RYAN B. FRAZIER (Idaho Bar No. 6201)
KIRTON McCONKIE
rfrazier@kmclaw.com
50 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

Counsel for Plaintiff The Northwestern Band of the Shoshone Nation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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, vs. STATE OF IDAHO; and GOVERNOR BRAD LITTLE 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, Defendants.	**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS [Dkt. 7]** Case No.: 4:21-CV-00252-CWD Magistrate Judge Candy W. Dale

Pursuant to Federal Rules of Civil Procedure 7 and 12 and Local Rule 7.1, Plaintiff The Northwestern Band of the Shoshone Nation (the "Northwestern Band" or the "Tribe") hereby opposes the Motion to Dismiss ("Motion") filed by Defendants the State of Idaho, Department of Fish and Game Director Ed Schriever (in his official capacity), and Enforcement Bureau Chief Greg Wooton (in his official capacity) (collectively, "Defendants").

INTRODUCTION

The Northwestern Band is a federally recognized sovereign Native American tribe whose members have been unequally and unfairly treated by Defendants. In 1868, the United States and Chief Washakie, on behalf of the Shoshone Tribes, entered into a treaty that was signed at Fort Bridger, Wyoming (the "1868 Treaty"). With other Shoshone Tribes, the 1868 Treaty granted the Northwestern Band hunting and fishing rights on the unoccupied lands of the United States (collectively, the "Hunting Rights"). The United States Department of the Interior (the "DOI") has since concluded and affirmed that the Northwestern Band has Hunting Rights under the 1868 Treaty. (the 1985 Memorandum, attached hereto as Exhibit "A.") The DOI unequivocally concluded that Chief Washakie signed for the Northwestern Band. (*See id.*) The Northwestern Band continues to have the Hunting Rights. The Northwestern Band has maintained a continuous organized structure since the 1868 Treaty was signed, and as such, has the right to hunt pursuant to the terms thereof, which have not been abrogated by Congress.

However, despite the rights granted by the 1868 Treaty and the recognition by the United States of such rights in 1985, the State of Idaho and the other Defendants refuse to recognize those rights. Acting under the color of law, Defendants have denied Northwestern Band and its members the same protection of fundamental rights afforded to other Shoshone bands who were treaty signatories and their members, including the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation (the "Shoshone-Bannock Tribe"). Accordingly, the Northwestern Band has filed this lawsuit seeking a declaration that the Tribe has Hunting Rights under the 1868 Treaty and arguing that the Tribe has been unfairly treated in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Now, through their Motion, Defendants seek to have the Tribe's lawsuit dismissed. Such

would further harm the Northwestern Band and its members as it would effectively deny the Northwestern Band of its rights under the 1868 Treaty in Idaho. However, the Northwestern Band respectfully requests that the Court deny the Motion. In the Motion, Defendants improperly assert factual arguments and conclusions of law, undermining the well-founded rule that the Court must accept all allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party, the Northwestern Band. *See Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021) (internal citations and quotations omitted). In addition, the Tribe has alleged sufficient facts to state a claim to relief that is plausible on its face, allowing the Court to draw reasonable inferences that it is entitled to its relief requested. *Id.* Further, Defendants fail to carry their burden of demonstrating to the Court that joinder of the Shoshone-Bannock Tribe is required in this action. Complete relief can be fashioned between the existing parties, and the Shoshone-Bannock Tribe has no legal interest in the underlying claims herein asserted. Finally, Defendants fail to establish that the Eleventh Amendment bars the Northwestern Band's claims based on sovereign immunity. For these reasons and the reasons set forth below, Defendants' Motion should be denied in its entirety.[1]

ARGUMENT

I. RULE 19 DOES NOT REQUIRE DISMISSAL OF THIS ACTION FOR FAILURE TO JOIN THE SHOSHONE-BANNOCK TRIBE.

Defendants fail to carry their burden of showing that the Shoshone-Bannock Tribe is required to be joined in this action based on the specific claims asserted herein. As Defendants

[1] To the extent Defendants misstate or misinterpret the Complaint as has been filed with the Court, the Northwestern Band hereby submits its general objection to Defendants' "Background" section in the Motion. To avoid burdening the Court with a restatement, verbatim, of the Complaint, which was filed with the Court on June 14, 2021, the Complaint is hereby incorporated herein by this reference and cited to herein as needed. (*See* Dkt. 1.)

state, Rule 19 imposes a three-step inquiry: (1) is the absent party necessary (*i.e.*, required to be joined if necessary)?; (2) if necessary, is it feasible to order that the absent party be joined?; and (3) if joinder is not feasible, can the case, in equity and good conscience, proceed without the absent party, or is the absent party indispensable such that the action must be dismissed? *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005). Rule 19 is grounded in equitable principles, and its application must be viewed with an eye towards doing justice as among the parties that are before the Court. *See generally Greenleaf v. Safeway Trails*, 140 F.2d 889, 891 (2nd Cir. 1944).

A. The Shoshone-Bannock Tribe is not a Necessary Party to this Action.

The Shoshone-Bannock Tribe does not need to be joined because it is not a necessary party. The determination of whether a non-party is "necessary" to an action "is heavily influenced by the facts and circumstances of each case." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Using a two-part analysis, courts generally determine: (1) "if complete relief is possible among the parties already in the action"; and (2) "whether the absent party [has claimed] a legally protected interest" relating to the subject matter of the action. *Id.*; *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020) (internal citation omitted emphasis added); FED. R. CIV. P. RULE 19(a)(1)(A). "To be 'complete,' relief must be 'meaningful relief *as between the parties*.'" *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013) (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004) (emphasis in orig.)).

1. Complete Relief is Possible Among the Parties to the Action.

Notwithstanding arguments to the contrary, Rule 19(a)(1)(A) provides that complete relief need only be possible "among existing parties." To the extent Defendants argue the

complete relief requirement extends to non-parties, Defendants are incorrect.[2]

The State of Idaho currently refuses to recognize that the Northwestern Band has hunting and fishing rights under the 1868 Treaty (collectively, the "Hunting Rights"). The relief sought by Northwestern Band is (1) a declaration by the Court recognizing that the Northwestern Band has Hunting Rights under the 1868 Treaty that must be recognized by the State of Idaho and (2) a ruling that the State of Idaho has treated the Northwestern Band differently under the 1868 Treaty in violation of the Equal Protection Clause of the United States Constitution. (*See generally* Compl.) Both claims involve only the Northwestern Band's rights and their recognition by the State of Idaho. Thus, these rights can be determined by the Court as between the Tribe and the State of Idaho alone.[3]

The claims as pleaded do not implicate the Shoshone-Bannock Tribe or its rights. The Northwestern Band recognizes that the Shoshone-Bannock Tribe also has Hunting Rights under the 1868 Treaty. Whether the Shoshone-Bannock Tribe has Hunting Rights has no bearing on whether the Northwestern Band also has such rights. Defendants misconstrue the Northwestern Band's claims by stating: "The Northwestern Band now asks the Court to force the Shoshone-Bannock Tribes to share their off-reservation hunting and fishing rights with another tribe without the Tribes being a party to this case." (Mem. Supp. Mot. Dismiss at 11.) Nothing could be further from the truth. The Complaint is devoid of any allegation that asks that the Shoshone-Bannock Tribe's Hunting Rights be reduced or altered. (*See generally* Compl.) And the

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[2] "[T]he court must decide if complete relief is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party." *Makah*, 910 F.2d at 558.

[3] "In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. Sec. 2201(a) (emphasis added).

Northwestern Band is not asking to force the Shoshone-Bannock Tribe to do anything.

Moreover, Defendants' argument incorrectly assumes that any hunting right stemming from the 1868 Treat is a zero-sum game – that by recognizing the Northwestern Band's Hunting Rights the Court necessarily somehow reduces the Shoshone-Bannock Tribe's Hunting Rights. Implicit in the Defendants' argument is an assumption that the Hunting Rights are limited and must be shared between any tribes. However, rather than arguing for a greater share of a limited pie, the Northwestern Band is instead requesting recognition of an expanded Hunting Rights pie.

No limitation on the Hunting Rights stems from the language of the 1868 Treaty itself. The 1868 Treaty provides that the Native Americans subject to the treaty "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." The only limitations from the treat regarding whether game is found on the unoccupied lands and that peace exist. The argument that the right is "finite" or that it must be shared between tribes is based solely on limitations to the Hunting Rights unilaterally imposed by the State of Idaho. However, the State of Idaho does not have the right to limit a treaty right granted by the United States. *See* U.S. Const., art. VI, cl. 2 (providing that treaties are the "supreme law of the Land" and may only be abrogated or modified by an act of Congress).

Further, Defendants fail to demonstrate how complete relief cannot be afforded to either Northwestern Band or Defendants in the absence of the Shoshone-Bannock Tribe. Nothing in this case would prevent the Shoshone-Bannock Tribe from defending and regulating their fishing and hunting resources as suggested in the Defendants' brief. (*See* Mem. Supp. Mot. Dismiss at 12.) The Defendants have also not shown how the relief sought by the Northwestern Band would cause Shoshone-Bannock Tribe's Hunting Rights to have "less value." There is no

evidence of valuation or diminution of the value. It is simply an unsupported statement.

Defendants also suggest that the Shoshone-Bannock Tribe would be adversely affected because under the Endangered Species Act, certain fish are limited in number. (*See id.*) However, the declaration sought in this case has no effect on the number of fish or game that can be taken by the Northwestern Band; the Northwestern Band simply requests a declaration that they have Hunting Rights. Concluding that because a recognition of the Northwestern Band's Hunting Rights may (and this is purely speculative at this point) at some future date result in a need to allocate the amount of fish or game that may be taken between tribes or the tribes and the State is a separate issue and not before the Court at this time. Considering that issue now would be to put the proverbial cart-before-horse.

Any lawsuit, action, or administrative proceeding to determine how to allocate a limited number of fish or game can be addressed later in another venue. If number of fish or game that can be taken under the ESA needs to be regulated, those numbers can be addressed in another venue. Because that case, which is more akin to the allocation of a tribe's share of an ocean harvest of fish that was at issue in *Makah Indian Tribe v. Verity*, the Shoshone-Bannock Tribe may be a necessary party in such a proceeding. *See* 910 F.2d 555 (9th Cir. 1990).

If a recognition of the Northwestern Band's Hunting Rights somehow were to reduce any "finite fishing and hunting resources,"[4] the reduction would be of such rights of the people of the State of Idaho. Complete relief can be accorded as between the Northwestern Band and the state.

2. The Shoshone-Bannock Tribe Does not Have a Legal Interest Relating to the Subject of This Action.

Defendants fail to show that the Shoshone-Bannock Tribe has a legal interest relating to

[4] In reality, because the Northwestern Band is fairly small in number, a recognition of its right would have little effect on either the State of Idaho's populace or any other group.

the subject of this action. "It is not enough under [Rule 19] for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under [Rule 19] are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation." *In re Hwang*, 438 B.R. 661 (C.D. Cal. 2010) (internal citation omitted).

Defendants rely on *Makah Indian Tribe* for the speculative argument that if the case proceeds without the Shoshone-Bannock Tribe, the Shoshone-Bannock Tribe's hunting and fishing rights could be impaired or somehow diminished. However, *Makah* is readily distinguishable from the present case. The *Makah* case regarded the allocation of one tribe's share of the ocean harvest in the specific year 1987 rather than a change in the procedure for determining allocations in the future. *See Makah Indian Tribe*, 910 F.2d at 556-57. The Ninth Circuit stated, "[w]e agree that to the extent the Makah seek a reallocation of the 1987 harvest or challenge the Secretary's inter-tribal allocation decisions, the absent tribes may have an interest in the suit." *Id.* at 559. The court added, "[w]e disagree, however, that the absent tribes are necessary to Makah's procedural claims for which they seek prospective injunctive relief." *Id.* The court added an interest must be "more than speculation about a future event." *Id.* at 558.[5]

The same is true here. In this case, Northwestern Band seeks declaratory judgment for prospective, not retroactive, application. The only purported interest that the Shoshone-Bannock Tribe has in this case is that of speculative diminishment of future resources. However, as noted above, the Northwestern Band is not asking the Court to allocate finite fish and game between

[5] "A fixed fund which a court is asked to allocate may create a protectable interest in beneficiaries of the fund." *Makah*, 910 F.2d at 558 (emphasis added).

the tribes. (*See generally* Compl.) Any harm identified by Defendants is purely speculative at this point. Thus, Defendants' claim for the Shoshone-Bannock Tribe's future, speculative loss, and Defendants' argument that a claim for allocation of a limited resource is analogous to a request by a beneficiary to allocate a common fund, are unavailing.

The underlying claims of this action do not seek any alteration or determination as to the rights of the Shoshone-Bannock Tribe—and certainly not an elimination, dilution, or diminishment of any kind. Thus, the relevant inquiry for Rule 19 is whether cognizable legal rights of the absent non-party will be prejudiced by the suit's continuation, which Defendants have not shown because there are no such rights.[6]

Finally, Defendants improperly assert that Northwestern Band has alternatives for addressing its claims "through intertribal negotiations or United States' involvement." However, it is not Northwestern Band's burden to seek alternative relief when this Court is properly situated to make a complete determination on its claims against Defendants in the present action. Indeed, federal courts have the jurisdiction and authority to declare the rights of Indian litigants. *See*, *e.g.*, *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir.1981) (declaring rights under Treaty of Olympia and associated laws). Instead, where complete relief may be granted "among the existing parties in the action"—as the Court may do in this case—the burden is on the non-party to seek alternative remedies in the event it claims interest in the action, e.g. *amicus curiae* or intervention, which Defendants concede the Shoshone-Bannock Tribe has already done in the past. (*See* Mem. Supp. Mot. Dismiss at 9.)

Accordingly, Defendants fail to demonstrate to how the Shoshone-Bannock Tribe is a

[6] "'Prejudice to one's self-interest' and 'prejudice to one's legally protected interests' are not synonymous." *Lujan*, 928 F.2d at 1503 (concurring and dissenting opinion).

necessary party to this action. Complete relief can be grant among the existing parties, Defendants have not shown that the Shoshone-Bannock Tribe has any cognizable legal rights other than speculative, prospective hunting and fishing rights, and the Shoshone-Bannock Tribe has various alternative remedies to asserting its claimed interest in this matter (just at it did in the past). Therefore, Defendants argument for dismissal under Rule 19 fails as a matter of law.

B. The Shoshone-Bannock Tribe Can be Feasibly Joined.

If a party is necessary, the next question is whether the party can be feasibly joined. *See E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005). Even if the Shoshone-Bannock Tribe were determined to be a necessary party, it can be feasibly joined to this action. Defendants' argument that the lawsuit should be dismissed because the Shoshone-Bannock Tribe, as a necessary and indispensable party, "cannot be joined due to sovereign immunity" is premised on an incorrect assumption and read of the law. (Mem. Supp. Mot. Dismiss at 8.) Sovereign immunity does not apply in this case to preclude joinder of the Shoshone-Bannock Tribe.

The Ninth Circuit has already concluded that a Native American tribe, which enjoys sovereign immunity, can nevertheless be joined when affirmative relief is not sought against the tribe and it is necessary for a complete adjudication. *See Peabody W. Coal*, 400 F.3d at 778. The Court explained: "[A] plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* at 781. It then elaborated: "'[A] person may be joined as a party [under Rule 19(b)] for the sole purpose of making it possible to accord complete relief between those who are already parties, even though no present party asserts a grievance against such person.'" *Id.* (quoting *Beverly Hills Fed. Savs. & Loan Ass'n v. Webb*, 406 F.2d 1275, 1279-80 (9th Cir. 1969)).

In this case, if the Shoshone-Bannock Tribe were joined, there would not be a direct claim against it. Rather, the Shoshone-Bannock Tribe would be joined solely for the purpose of making it possible to accord complete relief between those that are already parties. *See Peabody W. Coal*, 400 F.3d at 781. In this case, the Shoshone-Bannock Tribe would effectively be "a party against which relief has not formally been sought but is so situated that effectiveness of relief for the present parties will be impaired if it is not joined." *See id.* at 783-84. In such a case, joinder is feasible. *See id.*

C. This Case, in Equity and Good Conscience, May Proceed Without the Shoshone-Bannock Tribe.

If the Court determines that joinder is not feasible, then the final question is whether the case can, in equity and good conscience, proceed without the absent party. *See Peabody W. Coal*, 400 F.3d at 779-80. In the unlikely event the Court determines the Shoshone-Bannock Tribe is a necessary party to the action but it is not feasible to join it, the case may nevertheless proceed in equity and good conscience. FED. R. CIV. P. 19(b). The Court may consider facts such as: (1) extent of prejudice; (2) whether prejudice may be lessened or avoided; (3) whether judgment would be adequate; and (4) whether there are alternative remedies.

Importantly, however, as previously set forth, it is not enough that the Shoshone-Bannock Tribe have an interest – or even a very strong interest. *See Hwang*, 438 B.R. 661 (C.D. Cal. 2010). As the court in *Makah* provides, an interest must be "more than speculation about a future event." 910 F.2d at 558.

The Shoshone-Bannock Tribe would not be adversely prejudiced if it were not joined to this action. Defendants only claim is that the Shoshone-Bannock Tribe's Hunting Tights will be diluted and impaired. However, such claim is prospective and speculative. The argument finds no support in the law of this circuit. *Id.* Defendants have not shown how the Northwestern

Band's specific claims of declaratory judgment as to its rights under the 1868 Treaty and violations of its own equal protection rights would implicate the Shoshone-Bannock Tribe—they cannot. Indeed, the Northwestern Band's claims are those which go to its own independent rights. The Northwestern Band does not seek to alter rights of third-parties. Notwithstanding Defendants' argument to the contrary, it is not enough that the Shoshone-Bannock Tribe be adversely affected by the outcome. *See Hwang*, 438 B.R. 661. Therefore, the Shoshone-Bannock Tribe will not be adversely prejudiced should the action continue.

Further, any relief granted in this action could be shaped in a manner such that prejudice to the Shoshone-Bannock Tribe may be lessened, mitigated, or avoided altogether. A simple declaration that the Defendants have the claimed Hunting Rights will not affect the concurrent rights of the Shoshone-Bannock Tribe or making a ruling as to that tribe's take of fish or game. The Court could also include various protective provisions in any judgment rendered to prevent prejudice to the Shoshone-Bannock Tribe. Indeed, the Shoshone-Bannock Tribe could appear via *amicus curiae* in an effort to protect their rights to the extent there is any potential prejudice. In short, given that the only claimed interest of the Shoshone-Bannock Tribe is the prospective, speculative loss of hunting and fishing resources (which will require a decision from the Court akin to an advisory opinion), any claimed adverse prejudice can be easily lessened without the harsh decision of dismissal of the action as a whole.

In contrast, the prejudice to the Northwestern Band if this case were dismissed would be irreparable. Dismissal of this case is more than harsh. It is the Northwestern Band's position that it has Hunting Rights under the 1868 Treaty. If the Northwestern Band cannot seek redress in this Court, then it will be unable to exercise those rights in the State of Idaho, which flatly refutes to recognize them. Dismissal would effectively be a *de facto* ruling that the Shoshone-

Bannock Tribe has the treaty rights while the Northwestern Band does not – at least in Idaho. And the Northwestern Band would have no venue or forum in which to vindicate its rights. It would simply be denied the rights and the Equal Protection ensured by the Fourteenth Amendment to the United States Constitution.

As previously set forth, the Northwestern Band's claims implicate its own rights and the actions and obligations of the State of Idaho only. Therefore, judgment rendered in this matter would be adequate. The Northwestern Band's claims are for declaratory judgment as to its own rights under the 1868 Treaty and violation of its own equal protection rights under the Fourteenth Amendment as against the State of Idaho. Judgment rendered on either of those two claims, would therefore be adequate.

Finally, there are not any alternative remedies that would necessarily be availing. The Defendants argue that the "Northwestern Band has other[] means of resolving this issue." (Mem. Supp. Mot. Dismiss at 15.) However, that is not the case. None of the options proposed by Defendants are viable options for redress. Appeal to the State of Idaho has been completely rebuffed at this point. The Defendants suggest that the Northwestern Band could negotiate with the Shoshone-Bannock Tribe. However, there is no reason to believe that such would provide any redress. There is no evidence that the Shoshone-Bannock Tribe would even negotiate. That is particularly true if the Shoshone-Bannock Tribe currently hold what is tantamount to a monopoly and, if the Defendants argument is to be believed, would need to surrender "finite hunting and fishing resources" in any negotiation. Indeed, it appears that Shoshone-Bannock Tribe would have no incentive even to engage in a dialogue.

As shown above, the DOI has already rendered an opinion that the Northwestern Band has Hunting Rights under the 1868 Treaty. Involving the United States will do little at this point

as long as the State of Idaho continues to refuse to recognize rights already recognized by the United States government.

Regardless, it is neither the Northwestern Band's duty nor obligation to seek alternative remedies where this Court is properly situated to render judgment on its claims. *See*, *e.g.*, *Wahkiakum*, *supra*.; *see generally Romero v. Kitsap County*, 931 F.2d 624 (9th Cir. 1991) (determining litigation and court consideration is the proper avenue for determining rights under treaty). Negotiation to have an existing right established is unnecessary and should not be required for a right-holder. Therefore, this case may proceed in equity and good conscience without the Shoshone-Bannock Tribe. Accordingly, Defendants' Motion should be denied.

D. Defendants Adequately Represent the Shoshone-Bannock Tribe's Interests.

Even assuming, *arguendo*, the Shoshone-Bannock Tribe has an interest in the underlying claims of this action, which it does not, Defendants can adequately represent the Shoshone-Bannock Tribe's interests. "An absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (internal citations omitted). In determining whether an absent party is adequately represented by an existing party, the Court should consider whether:

> [T]he interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect.

Id. (internal citations and quotations omitted). The foregoing elements are met in this case. Therefore, the Shoshone-Bannock Tribe is not a required party.

Defendants, as evidenced by the arguments asserted in their Motion, have made all of the arguments the Shoshone-Bannock Tribe would have made had they been named in this action.

Defendants have shown that they are capable and willing to make arguments protecting the Shoshone-Bannock Tribe's interests.

Further, the Shoshone-Bannock Tribe would not offer any element to the proceedings that the present parties would neglect. Again, Defendants assert the same position the Shoshone-Bannock Tribe would assert. Therefore, notwithstanding the fact that the Shoshone-Bannock Tribe does not have an interest in Northwestern Band's claims, if it did, such interest would be adequately represented. Defendants' Motion should be dismissed.

II. THIS CASE SHOULD NOT BE DISMISSED UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM.

A. The 1868 Treaty Does not Condition Hunting Rights on the Northwestern Band making a Reservation the Permanent Home of Tribal Members.

Defendants argue that this case should be dismissed because the Northwestern Band does not have Hunting Rights inasmuch as the Tribe has not made the Fort Hall or Wind River Reservations the permanent home of its members. (Mem. Supp. Mot. Dismiss at 16.) However, Defendants' interpretation of the 1868 Treaty is incorrect. The 1868 Treaty does not require the Tribe to make a reservation their permanent residence before it has Hunting Rights. Article 4 to the 1868 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; **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.

(1868 Treaty, Art. 4 (emphasis added).) According to the plain language of this Article, the only conditions are that game be found on the land and that peace exist. This language does not condition the Hunting Rights on tribal members making reservations their home. (*See id.*)

Significantly, the United States government – the other party to the 1868 Treaty – has

already concluded that the Northwestern Band has Hunting Rights under the 1868 Treaty. The United States analyzed and affirmed the Northwestern Band's Hunting Rights under the 1868 Treaty. (*See* 1985 Memorandum, prepared by the DOI, attached as Exhibit "A" ("1985 Memorandum").) Specifically, the DOI, the United States agency that protects and manages the Nation's natural resources and cultural heritage, found 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." (*Id.* at 1.) The DOI further found that the "1868 treaty reserved to the Northwestern Band a right to hunt and fish on unoccupied lands in accordance with Article IV of the treaty…." (*Id.* at 3.) However, the Northwestern Band's lack of a reservation, which the DOI recognized (*see id.* at 1), did not factor into the analysis. (*Seen generally id.*)

Despite the DOI's opinion, the State of Idaho has nevertheless concluded that the Hunting Rights are condition on a reservation. Defendants argue the word "but" implies a condition precedent to Hunting Rights. (*See* Mem. Supp. Mot. Dismiss at 16.) Specifically, Defendants argue that to be entitled to hunting rights status on unoccupied lands, the Indians must first "make one of the two" named reservations their permanent homes. (*See id.*)

However, Defendants misinterpret the 1868 Treaty, and the "but" in Article 4 does not have the meaning that the Defendants ascribe to it. Instead, the "but" separates two independent clauses (made more apparent by the existence of the semicolon immediately preceding the word "but") indicating a contrasting clause from one that has already been asserted. In other words, the first independent clause stated in Article 4 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. The second independent clause, which is separated

from the first independent clause by both a semicolon and the conjunctive, "but," provides that "so long as game may be found [on the unoccupied lands of the United States…,]" the Indians shall have the right to hunt thereon. This reading comports with the United States' opinion in its 1985 Memorandum.

At the very least, the language in Article 4 to the 1868 Treaty creates an ambiguity. In such circumstances, the language of the 1868 Treaty must be construed in favor of the Northwestern Band. Defendants improperly interpret the language of the 1868 Treaty in a light most favorable to their position. The allegations in the Complaint must be taken as true, and courts are to interpret treaties "in the sense in which [the treaty language] would naturally be understood by the Indians." *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) (internal citations omitted); *State v. Watters*, 156 P.3d 145, 211 Or. App. 628, 640 (Or. App. 2007). Treaty language must be viewed as a whole, and the Court should look to the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed. *Cree*, 78 F.3d at 1403. Treaties are "broadly interpreted," with any ambiguities being construed in favor of the Native Americans. *Id.*; *Makah*, 873 F.3d at 1163. Thus, all ambiguities in the treaty must be construed in the Northwestern Band's favor, in addition to viewing all allegations in the Complaint as true.

Accordingly, and even more so at the motion to dismiss phase, dismissing the action would be improper where both the facts of the Complaint must be taken as true and any ambiguity in the 1868 Treaty must be construed in Northwestern Band's favor. To the extent Defendants assert arguments related to circumstances surrounding the 1868 Treaty, and the conduct or negotiations of the parties since the 1868 Treaty was signed, such arguments seek factual determinations outside the scope of the Complaint which require discovery. At

minimum, a factual dispute exists as to whether a reservation is required under the 1868 Treaty to have hunting and fishing rights. That would be determined during this lawsuit. The Motion must, therefore, be denied where facts are viewed in the light most favorable to Northwestern Band, and the case must proceed to discovery.

B. The Question of Political Cohesion is not Suited for a Determination on a Motion to Dismiss.

Defendants assert factual arguments as to the determination of political cohesion which cannot be decided on a motion to dismiss; thus, the Motion must be denied. Courts have deemed the question of political cohesiveness a "factual inquiry," which requires a determination based on presentation of evidence following discovery. *See*, *e.g.*, *United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010) (relying on evidence presented related to the history of the subject tribes); *U.S. v. State of Or.*, 29 F.3d 481 (9th Cir. 1994) (relying upon the lower court's factual findings relating to the history of the bands who sought to trace their cultural and political lineage to the tribes that signed the subject treaty); *U.S. v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990) (reviewing an appeal of a lower court decision which relied on a two day trial during which facts and evidence were presented to a magistrate judge).

When a tribe asserts rights under a treaty as successors in interest, the tribe is to establish status by showing that it is a group of citizens of Indian ancestry descended from a treaty signatory, "and has maintained an organized tribal structure." *Id.* at 776 (internal citation and quotations omitted). "Changes in tribal policy and organization attributable to adaptation will not necessarily destroy treaty tribe status." *Id.* Indeed, "[o]ver a century, change in any community is essential if the community is to survive," and "Indian tribes in modern America have had to adjust to life under the influence of a dominant non-Indian culture." *United States v.*

Washington, 641 F.2d 1368 (9th Cir.1981).

In deciding this Motion, the Northwestern Band's allegations in its Complaint must be taken as true and construed in its favor. As such, the question as to political cohesiveness should be determined following discovery and presentation of evidence—not on a motion to dismiss. The allegations of the Complaint adequately set forth the Northwestern Band's claim as to its rights under the 1868 Treaty, including assertion of hunting and fishing rights on unoccupied lands stemming from ancestry with signatories of the 1868 Treaty. The Northwestern Band adequately asserts its descendance from a signatory of the 1868 Treaty, Chief Washakie, and properly asserts that it has maintained an organized tribal structure. This is consistent with the 1985 Memorandum issued by the United States. (*See* 1985 Memorandum, Ex. "A," at 1-6.)

Defendants' conclusory assertions that such allegations are insufficient to create the existence of political cohesion are unavailing and act to circumvent the presentation of evidence to which the Northwestern Band is entitled following proper discovery. The Northwestern Band has alleged sufficient facts, which must be taken as true, to establish political cohesion and overcome the conclusory arguments asserted by Defendants in their Motion. As the determination of political cohesion is fact intensive and cannot be determined on a motion to dismiss, the Motion should be denied.

III. THE ELEVENTH AMENDMENT DOES NOT BAR THE NORTHWESTERN BAND'S CLAIMS AGAINST DEFENDANTS.

As a threshold matter, a suit seeking prospective equitable relief against a state official who has engaged in a continuing violation of federal law is not deemed to be a suit against the State for purposes of state sovereign immunity. *See IN RE: JAMES ELLETT*, 254 F.3d 1135 (9th Cir. 2001) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v.*

Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.*

Defendants' assertion that the Eleventh Amendment bars the Northwestern Band's claims is incorrect. The Northwestern Band seeks prospective, equitable relief against Defendants in the form of equal protection as to the Hunting Rights under the 1868 Treaty. Defendants' argument that Northwestern Band's claims are barred under the Eleventh Amendment effectively means state law trumps federal law and rights because an individual, group, or tribe would not be able to sue to have their federal rights "declared." The result of such argument would be that a state could deprive individuals and groups of their federal rights on the grounds that the individual or group cannot sue the state to vindicate its rights—pursuant to the settled case law, i.e. "assuring supremacy of the law," Defendants' argument fails.

CONCLUSION

Pursuant to the foregoing, the Northwestern Band respectfully requests the Court deny Defendants' Motion in its entirety. Defendants fail to establish the necessary elements to their claim for failure to join a necessary party, assert legal conclusions and argue factual issues that are improper at the motion to dismiss stage, and have not shown that the Eleventh Amendment shields them from suit based on the Northwestern Band's prospective equitable relief sought.

DATED this 25th day of August, 2021.

KIRTON McCONKIE

By */s/ Ryan B. Frazier*
Ryan B. Frazier
Counsel for Plaintiff The Northwestern Band of the Shoshone Nation

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2021, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS [Dkt. 7]** was served upon the following by the method indicated:

Lawrence G. Wasden Kathleen E. Trever Owen H. Moroney State of Idaho Office of the Attorney General 700 W. Jefferson Street, Suite 210 Boise, Idaho 83720-0010	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (X) E-mail/E-filer

By: /s/ *D'Mia A. Lamar*
D'Mia A. Lamar