IN THE SUPREME COURT, STATE OF WYOMING

STATE OF WYOMING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. S-21-0293
	)	
CLAYVIN HERRERA,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF REVIEW

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TABLE OF CONTENTS

Petitioner, State of Wyoming, through the Office of the Wyoming Attorney General, petitions this Court to enter a writ of review in this matter.

I. Nature of Review Desired and Relief Sought

The State seeks this Court's review of an order entered on December 3, 2021, in Docket No. CV-2020-273, by the District Court for the Fourth Judicial District, Sheridan County, reversing on appeal the *Order on State's Request for Post-Remand Issue Preclusion* entered by the circuit court on June 11, 2020. (Apps. A and B). The State requests that this Court reverse the district court's order and affirm the circuit court's order.

II. Statement of the Facts

A. The Decisions in *Repsis*

In 1992, the Crow Tribe initiated a declaratory judgment action after a tribal member, Thomas Ten Bear, was prosecuted by the State of Wyoming for killing an elk within the Bighorn National Forest. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520, 521 (D. Wyo. 1994). The Crow Tribe asserted an unrestricted treaty right to hunt in the Bighorn National Forest. *Id.* at 521-22. The 1868 Treaty of the Crows provided the Tribe a "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* at 522. Game Warden, Chuck Repsis argued that the Crow Tribe's treaty rights were abrogated with the act admitting Wyoming into the United States, a conclusion based on the United States Supreme Court's prior holding in *Ward v. Race Horse*, 163 U.S. 504 (1896). *Id.*

The district court agreed, finding that while *Race Horse* had been widely criticized, it remained good law. *Id.* at 524. Because the facts in *Repsis* were identical to those in *Race Horse*, including the treaty language at issue, the district court held that Wyoming's statehood abrogated the Crow Tribe's treaty rights to hunt on unoccupied lands within Wyoming. *Id.*

On appeal, the Tenth Circuit affirmed the district court's holding. *Crow Tribe of Indians v. Repsis,* 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied,* 517 U.S. 1221 (1996). (citing *Race Horse* to support the conclusion that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union"). But that court did not end its analysis with the question of treaty abrogation. It also affirmed the district court's decision on the alternative grounds that Congress's creation of the Bighorn National Forest "resulted in the 'occupation' of the land." *Id.* at 993. The Tenth Circuit further acknowledged that, even if the Crow Tribe's treaty-based hunting rights had survived Wyoming's statehood, Wyoming could regulate hunting by the Crow Tribe "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* at 992 (quoting *Puyallup Tribe v. Dep't of Game of Wash. (Puyallup I)*, 391 U.S. 392, 398 (1968)). Citing to portions of the record before it on appeal, the court "h[e]ld there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation." *Id.* at 993. In reaching these additional holdings, the court noted that it was "'free to affirm a district court decision on any grounds for which there is a record sufficient

to permit conclusions of law, even grounds not relied upon by the district court.'" *Id.* (quoting *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994)).

B. The Initial Proceedings Below

Twenty years after *Repsis* was decided, Clayvin Herrera was cited for taking an elk in the Bighorn National Forest without a license. *Herrera v. Wyoming,* — U.S. —, 139 S. Ct. 1686, 1693 (2019). Herrera is a member of the Crow Tribe. *Id.* At trial in the circuit court on his criminal charges, Herrera sought to assert a right to hunt elk in the Bighorn National Forest under the 1868 Treaty. *Id.* at 1693. The circuit court prevented Herrera from asserting his treaty right defense and he was later convicted by a jury. *Id.*

On appeal, the district court affirmed Herrera's conviction, finding that *Repsis* had issue-preclusive effect on Herrera. *Id.* at 1694. The district court specifically precluded Herrera from arguing that the Crow Tribe's treaty rights survived Wyoming's statehood, pointing to the decision in *Repsis*. *Id.* at 1701 n.5. The district court also held that the Bighorn National Forest became "occupied" when it was created, thus restricting any treaty-based hunting rights that had not expired by virtue of Wyoming's statehood. *Id.* at 1694.

The United States Supreme Court granted certiorari to review the Wyoming district court's decision. *Herrera v. Wyoming,* — U.S. —, 138 S. Ct. 2707 (2018). The Supreme Court first resolved whether Wyoming's statehood abrogated the Crow Tribe's hunting rights under the 1868 Treaty. The *Herrera* Court found that *Race Horse* had no vitality after the Court's prior decision in *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999). *Herrera,* 139 S. Ct. at 1697.

The *Herrera* Court then turned the implications of *Mille Lacs* into an express holding, formally repudiating *Race Horse* "to the extent it held that treaty rights can be impliedly extinguished at statehood." *Id.* With *Race Horse* repudiated, the Court held that *Repsis* could no longer preclude Herrera from arguing that his treaty-based hunting rights survived Wyoming's statehood. *Id.* (citation omitted) (recognizing an exemption to issue preclusion where there has been "an intervening 'change in [the] applicable legal context'"). It then determined, using a framework established in *Mille Lacs*, that Wyoming's admission to the United States did not abrogate the Crow Tribe's off-reservation treaty hunting rights. *Id.* at 1698.

The Supreme Court also reviewed the district court's holding that even had Herrera's treaty rights remained intact, they would not apply within the Bighorn National Forest, because it became "occupied" upon its creation. *Id.* at 1701. Itfound that the term "unoccupied," as understood by the Crow Tribe in 1868, "denote[s] an area free of residence or settlement by non-Indians." *Id.* The creation of the Bighorn National Forest restricted further settlement of the lands in question, which made the creation of the national forest "more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right." *Id.* at 1702. The Supreme Court thus concluded that the Bighorn National Forest did not become "categorically occupied" at the time of its creation. *Id.* at 1703.

The *Herrera* holding on occupation of the Bighorn National Forest was limited in two respects. First, the Supreme Court noted that specific portions of the Bighorn National Forest could still be "occupied" within the meaning of the 1868 Treaty. *Id.* It identified this as an issue to be resolved on remand. *Id.* Second, the Supreme Court declined to answer

whether its own holding on the occupation of the national forest would alter the preclusive effect of the Tenth Circuit's alternative holding in *Repsis*. *Id.* at 1701 n.5. Itpointed out that the Wyoming district court had not given "issue-preclusive effect ... to *Repsis's* independent, narrower holding that the Bighorn National Forest in particular was 'occupied' land." *Id.* Resolving this issue preclusion question "would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in [the *Herrera*] litigation, among other matters." *Id.* For this reason, the Supreme Court directed the Wyoming courts to decide these "gateway issues" in the first instance. *Id.*

The Supreme Court also acknowledged conservation necessity as another issue to be addressed on remand. *Id.* at 1703. ("On remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation."). Because the Wyoming district court did not reach this issue, the Supreme Court did not address the merits of this issue. *Id.*

While the majority in *Herrera* (a five to four decision) did not reach the preclusive effect of *Repsis's* alternative holding on occupation, the dissent did. The dissent opined that the Court's decision would have no effect if Herrera and the Crow Tribe were bound by the occupation holding in *Repsis* under the doctrine of issue preclusion. *Id.* at 1703 (Alito, J., dissenting). After an extended analysis, the dissent concluded that Herrera and the Crow Tribe would be barred "from relitigating the continuing validity of the hunting right conferred by the 1868 Treaty." *Id.* at 1713. Thus, in the dissent's view, the Court's decision was "likely, in the end, to be so much wasted ink." *Id.* at 1703.

C. *Herrera* on Remand

Following the Supreme Court's decision, the district court remanded the matter to the circuit court with instructions to conduct an evidentiary hearing on the two unresolved factual issues – occupation of specific sites within the Bighorn National Forest and the State's conservation interests. (App. C at 1). The district court also directed the circuit court to decide "whether collateral estoppel/issue preclusion applies to prevent Mr. Herrera from challenging whether the Bighorn National Forest is occupied[.]" (*Id.*).

While the remand order only directed the circuit court to resolve issue preclusion on the occupation question, the State argued that the second alternative holding in *Repsis* – that the State's game regulations were "reasonable and necessary for conservation" – should also have issue-preclusive effect. (App. B at 2). The circuit court agreed to consider whether each of *Repsis's* alternative holdings had issue-preclusive effect on Herrera. (*Id.*)

Generally following the dissent's reasoning in *Herrera* on the issue preclusion question the majority declined to address, the circuit court found that *Repsis* provided a final adjudication on the merits of both the national forest occupation and conservation necessity issues and that the Crow Tribe had a full and fair opportunity to litigate these issues. (*Id.* at 16-25). It also decided that the issues in *Repsis* and *Herrera* were identical and that Herrera, as a tribal member, stood in privity with the Crow Tribe. (*Id.*). The circuit court further found that there had been no intervening change in the law governing conservation necessity preventing the application of the doctrine of issue preclusion on this alternative holding in *Repsis*. (App. B at 28-30). The circuit court similarly found no intervening change in the law governing occupation, despite the Supreme Court's

disagreement with *Repsis* on this issue. (App. B at 30-31). With all prerequisites met, and no applicable exceptions, the circuit court held that both of the alternative holdings in *Repsis* had issue-preclusive effect against Herrera in his criminal prosecution. (*Id.* at 32).

Herrera appealed the circuit court's decision, and the parties filed extensive briefs in the district court on the applicability of issue preclusion to the alternative holdings in *Repsis*. Concurrently, the Crow Tribe sought relief in the federal courts. On January 27, 2021, the Crow Tribe filed a motion for partial relief from the judgment that had been entered in *Repsis* in 1995 and affirmed on appeal in 1996. Plaintiff's Mot. Partial Relief from J., *Crow Tribe of Indians v. Repsis,* No. 1:92-cv-01002-ABJ (D. Wyo. Jan. 1, 2021) (ECF No. 69). The federal district court denied the Crow Tribe's motion for partial relief from judgment on July 1, 2021. Order, *Crow Tribe of Indians v. Repsis,* No. 1:92-cv-01002-ABJ (D. Wyo. July 1, 2021) (ECF No. 84). The Crow Tribe appealed to the Tenth Circuit. *See Crow Tribe of Indians v. Repsis,* No. 21-8050 (10th Cir.). That case has been fully briefed and the parties await an oral argument setting.

On December 3, 2021, the district court entered the order at issue reversing the circuit court. (App. A.). The district court reduced the many legal issues presented by the parties down to one question: "assuming that it was permissible for the circuit court to consider issue preclusion and that all of the prerequisites for applying the doctrine were met, was the application of the issue preclusion doctrine proper in this case?" (App. A at 5). The district court then explained that issue preclusion may not be warranted if there has been an intervening change in the applicable legal context. (*Id.* (citing *Herrera*, 139 S. Ct. at 1697)). The district court concluded that application of the doctrine was not proper in

this case, because "there have been multiple changes in the applicable legal context since the *Repsis* decision was issued[.]" (App. A at 6). In reaching this conclusion, the district court identified no intervening change in the law governing conservation necessity and pointed only to the Supreme Court's holding on occupation in this same case as an intervening change in the legal context on that issue. (*Id.*).

After reversing the circuit court, the district court remanded the matter for an evidentiary hearing on the issues of site specific occupation and conservation necessity. (Appendix A at 8).

III. Question Presented

Did the district court err when it disagreed with four justices of the United States Supreme Court and determined that the application of issue preclusion was not proper in this case despite there being no intervening change in the legal context governing either of the alternative holdings in *Repsis*?

IV. Applicable Principles of Law

The State relies upon the following principles of law:

1. Rule 13.02 of the Wyoming Rules of Appellate Procedure provides:

> A writ of review may be granted by the reviewing court to review an interlocutory order of a trial court in a civil or criminal action, ..., which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there are substantial bases for difference of opinion and in which an immediate appeal from the order may materially advance resolution of the litigation.

2. "[T]he authority to review a trial court determination by way of a writ is available where a question of first impression, constitutional magnitude and great public import is raised." *State v. Newman*, 2004 WY 41, ¶ 20, 88 P.3d 445, 452 (Wyo. 2004).

3. The preclusive effect of the judgment of a federal court is governed by federal law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

4. "Under federal issue-preclusion principles, 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" *Herrera*, 139 S. Ct. at 1707 (footnote omitted) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

5. Issue preclusion prevents relitigation of wrong decisions just as much as right ones. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 157-58 (2015) (citation omitted); *see also* Restatement (Second) of Judgments § 28 cmt. j (Am. Law Inst. 1982) (explaining that "refusal to give the first judgment preclusive effect should not ... be based simply on a conclusion that [it] was patently erroneous").

6. "Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening 'change in [the] applicable legal context.'" *Herrera*, 139 S. Ct. at 1697 (quoting Restatement (Second) of Judgments § 28 cmt. c (Am. Law Inst. [1982])).

V. Why the Ends of Justice Require this Court's Review

The State asserts that the ends of justice require this Court's review for the following reasons:

1. The district court's decision thwarts the principles of finality and repose at the heart of our system of justice. The Crow Tribe initiated the *Repsis* litigation in 1992, presumably with the understanding and hope that the issues litigated there would be finally and conclusively determined. They were, and *Repsis* has been the status quo for over two decades. The State of Wyoming won something extremely valuable in that litigation and neither Herrera, nor the Crow Tribe, should be permitted to relitigate those issues generation after generation until they get the result they prefer.

The dissent in *Herrera* recognized as much when it addressed the applicability of issue preclusion to the alternative occupation holding in *Repsis*. It concluded that the alternative holding would be entitled to issue-preclusive effect, notwithstanding the majority's determination that the Tenth Circuit was wrong when it ruled that the Bighorn National Forest became occupied when it was created. *Herrera,* 139 S. Ct. at 1709 (Alito, J., dissenting) (explaining that "today's decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judgment binds all members of the Crow Tribe who hunt within the Bighorn National Forest. And … such a holding would be correct").

In fact, this result is normal and what the State has a right to expect in this litigation. "The Supreme Court of the United States has held that although res judicata and estoppel do not apply to pure questions of law, the doctrines do apply when a fact, question, or right

has been adjudicated in a previous action, even if that determination was based on an erroneous application of the law[.]" (App. D at 13-14) (citing *United States v. Moser*, 266 U.S. 236, 242 (1924)). As Justice Alito explained in the dissent to *Herrera*:

> It is 'a fundamental precept of common-law adjudication' that 'an issue once determined by a competent court is conclusive.' 'The idea is straightforward: Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts." Succinctly put, 'a losing litigant deserves no rematch after a defeat fairly suffered.'

139 S. Ct. at 1706-07 (internal citations omitted).

Accordingly, it is manifestly inequitable to the State to permit Herrera to relitigate the defeat fairly suffered in *Repsis* on the alternative holdings even if one of those holdings was incorrect.

2. The issues in this case are novel and the district court's decision is wrong. The district court incorrectly determined that "there have been multiple changes in the applicable legal contexts since the *Repsis* decision was issued[.]" (App. A at 6). There have been no such changes.

With regard to the law governing conservation necessity, Herrera argued before the circuit court that two cases changed the law regarding the right of states to enforce regulations on tribal members with off-reservation treaty rights for purposes of conservation. (App. B at 28 (citing *Mille Lacs*, 526 U.S. 172 (1999) and *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, — U.S. —, 139 S. Ct. 1000 (2019)). The circuit court concluded that neither of these cases addressed, let alone, changed the law governing conservation necessity. (App. B at 29). For its part, the district court did not identify one

case or other authority of any kind that purports to change the law of conservation necessity such that this exception to issue preclusion should apply. Accordingly, the district court erred in applying the change in legal context exception to this alternative holding in *Repsis*.

With regard to the law governing the occupation holding in *Repsis*, the majority opinion in *Herrera*, while certainly a change, was not an "intervening" change. It happened in this case, not an intervening case. *See, e.g.*, Restatement (Second) of Judgments § 28 cmt. c illustrations 3, 4, and 5 (providing examples showing the exception applies when a case between different parties changes the law before the second case between the original parties). It is patently unfair to allow Herrera to circumvent the doctrine of issue preclusion simply because the Supreme Court chose to avoid the threshold issue in a rush to decide the merits.

Even so, the dissent in *Herrera* did not view the majority's disagreement with *Repsis* on occupation as a barrier to the application of issue preclusion. Those four justices expressly concluded that issue preclusion would bar relitigation of the issue regardless of the majority opinion. *Herrera,* 139 S. Ct. at 1713. The other five justices did not disagree. Instead, they specifically refused to address, and potentially foreclose, the application of issue preclusion. *Herrera,* 139 S. Ct. at 1701 n.5). For its part, the district court offered no explanation justifying its disagreement with four justices of the Supreme Court on this point. Accordingly, the district court erred in applying the change in legal context exception to this alternative holding in *Repsis*.

3. This is a matter of great public importance. The State has paramount interests in the management of its wildlife that are imperiled by the district court's decision and

likely will not be subject to review in future proceedings. The State has "the power and duty to protect, preserve and nurture the wild game" living within its borders. *O'Brien v. State*, 711 P.2d 1144, 1149 (Wyo. 1986). The State's interests are federally recognized as "broad trustee and police powers over wild animals" living within its borders. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). These regulatory interests are substantial. *See Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 390 (1978). In furtherance of these interests, the Wyoming Legislature has enacted a comprehensive regulatory scheme to conserve, manage and protect the wildlife living in Wyoming. *See* Wyo. Stat. Ann. §§ 23-1-101 through 23-6-304.

Uniform and consistent regulations and management decisions are essential to the long-term conservation and propagation of game species. But the circuit court found that the Crow Tribe does not regulate treaty hunters in the Bighorn National Forest. (App. B at 8). Thus, the district court's decision invites tribal members to disregard the State's comprehensive regulatory scheme and act as a law unto themselves, unbounded as they are by any existing tribal authority. That way lies chaos, conflict, and harm to Wyoming's wildlife.

Application of the doctrine of issue preclusion in this case avoids these harms and gives the State the benefit of its victory in *Repsis*. Absent immediate review by this Court, however, the State likely will have no further opportunity to vindicate its rights under *Repsis* regardless of the outcome in the circuit court on remand. *See, e.g., Crozier v. State*, 882 P.2d 1230, 1236 (Wyo. 1994) ("The Legislature has not authorized the State to appeal in a criminal case."). The interests at stake for the State, its citizens, the

Crow Tribe, its members, and Wyoming wildlife are significant and the issues in this case deserve to be heard by this Court rather than rendered moot by the press of future proceedings.

VI. Certification that this Petition is Not Interposed for Purposes of Delay

By signing this Petition for Review, counsel for the State of Wyoming certifies that this Petition is not interposed for the purposes of delay.

VII. Certification that this Petition for Review is Timely

By signing this Petition, counsel for the State of Wyoming certifies that this Petition for Review is brought within fifteen days of the district court's December 3, 2021 order.

WHEREFORE, Petitioner, the State of Wyoming requests that the Court issue a writ of review to the District Court for the Fourth Judicial District, Sheridan County, in the above captioned matter.

DATED this 20th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I served the foregoing *Petition for Writ of Review* by U.S. mail, postage prepaid and addressed as follows:

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