IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

THE CROW TRIBE OF INDIANS, et al.,

Plaintiffs,

v.

CHUCK REPSIS, et al.,

Defendants.

Case No. 92-CV-1002-ABJ

ORDER ON RELIEF FROM JUDGMENT

THIS MATTER comes before the Court on Plaintiffs' Motion for Partial Relief from Judgment. ECF No. 69. Defendants responded on March 1, 2021. ECF No. 78. Plaintiffs replied to Defendants' response on March 19, 2021. ECF No. 79. The Court held a hearing on the matter on May 17, 2021. Having reviewed the filings, arguments, applicable law, and being otherwise fully advised, the Court hereby **DENIES** Plaintiffs' Motion.

BACKGROUND

Members of the Crow Tribe initiated this case in 1992 because they wanted a declaration that the Fort Laramie Treaty of 1868 gave them the unrestricted right to hunt and fish on Bighorn National Forest lands in the State of Wyoming. *Crow Tribe of Indians v. Repsis,* 866 F.Supp. 520, 521 (D. Wyo. 1994). This Court granted summary judgment in favor of Defendants because it found the United States Supreme Court case *Ward v. Race*

Horse, 163 U.S. 504 (1896) to be controlling, as the fact patterns and treaty language were similar. *Id.* at 524. *Race Horse* held Wyoming's statehood abrogated tribal hunting rights, so this Court felt compelled to come to the same conclusion. *Repsis,* 866 F.Supp. at 523. The case was dismissed. *Id.* at 525.

The Crow Tribe appealed this Court's decision to the Tenth Circuit, who affirmed. *Crow Tribe of Indians v. Repsis,* 73 F.3d 982 (10th Cir. 1995). First, the Tenth Circuit affirmed the dismissal, finding *Race Horse* was still good law and concluding the tribal hunting rights were extinguished upon Wyoming's statehood. *Id.* at 989-92. Although this Court's opinion did not discuss it, the Tenth Circuit also affirmed the dismissal because it found the creation of the Bighorn National Forest was an "occupation" of the land within the meaning of the Treaty, and the hunting rights only lasted while the land was unoccupied. *Id.* at 993. The Tenth Circuit also affirmed on a conservation necessity finding, stating "there is ample evidence in the record to support the States' contention that its regulations were reasonable and necessary for conservation." *Id.*

STANDARD OF REVIEW

Plaintiffs ask for partial relief from this Court's judgment. ECF No. 70. The Federal Rules of Civil Procedure allow relief where the judgment "is based on an earlier judgment that has been reversed or vacated [] or applying it prospectively is no longer equitable." FED. R. CIV. P. 60(b)(5). A judgment is not "based on" an earlier judgment when it was simply used as precedent. *Manzaneres v. City of Albuquerque,* 628 F.3d 1237, 1240 (10th Cir. 2010). When there is "a significant change either in factual conditions or in law" and continued enforcement of the judgment is "detrimental to the public interest," the Court

may grant relief. *Horne v. Flores,* 557 U.S. 433, 447 (2009). But the changed circumstances must produce a "hardship so extreme and unexpected as to make the decree oppressive." *EEOC v. Safeway Stores,* 611 F.2d 795, 800 (10th Cir. 1975).

Additionally, this Court may grant relief for "any other reason that justifies [it]." FED. R. CIV. P. 60(b)(6). Rule 60(b)(6) is only available "when it offends justice to deny such relief." *Yapp v. Excel Corp.,* 186 F.3d 1222, 1232 (10th Cir. 1999). "A change in the law or in the judicial view of an established rule of law is not [] an extraordinary circumstance which justifies such relief." *Collins v. City of Wichita,* 254 F.2d 837, 839 (10th Cir. 1958).

Relief from judgment is extraordinary. *Brown v. McCormick,* 608 F.2d 410, 413 (10th Cir. 1979). The party requesting relief from judgment bears the burden. *Horne*, 557 U.S. at 447. Motions "must be made within a reasonable time." FED. R. CIV. P. 60(c)(1). Reasonableness of the timing "depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *United States v. All Monies from Account No. PO-204,675.0,* 1998 WL 769811 at 5 (10th Cir. 1998).

DISCUSSION

A. Arguments

Plaintiffs request this Court grant relief from the judgment barring their off-reservation treaty hunting rights. ECF No. 70 at 8. First, Plaintiffs seek relief under Rule 60(b)(5) because this Court based its judgment entirely on *Race Horse,* finding the facts and legal issues identical. *Id.* at 17-18. However, *Race Horse* was overturned in *Herrera*

v. Wyoming, 139 S.Ct. 1686 (2019) when the U.S. Supreme Court determined Wyoming's statehood did not abrogate the Crow Tribe's hunting rights. *Id.* at 18. Although the Tenth Circuit affirmed this Court's decision, Plaintiffs argue the Court can still grant relief without first seeking leave from the Tenth Circuit. *Id.* at 19.

Alternatively, Plaintiffs argue they are entitled to relief under Rule 60(b)(6). *Id.* at 20. The Crow Tribe ceded millions of acres of land to the United States through treaties based on the understanding its members would have the right to hunt upon that land. *Id.* Plaintiffs do not believe this Court's judgment should continue to impede their off-reservation treaty hunting rights. *Id.*

The Tenth Circuit affirmed this Court's decision, but also stated alternative bases for its affirmance; specifically, regarding the occupation of the Bighorn National Forest and conservation necessity. Plaintiffs request this Court declare the alternative holdings are not part of the final judgment. *Id.* at 22, 24.

If the Court were to find the Tenth Circuit's alternative holdings are part of the final judgment, Plaintiffs request this Court vacate the decision. *Id. Herrera* determined the creation of the Bighorn National Forest did not preclude the treaty hunting rights; so, Plaintiffs believe the Tenth Circuit's contrary holding should be vacated. *Id.* at 22. The treaty is federal law, so Plaintiffs argue this Court should vacate the Tenth Circuit's alternative holding to enforce the treaty. *Id.* at 23.

In regards to the conservation necessity holding, Plaintiffs claim the evidentiary standard the Tenth Circuit articulated would not have been sufficient to resolve the summary judgment motion that was on appeal, and the Tenth Circuit did not address all of

the elements for a conservation necessity finding. *Id.* at 23-24. Alternatively, equity requires the decision be vacated under Rule 60(b)(6), according to Plaintiffs. *Id.*

Plaintiffs also claim they are entitled to relief from the conservation necessity holding under Rule 60(b)(5) because of its prospective effect. *Id.* at 24. The conservation necessity finding has prospective effect because Wyoming continues to rely on it to regulate the Crow Tribe's off-reservation treaty hunting rights. *Id.* at 24-25. However, Plaintiffs contend the circumstances have changed because there is a significant overpopulation of elk that was not present 25 years ago. *Id.* at 27. Further, the goal of conservation necessity has been met because the elk population exceeds the State's management objectives and Wyoming is now trying to reduce their population. *Id.* at 28.

The Motion must be timely in order to receive relief, and Plaintiffs argue their Motion is timely because the earliest they could have brought the Motion was May 20, 2019 when the U.S. Supreme Court decided *Herrera* and expressly overruled *Race Horse*. *Id.* at 9. They did not immediately move for relief because Plaintiffs believed Wyoming would stop relying upon this decision and did not know the state courts would preclude tribal members from utilizing the treaty as a defense to criminal prosecution. *Id.* at 10. Further, COVID-19 and a change in tribal leadership added to the timeline. *Id.* Plaintiffs do not believe Defendants have suffered prejudice from any delay; rather, they believe the delay benefitted them. *Id.* at 10-11.

Defendants first contend Plaintiffs have not been diligent in seeking relief because they could have sought relief in 1999 after the U.S. Supreme Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999), which the U.S. Supreme

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