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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE CROW TRIBE OF INDIANS,

Plaintiff - Appellant,

and

THOMAS L. TEN BEAR,

Plaintiff,

v.

CHUCK REPSIS, individually; BRIAN NESVIK, individually, and as Director of the Wyoming Game and Fish Department, and as Director of the Wyoming Game and Fish Commission,

Defendants - Appellees.

No. 21-8050

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 1:92-CV-01002-ABJ)

Daniel D. Lewerenz, Native American Rights Fund, Washington, D.C. (Wesley J. Furlong, Native American Rights Fund, Anchorage, Alaska, with him on the briefs), for Plaintiff-Appellant.

James Kaste, Deputy Attorney General (Jenny Staeben, Senior Assistant Attorney General, with him on the brief), Office of the Wyoming Attorney General, Cheyenne, Wyoming, for Defendants-Appellees.

Before **HOLMES**, Chief Judge, **BRISCOE**, and **MORITZ**, Circuit Judges.

HOLMES, Chief Judge.

This appeal presents the latest phase in a long-running dispute between the Crow Tribe of Indians (the "Tribe") and the State of Wyoming ("Wyoming") over the Tribe's treaty hunting rights. In 1992, the Tribe brought a declaratory action against Wyoming Game and Fish officials to determine whether the 1868 Treaty with the Crows—which provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States"—afforded it an unrestricted right to hunt in the Bighorn National Forest. Relying on a line of prior Supreme Court cases interpreting Indian treaties, the District Court for the District of Wyoming held in *Crow Tribe of Indians v. Repsis (Repsis I)*, 866 F. Supp. 520 (D. Wyo. 1994), that Wyoming's admission as a state extinguished the Tribe's treaty hunting rights (the "Statehood Holding"). On direct appeal in *Crow Tribe of Indians v. Repsis (Repsis II)*, 73 F.3d 982 (10th Cir. 1995), we affirmed the district court's Statehood Holding. Alternatively, we held that the Bighorn National Forest was "occupied," so the Tribe's treaty hunting rights would not have applied to the area in question (the "Occupation Rationale"), and also reasoned that Wyoming could have justified its restrictions on hunting due to its interest in conservation (the "Conservation Necessity Rationale").

But this was not the end of the story. Nearly 25 years later, the Supreme Court decided *Herrera v. Wyoming*, --- U.S. ----, 139 S. Ct. 1686 (2019), in response to Wyoming's attempts to prosecute a Tribe member for hunting in Bighorn National

Forest. Crucially, the Court held that the Tribe's treaty rights had *not* been extinguished by Wyoming's admittance as a state and that Bighorn National Forest was not categorically "occupied." Having issued these two rulings on the nature of the Tribe's treaty rights, the Supreme Court remanded the case to the Wyoming courts. On remand, Wyoming continued its efforts in *Herrera* to prosecute the Tribe's member, arguing in part that the defendant could not assert a treaty right to hunt in Bighorn National Forest because *Repsis II* continued to bind the Tribe and its members through the doctrine of issue preclusion.

Spurred on by the Supreme Court's ruling and Wyoming's continued prosecution in *Herrera*, the Tribe moved for relief from our judgment in *Repsis II* under Federal Rule of Civil Procedure 60(b). But the district court denied the Tribe's motion, holding that it lacked the power to grant relief from our judgment in *Repsis II* because we had relied on alternative grounds for affirmance—i.e., the Occupation and Conservation Necessity Rationales—that the district court had not considered in *Repsis I*. The Tribe now appeals, arguing that the district court legally erred when it held that it lacked the power to review the Tribe's Rule 60(b) motion. The Tribe further urges us to exercise our independent power to grant it Rule 60(b) relief, or alternatively, to recall our mandate in *Repsis II*.

Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that the district court abused its discretion when it held that it lacked the authority to review the Tribe's motion for post-judgment relief. However, because we believe the district court is better positioned to decide whether to grant Rule 60(b) relief on the merits,

we decline the Tribe's request to grant Rule 60(b) relief in the first instance or to recall our mandate in *Repsis II*. Accordingly, we **vacate** the district court's decision and **remand** the case for further proceedings.

I

A

The Crow Tribe is a federally recognized American Indian tribe with roots in present-day Montana and Wyoming. *See Herrera*, 139 S. Ct. at 1691. In 1868, the Tribe signed a treaty with the federal government in which it agreed to move from a nomadic lifestyle to a reservation in Montana bordering Wyoming and the Bighorn National Forest. *See id.* at 1692. As relevant to this case, the treaty provided:

> The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but *they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts*.

Repsis I, 866 F. Supp. at 521–22 (quoting Treaty with the Crows, Crow Tribe-U.S., art. IV, May 7, 1868, 15 Stat. 650).

This appeal stems from a dispute over the meaning of the italicized language, *supra*. In 1989, Thomas Ten Bear, a member of the Tribe, was hunting on the grounds of the reservation in Montana when he crossed into a section of Bighorn

National Forest in Wyoming and shot and killed an elk. Wyoming charged and convicted Mr. Ten Bear with taking an elk on National Forest lands without a hunting license. In response, the Tribe sued Wyoming Game and Fish officials in the District of Wyoming seeking a declaratory judgment that its members, including Mr. Ten Bear, had an off-reservation right to hunt on unoccupied and public lands under the 1868 treaty that could not be impeded by Wyoming's hunting and fishing laws.[1] *See Repsis II*, 73 F.3d at 986.

The district court granted Wyoming's motion for summary judgment. *See Repsis I*, 866 F. Supp. at 524. It relied on the Supreme Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), in which the Court, interpreting "identical treaty language preserving Indian hunting rights," held those rights extinguished upon the creation of the State of Wyoming, *Repsis I*, 866 F. Supp. at 522–23. Although the district court noted that "*Race Horse* is a much-criticized decision," it determined that it was still controlling. *Id.* at 523. Accordingly, "[w]here the United States Supreme Court ha[d] already determined the legal issue before [the district] court in *Race Horse*, where the underlying fact pattern, including the treaty language at issue, precisely matche[d] that present[ed] in the instant case, and where *Race Horse* ha[d] not been expressly rejected or overruled," the district court concluded that it "must

[1] The Tribe also sought a declaratory judgment that Wyoming had violated the Unlawful Inclosures of Public Lands Act, which the district court dismissed. *See Repsis I*, 866 F. Supp. at 524–25. That holding is not at issue here.

follow the controlling decision." *Id.* at 524. The district court then dismissed the suit. *See id.* at 525.

On appeal, we affirmed the district court's grant of summary judgment. *See Repsis II*, 73 F.3d at 994. We held *Race Horse* controlled, stating "[u]nlike the district court's apologetic interpretation of and reluctant reliance upon *Ward v. Race Horse*, we view *Race Horse* as compelling, well-reasoned, and persuasive." *Id.* Accordingly, we concluded 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." *Id.* at 992.

We also offered two additional rationales for our decision. As "an alternative basis for affirmance" we held that, even if the Tribe *had* maintained its treaty right past the creation of the State of Wyoming, "the creation of the Big[horn] National Forest resulted in the 'occupation' of the land." *Id.* at 993. Accordingly, the Treaty's provision of hunting rights on "unoccupied lands" did not apply to the Bighorn National Forest. *See id.* We refer to this language in *Repsis II* as the "Occupation Rationale."

Moreover, we recognized as a general matter that "states may regulate off-reservation treaty rights '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.*, 391 U.S. 392, 398 (1968)). In discussing the continued applicability of *Race Horse*, we noted in closing that even if the tribal treaty in question "had reserved a continuing right which had

survived Wyoming's admission, we hold 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. We refer to this language in *Repsis II* as the "Conservation Necessity Rationale."

After we issued our opinion, the Supreme Court denied certiorari in 1996, and the judgment in the case became final. *See Crow Tribe of Indians v. Repsis*, 517 U.S. 1221 (1996).

B

Nearly 20 years after we issued our decision in *Repsis II*, the status of the Tribe's treaty rights arose again in a prosecution of one of the Tribe's members for violating Wyoming's hunting laws. In 2014, Tribe member Clayvin Herrera was prosecuted and convicted for taking elk off-season and without a license after crossing from the Tribe's Montana reservation into Bighorn National Forest. Mr. Herrera asserted as an affirmative defense "that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty," and posited that our decision in *Repsis II* had been repudiated by subsequent Supreme Court decisions. *Herrera*, 139 S. Ct. at 1693. But the Wyoming state courts rejected this argument, holding that *Repsis II* continued to control and merited issue-preclusive effect against Mr. Herrera as a member of the Tribe, which had litigated *Repsis II* on behalf of its members. *See id.* at 1694.

The Supreme Court granted certiorari and vacated Mr. Herrera's conviction. Relying on its intervening decision in *Minnesota v. Mille Lacs Band of Chippewa*

Indians, 526 U.S. 172 (1999), which "upended both lines of reasoning in *Race Horse*," the Court clarified "that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood." *Herrera*, 139 S. Ct. at 1696–97. And "[b]ecause this Court's intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis* [*II*]," the Court held *Repsis II* "does not preclude [Mr.] Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood." *Id.* at 1697. Accordingly, it concluded that Wyoming's admission to the Union did not abrogate the Tribe's treaty right to hunt in unoccupied lands. *See id.* at 1698.

The Court then held the "Bighorn National Forest did not become categorically 'occupied' within the meaning of the 1868 Treaty when the national forest was created." *Id.* at 1700–01. Significantly, although the Court acknowledged the alternative rationale in *Repsis II* that the Forest was occupied under the treaty, it declined to address whether issue preclusion applied to this issue because the Wyoming state courts had not addressed it in the first instance. *See id.* at 1701 n.5. Instead, it concluded that "[t]hese gateway issues should be decided [by the state courts] before this Court addresses them." *Id.*

As such, the Court remanded to the Wyoming state courts while noting two limitations in its decision. First, although the Court held that the Forest was not "categorically occupied," it reasoned that Wyoming could still "argue that the specific site where [Mr.] Herrera hunted elk was used in such a way that it was 'occupied' within the meaning of the 1868 Treaty." *Id.* at 1703. Second, it noted

that Wyoming "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." *Id.*

C

On remand from the Supreme Court's decision in *Herrera*, the Wyoming state trial court found that issue preclusion applied to *Repsis II*'s Occupation and Conservation Necessity Rationales. *See* Aplt.'s App. at 80–81 (Wyo. State Ct. Order on State's Req. for Post-Remand Issue Preclusion, filed June 11, 2020). Accordingly, it concluded that issue preclusion barred Mr. Herrera from "arguing that he is immune from prosecution due to his Treaty Hunting right" based on the alternative rationales in *Repsis II*. *Id.* at 82–83.

Following these developments, the Tribe filed a motion for relief from our judgment in *Repsis II* under Rule 60(b) of the Federal Rules of Civil Procedure in the district court. *See id.* at 50–51 (Pl.'s Mem. in Supp. of Mot. for Partial Relief from J., filed Jan. 27, 2021). It asserted that it had filed the motion because "Wyoming has argued [on remand from *Herrera*] that *Repsis II*, specifically its language concerning categorical occupation of the Bighorn National Forest and conservation necessity, continues to preclude Mr. Herrera from asserting his treaty rights." *Id.* at 56. The Tribe contended that allowing the now-repudiated *Repsis* judgment "to bar the Crow Tribe and its members from legally exercising their off-reservation treaty hunting rights would be a profound injustice." *Id.* at 51.

Specifically, the Tribe sought partial relief from the *Repsis II* judgment under Rule 60(b)(5)—which applies when a decision "is based on an earlier judgment that has been reversed or vacated"—because the *Race Horse* decision was overturned in *Herrera*. *See* Aplt.'s App. at 173–75 (District Ct. Order on Relief from J., filed July 1, 2021). Additionally, to the extent the district court found the Occupation Rationale and Conservation Necessity Rationale to be "part of the final judgment," the Tribe also asked the district court to vacate these aspects of the decision under Rule 60(b)(5)—which applies when prospective application of a judgment "is no longer equitable"—and Rule 60(b)(6)—which applies for "any other reason that justifies relief." *See id.*

In considering these claims, the district court first rejected Wyoming's argument that it should abstain from deciding the Tribe's motion due to the ongoing state proceedings, holding both that the Tribe was not a direct party to these proceedings and that the issues involved implicated federal law.[2] *See id.* at 179–84.

It then held the Tribe's motion for post-judgment relief was timely under Rule 60(c)(1). Specifically, the court reasoned that the Tribe only learned of its grounds for relief after the Supreme Court's decision in *Herrera* and had not known of the necessity of bringing this motion until Wyoming continued to rely on *Repsis II* during the state court proceedings. *See id.* at 184. The court also held that the timing did not unreasonably prejudice Wyoming because any relief from judgment would

[2] Wyoming has expressly abandoned its abstention arguments in this appeal. *See* Aplees.' Resp. Br. at 13 n.3.

simply mean Wyoming could not rely on the preclusive effect of the *Repsis II* judgment in the future. *See id.* at 185–86.

The district court next addressed the Rule 60(b) motion itself. As to the Statehood Holding—*viz.*, that Wyoming's statehood extinguished the Tribe's treaty rights—the court noted that it did not need to seek leave from the Tenth Circuit to address this issue because the district court "addressed the same issues and considered the same record" in *Repsis I*. *Id.* at 186. But it held on the merits that neither Rule 60(b)(5) nor Rule 60(b)(6) provided relief. Specifically, the court reasoned that because its "decision on statehood and treaty hunting rights was repudiated and no longer has preclusive effect in light of *Herrera*[,] [t]here is no reason to grant relief from this portion of the case because it no longer stands as a barrier to the exercise of treaty hunting rights."[3] *Id.* at 187 (citation omitted).

As to the Occupation Rationale and the Conservation Necessity Rationale, however, the court found that it was without "power" to decide whether Rule 60(b) relief was warranted. *Id.* at 188. The court noted that these were alternative rationales from *Repsis II*, which the district court had not addressed in *Repsis I*. *See id.* at 188–90. More precisely, the court "genuinely question[ed] whether it [wa]s possible" for it to "vacate a Tenth Circuit decision on an issue completely different from that which [it] ruled on." *Id.* at 189. It concluded that the alternative rationales

[3] The Tribe has not appealed the district court's ruling on the Statehood Holding issue. *See* Aplt.'s Opening Br. at 14–15.

"would only be subject to correction through the Tenth Circuit or the U.S. Supreme Court," *id.*, and thus declined to grant relief because it did "not believe it ha[d] the power to grant the additional relief [the Tribe] request[ed] in the form of vacating the Tenth Circuit's decision," *id.* at 190. In other words, the district court never reached the merits of the Rule 60(b) motion on the Occupation Rationale or the Conservation Necessity Rationale. The Tribe then commenced this appeal.

D

While the Tribe was litigating this appeal, the *Herrera* proceedings continued. On January 18, 2022—after the parties had submitted their briefs in this appeal—the parties filed a 28(j) letter informing us that Wyoming's intermediate appellate court had reversed the trial court's issue preclusion finding. *See* 28(j) Letter at *1, *Crow Tribe v. Repsis*, No. 21-8050 (10th Cir., filed Jan. 18, 2022) ("Jan. 18, 28(j) Letter"). Specifically, the Wyoming intermediate appellate court held that issue preclusion did *not* apply to *Repsis II*'s Occupation and Conservation Necessity Rationales; thus, Mr. Herrera could argue that he was immune from prosecution under the 1868 Treaty. After holding that issue preclusion did *not* bar Mr. Herrera's arguments, the Wyoming appellate court remanded so the trial court could determine the "fact intensive questions" involving "site specific occupation and conservation necessity" through an evidentiary hearing without relying on *Repsis II*. *Id.* App. A., at 8 (Wyo. App. Decision, dated Dec. 3, 2021). The Wyoming Supreme Court denied review, letting the intermediate court's issue preclusion holding stand. *See id.* App. B., at 1 (Order Denying Pet. for Writ of Review, dated Jan. 4, 2022).

The parties followed up with another 28(j) letter two months later, informing us that Wyoming chose not to file a petition for certiorari to the U.S. Supreme Court, and thus the "portion of the state court proceedings related to the issue preclusive effect of the Court's decision in [*Repsis II*] is concluded." 28(j) Letter at *1, *Crow Tribe v. Repsis*, No. 21-8050 (10th Cir., filed Mar. 9, 2022) ("Mar. 9, 28(j) Letter").

II

Although the ongoing dispute between the Tribe and Wyoming implicates decades of treaty hunting rights, the issue presented in this appeal—namely, whether the district court erred in denying the Tribe's motion for partial relief from judgment under Federal Rule of Civil Procedure 60(b)—is more limited in nature.

Specifically, the parties raise three substantive disagreements over the district court's application of Rule 60(b) in this case. First, Wyoming claims that the district court should have declined to consider the Tribe's Rule 60(b) motion, as it was untimely. Second, asserting that its motion was indeed timely, the Tribe contends that the district court erred when it determined that it lacked the authority to grant Rule 60(b) relief on the *Repsis II* alternative rationales. Finally, the Tribe urges us to grant its Rule 60(b) motion in the first instance, or, alternatively, to exercise our independent power to recall our mandate in *Repsis II*.

After carefully reviewing the briefs and the district court's order, we conclude that the Tribe's Rule 60(b) motion was indeed timely, and that the district court erred when it determined that it lacked the power to rule on the Tribe's Rule 60(b) motion. However, we decline the Tribe's invitation to rule on its Rule 60(b) motion or to

recall our mandate in *Repsis II*. Instead, we vacate the denial of post-judgment relief and remand the case to the district court to conduct a Rule 60(b) merits analysis in the first instance.

III

"Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *In re Gledhill*, 76 F.3d 1070, 1080 (10th Cir. 1996) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)). Of relevance here, the Rule states:

> 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). "Relief under Rule 60(b) is 'extraordinary and may only be granted in exceptional circumstances.'" *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1241 (10th Cir. 2010) (quoting *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005)). And the party requesting relief from judgment bears the burden of showing that relief is warranted. *See Horne v. Flores*, 557 U.S. 433, 447 (2009).

We review a "district court's denial of a Rule 60(b) motion for abuse of discretion." *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998).

"Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." *Zurich N. Am.*, 426 F.3d at 1289 (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)). "However, '[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.* (alteration in original) (quoting *United Pac. Ins. Co.*, 152 F.3d at 1272); *see also Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020) ("The abuse-of-discretion standard, however, 'does not shelter a district court that makes an error of law, because [a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" (alteration in original) (quoting *McLane Co. v. EEOC*, 581 U.S. 72, 81 n.3 (2017))). "Thus, even in the context of the deferential abuse-of-discretion standard, we review subsidiary legal questions de novo." *Johnson*, 950 F.3d at 701.

IV

A

As an initial matter, Wyoming argues that the district court's decision should be affirmed on the grounds that the Tribe's Rule 60(b) motion was untimely. *See* Aplees.' Resp. Br. at 30. Specifically, contrary to the district court's ruling, Wyoming contends the Tribe's motion was untimely because the Tribe could have filed its Rule 60(b) motion after the Supreme Court's *Mille Lacs* decision in 1999—*viz.*, twenty years before the present motion was filed. *See id.* at 31. Furthermore,

Wyoming claims that "waiting until the effect of the judgment is actually being litigated in proceedings in the state courts severely prejudices Wyoming in those proceedings." *Id.* at 31–32. As such, Wyoming asserts that the "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." *Id.* at 32.

The Tribe contends Wyoming waived this argument by failing to cross appeal the district court's timeliness holding. *See* Aplt.'s Reply Br. at 9–10. In any event, the Tribe urges that its timing was "reasonable" within the meaning of Rule 60(c) because it could not have moved for relief under *Mille Lacs* and Wyoming fails to make a cognizable showing of "prejudice." *See id.* at 10–14.

We partially agree with the Tribe. We first hold that Wyoming did not need to cross appeal the district court's timeliness holding. As such, we can consider Wyoming's timeliness arguments. Nevertheless, we conclude the district court did not abuse its discretion in holding that the Tribe's Rule 60(b) motion was timely.

1

We first hold that Wyoming's timeliness challenge is properly before us; its challenge does not necessitate a cross appeal. A party must cross appeal when it seeks to "enlarg[e] [its] own rights" or "lessen[] the rights of [its] adversary." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924); *see Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee."). But "[a]n appellee 'is generally permitted to defend the judgment won below on any

ground supported by the record without filing a cross appeal[,]' . . . even if, as here, [its] argument involves 'an attack upon the reasoning of the lower court.'" *Frasier v. Evans*, 992 F.3d 1003, 1019 (10th Cir. 2021) (citations omitted) (first quoting *Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003*, 715 F.3d 1231, 1240 (10th Cir. 2013); and then quoting *Jennings v. Stephens*, 574 U.S. 271, 276 (2015)).

Here, Wyoming does not dispute the district court's *disposition* of the Rule 60(b) motion—*viz.*, that the Tribe's Rule 60(b) motion should be denied. Rather, it merely attacks one component of the district court's *rationale*, as an alternative ground to affirm the district court's ruling; if successful, it would neither "enlarg[e] [its] own rights" nor "lessen[] the rights of [the Tribe]." *Am. Ry. Express*, 265 U.S. at 435. Consequently, we consider Wyoming's timeliness arguments.

2

Nevertheless, we conclude that the district court did not abuse its discretion in holding that the Tribe's Rule 60(b) motion was timely. The Federal Rules of Civil Procedure dictate that "[a] motion under Rule 60(b) must be made within a reasonable time." FED. R. CIV. P. 60(c)(1). We review the district court's ruling that the Tribe's motion was "made within a reasonable time" for abuse of discretion. *See Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1177 (10th Cir. 2005) (reviewing the district court's conclusion that a Rule 60(b) motion was not "made within a reasonable time" for abuse of discretion).

Several of our decisions—along with the decisions of our sister circuits—have viewed the "reasonable time" standard as a fact-dependent inquiry that requires

courts to weigh the length of the delay against the reasons for the delay, the movant's ability to discover the grounds for relief, and the prejudice suffered by the opposing party. *See, e.g.*, *Sec. Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1067–68 (10th Cir. 1980) (weighing factors including the length of the delay, the confusion leading to the delay, the movant's awareness of grounds for relief, and the degree of prejudice suffered by the non-movant to determine that a delay was unreasonable); *Doe v. Briley*, 562 F.3d 777, 781 (6th Cir. 2009) ("In making the reasonable-time determination, we consider 'the length of the delay, the explanations for the delay, the prejudice to the opposing party caused by the delay and the circumstances warranting relief.'" (quoting *Associated Builders & Contractors v. Mich. Dep't of Lab. & Econ. Growth*, 543 F.3d 275, 278 (6th Cir. 2008))); *Shakman v. City of Chicago*, 426 F.3d 925, 934 (7th Cir. 2005) ("[T]he litigants' knowledge of the grounds for relief is only one factor for the district court to weigh. Other factors include 'the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties.'" (second and third alterations in original) (quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986))); *see also United States v. All Monies from Acct. No. PO-204,675.0*, 162 F.3d 1174, 1998 WL 769811, at *5 (10th Cir. Oct. 29, 1998) (unpublished table decision) ("[W]hether a Rule 60(b) motion is filed within a reasonable time '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.'" (quoting *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981))).[4] And we further emphasize that, in the Rule 60(b) context, the district court's timeliness decision "is discretionary and the ruling should not be disturbed except for a manifest abuse of discretion." *Security Mut.*, 621 F.2d at 1068.

Under this fact-intensive and deferential standard, Wyoming's two proffered arguments are unavailing. Wyoming first contends that the Tribe did not move for relief from judgment "within a reasonable time" because it failed to bring its Rule 60(b) motion after the Supreme Court's decision in *Mille Lacs* in 1999. But, as the Tribe points out, the *Mille Lacs* decision did not conclusively rule on the continued applicability of *Race Horse*, which served as the basis for our Statehood Holding in *Repsis II*. *See Herrera*, 139 S. Ct. at 1697 (acknowledging that "*Race Horse* 'was not expressly overruled' in *Mille Lacs*" and, consequently, expressly repudiating *Race Horse* "[t]o avoid any future confusion" (quoting *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361 (1984))). Furthermore, *Mille Lacs* did not disturb our Occupation Rationale in *Repsis II* concerning the occupied status of the Bighorn National Forest; only *Herrera* did. *See Herrera*, 139 S. Ct. at 1700–01 ("We agree with [the Defendant] that Bighorn National Forest did not become categorically 'occupied' within the meaning of the 1868 Treaty when the national forest was created."). Additionally, Wyoming cites no authority in which we have reversed a

[4] We rely for support here on this persuasive nonprecedential decision, fully aware that it is not controlling authority. *See* FED. R. APP. P. 32.1; 10TH CIR. R. 32.1.

district court's timeliness ruling based on a case that did *not* overrule the decision on which Rule 60(b) relief is sought. Based on the foregoing, we believe that the district court did not abuse its discretion in concluding that *Mille Lacs* did not trigger an obligation on the part of the Tribe to move under Rule 60(b).

Equally unavailing is Wyoming's argument that the Tribe's delayed attempts to vacate the *Repsis II* judgment prejudiced Wyoming in the *Herrera* prosecution. The only "prejudice" Wyoming has identified is the possibility that our grant of Rule 60(b) relief "would remove the very basis" for its argument in the *Herrera* proceeding that the *Repsis II* decision has issue-preclusive effect. Aplees.' Resp. Br. at 32. But, as the parties have informed us in their Rule 28(j) letters, the Wyoming state courts have already held that the *Repsis II* decision *does not* have issue preclusive effect. *See* Mar. 9, 28(j) Letter, at *1 (informing the court that the "portion of the state court proceedings related to the issue preclusive effect of the Court's decision in [*Repsis II*] is concluded"). And, Wyoming has chosen not to file a petition for certiorari to the U.S. Supreme Court. Accordingly, Wyoming's sole basis for prejudice—i.e., that it would not have "a fair opportunity to fully and finally resolve the merits" of its issue-preclusion claims, Aplees.' Resp. Br. at 32—is no longer a viable issue. As such, we conclude that the district court did not abuse its discretion in finding the Tribe's Rule 60(b) motion timely.

B

We next evaluate the Tribe's primary contention in this appeal: that the district court erred when it determined that it lacked the "power" to rule on the Rule 60(b)

motion. Because a proper understanding of the contours of the district court's decision is essential to resolving this appeal, we begin by examining them.

1

In concluding that it was without power to resolve the Tribe's Rule 60(b) motion, the district court considered the Supreme Court's seminal decision in *Standard Oil Co. v. United States*, in which the Court held that district courts "may entertain a Rule 60(b) motion without leave" of an appellate court. 429 U.S. 17, 17 (1976) (per curiam). However, the district court rejected the Tribe's argument that *Standard Oil* allowed it to vacate the *Repsis II* alternative rationales. Rather, it reasoned that *Standard Oil* was distinguishable from the present matter because it "addressed whether a district court must seek leave from an appellate court to reopen a case that was *affirmed on appeal*." Aplt.'s App. at 188 (emphasis added).

Noting that *Repsis II* rested on alternative rationales that it had not considered in *Repsis I*, the district court posited that *Standard Oil* said nothing about its "power to vacate a Tenth Circuit decision on an issue completely different from that which [it] ruled on." *Id.* at 189. It found persuasive the District of Vermont's reasoning in *Lapiczak v. Zaist*, 54 F.R.D. 546, 549 (D. Vt. 1972), in which the court held an appellate court's erroneous decision could only be corrected by the Supreme Court. *See* Aplt.'s App. at 189. Accordingly, the district court concluded that it had "no authority to vacate" our alternative rationales and denied the motion. *Id.* at 190.

2

On appeal, the Tribe argues that the district court committed legal error by misinterpreting *Standard Oil* and relying on *Lapiczak* because "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." Aplt.'s Opening Br. at 20–21 (quoting *Standard Oil*, 429 U.S. at 18). It further contends that *Lapiczak* is no longer good law in the wake of *Standard Oil*. Specifically, the Tribe claims that while a district court may not grant Rule 60(b) relief because it believes an appellate court's decision was erroneous, it need not seek the permission of an appellate court to find that there has been a change in legal or factual circumstances—regardless of the appellate court's grounds for the prior decision. *See id.* at 21–23.

We agree with the Tribe. The district court had the power to rule on the Tribe's Rule 60(b) motion; accordingly, the court legally erred—and thus abused its discretion—by declining to decide the Tribe's Rule 60(b) motion on the grounds that it lacked the "authority" to do so.

A closer look at *Standard Oil* reveals why this is so. There, the Supreme Court held that a plaintiff could file a Rule 60(b) motion to set aside a judgment in the district court without moving for leave of court in the Supreme Court (the relevant appellate-level tribunal there). *See Standard Oil*, 429 U.S. at 17. In reaching this conclusion, the Court first considered the Respondent's argument that a Rule 60(b) movant needed appellate leave to seek district court review of a previously rendered appellate decision—recognizing that it "derived from a belief

that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate." *Id.* at 18. But the Supreme Court wholly rejected this notion, holding that "the appellate mandate relates to the record and issues then before the court, and *does not purport to deal with possible later events*. Hence, *the district judge is not flouting the mandate by acting on the* [*Rule 60(b)*] *motion*." *Id.* (emphases added). And although the Petitioner's Rule 60(b) motion in *Standard Oil* did not seek relief from an appellate court's alternative rationales, nothing in the Supreme Court's decision turns on such a distinction.

Accordingly, *Standard Oil* guides our resolution of the present matter. Here, the district court concluded that it was without power to disturb our Occupation and Conservation Necessity Rationales because it was bound by our mandate in *Repsis II*. But, as *Standard Oil* explains, a district court acting on a Rule 60(b) motion does not disrespect an appellate court's mandate because the motion implicates "possible later events" unrelated to the prior mandate issued by the appellate court. *Id.*

Indeed, our own cases have declined to limit a district court's Rule 60(b) review authority based on our prior mandates. In *Wilkin v. Sunbeam Corp.*—which was decided four years before *Standard Oil*—we recognized that "a 60(b) motion 'does not affect the finality of a judgment'" and that "the trial court is in a better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." 405 F.2d 165, 166 (10th Cir. 1968) (per curiam). More to the point, in *Prop-Jets, Inc. v. Chandler*, we reasoned that "the district court retains the power to act on a Rule 60(b) motion after this Court has *resolved* a matter upon appeal, and there is no necessity

that a petition requesting permission to exercise such authority be filed with this Court." 575 F.2d 1322, 1325 (10th Cir. 1978) (emphasis added).

Plainly, then, the district court erred when it attempted to use our initial disposition of the case as a threshold test for whether it could conduct a Rule 60(b) analysis. It should have evaluated the Rule 60(b) issue on the merits, and its failure to do so constitutes an abuse of discretion. *See Johnson*, 950 F.3d at 701 (explaining that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law" (alteration in original) (quoting *McLane Co.*, 581 U.S. at 81 n.3)); *see also* 11 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2872 (3d ed.), Westlaw (database updated Apr. 2023) (recognizing that in reviewing a district court's ruling on a Rule 60(b) motion, "[t]he appellate court readily can reverse if the district court has not exercised discretion, as when it mistakenly thinks it lacks power to act"). Stated another way, we conclude the district court had the authority to review the Tribe's motion for post-judgment relief—specifically, insofar as that motion implicated the Occupation Rationale and the Conservation Necessity Rationale.

3

In response, Wyoming does not contest the Tribe's interpretation of *Standard Oil*. Rather, it contends that the district court's decision was—in all but name only—a proper application of the "mandate rule," which provides that "a district court must comply strictly with the mandate issued by the appellate court." Aplees.' Resp. Br. at 18 (citing *Ute Indian Tribe v. Utah (Ute Indian Tribe IV)*, 935 F. Supp. 1473, 1517

(D. Utah 1996)). Because "[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 18 (quoting *Ute Indian Tribe IV*, 935 F. Supp. at 1522), Wyoming claims that "[w]hile the district court was not required to seek leave from this Court before considering the [Rule 60(b)] motion, it was required to follow the mandate issued by this Court," *id.* at 19 (citing *Ute Indian Tribe IV*, 935 F. Supp. at 1517). Stated another way, Wyoming contends that, consistent with *Standard Oil*, the district court reached the merits of the Tribe's Rule 60(b) motion but rejected it under the teachings of the mandate rule. We are unpersuaded.

As an initial matter, we note that there is no indication in the district court's order that it applied the mandate rule when considering the Rule 60(b) motion. At no point in its decision did the district court use the term "mandate rule," let alone discuss the rule's application to the Tribe's Rule 60(b) motion. *See* Aplt.'s App. at 188–90 (omitting any discussion of the mandate rule). Indeed, Wyoming itself failed to invoke the mandate rule at any point during the district court proceedings.

Moreover, the district court's assertion that it was without "power" and "authority" to grant Rule 60(b) relief is plainly inconsistent with how we have construed the mandate rule. Specifically, we have held that "[n]either law of the case nor the mandate rule is jurisdictional"; rather, they are "rule[s] to be applied at the sound discretion of the court to effectuate the proper administration of justice." *United States v. Gama-Bastidas*, 222 F.3d 779, 784–85 (10th Cir. 2000) (quoting

United States v. Carson, 793 F.2d 1141, 1147 (10th Cir. 1986)). Stated another way, our precedent makes clear that the "mandate rule" is a component of the Rule 60(b) *merits* inquiry—rather than a component of the court's *jurisdictional* inquiry. Here, however, the district court never reached the merits of the Rule 60(b) motion on the Occupation Rationale or the Conservation Necessity Rationale. Instead, it simply determined that it had "no authority to vacate" these rationales, and consequently failed to consider whether a change in legal or factual circumstances justified relief.

As such, based on the district court's language and our precedent, we are unconvinced that the district court rejected the Tribe's Rule 60(b) motion on the merits under the teachings of the mandate rule.[5]

***

Accordingly, for the foregoing reasons, we hold the district court abused its discretion when it determined that it lacked the authority to review the Tribe's

[5] Wyoming also seems to rely on the *Ute Indian Tribe* line of cases to assert that the district court lacked "authority" to rule on the Tribe's Rule 60(b) motion. *See* Aplees.' Resp. Br. at 18–19. However, those cases are not analogous to the present matter. To start, although *Ute Indian Tribe* bears some resemblance to this case—as it involved state-tribal disputes and conflicting Tenth Circuit and Supreme Court resolutions of those disputes—it did not involve a Rule 60(b) motion. Indeed, only the district court's non-precedential decision in *Ute Indian Tribe IV* discussed Rule 60(b). But the district court's rationale there only reaffirms that it *did* have the power to rule in the first instance on a Rule 60(b) motion based on a change of law. *See Ute Indian Tribe IV*, 935 F. Supp. at 1526 n.83 ("*Standard Oil* thus may be read to say that a district court may consider the question under Rule 60(b), but *Colorado Interstate Gas* instructs that the answer to the question, at least under Rule 60(b)(6), shall in these circumstances be 'no.'"). As such, Wyoming's reliance on these cases is unavailing.

motion for post-judgment relief—specifically, insofar as that motion implicated the Occupation Rationale and the Conservation Necessity Rationale.

C

Because we hold that the district court erred in concluding that it was without authority to rule on the Tribe's Rule 60(b) motion, we believe it is prudent to vacate the district court's decision and remand to allow the district court to evaluate the merits of the Tribe's Rule 60(b) motion in the first instance. *See Johnson*, 950 F.3d at 703 (vacating the district court's orders after determining it applied the wrong legal standard, while "underscor[ing] that we do not take any position concerning whether [the plaintiff] is entitled to Rule 60(b)(6) relief" and remanding "for the district court to use the full and proper scope of its discretion in addressing that matter"); *see also United Pac. Ins. Co.*, 152 F.3d at 1275 (reversing a district court's denial of Rule 60(b) on legal grounds and remanding so that the court could consider the movant's double recovery assertions and "grant or deny Defendants relief from the judgment accordingly"). We recognize that both parties have asked us to evaluate the merits ourselves "in the interest of judicial economy and efficiency." Aplt.'s Opening Br. at 28 (quoting *Gokool v. Oklahoma City Univ.*, 770 F. App'x 894, 896 (10th Cir. 2019) (unpublished)); Aplees.' Resp. Br. at 30. However, as the Supreme Court recognized in *Standard Oil*, "the trial court 'is in a much better position to pass upon the issues presented'" in a Rule 60(b) motion. 429 U.S. at 19 (quoting *Wilkin*, 405 F.2d at 166).

On remand, the district court will be able to more thoroughly consider the parties' arguments concerning the Occupation and Conservation Necessity Rationales, including the recent issue preclusion holdings in the *Herrera* state court proceedings and the import of the Conservation Necessity Rationale in Bighorn National Forest.[6] Moreover, the district court's ability to make specific findings will

[6] We note that the parties continue to dispute whether the Conservation Necessity Rationale was part of the *Repsis II* holding and, if so, whether the Conservation Necessity Rationale has a prospective effect on tribal members. At oral argument, the Tribe argued that Rule 60(b) relief is necessary to vacate the Conservation Necessity Rationale because Wyoming could use the *Repsis II* holding in future prosecutions of tribal members. *See* Oral Arg. at 8:20–9:00; *see also id.* at 5:20–6:15 (contending that Wyoming might argue that "because this Court once found conservation necessity, that the burden has shifted to the treaty hunter to prove that conservation necessity doesn't exist"). Furthermore, it suggested that the district court hold an evidentiary hearing to determine whether the changing elk population numbers have affected the original Conservation Necessity Rationale. *See id.* at 7:40–8:05 (suggesting that the evidentiary hearing examine whether the "prior judgment is no longer equitable going forward").

For its part, Wyoming argues that Rule 60(b) relief is unnecessary because the Conservation Necessity Rationale is retroactive only—i.e., the holding is "limited to the facts of" the specific prosecution of Mr. Ten Bear in *Repsis*. *Id.* at 25:55–26:00. As such, Wyoming posits that an evidentiary hearing is unnecessary to address the changes in elk population because these facts are "wholly unrelated" to the *Repsis* prosecution. *Id.* at 25:20–25:27. Accordingly, Wyoming asserts that because conservation necessity "is an event-specific inquiry," the issue may be decided on a case-by-case basis as part of future prosecutions. *Id.* at 26:30–27:04.

Because many of these arguments were raised for the first time at oral argument in the aftermath of the Wyoming courts' issue preclusion rulings, we express no opinion on their resolution. Instead, we hold that the district court may consider these issues on remand and, if it deems it necessary, may hold an evidentiary hearing to determine whether Rule 60(b) relief is warranted.

in turn provide us with a crystalized record of the district court decision, so we may be better situated to evaluate it in the event of future appeals.[7]

V

For the foregoing reasons, we **VACATE** the district court's denial of the Tribe's Rule 60(b) motion and **REMAND** to the district court for proceedings consistent with this opinion.

[7] For similar reasons, we decline the Tribe's invitation to exercise our independent power to recall or alter our mandate in *Repsis II*. *See* Aplt.'s Opening Br. at 26–27. The Supreme Court has explained that recalling a mandate serves as a "last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). This case does not present such exceptional circumstances. Specifically, because we conclude that the district court had the power to rule on the Rule 60(b) motion, we need not turn to the "last resort" of recalling our mandate here.

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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 24, 2023

To Counsel of Record

RE: 21-8050, Crow Tribe of Indians, et al v. Repsis, et al
Dist/Ag docket: 1:92-CV-01002-ABJ

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp