

## *Herrera v. Wyoming*: The Supreme Court’s Most Recent Attempt to Balance Tribal Rights, State Power, and Conservation Efforts

I. OVERVIEW .....	195
II. BACKGROUND .....	197
III. COURT’S DECISION.....	199
IV. ANALYSIS .....	203
V. CONCLUSION .....	205

### I. OVERVIEW

As concern for the environment continues to be at the forefront of political discussions, presidential campaigns, and corporate decision making, Native American rights must remain a consideration in creating environmental policy. The case of *Herrera v. Wyoming* represents the Supreme Court’s most recent attempt to balance Native American rights, state control, and animal welfare. Hunting has been and continues to be a tradition and way of life for the Crow Tribe for more than three hundred years.<sup>1</sup> Increased conflict with non-Indian settlers led the Tribe to enter into treaties with the United States in the nineteenth century.<sup>2</sup> Under the Second Treaty of Fort Laramie, the Crow Tribe ceded over 30 million acres of territory in modern Wyoming and Montana to the United States.<sup>3</sup> In exchange, the United States promised that the Crow Tribe “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon” and “peace subsists on the borders of the hunting districts.”<sup>4</sup> The Treaty specifically stated that the “tribes did not surrender the privilege of hunting, fishing, or passing over any of the lands in dispute by entering the treaty.”<sup>5</sup> Congress provided that this new Territory would not “impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall

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1. Brief for Petitioner at 4, *Herrera v. Wyoming*, 138 S. Ct. 2707 (No. 17-532).  
2. Jason Mitchell, *Unoccupied: How a Single Word Affects Wyoming’s Ability to Regulate Tribal Hunting Through a Federal Treaty*; *Herrera v. Wyoming*, 19 WYLR 271, 274 (2019).  
3. Treaty with the Crows, U.S.-Crow, May 7, 1868, 15 Stat. 649.  
4. Treaty Between the U.S. and the Crow Tribe of Indians, art. IV, May 7, 1868, 15 Stat. 650.  
5. *Montana v. United States*, 450 U.S. 544, 548 (1981).

remain unextinguished by treaty.”<sup>6</sup> In 1890, Congress formally admitted Wyoming into the United States through the State’s enabling act, which did not address Native American rights in the State.<sup>7</sup> In 1897, President Grover Cleveland reserved part of Wyoming from entry or settlement.<sup>8</sup> These lands were made up of lands ceded by the Crow Tribe and became known as the Bighorn National Forest.<sup>9</sup>

In 2014, Clayvin Herrera, as well as other members of the Crow Tribe, left the Crow Reservation in Montana to pursue a group of elk.<sup>10</sup> The pursuit ended in Wyoming’s Bighorn National Forest, when the members shot several bull elk.<sup>11</sup> The State of Wyoming charged Herrera for taking elk off season or without a state hunting license, as well as being an accessory to the same.<sup>12</sup> In Wyoming state court, Herrera asserted that he had a protected right to hunt under the conditions in question pursuant to the 1868 Treaty.<sup>13</sup> The Court disagreed and denied Herrera’s motion to dismiss.<sup>14</sup> After unsuccessfully seeking a stay of the trial court’s order from the Wyoming Supreme Court, the trial court determined that he was not permitted to advance a treaty-based defense.<sup>15</sup> The trial court imposed a suspended jail sentence, a fine, and a three-year suspension of Herrera’s hunting privileges.<sup>16</sup> Herrera appealed, arguing that the Crow Tribe’s off-reservation hunting rights remain valid.<sup>17</sup> The Supreme Court of Wyoming determined that precedent ruled that the 1868 Crow Treaty rights had expired upon Wyoming’s statehood.<sup>18</sup> Additionally, the Wyoming Supreme Court held that the judgement of a case litigated twenty years prior merited issue preclusive effect against Herrera because he is a member of the Crow Tribe and the Tribe had already litigated the issues raised by Herrera.<sup>19</sup> The Supreme Court of the United States *held* that the Crow Tribe’s hunting right survived Wyoming’s statehood, and the lands within the Bighorn National Forest did not become categorically occupied

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6. Wyoming Organic Act, July 25, 1868, 235, 15 Stat. 178.

7. Wyoming Statehood Act, July 10, 1890, ch. 664, 26 Stat. 222.

8. Presidential Proclamation No. 30, 29 Stat. 909.

9. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1693 (2019).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1694.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; see also *Crow Tribe of Indians v. Reppis*, 73 F.3d 982, 994 (10th Cir. 1999).

when set aside as a national reserve. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1692 (2019).

## II. BACKGROUND

While states have an important interest in regulating wildlife and natural resources within their borders, regulatory authority is shared with the federal government when the federal government exercises an enumerated constitutional power.<sup>20</sup> For instance, a state may regulate private relations within the state, unless a federal treaty overrides that power.<sup>21</sup> The United States may seek to enter into treaties with Native American tribes that establish tribal rights to obtain or capture the state's natural resources.<sup>22</sup> Native American treaty-based usufructuary rights do not guarantee "absolute freedom" from state regulation.<sup>23</sup> These rights are subject to reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.<sup>24</sup> In considering whether tribal rights granted by treaty are to be abrogated or modified, courts will determine the intent of Congress through analyzing the language used in the treaty.<sup>25</sup>

The scope of Native American treaties has been fiercely litigated for more than a century.<sup>26</sup> Three cases are frequently cited in consideration of hunting rights established by treaty. Less than thirty years after the signing of the 1868 Crow Treaty, the Supreme Court decided *Ward v. Race Horse*, which involved treaty language almost identical to that of the Crow Treaty.<sup>27</sup> *Race Horse* arose when a member of the Bannock Tribe of Indians was arrested for violating Wyoming game laws for killing seven elk.<sup>28</sup> The defendant argued that the right to hunt elk was guaranteed to members of the Bannock Tribe under a treaty between the Bannock Tribe and the United States.<sup>29</sup> Like the language utilized in the Crow Treaty, the Bannock Treaty permitted hunting on the unoccupied lands of the United States.<sup>30</sup> The Supreme Court's analysis considered whether this language

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20. U.S. CONST. art. VI, cl.2.

21. *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

22. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

23. *Or. Dep't of Fish & Wildlife v. Klamath Tribe*, 473 US. 753, 765 (1985).

24. *Puyallup Tribe v. Dep't of Game of Wash.* 391 U.S. 392, 398 (1968).

25. *Menominee*, 391 U.S. at 413.

26. Mitchell, *supra* note 2, at 275.

27. *Ward v. Race Horse*, 163 U.S. 504, 504 (1896).

28. *Id.*

29. *Id.* at 600.

30. *Id.* at 507; *see also* Treaty with the Bannock, U.S-Bannock, Mar. 3, 1891, 36 Stat. 826.

provided for continuous validity of the Bannock's hunting rights.<sup>31</sup> The Court reasoned that because new states are admitted to the Union on an "equal footing" with existing states and a protected hunting right would interfere with Wyoming's power to regulate game within its borders, the treaty rights must be repealed.<sup>32</sup> Additionally, the *Race Horse* Court found no evidence that Congress intended the treaty right to continue in "perpetuity."<sup>33</sup> Rather, the Court explained that because the right to hunt was dependent upon whether the land was unoccupied public land of the United States, Congress clearly contemplated the disappearance of the right upon statehood.<sup>34</sup> The majority ultimately held that Wyoming's admittance into the Union extinguished the rights under the Treaty.<sup>35</sup> In his dissent, Justice Brown argued that there was no convincing evidence that the Wyoming Statehood Act intended to repudiate treaty rights and criticized the majority's analysis that statehood alone changed the State's character from unoccupied to occupied.<sup>36</sup>

The issue of hunting rights granted to the Crow Tribe by the 1868 Treaty was considered by the Circuit in 1995, in *Crow Tribe of Indians v. Repsis*.<sup>37</sup> The case arose from the conviction of a Crow Tribe member who was convicted of hunting and killing an elk within the Bighorn National Forest without a state-issued license.<sup>38</sup> The defendant and other members of the Crow Tribe sought a declaratory judgement and injunctive relief arguing that the conviction violated the Treaty.<sup>39</sup> The Tenth Circuit found in favor of the State of Wyoming, holding that the Crow Tribe's right to hunt was repealed upon Wyoming's admission to the Union.<sup>40</sup> The Court also analyzed the meaning of the word "unoccupied."<sup>41</sup> The Tenth Circuit determined that at the time of the signing of the Crow Treaty, the lands that now make up Bighorn National Forest were "unoccupied" because they were open for settlement.<sup>42</sup> However, once Congress set aside these

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31. *Race Horse*, 163 U.S. at 509.

32. *Id.*; *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 990-91 (10th Cir. 1999) ("[T]he equal-footing doctrine requires that all states admitted into the Union after the original states be admitted on 'equal footing' with the original states . . . .")

33. *Race Horse*, 163 U.S. at 514-15.

34. *Id.* at 510.

35. *Id.* at 504.

36. *Id.* at 519-20.

37. *Repsis*, 73 F.3d at 982.

38. *Id.* at 985.

39. *Id.*

40. *Id.* at 992.

41. *Id.* at 993.

42. *Id.*

lands for the Bighorn National Forest, they became occupied.<sup>43</sup> Finally, the Court held that while there was ample evidence to support the State's contention that the hunting regulations are necessary for conservation, the Crow Tribe and its members are subject to the regulations regardless of whether the regulations are reasonable and necessary for conservation.<sup>44</sup>

The Supreme Court had the opportunity to reconsider and reconcile precedent on the issue in 1999, in *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>45</sup> This time, the Supreme Court held that statehood by itself was insufficient to extinguish Native American treaty rights.<sup>46</sup> The case arose from a treaty between the Chippewa Indians and the United States, which granted the tribes limited hunting rights in what is now Minnesota.<sup>47</sup> However, the Chippewa Treaty did not include the "unoccupied land" requirement established by the Crow Tribe Treaty. The Mille Lacs Band of Chippewa Indians sought a declaratory judgement that the Tribe retained its usufructuary rights under the Treaty.<sup>48</sup> The Supreme Court looked to the Minnesota Enabling Act and found no evidence that Congress intended to abrogate the Chippewa Treaty rights.<sup>49</sup> Additionally, the Court determined that the *Race Horse* Court incorrectly relied on the premise that treaty rights conflict with state regulation of natural resources and therefore impair sovereignty.<sup>50</sup> The *Mille Lacs* Court was persuaded that state sovereignty over natural resources is not irreconcilable with treaty rights that grant access to such resources.<sup>51</sup>

### III. COURT'S DECISION

In the noted case, the Supreme Court followed the framework established by the Court in *Millie Lacs* to analyze the validity of the Crow Tribe's off-reservation hunting rights. The Supreme Court concluded five essential holdings in the noted case. First, the Supreme Court held that the defendant was not precluded from arguing that the right to hunt under the 1868 Treaty between the United States and Crow Tribe of Indians barred

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43. *Id.*

44. *Id.*

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

46. *Id.* at 207.

47. *Id.* at 176.

48. *Id.* at 185.

49. *Id.* at 204.

50. *Id.*

51. *Id.*

his conviction.<sup>52</sup> Second, the Supreme Court held that Wyoming's admission to the Union did not abrogate the Crow Tribe of Indian's right to hunt under the Treaty.<sup>53</sup> Third, the Court held that Wyoming's statehood did not render all the lands in the State "occupied" within the meaning of the treaty.<sup>54</sup> Fourth, the Court held that the Bighorn National Forest did not become categorically "occupied" within the meaning of the Treaty when it was created.<sup>55</sup> Finally, the Supreme Court held that the presence of exploitative mining and logging operations in the Bighorn National Forest did not render the forest "occupied" under the Treaty.<sup>56</sup>

In analyzing whether the Crow Tribe's hunting rights remained valid, the Court first considered whether the case at hand was controlled by *Millie Lacs* or by *Race Horse*.<sup>57</sup> The Court began by noting that while *Millie Lacs* stopped short of explicitly overruling *Race Horse*, the *Millie Lacs* Court repudiated the logic relied on in the decision.<sup>58</sup> The Court explained that *Millie Lacs* determined that treaty rights are reconcilable with state sovereignty over natural resources; therefore, any decision relying on the premise that the two are irreconcilable rests on a false premise.<sup>59</sup> The Court also noted that later decisions demonstrate that States may impose reasonable and nondiscriminatory regulations on a tribe's treaty given hunting, fishing, and gathering rights on state land when necessary for conservation.<sup>60</sup> After *Millie Lacs*, the Court reasoned that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty has been satisfied.<sup>61</sup> Therefore, statehood is irrelevant to this analysis unless a statehood act clearly demonstrates that Congress intended to abrogate the treaty or unless statehood appears as a termination point.<sup>62</sup> The Court concluded its comparison of the reasoning in *Millie Lacs* and *Race Horse* by holding that *Race Horse* is repudiated

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52. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019).

53. *Id.* at 1698.

54. *Id.* at 1700.

55. *Id.* at 1702.

56. *Id.*

57. *Id.* at 1695.

58. *Id.*

59. *Id.* (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999)).

60. *Id.*; see also *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 659 (1979).

61. *Herrera*, 139 S. Ct. at 1696.

62. *Id.*

as to its holding that treaty rights may be impliedly extinguished upon statehood.<sup>63</sup>

Second, the Court considered whether Herrera is barred from arguing a treaty-based defense under the doctrine of issue preclusion. The Court explained that even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening change in the “applicable legal context.”<sup>64</sup> Here, the Court determines that there is a justified exception to preclusion.<sup>65</sup> The Court held that *Millie Lacs* repudiated the reasoning relied on by the Tenth Circuit in *Repsis*, and *Repsis* does not preclude Herrera from arguing that the Crow Treaty rights survived Wyoming’s admission to the Union.<sup>66</sup>

The Court next examined whether upon its statehood, Wyoming abrogated the Crow Tribe’s off-reservation hunting rights. The Court first explained that the Wyoming Statehood Act does not demonstrate that Congress intended to end the hunting rights established by the 1868 Treaty.<sup>67</sup> The Court compared the Wyoming Statehood Act to the Minnesota Enabling Act discussed in *Millie Lacs* and reasoned that both Acts failed to mention Indian treaty rights or demonstrate evidence that Congress intended to abrogate such rights upon Wyoming’s admission.<sup>68</sup> Additionally, the Court reasoned that because a treaty is a contract between two sovereign nations, Indian treaties must be interpreted in light of the parties’ intentions and any ambiguities must be resolved in favor of the Native American party.<sup>69</sup> Similarly, the words of such a treaty must be construed in the sense in which they would naturally be understood by Native Americans.<sup>70</sup> The Court is also persuaded that because the Crow Treaty explicitly identifies four situations in which treaty rights would terminate, termination by statehood must not be an implied circumstance of termination.<sup>71</sup> The language of the Treaty similarly did not imply that

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63. *Id.* at 1697.

64. *Id.* (citing *Bobby v. Bies*, 556 U.S. 825, 834 (2009)).

65. *Id.* at 1698.

66. *Id.* at 1697.

67. *Id.* at 1699.

68. *Id.*

69. *Id.* (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)).

70. *Id.* (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979)).

71. *Id.*; see also *Treaty Between the U.S. and the Crow Tribe of Indians*, supra note 4, at 650 (identifying four situations that would terminate the right: (1) the lands are no longer “unoccupied;” (2) the lands no longer belong to the United States; (3) game can no longer “be found thereon;” (4) and the Tribe and non-Indians are no longer “at peace . . . on the borders of the hunting districts”).

any of the conditions for termination would be satisfied at statehood.<sup>72</sup> Finally, in its analysis of statehood as a condition of termination, the Court emphasized the importance of hunting rights throughout the Tribe's history.<sup>73</sup> The Court explains that because Crow Tribe leaders stressed the importance of the hunting right during negotiations of the Treaty, the Tribe would not have understood statehood as a condition of termination of their hunting rights.<sup>74</sup> Because five states in the west also established statehood around the time of discussions of treaties, the Court suggested that federal negotiators had every reason to bring up statehood if it was intended to extinguish Tribal hunting rights.<sup>75</sup> The Court concluded this analysis holding that the Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right.<sup>76</sup>

The Court next considered whether the 1868 Treaty Right protects the Bighorn National Forest from hunting because the forest lands are "occupied." The Court determined that at the time of the signing of the Treaty, the Crow Tribe would have understood the word "unoccupied" to mean an area free of residence or settlement by non-Indians.<sup>77</sup> The Court pointed to specific treaty provisions in its analysis. For instance, the Court highlighted Article IV of the Treaty which made the Tribe's hunting right contingent upon peace "among the whites and Indians on the borders of the hunting districts."<sup>78</sup> Under this provision, the Treaty contrasts unoccupied hunting districts with areas of white settlement.<sup>79</sup> Additionally, the Court reasoned that because the term "unoccupied" implied a lack of non-Indian settlement, President Cleveland's proclamation creating the Bighorn National Forest did not occupy the area within the treaty's meaning.<sup>80</sup> The Court similarly rejected Wyoming's argument that the presence of mining and logging of the forest lands prior to the signing of the Treaty did not render these lands occupied.<sup>81</sup> Ultimately, the Court found in favor of Herrera, holding that the Bighorn National Forest was not removed from the scope of the Treaty.

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72. *Herrera*, 139 S. Ct. at 1699.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1700.

77. *Id.* at 1701.

78. *Id.* (citing Treaty Between the U.S. and the Crow Tribe of Indians, *supra* note 4).

79. *Id.*

80. *Id.* at 1702.

81. *Id.*

Finally, the Court imposed two limitations upon its decision. First, the Court noted that its determination the Bighorn National Forest is not categorically occupied does not imply that all the areas within the forest are unoccupied.<sup>82</sup> The Court suggested that on remand the State may argue that the specific site where Herrera hunted was occupied within the meaning of the 1868 Treaty.<sup>83</sup> Second, the Court's decision did not address the requirement Wyoming may regulate the exercise of the 1868 Treaty right "in the interest of conservation."<sup>84</sup> Therefore, the State may argue that members of the Crow Tribe are bound by state regulation because the regulation is necessary for conservation.<sup>85</sup>

Justice Alito, joined by Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh, authored a dissenting opinion, which criticizes the majority for failing to fully address the doctrine of issue preclusion.<sup>86</sup> Justice Alito argued that the issue preclusion doctrine is applicable because the events in the case at hand are substantially similar to the events giving rise to the Tenth Circuit opinion in *Repsis*.<sup>87</sup> Justice Alito argued that because the Tenth Circuit was competent, albeit not entirely clear, the *Repsis* opinion is controlling.<sup>88</sup> The dissent also claimed that even if the Court's analysis of the interpretation of the Treaty is correct, its decision will have no effect on members of the Crow Tribe because they are bound by the controlling opinion in *Repsis*.<sup>89</sup> Finally, Justice Alito determined that because the *Repsis* decision is binding on the Crow Tribe, it is also binding on Herrera. Therefore, the Wyoming Supreme Court was correct in holding that Herrera was barred from asserting a treaty rights defense.<sup>90</sup>

#### IV. ANALYSIS

The majority's opinion was well reasoned, resolved conflicting precedent, and offered relief to tribal members who have faced displacement and loss of territory at the hand of the United States government. The Court was correct in determining that an intervening

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82. *Id.* at 1703.

83. *Id.*; *see also* State v. Cutler, 109 Idaho 448, 451 (1985) (finding that the Federal Government may not be foreclosed from using land in such a way that Native Americans would have considered it occupied.).

84. *Herrera*, 139 S. Ct. at 1703.

85. *Id.*

86. *Id.* at 1704.

87. *Id.* at 1706.

88. *Id.* at 1707 ("An issue once determined by a competent court is conclusive." (citing *Arizona v. California*, 460 U.S. 605, 619 (1983))).

89. *Id.* at 1703.

90. *Id.* at 1707.

change in the applicable legal context warranted an exception to the doctrine of issue preclusion. Even though the treaty language in *Millie Lacs* and *Repsis* had some differences, the language was not substantially different so as to distinguish the treaties and justify two different outcomes in analyzing congressional intent of signing the treaties. For instance, the *Mille Lacs* Court determined that because of the language utilized in the Chippewa Treaty, Congress clearly intended for the Chippewa Treaty to survive statehood.<sup>91</sup> Alternatively, under the same inquiry into congressional intent, the *Repsis* Court determined the 1868 Crow Treaty to be “temporary and precarious.”<sup>92</sup> The minor differences between the Chippewa Treaty and the Crow Treaty were not sufficient to justify the loss of rights to one tribe upon statehood while the other continued to enjoy the promises of the treaty long after statehood. The Supreme Court in *Herrera* was correct in realizing the major discrepancy of these results.

Supreme Court precedent is clear that courts must inquire into Congress’ intent at the time of signing as to determine whether the rights established by the treaty remain valid. However, this inquiry is not sufficient to overturn tribal hunting rights that have been relied upon for decades. A new test should be adopted by the Court that balances the present need for increased conservation efforts against Native American use of resources in a specific region. This balancing test could allow states to enact sound environmental policy while including tribal leaders in the decision-making process.

Though the Court’s decision was well analyzed and consistent with the reasoning utilized in *Millie Lacs*, it may be criticized for its failure to address the ambiguity of the language “when necessary for conservation.”<sup>93</sup> Because the majority failed to address the conservation necessity doctrine, the State’s ability to regulate hunting remains unsettled. Because *Herrera* determined that treaty rights are valid, Wyoming may be limited in its authority to protect hunting interests.<sup>94</sup> The conservation necessity doctrine may not adequately protect these interests. Because the majority opinion both failed to fully address issue preclusion and failed to adopt a useful test for conservation necessity doctrine, *Herrera v. Wyoming* is neither a win for environmentalists nor for indigenous rights activists.

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91. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999).

92. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 988 (10th Cir. 1999).

93. *Herrera*, 139 S. Ct. at 1703.

94. Mitchell, *supra* note 2, at 288.

## V. CONCLUSION

*Herrera v. Wyoming* represents the Supreme Court's most recent attempt to balance the interests of Native American populations, state's rights, and conservation efforts. The majority opinion lays out five essential holdings, including that the Crow Tribe's treaty-based hunting rights were not abrogated by the establishment of Wyoming's statehood. In doing so, the Court determined that the Tenth Circuit *Repsis* court erroneously relied on the premise that a state's sovereignty to regulate the natural resources within its borders is irreconcilable to Native American treaty rights to utilize such resources. Although the *Herrera* majority opinion is well reasoned, it fails to address the conservation necessity doctrine. Because the majority fails to address the ambiguities of the conservation necessity doctrine, the majority opinion is not an overwhelming victory for environmentalists or indigenous rights activists. *Herrera v. Wyoming* demonstrates the importance of keeping Native American interests at the forefront of conversations about the environment and the need to include tribal leaders in environmental policy making.

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