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.

On Appeal from the United States District Court for the District of Idaho
No. 4:20-cv-05640-YGR
Hon. Yvonne Gonzalez Rogers

BRIEF OF THE STATE OF UTAH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The State of Utah ("Utah" or "Amicus State") files this amicus curiae brief in support of Appellant Northwestern Band of the Shoshone Nation ("Northwestern Band" or the "Tribe"). The Northwestern Band is a federally recognized American Indian tribe with tribal offices located and members living in Utah. Utah promotes programs to help the tribes and Indian communities within its borders to find and implement solutions to their community problems and to promote government-to-government relations between the states and tribal governments. *See, e.g.*, Utah Code § 9-9-103 (creating Utah Division of Indian Affairs to develop and promote programs for tribes and Indian communities). Utah has a substantial interest in ensuring that tribal members living in Utah receive the benefits to which they are entitled under federal law and that federal treaties are implemented uniformly.

The Idaho district court's decision contravenes an opinion of the U.S. Department of the Interior which served as a partial basis for Utah negotiating and executing a collaborative hunting and fishing agreement

with the Tribe in 2001. Because many of the Northwestern Band's members live in Utah and assert hunting and fishing rights under the treaty at issue, Utah has a substantial interest in the outcome of this dispute.

SUMMARY OF THE ARGUMENT

The United States Supreme Court and the Ninth Circuit have recognized that when an Indian tribe enters into a treaty with the United States, the relationship framework was not one in which the government granted rights to the tribe. *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *United States v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998). Hunting and fishing rights, for example, were not for the government to give; tribes had been exercising those rights long before the existence of the United States. Rather, the proper framework for construing a treaty is one in which the tribe granted a right to the government—most often the right to unencumbered title for land over which the tribe claimed aboriginal title. In exchange, the government agreed to undertake obligations to the tribes as part of a unique trust relationship. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (describing the "undisputed existence of a general trust relationship between the United States and the Indian people"), quoting *United States*

v. Mitchell, 463 U.S. 206, 225 (1983). Usually, this entailed creation of a reservation, annuities, provision of some housing and education, etc. Thus, a reservation of hunting and fishing rights in a treaty is just that—a reservation of right, and not a grant of a right from the federal government.

The district court here missed this distinction, and therefor misinterpreted the language of the treaty at issue in this case—the 1868 Fort Bridger Treaty (the "1868 Treaty"). The plain language of the 1868 Treaty between various Shoshone tribes, including Appellant, and the United States emphasizes that even though the tribes relinquished claims to land title, they did not relinquish their aboriginal right to hunt and fish which, at the time, provided the basis for their survival. Thus, it is improper to read the tribes' promise to relocate to a reservation as a condition they had to fulfill in order to exercise their hunting and fishing rights.

This case could be resolved in the Tribe's favor on that straightforward reading of the 1868 Treaty. However, if the Treaty provision at issue is ambiguous, the correct judicial action according to longstanding canons of Indian treaty construction is to: (1) resolve the ambiguity by

reference to how the Tribe would have understood the Treaty in 1868; and (2) resolve any remaining ambiguity in the Tribe's favor. If this Court determines there is ambiguity in the Treaty's language that cannot be resolved without external evidence, then the correct course of action is to remand to the district court with instructions to allow discovery and introduction of such evidence.

ARGUMENT

I. Canons of treaty construction require the Court to consider the Tribe's history including the United States Army's 1863 massacre of the Northwestern Band—the largest massacre of Native Americans in the West.

The goal of treaty interpretation is to determine what the parties meant by the treaty terms. *Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). "[I]t is the intention of the parties . . . that must control any attempt to interpret the treaties." *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). This analysis of the parties' intentions "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (internal quotations and citations omitted). "'[T]reaties are construed 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.'" *Id.* at 535 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)). The Northwestern Band's history is particularly salient here.

The Shoshone people migrated more than 2,000 years ago from present-day Mexico to the Western Plains and Great Basin areas. *See* Darren Parry, *The Bear River Massacre: A Shoshone History* 10 (2019). By 1845, the Shoshone people were broken into several large groups, with an Eastern band centered near the Wind River mountain range in Wyoming, the Bannock band near Pocatello, Idaho, and the Northwestern Band in what became southeastern Idaho and northern Utah; several more bands came to reside in Nevada and eastern California. *Id.* at 11, 13. The Northwestern Band, Appellant in this case, were nomadic gatherers, hunters, and fishers. *Id.* at 13. In the winter months, the Northwestern Band was often in the Bear River valley near springs of warm water. *Id.*

As Mormon settlers moved into the Cache Valley in the mid-1800s, they encroached upon traditional Shoshone hunting, fishing, and gath-

ering areas. *Id.* at 30-31. This introduced competition for scarce resources that led to tension and violence. On January 29, 1863, prompted by reports of Shoshone violence, Colonel Patrick Connor of the United States Army led his troops to the Northwestern Band's campsite on the Bear River and there slaughtered over 400 men, women, and children—the largest massacre of Native Americans in the West. *Id.* at 37. In the years that followed, Chief Sagwitch of the Northwestern Band led his nearly decimated people in the difficult effort merely to survive. *Id.* at 55-88.

Later that year, the Northwestern Band and other Shoshone tribes entered into peace treaties with the United States. In 1868, the Northwestern Band and other Shoshone tribes entered into the 1868 Fort Bridger Treaty. In the 1868 Treaty, the Shoshone relinquished their title to land and the government agreed to create reservations for Shoshone people. *See* 1868 Treaty, attached as Addendum to Appellants' Opening Br. In 1985, the Office of the Solicitor of the Department of the Interior published a memorandum ("DOI Memorandum") expressing the United States' opinion that the Northwestern Band is party to the 1868 Treaty and enjoys hunting and fishing rights pursuant thereto. *See* ER69-78.

Due in part to the DOI Memorandum, Utah entered into a Cooperative Agreement with the Northwestern Band in 2001. *See* Cooperative Agreement, attached hereto at Addendum. In that Agreement, Utah conditionally recognized the Northwestern Band's treaty-based hunting and fishing rights, and the parties sought to clarify the scope of those rights and work together to manage the resources important to both the Tribe and the State. *See id.* at 1. Although the Tribe terminated the Cooperative Agreement in 2016, Utah continues to work cooperatively with the Tribe on hunting and fishing matters.

II. The Northwestern Band's hunting and fishing rights are not conditioned on relocation to a reservation.

The district court concluded that the critical component of the 1868 Treaty was the Tribe's promise to relocate:

> The Indians herein named agree . . . 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.

See 1868 Treaty, Art. IV, attached as Addendum to Appellants' Opening Br. Because that relocation promise was followed by the conjunctive

"but," which in turn was followed by mention of the Tribe's off-reservation fishing and hunting rights, the district court reasoned that the hunting rights were conditioned on the promise to relocate. *See* Memorandum Decision and Order, ER14-18. The court concluded that "[i]t would make little sense for the government ***to grant*** Hunting Rights but not receive anything in exchange." ER18 (emphasis added). The court's conclusion is wrong for two reasons.

First, the district court's conclusion is based on the false premise that the United States was *granting* hunting and fishing rights to the Tribe. This Court has recognized that an Indian treaty "involve[s] a grant of rights *from* the Indians *to* the United States," not the other way around. *Washington*, 157 F.3d at 643 (emphasis in original). The Court in *Washington* followed the lead of the Supreme Court, which in an earlier case held that fishing rights under the Stevens treaty was "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *Id.* at 644 (quoting *Winans*, 198 U.S. at 381).

Here, the district court erroneously characterized the 1868 Treaty as if the United States granted fishing rights to the Tribe, and placed

conditions upon the exercise of those purportedly bestowed rights. The district court found that "[t]he plain language of the 1868 Treaty clearly indicates that a necessary condition of ***receiving*** hunting rights was living on [the Reservations]." *See* Memorandum Decision and Order, ER14 (emphasis added). This mischaracterization of the 1868 Treaty led the district court to an incorrect interpretation of its provisions. Rather than receiving fishing and hunting rights from the United States, the Tribe granted to the United States rights to land to which the Tribe had aboriginal claim. In making this grant, though, the Tribe specifically reserved to itself the legal right to hunt and fish in its traditional territory, which was necessary to its survival. During the previous five years, the Tribe had barely survived after it had been nearly annihilated by the very entity with which it was negotiating in 1868. The Tribe could not afford to relinquish the means of its survival. This historical context supports the Tribe's interpretation, as required by the canons of Indian Treaty construction. *See Eastern Airlines, Inc.*, 499 U.S. at 534-35; *Choctaw Nation*, 318 U.S. at 431–32.

To be certain, the Tribe acceded to conditions placed upon the exercise of its hunting and fishing rights, and those conditions are plainly

denoted in the Treaty through express conditional language—"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." *See* 1868 Treaty, Art. IV, attached as Addendum to Appellants' Opening Br. But this express conditional language stands in sharp contrast with the language that the district court relied on in finding a relocation-to-reservation condition for the Tribe's exercise of fishing and hunting rights.

Second, the district court also wrongly concluded that without this promise to relocate, the government would have received nothing in exchange. ER18. To the contrary, the Tribe granted to the government unfettered title to land, reserving to themselves the right to hunt and fish off-reservation. *See* 1868 Treaty, Art. II, Art. IV, attached as Addendum to Appellants' Opening Br. The language that comes after the semicolon was included to leave no doubt that the Tribe maintained their aboriginal fishing and hunting rights even as it gave up land and relocated. The district court erroneously reached the opposite conclusion.

III. Even if the language of the Treaty is not clear enough to resolve in the Tribe's favor on its face, the district court erred by refusing to allow evidence of how the Tribe would have understood the Treaty.

The district court did not properly apply two canons of Indian Treaty construction to the extent it applied them at all. *First*, any ambiguity in the language should be resolved in favor of the Tribe. Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights. *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996). "Any ambiguities in construction must be resolved in favor of the Indians." *Id.* (citation omitted). "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

The district court found no ambiguity in the treaty language. ER19. The State Amicus agrees that the language of the treaty is sufficiently unambiguous that a court could resolve the matter without reference to external evidence but disagrees that resolution favors Appellees. Rather, as set forth in Section II above, a plain reading of the Treaty favors the Tribe. However, the extent to which the district court went to determine that a semicolon followed by the word "but" created

an inexorable condition on the Tribe's hunting and fishing rights suggests there might be an ambiguity in the Treaty.

An ambiguous provision in a treaty is one that is "susceptible [to] two interpretations." *Seneca Nation of Indians v. New York*, 382 F.3d 245, 269 (2nd Cir. 2004). The 1868 Treaty language is plausibly susceptible to two interpretations. In the interpretation adopted by the district court, the word "but" creates a second dependent conditional clause. ER16. However, "but" could also be understood as synonymous with "notwithstanding" or "except for the fact." *See but*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/but (last visited June 24, 2022). With this plausible definition in mind, the Treaty reads quite consistently with the understanding that the Tribe granted rights, not the government: "The Indians herein named agree . . . they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; [notwithstanding] they shall have the right to hunt on the unoccupied lands of the United States." *See* 1868 Treaty, Art. IV, attached as Addendum to Appellants' Opening Br. On this reading, a promise to relocate to a reservation was not a condition of exercising fishing and hunting rights.

Second, courts should strive to interpret and enforce treaties as the Tribe would have understood them at the time of entry. *Confederated Tribes of Chehalis*, 96 F.3d at 340. To the extent there is an ambiguity in the language, the district court erred in foreclosing the discovery and introduction of evidence of how the Tribe would have understood the Treaty in 1868. ER14. At a minimum, this case should be remanded so that the parties can present that evidence.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,503 words.

Dated: June 28, 2022

/s/ Melissa A. Holyoak
Melissa A. Holyoak
Solicitor General

CERTIFICATE OF SERVICE

I certify that on June 28, 2022, I caused service of the forgoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: June 28, 2022

/s/ Melissa A. Holyoak
Melissa A. Holyoak
Solicitor General

ADDENDUM

ORIGINAL

COOPERATIVE AGREEMENT
between
THE NORTHWESTERN BAND OF
THE SHOSHONE NATION
and
THE STATE OF UTAH
REGARDING OFF-RESERVATION
HUNTING, FISHING AND TRAPPING

July 27, 2001

COOPERATIVE AGREEMENT
between
THE NORTHWESTERN BAND OF
THE SHOSHONE NATION
and
THE STATE OF UTAH
REGARDING OFF-RESERVATION
HUNTING, FISHING AND TRAPPING

THIS COOPERATIVE AGREEMENT ("Agreement") is made and entered into by and between the NORTHWESTERN BAND OF THE SHOSHONE NATION and the STATE OF UTAH ("State") by and through the Governor of the State of Utah.

WHEREAS, the State of Utah is a state of the United States, admitted to the Union on January 4, 1896; and

WHEREAS, the Northwestern Band of the Shoshone Nation is a federally recognized Indian band, with formal United States government relations established and recognized through the Treaty of July 3, 1868 (15 Stat. 673), and 50 F.R. 6055 (1985); and

WHEREAS, the United States Indian Claims Commission determined in Shoshone Tribe of Indians v. U.S., 11 Ind. Cl. Comm. 387 (1962) that the Northwestern Band of the Shoshone Nation is a rightful party to the Treaty of July 3, 1868: and

WHEREAS, Article IV of the Treaty of 1868 provides that the Indians subject to the Treaty ". . . shall have the right to hunt on the unoccupied lands of the United States as long as game may be found thereon, and so long as peace

subsists among the whites and the Indians on the borders of the hunting districts;" and

WHEREAS, the Northwestern Band of the Shoshone Nation's off-reservation hunting rights under the Treaty of 1868 and the breadth thereof is undefined and subject to varying interpretations; and

WHEREAS, the State is authorized pursuant to Utah Code Section 23-13-12.5 to enter into agreements with federally recognized Indian tribes and bands to resolve treaty based off-reservation hunting right issues within Utah; and

WHEREAS, the Northwestern Band of the Shoshone Nation and the State of Utah desire to work cooperatively together in a government-to-government relationship to establish procedures addressing the Band's off-reservation hunting rights within Utah, without prejudice to the legal rights, privileges or positions of either party.

NOW THEREFORE, in consideration of the foregoing and the mutual promises and obligations contained herein, the Parties hereby agree as follows:

SECTION ONE
PURPOSE

The purpose of this Agreement is to eliminate future disagreement concerning the Northwestern Band of the Shoshone Nation's Treaty-based off-reservation hunting rights in Utah through the mutual accommodations and understandings set forth herein.

SECTION TWO
DEFINITIONS

As between the Parties and for purposes of this Agreement only, the following terms shall have the meaning set forth hereafter.

1. "Aboriginal Lands" means those lands within the State of Utah beginning at the Utah/Nevada state line and Interstate 80 at Wendover; east along Interstate 80 to US Highway 40; south along US Highway 40 to State Road-32; east along State Road 32 to State Road 35 at Francis; east along State Road 35 to Soapstone Basin Road (U.S. Forest Service Road 037); north along Soapstone Basis Road to State Road 150; northeast along State Road 150 to the Summit/Duchesne county line at Hayden Pass; east along the Summit/Duchesne county line (summit of the Unita Mountains) to the Duchesne/Daggett county line; east along the Duchesne/Daggett county line to the Daggett/Uintah county line; east along the Daggett/Uintah county line to the Utah/Colorado state line; north along the Utah/Colorado state line to the Utah/Wyoming state line; west and north along the Utah/Wyoming state line to the Utah/Idaho state line; west along the Utah/Idaho state line to the Utah/Nevada state line; and south along the Utah/Nevada state line to the point of beginning.

2. "Big game" means mule deer, rocky mountain elk, pronghorn, and moose.

3. "Eligible Members" means Members who have satisfied all requirements under State law or this Agreement, including hunter and

furharvester education courses as required by State law, prerequisite to receiving a hunting, trapping or fishing license or permit.

4. "Members" means enrolled members of the Northwestern Band of the Shoshone Nation.

5. "Northwestern Band" or "Band" means the Northwestern Band of the Shoshone Nation established and recognized through the Treaty of July 3, 1868 (15 Stat. 673), and 50 F.R. 6055 (1985).

6. "Non-Reservation Lands" means all lands within Utah, excluding Reservation Lands.

7. "Parties" means the Northwestern Band of the Shoshone Nation and the State of Utah.

8. "Proper Identification" means an identification card issued by the Band designating the holder as an enrolled member of the Northwestern Band of the Shoshone Nation.

9. "Reservation" or "Reservation Lands" means those lands allocated to the Northwestern Band of the Shoshone Nation and held in trust by the United States for the benefit of the Band pursuant to 25 C.F.R. 151.12.

10. "State" means the State of Utah.

SECTION THREE
LAW ENFORCEMENT

1. The State shall exercise primary civil and criminal jurisdiction over all wildlife related activities on Non-Reservation Lands, whether involving Members or non-Members. The Band reserves the right to criminally prosecute

Members on a case by case basis for violations on Aboriginal Lands under this Agreement.

2. Except as explicitly provided in this Agreement, the Band and its Members shall abide by all State statutes, rules, and proclamations regulating the taking of protected wildlife, as defined in Title 23, Chapter 13 of the Utah Code, while engaged in wildlife related activities on Non-Reservation Lands.

3. Nothing in this Agreement shall be construed as exempting Members from the regulations and requirements imposed by the United States government on the taking or possession of wildlife.

4. The Band's treaty-based hunting, trapping and fishing rights on Non-Reservation Lands shall be subsumed and circumscribed by this Agreement while it remains in effect. Members desiring to hunt, trap or fish on Non-Reservation Lands shall obtain and have on their person a valid permit or license issued under authority of this Agreement. Hunting, trapping or fishing without the appropriate license or permit shall subject Members to criminal prosecution under applicable State law.

5. Nothing in this Agreement shall be construed as authorizing Members to possess more than one Utah permit annually for each of the following: buck deer, antlerless deer, bull elk, antlerless elk, moose, pronghorn, bear, or cougar. Likewise, Members may not take on Non-Reservation Lands, except as authorized in paragraph 7 of this Section, more than one of each of the following on an

annual basis: buck deer, antlerless deer, bull elk, antlerless elk, moose, pronghorn, bear, or cougar.

6. The rights, privileges and benefits set forth in this Agreement extend exclusively to the Band and its Members. The Band shall not sell or otherwise issue any license or permit authorized for distribution under this Agreement to a non-Member.

7. Members shall not lend, sell, assign or transfer any license or permit issued to them under this Agreement to any other person, including other Members, except as hereafter provided:

a. Members that are physically or mentally incapable of hunting big game animals may acquire a general season bull elk permit, general season buck deer permit, or an antlerless elk or deer permit pursuant to this Agreement, and petition the Band to authorize a substitute Member to take the animal in their behalf for subsistence purposes. The Band shall evaluate the petition and ensure that authorization is issued only in those cases where a Member is physically or mentally incapable of hunting big game animals and needs the animal for subsistence.

(1) The Band shall issue an official written authorization to the Member designated as the substitute hunter which must contain the following information: 1) the substitute hunter's name and address; 2) the incapacitated Member's name and address; 3) the incapacitated Member's permit type, number and year; 4) the date of the authorization; and 5) a statement that the substitute

hunter is authorized by the Band to take the specified animal for and in behalf of the incapacitated Member.

(2) The substitute hunter must be a Member and otherwise legally eligible under State law to hunt elk and deer. The fact that a Member possesses a buck deer or bull elk permit issued in his or her name or has taken an animal under such a permit, does not act to disqualify the Member from acting as a substitute hunter in the same year.

(3) The incapacitated Member need not be present with the substitute hunter while hunting under the Band authorization. The substitute hunter shall be required to have on his/her person the incapacitated Member's permit and the Band's authorization allowing the substitute hunter to take a buck deer, a bull elk, or an antlerless deer or elk in behalf of the incapacitated Member.

(4) The substitute hunter shall be subject to the same conditions, restrictions and laws that would otherwise apply to the incapacitated hunter if hunting personally under the permit.

(5) The provisions of this paragraph on substitute hunting do not apply to fishing licenses, furbearer licenses, small game licenses, turkey permits, bear and cougar permits, limited entry buck deer and bull elk permits, antelope permits, and moose permits.

8. Nothing in this Agreement shall be construed as authorizing Members to hunt, fish or trap upon "cultivated" or "properly posted" private lands as

defined in Title 23, Chapter 20 of the Utah Code without having first obtained written authorization to do so.

SECTION FOUR
COOPERATION

The Parties shall work together to manage wildlife resources as a valuable resource that inhabits lands subject to the jurisdiction of the Band and the State. The Band shall collect and timely provide data to the State on the Members' annual harvest of deer, elk, antelope, moose, turkey, bear and cougar in Utah. The Band will cooperate with the State in reducing yearly totals of permits issued under Section Eleven of this Agreement where the Band is unable to distribute the full allocation of permits to Eligible Members. This voluntary reduction shall not constitute a waiver of the Band's right to a full allocation of permits under Section Eleven, but serve only as a temporary cooperative gesture making available to non-Members highly sought-after permits that would otherwise go unused. The State will manage wildlife resources on Non-Reservation Lands.

SECTION FIVE
FISHING

1. Upon providing proof of Band membership, Eligible Members may receive from the State a free fishing license to fish within the State of Utah consistent with the State's statutes, rules and proclamations regulating the taking of protected aquatic wildlife.

2. This section does not provide Members an opportunity outside regular state law procedures to obtain a certificate of registration to harvest brine

shrimp or brine shrimp eggs, nor does it authorize Members to harvest brine shrimp or brine shrimp eggs without a State-issued certificate of registration.

SECTION SIX
SMALL GAME

1. Upon providing proof of Band membership, Eligible Members may receive from the State a free small game license to take small game within the State of Utah consistent with the State's statutes, rules and proclamations regulating the taking of small game. For purposes of this section, "Small Game" means band-tailed pigeon, blue grouse, chukar partridge, coots, cottontail rabbit, ducks, geese, Hungarian partridge, mergansers, mourning dove, pheasant, quail, ruffed grouse, sage grouse, sandhill crane, sharped-tail grouse, snowshoe hare, swans and white-tailed ptarmigan.

2. An additional permit beyond that of the small game license is required under State law to take some species of small game. These species are identified in the State's annual proclamations. Eligible Members may obtain, without charge, the necessary permits required by State law to take these small game species under the same procedures and constraints imposed on non-Members.

SECTION SEVEN
FURBEARER

Upon providing proof of Band membership and having satisfied all state law requirements to receive a furbearer license, Eligible Members may receive from the State a free furbearer license to take furbearer animals within the State of Utah consistent with the State's statutes, rules and proclamations regulating the taking

of furbearer animals. For purposes of this section, "Furbearer animals" means species of the Bassariscidae, Canidae, Felidae, Mustelidae, and Castoridae families, except coyote and cougar.

2. Additional permits and tags beyond that of the furbearer license are required under State law to take and possess some species of furbearer animals. These species are identified in the State's annual proclamations. Eligible Members may obtain, without charge, the necessary permits and tags required by State law to take these furbearer species under the same procedures and constraints imposed on non-Members.

SECTION EIGHT
TURKEY

Pursuant to Section Eleven of this Agreement, the State shall allocate turkey permits to the Band for distribution to Eligible Members. The State may pool turkey permits from one or more units or subunits within the Aboriginal Lands boundary in order to allocate a turkey permit to the Band. The State, in its sole discretion, may designate which unit or combination of units may be hunted under authority of the permit.

SECTION NINE
BEAR AND COUGAR

1. Limited Entry Bear and Cougar: Pursuant to Section Eleven of this Agreement, the State shall allocate limited entry bear and cougar permits to the Band for distribution to Eligible Members. The State may pool bear or cougar permits, respectively, from one or more units or subunits within the Aboriginal

Lands boundary in order to allocate a bear or cougar permit to the Band. The State, in its sole discretion, may designate which unit or combination of units may be hunted under authority of the permit.

b. Harvest Objective Cougar: Upon providing proof of Band membership, Eligible Members may receive from the State a free harvest objective cougar permit to take a cougar within a specified unit or subunit consistent with the State's statutes, rules and proclamations regulating the taking of cougar.

c. Bear and Cougar Pursuit: Upon providing proof of Band membership, Eligible Members may receive from the State a free bear or cougar pursuit permit to pursue respectively bear or cougar within the State of Utah consistent with the State's statutes, rules and proclamations regulating the pursuit of bear.

SECTION TEN
BIG GAME

1. DEER.

a. General Season Buck Deer: The Band may issue to Eligible Members one hundred (100) general season buck deer permits valid on Aboriginal Lands. These permits entitle Eligible Members to hunt that portion of any general season buck deer area (as described in the State's annual proclamations) that lies within the Aboriginal Lands' boundary, excluding cooperative wildlife management units, buck deer limited entry units, and lands otherwise closed to hunting. The permits further entitle Eligible Members to hunt during the designated general archery season exclusively with legal archery tackle, general muzzleloader season

exclusively with a legal muzzleloader, and general rifle season with any legal weapon. Eligible Members may take no more than one buck deer each year under this Agreement and are required to abide by all other requirements and restrictions published in the State's annual proclamations.

b. Limited Entry Buck Deer: Pursuant to Section Eleven of this Agreement, the State shall allocate limited entry buck deer permits to the Band for distribution to Eligible Members.

c. Antlerless Deer: The Band may issue to Eligible Members fifty (50) antlerless deer permits valid on Aboriginal Lands. These permits entitle Eligible Members to hunt that portion of any general season buck deer area and limited entry deer unit (as described in the State's annual proclamations) that lies within the Aboriginal Lands' boundary, excluding cooperative wildlife management units and lands otherwise closed to hunting. The permits further entitle Eligible Members to hunt antlerless deer during the designated general archery buck deer season exclusively with legal archery tackle, the general muzzleloader buck deer season exclusively with a legal muzzleloader, the general rifle buck deer season with any legal weapon, and for the period beginning the third Saturday of November through December 31st with any legal weapon. Eligible Members may take no more than one antlerless deer each year under this Agreement and are required to abide by all other requirements and restrictions published in the State's annual proclamations.

2. ELK.

a. General Season Bull Elk: The Band may issue to Eligible Members one hundred (100) general season bull elk permits valid on Aboriginal Lands. These permits entitle Eligible Members to hunt that portion of any general season bull elk unit (as described in the State's annual proclamations) that lies within the Aboriginal Lands' boundary, excluding cooperative wildlife management units, limited entry bull elk units, and lands otherwise closed to hunting. The permits further entitle Eligible Members to hunt during the designated general archery season exclusively with legal archery tackle, general muzzleloader season exclusively with a legal muzzleloader, and general rifle season with any legal weapon. Eligible Members may take no more than one bull elk each year under this Agreement. Eligible Members shall abide by all other requirements and restrictions published in the State's annual proclamations for taking bull elk, including spike only restrictions when taking elk on spike only general season units.

b. Limited Entry Bull Elk: Pursuant to Section Eleven of this Agreement, the State shall allocate limited entry bull elk permits to the Band for distribution to Eligible Members.

c. Antlerless Elk: The Band may issue to Eligible Members fifty (50) antlerless elk permits valid on Aboriginal Lands. These permits entitle Eligible Members to hunt that portion of any general season bull elk unit and limited entry bull elk unit (as described in the State's annual proclamations) that lies

within the Aboriginal Lands' boundary, excluding cooperative wildlife management units and lands otherwise closed to hunting. The permits further entitle Eligible Members to hunt antlerless elk during the designated general archery bull elk season exclusively with legal archery tackle, the general muzzleloader bull elk season exclusively with a legal muzzleloader, the general rifle bull elk season with any legal weapon, and for the period beginning the third Saturday of November through January 31st with any legal weapon. Eligible Members may take no more than one antlerless elk each year under this Agreement and are required to abide by all other requirements and restrictions published in the State's annual proclamations.

3. MOOSE.

a. Bull Moose: Pursuant to Section Eleven of this Agreement, the State shall allocate bull moose permits to the Band for distribution to Eligible Members.

b. Antlerless Moose: Pursuant to Section Eleven of this Agreement, the State shall allocate antlerless moose permits to the Band for distribution to Eligible Members. The State may pool the antlerless moose permits from one or more units or subunits within the Aboriginal Lands boundary in order to allocate an antlerless moose permit to the Band. The State, in its sole discretion, may designate which unit or combination of units may be hunted under authority of the permit.

c. General: Eligible Members may take no more than one moose each year under this Agreement and are required to abide by all other requirements and restrictions published in the State's annual proclamations.

4. PRONGHORN.

a. Buck and Doe Pronghorn: Pursuant to Section Eleven of this Agreement, the State shall allocate buck and doe pronghorn permits to the Band for distribution to Eligible Members. The State may pool buck or doe pronghorn permits, respectively, from one or more units or subunits within the Aboriginal Lands boundary in order to allocate respectively a buck or doe pronghorn permit to the Band. The State, in its sole discretion, may designate which unit or combination of units may be hunted under authority of the permit.

b. General: Eligible Members may take no more than one antelope each year under this Agreement and are required to abide by all other requirements and restrictions published in the State's annual proclamations.

5. BIG HORN SHEEP, ROCKY MOUNTAIN GOAT AND BISON.

Permits to take big horn sheep, rocky mountain goat and bison will not be allocated to the Band or Eligible Members pursuant to Section Eleven of this Agreement. Permits for these species may be obtained by Eligible Members under the same conditions, restrictions and procedures imposed on non-Members by the State through its annual big game proclamations.

SECTION ELEVEN
LIMITED ENTRY AND LIMITED ENTRY TYPE DRAWINGS

The Parties recognize that certain portions of Aboriginal Lands are managed as limited entry or limited entry type hunting units. The Parties agree that the Band may, pursuant to its proclamations and subject to the limitations in this Agreement, issue to Eligible Members a proportional number of permits that

reflect the total amount of Aboriginal Lands committed to those limited entry hunt areas that extend into or fall within Aboriginal Lands.

1. For purposes of this Agreement, the Parties agree that the Band may issue to Eligible Members, except where otherwise provided, five percent (5%) of the permits allocated by the State to each limited entry draw unit or subunit that falls within the Aboriginal Lands boundary. The number of permits to be issued by the Band for each limited entry draw unit or subunit shall be determined through application of the examples provided below.

Examples: The lands enclosed within a limited entry hunt unit or subunit are composed of sixty percent (60%) Aboriginal Lands and forty percent (40%) non-Aboriginal Lands, for which one hundred (100) limited entry bull elk permits are available. Of the one hundred (100) permits, sixty percent (60%) are allocable to the Aboriginal Lands of the unit or subunit (100 permits x 60% of the unit/subunit acreage = 60 permits). The Band is entitled to issue five percent (5%) of the permits allocable to the Aboriginal Lands. Thus, the Band will be permitted to issue three (3) permits for such limited entry unit or subunit (60 permits x 5% = 3).

The lands enclosed within a limited entry hunt unit or subunit are composed of one hundred percent (100%) Aboriginal Lands, for which twenty-two (22) limited entry buck pronghorn permits are available. All twenty-two (22) permits, one hundred percent (100%), are allocable to the Aboriginal Lands of the unit or subunit (22 permits x 100% of the unit/subunit acreage = 22 permits). The Band is entitled to issue five percent (5%) of the permits allocable to the Aboriginal Lands. Thus, the Band will be permitted to issue one (1) permit for such limited entry unit or subunit (22 permits x 5% = 1.1, rounded normally to 1).

In all instances, the number of permits available to the Band for issuance to Eligible Members shall be further determined by rounding the figure arrived at under the preceding formula to the next closest whole number; e.g.: (i) if the

number is 4.5 through 5.4 permits, the Band may issue 5 permits; and (ii) if the number is 5.5 through 6.4 permits, the Band may issue 6 permits.

2. For purposes of calculating the Band's allocable share of permits, the "total number of permits" available for each limited entry unit or subunit shall include all permits identified by the State for issuance to residents and non-residents.

3. Limited entry permits issued to Eligible Members under this section entitle the holder to hunt the entire unit or subunit authorized by the permit, including those portions of the unit or subunit that are not on Aboriginal Lands. Eligible Members shall not hunt on any portion of a limited entry unit that is a cooperative wildlife management unit for the same species of wildlife designated on the limited entry or limited entry type permit.

4. Any permit issued pursuant to this Section, except as otherwise provided in this Agreement, requires the hunter to: 1) use only that weapon(s) authorized for the particular hunt in the applicable State proclamation; 2) hunt only in the unit(s) or subunit(s) described for the particular hunt in the applicable State proclamation; 3) hunt only during the season(s) prescribed for the particular hunt in the applicable State proclamation; and 4) otherwise comply with all other State laws regulating the taking of protected wildlife.

SECTION TWELVE
PROPER IDENTIFICATION

All Members hunting, fishing, trapping or transporting protected wildlife on Non-Reservation Lands shall have the appropriate permit and Proper Identification on their person while engaged in such activities.

SECTION THIRTEEN
FORM OF TAGS

The Band and the State shall issue tags with all permits that authorize the taking of the following species on Non-Reservation Lands: deer, elk, moose, pronghorn, bear, cougar, turkey, and bobcat. The tags shall identify the species of animal authorized and be of the type that require successful hunters to cut a notch in the tag to designate the date of harvest and sex so to ensure that no more than the authorized number of animals are harvested by each hunter.

SECTION FOURTEEN
PROCLAMATIONS

The Band, through annual proclamations, shall inform Members about the terms and conditions of hunting, trapping and fishing under this Agreement. The Band agrees that its proclamations governing hunting, trapping, fishing, and transporting on Non-Reservation Lands shall be consistent with the State's annual proclamations and regulations, except where otherwise provided in this Agreement. The Band's proclamations shall advise Members that they are not permitted to hunt, trap or fish upon privately-owned lands that are cultivated or posted against trespassing without the prior written consent of the landowner.

SECTION FIFTEEN
TERM AND TERMINATION

1. This Agreement shall be effective on the date executed by the Parties and shall remain in force in perpetuity, unless amended or terminated as set forth herein. Either the State or the Band may terminate or propose amendment to this Agreement by giving written notice to the other party no later than January 31 of any calendar year. If such notice of termination or proposed amendment is not given on or before January 31, the Agreement shall remain in force for that year and may not be terminated or amended until the next year. Any amendment to this Agreement must be ratified by both parties and otherwise comply with applicable state and federal law.

2. Notwithstanding the foregoing, the Governor of the State may unilaterally terminate and renegotiate this Agreement pursuant to Utah Code Ann. § 23-13-12(2)(d)(v) if any provision herein is found inconsistent with a state statute for which an exemption is not authorized under § 23-13-12.

SECTION SIXTEEN
WAIVER AND ESTOPPEL

The Band and the State agree that nothing contained herein shall be deemed a waiver, estoppel, or creation of vested rights or an acceptance by either party hereto of a position with respect to wildlife management, general jurisdiction, hunting rights, etc. The Parties acknowledge that positions different than those contained herein have previously been taken and may be taken in the future.

SECTION SEVENTEEN
FEDERAL APPROVAL

The Band represents that it has legal authority to enter into this Agreement and that it has obtained any approval as may be required by federal law. The Parties agree that this Agreement is subject to federal approval, in the event it is required.

SECTION EIGHTEEN
MISCELLANEOUS PROVISIONS

1. Notice - Any notice required to be given pursuant to this Agreement shall be sent by registered or certified mail, with postage paid, to the Parties at the following addresses:

Northwestern Band of the Shoshone Nation
Attn. Executive Director
108 East Forest Street
Brigham City, Utah 84302

State of Utah
Division of Wildlife Resources
Attn: Director
1594 West North Temple
Salt Lake City, Utah 84114-6301

2. Headings - All headings used in this Agreement are inserted only for convenience and ease of reference, and are not to be considered in the construction or interpretation of any provision of this Agreement.

3. Entire Agreement - This Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject addressed herein and supersedes and renders void any prior understandings, negotiations, or agreements between the Parties affecting this subject. No provision of this

Agreement may be changed, modified, waived, or amended without the prior written consent of the Parties.

4. Authority - The representatives executing this Agreement in behalf of the Band and the State represent they are authorized by their respective governments to so act, and that they have legal authority to bind their respective governments to the terms of this Agreement.

IN WITNESS WHEREOF the State of Utah and the Northwestern Band of the Shoshone Nation do hereby enter into this Agreement effective this 27th day of July, 2001.

NORTHWESTERN BAND OF
THE SHOSHONE NATION

By: Gwen T. Davis
Gwen T. Davis
Tribal Chairman

STATE OF UTAH

By
Michael O. Leavitt
Governor