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CASE NO. 21-8050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CROW TRIBE OF INDIANS, *et al.,*

Appellants,

v.

CHUCK REPSIS, *et al.*

Appellees,

On Appeal from the United States District Court for the District of Wyoming,
The Honorable Alan B. Johnson
Case No. 1:92-cv-1002-ABJ

APPELLEES' BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no pending federal appeals related to this case. This Court previously decided the merits of this case in *Crow Tribe of Indians v. Repsis,* 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). A related action is currently pending in Wyoming state district court as more fully explained in the body of this brief. *See Herrera v. State,* No. CV-2020-273 (Wyo. 4th Dist. Ct., Sheridan Cty.).

STATEMENT OF JURISDICTION

Appellees, Chuck Repsis and Brian Nesvik,[1] agree with Appellant, the Crow Tribe of Indians' (Crow Tribe), statement of jurisdiction.

[1] The Appellees in this matter are Chuck Repsis, the relevant game warden at the time this action was commenced, and Brian Nesvik, the current Director of the Wyoming Game and Fish Department. Director Nesvik was substituted for Francis Petera who was the Director of the Department at the time this action was commenced. *See* Fed. R. Civ. P. 25(d).

STATEMENT OF THE ISSUES

I. Did the district court properly adhere to the law of the case doctrine, specifically the mandate rule, when it declined to relieve the Crow Tribe from the judgment entered in this matter and affirmed on appeal?

II. Even if the district court incorrectly followed the mandate rule, is the Crow Tribe entitled to relief from the judgment under Rule 60(b)?

III. Should the Court recall the mandate in this case and reconsider its prior rulings in light of the United States Supreme Court's decision in *Herrera v. Wyoming,* — U.S. —, 139 S. Ct. 1686 (2019) or because the Crow Tribe asserts that the facts have changed?

STATEMENT OF THE CASE

I. Introduction

Twenty-six years ago, this Court affirmed a decision of the District Court for the District of Wyoming for three distinct and equally effective reasons. *Crow Tribe of Indians v. Repsis,* 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). In 2019, in a different case, the United States Supreme Court disagreed with two of those reasons and held that the primary reason offered by this Court did not have issue-preclusive effect. *Herrera v. Wyoming,* — U.S. —, 139 S. Ct. 1686 (2019). But the Supreme Court declined to consider whether the two remaining reasons continued to have issue-preclusive effect, and it remanded the matter to the state court from which the action arose to consider those issues in the first instance. *Id.* at 1703. On remand, the state circuit court held that the two remaining reasons do have issue-preclusive effect. That decision has been appealed to the state district court and the Crow Tribe has weighed in on those proceedings by filing an amicus curiae brief.

Rather than allowing the state court proceedings to reach a final resolution, the Crow Tribe asked the district court to intercede and pull the rug out from under the state courts. The Crow Tribe asked the district court for relief from the judgment rendered in *Repsis* which would effectively determine the outcome of the

proceedings now pending in the state district court in *Herrera*. The district court declined the Crow Tribe's invitation to vacate the rulings of this Court.

On appeal, the Crow Tribe seeks to overturn the district court's decision to scrupulously follow this Court's mandate. Alternatively, the Crow Tribe now asks this Court to take the extraordinary step of recalling its mandate. Neither action is warranted. Instead, this Court should reject the Crow Tribe's collateral attack on the pending state court criminal proceedings.

II. The Decisions in *Repsis*

In 1992, the Crow Tribe initiated this 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 522. 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.* 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, this Court affirmed the district court's holding. *Repsis*, 73 F.3d at 992 (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 this 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. This Court further acknowledged that, even had the Crow Tribe's treaty-based hunting rights 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, 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."[2] *Id.* at 993. Each one of these holdings constituted independent and sufficient grounds for affirming the district court's decision. *See, e.g., Id.* (quoting *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (noting that the Tenth Circuit 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.'").

III. The *Herrera* Proceedings

Twenty years after *Repsis* was decided, Clayvin Herrera was cited for taking an elk in the Bighorn National Forest without a license. *Herrera*, 139 S. Ct. at 1693. Herrera is a member of the Crow Tribe. *Id.* At trial 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 trial court prevented Herrera from asserting his treaty right defense and he was later convicted by a jury. *Id.*

On appeal, the Wyoming Fourth Judicial District Court affirmed Herrera's conviction, finding that *Repsis* had issue-preclusive effect on Herrera. *Id.* at 1694.

[2] On multiple occasions before the district court and again in its opening brief, the Crow Tribe selectively quotes from *Repsis* by omitting the word "hold" from its description of this ruling. *See, e.g.,* (Crow Tribe Br. at 9). This omission parallels Herrera's argument to the state circuit court that the Tenth Circuit did not rule on the question of conservation necessity. But the state circuit court "reject[ed] [Herrera]'s contention that the above language does not constitute a ruling. The plain meaning of the words indicates otherwise." (Aplt. App. Vol. I at 96).

The Wyoming district court specifically precluded Herrera from arguing that the Crow Tribe's treaty rights survived Wyoming's statehood, pointing to this Court's decision in *Repsis*. *Id.* at 1701 n.5. The Wyoming 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 Wyoming district court's holding that even had Herrera's treaty rights remained intact, they would not apply within the Bighorn National Forest, which became "occupied" upon its creation. *Id.* at 1701. The Court found 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 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 is limited in two respects. First, the 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 this Court's alternative holding in *Repsis*. *Id.* at 1701 n.5. The Court pointed out that the Wyoming district court had not given "issue-preclusive effect … to *Repsis*'*s* independent, narrower holding that 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 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 the alternative holding in *Repsis* 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.

IV. *Herrera* on Remand

Following the Supreme Court's decision, the Wyoming district court remanded Herrera's case to the Wyoming 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. (Aplee. Supp. App. Vol. I at 34). The Wyoming 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.* at 39).

While the remand order only directed the Wyoming circuit court to resolve issue preclusion on the occupation question, Wyoming argued that the second alternative holding in *Repsis* – that Wyoming's game regulations were "reasonable and necessary for conservation" – should also have issue-preclusive effect. (Aplt. App. Vol. I at 76). The Wyoming 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 Wyoming 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 90-99). The circuit court 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 the current number of elk in the Bighorn National Forest did not establish a material change or change in the controlling facts preventing the application of the doctrine of issue preclusion on *Repsis*'*s* alternative holding on conservation necessity. (*Id.* at 102). With all prerequisites met, the Wyoming circuit court held that both of the alternative holdings in *Respis* had issue-preclusive effect against Herrera in his criminal prosecution. (*Id.* at 106).

Herrera appealed the circuit court's decision, and the parties have briefed the preclusion issues before the Wyoming Fourth Judicial District Court. *See* (Aplee. Supp. App. Vol. I at 40). The Crow Tribe filed a motion for leave to file amicus brief and a proposed brief in support of Herrera, which was granted. (Aplee. Supp. App. Vol. I at 63-111). As of the date of this filing the Wyoming district court has not yet issued a ruling in Herrera's appeal.

V. The Proceedings and Decision Below

In the midst of the Wyoming district court's consideration of the appeal now pending before it, the Crow Tribe asked the district court below to set aside the two holdings at issue in the state proceedings. On January 27, 2021, the Crow Tribe filed a motion for partial relief from the judgment that had been entered in this case in 1995 and affirmed on appeal in 1996. (Aplt. App. Vol. I at 41-43). The Crow Tribe

argued that it was entitled to relief from all three *Repsis* holdings under Federal Rule of Civil Procedure 60(b)(5) and (6) because those holdings were either based on the now repudiated *Race Horse* case, conflicted with the Supreme Court's occupation holding in *Herrera*, or because it was no longer equitable to continue to apply those holdings prospectively. (Aplt. App. Vol. I at 44-73).

On July 1, 2021, the district court entered an order denying the Crow Tribe's motion for partial relief from judgment. (Aplt. App. Vol. II at 172-91). The district court initially found that the Crow Tribe's motion was timely even though it came twenty-six years after the final judgment.[3] (Aplt. App. Vol. II at 184-86). The district court then considered each of the *Repsis* holdings in turn.

First, the district court considered the primary holding in *Repsis* that Wyoming's statehood abrogated the Crow Tribe's treaty hunting right. (Aplt. App. Vol. II at 186-87). In spite of the fact that *Herrera* directly contradicts *Repsis* on this issue, the district court concluded that the Crow Tribe was not entitled to relief from the judgment because *Repsis* was not based on the now repudiated *Race Horse* case. (Aplt. App. Vol. II at 186). The district court noted that it could not "grant relief

[3] In the proceedings below, Repsis and Nesvik argued that the district court should abstain from deciding the motion for partial relief from judgment until the Wyoming state court proceedings concluded under either *Younger v. Harris,* 401 U.S. 37, 43-44 (1971) or using its discretionary powers under *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir. 1995). (Aplee. Supp. App. Vol. I at 54-57). The district court declined to abstain under either doctrine. (Aplt. App. Vol. II at 179-84). Repsis and Nesvik do not reassert those arguments in this appeal.

from judgment simply because the law it applied has since been overruled in another unrelated proceeding." (Aplt. App. Vol. II at 187 (citing *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972)). Practically, however, the district court observed that there was "no reason to grant relief from this portion of the case because it no longer stands as a barrier to the exercise of [the Crow Tribe's] treaty hunting rights." (*Id.*). Repsis and Nesvik agree that the Supreme Court rendered this holding a dead letter when it determined that this holding no longer had issue preclusive effect. *Herrera*, 139 S. Ct. 1697-98.

Next, the district court considered the first alternative holding in *Repsis* that the creation of the Bighorn National Forest resulted in occupation of the land. (Aplt. App. Vol. II. at 188-89). While the Crow Tribe argued that this alternative holding was not part of the judgment, the district court disagreed. (Aplt. App. Vol. II at 188). The district court then acknowledged that it had no duty under *Standard Oil of California v. United States*, 429 U.S. 17, 18 (1976) to seek leave from the appellate court before relieving a party from a judgment. (*Id.* at 189). Nevertheless, the district determined that it did not have the power to vacate this holding by the superior tribunal. (Aplt. App. Vol. II at 188-89 (citing *Lapiczak v. Zaist*, 54 F.R.D. 546, 549 (D. Vt. 1972)). It noted that the Crow Tribe had not provided any authority supporting such a power but acknowledged that the issue could be corrected by either the Tenth Circuit or the Supreme Court. (Aplt. App. Vol. II at 189).

Finally, the district court considered *Repsis's* second alternative holding that state regulations were reasonable and necessary for conservation. (*Id.*). Again, it concluded that it could not vacate this holding by the superior tribunal. (Aplt. App. Vol. II at 190). The district court explained that it simply was "not in a position to review or question a Tenth Circuit decision. The Tenth Circuit is the appellate court." (*Id.*).

Accordingly, the district court denied the motion for partial relief from judgment in whole. (Aplt. App. Vol. II at 191). The Crow Tribe then filed a timely notice of appeal on July 26, 2021. (Aplee. Supp. App. Vol. I at 112-13).

SUMMARY OF THE ARGUMENT

The district court correctly adhered to the law of the case and the mandate rule when it determined that it did not have the power to vacate the alternative holdings of this Court on occupation and conservation necessity. There are exceptions to the mandate rule, but none of them apply here. The intervening-change-in-law exception does not apply because that exception only applies while a case is still under consideration, but this case was fully and finally resolved long ago. The new evidence exception also does not apply because no fact of consequence has changed. And finally, the manifest injustice exception does not apply because the proper application of res judicata principles by the state courts to the alternative holdings in this case represents a just result.

Even if the district court was not required to follow this Court's mandate or an exception to the mandate rule applied, the Crow Tribe's motion should be denied on its merits. The Crow Tribe's motion, filed twenty-six years after judgment was entered in this case, was untimely. Accordingly, the district court's order can, and should, be affirmed on that basis. Moreover, the district court's order should be affirmed because it is not inequitable to continue to hold the Crow Tribe to the alternative holdings in this case if the state courts continue to rule that those holdings have issue-preclusive effect.

Finally, the Court should not recall its mandate. Recalling a mandate is, and should be, an extraordinary and rare act precipitated by grave injustice. No such injustice exists here. Instead, the Crow Tribe seeks only to avoid an unfavorable ruling from the Wyoming circuit court before that ruling has even been finally resolved on appeal. Under these circumstances, there is no compelling reason to recall the mandate and certainly no urgent reason to do so before the state proceedings in *Herrera* have concluded.

ARGUMENT

I. The district court correctly followed the mandate rule.

A. Standard of Review

This court reviews the district court's denial of a Rule 60(b) motion for abuse of discretion. *See FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998). "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." *Id.* (internal quotation marks and citations omitted).

B. The district court correctly followed the mandate rule.

"'Law of the case rules' have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1516 (D. Utah 1996) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (1981)). Thus, "once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997). "The 'law of the case' doctrine [also] requires every court to follow the decisions of courts that are higher in the judicial hierarchy. The doctrine applies to issues previously decided, either explicitly or by necessary implication." *Ute Indian Tribe*, 935 F. Supp. at 1517 (quoting *Guidry v. Sheet Metal Workers Int'l Ass'n,*

Local No. 9, 10 F.3d 700, 705-06 (10th Cir. 1993) (internal citations omitted). This requirement that a district court must comply strictly with the mandate issued by the appellate court is known as the "mandate rule." *Id.*

In this Circuit, "The rule is well established that a district court must strictly comply with the mandate rendered by the reviewing court." *Id.* (citations omitted). "[A]fter the law of the case is determined by a superior court, the inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience." *Id.* at 1519 (quoting 1B Moore's Federal Practice ¶ 0.0404[1], at II-2-II-3). The rule continues to bind district courts even where a subsequent Supreme Court decision differs from the mandate issued by the court of appeals. *Ute Indian Tribe*, 935 F. Supp. at 1518-19. In such circumstances, the court of appeals may have the power to reconsider its opinion, but the district court does not. *Id.* "[T]he court of appeals expects district courts to comply with its mandates even where the Supreme Court has indicated that a party may be entitled to relief beyond that afforded by the mandate." *Id.* at 1522.

The Crow Tribe asserts that the district court erred as a matter of law in holding that it lacked authority to decide the Rule 60(b) motion because, under *Standard Oil*, the district court was not required to seek leave from the appellate court before deciding the motion. (Crow Tribe Br. at 18-26). But there is an important difference between pre-authorization under the old appellate-leave

requirement and the law of the case doctrine. While the district court was not required to seek leave from this Court before considering the motion, it was required to follow the mandate issued by this Court. *Ute Indian Tribe*, 935 F. Supp. at 1517.

Although the district court did not use the words "law of the case" or "mandate rule" in its decision, its reasoning clearly invoked those rules. The district court concluded that it did not have the power to vacate a holding by the superior tribunal and that it was not "in a position to review or question a Tenth Circuit decision." (Aplt. App. Vol. II at 188-90). These conclusions perfectly parallel the substance of the mandate rule. *See, e.g., Ute Indian Tribe*, 935 F. Supp. at 1517-19. Rather than committing an error of law in following the rule, the district court would have erred if it had not.

C. None of the exceptions to the mandate rule apply.

Although the Crow Tribe has not argued that one of the exceptions to the mandate rule applies, none of them do.

The mandate rule has three generally recognized exceptions. *Id.* at 1519-20. A district court may act contrary to an appellate decision: "'(1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered contrary to the law of the appellate decision; and (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented.'" *Id.* at 1520 (quoting *Legget v. Badger*, 798 F.2d 1387,

1389 (11th Cir. 1986)). "'A district court should follow the law of the case as decided by the appellate court unless the court is certain that one of the three specifically and unquestionably applies.'" *Id.* (quoting *Legget*, 798 F.2d at 1389 n.2).

This Circuit has recognized an important limitation on the second exception involving an intervening change in the law. "[T]he intervening-change-in-law exception does not apply where, as here, the case in which the erroneous ruling occurred is no longer sub judice—that is, where the case has become final." *Ute Indian Tribe*, 114 F.3d at 1521 (citing *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 962 F.2d 1528, 1534 (10th Cir. 1992) (holding that once an appellate court resolves an issue and remands the case to enter judgment in accordance with the mandate, the district court may not disregard the mandate and apply a later change in law on remand because the question is no longer sub judice); *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958) (holding that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies" setting aside a final judgment)).

The new evidence exception does not apply. The Crow Tribe asserts that there is now an overpopulation of elk in the Bighorn National Forest and this new fact warrants relief from the prior judgment. (Crow Tribe Br. at 39-42). Herrera asserted the exact same point to the Wyoming circuit court on remand in support of his argument that the conservation necessity ruling should not be given issue-preclusive

effect. That court did not find that the alleged change in circumstances prevented the application of issue preclusion to this alternative holding. Instead, that court specifically found that, "The different numbers of elk in the [Bighorn National Forest] in 2014 therefore do not establish a material or a change in controlling facts; and no change in facts prevents issue preclusion from applying to the conservation ruling of *Repsis*. The facts have not changed." (Aplt. App. Vol. I at 102). In so concluding, the Wyoming circuit court noted that,

> "The existence- or lack thereof- of a present existential threat to wildlife was not a material, controlling fact essential to the judgment in the *Repsis* litigation. … Both [the Crow Tribe and the Defendants] submitted that there was no such threat because the numbers of elk were over objective [at the time *Repsis* was decided]."

(*Id.* at 101-02). Because the facts have not changed and the number of elk was not a fact relevant to this Court's conservation necessity holding, the district court could not have been "certain" that the new evidence exception "specifically and unquestionably applie[d]." *Ute Indian Tribe*, 935 F. Supp. at 1520.

The intervening-change-in-law exception also does not apply because this case is no longer sub judice. *Ute Indian Tribe*, 114 F.3d at 1521. This case became final when the Supreme Court denied certiorari in 1996. *See, e.g., Colorado Interstate Gas*, 962 F.2d at 1534 (explaining that a suit is deemed pending until the appeal is disposed of at which point it is no longer sub judice). As a result, the district

court properly concluded that it did not have the power to vacate a ruling from this Court based on the Supreme Court's decision in *Herrera*.

Finally, the manifest injustice exception does not apply to either the occupation or conservation necessity holdings. The only possible harm the Crow Tribe or its members could face from the *Repsis* occupation holding is its possible issue-preclusive effect. The majority in *Herrera* declined to address this issue, instead identifying the Wyoming state courts as the appropriate forum to resolve this issue preclusion question in the first instance. *Herrera*, 139 S. Ct. at 1701 n.5 (identifying multiple issues for the state courts to resolve, including whether the occupation issue was fully and fairly litigated in *Repsis* and whether alternative holdings can be given issue-preclusive effect).

The dissent, however, did address the issue. It concluded that the holding would be entitled to issue-preclusive effect, notwithstanding the majority's determination that this Court 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 "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"). The dissent

seemingly did not think that this result would be inequitable. Presumably, it would have said so if it had.

In fact, this result is normal. "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[.]" (Aplee. Supp. App. Vol. I at 22-23) (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. 1686, 1706-07 (internal citations omitted). The cases applying Rule 60(b) similarly reflect this preference for finality. *See, e.g., Lubben,* 453 F.2d at 650 (noting that "a change in applicable law does not provide sufficient basis for relief"); *see also* 11 Charles A. Wright et al., *Federal Practice & Procedure* § 2864 n.51 (3d ed.), Westlaw (database updated Oct. 2020) (collecting cases and noting that courts generally deny requests for relief under Rule 60(b)(6) when there has been a change in decisional law).

Accordingly, it is not manifestly inequitable to continue to bind the Crow Tribe to the judgment rendered in this case on the occupation holding even if that holding was incorrect. And that result is not even certain. Two outcomes are possible from the current *Herrera* proceedings. The preclusive effect of the *Repsis* occupation holding could be affirmed, in which case the Crow Tribe could argue that it is harmed by the prospective application of this holding, though not unfairly so under the normal principles of finality.

Alternatively, the state courts could determine that the *Repsis* occupation holding has no preclusive effect, rendering it a dead letter. The Crow Tribe certainly cannot show that it meets the manifest injustice exception at present and there is nothing extreme or unexpected about being held to a judgment after "a defeat fairly suffered." *Herrera*, 139 S. Ct. at 1707 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)).

The same holds true with regard to the conservation necessity holding. It is not manifestly inequitable to continue to bind the Crow Tribe to the judgment rendered in this case on conservation necessity. In fact, the proper application of res judicata principles by the state courts to this holding, however that inquiry is ultimately resolved, represents justice not injustice.

Moreover, it would have been manifestly unjust to Wyoming for the district court to vacate that holding in the proceedings below. As conceived by the Crow

Tribe, the issue of conservation necessity is a fact intensive inquiry well suited to a trial, or at least an evidentiary hearing. (Crow Tribe Br. at 37-42). As the Supreme Court explicitly contemplated in *Herrera*, such an evidentiary hearing will take place in the Wyoming circuit court if that court's rulings on issue preclusion are reversed on appeal to the Wyoming district court. *Herrera,* 139 S. Ct. at 1703.

If those evidentiary proceedings occur, they may well reach the result the Crow Tribe seeks. If not, the Crow Tribe could bring a new suit to adjudicate this issue on its own behalf, unburdened as it would then be from the issue-preclusive effect of this case. Such an action would provide an adequate vehicle for all parties to develop the facts relevant to a conservation necessity determination. Unlike the present proceedings, which did not include, and did not contemplate, an evidentiary hearing of any kind. To make such a finding in these proceedings without a full evidentiary hearing would unfairly prejudice Wyoming, which did, after all, previously demonstrate to the satisfaction of this Court that conservation necessity warranted state regulation. *Repsis*, 73 F.3d at 993. And as the Wyoming circuit court found, the facts have not changed. (Aplt. App. Vol. I at 102).

Accordingly, because the district court correctly adhered to the mandate rule and none of the exceptions apply, the district court properly denied the Crow Tribe's Rule 60(b) motion. This Court should affirm that decision.

II. Even if the district court incorrectly followed the mandate rule, the Crow Tribe is not entitled to relief under Rule 60(b).

A. Standard of Review

This Court is "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," *Repsis* 73 F.3d at 993. When an appellate court considers an issue that the district court did not reach, it necessarily reviews that issue de novo. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 497 (6th Cir. 2006) ("We review all other issues *de novo* because the district court did not reach them.")

B. Standards Governing Relief from Judgment under Rule 60(b)

The Crow Tribe brought its motion for relief from judgment under Rule 60(b)(5) and (6). This rule provides, in relevant part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: […]
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(5), (b)(6).

Obtaining relief from a judgment under Rule 60(b) is an "extraordinary procedure" that not only requires a showing of good cause, but must be balanced

against "the obvious need for finality of judgments." *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979). As a general matter, "claims once tried, decided on the merits, appealed, and closed should–with only a few exceptions–be considered forever settled as between parties." *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1240 (10th Cir. 2010) (citation omitted). "'Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal.'" *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005) (quoting *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 955 (10th Cir. 2004), *abrogated on other grounds by Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006)).

Rule 60(b)(5) has three distinct clauses, each creating an independent basis for relief. *Horne v. Flores*, 557 U.S. 433, 454 (2009). The first clause is not at issue in these proceedings. The second clause allows relief from a judgment that was based on a prior decision that has later been reversed or vacated. Fed. R. Civ. P. 60(b)(5). Relief under the second clause is "limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel." *Klein v. United States*, 880 F.2d 250, 258 n.10 (10th Cir. 1989). "For a decision to be 'based on' a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense." *Lubben*, 453 F.2d at 650.

By contrast, "a change in applicable law does not provide sufficient basis for relief." *Id.* Rule 60(b)(5) "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." *Id.* (citation omitted). "'Cases in which one judgment is 'based' on another are not that frequent or obvious.'" *Manzanares*, 628 F.3d at 1240 (citation omitted).

The third clause of Rule 60(b)(5) allows the court to grant relief from a judgment where its prospective application no longer remains equitable. Fed. R. Civ. P. 60(b)(5). This clause cannot be used to "challenge the legal conclusions on which a prior judgment or order rests[.]" *Horne*, 557 U.S. at 447. It can, however, support modifying or vacating a judgment where "a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." *Id.* (internal quotation marks and citation omitted).

But even with proof of changed circumstances, relief from prospective application of a judgment is only warranted "upon a showing of changed circumstances which have produced 'hardship so extreme and unexpected' as to make the decree oppressive." *EEOC v. Safeway Stores,* 611 F.2d 795, 800 (10th Cir. 1979) (citing, *inter alia*, *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19, 22 (10th Cir. 1970) (requiring a showing that "the moving party is exposed to severe hardships of extreme and unexpected nature.")). While a court may grant relief from the

prospective effect of a judgment under Rule 60(b)(5), this provision is not designed to "erase retroactively the effect of the decree." *EEOC*, 611 F.2d at 801.

Rule 60(b)(6) provides a catch-all clause, allowing courts to alter the effect of a judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). However, relief under Rule 60(b)(6) is only available in "extraordinary situations." *Collins*, 254 F.2d at 839. "A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief." *Id.* The Tenth Circuit has used Rule 60(b)(6) to address "only a particular kind of legal error," namely a "post-judgment change in the law 'arising out of the same accident as that in which the plaintiffs … were injured.'" *Sindar v. Garden*, 284 F. App'x 591, 596 (10th Cir. 2008) (quoting *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975). Moreover, "[t]he clear import of the language of clause (b)(6) is that the clause is restricted to reasons other than those enumerated in the previous five clauses." *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002). Thus, a party cannot resort to Rule 60(b)(6) simply because its motion under Rule 60(b)(5) has failed. *Id.*

Motions under Rule 60(b)(5) and (6) must be filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1). Whether the timing of a Rule 60(b) motion is reasonable "depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds

relied upon, and prejudice to other parties." *United States v. All Monies from Account No. PO-204,675.0*, No. 97-1250, 1998 WL 769811, at *5 (10th Cir. 1998) (unpublished) (quoting *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981)).

C. The Crow Tribe's motion for relief from judgment should be denied on its merits.

Repsis and Nesvik agree with the Crow Tribe that if this Court concludes that the district court was not prohibited by the mandate rule from vacating the alternative holdings in this case, this Court should consider the merits to the Crow Tribe's motion in the interests of judicial economy and efficiency. (Crow Tribe Br. at 28). Nevertheless, the Crow Tribe's Rule 60(b) motion should be denied on its merits for two distinct reasons.

1. The Crow Tribe's motion was untimely.

The Crow Tribe's motion was untimely and the district court abused its discretion when it concluded otherwise. (Aplt. App. Vol. II at 184-86). This Court can correct that abuse of discretion based on the record before it and affirm the district court order denying the Crow Tribe's motion because it was untimely. *See, e.g., Repsis*, 73 F.3d at 993 (quoting *Sandoval*, 29 F.3d at 542 n.6) (noting that this Court is "'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'").

Rule 60(c)(1) requires that a Rule 60(b)(5) or (6) motion for relief from a judgment be brought within a "reasonable time." Reasonableness depends upon the circumstances, and "[w]hile the movant's diligence in seeking relief is relevant," so too is the prejudice to nonmovants. *Belt v. Lane*, No. 74-00387, 2014 WL 12796740, at *2 (D.N.M. Mar. 24, 2014) (unpublished). Here the Crow Tribe has not been diligent and the timing of the motion was specifically calculated to prejudice Wyoming in the state court proceedings.

The Crow Tribe contended in the district court that the earliest time that it could have sought relief under Rule 60(b) was the day the Supreme Court decided Herrera in 2019. (Aplt. App. Vol. I at 58). Not so. In *Herrera,* the Supreme Court simply applied its 1999 ruling in *Mille Lacs* to conclude that the Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right. *Herrera,* 139 S. Ct. at 1700. According to the Court, "[a]pplying *Mille Lacs*, this is not a hard case." *Id.* If this was not a hard case in 2019, it was not a hard case in 1999 either. Nothing prevented the Crow Tribe from seeking relief from the judgment in this case under Rule 60(b) at any time after 1999 when *Mille Lacs* was decided. And nothing prevented the Crow Tribe from filing an independent action for relief from the judgment under Rule 60(d)(1). Waiting twenty years to act is unreasonable.

More importantly, waiting until the effect of the judgment is actually being litigated in proceedings in the state courts severely prejudices Wyoming in those

proceedings. The Crow Tribe contended in the district court that Wyoming cannot be prejudiced because the State would only lose a benefit to which it is not entitled by law. (Aplt. App. Vol. I at 60). But that is the very question pending in the state courts—whether the alternative holdings have issue-preclusive effect to the benefit of Wyoming. Relieving the Crow Tribe from the judgment in this case would remove the very basis for Wyoming's claims in the state court proceedings without providing Wyoming a fair opportunity to fully and finally resolve the merits of those claims. Nothing could be more prejudicial.

Accordingly, the Crow Tribe's motion should be denied on the grounds that it is untimely and unfairly prejudicial to Wyoming's substantial interests in ongoing litigation in the state courts.

2. The Crow Tribe is not entitled to relief under either Rule 60(b)(5) or (6).

On its merits, the Crow Tribe's motion should fail for the same reasons that none of the exceptions to the mandate rule apply. The crux of the Crow Tribe's argument is that applying the judgment prospectively is no longer equitable under Rule 60(b)(5), either because of an intervening change in the law or because of a change in the facts. (Crow Tribe Br. at 28-44). But, as set forth above, the facts have not changed and it is not inequitable to hold a party to a judgment fairly litigated even if the law subsequently changes. Accordingly, so long as the state courts fairly

resolve the issue preclusion questions pending before them, it is not inequitable to apply the judgment in this case prospectively.

Repsis and Nesvik concede that the primary holding in *Repsis,* that the Crow Tribe's hunting right was abrogated by statehood, no longer binds the Tribe and cannot be applied in future cases. But the judgment itself may still apply prospectively if the state courts, and potentially the Supreme Court, ultimately conclude that the alternative holdings have issue-preclusive effect. In that event it would not be inequitable to apply the judgment prospectively. In fact, it would be patently inequitable to Wyoming not to.

Alternatively, if the state courts determine that the alternative holdings do not have issue-preclusive effect, the judgment in this case would no longer bind the Crow Tribe or apply prospectively to anyone. Therein lies the rub for the Crow Tribe. The state circuit court did not issue a favorable ruling for the Crow Tribe and it seeks to avoid that ruling through the present proceedings. But a Rule 60(b) motion is not a substitute for the appeal that is presently pending before the state district court or future appeals in that case before either the Wyoming Supreme Court, the United States Supreme Court, or both. *See, e.g., Zurich*, 426 F.3d at 1289.

Failure under Rule 60(b)(5) in this instance precludes relief under Rule 60(b)(6). While both provisions provide independent grounds for relief, "clause (b)(6) … is restricted to reasons other than those enumerated in the previous five

clauses." *Buck*, 281 F.3d at 1341. Here, the Crow Tribe's reasons for requesting relief from the judgment fall squarely within clause (b)(5) making resort to clause (b)(6) improper.

Even so, at least until the state courts finally determine the preclusive effect of the alternative holdings, the equities in this case favor maintaining the judgment. This Court's decision in *Collins* is instructive.

In *Collins*, the Court explained that Rule 60(b)(6) requires extraordinary circumstances, something more than a "change in the law or in the judicial view of an established rule[.]" *Collins*, 254 F.2d at 839. The appellants in *Collins* had unsuccessfully challenged the condemnation of a water line right of way across their property, despite alleged defects in the notice they received. *Collins v. City of Wichita*, 225 F.2d 132, 134 (10th Cir. 1955). In a later case involving different parties, the United States Supreme Court struck down the notice provisions of the same condemnation statute. *Walker v. Hutchinson City*, 352 U.S. 112, 115-17 (1956). The appellants in *Collins* then asked for relief from the judgment entered against them under Rule 60(b)(6). *Collins*, 254 F.2d at 839. This Court, denied the motion, explaining: "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." *Id.*

These same principles apply to the alternative holdings in *Repsis*. The fact that *Herrera* contradicts the *Repsis* occupation holding is not enough, on its own, to justify relief under Rule 60(b)(6). Nor does the Crow Tribe's desire to avoid the Wyoming circuit court's unfavorable decision on conservation necessity demonstrate extraordinary circumstances. Losing an argument in court is simply not an extraordinary circumstance, particularly where that result may yet be reversed on appeal.

Accordingly, if the Court reaches the merits of the Crow Tribe's Rule 60(b) motion, it should affirm the decision of the district court denying the motion.

III. There is not a compelling reason to recall the Court's mandate.

The mandate rule provides a clear and simple path to affirm the decision of the district court, but that does not resolve the real question presented in this appeal. This Court is not bound by the mandate rule. It unquestionably has the power to recall its mandate and vacate the alternative holdings. In its brief, the Crow Tribe asks the Court to do just that. (Crow Tribe Br. at 26). But the Court should decline this request, or at a minimum, defer its decision on the request until after the state court proceedings conclude. Only then will this Court be in a position to know whether it should intercede.

"'[A]n appellate court has the power to set aside at any time a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of

the judicial process.'" *Ute Indian Tribe*, 114 F.3d at 1522 (quoting *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987). However, "the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances." *Id.* "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). "The limited nature of this power is a reflection of the importance of finality: once parties are afforded a full and fair opportunity to litigate, the controversy must come to an end and courts must be able to clear their dockets of cases." *Ute Indian Tribe*, 114 F.3d at 1522.

Ute Indian Tribe presents a good example of the type of extraordinary circumstances that warrant using this power of last resort. In that case, this Court had previously determined that certain lands were within the exterior boundary of the Uintah Valley Reservation. *Id.* at 1515. In subsequent unrelated litigation, the Supreme Court held that these lands were not part of the Reservation. *Hagen v. Utah*, 510 U.S. 399, 421-22 (1994). Faced with these competing rulings, the Ute Indian Tribe brought suit in the District of Utah seeking to enjoin the State of Utah, and the relevant counties and municipalities (collectively hereafter referred to as Utah) from exercising civil and criminal jurisdiction in the areas that this Court had determined were within the boundaries of the reservation notwithstanding the latter ruling of the Supreme Court. *Ute Indian Tribe,* 114 F.2d at 1515. The district court, relying on

the mandate rule, held that it was bound under the law of the case doctrine to follow this Court's mandate. *Id.* However, the district court requested instructions from this Court on how to proceed and requested that this request be construed as an invitation to recall the earlier mandate. *Id.*

On appeal, this Court upheld the district court's determination that it was bound by the mandate rule to follow the circuit court's jurisdictional decision despite the later conflicting decision by the Supreme Court. *Id.* at 1520-21. Turning to the question of whether it should modify its earlier decision, this Court first addressed the Tribe's claim that Utah should be barred by the doctrines of collateral estoppel and res judicata from relying on *Hagen*. Because both *Ute Indian Tribe* and *Hagen* had been fully litigated to final judgment, this Court found that collateral estoppel, which usually prevents relitigation of issues, did not apply. *Id.* at 1522-23. Although it appears later in the opinion, this conclusion seems to flow from this Court's assumption that "[b]y reaching the merits in *Hagen*, the Utah Supreme Court effectively ruled that the State was not precluded from relitigating the boundary issue[,]" and that "ruling" was not challenged or upset by the United States Supreme Court. *Id.* at 1525.

Next, this Court explained that collateral estoppel was not a bar to modifying the mandate simply because the earlier determination may have been erroneous.

> [This Court is] not motivated by a desire to achieve a more accurate judgment or to avoid the injustice that might result from a strict

> application of the principles of finality[.] … The fact that *Ute Indian Tribe* [] may have been wrongly decided or operates unfairly against the state and local defendants is not a concern that informs our analysis. … Rather [the] decision is based on the need to reconcile two inconsistent boundary determinations and to provide a uniform allocation of jurisdiction among separate sovereigns. … The State's successful relitigation of the boundary issue has put the judgment in *Ute Indian Tribe* [] on a collision course with *Hagen*, and therefore, [this Court] must directly confront whether *Ute Indian Tribe* [] should give way to the equally final, contrary judgment in *Hagen*.

Id. at 1523-24.

This Court then considered which of the competing interests in finality or uniformity should prevail. *Id.* at 1524-26. After recognizing that the Tribe had a reasonable expectation that it could rely on the judgment it had obtained and that its victory was time and resource intensive for both the parties and the courts, this Court concluded that Utah had the same interests in the *Hagen* proceedings. *Id.* at 1525. Thus, the purposes of finality did not favor the position of either party. *Id.* Moreover, this Court concluded that the general notion that "our hierarchical system of courts prefer[s] to give effect to the pronouncement[s] of the Supreme Court[]" [did not] conclusively dictate that this Court's ruling must give way to resolve the inconsistency between the two decisions. *Id.*

Instead, this Court found that uniformity must prevail over finality because the two decisions presented "a practical dilemma of daily importance" with regard to the exercise of criminal jurisdiction by the various sovereigns. *Id.* at 1526. The practical need to create a uniform allocation of jurisdiction among the parties

dictated that uniformity should prevail over finality. *Id.* Moreover, because the jurisdictional issues created by the conflicting rulings were continuing in nature, the interests in uniformity outweighed the competing concern for finality. *Id.*

The present case is very different. First, and very importantly, although Herrera was permitted to relitigate the occupation issue in his case, the issue preclusive effect of this Court's alternative holding in *Repsis* was not resolved either explicitly or implicitly by the Supreme Court. Instead, the Supreme Court specifically remanded that "gateway issue" back to the state courts for resolution in the first instance. *Herrera,* 139 S. Ct. at 1701 n.5. Thus, neither Herrera nor the Crow Tribe have the same reasonable expectation of finality as Utah did in the result in *Hagen*. In fact, the Supreme Court made clear that the question remained to be decided, and the dissent made clear that the decision should be resolved unfavorably to Herrera and the Crow Tribe. *Herrera,* 139 S. Ct. at 1713.

Second, the conflict between *Herrera* and *Repsis* does not create the substantial practical problem at issue in *Ute Indian Tribe*. There is no ambiguity or question of competing jurisdiction bedeviling the parties or the public such that this Court needs to intercede. Because the Wyoming circuit court has ruled that the alternative holdings in *Repsis* have issue-preclusive effect, the limits on the Crow Tribe's treaty hunting right are clear. As the matter now stands after the decision of the Wyoming circuit court, Crow Tribe members must follow state hunting

regulations in the Bighorn National Forest. Alternatively, if the state courts ultimately conclude that the Wyoming circuit court erred and the alternative holdings in *Repsis* do not have issue preclusive effect, that ruling will not create a problem this Court needs to resolve either. In that event, Crow Tribal members will not have to follow state hunting regulations in the Bighorn National Forest except in specifically occupied locations or unless the regulations at that time are reasonable and necessary for conservation.

Thus, regardless of how the state court proceedings are ultimately resolved, there is no compelling reason for this Court to modify or vacate its holdings. To be sure, there is a legal issue yet to be finally resolved, but that issue is squarely before the state courts, where the Supreme Court said it should be. If the state courts get it wrong, the Supreme Court can correct their error.

Even if there were a good reason for the Court to recall its mandate, now is not the time for that action. If recalling a mandate truly should be exercised only in extraordinary circumstances as a matter of last resort, then it should occur only when all other avenues for relief have been foreclosed. *See Ute Indian Tribe*, 114 F.3d at 1522; *Calderon*, 523 U.S. at 550. Here the issue preclusive effect of the alternative holdings in *Repsis* remains to be decided by the Wyoming district court, subject to discretionary review by either the Wyoming Supreme Court, the United States Supreme Court, or both. At the conclusion of those proceedings, the Crow Tribe may

or may not be satisfied with the outcome. But until those proceedings are fully and finally resolved, the Crow Tribe's request to recall the mandate is premature.

Accordingly, the Crow Tribe's request to recall the mandate should be denied or, alternatively, a decision on the request should be deferred until such time as the state proceedings in *Herrera* are fully and finally resolved.

CONCLUSION

For the foregoing reasons the Defendants, Chuck Repsis and Brian Nesvik request that the Court affirm the district court's order denying the Crow Tribe's motion for partial relief from judgment and deny the Crow Tribe's request to recall the mandate.

Dated this 27th day of October, 2021.

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Appellant has requested oral argument. Appellees agree that the factual and legal issues presented in this appeal are both novel and complex and that oral argument would benefit the Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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 brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: October 27, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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