No. 22-35140

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE NORTHWESTERN BAND OF THE SHOSHONE NATION,
Plaintiff-Appellant,
v.
STATE OF IDAHO, et al.,
Defendants – Appellees,

On Appeal from the United States District Court for the District of Idaho
No. 4:21-CV-00252-CWD

BRIEF OF AMICUS CURIAE SACRED GROUND LEGAL SERVICES IN SUPPORT OF APPELLANT NORTHWESTERN BAND OF THE SHOSHONE NATION SEEKING REVERSAL

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Identity of *Amicus Curiae*

Amicus is a nonprofit legal services provider serving low income members of the Yakama Nation and other federally recognized tribes in central Washington state.

Corporate Disclosure Statement

Amicus Curiae is a non-profit entity. It does not have a parent corporation, and no publicly held corporation holds stock in it.

Statement Per FRAP 29 (4) (E)

No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or its counsel made a monetary contribution for the preparation or submission of this brief.

Prior to submission of this brief, counsel sought consent of the principal parties. Appellant Northwestern Band of the Shoshone Nation consents to its submission. Appellee State of Idaho does not oppose such submission

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Introduction

> When we are faced with two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'
>
> --*County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 269 (1992)

Interest of Amicus Curiae

Amicus Curiae is a nonprofit entity which provides legal advice and representation to low income tribal nations and their members in the Pacific Northwest, including representation in criminal and civil cases arising from conflicts between State and Tribal authorities over the existence, scope, and extent of rights reserved to Tribal signatories in the numerous 1854-1855 treaties negotiated by the then *ex officio* U.S. Indian Agent Isaac Ingalls Stevens and Treaty Secretary James Doty—the principal U.S. representatives for negotiation of Treaties strikingly similar to the Treaty involved in this appeal.

Counsel for *amicus curiae* is familiar with the issues involved in this appeal, having served from 1980-1982 as Research Assistant to the late Barbara Lane, Ph.D.,

whom the United States District Court for the Western District of Washington relied upon in fashioning the result in the landmark case of *United States v. Washington*[1] and its progeny, having served as counsel for one or more tribes in such case since 1990, and having previously appeared as counsel for a party or amicus on Treaty rights-related appeals in this Court. *See, e.g*., *Cree v. Flores*, 157 F. 3d 762 (9th Cir. 1998); *United States v. Smiskin*, 467 F. 3d 1260 (9th Cir. 2007). As such, *amicus curiae* is familiar with the rules of this Court and with the issues involved herein which parallel those which regularly arise in the Pacific Northwest. This brief of *amicus* will be short in length and not duplicative of the arguments of the parties.

Statement of the Case

Amicus Curiae agrees with and incorporates by reference the statement of facts stated in the brief of Appellant Northwestern Band of the Shoshone Nation.

Summary of Argument

The District Erred in concluding that the conjunction between the "permanent home" and hunting rights provisions of the Treaty of Fort Bridger established removal to the reservation as a condition precedent to vesting of hunting rights.

Argument

The District Court erred in concluding that the plain language of the Treaty of Fort Bridger foreclosed Northwestern Shoshone from possessing Treaty hunting rights.

[1] 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed* 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

A treaty between the United States and an Indian tribe is a contract between two sovereign nations. *Washington v. Washington Passenger fishing Vessel Association*, 443 U.S. 658, 675 (1979). Any ambiguous passage in a treaty with an Indian tribe must be "construed more liberally than private agreements…so far as possible, in the sense in which the Indians understood them in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938).

Ambiguity arises as to whether a contract clause is capable of two or more constructions. *Int'l Bhd. of Teamsters, Local 396 v. NASA Servs.*, 957 F.3d 1038, 1041, 1044 (9th Cir. 2020). This Court has consistently ruled that "interpreting a contract is to give effect to the mutual intention of the parties as it existed at the time of contracting." *Id.* at 1042. Blatantly breaking away from the principle that each contracting party's intent is "paramount" and downright dismissing the firmly established the Indian canon of construction that ensures that wording of treaties is never to be construed to their prejudice, the District Court of Idaho ascribed its own fictional implausible intent to the Northwestern Shoshone tribe in interpreting the meaning of the Article IV of the Treaty of Fort Bridger, as if the tribe acquiesced to

a condition that strips them of their hunting rights on unoccupied lands, after already relinquishing millions of acres of their ancestral lands, should they choose to live outside of the reservations. *Id*. at 1043; *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

The District Court of Idaho based this absurdly partial opinion on the assertion that a mere word "but" constitutes an unambiguous and plain conjunction that making reservations as the tribe's permanent home was a prerequisite condition precedent to preserving the hunting rights. ER 14. Although the Northwestern Shoshone and Idaho passionately disagree as to their intent to its meaning at the time when the treaty was signed, the District Court selectively chose to apply one of multiple definitions of the conjunctive word "but" between them to conclude that there was no need to construe the language as the meaning was plain that removal to the reservation was a condition precedent to the vesting of the Northwestern Shoshone's hunting rights. ER 15-17. The plain meaning is to the opposite effect.

A condition precedent is a fact or event that must occur before a duty of performance arises. *N. E. Med. Servs. v. Cal. Dep't of Health Care Servs.,* 710 F. App'x 737, 739 (9th Cir. 2017). Under this definition, the Northwestern Shoshone cannot build their homes and families anywhere else except on the reservations as a condition to having their hunting rights undisturbed by the Idaho state authority; in

other words, the tribe must have unequivocally agreed to imprison themselves within the boundaries of reservations in exchange of preserving their hunting rights. This conclusion contradicts this Court's consistent position that disfavors condition precedents and interprets a contract clause "in the light of the surrounding facts and circumstances." *Id.*

Conflict between the reasonable interpretation of internal words within a statute can create an ambiguity meriting a *pari materia* construction which renders them harmonious rather than disharmonious. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). As to Treaties with Tribal nations:

> [W]e have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection[.]

United States v. Winans, 198 U.S. 371, 380 (1905). Among the most authoritative scholars on contractual language was Arthur Corbin. According to Corbin:

> A judge who believes that contract terms can have a single, reasonable meaning that is apparent without reference to extrinsic evidence of the parties' intentions "retires into that lawyer's paradise."

5 *Corbin on Contracts* §24.7, n.87 (*quoting* J. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 487). That is the error committed by the District Court in this cause. While proclaiming that the meaning of the language in Article IV of the Shoshone Treaty was so "clear and plain" as to require no construction, the

District Court found it necessary to resort to the extrinsic aid of 1979 (ER 15) and 1966 dictionaries (ER 16) of the English language. The only reasonable conclusion from such an inconsistency is that the language was *not* clear and plain but rather required consideration of extrinsic evidence to derive its meaning, *i.e.*, the meaning of the two clauses in Article IV conjoined by the word but was indeed ambiguous.

This raises the obvious error: If the treaty lacked such clarity as to require the judge to resort to a dictionary of the English language to derive its meaning, why did not the District Court resort to determining its meaning based upon the language spoken by the Northwestern Shoshone Band at the time of the Treaty? It is apparent from the opinion of the Idaho Supreme Court that the negotiation of Treaty of Fort Bridger was conducted using multiple layers of translation to attempt to convey words from the United States negotiators to Shoshone indigenous leaders:

> Nowhere in this quoted section or in other parts of the treaty does one find reference to the term "fish" or "fishing." On this point the district court had the benefit of the expert testimony of Dr. Sven S. Liljeblad, a professor of anthropology and linguistics at Idaho State University, relating to the term "to hunt" as the term was generically used in the languages of the signatory Indians. According to his testimony the particular Indian languages did not employ separate verbs to distinguish between hunting and fishing but rather used a general term for hunting and coupled this with the noun corresponding to the object (either animal or vegetable) sought. The Shoshone verb was "tygi" while the corresponding Bannock term was "hoawai"; both were defined as meaning "to obtain wild food." As Dr. Liljeblad explained, the English terminology when translated to those Indian leaders at the treaty negotiations would have been understood to encompass both "fishing"

> and "hunting" for game.

State v. Tinno, 94 Idaho 759, 762 (Idaho 1972). This was expressly noted in *United States v. Shoshone Tribe of Indians*, *supra*:

> When the treaty of 1868 was made, the tribe consisted of full-blood blanket Indians, unable to read, write, or speak English.

304 U.S. at 114. Such was the case with a predecessor Treaty, where the Supreme Court found pertinent that "the Treaty negotiations involved use of "Chinook Jargon"…imperfectly (and not often) understood by many of the Indians…composed of a simple 300-word commercial vocabulary that did not corresponding to many of the Treaty terms." *Washington v. Washington Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 657 n. 10 (1979).

Faced with such a case, the District Court should, more properly, have undertaken an inquiry to discern the meaning *based upon the understanding of Northwestern Shoshone tribal leaders*. As the United States Supreme Court enunciated more than a century ago:

> In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by

> themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States, and that the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U.S. 1, 11 (1898).

First, having relinquished title to millions of acres of Shoshone lands it would never have been contemplated that failure to maintain a residence on the reservation would place the Northwestern Shoshone merely on the same basis as other citizens, or in a more disadvantaged one, in that the tribe would have *no* rights within the Hunting District notwithstanding that citizens of the United States or of the states would. This would certainly be "an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the Nation for more". *United States v. Winans*, *supra*.

Nor does the reading given to the Treaty language by the District Court resulting in residence on the reservation being a condition precedent to the vesting of Shoshone hunting rights comport with the precedents of this Circuit. Generally, the United States entered into treaties with Tribal Nations to end wars and acquire the Tribes' ancestral lands. In exchange, the Tribal Nations used treaties to reserve

and retain rights such as the sovereign right of self-government, fishing and hunting rights, and jurisdictional rights over their own lands.[2] The Northwestern Shoshone possessed hunting rights within the territory they occupied *prior* to execution of the Treaty of Fort Bridger, and nothing therein relinquishes that right. This judicially recognized principle is known as "Reserved Rights Doctrine" which establishes a treaty with Tribal Nations being a grant of rights *from* the Tribal Nations rather than a gift *to* them and the Tribe reserves all rights it did not grant and not specifically relinquished by a tribal signatory to a treaty with the United States. *United States v. Washington*, 520 F. 2d 676, 684 (9th Cir. 1975), *quoting Winans, supra*, 198 U.S. at 381 This exceedingly important doctrine is predicated upon the understanding that Tribal Nations possessed exclusive control over their affairs and lands and the Supreme Court "formulated a rule of judicial construction through which "treaty documents should be read so as to eliminate…the disparities that history and cultural difference had created."[3]

[2] Ovsak, Catherine M. (1994) "Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-reservation in Minnesota," William Mitchell Law Review: Vol. 20: Iss. 4, Article 8 (citing KIRKE KICKINGBIRD ET AL., INDIAN TREATIES 6 (1980)).

[3] Vine Deloria, Jr. and Clifford M. Lytle, American Indians, American Justice. 49, 50. The University of Texas Press (1983).

Nothing in the Treaty of Fort Bridger can reasonably be considered as a relinquishment, nor conditional relinquishment of hunting rights, the only limitation upon them expressed in the Treaty is that the right exists "so long as game may be found thereon." The district court arrived at its absurd conclusion that Northwestern Shoshone hunting rights were conditioned upon removal to a reservation and this was premised upon a strained definition of the conjunction "but" between them. The "but" can be given a wide range of interpretations and purposes and its meaning "*varies according to the context*." *Perdomo-Paz v. Buckner*, No. 20-00221-CV-W-SRB-P, 2021 U.S. Dist. LEXIS 257585, at *22 (W.D. Mo. Oct. 15, 2021) (concluding that the defendant's use of the conjunction "but" was an ambiguous invocation of Miranda rights, suggesting that he was experiencing an internal conflict) (emphasis added); *Bd. of Trs. v. Attorney General*, 228 Mo. 514, 530, 129 S.W. 27, 30 (1910). The "but" can serve to "separate or distinguish the different paragraphs or sentence" as a conjunction to independent paragraph." *Ga. R. & Banking Co. v. Smith*, 128 U.S. 174, 181 (1888).

Other district courts under this Court's appellate jurisdiction have held that the plain and unambiguous terms specifically associated with conditions precedent are "if", "on condition that", "subject to" or "provided." *JPaulJones, L.P. v. Zurich Gen. Ins. Co. (China)*, 533 F. Supp. 3d 999, 1012 (D. Or. 2021); *Vogt-Nem, Inc. v.*

M/V Tramper, 263 F. Supp. 2d 1226, 1232 (N.D. Cal. 2002); *In re Marriage of Hasso*, 229 Cal. App. 3d 1174, 1181, 280 Cal. Rptr. 919, 923 (1991). In contrast, the conjunction "but" has not been found to operate as a condition precedent. For example, in *Vogt-Nem, Inc. v. M/V Tramper*, the court asserted that "the court will not construe contract terms as conditions unless required to do so by "plain, unambiguous language" and the conjunction "but" did not trigger a condition precedent in the clause stating that "any dispute [between plaintiff and defendant] will be settle first amicably, *but* in the case of disagreement…[it] will be submitted to the competent court." The court explained that there is "no plain, unambiguous language" indicating that attempted settlement is a condition precedent to submission of the dispute to the court. *Vogt-Nem, Inc*, 263 F. Supp. 2d at 1232. (quoting J. Calamari, Contracts § 142 (1970) (emphasis added).

Furthermore, the Idaho District Court failed to scrutinize the meaning of the semicolon with equal importance as it did to the conjunction "but" in Article IV of the Treaty. A semicolon is used to indicate separating independent clauses. *Ins. Co. v. Slaughter*, 79 U.S. 404, 406 (1870)(concluding that a semicolon indicated separate clauses in an insurance policy); *Sprint Spectrum Realty Co., LLC v. Hartkopf*, No. 19-cv-03099-JSC, 2021 U.S. Dist. LEXIS 88032, at *8 (N.D. Cal. May 7, 2021)(concluding that a semicolon is used in a coordinating function between major

sentence elements, separating them with more distinctness than a comma); *United States v. Letter from Alexander Hamilton to the Marquis De Lafayette*, 15 F.4th 515, 525 (U.S. 1st Cir. 2021); A semicolon "tend to suggest related but separate ideas and stands for "or" and "clauses separated by a semicolon are presumed to be independent clauses." *Elgin Nursing & Rehab. Ctr. v. United States HHS*, 718 F.3d 488, 494 (5th Cir. 2013); *United States v. Republic Steel Corp.*, 362 U.S. 482, 486, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960) (provisions found to be separate and distinct where separated by a semicolon).

Heterogenous meanings of the conjunction "but" in different contexts and a semicolon which is often used to indicate independent and separate clauses appeal to this Court to conclude that the usage of "; but" in Article IV of the Treaty is ambiguous at best and open to more than one interpretation. When the contracting parties subscribe different meanings to an ambiguous clause, courts can admit extrinsic parol evidence to aid in interpreting the clause. The usefulness of extrinsic parol evidence largely turns on its consideration of "*all* of the circumstances surrounding the author of the instrument" in order to "understand the intent and meaning of the parties." *Rehart v. Clark*, 448 F.2d 170, 174 (9th Cir. 1971) (emphasis added). Understanding all the circumstances of the case is the preliminary knowledge "as dispensable as that of the language in which the instrument is written"

and "a reference to the actual condition of things at the time, as they appeared to the parties themselves, if often necessary to *prevent the court, in construing their language, from falling into mistakes and even absurdities*." *Id.* (emphasis added).

The circumstances and conditions surrounding the 1868 Treaty of Fort Bridger is as follows. Approximately, two decades prior to the treaty, the Shoshones began to see irreversible destructions to their lands as the large numbers of European settlers began travelling on their lands and the fur trappers and traders killed countless wildlife for food and sport, depleting the Shoshones of the natural resources they depended on for centuries.[4] Washakie, the great chief of the Shoshones and the main negotiator in the 1868 Treaty of Fort Bridger lamented to the Mormon missionaries who visited him in 1855 with a goal of converting the Shoshones to the Mormon faith.

> This country was once covered with buffalo, elk, deer and antelope, and we had plenty to eat, and also robes for bedding, and to make lodges. But now, since the white man has made a road across our land, and has killed off our game, we are hungry, and there is nothing left for us

[4] Hodge, Adam R., "Adapting to a Changing World: An Environmental History of the Eastern Shoshone, 1000-1868" (2013). Dissertations, Theses, & Student Research, Department of History. 55.

> to eat. Our women and children cry for food, and we have no food to give them.[5]

By the time the chief Washakie signed the treaty of cession at Fort Bridger in 1858, the reservation's boundaries encompassed mere 1,744,400 acres from its original acreage of 3,768, 500,13, meaning the Shoshone tribe ceded almost 96% of their ancestral lands to the United States.[6] The federal government's encroachment on the Shoshone lands did not stop there. In April 1904, all of the land north of the Wind River on the reservation was ceded back to the United States for the purpose of creating homestead for white settlers. It was in this area of a million and a half acres that Chief Washakie and people hunted since the time immemorial.[7]

Reading the Article IV of the Treaty with this cataclysmic history of losing almost all of their ancestral lands, it is simply nonsensical to infer that the Shoshones were also willing to limit their inherent hunting right to the reservations. James Patten, who was appointed to be the Indian Agent on the Shoshone Tribe, wrote in his report in 1877:

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[5] James S. Brown, quoted in Virginia Cole Trenholm and Maurine Carley, *The Shoshonis: Sentinels of the Rockies* (Norman: University of Oklahoma Press, 1964), 154.

[6] Grace Raymond Hebard, Washakie: Chief of the Shoshones. XIV. The University of Nebraska Press (1995)(quoting Patten, JamesI., Shoshone and Bannock agency, Indian Agent, *Report*, November 21, 1877).

[7] Id. at 221.

> The Shoshones also understand that with the treaty of 1868 permission was given to them to hunt upon the unoccupied lands of the United States as long as game may be found thereon and that the same does not interfere with white settlers.[8]

While it may be appropriate for a court, when discerning the meaning of a word in a Treaty, to turn to a dictionary *contemporaneous* to the time it was used, as was resorted to by the late Honorable George H. Boldt in defining the meaning of "in common" in Pacific Northwest treaties when he turned to Webster's 1828 Dictionary, the District Court merely referred to a *1979* Collegiate Dictionary from which he selected but one of the many alternative definitions contained in it. Judge Boldt's arrival at a definition was supported by the testimony of expert anthropological witness Barbara Lane, who he proclaimed to be the most credible witness in the case. 384 F. Supp. at 350. In this case, the Idaho District Court, in the absence of expert testimony or oral argument (ER 8) appears to have proclaimed itself a lexicologist. Nothing in the record supports his interpretation.

This Court recently held that the assertion of Treaty hunting rights by the Snoqualmie Tribe was foreclosed by principles of former adjudication. *Snoqualmie Tribe v. Department of Wildlife*, No. 20-35346. That being the case, one must ask

[8] Id. at 167.

why the State of Idaho is not estopped by the decision of the Idaho Supreme Court in *State v. Tinno* to which Idaho was a party and within which the argument made by Idaho in this appeal were not raised. *See, Idaho v. Tinno*, 94 Idaho 759, 497 P. 2d 1386 (1972).

Finally, the District Court erred in dismissing Northwestern Shoshone's complaint under Fed. R. Civ. P. 12, according to which its allegations are presumed to be true and all doubts resolved in its favor.

Conclusion

For the foregoing reasons, the decision of the District Court should be *reversed* and this appeal remanded for further proceedings.

Respectfully submitted,

DATED this 28th day of June, 2022.

Sacred Ground Legal Services, Inc.

By:

S/Jack Warren Fiander

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

Signature S/Jack Warren Fiander **Date** 06/28/2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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I am the attorney or self-represented party.

This brief contains 3721 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature S/Jack Warren Fiander **Date** 06/28/2022

Certificate of Service

The foregoing brief of amicus curiae was filed with the Clerk of Court utilizing the CM/ECF system, with a copy served upon all counsel of record on the date of submission.

S/Jack Warren Fiander