IN THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, STATE OF WYOMING

CLAYVIN HERRERA,	)	
	)	
Appellant,	)	CV 2016-242
	)	
vs.	)	
	)	
	)	
STATE OF WYOMING,	)	
	)	
	)	
Appellee.	)	

Appeal from Fourth Judicial Circuit Court, Sheridan County, Wyoming

Representing Appellant:

Kyle Gray & Steven Small of Holland & Hart, Billings, Montana; Hadassah Reimer of Holland & Hart, Jackson, Wyoming. Argument by Ms. Gray.

Representing Respondent:

Christopher LaRosa, Deputy County and Prosecuting Attorney, Sheridan, Wyoming.

Representing the* Crow *Tribe of Indians, Amicus Curiae in Support of Clayvin Herrera:

Andrew A. Irvine, Wilson, Wyoming; Dennis M. Bear Don't Walk, Crow Agency, Montana.

John G. Fenn, District Court Judge

The above-entitled matter came before the Court on Appellant, Clayvin Herrera's appeal from the *Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting State's Motion in Limine*, entered on October 16, 2015, the *Order After Pretrial Conference*, entered on April 18, 2016, and the *Judgment and Sentence* entered by the Fourth Judicial Circuit Court on April 29, 2016. Having reviewed the record, the briefs of the parties, and being otherwise fully advised, the Court **AFFIRMS** the circuit court's orders and the *Judgment and Sentence*.

ISSUES

The Appellant frames the pertinent issues as follows:

1. Did the circuit court err in denying treaty-based immunity to Herrera by holding itself "bound by" an erroneous Tenth Circuit decision, and ruling – in the face of binding U.S. Supreme Court precedent and federal statutory language to the contrary – that the

establishment of the BHNF in 1897 by presidential proclamation extinguished the Crow Treaty hunting rights even though Congress has never abrogated those rights?

2. Should the Court grant judgment of acquittal to Herrera, and dismiss the misdemeanor counts against him because the State did not, and cannot meet the controlling federal "conservation necessity" standard for prosecution of an otherwise immune treaty-hunter under state wildlife laws?

The Appellee frames the pertinent issues as follows:

I. Did the trial court err by following *Repsis* and ruling that the Article 4 hunting right was intended to be temporary and no longer exists?

II. Did the trial court err in ruling that the Big Horn National Forest is "occupied land" of the United States?

III. Did the trial court err in ruling that the State's elk seasons were enforceable on Appellant in the Big Horn National Forest because they are reasonable and necessary for the purposes of conservation?

IV. If the trial court erred, what is the appropriate remedy?

The Court held oral arguments in this matter, and it raised an additional question:

I. Do the doctrines of collateral estoppel, issue preclusion, or *res judicata* apply to preclude the Appellant from relitigating the validity of the off-reservation treaty hunting right?

FACTS

Herrera is an enrolled member of the Crow Tribe and a resident of St. Xavier, Montana, which is located on the Crow Reservation. In January 2014, Herrera and several other tribal members decided to hunt for elk on the Crow Reservation. They spotted several elk on the Reservation in the vicinity of Eskimo Creek. At some point, the elk crossed a fence, leaving the Crow Reservation and entering into the Big Horn National Forest in the State of Wyoming. Herrera and the others crossed the fence into Wyoming and continued to track the elk. They shot three bull elk and took the meat back with them to Montana. The elk were taken without a license and during a closed season. Herrera was cited with two misdemeanors, Taking an Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. §

23-3-102(d), and Accessory to Taking Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-6-205.

PROCEEDINGS BELOW

On July 2, 2015, Herrera filed a *Motion to Dismiss Under the Supremacy Clause of the United States Constitution and the Fort Laramie Treaty of 1868*. Herrera did not deny taking the elk, but he asserted that he had a right to hunt where and when he did under Article 4 of the Treaty with the Crow, 1868 ("Crow Treaty"). He argued that this treaty gave the Crow Tribe the right to hunt off of the reservation on the "unoccupied lands of the United States" that fell within territory that had been ceded by the Crow, and that this treaty right was still valid and preempted state law. The State filed a *Response* on August 6, 2015, and a *Supplemental Response* with exhibits on August 20, 2015. The State also asked for an evidentiary hearing so the State could offer evidence in support of its position, and it filed a *Motion in Limine re Affidavits* seeking to strike certain affidavits that had been filed with Herrera's motion. On August 20, 2015, the State filed a *Motion in Limine re Treaty Rights*, asking the trial court to prohibit Herrera from making reference to the asserted treaty hunting right at trial, if the circuit court determined that the treaty rights were no longer valid and provided no defense to the State's prosecution.

The circuit court held a status conference on September 1, 2015. It allowed the parties to submit additional briefing and agreed to schedule two evidentiary hearings. The first hearing was set for November 16, 2015, and it was intended to address the meaning of the Crow Treaty and its application to the site where the elk were killed. The second hearing was set for January, and it was set to address whether the State's elk season regulations were reasonable and necessary for the purposes of conservation and therefore would apply to treaty hunters even if the off-reservation hunting right was still valid. On September 18, 2015, Herrera filed a *Limited Response to the State of Wyoming's Assertion of Conservation Necessity*. The State filed its *Second Supplemental Response* on October 5, 2015. Both parties submitted numerous exhibits in support of their positions.[1] Herrera asserted that no evidentiary hearings were needed, and the court should rule in his favor on all issues as a matter of law.

[1] Many of the exhibits submitted by both parties contained inadmissible hearsay. The State objected to the hearsay contained in the affidavits filed by Herrera, but it does not appear that Herrera filed a formal objection to any of the State's exhibits. The circuit court never ruled on the admissibility of any of these exhibits, but it did cite to some of the laws and game codes that had been submitted by the State. Thus, it is unclear which of the exhibits the circuit court relied on when making its decision, or which of these exhibits, if any, were actually admitted into evidence by the court.

On October 16, 2015, the circuit court entered its *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine*. The trial court held that "[t]his issue of off-reservation treaty hunting rights is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs. Repsis*, 73 F.3d 982 (10th Cir. 1995)." The circuit court found itself to be "bound by the Tenth Circuit's holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." The circuit court also rejected Herrera's argument that *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), had reversed and rejected the *Repsis* case as well as *Ward v. Race Horse*, 163 U.S. 504 (1896), upon which the *Repsis* decision was based. The circuit court agreed with the *Repsis* court's decision that the off-reservation treaty hunting right was intended to be temporary and is no longer valid. The circuit could alternatively held that even if the treaty rights still existed, the regulation at issue met the "conservation necessity" standard, and therefore the regulation would apply to treaty hunters. The circuit court then cancelled the evidentiary hearings that had been set, and trial was scheduled for April 27, 2016.

Herrera filed a *Petition for a Writ of Review, Writ of Certiorari and Writ of Prohibition* with the Wyoming Supreme Court on November 2, 2015. The Wyoming Supreme Court denied the *Petition* on November 23, 2015. Herrera had also filed a *Notice of Appeal* with this Court on November 12, 2015. The State moved to dismiss the appeal for lack of jurisdiction. This Court dismissed the appeal on April 5, 2016, finding that the *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine* was not a final, appealable order.

Herrera then asked the circuit court to reconsider its position on the State's *Motion in Limine re Treaty Rights*. The circuit court denied this motion in the *Order After Pretrial Conference*, issued on April 18, 2016. The circuit court held that at the time of the alleged violations the controlling law was that members of the Crow Tribe had no off-reservation treaty hunting rights, and therefore they had no right to hunt in the Big Horn National Forest in violation of Wyoming law. Herrera sought a stay of his trial from both the Wyoming Supreme Court and the Supreme Court of the United States, but neither stay was granted, and his trial commenced on April 27, 2016.

At trial, because a treaty rights defense was not available, Herrera attempted to argue that he was not off of the reservation when he and his companions took the elk. He admitted that he

crossed the fence, but claimed that the fence did not mark the true boundary between Wyoming and Montana. The State presented evidence that the spot where the elk were killed is within Sheridan County, Wyoming, and that Herrera knew he was off of the reservation when he killed the elk. The jury convicted Herrera of both counts, and he was given concurrent sentences of one (1) year in jail suspended in lieu of unsupervised probation, three (3) years of suspended hunting privileges, and $8,080.00 in fines and court costs. This appeal followed. Herrera is not challenging anything that occurred at his trial. Rather, he is appealing the circuit court's pretrial decisions on the validity of the off-reservation treaty hunting right.

STANDARD OF REVIEW

This case raises questions of law which are reviewed *de novo*, and the Court affords no deference to the trial court's determinations on the issues. *See, e.g., Bear Cloud v. State*, 2014 WY 113, ¶ 13, 334 P.3d 132, 137 (Wyo. 2014). However, "if the determination of the trial court is correct on any theory it will not be disturbed, or if there exists any legally valid ground appearing in the record, [this Court] must affirm." *Matter of Adoption of RHA*, 702 P.2d 1259, 1263 (Wyo. 1985) (citing *Anderson v. Bauer,* 681 P.2d 1316 (Wyo. 1984); *Valentine v. Ormsbee Exploration Corp.,* 665 P.2d 452 (Wyo. 1983); *People v. Fremont Energy Corp.,* 651 P.2d 802 (Wyo. 1982); *ABC Builders, Inc. v. Phillips,* 632 P.2d 925 (Wyo. 1981)).

DISCUSSION

I. Collateral Estoppel, Issue Preclusion, and Res Judicata

The crux of Herrera's argument seems to be that the *Repsis* court incorrectly interpreted the Crow Treaty, and because that interpretation was incorrect, the circuit court should have reinterpreted the treaty under the "proper" federal standards of treaty interpretation. Thus, it appears that Herrera is either directly or indirectly attempting to relitigate the issue that was previously raised and decided in *Repsis*. The Court was concerned that he may be precluded from doing so under the doctrines of collateral estoppel, issue preclusion, or *res judicata*, and it asked the parties to submit additional briefing on this issue.[2] The Court asked the parties to address collateral estoppel, issue preclusion, and *res judicata*, because the doctrines are related,

[2] Although the parties did not raise this issue, it is proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues. *See Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993). Allowing the appellate court to raise the issue *sua sponte* is consistent with policies of avoiding unnecessary judicial waste and fostering reliance on judicial decisions by precluding relitigation. *Merrilees v. Treasurer, State of Vt.*, 159 Vt. 623, 623-24, 618 A.2d 1314, 1315-16 (1992) (citing *Dakota Title & Es*Crow *Co. v. World-Wide Steel Systems, Inc.,* 238 Neb. 519, 525-26, 471 N.W.2d 430, 434-45 (1991); *Wilson v. United States,* 166 F.2d 527, 529 (8th Cir. 1948)).

and the terms have sometimes been used interchangeably. A good summary of these doctrines is set out in *Goodman v. Voss*, 2011 WY 33, ¶ 23, 248 P.3d 1120, 1126 (Wyo. 2011), where the Wyoming Supreme Court held:

> Collateral estoppel and *res judicata* are analogous, but not synonymous. Although they share a common interest in finality, the doctrines themselves are different. *Tenorio v. State ex rel. Wyoming Workers' Compensation Div.*, 931 P.2d 234, 238 (Wyo.1997). We recently reiterated their differences:
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> > In *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶¶ 15–20, 25 P.3d 511, [517–18] (Wyo. 2001), we extensively recognized that *res judicata* and collateral estoppel are related but distinct concepts.
> >
> > *Res judicata* bars the relitigation of previously litigated claims or causes of action. *Slavens v. Board of County Commissioners,* 854 P.2d 683, 686 (Wyo. 1993). Four factors are examined to determine whether the doctrine of *res judicata* applies: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them. *Id.* Collateral estoppel bars relitigation of previously litigated issues and involves an analysis of four similar factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*
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> *Polo Ranch Co. v. City of Cheyenne,* 2003 WY 15, ¶ 12, 61 P.3d 1255, [1259] (Wyo. 2003).
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> Collateral estoppel is issue preclusion, while *res judicata* is claim preclusion. *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶ 15, 25 P.3d 511, [517] (Wyo. 2001).

Although this case involves the application of federal law, federal courts apply the same four prerequisites for collateral estoppel as Wyoming courts do. *See, e.g., Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992). Therefore, collateral estoppel/issue preclusion is the appropriate doctrine to analyze. Herrera argues that the doctrine does not apply to him for the following reasons: 1) *Repsis* was overruled by *Mille Lacs*, and this change in the law prevents preclusion; 2) a change in the applicable facts prevents preclusion; 3) Herrera was not a party or in privity with a party in the *Repsis* case; and 3) the issues in the two cases are not identical. The State asserts that collateral estoppel does bar

Herrera's treaty rights defense, and its use here is justified by the facts and the nature of the treaty right at issue. The Court must therefore determine whether the factors of collateral estoppel/issue preclusion are present in this case, such that Herrera would be precluded from relitigating the validity of the off-reservation treaty hunting right.

(a) Whether the issue decided in the prior adjudication was identical with the issue presented in the present action

The State asserts that the primary issue in this case is identical to the primary issue in the *Repsis* case: the continued validity of the off-reservation treaty hunting right. Herrera argues that the issues in the *Repsis* case were not identical to the issues in this case. He admits that *Repsis* involved a ruling on the continued validity of the treaty-hunting right in the Crow Treaty. However, he argues that the issues are not identical, because "*Repsis* did not address the issue raised in this matter of the treaty-hunting right as retained and kept in force by two subsequently Congressionally (sic) ratified agreements." However, these "subsequently" ratified agreements were signed in 1891 and 1904. Hence, their existence was known when the *Repsis* case was decided. The fact that Hererra may be making a different argument for the enforceability of the treaty hunting right does not change the fact that the ultimate issue in the two cases is identical.[3] The primary issue that Herrera is attempting to litigate is indistinguishable from the issue that was previously litigated in *Repsis*. The Court finds that the first prerequisite for the application of collateral estoppel has been met.

(b) Whether the prior adjudication resulted in a judgment on the merits

"Adjudication on the merits requires that the adjudication be necessary to the judgment." *Murdock*, 975 F.2d at 687 (citing *Block v. Comm'rs,* 99 U.S. 686, 693 (1878)). "[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which *it must necessarily have been founded.*" *Id.* (emphasis in original). In *Repsis*, the Crow Tribe sought a declaratory judgment asking the court to determine the validity of the off-reservation treaty hunting right. The federal district court for the State of Wyoming found that the right was intended to be temporary in nature, and it was no

[3] Herrera also argues that the issues in this case are not identical to those in *Repsis*, because the conservation necessity issue involved a different State regulation. However, the circuit court's ruling on the conservation necessity issue was an alternative holding in the event that the treaty rights do still exist. If the treaty rights do not exist, then it is immaterial whether the State's regulation met the conservation necessity standard. Therefore, the Court's ruling the treaty hunting right issue makes it unnecessary to address the conservation necessity issue.

longer valid. Thus, the validity of the off-reservation treaty hunting right was necessary to that judgment. Thus, the Court finds that this prerequisite has also been met.

(c) Whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication

Although Herrera was not a party to the *Repsis* case, the Crow Tribe was a party. Thus, the Court must decide if Herrera is in privity with the Crow Tribe.[4] The Supreme Court has long recognized that "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 US 793, 798 (1996)) (alterations in original). Although privity does not have a set definition in federal law, the Ninth Circuit has set forth a three-factor test for determining whether an absent party's interests are being adequately represented:

> Consequently, we will consider three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings.

U.S. ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 666 (D.S.D. 1996) (citing *Shermoen v. U.S.*, 982 F.2d 1312, 1318 (9th Cir. 1992) (citations omitted); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995)).[5]

In this case, the three factor test set out by the Ninth Circuit is clearly satisfied. The Treaty was made with the Crow Tribe, and they had an equal, if not greater, interest than Herrera in having the off-reservation treaty hunting rights declared valid. The Tribe was represented by competent legal counsel, who was willing and capable of making arguments in favor of the Treaty's validity. The Tribe wanted the right to be declared valid for all of its members, and

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[4] More recent cases have moved away from using the term "privies," and it was abandoned in the Second Edition of the Restatement. However, these cases still focus on whether the person bringing the second suit had a direct financial or proprietary interest in the previous suit and are now "seeking to redetermine issues previously resolved." *See, e.g., Montana v. United States*, 440 U.S. 147, 154 (1979). In this case, both the Crow Tribe and Herrera had a direct interest in having the treaty rights declared to be valid in the *Repsis* case, and they are now seeking to have this issue redetermined in this case.

[5] In *Gambler's Supply*, the South Dakota federal district court found that *res judicata* precluded the Yankton Sioux Tribe from bringing a *qui tam* action against a casino management company, because a tribal member had previously brought her own *qui tam* action against the company. The court found that the tribe and its member were in privity with each other. 925 F. Supp. at 670.

Herrera's presence in the *Repsis* case would not have offered any element necessary to the proceeding.

Further, federal courts have recognized that treaty hunting and fishing rights inure to the benefit of the Tribe as a whole:

> Each tribe bargained as an entity for rights which were to be enjoyed communally . . . . Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the right of a stockholder in the property of the corporation . . . . The right to fish was one such community property right pertaining to the tribe."

United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975) (quoting F. Cohen, *Handbook of Federal Indian Law* (1942)). Herrera only has an off-reservation treaty hunting right if the Crow Tribe has such a right. If the Tribe no longer has these rights, its members do not have them either. In *Repsis*, the Tribe's interests were aligned with Herrera's, and the Tribe understood itself to be acting in a representative capacity for its members. *See Taylor*, 553 U.S. at 900 (holding that the representation of a nonparty is adequate when the interests of the nonparty and her representative are aligned, and the party understood herself to be acting in a representative capacity). Therefore, the Court finds that Herrera is in privity with the Crow Tribe, and the third prerequisite is also satisfied.

(d) Whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding

The full and fair inquiry often focuses on whether there were significant procedural limitations in the prior proceeding, whether the party to the prior action had the incentive to litigate the issue fully, and whether effective litigation was limited by the nature or relationship of the parties. *Murdoch*, 975 F.2d at 689 (citing *Si-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir. 1990)). The *Repsis* case was resolved through summary judgment. Federal case law makes clear that "a plaintiff has a full and fair opportunity to litigate if it is allowed to submit evidence to defeat a motion for summary judgment. *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1211 (10th Cir. 2001) (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1319 (5th Cir.1970) ("It would be strange indeed if a summary judgment could not have collateral estoppel effect."); 18 Charles Alan Wright, *Federal Practice and Procedure* § 4419 (1981) ("It is clear enough that issue preclusion generally is appropriate if some effort is made to litigate the issue, but the evidence introduced is held

insufficient to carry the burden of persuasion or even the burden of production.")). A full and fair opportunity to litigate an issue also includes some opportunity to appeal an adverse decision. *Bell v. Dillard Dept. Stores, Inc.*, 85 F.3d 1451, 1456 (10th Cir. 1996). After consideration of these factors, the Court concludes that the Crow Tribe, which is in privity with Herrera, had a full and fair opportunity to litigate the issue in *Repsis*. The Tribe had an opportunity to present evidence to defeat the summary judgment motion, and it did appeal the federal district court's decision. When the district court's decision was affirmed by the Tenth Circuit, the Tribe sought a writ of certiorari to the Supreme Court of the United States, which was ultimately denied. The Court also finds that the Tribe had an incentive to litigate the issue fully, and effective litigation was not limited by the nature or relationship of the parties. Thus, the Court finds that the fourth prerequisite is also satisfied.

II. Exceptions to the Doctrine

Collateral estoppel is largely a "judge-made" doctrine and several exceptions have been found to exist. *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994) (citing Hart and Wechsler's *The Federal Courts and the Federal System* 1598 (3d ed. 1988)). These exceptions are set out in Restatement (Second) of Judgments § 28 (1982), which reads:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
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> > (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> >
> > (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
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> > (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
> >
> > (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Herrera argues that the *Mille Lacs* case constitutes an intervening change in the applicable legal context since *Repsis* was decided, such that a new determination is necessary. The State contends that *Mille Lacs* did not overrule *Repsis*, so there has been no change in the law, and this exception does not apply in this case.

The *Repsis* decision was largely based on the holding of *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Race Horse*, the Supreme Court of the United States was tasked with determining whether the treaty made by the United States with the Bannock Indians gave them the right to exercise an off-reservation hunting privilege within the limits of the state of Wyoming in violation of its laws. *Id.* at 507. A member of the Bannock Tribe had been arrested on charges of killing seven elk in violation of Wyoming's game laws. The Supreme Court looked at the language of the treaty, which read:

> But they 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 white and Indians on the borders of the hunting districts.

The Supreme Court found that the treaty hunting right given by the treaty was "temporary and precarious" in nature. *Id.* at 510. The right was "essentially perishable, and intended to be of a limited duration." *Id.* at 515. The Supreme Court also found that the act that admitted Wyoming to the Union was inconsistent with the rights granted in the treaty, and if it remained, Wyoming would not have been admitted as an "equal member" of the Union. *Id.* at 514. This so called "equal footing" doctrine has subsequently been rejected by numerous cases. However, the "temporary and precarious" doctrine remained alive and well.

In *Repsis*, the Tenth Circuit Court of Appeals found that the off-reservation hunting right found in Article 4 of the Crow Treaty was also "temporary and precarious." 73 F.3d at 988. It made this conclusion in part on the fact that the language in the two treaties is identical. *Id.* at 987. The *Repsis* court concluded that "[t]he Tribe's right to hunt reserved in the Treaty with the

Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse*, 163 U.S. at 514). The *Repsis* court also pronounced an alternative reason for affirming the district court's ruling; the creation of the Big Horn National Forest resulted in the "occupation" of the land, extinguishing the off-reservation hunting right. *Id.* at 993. As a third reason for affirmance, the court also concluded that "there was ample evidence in the record to support a finding that the regulations at issue were reasonable and necessary for conservation." *Id.*

In *Mille Lacs,* the Mille Lacs Band of Chippewa Indians had filed a declaratory judgment action seeking a determination that their treaty rights were still in effect. An 1837 treaty had given the Tribe the right to hunt, fish, and gather wild rice on territory ceded to the United States during the pleasure of the president. 526 U.S. at 177. In 1850, President Zachary Taylor issued an executive order stating that the privileges granted to the Chippewa Indians were revoked. *Id.* at 179. However, as of 1855 the federal officials in Minnesota were still recognizing the Chippewa's rights to hunt and fish. *Id.* at 182. Another treaty was signed in 1855, but it did not explicitly mention whether the hunting and fishing rights were still in effect. *Id.* at 184. Minnesota was admitted to the Union three years later, and the admission act was also silent with respect to Indian Treaty Rights. *Id.* at 185. The Tribe filed suit in 1990 to clarify their rights under the various treaties. The Supreme Court of the United States again rejected the equal footing doctrine of *Race Horse*. However it acknowledged that the *Race Horse* court had "also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood." *Id.* at 206. The Court then went on to say that "[t]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* However, the Supreme Court did not completely reject the temporary and precarious doctrine. Rather it stated that "[t]he focus of the *Race Horse* inquiry is whether Congress . . . intended the rights secured by the 1837 Treaty to survive statehood." *Id.* at 207. It then concluded that unlike the treaty in *Race Horse*, "there [was] no fixed termination point to the 1837 Treaty Rights." The Supreme Court went on to say:

> The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. By contrast the 1837 Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event.

Id. at 207. While the *Mille Lacs* court stated that *Race Horse* did not compel the conclusion that Minnesota's admission to the Union extinguished Chippewa usufructuary rights, it affirmed the concept that certain treaties, like the one in *Race Horse* were intended to terminate upon the happening of a "clearly contemplated" event. Thus, contrary to Herrera's contention, *Mille Lacs* did not overturn *Race Horse* or *Repsis*.[6] Rather, it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a "clearly contemplated event." *Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties. When the legal framework is unchanged, "normal rules of preclusion should operate to relieve the parties from redundant litigation . . . ." *Montana v. United States*, 440 U.S. 147, 162 (1979).

In addition, although preclusion does not generally attach to pure questions of law, it does generally apply to determinations that mingle facts with conclusions of law. 18 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 4425 (3d ed. 2017). Preclusion generally is appropriate if both the first and second action involve application of the same principles of law to a historic fact setting that was complete by the time of the first adjudication. *Id.* The determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication.[7] The Supreme Court of the United States has held that although *res judicata* and estoppel do not apply to pure questions of law, the doctrines do apply when a fact, question, or right has been adjudicated in a previous action, even if that determination was based on an erroneous application of the law:

> The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has

[6] The Court notes that Chief Justice Rehnquist opined in his dissent that *Mille Lacs* "effectively overrules *Race Horse sub silientio*." 526 U.S. at 219 (Rehnquist, C.J., dissenting). However, this Court has careful reviewed the majority opinion, and cannot agree with this assertion. The *Mille Lacs* Court clearly rejected the equal footing doctrine of *Race Horse*, and while it arguably narrowed the "temporary and precarious" doctrine, it did not overrule it. Instead, the *Mille Lacs* Court held that courts should look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* Court had done.

[7] Herrera also argues that the total population of elk has changed since *Repsis*. If the *Repsis* case had decided that the Treaty rights were no longer valid because game could no longer be found in the area ceded by the Crow Tribe, the change in the elk population might be relevant to the issue of preclusion. However, this was not the basis for *Repsis*'s holding. In addition, the total population of elk would be relevant for determining whether the regulation met the conservation necessity. However, this inquiry is only necessary if the Court found that the treaty hunting rights were valid. Because the Court concludes that the treaty rights are not valid, it does not need to reach the conservation necessity issue.

> enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. **But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.** That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. *See Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 291, 26 S. Ct. 252, 50 L. Ed. 447; *United States v. California & Ore Land Co.*, 192 U. S. 355, 358, 24 S. Ct. 266, 48 L. Ed. 476; *Scotland County v. Hill*, 112 U. S. 183, 187, 5 S. Ct. 93, 28 L. Ed. 692; *Southern Minnesota Ry. Ext. Co. v. St. Paul & S. C. R. Co.*, 55 F. 690, 695, 696, 5 C. C. A. 249; *Pittsford v. Chittenden*, 58 Vt. 49, 57, 3 A. 323; Bigelow on Estoppel (6th Ed.) p. 112.

United States v. Moser, 266 U.S. 236, 242 (1924) (emphasis added). Therefore, because the Crow Tribe's rights under the Crow Treaty were previously adjudicated in *Repsis*, that right cannot be disputed in the present action, even if the determination was reached through an erroneous application of the law.

III. Offensive Issue Preclusion in a Criminal Case

The Court recognizes that collateral estoppel/issue preclusion is most often applied in civil cases, and that its use in criminal cases is rare. Federal courts have stated that "while 'wise public policy and judicial efficiency' may be sufficient reasons to apply collateral estoppel in civil cases, they do not have the same weight and value in criminal cases." *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998). The Wyoming Supreme Court has yet to tackle this issue, but is has held that collateral estoppel can apply in a civil action to an issue that was litigated in a criminal action. *See Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶¶ 11-12, 245 P.3d 827, 830–31 (Wyo. 2011) (holding that collateral estoppel precluded the appellant in an administrative action from relitigating the question of whether his breath tests results were legally obtained when that issue had previously been adjudicated in a criminal case). Some federal courts have also allowed the government to use a judgment in a criminal case following a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal case, while others have held that doing so violates due process. *Compare United States v. Gallardo-Mendez*, 150 F.3d at 1244, *with Hernandez-Uribe v. United States,* 515 F.2d 20, 21-22 (8th Cir. 1975), *and United States v. Bejar-Matrecios,* 618 F.2d 81, 83-84 (9th Cir. 1980).

It appears that the applicability of collateral estoppel in criminal cases turns on whether the doctrine would preclude the defendant from challenging a substantive element of the charged

offense. Some courts are allowing the use of collateral estoppel when it "affects a judge's pre-trial ruling and does not necessarily eliminate a jury's consideration of substantive elements of the indicted offense." *State v. Hewins*, 409 S.C. 93, 111, 760 S.E.2d 814, 823 (2014). Accordingly, some courts have declined to adopt a blanket prohibition of the offensive use of collateral estoppel in this context, provided that the requirements of collateral estoppel are met. *Id.* (citing 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(g) (5th ed. Supp. 2013); Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency,* 64 Rutgers L. Rev. 409, 432-40 (Winter 2012)).

Further, at least one state court has allowed collateral estoppel to be used in a criminal case when the issue was previously adjudicated in a civil case. In *Moses v. Department of Corrections*, the Michigan Court of Appeals upheld the use of collateral estoppel to preclude a defendant from challenging the court's jurisdiction to prosecute him for a crime he asserted had been committed in "Indian Country." 274 Mich. App. 481, 503–04, 736 N.W.2d 269, 282–83 (2007). A previous decision had held that the "swampland" where the crime had been committed was not part of the Reservation, but was actually part of the State of Michigan. The court held that this decision precluded the defendant from challenging the court's jurisdiction in his criminal case:

> Second, the prosecutor correctly points out that in *Oglala Sioux Tribe v. Homestake Mining Co.,* 722 F.2d 1407, 1413-1414 (C.A.8, 1983), the Eighth Circuit Court of Appeals found that a commission decision, under the doctrine of collateral estoppel, precluded a tribe from litigating title in an action against a private party. Notwithstanding the prosecutor's cursory treatment of this issue, we conclude that there is merit in the prosecutor's position that the doctrine of collateral estoppel applies. Collateral estoppel is a rule of issue preclusion. It bars the "relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v. Orion Twp.,* 269 Mich. App. 527, 530, 711 N.W.2d 438 (2006). But the absence of mutuality does not always preclude application of collateral estoppel. *Monat v. State Farm Ins. Co.,* 469 Mich. 679, 688, 677 N.W.2d 843 (2004). In *Monat, supra* at 695, 677 N.W.2d 843, our Supreme Court held that, where collateral estoppel is asserted against a party who already had a full and fair opportunity to litigate the issue, mutuality is not required. Although plaintiff was not a party to the matter before the Indian Claims Commission, he claims rights as a member of the Indian tribe that was a party. "To be in privity is to be so identified in interest with another party that the first litigant represents the

> same legal right that the later litigant is trying to assert." *Adair v. Michigan,* 470 Mich. 105, 122, 680 N.W.2d 386 (2004). Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, we find that the requisite privity exists to apply the doctrine of collateral estoppel in this case.
>
> The fact that the instant case is a criminal case should not preclude application of the doctrine. Collateral estoppel cannot be invoked to preclude a defendant from contesting an essential element of a criminal charge. *People v. Goss (After Remand),* 446 Mich. 587, 600, 521 N.W.2d 312 (Levin, J.), 610-611 (Brickley, J.); 446 Mich. 587, 521 N.W.2d 312 (1994). But because the instant issue involves only a jurisdictional challenge to the Isabella County Prosecutor's authority to prosecute plaintiff in the criminal case, we conclude that it is permissible under *Monat, supra* at 695, 677 N.W.2d 843, for the prosecutor to make defensive use of collateral estoppel to preclude relitigation of an issue previously litigated by plaintiff's Indian tribe regarding whether the swampland was part of the reservation. The doctrine, as applied, promotes the efficient administration of justice and ensures more consistent judicial decisions. *Id.* It also furthers the purpose of the Indian Claims Commission Act by according finality to the Indian Claims Commission's determinations regarding Indian claims. *Dann, supra* at 45, 105 S. Ct. 1058. Applying the rule of law established in *Bennett* to the commission's finding, it follows that the swampland granted to the state of Michigan is not "Indian country" as a matter of law because it is not "within the limits of any Indian reservation under the jurisdiction of the United States Government," as required by 18 U.S.C. 1151.

Moses v. Dep't of Corr., 274 Mich. App. at 503–04, 736 N.W.2d at 282–83.

In this case, the use of collateral estoppel would not preclude Herrera from contesting an essential element of the criminal charge. Herrera was claiming a treaty based immunity from prosecution. This issue was civil in nature, and it did not present questions of fact for a criminal jury to weigh in deciding his guilt or innocence. Applying collateral estoppel would not eliminate the jury's consideration of the substantive elements of the offense. The State still had to prove all of the elements of the charged crimes beyond a reasonable doubt. Thus, the Court finds that the application of collateral estoppel in this case does not violate Herrera's right to due process. Therefore, the Court concludes that collateral estoppel should apply to preclude Herrera from attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case. Although the circuit court did not base its holding on collateral estoppel, it is a legal ground appearing in the record, and this Court can affirm the circuit court's decision on this basis.

IV. Alternative Reason for Affirmance

Even if collateral estoppel did not apply in this case, there are other grounds appearing in the record that support affirming the circuit court's decision. Under the Supremacy Clause,

treaties are binding on the states until Congress limits or abrogates the treaties. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 201-02 (1975). Treaties are contracts, and principles of contract law apply when a court is tasked with interpreting a treaty. As with all contracts, the interpretation begins with the text of the treaty. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). The goal is to determine the intent of the parties. *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 675 (1979). However, unlike most contracts where parol evidence is not considered, "the history of the treaty, the negotiations, and the practical construction adopted by the parties should also be considered. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). There should be a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior construction of the treaties." *Fishing Vessel*, 443 U.S. at 675. *Race Horse* applied these cannons of construction when interpreting the Bannock Treaty. 163 U.S. at 508. The Court opined:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with the language and in conflict with an act of Congress, and also destructive of the rights of one of the States.

Id. at 516. After considering the language of the treaty, the *Race Horse* court concluded that the rights granted in the treaty were temporary in nature, and they were not intended to survive Wyoming statehood. *Id.* at 515. Similarly, the *Repsis* court discussed these cannons of construction when interpreting the Crow Treaty. 73 F.3d at 992. After considering the language of the Crow Treaty, the *Repsis* court found that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. Therefore the tribe and its members are subject to Wyoming's game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation." *Id.* at 992-93. The *Repsis* court also alternatively held that the treaty rights were no longer valid, because "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Id.* at 993.

The circuit court found itself to be "bound" by the decision in the *Repsis* case. The State concedes that while the Supreme Court of the United State's interpretation of federal law is binding on state courts, neither the Supremacy Clause nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. *See Lockhart v. Fretwell*, 506 US 364, 376 (1993) (Thomas, J. concurring).

Therefore, *Repsis* was not binding authority. However, where no decision on a particular issue has been rendered by the Supreme Court of the United States, state courts "are free to adopt decisions of the lower federal courts if [they] find their analysis and conclusions persuasive and appropriate for [their] jurisprudence." *Abela v. Gen. Motors Corp.*, 469 Mich. 603, 606-607, 677 N.W.2d 325 (2004); *see also Evan v. Thomson*, 518 F.3d 1, 8 (1st Cir. 2008). Although there was binding authority on the invalidity of the Bannock Treaty, other than through collateral estoppel as discussed above, there was no binding decision on the validity Crow Treaty. However, the circuit court was presented with the *Repsis* case, which had squarely addressed the interpretation of the Crow Treaty. The circuit court was free to adopt that decision if it found it to be persuasive and appropriate. The circuit court did adopt the analysis and conclusions of the *Repsis* case, and this Court finds that it was appropriate to do so.

Herrera's primary argument is that the circuit court should not have found *Repsis* to be persuasive, because it was overruled by *Mille Lacs*. The circuit court rejected this argument, and as discussed above, this Court also concludes that *Mille Lacs* did not overrule *Repsis*. Rather, *Mille Lacs* reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a "clearly contemplated" event. The *Repsis* court applied this principle and determined that the off-reservation treaty hunting right in the Crow Treaty was no longer valid. It was therefore proper for the circuit court to adopt the reasoning in the *Repsis* decision, and bar Herrera from asserting the invalidated treaty hunting right as a defense to the criminal prosecution.

NOW, THEREFORE, IT IS HEREBY ORDERED that the circuit court's orders and the *Judgment and Sentence* are **AFFIRMED**.

Dated this 25 day of April, 2017.

John G. Fenn
District Court Judge

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument which is on file or of record in this court.
Done this 25 day of April 20 17
Clerk
By Deputy

Copies to:
Christopher LaRosa
Kyle Gray
Andrew A. Irvine
Dennis M. Bear Don't Walk