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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 REPLY IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM JUDGMENT**

INTRODUCTION

The U.S. Supreme Court's decision in Herrera v. Wyoming, 139 S. Ct. 1686 (2019), necessarily implicates this Court, which previously held that the Crow Tribe's treaty right to hunt on "unoccupied" off-reservation lands expired upon Wyoming's statehood. Crow Tribe of Indians v. Repsis, 866 F. Supp. 520, 522-24 (D. Wyo. 1994) ("Repsis I"), aff'd 73 F.3d 982, 993 (10th Cir. 1995) ("Repsis II"). Herrera held that it did not—that, in fact, the Crow Tribe's off-reservation treaty hunting right remains intact today. Herrera, 139 S. Ct. at 1694-1701. Only this Court can revisit its judgment, and the Federal Rules of Civil Procedure provide the mechanism for doing so: Rule 60(b)(5) and (6). While this Court did not opine on the status of the Bighorn National Forest, the Tenth Circuit held that creating the Forest meant those lands were no longer "unoccupied," and therefore that the entire Forest was off-limits to Crow Tribe treaty hunting. Repsis II, 73 F.3d at 993. Herrera held, to the contrary, that the creation of the Forest did not categorically "occupy" those lands. 139 S. Ct. at 1700-03. This Court is the proper venue to revisit that judgment, as well. Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976) (*per curiam*); Ramirez-Zayas v. Puerto Rico, 225 F.R.D. 396 (D.P.R. 2005).

Defendants try their best to avoid Herrera's obvious implications for Repsis. They characterize the present Motion as a "collateral attack" on state court proceedings, Defs.' Br. at 1, 18, 23, 24, because they want milk preclusive effect from Repsis. But it is not a collateral attack to ask a court to revisit its own judgment, even if another court is separately considering whether to enforce that judgment. They also repeatedly disregard Supreme Court precedent—both Herrera, and the case law governing conservation necessity—and their arguments today are wildly inconsistent with their previous arguments, both to this Court in Repsis, and in Herrera.

This Court should grant Plaintiff's Motion for Partial Relief from Judgment.

ARGUMENT

1. Younger abstention is not required, and discretionary abstention is not warranted.

Under Younger v. Harris, 401 U.S. 37 (1971), a federal court must abstain when: "(1) there is an ongoing state criminal . . . proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings 'involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.'" Amanatullah v. Colorado Bd. of Med. Exam'rs, 187 F.3d 1160, 1163 (10th Cir. 1999) (quoting Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997)). At least two of those conditions are not present here.

First, the ongoing proceedings in Herrera neither "look to state law for their resolution" nor "implicate separately articulated state policies." Rather, the matter before the Wyoming District Court presents purely federal questions. As to issue preclusion, the State argued in the Wyoming Circuit Court that "[t]he *federal law* of issue preclusion applies." Herrera v. Wyoming, State's Remand Br. on Issue Preclusion at 24, No. CT-2014-2687; 2688 (Oct. 21, 2019) (emphasis added) (Pl.'s Exh. A.) That court agreed. Order on State's Request for Post-Remand Issue Preclusion at 13 ¶ 14, Herrera v. Wyoming (No. CT-2014-2687; 2688) (ECF No. 70-1) (describing the issue as "*federal* issue preclusion") (emphasis added). Likewise, the underlying questions concerning treaty hunting on federal lands and application of the conservation necessity doctrine are purely federal questions. See Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) (assertion of treaty hunting rights raises federal question).

The interest that Defendants assert—that Wyoming law declares "all wildlife within the borders of Wyoming are the property of the State," Defs.' Br. at 22—is of no legal consequence, because State law cannot impair a federal treaty right. U.S. CONST. art. VI, cl. 2 (Supremacy

Clause); Wash. St. Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1013 (2019) ("Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians."); Puget Sound Gillnetters Ass'n v. Moos, 603 P.2d 819, 825-26 (Wash. 1979) (en banc) ("The treaty rights of the signatory tribes create a federal obligation that cannot be adversely affected by state law. The Supremacy Clause requires that the state agencies comply with orders necessary to implement the Supreme Court's interpretation of the rights guaranteed by treaty." (internal citations omitted)).

Second, the state court is not an adequate forum, because that court cannot grant the relief that Plaintiff seeks: partial vacatur of the Repsis judgment in light of the Supreme Court's Herrera decision. The only relief a state court can provide is to refuse, in any particular case, to impute preclusive effect to the Repsis judgment. But the potential scope of the Repsis judgment reaches beyond the Wyoming state courts. The Crow Tribe's treaty hunting lands include parts of Wyoming, Montana, and the Dakotas. See Treaty of Fort Laramie, art. V, 11 Stat. 749 (1851) and 2 C. Kappler, Indian Affairs: Laws and Treaties 594, 595 (2d ed. 1904) (describing Crow Tribe territory). Even if the state court determines that Repsis does not preclude Mr. Herrera from asserting a treaty defense, that would not insulate the Crow Tribe and its members from actions in other states' courts, or under different circumstances in Wyoming courts. Only this Court's partial vacatur of the Repsis judgment can relieve Plaintiff from having to re-litigate what the Supreme Court has already determined—that the Crow Tribe's off-reservation treaty hunting right remains intact, and that the creation of a national forest does not categorically "occupy" those lands.

Even if the state court could vacate the Repsis judgment, it would not be an adequate forum because the Crow Tribe is not—and cannot be—a party in the proceeding before that court. The Crow Tribe cannot intervene as a party with full rights of participation because the state court

proceeding is a criminal proceeding. Instead, it may participate only in the inferior position of an *amicus curiae*,[1] and even then only by leave of the court.[2] The Crow Tribe cannot adequately, and should not have to, defend its rights from such an inferior and limited position.

The elements for Younger abstention are not met here, and this Court need not abstain.

Nor is there any reason for this Court to exercise its discretion to abstain. There is no reason to believe, aside from Defendants' bald assertion, that a decision from this Court would "cause friction between the federal and state courts." Defs.' Br. at 24. If this Court grants the present Motion, the state court will know that the Repsis judgment is no longer valid and cannot be given preclusive effect; if this Court denies the Motion, the state court can proceed with its preclusion analysis.

The present motion is not a collateral attack on a state court proceeding.[3] A collateral attack is "a tactic whereby a party seeks to circumvent an earlier ruling of one court by filing *a subsequent action* in another court." Harbinger Capital Partners v. Ergen, 103 F. Supp. 3d 1251, 1265 (D. Colo. 2015) (emphasis added) (quoting Pratt v. Ventas, Inc., 365 F.3d 514, 519 (6th Cir.

[1] While parties to appellate proceedings in the Wyoming state courts may file briefs up to 60 pages, and appellants may file a reply brief up to 18 pages, *amici* can file only one brief, limited to 35 pages. Compare Wyo. R. App. P. 7.03, 7.05(a)(1), with Wyo. R. App. P. 7.12(d), 7.12(f). And while parties are entitled to participate in oral argument, *amici* may participate only with leave of the court *and* consent of the party supported, "and only for extraordinary reasons." Compare Wyo. R. App. P. 8.02(a), with Wyo. R. App. P. 7.12(h).

[2] Although the Wyoming District Court granted the Crow Tribe's most recent motion for leave to file an *amicus* brief, both that court and the Wyoming Supreme Court denied similar motions at earlier stages of the case. Order Denying Mot. Leave File Amicus Curiae Br., Herrera v. Wyoming, No. CV 2016-13 (Wyo. 4th Jud. Dist. Apr. 5, 2016) (Pl.'s Exh. B); Order Denying Pet. Writ Rev., Herrera v. Wyoming, No. S-17-0129 (Wyo. June 6, 2017) (Pl.'s Exh. C).

[3] Nor is the present Motion "procedural fencing." Defendants cite St. Paul Fire & Marine Ins. Co. v. Runyon; but there the Tenth Circuit affirmed the lower court's finding of procedural fencing when the plaintiff in the federal action (1) knew both that the defendant planned to file a state court claim, (2) knew the precise date the claim would be filed, (3) waited three years, and (4) initiated its federal action the day before the defendant planned to file his state court claim. 53 F.3d 1167, 1170 (10th Cir. 1995). The present Motion looks nothing like that action.

2004)). A Rule 60(b) motion is not an "action,"[4] as the Federal Rules of Civil Procedure expressly contemplate "[t]wo types of procedure to obtain relief from judgments . . . . One procedure is by motion in the court and in the action in which the judgment was rendered[,]" as Plaintiff has done here; "[t]he other procedure is by a new or independent action to obtain relief from a judgment . . . ." Fed. R. Civ. P. 60 (Advisory Committee's Notes to 1946 amendment, Subdivision (b)).

The Crow Tribe initiated this action 29 years ago, and received an unfavorable judgment. When that judgment was repudiated by the Supreme Court's Herrera decision, Plaintiff timely sought relief from that judgment, in the court that initiated that judgment, by the prescribed method for seeking such relief. There is no reason for this Court to abstain from considering the Motion.

2. The motion is timely, and it does not prejudice Defendants.

Defendants do not dispute that the motion is timely if the clock started with the Supreme Court's 2019 Herrera decision. Instead, they argue—without even a hint of irony—that the Crow Tribe should have moved for Rule 60(b) relief after the Supreme Court decided Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). Defs.' Br. at 12. This argument is disingenuous, considering the State argued *for years* in Herrera that Mille Lacs left Race Horse untouched—even that Mille Lacs *affirmed* Race Horse: "In Ward v. Race Horse, this Court held that Congress intended the off-reservation hunting right in the Shoshone-Bannock Treaty to expire when Wyoming became a state. In 1999, this Court affirmed that holding." Br. Resp. at 2, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) (citations omitted) (Pl.'s Exh. D).[5]

[4] In federal litigation, "action" is a term of art, and "is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

[5] See also id. at 16-17, 20, 22, 26-30; Resp. Mot. Dismiss at 10-12, 19-22, Wyoming v. Herrera (No. CT 2014-2687; 2688) (Wyo. Cir. Ct. 4th Jud. Dist. Aug. 6, 2015) (Pl.'s Exh. E); Br. Appellee at 10, 15-17, Herrera v. Wyoming (No. CV – 2016-242) (Wyo. Dist. Ct. 4th Jud. Dist. Oct. 17, 2016) (Pl.'s Exh. F); Appellee's Suppl. Br. at 25-26, Herrera v. Wyoming (No. CV – 2016-242) (Wyo. Dist. Ct. 4th Jud. Dist. Feb. 1, 2017) (Pl.'s Exh. G); Resp. Opp. Pet. Writ Rev. at 8, Herrera

Nevertheless, Plaintiff could not have made the present Motion after Mille Lacs, because Mille Lacs "stopped short of explicitly overruling Race Horse." Herrera, 139 S. Ct. 1695; id. at 1697 ("Race Horse was not expressly overruled in Mille Lacs."). A Supreme Court decision, even one with "wobbly, moth-eaten foundations," remains precedent that the lower courts must follow, "for it is this Court's prerogative alone to overrule one of its precedents." State Oil v. Khan, 522 U.S. 3, 20 (1997). Thus, Plaintiff could not seek Rule 60(b)(5) relief until the Court in Herrera "ma[d]e clear . . . that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood." Herrera, 139 S. Ct. at 1697.

Defendants argue that they will suffer prejudice if this Court grants Rule 60(b) relief, because they will not be able to enforce the Repsis judgment. But that is not prejudice; rather, it is precisely the point of Rule 60(b). See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 447 F.3d 835, 840 (D.C. Cir. 2006) ("Prejudice under Rule 60(b)(1) appears typically and properly to contemplate costs that reconsideration of the final judgment would inflict on the non-moving party *independent of the chance of reversal*.") (emphasis in original). A nonmoving party suffers prejudice where granting relief might result in significant financial or legal exposure to the nonmoving party. See, e.g., Pigford v. Johanns, 416 F.3d 12, 21-22 (D.C. Cir. 2005) (affirming denial of 60(b)(5) motion where doing would subject nonmoving party to almost $1 million in additional damages); Wang v. Int'l Bus. Machines Corp., --- Fed. Appx. ---, 2021 WL 272152 at *2 (2d Cir. Jan. 27, 2021) (affirming denial of 60(b)(6) motion where "reopening this case would cause significant prejudice to IBM, which already has paid Mr. Wang in accordance with the settlement"). Defendants make no showing that they would suffer such prejudice. Defendants

v. Wyoming (No. S-17-0129) (Wyo. May 25, 2017) (Pl.'s Exh. H); Br. Opp. at 19-22, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532) (Nov. 9, 2017) (Pl.'s Exh. I); Suppl. Br. Resp. at 12, id. (June 5, 2018) (Pl.'s Exh. J); Tr. at 36 lines 23-25, id. (Jan. 1, 2019) (Pl.'s Exh. K).

also make no attempt to distinguish Belt v. Lane, which held that even years-long delay in seeking Rule 60(b) relief does not prejudice a state that regulated a hunting right it was not legally entitled to regulate. Civ. No. 74-00387 MCA/ACT, 2014 WL 12796740 at *2 (D.N.M. Mar. 24, 2014). Defendants will suffer no prejudice shout this Court grant the present Motion.

3. This Court's Repsis I judgment, affirmed in Repsis II, was "based on" Race Horse.

Defendants emphasize the narrow category of cases that are "based on" a prior judgment for Rule 60(b)(5) purposes, noting that "the prior judgment must be a necessary element of the decision, giving rise, for example to the cause of action *or a successful defense*." Defs.' Br. at 8, 13 (emphasis added) (quoting Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972)). Thus, Defendants endeavor to distinguish Race Horse from Repsis, noting that the two cases concerned different tribes with different treaties, Defs.' Br. at 13-14, and arguing that "Race Horse served only as precedent" for the Repsis decisions. Defs.' Br. at 13. This stands in stark contrast to what Defendants previously told this Court and other courts.

In Repsis I, in their Answer, Defendants did not merely identify Race Horse as relevant precedent, they raised it as *an affirmative defense*, arguing that "this court is bound by stare decisis and lacks authority to render a decision which reverses Race Horse." Answer at 5 (ECF No. 29). At summary judgment, Defendants further argued:

> The facts presently before the court cannot be distinguished from those in Ward v. Race Horse. Ward v. Race Horse has never been overruled and is controlling law in the United States, and especially in this circuit. Those cases which failed to follow Race Horse did so on very different facts.
>
> This case cannot be distinguished from Race Horse. Therefore, this court, as a matter of law, is obligated to follow the high court's decision.

Br. Supp. Defs.' Mot. Summ. J. at 2-3 (ECF No. 34); see also Reply Br. Defs. at 8 (ECF No. 52) ("The only parties to which this court can grant summary judgment are the defendants because as a matter of law they are entitled to summary judgment because of Ward v. Race Horse."). And on

appeal, Defendants framed the question as "[w]hether the trial court decision to grant summary judgment in favor of the Appellees *based on a finding that the U.S. Supreme Court decision of Ward v. Race Horse is controlling* should be affirmed." Answer Br. Appellees at 1, Crow Tribe of Indians v. Repsis, 73 F.3d 982 (No. 84-8097) (Apr. 14, 1995) (Pl.'s Exh. L) (emphasis added); see also id. at 8-11 (arguing that Race Horse was "indistinguishable" from the case at bar).[6] Both this Court and the Tenth Circuit were persuaded, holding that the factual and legal similarities to Race Horse left them no choice but to hold that the Crow Tribe's off-reservation treaty hunting right had expired upon Wyoming's statehood. Repsis I, 866 F. Supp. at 524 ("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."); Repsis II, 73 F.3d at 992 ("The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming to the Union." (citing Race Horse, 163 U.S. at 514)).

But even if Repsis was not "based on" Race Horse for Rule 60(b)(5) purposes, this Court should grant the Motion under Rule 60(b)(6).[7] Defendants have no answer to the equitable case for vacating the Repsis judgment. They merely ask this Court again to abstain "at least until the state courts finally determine the preclusive effect of the alternative holdings." Defs.' Br. at 14. But, as demonstrated above, the state courts cannot provide the relief Plaintiff seeks.

This Court should vacate the Repsis judgment that the Crow Tribe's off-reservation treaty hunting right was extinguished upon Wyoming's statehood.

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[6] In the Herrera litigation, Defendants consistently to emphasized the similarities between Race Horse and Repsis. E.g., Pl.'s Exh. E at 7, 19; Pl.'s Exh. F at 12-15; Pl.'s Exh. K at 43 lines 6-11.

[7] While Rule 60(b)(6) "is restricted to reasons other than those enumerated in the previous five clauses[,]" United States v. Buck, 281 F.3d 1336, 1341 (10th Cir. 2002), that does not bar Plaintiff from independently asserting grounds for relief under both Rule 60(b)(5) and 60(b)(6).

4. Repsis II did not include a judgment concerning the occupation of the Bighorn National Forest; but if it did, this Court should vacate that judgment.

Defendants have no answer for the fact that the Tenth Circuit merely affirmed this Court's judgment concerning the expiration of the Crow Tribe's off-reservation treaty hunting right, and that alternative holdings are not part of the judgment. Pl.'s Br. at 15-16. Instead, they merely assert, incorrectly, that the Supreme Court in Herrera remanded to the Wyoming state courts the question whether the Repsis II alternative holding has preclusive effect.

Not so. The Supreme Court allowed that the Wyoming state courts might consider two issues on remand: specifically, "[o]n remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was 'occupied' within the meaning of the 1868 Treaty," and (2) "the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation." Herrera, 139 S. Ct. at 1703. The majority *did not* identify the preclusive effect of the Repsis II alternative holding as a subject for the state courts upon remand. Id.[8] Defendants note that the dissent would have ruled against Mr. Herrera on the basis of issue preclusion; but "dissents . . . carry no legal force." Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1511 (2020) (alterations, citations, and quotations omitted).

The Supreme Court definitively held that the creation of the Bighorn National Forest did not categorically "occupy" those lands. Herrera, 139 S. Ct. at 1700-03. If Repsis II contained a

[8] Defendants argue that Herrera "identif[ied] multiple issues for the state courts to resolve, including whether the occupation issue was fully and fairly litigated in Repsis and whether alternative holdings can be given preclusive effect." Defs.' Br. at 15 (citing Herrera, 139 S. Ct. at 1701 n.5); see also id. at 5, 25. Herrera did no such thing. Footnote 5 simply states that the state courts had not considered whether the Repsis II alternative holding should have preclusive effect, and that the Supreme Court would not decide the question "in the first instance." Herrera, 139 S. Ct. at 1701 n.5.

judgment to the contrary, it would be manifestly unjust to leave that judgment in place. Therefore, this Court should vacate it.

5. Changed factual circumstances warrant relief from any conservation judgment.

Defendants seem determined to hold up the Tenth Circuit's sentence fragment as an "alternative holding," Defs.' Br. at 18, even though it is not described as an alternative holding by either the Tenth Circuit, Repsis II, 73 F.3d at 993, or the Herrera dissent. Herrera, 139 S. Ct. at 1705-06 (Alito, J., dissenting) (describing Repsis II as resting on "two independent grounds," and failing to discuss conservation necessity). Defendants also seem determined to ignore that there are three elements to a conservation necessity holding, Antoine v. Washington, 420 U.S. 194, 207 (1975), and Repsis II addressed only one of them. The Tenth Circuit made no conservation necessity judgment, and this Court should say so.

Even if the Tenth Circuit did make a complete conservation necessity holding, Defendants seem determined to ignore the extensive conservation necessity jurisprudence from the U.S. Supreme Court and Circuit Courts, holding that conservation necessity lasts only while a species population is at risk, and requires constant re-evaluation. Pl.'s Br. at 18-22 (collecting cases). Instead, Defendants simply ask again that this Court abstain in favor of the state courts. Plaintiff need not repeat why abstention is inappropriate in this case.

If Repsis II contains a conservation necessity judgment, this Court should vacate it.

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 19th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that, on the 19th day of March, 2021, a copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM JUDGMENT** was filed through the Court's CM/ECF management system on the following counsel:

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