No. 21-8050

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CROW TRIBE OF INDIANS, et al.

Appellants,

v.

Chuck REPSIS, *et al.*,

Appellees.

Appeal from the U.S. District Court for the District of Wyoming,
Case No. 1:92-cv-01002-ABJ (Hon. Alan B. Johnson)

PLAINTIFF'S/APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Appellant, the Crow Tribe of Indians, is a Federally recognized Indian Tribe. *Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021). Because Appellant is neither a "nongovernmental corporation," Fed. R. App. P. 26.1, nor "formed as a limited liability company (LLC) partnership," 10th Cir. R. 26.1(A), no corporate disclosure statement is required.

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STATEMENT OF RELATED CASES

The Crow Tribe of Indians is not aware of any currently pending cases raising the same or similar issues. The following case is provided as a prior appeal under 10th Cir. R. 28.2(C)(3):

Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995)

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

1868 Treaty	Treaty Between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 650
1851 Treaty	Treaty of Fort Laramie with Sioux, Etc., 1851, 11 Stat. 749 (1851) and 2 Charles Kappler, Indian Affairs: Laws and Treaties (1904)
2020 Preclusion Order	Order on State's Request for Post-Remand Issue Preclusion, Wyoming v. Herrera, Case No. CT 2014-2687 (Wyo. Cir. Ct. 4th Jud. Dist., June 11, 2020)
Crow Tribe or Appellant	Crow Tribe of Indians
State or Appellees	State of Wyoming and its agents
WGFD 2020 Annual Report	Wyoming Game and Fish Department, U.S. Fish and Wildlife Service Comprehensive Management System Annual Report (2020), https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUALREPORT_2020.pdf

INTRODUCTION

In 1868, the Crow Tribe of Indians ("Crow Tribe" or "Appellant") ceded more than 30 million acres of territory to the United States. Herrera v. Wyoming, 139 S. Ct. 1686, 1692 (2019) (citing Treaty Between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 650 ("1868 Treaty")). Among the conditions of that cession was that Crow Tribe members would retain certain off-reservation hunting rights. Id. at 1692-93. Just two years ago, the U.S. Supreme Court affirmed both that the Crow Tribe's off-reservation hunting right has not been extinguished, and that Crow Tribe members can exercise that right in the Bighorn National Forest. See generally id.

This appeal concerns whether a 26-year-old decision of this Court can negate the Supreme Court's decision in Herrera. In Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) ("Repsis II") (Aplt. App'x at A.III.17-40), this Court made two key holdings. First, affirming the decision and the reasoning of the District Court,[1] this Court held that the Crow Tribe's off-reservation treaty hunting right was extinguished by

[1] Crow Tribe of Indians v. Repsis, 866 F. Supp. 520, 522-24 (D. Wyo. 1994) ("Repsis I") (Aplt. App'x at A.II.7-13).

Wyoming's statehood. Repsis II, 73 F.3d at 987-93 (Aplt. App'x at A.III.23-35). Second, and in the alternative, this Court held that even if the Crow Tribe's off-reservation treaty hunting right had survived, it could not be exercised in the Bighorn National Forest. Id. at 993 (Aplt. App'x at A.III.37-38). Those decisions cannot be reconciled with Herrera. This Court also stated, without identifying its statement as an alternative holding, that Wyoming's hunting laws were "reasonable and necessary for conservation." Repsis II, 73 F.3d at 993 (Aplt. App'x at A.III.37). But whatever necessity this Court saw then does not exist now, with elk populations far exceeding State management goals, and Wyoming game officials struggling to keep them in check. Changed law and changed facts leave no part of the Repsis II judgment viable today.

Nevertheless, Wyoming continues to invoke this Court's decision to justify prosecution of Crow Tribe treaty hunters. Order on State's Request for Post-Remand Issue Preclusion at 9-32, Wyoming v. Herrera, Case No. CT 2014-2687; 2688 (Wyo. Cir. Ct. 4th Jud. Dist., June 11, 2020) (the "2020 Preclusion Order") (Aplt. App'x A.VI.83-106). So the Crow

Tribe moved in the District Court, pursuant to Federal Rule of Civil Procedure 60(b), for relief from the Repsis judgments. Pl.'s Mot. Partial Relief from J. (Aplt's App'x at A.IV.41-43.) The District Court was the appropriate place to make such a motion. For decades it has been black letter law that appellate leave is not required for a Rule 60 motion, even when the judgment from which relief was sought has been affirmed by a higher court. Standard Oil Co. of Calif. v. United States, 429 U.S. 17 (1976). In fact, this Court eschewed the appellate-leave rule even before Standard Oil eliminated that rule nationwide. See Kodekey Elect. v. Mechanex Corp., 500 F.2d 110, 113 (10th Cir. 1974); Wilkin v. Sunbeam Corp., 402 F.2d 165, 166 (10th Cir. 1968) (per curiam). The District Court, however, denied the motion in relevant part because it mistakenly believed that it lacked authority to grant relief from its judgment when that judgment was affirmed on alternative grounds by this Court. Order on Relief from Judgment at 17-20 ("Order") (Aplt. App'x at A.IX.188-91).

This Court should reverse and remand to the District Court for consideration of the Crow Tribe's Rule 60 motion. In the alternative, if the District Court *does* lack authority to grant relief from this Court's decision, or simply in the interest of judicial economy, this Court should

itself grant the Crow Tribe's motion. This Court's alternative holding concerning the Bighorn National Forest is incompatible with the Supreme Court's holding in Herrera. In addition, to the extent that this Court authorized Wyoming's enforcement of its hunting regulations against Crow Tribe treaty hunters in 1995, the "necessity" that warranted such authority no longer exists today, as elk populations far exceed the State's own management goals.

JURISDICTIONAL STATEMENT

Jurisdiction was proper in the U.S. District Court for the District of Wyoming (1) pursuant to 28 U.S.C. § 1331, as the status of an Indian treaty right is a Federal question; (2) pursuant to 28 U.S.C. § 1362, as a "civil action[], brought by an[] Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States"; and (3) pursuant to 28 U.S.C. § 2201(a), as a plea for declaratory relief. The District Court entered its Order denying the Crow Tribe's Rule 60 motion, which was a final order disposing of all parties' claims, on July 1, 2021. See generally Order (Aplt. App'x at A.IX.172-91). This

Court has jurisdiction over the Crow Tribe's appeal of that Order pursuant to 28 U.S.C. § 1291. See FDIC v. United Pac. Ins. Co., 152 F.3d 1266, 1268 (10th Cir. 1998). Appellant timely noticed its appeal on July 26, 2021. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

For purposes of this Appeal, the Crow Tribe sought relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6), related to two aspects of this Court's opinion in Repsis II.[2] The District Court denied the motion, without considering the merits, because it believed it lacked authority to grant such relief. Order at 17-20 (Aplt. App'x at A.IX.188-91).

[2] Appellants also sought relief from the District Court's holding that the Crow Tribe's treaty hunting right was extinguished by Wyoming's statehood. See Repsis I, 866 F. Supp. at 522-24 (Aplt. App'x at A.II.7-13), aff'd Repsis II, 73 F.3d at 987-93 (Aplt. App'x at A.III.23-35). The District Court denied that aspect of the Crow Tribe's motion on the merits, while also observing that that aspect of the judgment had been rendered unenforceable. Order at 15-16 (Aplt. App'x at A.IX.186-87). The Crow Tribe does not appeal that aspect of the District Court's Order.

The issues presented are:

1. Did the District Court err in holding (1) that it lacked authority under Federal Rule of Civil Procedure 60 to grant relief from this Court's alternative holding(s), and (2) that the U.S. Supreme Court's decision in Standard Oil does not apply when a party seeks relief from a judgment that was reached in the alternative by a higher court? And,
2. Should this Court grant Appellant's Rule 60 motion, either because the District Court lacks authority to do so, or in the interest of judicial economy?

STATEMENT OF THE CASE

A. The Treaties

This case arises from two treaties between the Crow Tribe and the United States, and from subsequent actions the State of Wyoming and its agents ("State" or "Appellees") have taken in derogation of those treaties. The first treaty defined the Crow Tribe's traditional hunting areas. Treaty of Fort Laramie with Sioux, Etc., 1851, 11 Stat. 749 (1851) and 2 Charles Kappler, Indian Affairs: Laws and Treaties 594 (1904) (the

"1851 Treaty"). The second reserved to the Crow Tribe, among other things, "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." 1868 Treaty at art. IV. These treaties, just like the Constitution itself and Federal statutes, are "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2.

B. The Repsis Litigation

The Crow Tribe and Crow Tribe member Thomas L. Ten Bear (together "Plaintiffs"), initiated this action in 1992, seeking declaratory judgment that the Crow Tribe's off-reservation treaty hunting right had not been extinguished, and injunctive relief barring Defendants[3] from enforcing Wyoming hunting and fishing laws and regulations in contravention of those treaty rights. Repsis I, 866 F. Supp. at 521 (Aplt. App'x at A.II.3).

On cross motions for summary judgment, the District Court found in favor of Defendants and dismissed Plaintiffs' claims. See generally id.

[3] Defendants are various Wyoming State officials authorized to enforce the State's hunting regulations.

(Aplt. App'x at A.II.3-16). The District Court found that the factual and legal issues in Repsis were identical to those in Ward v. Race Horse, 163 U.S. 504 (1896). Repsis I, 866 F. Supp. at 522 & n.5 (Aplt. App'x at A.II.7-8, 8 n.5). It then held that Race Horse compelled a finding that the Crow Tribe's off-reservation treaty hunting right had been extinguished upon Wyoming's statehood. Id. at 522-24 (Aplt. App'x at A.II.7-13). Defendants made two alternative arguments: first, that the Bighorn National Forest was no longer "unoccupied lands" upon which the Crow Tribe could exercise its off-reservation treaty hunting right because "federal lands are occupied"; and second, that conservation necessity justified Wyoming's regulation of treaty hunting. Id. at 522 (Aplt. App'x at A.II.6). The District Court, however, did not reach those issues, and instead entered judgment based only upon its finding that the Crow Tribe's treaty right had been extinguished. See generally id. (Aplt. App'x at A.II.3-16).

The Crow Tribe appealed, and this Court affirmed. Repsis II, 73 F.3d 982 (Aplt. App'x at A.III.17-40). Like the District Court, this Court found Race Horse to be dispositive, and held that the Crow Tribe's off-

reservation treaty hunting right had been extinguished upon Wyoming's statehood. Id. at 987-93 (Aplt. App'x at A.III.23-35).

This appeal concerns two other aspects of this Court's Repsis II opinion. First, this Court articulated "an alternative basis for affirmance": that even if the off-reservation treaty hunting right survived Wyoming's statehood, the Crow Tribe could not exercise that right in the Bighorn National Forest because "the creation of the Big Horn [sic] National Forest resulted in the 'occupation' of the land." Id. at 993 (Aplt. App'x at A.III.38). Second, in a sentence fragment appended to its extinguishment holding, but *not* identified as an alternative holding, this Court stated that even if the off-reservation treaty hunting right survived Wyoming's statehood, "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 (citation to record omitted) (Aplt. App'x at A.III.37).[4] The Supreme Court denied *certiorari*. Crow Tribe of Indians v. Repsis, 517 U.S. 1221 (1996).

[4] In addition to dismissing Plaintiffs' treaty claims, the District Court also dismissed Plaintiffs' claims under the Unlawful Inclosures Act, Repsis I, 866 F. Supp. at 524-25 (Aplt. App'x at A.II.15-16); and this Court affirmed. Repsis II, 73 F.3d at 993-94 (Aplt. App'x at A.III.38-

C. The Herrera Litigation

In 2014, Clayvin Herrera was among a group of Crow Tribe members hunting elk within the boundaries of the Crow Reservation when they crossed into Wyoming and the Bighorn National Forest. Herrera, 139 U.S. at 1693. While there, Mr. Herrera and other members of his hunting party shot three bull elk and returned to the Reservation with the meat. Id. Mr. Herrera subsequently was charged with, and tried for, taking elk out of season and with being an accessory to the same. Id.

At trial, Mr. Herrera was not permitted to assert his treaty right as a defense, and he was convicted on both counts. Id. The State court imposed a one-year jail sentence, which it suspended; ordered Mr. Herrera to pay more than $8,000 in fines and court costs; and suspended his hunting privileges in Wyoming for three years. Id.; see also Br. for Pet. at 15, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532), 2018 WL 4293381 at *15 (Sept. 4, 2018).

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39). The Crow Tribe's Rule 60 Motion does not seek to disturb that portion of the judgment.

Mr. Herrera appealed, but the State appellate court affirmed both his conviction and his sentence. Herrera, 139 S. Ct. at 1694. First, it held *sua sponte* that this Court's Repsis II decision "merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the Repsis suit on behalf of itself and its members. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case." Herrera, 139 S. Ct. at 1694 (citations to the record omitted). The State appellate court also held, in the alternative and following Repsis II, that even if the Crow Tribe's off-reservation treaty hunting right survived, Mr. Herrera could not exercise it in the Bighorn National Forest because "the national forest became categorically 'occupied' when it was created." Herrera, 139 S. Ct. at 1694. The Wyoming Supreme Court denied a petition for review. Id.

The U.S. Supreme Court reversed and remanded. Id. at 1703. First, noting that Race Horse had articulated two different reasons why Wyoming's statehood had extinguished Tribal off-reservation treaty hunting rights, the Court held that Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), "upended both lines of reasoning in Race Horse." Herrera, 139 S. Ct. at 1696. Finding it "impossible to

harmonize Mille Lacs' analysis with the Court's prior reasoning in Race Horse," the Court rejected both Race Horse's equal footing holding and its holding that treaty rights of a "temporary and precarious" nature might be impliedly dissolved by statehood:

> We thus formalize what is evident in Mille Lacs itself. While Race Horse was not expressly overruled in Mille Lacs, it must be regarded as retaining no vitality after that decision. To avoid any future confusion, we make clear today that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

Id. at 1697 (internal quotations, citation omitted). Having rejected the Race Horse rationale that statehood itself was inconsistent with treaty hunting rights, the Court found that the Crow Tribe's off-reservation treaty hunting right has never been abrogated by Congress and, therefore, continues to this day. Id. at 1698-1700. "Applying Mille Lacs," the Court wrote, "this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the

circumstances in which the right will expire. Statehood is not one of them." Id. at 1700.[5]

The Court also rejected the State appellate court's alternative holding, concluding that "the Bighorn National Forest did not become categorically 'occupied' within the meaning of the 1868 Treaty when the national forest was created." Id. at 1700-03. Having reversed on both the substantive and procedural questions, the Court remanded to the State appellate court. Id. at 1703.[6]

On remand, Wyoming has argued that Repsis II precludes Mr. Herrera (and presumably any other Crow Tribe treaty hunter) from asserting his treaty rights within the Bighorn National Forest, notwithstanding Herrera, or from disputing the State's assertion of conservation necessity; the State trial court agreed, and upheld the jury verdict against Mr. Herrera. See generally 2020 Preclusion Order (Aplt.

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[5] The Court also held that Repsis II did not preclude Mr. Herrera from asserting his treaty rights because Mille Lacs had effected an intervening change in the law. Herrera, 139 S. Ct. at 1697-98.

[6] The Court allowed that, on remand, Wyoming "may press" two alternative defenses to the Crow Tribe's otherwise controlling treaty right: site-specific occupation within the Bighorn National Forest, and conservation necessity. Id.

App'x A.VI.75-107). Mr. Herrera has appealed, and the matter currently is before the Wyoming District Court, sitting in an intermediate appellate capacity.

D. The Present Action

After it became clear that Wyoming would continue to rely on this Court's Repsis II opinion, in defiance of Herrera, the Crow Tribe on January 27, 2021, moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6). See Crow Tribe's Mot. Partial Relief from J., (Aplt. App'x at A.IV.41-43). The motion was fully briefed, and the District Court heard argument on May 17, 2021. See Order at 1 (Aplt. App'x at A.IX.172). On July 1, 2021, the District Court denied the motion. See generally id. (Aplt. App'x at A.IX.172-91). As relevant to this appeal, the District Court first held that abstention was neither required nor warranted. Id. at 8-13 (Aplt. App'x at A.IX.178-84). Next, the District Court held that the Crow Tribe's Motion was timely. Id. at 13-15 (Aplt. App'x at A.IX.184-86). Turning to the merits, the District Court denied the motion with respect to the extinguishment holdings of both Repsis decisions, but also observed that, in the wake of Herrera, that aspect of the judgment "no longer stands as a barrier to the exercise of

treaty hunting rights." Id. at 16 (Aplt. App'x at A.IX.187). The Crow Tribe does not appeal from any of those decisions.

However, the District Court then held that it lacked authority to grant the Crow Tribe's motion with respect to the two aspects of this Court's opinion that were not originally reached by the District Court. Id. at 17-19 (Aplt. App'x at A.IX.188-90). The Crow Tribe demonstrated the District Court's authority to do so pursuant to Standard Oil, 429 U.S. 17, in which the Court held that a district court had authority to decide a Rule 60 motion even though the Supreme Court had affirmed district court's judgment. Pl.'s Mem. Supp. Mot. Partial Relief from J. at 13 (Aplt. App'x at A.V.62). The State did not dispute that the District Court had such authority, and the Court asked no questions about its authority at oral argument. See generally Tr. (Dkt. #83). Nevertheless, the District Court *sua sponte* held that it "d[id] not believe it ha[d] the power" to grant the Crow Tribe's motion. Order at 17 (Aplt. App'x A.IX.188).

The District Court first sought to distinguish Standard Oil. The District Court described Standard Oil as "a case that was affirmed on appeal," but that "did not address whether a district court can vacate an appellate court decision affirming the district court's judgment when the

appellate decision contains alternative holdings," which the District Court described as "distinct issues." Order at 17-18 (Aplt. App'x at A.IX.188-89). The District Court looked instead to Lapiczak v. Zaist, 54 F.R.D. 546, 549 (D. Vt. 1972), which it described as a "similar" case, and in which the district court denied a Rule 60(b) motion that sought relief from an appellate court decision. Order at 18 (Aplt. App'x at A.IX.189). The District Court then applied that reasoning to deny the Crow Tribe's motion for relief, with respect to both this Court's alternative holding concerning the status of the Bighorn National Forest, and this Court's statement concerning conservation necessity. Id. at 18-19 (Aplt. App'x at A.IX.188-90).

The Crow Tribe timely appealed.

SUMMARY OF ARGUMENT

First, the District Court erred in holding that it lacked authority to decide the Crow Tribe's Rule 60 motion. This Court has never required that parties seek its leave before making a Rule 60 motion. Kodekey Elect., 500 F.2d at 113; Wilkin, 402 F.2d at 166. Even if this Court had followed the appellate-leave rule, the Supreme Court vitiated that rule

in Standard Oil. 429 U.S. at 18-19. The District Court compounded its error in relying on Lapiczak, which is both completely inapposite and bad law. Where, as here, a party moving for Rule 60 relief properly alleges that such relief is warranted by circumstances that arose after the judgment, the District Court is in the best position—and has fully authority—to grant that relief. Because the District Court's failure to exercise its authority constitutes an abuse of discretion, this Court should reverse and remand for full consideration of the Crow Tribe's Rule 60 motion.

In the alternative (if the District Court does lack authority to grant the Crow Tribe's motion), or simply in the interest of judicial economy, this Court can and should itself grant the motion.

With respect to the status of the Bighorn National Forest, the Crow Tribe is entitled to relief pursuant to Rule 60(b)(6), which allows for relief for "any other reason that justifies relief." This Court's Repsis II holding that the Bighorn National Forest is "occupied" and, thus, off limits to Crow Tribe treaty hunting cannot be reconciled with the Supreme Court's decision in Herrera. A failure to grant the Crow Tribe relief effectively negates the Supreme Court's more recent decision, which this Court

cannot do. In addition, to the extent that this Court's statement that Wyoming's game laws were "reasonable and necessary for conservation" constitutes any binding judgment, this Court should grant also grant the Crow Tribe relief from that judgment. Rule 60(b)(5) allows for relief when "applying [the judgment] prospectively is no longer equitable." Here, any finding of conservation necessity 25 years ago, when northern Wyoming elk populations were near management goals, has no purchase today, when the State's own game managers admit their inability to control elk populations that far exceed management goals.

ARGUMENT

I. The District Court erred in holding that it lacked authority to decide the Crow Tribe's Rule 60 motion.

Ordinarily, this "court reviews the district court's denial of a Rule 60(b) motion for abuse of discretion." United Pac. Ins., 152 F.3d at 1272. In the present case, however, the District Court did not exercise its discretion; rather, it found as a matter of law that it had no discretion to grant the Crow Tribe's motion. Order at17-19 (Aplt. App'x at A.IX.188-90). Thus, the question for this Court is not whether the District Court abused its discretion in denying the motion, but instead whether the

District Court's failure to exercise its discretion was itself an abuse of discretion. See United Pac. Ins., 152 F.3d at 1274 ("The district court was therefore not precluded by this court's mandate from considering the Rule 60(b) motions. The district court's denial of relief on the ground that such denial was dictated by this court's mandate thus constituted an abuse of discretion.").[7]

To determine whether the District Court's failure to exercise its discretion was in error, and thus an abuse of its discretion, this Court must determine whether the District Court properly construed Rule 60, a question this Court reviews de novo. Republic of Ecuador v. For Issuance of Subpoena under 28 U.S.C. § 1782(a), 735 F.3d 1179, 1183

[7] See also LSLJ P'ship v. Frito-Lay, Inc., 920 F.2d 476, 479 (7th Cir. 1990) ("A motion to vacate a judgment pursuant to Rule 60(b) is addressed to the sound discretion of a district court and a denial of a Rule 60(b) motion will not be overturned on appeal in the absence of discretion. However, a trial court may abuse its discretion by failing to exercise its discretion. Furthermore, the abuse of discretion standard implies that the judge must actually exercise his discretion." (cleaned up)); accord Logan v. Burgers Ozark Country Cured Hams Inc., 64 Fed. App'x 416 at *3 (5th Cir. unpub. 2003) ("Generally, Rule 60(b) rulings are reviewed only for abuse of discretion. Here, however, we are not reviewing the merits of the reentered May 2000 order; instead, we are deciding whether the district court had *authority* . . . to take such action. This is a purely legal issue, reviewed *de novo*." (emphasis in original)).

(10th Cir. 2013) (citing Esposito v. United States, 368 F.3d 1271, 1275 (10th Cir. 2004)). If the District Court misconstrued Rule 60, and that error caused the District Court to fail to properly exercise its discretion, then that error was itself an abuse of discretion. United Pac. Ins., 152 F.3d at 1272 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.") (quoting Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 727 (10th Cir. 1993) (quoting, in turn, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)).

A. The District Court erred by failing to follow Standard Oil.

Since the Supreme Court decided Standard Oil in 1976, it has been black-letter law that a district court may decide a proper Rule 60 motion without seeking leave of any appellate court, even when the judgment from which relief is sought was ordered by the appellate court. 429 U.S. at 19. This Court has held to that rule even longer. See Wilkin, 402 F.2d at 165-66. The Supreme Court articulated four reasons for this rule, three of which are relevant to this proceeding. First, while the original judgment and the appellate decision arise from "the record and issues then before the court," a proper Rule 60 motion arises from "later events,"

and therefore a district court's grant of Rule 60 relief based on those later events does not disrespect the appellate court's mandate. Standard Oil, 429 U.S. at 18. Second, the Court was not persuaded that the appellate-leave requirement helped to screen out frivolous Rule 60 motions: "[W]e have confidence in the ability of the district courts to recognize frivolous Rule 60(b) motions. Indeed, the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b).'" Id. at 19 (quoting Wilkin, 405 F.2d at 166). Third, "[t]he appellate-leave requirement adds to the delay and expense of litigation and also burdens the increasingly scarce time of the federal appellate courts." Id.[8]

The District Court *sua sponte* distinguished this case from Standard Oil because the Crow Tribe sought relief from alternative holdings reached by this Court that were not addressed in the District Court's entry of summary judgment. But that distinction is of no material consequence. Standard Oil rejected the appellate leave rule—it

[8] The Court's fourth reason, that "the interest in finality is no more impaired" when a movant fails to first obtain leave of the appellate court "than in any Rule 60 proceeding," id. at 19, is not relevant in this case, because the State did not argue, and the District Court did not hold, that the finality of the judgment would be better protected through an appellate-leave requirement.

did not create an exception generally for when the district court's reasoning and the appellate court's reasoning are not aligned, or specifically when the appellate court affirmed on alternative grounds not reached by the district court.

Nor has this Court made any such distinction; instead, this Court has said the critical question is whether the Rule 60 motion is based on facts that arose or were discovered after the original trial. United Pac. Ins., 152 F.3d at 1273 ("a district court may consider a Rule 60(b) motion to reopen a decision that has been affirmed on appeal when the basis for the motion was not before the appellate court or resolved on appeal.") (citing Standard Oil, 429 U.S. at 18-19). At least two Circuit Courts have held that a district court may grant Rule 60(b) relief even when the appellate court *reversed* the district court. Hernandez v. Results Staffing, Inc., 907 F.3d 354, 359-61 (5th Cir. 2018); DeWeerth v. Baldinger, 38 F.3d 1266, 1270-71 (2d Cir. 1994). If a district court has authority to grant Rule 60(b) relief when its judgment was *reversed* by the appellate court, then surely a district court has authority to grant Rule 60(b) relief where, as here, its judgment was *affirmed* by the

appellate court, which also articulated an alternative ground (or grounds) for affirmance.

Finally, the District Court erred in relying on Lapiczak. Lapiczak *is not good law*: it was decided four years before Standard Oil, and embraces the very appellate-leave rule that Standard Oil invalidated and that this Court has never embraced. Compare Lapiczak, 54 F.R.D. 546, with Standard Oil, 429 U.S. at 18-19, and Wilkin, 405 F.2d at 166. Moreover, the District Court cites Lapiczak for the proposition that a district court may not grant Rule 60(b) relief simply because it believes that the appellate court's decision was erroneous. Order at 18 (Aplt. App'x at A.IX.189). While that certainly is true, the Crow Tribe's Rule 60(b) motion did not argue that this Court erred in Repsis II. The Crow Tribe sought Rule 60(b) relief because (1) the Repsis II alternative holding concerning the status of the Bighorn National Forest cannot be reconciled with the Supreme Court's subsequent and controlling holding in Herrera; and (2) if Repsis II made a conservation necessity holding, "applying it prospectively is no longer equitable," Fed. R. Civ. P. 60(b)(5), because of changed factual circumstances.

As previously noted, even before Standard Oil, this Circuit did not require leave of this Court for a district court to consider a Rule 60 motion, even when the judgment from which relief was sought had been affirmed by this Court. See Kodekey Elect., 500 F.2d at 113 (holding that Wilkin "eliminated the necessity of obtaining prior permission from the court of appeals" to consider a Rule 60(b) motion). Standard Oil nationalized this Court's approach. And the District Court erred by failing to follow Standard Oil.

B. The Crow Tribe's Rule 60(b) motion meets all of Standard Oil's substantive requirements.

First, the Crow Tribe properly alleged that "later events," Standard Oil, 429 U.S. at 18, warranted granting relief from the judgment. With respect to the status of the Bighorn National Forest, the Crow Tribe argued that Court's alternative holding that the creation of the Bighorn National Forest "occupied" those lands for purposes of the Crow Tribe's treaty hunting right, Repsis II, 73 F.3d at 993 (Aplt. App'x at A.III.37-38), cannot be reconciled with the Supreme Court's subsequent holding to the contrary in Herrera. 139 S. Ct. at 1700-03. Pl.'s Mem. Supp. Mot. Partial Relief from J. at 15-17 (Aplt. App'x at A.V.64-66). With respect to conservation necessity, the Crow Tribe argued that after this Court

stated that Wyoming's game laws "were reasonable and necessary for conservation," Repsis II, 73 F.3d at 993 (Aplt. App'x at A.III.37), elk rebounded so robustly that the State is now actively working to *reduce* elk numbers, thus negating any conservation necessity. Pl.'s Mem. Supp. Mot. Partial Relief from J. at 17-22 (Aplt. App'x at A.V.66-71).

Second, because "the trial court is in a much better position [than an appellate court] to pass on the issues presented," Standard Oil, 429 U.S. at 19 (quoting Wilkin, 405 F.2s at 166)), i.e., the changed factual circumstances upon which the Crow Tribe's 60(b) motion is based, review was proper in the District Court. Specifically, in arguing that "applying [this Court's conservation necessity statement] prospectively is no longer equitable," Fed. R. Civ. P. 60(b)(5), the Crow Tribe's motion contrasts Wyoming's elk population numbers when this Court made its conservation necessity statement with current elk population numbers. Pl.'s Mem. Supp. Mot. Partial Relief from J. at 19-21 (Aplt. App'x at A.V.68-70). Standard Oil counsels that such evidence is best presented to, and passed upon by, a district court.

Third, the very fact of this appeal demonstrates that the District Court's erroneous decision that it lacked authority to decide the Crow

Tribe's Rule 60(b) motion already has "add[ed] to the delay and expense of litigation and also burden[ed] the increasingly scarce time of" this Court. Standard Oil, 429 U.S. at 19.

C. In the alternative, if this Court's mandate bars the District Court from deciding the Crow Tribe's Rule 60 motion, this Court may recall its mandate and remand to the District Court.

"In this circuit, as in all circuits that have addressed the issue, 'an appellate court has the power to set aside at any time a mandate . . . to prevent injustice, or to preserve the integrity of the judicial process.'" Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah, 114 F.3d 1513, 1522 (10th Cir. 1997) (quoting Coleman v. Turpen, 827 F.2d 667, 671 (10th Cir. 1987)). In so doing, this Court may simultaneously "remand the matter for further consideration" by the District Court. James Barlow Family Ltd. P'ship v. David M. Munson, Inc., 132 F.3d 1316, 1316 (10th Cir. 1997).

For example, in Ute Indian Tribe, this Court acknowledged that the Supreme Court's decision in Hagen v. Utah, 510 U.S. 399 (1994), was at least in part "contrary to our decision in" Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc). Ute Indian Tribe, 114 F.3d at 1515. Consequently, this Court "conclude[d] that modification of our earlier

judgment [was] appropriate, not merely because the two decisions are incongruent, but because of the effect of the incongruency on the interests of uniformity and the integrity of our system of judicial decisionmaking." Id. at 1527. To achieve consistency with Hagen, this Court then "modif[ied] our earlier judgment only to the extent that it directly conflicts with the holding in Hagen." Id.

If this Court's mandate is a barrier to the District Court's consideration of the Crow Tribe's Rule 60 motion, then this Court should recall its mandate "for good cause shown," Coleman, 827 F.2d at 671, and remand to the District Court for further consideration of the motion. Such a remand would be consistent with Standard Oil's reasoning, as it would allow the District Court to consider changes in law and fact arising after this Court's mandate that warrant relief from judgment. As discussed herein, if this Court's mandate is a barrier to the District Court's consideration of the Crow Tribe's Rule 60 motion, good cause exists for this Court to recall its mandate.

II. If this Court does not remand to the District Court, then it should grant the Crow Tribe's Rule 60 motion.

Federal Rule of Civil Procedure 60 provides a mechanism by which a party may obtain relief from judgment. Relief under the rule is "an extraordinary remedy and may only be granted in exceptional circumstances." Jackson v. Los Lunas Cmty. Program, 880 F.3d 1176, 1191-92 (10th Cir. 2018).

Although remand to the District Court is appropriate, in accordance with Standard Oil, this Court can instead, "in the interest of judicial economy and efficiency," address the merits of the Crow Tribe's motion. Gokool v. Oklahoma City Univ., 770 Fed. Appx. 894, 896 (10th Cir. 2019). Doing so would be consistent with Standard Oil's goal of avoiding "the delay and expense of litigation and also burdens [on] the increasingly scarce time of the federal appellate courts." 429 U.S. at 19.

Should this Court proceed to the merits, it should grant the Crow Tribe's motion with respect to both the status of the Bighorn National Forest and any conservation necessity.

A. This Court should vacate its mandate with respect to the status of the Bighorn National Forest, which cannot be reconciled with the U.S. Supreme Court's decision in Herrera.

Rule 60 sets forth specific grounds for relief in sections (b)(1)-(5), and also provides that a court may grant relief from judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Tenth Circuit has described this rule as "a grand reservoir of equitable power to do justice in a particular case." Manzanares v. City of Albuquerque, 628 F.3d 1237, 1241 (10th Cir. 2010) (quoting State Bank v. Gledhill (In re Gledhill), 76 F.3d 1070, 1080 (10th Cir. 1996)). Relief under Rule 60(b)(6) "is appropriate only 'when it offends justice to deny such relief.'" Yapp v. Excel Corp., 186 F.3d 1222, 1232 (10th Cir. 1999) (quoting Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996)).

1. This Court's alternative holding in Repsis II, to the extent that it constitutes part of the judgment,[9] cannot be reconciled with the

[9] The Crow Tribe does not concede that the Repsis II alternative holding concerning the Bighorn National Forest constitutes part of the judgment. This Court affirmed the District Court's judgment, which said nothing about the status of the Bighorn National Forest, Repsis II, 73 F.3d at 982; and this Court does not give preclusive effect to alternative holdings. See Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292, 1297 n.1 (10th Cir. 2014). Wyoming's attempt to give this alternative holding preclusive effect, notwithstanding Tenth Circuit

Supreme Court's decision in Herrera, and because Herrera must control it would "offend justice" to deny the Crow Tribe's motion. Yapp, 186 F.3d at 1232 (quoting Cashner, 98 F.3d at 580).

In Repsis II, this Court held that the Crow Tribe "has no right to hunt in the Big Horn National Forest in violation of Wyoming's game laws since the treaty reserved an off-reservation hunting right on 'unoccupied' lands and the lands of the Big Horn National Forest are 'occupied.'" 73 F.3d at 993. This Court reasoned that the creation of the Bighorn National Forest in 1887 "expressly mandated that the national forest lands be managed and regulated for specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber." Id. (citation omitted). In this Court's view, because the Bighorn National Forest lands "were no longer available for settlement," nor could anyone "timber, mine, log, graze cattle, or homestead on these lands without federal permission, . . . the creation of the Bighorn National Forest resulted in the 'occupation' of the land." Id. (citations omitted).

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precedent, see 2020 Preclusion Order at 9-12, 16-19 (Aplt. App'x at A.VI.83-86, 90-93), is one reason that Rule 60(b) relief is necessary.

In Herrera, the Supreme Court held otherwise. 139 S. Ct. at 1700-03. Drawing on historical materials and interpreting the treaty language as the Crow Tribe would have understood it when it was negotiated, id. at 1701-02, the Supreme Court held that "unoccupied" lands were those "free of residence or settlement by non-Indians." Id. at 1701. In fact, because the creation of the Bighorn National Forest barred "entry or settlement" within the Forest, the Court reasoned that the creation of the Forest, "[i]f anything . . . made [the] Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty [off-reservation hunting] right." Id. at 1702. Accordingly, the Court held "that the creation of the Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty." Herrera, 139 S. Ct. at 1702-03.

2. The Crow Tribe is entitled to relief. "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." Horne v. Flores, 557 U.S. 443, 450 (2009). The 1868 Treaty is one such federal law. U.S. CONST. art. VI, cl. 2. The Supreme Court has held, directly contrary to Repsis II, that creation of the Bighorn National Forest *did not* categorically "occupy" those lands

for purposes of the Crow Tribe's off-reservation treaty hunting right. Herrera, 139 S. Ct. at 1700-03. Relief under Rule 60(b)(6) is appropriate, and this Court should utilize that Rule's "grand reservoir of equitable power to do justice," Manzanares, 628 F.3d at 1241 (quoting In re Gledhill, 76 F.3d at 1080), and grant the Crow Tribe's motion. Preserving the Repsis II alternative holding would serve no equitable purpose, and instead would "offend[] justice," Yapp, 186 F.3d at 1232 (quoting Cashner, 98 F.3d at 580), by barring Crow Tribe members from exercising their treaty rights in a place where the Supreme Court has unequivocally held that they may exercise those rights.

B. This Court should vacate or modify any holding of conservation necessity because, as a result of changed factual circumstances, "applying it prospectively is no longer equitable."

Rule 60(b)(5) allows a party to seek relief from judgment where, *inter alia*, "applying [the judgment] prospectively is no longer equitable."[10] Under this provision, a court may grant relief "if 'a

[10] The same rule permits relief when "the judgment has been satisfied, released, or discharged; [or] it is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). "Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient" to grant relief. Horne, 557 U.S. at 454.

significant change in either factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" Horne, 557 U.S. at 447 (quoting Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992)). "A movant may establish that changed factual circumstances warrant modification when . . . 'enforcement of the [judgment] without modification would be detrimental to the public interest.'" Jackson, 880 F.3d at 1201 (quoting Rufo, 502 U.S. at 384).

Under Rule 60(b)(5), "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." Horne, 557 U.S. at 447 (2009) (citing Rufo, 502 U.S. at 383). However, "once a party carries this burden, a court abuses its discretion" when it fails to grant appropriate relief. Id. (citing Agostini v. Felton, 521 U.S. 203, 215 (1997)).

1. As an initial matter, the parties dispute whether this Court's conservation necessity statement in Repsis II was an alternative holding that is part of the judgment. The Crow Tribe argued below that the conservation necessity statement was mere *obiter dictum*, the State disagreed, and the District Court did not address this question. This Court can resolve that ambiguity. Security Mut. Cas. Co. v. Century Cas.

Co., 612 F.2d 1062, 1064 (10th Cir. 1980) ("If there is any ambiguity or obscurity or of the judgment fails to express the rulings in the case with clarity or accuracy, reference may be had to the findings and the entire record for the purpose of determining what was decided." (citing Moore v. Harjo, 144 F.2d 318, 321 (10th Cir. 1944)); see also United States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005) ("[W]here an order or judgment is unclear, a court retains inherent authority to interpret ambiguities."). For the reasons articulated below, this Court should hold that its Repsis II opinion *did not* make a "conservation necessity" finding.

Conservation necessity may warrant State regulation of Tribal treaty hunting and fishing; however, this Court made no such holding in Repsis II. Instead, after holding that the Crow Tribe's off-reservation treaty hunting right had been extinguished, this 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." 73 F.3d at 993 (Aplt. App'x at A.III.37).

There are three reasons why this statement does not constitute a conservation necessity holding. First, it addresses only one of the three elements of a conservation necessity holding. The Supreme Court has

held that a State seeking to regulate Tribal treaty hunting on the basis of conservation necessity must prove three elements: (1) "that its regulation is a reasonable and necessary conservation measure," (2) "that [the regulation's] application to the Indians is necessary in the interest of conservation," and (3) that "the regulation . . . does not discriminate against the Indians." Antoine v. Washington, 420 U.S. 194, 207 (1975) (internal quotations and citations omitted). This Court's description of Wyoming's regulations as "reasonable and necessary for conservation" satisfies only the first of those three elements, and says nothing about the other two elements. Thus, under the standard the Supreme Court has established, this Court's statement in Repsis II cannot be a conservation necessity holding.

Second, although this Court used the word "hold," it did not identify its statement as an alternative holding. Contrast the conservation necessity statement with the very next sentence in Repsis II, which begins the alternative holding concerning the Bighorn National Forest: "As an alternative basis for affirmance of the district court's dismissal of the Tribe's action . . . ." 73 F.3d at 993 (Aplt. App'x at A.III.37). Next, Repsis II recites the standard for reaching an alternative holding. Id.

(Aplt. App'x at A.III.37) (quoting United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994)). Neither of these hallmarks of an alternative holding is present in the conservation necessity statement, which is a mere sentence fragment. Thus, it appears that this Court did not see its conservation necessity statement as an alternative holding.[11]

Third, the evidentiary standard this Court articulated in its conservation necessity statement was not sufficient to resolve a summary judgment motion on appeal. Compare id. (Aplt. App'x at A.III.37) ("[T]here is *ample evidence in the record* to support the State's contention that its regulations were reasonable and necessary for conservation" (emphasis added)); with Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is *no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law." (emphasis added)).

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[11] Likewise, the Supreme Court did not see conservation necessity as a part of the Repsis II judgment. The Herrera majority addressed conservation necessity only to allow that the State could assert conservation necessity on remand. 139 S. Ct. at 1703. The dissent said that the Repsis II "judgment was based on two independent grounds," which it identifies as the extermination of the Crow Tribe's treaty hunting right upon Wyoming's statehood and the occupation of the Bighorn National Forest, but said nothing about any Repsis II conservation necessity holding. Id. (Alito, J., dissenting).

This Court should clarify that conservation necessity is not part of the Repsis II holding. If, however, conservation necessity is part of the holding, this Court should grant the Crow Tribe's motion and vacate that part of the holding because changes in the factual circumstances mean that "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

2. Rule 60(b)(5) allows for relief from a judgment that has "prospective" effect. Fed. R. Civ. P. 60(b)(5). For a judgment to have prospective effect, it must be "executory or involve[] supervision of changing conduct or conditions." Dowdell by Dowdell v. Bd. of Educ. of Oklahoma City Sch., Indep. Dist. No. 89, 8 F.3d 1501, 1509 (10th Cir. 1993) (citing Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138-39 (D.C. Cir. 1988)). The most common such judgments are injunctions and consent decrees.

A conservation necessity finding is similar to an injunction or consent decree. An injunction, for example, may "remain in force for many years, and the nature of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its implementation by the courts, and new

policy insights—that warrant reexamination of the original judgment." Horne, 557 U.S. at 447-48. The same is true of a conservation necessity finding, as evidenced by the fact that Wyoming continues to rely on the Repsis II conservation necessity statement *25 years later* to regulate the Crow Tribe's off-reservation treaty hunting rights. See 2020 Preclusion Order at 5-8 (Aplt. App'x at A.VI.79-82).

And just as courts have found that changed circumstances may warrant Rule 60(b)(5) relief from an injunction, changed circumstances also warrant modification or vacatur of a finding of conservation necessity. See Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n, 42 F.3d 1278, 1283 (9th Cir. 1994) ("The circumstances of each year's salmon run are different, and the necessary conservation measures will change with them.").

This principle is illustrated in United States v. Oregon. 769 F.2d 1410 (9th Cir. 1985). In Oregon, the district court approved a particular state regulation of tribal treaty fishing in 1977, and again in 1982, on the basis of conservation necessity. Id. at 1412-13. Just one year later, however, circumstances had changed: "The evidence showed that the runs of certain species of fish had declined, but that the steelhead runs

in general had improved, and that surplus coho and jack salmon would escape under the States' regulations." Id. at 1417. Because the populations had rebounded, the district court struck down comparable regulations, and the circuit court affirmed. Id. at 1416-17; see also Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 46 (1973) (noting Washington regulation for conservation necessity required that new regulations of tribal fishing must be made each year and supported by "facts and data that show the regulation is necessary for the conservation" of the species) (citation omitted); id. at 48-49 (explaining that such regulation can only be valid against an otherwise preemptive treaty right "until the species regains assurance of survival").

3. Changed circumstances—namely, overpopulation of elk both statewide, and in and around the Bighorn National Forest—warrant granting the Crow Tribe relief from any Repsis II judgment of conservation necessity. Where tribal treaty hunting or fishing rights are at issue, a finding that conservation necessity warrants state regulation of those rights necessarily requires a finding "that it is highly probable that irreparable harm [to the species or resource needing conservation] will occur and that the need for regulation exists." United States v.

Michigan, 653 F.2d 277, 279 (6th Cir. 1981); United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) (conservation necessity doctrine allows a state to preserve a "reasonable margin of safety" between the existing population of a species and "the imminence of extinction."). "In the absence of such a showing, the state may not restrict Indian treaty [hunting] . . . ." Michigan, 653 F.2d at 279.

When the Crow Tribe filed its Complaint in 1992, the elk population in the Bighorn National Forest was very close to Wyoming's management objective:

> The total winter count for elk was 2,504 compared to [the Wyoming Game and Fish Department]'s objective of 2,500. The elk count within the Kerns Big Game Winter Range which is located immediately north of the [Bighorn National Forest] was 656, which showed a decline over the previous two years.

Crow Tribe Mem. Opp. Defs.' Mot. Summ J. at 19-20 n.14 (Aplt. App'x at A.VII.132-33 n.14), (citing Application for License for a Major Unconstructed Project, FERC No. 10725.000 at E.3-47 (Dry Fork Energy Storage Project) submitted by Little Horn Energy, Wyoming, Inc., May 1992) (Aplt. App'x at A.VIII.150).

The most recent data show elk overpopulation both statewide and in and around the Bighorn National Forest. The statewide elk population

of 112,900 is more than 40 percent over the statewide population objective of 79,125. Wyoming Game and Fish Department, U.S. Fish and Wildlife Service Comprehensive Management System Annual Report A-3 (2020) ("WGFD 2020 Annual Report"), https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUALREPORT_2020.pdf. It should come as no surprise, then, that "the Department continues to apply management strategies *to reduce Wyoming elk numbers*," such as allowing hunters to "obtain up to three elk licenses per year." Id. (emphasis added). Despite the State's efforts to reduce elk populations, "conditions are such that *elk numbers remain difficult to decrease*." Id. (emphasis added).

The North Bighorn elk herd is experiencing similar overpopulation. The State last year reported the North Bighorn herd population to be 5,575, which is 28 percent above objective of 4,350. Wyoming Game and Fish Department, Sheridan Region Job Completion Report 42 (2019), https://wgfd.wyo.gov/WGFD/media/content/PDF/Hunting/JCRS/SN-Region-JCRs-2019-Final.pdf.[12] Because of this overpopulation, "[i]n

[12] The North Bighorn herd is in Hunt Areas 35-40, in and around the Bighorn National Forest; areas 38 and 39 border the Crow Reservation. See Wyoming Game and Fish Department, Elk Hunting,

recent years, liberal hunting seasons were designed to increase harvest *with the intent of reducing elk population*." Id. at 44 (emphasis added).

Now that elk populations consistently and significantly exceed State management objectives, both statewide and in the Bighorn National Forest, applying prospectively any judgment resulting from the Repsis II statement concerning conservation necessity "is no longer equitable" and Rule 60(b)(5) relief is appropriate. If there is a conservation necessity judgment, these changed circumstances require this Court to vacate it. Oregon, 769 F.2d at 1416-17.

4. In determining whether to grant Rule 60(b)(5) relief, a court also may ask whether the objective of the original judgment has been met. Horne, 557 U.S. at 450; Jackson, 880 F.3d at 1201. The obvious objective of any conservation necessity finding is the recovery of a species to the point where the state's regulation of treaty hunting no longer is necessary. See Puyallup, 414 U.S. at 48-49 (regulation for conservation necessity only valid "until the species regains assurance of survival");

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https://wgfd.wyo.gov/Hunting/Hunt-Planner/Elk-Hunting/Elk-Map (last visited Sept. 19, 2021).

Oregon, 769 F.2d at 1416-17 (affirming vacatur of conservation necessity regulations after fish population rebounded).

As demonstrated in Part II.B.3, supra, the conservation objective implicated by the Repsis II statement has been met: elk populations far exceed Wyoming's management objectives. If the survival of elk in the Bighorn National Forest ever was in doubt, it certainly is not now, as Wyoming is actively managing elk to *reduce their population*. WGFD 2020 Annual Report, at A-3. Consequently, applying prospectively any judgment arising from the Repsis II conservation necessity statement "is no longer equitable," and equity requires that this Court grant the Crow Tribe Rule 60(b)(5) relief and vacate any such judgment.

5. Even if Rule 60(b)(5) is not the appropriate vehicle for granting the Crow Tribe relief from any judgment arising from the Repsis II conservation necessity statement, this Court should grant relief pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power to do justice." Manzanares, 628 F.3d at 1241 (quoting In re Gledhill, 76 F.3d at 1080).

CONCLUSION

For the aforementioned reasons, this Court should REVERSE the District Court and REMAND for consideration of the Crow Tribe of Indians' Rule 60 motion. In the alternative, if the District Court lacks authority to hear the motion, then this Court should GRANT IN PART the Crow Tribe of Indians' Rule 60 motion and VACATE those portions of this Court's Mandate and/or of the Judgment holding that (1) the creation of the Bighorn National Forest "occupied" those lands and thereby placed them off-limits to the Crow Tribe's off-reservation treaty hunting right; and (2) the State of Wyoming's regulation of Crow Tribe treaty hunting is warranted by conservation necessity.

Respectfully submitted,

DATED this 27th day of September, 2021.

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REQUEST FOR ORAL ARGUMENT

The Treaty between the United States of America and the Crow Tribe of Indians, art. IV, 15 Stat. 649 (1868), is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In Herrera v. Wyoming, 139 S. Ct. 1686 (2019), the U.S. Supreme Court affirmed (1) that the Crow Tribe's off-reservation hunting right, guaranteed in that treaty, continues to this day, id. at 1698-1700; (2) that the creation of the Bighorn National Forest did not categorically "occupy" those lands for purposes of the Crow Tribe's treaty hunting right, id. at 1700-03; and (3) that if the State wishes to argue that its regulation of treaty hunting is justified by conservation necessity it must demonstrate such necessity. Id. at 1703. The State, maintains that this Court's opinion in Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) (Aplt. App'x at A.III.17-40), precludes Crow Tribe treaty hunters who face criminal or civil prosecution by the State of Wyoming from asserting a treaty rights defense for hunting within the Bighorn National Forest, and also precludes Crow Tribe treaty hunters from requiring that the State prove any asserted conservation necessity—both arguments that cannot be reconciled with Herrera. This is precisely the sort of circumstance that Rule 60 was crafted to remedy;

yet, the District Court, under a mistaken understanding of its authority, declined to consider the merits of the Crow Tribe's Rule 60 motion. Because this case implicates Federal rights of the highest order, and because this case presents a novel question of Rule 60's application, Appellants believe that oral argument will prove both appropriate and helpful to the Court in ensuring full deliberation of the issues presented. Appellants, therefore, request oral argument, with each side allotted twenty (20) minutes.

CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 32(g) and Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), this document contains 8,899 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font and Century font style.

Date: September 27, 2021 /s/ Daniel D. Lewerenz

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2021, a copy of the foregoing **PLAINTIFF'S / APPELLANT'S OPENING BRIEF** was electronically filed using the Court's CM/ECF management system which will send notification of such filing to the following:

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