No. 22-35140

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE NORTHWESTERN BAND OF THE SHOSHONE NATION, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members,

Plaintiff-Appellant,

v.

STATE OF IDAHO; and DEPARTMENT OF FISH AND GAME DIRECTOR ED SCHRIEVER and DEPARTMENT OF FISH AND GAME ENFORCEMENT BUREAU CHIEF GREG WOOTEN, in their official capacities; and
DOES 1–10,

Defendant-Appellee ,

GOVERNOR BRAD LITTLE,

Defendant.

On Appeal from the United States District Court
for the District of Idaho; No. 4:21-cv-00252-DCN
Hon. David C. Nye

APPELLANT'S OPENING BRIEF

Ryan B. Frazier
KIRTON MCCONKIE
36 S. STATE STREET, #1900
SALT LAKE CITY, UTAH 84111
(801) 328-3600; rfrazier@kmclaw.com
Attorneys for Appellant
The Northwestern Band of the Shoshone Nation

DISCLOSURE STATEMENT

The Northwestern Band of the Shoshone Nation ("Appellant" or "Northwestern Band" or the "Tribe") is a sovereign entity that issues no stock and has no parent corporation.

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INTRODUCTION

This case involves the interpretation of the 1868 Fort Bridger Treaty (the "Treaty") between several Shoshone bands and the United States, through which the Northwestern Band of the Shoshone Nation (the "Tribe") reserved its right to hunt and fish on unoccupied lands of the United States within its aboriginal territory (the "Hunting Right"). Pursuant to the Treaty, the Shoshone Tribes ceded their territory, which included millions of acres spread throughout Wyoming, Colorado, Utah, Idaho, and Nevada, to the United States. The Treaty recognized that the Shoshone bands had for generations hunted and fished these ancestral lands that they had traditionally inhabited and controlled. In exchange for ceding these lands to the United States, the United States promised that the Shoshone Tribes "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 among the whites and Indians on the borders of the hunting districts." Treaty with the Shoshonee and Bannacks, July 3, 1868, attached hereto as Addendum, at Article IV.

As European-American settlers migrated west to and through that Shoshone territory beginning in the late 1840s, competition for territory and resources incited tensions between the settlers and the Shoshone bands. The Tribe and other Shoshone bands suffered famine, resulting in violence between the Shoshone bands, including the Tribe, and the settlers and the United States military. In 1863,

soldiers massacred hundreds of members of the Tribe on the banks of the Bear River in Southern Idaho. Later in 1863, the Tribe and other Shoshone bands entered into five peace treaties with the United States in return for the government's pledge of annuities and goods to help relieve their misery.

In 1868, the allied bands that entered into three of those peace treaties and the United States then entered into the Treaty at issue here. In that Treaty (to which the Tribe is a party), the Tribe reaffirmed its peace pledge and ceded its lands in exchange for, in part, a covenant and guarantee that the Tribe's historic Hunting Right would be protected and preserved. This peace accord, land relinquishment, and Hunting-Right guarantee was memorialized in the Treaty.

The Tribe has attempted to exercise its Hunting Right within the region. It has been able to exercise its right in some places such as Utah. However, Idaho officials have refused to recognize or allow the Tribe to exercise the Tribe's Hunting Right in Idaho.

In this action, the Tribe seeks in the United States District Court for the District of Idaho (the "District Court") a declaration that the Tribe may exercise the Hunting Right, including in Idaho. The District Court dismissed all of the Tribe's claims because it erroneously concluded that "a necessary condition of receiving Hunting Right was living on the Fort Hall Reservation or the Wind River Reservation." Mem. Dec. & Ord., dated Jan. 19, 2022 (the "Decision"), ER-14.

However, the Treaty's plain language provides that the only conditions that had to remain in effect for the Tribe to exercise the Hunting Right were that the United States hold the land, the land be "unoccupied, game be found on the land, and peace subsist between the "whites and Indians on the borders of the hunting districts." Those conditions have been satisfied. The Tribe's Hunting Right should be recognized, and the District Court's Decision should be overturned.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1362, and 2201, as the action concerns a treaty of the United States, was brought by a Native American tribe with a governing body duly recognized by the Secretary of the Interior wherein the matter arises under a treaty of the United States, and the Tribe seeks declaratory judgment in a case of actual controversy. The District Court entered its final order on January 19, 2022, and the Tribe timely filed its notice of appeal on February 17, 2022, pursuant to Federal Rules of Appellate Procedure 3 and 4. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATUTORY AND REGULATORY AUTHORITIES

All relevant constitutional provisions, treaties, statutes, ordinances, regulations, or rules appear in the Addendum to this brief in accordance with Ninth Cir. R. 28-2.6. The Treaty is also included as part of Appellant's Excerpts of Record.

ISSUES PRESENTED

1. Whether the District Court erred in concluding that the plain language of the Treaty conditioned the Tribe's Hunting Right on making either the Fort Hall Reservation or the Wind River Reservation its permanent home where the plain language in the Treaty requires only that the land be held by the United States, the land be unoccupied, game be found on the land, and that peace subsists and where the Tribe would not have understood in 1868 that failing to relocate to a reservation would extinguish its Hunting Right.
2. Whether the District Court erred in dismissing this case under Federal Rule of Civil Procedure 12(b)(6), which requires the court to accept as true all factual allegations in the Complaint, when the Tribe alleged in its Complaint that Treaty parties – the Tribe and the United States – understood that "the Indians shall have the right to hunt on the unoccupied land 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 border of the hunting districts."

STATEMENT OF THE CASE

I. Statement of Facts

a. Brief History of Shoshone Nation and The Northwestern Band.

The Shoshone bands and their ancestors, including the Tribe, have subsisted on the land for thousands of years, relying on practices of hunting, fishing, and

gathering for their survival. ER-116. By the mid-nineteenth century, when westward migration of European-American settlers reached the Shoshone territory, the Shoshone bands roamed and resided on over eighty million acres of prairie, forest, and mountain in the present states of Wyoming, Colorado, Idaho, Utah, and Nevada. *See Northwestern Bands of the Shoshone Indians v. United States*, 324 U.S. 335, 340, 65 S.Ct. 690 (1945) (citing *The Northwestern Bands of the Shoshone Indians v. United States*, 95 Ct. Cl. 642 (1942)); *see also* ER-116-17. Each Shoshone band preferred certain sections of the Shoshone territory as areas of greater attachment, *i.e.*, "home bases." ER-120. Nevertheless, each band often hunted, fished, gathered, and wintered together throughout the larger Shoshone territory. ER-121. Around the time of the treaty at issue, an estimated 14 Shoshone bands were led primarily by the main chief, Chief Washakie. *Id.*

The westward migration of European-American settlers resulted in the disappearance of game from the hunting grounds of the Shoshone nation. *Northwestern Bands of the Shoshone Indians*, 324 U.S. at 341; ER-117. The expansion of European-American settlements into the arable valleys of southeastern Idaho resulted in substantial losses of the already sparse supplies of grass and timber from which the natives obtained a considerable portion of their livelihood in the form of roots, berries, and nuts. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 646-47; ER-117. The disappearance of game and

destruction of the flora caused the Shoshone Indians to be reduced to conditions of practical starvation, particularly those in southern Idaho and northwestern Utah. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 646-47; ER-117. The plight of the Shoshone bands living in this region caused increased tensions between the Shoshone bands and the settlers and travelers from the United States. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 649; ER-117.

b. The Bear River Massacre and 1863 Treaties.

Beginning in the late 1840s, the northwestern bands were occasionally aggravated and provoked by "unscrupulous white men." *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 649; ER-118. In retaliation, some natives would attack white travelers crossing the territory. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 649; ER-118. In an effort to bring peace, the Superintendent of Indian Affairs recommended that food and supplies should be appropriated to aid the natives. *Id*. In July 1862, Congress instigated negotiations for a treaty between the United States and the "Shoshone or Snake Indians," as Congress identified them at the time. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 649-50; ER-119. Despite the recommendation for supplies and food, such aid did not reach these natives in 1862, and conflict continued. *Id*.

In January 1863, Colonel Patrick Edward Conner led more than 200 cavalry men to an encampment of the northwestern bands and massacred between 200-500

Shoshone natives, including women and children (the "Bear River Massacre"). *Id.* at 653. One band, led by Chief Sanpitz, was essentially exterminated. *Id.* To this day, the Tribe gathers annually at the massacre site near Preston, Idaho, to commemorate the lives of its people taken on that fateful day.

By summer of 1863, following the Bear River Massacre, the Shoshone tribes were living in dire conditions. *Id.* Between June and October of 1863, five separate treaties were entered between Shoshone bands and the United States—the Eastern Shoshone Treaty, Northwestern Shoshone Treaty, Western Shoshone Treaty, the Shoshonee-Goship Treaty, and the Mixed Bands Treaty. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 657-68; *Northwestern Bands of the Shoshone Indians*, 324 U.S. at 340-43; ER-119. These treaties were to be, and were, treaties of "peace and amity," with annuities paid by the United States for the purposes of accomplishing that objective and achieving that end. *Northwestern Bands of the Shoshone Indians*, 324 U.S. at 346 (citing *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 676); ER-120. The Northwestern Shoshone Treaty, entered in Box Elder, Utah Territory, acknowledges that the northwestern bands have been reduced by war to a state of utter destruction. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 660-61; ER-120.

c. The 1868 Treaty at Fort Bridger.

In 1868, certain Shoshone bands under the leadership of Chief Washakie, which included the northwestern Shoshone bands (the Tribe), desired to enter a lasting compromise with the United States and to be compensated for their land that the western-moving white settlers had continued to occupy. ER-121. On July 3, 1868, Chief Washakie signed the Treaty at Fort Bridger. According to the Treaty, certain Shoshone bands ceded their territory, including the territory occupied by the Tribe, to the United States. *See Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 485, 57 S.Ct. 244 (1937); ER-121. Specifically, Article II stated that "henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States," except within established land reserved to the bands. Addendum, at Article II. Prior to ceding land in the Treaty, the Shoshone nation held Indian title to the lands of the Shoshone territory. *Northwestern Bands of the Shoshone Indians*, 324 U.S. at 345-46; ER-121. The United States Supreme Court recognized that the Shoshone bands "relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho, and Wyoming."[1]

[1] In exchange, the Wind River Reservation discussed below "of 3,054,182 acres in Wyoming" was established. *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming*, 299 U.S. at 485.

Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, 299 U.S. at 485.

Article II of the Treaty contemplated the establishment of two (2) reservations of land to be "set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named." Addendum, at Article II. One was the Wind River Reservation in Wyoming and a prospective reservation for the Bannacks when they "desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation[.]" *Id.* No specific deadline was established for the creation of the prospective reservation. *See id.* Such reservations were to promote the peace as "no persons except those herein designated and authorized to do so [with the exception of United States government officials carrying out their duties] shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians." *Id.* The United States further agreed at its own proper expense, to build a warehouse store-room and five other commercial buildings, and a schoolhouse or mission. *Id.*

Additionally, the Treaty parties agreed in Article IV of the Treaty that the Shoshone bands ceding their lands reserved their aboriginal hunting right: The "Indians herein named . . . shall have the right to hunt on the unoccupied land 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 border of the hunting districts." Addendum, at Article IV.

d. Department of Interior Interpretation of The 1868 Treaty.

In March 1985, the United States Department of the Interior ("DOI"), through the Office of the Solicitor, authored a memorandum setting forth its opinion on whether members of the Tribe may exercise treaty hunting and fishing rights pursuant to the Treaty (the "1985 DOI Memorandum"). ER-69-78.

In the 1985 DOI Memorandum, the DOI concluded that the "Northwestern Band does possess treaty protected hunting and fishing rights which may be exercised on the unoccupied lands within the area acquired by the United States pursuant to the 1868 Treaty of Fort Bridger." ER-69. In arriving at this determination, the DOI specifically "review[ed] the history and treaty status of the Shoshone Indians[.]" *Id.* Further, the DOI recognized that the Northwestern Band "is a federally recognized tribal entity" and that it "does not have a reservation." *Id.* The DOI did not opine on which specific land areas may be regarded as "unoccupied lands" for purposes of exercise of the treaty right. *Id.*

The DOI found that the 1863 treaties into which the Shoshone Indians and the United States entered were "friendship treaties," that did not resolve title or rights questions. ER-70. The Treaty, in contrast, was the "more comprehensive" treaty, established the Wind River Reservation for the Eastern Band of Shoshone,

and provided for the separate future establishment of a reservation for the Shoshone-Bannocks (recognizing also that the Fort Hall Reservation was established by Executive Order later). *Id.* The DOI also recognized that a reservation (known as the Fort Carlin Reserve) was proposed for the Northwestern Band, but it was determined that it was too small for the band's needs. *Id.*

In reviewing Article IV of the Treaty, the DOI concluded that the Hunting Right on "unoccupied lands of the United States" was reserved to the Treaty's parties, which includes the Tribe despite not being expressly identified as a signatory. ER-71. Specifically, referring to previous proceedings initiated by various Shoshone groups seeking compensation for lands taken from the aboriginal Shoshone Tribe, (*see Shoshone Tribe of Indians of the Wind River Reservation, Wyo., et al. v. United States*, 11 Ind. Cl. Comm. 387), the DOI concluded that the Treaty reserved to the Northwestern Band a right to hunt and fish on unoccupied lands in accordance with Article IV of the Treaty. ER-72.

e. Procedural History.

Although Idaho has recognized the Hunting Right of the Shoshone-Bannock and Eastern Shoshone Tribes under the Treaty, it has refused to recognize the Tribe's Hunting Right. On December 11, 2019, Wyatt R. Athay and Shanelle M. Long, each tribal members of the Northwestern Band, were cited for hunting without tags issued by the State of Idaho. ER-123. Mr. Athay and Ms. Long have

asserted their hunting right under the Treaty. *Id.* The parties to Mr. Athay's and Ms. Long's action agreed to stay the matter, pending the filing of this underlying action, wherein the Tribe is seeking a declaration that it and its members have the Hunting Right under the Treaty. *Id.*

Appellants filed a Complaint for Declaratory Relief as to Treaty Status and Injunctive Relief (the "Complaint") on June 14, 2021, against the State of Idaho, Governor Brad Little, Department of Fish and Game Director Ed Schriever, and Department of Fish and Game Enforcement Bureau Chief Greg Wooten, Case No. 4:21-cv-00252-DCN. On July 28, 2021, Appellees filed a Motion to Dismiss the Tribe's Complaint ("Motion to Dismiss"). ER-79-113. Appellees sought dismissal under Fed. R. Civ. P. 12(b)(1), 12(b)(7), and 19. ECF No. 7-1 (filed July 28, 2021). They devoted most of their brief to arguing that the Shoshone-Bannock Tribe is a necessary and indispensable party that cannot be joined because of its sovereign immunity. *Id*. at 6-15. Appellees also argued briefly that the Tribe failed to state a claim because Article IV of the 1868 Treaty conditioned the Hunting Right on residence on one of the two reservations named in Article II. *Id*. at 16-17. And Appellees further argued briefly that the Tribe failed to state a claim because it had not maintained political cohesion with the Shoshone-Bannock Tribe and the Eastern Shoshone Tribe, the Treaty signatories. *Id*. at 17-19.

On August 25, 2021, the Tribe filed its Opposition to the Motion to Dismiss ("Opposition"). ER-47-78. Given the focus of Appellees' motion and briefing, the Tribe's response devoted most attention to Appellees' argument for dismissal based on Rule 19. ECF No. 18, at 3-15 (filed Aug. 25, 2021.) The Tribe also argued that the Treaty's text was not properly interpreted to condition the Hunting Right on tribal members' residence on a reservation and that, "[a]t the very least," dismissal was inappropriate because the allegations in the Complaint had to be taken as true, the Treaty had to be interpreted as the Tribe would have understood it, and discovery was required to the extent that Appellees relied on negotiation history and post-Treaty events. *See id.* at 15-18. The Tribe similarly argued that the Appellees' political cohesion argument raised factual questions that required discovery and development. *See id* at 18-19.

On September 10, 2021, Appellees filed their Reply Memorandum in Support of Motion to Dismiss ("Reply"). ER-28-46. In reply, Appellees again focused on Rule 19. ECF No. 19, at 1-4 (filed Sept. 10, 2021). Appellees briefly elaborated on their treaty interpretation, *id*. at 4-5, and argued that their motion to dismiss was based on issues of law that required no factual development, *id*. at 6-8.

f. The District Court's Ruling.

Without holding oral argument, the District Court, on January 19, 2022, issued its Decision, dismissing the Complaint with prejudice. The District Court

concluded in the Decision that the Treaty's text was unambiguous as to conditions for the Hunting Right. ER-18. The District Court concluded that the "plain language of the 1868 Treaty clearly indicates that a necessary condition of receiving Hunting Rights was living on the Fort Hall Reservation or the Wind River Reservation." ER-14.

The District Court found support for its textual interpretation in an Idaho State court's decision, which addressed the issue of the Hunting Right. ER-19-20. The District Court agreed with the State District Court (and magistrate court), that "[i]n order for the Northwestern Band to have . . . hunting rights, it would have had to move to the reservation and become part of either what is now generally known as the Eastern Shoshone tribe or the Shoshone-Bannock tribe for it is these two tribes in which the hunting rights are vested." ER-20. However, the District Court "decline[d] to rule on whether the Northwestern Band has maintained political cohesion with the Shoshone-Bannock Tribes." ER-22.

In rendering its Decision, the District Court refused to give any weight to the 1985 DOI Memorandum. Instead, the court found that the 1985 DOI Memorandum was unpersuasive because (1) it is not mandatory authority, (2) it pre-dated cases discussing political cohesion, and (3) it was not thorough, in that it did not factor into its analysis the Tribe's decision not to live on a reservation. ER-21-22.

SUMMARY OF THE ARGUMENT

The District Court's interpretation of the Treaty, and specifically Article IV, is incorrect on its face. The plain language of Article IV of the Treaty reserves and guarantees the Tribe's Hunting Right on the unoccupied lands of the United States that were previously the Tribe's ancestral lands. Addendum, at Article IV. The only conditions to exercising the Hunting Right under the Treaty are that the United States continue to hold the land, the land remains unoccupied, game is found upon the unoccupied lands of the United States, and peace subsist "among the whites and Indians." *Id.* The Tribe and Appellees ascribe different meaning to the word "but" in Article IV of the Treaty. The Tribe argues that "but" separates the first independent clause from the second independent clause, such that the Hunting Right in the second clause is contingent on only the explicit conditions in the second clause and is not contingent on any reservation requirement in the first clause. In contrast, Appellees argued – and the District Court incorrectly accepted – that the Hunting Right is contingent on the first clause because the word "but" denotes an exception to the promise to stay on the reservation. ER-16.

However, the District Court's interpretation of Article IV of the Treaty is not consistent with the United States Supreme Court's prior interpretation of identical treaty language reserving a hunting right for the Crow Tribe. *Herrera v. Wyoming*, 139 S.Ct. 1686, 1694 (2019). The Supreme Court concluded in *Herrera* that the

Crow Tribe's hunting right could be extinguished only in one of four circumstances: "(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.'" *Id.* at 1699 (quoting Art. IV of Crow Treaty, 15 Stat. 650). Although the treaty at issue in *Herrera* contained language providing that the Crow tribe would make a reservation its permanent home (exactly as the Treaty at issue in this case), the Supreme Court did not identify relocation to a reservation as a prerequisite to maintaining the reserved hunting right. *See id.* Thus, the District Court's interpretation of identical language in this case was inconsistent with Supreme Court precedent and was error.

In addition, the District Court purported to consider the Tribe's understanding of the Treaty, but it did not actually do so. The court should have allowed for development of the facts regarding the Tribe's understanding of the Treaty as the Tribe requested. Findings made in prior litigation relating to the 1868 Treaty indicate that the parties understood that the fundamental purposes of the Treaty were to ensure peace between nations and to have the tribes cede their lands to the United States, not to require settlement on reservations. The Tribe and its members did not understand in 1868 that failing to relocate to a reservation would extinguish its Hunting Right.

The DOI, an agency of the United States – a signatory to the Treaty – recognized that the Tribe did not have a reservation, but the DOI nevertheless expressly concluded that the Tribe had a Hunting Right as reserved by the Treaty. ER-69 (1985 DOI Memorandum). But the District Court refused to give weight to the 1985 Memorandum as the interpretation of a party to the Treaty. ER-21-22. This was error.

If the Ninth Circuit determines that the Treaty language and evidence of the parties' understanding is not sufficiently clear to conclude at this stage in the litigation that the Tribe has a Hunting Right, then, at the very least, the Ninth Circuit should conclude that an ambiguity exists which precludes judgment in favor of the Idaho officials. The Indian Canon of Construction requires liberal interpretation of ambiguous provisions in treaties in favor of Indians. And Rule 12(b)(6) requires the District Court to accept as true the well-pleaded facts in the Tribe's Complaint.

For these reasons, and those that follow, the Court should reverse the District Court's Decision.

STANDARD OF REVIEW

The Court reviews de novo a district court's dismissal of claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Doe v. Garland*, 17 F.4th 941, 944 (9th Cir. 2021); *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 950 F.3d 610

(9th Cir. 2020). All factual allegations in the Tribe's Complaint are accepted as true on review and the pleadings are construed in the light most favorable to the Tribe. *See Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025 (9th Cir. 2021). Dismissal may only be affirmed where "it appears beyond doubt" that the Tribe can prove no set of facts in support of its claims which would entitle it to relief. *See Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co.*, 943 F.3d 1243, 1248 (9th Cir. 2019) (internal citation and quotation omitted). The *de novo* standard is applicable to each of the Tribe's issues presented above.

ARGUMENT

I. THE TREATY'S PLAIN LANGUAGE RESERVES THE TRIBE'S HUNTING RIGHT WITHOUT REQUIRING THE TRIBE TO RELOCATE TO A RESERVATION.

In 1868, the United States and the Shoshone bands entered into the Treaty by which the Shoshone parties ceded their land to the United States under the Treaty. Article II of the Treaty provides that the Shoshone bands that are Treaty parties "will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States," except within established land reserved to the bands. Addendum, at Article II. In exchange, these Shoshone bands, including the Tribe, were promised in the Treaty that their aboriginal Hunting Right would be reserved on the unoccupied lands of the United States that

are within the Tribe's traditional, ancestral territory where they had hunted and fished for generations.

Idaho State Officials have refused to recognize the Tribe's Hunting Right. The Tribe brought this suit against those officials to have the District Court declare that the Hunting Right had been reserved by the Treaty, continues to exist, and may be exercised by the Tribe. The District Court dismissed the Tribe's action. It did so based on its erroneous determination that the Tribe does not have a Hunting Right because the Tribe failed to make either the Fort Hall Reservation or the Wind River Reservation their permanent residence, which it considered to be a precondition to exercising the Hunting Right under the Treaty. ER-16-18. However, the District Court's interpretation of the 1868 Treaty, and specifically Article IV, is incorrect on its face.

"A treaty is 'essentially a contract between two sovereign nations.'" *Herrera*, 139 S.Ct. at 1699 (quoting *Wash. v. Wash. State Comm. Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675, 99 S.Ct. 3055 (hereinafter, ("*Fishing Vessel Assn.*")). "Treaty analysis begins with the text, and treaty terms are construed as 'they would naturally be understood by the Indians.'" *Herrera*, 139 S.Ct. at 1702 (quoting *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055).

The plain language of Article IV of the Treaty explicitly reserves the Tribe's off-reservation Hunting Right. Article IV of the Treaty, the provision at issue, provides:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their 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 so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Addendum, at Article IV (emphasis added). Appellees argued, and the District Court erroneously agreed, that the Treaty required the tribes to relocate to a reservation as a precondition to exercising[2] their traditional Hunting Right. ER-15.

It is important to begin by acknowledging that the Hunting Right in the Treaty was a *reservation* by the Tribe of its aboriginal hunting right, not a *grant* from the United States to the Tribe of a new right. Indeed, the United States Supreme Court construed the language of Article IV of the Treaty, like the 1868 Treaty between the United States and the Crow Tribe (the "1868 Crow Treaty") at

[2] The District Court was unclear whether it interpreted the "reservation requirement" to apply to the Tribe or to the individual Tribal members who exercise the Hunting Right. On the one hand, the court claims that the Treaty provides that "those Indians who live on the reservation may leave the reservation" "to exercise their Hunting Rights," suggesting that it considered the requirement to apply to individuals. ER-15-16. On the other hand, the court seems to focus on where the "Tribe" settled in "northern Utah," suggesting that it believed that it was the Tribe itself that had to be on a reservation. ER-9 & -18.

issue in *Herrera*, as a reservation of a hunting right. The Court explained that both the Treaty in this case and the Crow Treaty "contained language *reserving* an off-reservation hunting right." *Herrera*, 139 S.Ct. at 1694 (emphasis added); *see also, e.g.*, *U.S. v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662 (1905) (describing the "reserved" fishing "rights possessed by the Indians" under a treaty). In other words, the Hunting Right at issue existed prior to the Treaty, was guaranteed to continue to exist by the Treaty, and continues unless the right is terminated. As such, the Tribe was not required to make a reservation its permanent residence ***before*** it exercised the Hunting Right reserved by the Treaty. The question is instead what the Treaty provides with respect to the *termination* of the Hunting Right.

A. The United States Supreme Court Already Determined When the Hunting Right may be Terminated under the Treaty's Language, and not Residing on a Reservation does not Terminate the Right.

The United States Supreme Court already determined in *Herrera* when a hunting right may be extinguished under the very language at issue in this case. About two months before the United States and the Shoshone bands entered into the Treaty at issue here on July 3, 1868, the United States entered into the 1868 Crow Treaty on May 3, 1868. *See id.*, 139 S.Ct. at 1691. As the Supreme Court recognized, the Treaty in this case and the 1868 Crow Treaty "contain ***identical***

language reserving an off-reservation hunting right." *Id.* at 1694 (emphasis added.)

The issue in *Herrera* was the circumstances under which the Crow's hunting right reserved by the 1868 Crow Treaty could be *terminated*. *See generally Herrera*, 139 S.Ct. at 1691-92, 1694, & 1699. The Supreme Court looked to the language of the Crow's hunting right reservation to determine when it could be terminated. *See id.* at 1699. "If a treaty 'itself defines the circumstances under which the rights would terminate,' it is to those circumstances that the Court must look" to terminate the right. *Id.* at 1699 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999). Analyzing the 1868 Crow Treaty language, the Supreme Court concluded termination results in only four (4) situations:

> The [1868 Crow T]reaty 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."

Herrera, 139 S.Ct. at 1699 (quoting Art. IV of 1868 Crow Treaty, 15 Stat. 650).

None of the situations that terminated the Crow's hunting right in *Herrera* included relocation to a reservation. *See id.* And, like the Treaty in this case, the first clause of Article IV of the 1868 Crow Treaty requires that the Crow Tribe "make its 'permanent home' a reservation . . . and to make 'no permanent

settlement elsewhere." *Id.* at 1692 (citing Art. IV of 1868 Crow Treaty, 15 Stat. 650). Despite the inclusion of this reservation-requirement language in the 1868 Crow Treaty, the Supreme Court did not identify relocation to a reservation as a requirement for maintaining the Crow Tribe's hunting and fishing rights. *Id*.

Because both the Treaty at issue and the 1869 Crow Treaty contain identical language reserving off-reservation hunting rights, the Supreme Court's determination of the only situations in which the Crow Tribe's hunting right could be extinguished should govern when the Tribe's Hunting Right could be extinguished under the Treaty. Consistent with the Supreme Court's conclusion in *Herrera* when hunting rights can be extinguished, the ***only*** conditions that would terminate the Hunting Right under the Treaty in this case are (1) the lands are no longer unoccupied, (2) the lands no longer belong to the United States, (3) game is no longer found on the land, and (4) peace ceases to exist. Addendum, at Article IV. As such, the language of the Treaty in this case does not condition the Hunting Right on tribal members making reservations their home. Addendum, at Article IV.

If the parties to the Treaty had intended the reservation requirement to be a condition to the maintenance of the Hunting Right, it could have expressly and unequivocally tied the exercise of the right to relocation to a reservation. But the Treaty does not contain such explicit language.

B. The District Court Erroneously Interpreted the Language of Article IV of the Treaty.

Appellees argued – and the District Court incorrectly accepted – that the Hunting Right in the second clause of Article IV of the Treaty is contingent on the first clause of Article IV of the Treaty about relocation to a reservation. The District Court concluded that the word "but" in Article IV denotes an "exception to staying on the reservation," and that "Indians could leave to exercise their Hunting Rights." ER-15 (emphasis added). The District Court concluded that "the term 'but' is a coordinating junction that joins two clauses in a compound sentence." *Id.* As such, the Court concludes the "most reasonable reading" is the "but" is "an exception to the promise to stay on the reservation in the first independent clause." ER-16. However, the language in Article IV of the Treaty does not have the meaning Appellees or the District Court ascribe to it.

The District Court's interpretation effectively flips the order of the first and second clauses of Article IV and interprets the transitional "but" to mean "provided that." Such interpretive gymnastics revise the meaning of Article IV rather than reading the language on its face.

Article IV of the Treaty consists of two separate *independent* clauses. The first clause, the reservation requirement, provides specifically that the Indians, "when the agency house and other buildings shall be constructed on their reservations named," will make said reservations their permanent home.

Addendum, at Article IV. This is a land reservation. The second independent clause, the Hunting Right, provides that "so long as game may be found [on the unoccupied lands of the United States, and so long as peace subsists among the whites and Indians,]" the Native Americans shall have the right to hunt on the unoccupied lands of the United States. *Id.* This clause is a Hunting Right reservation.

Both clauses may (and do) stand alone. The mere fact that the two clauses may be related does not change the independent character of the clauses. The second clause is devoid of any language that makes it contingent on the first clause. The "but"[3] separates the first clause from the second independent clause, suggesting that any reservation requirement is not a condition precedent to the Tribe's Hunting Right as long as the explicit conditions (discussed in Section I(A) *supra*) to the Hunting Right are satisfied. In essence, "but" could be replaced with "except that."[4]

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[3] The semicolon immediately preceding the word "but" emphasizes that the second clause (*i.e.*, related to the Hunting Right) is not dependent on the first clause (*i.e.*, related to permanent settlement on reservations). Addendum, at Article IV. A semicolon is not required, however, as the Supreme Court in *Herrera* reached the same conclusion as to the 1868 Crow Treaty language that had a comma rather than a semicolon.

[4] The District Court, citing WEBSTER'S NEW COLLEGIATE DICTIONARY (1979), admits that "but" can also mean "except for the fact[.]" ER-15.

When tribes ceded their territories to the United States, the tribes typically ceded their rights attendant to those lands, including hunting and fishing rights. Unless off-reservation hunting and fishing rights were reserved, tribal members would preserve only the aboriginal right to hunt and fish on the reservation (*i.e.*, the land reservation). In this case, where off-reservation hunting rights are reserved, that Hunting Right stands as an exception to what would normally be preserved – hunting only on the reservation. In other words, not only would the Tribe be permitted to hunt on its reservation, but it would also be allowed to hunt elsewhere as permitted by the language – in this case on the unoccupied lands of the United States.

Further, the Treaty makes no mention of "leaving" from or "staying" on a reservation. *See generally* Addendum, at Article I-XIII. The language in Article IV states only that reservations will be a "permanent home," and there will be no "permanent settlement elsewhere." Addendum, at Article IV. This language, at most, addresses where natives will "settle," *i.e.*, residency. It does not, however, pertain to the Tribe exercising its Hunting Right.

The District Court also improperly interpreted the word "they" at the beginning of the second clause to mean those who had made reservations their home. ER-16, fn. 2. The District Court reached this conclusion by "relating the pronouns back to their nouns," finding that "[t]he group that is giving the hunting

permissions are 'they' who are named and who have made the reservation their permanent home." *Id.* (emphasis added). That interpretation was in error. "[T]hey" relates back to the "Indians named herein," which means the parties to the Treaty, *i.e.*, the noun to which the pronoun "they" relates in Article IV. *See generally* Addendum, at Article I-IV. To interpret the meaning of "they" in Article IV as those "who have made the reservation their permanent home" improperly alters the Treaty's meaning. Indeed, the language "who have made the reservation their permanent home" is not found in the Treaty.

The District Court's conclusion is also undermined by the fact that the supposed reservation-precondition has no deadline for compliance. Article IV of the Treaty provides: "The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere." Addendum, at Article IV. But the Treaty is silent as to deadlines for relocation to a reservation with the exception of the imprecise "when the agency house and other buildings shall be constructed." *Id.* And, there was no deadline specified for the construction of the agency houses and "other buildings." *Id.*

In addition, the Fort Hall Reservation was not established for the Shoshone-Bannock Tribe in 1868 when the Treaty was signed. At that point, the Treaty

specifically contemplated its creation at some future date. *See id.* But there was no indication in the Treaty of when that would be. *See id.* Under the District Court's interpretation, the Hunting Right would have ceased to exist for all Shoshones – including the Shoshone-Bannock Tribe for which the Fort Hall Reservation was eventually created – subject to the treaty that did not relocate to the Wind River Reservation. Doubtless, that was not the understanding of the Shoshones in 1868 when the Treaty was signed.

Furthermore, the District Court erred in giving weight to lower state district court rulings that analyzed the Hunting Right under the Treaty over twenty years ago. Although the District Court recognized that the state district court's interpretation of the Treaty is not binding, it nevertheless concurred with the state:

> In order for the Northwestern Band to have these same hunting rights, it would have had to move to the reservation and become part of either what is now generally known as the Eastern Shoshone tribe or the Shoshone-Bannock tribe for it is these two tribes in which the hunting rights are vested. By distancing themselves from these tribal entities, the Northwestern Band has no claim to those tribe's [sic] vested hunted rights.

ER-20. However, this interpretation is inconsistent with the plain language of the Treaty as it requires the Tribe to "become part of either … the Eastern Shoshone tribe or the Shoshone-Bannock tribe." In other words, despite the fact that the Tribe is federally-recognized, it would have to give up its identity, independence, and sovereignty for the Hunting Right. That is not what the Treaty contemplated.

Further, the state-court rulings do not comport with the interpretation of the language at issue as interpreted by the United States Supreme Court in *Herrera*. *See* Section I(A) *supra*.

Accordingly, the District Court failed to interpret the language in Article IV correctly on its face, which was error. Its Decision should, therefore, be reversed.

II. THE UNDERSTANDING OF THE PARTIES TO THE TREATY SHOULD BE GIVEN EFFECT.

A. The District Court Failed to Give Meaning to the Treaty in Accordance with the Tribe's Understanding in 1868.

Courts are to interpret and construe "treaty terms" as "'they would naturally be understood by the Indians.'" *Herrera*, 139 S.Ct. at 1701 (quoting *Fishing Vessel Ass'n*, 443 U.S. at 676); *see also Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) (courts interpret treaties "in the sense in which [the treaty language] would naturally be understood by the Indians." (internal citations omitted)). This principle is firmly established in Federal case law. *See, e.g., Mille Lacs*, 526 U.S. at 196, 119 S.Ct. 1187; *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) (holding that treaty text must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor); *U.S. v. State of Wash.*, 157 F.3d 630, 643-42 (9th Cir. 1998) ("[T]reaties are constructed more liberally than private agreements, and to ascertain their meaning we may look beyond written words to the history of the

treaty, the negotiations, and the practical construction adopted by the parties") (internal citation and quotation omitted); *Tulee v. State of Wash.*, 315 U.S. 681, 684-85, 62 S.Ct. 862 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.").

This Indian canon of construction requires a court to give effect to the Indians' understanding even when a court reads the treaty's language to have a particular or different meaning. *See, e.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1011-12 (2019). In that case, the treaty guaranteed to the Yakama Nation "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" and "the right, in common with citizens of the United States, to travel upon all public highways." *Id.* at 1011. The Supreme Court recognized that the words "in common with" in this guarantee "could be read to permit application to the Yakamas of general legislation . . . that applies to all citizens." *Id.* But the Supreme Court rejected that interpretation because "that is not what the Yakamas understood the words to mean in 1855." *Id.* The Court identified various considerations for this result. *See id.* at 1012. For one thing, the Court recognized that "the fact that the treaty negotiations

were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage." *Id.* It also considered the historical context in which the treaty was negotiated and signed. *See id.* In particular, the Court believed that the tribes' religion and culture at the time were relevant considerations. *See id.*

In this case, the District Court acknowledged the treaty canon of construction, but it failed to apply it. *See* ER-18-19. Rather than allowing the Tribe to develop the factual record about the Tribe's contemporaneous understanding of the Treaty, the District Court simply asserted that the Tribe would have understood the Treaty in the same way it did. To the contrary, in is anticipated that a well-developed factual record would show that the Tribe would have understood in 1868 that its Hunting Right was preserved and that maintaining the right was not contingent on relocating to a reservation. But because the District Court dismissed the case at the pleading stage, the Tribe did not have an opportunity to present such relevant evidence.

In some cases, trial is required to discern the tribe's contemporaneous understanding. For example, the District Court for the Western District of Washington recently denied the parties' motions for summary judgment on their respective rights under the Treaty of Point Elliott and set the case for trial. *United States v. Wash.*, No. 17-03 RSM, 2022 WL 782612, at *8 (W.D. Wash. Mar. 15, 2022) ("In the end, the Court is left with a jumble of evidentiary disputes,

numerous exhibits that are open to multiple reasonable interpretations and are weighed differently by each of the tribes, differing interpretations and guidance from the tribes' experts, and disagreement on the appropriate conclusions which follow…."). In other cases, treaties may appropriately be interpreted through a well-developed record on summary judgment. *See Little Traverse Bay Bands of Odawa Indians v. Whitmer*, 398 F. Supp. 3d 201 (W.D. Mich. 2019), *aff'd*, 998 F.3d 269 (6th Cir. 2021) (denying defendants' motion for judgment on the pleadings but granting defendants' motion for summary judgment after factual development). The District Court erred in dismissing the action without allowing the Tribe to develop a factual record of its understanding at the time the Treaty was signed in 1868, including historical context and negotiation history. *See United States v. Washington*, 827 F.3d 836, 851 (9th Cir. 2016) ("We look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties").

Despite the fact that a factual record had not yet been developed, and contrary to the allegations in the Complaint about the historical context for the Treaty, the District Court concluded that the "promise to live on the reservation was the most significant promise made by the Indians in that treaty," and that "[i]t would make little sense for the government to grant Hunting Rights but not receive anything in exchange." ER-17. The District Court had no basis for that

conclusion. The District Court failed even to mention two other promises the Tribe made in the Treaty – peace "among the whites and Indians" and ceding of the Tribe's ancestral lands – which are reasonably viewed as the most important promises. Addendum, at Article I. Specifically, Article I of the Treaty provides:

> From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Id. As discussed above, Article II provided for the cession. And the second clause of Article IV had its own condition to keep the peace.

The serious conflicts between the Shoshone bands and European-American settlers have been well-documented. ER-70, 116-20. Tragically, this conflict, among other fateful events, culminated in the Bear River Massacre, which resulted in the desolation and near destruction of the Tribe. *The Northwestern Bands of the Shoshone Indians*, 95 Ct. Cl. at 649-50; ER-119. Ultimately, in an effort to avoid further conflict, lands were ceded by the Shoshone Indians, including the Tribe, to the United States. *Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 299 U.S. at 485; ER-121. In exchange, and to maintain peace among nations, the United States allowed the tribal signatories, among other things, to continue their traditional Hunting Right on the lands that the United States acquired. *Id.*; *see also* Addendum, at Article IV. The United States received substantial consideration for the Hunting Right – it acquired the Tribe's ancestral

lands and peace for the European-American settlers. As such, the District Court erred in its conclusion that the United States would have received little, if any, consideration for the Hunting Right unless it forced the Tribe to relocate to a reservation.

The historical facts support the Tribe's argument and, at the very least, create an ambiguity as to the District Court's interpretation of Article IV of the Treaty. The District Court's ruling was thus in error.

B. The 1985 DOI Memorandum Supports the Tribe's Interpretation.

The United States, a party to the 1868 Treaty, recognizes the Tribe's Hunting Right, as explained in the 1985 DOI Memorandum. The DOI is given broad authority to supervise and manage Indian affairs, including trust obligations of the United States. *See Stuart v. U.S. By and Through Dep't. of the Interior, Bureau of Indian Affairs*, 109 F.3d 1380, 1387 (9th Cir. 1997).

The District Court, in error, disregarded the 1985 DOI Memorandum entirely, and instead, ruled based on Appellees' and its own interpretation of the Treaty language. ER-21-22. However, the District Court should have given due consideration to the 1985 DOI Memorandum. That interpretive memorandum is valuable as it reflects the understanding of the DOI, which governs Native American affairs, and is an agency of the United States, a party to the Treaty.

The 1985 DOI Memorandum expressly recognizes the intent of the parties to the 1868 Treaty—the Tribe and the United States. Specifically, it provides:

> After reviewing the history and treaty status of the Shoshone Indians, we conclude the Northwestern Band does possess treaty protected hunting and fishing rights which may be exercised on the unoccupied lands within the area acquired by the United States pursuant to the [1868 Treaty].

ER-69 (emphasis in original). That document further provides:

> The basis for the Commission's decision [in proceedings initiated by various Shoshone groups seeking compensation for lands taken from the aboriginal Shoshone Tribe] supports also a conclusion that the 1868 [T]reaty reserved to the Northwestern Band a right to hunt and fish on unoccupied lands in accordance with Article IV of the [T]reaty, and several of the Commission's findings in the case are relevant in determining the nature and scope of the Northwestern Band's hunting and fishing rights.

ER-71 (emphasis in original). Further, the memorandum provides:

> Because ratification of the 1868 [T]reaty effectively bound the United States and the Northwestern Band to fulfillment of the terms of the treaty, it is our opinion the Northwestern Band retains the right to exercise hunting and fishing rights on the unoccupied lands of the United States as provided in the [T]reaty.

ER-72 (emphasis in original). As an agency of the United States, the DOI's determination is relevant and should have been considered by the District Court in interpreting the Treaty. At the very least, it gives insight into the understanding of one of the parties to the Treaty – the United States.

The District Court gave the 1985 DOI Memorandum no weight because it is not "mandatory authority" and the court was "under no obligation to adopt the

same interpretation of the law as the DOI memo" was error. ER-22. Although the 1985 DOI Memorandum may not be "mandatory" authority, it was error for the District Court not to give it any weight whatsoever. On the contrary, the "meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (dealing with Department of State interpretation of a treaty); *see also Patterson v. Wagner*, 785 F.3d 1277 (9th Cir. 2015) ("Because the purpose of treaty interpretation is to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties, courts…look to the executive branch's interpretation of the issue…and the treaty's negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent"); *Medellin v. Texas*, 552 U.S. 491, 508-13 (2008) (examining the same in textual analysis).

The District Court also erred in criticizing the 1985 DOI Memorandum as "not thorough," and therefore, unpersuasive. ER-22. The Court incorrectly asserted that the DOI had not factored into its analysis the fact that the Tribe did not live on a reservation. *Id.* The DOI specifically stated that "[t]he [Tribe] is a federally recognized tribal entity…but does not have a reservation." ER-69. Thereafter the DOI reviewed the language of the Treaty itself, in depth, and DOI concluded that the Tribe does have Hunting Right. *Id.* Any perceived lack of

detail does not mean the DOI did "not factor into the [its] analysis" the fact that the Tribe does not have a reservation or was not otherwise thorough in its analysis. ER-22. And while it is true that the 1985 DOI Memorandum did not discuss cases decided after 1985 that discussed political cohesion, those cases did not bear on the District Court's dismissal of the Tribe's Complaint. Indeed, the District Court expressly "decline[d] to rule on whether the Northwestern Band has maintained political cohesion with the Shoshone-Bannock Tribes." *Id.* In any case, the 1985 DOI Memorandum does, in fact, detail and support the fact that Chief Washakie negotiated the 1868 Treaty on behalf of the Tribe, going into great detail. *See generally* ER-71-76. Accordingly, it was error for the District Court to disregard the 1985 DOI Memorandum, which supports the Tribe's reasonable interpretation of Article IV of the Treaty.

Both the Tribe and the United States interpreted the Treaty the same way. A court "must give a treaty a meaning consistent with the shared expectations of the contracting parties." *In re the Matter of The Search of The Premises Located At 840 140th Ave. Ne*, 634 F.3d 557, 568 (9th Cir. 2011) (internal citation and quotation omitted). The understanding of the relevant parties – in this case, the Tribe and the United States – should be given great weight in interpreting the Treaty.

Idaho is not a party to the Treaty. The underlying case was filed because

Idaho, through its agents, erroneously interpreted the Treaty and unilaterally rejected the Tribe's Hunting Right.[5]

III. IF THE COURT CONCLUDES THAT AN AMBIGUITY EXISTS IN ARTICLE IV OF THE TREATY, THAT AMBIGUITY PRECLUDES DISMISSAL.

Alternatively, if the Ninth Circuit determines that the Treaty language and evidence of the parties' understanding is insufficiently clear to conclude at this point that the Tribe has the reserved Hunting Right, then, at the very least, the Ninth Circuit should conclude that any ambiguity precludes judgment for the Appellees. "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera*, 139 S.Ct. at 1699 (quoting *Milee Lacs*, 526 U.S. at 675, 119 S.C.t 1187). A term is ambiguous if it is susceptible to more than one reasonable interpretation. *See J.B. v. United States*, 916 F.3d 1161, 1167 (9th Cir. 2019).

If the language is, in fact, ambiguous, then the Treaty must be construed broadly in favor of the Tribe. *See Makah Indian Tribe v. Quilete Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017) ("ambiguous provisions [should be] interpreted to [the tribe's] benefit") (internal citations and quotations omitted); *Cree v.*

[5] It is problematic if each state independently and unilaterally interprets the federal Treaty. If each state interprets the Treaty, there is potential for inconsistent application of the Treaty depending on the state in which the Hunting Right are to be exercised. Indeed, there have already been disparate state interpretations. For example, Utah (unlike Idaho) recognizes the Tribe's Hunting Right.

Waterbury, 78 F.3d 1400, 1403 (9th Cir. 1996) (citing *Fishing Vessel'*, 443 U.S. at 675-76 (holding that United States, as presumptively superior party in entering into a treaty, must avoid taking advantage of the other side, and treaties are thus "broadly interpret[ed]…in the Indians' favor") (internal citations and quotations omitted). The District Court did not apply this principle as it concluded that the language was unambiguous. ER-18.

Nevertheless, any ambiguity should be interpreted in the Tribe's favor, which would result in a determine that the Hunting Right has been reserved and continues to exist without such right being contingent upon relocation to a reservation.[6] Thus, the District Court erred in not interpreting the Treaty in the Tribe's favor. At the very least, the Decision should be overturned and remanded

[6] The District Court downplays application of this concept, (*see* ER-18-19), which is firmly established in the Ninth Circuit. *See, e.g., Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017). The District Court suggests the canon is not applicable here because it "becomes complicated to apply when Indian tribes are suing each other." ER-18. However, this case is not a dispute between tribes. The Tribe has sued agents of Idaho. The court nevertheless reasons that a non-party tribe "may be disadvantaged" by canon's application. Such reasoning is speculative. There is no evidence that any other tribe would be disadvantaged. Besides, the Tribe is not requesting to take or infringe another tribes' rights. Rather, it seeks recognition of its rights that have existed since 1868 when the Treaty was signed. The Tribe is not advocating that other tribes give up anything as those tribes enjoy these same right. Regardless, any harm to other groups, if any, would be determined ***only after*** the Tribe's right is recognized. The District Court should not be considering a speculative harm that is not at issue. Thus, this canon should be applied.

so that any ambiguity can be determined after taking evidence that can be considered in light of the Indian Canon of Construction.

IV. THE DISTRICT COURT ERRED BY NOT ACCEPTING AS TRUE THE TRIBE'S ALLEGATIONS IN THE COMPLAINT REGARDING THE TRIBE'S HUNTING RIGHT UNDER THE TREATY.

The District Court was required to accept as true all material allegations of the Tribe's Complaint and construe the Complaint in favor of the Tribe. *Tribes v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020) ("[W]e must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." (internal citation and quotation omitted)). However, it did not do so. Although the court is not required to accept as true legal conclusions cast in the form of factual allegations, it must do so if those conclusions can be reasonably drawn from the facts alleged. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752 (9th Cir. 1994)).

The District Court reasoned that although it was required to accept as true all well-pleaded factual allegations, it was not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." ER-12.[7] While this is a correct restatement of the general rule

[7] The District Court cites *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001) in support of its holding. However, in *Sprewell*, the plaintiff's allegations were not accepted as true because the unambiguous language in an

applicable to dismissals under Federal Rule of Civil Procedure 12(b)(6), the Tribe's allegations are not conclusory or unwarranted, and are certainly not "unreasonable inferences," where the parties to the Treaty have expressly supported the claim that the Tribe possesses vested Hunting Right pursuant to the Treaty's terms.

Furthermore, the Tribe supported any purported legal conclusion in its Complaint with sufficient factual support from which a conclusion could be reasonably drawn by the District Court. The Tribe, in pertinent part, alleged in its Complaint:

> The parties to the 1868 Fort Bridger Treaty also agreed that the Indians shall have the right to hunt on the unoccupied land 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 border of the hunting districts.

ER-21. In support of this allegation, the Tribe alleges substantial factual history as to the signing of the Treaty, including the status of the Tribe both pre and post Treaty, as well as the overall purpose of the Treaty itself. *See generally* ER-116-23. Moreover, and importantly, the DOI in its 1985 DOI Memorandum expressly concluded that the Tribe possess Hunting Right pursuant to the Treaty, supporting

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arbitration award, attached to the complaint, directly undermined the plaintiff's allegations. There is no such document in this case which undermines the Tribe's allegations, and in fact, the 1985 DOI Memorandum, and plain language of the Treaty, support the Tribe's allegations—or at the very least, create an ambiguity that must be construed in the Tribe's favor.

the Tribe's allegation in its Complaint. ER-69.

At the very least, a factual dispute exists as to the interpretation of the Treaty according to the well-pleaded facts in the Complaint. However, rather than accepting the facts asserted by the Tribe as true, and despite the District Court's obligation to interpret a treaty in accordance with the shared expectations of the parties, the District Court underwent a factual analysis, supplanting the intention of the parties with its own interpretation. This was error. Accordingly, because the District Court failed to accept the Tribe's allegations as true, its decision to dismiss the Complaint was in error and should be reversed. The case should be remanded so that a factual record can be developed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for consideration of the Tribe's claims on the merits.

Date: June 21, 2022

Kirton McConkie

/s/ Ryan B. Frazier
Ryan B. Frazier
Attorneys for Appellant, The Northwestern Band of the Shoshone Nation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 22-35140

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature */s/ Ryan B. Frazier* **Date** June 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 22-35140

I am the attorney or self-represented party.

This brief contains 10,287 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

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[ ] it is a joint brief submitted by separately represented parties;
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[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Ryan B. Frazier* **Date** June 21, 2022

ADDENDUM

TREATY WITH THE SHOSHONEE AND BANNACKS. JULY 3, 1868

This is the most important political document for the Eastern Shoshones. The Treaty of Fort Bridger, 1868, established the boundaries of the Wind River Reservation and guaranteed to the tribe a lasting relationship with the United States. Unlike the earlier Treaty of Fort Bridger, 1863, which merely described the outline of Shoshone Country, a territory that lay *west* of the Wind River Mountains, the 1868 Treaty gave the tribe the right to occupy what had been their hunting grounds and winter camps, but never their home. In effect, this document denied any claims to the Wind River valley made by competing tribes such as the Arapahos, Crow, or Oglala Sioux. There are a few interesting mistakes in spelling in this treaty, most notably the clerk recorded the words "Camas Prairie" as "Kansas Prairie" and agent Luther Mann gets recorded as Luther Manpa. Like most treaties with Indian peoples, this 1868 document clearly makes the point that the government wants the Indians to give up any sort of tribal allegiance and transform themselves into independent citizen farmers. Almost all the articles of the treaty are written with this objective in mind. [Ref: United States Statutes at Large. 40th Congress, 1867-1869. Vol. 15. Pp. 673-678.]

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Wash-a-kie, Wau-ni-pitz, and other chiefs and headmen of the Eastern Band of Shoshonee Indians, and Tag-gee, Tay-to-ba, and other chiefs and headmen of the Bannack tribe of Indians, on the part of said band and tribe of Indians respectively, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, made the third Day of July, 1868, at Fort Bridger, Utah Territory.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty eight, by and between the undersigned commissioners on the part of the United States, and the chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack Tribes of Indians, they being duly authorized to act in the premises:

ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of

Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of the agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and summit of Wind River mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along the middle channel of Owl creek to a place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as embraced within the limits aforesaid.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; and agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and

five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school house or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

ARTICLE IV. The Indians herein named agree, when the agency house and other building shall be constructed on their 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 so long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all case of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties of this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value of one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress my by law change the appropriation for other purposes; but in no event shall the amount of the appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, an blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient o employ such persons.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent any individual member of his right to any tract of land selected by him, as provided in Article VI. of this treaty.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. TAYLOR,
W. T. SHERMAN,
Lt. Genl.
WM. S. HARNEY,
JOHN B. SANBORN,
S. F. TAPPAN,
C. C. AUGUR,
Bvt. Major Genl. U. S. A., Commissioners.
ALFRED H. TERRY,
Brig. Gen. and Bvt. M. Gen. U. S. A.

Attest:

A. S. H. WHITE, *Secretary*.

Shoshones:

WASH-A-KIE.	his + mark
WAU-NY-PITZ.	his + mark
TOOP-SE-PO-WOT.	his + mark
NAR-KOK.	his + mark
TABOONSHE-YA.	his + mark
BAZEEL.	his + mark
PAN-TO-SHE-GA.	his + mark
NINNY-BITSE.	his + mark

Bannacks:

TAGGEE.	his + mark
TAY-TO-BA.	his + mark

WE-RAT-ZE-WON-A-GEN.	his + mark
COO-SHA-GAN.	his + mark
PAN-SOOK-A-MOTSE.	his + mark
A-WITE-ETSE.	his + mark

Witnesses:

HENRY A. MORROW,
Lt. Col. 36th Infantry and Bvt. Col. U. S. A., Comdg. Ft. Bridger.
LUTHER MANPA, *U. S. Indian Agent.*
W. A. CARTER.
J. VAN ALLEN CARTER, *Interpreter.*

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixteenth day of February, one thousand eight hundred and sixty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 16, 1869.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Shoshonee (eastern band) and Bannack tribes of Indians, made and concluded at Fort Bridger, Utah Territory, on the third day of July, 1868.

Attest: GEO. C. GORHAM,
Secretary.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution on the sixteenth day of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America, the ninety-third.

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD,
Secretary of State.