To: The Crow Tribal Legislature, et. al.

From: Jay Harris, Law Student and Member of Crow Tribal General Council

Re: Information concerning possible Crow Tribal treaty right to hunt off reservation

Date: April, 2008

Question Presented:

Does the Crow Tribe have a treaty right to hunt on federal lands outside the Crow Reservation?

Brief Answer:

Most likely. Recent case law suggests that the Crows probably have an 1868 treaty right to hunt on "unoccupied" lands in the United States, including but perhaps not limited to ceded portions of the original Crow Reservation.

Discussion:

Historical background

On May 7, 1868 eleven Crow Chiefs signed what is today known as the "Fort Laramie Treaty of 1868" with U.S. government officials. See 15 Stat. 649. The treaty and its terms were approved by the U.S. Senate in late July of the same year and signed by President Johnson a few weeks later. Id. Of particular concern for the present purpose is Article IV of the Treaty, which in relevant part provides the following:

> [The Crows] 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.

Fort Laramie Treaty of 1868, Treaty with the Crow Indians, U.S.-Crow Tribe of Indians, art. IV, May 7, 1868, 15 Stat. 649.

This language clearly sets out a right for Crows to hunt off the reservation, provided that the hunting takes place on "unoccupied lands of the United States" with further provisos concerning the availability of game and the state of peace between Crows and whites (probably meaning Euro-Americans) on the borders of the said hunting districts. In total, there are twelve articles in the 1868 treaty but none further condition the right to hunt off the reservation. In fact, taken as a whole the only other provision in Article IV is of limited modern relevance and pertains to the Crow promise to stay on the reservation and make it their home as soon as the promised Indian agency house and "other buildings" were constructed.

No other provision in the 1868 Treaty seeks to condition the right to hunt off the Reservation and a fair construction of Article IV is that the United States sought to locate the Crows on a reservation and simply thought it good policy to allow the Crows the right to hunt on lands off the reservation so as to convince the Tribe that acceptance of such a sizable and permanent reduction of their homeland would not mean forsaking traditional hunting grounds. After all, it was activities such as hunting (and other food gathering), warfare, and trade that served as the primary purposes the Tribe would have left their homeland.

In furtherance of the underlying federal policies regarding the establishment of Indian reservations, it is clear that the United States wanted the Crows to end their practice of fighting other tribes. The tribal need for goods traditionally sought in trade would be provided by the federal government (who, of course, also wanted the Crows to transition to a primarily agricultural society). But hunting was something the federal government thought reconcilable with the need to locate Indians on reservations. Perhaps the thought was that hunting parties would likely be small and limited to areas known to the Crows for an abundance of game on the periphery of the Reservation.

Overall, in agreeing to the treaty terms the United States was essentially saying to the Crows:

You can leave your reservation in order to hunt under the following conditions:

1) *your hunting takes place on unoccupied lands of the United States, and*

2) *there is game available to hunt, and*

3) *you do not breach the peace with whites, especially in the areas near the places you have a right to hunt*

Our contention should be first that this 1868 treaty right has never been abrogated by Congress. Additionally, we can argue that the specific treaty conditions have always been met and can be met today as a matter of fact and law. Together, these arguments, if successfully made, serve as the preconditions upon which the Crow Tribe can invoke and exercise the 1868 treaty

right to hunt on unoccupied lands, which may be exercised by any Tribal member[1].

Modern Crow Reservation and People

Since the federal government's recognition of the 38-million acre Crow territory in the 1851 Fort Laramie Treaty and the later establishment of the Crow Reservation under the terms of the 1868 Treaty, Congress has passed three land cession acts (in 1882, 1891, and 1904) which gradually reduced the size of the Reservation from 8 million to about 2.2 million acres, its current size. See Dr. Joe Medicine Crow, A Handbook of Crow Indian Laws and Treaties, 60-61 (1966). Of course, like many others, the Crow Reservation was subject to federal allotment policies and today about one-third of the Reservation is non-Indian fee land. Id., also see Dr. James Lopach, et. al., Tribal Government Today (Revised Edition), 61 (1998).

For the purposes of exercising the 1868 Treaty hunting right, it is perhaps entirely irrelevant that the Crow Reservation has been reduced in size and allotted. What is important in our case is that the Crow Tribe still perseveres as a self-governing and federally-recognized tribal people. The Ninth Circuit Court of Appeals, in United States v. Suquamish Tribe, 901 F.2d 772 (1990), has held, however, that a tribe need not be federally recognized in order to modernly benefit from a historic treaty. Instead, the only requirement asked by the courts is that a tribe preserves an organized tribal body that can be traced at least to the time the treaty was made. Of course, the Crows

[1] This, of course, presumes that neither the Crow Tribal General Council nor the Tribal government (particularly the executive and/or the tribal legislature) established by the 2001 Crow Constitution has ever promulgated any laws or regulations prohibiting or significantly conditioning the ability of individual Crows to exercise off-reservation treaty hunting rights.

have not only survived but today remain a vibrant people with a vibrant culture. By any standard, the Crows are simply the modern version of the same people that entered into the 1868 treaty. Today, the reservation that serves as our modern homeland is regarded as one of the most scenic and resource-rich in America. On the reservation we can observe and practice our thriving customs and traditions, including hunting. And one of our great tribal legacies is a profound love for our homeland. Recall the 19th Century words of the Chief Alapooish (Sore Belly):

> The Crow country is a good country. The Great Spirit has put it in exactly the right place. *** There you can hunt the elk, the deer, and the antelope, when their skins are fit for dressing; there you will find plenty of white bears and mountain sheep. *** [T]here you will find buffalo meat for yourselves *** Everything good is to be found there. There is no country like the Crow country.

Dr. Joe Medicine Crow, From the Heart of the Crow Country: The Crow Indians' Own Stories, xxi-xxii, (1992).

The following legal analysis will briefly lay out the body of law which serves as the basis for an argument that the 1868 treaty right to hunt continues to this day. If in fact the right exists and is recognized by the courts and/or non-tribal governments, it is absolutely imperative the Crow Tribe work closely and in association with the federal government and any affected states (including Montana and Wyoming) to strike a balance between the exercise of our treaty right to hunt off the reservation and sensible state and federal game management so as to minimize the potential for costly and time-consuming litigation or perhaps even a possible Congressional or judicial extinguishment of the right.

With a careful and informed approach, we may be able to reconnect in an important way with our treasured historic homeland that both sustained and inspired our ancestors. In addition, perhaps we can reconnect with the sense of hope our insightful progenitors have always held concerning our connection to the sacred homelands, especially with regards to the importance they must have placed in reserving a treaty right to hunt in traditional areas off the reservation.

The following analysis is divided into two parts: 1) The 1868 Treaty Right Has Not Been Abrogated and 2) What are "unoccupied lands" of the United States?

The 1868 Treaty Right Has Not Been Abrogated

The first and principal question to ask concerning the viability of any historic treaty right is: does the right still exist?

There are at least three important principles that need to be understood in this context and in the construction of Indian treaties generally. First, the federal government has the exclusive constitutional authority to enter into treaties with Indian tribes and state-tribal treaties are facially invalid. See, e.g., Worcester v. Georgia, 31 U.S. 515 (1832); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). Second, this federal authority creates law which is supreme to any competing state law by virtue of the Supremacy Clause of the U.S. Constitution. See U.S. Const., Art. IV, § 2. Thirdly, Indian treaties and treaty rights lay at the mercy of Congress, which can wholly abrogate a treaty simply by passing a statute which clearly intends such a result. See Lone Wolf v.

Hitchcock, 187 U.S. 553 (1903). This latter principle is very important. As Senior Ninth Circuit Judge William C. Canby wrote in American Indian Law in a Nutshell, Fourth ed., 119. (2004):

> One of the least understood facts about Indian treaties is that they may be abrogated unilaterally by Congress. *** Like federal statutes, they can be repealed or modified by later federal statutes.

Despite being subject to unilateral Congressional repeal, no act of Congress may be interpreted as extinguishing the Crow 1868 treaty hunting right[2]. Not the land session acts, not the Montana statehood act; nothing Congress has done legislatively may be construed as extinguishing the Crow 1868 treaty hunting right and the legal principle upon which this legal argument can be made has been affirmed in an important Supreme Court case decided less than a decade ago.

The following legal analysis serves as an explanation for maintaining a claim that the 1868 treaty right is still valid.

In 1989, tribal member Tyrone Ten Bear went onto the Bighorn National Forest in Wyoming, just south of the reservation line, to hunt elk. Ten Bear believed that the 1868 treaty was valid and gave him a right to hunt an *ichiiliikaashe* in that portion of the *Basawaxaawuua* now in the state of Wyoming. It is possible that Ten Bear was the first and only Crow to attempt to exercise the 1868 off-reservation treaty right. Short-lived was the honor, however, as the Wyoming Game and Fish Department warden who happened across Ten Bear and his downed elk was not

[2] Article I of the 1904 Crow Land Cession reads as follows: "That the said Indians of the Crow Reservation *do hereby cede, grant, and relinquish to the United States all right, title, and interest* which they may have to the lands embraced within and bounded by the following described lines: [the article then gives a legal description of the 1904 ceded strip]." 58 P.L. 183; 58 Cong. Ch. 1624; 33 Stat. 352, (italics added). There is no case law interpreting this language with regards to a hunting right, but the courts have recognized that the tribe retains beneficial ownership of coal underlying the surface. See, e.g., Cady v. Morton, 527 F.2d 786 (9th Cir. 1976).

prepared to recognize such a right and cited him for poaching. Ten Bear challenged his citation under the terms of the 1868 treaty. Ten Bear and the Tribe sought a declaratory judgment from the courts that the treaty right still existed and injuctive relief that would shield Ten Bear and other Crows from prosecution. After a U.S. District Court decision in favor of Wyoming and six years after the elk was shot, the Tenth Circuit Court of Appeals in Denver ruled, in Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995), against Ten Bear and the Crows.

First, the Court said that the Wyoming Statehood Act of 1890 served to extinguish the Tribe's off-reservation hunting right. Citing an 1896 U.S. Supreme Court decision (Ward v. Race Horse, 163 U.S. 504) which held that the Bannock/Shoshone 1869 treaty rights (which contained the same language creating a right to hunt on unoccupied lands of the United States) ended when Wyoming became a state. The Tenth Circuit reasoned that since the Crow Treaty contained the same language, the precedent established in Ward v. Race Horse was:

> ...compelling, well-reasoned, and persuasive. Also, contrary to the Tribe's views, there is nothing to indicate that Race Horse has been "overruled, repudiated or disclaimed;" Race Horse is alive and well.

Repsis at 994.

As the Supreme Court did in Race Horse, the Tenth Circuit found implicitly a Congressional intent to abrogate the Indian treaty right to hunt off-reservation (at least in Wyoming) and, therefore, characterized the right as being only "temporary and precarious." Repsis at 988; Race Horse at 510. Despite the long-established judicial rule which provides that repeals of

treaties by implication will not be favored[3], both courts viewed Wyoming's ascension to statehood and corresponding attainment of sovereign authority under the Equal Footing Doctrine[4] as simply incompatible with a continuing off-reservation treaty right to hunt and therefore Congress must have intended to make the treaty rights only temporary. See Repsis at 989. Since Repsis relied on Race Horse, it is important to analyze the reasoning behind the Court's decision in the latter case, which is set out clearly in their opinion and is contextually based upon the circumstances presented to the Court in 1896:

> The elucidation of this issue will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being and of the purposes intended to be by it accomplished.

Id. at 508.

According to the Race Horse Court, here was the situation and the necessities existing at the time which brought the treaty and its incumbent hunting right into being:

> When in 1868 the treaty was [adopted] the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the [areas selected] for the [Crow and other] Indian reservation[s].
>
> [The] march of advancing civilization foreshadowed the fact that...the [hunting districts were] destined to be occupied and settled by the white man, hence interfering with the hitherto untrammelled right of occupancy of the Indian. For this reason, to protect his rights and to preserve for him a home where his tribal relations might be enjoyed under the shelter of the authority of the United States, the [reservations were] created. Whilst confining him to the reservation, and in order to give him the privilege of hunting in the designated

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[3] Congress must be "clear and plain" if intending to abrogate Indian treaty rights. See, e.g., United States v. Dion, 476 U.S. 734 (1986); United States v. Sante Fe Pacific R. Co., 314 U.S. 339 (1941).

[4] The Equal Footing Doctrine is a judicially-created principle of law that requires equal state political authority upon admission into the Union and further holds that absent clear Congressional intent to the contrary, a state may assume ownership over the navigable waterways within its borders. In a landmark 1845 U.S. Supreme Court decision, the Court said: "[B]ecause the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." Pollard v. Hagan, 44 U.S. 212. This language can no longer be taken as an absolute as the Doctrine has since been significantly qualified, including in Mille Lacs.

> districts, so long as the necessities of civilization did not require otherwise, the provision in question [regarding an off-reservation hunting right] was doubtless adopted...[but this right is] dependent absolutely upon the will of Congress.
>
> To prevent this [hunting] privilege from becoming dangerous to the peace of the new settlements as they advanced, [there is a] provision allowing the Indian to avail himself of it only whilst peace reigned on the borders...
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> To suppose that the words of the treaty intended to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of [state] law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that Congress, whilst preparing the way, by the treaty, for new settlements and new States, yet created a provision not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the States already existing.
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> [Federal land in federal territories] ceased to be a part of the hunting districts [upon coming] within the authority and jurisdiction of a State.
>
> The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. Indeed...the right depend[s] on whether the land in the hunting districts [is] unoccupied public land of the United States. This...[leaves] the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts. No restraint was imposed by the treaty on the power of the United States to sell [federal lands], although such sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred. And this view of the temporary and precarious nature of the right reserved, in the hunting districts, is manifest by the act of Congress creating the Yellowstone Park Reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty...
>
> The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the Territory, where it is now asserted there was a contract right to kill game, created by the treaty in favor of the Indians.

Race Horse, 163 U.S. 504, 508-510.

In sum, the Court said that the Congressional policy behind the establishment of off-reservation Indian hunting rights was clearly intended as only temporary because the "march of

advancing civilization" would make any such treaty right to hunt off-reservation, which extends only to federal land that is "unoccupied", impossible to sustain with continued Western settlement because such lands were to eventually become non-federal. An inevitable result, the Court said, "naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred." Id. at 509.

In 1896, large scale land disposal may have been a reasonable understanding of federal policy which the Court could have taken judicial notice of by recognizing disposal as being the "settled policy of the government." Id. But in 2008, such an observation cannot be logically made by judicial notice or through introduction of evidence into a judicial record. In fact, much to the contrary, an enormous body of modern statutory federal law runs contrary to what could reasonably be seen as federal policy in 1896. See, e.g., the Federal Land Management and Policy Act of 1976 § 102, as amended, 43 U.S.C.S. §1701 (a)(1) (2007). ("The Congress declares that it is the policy of the United States that the public lands be retained in federal ownership.")

The Race Horse Court held that since the treaty language conditioned the right to hunt on "peace subsisting amongst the Indians and whites", Congressional policy would not allow the Indians to exercise any right which would have been detrimental to peace between Indians and whites. The Court here presumed that the exercise of an off-reservation treaty hunting right in a state would, by itself, breach the peace between Indians and whites and "frustrate the very object it had in view." Id. at 510. This is an important part of the Court's reasoning because the opinion was based on a review and rationalization of federal

policies in light the circumstances presented at the time of the case. Today, much to the contrary, it would seem as though this particular interpretation of the treaty retains little if any relevance as it is now likely that courts will view modern federal Indian policy as lending no significance to treaty language that speaks to peace among Indians and whites. Moreover, courts may even view subsequent Congressional action as clearly moving away from viewing the Indian tribes (especially the Crows) as a potential military adversary. Cf. the Indian Citizenship Act of 1924, 8 U.S.C.A. 1401(b) (2008); See also the Treason Clause of the U.S. Constitution: "Treason against the United States, shall consist only in levying War against them...". U.S. Const. Art. III, sec. 3, cl. 1.

If anything, the argument can be made that the tribes (again, especially the Crows) have not only maintained peace with the United States (and "whites"), but with regards to federal Indian policy are essentially (and legally) no different than other U.S. citizens in being able to serve in the military, including receiving commissions as officers. In other words, if this treaty language is viewed as having any relevancy it would probably only have significance as a condition which has not been violated by the Crow Tribe and, therefore, cannot serve as an obstruction against the exercise of the right to hunt on unoccupied lands of the United States.

Finally, the Race Horse Court reasoned that since Congress retained the absolute authority to limit or eliminate the right of Indians to hunt pursuant to the treaty terms, including by simply disposing of federal lands (here the Court used the 1872 legislation creating Yellowstone National Park as an example), the right was naturally "temporary and precarious." Race Horse

at 510. Without much in the way of a legal explanation, the Court inferred from the establishment of a national park in an area which was part of an Indian hunting district under treaty that Congress made clear its intent in construing the treaty right as limited in duration. See Id. The Court said this was a "clear indication of the intent of Congress on this subject." Id. To the contrary, the establishment of Yellowstone National Park shows a Congressional policy of reserving federal lands in federal ownership for preservation and conservation purposes. See the Yellowstone Park Act of 1872, 17 Stat. 32 (providing, inter alia, that the Interior Secretary shall prevent "the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit.") The modern restriction against hunting in Yellowstone Park is by order of the Park Superintendent, through a delegation from the Interior Secretary. See 36 C.F.R. 1.4-1.5 (2008). Hunting in Yellowstone, however, may be allowed given a revised federal regulation, so long as the Interior Secretary does not allow the "wanton destruction" of game in the process of regulating hunting (note that fishing has always been allowed in Yellowstone Park under federal regulatory control).

Because Congress has never sought to absolutely prohibit hunting, including Indian treaty hunting, in Yellowstone Park the Race Horse Court probably exceeded the bounds of proper judicial interpretation of Congressional policy in holding that, by virtue of the Interior Secretary receiving authority under federal statute to regulate hunting in Yellowstone, there was no intent to perpetuate any Indian treaty right in the area. At most, the Congressional establishment of Yellowstone National Park only conditions further the exercise of Indian treaty rights to hunt in that particular area so as to require any

hunting to be conducted in accordance to federal regulations. Though the law is not clear on this particular issue it is perhaps unlikely that the actual regulations in existence today, which do not allow hunting at all, would be subject to a "conservation necessity" as state-imposed limitations on an Indian treaty right are. See, e.g., Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172, 205 (1999), citing Puyallup Tribe v. Department of Game of Wash., 391 U.S. 392, 398 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 682 (1979); Antoine v. Washington, 420 U.S. at 207-208 (1975).

The Race Horse Court also discussed the irreconcilable conflict between state regulatory authority over natural resource management and preexisting treaty rights as another justification for recognizing an implicit abrogation by Congress. This is a legal principle the Supreme Court has since disavowed (as will be discussed below). Overall, taken together neither justification (implicit Congressional abrogation and state preemption) serves to accomplish the effect argued by the Race Horse Court.

The preceding analysis could have served as a possible argument in favor of a court's reversal of the Race Horse and Repsis precedents. However, a landmark U.S. Supreme Court decision has now changed the legal landscape in this area dramatically and it is largely upon the following legal analysis which the Crow Tribe may now make the even stronger argument that it is the 1868 treaty right, not the Race Horse holding, which is "alive and well."

In 1999, the Supreme Court heard a case involving hunting and fishing rights held by the Mille Lacs Band of Chippewa under 1837 and 1855 treaties. The Chippewas argued that the right was never extinguished by the federal government, despite even more restrictive language than the 1868 Crow treaty. For example, the Chippewa's treaty rights extended only to ceded reservation land and was subject to presidential extinguishment via executive order. See 1837 Treaty with the Chippewa, 7 Stat. 537. In preserving the Chippewa's claim of a "usufructuary[5]" treaty right to fish on former reservation lands (which, like much of the 1868 Crow Reservation, had been ceded by Congress), the Supreme Court acknowledged that the Equal Footing Doctrine "prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union." Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172, 203-204 (1999). But the Court, in a 5-4 decision authored by Justice O'Connor, also said that "*Race Horse* rested on a false premise." Id. at 204. This false premise was that Indian treaty rights are, as a matter of law, per se irreconcilable with state authority to regulate fish and wildlife.

The Supreme Court found that off-reservation tribal hunting and fishing rights under treaty *can* coexist with state management of natural resources. See Mille Lacs at 204. By itself, this aspect of the Mille Lacs holding would seriously question the Repsis Court's reasoning that Wyoming's hunting laws could not be reconciled with the asserted Crow treaty right. The Repsis Court held that the Crow treaty right no longer existed since an extinguishment of all Indian treaty hunting and fishing rights

[5] "Usufructuary": one who holds property for use as a usufruct; "usufruct": the right of using the property of another and of drawing the profits it produces without wasting its substance. Funk and Wagnall's New Practical Standard Dictionary of the English Language, Volume 2, (1956).

would have been anticipated by Congress to result from the granting of Wyoming statehood. But the Supreme Court explained away any legal validity this view once had and the law now affirmatively recognizes that tribal treaties which provide for off-reservation hunting rights can coexist with state management. See Mille Lacs at 204.

So instead of presuming that off-reservation treaty rights are "temporary and precarious", the Mille Lacs Court recognized and reaffirmed the long-standing principle that state authority to regulate hunting and fishing is "shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty-making." Id. at 204-205; citing Missouri v. Holland, 252 U.S. 416 (1920); Kleppe v. New Mexico, 426 U.S. 529,(1976); and United States v. Winans, 198 U.S. at 382-384 (1905). Furthermore, Justice O'Connor said using the terms "temporary" and "precarious" was "too broad to be useful in distinguishing rights that survive statehood from those that do not." Mille Lacs at 206. Thus, the Court reaffirmed the principle that creation of permanent Indian treaty rights to hunt and/or fish on federal lands in a federal territory may not be presumed extinguished when those lands become part of a state. See, e.g. Winans, 198 U.S. at 381-82. ("[T]he equal-footing doctrine does not prevent the United States from creating a right in a [federal] territory which would be binding on the state upon its admission into the Union. [But] it must be a continuing or perpetual right – a right that is intended at its formation to be continuing against the United States and its grantees, including the state.")

The Supreme Court also said state regulatory authority over fish and wildlife (in order to be valid) must be pursuant to a

"conservation necessity" that accommodates treaty rights. Mille Lacs at 205. Overall, the Court's recognition of federal constitutional authority to directly manage or condition state management of wildlife makes it clear that the federal creation of tribal treaty rights to hunt off-reservation may not be construed as an impairment of state sovereignty. See Winans, supra. As the Mille Lacs Court properly recognized, "treaty rights are not impliedly terminated upon statehood." Id. at 208, citing Wiconsin v. Hitchcock, 201 U.S. 202, 213-214 (1906).

What law we have today is not representative of an extinguishment of any Crow Treaty right to hunt, but rather an extinguishment of the Race Horse and Repsis doctrine which viewed the Crow 1868 and Bannock/Shoshone 1869 treaty hunting language as "temporary and precarious." Typically seen as no fan of overturning precedent, Chief Justice Rehnquist, in dissent, acknowledged that the Court in Mille Lacs "invalidates...and overrules a 103-year-old precedent [the Race Horse case] of this Court." Id. at 220, (C.J. Rehnquist in dissent).

Judge Canby of the Ninth Circuit has recently wrote that, after the Mille Lacs decision, the primary Repsis holding (that there is no more Crow treaty right) is "almost certainly not the law" and that the Supreme Court has now "put an end to such reliance on Race Horse." Canby, American Indian Law in a Nutshell, Fourth ed., 112, 454 (2004).

So, if there was never any implicit Congressional termination of the 1868 Crow treaty hunting right, the next question is: where, if anywhere, may this right be exercised?

What Are "unoccupied lands" of the United States?

Recall the relevant language from the 1868 Treaty:

> [The Crows] 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.

Fort Laramie Treaty of 1868, Treaty with the Crow Indians, U.S.-Crow Tribe of Indians, art. IV, May 7, 1868, 15 Stat. 649.

First of all, it is important to note that NO Congressional act has sought to define precisely what "unoccupied lands of the United States" are for purposes of this treaty. The U.S. Supreme Court has had only a single occasion to make a determination and it was in the 1896 Race Horse decision. The Court, in a rather complicated and dubious manner, essentially held the following:

First:

- the term "unoccupied lands" describes areas contained within "hunting districts"

Therefore:

- "unoccupied lands of the United States", as the term would have been understood by Congress and the Indians, are NOT all lands of the United States (i.e., NOT all lands in federal ownership) which are unoccupied, wherever situated; rather, they are simply "the lands of that [unoccupied] character embraced within what the treaty denominates as 'hunting districts'"

Because:

- the relation of "unoccupied lands" to "hunting districts" is "necessarily determined, as the less[er] is contained in the greater"; in other words, any "unoccupied lands"

> subject to a treaty hunting right must be contained within the borders of the "hunting districts"

And furthermore:

> - "hunting districts" CANNOT simply mean lands where game may be found "for this would read out of the treaty the provision as 'to peace on the borders' of such districts, which clearly point[s] to the fact that the [hunting districts were]...beyond the borders of the white settlements"

See Race Horse at 508.

Of course, in Repsis the State of Wyoming argued that even if the Crow treaty right was not extinguished, the national forest land which Ten Bear sought to exercise his treaty right could not be considered "unoccupied" for purposes of the treaty interpretation. The Tenth Circuit agreed and held that by virtue of Congressional intent to manage visitor use (which, interestingly, precludes any permanent "occupation") on the national forests exhibited in the body of federal land management statutes, the forest lands could no longer be regarded as "unoccupied." Repsis at 993.

Here, our argument should be simple:

The Race Horse Court erred in its judgment that unoccupied lands and the hunting districts are related as the lesser is to the greater; instead of the Race Horse interpretation, the treaty language should be read to hold that "hunting districts" is simply a descriptive term used to describe those unoccupied lands of the United States where game may be found; so, given 1) an "unoccupied" character and 2) no Congressional intent to restrict tribal treaty hunting and 3) the presence of game, all federal lands in historic Crow territory are subject to the Crow

Tribal treaty hunting right[6], unless otherwise prohibited by Congress.

Under this argument, the terms "unoccupied" and "hunting district" would still need an exact definition. The Race Horse Court only said what did not qualify as unoccupied lands and made allusion to hunting districts without saying what they were. Absent litigation, this definition will have to result from state and/or federal recognition.

In Repsis, Wyoming also argued that the Game and Fish Department's hunting regulations should be upheld as based on sound conservation principles and did not violate any possibly existing Indian treaty right to hunt. Again, the Tenth Circuit agreed and ruled that even if the Crows retained a right to hunt under their 1868 treaty, and even if such a right extended to national forests, "there is ample evidence ... to support the State's contention that its regulations were reasonable and necessary for conservation." Id. at 993.

In total, the Tenth Circuit essentially said to the Crows:

-you have NO treaty right to hunt off your reservation, and

-even if you did have a right to do so you CANNOT exercise that right on national forests because they are not unoccupied, and

-even if you could exercise a treaty right to hunt on national forests the state of Wyoming has exercised its sovereign authority to regulate all hunting in the state, which are

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[6] Under this argument, unoccupied lands would carry at least the same meaning as "open and unclaimed land", a term used in other 19th Century Indian treaties (see, e.g., Treaty of Hell Gate, 12 Stat. 975 (1855), and includes national forests, BLM-managed land, and perhaps even other types of federal land holdings, such as National Park Service-managed National Recreation Areas and U.S. Fish and Wildlife Service-managed Wildlife Refuges. The analysis here would go to whether there is clear Congressional intent to preclude the exercise of Indian treaty rights on particular federal lands but the broad definition would include all federal lands not otherwise withdrawn from hunting.

enforceable against Crow tribal members so long as the regulations do not violate federal law

But the Repsis case (also known as the "Ten Bear case") was only ever binding precedent in the Tenth Circuit. The Ninth Circuit, which includes the U.S. District Court in Montana, would be free to hold otherwise if given the opportunity. So the rule of law the Repsis court set out lasted less than a half-decade and was never applicable in Montana during that time.

The only other legal precedents of any legal help are state court cases interpreting similar treaty language, which have limited value as precedent in federal court but are likely to be persuasive, especially in view of the Mille Lacs decision. Although no state courts have had an opportunity to interpret the Crow right to hunt under the 1868 treaty, the Montana Supreme Court has interpreted the 1855 Hell Gate Treaty (pertaining to the Flathead Indians) phrase "open and unclaimed lands" as including national forest land within aboriginal hunting rights. See State v. Stasso, 172 Mont. 242 (Mont. 1977). The Idaho courts have held likewise. See, e.g., State v. Coffee, 556 P.2d 1185 (Idaho 1976), State v. Tinno, 497 P.2d 1386 (Idaho 1972). In Washington, the phrase "open and unclaimed lands" contained in the 1859 Point Elliot Treaty was held to allow off-reservation hunting of elk on state land (the Oak Creek Wildlife Area). See State v. Buchanan, 978 P.2d 1070 (Wash. 1999).

Conclusion:

Because the legal basis which the Tenth Circuit relied on in the Repsis (Ten Bear) decision has been disavowed by the Supreme Court, it cannot be relied on as binding precedent in any

federal circuit and is very likely not the law today. Further, the Ninth Circuit has not had an opportunity to determine to what extent Crow Tribal members may hunt off-reservation under the 1868 Fort Laramie Treaty.

It is likely that the state of Montana is willing to recognize a Crow treaty right to hunt on all or most off-reservation federal land contained within the original 1868 reservation. However, some questions remain as to the extent by which Montana will seek to regulate the exercise of this treaty right, such as restricting the type of species which may be hunted, the time of year when they may be hunted, the means by which they may be hunted, and the total allowable harvest.

In absence of litigation, I recommend the Crow Tribe seek recognition from the state of Montana (and possibly the state of Wyoming) as having a treaty right to hunt on all federal lands that were formerly part of the Crow Reservation AND all federal lands in the historic Crow homeland (which would include land west and north of the Yellowstone River) where hunting is not expressly prohibited by an act of Congress. If acceptable to the tribe, there should be a cooperative management program established by the tribe and the states so as to make predictable and manageable the amount and duration of treaty hunts.

Given such an agreement, it is possible that a limited number of "Crow treaty permits" may be allowed every year for tribal members to hunt such species as buffalo, black bear, elk, moose, mountain goat, bighorn sheep, deer, pronghorn, grouse, and mountain lion in historic Crow Country. Aho.