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High Court Remains Supportive Of Tribal Treaty Rights

By **Rob Roy Smith** (May 23, 2019, 1:52 PM EDT)

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On Monday, May 20 — for the second time during the 2018-2019 term — Justice Neil M. Gorsuch joined the four U.S. Supreme Court Democratic-appointed justices in a 5-4 decision, authored by Justice Sonia Sotomayor, to support tribal treaty rights.[1]

This time, in Clayvin Herrera, Petitioner v. Wyoming, the majority concluded that the Crow Tribe's reserved hunting right survived Wyoming's statehood and that the lands within Big Horn National Forest did not become categorically "occupied" when set aside as a national reserve.[2]

The case arose from a Wyoming state criminal conviction for elk hunting violations on lands within the Big Horn National Forest. Crow Tribe member Clayvin Herrera argued that a treaty between the tribe and the federal government allowed him to hunt in the area. The 1868 treaty between the United States and the Crow Tribe promised that, in exchange for most of the tribe's territory in modern-day Montana and Wyoming, its members would "have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon ... and peace subsists ... on the borders of the hunting districts."[3]

The majority's opinion contained two separate, but equally important holdings. First, the majority clarified that the court's prior decision Minnesota v. Mille Lacs Band of Chippewa Indians[4] controls in cases of treaty interpretation. Mille Lacs established that the crucial inquiry for treaty termination analysis as whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right, or whether a termination point identified in the treaty itself has been satisfied.[5]

Applying Mille Lacs, the majority held that Wyoming's admission into the Union did not abrogate the Crow Tribe's previously reserved off-reservation treaty hunting right. The majority noted that neither the Wyoming Statehood Act nor the treaty itself expressed Congress's intent that the Crow hunting right would expire at statehood. The majority also relied on the historical record surrounding treaty negotiations to support its reading of the treaty.

Second, the majority turned to whether Bighorn National Forest became categorically "occupied" within the meaning of the 1868 treaty when the national forest was created. Construing the treaty's terms as "'they would naturally be understood by the Indians,'" the majority concluded that the tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

The treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement.

Thus, the majority reasoned that the proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians. The majority did note the limitations on the ruling, stating that it was not holding that all areas within the forest are unoccupied, meaning that, on remand, Wyoming could argue that the specific site, where Herrera was hunting, was used in such a way that it was "occupied" within the meaning of the 1868 treaty.

The dissent, authored by Justice Samuel Alito, argued that the majority should not have reached the treaty interpretation at all, and that the case is governed by prior decisions, which preclude consideration of Herrera's arguments.[6]

Critical Takeaways

A New Swing Vote?

If one term is any guide, Justice Gorsuch may prove to be the crucial swing-vote in Indian law cases, at least when tribal treaty construction is at issue. Justice Gorsuch's record in tribal cases, while a judge on the U.S. Court of Appeals for the Tenth Circuit, which encompasses six western states and 76 federally recognized Indian tribes, was generally favorable to the tribes, and he has the deepest understanding of Indian law of any of the justices.

United States' Support Remains Crucial

The United States supported Herrera's position on appeal. Seeking the support of the administration in close Indian law cases remains critically important. That said, the United States was not asked to take an extreme position. Courts, both state and federal, in Idaho, Montana, Oregon and Washington have long recognized national forests as subject to reserved Indian treaty hunting rights.[7] All of these cases reviewed the understanding of the Indians at the time of treaties entered into in the late 1850s and came to same conclusion: The mere designation of a national forest does not extinguish treaty-reserved rights to hunt on those lands.

Indian Treaties' Continued Vitality

The last two years at the Supreme Court showed the continuing vitality of Indian treaties. Last year, the court let stand a U.S. Court of Appeals for the Ninth Circuit decision affirming the power of treaties entered into by tribes in Washington state to force the state to remove state-owned culverts that block salmon spawning areas.[8] And, earlier this year the court relied on an 1855 Yakama Treaty to block application of a Washington state tax.[9] Tribal treaties will likely continue to play a significant role in future litigation, particularly with respect to climate change litigation.

Future Hunting and Gathering Rights

Unlike treaty fishing rights, which have been subject to substantial adjudication in the Pacific Northwest, the scope of treaty hunting and gathering rights remain largely undecided by the courts. Tribal hunters and gatherers harvest a small fraction of the wildlife and botanical resources taken annually throughout the west. For example, in recent years in Washington state, tribal members have harvested between 2-

5% of the statewide nontribal elk and deer harvest, and tribal deer harvest remains lower than the yearly state roadkill rate.[10] The court's decision could ignite efforts of other tribes to define the scope of treaty-reserved hunting and gathering rights outside their treaty-created reservations on "unclaimed" or "open and unclaimed lands."

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[1] On March 19, Justice Gorsuch joined the same four justices in Washington State Department of Licensing v. Cougar Den, finding that an 1855 treaty between the federal government and the Yakama Tribe precluded Washington state from imposing a fuel import tax on tribal-owned businesses. Last term, Justice Gorsuch wrote for the Court's 7-2 majority in reversing a lower court ruling that limited the reach of tribal sovereign immunity in Upper Skagit Indian Tribe v. Lundgren.

[2] Herrera v. Wyoming, 587 U.S. ___ (2019).

[3] 15 Stat. 650

[4] 526 U. S. 172 (1999).

[5] Id. at 202, 207.

[6] Ward v. Race Horse, 163 U.S. 504 (1896) and Crow Tribe of Indians v. Repsis, 73 F. 3d 982, 992-993 (10th Cir. 1995).

[7] E.g., State v. Arthur, 261 P.2d 135, 140-41 (1953), cert. denied 347 U.S. 937 (1954) (hold that the term "open and unclaimed land" as employed in the Nez Perce Treaty "[w]as intended to include and embrace such lands as were not settled and occupied by the whites…and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'").

[8] Washington v. United States, 584 U.S. ____ , 138 S. Ct. 1832 (2018) (per curiam) (affirming decision below by equally divided court).

[9] Washington State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. ___ (2019).

[10] https://nwifc.org/about-us/wildlife.