IN THE DISTRICT COURT, FOURTH JUDICIAL DISTRICT,
IN AND FOR SHERIDAN COUNTY, WYOMING

CLAYVIN HERRERA,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	Case No. CV - 2016-242
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee/Plaintiff.	)	

BRIEF OF APPELLEE

Kyle A. Gray # 5-2297
Holland & Hart LLP
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59101
(406) 252-2166

Steven T. Small # 7-5453
Holland & Hart LLP
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59101
(406) 252-2166

Dessa Reimer # 6-3825
Holland & Hart LLP
P.O. Box 68
Jackson, WY 83001-0068
(307) 739-9741

ATTORNEYS FOR APPELLANT

Christopher LaRosa # 6-4025
Deputy County and Prosecuting Attorney
Sheridan County Attorney's Office
148 S Brooks Street
Sheridan, WY 82801
(307) 674-2580

ATTORNEY FOR APPELLEE

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STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Pretrial

In September 2014 Appellant - a game warden for the Crow Tribe- was cited with Taking an Antlered Big Game Animal during a closed season and with being Accessory to others doing the same, two misdemeanor offenses. W.S. §§ 23-3-102(d), 23-6-205, (R. 1-2). The elk at issue were killed in Sheridan County in January 2014 after Appellant and others crossed the fenced state line into Wyoming and hunted elk in the Bighorn National Forest. *See* Aff. Shorma; Tr. Ex. 32 (R. 69-73, 1463-1467). The elk season was then closed in Hunt Area 38, where three elk carcasses were found. Ex. 18 (R. 581-586).

On October 14, 2014 Appellant appeared and pleaded not guilty. He hired counsel. (R. 3, 7-10). On July 2, 2015 Appellant filed a Motion to Dismiss Under the Supremacy Clause of the United States Constitution and the Fort Laramie Treaty of 1868, along with a supporting Brief in Support of Motion to Dismiss. (R. 359-395).

Appellant's brief asserted that, as a Crow Indian, he could hunt where and when he did in Wyoming's Bighorn National Forest without regard to Wyoming law. He claimed that Article 4 of the Fort Laramie Treaty of 1868 gave the Crow an off-reservation hunting right on "unoccupied lands of the United States;" that this right was still valid where he hunted; that the right preempted state law pursuant to the Supremacy Clause; and that the prosecution had to be dismissed because the law violated was not reasonable and necessary for purposes of conservation, (R. 368, 374, 380, 392-393).

The State filed a Response on August 6, 2015 and a Supplemental Response on August 20, 2015, both with exhibits attached. (R. 396-763, 767-804, 807, 823-845). On

August 6, 2015 the State filed a Motion for Status Conference re Evidentiary Hearing, asking for an evidentiary hearing so the State could offer evidence in support of its positions, as well as a Motion in Limine re Affidavits, objecting to the affidavits filed by Appellant and seeking to subject the testimony of the affiants to the rules of evidence at a hearing. (R. 764-766, 805-806). On August 20, 2015 the State filed a Motion in Limine re Treaty Rights, asking the court to prohibit Appellant from making reference at trial to claimed treaty rights if his motion to dismiss was denied and his claimed treaty rights were held to provide no defense to the State's prosecution. (R. 821-822).

In its responses the State relied on *Ward v. Race Horse*, 163 U.S. 504 (1896), *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), and other authority in asserting that the treaty right expired when Wyoming became a State in 1890. Resp. Mot. Dismiss at 1, 7-26. (R. 767, 773-792). The State further contended that the Bighorn National Forest was not "unoccupied land of the United States" pursuant to *Repsis*, other persuasive authority, and evidence it would introduce at a hearing. *Id.* at 2, 27-36. (R. 768, 793-802).

The State also maintained that the treaty right could not attach to a state-created elk resource that would not exist but for more than a century of reintroduction, regulation and conservation management; and also that the use of elk seasons was fundamental, reasonable and necessary for purposes of conservation, rendering the seasons enforceable against Appellant under U.S. Supreme Court precedent even if his treaty right was still valid and applied in the Bighorn National Forest. *See* Supplemental Resp. Mot. Dismiss at 1-22, Second Supplemental. Resp. Mot. Dismiss at 4-13. (R. 823-844, 970-979).

At a status conference on September 1, 2015 the trial court allowed more briefing and agreed to schedule two evidentiary hearings. App. E. The first was set for November 16, 2015. It was to address the treaty hunting right's meaning, current validity and application to the site of the elk killings. The court ordered an exchange of witnesses. A second hearing was set for January 2016, to address whether the State's elk seasons were reasonable and necessary for the purposes of conservation. *Id.* (857, 904-905).

On September 18, 2015 Appellant filed a Limited Response to the State of Wyoming's Assertion of Conservation Necessity, (R. 856-903), to which the State replied in its Second Supplemental Response on October 5, 2015. (R. 967-983). On September 18, 2015 Appellant filed a Reply in Support of Its Motion to Dismiss (R. 904-964). In filings totaling hundreds of pages, both parties submitted many exhibits in support of their positions. In his final two filings Appellant asserted that no evidentiary hearings were needed. He asked the court to decline to receive evidence or testimony and to rule in his favor on *all* issues as a matter of law. (R. 865-866, 905, 911, 933-934, 939-940).

On October 15, 2015 the State filed its Witness List for the first hearing, listing seven witnesses. (R. 984-985). The next day the trial court denied Appellant's Motion to Dismiss and granted the State's Motion in Limine re Treaty Rights in an Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine. App. C; (R. 986-991). In its order the trial court said that (1) it was following federal precedent interpreting the treaty right; that (2) under that precedent "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming;" and that (3) no evidentiary hearing or new interpretation was needed. (R.

987). The trial court further held that the state's elk seasons were non-discriminatory, reasonable and necessary for the purposes of conservation, and were enforceable against Appellant even if his claimed treaty rights still existed as claimed. (R. 988-990).

The trial court scheduled trial for April 27, 2016. (R. 992-993). Appellant filed a Petition for Writ of Review, Writ of Certiorari and Writ of Prohibition with the Wyoming Supreme Court on November 2, 2015. (R. 994-1025). The State filed an opposing response, (R. 1079-1094), and the Wyoming Supreme Court denied the petition in an Order on November 23, 2015.[1] Appellant filed a Notice of Appeal on November 12, 2015. (R. 1027-1029). The State moved to dismiss the appeal for lack of jurisdiction, and the District Court dismissed the appeal in an order on April 5, 2016. (R. 1218-1220).

Appellant moved for reconsideration of the State's Motion in Limine re Treaty Rights. (R. 1129-1157). The State opposed the motion and amended the citations. (R. 1158-1171). The trial court denied the motion after an April 14, 2016 hearing in an Order after Pretrial Conference, restating its ruling that "at the time the alleged violations occurred . . . the Crow Tribal Members have no off-reservation treaty hunting rights." App. D. (R. 1175-1177). Appellant unsuccessfully sought trial stay orders from the trial court and the Wyoming and United States Supreme Courts. (R. 1105-1112, 1195-1261, 1400, 1478).[2] Trial commenced on April 27, 2016.

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[1] Online at http://efiling.courts.state.wy.us/public/caseView.do?csIID=18478.

[2] Online at http://efiling.courts.state.wy.us/public/caseView.do?csIID=18732 and https://www.supremecourt.gov/docket/docket.aspx.

At trial Appellant testified and admitted his role in the three killings. He repeatedly claimed that he was not off-reservation in Wyoming when he acted, but was instead on the Crow Reservation. He said that if he was in Wyoming when he acted it would be "a violation." App. F: 4/28/16 ≈ 2:53:25-2:53:35, 3:20:25-3:25:05. *See* Tr. Ex. 6 (R. 1427). During cross-examination Appellant marked the spot where he shot on State's Exhibit 23. (R. 1451). The spot is in Wyoming, but Appellant claimed that this was Crow land and not Wyoming. *Id.* ≈ 3:06:37-3:07:23; Tr. Ex. 8-23. (R. 1429-1451). The jury convicted Appellant of both cited offenses on April 29, 2016, and the trial court sentenced Appellant. (R. 1468-1469). This appeal followed. (R. 1481-1494).

II. The Treaty Language at Issue: Article 4

The principal issues raised in this appeal deal with (1) the meaning and current validity of the off-reservation hunting right provided for in Article 4 of the Fort Laramie Treaty of 1868 with the Crow Indians; with (2) the applicability of that right to the Bighorn National Forest in the event the right still exists; and (3) in the event that the right still exists and applies in the area of the Bighorn National Forest where the cited elk killings occurred, with the enforceability of Wyoming's elk seasons on the Defendant notwithstanding the claimed treaty right. Article 4 in its entirety states:

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

15 Stat. 649; Ex.1 (R. 396-402).

ARGUMENT

Introduction

The Supremacy Clause provides that federal law, including treaties made, is "the supreme law of the land" and is binding over state laws to the contrary. U.S. Const. art. VI. This includes treaties made with the Indians. They bind the States until Congress limits or abrogates the treaty. *Antoine v. Washington*, 420 U.S. 194, 201- 04 (1975); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

It is also true that individual tribal members acting outside their Indian country are subject to non-discriminatory state law in the absence of express federal law to the contrary; and that states have criminal jurisdiction over reservation Indians for crimes committed off the reservation. *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). Furthermore, states have broad police powers over wild animals in their jurisdiction, *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976), and this sovereign right to regulate can prevail over and limit off-reservation treaty rights. *Puyallup Tribe v. Dept. of Game of Wash.*, 391 U.S. 392, 399 (1968) [hereafter *Puyallup I*] ("The overriding police power of the state, expressed in non-discriminatory measures for conserving fish resources, is preserved . . ."); *Tulee v. Washington*, 315 U.S. 681, 684 (1942) (the state has the power to regulate fish as necessary for conservation).

Standards of Review and Principles of Treaty Interpretation

An appellate court must affirm a trial court decision if there is any legally valid ground appearing in the record. *Matter of Adoption of RHA*, 702 P.2d 1259, 1263 (Wyo.

1985). Questions of law are reviewed *de novo*. *Bear Cloud v. State,* 334 P.3d 132, 137 (Wyo. 2014). United States Supreme Court interpretations of federal law are binding on state courts. *Odhinn v. State*, 82 P.3d 715, 719-720 (Wyo. 2003). "It is this Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma,* 580 U.S. ___ (2016) (per curiam) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). But "neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J. *concurring*); *see also Evans v. Thompson*, 518 F.3d 1, 8 (1st Cir. 2008) (agreeing but adding that state courts may rely upon lower federal court decisions when adjudicating federal claims).

A treaty, including one between the United States and an Indian tribe, is essentially a contract. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) [hereafter *Fishing Vessel*]. "The legal principles applicable to the interpretation of contracts apply also to the interpretation of Indian treaties." *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 94 (Wyo. 1988) (citing *Fishing Vessel)* [hereafter *In re Gen. Adjudication*].

As with contracts, the goal of treaty interpretation is to determine the intent of the parties. *Fishing Vessel*, 443 U.S. at 675. The interpretation begins with its text. *Air France v. Saks*, 470 U.S. 392, 396–397 (1985). With treaties the Court has "also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the post-ratification understanding of signatory nations." *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (internal quotations omitted); *Choctaw Nation v. United States*, 318

U.S. 423, 431-32 (1943) ("[W]e may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

Indian treaties are construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they naturally would be understood by the Indians." *Fishing Vessel*, 443 U.S. at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). Treaties are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *In re Gen. Adjudication*, 753 P.2d at 96-97 ("Indian treaties should be interpreted generously…"). But this "mean[s] no more than that the language should be construed in accordance with the tenor of the treaty. . . We stop short of varying its terms to meet alleged injustices." *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945).

Courts cannot ignore treaty language that "viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indians Tribe*, 473 U.S. 753, 774 (1993). Treaties cannot be improperly construed in favor of Indians, for "[W]e cannot remake history." *In re Gen. Adjudication*, 753 P.2d at 97 (citing *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 615 (1977), and *DeCoteau v. District County Ct. for Tenth Judicial District*, 420 U.S 425, 449 (1975)). "Even Indian treaties cannot be rewritten . . . to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 432.

I. THE TRIAL COURT DID NOT ERR BY FOLLOWNG *REPSIS* AND RULING THAT THE ARTICLE 4 HUNTING RIGHT WAS INTENDED TO BE TEMPORARY AND NO LONGER EXISTS

In denying Appellant's motion to dismiss, the trial court followed the Article 4 interpretation of *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *certiorari denied*, 517 U.S. 1221 (1996). Under that interpretation the off-reservation hunting right was intended to be temporary and did not survive Wyoming's admission as a state. The same interpretation was made in *Ward v. Race Horse*, 163 U.S. 504 (1896), with respect to the identical Article 4 in the virtually identical 1868 Treaty of Fort Bridger, which created the Wind River Indian Reservation. *See In re Gen. Adjudication*, 753 P.2d at 83.

The trial court was entitled to rule that the "Crow Tribe's right to hunt . . . was temporary and is no longer a valid right" either in the Bighorn National Forest or "anywhere within the State of Wyoming." (R. 987-988). *Repsis* has not been overruled and is federal precedent directly on point. *Repsis* relies on the U.S. Supreme Court's Article 4 interpretation in *Race Horse*. Pursuant to *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999) [hereafter *Mille Lacs*], that interpretation remains good law. Considering the language, purpose and historical context of the 1868 Crow treaty, and the U.S. Supreme Court's prior construction of Article 4 in *Race Horse*, the trial court's decision to follow *Repsis* is correct as a matter of law.[3]

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[3] Appellant insists that the trial court held that the Article 4 right survived statehood in 1890. Appellant's Br. at 4, 25-26. The court's order never expressly says this, but it does state that the treaty interpretation of *Repsis* "is the precedent followed" and that pursuant to that precedent "Crow tribe members do not have off-reservation hunting rights *anywhere within the State of Wyoming."* (R. 987) (emphasis added). The court

A. U.S. Supreme Court jurisprudence establishes that identical treaty provisions in multiple treaties, negotiated at the same time, in the same region, for the same purpose, are properly given the same meaning.

The *Repsis* decision accepts the essential import of U.S. Supreme Court jurisprudence with respect to Indian treaties: to wit, that prior construction of identical treaty rights in other treaties matters, particularly when the historical purpose and context of those other treaties are similar. Both Appellant and the State in their filings cited the many Stevens treaty cases in which the Supreme Court recognized the continuing validity today of fishing rights struck in territorial days with many separate Pacific Northwest Indian tribes in the 1850's, which rights provided for "the right of taking fish at all usual and accustomed places," and which rights have been found by the Supreme Court to have survived statehood and state sovereignty. *See e.g. Fishing Vessel*, 443 U.S. at 661-67 (discussing the history and context); *Puyallup I*, 391 U.S. at 395; *Tulee v. Washington*, 315 U.S. 681, 683 (1942); *United States v. Winans*, 198 U.S. 371, 378 (1905).

Those identical rights in separate treaties were struck at the same time in a particular context: to wit, when the fishing resource *appeared inexhaustible*; and they have been interpreted the same by the U.S. Supreme Court. *See Fishing Vessel*, 443 U.S. at 668-669 (discussing the unending abundance presumed by the parties to the treaties). In doing so, the U.S. Supreme Court's interpretations have involved "a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior

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indisputably held that the Article 4 right "was temporary and is no longer a valid right." (R. 988). As argued herein, there are multiple grounds on which to affirm this holding.

construction of the treaties." *Id.* at 675. *Repsis* properly took this same approach. *See Repsis* 73 F.3d at 987 n.2 (noting that its adoption of *Race Horse's* Article 4 interpretation was consistent with U.S. Supreme Court practice).

Appellant complained that similar language alone was not enough, citing *Mille Lacs* and asserting that "similar language in two treaties involving different parties" need not have "precisely the same meaning." (R. 372). And this is so. Courts engaging in treaty interpretation must examine purpose and context as well as language. *Mille Lacs*, 526 U.S. at 202. But Article 4 of the Fort Laramie Treaty is not merely similar to Article 4 of the Fort Bridger Treaty. It is *identical*. 15 Stat. 649; 15 Stat. 673; Ex.1, Ex. 2. (R. 396-402, 403-410).[4]

Moreover, except for some differing payment amounts promised by the United States, and the differing reservation areas created and described, the language in articles 1 through 12 are exactly the same in both treaties. *Id.* Both create reservations "set apart for the absolute and undisturbed *use and occupation* of the Indians herein named." *Id.* at art. 2 (emphasis added). Both commit the United States to build warehouses, mills, and buildings for a school, physician and other services on the reservation. *Id.* at art. 3. Both treaties provided subsistence rations for those who settled on the reservation. Both provided that Indians who farmed would be allotted land and given supplies. Both made greater payments to Indians who farmed than those who roamed. *Id.* at art. 6,8,9.

[4] The Fort Bridger treaty says "reservations" in Article 4, because two are provided for.

The *purpose* of both was "to create a reservation with a sole agricultural purpose. . . [It] does not encourage any other occupation or pursuit." *In re Gen. Adjudication*, 753 P.2d at 97 (as to the purpose of the Fort Bridger Treaty); *Montana v. United States*, 450 U.S. 544, 571 (1981) (Blackmun, J. *dissenting*) (the 1851 Treaty was intended to convert the Crow "from a nomadic hunting tribe to a settled agricultural people."). (R. 773-774).

Both treaties were struck *at the same time, in the same region,* just before Wyoming became a territory on July 25, 1868. 15 Stat. 178; 15 Stat. 649; 15 Stat. 673; Ex. 1, Ex. 2, Ex 3. (R. 396-418). The Fort Laramie Treaty was concluded on May 7th, the Fort Bridger Treaty on July 3rd. Both involved the large scale sale of Wyoming territorial lands by nomadic Indians.

Both share the same historical context. The Stevens treaties were negotiated when the fishing resource appeared inexhaustible and the language in those treaties could be read to provide a right that was intended to survive statehood and provide a right to a fair share of the fish in perpetuity. *See Fishing Vessel*, 443 U.S. at 675, 684-85 (so finding).

Not so with the treaties negotiated for Wyoming territorial land. The parties to these two treaties knew the settlers were arriving and the "game was fast disappearing." *See* Resp. Mot. Dismiss at 8-10 (quoting historical records cited by courts). (R. 774-776). Records cited by the State show that the Indians understood the purpose of negotiations: to change their way of life. Courts have not hesitated to conclude that the Indians "understood that their off-reservation hunting rights . . . were not absolute and would diminish with the increased occupation of the lands and the decrease in available

game." *State v. Cutler*, 708 P.2d 853, 857-58 (Idaho 1985) (construing Article 4 in the Fort Bridger Treaty and citing records relating to treaty negotiations).

Where the language and purpose are identical and the context much the same, Supreme Court precedent supports the trial court's conclusion: *Repsis* got it right. The Crow right was temporary and intended to perish, just as was the right in *Race Horse.*

B. *Race Horse's* Article 4 interpretation remains good authority and the trial court therefore correctly held that the Crow Article 4 right was intended to be temporary and no longer exists.

In 1896, only 28 years after the Fort Bridger and Fort Laramie treaties were negotiated, the U.S. Supreme Court decided the meaning of Article 4 in *Race Horse*. It held that the hunting rights were "temporary and precarious," that they were "essentially perishable, and intended to be of limited duration," and that they expired when Wyoming became a State in 1890. The Court held that the right to hunt in hunting districts off-reservation pertained only to certain hunting districts then existing; and it held that the parties understood that those districts and the right to hunt there were both expected to expire. "The hunting right, given by the treaty, clearly contemplated the disappearance of the conditions therein specified." *Race Horse*, 163 U.S. at 508-511, 515.

As the State and *Repsis* discussed, the *Race Horse* Court interpreted Article 4 fully aware of the canons of construction applicable to Indian treaties. It was aware that rights intended to be perpetual and continuing could be reserved so as to survive an act of admission silent as to Indian rights. It was aware that the issue was the intent of the parties, and aware that the parties knew the land was destined to be occupied by the arrival of western civilization. The Court saw the post-ratification understanding given

by Congress to Article 4 when it created Yellowstone Park less than four years later and immediately restricted hunting there, and held that this was properly considered in determining the parties' intent. *Repsis*, 73 F.3d 988-992; Resp. Mot. Dismiss at 11-16, *See* Ex. 5, Ex. 6; 17 Stat.32; 28 Stat. 73. (R. 426-434, 777-782).

Appellant wants courts to treat the interpretations of *Repsis* and *Race Horse* as null and void because, as the trial court acknowledged, *Race Horse's* conception of the equal footing doctrine has been rejected. (R. 988).[5] There is no need to do so. *Race Horse* viewed a state's right to regulate game and fish as "an essential attribute of its governmental existence," one that could not be impaired by an act of admission silent as to Indian rights. *Race Horse*, 163 U.S. at 516. The courts in both *Mille Lacs* and *Repsis* disagreed. Both decisions accepted longstanding precedent establishing that Indian off-reservation hunting and fishing rights were not fundamentally irreconcilable with state sovereignty. *Mille Lacs*, 526 U.S. at 204; *Repsis*, 73 F.3d at 990-991.

But *Mille Lacs* did not reject the Article 4 interpretation of *Race Horse*, the one relied upon by the Tenth Circuit in rejecting the claims Appellant revisits. Rather, *Mille Lacs* recognized that interpretation as the "alternative holding" of *Race Horse*: to wit, that "the particular rights in the Treaty at issue there- 'the right to hunt on the unoccupied lands of the United States'-were not intended to survive statehood." *Mille Lacs*, 526 U.S. at 206 (citing to *Race Horse*); *Repsis*, 73 F.3d. 989-992 (similarly citing).

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[5] Under equal footing doctrine all states are admitted to the Union with the same attributes of sovereignty as the original 13 states. *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

Mille Lacs recognized the temporary and precarious nature of the Article 4 hunting right: "The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Mille Lacs*, 526 U.S. at 207. The upshot is that *Race Horse's* Article 4 interpretation remains good authority, and the trial court was correct to rule that *Mille Lacs* "had no effect on the *Repsis* decision." (R. 988).

Appellant disagrees. He says *Race Horse* is "dead and buried." Appellant's Br. at 28; (R. 388). But in his brief he never once mentions the *Mille Lacs* discussion of *Race Horse's* alternative holding, and instead he engages in rank mischaracterization of the State's position. He says the State's claim is that the Article 4 right ended at statehood because of the "equal footing doctrine." Appellant's Br. at 4, 18. The State has never so claimed. It claims that the alternative holding recognized by *Mille Lacs*, the one left unmentioned by Appellant, left the Article 4 interpretation of *Race Horse* intact. (R. 786-788). It was a temporary, precarious right that was not intended to survive statehood.

Appellant himself relies on *Race Horse* when he thinks it can help him. He claims that "as long as the United States continues to own the public land in question – and it is located within the hunting districts as defined by the treaty – such land is open to treaty-based hunting." His *quoted* support: *Race Horse*, which held that the Article 4 right would "cease the moment the United States parted with the title to its land in the hunting districts," without any change in the nature, quantity or condition of the land or the wildlife thereon, or any act of Congress. *Race Horse*, 163 U.S at 510. (R. 381).

Appellant cannot have it both ways. His reliance on *Race Horse* proves too much. It effectively concedes the precarious nature of the Article 4 hunting right recognized in *Repsis* and *Mille Lacs*. Viewing matters in historical context, and appraising the purpose and language of the treaty, the prior construction by *Race Horse*, and the post-ratification understanding quickly evinced by Congress in creating Yellowstone Park out of Indian hunting districts, the Crow Treaty right to hunt off-reservation also expired long ago.[6]

C. Appellant relies on treaties whose language and context are different and whose import is adverse. His assertions beg the question to be answered.

In his attempt to distract the trial court from the decisive authorities, Appellant cited decisions interpreting other treaties, particularly Stevens treaties, with their right of taking fish and their "privilege of hunting . . . upon open and unclaimed land." (R. 381-383, 783 at n. 8). These treaties involve differently-worded rights evincing different contract intentions. To the degree they have any bearing on the meaning of Article 4, they are adverse to Appellant's position. They establish that identical treaty provisions, struck in multiple treaties and in similar contexts, are properly construed the same. *See Repsis*, 73 F.3d at 987 n.2 (*Winans* and *Puyallup I* "involved the interpretation of identical provisions of two separate treaties with two separate Indian tribes . . .").

It is also telling that these differently-worded off-reservation *hunting* rights are considered to be a much lesser right than the fishing rights provided in the same treaties. They are held to be of "temporary and self-limiting nature . . . intended to diminish as lands became settled, without the need of Congressional action." *State v. Buchanan*, 978

[6] Appellant says that the Crow hunting districts included Yellowstone land. (R. 924).

P.2d 1070, 1080 (Wash. 1990); *see also United States v. Hicks*, 587 F.Supp. 1162. 1164-1165 (W.D. Wash. 1984) (the Stevens treaty hunting right is a defeasible privilege that expires *without abrogation* when the status of the land changes). These other treaty rights support the general view that off-reservation hunting rights were not intended to last and would expire without any need for the Congress to abrogate, and the Supreme Court accepted that view with respect to Article 4 in *Mille Lacs*. Appellant therefore engages in gross misdirection when he now repeatedly posits that the right must still exist because Congress has failed to act. Appellant's Br. at 1-2, 5, 11, 16-17, 24-25, 28, 34. 36-37, 39-40. You do not need to abrogate what expires upon its own terms.

The State's filings identified repeated instances where Appellant over-claimed or misrepresented authority. *See* Resp. Mot. Dismiss at 22-25, 36 at n. 15; Supp. Resp. Mot. Dismiss at 4 (R. 788-791, 802, 826). He also relied on *State v. Tinno*, 497 P.2d 1386 (Idaho 1972). Def.'s Br. Support Mot. Dismiss at 16, 21. (R. 383, 388). That decision construed the *fishing* rights of Article 4 in the Fort Bridger Treaty. Article 4 mentions no fishing rights, yet *Tinno* held that they existed and controlled over state law, and it did so in an *advisory opinion* issued when dismissing the case for lack of jurisdiction. *Tinno*, 497 P.2d. at 1388-1394. Advisory opinions are improper in both the federal courts and the courts of Wyoming. *Alabama v. Shelton*, 535 U.S. 654, 676 (2002) ("[T]he Court has no business offering an advisory opinion . . ."); *Golden v. Zwicker*, 394 U.S. 103, 108 (1969) ("federal courts . . . do not render advisory opinions . . ."); *State Dept. of Rev. v. Amoco Prod Co.*, 7 P.3d 35, 41 (Wyo. 2000) ("This Court has repeatedly said it will not issue advisory opinions and we decline to do so now.") (R. 788-789).

Finally, Appellant claims that it does not matter if *Race Horse* is good law because Congress "re-ratified" Article 4 after Wyoming became a state in 1890. He cites 1891 and 1904 agreements where the United States bought Crow reservation land and provided in those later agreements for the continuation "*in force*" of the "*existing provisions*" of *earlier* treaties where or because those provisions were "*not inconsistent*" with the new agreements being struck. Appellant's Br. at 9-10, 29; Def.'s Br. Support Mot. Dismiss at 23-24. (R. 390-391). *See* 26 Stat. 1042; 33 Stat. 359, Ex. 7, Ex. 8 (R. 441, 450).

These general provisions are similar to those included in *post-statehood* and *post-Race Horse* Congressional agreements that purchased Wind River Reservation land created by the Fort Bridger Treaty. Resp. Mot. Dismiss at 23-25; 30 Stat. 93; 33 Stat. 1016; Ex. 9; Ex. 10 (R. 461, 469, 789-791). These provisions do not re-ratify anything, and they cannot override the meaning given to Article 4 by the U.S. Supreme Court, the final arbiter of meaning regarding a federal law. U.S. Const. art. III, §§ 1-2 ("The Judicial Power of the . . . Supreme Court . . . shall extend to all. . . Treaties made . . ."); *Jones v. Meehan*, 175 U.S. 1, 31 (1899) (the Supreme Court has the final power to interpret treaties under Article III and "Congress has no constitutional power to settle the rights under a treaty."). But most importantly, Appellant's re-ratification claim simply *begs the question to be answered*: to wit, what is the meaning of Article 4? Was it a temporary right intended to expire, or was it intended to last? Appellant just assumes the meaning he wants in making his claim. It still existed; and therefore it still existed.

The trial court rightly ignored this red herring, just as it did the claim, made again on appeal, that Article 4 is still valid because an 1891 forest reserve law expressly stated

that it did not change any Indian treaty rights, that it did not "*change, repeal or modify*" any such rights, and that the disposition of such rights would "*continue in accordance with the provisions of such treaties or agreements*." 26 Stat. 1095; (R. 143); Appellant's Br. at 10-11, 17, 36-37 (calling the language "anti-abrogation language"); Def.'s Reply Br. Support Mot. Dismiss 32-34; (R. 935-937).

These claims rely on a logical fallacy. That the rights were not *changed* does not tell you what the rights *are*. If the rights were temporary, they remained so when a new law said the rights were not changed. If they were limited, the limitations remained in place. If qualified, the same. If the rights were intended to expire upon the "happening of . . . conditions . . . 'clearly contemplated' when the Treaty was ratified," they still did expire if those conditions occurred. *See Mille Lacs*, 526 U.S. at 207 (discussing the temporary Article 4 right). Appellant makes his claims for a reason. He cannot show error in the trial court's decision to follow the Article 4 interpretation of *Race Horse, Mille Lacs,* and *Repsis*. So he creates the error instead, with fallacious reasoning.[7]

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[7] If the rights still existed, the new law changed nothing. The new law changed nothing. Therefore, the rights still existed. If Bacon wrote *Hamlet*, Bacon was a great writer. Bacon was a great writer. Therefore, Bacon wrote *Hamlet*. If P, then Q. Q. Therefore P. This is the fallacy of "affirming the consequent." *See In re Stewart Foods, Inc.,* 64 F.3d 141, 145 n.3 (4th Cir. 1995); *City of Green Ridge v. Kreisel,* 25 S.W.3d 559, 564 n. 2 (Mo. Ct. App. 2000); Irving M. Copi, *Introduction to Logic*, 263 (6th ed. 1982); Damer, T.E., *Attacking Faulty Reasoning*, 63-67, 78-80 (Wadsworth 6th ed. 2009).

D. Article 4 does not attach to a state-created elk resource brought about after the game became scarce. The Indians have no treaty right to free-ride on the accomplishments and creations of the State of Wyoming.

Appellant claims a right to hunt in the Bighorn National Forest because (1) Article 4 created a right to hunt in the natural hunting districts of the Crow, and (2) because the Bighorns were one of those districts long ago. But nowhere in hundreds of pages of argument and contention is there any acknowledgement of the obvious: there are no natural hunting districts left in the Bighorns. They were expected to perish and did, and with them any off-reservation hunting rights provided for by treaty.

The elk in today's Bighorn Mountains are not the product of nature. The state of the elk in the Bighorns today is entirely due to the State's conservation management and, moreover, to its affirmative acts over a long period of time to relocate, reintroduce, repopulate, nurture and protect the elk at issue in the area where Appellant claims his right, after they became scarce as expected by the parties in 1868. The State submits that Appellant's claimed right cannot attach to a state-created resource. The Indians do not get to free-ride on the accomplishments and creations of the State.

The State presented legal and historical support for this position in both of its supplemental responses. *See esp.* Supp. Resp. Mot. Dismiss at 1-23; Second Supp. Resp. Mot. Dismiss. at 4-13 (R. 823-845, 970-979). That support rests on both history and on what the Supreme Court has held about a state's right to enforce its regulations on Indians with other off-reservation treaty rights that- *unlike Article 4*- have been found by the Court to survive statehood, to still exist, and to bind the states. That history and those principles offer completely separate grounds on which to affirm the trial court's ruling.

First, there is no question that by the end of the 19th century the elk and the big game became scarce as the parties to the 1868 treaties expected; and that this was due to the lack of restrictions, the development of guns and ammunition, and the arrival of settlers to occupy the west. The settlers came and the game was wiped out, with the elk virtually gone from the Bighorns even though the State and Indian populations were but a small fraction of what they are today. *See* Supp. Resp. Mot. Dismiss at 9-10, 20-21 (citing historical summaries and census figures), Ex. 15 at 1-8 (detailing the scarcity of elk in the early 1900's), Ex. 28. Ex. 29; Ex. 30 (R. 831-832, 842-843, 522-526, 724-746).

Second, the State offered *some* of the historical sources detailing what the State and its citizens then did at great effort to reintroduce the elk to the Bighorns and, over ensuing decades, to bring about the herds which today populate the area where Appellant took elk during a closed season. Supp. Resp. Mot. Dismiss at 10-15, Ex. 15 (R. 832-837, 515-542). Simply put, relocation, reintroduction and state regulation brought the elk back to the Bighorns. Its hunting districts are the creation of the State.

In further support of that contention, and pursuant to W.S. § 1-12-302 and W.R.E. 201 (d), the State asks the court to take notice of the early laws passed in Wyoming as summarized in Appendix A and provided in Appendix G. Counting Appendix A towards the length of this brief still complies with the restrictions of W.R.A.P. 7.05 (a), so this brief incorporates it. Notice of law is required upon proof. Judicial notice may be taken at any stage of the proceedings and would have been requested at the evidentiary hearings. *See 37 Gambling Devices (Cheyenne Elks Club & Cheyenne Music & Vending, Inc.) v. State*, 694 P.2d 711, 716-717 (Wyo. 1985) (discussing notice on appeal).

This early law bears on the time when the big game became scarce, and the degree to which the State acted to feed the big game, to eradicate its predators, to relocate the elk, reintroduce them, and then protect them by *prohibiting* elk hunting in the Bighorn National Forest and in Sheridan County, turning the Bighorn National Forest into a state game preserve *with no hunting season*.

Third, it is not just the long-ago history of the Bighorns which supports a finding that its elk are state-created. The general history of time and manner regulations allows that finding, as does consideration of *recent* history involving the areas embraced by the two 1868 Wyoming treaties. The State's filings quoted seven Supreme Court decisions holding that basic time and manner regulations are enforceable on Indians with treaty rights if reasonable and necessary for the purposes of conservation.[8] The State then set out to show that the use of seasons is fundamental to conservation management; that seasons have been used for hundreds of years; that protecting the big game in the winter has always been deemed essential; and that there are practical and biological reasons why this is so. Supp. Resp. Mot. Dismiss at 13-15, Ex. 17; Ex. 17.1 (R. 835-837, 546-580).

The State further showed, not only that the Crow themselves deem seasons essential to conservation - at least as applied to non-Indians- but that they came to that

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[8] Supp. Resp. Mot. Dismiss at 2, 4-8 (quoting *Antoine*, 420 U.S. at 207; *Kennedy v. Becker*, 241 U.S. 556, 564 (1916); *Mille Lacs,* 526 U.S. at 205; *Puyallup I*, 391 U.S. at 398; *Dept. of Game of Wash. v. Puyallup Tribes*, 414 U.S. 44, 47-49 (1973) [*Puyallup II*], *Tulee,* 315 U.S. at 684; *Winans*, 198 U.S. at 384) (R. 824, 826-830).

conclusion late, after their animals were wiped out with unrestricted hunting, and that they still suffer the scarcity of big game because they do not regulate themselves. Supp. Resp. Mot. Dismiss at 15-18; Ex. 19; Ex. 20; Ex.21 (R. 837-840, 591-617). Finally, the State showed that the recent history of the Wind River Indian Reservation demonstrates what happens to the big game without basic time and manner restrictions, and also what happens when a system of management like Wyoming's is put into place. Supp. Resp. Mot. Dismiss at 19-20, Ex. 22; Ex. 23; Ex. 24; Ex. 25; Ex. 26; Ex. 27; Ex. 28; Ex. 29 (R. 841-842, 618-742). *See Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 743-46 (10th Cir. 1987) (discussing the 1980's crisis). All this supports a finding that there is no natural elk herd in the Bighorn National Forest; that the Crow natural hunting districts disappeared long ago; and that what exists today is state-created.

Finally, there is support in the law itself for the position that the Article 4 right cannot attach to today's state-created game population. The United States Supreme Court has never held that off-reservation treaty hunting or fishing rights must attach to a resource that a state creates on its own initiative; and it has in fact suggested the opposite.

In 1968 in *Puyallup I* the Court held that a still valid Stevens Treaty off-reservation fishing right did not foreclose reasonable non-discriminatory state regulation of fishing by the Indians "in common" with fishing by others. *Puyallup I*, 391 U.S. at 398. The issue on remand was whether a total ban on Indian net fishing was justified for conservation. *Id.* at 402-03. In *Puyallup II* the Court did not allow such a total ban for steelhead trout. The evidence developed during litigation established that the natural annual run of steelhead trout returning to spawn in the Puyallup River was only 5000 to

6000 trout and that this is what would exist in the absence of any state management. The State of Washington hatched more than 100,000 baby trout – or smolt- in hatcheries, financed largely by fees assessed on licensed fishers. These smolt increased the annual run in the river by more than 10,000 trout. *Puyallup II*, 414 U.S. at 46-48. State-licensed sportsmen then caught annually *more than* the natural run. This is why the Court held that a total ban on Indian net fishing discriminated against the Indians. *Id.*

Justice White, concurring in the judgment and joined by Justice Stewart and Chief Justice Burger, qualified their understanding of the Court's holding:

> The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6000 steelhead. **It is only to this run that Indian Treaty rights extend. Moreover**, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, **the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion.** Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

Id. at 49-50 (emphasis added). This concurrence issued in a case, won by the Indians, which affirmed and applied a State's right to enforce time and manner regulations on Indians with *perpetual* off-reservation rights. It provides direct support for the position that off-reservation treaty rights can be limited to what would exist in the absence of state action, without violating either the Supremacy Clause or Supreme Court jurisprudence on the enforceability of state game and fish regulations on Indians with valid treaty rights.

On remand from *Puyallup II*, the Washington Supreme Court held that the Indians' treaty rights extended to only the river's natural run of fish; that the Indians

never contemplated a right to fish beyond what naturally existed; and that they had no right to the State's hatchery fish beyond that enjoyed by others subject to state law. *Dept. of Game v. Puyallup Tribe, Inc.*, 548 P.2d 1058, 1070-1072 (Wash. 1976) [*Puyallup Tribe], partially vacated and remanded* 433 U.S. 165 (1977). When *Puyallup Tribe* was appealed to the Supreme Court, this holding was not appealed and the Court did not address it, but it did say that an appropriate standard of conservation necessity was applied. *Puyallup Tribe, Inc.* v. *Dept. of Game of State of Wash.*, 433 U.S. 165, 177 and n. 17 (1977) [*Puyallup III*] ("[P]etitioner states that the courts below have failed to apply a standard of conservation necessity. . . We disagree.").[9]

In Michigan it was held that a valid Indian treaty fishing right did not permit commercial fishing of state-planted lake trout, though the Indians had long commercially

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[9] Subsequent litigation led to an equitable allocation of *all* the fish between the Indians and non-Indians by the federal courts, but not because the Supreme Court required this. *See Fishing Vessel*, 443 U.S. at 685 and 688 n. 30 ("[T]his method of dividing the resource, unlike the right to *some* division, is not mandated by our prior cases."); *Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819, 827 (Wash. 1979) (noting post-*Fishing Vessel* that the Supreme Court had not ruled on the hatchery rights issue). To put it plainly: there is no U.S. Supreme Court precedent which expressly and generally holds that Indian off-reservation treaty rights binding the states must attach to fish or game resources created by a state acting on its own initiative via relocation, reintroduction and sustained regulation. The above citations and quotations make this abundantly clear.

fished in exercising that right. *Michigan United Conservations Clubs v. Anthony,* 280 N.W.2d 883, 887-890 (Mich. Ct. App. 1979). In its holding the court cited the *Puyallup II* concurrence. It noted that the trout had "for all practical purposes [been] eradicated from the Great Lakes by the early 1960's," stating that "[t]heir present existence in any significant quantities is due entirely to the . . . restocking program;" a program described as an extensive, detailed program involving control of predators, large plantings of fish, and substantial regulation. *Id.* at 888-889. It also held that in any event the restrictions imposed on the Indians met the requirements of conservation necessity. *Id.* at 890.

The trial court did not give the State the opportunity it requested to present its evidence at a hearing. That evidence, much of it historical, was still being collected when the trial court ruled. But the record still suffices to support a finding that the elk in the Bighorn National Forest would not exist *but for* reintroduction and the State's long-term conservation management; that Appellant has no treaty right which can attach to this elk resource; and that the trial court properly denied Appellant's motion to dismiss.[10]

It does no good for Appellant to claim that the elk never entirely disappeared. *See* Br. Support Mot. Dismiss at 10 (R. 377). An appropriate reading of Article 4 cannot and does not require extinction to end a temporary and precarious right. Even

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[10] The trial court held that "[i]f not for the continuing conservation efforts there would be no game to hunt." (R. 989). Judge Bucholz held similarly in the *Ten Bear* case. *See* Ex. 31, *State v. Thomas Ten Bear*, CT 8911-0239, *Memorandum of Decision and Order On Motion to Dismiss*, Wyo. County Ct. July 17, 1990. (R. 844, 747-752).

perpetual rights do not require near extinction before state law can prevail over treaty rights. In *Puyallup II* the Supreme Court held that under certain conditions a complete ban on fishing could be appropriate. 414 U.S. at 47-49 ([T]he Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.").

If this is the rule for rights *intended to last forever*, then the temporary, more precarious and diminishing right to take game fast disappearing cannot require extinction to *end* a right to game that exists now only due to state action. The trial court was not required to grant the Crow a treaty right to a state-created resource – now to be harvested with jeeps, trucks, four wheelers and snowmobiles instead of on foot or horseback- and now using semiautomatic weapons, scopes, lasers and rangefinders rather than with bow and arrow, spear, and black powder rifle- all because the elk were not entirely wiped out.

E. The principle of *stare decisis* supports the trial court's decision to follow the *Repsis* treaty interpretation. Any other ruling would remake history.

In following *Repsis*, the trial court concluded as did the Tenth Circuit: respect for *stare decisis* was appropriate.[11] Per *stare decisis* a court should follow established precedent from previously decided cases when determining a later case involving similar facts or issues. *Borns*, 70 P.3d at 271. When the same points arise again in litigation, the result should be the same. *Alpine Lumber v. Capital West Nat'l Bank*, 231 P.3d 869, 872 (Wyo. 2010). While not an inexorable command, adherence to *stare decisis* contributes

[11] "Stare decisis" means "to stand by things decided." Black's Law Dictionary 1414 (7th ed. 1999). The concept is the basis of Anglo–American common law. *Borns ex rel. Gannon v. Voss*, 70 P.3d 262, 271 (Wyo. 2003).

to the actual and perceived integrity of the judicial process. *Brown v. City of Casper*, 248 P.3d 1136, 1146 (Wyo. 2011); *Dunnegan* v. *Laramie County Comm'rs*, 852 P.2d 1138, 1140 (Wyo. 1993). The doctrine "is of fundamental importance to the rule of law" and any departure from *stare decisis* demands "special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). No such justification can be found here to "remake history" and "rewrite [an] Indian treat[y] to remedy a claimed injustice" so as to validate a claim that was asserted, ruled on and rejected both 20 and 120 years ago.

Stare decisis considerations weigh most heavily in cases involving property and contract rights, where reliance interests are created. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). The State of Wyoming has relied on the holding of *Race Horse* for 120 years. It has for more than a century devised, funded and implemented statewide a complex scheme of wildlife conservation management; and it has applied its laws and regulations to generations of the citizenry and the Indians, all with the understanding that the extent of its authority was not in question. It has achieved astonishing success, after the game – including the elk – became scarce long ago, just as the parties to two identical Wyoming treaties foresaw. Game has been reintroduced and herds re-developed, all done in reliance on the integrity of a judicial process that ruled on the State's authority more than one hundred years ago. It is too late to wipe clean the slate, wipe out that history, and hold that the Crow and the Bannocks and the Shoshoni now get to go first.

Ten years after *Repsis*, the United States Supreme Court ruled that an Indian tribe's long delay in seeking judicial relief from an infringement of its sovereign rights, and its long acquiescence to a state exerting dominion and regulatory authority over its

lands, equitably barred the tribe from asserting those rights. In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Court, citing laches and acquiescence doctrine, barred the Oneida tribe's claim that it was exempt from taxation on recently re-purchased reservation land.[12] That land, sold unlawfully long ago, was governed and regulated by New York State and its county and municipal units for two hundred years before the tribe sought judicial relief. *Id.* at 202. Noting "the principle that the passage of time can preclude relief has deep roots in our law," the Supreme Court held that it was too late for the tribe to assert its sovereign rights so as to obtain a "disruptive remedy" that would overturn a longstanding status quo. *Id.* at 216-221.

Sherrill offers all the more reason why *stare decisis* must apply here. The State has relied upon *Race Horse* for more than one hundred years in exercising its dominion and regulatory authority. The Crow waited almost one hundred years to claim that Article 4 in their treaty had to be given an interpretation different from that announced in *Race Horse*, and to seek relief in the federal courts. They lost that claim in *Repsis*. The U.S. Supreme Court chose not to review that decision. The matter should be at an end.

The Article 4 right was temporary and precarious. The United States could have sold the entire Bighorn Mountains to Cornelius Vanderbilt and the treaty right would

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[12] *Id.* at 218 ("As between states, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory. . . [L]ong acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and authority.") (citations and quotations omitted).

have been instantly gone- this the Defendant concedes. (R. 381). There was no promise or understanding that the game would be protected and preserved for the Indians' harvest and use. There was no promise or understanding that the hunting right would last. There was instead a clear understanding that it would not. *Mille Lacs, Race Horse* and *Repsis* all so hold. The trial court was correct as a matter of law when it ruled that the Article 4 right was temporary and no longer exists. Any other ruling would remake history.

II. THE TRIAL COURT DID NOT ERR BY RULING THAT THE BIGHORN NATIONAL FOREST IS "OCCUPIED LAND" OF THE UNITED STATES.

In following the *Repsis* decision, the trial court adopted its second holding: that the Bighorn National Forest was occupied land of the United States, rendering any Article 4 hunting rights inapplicable there today, irrespective of whether or not the right survived the admission of Wyoming as a state. *Repsis*, 73 F.3d at 993. (R. 987-990).

That decision was correct as a matter of law. The Article 4 right could only be exercised where the land was both unoccupied and owned by the United States. Contrary to Appellant's claim in this appeal, case law establishes that governments, including the federal government, can occupy land, and that a sufficient exercise of dominion, control and occupancy renders land "occupied" for the purposes of Article 4. *See* Appellant's Br. at 42 (claiming that no such case law exists). The Bighorn National Forest is occupied as a matter of law, and the record suffices to support the trial court's ruling.

A. Article 4's hunting right only applied to hunting district lands that remained both owned by the United States and unoccupied.

Race Horse held that the Article 4 off-reservation hunting right did not apply to all "unoccupied lands of the United States," but only to "lands of that character embraced

within what the treaty denominates as 'hunting districts.'" *Race Horse*, 163 U.S. at 508; *Repsis*, 73 F.3d at 988 (stating the same). Conversely, in such districts the right would persist only so long as those districts remained "unoccupied public land of the United States." Article 4 "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied *and* owned by the United States." *Mille Lacs*, 526 U.S. at 207 (emphasis added). Therefore, Article 4 hunting rights cannot exist on United States land that is occupied. The issue is what it means for a government to occupy land.

B. The most relevant authority establishes that government-owned land is occupied for the purposes of Article 4 when the government, state or federal, asserts and exercises sufficient dominion and control over the use and occupancy of the land by others.

In 1896 the United States Supreme Court held that Article 4 had expired in 1890, and so there is not much case law construing the term "unoccupied" in Article 4. There is little need to litigate the meaning of expired contract right terms. Nonetheless, the authority most on point was provided to the trial court, and it supports the trial court's ruling that the Bighorn National Forest is occupied. *See* Resp. Mot. Dismiss at 27-36 (R. 793-802). That case law includes not only the *Repsis* decision but other case law construing directly what it means to be "unoccupied land of the United States."

Race Horse implicitly held that Wyoming occupied the hunting districts when it became a state, and even courts that have rejected *Race Horse's* view of the equal footing doctrine have accepted that notion as logical. *See Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904, 927 (8th Cir. 1997), *affirmed by Mille Lacs*, 526 U.S. 172 (1999) ("The standard of when "unoccupied" lands become "occupied" is certainly

vague, and could logically include the grant of sovereignty to a newly formed state."). Moreover, the *Race Horse* Court saw Yellowstone Park's creation as bearing on the temporary nature of the Article 4 right, and this further sets forth the idea that a government can exercise or assert dominion over public land so as to render it occupied.

The *Repsis* decision accepted this idea in ruling that creation of the Bighorn National Forest in 1897 resulted in occupation of the forest:

> When the Treaty with the Crows, 1868, was executed the lands located in what is now the Big Horn National Forest were unoccupied; they were open for settlement in the westward expansion of the United States. However, in 1887, 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. *See* 16 U.S.C. § 475. These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. *See* Act of June 4, 1897, Ch. 2, 30 Stat. at 35–36 (1897). **Thus, the creation of the Big Horn National Forest resulted in the "occupation" of the land.**

Repsis. 73 F.3d at 993 (emphasis added); Ex. 11, Ex. 12. (R. 474-506). *Repsis* ruled that the creation of the Big Horn National Forest was a restrictive act that *resulted in* an assertion of control and dominion over the land and its use and occupancy, and that this occupied the lands and ended any Article 4 treaty rights there.

Repsis is not alone in its view of when land of the United States is occupied. In *State v. Cutler*, 708 P.2d 853 (Idaho 1985), decided after the *Tinno* advisory opinion, the Idaho Supreme Court directly construed Article 4 and what it meant for land to be "occupied." It held that a *state-owned* elk refuge was "occupied" and that no Article 4 hunting rights existed there pursuant to the 1868 Fort Bridger Treaty. *Id.* at 854-60.

The court's decision rested on three grounds. First, the court found that "the signatory Indians understood that their off-reservation hunting rights . . . were not absolute and would diminish with the increased occupation of the lands and the decrease in available game." *Id.* at 858. Second, it saw in treaty language a recognition that sovereign entities and institutions could occupy land, and it saw evidence that the Indians understood this when the treaty was signed. It noted language in Article 2 – which identical language is in the 1868 Crow treaty - providing that the enormous reservation being created was "for the absolute and undisturbed use and *occupation* of the . . . Indians herein named." *Id.* at 856-57; Ex. 1, Ex. 2 (R. 396-410). The court reasoned thus:

> Under the treaty a relatively few Indians were to "occupy" millions of acres of land within the meaning of the treaty, which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an "unoccupied" to an occupied status. The extrinsic evidence reveals that the tribal leaders had visited federal military outposts and settlements in the northwest, including Fort Bridger, Fort Laramie, and Salt Lake City, and from those settlements undoubtedly understood that a governmental unit could "occupy" lands within the meaning of the treaty. Therefore the mere fact that the State of Idaho owns the ranch and no one physically resides on the property year round does not necessarily mean that the Sand Creek Ranch is "unoccupied lands."
>
> *Cutler*, 708 P.2d at 857.

Third, there were signs of occupation and dominion present on the land: The presence of cattle, fences, cultivated fields, and buildings; such were traditional indications that the Indians would take as a sign of occupation to the exclusion of their hunting rights. The presence of such things at the refuge, along with continuous fences, signs, roads, and campgrounds, led the court to hold that the refuge was occupied; and that precluded the exercise of any still valid treaty rights there. *Id.* at 859. (R. 796-797).

C. The trial court correctly ruled that the Bighorn National Forest is occupied.

The *Repsis* and *Cutler* decisions are consistent with the reading given to Article 4 in the *Mille Lacs* and *Race Horse* decisions. *Repsis* focuses on the laws and directives that *resulted in* occupation, laws which, as noted below, go beyond those noted in *Repsis*. The focus of *Cutler* is on evidence of occupation. But both decisions accept that a government can assert enough control and dominion over the use and occupancy of land so as to render it occupied for the purposes of Article 4. They support the trial court's decision to declare the Bighorn Forest occupied land where no Article 4 rights can apply.

The issue is not, as Appellant puts is, whether the trial court held that "executive action . . . impliedly extinguished the treaty-based right." Appellant's Br. at 6. The trial court's order says no such thing. Nor does the *Repsis* decision. The issue is whether the Bighorn National Forest was occupied land on the date Appellant acted; and the law regarding that forest, its existence and management, supports a ruling that it was.

When the Bighorn National Forest was created, the 1897 Organic Administration Act of 1897 empowered the administration to issue rules and regulations to "regulate the[] occupancy and use" of the forests and to "preserve the forests thereon from destruction." 30 Stat. 35, 16 U.S.C. § 551. In its first appropriation to implement the Act, Congress directed that forest employees "shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game . . ." 30 Stat. 1095; *see United States v. New Mexico*, 438 U.S. 696, 722 (1978) (discussing the history.) This directive became law applied to the U.S. Forest Service in 1908. It remains the law today. 35 Stat.

259, 16 U.S.C. § 553. History thus indicates that the United States has from inception of the national forests incorporated state law into its *occupation* of the forests, and has intended state game and fish law to apply and govern the *use and occupancy* of the forest.

This history, along with that set forth in State's Appendix A, puts the lie to Appellant's implicit claim, in speaking of the national forests, that hunting "has always been a lawful use" in the Bighorn National Forest. Appellant's Br. at 12. These histories, together with the reintroduction evidence provided to the trial court, show the extraordinary extent to which the State proceeded, with the approval and invitation of Congress, to *occupy* the Bighorn National Forest, as it created new hunting districts to replace the ones that had failed. History shows that creation of the Bighorn National Forest *resulted in* the occupation of the forest. History can be remade only if ignored.

Laws affecting and expanding the occupation of the Bighorn National Forest have only proliferated. In 1960, Congress passed the Multiple–Use Sustained Yield Act of 1960 which provided that "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" as well as the original purposes set forth in 16 U.S.C. § 475. 16 U.S.C. § 528; Ex. 14 (R. 513-514). This increased the government's dominion over and management of the land. Full appreciation of the forest's present occupation would also consider fire suppression activities and other present day impacts on forest management and activity due to environmental laws and statutes such as the Wilderness Act and the Endangered Species Act. *See* 16 U.S.C. §§ 1131 *et seq.*, 1531 *et seq*. All these laws and developments, taken

together, make plain that the government had sufficient dominion and control over the national forest in January of 2014 so as to render it occupied for the purposes of Article 4.

At the first evidentiary hearing the State would have produced more evidence than the 2014 annual report of the Bighorn National Forest it submitted as an exhibit. (R. 507-512). The State told the trial court it had more evidence showing that the Bighorn National Forest had become a highly regulated, occupied land, referring to the special permitting system, to significant improvements to and maintenance of the land, and to a detailed grazing system. Resp. Mot. Dismiss at 32-33; Ex. 13 (R. 798-799, 507-512). *See e.g. Bilderback v. United States*, 558 F.Supp. 903 (D.C. Or. 1982) (a national forest was not open range land due to pervasive, detailed federal grazing law). The trial court chose not to receive that evidence. It ruled that *Repsis* decided the issue. But the filings and attachments of the State still provided the court with a sufficient record and basis to hold that the Bighorn National Forest was "occupied land" for the purposes of Article 4.

D. The trial court properly declined to give Article 4 the meaning given to different language in other treaties.

Faced with adverse authority, Appellant wants to focus on other treaties with different hunting rights language. He maintains that if lands are a forest and a national one, then they are unoccupied lands as a matter of law, even if they would be considered occupied if owned by a private party. Appellant's Br. at 33. He made the same claim to the trial court. Def.'s Br. Support Mot. Dismiss at 14-17 (R. 381-384).

Tellingly, Appellant does not even cite *Cutler* in his appellate brief, though it is a case that directly construes what it means for land to be "occupied" for the purposes of

Article 4. In his trial court filings, he suggested that *Cutler* was not adverse authority because the elk management area was privately owned before it was state-owned, and because *Cutler* in no way suggests that the federal government can occupy forested land. *Id.* at 16; Def.'s Reply Br. Support Mot. Dismiss at 31 n. 7, 35-36 (R. 383, 934, 938-939).

Not so. The Idaho Supreme Court said its decision had nothing to do with the fact that the land was owned by the state rather than the federal government: "Our determination is based on whether this land is occupied, not on a distinction between federal and state-owned land. . . [W]e can find no authority . . . for the proposition that the federal government could not 'occupy' lands to the exclusion of the off-reservation hunting rights retained in the 1868 Fort Bridger Treaty." *Cutler*, 708 P.2d at 860. *See* Resp. Mot Dismiss at 30. (R. 796).

Appellant wants "unoccupied land of the United States" to mean the same thing as "open and unclaimed land," a term used in Stevens treaties that provide for "the privilege of hunting on open and unclaimed land." Appellant's Br. at 33, 40-41; Br. Support Mot. Dismiss at 15-16 (citing cases) (R. 382-383).[13] Courts interpreting Stevens treaties have held that privately-owned land is no longer "unclaimed," even if still "open," and also that certain national forests are open and unclaimed. *State v. Arthur*, 261 P.2d 135, 141

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[13] Appellant says *Tinno* held that a national forest was "unoccupied land of the United States." Appellant's Br. at 33; (R. 383). In *Tinno* the parties *stipulated* that the forest area involved was unoccupied. The matter was never litigated. *Tinno,* 497 P.2d at 1391.

(Idaho 1953) (Idaho National Forest was open and unclaimed); *State v. Coffee*, 556 P.2d 1185 (Idaho 1976) (land privately owned and so not open and unclaimed).

Decisions suggest that forested land is open and unclaimed if the government owns it, but not if a private party does. *See State v. Simpson*, 54 P.3d 456 (Idaho 2002) (forested land was open to recreational use by the public such as hunting and camping, but it was owned by timber company Potlatch Corporation and so per *Arthur* was not "open and unclaimed land"). *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (the national forest land at issue, open to state-regulated hunting, was open and unclaimed for the purposes of the treaty right). *See also* Resp. Mot. Dismiss at 36 n. 15 (noting the irrelevance of some of the cases cited by Appellant in support of his claim) (R. 802).

Simply put, Appellant wants Article 4 to bear the same meaning as similar but different language in other treaties with other tribes. This is of course the legal position Appellant derided as involving a "fundamental misunderstanding" of proper treaty interpretation, as he tried to avoid *Race Horse's* interpretation of an *identical* Article 4 in the Fort Bridger Treaty, struck at the same time, in the same region, as the Crow Treaty. Def.s Reply Br. Support Mot. Dismiss at 17 (citing *Mille Lacs*) (R. 920). Yet he wants no weight given to authority holding that the Bighorn National Forest is occupied, and he avoids any mention of Idaho authority that directly construes Article 4 and holds (1) that *all* governments can occupy land, and (2) that *elk wildlife areas* can be found occupied to the exclusion of Article 4 treaty rights. Hiding the evidence does not make it go away.

Even Stevens treaty case law is not always helpful to Appellant. Some courts have gone beyond the simple public/private distinction to hold that Stevens treaty hunting

rights do not turn on who owns the land. In *State v. Watters, Jr.*, 156 P.3d 145 (Or. Ct. App. 2007), the paper products company Boise Cascade owned forested land. It allowed recreational activity on the land, including hunting under state law. The court found treaty hunting rights inapplicable there, but not because it was privately owned. Rather, the court assessed the meaning of "open and unclaimed" and considered the evidence of *occupancy* and *dominion*, just as did the courts in *Repsis* and *Cutler*. In doing so, the court found that the land was "occupied" and not open and unclaimed:

> In light of the wording of the treaty, the context of the phrase at issue, and the circumstances surrounding the formation of the treaty, we conclude that the parties would not have considered the property where defendants killed the elk in this case to be "open and unclaimed." The land was indisputably claimed by Boise Cascade; that is, Boise Cascade asserted title to the land. **And it was occupied** - a term used in the negotiations– **by Boise Cascade.** In short, the site where the elk were downed was not "unclaimed" as that term is used in the 1855 treaty. Nor was the land "open." Rather than being "[n]ot fenced or obstructed," **the land was gated, included cabins, was posted with signs at major points of entrance, had cattle guards, had roads, and had drift fences**. In short, the area where defendants killed the elk was not "open and unclaimed"; accordingly, the 1855 treaty between the United States and the Nez Perce did not permit defendants' conduct.
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> *Id.* at 154-55 (emphasis added). (R. 800-801).

Even Stevens treaty case law offers support for the State's position that whether land is occupied for the purposes of Article 4 turns not on who owns it, but rather on the authority and dominion exercised over the occupancy and use of that land. *See also Buchanan*, 978 P.2d at 1081-82 (holding that a state wildlife refuge was still "open and unclaimed" but citing *Cutler* and noting that the State *produced no evidence of occupation* such as fences, signs, cattle guards, roads, machinery, campgrounds or

buildings); *Hicks*, 587 F.Supp. at 1164-65 (Olympic National Park was not open and unclaimed; the hunting right expired due to restrictions imposed on the land's use).

The trial court followed the most relevant case authority in holding that the Bighorn National Forest was occupied land for the purposes of Article 4. It was correct as a matter of law and its ruling should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN RULING THAT THE STATE'S ELK SEASONS WERE ENFORCEABLE ON APPELLANT BECAUSE THEY ARE REASONABLE AND NECESSARY FOR THE PURPOSES OF CONSERVATION.

The trial court ruled that Appellant's Article 4 hunting rights no longer exist, and it further ruled that the Bighorn National Forest was occupied land, to which no Article 4 rights could apply even if they existed. If either ruling is affirmed, there is no need to decide whether the State's elk seasons were enforceable on Appellant because they are reasonable and necessary for the purposes of conservation. That issue need be decided only if Appellant has a treaty right to hunt in the location at issue. *See Watters, Jr.,* 156 P.3d at 151, 156 (so stating and declining to rule on that issue after finding no treaty right applied to the land). Nonetheless, the trial court reached the issue and ruled. It found that without regulations there would be no sustainable elk population in the Bighorn National Forest. Indeed, it found there would be no game at all. (R. 989-991).

The trial court was correct to rule that the State's elk seasons were enforceable on Appellant even if he still had Article 4 rights in the Bighorn National Forest. The U.S. Supreme Court has repeatedly held that States may impose non-discriminatory time and manner restrictions on Indians with off-reservation hunting or fishing rights where

reasonable and necessary for conservation purposes. Seasons have always been fundamental to conservation. If seasons cannot be imposed on Indians with off-reservation rights, no time and manner regulation can be.

The trial court correctly rejected Appellant's claim that, before enforcing elk seasons on Crow Indians with valid treaty rights, the State first had to prove that the elk are presently endangered or, as he now puts it, that there is an "existential risk" to the elk and that "the survival of the species . . . is at risk." Appellant's Br. at 17, 20-21. (R. 392). The trial court also correctly ignored the argument that Wyoming's seasons are not enforceable because treaty-rights Indians get to go first. *Id.* at 45-46. (R. 861).

Neither argument is valid. First, because *basic* non-discriminatory conservation measures may be imposed upon *everyone* equally; and second, because the Bighorn elk would not even be present *but for* the actions taken by the State of Wyoming to relocate and reintroduce the elk into the Bighorns, and to then protect and nurture them with regulation and sustained conservation management for more than one hundred years.

The State provided the trial court with substantial historical data and information to establish that the elk of the Bighorns are a state-created resource; and also to show that its seasons are needed to ensure a viable and sustainable elk population there. The State's showing was sufficient to support the court's ruling, and that ruling should be affirmed.

A. The U.S. Supreme Court has repeatedly held that States may place basic non-discriminatory time and manner restrictions on Indians with off-reservation hunting and fishing rights, when the restrictions are reasonable and necessary for the purposes of conservation.

In 1999 the Supreme Court stated: "We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations in Indian hunting, fishing, and gathering rights in the interest of conservation." *Mille Lacs*, 526 U.S. at 205. (R. 824). Indeed, the Court's position has been settled for more than one hundred years.

In 1905 the Supreme Court held that a Stevens treaty fishing right still existed and prevailed over contrary state law, but also that limits to the rights existed. The Indians had a treaty right of "taking fish at all usual and accustomed places," but the Court added: "Nor does it restrain the state, unreasonably, if at all, in the regulation of the right." *Winans*, 198 U.S. at 384. (R. 824). In 1942 the Court held that Washington could not charge the Indian defendant a fee to exercise his treaty fishing rights, but it also held that the treaty "leaves the state with power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the *time and manner* of fishing outside the reservation as are necessary for the conservation of fish." *Tulee*, 315 U.S. at 684 (emphasis added). The Court cited to *Winans* and also to *Kennedy v. Becker*, 241 U.S. 556, 564 (1916), which held that off-reservation treaty rights were "subject . . . to that necessary power of appropriate regulation . . . which inhered in the sovereignty of the state over the lands where the privilege was exercised." (R. 826-827).

In1968 the Supreme Court cited *Winans, Tulee* and *Kennedy* and held that a Stevens treaty did not foreclose reasonable state regulation of treaty fishing. The Court held that the fishing guaranteed by the treaty could be regulated by "an appropriate exercise of the police power of the state" and further, that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the

State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup I*, 391 U.S. at 398. (R. 827).

The Court remanded the litigation back to state court to determine whether a total ban on Indian net fishing was justified by the interest in conservation. *Id.* at 401-03. In *Puyallup II*, the Court held that such a ban was precluded for trout, and it remanded the matter for further determinations. In its decision the Court noted that the regulations in place included *times of the year when there could be no fishing* and it further held that under certain conditions *a complete ban on all trout fishing could be appropriate*: "We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species, and time may come when . . . all fishing should be banned until the species regains assurance of survival." *Puyallup II*, 414 U.S at 47-49. Then in *Puyallup Tribe, Inc.* v. *Dept. of Game of State of Wash.*, 433 U.S. 165, 175-77 (1977) [*Puyallup III*], the Court held that the demonstrated need for conservation of trout was so substantial that the State could regulate Indians fishing *on the reservation*, where the State normally lacks jurisdiction. (R. 827-828).

These cases place beyond dispute the right of states to enforce where appropriate, on Indians with treaty rights as well as on everyone else, non-discriminatory time and manner regulations, including the use of closed seasons. No U.S. Supreme Court decision has ever said otherwise.

B. The use of seasons is fundamental to conservation management, and closed seasons discriminate against no one. If hunting seasons cannot be enforced against Indians with treaty rights, no time and manner regulation can be.

The Supreme Court has no issue with basic time and manner regulations such as seasons and closed seasons because they are fundamental to the concept of conservation. They have been used since conservation efforts began. They are integral to the means by which wildlife is sustainably managed. Closed seasons close hunting to *everyone*. They discriminate against *no one*. If seasons and closed seasons are not enforceable on Indians with off-reservation treaty rights, than *no* regulation is enforceable, and one hundred years of U.S. Supreme Court precedent has no meaning at all.

The State produced authority showing that all twelve original colonies enacted game laws; that all but one had closed seasons; that Massachusetts had a closed season for deer as far back as 1694; that the use of seasons and limits was elementary in other nations; that the closure of the hunting season for the bigger game in the winter has been practiced nationwide for hundreds of years; and that this was so in Wyoming's territorial years. Supp. Resp. Mot. Dismiss at 13-14, Ex. 17, 17.1 (835-836, 546-578, 579-580).

The State cited treatises stating that seasons and limits are fundamental to the sound application of conservation efforts; to expert publications setting forth practical and scientific reasons why this is so; and to the data from the location of the kills at issue, which shows how the state's basic time and manner regulations have allowed a stable, sustainable elk population to exist in the Bighorns for generations. Supp. Resp. Mot. Dismiss at 14-15, Ex. 16 (R. 836-837, 543-545).

The State cited the Crow Tribe's own Game Code, which accepts that seasons and limits and other basic time and manner regulations are fundamental to conservation management. The State set out the telling history of that code, which arose only after the

big game – including the elk – was almost wiped out because of year-long, unrestricted hunting that reduced a reservation herd of 5000 elk to 65 from the 1970s to the 1980s. The State cited research reports, received by the Crow and intended to help them, which urged the Crow to establish seasons and limits that applied to themselves as well as to others; and the State noted evidence of the continuing scarcity of big game on the reservation because of the Crow refusal to enforce seasons and limits on themselves. Supp. Resp. Mot. Dismiss at 15-18; Ex 19; Ex. 20; Ex. 21; Ex. 22; Ex. 23; Ex. 24 (R. 837-840, 591-653). *See* Appellant's Br. at 13 (no closed elk season on the reservation).

The State set forth the recent history on the Wind River Reservation, where not very long ago the lack of seasons and limits led to a big game crisis so serious that the federal government had to step in to save the big game; but where the introduction of seasons and limits led to the rise of a thriving, stable big game population. Supp. Resp. Mot. Dismiss at 18-20, Ex. 25; Ex. 26; Ex. 27 (R. 840-842, 654-723).

Finally, the State established the change in population, Indian and non-Indian, from the beginning of the twentieth century, when the elk nearly disappeared from the Bighorn Mountains because of unrestricted hunting by a far smaller population, using far less capable weaponry, and far less capable means of transportation and access to the wild. Supp. Resp. Mot. Dismiss at 20-22, Ex. 28, Ex. 29, Ex. 30 (R. 842-44, 724-746).

The State submits that this record overwhelmingly supported the State's basic contention: that the use of elk seasons was reasonable and necessary for conservation purposes; that in their absence elk would suffer the progressive depletion mentioned in *Puyallup II*; and that the Bighorn seasons were therefore enforceable on the Crow even if

their Article 4 hunting rights had not expired and somehow also still attached to the Bighorn elk herds created by the State after the natural hunting districts disappeared.[14]

C. Appellant misrepresents U.S. Supreme Court jurisprudence to hide the weakness of his position. His extreme view of conservation necessity has never been required by the U.S. Supreme Court.

Faced with the State's showing, Appellant's response has been to make stuff up. He misrepresents U.S. Supreme Court jurisprudence, attributing to it holdings the Court has never made, all in an attempt to saddle courts with a view of conservation necessity that has never been required by the U.S. Supreme Court, that state courts are free to ignore, and that should be rejected. Trickery is the only way Appellant can prevail. His view of conservation necessity is an extreme one, and it was rightly rejected.

First, Appellant suggests that the enforceability of closed seasons has already been decided. He suggests that the U.S Supreme Court has already held that closed seasons cannot be imposed on Indians with off-reservation treaty hunting rights. He claims that the Supreme Court applied its doctrine of conservation necessity in *Antoine* and reversed the conviction of an Indian who hunted during a closed season Appellant's Br. at 20, 46.

That never happened. No rule or view of conservation necessity was decided or applied at all. "We have no occasion in this case to address the question. The State of Washington has not argued . . . that applying the ban on out-of-season hunting of deer by

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[14] The State's cited Crow population was low. From the Affidavit of Dennis M. Bear Don't Walk: "[A]s of January 28, 2014, there were 13,394 enrolled Crow tribal members, and 9,080 Crow tribal members living on the Crow Indian reservation." (R. 349).

the Indians on the land in question is in any way necessary or even useful for the conservation of deer." *Antoine*, 420 U.S. at 207.

Second, he claims that "[a]bsent an existential risk to elk, state laws that regulate *when* and *how* elk can be hunted on national forest land are simply not enforceable at all" on treaty rights Indians pursuant to U.S. Supreme Court precedent; and also that *limits* - the amount of the take - can be enforced only if and when "the survival of the species is at risk" and there is a demonstrated "need to conserve the species." He cites the *Puyallup* cases to support that contention. Appellant's Br. at 17, 20-21 (emphasis added).

Those cases say no such thing. Appellant's claim is completely belied and at odds with the precedent cited and quoted above, including those decisions. A simple reading of the decisions makes this clear. So why make the claim? Because Appellant wants to bind Wyoming courts with mostly lower federal court law he knows is not binding and need not be followed by Wyoming state courts. *See* Appellant's Br. at 30 (noting that the trial court was not "bound" by the *Repsis* decision).

Appellant claims that the State of Wyoming must first preclude its own citizens from hunting, and then find that the elk will not survive, before it may impose any conservation regulations on the Crow Indians. The Crow get to go first. They have first rights to what the State created in the Bighorn National Forest. Appellant's Br. at 43-48.

He tried the same gambit with the trial court, claiming that his view was "the controlling federal test." Def.'s Ltd. Resp. Conservation Necessity at 5 (R. 860-862). But the State showed that the so-called controlling federal test came from lower federal court decisions cited, a fact Appellant had tried to hide. Second Supp. Resp. Mot.

Dismiss at 4-6, & esp. n. 1. (R. 970-973). So now he hides any mention at all of that authority. Just as he avoids mention of the alternative holding of *Race Horse* recognized in *Mille Lacs*. Just as he never sees fit to mention the *Cutler* decision.

In actual fact, Appellant's position relies on Stevens treaty fishing decisions, especially *United States v. State of Washington*, 384 F.Supp. 312 (W.D. Wash 1974), *aff'd, 520* F.2d 676, 686 (9th Cir. 1975), *certiorari denied*, 423 U.S. 1086 (1976); ["*Washington*"]. That federal court, ruling in equity, held that the State would first have to try eliminating non-Indian fishing before it could regulate the perpetual Indian fishing right. *See Washington*, 520 F.2d at 683-686 (affirming the lower ruling). (R. 861, 972).

The U.S. Supreme Court never reviewed this ruling and it has *never* held that such a view of conservation necessity is the rule. Such a rule claims a level of indispensability and deference to a treaty right that the Supreme Court has never adopted. *See Antoine*, 420 U.S. at 207 (declining to rule that a state must show a "compelling need"); *Puyallyp I*, 391 U.S. at 401 n.14 (declining to hold that regulations needed to be indispensable); *People v. Jondreau*, 166 N.W.2d 293, 294 (Mich. Ct. App. 1968), *rev'd* 185 N.W.2d 375 (Mich. 1971) (discussing the amicus brief in *Puyallup I* which unsuccessfully argued that a regulation had to be indispensable to conservation before it could apply to Indians). Courts recognize that *Washington* went beyond what Supreme Court law required. *See e.g. Peterson v. Christensen*, 455 F.Supp. 1095, 1100 (E.D. Wisc. 1978) (declining to apply this and other *Washington* rulings to a Wisconsin treaty and noting that *Washington* went beyond what the Supreme Court and the Constitution required). (R. 972-973).

Other courts have considered Supreme Court precedent and their rulings support the State's position: that it could enforce its elk seasons in the Bighorn National Forest on Crow Indians- if their treaty rights there had not expired- because they are reasonable and necessary for conservation purposes and they do not discriminate. On remand from *Puyallup II* the Washington Supreme Court held that "a proper interpretation of the . . . Treaty permits the state to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non-Indian equally." *Dept. of Game v. Puyallup Tribe, Inc.*, 548 P.2d 1058, 1069 (Wash. 1976) [*Puyallup Tribe], partially vacated and remanded* 433 U.S. 165 (1977). There was no holding that conservation necessity allowed restrictions on Indians only if conservation could not be established by preventing non-Indians from fishing at all. The decision was partially vacated due to sovereign immunity in so far as it applied to the *tribe* as opposed to its individual members, but the state court's view of conservation necessity was affirmed. *Puyallup III*, 433 U.S. at 173, 177 ("[P]etitioner states that the courts below have failed to apply a standard of conservation necessity. . . We disagree."). (R. 973-74).

Michigan courts have held that the existence of a treaty fishing right did not preclude state regulation under the Supreme Court's holdings "as long as the regulations affect 'all citizens, Indian and non-Indian equally,' and the regulations concern a subject not covered by the applicable treaty." *Michigan United*, 280 N.W.2d at 890 (quoting *Puyallup Tribe*). The regulations had to be non-discriminatory and their uniform application necessary for the preservation of the fish protected. *Id.* (R. 974). Wisconsin courts have held that a fishing regulation could be enforced on treaty rights Indians as on

others if it was "reasonable and necessary to prevent a substantial depletion of the fish supply." *State v. Gurnoe*, 192 N.W.2d 892, 902 (Wisc. 1972); *State v. Newago*, 397 N.W.2d 107, 109 (Wisc. Ct. App. 1986) (same). The trial court was provided with this authority. Second Supp. Resp. Mot. Dismiss at 4-9 (R. 970- 975). It was free to ignore Appellant's federal test and to consider which law to apply to the situation at hand.[15]

Appellant's position is a caricature of the applicable law. It has no mooring in binding law or in the environmentally-grounded concept of conservation. Appellant says statewide elk population figures are decisive as to the needs of conservation in the Bighorns. *See* Appellant's Br. at 13 (citing an objective to lower the elk population statewide). (R. 336). The law does not support such an approach. *Puyallup II* involved the right to regulate Indian net fishing for *two* fish species in *two* rivers to which treaty rights attached under one Stevens treaty. The Court did not count all the fish in all the rivers of Washington state to decide the issue before it. It focused on the rivers at issue.

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[15] Appellant adopts and discards legal positions depending on his need at the moment. Identical language in different treaties means nothing (*Race Horse*), but merely similar language must mean the same thing ("open and unclaimed land). *Race Horse* is dead and buried, except the part that he needs. The majority opinion controls (*Mille Lacs*) until he needs the dissent (*Mille Lacs*). Ignore the lower federal courts (*Repsis*) until he needs them to *bind* you (*Washington*). State decisions are persuasive (*Tinno)*, but not if they hurt. (*Cutler, Watters Jr., Puyallup Tribe, Michigan United, Gurnoe, Newago*). Heads he wins, tails the State loses. It is as if the proposed canon is simply: Indians win.

Appellant's approach, followed to its logical conclusion, would countenance a slaughter in the Bighorns and call it legal. In 2013, in Bighorn Hunt areas 35 through 40, the winter trend count was 5,437 elk. Ex. 18 (R. 585); *see* Tr. Ex. 5 (a map of the hunt areas) (R. 1426). Under Appellant's approach, the Crow could take them all, and then another 25,000 on other lands roamed 150 years ago. They could re-extirpate the Bighorn elk and wipe out a century of state effort, before Wyoming and its citizens had any legal recourse, because there are way too many elk elsewhere in the State and because the Crow get to go first in the Bighorns. Appellant may deny this is so, but he must then concede that his cited figures do not decide the issue as claimed, and his entire argument collapses. Appellant's position is an extreme one. The trial court rightly rejected it.

D. The State need not show that the survival of the Bighorn elk is at immediate risk where those elk are a creation of the State and the result of long-term sovereign state action.

Supreme Court authority is consistent with and supports the State's position that: (1) the Article 4 treaty hunting rights, if they still exist, only attach to what would exist in the absence of state action and reintroduction (likely nothing); and (2) that the State's elk seasons would be enforceable on Indians with Article 4 rights because any elk naturally present would suffer progressive depletion if the seasons were not enforced. The State need not show the Bighorn elk to be presently endangered when they were created by the State and are the result of relocation, reintroduction, and long-term sovereign state action. The State must at most show a likelihood of progressive depletion; something easily seen when one considers the elk's virtual extirpation at the turn of the last century, and when

one further considers the respective histories of the Big Horn National Forest and the Wind River and Crow Indian Reservations.

The Washington court in *Puyallup Tribe* followed the approach of the *Puyallup II* concurrence and the Supreme Court held that "conservation necessity" was properly applied. *Puyallup III*, 433 U.S. at 177 and n. 17. In *Michigan United* the appellate court held that Indians had no treaty rights to state-reintroduced trout and also that *in any event* the restrictions imposed met the requirements of conservation necessity. 280 N.W.2d at 887-890. "Necessity" did not mean the fish would die out but for the regulations. Permitted conservation measures were not limited to the minimum necessary to prevent extinction. They extended to measures designed to maintain a present population level or to rise to a desired level. *Id.* Wisconsin courts held regulations enforceable on treaty rights Indians where "reasonable and necessary to prevent a substantial depletion of the fish supply." *Gurnoe*, 192 N.W.2d at 902; *Newago*, 397 N.W.2d at 109. (R. 974-975).

E. The trial court correctly ruled that the State's elk seasons were reasonable and necessary for conservation and enforceable on Appellant even if his Article 4 rights still exist and apply throughout the Bighorn National Forest.

The trial court declined to hold the evidentiary hearings requested by the State; and it held that in the absence of the State's conservation efforts there would be no game to hunt in the Bighorn National Forest. It further held that it was the State's efforts that made the elk population sustainable in Wyoming's Bighorn National Forest. (989-991). The authorities and exhibits provided to the trial court were but a portion of the State's available evidence. But they suffice to support the court's ruling.

The trial court was correct when it ruled that the State's elk seasons were reasonable and necessary for conservation purposes, and were enforceable on Appellant even if his treaty rights had not expired and the Bighorn National Forest had not become occupied. It is the only proper ruling given the history which unfolded in the Bighorns since the treaty was signed. It is the only proper ruling given the fundamental role seasons play in conservation efforts and the immense impact they have had, *in this region in particular*, both when they are used, and when they are not. It is the only proper ruling given the Supreme Court's jurisprudence on the matter. If seasons cannot be imposed to protect what the state itself has created, no time and manner regulation can be imposed on Indians with treaty rights. And that is not the law of the land.

Appellant labeled the *Puyallup II* concurrence "merely . . . distraction." Def.'s Ltd. Resp. at 8-9 (R. 863-864). No, it gets to the heart of the matter. That concurrence's limitation concept has obvious application to the limited, temporary, precarious and diminishing hunting right provided for in Article 4. The right was expected to end. The game was disappearing. The hunting districts were expected to become occupied.

That precarious nature defeats any attempt to argue that Article 4 survived the near extirpation of the elk from the Bighorns and that it now applies to an elk resource attained by reintroduction, sustained state action, and *state occupation* of the national forest for more than one hundred years. That nature defeats any attempt to argue that the State has some incredibly high burden to meet to justify its seasons and its conservation regime.

The law should not remake history. The State's Bighorn elk seasons are enforceable on the Crow Indians even if they still have treaty hunting rights in the Bighorn National Forest. The trial court's ruling to that effect should be affirmed.

IV. IF THE TRIAL COURT ERRED, THE APPROPRIATE REMEDY IS TO REMAND FOR THE EVIDENTIARY HEARINGS REQUESTED BY THE STATE.

Affirmance of the trial court's rulings is appropriate. The record supports its rulings that: (1) The Article 4 hunting right was intended to be temporary and no longer exists; that (2) the Bighorn National Forest is occupied land; and that (3) the State can enforce its elk seasons in the Bighorn National Forest even if the Article 4 right still exists, and still exists there.

While the record supports affirmance, it does not permit rulings against the State without further proceedings. Appellant concedes that the State requested an evidentiary hearing on the issue of conservation necessity. Appellant's Br. at 45. In fact, the State requested an evidentiary hearing on every issue, a fact recognized by the court in its order denying the motion to dismiss. (R. 805-806, 986-987). At the status conference of September 1, 2015, held at the State's request, the State contested whether the treaty right still existed and whether it still existed in the Bighorn National Forest. It maintained that its seasons were enforceable for purposes of conservation. It asked for an evidentiary hearing on every issue. App. E: ≈ 2:07:04 – 2:09:56. The trial court agreed to set two hearings to accommodate that request, without objection. *Id.*: ≈ 2:17:09 – 2:26:26.

The State submits that it justified its request in its trial court filings. Appellant disagrees and contends that there is no basis for remand. Appellant's Br. at 45 n. 8. But

his position was different when he attempted to appeal pretrial. Then he conceded, with respect to a remand on the validity of the treaty right: "That is, in fact, one appropriate outcome." *Clayvin Herrera v. State,* CV 2016-13, Appellant's Opening Br. at 43.[16] This court should see gamesmanship for what it is. If this court cannot affirm the trial court's rulings, the remedy must be to remand for the evidentiary hearings requested by the State.

A. If the trial court is not affirmed, the State must be allowed to submit its evidence at a hearing.

If this court cannot affirm the trial court's decision to follow the Article 4 interpretation of *Repsis*, another interpretation is needed. The State must be allowed to present all the evidence it has as to the intent of the parties, the history of negotiations, their purpose, the context in which they occurred, and the practical construction adopted by the parties. *Fishing Vessel*, 443 U.S. at 675. The State of Wyoming has not done so yet. The State must be allowed to present all the evidence it has to support its claim that the Bighorn elk are state-created and that the Article 4 right cannot attach to those elk. The State of Wyoming has not done so yet.

If this court cannot affirm the trial court's ruling that the Bighorn National Forest is occupied land, then the State of Wyoming must be allowed to present the evidence it was preparing to introduce at the scheduled November 2015 evidentiary hearing, evidence referred to in the State's filings. Resp. Mot. Dismiss at 32-33 (R. 798-799). That evidence bears on whether the federal government exercises sufficient dominion and control over the use and occupancy of the forest so as to render it occupied.

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[16] At: https://wyuser3.courts.state.wy.us/case/instance/view?caseInstanceID=488036.

If this court cannot affirm the enforceability of the State's elk seasons on Crow Indians if they have Article 4 rights in the Bighorn National Forest, then the State must be allowed to present all of its conservation necessity evidence at a hearing. There is much more historical information. The State's submission of early Wyoming state law in Appendix A shows this is true. There is more conservation history, biological data, expert testimony, all bearing on whether the State's elk seasons are reasonable, non-discriminatory, and necessary for conservation in the Bighorn National Forest.

The issues raised in this misdemeanor case have required extensive research, which has taken a great deal of time and effort. While asking for evidentiary hearings, the State made an initial presentation in its trial court filings. The trial court thought it enough. If this court says it is not, the State must be given a complete opportunity to be heard. The sovereign State of Wyoming must be allowed to offer all that it has before the last one hundred and twenty-six years may be erased, and the world made new again.

CONCLUSION

For the foregoing reasons, the State of Wyoming asks that Appellant's conviction and sentence and the trial court's denial of Appellant's Motion to Dismiss be affirmed in all respects.

SUBMITTED this 13th day of October, 2016.

Christopher LaRosa
CHRISTOPHER LaROSA # 6-4025
Deputy County and Prosecuting Attorney
148 S. Brooks St.
Sheridan, Wyoming 82801
Tel (307) 674-2580; Fax (307) 674-2585

CERTIFICATE OF SERVICE

I, Christopher LaRosa, Deputy County and Prosecuting Attorney, Sheridan County, Wyoming, do hereby certify that I served a true and correct copy of the within and foregoing Brief of Appellee this 13th day of October, 2016, by depositing a copy thereof in the United States Mail, postage prepaid and duly addressed to the following:

Peter K. Michael
Wyoming Attorney General
James Kaste
Deputy Attorney General
D. David Dewald
Senior Assistant Attorney General
Wyoming Attorney General's Office
123 State Capitol
Cheyenne, WY 82002

Kyle A. Gray & Steven T. Small
Holland and Hart LLP
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59101

Dessa Reimer
Holland & Hart LLP
P.O. Box 68
Jackson, WY 83001-0068

Christopher LaRosa