No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
RACHEL HERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Crow Tribe of Indians' right under the Second Treaty of Fort Laramie of 1868 to hunt on "unoccupied lands of the United States" survived Wyoming's admission to the Union.

2. Whether the establishment of a National Forest, in and of itself, renders lands within that forest "[]occupied" under the 1868 Treaty.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution, treaties, statutes, and regulations:

In the Supreme Court of the United States

No. 17-532

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the scope and continuing validity of a right reserved to the Crow Tribe of Indians by a treaty between that Tribe and the United States. The United States has a substantial interest in the proper interpretation of its treaties with Indian tribes, in light of both its status as a party to such treaties and its special relationship with the Indian signatories whose rights such treaties secure. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Three centuries ago, the Crow Tribe of Indians (the Crow or the Tribe) migrated from Canada to what is now southern Montana and northern Wyoming. *Montana* v. *United States*, 450 U.S. 544, 547 (1981); Pet. 4. "In the 19th century, warfare between the Crows and

several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-548; see Treaty of Fort Laramie (1851 Treaty), Sept. 17, 1851, 11 Stat. 749; 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904) (Kappler). The 1851 Treaty "identified approximately 38.5 million acres as Crow territory." *Montana*, 450 U.S. at 548. It also specified that the tribes did "not surrender the privilege of hunting, fishing, or passing over any of the" designated lands. Kappler 595.

By the 1860s, non-Indians were rapidly settling the lands that the 1851 Treaty had identified as Crow territory—laying out roads, taking possession of valuable mines, and scaring away game. Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, at 86-88, 90 (1975) (*Proceedings*). In 1867, representatives of the United States, including the Commissioner of Indian Affairs, approached the Crow with a proposal to "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." *Id.* at 86. As for "the rest" of the Crow's territory, the United States proposed to "buy * * * the right to use and settle [it]," while "leaving to" the Crow "the right to hunt upon it as long as the game lasts." *Ibid.*; see *id.* at 90 ("You will still be free to hunt as you are now.").

The United States and the Tribe subsequently signed the Second Treaty of Fort Laramie of 1868. Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), May 7, 1868, 15 Stat.

649; see *Montana*, 450 U.S. at 548. That treaty established in present-day Montana "a Crow Reservation of roughly 8 million acres," *Montana*, 450 U.S. at 548, "for the absolute and undisturbed use and occupation of the [Crow]," 1868 Treaty, art. II, 15 Stat. 650. In exchange, the Tribe agreed to cede the rest of its lands, including its lands in present-day Wyoming, to the United States. *Ibid.* The 1868 Treaty expressly provided, however, that the Tribe would retain certain rights in those ceded lands. In particular, Article IV specified that the Crow "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." 15 Stat. 650.

2. Two months after the 1868 Treaty was signed, Congress passed a statute creating a temporary government for the Territory of Wyoming. Act of July 25, 1868 (1868 Act), ch. 235, 15 Stat. 178. That statute provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." *Ibid.*

In 1890, Congress passed an Act admitting Wyoming to the Union "on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. Under the terms of that Act, the United States granted certain public lands to Wyoming, *e.g.*, § 4, 26 Stat. 222-223, while other lands within the new State's boundaries remained public lands of the United States, see § 12, 26 Stat. 224. The statehood Act made no reference to the Crow's rights under the 1868 Treaty.

3. Shortly after Wyoming's admission to the Union, Congress enacted a statute authorizing the President to

"set apart and reserve" tracts of public lands as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority in 1897, President Cleveland issued a proclamation "reserv[ing] from entry or settlement and set[ting] apart as a Public Reservation" certain public lands bearing forests in northern Wyoming. Proclamation No. 30 (1897 Proclamation), 29 Stat. 909; see *id.* at 910 ("Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation."). The public reservation encompassed lands ceded by the Tribe in 1868 and adjacent to the Crow Reservation across the border in Montana. Pet. 7; J.A. 234.

The lands reserved by the 1897 Proclamation are known today as the Bighorn National Forest. Pet. Br. 10 & n.5. As part of the National Forest System, those lands are to be administered "for the purpose of securing favorable conditions of water flows" and "furnish[ing] a continuous supply of timber." 16 U.S.C. 475. They also are to "be administered for outdoor recreation, range, * * * and wildlife and fish purposes." 16 U.S.C. 528.

4. In 1989, a member of the Crow Tribe shot and killed an elk in the Bighorn National Forest. *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982, 985 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996). After the State of Wyoming prosecuted the tribal member for hunting without a state license, *ibid.*, the Tribe sued Wyoming state officials in federal district court in Wyoming, seeking a declaratory judgment that the Tribe and its members have a right under the 1868 Treaty to hunt on unoccupied lands of the United States, including National Forest lands, *id.* at 986.

The district court granted summary judgment to the state officials. *Crow Tribe of Indians* v. *Repsis*,

866 F. Supp. 520, 521-525 (D. Wyo. 1994). The court found controlling this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), involving a nearly identical provision of a treaty with the Bannock Indians. *Id.* at 507; see Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, art. IV, 15 Stat. 674-675; *Repsis*, 866 F. Supp. at 524. In *Race Horse*, this Court had perceived a conflict between the Bannock's right under the Shoshone-Bannock Treaty "to hunt on the unoccupied lands of the United States," art. IV, 15 Stat. 674, and the Act admitting Wyoming to the Union "on equal terms with the other States." 163 U.S. at 514. Based on that supposed conflict, the Court had concluded that the Shoshone-Bannock Treaty conveyed only a "temporary and precarious" right that would not continue beyond statehood, *id.* at 515, and that Wyoming's statehood Act had "repeal[ed]" that right, *id.* at 514. Finding *Race Horse* indistinguishable, the district court concluded that Wyoming's admission to the Union had likewise extinguished the Crow's right to hunt under the Tribe's 1868 Treaty. *Repsis*, 866 F. Supp. at 522-524.

The Tenth Circuit in *Repsis* affirmed, agreeing that *Race Horse* was indistinguishable and that the 1868 Treaty with the Crow Tribe conveyed only "a temporary right which was repealed with Wyoming's admission into the Union." 73 F.3d at 994. The Tenth Circuit also affirmed on an "alternative basis" that the district court had not reached. *Id.* at 993. The Tenth Circuit observed that the right to hunt under the 1868 Treaty extends only to "unoccupied" lands. *Ibid.* The court reasoned that when the 1868 Treaty was executed, "the

lands located in what is now the Big Horn National Forest were unoccupied" because "they were open for settlement in the westward expansion of the United States." *Ibid.* But, the court continued, when the Bighorn National Forest was created—such that no one could "timber, mine, log, graze cattle, or homestead on the[] lands without federal permission"—the "lands were no longer available for settlement." *Ibid.* The court concluded that, by rendering the lands unavailable for settlement, the creation of the Bighorn National Forest had rendered them "occupied." *Ibid.* The court therefore held that the Crow no longer had a right under the 1868 Treaty to hunt on those lands. *Id.* at 994.

Four years after the Tenth Circuit's decision in *Repsis*, this Court decided *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Among the issues in *Mille Lacs* was whether the Act admitting Minnesota to the Union extinguished the Chippewa's rights to off-reservation hunting, fishing, and gathering under an 1837 treaty. *Id.* at 202-203; see *id.* at 175-177. In considering that question, the Court revisited *Race Horse* and determined that it had "rested on a false premise"—namely, that such treaty rights "conflicted irreconcilably" with state sovereignty. *Id.* at 204. Rejecting that premise and other aspects of *Race Horse*'s reasoning, *id.* at 205-208, the Court held that the Chippewa's treaty rights were not extinguished upon Minnesota's statehood, *id.* at 202-203, 207-208.

5. Petitioner is a member of the Crow Tribe who lives on the Crow Reservation in Montana. Pet. App. 5. In 2014, he and other tribal members went hunting on the Reservation. *Ibid.* When the elk they were hunting crossed a fence and entered the Bighorn National For-

est in Wyoming, petitioner and his companions followed. *Ibid.* There, on land ceded by the Tribe in 1868, they shot and killed three elk. *Ibid.* They then returned with the meat to the Reservation. *Ibid.*

The State of Wyoming cited petitioner for taking an antlered big-game animal during the State's closed season and for being an accessory to others' doing the same—both misdemeanors under state law. Pet. App. 5. Petitioner moved to dismiss the citations, contending that in taking the elk, he was exercising his right to hunt on unoccupied lands of the United States under the 1868 Treaty. *Id.* at 36-37.

The state trial court denied the motion to dismiss. Pet. App. 36-43. The court agreed with the Tenth Circuit's conclusions in *Repsis* that the Crow's treaty right was "temporary" and that the Bighorn National Forest "was 'occupied land' which terminated the * * * right." *Id.* at 38. The court also stated that even "if [petitioner] had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation," *id.* at 39, and petitioner "is subject to [those] regulations," *id.* at 40. Having decided the issue of "off-reservation treaty hunting rights" as a matter of "law," the court found an evidentiary hearing unnecessary, *id.* at 37.

Thereafter, a jury found petitioner guilty on both charges. Pet. App. 9. Petitioner received a one-year suspended jail sentence and a three-year suspension of hunting privileges. *Ibid.* He was also ordered to pay $8080 in fines and costs. *Ibid.*

6. The Wyoming district court affirmed. Pet. App. 3-35.

The Wyoming district court concluded that issue preclusion barred petitioner from relitigating the "judgment" of the "federal district court" in *Repsis* that the treaty right "was intended to be temporary in nature" and "was no longer valid." Pet. App. 14; see *id.* at 31. Recognizing application of issue preclusion to be a matter of federal law, *id.* at 12, the court found each of the prerequisites satisfied, including that petitioner is "in privity" with the Tribe, a party to the prior adjudication, *id.* at 17. The court also rejected petitioner's contention that the prior judgment should be denied preclusive effect in light of this Court's intervening decision in *Mille Lacs*. *Id.* at 20.

The Wyoming district court further determined that "[e]ven if collateral estoppel did not apply," Pet. App. 31, the trial court "appropriate[ly]" "adopt[ed]" the Tenth Circuit's "conclusions" in *Repsis*, *id.* at 34, that the "Tribe's right to hunt * * * was repealed by the act admitting Wyoming into the Union" and that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," *id.* at 33 (quoting *Repsis*, 73 F.3d at 992-993).

The Wyoming Supreme Court denied review. Pet. App. 1-2.

SUMMARY OF ARGUMENT

I. The Crow did not lose their right under the 1868 Treaty to hunt on unoccupied lands of the United States when Wyoming became a State.

A. The 1868 Treaty itself specifies the circumstances under which the Crow's right to hunt would terminate. Because the treaty does not specify statehood as among those circumstances, the right to hunt under the treaty did not expire at statehood. Nor was that right repealed by the Act admitting Wyoming to the Union. That Act

does not mention the Crow's treaty right, let alone clearly express any intent to abrogate it. The Crow therefore retained their right to hunt on unoccupied lands of the United States after Wyoming became a State.

B. *Ward* v. *Race Horse*, 163 U.S. 504 (1896), does not compel a different conclusion. In *Race Horse*, the Court determined that the Bannock's right to hunt under the Shoshone-Bannock Treaty could not "coexist[]" with state sovereignty. *Id.* at 514. In light of that perceived conflict, the Court concluded that the treaty right either was "repeal[ed]" by Wyoming's statehood Act, *ibid.*, or was a "temporary and precarious" right not intended to continue past statehood, *id.* at 515.

This Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), expressly repudiated both of those rationales. Rejecting the premise that "treaty rights are irreconcilable with state sovereignty," the Court in *Mille Lacs* held that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. The Court also rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206. In light of *Mille Lacs*, the State's continued reliance on *Race Horse* is misplaced.

C. Issue preclusion does not bar petitioner from litigating whether the treaty right survived statehood. Following *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), aff'd, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), the applicable legal context changed when this Court decided *Mille Lacs*.

The federal district court's judgment in *Repsis* therefore is not entitled to preclusive effect.

II. The establishment of the Bighorn National Forest did not itself render lands within that forest occupied under the 1868 Treaty.

A. The text of the treaty indicates that the borders of the "unoccupied lands" were the "borders" between "the whites and Indians." 1868 Treaty, art. IV, 15 Stat. 650. Thus, so long as the lands remained unsettled by "the whites," the lands would remain "unoccupied." *Ibid.* Indeed, following the treaty's ratification, U.S. officials referred to the Crow's hunting right as a right to hunt where non-Indians had not settled.

B. The fact that an area has been designated as part of the National Forest System does not render that area occupied. In fact, the proclamation creating the Bighorn National Forest prohibited persons from settling the land within the forest. This is not to say that National Forest land is categorically "*un*occupied." The creation of a National Forest does not foreclose the federal government itself from administering a particular tract of land in such a way as to render it occupied.

C. Petitioner should not be precluded from litigating whether National Forest lands are categorically occupied. The Wyoming district court did not give preclusive effect to the Tenth Circuit's alternative holding on that issue in *Repsis*, and the question whether issue preclusion applies to such an alternative holding was not decided below.

ARGUMENT

When the State of Wyoming charged petitioner with taking elk on National Forest lands in violation of state hunting laws, petitioner moved to dismiss the charges on the ground that he had a right under the 1868 Treaty

to hunt on unoccupied lands of the United States. The Wyoming district court rejected that defense, following the Tenth Circuit's conclusions in *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (1995), cert. denied, 517 U.S. 1221 (1996), that: (1) the treaty right had been repealed by the Act admitting Wyoming to the Union; and (2) the creation of the Bighorn National Forest, in and of itself, "resulted in the 'occupation' of the land" for purposes of the treaty. Pet. App. 33-34 (quoting *Repsis*, 73 F.3d at 993). Neither conclusion is correct.

I. THE CROW'S RIGHT TO HUNT UNDER THE 1868 TREATY WAS NOT EXTINGUISHED BY WYOMING'S ADMISSION TO THE UNION

The 1851 Treaty designated "approximately 38.5 million acres as Crow territory." *Montana* v. *United States*, 450 U.S. 544, 548 (1981). Under the terms of the 1868 Treaty, the Crow relinquished their claim to most of that land, while retaining a "right to hunt on the unoccupied lands of the United States." Art. IV, 15 Stat. 650. That right was not extinguished upon Wyoming's admission to the Union, and it endures to this day.

A. Wyoming's Admission To The Union Did Not Terminate The Crow's Right To Hunt Under The 1868 Treaty

The 1868 Treaty does not provide for the right to hunt on unoccupied lands of the United States to terminate upon admission to the Union of a State encompassing such lands. Nor was that right repealed by the Act admitting Wyoming as a State.

1. The 1868 Treaty does not provide for the hunting right to terminate at statehood

a. The "starting point" for interpreting a treaty "is the treaty language itself." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).

That language should "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians," *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (*Fishing Vessel*) (citation omitted), "with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U.S. at 206.

Article IV of the 1868 Treaty provides that the Crow "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." 15 Stat. 650. The text of the treaty itself specifies the circumstances under which the right to hunt would no longer exist: (1) when the land is no longer "unoccupied"; (2) when the land is no longer owned by the United States; (3) when "game" may no longer be "found thereon"; and (4) when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* A State's admission to the Union is not one of those specified circumstances. Thus, under a straightforward reading of the treaty's text, the right to hunt did not expire when Wyoming was admitted to the Union in 1890.

This Court reached a similar conclusion in *Mille Lacs*. That case involved an 1837 treaty between the United States and several Bands of Chippewa Indians. *Mille Lacs*, 526 U.S. at 175; see Treaty of July 29, 1837 (1837 Treaty), 7 Stat. 536. The 1837 Treaty provides: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes in-

cluded in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." Art. 5, 7 Stat. 537.

The Court in *Mille Lacs* rejected the contention that the Chippewa's treaty rights were not intended to survive the admission of Minnesota to the Union in 1858. 526 U.S. at 206-208. The Court explained that "[t]he 1837 Treaty itself defines the circumstances under which the rights would terminate: when the exercise of those rights was no longer the 'pleasure of the President.'" *Id.* at 207. And the Court found "no suggestion in the Treaty that the President would have to conclude that the privileges should end when a State was established in the area." *Ibid.*

The 1868 Treaty likewise contains no suggestion that the Crow's right to hunt on unoccupied lands of the United States would terminate upon the admission to the Union of a State encompassing those unoccupied lands. Although the 1868 Treaty "tie[s] the duration of the right[] to the occurrence of some clearly contemplated event[s]," *Mille Lacs*, 526 U.S. at 207, statehood is not among them. As in *Mille Lacs*, this Court should decline to add to the events specified in the text of the treaty itself. See *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*.").

b. Nothing in "the history of the treaty" or its "negotiations," *Mille Lacs*, 526 U.S. at 196 (citation omitted), suggests that the Crow would have understood the hunting right to terminate upon the establishment of a State in the ceded area. Representatives of the United States met with the Crow to discuss a treaty in late 1867, see *Proceedings* 86, only eight months before the creation of a territorial government for Wyoming, see

1868 Act, 15 Stat. 178. Yet the record of the proceedings contains no suggestion by federal representatives that it was relevant that Wyoming could become a territory and later a State, or that Wyoming's eventual statehood would extinguish the Crow's right to hunt on lands ceded to the United States. See *Proceedings* 86-87, 89-90. Nor is there any reason to suppose that the Crow would have regarded the particular form of non-Indian government that might be created for the ceded area to be relevant to the commitments the United States was making.

Instead, representatives of the United States emphasized that the Crow would have "the right to hunt upon [the ceded lands] as long as the game lasts." *Proceedings* 86. The representatives viewed the decreasing availability of game as the most urgent threat to the Crow's ability to hunt, *ibid.*, warning that "[t]he game will soon entirely disappear," *id.* at 90. The Crow responded that "[t]here is plenty of buffalo, deer, elk, and antelope in [the] country," and that "whenever [the game] gets scarce," there "will be time enough to go farming." *Id.* at 91. In light of those discussions, the Crow would have been surprised to learn that their right to hunt would expire if Wyoming became a State, even while game could still be found on the unoccupied lands of the United States. The historical record thus reinforces the conclusion that follows from a straightforward reading of the treaty's text: The right to hunt under the 1868 Treaty did not terminate upon Wyoming's admission to the Union.

2. Wyoming's statehood Act did not repeal the hunting right reserved by the 1868 Treaty

The right to hunt under the 1868 Treaty likewise was not repealed by the Act admitting Wyoming to the Union. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.* at 202-203 (quoting *United States* v. *Dion*, 476 U.S. 734, 740 (1986)).

Applying those principles in *Mille Lacs*, this Court determined that the Act admitting Minnesota to the Union did not abrogate the Chippewa's rights under the 1837 Treaty. 526 U.S. at 202-203. That Act provides: "[T]he State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever." Act of May 11, 1858, ch. 31, 11 Stat. 285. The Court observed that "[t]his language, like the rest of the Act, makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." *Mille Lacs*, 526 U.S. at 203. The Court thus found no "'clear evidence' of congressional intent to abrogate the Chippewa Treaty rights" in Minnesota's statehood Act. *Ibid.*

There is likewise no clear evidence that Congress intended to abrogate the Crow's treaty rights when it passed the Act admitting Wyoming to the Union. In language similar to Minnesota's statute, Wyoming's statehood Act provides: "[T]he State of Wyoming is

hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. Neither that language nor any other in Wyoming's statehood Act mentions Indian treaty rights or hints that Congress considered the reserved rights of the Crow and decided to abrogate them. Because the right to hunt under the 1868 Treaty was not intended to terminate at statehood and was not repealed by the statehood Act, it was not extinguished when Wyoming was admitted to the Union.

B. In Light Of *Mille Lacs*, *Race Horse* Does Not Compel A Different Conclusion

In reaching a contrary conclusion, the lower courts in this case relied on the Tenth Circuit's decision in *Repsis*, see Pet. App. 32-34, 37-39, which in turn relied on this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), see *Repsis*, 73 F.3d at 987-992, 994. But in light of this Court's subsequent decision in *Mille Lacs*, *Race Horse* does not compel the conclusion that the Crow lost their right to hunt when Wyoming became a State.

1. *Race Horse* involved a member of the Bannock Indians who lived on that tribe's reservation in Idaho. 163 U.S. at 505-506 (statement of the case). In 1895, the State of Wyoming charged him with killing seven elk in Wyoming in violation of state hunting law. *Id.* at 506. The tribal member argued that his detention violated Article IV of the Shoshone-Bannock Treaty, *ibid.*, which provides that the Bannock "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 15 Stat. 674-675. The question

presented was whether that treaty gave the Bannock "the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws." *Race Horse*, 163 U.S. at 507.

In deciding that question, the Court in *Race Horse* observed that "[t]he act which admitted Wyoming into the Union * * * expressly declared that that State should have all the powers of the other States of the Union." 163 U.S. at 511. The Court stated that one of those powers is "to regulate the killing of game within their borders." *Id.* at 514. The Court therefore reasoned that, if the Shoshone-Bannock Treaty "was so construed as to allow the Indians to * * * disregard and violate" Wyoming's hunting laws, *id.* at 511, Wyoming "will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union," *id.* at 514.

To avoid that outcome, *Race Horse* rendered what this Court later described as two "alternative" holdings. *Mille Lacs*, 526 U.S. at 206; see *id.* at 203-208. The Court in *Race Horse* first held that Wyoming's statehood Act "repeal[ed]" the Bannock's right under the treaty to "hunt on unoccupied lands of the United States." 163 U.S. at 514. The Court reasoned that, "if the treaty applies to [such lands] in the State of Wyoming," "the treaty and the act admitting that State into the Union" would be "irreconcilable," with the "result[]" being a "repeal" of the treaty right by the statehood Act. *Ibid.*

The Court in *Race Horse* further concluded that the "treaty rights at issue were not intended to survive Wyoming's statehood" in the first place. *Mille Lacs*, 526 U.S. at 206; see *Race Horse*, 163 U.S. at 515-516. The Court

assumed that it would be "within the power of Congress" to create treaty rights that survived a State's "admission into the Union." *Race Horse*, 163 U.S. at 515. But the Court declined to construe the Shoshone-Bannock Treaty as recognizing such a "perpetual right." *Ibid.* Noting that under the terms of the treaty, the right to hunt would "cease whenever the United States parted merely with the title to any of its lands," the Court determined that the treaty should be construed as conveying only a "temporary and precarious" right that would not continue beyond statehood. *Ibid.* The Court reasoned that construing the treaty in that way would avoid any "conflict" with the statehood Act and the "rights" of Wyoming. *Id.* at 516.

2. A century later, this Court in *Mille Lacs* expressly repudiated the reasoning behind both of *Race Horse*'s alternative holdings.

a. As the Court in *Mille Lacs* explained, *Race Horse*'s "equal footing holding" rested on a "false premise." 526 U.S. at 204-205. *Race Horse* had concluded that Wyoming's statehood Act repealed the treaty rights on the premise that "the treaty rights conflicted irreconcilably with state regulation of natural resources —'an essential attribute of [a State's] governmental existence.'" *Id.* at 204 (quoting *Race Horse*, 163 U.S. at 516). But the Court in *Mille Lacs* explained that "subsequent cases ha[d] made clear" that "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State." *Ibid.* "Rather," the Court continued, "Indian treaty rights can coexist with state management of natural resources." *Ibid.* In that vein, the Court noted that it had "repeatedly reaffirmed state authority to impose reasonable and necessary

nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205.

The Court therefore held that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Mille Lacs*, 526 U.S. at 205. The Court reiterated that if Congress wishes to "abrogate Indian treaty rights," "it must clearly express its intent to do so." *Id.* at 202. And as explained above, see pp. 15-16, *supra*, Congress did not do so in either the Minnesota statehood Act in *Mille Lacs* or the Wyoming statehood Act here.

b. The Court in *Mille Lacs* also rejected the reasoning behind *Race Horse*'s alternative holding that "Congress (the Senate) could not have intended the rights to survive statehood." 526 U.S. at 208. That holding, the Court recognized, was likewise informed by *Race Horse*'s erroneous conclusion that "the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. In addition, the Court noted that *Race Horse* had viewed the "right to hunt on federal lands" as "temporary because Congress could terminate the right at any time by selling the lands." *Id.* at 207. But "[u]nder this line of reasoning," the Court explained, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Ibid.*

The Court therefore rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Mille Lacs*, 526 U.S. at 206. Instead, in determining whether the rights under the treaty were "intended" to "survive statehood," the Court

stressed that the treaty "itself defines the circumstances under which the rights would terminate." *Id.* at 207. The Court also noted that "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Ibid.*; see *ibid.* ("Treaty rights are not impliedly terminated upon statehood."). Those same basic points are applicable here. As explained above, see pp. 11-14, *supra*, the 1868 Treaty with the Crow, like the 1837 Treaty with the Chippewa, does not provide for the hunting right to terminate at statehood.

3. In light of *Mille Lacs*, the State's continued reliance on *Race Horse* is misplaced.

The State contends (Cert. Supp. Br. 12) that *Mille Lacs* did not overrule *Race Horse*. But *Mille Lacs* expressly repudiated *Race Horse*'s reasoning, 526 U.S. at 202-208, and the dissent in *Mille Lacs* understood that to mean that *Race Horse* had been "overrul[ed] *sub silentio*," *id.* at 220 (Rehnquist, C.J., dissenting), or at least "apparently" or "effectively" overruled, *id.* at 219 & n.3, 220; see also *State* v. *Buchanan*, 978 P.2d 1070, 1076, 1083 (Wash. 1999) (en banc) (agreeing that *Mille Lacs* "effectively overruled" *Race Horse*), cert. denied, 528 U.S. 1154 (2000).[1] And since *Mille Lacs*—indeed,

---

[1] Even before *Mille Lacs*, some lower courts regarded *Race Horse* as no longer good law in light of *Tulee* v. *Washington*, 315 U.S. 681 (1942), and *United States* v. *Winans*, 198 U.S. 371 (1905). See *Holcomb* v. *Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967); *State* v. *Arthur*, 261 P.2d 135, 138-139 (Idaho 1953), cert. denied, 347 U.S. 937 (1954). Indeed, the Idaho Supreme Court declined to follow *Race Horse* in a case involving the same treaty at issue in *Race Horse* itself. *State* v. *Tinno*, 497 P.2d 1386, 1392 n.6 (1972); see *Shoshone-Bannock Tribes* v. *Fish & Game Comm'n*, 42 F.3d 1278, 1286 (9th Cir. 1994) (relying on *Tinno*). The United States filed an amicus brief in *Tinno*, *supra*

since even *Race Horse*—this Court has not found a tribe's off-reservation treaty right extinguished by a State's admission to the Union. The Court may therefore wish to take this opportunity to overrule *Race Horse* explicitly.

Regardless whether this Court takes that step, the outcome here should be the same. Given that this Court has already rejected *Race Horse*'s reasoning, it should, at a minimum, decline to extend that reasoning beyond the specific Shoshone-Bannock Treaty at issue in *Race Horse*. Just as *Race Horse* did not "compel" the rejection of rights under a different treaty in *Mille Lacs*, 526 U.S. at 208, *Race Horse* should not compel that outcome here.

Although the State acknowledges (Br. in Opp. 20) that *Mille Lacs* rejected *Race Horse*'s reliance on the "equal footing doctrine," it contends (*ibid.*) that *Mille Lacs* did not disturb *Race Horse*'s "approach" to the "interpretation of treaties." According to the State (*ibid.*), the "proper inquiry" is still the same: "whether the [treaty] rights were intended to be perpetual, or whether they were intended to expire upon the happening of an event." But the Court in *Race Horse*—informed by its view at the time that "Indian treaty rights were inconsistent with state sovereignty," *Mille Lacs*, 526 U.S. at 207—was willing to infer that such rights were "temporary and precarious," and thus not intended to survive statehood, based merely on the fact that they would

---

(No. 10737), arguing (at 19-20) that the theory of *Race Horse* had been repudiated by, *inter alia*, *Tulee* and *Winans*. *Tinno* was decided well before *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which admonished lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Id.* at 484.

expire upon the happening of some *other* event (such as Congress's "selling the lands"). *Id.* at 206-207.

The Court in *Mille Lacs* rejected that "broad"-brush approach to treaty interpretation. 526 U.S. at 207. It required instead a more focused inquiry into whether treaty rights were intended to survive statehood and stressed that the 1837 Treaty did not identify statehood as a termination point. *Ibid.* The Court further held that "[t]reaty rights are not impliedly terminated upon statehood," and that "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Ibid.* And the Court noted that the "*Race Horse* Court's decision to the contrary—that Indian treaty rights were impliedly repealed by Wyoming's statehood Act—was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. The Court in *Mille Lacs* rejected that conclusion as well. *Id.* at 203-205. Thus, far from "reaffirm[ing]" *Race Horse*'s approach, Br. in Opp. 20, *Mille Lacs* repudiated it. Under the inquiry called for by *Mille Lacs*, the right to hunt under the 1868 Treaty was not intended to expire when Wyoming was admitted to the Union. See pp. 11-14, *supra*.[2]

---

[2] The government argued in *Mille Lacs* that, "whatever vitality *Race Horse* retain[ed]," the Chippewa's rights under the 1837 Treaty were not "'temporary'" or "'precarious'" like the treaty right in *Race Horse*. U.S. Br. at 42-44, *Mille Lacs*, *supra* (No. 97-1337). In particular, the government argued that, whereas the rights under the 1837 Treaty lacked "any fixed termination point," the right under the Shoshone-Bannock Treaty would "continue only for so long as [the Bannock's] hunting grounds remained unoccupied and owned by the United States, conditions whose 'disappearance' was already 'clearly contemplated' at the time that the treaty was ratified." *Id.* at 44 (quoting *Race Horse*, 163 U.S. at 509). Although the

C. Petitioner Should Not Be Precluded From Litigating Whether The Treaty Right Survived Statehood

In addition to holding that the trial court properly "adopt[ed]" the "conclusions" of the Tenth Circuit in *Repsis*, Pet. App. 34, the Wyoming district court determined that petitioner is precluded from litigating whether the Crow's "off-reservation treaty hunting right" is "no longer valid" because "the right was intended to be temporary in nature," *id.* at 14. That determination is incorrect.

Issue preclusion (or collateral estoppel) bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). The Wyoming district court identified the relevant prior judgment here as the "judgment" of the "federal district court" in *Repsis* that was affirmed on appeal. Pet. App. 14; see *id.* at 18. Petitioner was not a party to that adjudication, but the Tribe was. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520 (D. Wyo. 1994). And like the "very great majority" of Indian treaty rights, the right to hunt under the 1868 Treaty is a right reserved to the Tribe as a whole. *Hebah* v. *United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970)

Court in *Mille Lacs* noted that distinction in the course of concluding that the Chippewa's treaty rights were not extinguished upon statehood, 526 U.S. at 207, it rejected "the 'temporary and precarious' language in *Race Horse*" at which the distinction had been aimed, *id.* at 206. It also emphasized that the "1837 Treaty itself defines the circumstances under which the rights would terminate," and that treaty rights cannot "be extinguished by *implication* at statehood." *Id.* at 207. Thus, following *Mille Lacs*, even if a treaty "tie[s] the duration of the rights to the occurrence of some clearly contemplated event[s]," *ibid.*, the rights should not be held to expire at statehood unless statehood itself is one of those specified events.

(citing *Blackfeather* v. *United States*, 190 U.S. 368, 377 (1903)). Thus, in appropriate circumstances, a civil judgment against the Tribe in a suit pertaining to its rights under the 1868 Treaty could be given preclusive effect in subsequent litigation involving an individual tribal member who was not a party to the prior suit. Cf. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938) (holding that the judicial apportionment of water rights in litigation between States is binding upon the citizens of each State).

This Court has recognized, however, that the "general rule" of "issue preclusion" does not apply when "a 'change in the applicable legal context' intervenes." *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (brackets and citation omitted). After *Repsis* was decided, *Mille Lacs* expressly repudiated *Race Horse*'s conclusion that off-reservation "treaty rights are irreconcilable with state sovereignty" and are thus "extinguish[ed]" upon statehood. 526 U.S. at 205. *Mille Lacs* also held that *Race Horse*'s characterization of a treaty hunting right as "'temporary and precarious'" was "too broad to be useful as a guide" to whether that right was "intended to survive statehood." *Id.* at 206-207. *Mille Lacs* thus changed the applicable legal context with respect to both of *Race Horse*'s rationales. Because the federal district court's judgment in *Repsis* rested on *Race Horse*, see 866 F. Supp. at 522-524, it is not entitled to preclusive effect.

II. THE ESTABLISHMENT OF THE BIGHORN NATIONAL FOREST DID NOT ITSELF RENDER LANDS WITHIN THAT FOREST OCCUPIED UNDER THE 1868 TREATY

Under the 1868 Treaty, the Tribe's hunting right extends only to "unoccupied lands of the United States."

Art. IV, 15 Stat. 650. The Tenth Circuit in *Repsis* determined that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land" for purposes of the 1868 Treaty because the land was "no longer available for settlement." 73 F.3d at 993. Under the 1868 Treaty, however, unsettled lands *are* "unoccupied lands." Thus, the creation of the Bighorn National Forest, in and of itself, did not render lands within the forest occupied.

A. Under The 1868 Treaty, "Unoccupied Lands" Are Lands That Have Not Been Settled

Although the 1868 Treaty does not define the term "unoccupied lands," the text of the treaty indicates that the term refers to lands not settled by "the whites." Art. IV, 15 Stat. 650. The text provides that the Crow "shall have the right to hunt on the unoccupied lands of the United States * * * as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* Both "unoccupied lands" and "hunting districts" thus refer to the areas where the Crow may hunt. And the text indicates that the "borders" of those areas were the borders between "the whites and Indians." *Ibid.* It follows that as "the whites" settled more land, the land would become "[]occupied." *Ibid.* Conversely, as long as the land was not settled by "the whites," the land would remain "unoccupied." *Ibid.*; cf. art. II, 15 Stat. 650 (setting apart the Crow Reservation for "use and occupation of the Indians" and providing that others may not "settle upon" that land).

The historical record supports that understanding. See *Mille Lacs*, 526 U.S. at 196 (explaining that treaty language should be construed in light of "history" and "the practical construction adopted by the parties") (citation omitted). During subsequent consideration of a

bill to make appropriations to fulfill the United States' obligations under the 1868 Treaty, Senator Harlan reminded his colleagues that the treaty permitted the "Indians to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Senator Harlan explained: "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game." *Ibid.*

A representative of the United States echoed that interpretation during negotiations to secure further cessions of land from the Crow. See Act of Mar. 3, 1873, ch. 321, 17 Stat. 626 (authorizing negotiations). Addressing tribal members, the federal representative described the 1868 Treaty as allowing the Crow to hunt "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 135 (1874); see *id.* at 132 (stating that the treaty allowed the Crow to hunt "as long as there are any buffalo, and as long as the white men are not here * * * with farms"). The historical record thus indicates that the parties understood "unoccupied lands" to refer to lands "the whites" had not settled.

B. Lands Do Not Become Settled Simply By Virtue Of Becoming Part Of The National Forest System

1. Given that "unoccupied lands" are lands that have not been settled, the fact that an area has been designated as part of the National Forest System does not render that area "[]occupied." Quite the opposite, the creation of the Bighorn National Forest meant that those "lands were no longer available for settlement" by private persons. *Repsis*, 73 F.3d at 993. Indeed, the 1897 Proclamation setting apart those lands "expressly"

"[w]arn[ed]" "all persons not to * * * make settlement upon" them. 29 Stat. 910.

Such a prohibition on settlement would not have led the Crow to think that those lands had become "[]occupied" and thus off limits for hunting. During negotiations leading up to the 1868 Treaty, the Crow and the United States had agreed that settlement of Crow territory by "white people" was "driv[ing] away" the "game." *Proceedings* 86 (statement of Commissioner Taylor); see *id.* at 87 (statement of Bear's Tooth) ("Your young men scare away the game and I have none left."); *id.* at 88 (statement of Black Foot) ("We are being surrounded by the whites and by other nations. * * * The whites have made two branches of a road besides the California and have cut up the best game country we have."). The Crow therefore would have naturally understood the 1897 Proclamation as making the lands within the National Forest more secure for hunting—not as extinguishing the treaty hunting right on those lands.

In concluding that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," 73 F.3d at 993, the Tenth Circuit in *Repsis* did not examine the words of the 1868 Treaty or consider how they "would naturally be understood by the Indians," *Fishing Vessel*, 443 U.S. at 676 (citation omitted). Its counterintuitive conclusion that lands closed to private settlement and set aside as a forest reserve should categorically be considered "[]occupied" has no sound basis in the text or history of the treaty.

2. This is not to say that lands within a National Forest must categorically be considered "*un*occupied." The establishment of a National Forest prohibits private settlement of lands within the forest. *E.g.*, 1897 Proclamation, 29 Stat. 910. But it does not foreclose the federal

government itself from administering a particular tract of National Forest land in such a way that renders that land occupied within the meaning of the 1868 Treaty. See *State* v. *Cutler*, 708 P.2d 853, 856 (Idaho 1985) (explaining that the "federal government is not necessarily foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied"). For example, the U.S. Forest Service may construct roads, campsites, or administrative buildings on particular tracts of National Forest land. Where the Forest Service has done so, those areas may be considered occupied under the 1868 Treaty, such that the Crow have no treaty right to hunt in them. Consistent with that understanding, a Forest Service regulation prohibits the discharge of firearms "within 150 yards of a residence, building, campsite, developed recreation site *or occupied area*" on National Forest lands. 36 C.F.R. 261.10(d)(1) (emphasis added).[3]

The Tenth Circuit in *Repsis*, however, concluded that the establishment of the Bighorn National Forest, by itself, rendered the land occupied, without considering the uses to which the Forest Service had put any

---

[3] There is no blanket prohibition on hunting on National Forest lands; rather, hunting is permitted, so long as it would not violate a specific "Federal or State law." 36 C.F.R. 261.8; see 36 C.F.R. 251.50(c) (providing that a "special use authorization" is generally "not required" for "hunting" on National Forest lands); see also 43 U.S.C. 1732(b) (authorizing the Secretary of Agriculture to "designate areas of * * * National Forest [lands] where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law"). State law, however, would be preempted to the extent petitioner had a right under the 1868 Treaty to hunt in this case. U.S. Const. Art. VI, Cl. 2.

particular tract. 73 F.3d at 993. The courts below simply adopted that analysis, without considering the circumstances of this particular case or the view of the Forest Service. Pet. App. 34, 38. Indeed, the trial court had originally scheduled an evidentiary hearing "to address the meaning of the Crow Treaty and its application to the site where the elk were killed," *id.* at 6, but the court canceled that hearing after concluding that petitioner had no right to hunt under the treaty as a matter of "law," *id.* at 37; see *id.* at 43. If this Court were to reverse that legal conclusion, an evidentiary hearing would be appropriate on remand to the extent there is a factual dispute over whether the site where the elk were killed was being used in a way that rendered it occupied.[4]

---

[4] On remand, an evidentiary hearing would also be appropriate to address whether prohibiting the Crow from hunting during the State's closed season was necessary for the conservation of elk in 2014. Although usufructuary rights reserved by a federal treaty may "not be qualified by the State," *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975) (citation omitted), States may impose certain regulations if they can "demonstrate that [the] regulation is a reasonable and necessary conservation measure" and that application of the regulation to the tribe in particular is "necessary in the interest of conservation," *ibid.* Petitioner appealed the state trial court's conclusion that the State "may regulate [his treaty] right in the interest of conservation," Pet. App. 39; see Pet. Cert. Supp. Br. 2, but the Wyoming district court did not reach the issue, Pet. App. 14 n.3, 25 n.7. On remand, the lower courts would not be bound by the Tenth Circuit's statement in *Repsis* that the State's "regulations were reasonable and necessary for conservation." 73 F.3d at 993. That is because the issue would be whether prohibiting the Crow from hunting during the State's closed season was necessary for the perpetuation or preservation of state elk populations in 2014, not whether it was necessary two decades ago. See *Antoine*, 420 U.S. at 207.

C. Petitioner Should Not Be Precluded From Litigating Whether National Forest Lands Are Categorically Occupied

The State errs in contending (Br. in Opp. 17-18) that petitioner should be precluded from litigating whether the establishment of the Bighorn National Forest rendered the land within the forest no longer "unoccupied" under the 1868 Treaty. As noted above, see p. 23, *supra*, the Wyoming district court viewed the relevant prior judgment for purposes of issue preclusion as the "judgment" of the "federal district court" in *Repsis* that was affirmed by the Tenth Circuit. Pet. App. 14; see *id.* at 18. The only treaty-related question addressed by the federal district court was whether the treaty right "was no longer valid" because "the right was intended to be temporary in nature." *Id.* at 14; see *Repsis*, 866 F. Supp. at 522-524. That court "did not reach" the issue whether "the lands of the Big Horn National Forest are 'occupied.'" *Repsis*, 73 F.3d at 993. Accordingly, the Wyoming district court gave preclusive effect only to the federal district court's holding, affirmed on appeal, that the treaty right was temporary and no longer valid. Pet. App. 14, 18; cf. *id.* at 33 (noting, in discussing the merits without regard to issue preclusion, the Tenth Circuit's alternative holding on the "unoccupied" issue) (quoting *Repsis*, 73 F.3d at 993).

Although the Tenth Circuit in *Repsis* did decide whether "the lands of the Big Horn National Forest are 'occupied,'" it did so only very briefly and only as an "alternative basis for affirmance." 73 F.3d at 993. In response to the Wyoming district court's *sua sponte* request for briefing on issue preclusion, petitioner argued that such an alternative holding should not be given preclusive effect. Pet. D. Ct. Supp. Br. 26. The State, by

contrast, identified the 1868 Treaty's "application to national forest land in Wyoming" as part of the "issue" petitioner should be precluded from litigating. State D. Ct. Supp. Br. 4 (emphasis omitted). But in identifying the relevant prior adjudication, the State referred only to what "was necessarily adjudicated on the merits with the grant of summary judgment," without specifically addressing whether an alternative holding on appeal should be given preclusive effect. *Id.* at 11. The Wyoming district court likewise did not address that question, let alone take sides in what the State asserts (Br. in Opp. 17 n.4) is "a split of authority" on the preclusive effect of alternative holdings.

Given that this Court does not ordinarily consider questions not addressed below, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."), it should decline to consider whether issue preclusion applies to the Tenth Circuit's alternative holding in *Repsis* that lands within the Bighorn National Forest are occupied. That will allow the Court to undertake a full examination of the scope of the treaty right after giving fresh consideration to whether that right survived Wyoming's statehood (the primary issue in *Repsis* and the proceedings below) and taking into account the position of the United States (the other party to the treaty) that National Forest lands are not categorically occupied within the meaning of the treaty.

CONCLUSION

The judgment of the Wyoming district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
RACHEL HERON
Attorneys

SEPTEMBER 2018