IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL DISTRICT
WITHIN AND FOR THE COUNTY OF SHERIDAN, STATE OF WYOMING

STATE OF WYOMING,	)	Case No. CT 2014-2687; 2688
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CLAYVIN B. HERRERA,	)	
	)	
Defendant.	)	

NO. _____
FILED IN CIRCUIT COURT OF
SHERIDAN COUNTY WYOMING

JUN 11 2020

_____ CLERK
BY _____ DEPUTY

ORDER ON STATE'S REQUEST FOR POST-REMAND ISSUE PRECLUSION

THIS MATTER is on remand from the District Court of the Fourth Judicial District for Sheridan County, Wyoming (DC) for further proceedings pursuant to the decision by the United States Supreme Court (USSC) in *Herrera v. Wyoming* ("*Herrera*"), 139 S. Ct. 1686 (2019). The defendant, Clayvin Herrera was cited in CT-2014-2687 for *Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-3-102(d) and in CT-2015-2688 with *Accessory to Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-6-205. The violations occurred on January 18, 2014. Defendant pled not guilty to both charges and on July 2, 2015 moved for dismissal of the citations under the Supremacy Clause of the United States Constitution. In his motion defendant argued that the Bighorn National Forest (BNF) was unoccupied land allowing him unregulated hunting as an off-reservation Treaty Hunter. The State asserted that the forest was not "unoccupied" and due to the necessity to conserve elk in the BNF the defendant was not immune from prosecution. This Court following the decision in *Crow Tribe of Indians v. Repsis* (*"Repsis"*), 73 F.3d 982 (10th Cir. 1995) denied the motion finding that the BNF was occupied and if not occupied there was a conservation necessity to regulate Treaty Hunters.

A jury found Defendant guilty on both counts and he appealed his conviction to the DC sitting as the appellate court. DC upheld Defendant's convictions concluding that the *Repsis* decision finding that the BNF was occupied precluded the defendant from arguing that he had a valid Treaty Hunting right. CV 2016-242, *Order Remanding*. DC neither reviewed the issue of conservation necessity on its merits nor on the basis of issue preclusion. On Writ of Certiorari the USSC ruled in favor of Defendant on the occupation issue and vacated DC's decision. 139 S. Ct. 1686. Neither USSC nor DC vacated the jury verdicts.

DC has remanded the matter for further hearing consistent with the USSC and DC mandates. The first two remand issues are those remanded by USSC: 1) was the area of the BNF where the elk was taken "occupied" within the meaning of the treaty; and 2) is the application of the state conservation regulations to treaty hunters necessary for the conservation of the species. *Order Remanding*, p.1. The DC included a third issue: "whether collateral estoppel/issue preclusion applied to prevent Mr. Herrera from challenging whether the Bighorn National Forest is occupied." *Id.* The state in its Remand Brief, raised a fourth issue questioning whether issue preclusion prevents the defendant from challenging that he is subject to the Wyoming Game and Fish regulations. The parties have thoroughly briefed the third remanded issue and the fourth issue raised by the state. Oral arguments were held on January 13, 2020.[1]

In considering conservation necessity for regulating Treaty Hunters it seems only appropriate to investigate whether issue preclusion should be included. The state did not pursue issue preclusion in responding to Defendant's Motion to Dismiss. The defendant argues that

[1] The first and second remand issues necessitate witness fact finding hearings. Both of those hearings will be unnecessary if the defendant is precluded from arguing immunity from prosecution. The Court defers addressing the first two remand issues and will address the issue preclusion claims of the State as to both occupation and conservation necessity.

including both preclusion issues is inconsistent with the "Mandate Rule." It was the Court in denying the motion to dismiss that found basis in *Repsis* that the defendant was not immune from prosecution. This Court attempted sua sponte to preclude Mr. Herrera's arguments finding that the issues of "occupation and conservation necessity" were decided in *Repsis* (see *Order Denying Dismissal* filed October 15, 2015.) The Court's ruling regarding conservation necessity has not been under appellate review and should be open to the Court for further consideration.

As the finder of fact, this Court will investigation the proceedings in *Repsis* and determine if issue preclusion bars the defendant's from relitigating the issues of occupation and conservation necessity. The USSC recognized the requirement of a fact intensive analysis as to whether the "occupation" issue was fully and fairly litigated in *Repsis* or was forfeited. *Order Remanding*, p.2 citing *Herrera* 139 S. Ct. at 1701 n.5. The "conservation necessity" issue also requires a fact intensive analysis as to whether it was fully and fairly litigated in *Repsis* or was forfeited. Consistent with the opinion of the USSC, this Court admits as evidence State's Exhibit A consisting of a digital preservation of Briefings, Joint Appendix (J.A. No. 94-8097 Vol 3 of 3) and Petition for Writ of Certiorari No.95-1560 (*Repsis* Writ) in *The Crow Tribe of Indians et al. vs Repsis*, 73 F. 3d 982 (10th Cir. 1995), and takes judicial notice of same. The Court also admits as evidence and takes judicial notice of exhibits filed herein on behalf of Defendant's Motion to Dismiss and of exhibits filed herein by both the state and Defendant with their respective responsive briefs regarding the defendant's Motion to Dismiss. Judicial notice of these exhibits is necessary and appropriate.

There is now ample evidence before the Court upon which an issue preclusion decision can be determined and whether it applies to the defendant. The Court will assess the facts, arguments and decisions of *Repsis* and compare to facts and arguments in the prosecution and

defense of the defendant. From the analysis the Court can determine whether the occupation and conservation necessity issues were fully and fairly litigated and whether the defendant is precluded from claiming immunity from prosecution.

Based on the review, comparison of facts litigated in *Repsis* and legal arguments of the parties, the Court FINDS as follows:

1. That the Mandate Rule does not prevent determination of the preclusion issues raised by the state.

2.That issue preclusion is ripe for analysis regarding occupation and conservation necessity.

3. That the findings of the USSC and the DC are the law of the case for purposes of remand.

4. That the defendant, Clayvin Herrera as a member of the Crow Tribe of Indians and is in privity with the Crow Tribe. *Herrera, CV-2016-242, Op. Affirming at 8-9.*

5. That issue preclusion can be a bar to defense in a criminal prosecution as ruled by the DC. *Herrera,* CV-2016-242, *Op. Affirming* and 139 S. Ct. at 1712.

6. That the issues in *Repsis* are identical to those which the defendant argues as shown when the briefings, exhibits and affidavits filed of record in both matters are compared.

7. That the issue of occupation was fully litigated and adjudicated in *Repsis*.

a. That the Crow Tribes had a full and fair opportunity to litigate as shown in their Amended Complaint arguing that BNF is unoccupied (J.A. No. 94-8097, Vol. 1 at 151-153.)

b. That the Crow Tribe further argued the occupation issue in their partial summary judgement. (J.A. No. 94-8097, Vol. 2 at 278-279.)

c. After the 10th Circuit ruled in favor of the *Repsis* defendants, the Crow Tribe by Writ of Certiorari requested the USSC review the occupation issue and USSC denied the writ. (Exhibit A, *Repsis* Writ at i (No. 95-1560), *cert denied*, 517 U.S. 1221 (1996).

8. That *Repsis* settled the issue between the Crow Tribe of Indians and the state of Wyoming with a final adjudication on the merits ruling that the BNF is occupied.

9. That based on *Repsis* the defendant was precluded from arguing that the BNF was unoccupied as a defense to his prosecution.

10. That *Repsis* settled the issue between the Crow Tribe and the state of Wyoming with the ruling that Wyoming Game and Fish Department could regulate tribal members hunting in the BNF due to conservation necessity.

11. That the Crow Tribe of Indians had a full and fair opportunity to litigate the issue of conservation necessity as shown in their arguments for partial summary judgment in Repsis. (Exhibit A, *Repsis* Briefings and J.A. No. 94-8097.)

12. That the Crow Tribe has recognized the need of conservation necessity and regulation for off-reservation treaty hunting.

a. That an affidavit in *Repsis* of a Mister Harold Brien, chairman of the Crow Fish and Wildlife Commission states that on October 22, 1992, the Crow Tribe adopted "The Crow Tribe Wildlife Management Code." (J.A. No. 94-8097, Vol 3 at 91-92.) In the affidavit Mr. Brien states:

> "5. Further, the Crow Wildlife Management Code ***recognizes the need for the conservation of this resource and the need for the regulation of off-Reservation hunting and fishing by Crow Tribal members*** (emphasis added) and contains provision to that end.
>
> 6. The Crow Fish and Wildlife Commission has closed hunting on the ceded lands in Wyoming (Zone 9) in order to avoid the

> potential prosecution of Tribal Members during the pendency of this litigation. When the issue is successfully resolve in court, the Commission will re-open this zone to Tribal members and regulate game harvests pursuant to the provisions of the Crow Wildlife Management Code."

J.A. No. 94-8097, Vol 3 at 92.

b. That "The Crow Tribe Wildlife Management Code" describes Zone 9: "All unoccupied lands of the United States within the State of Wyoming where Crow Tribal members may exercise federally recognized hunting rights pursuant to the Fort Laramie Treaties of 1851 and 1868. (Closed until further notice.)[2]" ("Section 5. General Hunting and Trapping Regulations. 5.01 Zones defined; J.A. No. 94-8097, Vol 3 at 125.)

c. That the Code further reflects: "Zone 9: MEMBERS ONLY: (Closed until further notice).[3] (Section 8. BIG GAME REGULATIONS 8.03. zones and species open to Big Game Hunting, J.A. No. 94-8097, Vol 3 at 137.)

13. That after the 10th Circuit ruled in favor of the *Repsis* defendants, the Crow Tribe by way of Writ of Certiorari requested the USSC to review the conservation necessity issue *Repsis* Writ at i (No. 95-1560), *cert denied*, 517 U.S. 1221 (1996) and USSC denied the writ. (Exhibit A, *Repsis* Writ.

14. That the issue of conservation necessity had a final adjudication on the merits in *Repsis* and has a binding affect between the Crow Tribe and the State of Wyoming.

15. That *Repsis* determined that the state of Wyoming Game and Fish Department's regulations were reasonable and necessary for conservation.

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[2] Zone 10 is described as "All unoccupied lands of the United States within the State of Montana where Crow Tribal members may exercise federally recognized hunting rights pursuant to the Fort Laramie treaties of 1851 and 1868. (Closed until further notice.)" Exhibit A – 10th Cir-Joint Appendix Vol 3 of 3, page 125.

[3] Zone 10: Members only: (Closed until further notice.). Exhibit A – 10th Cir-Joint Appendix Vol 3 of 3, page 125.

16. That *Repsis* determined that the state of Wyoming Game and Fish Department can regulate Crow Tribe members' off-reservation treaty hunting because of the necessity to conserve wildlife, namely elk, resources.

17. That the defendant has offered no evidence demonstrating a change in the facts or law since 1995 that would prevent the state of Wyoming from regulating Crow Tribe members off-reservation treaty hunting rights in the BNF located in Wyoming.

18. That the Crow Tribe of Indians continue to recognize the need for conservation necessity and for the regulation of tribal member off-reservation treaty hunting:

a. That the Crow Tribe Legislature passed a joint resolution on May 7, 2013 to declare off-reservation treaty hunting rights. *Motion to Dismiss*, Affidavit of Timothy P. McCleary, Ph.D. p. 5, ¶22 and the attached Exhibit 9, *A Joint Action Resolution of the Crow Tribe to Enact and Declare Official Crow Tribal Policy of Fully Exercising Off-Reservation Hunting Rights Pursuant to the 1868 Fort Laramie Treaty,* pp 1-6.

b. That the Crow resolved the intent to hunt on all federal lands including those managed by the Forest Service, Bureau of Land Management, National Parks, monuments and recreation areas, wildlife refuges, fish and game, Army Corp of Engineers and Bureau of reclamation, but would honor those federal lands designated as off-limits to hunting generally. *Id*, p 1, Section 1. (a).

b. That the Crow Tribe intended to enact regulations governing the exercise of all off-reservation treaty hunting conducted by Crow tribal members through an amendment to the Crow Fish and Game Code as contained in Title 12 of the Crow Law and Order Code." *Id.* Exhibit 9, p 3, Section 1. (c).

c. That the Crow Tribe intended the regulation of treaty hunters with procedures for issuance of treaty licenses; treaty hunting seasons, harvest quotas, and enforcement with penalties for violations. *Id.*

d. That the Crow Tribe intended "inter-governmental agreements including cooperative habitat improvement projects, and other conservation-based regulatory measures." *Id.*

19. That there is a continued need recognized by the State and the Crow Tribe for regulation of Treaty Hunters and conservation in the BNF.

20. That the only agency continuing to regulate Treaty Hunters in the BNF is Wyoming Game and Fish.

a. That the defendant has not shown that the 2013 Crow Tribe Legislation affected the *Crow Game and Fish Code*.

b. That there is no evidence that the state of Wyoming is in an inter-agency cooperation with the Crow Tribe for treaty hunter regulation.

21. That there has been no intervening change of facts or law since *Repsis* which would cause an exception to issue preclusion.

22. That the defendant has made no claim to have been hunting under the provisions, regulations or licensure of the *Crow Fish and Game Code of 1992* or as amended, if any.

23. That the defendant's off-reservation treaty hunting rights must be regulated due to the necessity of conserving the elk and wildlife resources.

24. That the defendant is precluded from arguing that he is immune from prosecution due to his Treaty Hunting right.

25. That the defendant is precluded from arguing that the conservation necessity to regulate tribal members off-reservation hunting is no longer reasonable or necessary.

26. That the *Repsis* alternative holdings regarding "occupation and conservation necessity" are still valid holdings and are appropriate for issue preclusion against the defendant.

AS FURTHER ANALYSIS THE COURT ADOPTS AND INCORPORATES THE FINDING OF FACTS AND CONCLUSIONS OF LAW AS SUBMITTED BY THE STATE AND RULES AS FOLLOWS:

I. The Mandate Rule does not prevent determination of the preclusion issues raised by the State on remand.

1) The USSC mandate issued in *Herrera* vacated the judgment of the DC and remanded the matter to the DC "for further proceedings not inconsistent with the opinion of this Court."

2) Authorities supplied by the parties establish that the DC and this Court may not deviate from that mandate but may decide issues not decided on appeal when consistent with the spirit or express terms of the appellate decision. This Court may consult the entire opinion- including majority and dissenting opinions- to determine what was decided, what was intended by the mandate, and what was left open for decision on remand. It is appropriate to give words their plain meaning, to consider the circumstances embraced by the opinion, and to read sections of the opinion consistent with each other.

3) Issues identified in *Herrera* still open for determination include: (1) whether the site where Defendant hunted elk was occupied land within the meaning of the 1868 Treaty; (2) whether the application of state regulations to Defendant and other Crow Tribe members is necessary for conservation; and (3) whether the *Repsis* judgment might still bind Defendant and other enrolled members of the Tribe who hunt in the BNF given alternative rulings made in *Repsis*. The DC so acknowledged in remanding the case here.

4) Section IV of the *Herrera* majority opinion begins with the words "we note two ways in which our decision is limited." *Herrera*, 139 S. Ct. at 1703. Defendant contends that this language expressly limited the issues open on remand to the occupation and conservation issues identified in that section. That contention ignores this Court's responsibility to consult the entire opinion, to read its sections as consistent with one another, and to give words their plain meaning.

5) Consideration of the entire opinion supports a conclusion that preclusion issues remain open for decision on remand. This is based on the plain meaning of the majority's words in footnote 5; and given the context as a response to contentions made in the dissent.

6) The footnote's decisive words, with internal quotation and citations omitted, are:

> "Context thus makes clear that the state court gave issue-preclusive effect only to *Repsis'* holding that the 1868 Treaty was no longer valid, not to *Repsis'* independent, narrower holding that Bighorn National Forest was occupied land. . . **[B]ecause the Wyoming District Court did not address this contention, we decline to address it here**. . . Resolution of this question would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in this litigation, among other matters. **These gateway issues should be decided before this Court addresses them, especially given that even the dissent acknowledges that one of the preclusion issues raised by the parties is important and undecided**, *post*, at 1710 . . . Unlike the dissent, **we do not address these issues in the first instance**."

139 S. Ct. at 1701 n.5 (emphasis added).

7) The commonsense language is that important preclusion issues were raised and identified by the parties but would not be decided because the DC did not decide them; and that the lower courts could decide them first on remand rather than the USSC deciding. These issues clearly include the preclusive effect of alternative *Repsis* grounds, as the majority

cites to the section of the dissenting opinion where that issue is discussed. 139 S. Ct. at 1710.

8) Defendant contends that the same language declares undecided preclusion issues to be foregone forever. Resp. Remand Br. at 20-21. This claim is not supported by the plain meaning of the language or a fair reading of the entire opinion. The footnote responds to a dissenting opinion which openly states that preclusion issues remain, and which discusses the likely merits. *Id.* at 1703, 1709-11.

9) If the majority was precluding such litigation on remand, it could have easily said so, but did not. This Court cannot read words into an opinion which are not there; and it cannot ignore the plain meaning of words or the context in which they issue. The preclusion issues raised by the State remain open for decision on remand.

10) At the hearing Defendant claimed that the State was unconstitutionally trying to preclude only Defendant and no future Crow defendants from litigating their treaty rights. If the *Repsis* judgment precludes Defendant's treaty defense, it is because that judgment precludes all enrolled members of the Crow Tribe from asserting a treaty right immunity from state prosecution for hunting in the BNF in violation of State game laws.

II. The State did not waive or forfeit the preclusion issues raised on remand.

11) The *Herrera* decision also said that on remand the parties could address whether the State forfeited the right to pursue preclusion on remand. 139 S. Ct. at 1701 n.5. Defendant contends that the State waived the right. The State neither waived nor forfeited its right to pursue undecided preclusion issues as it has addressed that issue in its briefing before DC or before the USSC:

a) The USSC declined to address remaining preclusion issues because the DC did not address them, not because the State waived the issues;

b) Both parties raised the issue of preclusion on alternative grounds in briefing to the USSC, as shown by exhibits supplied in the State's Reply;

c) The State did not waive or forfeit anything by litigating in the USSC only the issues appealed by the Defendant on which certiorari was granted;

d) Both in DC and before the USSC the State phrased the preclusion issue broadly as whether there was a valid and unrestricted treaty right that allowed Crow members to hunt in the BNF immune from state prosecution for game and fish violations. The State did not forfeit any component of the preclusion issue. USSC precedent directs that the "issue" in issue preclusion "must be understood broadly enough 'to prevent repetitious litigation of what is essentially the same dispute." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1308 (2015);

e) The State's Remand Brief identified persuasive federal authority limiting forfeiture's application to issue preclusion and supporting the DC's ruling that it was proper to raise the issue *sua sponte* to avoid judicial waste and foster reliance on judicial decisions by precluding relitigation. Remand Br. at 16-17; *Herrera*, CV 2016-242, *Op. Affirming* at 5, n.2;

f) Defendant did not object to the DC's raising of issue preclusion;

g) The USSC *Herrera* decision anticipates a fact-intensive analysis that was less possible earlier in this litigation but is more possible now with judicial notice of the Joint Appendix now obtained. 139 S. Ct. at 1701, n.5; and

h) Judicial notice of *Repsis* court records is appropriate.

III. This Court can and will follow DC rulings where there is good cause to adopt them as the law of the case.

12) While the USSC vacated the DC judgment, the law of the case still gives this court discretion and reason to follow the rulings of another judge in the same case which have not been reversed on appeal. *Ultra Resources, Inc. v. Hartman*, 346 P.3d 880, 896 (Wyo. 2015); *BTU Western Resources, Inc. v. Berenergy Corp.*, 442 P.3d 50, 58 (Wyo. 2019).

13) The Court has good cause to adopt DC rulings not appealed or reversed where this Court's rulings on the same issue will be later reviewed *de novo* by the DC and where there is no compelling reason for the DC to alter its earlier rulings given the merits or the lack of law requiring a different result.

IV. The prerequisites for issue preclusion are as the DC stated.

14) Rules governing the availability and use of federal issue preclusion are reviewed *de novo*. *Liberty Mutual Insurance Co. v. FAG Bearings Corp.*, 335 F.3d 752, 757 (8th Cir. 2003); *Balbirer v. Austin*, 790 F.2d 1524, 1526 (11th Cir. 1986).

15) The Court will therefore adopt the DC's prerequisites. *See Herrera,* CV 2016-242, *Op. Affirming* at 6-9. The prerequisites for use of issue preclusion are:

> "(1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992). Furthermore, adjudication on the merits requires the adjudication to be necessary to the judgment. *Id.*; *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("Issue preclusion . . . bars successive litigation of an issue of

fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.").

V. The Court adopts the DC ruling that Defendant is in privity with the Crow Tribe.

16) The Court adopts the DC ruling that Defendant is in privity with the Crow Tribe with regards to its treaty rights litigation in *Repsis*. Any privity ruling will be reviewed *de novo* by the DC; and there is reason to adopt the DC ruling as correct on the merits. Defendant's treaty rights derive from the treaty rights of the Tribe. The Tribe's representation of Defendant's interest in his treaty rights was adequate, their interests were aligned, and the Tribe understood itself to be acting in a representative capacity on behalf of all tribe members. *See Herrera*, CV 2016-242, *Op. Affirming* at 8-9.

17) While the USSC did not reach or decide the privity issue, the four justices of the dissenting opinion in dicta considered the Defendant to be in privity with the Tribe because his rights "derive[] solely from his membership in the Tribe. . ." *Herrera*, 139 S. Ct. at 1712. The majority suggested nothing to the contrary.

18) The dissent in *Herrera* accepted the State's DC argument that Defendant be found in privity because issue preclusion must operate as a two-way street in treaty litigation. The dissent noted that preclusion "applies equally to binding judgments finding in favor of and against asserted treaty rights." *Id.; see Herrera,* CV 2016-242 *Appellee's Supplemental Br.* at 21-24.

VI. The Court adopts the ruling that issue preclusion can be used offensively against Defendant in this criminal case.

19) The legal rules regarding offensive use of preclusion in a criminal case will be reviewed *de novo* by the DC; and the DC has already ruled that offensive collateral estoppel may be applied in this criminal case because its pretrial use would not prevent Defendant from

contesting every element of the charged offenses or requiring the State to prove every element of those offenses beyond a reasonable doubt. *Herrera*, CV 2016-242, *Op. Affirming* at 14-16.

20) The DC cited precedent where, for the same reason, issue preclusion barred a criminal defendant from relitigating an issue determined adversely to his Tribe in prior civil litigation. *Id.*; *Moses v. Dept. of Corrections*, 736 N.W. 2d 269 (Mich. Ct. App. 2007).

21) Defendant contends that the intervening decisions in *Currier v. Virginia*, 138 S.Ct. 2144 (2018), and *Bravo-Fernandez v. United States*, 137 S.Ct. 352 (2016), require a different decision now. The Court is not persuaded. The issue was not decided in *Herrera*, but while the majority opinion said nothing on the issue, the dissenting opinion stated in dicta that the USSC's concerns in those cases "have no bearing here." The dissent stated: "in *Currier* and *Bravo-Fernandez*, we were reluctant to apply issue preclusion, not because the *subsequent* trial was criminal, but because the *initial* trial was." *Herrera*, 139 S.Ct. at 1712.

22) The dissent further noted that in *Currier* and *Bravo-Fernandez* "a party sought preclusion as to an element of the charged offense. The elements of the charged offense are not disputed here- Herrera's asserted treaty right is an affirmative defense." *Id.* at 1712 n.9. Four members of the USSC therefore already agree with the rationale of the DC's ruling.

23) Defendant has consistently maintained that his treaty rights give him immunity from prosecution and any trial. He argued that before trial to this Court, the DC, and the Wyoming Supreme Court. (R. 368, 392-393, 911-913, 994-1003, 1195-1201, 1218-1219). This supports the DC's ruling. Defendant concedes that his immunity is a civil and pretrial issue for the Court and not a jury.

24) This Court therefore has good cause to, and does, adopt the DC's ruling.

VII. The overall issue in *Repsis* is identical to the issue raised by Defendant.

26) The Court stands by its ruling that the issue raised by Defendant's treaty defense "is indistinguishable from the issue and arguments which were adjudicated in . . . *Repsis*." *Ord. Denying Mot. Dismiss* at 2; (R. 987). Defendant seeks to relitigate the same overall issue litigated in *Repsis*: whether the Crow Tribe and its members have a valid treaty right to hunt in the BNF without regard to state law and with immunity from state prosecution in the absence of an existential threat to wildlife that requires conservation regulations. The issue of the forest's occupation and the issue of when the treaty hunting right is restricted for conservation purposes are integral components of the overall issue.

VIII. The prerequisites for issue preclusion are met regarding the ruling in *Repsis* that the BNF was occupied.

Identity

27) The occupation issue in this litigation is the same as that litigated in *Repsis*: whether BNF lands are unoccupied lands within the meaning of Article 4 of the 1868 Treaty. That prerequisite is met.

Privity

28) With the DC ruling adopted, that prerequisite is met.

Final Adjudication on the Merits

29) The *Repsis* parties actively litigated whether the BNF was unoccupied throughout the Tribe's declaratory judgment action. The Tribe raised the issue in its Amended Complaint. (J.A. No. 94-8097, Vol. 1 at 151-153). The Defendants' Answer claimed

that "no treaty rights remain on federal lands in Wyoming, because such lands are no longer unoccupied." (J.A. No. 94-8097, Vol. 1 at 175).

30) The Tribe moved for partial summary judgment declaring the lands of the BNF to be "unoccupied lands of the United States." (J.A. No. 94-8097, Vol. 2 at 278-279). In supporting memoranda, the Tribe declared the matter ripe for summary judgment and cited many of the same authorities cited by Defendant Herrera in his briefing. (J.A. No. 94-8097, Vol. 2 at 286-88, 290, 293-303); (J.A. No. 94-8097, Vol. 3 at 530-31, 535-37) (R. 371-372, 382-383, 938-939, 1000). The *Repsis* defendants' reply to the Tribe's motion for summary judgment claimed that the BNF was occupied. (J.A. No. 94-8097, Vol. 2 at 381-382).

31) After the trial court granted the defendants' motion for summary judgment, the Tribe appealed and obtained *de novo* review in the Tenth Circuit. When defendants sought affirmance on grounds that the BNF was occupied, the Tribe agreed that the issue of occupation was ripe for decision on appeal, stating that "there was ample evidence in the record, and certainly ample legal authority," for the occupation issue to be decided in the Tribe's favor on appeal. *Reply Br. Appellants* at 2-3, *Repsis Briefing* (No. 94-8097).

32) The Tenth Circuit affirmed the grant of summary judgment and ruled that the BNF was occupied. *Repsis*, 73 F.3d at 993-94. That ruling independently supported the final judgment in *Repsis*. It decided an issue litigated by the parties and important to the parties; and it was not incidental or collateral to that judgment. It was therefore necessary to the judgment.

33) A summary judgment is a final ruling on the merits for the purposes of issue preclusion. *National Satellite Sports v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001). Further, the

general rule is that "the nature of the ultimate final judgment in a case ordinarily is controlled by the actual appellate disposition." 18A Wright, *Federal Practice and* Procedure, § 4432 (3d ed. 2017).

34) The occupation issue was fully litigated in *Repsis* and finally adjudicated on the merits for the purposes of issue preclusion. That prerequisite is therefore met.

Full and Fair Opportunity to Litigate

35) Procedures in *Repsis* were not "fundamentally poor, cursory, or unfair." *B&B Hardware*, 135 S. Ct. at 1309. The Tribe had a fair opportunity "procedurally, substantively, and evidentially" to contest the occupation issue that the Tribe itself raised. *In re Bush*, 62 F.3d 1319, 1323 (11th Cir. 1995); 18A Wright, *Federal Practice and Procedure*, § 4419 (3d ed. 2016) ("issue preclusion generally is appropriate if some effort is made to litigate the issue.").

36) The almost complete equivalence between the occupation arguments of the Tribe and those of the Defendant supports a finding that *Repsis* afforded the Tribe and its members a full and fair opportunity to litigate the occupation issue.

37) The Tribe sought a ruling that the forest was unoccupied as a matter of law the same as the defendant does now. (R. 934). The defendant protests that on appeal the *Repsis* defendants raised a new occupation argument. (Resp. Remand Br. at 47). The Tribe still invited an occupation ruling, arguing that evidence and legal authority in the record merited a ruling that the forest was unoccupied. There was no procedural unfairness.

38) The Tribe had an opportunity to appeal and did appeal; and an occupation ruling issued on appeal as invited by the parties. The Tribe then exercised its opportunity to petition the

USSC for a writ of certiorari and review of that ruling. *Repsis* Writ at i (No. 95-1560), *cert denied*, 517 U.S. 1221 (1996).

39) Denial of the petition did not deny the Tribe a full and fair opportunity to litigate. The USSC has never held that litigated issues decided on appeal must be reviewed. The general rule is that only a total inability to appeal prevents preclusion, not "when there is discretion in the reviewing court to grant or deny review and review is denied." Restatement (Second) of Judgments § 28 cmt. A (1982).

40) Defendant therefore had a full and fair opportunity in the *Repsis* declaratory judgment action to litigate the issue of whether the BNF was unoccupied land within the meaning of Article 4. That prerequisite is met.

IX. The prerequisites for issue preclusion are met regarding the ruling in *Repsis* that the State's regulations were reasonable and necessary for conservation.

Identity of Issue

41) Both the Tribe and Defendant make the same claim regarding whether and when the State could justify and enforce regulations for conservation purposes on Crow Tribe members hunting in the BNF.

42) The Court rejects Defendant's contention that the issues in the two litigations are different. The argument in *Repsis* was about licensing and Defendant's case is about closed seasons. Regardless, the conservation issue raised in both litigations concerns whether and when state regulation is allowed because the needs of conservation prevail over unrestricted off-reservation treaty hunting rights in the BNF.

43) Defendant's immunity position was clearly stated: "Absent an existential risk to elk, state laws that regulate when and how elk can be hunted on national forest lands are simply not

enforceable against treaty-hunters like Herrera." *Appellant's Opening Br.* At 17-18; (Dist. Ct. R. 40-41). Only then could enforcement be deemed "necessary for perpetuation of the species" or for "assurance of survival" of the species at issue in the area at issue. (R. 392, 856-857, 999).

44) The Tribe claimed that same immunity. Its motion for partial summary judgment requested a declaration that its members had an "unrestricted right to hunt and fish on Big Horn National Forest lands within the State of Wyoming." (J.A. No. 94-8097, Vol. 2 at 286-87). Its Amended Complaint sought a declaration that the Tribe's Article IV treaty rights "preclude state regulation." It asked that game and fish defendants be "permanently enjoined from enforcing Wyoming hunting and fishing laws and regulations against Plaintiff and other members of the Crow Tribe of Indians." (J.A. No. 94-8097, Vol. 1 at 157).

45) The Tribe claimed that state regulations could be enforced on tribal members only "in very limited circumstances . . . when it is proven that such regulation is necessary to prevent the potential extinction of a species." (J.A. No. 94-8097, Vol. 3 at 530-532). This position is the same as that asserted by Defendant.

46) The conservation issue raised in *Repsis* is therefore identical to the issue raised by Defendant. That prerequisite is therefore met.

Privity

47) With the DC ruling adopted, that prerequisite is met.

Final Adjudication on the Merits

48) The issue of whether the needs of conservation allowed state regulation and prosecution of Crow Tribe members hunting in BNF was litigated in *Repsis*. The *Repsis* defendants

asserted that the immunity sought by the Tribe "would undermine conservation," and that but for state regulation there would be no elk in the BNF. These defendants offered numerous affidavits in support of their position. (J.A. No. 94-8097 Vol. 1 at 183, 189-190, 196-212, 245-260, 264-266, 270-277).

49) The arguments and contentions in both *Repsis* and this litigation with respect to the conservation issue are nearly equivalent. This was established with particularity in the State's brief. *See* Remand Brief at 28-32. The review of the *Repsis* litigation compared to the defendant's arguments and offers of proof shows that the State's assessment is accurate. As does the defendant, the Tribe maintained that the elk population was over objective in the BNF, that there was no existential threat, and that the treaty right could therefore be declared unrestricted as a matter of law. (J.A. 94-8097 and the states exhibits herein filed.) As does the State, the *Repsis* defendants maintained that the elk almost disappeared and that, but for relocation, reintroduction, protection, and longstanding regulation, there would be no elk in the BNF. *Id.* Like the State, the *Repsis* defendants maintained that unrestricted hunting without seasons would diminish wildlife populations over time; that the historical experience on both the Wind River reservation and the Crow reservation supported a ruling that the state's regulations were reasonable and necessary for the purposes of conservation; and that the regulations could therefore be enforced on the Tribe and its members. *Id.*

50) The Tenth Circuit reviewed the record *de novo* on appeal and held: "if the Treaty . . . reserved a continuing right which had survived Wyoming's admission, we hold that there is ample evidence to support the State's contention that its regulations were reasonable

and necessary for conservation." It cited to the affidavits submitted by the defendants in explaining its ruling. *Repsis*, 73 F.3d at 993.

51) The Court rejects Defendant's contention that the above language does not constitute a ruling. The plain meaning of the words indicates otherwise.

52) The conservation ruling in *Repsis* independently supported the summary judgment affirmed on appeal. It decided an issue that was litigated by the parties and important to the parties; and it was not incidental or collateral to that judgment. It was therefore necessary to the judgment.

53) In sum, the issue of whether the needs of conservation allowed state regulation of treaty right hunting in the BNF was actively litigated and finally adjudicated on the merits. That prerequisite is therefore met.

Full and Fair Opportunity to Litigate

54) The Tribe's declaratory judgment action sought to establish the immunity from prosecution as claimed by Defendant. The procedures followed were not "fundamentally poor, cursory, or unfair." *B&B Hardware*, 135 S. Ct. at 1309.

55) The near equivalence between the conservation and immunity arguments in *Repsis* and in this case supports a finding that *Repsis* afforded the Tribe and its members a full and fair opportunity "procedurally, substantively, and evidentially" to litigate the conservation necessity issue.

56) The Tribe enjoyed the opportunity for an appeal with *de novo* review of the record. *Repsis,* 73 P.3d at 986. The Tribe then exercised its opportunity to petition the USSC for review of the Tenth Circuit's conservation ruling. *Repsis Writ* at i, 24-26, (No. 95-1560), *cert. denied*, 517 U.S. 122 (1996).

57) As a member of the Crow Tribe, the defendant's rights were determined by the full and fair opportunity to litigate the issue of immunity from prosecution and regulation for conservation purposes in *Repsis*. That prerequisite is therefore met.

X. Preclusion with respect to alternative grounds is appropriate in this case.

58) This Court need not and does not decide whether preclusion on alternative grounds is always or never appropriate; or whether the First or Second Restatement approach governs in federal court. This Court need decide only whether the alternative rulings in *Repsis* may each be given preclusive effect to bind Defendant and other enrolled tribal members who hunt in the BNF.

59) The Court rejects Defendant's contention that this Court must follow Tenth Circuit decisions following the Second Restatement approach and deny issue preclusion to the alternative grounds. The Wyoming Supreme Court has ruled that "the decisions of lower federal courts are not binding on state courts, even on issues of federal law. . ." *Wyo. Guardianship Corp. v. Wyo. State Hosp.*, 428 P.3d 424, 430 (Wyo. 2018). Both the Defendant and the State have asserted the same throughout this litigation. This Court should therefore address the merits.

60) The Court rules that issue preclusion can and should apply to either alternative ground of *Repsis* if no recognized exception to use of issue preclusion applies to prevent preclusion with respect to that ground. Both the occupation issue and the conservation issue were important to and litigated by the parties. The rulings on each issue independently supported the affirmed grant of summary judgment.

61) Defendant's full and fair opportunity to litigate the occupation and conservation issues in *Repsis* significantly safeguards the essential fairness that issue preclusion requires. *See*

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) (discussing the value of that prerequisite).

62) The reasoning of *Jean Alexander Cosmetics v. L'Oreal U.S.A., Inc.*, 458 F.3d 244, 250-253 (3d Cir. 2006), is persuasive. Where alternative grounds independently support a judgment and decide actually litigated issues, giving each ground preclusive effect advances the purpose of issue preclusion to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

63) *Repsis* was a declaratory judgment action. The very purpose of declaratory relief is to achieve a final and reliable determination of the legal rights of parties and avoid future litigation. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 200 (2014); *Reiman Corp., v. City of Cheyenne*, 838 P.2d 1182, 1185 (Wyo. 1992). The law strongly favors applying issue preclusion to issues decided in declaratory judgment actions, 18 Wright, *Federal Practice and Procedure*, § 4421 (3d ed. 2016) ("Every issue that the parties have litigated that that the court has undertaken to resolve is necessary to the judgment and should be precluded.").

64) Concerns favoring the Second Restatement approach have no bearing here. The Tribe had a full incentive to appeal and did appeal. There is no reason to conclude that the Tenth Circuit did not give its rulings careful attention. Furthermore, the concerns identified in *Parklane Hosiery Co, Inc. v. Shore*, 439 U.S. 322, 329-331 & n.15 (1979) regarding offensive use of issue preclusion are completely inapplicable here. Its use here would decrease rather than increase litigation; the Tribe had a huge incentive to litigate

its rights and the rights of its members; and the procedures in *Repsis* were not fundamentally poor, cursory, or unfair.

65) The occupation and conservation issues in this case are each integral components of the same overall dispute litigated in *Repsis*. This favors application of issue preclusion to each alternative ground if no exception to preclusion applies to that ground. *See Intellectual Ventures I LLC v. Capital One Financial Corp.*, 937 F.3d 1359, 1374-1376 (Fed. Cir. 2019) (even where the Second Restatement approach applies, preclusion on alternative grounds is favored where each ground in the prior litigation is raised in the new litigation). Preclusion on each alternative ground would further the USSC's directive that the issue in issue preclusion "must be understood broadly enough 'to prevent repetitious litigation of what is essentially the same dispute.'" *B&B Hardware*, 135 S. Ct at 1308.

XI. No recognized exception to use of issue preclusion applies to either the occupation or conservation ruling of *Repsis*.

66) The State contends that no recognized exception to use of issue preclusion applies to either alternative ground. Remand Br. at 44-49. The defendant maintains that differences in the burden of proof prevent preclusion; that the "unmixed question of law" prevents preclusion with respect to the *Repsis* occupation ruling; that the "change in controlling facts" exception prevents preclusion with respect to the *Repsis* conservation ruling, and that a "change in law" prevents preclusion with respect to both *Repsis* alternative rulings. Resp. Remand Br. at 23-41.

Difference in Burden of Proof

67) No differences in the burden of proof prevent preclusion. *See* Restatement (Second) of Judgments § 28 (4). Neither the USSC nor DC has vacated the jury decision finding the

Defendant guilty. The remand issues are within the Court's preview determining the legal rights of the defendant. As such the occupation and conservation issues are for the Court and not the jury. The Defendant conceded this when claiming complete immunity from trial. He is estopped from contending otherwise now. Constitutional claims in motions to suppress evidence in a criminal case are resolved under the preponderance standard. It is no different here.

Unmixed Issue of Law Exception

68) The "unmixed issue of law" exception does not apply to the *Repsis* occupation ruling. Defendant claims the Tenth Circuit's occupation ruling was a purely legal ruling. Resp. Remand Br. at 41, n.12. Yet use of the exception does not turn on whether the issue is purely legal, but rather on whether the issue "arises in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted." *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171-72 (1984). When claims in two litigations are closely related, whether the issue is purely one of law is less important than the principle that it is "unfair to . . . allow repeated litigation of the same issue in what is essentially the same controversy." *Id.*

69) Defendant's treaty defense to the State's prosecution raises the same controversy litigated in *Repsis*. It seeks to establish the same right in the same place, with immunity from state regulation and prosecution to the same extent claimed in *Repsis*. The unmixed issue of law exception therefore does not apply.

Intervening Change in the Facts of Conservation Necessity

70) Use of issue preclusion where prerequisites are met may not be appropriate where "controlling facts or legal principles have changed significantly." *Montana*, 440 U.S.

147, 155 (1979). Defendant claims that changes in fact prevent preclusion on the conservation issue because elk populations in the BNF have changed since *Repsis*; and because the issue is whether conservation regulations are needed in 2014, not decades earlier when *Repsis* was decided. He suggests that the United States supports his claim. Resp. Remand Br. at 37-40.

71) The State argues that the change in fact exception to issue preclusion requires *material* change in *controlling* facts, not just *any* factual change. It argues that otherwise the exception would have no limiting principle and the conservation issue could be relitigated every time wildlife populations changed to any degree over any time period. The State notes that the United States has in other litigations failed to appreciate the need for a change in *controlling* facts. Remand Br. at 47-48 (citing *Stauffer*, 464 U.S. at 172, n.5, and *Montana*, 440 U.S. at 159-162).

72) The Court agrees with the State's analysis. There has been no material change in the factual context or in controlling facts which prevents issue preclusion from applying to the conservation ruling of *Repsis*. Where the factual context "has not materially altered . . . normal rules of preclusion should operate . . ." *Montana*, 440 U.S. at 162. Only "changes in facts essential to the judgment" will prevent preclusion in a subsequent action raising the same issue. *Id.* at 159; *New Hampshire v. Maine*, 532 U.S. 742, 755-756 (2001) (stating the same).

73) The existence- or lack thereof- of a present existential threat to wildlife was not a material, controlling fact essential to the judgment in the *Repsis* litigation. Both the Tribe and Defendant argued that Crow members were immune from state regulations given the absence of a present existential threat to elk. (R. 392, 856-857, 999, 1018); (Dist. Ct. R.

40-41); (J.A. No. 94-8097, Vol. 3 at 531-32). Both submitted that there was no such threat because the numbers of elk were over objective. (R. 392-393, 856-857, 999); *Memo. Crow Tribe. Opp'n Def.'s Mot. Summ. J.* at 3-4, 13-20 & n.14; (J.A. No. 94-8097, Vol. 3 at 531-32, 541-548).

74) But neither the *Repsis* defendants nor the State here prevailed on the conservation issue by positing a present existential threat to elk in the forest. Rather, the argument in each litigation was that the state's game laws were enforceable on Crow members in the BNF because they were reasonable and necessary for conservation; because restrictions were needed to manage a species; because depletion would result over time without basic restrictions; because the experiences on the Wind River reservation and Crow reservation were proof of that fact; and because there would be no elk in the BNF but for reintroduction and decades long management. This is set forth in detail in the State's Remand Brief. Remand Br. at 28-32.

75) The different numbers of elk in the BNF in 2014 therefore do not establish a material change or a change in controlling facts; and no change in facts prevents issue preclusion from applying to the conservation ruling of *Repsis*. The facts have not changed.

Change in Law re Conservation

76) Defendant claims that developments in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), in *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), and in *Herrera* have significantly changed the law regarding the right of states to enforce regulations on tribal members with off-reservation treaty rights for purposes of conservation. Resp. Remand Br. at 29-34. The State contends that no such change has occurred. Reply Br. at 12-14.

77) The Court agrees with the State. *Mille Lacs* simply reaffirmed that states could "impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." 526 U.S. at 205; and *Herrera* did not address conservation at all.

78) The Court agrees with the State that *Cougar Den*, which has no majority opinion, had nothing to do with any regulation justified by or enforced for conservation purposes, but only with whether Washington state could assess fuel tax and licensing fees on Indians with a treaty right to travel on the public highways. The Court further agrees that resolution of this issue was grounded in decisions issued prior to *Repsis* regarding that specific Indian treaty right. *See Cougar* Den, 139 S. Ct. 1011-1012. The *Cougar Den* decision therefore could not and did not constitute an *intervening* change in conservation necessity law, and the change in law exception does not apply to the conservation ruling of *Repsis*.

79) It was in May 2013 that the Crow Tribe declared off-reservation treaty hunting on the BNF and other Federal lands. The Tribe also resolved to conserve wildlife and regulate treaty hunters pursuant to the Crow Tribe's interpretation of *Mill Lacs*. *Motion to Dismiss, McCleary Aff. Exhibit* 9.

80) The Defendant poses that just seven months later in January 2014 when he killed elk in the BNF that the necessity to conserve wildlife no longer existed because there were plentiful elk. That argument is in direct contrast the Crow Tribe's continued recognition that conservation is a necessity in the BNF. In *Repsis*, the Crow Tribe claimed unrestricted hunting privileges and Defendant claims the same here. In both cases the Crow Tribe recognizes the need for regulation and conservation, but they have failed to

regulate their Treaty Hunters. Prior to *Repsis* the tribe had no regulations. It was only during the Repsis litigation that the Crow Tribe drafted such regulation. (J.A. No. 94-8097, Vol 3 at 91-92). That Code does not regulate hunting on the BNF except to state it is closed to treaty hunters. *Id.*

81) There is no change of facts since *Repsis. Mill Lacs* is not a change in law that would affect the State's reasonable and necessary nondiscriminatory regulation of Treaty Hunters in the interest of conservation. The Crow Tribe resolved to enact regulations on Treaty Hunting and there is no evidence that the defendant or any other was are no other laws regulating Treaty Hunter's in the BNF.

Change in Law re Occupation

82) Defendant contends that *Herrera's* occupation ruling prevents the occupation ruling of *Repsis* from having issue preclusive effect because *Herrera* held that the occupation ruling of *Repsis* was wrongly decided; and because *Herrera* stated that "a repudiated decision does not retain preclusive force" when repudiating the *Race Horse* decision. *Herrera*, 139 S. Ct. 1698; Resp. Remand Br. at 24-25.

83) The State contends that preclusion is available because the USSC left the preclusive effect of the *Repsis* occupation ruling open for decision on remand; because issue preclusion applies to wrongly decided issues just as much as those rightly decided; because *B&B Hardware* and *United States v. Moser*, 266 U.S. 236, 242 (1924) both so hold; and because concerns of repose and reliance at the heart of issue preclusion justify applying issue preclusion here, where Defendant is relitigating the same dispute resolved in *Repsis*. Remand Br. at 45-47, 50-51.

84) The Court has ruled that the USSC mandate in *Herrera* left open whether the occupation ruling of *Repsis* could be given issue preclusive effect against Herrera and enrolled tribal members. If open for decision, *Herrera's* interpretation of "unoccupied lands of the United States" cannot by itself prevent the occupation ruling of *Repsis* from binding Defendant and other members of the Crow Tribe who hunt in the BNF.

85) *Herrera* interpreted treaty language, but it did not answer the question of whether Defendant and other enrolled members are bound by the judgment in *Repsis* given its alternative rulings. Further, *Herrera* and *Mille Lacs* did not repudiate *Repsis* but only *Race Horse*. *Herrera*, 139 S. Ct. at 1696-97. The statement that a "repudiated decision does not retain preclusive force" does not apply to the issues *Herrera* left open on remand; and the change in legal principles exception therefore does not apply to the occupation ruling of *Repsis*.

86) In sum, no recognized exception identified by Defendant prevents use of issue preclusion with respect to either the occupation or conservation ruling of *Repsis*.

XII. Issue preclusion should be applied to each alternative ruling in *Repsis*.

87) Issue preclusion is most appropriate when (1) its use will "prevent repetitious litigation of what is essentially the same dispute," *B&B Hardware*, 135 S.Ct. at 1308; and also (2) where there are "compelling concerns of repose or reliance." *Herrera*, 139 S.Ct. 1698 n.3; 18 Wright, *Federal Practice and Procedure*, § 4425 (3d ed. 2016) (if issue preclusion is to mean anything, reliance on a prior adjudication must be protected).

88) The State's submission of early game laws, of which this Court takes notice, show that the State's regulations and conservation efforts in the BNF began in earnest more than one century ago, after the *Race Horse* decision. (summary at Dist. Ct. R. 313-322). The

Repsis judgment preserved the State's authority in the BNF and its right to enforce its regulations after the defendants in *Repsis* argued the historical and fundamental importance of those regulations. There are therefore compelling concerns of repose and reliance.

89) It is appropriate to apply issue preclusion to both the occupation and conservation rulings of *Repsis* because (1) the prerequisites with respect to each ruling are met; because (2) no exception applies to prevent use of preclusion with respect to either ruling; because (3) USSC precedent supports its use; and because (4) use of preclusion will advance the basic objectives and principles of preclusion.

XIII. Conclusion:

Based on the fact analysis and comparision of the *Repsis* litigation and the *Herrara* litigation presented in its entirety and application of law THE COURT CONCLUDES AND RULES AS FOLLOWS:

a) That issue preclusion applies to the occupation ruling of *Repsis*;

b) That issue preclusion applies to the conservation ruling of *Repsis*;

c) That pursuant to each issue, the *Repsis* judgment has preclusive effect and subjects the Defendant, as an enrolled member of the Crow Tribe, to the game laws of Wyoming when hunting in the BNF;

d) That issue preclusion application and effect remain after *Herrera v. Wyoming*;

e) That Defendant, as an enrolled member of the Crow Tribe, was therefore precluded from asserting immunity from State prosecution in this criminal matter; and

f) That Defendant's Motion to Dismiss the prosecution because of his treaty rights defense was therefore properly denied by the Court prior to jury trial.

DATED this 11th day of June 2020.

JUDGE OF CIRCUIT COURT

CIRCUIT COURT OF THE 4TH JUDICIAL DISTRICT STATE OF WYOMING SHERIDAN COUNTY

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