

**No. 21-8050**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

---

**CROW TRIBE OF INDIANS, et al.**

**Appellants,**

**v.**

**Chuck REPSIS, et al.,**

**Appellees.**

---

Appeal from the U.S. District Court for the District of Wyoming,  
Case No. 1:92-cv-01002-ABJ (Hon. Alan B. Johnson)

---

**PLAINTIFF'S/APPELLANT'S OPENING BRIEF**

**ORAL ARGUMENT REQUESTED**

---

Daniel D. Lewerenz  
NATIVE AMERICAN RIGHTS FUND  
1514 P St NW, Suite D  
Washington, DC 20005  
Phone: (202) 785-4166  
Fax: (202) 822-0068  
lewerenz@narf.org

Wesley J. Furlong  
NATIVE AMERICAN RIGHTS FUND  
745 W. 4th Ave., Suite 502  
Anchorage, AK 99501  
Ph. (907) 276-0680  
Fax (907) 276-2466  
wfurlong@narf.org

*Counsel for Appellants*

## CORPORATE DISCLOSURE STATEMENT

Appellant, the Crow Tribe of Indians, is a Federally recognized Indian Tribe. *Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021). Because Appellant is neither a “nongovernmental corporation,” Fed. R. App. P. 26.1, nor “formed as a limited liability company (LLC) partnership,” 10th Cir. R. 26.1(A), no corporate disclosure statement is required.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	v
STATEMENT OF RELATED CASES.....	xi
GLOSSARY OF ACRONYMS AND ABBREVIATIONS .....	xii
INTRODUCTION .....	1
JURISDICTIONAL STATEMENT .....	4
STATEMENT OF ISSUES .....	5
STATEMENT OF THE CASE .....	6
A.    The Treaties .....	6
B.    The <u>Repsis</u> Litigation .....	7
C.    The <u>Herrera</u> Litigation.....	10
D.    The Present Action.....	14
SUMMARY OF ARGUMENT.....	16
ARGUMENT.....	18
I.    The District Court erred in holding that it lacked authority to decide the Crow Tribe’s Rule 60 motion.....	18
A.    The District Court erred by failing to follow <u>Standard Oil</u> ..	20

B.	The Crow Tribe’s Rule 60(b) motion meets all of <u>Standard Oil’s</u> substantive requirements. ....	24
C.	In the alternative, if this Court’s mandate bars the District Court from deciding the Crow Tribe’s Rule 60 motion, this Court may recall its mandate and remand to the District Court. ....	26
II.	If this Court does not remand to the District Court, then it should grant the Crow Tribe’s Rule 60 motion.....	28
A.	This Court should vacate its mandate with respect to the status of the Bighorn National Forest, which cannot be reconciled with the U.S. Supreme Court’s decision in <u>Herrera</u> . ....	29
B.	This Court should vacate or modify any holding of conservation necessity because, as a result of changed factual circumstances, “applying it prospectively is no longer equitable.” ....	32
CONCLUSION .....		44
REQUEST FOR ORAL ARGUMENT .....		46
CERTIFICATE OF COMPLIANCE.....		48
CERTIFICATE OF SERVICE .....		49
ATTACHMENTS		
<u>Crow Tribe of Indians v. Repsis,</u>		
Order on Mots. Summ. J. (Dkt. #60)		
Memorandum Opinion on Mots. Summ. J. (Dkt. #61)		
10th Circuit Opinion (Doc. #01019280386)		
Order Denying Rule 60(b) Mot. (Dkt. 84)		

...

## TABLE OF AUTHORITIES

### CASES

<u>Agostini v. Felton</u> , 521 U.S. 203 (1997) .....	33
<u>Antoine v. Washington</u> , 420 U.S. 194 (1975) .....	34-35
<u>Cashner v. Freedom Stores, Inc.</u> , 98 F.3d 572 (10th Cir. 1996) .....	29-30, 32
<u>Coleman v. Turpen</u> , 827 F.2d 667 (10th Cir. 1987) .....	26, 27
<u>Cooter &amp; Gell v. Hartmarx Corp.</u> , 496 U.S. 384 (1990) .....	20
<u>Crow Tribe of Indians v. Repsis</u> , 866 F. Supp. 520 (D. Wyo. 1994).....	1n.1, 5n.3, 7-8, 9n.5
Pl.’s Mot. Partial Relief from J. (Dkt. #69) .....	3, 14
Pl.’s Mem. Supp. Mot. Partial Relief from J. (Dkt. #70) .....	15, 24, 25
Order on State’s Request for Post-Remand Issue Preclusion, <u>Wyoming v. Herrera</u> , Case No. CT 2014-2687; 2688 (Wyo. Cir. Ct. 4th Jud. Dist., June 11, 2020) (Dkt. No. 70-1) .....	2, 13-14, 29-30 n.10, 38
Pl.’s Mem. Opp. Defs.’ Mot. Summ. J. (Dkt. #70-3) .....	40
Pl.’s Exh. 4: Application for License for a Major Unconstructed Project, FERC No. 10725.000 (Dry Fork Energy Storage Project) submitted by Little Horn Energy, Wyoming, Inc., May 1992) (Dkt. #70-4) .....	40
Hr’g Tr. (Dkt. #83) .....	15
Order on Relief from J. (Dkt. #84) .....	4, 5, 14-16, 18, 23

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.