LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
DARRELL G. EARLY
Chief, Natural Resources Division
KATHLEEN E. TREVER (Idaho Bar No. 4862)
OWEN H. MORONEY (Idaho Bar No. 9553)
Deputy Attorneys General
600 S. WALNUT STREET
P.O. BOX 25
BOISE, ID 83707
TELEPHONE: (208) 334-3715
FAX: (208) 334-4885
E-Mail: kathleen.trever@idfg.idaho.gov
owen.moroney@idfg.idaho.gov

Attorneys for Defendants

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, 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, Defendants.	Case No. 4:21-CV-00252-CWD REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants State of Idaho; Department of Fish and Game Director Ed Schriever; and Enforcement Bureau Chief Greg Wooten, in their official capacities, (collectively "State Defendants") hereby submit this reply memorandum in support of their Motion to Dismiss.

ARGUMENT

1. This case should not proceed in the Shoshone-Bannock Tribes' absence.

This Court should dismiss this case for failure to join the tribes who signed the Fort Bridger Treaty. Those tribes have recognized treaty hunting rights through continued compliance with treaty terms. Declaration of Devon Boyer, ¶ 15.[1] As stated by the Shoshone-Bannock Tribes, a decision in the Northwestern Band's favor "would disrupt and impair the Tribes' ability to exercise and regulate the Tribes' longstanding off-reservation treaty rights." *Id.*, ¶¶ 15, 16.

The Northwestern Band's assertions that this Court could grant adequate relief in the absence of the Tribes and that harm to the Shoshone-Bannock Tribes is speculative are unavailing. *See* Resp. br. at 4-10. For example, the Northwestern Band wholly ignores the right to exercise off-reservation treaty hunting rights is attached, under the express terms of the Fort Bridger Treaty, to the Tribes occupying the named reservations. As such, the Northwestern Band's interpretation of the Treaty is counter to the Shoshone-Bannock Tribes' requirement that "[o]nly enrolled members of the Shoshone-Bannock Tribes who make the Fort Hall Reservation their permanent home shall enjoy the off-Reservation Tribal hunting and fishing rights as set forth pursuant to the Fort Bridger Treaty of July 3, 1868 . . . ." Sec. 11-1-8(b), Shoshone-

[1] Courts may properly consider affidavits and declarations of persons having knowledge of an absent party's interests when ruling on a motion under Rule 12(b)(7). § 1359 *Failure to Join a Party Under Rule 19*, 5C Fed. Prac. & Proc. Civ. § 1359 (3d ed.).

Bannock Tribal Code.[2] Further, the Tribes have engaged in litigation, including *Warner*, where they successfully opposed Northwestern Band members' claims. Boyer Decl., ¶ 16.

It is irrefutable that fish and wildlife resources are limited. Creation of an "expanded Hunting Rights pie" is simply not possible. *See* Resp. br. at 6. Granting the Northwestern Band hunting and fishing rights under the Fort Bridger Treaty would subject listed fish to take by a new tribe, necessarily limiting the amount of fish available for the Shoshone-Bannock Tribes.[3] Boyer Decl., ¶ 9. Allowed ceremonial take of these fish is extremely limited. For example, in the latest environmental assessment prescribed take is in the single digits for natural-origin Chinook in every applicable drainage of the Salmon River, and many drainages such as the Yankee Fork and East Fork Salmon River have prescribed take as low as one fish.[4] The Northwestern Band even alludes to the fact that there may be a future need to address allocation of fish and game between the tribes if the Northwestern Band prevailed in this litigation. *See* Resp. br. at 7.

This case is similar to *Makah Indian Tribe v. Verity* and its progeny, and the Northwestern Band's arguments to the contrary are unpersuasive. 910 F.2d 555 (9th Cir. 1990).

---

[2] These conflicting interpretations go against the recognized public stake in settling disputes by wholes under Rule 19. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) ("[W]hether the judgment issued in the absence of the nonjoined person will be 'adequate,' [refers] to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them.").

[3] State anglers are generally not allowed to directly harvest these natural-origin fish, so the Northwestern Band cannot simply take these fish from the State's share. *See* 2019-2021 Idaho Fishing Season and Rules at 45 *available at* https://idfg.idaho.gov/sites/default/files/seasons-rules-fish-2019-2021-steelhead.pdf?updated=12-9-2020. In Idaho, the brochure cited above is known as a "proclamation" and has the force and effect of law. *See* I.C. § 36-105.

[4] *Final environmental assessment, determination that the Tribal Resource Management Plan submitted by the Shoshone-Bannock Tribes satisfies the Tribal 4(d) Rule and does not appreciably reduce the likelihood of survival and recovery of Snake River spring/summer-run Chinook salmon evolutionary significant unit under the Endangered Species Act*, Table 7, page 20 *available at* https://repository.library.noaa.gov/view/noaa/4617.

Similar to the limited quantity of Columbia River salmon in *Makah*, in this case rare natural-origin Chinook salmon harvestable under the Fort Bridger Treaty are extremely limited. *See id.* at 559. The same is true with other listed fish, such as steelhead, and rare game such as bighorn sheep, mountain goats, and moose. *See* Boyer Decl., ¶ 9. Allowing the Northwestern Band to use the same treaty right to pursue these same animals, would prejudice the absent Shoshone-Bannock Tribes.

The Shoshone-Bannock Tribes cannot be feasibly joined. Simply put, the Ninth Circuit has repeatedly held there is a "wall of circuit authority" in favor of dismissing an action where a tribe is a necessary party. *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 858 (9th Cir. 2019) (quoting *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014)). The Northwestern Band erroneously cites *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774 (9th Cir. 2005) to argue for joinder. That case is readily distinguishable from this case because that court held joining of a tribe was feasible because the case was brought by a United States agency and tribal sovereign immunity does not apply against the United States. *See Peabody W. Coal Co.*, 400 F.3d at 781. Additionally, the Northwestern Band misunderstands the impact of involving the United States when it states: "Involving the United States will do little at this point. . . ." *See* Resp. br. at 13-14. Contrary to this assertion, states and tribes are not immune from suits brought by the United States. *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Peabody W. Coal Co.*, 400 F.3d at 781.

Moreover, State Defendants cannot adequately represent the Shoshone-Bannock Tribes' interests. The Northwestern Band's tenuous claim to the contrary ignores both legal precedent and history. In *Am. Greyhound Racing, Inc. v. Hull*, the Ninth Circuit recognized that a state could not adequately represent the interest of absent tribes because the state and tribes had an

adversarial history regarding tribal gaming and states owe no trust duties to tribes. 305 F.3d 1015, 1023 n.5 (9th Cir. 2002). Similar to *Am. Greyhound Racing*, State Defendants have a decades-long adversarial history with the Shoshone-Bannock Tribes over hunting and fishing rights, and have no trust responsibilities to the Tribes. *See* Boyer Decl., ¶ 19; *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972); *State v. Cutler*, 109 Idaho 448, 708 P.2d 853 (1985); *Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278 (9th Cir. 1994).

This case may not, in equity and good conscience, proceed without the Shoshone-Bannock Tribes. The Northwestern Band seeks a ruling moving the Tribes' rights from sole sovereign ownership to becoming tenants in common with the Northwestern Band, in derogation of the plain language of the Fort Bridger Treaty as regulated by the Shoshone-Bannock Tribes (requiring residence on the Fort Hall Reservation to exercise off-reservation hunting rights). *See* ECF 18-1 (1985 solicitor's opinion acknowledging that the Northwestern Band seeks "joint use rights similar to rights as tenants in common"). While dismissal may seem harsh, it is harsher to let the Band make an end-run around the Shoshone-Bannock Tribes more than 150 years after the treaty was signed. The Northwestern Band has apparently not even discussed this lawsuit with the Shoshone-Bannock Tribes, yet now seeks to litigate these rights in a forum that is "not of the Tribes choosing." *See* Boyer Decl., ¶ 17, 20.[5] Rule 19 dismissal is the least impactful way for an adverse ruling to be issued against the Northwestern Band, as it does not preclude further action by the Band should it succeed in negotiating a stipulation for joinder with the Shoshone-Bannock Tribes or persuade the U.S. to intercede on its behalf. For these reasons, this Court should dismiss this case.

[5] The Shoshone-Bannock Tribes also were not consulted regarding the 1985 solicitor's opinion and disagree with that opinion and key facts it discusses. Boyer Decl., ¶ 18.

2. The Court should dismiss this case for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Taking the facts alleged in the complaint to be true, the Northwestern Band is not entitled to hunting and fishing rights under the Fort Bridger Treaty because the Northwestern Band admits that it has not made its permanent home on either reservation or maintained political cohesion with the tribes named in the Treaty. Article 4 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*; 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.

Fort Bridger Treaty of 1868, 15 Stat. 673 (emphasis added).

The Northwestern Band's admission that it has not made either reservation its permanent home mandates dismissal. Article 4 requires the "Indians herein named" to make the two named reservations their permanent homes, but then identifies an exception allowing hunting outside the reservations. The clause granting hunting rights is used conjunctively with the previous clause requiring that the "Indians herein named" make the reservations their permanent homes, showing the two clauses are related. The hunting right's status as an exception conditioned upon residency on one of the two reservations is demonstrated by usage of the word "but" to begin the clause setting forth the hunting right.[6] "But" is a coordinating conjunction, joining the two clauses in a compound sentence. While the Northwestern Band argues the word "but" and the

[6] Other courts construing the conjunctive word "but" have similarly interpreted it to provide an exception. *See McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 281 (3d Cir. 1989) ("In common usage, the conjunction 'but' is used to signify an exception to or limitation of what is implied by the content of the previous clause"); *Winter v. Dibble*, 251 Ill. 200, 218 (1911) ("The clause is introduced by the word 'but,' which indicates an exception to what has gone before . . . .").

semi-colon separate two distinct independent clauses, the Northwestern Band's interpretation makes little sense.[7] Their reading would render the clear statement that the Indians "will make said reservations their permanent home, and they will make no permanent settlement elsewhere" utterly superfluous. *See* Resp. br. at 16. Courts should avoid a reading "of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

Further and contrary to the Northwestern Band's allegations, general rules of construction favoring Indian tribes are inapplicable. *See* Resp. br. at 17. Although such rules may apply in other cases, the U.S. owes the same trust duty to all tribes, and canons of construction favoring a tribe cannot be applied for benefit of one tribe if it would adversely affect the interests of another tribe. *Confederated Tribes of Chehalis Indian Rsrv. v. State of Wash.*, 96 F.3d 334, 340 (9th Cir. 1996). A ruling in this case in the Northwestern Band's favor would be very prejudicial to the Shoshone-Bannock Tribes' off-reservation hunting rights as one of the two entities named in the Fort Bridger Treaty. *Supra* at 1-4. An Idaho district court recognized as much in *Warner*, holding the canons do not apply "because of the countervailing interests of the Shoshone-Bannock." ECF 7-2 at 3-4. This Court should likewise not apply the canons in this case in favor of one tribe's interests and adversely affect those of another tribe.

Additionally, the Northwestern Band mischaracterizes the interpretation of the treaty as a factual question, alleging: "At minimum, a factual dispute exists as to whether a reservation is required under the 1868 Treaty to have hunting and fishing rights." Resp br. at 17-18. Contrary to the Band's allegations the "meaning of treaty language is a question of law . . . ." *United*

[7] The Northwestern Band admits the two clauses are "conjunctive" but contradictorily tries to maintain that the two clauses are "independent." *See* Resp. br. at 16-17.

States v. Idaho, 210 F.3d 1067, 1072 (9th Cir. 2000), *aff'd*, 533 U.S. 262 (2001). The State Defendants' opening brief offered additional information pertinent to this legal inquiry, including the negotiation history of the Fort Bridger Treaty described in *Cutler*, 109 Idaho at 451–52, 708 P.2d at 856–57[8], and a similar provision in the 1898 agreement between the Shoshone-Bannock Tribes and the U.S. requiring on-reservation residence to exercise off-reservation fishing and hunting rights.[9] ECF 7-1 at 4.

Next, under the facts alleged in the complaint, the Northwestern Band has not maintained political cohesion with the tribes who signed and were referenced in the Fort Bridger Treaty. The Treaty contemplates that the "[t]he Indians herein named" would be consolidated into two entities occupying two reservations: the first being set aside in Wyoming for the "Shoshonee Indians" and "such other friendly tribes or individual Indians as from time to time they may be willing," and the second being set aside in Idaho for the Indians identified in the Treaty as "the Bannacks," with the Treaty "secur[ing] to the Bannacks the same rights and privileges therein . . . as herein provided for the Shoshonee reservation." Fort Bridger Treaty of 1868, Art. 2, 15 Stat. 673. No other entities are identified in the Treaty as receiving any rights or privileges. While the Northwestern Band argues this is a factual issue not ripe for a motion to dismiss, the

[8] In addition to *Cutler*, the recent case of *Herrera v. Wyoming* is also a useful reference for similar treaty negotiation background. 139 S. Ct. 1686, 1692-93 (2019) (describing how another treaty with the Crow Tribe containing nearly identical off-reservation hunting language, negotiated in the same year as the Fort Bridger Treaty by the same U.S. representative, Commissioner of Indian Affairs Nathaniel G. Taylor, contained a promise to make a "permanent home" on reservation and make "no permanent settlement elsewhere" in "exchange" for off-reservation hunting rights).

[9] To the extent the Northwestern Band claims *Cutler* or the 1898 agreement provide impermissible facts/context outside of the complaint, a court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986). Although a court may not take judicial notice of a fact that is "subject to reasonable dispute," Fed.R.Evid. 201(b), the Northwestern Band has not disputed this background so it is properly before the court.

face of the Band's complaint itself precludes any dispute as to whether political cohesion exists. As set forth in the complaint, the Northwestern Band did not follow the requirements of the Fort Bridger Treaty and move onto either reservation, and the Northwestern Band readily admits it has "maintained an active political and cultural organization" as its own distinct federally recognized sovereign Indian tribe, with its own Tribal Council and Tribal Code. Compl. ¶¶ 1, 29, 31. These facts as pled, even when construed in a light most favorable to the Northwestern Band, admit and demonstrate there is presently no political cohesion between the Northwestern Band and the Shoshone-Bannock or Eastern Shoshone Tribes. Indeed, the facts pled indicate a lack of political cohesion dating back decades, if not entirely back to 1868.

Additionally, the Court should find the 1985 department of interior solicitor's opinion unpersuasive as it fails to analyze applicable law and facts. The opinion is merely an outdated, non-stress tested product of a lawyer advising an agency. The opinion does not carry the force of law or represent the U.S.'s position. "Solicitor's opinions . . . cannot properly be viewed as an administrative agency interpretation of statute that has the force of law." *McMaster v. United States*, 731 F.3d 881, 891 (9th Cir. 2013). Such opinions merely carry respect to the extent they are persuasive. *Id.* "The weight of such [an opinion] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, the 1985 solicitor's opinion is deeply flawed for multiple reasons.

First, the opinion fails to analyze relevant law, including the grounds for this motion to dismiss. The 1985 opinion pre-dates *Makah Indian Tribe*, 910 F.2d 555 (9th Cir. 1990), which applies to the Rule 19 joinder issue, and *United States v. State of Or.*, 29 F.3d 481 (9th Cir.),

amended, 43 F.3d 1284 (9th Cir. 1994), which applies to the political cohesion issue. The opinion further fails to reconcile its conclusion with the Fort Bridger Treaty's requirement that only tribes who make the reservations their permanent home shall enjoy off-reservation hunting and fishing rights. Indeed, the opinion entirely ignores this treaty language.

Second, the opinion's reasoning that Indian Claims Commission determinations are determinative of treaty rights is fundamentally unsound. Treaty rights and the Indian Claims Commission decisions are very different. The Indian Claims Commission decisions relied upon by the opinion were determinations in proceedings in which Congress authorized tribes to pursue claims for the taking of land without compensation. *See Shoshone Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387 (1962); *Shoshone-Bannock Tribes v. United States*, 19 Ind. Cl. Comm. 3 (1968). "These claims . . . involved compensation for individuals, not fishing [and hunting] rights for tribal units. The causes of action and factual issues litigated were different . . . ." *United States v. State of Wash.*, 641 F.2d 1368, 1374 (9th Cir. 1981). While it is undisputed that the Commission determined Chief Washakie's signature on the Fort Bridger Treaty bound the northwest Shoshone to relinquish title to their lands in 1868, the Commission's decision does not speak to the hunting and fishing rights reserved in that treaty. *See Shoshone Tribe of Indians*, 11 Ind. Cl. Comm. at 415. The Commission's analysis was fixed at the time of the Fort Bridger Treaty, in 1868, and does not analyze the events that have transpired in the more than 150 years thereafter. *See id.* These post-treaty facts, including failure to move onto reservations and maintain political continuity with the groups that signed the treaty, are determinative.

Finally, the opinion's analogy to the Kootenai Tribe's hunting and fishing rights is misplaced. See ECF 18-1 at 5-6. The Kootenai Tribe's hunting and fishing rights were established under the Treaty of Hellgate. That treaty and other treaties negotiated by Governor

Stevens do not contain the Fort Bridger Treaty's specific requirement that the tribes exercising treaty hunting rights make the named reservations their permanent homes. *Compare* Treaty with the Flatheads, Etc., 1855, 12 Stat. 975 *with* Fort Bridger Treaty of 1868, 15 Stat. 673. In addition, the case relied upon, *State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976), did not analyze political cohesion as it pre-dated the 1994 decision in *United States v. State of Or.*

For these reasons, the solicitor's opinion is not persuasive, and the Northwestern Band has failed to state a claim upon which relief can be granted.

3. The Northwestern Band misinterprets the State Defendants' Eleventh Amendment argument, which pertains to the State of Idaho and not the remaining named state officials.

As explained in State Defendants' original memorandum, this Court should dismiss the "State of Idaho" as a named defendant under well-established Eleventh Amendment law, if the Court does not otherwise dismiss the entire case. ECF 7-1 at 20-21. For sake of clarity, the State Defendants are not claiming the Eleventh Amendment bars the case from going forward against the remaining named state officials under *Ex parte Young*. *See id.*

CONCLUSION

State Defendants respectfully ask this Court to dismiss the complaint in its entirety for failure to state a claim and for failure to join an indispensable party, the Shoshone-Bannock Tribes. In the alternative, the Court should dismiss Defendant the State of Idaho because the Eleventh Amendment bars the claims alleged against the State.

DATED this 10th day of September, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/x/ Owen Moroney
Owen H. Moroney
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of September, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic filing:

Counsel for Plaintiff, the Northwestern Band of the Shoshone Nation
RYAN B. FRAZIER (Idaho Bar No. 6201)
KIRTON McCONKIE
50 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (80 I) 328-3600
Facsimile: (801) 321-4893
rfrazier@kmclaw.com

/x/ Owen Moroney
Owen H. Moroney
Deputy Attorney General
600 S. Walnut Street
P.O. Box 25
Boise, ID 83707
kathleen.trever@idfg.idaho.gov