What will invariably get everyone’s attention about this case is it is the second 5-4 decision where Justice Gorsuch has joined the four more liberal Justices to rule in favor of a tribe. And a ruling in the Court’s most interesting tribal case of the term is yet to come. But none of this should distract from the holding of this case.

The Supreme Court answered yes to the question in Herrera v. Wyoming of whether an old treaty allowing Native Americans to hunt on federal land is still valid. According to an amicus brief filed by the Crow Tribe “[a]t least nineteen tribes, in at least a dozen treaties, reserved for themselves the right to hunt on Federal lands away from their respective reservations.”

In 1868 the Crow Tribe ceded most of its territory in what is now Montana and Wyoming to the United States in exchange for an agreement the Crow could “hunt on the unoccupied lands of the United State.” Clayvin Herrera invoked this treaty to defend against a charge of violating state law by off-season hunting in Bighorn National Forest in Wyoming.

In a 5-4 opinion the Supreme Court held that the treaty’s hunting rights survived Wyoming’s statehood and that lands in the Bighorn National Forest aren’t categorically “occupied” because they are in a national reserve.

Over 100 years ago in Ward v. Race Horse (1896) the Supreme Court ruled that statehood extinguished hunting rights in an identical treaty between the Shoshone-Bannock tribes and the United States. The Court in Race Horse relied in the fact that (1) new states were admitted to the union on “equal footing” with existing states and (2) there was no evidence in the treaty that Congress intended for treaty rights to continue in “perpetuity.”

In 1999 in Minnesota v. Mille Lacs Band of Chippewa Indians the Supreme Court explicitly rejected the “equal footing” rationale of Race Horse. The Court in Mille Lacs also criticized the notion that treaty rights fail to survive statehood if they are “temporary and precarious” because all treaty rights can be unilaterally repudiated by Congress. According to the majority of the Supreme Court in Herrera v. Wyoming, “although the decision in Mille Lacs did not explicitly say that it was overruling the alternative ground in Race Horse, it is impossible to harmonize Mille Lacs’ analysis with the Court’s prior reasoning in Race Horse.”

Applying Mille Lacs rather than Race Horse, a majority of the Supreme Court, in an opinion written by Justice Sotomayor, joined by the three more liberal Justices and Justice Gorsuch, concluded Wyoming’s admission to the United States didn’t abrogate the Crow Tribe’s off-reservation treaty hunting rights. “The Wyoming Statehood Act did not abrogate the Crow Tribe’s hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.”

Even though the treaty rights were valid following Wyoming’s statehood the treaty does not protect hunting in “occupied” federal lands. The majority of the Court concluded the Bighorn National Forest
didn’t become categorically “occupied” when the national forest was created. Treaties are construed as “they would naturally be understood by the Indians.” According to the Court, “[h]ere it is clear that the Crow Tribe would have understood the word ‘unoccupied’ to denote an area free of residence or settlement by non-Indians.”

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