Off-Reservation Hunting in the Greater Yellowstone Area

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Introduction:

Many Tribal nations across the United States have explicit treaty rights that allow them to hunt**,** fish, and forage outside of their reservations. These rights allow increased access to traditional foods, which is critically important for cultural revitalization, food sovereignty, and the creation of healthier Indigenous communities. Native food systems have suffered dramatically in the face of settler-colonialism. The associated institutions, technologies, and worldviews have led to vast losses of non-human nature and degraded the health of ecosystems that are central to the vitality of Native food systems. In some cases, the removal of traditional foods was used as a genocidal tactic by the United States government. The most prevalent example of this is the mass slaughter of buffalo in the 19th century, driving the mammal to near extinction. Indian tribes, specifically those of the Great Plains, relied heavily on buffalo for physical, as well as spiritual, sustenance since time immemorial. The ultimate goal of the Federal government was to remove Indian nations from their land. Though this removal was temporally and spatially variable, the result was almost the entirety of North America being stolen from Indigenous communities. The diminished Tribal land base led to greatly decreased access to traditional foods that persisted through the environmental destruction by Euro-American culture. This access is critically important to many tribes, which is why provisions were included within treaties for their communities to maintain the right to hunt, fish, and forage outside of their established reservations and why Tribal nations continue to fight for these rights within the courts of the United States.

Background

In this paper, I will focus on off-reservation hunting treaty rights in the Greater Yellowstone Area (GYA), and more specifically within Yellowstone National Park (YNP). YNP

is the ancestral hunting grounds of several Tribal nations and has a rich Indigenous history. When the park was established by an act of Congress in 1872, it was still the permanent home of the Sheep Eater (Tukudika), a band of the Mountain Shoshone. By 1900, this band had been largely removed to the Wind River Reservation in Wyoming. In recent years, an increasing number of Tribes have requested that their treaty hunting rights be recognized by allowing them to engage in the yearly buffalo hunt held just outside of YNP, near Gardiner, MT. Currently, five tribes participate in this hunt in accordance with their treaty rights. These tribes include the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Salish and Kootenai Tribes, the Nez Perce Tribe, the Shoshone-Bannock Tribes, and the Confederated Tribes of the Yakama Nation. However, there is currently no hunting within the boundaries of YNP as a result of the 1894 Lacey Act. [1]

There are two particularly significant Supreme Court cases that address the topic of off-reservation hunting in the GYA. The first is *Ward v. Race Horse*, which was decided in 1896. This case, in summary, ruled that statehood invalidated treaty rights from treaties that were ratified before the creation of the State of Wyoming.[2] In 2019, a very similar case came to the Supreme Court. This case, *Herrera v. Wyoming,* went against the ruling in the 1896 case by honoring treaty hunting rights stated in the federal government's treaty with the Crow tribe.[3]

Race Horse arose from conflict in the area around Jackson Hole between a group of Bannock Indians and white settlers. The Bannock had retained their rights to hunt in the Jackson Hole area in the Fort Bridger Treaty of 1868, which stated that the Tribes "shall have the 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."

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[1] Lacey Act, U.S., Statutes at Large, vol.28, p.73 (1894)
[2] *Ward v. Race Horse,* 163 U.S. 504 (1896)
[3] *Herrera v. Wyoming,* No. 17-532, 587 U.S. (2019)

This same language was also used in the 1868 Treaty with the Crow Tribe of Indians. In the latter half of the 19th century, elk populations had begun to dwindle in Jackson Hole largely due to lost habitat and restrictions of their migratory routes by white settlements. At the time, white settlers blamed the declining populations on Indians who hunted in the area. Hunting guides in Jackson Hole were particularly concerned about the declining elk numbers, and aggressively sought to restrict the hunting rights of Indians in the area. These tensions came to a climax in the 1890s following the creation of Wyoming as a state. Wyoming had quickly created hunting regulations that restricted hunting to certain seasons. In 1894, whites around Jackson Hole were set on enforcing these laws on Indians hunting in the area, as a means to remove them from the area. This eventually led to the trial of John Race Horse, Sr., who had been arrested for killing 7 elk as a member of a Bannock hunting party in Wyoming. [4] The case went straight to the U.S. circuit court where the ruling was in favor of Race Horse, with the decision being based on the idea that the Federal government and treaties held superiority over state law. Wyoming appealed the case to the U.S. Supreme Court where it was heard in March of 1896.

The U.S Supreme Court ruled in favor of the State of Wyoming in a seven-to-one vote. The majority opinion was written by Justice Edward Douglass White who used the “equal footing” clause as the primary reasoning. This refers to the idea that when a state is added to the Union, it has equal footing with other states which were added previously. Because certain states that were previously admitted did not have the burden of upholding Indian treaties, the court argued that Wyoming should also be free of that burden. While Wyoming was a territory of the Federal government, it was required to uphold Indian treaties, but once it became a state it became able to make laws that would take precedence over treaties. White stated that the hunting

[4] Clayton, John. "Who Gets to Hunt Wyoming's Elk? Tribal Hunting Rights, U.S. Law and the Bannock 'War' of 1895." *Wyoming State Historical Society* (2020).

rights of the Bannock and other Tribes were “temporary and precarious” and meant to be of a “limited duration.” [5] White also used the 1872 creation of YNP and the 1894 Lacey Act to show that American governments had the right to adjust the off-reservation treaty rights of Indian nations, as these acts of Congress denied the treaty rights of the Bannock to hunt in Yellowstone. [6] This ruling effectively put an end to the Bannock being able to exercise their treaty hunting rights within the State of Wyoming and set the precedent that Treaty rights could be extinguished with statehood.

Nearly 100 years after the ruling in *Ward v. Race Horse*, another important case was heard in the Federal Tenth Circuit Court of Appeals. This case, *Crow Tribe of Indians v. Repsis,* provides important context for understanding off-reservation hunting in the GYA. In 1989, Thomas L. Ten Bear, a member of the Apsáalooke Nation was cited for killing an elk in the Bighorn National Forest of Wyoming without a permit by Chuck Repsis, a game warden from Wyoming Fish and Game Department. [7] Ten Bear argued in this case that he had the right to harvest elk in the Bighorn National Forest under Article 4 of the Treaty with the Crows, 1868. This treaty, similarly to the Fort Bridger Treaty of 1868, states that “The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the 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.” [8] Ten Bear posited in the case that Bighorn National Forest should be considered “unoccupied lands of the United States”. He also argued

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[5] *Ward v. Race Horse,* 163 U.S. 504 (1896)
[6] Ibid.
[7] *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (1995)
[8] Treaty with the Crows, 15 Stat. 649, 650 (1868)

that the ruling in *Ward v. Race Horse* had not extinguished the treaty rights of the Apsáalooke. Repsis and the Wyoming Fish and Game Department argued that *Race Horse* does apply to the 1868 Treaty with the Crows and that the hunting rights outlined by the treaty were invalidated when Wyoming was admitted to the Union as a state. They also argued that the lands of Bighorn National Forest are "occupied" and hunting there would not be permitted by the treaty, even if *Race Horse* did not apply. The Appeals Court sided with Repsis and the State of Wyoming.

The most recent case regarding treaty hunting rights in the GYA is *Herrera v. Wyoming*, which was brought to the Supreme Court after lower courts had ruled against Clayvin Herrera, a member of the Apsáalooke Nation. He was cited by the Wyoming Fish and Game Department for the taking of elk within the Bighorn National Forest illegally. The case was first heard in the Sheridan County Circuit Court. Herrera admitted to shooting the elk and argued that he did so within the rights granted to him in the 1868 Treaty with the Crows. The court would not allow him to make this argument due to similarities with the *Crow Tribe of Indians v. Repsis* case. After this lower court upheld his conviction, Herrera went through a series of appeals and eventually the case was brought to the U.S. Supreme Court. The Supreme Court found the case particularly intriguing as it was an opportunity to clarify the reasoning in *Repsis* and address the validity of *Race Horse* more explicitly. In summary, Herrera argued that the Big Horn National Forest remains "unoccupied land" and that the reasoning of the *Race Horse* decision was flawed. The case was quite complex and relied on a litany of past cases that had set certain precedents, which will be addressed in the discussion section below. On May 20, 2019 a five-to-four decision ruled in favor of Herrera. The majority opinion relied upon multiple arguments. First, *Repsis* did not preclude Herrera from arguing for his treaty rights. Secondly, due to one of the major canons of treaty construction, which states that treaties must be interpreted as Indigenous

people would have understood them at the time they were ratified, the Bighorn National Forest should be considered "unoccupied" by the courts. Lastly, but perhaps most significantly, the majority stated that "[W]e make clear today that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood." In the following section, these three cases will be more thoroughly analyzed in the context of other related cases and the ruling of the *Herrera* case will be interpreted in relation to the future of off-reservation hunting treaty rights in the GYA.

Discussion

The recent ruling in *Herrera v. Wyoming* opens up the door for significant questions about hunting within the GYA. Since the *Race Horse* ruling at the end of the 19th century, it has appeared that off-reservation hunting treaty rights were not protected within the State of Wyoming. Now, even with more clarity on the validity of *Race Horse*, it is still largely unclear what treaty hunting rights look like within the GYA. To better understand the present outlook for treaty hunting rights, it's important to examine the previously summarized cases more thoroughly.

The decision in *Ward v. Race Horse* was largely founded upon the understanding that language within the Fort Bridger Treaty of 1868 implied that off-reservation hunting rights were temporary and could be dissolved. The court concluded that "[t]he construction that would affix to the language of the treaty any other meaning ... would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the Territory" by creating Yellowstone National Park in 1872 "for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty." [9] However, the recent *Herrera* ruling argues that the courts must interpret

[9] *Ward v. Race Horse*, 163 U.S. at 510, 16 S. Ct. at 1078 (1896)

the 1868 Treaty with the Crow as they would have understood the language when it was ratified and states that the Crow would not have interpreted their treaty hunting rights to be of a limited duration. With this clarification, did the creation of Yellowstone National Park defraud the Indians by prohibiting hunting in the area?

The *Herrera* ruling also redefined "unoccupied lands of the United States" as "an area free of residence or settlement by non-Indians." This interpretation is based upon other language in the treaty such as "peace among the whites and Indians on the borders of the hunting districts," which can easily be interpreted to mean that the unoccupied hunting districts are considered to be free of settlement. For this reason, the court considered the area where Herrera killed the elk in the Bighorn National Forest to be unoccupied, though the areas within the forest where people live would be considered occupied. Yellowstone National Park is 2.2 million acres, and human settlement is concentrated into isolated pockets which make up remarkably little of the total landscape. With the definition set by *Herrera,* much of YNP would likely be considered "unoccupied."

Though the *Repsis* case was remarkably similar to *Herrera*, in 1999, the Supreme Court made a ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians* which challenged the primary arguments in *Race Horse* and opened up the door for a potentially different ruling. In this case, the Mille Lacs argued that their treaty right to off-reservation hunting, fishing, and foraging remained valid, even following the admission of Minnesota, Wisconsin, and Michigan to the Union. The Supreme Court ruled in their favor, thus securing these treaty rights. [10] This case was used as a precedent in the majority opinion of the *Herrera* case, rather than relying on *Race Horse*, which posited that treaty rights for the Crow Tribe of Indians expired with

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[10] *Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U. S. 172 (1999)*

Wyoming gaining statehood. In the *Mille Lacs* case, the Supreme Court thoroughly analyzed the Act which admitted Minnesota into the Union and the 1837 Treaty with the Chippewa, which maintained the Mille Lacs off-reservation hunting, fishing and foraging rights. In *Mille Lacs*, the Court rejected the "equal-footing" argument used in *Race Horse.* [11] Their reasoning for this rejection was that several cases following *Race Horse* had shown that state sovereignty over natural resource management could be reconciled with existing Indian treaty rights by giving the states the ability to enforce regulations on Indian treaty rights when needed for conservation. [12] [13] [14] Next, the Court stated that past cases had also shown that Congress had to "clearly express" any intent to extinguish treaty rights and no such intent was included in the Act which gave Minnesota statehood.

In conclusion, *Mille Lacs*, while it didn't explicitly overrule *Race Horse*, did repudiate that Court's primary arguments for its ruling and showed that unless the Act which admitted a State to the Union clearly expressed the intent to extinguish treaty rights, then the treaty rights that existed before admission remained intact. This landmark decision formed nearly the entire foundation of the majority opinion in *Herrera.*

While Wyoming itself had acknowledged that the "equal-footing" reasoning from *Race Horse* is flawed and did not pursue it in the *Herrera* case, it continued to argue that the language used in the 1868 Treaty with the Crow implied that the off-reservation hunting treaty rights would end when Wyoming was admitted into the Union. This, to the State, made *Herrera* different from *Mille Lacs*. As mentioned earlier, this is not how the Crow Tribe would have

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[11] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 at 205 (1999)
[12] *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*., 443 U. S. 658, 682 (1979)
[13] *Antoine v. Washington,* 420 U. S. 194, 207–208 (1975)
[14] *Puyallup Tribe v. Department of Game of Wash*., 391 U. S. 392, 398 (1968)

interpreted the treaty; therefore, Wyoming's argument was not considered sufficient reasoning to rule against Herrera.

When considering the validity of the Crow Tribe's treaty rights to hunt within Yellowstone National Park, there are several additional considerations. While *Herrera* showed that treaty rights could, at times, supersede state law, it did not display any evidence that treaty rights would take precedence over Acts of Congress, such as the creation of YNP and the Lacey Act of 1894 (also known as the Yellowstone Hunting Act of 1894). The primary questions regarding Tribal hunting rights within YNP are whether or not YNP is considered "unoccupied", and whether or not Congress "clearly expressed" that it meant to extinguish the rights of Tribes to hunt within YNP by passing the Yellowstone National Park Protection Act and the Lacey Act.

The Yellowstone National Park Protection Act of 1872, which created the park and designated its boundaries does not explicitly mention the treaty rights of Indian Nations. However, it does include language that would be relevant to a Court ruling on the legality of someone from the Crow Tribe hunting within the park. First of all, after delineating the park boundaries, the Act states that the park "is hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom." [15] This language explicitly states that the 2.2 million acres that make up YNP should be considered "an area free of residence or settlement by non-Indians." Thus, I would argue that Yellowstone National Park did not become "occupied" as

[15] Act creating Yellowstone National Park; Enrolled Acts and Resolutions of Congress, 1789-1996; General Records of the United States Government; Record Group 11; National Archives. (1872)

a result of the Yellowstone National Park Protection Act, and within the context of the 1868 Treaty with the Crow would fit the definition of "unoccupied lands of the United States."

Section 2 of the 1872 Act states that the Secretary of the Interior "shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit." [16] This language does not explicitly preclude the Indian tribes from hunting for subsistence within the park. However, the 1894 Lacey Act outlines more specifically the intentions of Congress regarding hunting within YNP. Section 4 of the act begins with "That all hunting, or the killing or wounding, or capturing at any time of any bird or wild animal, except dangerous animals, when it is necessary to prevent them from destroying human life or inflicting an injury, is prohibited within the limits of said park." Indian Tribes and their hunting rights are never mentioned in the Act. Given the historical context of the declining ungulate population in YNP leading up to this Act, which was falsely attributed to Indians hunting within the park, it may be implied that this Act was meant to extinguish the treaty rights of Tribes to hunt within the park. However, without mention of Indian Tribes, it is not entirely clear. Wyoming state law clearly outlines that hunting out of season or without a license is illegal, but the court ruled that this regulation did not take precedence over Crow treaty rights. The primary difference is that the Lacey Act of 1894 is Federal law, rather than State law.

Conclusion

Herrera showed that state law alone, without the state establishing an explicit need for conservation, was not enough to outweigh the treaty rights of the Crow. Yet, it is still unclear whether Federal law prohibiting hunting would hold more weight than state law. An argument could be made that Tribal hunting within the park could be regulated in a way that it would not

[16] Ibid.

pose significant threats to the long-term conservation of certain species within YNP, thus their treaty rights are reconcilable with the conservation aspect of the National Park Service's double-mandate.

In the *Race Horse* ruling, the Court stated "[t]hat 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty' is elementary" and "[o]f course the settled rule undoubtedly is that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by which both laws can coexist consistently with the intention of Congress." With this reasoning, it is questionable whether the Lacey Act of 1894 can coexist with the Crow Tribe's treaty hunting rights within Yellowstone National Park.

I believe it is unlikely that the Supreme Court would rule to uphold Tribal off-reservation hunting rights within YNP. Federal law and treaties are both considered "the Supreme Law of the Land" and technically hold the same power. However, since the courts have adequately shown that treaties can be altered by Federal legislation, I would posit that the Lacey Act of 1894 effectively extinguished Tribe's rights to hunt within YNP. Still, it could be argued that the Lacey Act of 1894 did not explicitly address Indian treaty rights and therefore did not show clear intent from Congress. Also, it would be possible to show that upholding Indian treaty rights does not have to conflict with the conservation mission of the Lacey Act and the 1872 YNP Protection Act.

Mainstream Americans, at least at first, would likely be opposed to the idea of tribal members hunting within YNP. However, I would posit that this challenge to beliefs about what a

healthy, functioning ecosystem looks like could be beneficial to a general public that has been taught to believe that humans are not a part of healthy ecosystems. Hunting can be used as a beneficial tool by Tribes and federal agencies to care for the Yellowstone landscape. Improving the relationships between Tribes and federal land management agencies could benefit the nation as a whole, as cross-boundary management of large landscapes like the GYA is essential for ecological health. Large fauna, like grizzly bear, elk, bison, and antelope do not adhere to political boundaries and the success of their population relies heavily on cooperative management. Additionally, the tribes that used the GYA for hundreds or thousands of years have an in-depth traditional knowledge of the land that will be essential in facing contemporary ecological challenges. Indigenous communities have called the GYA home for millennia. If stolen land is not to be repatriated, the public lands in the GYA should at the very least be co-managed by the Tribes alongside state and federal agencies.

Regardless of what the *Herrera* decision means for hunting within YNP, it has significantly altered off-reservation hunting in the GYA more broadly. The language regarding off-reservation hunting in the 1868 Treaty with Crow Tribe is the same as the 1868 Fort Bridger Treaty with the Shoshone-Bannock and Eastern Shoshone, so this ruling effectively reinstates the hunting rights granted in both treaties. Yet, it has not so far been tested in the State of Wyoming by these latter Tribes.

Just as state agencies and Tribal nations collaborate in managing the yearly buffalo hunt near Gardiner, MT, they have also made efforts to collaborate in managing off-reservation hunting. In August of 2019, the Crow Tribe adjusted its game codes to address off-reservation hunting in neighboring National Forests and Montana Fish, Wildlife, and Parks has agreed to not cite Tribal members, even if they are violating state law.

The *Herrera* ruling was an important step towards honoring the treaties that the United States signed with Tribal Nations and respecting their sovereignty. The right to access traditional foods is an essential component of cultural revitalization and restoring health to Indigenous communities. In the coming years, it will be essential that the courts of the United States respect the precedent set by *Herrera* and use it as a basis for upholding treaty rights for Tribes across the country. In regard to hunting in Yellowstone National Park, time will tell if the *Herrera* ruling will be used to justify new opportunities for Tribes to hunt within the park boundaries. In the past, the Tribes whose homelands are now YNP have respected the authority of the Lacey Act and since the *Herrera* ruling, no Tribe has shown the intent to challenge it. In conclusion, the case law surrounding off-reservation treaty hunting rights in the Greater Yellowstone Area is complex, but also remarkably interesting. It appeared that the Supreme Court, in its makeup before the death of Ruth Bader Ginsberg, was shifting in a positive direction for Indigenous sovereignty and self-determination with the ruling in *Herrera,* and the heavily publicized decision in *McGirt v. Oklahoma.* With the addition of Justice Amy Coney Barrett, the future of Federal Indian Law remains rather uncertain.