

# Looking *Race Horse* in the Mouth:

## A New Front in the Old Battle over Off- Reservation Hunting in Wyoming

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# Great Peace Commission, 1867-68



COUNCIL AT MEDICINE CREEK LODGE WITH THE KIOWA AND COMANCHE INDIANS.—SKETCHED BY J. H. BURNHAM.—(1868) (Page 128.)

# Treaty with the Crows (May 7, 1868)

Council at Ft. Laramie, November 12, 1867:

We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you however, the right to hunt upon it as long as the game lasts.*

-Commissioner Taylor

# Treaty with the Crows (May 7, 1868)

Council at Ft. Laramie, November 13, 1867:

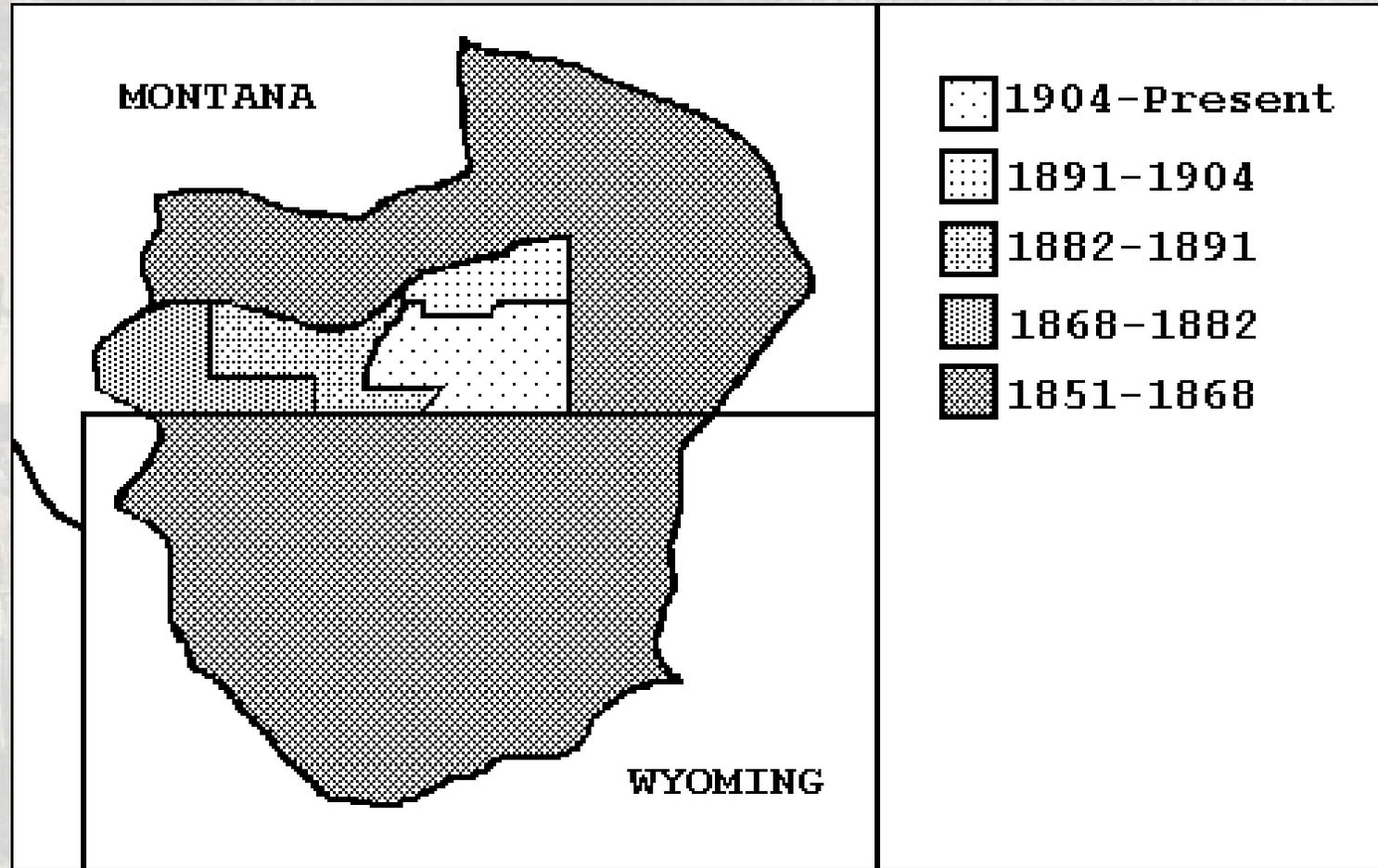
There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming.

- Chief Blackfoot

# Treaty with the Crows (May 7, 1868)

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, *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 as long as peace subsists among the whites and Indians on the borders of the hunting districts.*

# Treaty with the Crows (May 7, 1868)



Courtesy:  
Little Big Horn  
College  
Library

# Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868

Upon this reservation [the 'great father in Washington'] wishes you to go with all your people as soon as possible, and to make it your permanent home, but with permission to hunt wherever you can find game. In a few years the game will become scarce and you will not find sufficient to support your people. You will then have to live in some other way than by hunting and fishing.

-General Augur, Fort Bridger, July 3, 1868

# Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868

ARTICLE 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *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 as long as peace subsists among the whites and Indians on the borders of the hunting districts.*

# Disturbances in Jackson Hole Country, Wyoming 1895

Their treaty must be construed therefore as to mean that these Indians should have the right to hunt on unoccupied lands of the United States where game may be found and at any and all times of the year. The laws of the State of Wyoming which prohibit hunting within that State for certain kinds of game during certain months must be construed in the light of the treaty granting rights to these Indians to hunt on the unoccupied lands within the State, so far as they apply to the Shoshone and Bannock Indians. It is not competent for the State to pass any law which would modify, limit, or in any way abridge the right of the Indians to hunt as guaranteed by the treaty.

- 1895 Report of the Commissioner of Indian Affairs, at 73

# Ward v. Race Horse, 163 U.S. 504 (1896)

The right to hunt, given by the treaty, clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right depend on whether the land in the hunting districts was unoccupied public land of the United States. ...

Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the territory was essentially perishable, and intended to be of a limited duration.

# Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995)

The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. ...

[and, after creation of the Big Horn National Forest, t]hese lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. Thus, the creation of the Big Horn National Forest resulted in the “occupation” of the land.

# Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999)

Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.

[*Race Horse*] has been qualified by later decisions of this Court.

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.

# Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999)

Rehnquist, C.J., *dissenting*:

Today the Court appears to invalidate (or at least substantially limit) *Race Horse*, without offering any principled reason to do so.

MAY 7, 2013 CROW TRIBAL LEGISLATURE

JAR No. 13 -09

Introduced by Chairman Darrin Old Coyote  
Crow Tribal Executive Branch

Co-Sponsored by Senator Conrad J. Stewart  
Black Lodge District

A Joint Action Resolution Titled:

**A JOINT ACTION RESOLUTION OF THE CROW TRIBE TO ENACT AND  
DECLARE OFFICIAL CROW TRIBAL POLICY OF FULLY EXERCISING OFF-  
RESERVATION HUNTING RIGHTS PURSUANT TO THE 1868 FORT LARAMIE  
TREATY**

Legislative Findings:

**WHEREAS**, Article V, Section 2(a) of the Crow Tribal Constitution vests the Crow Tribal Legislature (hereinafter "Legislature") with the power and duty to promulgate and adopt laws and resolutions in accordance with the Crow Tribal Constitution and federal law for the governance of the Crow Tribe; and

**WHEREAS**, Article IV, Section 4(a) of the Crow Tribal Constitution provides that the "general duties" of the Executive Branch Officials shall include the duty to implement all laws, resolutions and policies duly adopted by the Legislature; and

**WHEREAS**, the Crow Tribe has always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival; and

**WHEREAS**, the 1851 Fort Laramie Treaty, which is recorded in the United States session laws at 11 Statutes at Large 749, recognized in Article V that the territory of the Crow Nation is recognized as follows: "[C]ommencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth;" and

**WHEREAS**, Article V of the 1851 Fort Laramie Treaty further provides that the Crow Tribe did not abandon or prejudice any rights or claims to any other lands and, further, that the Crow Tribe not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described; and

**NOW, THEREFORE, BE IT HEREBY RESOLVED BY THE EXECUTIVE BRANCH  
AND LEGISLATURE IN SPECIAL SESSION:**

**Section 1. Establishment of Tribal Policy.** The policy of the Crow Tribe shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States which are located within the traditional Crow homeland, as set out in the 1851 Fort Laramie Treaty, along with all such lands as located in traditional Crow territory according to tribal oral history.

(a) It shall be tribal policy to consider the term "unoccupied lands of the United States" as contained in Article IV of the 1868 Fort Laramie Treaty to include all federal lands managed by the United States Forest Service as national forests and national grasslands, all federal lands managed by the National Park Service as national parks and national recreation areas, all federal lands managed by the United States Fish and Wildlife Service as national wildlife refuges, and all federal lands managed by the Bureau of Land Management as national monuments, national recreation areas, and all such other BLM lands managed for multiple-use or resource preservation, and all federal lands managed by the Army Corps of Engineers and Bureau of Reclamation. All federal lands specifically designated by the United States Congress under statute as off-limits to hunting generally shall be honored as such by the Crow Tribe.

(b) It shall be tribal policy to consider the phrase "so long as game may be found thereon" as contained in Article IV of the 1868 Fort Laramie Treaty to include all native species of animals found in the traditional Crow homeland as identified in the 1851 Fort Laramie Treaty. Such species shall include but not be limited to: buffalo, elk, mule deer, white-tailed deer, black bear, grizzly bear, big horn sheep, shiras moose, grey wolves, pronghorn antelope, mountain lion, bobcat, wolverine, badger, beaver, sharp-tailed grouse, ruffed grouse, sage grouse, blue or dusky grouse, prairie chicken, wild turkey, waterfowl, birds of prey, and all fur-bearing animals.

(c) The Crow Tribe intends to enact regulations governing the exercise of all off-reservation treaty hunting conducted by Crow tribal members through an amendment to the Crow Fish and Game Code as contained in Title 12 of the Crow Law and Order Code. Such regulations shall, at a minimum, include procedures for issuance of treaty licenses, the establishment of treaty-hunting seasons, harvest quotas, enforcement procedures including penalties for violations, inter-governmental agreements including cooperative habitat improvement projects, and other conservation-based regulatory measures.

(d) Enrolled members of the Crow Tribe, pursuant to the Fort Laramie Treaties of 1851 and 1868, may take native species of animals, including but not limited to the aforementioned list in Section 1(b), permitted to be taken under Crow tribal law. All animal species federally-listed as endangered or threatened under the Endangered Species Act and all animal species otherwise specifically protected from hunting under federal statutory law shall be honored as protected by the Crow Tribe. Enrolled members engaged in treaty-hunting shall at all times have a current tribal identification card in their possession. It shall be unlawful for any non-member to accompany a tribal member engaged in off-reservation treaty hunting.

# Herrera v. Wyoming, No. 17-532



# Herrera v. Wyoming, No. 17-532

## QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.



# Thank you!

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