IN THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, STATE OF WYOMING

CLAYVIN HERRERA,	)	
	)	
Appellant,	)	CV 2020-273
	)	
vs.	)	
	)	
	)	
STATE OF WYOMING,	)	
	)	
Appellee.	)	

Appeal from Fourth Judicial Circuit Court, Sheridan County, Wyoming

Representing Appellant:
Kyle Gray & Steven Small of Holland & Hart, Billings, Montana; Hadassah Reimer of Holland & Hart, Jackson, Wyoming.

Representing Respondent:
Christopher LaRosa, Deputy County and Prosecuting Attorney, Sheridan, Wyoming.

Representing the* Crow *Tribe of Indians, Amicus Curiae in Support of Clayvin Herrera:
Bailey Lazzari, Lazzari Legal, Lander, Wyoming; Daniel D. Lewerenz, Native American Rights Fund, Washington, D.C.; Wesley Furlong, Native American Rights Fund, Anchorage, Alaska.

John G. Fenn, District Court Judge

The above-entitled matter came before the Court on Appellant, Clayvin Herrera's appeal from the *Order on State's Request For Post-Remand Issue Preclusion*, entered on June 11, 2020. Having reviewed the record, the briefs of the parties, and being otherwise fully advised, the Court **REVERSES** the circuit court's order.

ISSUES

The Appellant frames the pertinent issues as follows:

1. Under controlling federal law, does the U.S. Supreme Court's mandate in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), prevent preclusive use of the Tenth Circuit's decision in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), given the Supreme Court's repudiation of *Repsis* and the bases for its holdings?

2. Under controlling federal law, does the "change in the context of the law exception negate any preclusive effect that *Repsis* might possibly still maintain?
3. Under controlling federal law on the exceptions to issue preclusion, can alleged alternative grounds in *Repsis* be granted preclusive effect against Mr. Herrera?

The Appellee frames the pertinent issues as follows:

I. Does the mandate of *Herrera v. Wyoming* or any rule of waiver or forfeiture bar Wyoming courts from deciding the preclusion issues raised on remand?

II. Did the circuit court reasonably rule that issue preclusion applied to the occupation and conservation rulings of *Crow Tribe of Indians v. Repsis* and that pursuant to each ruling the *Repsis* judgment barred Appellant as an enrolled member of the Crow Tribe from asserting his treaty defense of immunity from prosecution?

FACTS

Herrera is an enrolled member of the Crow Tribe and a resident of St. Xavier, Montana, which is located on the Crow Reservation. In January 2014, Herrera and several other tribal members decided to hunt for elk on the Crow Reservation. They spotted several elk on the Reservation in the vicinity of Eskimo Creek. At some point, the elk crossed a fence, leaving the Crow Reservation and entering into the Bighorn National Forest in the State of Wyoming. Herrera and the others crossed the fence into Wyoming and continued to track the elk. They shot three bull elk without a license and during a closed season. Herrera was cited with two misdemeanors, Taking an Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-3-102(d), and Accessory to Taking Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-6-205.

In circuit court, Herrera filed a *Motion to Dismiss*, asserting that he was immune from these hunting regulations under Article 4 of the Fort Laramie Treaty. Without holding an evidentiary hearing, the circuit court denied Herrera's motion, finding that under *Repsis*, the treaty had expired, the Bighorn National Forest was "occupied" within the meaning of the treaty, and the regulation met the conservation necessity standard. Herrera unsuccessfully sought pretrial review of the denial of his motion to dismiss both from this Court and the Wyoming Supreme Court. A jury trial was held in April 2016, and Herrera was found guilty of both counts.

He appealed his convictions to this Court, again arguing that he was immune from prosecution under the Fort Laramie Treaty.

In December 2016, this Court ordered the parties to file additional briefing on whether the doctrines of collateral estoppel, issue preclusion, or res judicata applied to prevent Herrera from asserting his treaty hunting rights, due to the holding in *Repsis* that the treaty had expired. In April 2017, after reviewing the briefs and conducting oral argument, this Court found that the doctrine of issue preclusion applied, and it affirmed Herrera's convictions. Herrera sought a writ of review from the Wyoming Supreme Court, but that court declined to grant such a writ. Herrera then filed a petition for a writ of certiorari with the Supreme Court of the United States. In June 2018, the Supreme Court of the United States granted Herrera's petition for a writ of certiorari on the question of "[w]hether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hung on the 'unoccupied lands of the United States' . . . ." *Herrera* (No. 17-532), *Pet. for Cert.* at i; (R. 1678).

On May 21, 2019, the Supreme Court of the United States issued its decision in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). In a five-four decision, the *Herrera* court found that the creation of the Bighorn National Forest did not render it categorically occupied. *Id.* at 1698, 1700-01. The majority also held that issue preclusion did not apply to prevent the re-litigation of the validity of the Fort Laramie Treaty, because there had been an intervening change in the law due to the issuance of the decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1992). 139 S. Ct. at 1697-98. The majority opinion stated that on remand, the State could present evidence that "the specific site where Herrera hunted elk was 'occupied' within the meaning of the 1868 Treaty," and that the regulations at issue met the conservation necessity standard. *Id.* at 1703. In footnote five, the majority stated that it would not address whether *Repsis*'s occupation holding could still have preclusive effect, because this Court had not addressed it. The dissent stated that the state courts on remand could hold that portions of the *Repsis* judgment still had preclusive effect.

When the case was remanded back to this Court, the State asked the Court to take judicial notice of additional filings from the *Repsis* cases that had not previously been submitted either to the circuit court or to this Court. The State asked this Court to hold that issue preclusion still applied to *Repsis*'s occupation and conservation necessity holdings. Because issue preclusion is a

fact intensive issue, it was not appropriate for this Court sitting in its appellate jurisdiction to make that determination. This Court remanded the case back to circuit court to have an evidentiary hearing on the issues of site specific occupation and conservation necessity and to consider the issue preclusion question that had been raised by the State after remand.

PROCEEDINGS BELOW

On remand, the circuit court did not conduct an evidentiary hearing. Instead, the parties briefed the preclusion issues raised by the State. Herrera opposed the application of issue preclusion, and he argued that the mandate issued in the *Herrera* case barred the circuit court from considering any issue preclusion issues on remand. The State argued that the mandate did not bar the consideration of issue preclusion, all of the prerequisites for issue preclusion had been met with respect to both alternative rulings, and no exception applied. The circuit court held oral argument on January 13, 2020, but it did not issue its decision until June 11, 2020. The circuit court ruled that the *Herrera* mandate did not bar consideration of issue preclusion, and that the State had not waived or forfeited those issues. The circuit court ruled that the prerequisites for issue preclusion were met with respect to both alternative holdings, and that circumstances disfavoring preclusion were not present. The circuit court also found that no recognized exception to the use of issue preclusion applied. Finally, the circuit court concluded that the *Respis* alternative holdings each barred Appellant's treaty defense, and his pretrial motion to dismiss was properly denied. This appeal followed.

STANDARD OF REVIEW

The application of issue preclusion presents a question of law that this Court reviews *de novo*. *Loeffel v. Dash*, 2020 WY 96, ¶ 19, 468 P.3d 676, 681 (Wyo. 2020) (citing *Bird v. Lampert*, 2019 WY 56, ¶¶ 9-10, 441 P.3d 850, 854 (Wyo. 2019); *Doles v. State*, 2007 WY 119, ¶ 4, 163 P.3d 819, 820 (Wyo. 2007)).

DISCUSSION

In the voluminous briefs that were filed in this case, both parties presented this Court with hyper-technical arguments on a variety of issues. For example, the Court has been asked to determine the importance of a "dinkus," and decide whether something found in a "sentence fragment" can constitute an alternative holding. The parties have also asked this Court to determine whether the mandate issued in the *Herrera* case allowed the circuit court to consider issue preclusion on remand. Herrera asserts that it was improper for the circuit court to focus on

"ellipsed" portions of sentences in one footnote in the majority opinion to find that it could consider issue preclusion. The State alleges that although Section IV of the Herrera opinion only references the site specific occupation and conservation necessity issues, when the entire opinion is considered, issue preclusion could still be considered on remand. Herrera further argues that the conservation and occupation sentences were not alternative holdings, because they were not "necessary or essential" to the final outcome of the *Repsis* case. In the event this Court decides those sentences were alternative holdings, Herrera asks this Court to decide that the alternative holdings cannot have preclusive effect. Recognizing that the federal circuits are split on the preclusive effect of an alternative holding, he asks this Court to follow the rule set forth in § 27 of the Restatement (Second) of Judgments, and hold that alternative holdings do not have preclusive effect. The State argues that the Court should follow the rule set forth in § 68 of the Restatement (First) of Judgments, and hold that alternative holdings can and should have preclusive effect. Herrera also argues that the prerequisites for the doctrine of issue preclusion have not been met, and that even if they were met, an exception to the doctrine applies. The State asserts that the prerequisites are met and that no exception applies in this case.

The resolution of this appeal does not require the Court to resolve all of these issues. Instead, the Court only needs to answer one question: assuming that it was permissible for the circuit court to consider issue preclusion and that all of the prerequisites for applying the doctrine were met,[1] was application of the issue preclusion doctrine proper in this case? This Court concludes that it was not.

As the Supreme Court of the United States recognized, "[e]ven when the elements of issue preclusion are met, . . . an exception may be warranted if there has been an intervening 'change in [the] applicable legal context.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (quoting *Bobby v. Bies*, 556 U.S. 825, 834, 129 S. Ct. 2145 (2009)). The *Herrera* court specifically found that there had been a change in the applicable legal context since the *Repsis* case, specifically, the *Mille Lacs* case. 139 S. Ct. at 1698. The *Herrera* case itself is another

[1] The Court recognizes that it is likely that the prerequisites were not met for the conservation necessity "holding." The regulation at issue in *Repsis* was completely different from the regulation that is at issue in this case. Further, contrary to the State's assertion, a finding that one regulation meets the conservation necessity standard does mean that every regulation would pass such a test. The State has the burden of proving that each and every regulation it intends to apply to treaty hunters meets the conservation necessity standard. In other states where treaties have been found to be valid, the hunting and fishing regulations are often reviewed and revised on an annual basis to ensure compliance with the conservation necessity standard. This constitutes a separate reason for finding that issue preclusion should not have been applied to the conservation necessity "holding" in *Repsis*.

change in the legal context. The *Repsis* Court had found that the Fort Laramie Treaty had expired. *Herrera* held that Wyoming's admission to the Union did not abrogate the Crow Tribe's treaty hunting right. *Id.* at 1697. The *Herrera* court also held that the creation of the Bighorn National Forest did not render it categorically occupied, and the Treaty did not expire of its own accord when the forest was created. *Id.* at 1700-03. Because there have been multiple changes in the applicable legal context since the *Repsis* decision was issued, it was improper to apply issue preclusion to either the occupation or conservation necessity "holdings" of that case.

Herrera also argued that the State cannot met its burden of proving that the closed season regulation meets the conservation necessity standard, because elk are overpopulated. Herrera cites selective portions of the *Puyallup* case to support his assertion that a state can only make regulations that are "necessary for the perpetuation of the species," and those regulations "are only valid 'until the species regains assurance of survival.'" However, the Supreme Court has not defined the conservation necessity doctrine as narrowly as Herrera contends. The entire quote from *Puyallup* reads:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be located, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.
>
> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48–49, 94 S. Ct. 330, 333–34, 38 L. Ed. 2d 254 (1973). Herrera took small snippets from sentences two paragraphs apart to make it appear that the *Puyallup* court held something that it did not.

Two years later, in *Antoine v. Washington*, the Supreme Court was asked to hold that "state restrictions 'cannot abridge the Indians' federally protected rights without (the State's) demonstrating a compelling need' in the interest of conservation." 420 U.S. 194, 207 (1975). However, the Supreme Court declined to address this question, because the State of Washington had not argued or even attempted to establish that the regulation at issue was "in any way necessary or even useful for the conservation of deer." *Id.* (citing *Hunt v. United States*, 278 U.S. 96 (1928)). To this day, the Supreme Court has yet to tackle this issue.

There has been surprisingly little case law interpreting the "conservation necessity" standard since it was first announced. It appears that the only circuit that has had an opportunity to explore the proper definition of this standard is the Ninth Circuit. The Ninth Circuit expressly rejected the "endangered species" approach that is advocated by Herrera. In *United States v. Oregon*, the Ninth Circuit held:

> we refuse to endorse the "endangered species" approach of the tribes. We can easily foresee instances in which limitations on the geographical aspect would be proper under the treaty even though extinction of the brights as a species was not imminent. Conservation, properly understood, embraces procedures and practices designed to forestall the imminence of extinction. Preserving a "reasonable margin of safety" between an existing level of stocks and the imminence of extinction is the heart and soul of conservation. Limitations on the geographical aspect of the tribes' treaty rights to promote that end are permissible.

United States v. State of Or., 718 F.2d 299, 305 (9th Cir. 1983). The Ninth Circuit went on to say:

> The district court has substantial latitude in determining what limits, if any, to which the geographical treaty rights of the tribes should be subject in the light of an existing stock of brights. In determining what limits, if any, are necessary, the court must accord primacy to the geographical aspect of the treaty rights and invoke only such limits as required by the "comfortable margin" that sound conservation practices dictate.

Id. The Ninth Circuit also found that the district court "recognized the primacy of the treaty rights while recognizing the claims of conservation." *Id.* The Ninth Circuit reaffirmed its rejection of the "endanger species" approach in *United States v. Eberhardt*, 789 F.2d 1354, 1362 (9th Cir. 1986), and again in *Anderson v. Evans*, 314 F.3d 1006, 1028 (9th Cir.

2002). The Ninth Circuit has further explained the purposes behind the conservation necessity doctrine:

> The purpose of requiring the government to prove conservation necessity before imposing its wildlife laws on tribe members is to safeguard the hunting and fishing rights held by the tribes while pursuing the important goal of conservation. "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." *Department of Game v. Puyallup Tribe,* 414 U.S. 44, 49, 94 S. Ct. 330, 333, 38 L.Ed.2d 254 (1973).

United States v. Williams, 898 F.2d 727, 729 (9th Cir. 1990). Further, whether the Tribe has outlawed the same type of hunting is a relevant factor to be considered, although it is not dispositive. *Id.* at 729-30. Many of the cases involving conservation necessity involved expert testimony.

The site specific occupation and conservation necessity issues are fact intensive questions that can only be properly determined after competent, admissible evidence has been received at an evidentiary hearing. The Court finds that this case should be remanded to the circuit court to conduct an evidentiary hearing on these two issues.

NOW, THEREFORE, IT IS HEREBY ORDERED that the circuit court's *Order on State's Request For Post-Remand Issue Preclusion* is **REVERSED** and this case is **REMANDED** for an evidentiary hearing on the site specific occupation and conservation necessity holdings.

Dated this 3 day of Decemb, 2021.

JOHN G. FENN
DISTRICT COURT JUDGE

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this 3rd day of December 2021.

Clerk

By Deputy

Copies to:
Christopher LaRosa
Kyle Gray
Bailey Lazzari
Daniel D. Lewerenz