

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

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

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

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

24 JUSTICE GORSUCH: But --

25 MR. HICKS: -- to its belief that

1 states --

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

7 MR. HICKS: Justice Alito, a few
8 responses for that.

9 First of all, the -- the issue of
10 whether the Tenth Circuit's alternative
11 determination has preclusive effect was not
12 pressed or passed on below. There's nothing in
13 the decisions of the state courts that address
14 the preclusive effect of that alternative
15 determination. And this Court typically does
16 not address questions from state courts that
17 have not been pressed or passed on.

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

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

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

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

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

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

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

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

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

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

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

18 JUSTICE SOTOMAYOR: Could you --

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

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

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

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

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

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

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

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

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

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

17 JUSTICE SOTOMAYOR: Oh.

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

20 JUSTICE SOTOMAYOR: In the --

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

23 JUSTICE SOTOMAYOR: Right.

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

1 whether there was issue preclusion.

2 JUSTICE SOTOMAYOR: Oh, okay.

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

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

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

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

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

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

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

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

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

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

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

11 Do you find that to -- do you find
12 that to be a particularly strong argument?

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

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

25 The tribe, you know, only had a very

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

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

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

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

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

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

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

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

22 What's -- so why shouldn't we have the
23 same result here that we had in Race Horse, and
24 that's the part of Race Horse that is preserved
25 on page 207 by Mille Lacs?

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

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

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

19 MR. HICKS: I think you concluded that
20 in *Race Horse*, but --

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

25 And my question is, if that part of

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

7 MR. HICKS: A couple of responses.

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

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

23 MR. HICKS: That --

24 JUSTICE KAVANAUGH: -- and the clearly
25 contemplated event was the language said

1 hunting on the unoccupied lands of the United
2 States, that that was terminated by statehood,
3 right?

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

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

16 JUSTICE KAVANAUGH: Do you think --

17 JUSTICE KAGAN: So, Mister --

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

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

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

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

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

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

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

21 JUSTICE SOTOMAYOR: You know, Justice
22 -- Chief Justice Rehnquist -- I don't know if
23 he was Chief back then -- said that we had --
24 that the majority had effectively overruled
25 Race Horse, and so have commentators.

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

4 MR. HICKS: Well, I can --

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

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

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

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

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

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

19 For example --

20 JUSTICE KAVANAUGH: These two
21 treaties?

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

25 The Shoshone-Bannock were on the

1 complete other side of Wyoming. The treaty
2 came about because of different conflicts with
3 settlers.

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

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

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

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

25 MR. HICKS: Justice Kavanaugh, I think

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

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

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

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

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

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

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

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

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

1 rights.

2 If I can reserve my time, please.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Liu.

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

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

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

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

18 MR. LIU: The government would be fine
19 with that. We would invite the Court to
20 overrule Race Horse. I do want to make clear
21 that, in our view, it's not necessary to take
22 that extra step. Even though these two
23 treaties have the same language, this is a
24 different treaty than the treaty that was
25 before this Court in Race Horse. It governs a

1 different tribe on different lands.

2 And so I think this Court is still
3 faced with the question, even though the
4 language is the same, about whether to extend
5 the erroneous reasoning of Race Horse to a new
6 context.

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

9 MR. LIU: Oh, sure.

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

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

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

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

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

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

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

16 (Laughter.)

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

23 What it never tells you is how that
24 distinction relates at all to the statehood
25 question that's before us and that was before

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

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

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

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

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

1 terminating events under the treaty in Race
2 Horse, statehood isn't one of those either.

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

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

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

19 And yet you say when it comes to the
20 Bighorn National Forest or park, you say, well,
21 maybe it's occupied if we, the government, say
22 we don't want people coming on here.

23 It seems to me that the test has to be
24 the same for the United States' property at
25 Bighorn and for the other property in Wyoming.

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

6 Now it can be settled --

7 CHIEF JUSTICE ROBERTS: Has been
8 settled?

9 MR. LIU: It can be settled --

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

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

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

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

1 100,000 acres are occupied?

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

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

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

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

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

1 seeing a building 150 yards away is not too
2 much to ask.

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

10 MR. LIU: Right.

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

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

25 JUSTICE GORSUCH: So, fine, we -- we

1 could remand it back, but do we need to say
2 anything about this at all?

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

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

9 MR. LIU: Sure.

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

13 MR. LIU: Right.

14 JUSTICE GORSUCH: That -- I don't know
15 where it comes from, but you -- you tell us
16 that such a thing exists.

17 At the same time, though, the treaty
18 says that -- that the tribe is allowed to hunt
19 on the land until the game are gone --

20 MR. LIU: Right.

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

25 MR. LIU: I -- I think it goes back to

1 the basis of the conservation necessity
2 doctrine. It is a gloss on treaty language
3 that does not confer the exclusive right to
4 hunt on the Indians.

5 JUSTICE GORSUCH: I don't understand
6 that, if the treaty were silent about the game.

7 MR. LIU: Yeah.

8 JUSTICE GORSUCH: But the treaty is
9 express, and it contemplates no conservation.
10 It contemplates the complete elimination of the
11 game by the white man.

12 MR. LIU: Yeah.

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

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

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

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

24 JUSTICE GORSUCH: We don't need to
25 address that.

1 MR. LIU: You don't need to address
2 it.

3 JUSTICE SOTOMAYOR: This killing was
4 on --

5 JUSTICE ALITO: When you say that --

6 JUSTICE SOTOMAYOR: -- this killing
7 was on federal land, correct?

8 MR. LIU: Correct.

9 JUSTICE SOTOMAYOR: In all state -- in
10 all federal parks, state regulations apply?

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

16 JUSTICE SOTOMAYOR: Okay. I just
17 wasn't aware of that.

18 MR. LIU: It's a forest-by-forest and
19 land-by-land determination.

20 JUSTICE SOTOMAYOR: All right.

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

25 MR. LIU: No. I -- I think the way to

1 deal with the issue preclusion issue, Your
2 Honor, is -- is to conclude that that issue has
3 been not raised or passed upon below, that
4 either it's been forfeited or that it can be
5 pursued on remand.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Knepper.

3 ORAL ARGUMENT OF JOHN G. KNEPPER

4 ON BEHALF OF THE RESPONDENT

5 MR. KNEPPER: Mr. Chief Justice, and
6 may it please the Court:

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

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

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

24 Much of -- much of the -- the argument
25 over preclusion, Your Honor, has to do with

1 whether there has been a change in intervening
2 law, and this case is particularly ill-suited
3 to find such a change.

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

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

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

22 Now, in respect to the second and
23 different question, it's whether Race Horse
24 bars their claim. A totally different
25 question. And there, not with Repsis, the

1 basic argument is the law changed in Mille
2 Lacs.

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

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

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

22 MR. KNEPPER: Okay. Your Honor, the
23 -- there's not complete clarity within this
24 Court's jurisprudence as to what kind of a
25 change in the legal context is sufficient.

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

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

22 JUSTICE KAGAN: But, Mr. Knepper, I --
23 I think this isn't just any change. I -- I
24 think a fair reading would suggest that what
25 Mille Lacs did was to repudiate the reasoning

1 that Race Horse had in it with respect to
2 exactly the question before us.

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

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

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

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

25 JUSTICE KAGAN: Well, just to make

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

6 So that seems like a pretty relevant
7 change in the law.

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

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

21 And it reaches the conclusion that the
22 intent of the parties was -- and this is
23 restated from Mille Lacs -- that this was a --
24 it was clearly contemplated that this would be
25 a temporary hunting right so long as the

1 hunting grounds remained unoccupied and owned
2 by the United States and that that terminated
3 at statehood.

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

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

21 Even on the alternative holding, it's
22 not as if the Court in Mille Lacs said: Oh,
23 everything from Race Horse is good on the
24 alternative holding. It either ditched it or
25 recharacterized it or something.

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

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

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

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

25 MR. KNEPPER: Your Honor --

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

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

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

24 JUSTICE SOTOMAYOR: All right. So
25 that's wonderful. Tell me how a national park

1 isn't a traditional hunting district. I mean,
2 the government says we're not going to keep it
3 unoccupied. They open it up to hunting.

4 What was different back then?

5 MR. KNEPPER: Your Honor, I --
6 that's --

7 JUSTICE SOTOMAYOR: Unoccupied and
8 people went hunting.

9 MR. KNEPPER: Well, Your Honor, that's
10 where the Race Horse Court's evaluation of the
11 history at that time is so important because
12 the Race Horse Court looked at Yellowstone
13 National Park, and what the Race Horse Court
14 said was Yellowstone National Park was created
15 almost immediately after the treaty with the
16 Crows was signed. The -- Yellowstone National
17 Park is actually within the Crow hunting
18 district. And the Crow hunting district is a
19 very large area, but Yellowstone National Park,
20 which is an area the size of Connecticut, it's
21 not just geysers, was carved out of the hunting
22 district, and then the United States proceeded
23 over the entire time, beginning in 1872 and
24 then through the '80s, 1880s, to say to tribes:
25 You may not hunt here. This is off limits. We

1 have occupied this land.

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

11 JUSTICE GORSUCH: Can I -- can we just
12 --

13 CHIEF JUSTICE ROBERTS: Well, I
14 know --

15 JUSTICE GORSUCH: Oh, I'm sorry.

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

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

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

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

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

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: I'm sure it's
18 not.

19 MR. KNEPPER: But -- but I -- I think
20 -- I think there are -- there are -- you know,
21 you can envision, for example, a piece of
22 private land where there is no -- there are no
23 structures, and in that piece of private land,
24 I think there's no question Mille Lacs affirms
25 this, that there would be no right to hunt on

1 that piece of private land, even though it
2 looks like nothing, it looks like a vast
3 expanse of nothing.

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

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

24 In other words, this is a federal -- a
25 national forest. The current regulations for

1 the national forest say you can only hunt in
2 the national forest if you have either
3 permission from the -- the forest
4 superintendent or you're hunting in conjunction
5 with a state memorandum of understanding.

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

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

14 JUSTICE GORSUCH: Counsel, can we
15 return to --

16 MR. KNEPPER: Sure.

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

22 And you made an impassioned defense of
23 Race Horse and an excellent one, but what --
24 what kind of change in law is sufficient to
25 render issue preclusion inapplicable? Is it a

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

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

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

15 MR. KNEPPER: Sure.

16 JUSTICE GORSUCH: -- what standard
17 you'd have us apply.

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

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

24 MR. KNEPPER: Right. If -- if I -- if
25 I could --

1 JUSTICE KAVANAUGH: Is that it?

2 (Laughter.)

3 JUSTICE KAVANAUGH: You were -- you
4 sound like you were mid-sentence to me, but --

5 (Laughter.)

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

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

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

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

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

25 So maybe we should say Race Horse is

1 overruled. But the three big reasons, now, are
2 they little reasons or big reasons? I would
3 say the equal footing doctrine is a major
4 change to deny that.

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

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

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

1 MR. KNEPPER: Thanks. Thank you, Your
2 Honor.

3 (Laughter.)

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

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

23 And when one looks at Mille Lacs,
24 Mille Lacs does not question or even overrule
25 that approach to treaty interpretation. It

1 says statehood does not, independent of
2 whatever the treaty text says and whatever the
3 treaty means, automatically terminate an off --

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

10 MR. KNEPPER: The -- the --

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

14 MR. KNEPPER: Sure.

15 JUSTICE SOTOMAYOR: -- that -- that
16 gives you --

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

25 JUSTICE SOTOMAYOR: Who gave -- whose

1 settlement? Who -- tell me the settlement
2 history.

3 MR. KNEPPER: Non -- non-Indian
4 settlement.

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

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

14 JUSTICE SOTOMAYOR: Who ran the
15 General Land Office?

16 MR. KNEPPER: The United States.

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

21 MR. KNEPPER: I think that if what
22 you're asking is are there unoccupied lands
23 within the meaning of the treaty anymore within
24 the State of Wyoming, that's -- that's what the
25 decision both in Race Horse and in -- and in

1 Repsis concluded, that those -- those lands --
2 those lands have disappeared. They no longer
3 exist within the State of Wyoming.

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

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

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

23 So -- so -- so, in other words, we
24 have -- we have an officer out enforcing law in
25 either an area or in a certain -- in a certain

1 circumstance, and the question is he -- he or
2 she acts and then only after a period of
3 litigation does he actually find out that he
4 had the authority to do so.

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

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

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

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

23 But assuming that there's not
24 agreement with the United States, we're solely
25 acting as a -- as a matter of state power, not

1 really --

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

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

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

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

1 it a -- a --

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

7 MR. KNEPPER: Your Honor, there are
8 significant gaps. The two --

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

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

22 And so there are people, and -- and
23 I'm one of them, that won't take our children
24 into the national forest during hunting season
25 because there just -- there are risks there

1 that -- that are -- that are -- that are --
2 that are too much to overcome.

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

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

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

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

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

25 MR. KNEPPER: Your Honor, I don't -- I

1 mean, conservation necessity to my sense has
2 always been about ensuring that the game exists
3 and -- and preventing its extermination, not
4 the sort of --

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

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

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

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

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

24 MR. KNEPPER: You know, from -- from
25 the State's perspective, what we're -- what

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

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

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

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

22 But assuming that the treaty right was
23 given to -- to protect the Indian subsistence
24 rights and that their claim, taking it at face
25 value, is accurate, that they were on hard

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

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

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

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

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

5 JUSTICE SOTOMAYOR: It won't --

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

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

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

24 MR. KNEPPER: The government's
25 perspective is that it did not. The State's

1 perspective is that it occupied it by -- by
2 taking control.

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Sure.

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Hicks, two minutes.

3 REBUTTAL ARGUMENT OF GEORGE W. HICKS, JR.

4 ON BEHALF OF THE PETITIONER

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

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

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

19 Then on 207/208: The Race Horse
20 Court's decision that Indian treaty rights were
21 impliedly repealed by Wyoming statehood was
22 informed by that court's conclusion that the
23 Indian treaty rights were inconsistent with
24 state sovereignty over natural resources and,
25 thus, that Congress could not have intended the

1 rights to survive statehood.

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

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

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

25 And certainly, under the Indian canons

1 of construction, that's a reasonable reading
2 that is entitled to be given to the Indians.

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

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

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

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