

# CHAPTER 12

## FISHING AND HUNTING RIGHTS

### SECTION B.

#### OFF-RESERVATION FISHING AND HUNTING

### *Herrera v. Wyoming*

United States Supreme Court, 2019

\_\_ U.S. \_\_, 139 S.Ct. 1686

Justice SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe “shall 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.” Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not “unoccupied.” We disagree. The Crow Tribe’s hunting right survived Wyoming’s statehood, and the lands within Bighorn National Forest did not become categorically “occupied” when set aside as a national reserve.

I.

A.

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana v. United States*, 450 U.S. 544, 547, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, *From the Heart of the Crow Country* 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming “historically made up both the geographic and the spiritual heart” of the Tribe’s territory. Brief for Crow Tribe of Indians as Amicus Curiae 5.

The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie. *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245. The Treaty of Fort Laramie specified that “the tribes did not ‘surrender the privilege of hunting, fishing, or passing over’ any of the lands in dispute” by entering the treaty. *Id.*, at 548, 101 S.Ct. 1245.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, *Parading Through History* 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that “settlements ha[d] been made” upon the Crow Tribe's lands and that their “game [was] being driven away.” He told the assembled tribal leaders that the United States wished to “set apart a tract of [Crow Tribe] country as a home” for the Tribe “forever” and to buy the rest of the Tribe's land. *Ibid.* Taylor emphasized that the Tribe would have “the right to hunt upon” the land it ceded to the Federal Government “as long as the game lasts.” *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: “You speak of putting us on a reservation and teaching us to That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised”); *id.*, at 89 (Wolf Bow: “You want me to go on a reservation and farm. I do not want to do that. I was not raised so”). Although Taylor responded that “[t]he game w[ould] soon entirely disappear,” he also reassured tribal leaders that they would “still be free to hunt” as they did at the time even after the reservation was created. *Id.*, at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245; Art. II, 15 Stat. 650. The Tribe promised to make its “permanent home” a reservation of about 8 million acres in what is now Montana and to make “no permanent settlement elsewhere.” Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe. 1868 Treaty, Arts. III–XII, *id.*, at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating: “The Indians ... 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.” *Id.*, at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not “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.” An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming “into the Union on an equal footing with the original States in all respects,” in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land “reserved from entry or settlement.” Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 985 (CA10 1995).

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe’s off-reservation hunting right was still valid. The U.S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians v. Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d at 992–993. The Tenth Circuit’s decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward v. Race Horse*, 163 U.S. 504, 516, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). Herrera argued in the state court that this Court’s subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The court also held that, even if the 1868 Treaty right survived Wyoming’s entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on “unoccupied” lands and that the national forest became categorically “occupied” when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d at 994. The state appellate court affirmed the trial court’s judgment and sentence.

For the reasons that follow, we now vacate and remand.

## II.

We first consider whether the Crow Tribe’s hunting rights under the 1868 Treaty remain valid. Relying on this Court’s decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A.

Wyoming argues that this Court’s decision in *Race Horse* establishes that the Crow Tribe’s 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

*Race Horse* concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [sic] and the Bannack [sic] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 (“[T]hey 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”). The *Race Horse* Court concluded that Wyoming’s admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U.S. at 505, 514–515, 16 S.Ct. 1076.

*Race Horse* relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an “equal footing” with existing States. *Id.*, at 511–514, 16 S.Ct. 1076 (citing, e.g., *Lessee of Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes’ hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be “irreconcilably in conflict” with the power—“vested in all other States of the Union” and newly shared by Wyoming—to regulate the killing of game within their borders.” 163 U.S. at 509, 514, 16 S.Ct. 1076.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in “perpetuity.” *Id.*, at 514–515, 16 S.Ct. 1076. To the contrary, the Court emphasized that Congress “clearly contemplated the disappearance of the conditions” specified in the treaty. *Id.*, at 509, 16 S.Ct. 1076. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were “essentially perishable” and afforded the Tribes only a “temporary and precarious” privilege. *Id.*, at 515, 16 S.Ct. 1076.

More than a century after *Race Horse* and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut both pillars of *Race Horse*’s reasoning. *Mille Lacs* considered an 1837 Treaty that guaranteed to several bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands “ ‘during the pleasure of the President.’ ” 526 U.S. at 177, 119 S.Ct. 1187 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U.S. at 202–208, 119 S.Ct. 1187.

*Mille Lacs* approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquiries roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U.S. at 203, 119 S.Ct. 1187. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U.S. at 204, 119 S.Ct. 1187. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. *Id.*, at 204–205, 119 S.Ct. 1187 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); *Antoine v. Washington*, 420 U.S. 194, 207–208, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968)). "[B]ecause treaty rights are reconcilable with state sovereignty over natural resources," the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient "to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U.S. at 205, 119 S.Ct. 1187.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U.S. at 202, 119 S.Ct. 1187 (citing *United States v. Dion*, 476 U.S. 734, 738–740, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Fishing Vessel Assn.*, 443 U.S. at 690, 99 S.Ct. 3055; *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968)). The Court found no such " 'clear evidence' " in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U.S. at 203, 119 S.Ct. 1187.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U.S. at 206, 119 S.Ct. 1187.

The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are “ ‘ “of such a nature as to imply their perpetuity,” ‘ “ rather than “ ‘temporary and precarious.’ “ 526 U.S. at 206, 119 S.Ct. 1187. The Court rejected such an approach. The Court found the “ ‘temporary and precarious’ “ language “too broad to be useful,” given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U.S. at 738, 106 S.Ct. 2216—could be described in those terms. 526 U.S. at 206–207, 119 S.Ct. 1187. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate “intended the rights secured by the ... Treaty to survive statehood.” 526 U.S. at 207, 119 S.Ct. 1187. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the Chippewa bands’ treaty rights. The Chippewa Treaty itself defined the specific “circumstances under which the rights would terminate,” and there was no suggestion that statehood would satisfy those circumstances. *Ibid.*

Maintaining its focus on the treaty’s language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse*. Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, “tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]”—i.e., to whenever the hunting grounds would cease to “remai[n] unoccupied and owned by the United States.” 526 U.S. at 207, 119 S.Ct. 1187. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the “Treaty itself.” *Ibid.* Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was “impliedly repealed,” *Mille Lacs* disavowed that earlier holding. 526 U.S. at 207, 119 S.Ct. 1187. “Treaty rights,” the Court clarified, “are not impliedly terminated upon statehood.” *Ibid.* The Court further explained that “[t]he *Race Horse* Court’s decision to the contrary”—that Wyoming’s statehood did imply repeal of Indian treaty rights—“was informed by” that Court’s erroneous conclusion “that the Indian treaty rights were inconsistent with state sovereignty over natural resources.” *Id.*, at 207–208, 119 S.Ct. 1187.

In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress’ clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U.S. at 207, 119 S.Ct. 1187. “[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood.” *Ibid.*

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood.

We are unpersuaded. As explained above, 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 Courts prior reasoning in *Race Horse*.

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* “was not expressly overruled” in *Mille Lacs*, “it must be regarded as retaining no vitality” after that decision. . . . To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

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## C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, “it must clearly express its intent to do so.” *Mille Lacs*, 526 U.S. at 202, 119 S.Ct. 1187. “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, 119 S.Ct. 1187 (quoting *Dion*, 476 U.S. at 740, 106 S.Ct. 2216); see *Menominee Tribe*, 391 U.S. at 412, 88 S.Ct. 1705. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act “makes no mention of Indian treaty rights” and “provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act.” Cf. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the “‘clear evidence’ “ this Court's precedent requires. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187.4

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is “essentially a contract between two sovereign nations.” *Fishing Vessel Assn.*, 443 U.S. at 675, 99 S.Ct. 3055. Indian treaties “must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians,” *Mille Lacs*, 526 U.S. at 206, 119 S.Ct. 1187, and the words of a treaty must be construed “ ‘in the sense in which they would naturally be understood by the Indians,’ “ *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. If a treaty “itself defines the circumstances under which the rights would terminate,” it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187. Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood.

The treaty identifies four situations that would terminate the right: (1) the lands are no longer “unoccupied”; (2) the lands no longer belong to the United States; (3) game can no longer “be found thereon”; and (4) the Tribe and non-Indians are no longer at “peace ... on the borders of the hunting districts.” Art. IV, 15 Stat. 650. Wyoming’s statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

The historical record likewise does not support the State’s position. Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, e.g., *Proceedings* 88, and Commissioner Taylor assured them that the Tribe would have “the right to hunt upon [the ceded land] as long as the game lasts,” *id.*, at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming’s statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical matter, marked the arrival of “civilization” in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming’s arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier. Brief for Respondent 47 (quoting § 237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. § 492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm’r of Indian Affairs 495 (1873) (Black Foot: “On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain”). As for the Indian Department Regulations, there are reports that a group of Crow Tribe members “regularly hunted along the Little Bighorn River” even after the regulation the State cites was in effect. Hoxie, *Parading Through History*, at 26. Even assuming that Wyoming presents an accurate historical picture, the State’s mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming subverts this Court’s clear instruction that treaty-protected rights “are not impliedly terminated upon statehood.” *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.



Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally “occupied” by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 1701-1702. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case’s reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076; *Mille Lacs*, 526 U.S. at 207–208, 119 S.Ct. 1187.

Applying *Mille Lacs*, this is not a hard case. 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.

### III.

We turn next to the question whether the 1868 Treaty right, even if still valid after Wyoming’s statehood, does not protect hunting in Bighorn National Forest because the forest lands are “occupied.” We agree with Herrera and the United States that Bighorn National Forest did not become categorically “occupied” within the meaning of the 1868 Treaty when the national forest was created.

Treaty analysis begins with the text, and treaty terms are construed as “ ‘they would naturally be understood by the Indians.’ ” *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. Here 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.

That interpretation follows first and foremost from several cues in the treaty’s text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace “among the whites and Indians on the borders of the hunting districts,” thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word “occupation” to refer to the Tribe’s residence inside the reservation boundaries, and referred to the Tribe members as “settlers” on the new reservation. Arts. II, VI, *id.*, at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make “no permanent settlement” other than on the new reservation, but could hunt on the “unoccupied lands” of the United States. Art. IV, *id.*, at 650.

Historical evidence confirms this reading of the word “unoccupied.” At the treaty negotiations, Commissioner Taylor commented that “settlements ha[d] been made upon [Crow Tribe] lands” and that “white people [were] rapidly increasing and ... occupying all the valuable lands.” Proceedings 86. It was against this backdrop of white settlement that the United States proposed to buy “the right to use and settle” the ceded lands, retaining for the Tribe the right to hunt. *Ibid.* A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area “as long as there are any buffalo, and as long as the white men are not [in that area] with farms.” Dept. of Interior, Ann. Rep. of the Comm’r of Indian Affairs 500.

Given the tie between the term “unoccupied” and a lack of non-Indian settlement, it is clear that President Cleveland’s proclamation creating Bighorn National Forest did not “occupy” that area within the treaty’s meaning.

Wyoming’s counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government’s “exercise of dominion and control” over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, 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. 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; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§ 241.2, 241.3 (Supp. 1941); § 261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was “very little” settlement of Bighorn National Forest around the time the forest was created. Dept. of Interior, Nineteenth Ann. Rep. of the U.S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

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