual not to
6 apply --

7 JUSTICE KAVANAUGH: But that would
8 have been -- sorry to interrupt. That would
9 have been a reason on page 207 to say the Race
10 Horse decision is gone. And that's not what we
11 said. We distinguished the treaty language.
12 And maybe we should have said it's gone, but we
13 didn't.

14 MR. HICKS: Well, I certainly think
15 that if it gives you heartburn to have two
16 different results because you're applying your
17 latest legal reasoning, I think you can take
18 the extra step.

19 You did so in the Limbach case that we
20 -- that we cited, in the Sunnen case. I mean,
21 these are examples where, you know, Limbach
22 actually says so there -- so that there may be
23 no misunderstanding, we hereby expressly
24 overrule this decision that's -- you know, that
25 we probably should have just expressly

1 overruled before. So --

2 CHIEF JUSTICE ROBERTS: Well, how much
3 are you going to have to unwind if you apply --
4 you no longer believe that statehood eliminated
5 the treaty provisions in Race Horse?

6 MR. HICKS: Nothing, Your Honor,
7 because there's -- there's no other state that
8 has to -- that is operating under this.
9 There's no other state aside from Wyoming that
10 has been free of recognizing Indian treaty
11 rights.

12 So that's not a consideration. And
13 there's been no suggestion or evidence that
14 Wyoming has ever relied on this particular Race
15 Horse treaty in the way that it has formulated
16 its -- its natural resource management or in
17 the way that it --

18 CHIEF JUSTICE ROBERTS: Well, you'd
19 still have the result that concerns Justice
20 Kavanaugh, that under the exact same language,
21 the two different tribes are going to be
22 treated differently.

23 MR. HICKS: But I think that's a
24 consequence of the Mille Lacs reasoning, which
25 is your most recent controlling precedent on

1 interpreting the termination of Indian treaty
2 rights.

3 If I can reserve my time, please.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Liu.

7 ORAL ARGUMENT OF FREDERICK LIU
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE PETITIONER

10 MR. LIU: Mr. Chief Justice, and may
11 it please the Court:

12 If the principles of Mille Lacs apply
13 here, I don't think there can be much doubt
14 about the outcome. The decision below should
15 be reversed.

16 JUSTICE GORSUCH: What do you say to
17 the suggestion that we just be done with Race
18 Horse and overrule it?

19 MR. LIU: The government would be fine
20 with that. We would invite the Court to
21 overrule Race Horse. I do want to make clear
22 that, in our view, it's not necessary to take
23 that extra step, even though these two treaties
24 have the same language.

25 This is a different treaty than the

1 treaty that was before this Court in Race
2 Horse. It governs a different tribe on
3 different lands. And so I think this Court is
4 still faced with the question, even though the
5 language is the same, about whether to extend
6 the erroneous reasoning of Race Horse to a new
7 context.

8 JUSTICE SOTOMAYOR: Would you please
9 stop talking in generalities?

10 MR. LIU: Oh, sure.

11 JUSTICE SOTOMAYOR: Give me a specific
12 in which way are the two tribes or their
13 history different?

14 MR. LIU: Well, Your Honor, to be
15 frank, I -- I don't think there -- the
16 government isn't going to be able to point to a
17 difference in the history. We just think Race
18 Horse itself was wrong.

19 But I think the question is still,
20 should you extend that reasoning to a new
21 context? You know, one of the -- one of the
22 reasons you might want to extend it is this --
23 this interest in uniformity, but I think it's
24 important to remember that that -- that
25 uniformity rationale just isn't going to work

1 here.

2 The Shoshone-Bannock Tribe, which was
3 the tribe involved in the Race Horse decision,
4 has its reservation in Idaho. And the Idaho
5 Supreme Court and the Ninth Circuit for decades
6 have said Race Horse is already a dead letter.

7 JUSTICE KAGAN: Why do you think Race
8 Horse wasn't over -- overruled?

9 MR. LIU: I think for the simple
10 reason, Justice Kagan, that the Race Horse
11 treaty just wasn't before the Court in Mille
12 Lacs and --

13 JUSTICE KAGAN: Well, but it does try
14 to distinguish it. Now I have to say I've read
15 that paragraph three times, and I still really
16 have no idea what it's talking about.

17 (Laughter.)

18 JUSTICE KAGAN: But it does try to
19 distinguish it. It has this view that there
20 are two kinds of rights and -- and some are --
21 two kinds of termination points for a treaty,
22 and some are clearly contemplated and some
23 aren't.

24 What it never tells you is how that
25 distinction relates at all to the statehood

1 question that's before us and that was before
2 Mille Lacs. But -- but it does -- there's
3 something in its head about how these treaties
4 are different and why that matters.

5 And I guess I'm looking to you to tell
6 me what I don't understand about it.

7 MR. LIU: I think you're right,
8 Justice Kagan. That middle sentence and, I
9 think, the paragraph that -- that troubles all
10 of us is a distinction between the 1868 treaty
11 that was at issue in Race Horse and the -- and
12 the 1837 treaty that was at issue in Mille
13 Lacs.

14 But, number one, I -- I think it's
15 important to read that sentence within the
16 context of everything around it, and I -- and I
17 think everything around it makes clear that the
18 reasoning in Race Horse is no longer good.
19 Even that sentence itself doesn't provide any
20 affirmative reason why Race Horse was correct.

21 As you noted, it's just a -- a grounds
22 for distinguishing Race Horse. So you couldn't
23 look at that sentence and say Race Horse
24 actually reached the right result. In fact, if
25 you look at the terminating events that those

1 two sentences themselves identify as
2 terminating events under the treaty in Race
3 Horse, statehood isn't one of those either.

4 It focuses on the text. It focuses on
5 -- on whether the land is unoccupied and still
6 owned by the United States. That actually
7 flows nicely from the beginning of that
8 paragraph, which says that the inquiry should
9 be on the circumstances that the treaty itself
10 identifies.

11 So I think, read as a whole, this
12 paragraph is about what the proper focus of the
13 inquiry should be.

14 CHIEF JUSTICE ROBERTS: Counsel, you
15 are -- for the government, you are walking a
16 really thin tightrope here. You're saying that
17 in terms of whether the land is occupied, it
18 depends on the real question whether there are
19 settlers there, whether there are people there.

20 And yet you say when it comes to the
21 Bighorn National Forest or park, you say, well,
22 maybe it's occupied if we, the government, say
23 we don't want people coming on here. It seems
24 to me that the test has to be the same for the
25 United States' property at Bighorn and for the

1 other property in Wyoming.

2 MR. LIU: I -- I think that's right,
3 Mr. Chief Justice. We're not asking that a
4 different test be applied to the federal
5 government. Our test for whether land is
6 occupied is whether that land has been settled.

7 Now it can be settled --

8 CHIEF JUSTICE ROBERTS: Has been
9 settled?

10 MR. LIU: It can be settled --

11 CHIEF JUSTICE ROBERTS: The whole
12 point of Bighorn is that you don't want that
13 land settled.

14 MR. LIU: And -- and -- and that --
15 that's true. The -- the -- by designating the
16 land as a national forest, the federal
17 government has prevented private settlement.

18 What we're saying is that there are
19 things the federal government can do, just like
20 private settlers can do, that can result in the
21 land being occupied. We too can build
22 buildings, roads, campsites, recreation areas.

23 CHIEF JUSTICE ROBERTS: Well, how much
24 is enough? I mean, if you have the little --
25 you know, a little shed for the ranger, does

1 that allow you to say, well, these, you know,
2 100,000 acres are occupied?

3 MR. LIU: No, we wouldn't -- we
4 wouldn't say that -- that putting a shed in one
5 place occupies that much land. I think a -- a
6 good piece of guidance is our regulation, which
7 we cite in our brief, which prohibits discharge
8 of a firearm within 150 yards of a building or
9 a home. And so we -- we would consider the
10 area --

11 CHIEF JUSTICE ROBERTS: So you occupy
12 the land if nobody can fire a gun in it?

13 MR. LIU: No, it's -- it's 150 yards
14 around a -- a campsite, a building, a
15 residence, or other occupied area. So we would
16 -- we would take the -- the development of the
17 land as sort of the anchor point and then look
18 around 150 yards, and that would be the land --

19 CHIEF JUSTICE ROBERTS: Just so I
20 understand, so at 151 yards, Mr. Herrera could
21 take an elk?

22 MR. LIU: At a hundred and -- correct.
23 I mean, there has to be some line that we draw
24 between land that's occupied and unoccupied. I
25 -- I think there is some burden on the hunter

1 to know where he or she can hunt. And I think
2 seeing a building 150 yards away is not too
3 much to ask.

4 JUSTICE GORSUCH: Counsel, along those
5 lines, you asked for remand for an evidentiary
6 exploration of whether the land here was
7 occupied. At the same time, though, you -- you
8 point out that the district court didn't rely
9 on the occupation as a basis for its relying on
10 the Tenth Circuit opinion.

11 MR. LIU: Right.

12 JUSTICE GORSUCH: Seems there's some
13 tension there to me. Maybe not. Maybe you can
14 help me out why there isn't. Why should we
15 allow a remand for that? You know, it's a new
16 argument raised in this Court for the first
17 time. Why should we address it at all?

18 MR. LIU: I -- I -- I think -- I think
19 the district court -- I think the state trial
20 court in this case, to be more precise, did --
21 was open to having an evidentiary hearing from
22 the get-go, and it was only after the state
23 trial court determined that the issue could be
24 resolved as a matter of law, that that
25 evidentiary hearing was canceled.

1 JUSTICE GORSUCH: So, fine, we -- we
2 could remand it back, but do we need to say
3 anything about this at all?

4 MR. LIU: Oh, not at all. I -- I
5 think the government was -- was -- was trying
6 to be helpful in trying to formulate some sort
7 of test and flesh that out.

8 JUSTICE GORSUCH: All right. I've got
9 one more question for you then. That helps.

10 MR. LIU: Sure.

11 JUSTICE GORSUCH: The government says
12 that the state retains some conservation
13 easement here.

14 MR. LIU: Right.

15 JUSTICE GORSUCH: That -- I don't know
16 where it comes from, but you -- you tell us
17 that such a thing exists. At the same time,
18 though, the treaty says that -- that the tribe
19 is allowed to hunt on the land until the game
20 are gone.

21 MR. LIU: Right.

22 JUSTICE GORSUCH: Which seems to
23 suggest that the white man can eliminate all
24 the game. But now you say the Indian cannot.
25 How can that be?

1 MR. LIU: I -- I think it goes back to
2 the basis of the conservation necessity
3 doctrine. It is a gloss on treaty language
4 that does not confer the exclusive right to
5 hunt on the Indians.

6 JUSTICE GORSUCH: I don't understand
7 that. If the treaty were silent about the
8 game --

9 MR. LIU: Yeah.

10 JUSTICE GORSUCH: -- but the treaty is
11 express, and it contemplates no conservation.
12 It contemplates the complete elimination of the
13 game by the white man.

14 MR. LIU: Yeah.

15 JUSTICE GORSUCH: So, if the white man
16 gets to eliminate the game, again, counsel for
17 the government, how come the Indian may not?

18 MR. LIU: I -- I think it just goes
19 back to the fact that these treaties are -- are
20 more or less written against the backdrop of
21 states being able to exercise some conservation
22 authority because the right is not exclusive.

23 JUSTICE SOTOMAYOR: I'm sorry. For --

24 MR. LIU: But that issue hasn't been
25 raised, and it could be addressed on remand.

1 JUSTICE GORSUCH: We don't need to
2 address that.

3 MR. LIU: You don't need to address
4 it.

5 JUSTICE SOTOMAYOR: This killing was
6 on --

7 JUSTICE ALITO: When you say that --

8 JUSTICE SOTOMAYOR: -- this killing
9 was on federal land, correct?

10 MR. LIU: Correct.

11 JUSTICE SOTOMAYOR: In all state -- in
12 all federal parks, state regulations apply?

13 MR. LIU: It depends on the type of
14 federal land. So, here, we're talking about a
15 national forest land. And, by statute, the
16 state returns -- retains jurisdiction over
17 persons in this particular national forest.

18 JUSTICE SOTOMAYOR: Okay. I just
19 wasn't aware of that.

20 MR. LIU: It's a forest-by-forest and
21 land-by-land determination.

22 JUSTICE SOTOMAYOR: All right.

23 JUSTICE ALITO: When you say we don't
24 have to deal with the issue of whether it's
25 occupied, are you talking about the issue

1 preclusion issue?

2 MR. LIU: No. I -- I think the way to
3 deal with the issue preclusion issue, Your
4 Honor, is -- is to conclude that that issue has
5 been not raised or passed upon below, that
6 either it's been forfeited or that it can be
7 pursued on remand.

8 The federal government would -- would
9 not invite this Court to address the actual
10 merits of these various issue preclusion
11 doctrines. We agree that these issues are
12 difficult and the circumstances of this case
13 are particularly unusual because the
14 alternative judgment that was inserted into the
15 case by the Tenth Circuit in Repsis was done so
16 at the appellate level and not in the court of
17 first instance.

18 And not even Restatement Section 27
19 addresses this precise instance. So we -- we
20 would caution the Court against delving into
21 these tricky preclusion issues.

22 We do think the issue was not raised
23 or -- or addressed below. I think the clearest
24 place to look for this is -- is page 11 of the
25 state's supplemental brief addressing the issue

1 preclusion in -- in the courts below.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Knepper.

5 ORAL ARGUMENT OF JOHN G. KNEPPER
6 ON BEHALF OF THE RESPONDENT

7 MR. KNEPPER: Mr. Chief Justice, and
8 may it please the Court:

9 Mr. Herrera's claims are identical to
10 those presented 25 years ago by his sovereign
11 on his behalf in the case Crow Tribe v.
12 Repsis.

13 Nothing since Repsis, including the
14 decision by this Court in Mille Lacs, merits an
15 exception to this Court's repeated command
16 that, once the appeals are over, a final
17 judgment binds the parties and they may not
18 renew the same dispute in another forum.

19 Repsis ruled that this particular
20 treaty right had expired, and this Court should
21 not on collateral review allow it to spring
22 back, especially as, when you look at the
23 decision in Mille Lacs, Mille Lacs went out of
24 its way not to overrule the result in Race
25 Horse.

1 Much of -- much of the argument over
2 preclusion, Your Honor, has to do with whether
3 there has been a change in intervening law, and
4 this case is particularly ill-suited to find
5 such a change.

6 The treaty text has not changed.
7 There are no essential facts that have changed,
8 because when one looks at the underlying case
9 brought by the Crow Tribe, in the complaints
10 and the Joint Appendix, it was brought at the
11 broadest possible level of abstraction.

12 JUSTICE BREYER: Maybe I'm not
13 understanding this correctly because it's
14 complicated, but I thought there are two
15 separate issues in respect to issue preclusion.

16 One has to do with Repsis. And Repsis
17 was a case that held on your side. And there
18 haven't been much changes since then. But your
19 argument, their argument about that one is you
20 never raised the issue. The district court
21 never decided it. The Tenth Circuit just on
22 its own wrote the thing in there. And so you
23 forfeited that one.

24 Now, in respect to the second and
25 different question, it's whether Race Horse

1 bars their claim. A totally different
2 question. And there, not with Repsis, the
3 basic argument is the law changed in Mille
4 Lacs.

5 It doesn't in Restatement or where
6 we've quoted the Restatement, which we have in
7 a number of cases, Bobby v. Bies, Limbach v.
8 Hooven, et cetera, we haven't said that you are
9 free to bring a new issue only where the court
10 has overruled the case that came against you.

11 We said you're free to bring a new one
12 when there's a change in the applicable legal
13 context. Okay? So their argument there is
14 there is a change in the applicable legal
15 context. One, no more equal footing doctrine
16 and you win. Two, no more just become a state
17 and you win. Okay? That's a change in the
18 applicable legal context since Race Horse
19 relied on those two things.

20 Now that's my understanding of the
21 argument. So either tell me I'm wrong and
22 explain what the standing -- what the correct
23 argument is, or answer those points.

24 MR. KNEPPER: Okay. Your Honor, the
25 -- there's not complete clarity within this

1 Court's jurisprudence as to what kind of a
2 change in the legal context is sufficient.

3 Some say, you know, Stauffer Chemical
4 talks about a significant change or a major
5 doctrinal shift. The -- you know, the language
6 in Bobby v. Bies says just a change in the
7 applicable law.

8 You know, from -- from the state's
9 perspective, if -- if any change to a precedent
10 relied upon by a prior court, either it's
11 called into question by this Court or it's
12 called into question by a court of appeals in
13 some subsequent cases is sufficient to undo the
14 preclusive effect of the first opinion, then I
15 think there are very few cases that will have
16 preclusive effect because, you know, one need
17 only go through the opinion and say: Well,
18 this -- this case was cited by the court
19 somewhere, and -- and by citing that case, they
20 must have relied upon it and -- and, boy, look
21 over here, there -- there's another case that
22 has -- that has questioned it, not being
23 necessarily overruled.

24 JUSTICE KAGAN: But, Mr. Knepper, I --
25 I think this isn't just any change. I -- I

1 think a fair reading would suggest that what
2 Mille Lacs did was to repudiate the reasoning
3 that Race Horse had in it with respect to
4 exactly the question before us.

5 And it's true that it did not go all
6 the way to overruling the case, but it -- it
7 came up like half a step short of that. It
8 basically said the case was wrong, and then it
9 found some distinction that wasn't even
10 relevant to the question and said we don't have
11 to overrule it because there is this
12 distinction.

13 But all the reasoning is repudiated.
14 Wouldn't you think -- wouldn't you say that
15 that's right?

16 MR. KNEPPER: Your Honor, the court
17 did not overrule the approach to treaty
18 interpretation. It said the key is looking at
19 what the intent of the parties is.

20 It reached a conclusion that -- that a
21 court today might not reach. It might reach a
22 different conclusion. But that argument that
23 the court should have said something different
24 is -- is at root the argument that the court --
25 that the -- that the -- that the decision was

1 wrong.

2 JUSTICE KAGAN: Well, just to make
3 this more concrete, I mean, as I understand it,
4 Race Horse essentially said that these treaty
5 rights expired upon statehood. And Mille Lacs
6 comes in and says that's a wrong thing to say.
7 Treaty rights don't expire upon statehood.

8 So that seems like a pretty relevant
9 change in the law.

10 MR. KNEPPER: Well, Your Honor,
11 there's -- there's -- there's one subtlety, I
12 think, from the 19th Century law to the 20th
13 Century law that's being overlooked here, and
14 that is this Court's decision in Lone Wolf v.
15 Hitchcock. It was not until 1903 that any
16 party believed that Congress could unilaterally
17 overrule or appeal a treaty.

18 That -- the assumption in the 19th
19 Century was there had to be bargained-for
20 consideration. And so the Race Horse court,
21 when it's looking at this treaty question, is
22 saying: What was the intent of the parties?

23 And it reaches a conclusion that the
24 intent of the parties was -- and this is
25 restated from Mille Lacs -- that this was a --

1 it was clearly contemplated that this would be
2 a temporary hunting right so long as the
3 hunting grounds remained unoccupied and owned
4 by the United States and that that terminated
5 at statehood.

6 Now it was -- it was not terminated by
7 -- it was not so much that the statehood as a
8 legal act made it terminate. It was that the
9 treaty itself envisioned termination at
10 statehood. And because the parties agreed that
11 it would terminate at statehood, the treaty did
12 so.

13 JUSTICE KAVANAUGH: The oddity is
14 that, as Justice Kagan says, in *Mille Lacs*, we
15 say that the holding of *Race Horse* or the
16 reasoning that statehood automatically
17 terminates treaty rights for off-reservation
18 activity, that's no longer good, and then, on
19 the alternative holding, as we characterized it
20 from *Race Horse*, we say that language, the
21 precar -- temporary and precarious, that
22 language is also no good. Right?

23 Even on the alternative holding, it's
24 not as if the Court in *Mille Lacs* said: Oh,
25 everything from *Race Horse* is good on the

1 alternative holding. It either ditched it or
2 recharacterized it or something.

3 How would you make sense of what the
4 rule is that's preserved by Mille Lacs?

5 MR. KNEPPER: I think, Your Honor, the
6 rule preserved by Mille Lacs is that the treaty
7 language that was present in Race Horse, which
8 is identical to the treaty language in the
9 treaty with the Crows, expresses an intent by
10 the parties that the off-reservation hunting
11 right would terminate at statehood.

12 JUSTICE BREYER: Well, you have this
13 language right here in Mille Lacs: Treaty
14 rights are not impliedly terminated upon
15 statehood. The Race Horse decision, to the
16 contrary, was informed by that court's
17 conclusion that the Indian treaty rights were
18 inconsistent with state sovereignty. And then
19 it goes on to say that's not so. I mean, I can
20 read it to you, but isn't that what it says?

21 And so treaty rights are not implied.
22 Now that would seem like a change in the law
23 because they said in Race Horse treaty rights
24 were impliedly -- the Indian treaty rights were
25 impliedly repealed by statehood of Wyoming. I

1 mean --

2 MR. KNEPPER: Your Honor --

3 JUSTICE BREYER: -- I don't see how
4 you can get more opposite. You tell me.

5 MR. KNEPPER: -- Your Honor, I think
6 there are -- there -- the critical question --
7 and this sort of goes to what the text of
8 Article IV speaks of, which was, you know, and
9 -- and I may refer to Race Horse several times,
10 not just because it's binding precedent but
11 also because it's the clearest evidence that we
12 have before us of what 19th Century thinkers
13 thought the language meant.

14 In other words, it has a -- it has a
15 historical value as well, all of these
16 decisions were made during the 19th Century.
17 And -- and the Court in that case looked at the
18 treaty text and said: "Unoccupied lands," that
19 could be construed broadly, it could be
20 construed narrowly, but when construed in pari
21 materia with the language of borders of the
22 hunting districts, it applies only to lands of
23 such a character as would be embodied in
24 hunting districts. And the Court read that as
25 a term of art.

1 JUSTICE SOTOMAYOR: All right. So
2 that's wonderful. Tell me how a national park
3 isn't a traditional hunting district. I mean,
4 the government says we're not going to keep it
5 unoccupied. They open it up to hunting.

6 What was different back then?

7 MR. KNEPPER: Your Honor, I --
8 that's --

9 JUSTICE SOTOMAYOR: Unoccupied and
10 people went hunting.

11 MR. KNEPPER: Well, Your Honor, that's
12 where the Race Horse Court's evaluation of the
13 history at that time is so important because
14 the Race Horse Court looked at Yellowstone
15 National Park, and what the Race Horse Court
16 said was Yellowstone National Park was created
17 almost immediately after the treaty with the
18 Crows was signed. The -- Yellowstone National
19 Park is actually within the Crow hunting
20 district. And the Crow hunting district is a
21 very large area, but Yellowstone National Park,
22 which is an area the size of Connecticut, it's
23 not just geysers, was carved out of the hunting
24 district, and then the United States proceeded
25 over the entire time, beginning in 1872 and

1 then through the '80s, 1880s, to say to tribes:
2 You may not hunt here. This is off limits. We
3 have occupied this land.

4 Now that doesn't mean that there are
5 structures there, but that the -- that the --
6 the federal government's arrival and the
7 federal government's setting this land aside
8 has the effect of occupying the land, and that
9 the -- the tribe does not require -- or the
10 treaty does not require only -- that the tribe
11 refrain from hunting only on land where it can
12 identify a structure.

13 JUSTICE GORSUCH: Can I -- can we just
14 --

15 CHIEF JUSTICE ROBERTS: Well, I
16 know --

17 JUSTICE GORSUCH: Oh, I'm sorry.

18 CHIEF JUSTICE ROBERTS: I know that
19 when we're interpreting a treaty, we look at
20 the background and circumstances in
21 interpreting the language, and -- but your
22 argument's a pretty stark distinction, occupied
23 doesn't really have anything to do with
24 hunting. And yet you're -- you're sort of
25 saying, well, when they said "occupied," they

1 meant outside the hunting district. And that's
2 a bit of a stretch.

3 I know we try to look at the
4 background to illuminate the language, but,
5 here, it seems to me you're just substituting
6 an entirely different concept.

7 MR. KNEPPER: Your Honor, I -- I think
8 that the precise question is what did they mean
9 by "occupied" and what -- what -- what was land
10 -- what did land have to look like in --

11 CHIEF JUSTICE ROBERTS: Yeah, but your
12 argument is, you know, what did they mean by
13 "cow" and you're saying they meant "horse."
14 They're two totally different concepts.

15 MR. KNEPPER: I -- I'm not -- I'm not
16 sure that's what the State's argument is, but
17 --

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: I'm sure it's
20 not.

21 MR. KNEPPER: But -- but I -- I think
22 -- I think there are -- there are -- you know,
23 you can envision, for example, a piece of
24 private land where there is no -- there are no
25 structures, and in that piece of private land,

1 I think there's no question Mille Lacs affirms
2 this, that there would be no right to hunt on
3 that piece of private land, even though it
4 looks like nothing, it looks like a vast
5 expanse of nothing.

6 And so then the question is, when the
7 government has a specific purpose for which it
8 reserves land, and the government has done so
9 and did so throughout the 19th Century in terms
10 of military reservations for forts, which is a
11 larger portion of land than just the fort
12 itself, as well as public reservations, which
13 would be either the national forest or the
14 national parks, the government has said not --
15 not that this land is unoccupied but, rather,
16 we occupy this land. This is our land. We
17 dictate who comes in, who comes out, what
18 they're allowed to do while they're there.
19 This -- we have -- we have taken this land over
20 and managed it in a completely different way.

21 From -- from the -- from the State's
22 perspective, it's one of the reasons why we're
23 not concerned about some of the -- the
24 questions of whether Mr. Herrera -- whether the
25 United States could solve this another way.

1 In other words, this is a federal -- a
2 national forest. The current regulations for
3 the national forest say you can only hunt in
4 the national forest if you have either
5 permission from the -- the forest
6 superintendent or you're hunting in conjunction
7 with a state memorandum of understanding.

8 The state memorandum of understanding
9 for the Bighorn National Forest makes no
10 reference whatsoever to hunting outside of
11 Wyoming's permitting regime.

12 Now, if the United States wants a
13 different regime on its property, the United
14 States is free to provide that different regime
15 and free to make distinctions. And --

16 JUSTICE GORSUCH: Counsel, can we
17 return --

18 MR. KNEPPER: Sure.

19 JUSTICE GORSUCH: -- to an area where
20 we might at least be able to nail down some
21 agreement between the parties? And that is
22 your argument rests largely on issue
23 preclusion.

24 And you made an impassioned defense of
25 Race Horse and an excellent one, but what --

1 what kind of change in law is sufficient to
2 render issue preclusion inapplicable? Is it a
3 substantial change in the law? Is that the
4 test you'd have this Court use? Is it a change
5 in the law? Would you require a formal
6 overruling in so many words? What is -- what
7 is the State's understanding of the appropriate
8 test?

9 MR. KNEPPER: Your -- Your Honor, from
10 the State's perspective, that entire concept
11 gives us a great deal of pause.

12 JUSTICE GORSUCH: Well, you are the
13 one who's invoked it, though. I mean, you
14 invoked issue preclusion, all right, as the
15 primary argument in your -- in your briefs. So
16 I think you owe us an explanation --

17 MR. KNEPPER: Sure.

18 JUSTICE GORSUCH: -- what standard
19 you'd have us apply.

20 MR. KNEPPER: Your -- Your Honor, I
21 think the -- from the State's perspective, it
22 needs to be a -- both a major doctrinal
23 shift --

24 JUSTICE GORSUCH: Okay. That's the
25 test, major doctrinal shift? Thank you.

1 MR. KNEPPER: Right. If -- if I -- if
2 I could --

3 JUSTICE KAVANAUGH: Is that it?

4 (Laughter.)

5 JUSTICE KAVANAUGH: You were -- you
6 sound like you were mid-sentence to me, but --

7 (Laughter.)

8 MR. KNEPPER: Well, Your Honor, I
9 wanted to explain one of the reasons why the
10 State is so concerned about this concept of
11 change in law, especially in the context of
12 Indian treaties and jurisdictional questions,
13 because I think the greatest reason for caution
14 here is we have two eternal sovereigns. The
15 Crow Tribe will be here forever, as they have
16 been since time immemorial, and the State of
17 Wyoming has no intention of disappearing.

18 And our concern with -- with sort of a
19 -- with sort of a -- a notion that the change
20 in law is all that's necessary to remove
21 preclusion is that it creates the possibility
22 that people -- that parties just lurk, that
23 they wait and wait. And, you know, the
24 doctrine in a specific area of law may not
25 change over 10 or 20 or even 100 years, but

1 when you have two parties that will continue to
2 exist for more than a --

3 JUSTICE BREYER: But what you have is,
4 look, Race Horse, it says, your side, for two
5 or three reasons, reason 1, the equal footing
6 doctrine. Reason 2, they became a state. And
7 if there is a reason 3, it's related to the
8 second.

9 Along comes Mille Lacs and it says
10 reason 1 is no good. We think the opposite.
11 Reason 2 is no good. We think the opposite.
12 Reason 3 we think isn't any good either. We
13 think the opposite. And, therefore, Race Horse
14 doesn't bind us.

15 Now there's -- possibly they should
16 have added a fourth thing, and, therefore, the
17 words Race Horse is overruled, but the Court
18 didn't. I can understand that. I can perhaps
19 understand that better than you. There are a
20 lot of things to do every day, and you have to
21 write your opinions and you start putting in a
22 word like "overruled" and some of your
23 colleagues might think: Don't do it, you don't
24 know what you're getting, et cetera. All we
25 have to decide for this case is that Race Horse

1 doesn't bind us, okay?

2 So maybe we should say Race Horse is
3 overruled. But the three big reasons, now, are
4 they little reasons or big reasons? I would
5 say the equal footing doctrine is a major
6 change to deny that.

7 I would say to deny that they lose
8 their territory when they come into the state
9 is a major change, to say, no, that isn't so.
10 And, therefore, I thought maybe it fits within
11 what you're talking about. It has to be a
12 fairly big deal in change. It sounds like a
13 big deal.

14 And then you have another argument,
15 which is, of course, that we will get to
16 perhaps, it's not unoccupied. And, there, it's
17 more open, but you have the problem that the
18 treaty is filled with that word "unoccupied"
19 seeming to mean not occupied by white settlers.

20 And that's what the government thinks.
21 Well, the language in the treaty's supporting
22 that. And are there any white settlers in that
23 park? No, not one to my knowledge. Maybe
24 there's a games keeper. But see? Okay. So
25 that -- that's how I'm understanding your case.

1 I thought I'd spell it out. And now you say
2 what you would like.

3 MR. KNEPPER: Thanks. Thank you, Your
4 Honor.

5 (Laughter.)

6 MR. KNEPPER: I -- there -- there are
7 -- the question for -- for this Court, of
8 course, is not just Race Horse but what Repsis
9 says, Your Honor. And Repsis does not rely at
10 all on the equal footing doctrine. Repsis
11 mentions that there is an equal footing
12 doctrine and drives right past it. It does not
13 say that as a -- on -- on the basis of the
14 equal footing doctrine, that -- that the treaty
15 with the Crows' hunting right has expired.

16 Instead, it looks to what did -- what
17 does the treaty mean, and the treaty was
18 intended to expire upon statehood. The
19 language that -- that Repsis specifically --
20 the Court concluded that the right conserved by
21 the treaty with the Crows was a temporary and
22 precarious. It was not a continuing right.
23 That's -- that's -- that is treaty
24 interpretation.

25 And when one looks at Mille Lacs,

1 Mille Lacs does not question or even overrule
2 that approach to treaty interpretation. It
3 says statehood does not, independent of
4 whatever the treaty text says and whatever the
5 treaty means, automatically terminate --

6 JUSTICE SOTOMAYOR: So tell me what in
7 the treaty says it automatically terminates. I
8 saw a lot of conditions. I saw the game
9 disappearing, the land becoming occupied, but I
10 don't see on statehood or even anything
11 approaching it.

12 MR. KNEPPER: The -- the --

13 JUSTICE SOTOMAYOR: Where -- where
14 in -- just point me to something in the treaty
15 language --

16 MR. KNEPPER: Sure.

17 JUSTICE SOTOMAYOR: -- that -- that
18 gives you --

19 MR. KNEPPER: Your Honor, the -- the
20 decision rests on the conclusion that
21 unoccupied lands must be of the character of
22 the lands denominated as hunting districts, and
23 that hunting districts were a specific kind of
24 land understood, and that upon settlement, and,
25 you know, there's a -- there's a process, but

1 culminating in statehood.

2 JUSTICE SOTOMAYOR: Who gave -- whose
3 settlement? Who -- tell me the settlement
4 history.

5 MR. KNEPPER: Non -- non-Indian
6 settlement.

7 JUSTICE SOTOMAYOR: All right. And
8 non-Indians settled how? By grants by the
9 federal government, correct?

10 MR. KNEPPER: It wasn't so much
11 grants. Non-Indians came into an area and then
12 used it. And then, under the Homestead Act,
13 they would file for patents with the General
14 Land Office allowing them to turn certain
15 amounts of --

16 JUSTICE SOTOMAYOR: Who ran the
17 General Land Office?

18 MR. KNEPPER: The United States.

19 JUSTICE SOTOMAYOR: Okay. So, if the
20 United States had changed the General Land
21 Office to some other method, which they have,
22 that terminated the treaty?

23 MR. KNEPPER: I think that if what
24 you're asking is are there unoccupied lands
25 within the meaning of the treaty anymore within

1 the State of Wyoming, that's -- that's what the
2 decision both in Race Horse and in -- and in
3 Repsis concluded, that those -- those lands --
4 those lands have disappeared. They no longer
5 exist within the State of Wyoming.

6 JUSTICE KAVANAUGH: Can I ask about
7 the practical consequences of the decision?
8 Because, as Justice Gorsuch said to the
9 opposing counsel, there is still preserved in
10 the cases a right in the state to regulate in
11 the interest of conservation. Doesn't that
12 mitigate and maybe solve the concern that you
13 talked about with the state existing forever
14 and the tribe existing forever?

15 The way they can coexist, our case law
16 says, is the state still retains a right to
17 regulate in the interest of conservation? Why
18 isn't that good -- good enough?

19 MR. KNEPPER: Your Honor, conservation
20 out of necessity is not a middle ground from
21 the state's perspective, and the chief reason
22 is because the law enforcement officers who act
23 don't know whether they have jurisdiction until
24 after they have done so.

25 So -- so -- so, in other words, we

1 have -- we have an officer out enforcing law in
2 either an area or in a certain -- in a certain
3 circumstance, and the question is he -- he or
4 she acts and then only after a period of
5 litigation does he actually find out that he
6 had the authority to do so.

7 JUSTICE GORSUCH: I don't -- I don't
8 follow that, because if -- if we were to adopt
9 that -- approve of the conservation principle
10 that the government urges and the American
11 Congress does too, you would have your game
12 wardens out and about ensuring that people are
13 not hunting during off-season, for example.

14 And if they're allowed to go on the
15 forest land by agreement with the United
16 States, why then how would there be any
17 ambiguity about their capacity to issue
18 citations?

19 I'm just not clear about how
20 litigation would be required to resolve that.

21 MR. KNEPPER: Your Honor, leaving
22 aside the question of whether there's agreement
23 with the United States, right, that obviously
24 solves all problems.

25 But assuming that there's not

1 agreement with the United States, we're solely
2 acting as a -- as a matter of state power, not
3 really --

4 JUSTICE GORSUCH: Well, that's a
5 problem you have without respect to this case,
6 right? I mean, either the government allows
7 you to do that or it doesn't allow you to do
8 that. And that has nothing to do with anything
9 before us, right?

10 MR. KNEPPER: Well, the Congress in
11 this case has given the state the authority to
12 act.

13 JUSTICE GORSUCH: Right. So, okay, so
14 we can put that one aside. So, again, what
15 ambiguity remains in -- in response to Justice
16 Kavanaugh's question?

17 MR. KNEPPER: The current -- the
18 current vision of conservation necessity, which
19 has not admittedly been decided by this Court
20 in any time -- any time recently, is sort of --
21 is a reverse preemption doctrine. It's
22 essentially that the state is pushed out of an
23 area of traditional state concern and then the
24 burden is upon the state to show that it has
25 the need to come in and manage and -- and --

1 and only after sort of demonstrating at the end
2 of it that this particular activity, be it a --
3 a --

4 JUSTICE KAVANAUGH: But is it just a
5 timing issue then, because -- or is there some
6 gap between what you want to regulate and what
7 you can regulate under the conservation
8 interest?

9 MR. KNEPPER: Your Honor, there are
10 significant gaps. The two --

11 JUSTICE KAVANAUGH: Okay. What --
12 what -- give me some examples so we can
13 understand the practical consequences.

14 MR. KNEPPER: The most important, Your
15 Honor, is safety. Hunting seasons are
16 specifically limited in time. That not only
17 protects the wildlife, but it has two effects
18 beyond that. It ensures that when people are
19 recreating in the national forest or anywhere
20 else outside of that time period, there is no
21 danger -- you know, individuals who are using
22 firearms at that point have very, very little
23 justification for doing so.

24 And so there are people, and -- and
25 I'm one of them, that won't take our children

1 into the national forest during hunting season
2 because there just -- there are risks there
3 that -- that are -- that are -- that are --
4 that are too much to overcome.

5 There are limits in terms of when you
6 can fire your firearms. It has to be at
7 certain hours of the day.

8 There are requirements that if you are
9 hunting you are wearing vests so you're clearly
10 visible to one another, as well as to -- as
11 well as to third-parties.

12 Beyond -- beyond sort of the immediate
13 safety concerns, which are not embodied in
14 conservation necessity, there are disease
15 management concerns.

16 When -- when an individual takes an --
17 an elk or a deer in conjunction with a state
18 license, the Fish and Game Department will --
19 will take a sample of that animal and use it to
20 determine whether diseases like Brucellosis,
21 which can be captured -- caught both by wild
22 game animals, as well as by human beings, are
23 -- are -- are present. There are also --

24 CHIEF JUSTICE ROBERTS: But isn't that
25 covered by conservation?

1 MR. KNEPPER: Your Honor, I don't -- I
2 mean, conservation necessity to my sense has
3 always been about ensuring that the game exists
4 and -- and preventing its extermination, not
5 the sort of --

6 CHIEF JUSTICE ROBERTS: Doesn't --
7 doesn't disease interfere with that?

8 MR. KNEPPER: In some cases, it can,
9 Your Honor. In others, you know, the -- the
10 bison who have Brucellosis seem to be able to
11 function just fine within their reproductive
12 capacities. It's domestic cattle that cannot.

13 JUSTICE BREYER: Well, in -- in many
14 other Indian cases, the language has been used
15 that ordinary regulation is not foreclosed,
16 which sometimes has elaborated health, safety,
17 environment, for example. And is there any
18 reason that that would be different here?

19 MR. KNEPPER: Your Honor, I -- I -- if
20 -- if that -- if that were the theory, and that
21 the theory were that --

22 JUSTICE BREYER: It's the theory in
23 all the Yakama cases. I mean, that's what I've
24 been looking at.

25 MR. KNEPPER: You know, from -- from

1 the State's perspective, what we're -- what
2 we're looking at is the sort of extensive
3 litigation that we have not yet engaged in, but
4 also what the United States suggests in its
5 brief as sort of the approach that it would
6 take to conservation necessity, which suggests,
7 for example, that -- that different levels of
8 mule deer population or elk population on a
9 year-by-year basis would affect the interests
10 of the state in conservation.

11 JUSTICE KAVANAUGH: But, if safety
12 were added, as Justice Breyer said, that solves
13 the primary problem you identified, right?

14 MR. KNEPPER: It -- it certainly
15 solves -- solves at least one of them. There
16 are -- you know, there are other questions.

17 JUSTICE SOTOMAYOR: You're forgetting
18 the other side in this discussion, because the
19 tribe has a subsistence right. I know under
20 the facts of this case you're claiming the
21 killings were not for subsistence, an open
22 question, I'm not taking a side on that.

23 But assuming that the treaty right was
24 given to -- to protect the Indian subsistence
25 rights and that their claim, taking it at face

1 value, is accurate, that they were on hard
2 times and needed food to feed their families,
3 that balance is not yours alone to make. It
4 belongs to the government and it belongs to the
5 Indian tribes as well.

6 MR. KNEPPER: Your Honor, that's why
7 the State has been so accepting. I mean, the
8 State does not resist the notion that, as
9 proprietor, the United States could come in and
10 give all of the benefits that Mr. Herrera
11 seeks, including subsistence hunting.

12 What -- what -- what the advantage of
13 that approach would be is that all of the
14 questions that -- that -- that sort of tail out
15 of that, when, how, but also subsistence,
16 subsistence for whom, you know, the question of
17 hunting licenses being given to the tribe
18 rather than under the current situation where,
19 you know, the United States' position as to the
20 Crow treaty was not made clear to the State of
21 Wyoming until the filing in this Court in -- in
22 support of a grant of certiorari.

23 The United States had -- had no role
24 whatsoever in the Repsis litigation that we can
25 find. In fact, I believe the United States

1 declined to participate at all.

2 And so, from -- from the State's
3 perspective, the absence of the federal
4 government is -- is one, you know, we would
5 welcome the federal government's involvement.

6 JUSTICE SOTOMAYOR: It won't --

7 JUSTICE ALITO: On the land in
8 question here, what is the extent of the
9 federal government's regulatory authority and
10 where does it come from?

11 MR. KNEPPER: The -- the federal
12 government's regulatory authority comes from
13 the Organic Act that created the national
14 forests. There's a -- there's a gap. There
15 was -- there was a statute allowing creation of
16 the national forests. And then, when they were
17 reaffirmed in 1897, the so-called Organic Act
18 allows the federal government to just -- do
19 just about anything. And in the Coastal
20 California Commission, this Court said it's
21 plenary.

22 JUSTICE ALITO: Does the government
23 think that that abrogated the or that limited
24 the treaty right?

25 MR. KNEPPER: The government's

1 perspective is that it did not. The State's
2 perspective is that it occupied it by -- by
3 taking control.

4 JUSTICE ALITO: Well, then -- then how
5 can the government -- I mean, the government is
6 just as bound by the -- by the -- is bound by
7 the treaty. The government entered into the
8 treaty, right?

9 MR. KNEPPER: The government entered
10 into the treaty, yes.

11 JUSTICE ALITO: So doesn't there have
12 to be a statute that would limit the hunting
13 right that was conferred by the treaty?

14 MR. KNEPPER: Your Honor, may I
15 respond?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. KNEPPER: All of these actions
18 took place, Your Honor, before statutes could
19 repeal Indian treaty language, all -- including
20 the enactment of the organic statute.

21 So, from the State's perspective, all
22 of them represent not repeal of the hunting
23 right but, rather, the federal government's
24 occupation within the meaning of the hunting
25 right.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Hicks, two minutes.

4 REBUTTAL ARGUMENT OF GEORGE W. HICKS, JR.
5 ON BEHALF OF THE PETITIONER

6 MR. HICKS: Thank you, Mr. Chief
7 Justice. Just a few points.

8 First, in response to the idea that
9 Mille Lacs simply didn't change the approach, I
10 -- I think that's wrong for all the reasons
11 that Justice Breyer and Justice Kagan
12 identified. But I want to go a little bit
13 further than the sentence that you read,
14 Justice Breyer.

15 And it's the sentence on page 207/208.
16 Now earlier in the opinion the Court had said:
17 We concluded that the particular rights in the
18 Race Horse treaty at issue there were not
19 intended to survive statehood.

20 Then on 207/ 208: The Race Horse
21 Court's decision that Indian treaty rights were
22 impliedly repealed by Wyoming statehood was
23 informed by that court's conclusion that the
24 Indian treaty rights were inconsistent with
25 state sovereignty over natural resources and,

1 thus, that Congress could not have intended the
2 rights to survive statehood.

3 And that's an important last phrase of
4 that sentence because it's tying the entire
5 Race Horse holding to this mistaken premise
6 that Indian treaty rights are irreconcilable
7 with state sovereignty over natural resources.
8 I think that's a key sentence.

9 And I think, frankly, that kind of
10 undercuts a lot of the idea that even the
11 holding -- this second holding of Race Horse is
12 still viable. Again, we don't think you need
13 to take the next step to expressly overrule the
14 outcome in Race Horse. But if you, you know,
15 want to do that, you can follow the roadmap
16 that you have in Limbach and Sunnen where you
17 had almost exactly this situation.

18 The second point is simply to this
19 idea of the occupation and what "occupied"
20 means. Everything in the evidence, in the
21 historical evidence, is that both parties to
22 the treaty understood "occupation" to mean some
23 sort of actual physical presence and nothing
24 about simply a legal declaration that the
25 federal government was going to do something.

1 And certainly, under the Indian canons
2 of construction, that's a reasonable reading
3 that is entitled to be given to the Indians.

4 And the last point on conservation
5 necessity, you know, this discussion I think
6 just demonstrates that if the Court finds that
7 the treaty right is valid and has not been
8 terminated, Wyoming still has the ability to
9 regulate its -- its wildlife, its natural
10 resources, simply according to the conservation
11 necessity standard like every other state
12 already has to do.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 11:13 a.m., the case
16 was submitted.)

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