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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

The CROW TRIBE OF INDIANS, et al., *Plaintiffs*, v. Chuck REPSIS, Individually; Brian NESVIK, Individually, and as Director of the Wyoming Game and Fish Department, and as Director of the Wyoming Game and Fish Commission, *Defendants*.	Case No. **92-CV-1002** **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM JUDGMENT**

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INTRODUCTION

In 1992, the Crow Tribe of Indians ("Plaintiff" or "Crow Tribe") came to this Court to vindicate its off-reservation treaty hunting rights. Compl. (Dkt. #1).[1] This Court, feeling bound by the U.S. Supreme Court's decision in Ward v. Race Horse, 163 U.S. 504 (1896), held that the Crow Tribe's off-reservation treaty hunting rights were extinguished upon Wyoming's statehood. Crow Tribe of Indians v. Repsis, 866 F. Supp. 520, 522-24 (D. Wyo. 1994) ("Repsis I").[2] The U.S. Circuit Court of Appeals for the Tenth Circuit affirmed. Crow Tribe of Indians v. Repsis, 73 F.3d 982, 987-93 (10th Cir. 1995) ("Repsis II"). The U.S. Supreme Court denied *certiorari*. 517 U.S. 1221 (1996).

But that was not the end of the story. In 2014, Clayvin B. Herrera, a Crow Tribe member, along with other Crow Tribe members in his hunting party, took three elk in the Bighorn National Forest. Mr. Herrera was cited for, and convicted of, violations of Wyoming hunting laws. Mr. Herrera's case went all the way to the U.S. Supreme Court, which held that the Crow Tribe's off-reservation treaty hunting right was not extinguished by Wyoming's statehood. Herrera v. Wyoming, 139 S. Ct. 1686, 1700 (2019). In so doing, the Court also held "that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood." Id.

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[1] Defendants initially included the State of Wyoming, the Wyoming Department of Game and Fish, the Wyoming Game and Fish Commission, Chuck Repsis (individually), and Francis Petera (both individually and in his capacities as Director of the Wyoming Department of Game and Fish and the Director of the Wyoming Game and Fish Commission). Compl. at 1. This Court subsequently granted a motion to dismiss the State of Wyoming, the Wyoming Department of Game and Fish, and the Wyoming Game and Fish Commission, Order on Defs.' Mot. Dismiss (Dkt. 25), leaving only Defendants Repsis and Petera.

In accordance with Fed. R. Civ. P. 25(d), and reflected in the caption on this Memorandum, Plaintiff has substituted Mr. Nesvik, the present Director of the Wyoming Game and Fish Department and Director of the Wyoming Game and Fish Commission, for Mr. Petera.

[2] In addition to dismissing Plaintiffs' treaty claims, this Court also dismissed Plaintiffs' claims under the Unlawful Inclosures Act. Id. at 524-25. The Crow Tribe does not seek to disturb that portion of the judgment.

at 1697. Today, this Court has the opportunity to relieve the Crow Tribe from the judgment, based on Race Horse, that it entered more than 25 years ago.

This is precisely the sort of circumstance that Federal Rule of Civil Procedure 60 was written to remedy. This Court's Repsis judgment remains in force; but that judgment was based entirely on a case that has been expressly and entirely repudiated by the U.S. Supreme Court, which affirmed the vitality of the very same treaty right that that this Court and the Tenth Circuit found extinct. To allow this Court's Repsis judgment—which might have been correct when it was made, but now has been unequivocally repudiated by the Supreme Court—to bar the Crow Tribe and its members from legally exercising their off-reservation treaty hunting rights would be a profound injustice. Equity requires that the Crow Tribe, and by extension its members, be relieved from this Court's Repsis judgment, which this Court should now vacate.

PROCEDURAL HISTORY

This case arises from two treaties the Crow Tribe executed with the United States. The first treaty defined the Crow Tribe's traditional hunting areas. Treaty of Fort Laramie with Sioux, Etc., 1851, 11 Stat. 749 (1851) and 2 Charles Kappler, Indian Affairs: Laws and Treaties 594 (1904) (the "1851 Treaty"). The second reserved to the Crow Tribe, among other things, "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." Treaty between the United States of America and the Crow Tribe of Indians, art. IV, 15 Stat. 649 (1868) (the "1868 Treaty"). These treaties, just like Federal statutes and the Constitution itself, are "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2; therefore enforcement of these

treaties touches the very core of Federal judicial authority. Id. art. III, § 2 (judicial power extends to cases arising under ratified treaties).

A. The Repsis Litigation

The Crow Tribe and Crow Tribe member Thomas L. Ten Bear (together "Plaintiffs"), initiated this action in 1992, seeking declaratory judgment that the Crow Tribe's off-reservation treaty hunting right remained intact, and injunctive relief barring Defendants from enforcing Wyoming hunting and fishing laws and regulations in contravention of those treaty rights. Compl. at 6 ¶¶ b-d; Am. Compl. (Dkt. 28) at 9-10 ¶¶ b-d.

On cross motions for summary judgment, this Court found in favor of Defendants and dismissed Plaintiffs' claims. Repsis I, 866 F. Supp. 520.[3] With regard to the Crow Tribe's off-reservation treaty hunting right, this Court's decision was entirely based on Race Horse.[4] This Court first found that the factual and legal issues in Race Horse and Repsis were identical:

> The facts of the Race Horse case are not distinguishable from the present case. The identical treaty language preserving Indian hunting rights relied upon by plaintiffs in this case appears at Article 4 of the Treaty of July 3, 1868, 15 Stat. 673, to which the Bannock Indians were party.[5] The petitioner in the Race Horse case advanced the identical contention now made by plaintiffs: that they are not subject to any restrictions imposed by Wyoming's game laws because pursuant to treaty they possess the right to hunt on all unoccupied lands owned by the United States and located in the state of Wyoming.
>
> [5] Articles 4 of the two treaties are identical except that the Crow treaty refers to reservations in the singular and the Fort Bridger treaty at issue in Race Horse refers to reservations in the plural.

[3] In addition to dismissing Plaintiffs' treaty claims, this Court also dismissed Plaintiffs' claims under the Unlawful Inclosures Act. Repsis I, 866 F. Supp. at 524-25. The Crow Tribe does not seek to disturb that portion of the judgment.

[4] Defendants also argued that the Bighorn National Forest was no longer "unoccupied lands" upon which the Crow Tribe could exercise any off-reservation treaty hunting right because "federal lands are occupied," and that conservation necessity justified Wyoming's regulation of treaty hunting. Id. at 522. This Court, holding that the Crow Tribe's off-reservation treaty hunting right was extinguished upon Wyoming's statehood, did not reach those issues. See generally id.

Repsis I, 866 F. Supp. at 522 & n.5. While acknowledging that Race Horse was, even then, "a much-criticized decision," id. at 523, this Court ultimately held that it remained good law. Id. at 523-24. That left this Court no leeway:

> Where the United States Supreme Court has already determined the legal issue before this court in Race Horse, where the underlying fact pattern, including the treaty language at issue, precisely matches that present in the instant case, and where Race Horse has not been expressly rejected or overruled, this court must follow the controlling decision.

Id. at 524 (citation omitted). With regard to the Crow Tribe's off-reservation treaty hunting right, this Court entered judgment based entirely on Race Horse.

Plaintiffs appealed, but the Tenth Circuit affirmed. Repsis II, 73 F.3d 982. Just like this Court, the Tenth Circuit found Race Horse to be entirely dispositive. First, it noted the identical language in the treaties at issue in the two cases. Id. at 987 ("Since the Court's focus was on the interpretation of the emphasized language, it is immaterial whether it appears in the Fort Bridger Treaty of 1869 or the Treaty with the Crows, 1868."); see also id. at 987 n.2. Next, it noted "the 'irreconcilable conflict' in Race Horse . . . between the right conferred by the treaty and the act admitting Wyoming into the Union . . . ." Id. at 990 (citing Race Horse, 163 U.S. at 514). Consequently, the Tenth Circuit held that Race Horse completely controlled: "The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. Race Horse, 163 U.S. at 514. Therefore, the Tribe and its members are subject to Wyoming's game laws and regulations . . . ." Repsis II, 73 F.3d at 992-93.

Having affirmed this Court's holding, based on Race Horse, that the Crow Tribe's off-reservation treaty hunting right was extinguished upon Wyoming's statehood, the Tenth Circuit articulated an alternative ground for affirmance: that even if the off-reservation treaty hunting right survived Wyoming's statehood, the Crow Tribe could not exercise that right in the Bighorn

National Forest because "the creation of the Big Horn [sic] National Forest resulted in the 'occupation' of the land." Id. at 993. It also stated, in a single sentence appended to its equal footing holding, that even if the off-reservation treaty hunting right survived Wyoming's statehood, "there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation." Id. at 993 (citation to record omitted). The Supreme Court denied *certiorari*. 517 U.S. 1221.

B. The Herrera Litigation

In 2014, Mr. Herrera was among a group of Crow Tribe members hunting elk within the boundaries of the Crow Reservation when they crossed into Wyoming and the Bighorn National Forest. Herrera, 139 U.S. at 1693. While there, Mr. Herrera and two other members of his hunting party shot one bull elk apiece, which they quartered and field dressed before returning to the Reservation with the meat. Id. Mr. Herrera subsequently was charged with, and tried for, taking elk out of season and with being an accessory to the same by others. Id.

At trial, Mr. Herrera was not permitted to assert his treaty right as a defense to the charges, and he was convicted on both counts. Id. The State court imposed a one-year jail sentence, which it suspended; ordered Mr. Herrera to pay more than $8,000 in fines and court costs; and suspended his hunting privileges in Wyoming for three years. Id.; Br. for Pet'r, Herrera v. Wyoming, No. 17-532, 2018 WL 4293381 at *15 (Sept. 4, 2018).

Mr. Herrera appealed, but the State appellate court affirmed both his conviction and his sentence. Herrera, 139 S. Ct. at 1694. First, it held *sua sponte* that the Tenth Circuit's decision in Repsis II "merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the Repsis suit on behalf of itself and its members. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case." Herrera,

139 S. Ct. at 1694 (citations to the record omitted). The appellate court also held, in the alternative, and following Repsis II, that even if the Crow Tribe's off-reservation treaty hunting right survived, Mr. Herrera could not exercise it in the Bighorn National Forest because "the national forest became categorically 'occupied' when it was created." Herrera, 139 S. Ct. at 1694. The Wyoming Supreme Court denied a petition for review. Id.

On petition for *certiorari*, the U.S. Supreme Court reversed and remanded. First, noting that Race Horse had articulated two different arguments as to why Wyoming's statehood extinguished the Crow Tribe's off-reservation treaty hunting rights, the Court held that Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), "upended both lines of reasoning in Race Horse." Herrera, 139 S. Ct. at 1696. Finding it "impossible to harmonize Mille Lacs' analysis with the Court's prior reasoning in Race Horse," the Court rejected both Race Horse's equal footing holding and its holding that treaty rights of a "temporary and precarious" nature might be impliedly dissolved by statehood:

> We thus formalize what is evident in Mille Lacs itself. While Race Horse was not expressly overruled in Mille Lacs, it must be regarded as retaining no vitality after that decision. To avoid any future confusion, we make clear today that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

Id. (internal quotations, citation omitted). Having rejected the Race Horse rationale that statehood itself was inconsistent with treaty hunting rights, the Court found that the Crow Tribe's off-reservation treaty hunting rights survived intact. Id. at 1698-1700. "Applying Mille Lacs," the Court wrote, "this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty

itself defines the circumstances in which the right will expire. Statehood is not one of them." Id. at 1700.[5]

The Court also rejected the State appellate court's alternative holding, concluding that "the Bighorn National Forest did not become categorically 'occupied' within the meaning of the 1868 Treaty when the national forest was created." Id. at 1700-03. Having reversed on both the substantive and procedural questions, the Court remanded to the State appellate court. Id. at 1703.[6]

On remand, Wyoming has argued that Repsis II, specifically its language concerning categorical occupation of the Bighorn National Forest and conservation necessity, continues to preclude Mr. Herrera from asserting his treaty rights; the State trial court agreed, and upheld the jury verdict against Mr. Herrera. Order on State's Request for Post-Remand Issue Preclusion, Wyoming v. Herrera, Case No. CT 2014-2687; 2688 (Wyo. Cir. Ct. 4th Jud. Dist., June 11, 2020) (the "2020 Preclusion Order, Plaintiff's Exh. 1). Mr. Herrera has appealed.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60 provides a mechanism by which a party may obtain relief from judgment. Relief under the rule is "an extraordinary remedy and may only be granted in exceptional circumstances." Jackson v. Los Lunas Cmty. Program, 880 F.3d 1176, 1191-92 (10th Cir. 2018).

Rule 60(b)(5). Rule 60(b)(5) allows a party to seek relief from judgment where "[i] the judgment has been satisfied, released or discharged; [ii] it is based on an earlier judgment that has

[5] The Court also held that Repsis II did not preclude Mr. Herrera from asserting his treaty rights because Mille Lacs had effected an intervening change in the law. Herrera, 139 S. Ct. at 1697-98.

[6] The Court allowed that, on remand, Wyoming "may press" two alternative defenses to the Crow Tribe's otherwise controlling treaty right: site-specific occupation, and conservation necessity. Id.

been reversed or vacated; or [iii] applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5) (brackets added). "Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient" to grant relief. Horne v. Flores, 557 U.S. 443, 454 (2009).

Under the second provision, relief may be granted "if the Court finds that its determination was based on a prior decision which has been reversed, vacated, or is no longer good law." Ramirez-Zayas v. Puerto Rico, 225 F.R.D. 396, 398 (D.P.R. 2005). "For a judgment to be 'based on an earlier judgment' it is not enough that the earlier judgment was relied on as precedent; rather, it is necessary that 'the present judgment [be] based on the prior judgment in the sense of res judicata or collateral estoppel." Manzanares v. City of Albuquerque, 628 F.3d 1237, 1240 (10th Cir. 2010) (quoting Klein v. United States, 880 F.2d 250, 258 n.10 (10th Cir. 1989)).

The third provision allows a court to grant relief "if 'a significant change in either factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" Horne, 557 U.S. at 447 (quoting Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992)). "A movant may establish that changed factual circumstances warrant modification when . . . 'enforcement of the [judgment] without modification would be detrimental to the public interest.'" Jackson, 880 F.3d at 1201 (quoting Rufo, 502 U.S. at 384).

Under Rule 60(b)(5), "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief," Horne, 557 U.S. at 447 (2009) (citing Rufo, 502 U.S. at 383); "but once a party carries this burden, a court abuses its discretion" when it fails to grant appropriate relief. Id. (citing Agostini v. Felton, 521 U.S. 203, 215 (1997)).

Rule 60(b)(6). In addition to the specific grounds for relief set forth in Rule 60(b)(1)-(5), a court also may grant relief from judgment for "any other reason that justifies relief." Fed. R.

Civ. P. 60(b)(6). The Tenth Circuit has described this rule as "a grand reservoir of equitable power to do justice in a particular case." Manzanares, 628 F.3d at 1241. Relief under Rule 60(b)(6) "is appropriate only 'when it offends justice to deny such relief.'" Yapp v. Excel Corp., 186 F.3d 1222, 1232 (10th Cir. 1999) (quoting Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996)).

Rule 60(c)(1). A motion for relief under Rule 60(b)(5) or (6) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time under Rule 60(b) depends on the facts of each case." Brown v. Dietz, No. 99-2476-JWL, 2005 WL 2175159 at *1 (D. Kan. Sept. 7, 2005); see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Wisconsin, 769 F.3d 543, 548 (7th Cir. 2014) ("[S]ince the rules specify no deadline[,] . . . what is reasonable depends on the circumstances.").

Although "[t]here is no explicit time limit applicable to motions under Rules 60(b)(5) and 60(b)(6)[,] . . . a party that delays filing a Rule 60(b) motion 'must offer sufficient justification for the delay.'" Trujillo v. Williams, No. 4-635 MV/GBW, 2018 WL 6182429 at *3 (D.N.M. Nov. 27, 2018) (quoting Myzer v. Bush, 750 Fed. Appx. 644, 647 (10th Cir. 2018) (quoting, in turn, Cummings v. Gen. Motors Corp., 365 F.3d 944, 955 (10th Cir. 2004), abrogated on other grounds by Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 399 (2006))).

ARGUMENT

I. The Crow Tribe's Motion is Timely.

The Crow Tribe has sought Rule 60(b) relief in a reasonable time. The earliest that the Crow Tribe could have sought Rule 60(b) relief was May 20, 2019—the day that the Supreme Court decided Herrera, because Herrera repudiated both Race Horse, and Repsis I and II. The

Crow Tribe did not immediately move for Rule 60 relief because it reasonably believed that Wyoming would not attempt to continue to rely upon Repsis II following Herrera or, if it did, that the State courts would not countenance such an injustice by precluding Crow Tribe members from asserting their treaty rights as defense to prosecution. Unfortunately, the Crow Tribe's faith was misplaced. *See* 2020 Preclusion Order. Since ascertaining the need for Rule 60(b) relief, and accounting for the difficulties created by the COVID-19 pandemic and a change in the Crow Tribe's administration, the Crow Tribe has moved diligently to seek Rule 60(b) relief.

Furthermore, Defendants have suffered no prejudice from any delay. So long as the nonmoving party suffers no prejudice, courts often overlook any delay in moving for Rule 60(b) relief. Belt v. Lane, Civ. No. 74-00387 MCA/ACT, 2014 WL 12796740 at *2 (D.N.M. Mar. 24, 2014) ("While a movant's diligence in seeking relief is relevant, the Court views the absence of prejudice to Plaintiffs, the nonmovants, as the more weighty consideration."). If there is no prejudice to the nonmoving party and equity favors granting relief, "the mere passage of time should not be grounds for denying relief." Id. (citing Doe v. Briley, 562 F.3d 777, 781 (6th Cir. 2009)).

Belt, which also involved hunting regulations, is instructive. In that case, the plaintiff in 1977 won an injunction barring the New Mexico Department of Game and Fish from giving preference to in-state applicants over out-of-state applicants for certain hunting licenses. Id. at *1. Over the years, several changes in law called into question that judgment, culminating in a Tenth Circuit decision upholding the allocation of hunting licenses with preference for in-state hunters. Id. (citing Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005)). The defendant waited almost *eight years* after Schutz before seeking Rule 60(b) relief. Id. at *2. The court nevertheless found the plaintiff was not prejudiced by the delay—and, in fact, benefited from the delay, which left in

place "an injunction to which they were not entitled by federal law." Id.; c.f. Lac Courte Oreilles, 769 F.3d at 548 ("If reasonable reliance on a judgment is likely to grow over time, a motion to modify it should be made sooner rather than later. But in the case of regulatory decrees, such as the judgment in this case forbidding night hunting of deer, often the passage of time renders them obsolete, so that the case for modification or rescission actually grows with time, as in Horne[and other cases]." (citations omitted)).

The same is true here. The Crow Tribe did not delay in seeking Rule 60 relief; it now seeks relief just seven months after the State trial court held that Repsis II precludes Mr. Herrera's treaty defense. However, even had it done so, Defendants have not been prejudiced, as any delay merely allowed them the benefit of this Court's judgment—a benefit "to which," after Herrera, "they were not entitled by federal law." Belt, 2014 WL 12796740 at *2. Consequently, the Crow Tribe's Motion was made within a "reasonable time."

II. In light of the U.S. Supreme Court's Herrera decision, this Court should vacate its Repsis I judgment pursuant to Rule 60(b)(5) or (b)(6).

A. The Crow Tribe is entitled to relief under Rule 60(b)(5).

1. This Court's judgment—that the Crow Tribe's Complaint must be dismissed because its off-reservation treaty hunting right was extinguished upon Wyoming's statehood—was "based on" Race Horse. As demonstrated above, when this Court decided Repsis I, it did not view Race Horse as simply a relevant precedent; this Court found the cases to be factually and legally identical. Repsis I, 866 F. Supp. at 522 & n.5. And because Race Horse, at that time, remained good law, this Court could not help but base its decision entirely on Race Horse. Repsis I, 866 F. Supp. at 523-24 ("Thus, whether or not this court agrees that the reasoning or holding announced in Race Horse is correct, it remains controlling. Absent an express holding by the Tenth Circuit

Court of Appeals or the United States Supreme Court that the case is no longer controlling, this court must follow Race Horse."). The Tenth Circuit affirmed in Repsis II for the same reason. 73 F.3d at 993 (citing Race Horse, 163 U.S. at 514) ("The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming to the Union."); see also Herrera v. Wyoming, CV 2016-242, slip op. at 11 (Wyo. 4th Jud. Dist., Apr. 25, 2017) ("The Repsis [II] decision was largely based on the holding of Ward v. Race Horse, 163 U.S. 504 (1896).") (Exh. 2).

Because those judgments were "based on" Race Horse, "[w]hen [Race Horse] was later reversed, Rule 60(b)(5) relief became available." Manzanares, 628 F.3d at 1241.

2. Relief is unquestionably warranted. Through the 1868 Treaty, the Crow Tribe ceded to the United States some 30 million acres of land. Herrera, 139 S. Ct. at 1704. In exchange, the Crow Tribe negotiated for, and secured to itself and its members, "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV. When the Senate ratified that treaty, the Crow Tribe's off-reservation treaty hunting right became "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. And some 151 years after the Senate ratified that treaty, the U.S. Supreme Court affirmed that Wyoming statehood "did not abrogate the Crow Tribe's hunting right." Herrera, 139 S. Ct. at 1700. Thus, the public interest expressly favors the Crow Tribe and its members being able to exercise their off-reservation treaty hunting right.

Now that Race Horse is no longer good law, it would be a profound injustice, "'detrimental to the public interest,'" Horne, 557 U.S. at 447 (quoting Rufo, 502 U.S. at 367), and an abuse of

this Court's discretion, id., 557 U.S. at 447 (citing Agostini, 521 U.S. at 215), to leave in place a judgment that was entirely "based on" Race Horse.

3. The Tenth Circuit's Repsis II decision affirming Repsis I does not prevent this Court from granting Rule 60(b) relief. The Supreme Court has held that a district court whose judgment was affirmed on appeal may grant Rule 60(b) relief without first seeking leave from the appellate court. Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 17 (1976) (*per curiam*). Because the appeals court's mandate is based on the same record as the judgment, "the district judge is not flouting the mandate by acting on the [Rule 60(b)] motion." Id. at 18. In Standard Oil, the Court held that requiring leave of the appellate court would "add[] to the delay and expense of litigation and also burden the increasingly scarce time of the federal appellate courts" when, in fact, a "trial court 'is in much better position [than the appellate court] to pass upon the issues presented in a motion pursuant to Rule 60(b).'" Id. at 19 (quoting Wilkin v. Sumbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968)); see also Ramirez-Zayas, 225 F.R.D. at 398-99 (citing Standard Oil, granting Rule 60(b) relief notwithstanding the First Circuit's dismissal of movant's earlier appeal).

Similarly, in Ramirez-Zayas, when the plaintiffs moved for Rule 60(b)(5) relief, the district court was presented with "a unique issue, to wit whether the Court may amend its judgment after a review on appeal has been sought for said judgment." 225 F.R.D. at 398. That court answered in the affirmative, finding that the U.S. Supreme Court had "held that a district court may entertain a Rule 60(b) motion without leave of the appellate court even when said judgment has been affirmed by said appellate court." Id. (citing Standard Oil, 429 U.S. 17).

Equity requires that this Court grant the Crow Tribe relief from judgment by vacating its Repsis I judgment.

B. In the alternative, the Crow Tribe is entitled to relief under Rule 60(b)(6).

There should be no question that the equities in this case favor Rule 60(b) relief. In the 1868 Treaty, the Crow Tribe "ceded of 30 million acres of territory to the United States." Herrera, 139 S. Ct. 1686. From the beginning of the treaty negotiations,

> Tribe leaders stressed the vital importance of preserving their hunting traditions. See [Inst. for the Dev. of Indian Law, Proceedings of the Great Peace Commission of 1867-1868 (1975)] at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm. That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); id. at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so."). Although [Commissioner of Indian Affairs Nathaniel G.] Taylor responded that "the game would soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. Id. at 90.

Herrera, 139 S. Ct. at 1692 (brackets added, alteration in original omitted). Indeed, the negotiators for the United States "emphasized that the Tribe would have 'the right to hunt upon' the land it ceded to the Federal Government 'as long as the game lasts.'" Id. (quoting Proceedings at 86). The off-reservation hunting right was a paramount concern of the Crow Tribe and a key condition for its agreement to sign the 1868 Treaty. Upon ratification by the Senate, the 1868 Treaty and the Crow Tribe's off-reservation treaty hunting right became "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. And as Herrera made clear, in more than 152 years since the 1868 Treaty was ratified, no Act of Congress has abrogated that treaty right.

This Court's Repsis I judgment should no longer stand as an impediment to the Crow Tribe and its members exercising the very off-reservation treaty hunting right that the Supreme Court so recently affirmed.

If Rule 60(b)(5) is not the appropriate vehicle for granting the Crow Tribe relief, then this Court should find grounds to vacate within Rule 60(b)(6)'s "grand reservoir of equitable power to do justice." Manzanares, 628 F.3d at 1241. Preserving the judgment would serve no equitable

purpose, and instead would "offend[] justice," Yapp, 186 F.3d at 1232 (quoting Cashner, 98 F.3d at 580), by denying the Crow Tribe and its members the right they reserved as consideration for all that they gave up in the 1868 Treaty. See Herrera, 139 S. Ct. at 1699 ("A treaty is essentially a contract between two sovereign nations." (citation omitted)).

III. This Court should vacate the Tenth Circuit's Repsis II judgment pursuant to Rule 60(b)(5) or 60(b)(6).

A. The Repsis II judgment affirming Repsis I should be vacated.

This Court, pursuant to Rule 60(b), can vacate the Repsis II judgment. See Standard Oil, 429 U.S. at 17; Ramirez-Zayas, 225 F.R.D. at 398-99. Repsis II was "based on" Race Horse, just as Repsis I was. Compare Repsis II, 73 F.3d at 987, 992-93; with Repsis I, 866 F. Supp. at 522 & n.5, 524. Consequently, and pursuant to Rule 60(b)(5), Repsis II should be vacated for the same reasons as Repsis I. See Parts II.A.1-2, supra. Even if Rule 60(b)(5) is not the appropriate vehicle, then pursuant to Rule 60(b)(6), Repsis II should be vacated for the same reasons as Repsis I. See Part II.B, supra.

B. Any judgment resulting from the Repsis II alternative holding that the Bighorn National Forest was categorically occupied upon its creation should be vacated.

The Crow Tribe does not concede, that the Repsis II alternative holding concerning the Bighorn National Forest constitutes part of the Repsis II judgment. The judgment of the Tenth Circuit was that this Court's judgment—which said nothing about the status of the Bighorn National Forest—was "AFFIRMED." Repsis II, 73 F.3d at 982. Furthermore, the Tenth Circuit does not give preclusive effect to alternative holdings, see Stan Lee Media, Inc. v. Walt Disney

Co., 774 F.3d 1292, 1297 n.1 (10th Cir. 2014), indicating that they do not constitute part of a judgment.[7]

In granting the relief specified above, this Court should also declare that the Tenth Circuit's alternative holding concerning the Bighorn National Forest is not part of the judgment in this case. However, even if that alternative holding is part of the Repsis II, judgment, the Crow Tribe is entitled to relief under Rule 60(b), and that judgment should be vacated.

1. In Herrera, the U.S. Supreme Court reversed Repsis II on the question of the status of the Bighorn National Forest. Herrera, 139 S. Ct. at 1700-03. The Tenth Circuit held that the creation of the Bighorn National Forest "occupied" those lands by providing that they would be "managed and regulated for . . . specific purposes" and no longer would be available for settlement, mining, logging, or other uses "without federal permission." Repsis II, 73 F.3d at 993. But this holding misunderstood what the word "unoccupied" in the 1868 Treaty meant. In Herrera, the Supreme Court, drawing on historical materials and interpreting the treaty language as the Crow Tribe would have understood it, 139 S. Ct. at 1701-02, held that "unoccupied" lands were those "free of residence or settlement by non-Indians." Id. at 1701. The Court also observed that the creation of the Bighorn National Forest barred "entry or settlement" within the Forest. Id. at 1702. Thus, the Court found that the creation of the Bighorn National Forest, "[i]f anything . . . made [the] Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty [off-reservation hunting] right." Id.; contra Repsis II, 73 F.3d at 993 Accordingly, the Court held "that the creation of the Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty." Herrera, 139 S. Ct. at 1702-03.

[7] Wyoming's attempt to give this alternative holding preclusive effect, notwithstanding Tenth Circuit precedent, see 2020 Preclusion Order, is one reason that Rule 60(b) relief is necessary.

2. The Crow Tribe is entitled to relief. "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." Horne, 557 U.S. at 450. The 1868 Treaty is one such federal law. U.S. CONST. art. VI, cl. 2. The U.S. Supreme Court has held, directly contrary to Repsis II, that creation of the Bighorn National Forest *did not* categorically "occupy" those lands for purposes of the Crow Tribe's off-reservation treaty hunting right. Herrera, 139 S. Ct. at 1700-03. Relief under Rule 60(b)(5) is appropriate, and equity requires that this Court vacate any judgment resulting from the Repsis II alternative holding.

3. For the same reasons articulated in Part II.B, supra, if Rule 60(b)(5) is not the appropriate vehicle for granting the Crow Tribe relief from any judgment resulting from the Repsis II alternative holding, this Court should grant relief pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power to do justice," as preserving the judgment would serve no equitable purpose, and instead would "offend[] justice." Yapp, 186 F.3d at 1232 (quoting Cashner, 98 F.3d at 580).

C. Any judgment resulting from the Repsis II statement that conservation necessity justified State regulation of the Crow Tribe's off-reservation treaty hunting right should be vacated.

The Tenth Circuit's statement concerning conservation necessity has an even weaker claim to a place within the Repsis II judgment than the alternative holding concerning the Bighorn National Forest. First, the Tenth Circuit did not identify this statement as an alternative holding, but instead merely appended it to its primary holding—since repudiated by Herrera—that the Crow Tribe's off-reservation treaty hunting right was extinguished upon Wyoming's statehood. Repsis II, 73 F.3d at 993. Second, the evidentiary standard the Tenth Circuit articulated in this statement would not have been sufficient to resolve the summary judgment motion on appeal to that court. Compare id. ("[T]here is *ample evidence in the record* to support the State's contention that its regulations were reasonable and necessary for conservation" (emphasis added)); with Fed. R. Civ.

P. 56(a) ("The court shall grant summary judgment if the movant shows that there is *no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law." (emphasis added)). Third, for a state to regulate tribal treaty hunting on the basis of conservation necessity, it must prove three things: (1) "that its regulation is a reasonable and necessary conservation measure," (2) "that [the regulation']s application to the Indians is necessary in the interest of conservation, and (3) that "the regulation . . . does not discriminate against the Indians." Antoine v. Washington, 420 U.S. 194, 207 (1975) (internal quotations and citations omitted). The Tenth Circuit addressed only the first of these elements. There is no conservation necessity judgment in Repsis II.

In granting the relief specified above, this Court should also declare that the Tenth Circuit's statement concerning conservation necessity is no part of the judgment in this case. However, even if that statement is part of the Repsis II, judgment, the Crow Tribe is entitled to relief under Rule 60(b), and that judgment should be vacated.

1. The third provision of Rule 60(b)(5) allows for relief from a judgment that has "prospective" effect. Fed. R. Civ. P. 60(b)(5). For a judgment to have prospective effect, it must be "executory or involve[] supervision of changing conduct or conditions." Dowdell by Dowdell v. Bd. of Educ. of Oklahoma City Sch., Indep. Dist. No. 89, 8 F.3d 1501, 1509 (10th Cir. 1993) (citing Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138-39 (D.C. Cir. 1988)). The most common such judgments are injunctions and consent decrees.

A conservation necessity finding is similar to an injunction or consent decree. An injunction, for example, may "remain in force for many years, and the nature of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its implementation by the courts, and new policy insights—that warrant

reexamination of the original judgment." Horne, 557 U.S. at 447-48. The same is true of a conservation necessity finding, as evidenced by the fact that Wyoming continues to rely on the Repsis II conservation necessity statement *25 years later* to regulated the Crow Tribe's off-reservation treaty hunting rights. See 2020 Preclusion Order.

And just as courts have found that changing circumstances may warrant Rule 60(b)(5) relief from an injunction, so do changing circumstances warrant modification or vacatur of a finding of conservation necessity. Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n, 42 F.3d 1278, 1283 (9th Cir. 1994) ("The circumstances of each year's salmon run are different, and the necessary conservation measures will change with them.").

This idea is illustrated in United States v. Oregon. 769 F.2d 1410 (9th Cir. 1985). In that case, the district court approved a particular state regulation of tribal treaty fishing in 1977, and again in 1982, on the basis of conservation necessity. Id. at 1412-13. However, just one year later, circumstances had changed: "The evidence showed that the runs of certain species of fish had declined, but that the steelhead runs in general had improved, and that surplus coho and jack salmon would escape under the States' regulations." Id. at 1417. Because the population had rebounded, the district court struck down comparable regulations, and the circuit court affirmed. Id. at 1416-17; see also Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 46 (1973) (noting Washington regulation for conservation necessity required that new regulations of tribal fishing must be made each year and supported by "facts and data that show the regulation is necessary for the conservation" of the species); id. at 48-49 (explaining that such regulation can only be valid against an otherwise preemptive treaty right "until the species regains assurance of survival").

2. A change in circumstances—namely, decades of elk overpopulation—warrants granting the Crow Tribe relief from any Repsis II judgment of conservation necessity. Where tribal treaty

hunting or fishing rights are at issue, a finding that conservation necessity warrants state regulation of those rights necessarily implies "that it is highly probable that irreparable harm [to the species or resource needing conservation] will occur and that the need for regulation exists." United States v. Michigan, 653 F.2d 277, 277 (6th Cir. 1981); United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) (conservation necessity doctrine allows a state to preserve a "reasonable margin of safety" between the existing population of a species and "the imminence of extinction."). "In the absence of such a showing, the state may not restrict Indian treaty [hunting] . . . ." United States v. Michigan, 653 F.2d at 279.

When the Crow Tribe filed its Complaint in this case in 1992, the elk population in the Bighorn National Forest was very close to Wyoming's management objective:

> The total winter count for elk was 2,504 compared to [the Wyoming Game and Fish Department]'s objective of 2,500. The elk count within the Kerns Big Game Winter Range which is located immediately north of the [Bighorn National Forest] was 656, which showed a decline over the previous two years.

Crow Tribe Mem. Opp. Defs.' Mot. Summ J. at 19-20 n.14 (Dkt. #52) (Exh. 3) (citing Application for License for a Major Unconstructed Project, FERC No. 10725.000 at E.347 (Dry Fork Energy Storage Project) submitted by Little Horn Energy, Wyoming, Inc., May 1992) (Exh. 4).

The most recent data show elk overpopulation both statewide and in and around the Bighorn National Forest. The statewide elk population of 112,900 is more than 40 percent over the statewide population objective of 79,125. Wyoming Game and Fish Department, U.S. Fish and Wildlife Service Comprehensive Management System Annual Report A-3 (2020) ("WGFD 2020 Annual Report"), https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUAL REPORT_2020.pdf. It should come as no surprise, then, that "the Department continues to apply management strategies to reduce Wyoming elk numbers," such as allowing hunters to "obtain up

to three elk licenses per year." Id. Nevertheless, "conditions are such that elk numbers remain difficult to decrease." Id.

The North Bighorn elk herd is experiencing similar overpopulation. The State last year reported the North Bighorn herd had an estimated population (5,575) some 28 percent above objective (4,350). Wyoming Game and Fish Department, Sheridan Region Job Completion Report 42 (2019), https://wgfd.wyo.gov/WGFD/media/content/PDF/Hunting/JCRS/SN-Region-JCRs-2019-Final.pdf.[8] Because of this overpopulation, "[i]n recent years, liberal hunting seasons were designed to increase harvest *with the intent of reducing elk population*." Id. at 44 (emphasis added).

Now that elk populations consistently and significantly exceed State management objectives, both statewide and in the Bighorn National Forest, applying prospectively any judgment resulting from the Repsis II statement concerning conservation necessity "is no longer equitable" and Rule 60(b)(5) relief is appropriate. If there is a conservation necessity judgment, this Court should vacate it.

3. In determining whether to grant Rule 60(b)(5) relief, a court also may ask whether the objective of the original judgment has been met. Horne, 557 U.S. at 450; Jackson, 880 F.3d at 1201. The obvious objective of any conservation necessity finding is the recovery of a species to the point where the state's regulation of treaty hunting no longer is necessary. See Puyallup, 414 U.S. at 48-49 (regulation for conservation necessity only valid "until the species regains assurance

[8] The North Bighorn herd is in Hunt Areas 35-40, in and around the Bighorn National Forest; areas 38 and 39 border the Crow Reservation. See Wyoming Game and Fish Department, Elk Hunting, https://wgfd.wyo.gov/Hunting/Hunt-Planner/Elk-Hunting/Elk-Map (last visited Jan. 26, 2021).

of survival"); Oregon, 769 F.2d at 1416-17 (affirming vacatur of conservation necessity regulations after fish population rebounded).

As demonstrated in Part III.C.2, supra, the objective of the Repsis II conservation necessity finding has been met: elk populations far exceed Wyoming's management objectives. If the survival of elk in the Bighorn National Forest ever was in doubt, it certainly is not now, as Wyoming is actively managing elk to reduce their population. WGFD 2020 Annual Report, at A-3. Consequently, applying prospectively any judgment arising from the Repsis II conservation necessity statement "is no longer equitable." Equity requires that this Court grant the Crow Tribe Rule 60(b)(5) relief and vacate any such judgment.

4. Even if Rule 60(b)(5) is not the appropriate vehicle for granting the Crow Tribe relief from any judgment arising from the Repsis II conservation necessity statement, this Court should grant relief pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power to do justice." Manzanares, 628 F.3d at 1241; see Part II.B, Part III.B.3, supra.

In light of Herrera, equity requires that this Court—pursuant to either Rule 60(b)(5) or (b)(6)—grant the Crow Tribe relief by vacating any Repsis judgment arising from the Repsis II alternative holding concerning conservation necessity.

CONCLUSION

For the aforementioned reasons, this Court should GRANT Plaintiff's Motion for Partial Relief from Judgment, and VACATE any portion of the judgment concerning the Crow Tribe's off-reservation treaty hunting right.

Respectfully submitted,

DATED this __27th__ day of __January__, 2021.

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CERTIFICATE OF SERVICE

I certify that, on the 27th day of January, 2021, a copy of the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM JUDGMENT** was filed through the Court's CM/ECF management system and sent via UPS Overnight and by email on counsel at the following addresses:

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