No. 22-35140

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendant-Appellee,

GOVERNOR BRAD LITTLE,

Defendant.

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

APPELLANT'S REPLY BRIEF

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I. THE 1868 TREATY DOES NOT CONDITION THE TRIBE'S RESERVED HUNTING RIGHTS ON RELOCATION TO A RESERVATION.

A. The Plain Language of Article IV Does not Condition Reserved Hunting Rights on Relocation to a Reservation.

The Northwestern Band of the Shoshone Nation (the "Tribe") is a party to the 1868 Fort Bridger Treaty (the "1868 Treaty"), having been represented in the treaty negotiations by Chief Washakie. *See Shoshone Tribe of Indians of the Wind River Reservation, Wyo., et al. v. United States*, 11 Ind. Cl. Comm. 387, 403 (1962). Idaho fails to demonstrate in Part I.A. of its Brief (at 12-18) that the plain language of Article IV of the 1868 Treaty conditions the Tribe's reserved hunting rights on relocation to a reservation. Article IV 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, 15 Stat. 673, Art. IV, a copy of which is attached as the Addendum Appellant's Opening Br. (hereinafter, "1868 Treaty, Art. IV").)

The plain meaning of Article IV does not condition the Tribe's hunting rights in the second clause on the promise to relocate to a reservation in the first clause (the "Relocation Promise"). (*See id.*) "Conditions precedent are not

favored and the courts will not construe stipulations as conditions unless required to do so by plain, unambiguous language." *Southland Corp. v. Emerald Oil Co.*, 789 F.2d 1441, 1444 (9th Cir. 1986). Likewise, "conditions (subsequent) are not favored" and the "intent to create them must clearly appear." *Kapiolani Maternity & Gynecological Hosp. v. Wodehouse*, 70 F.2d 793, 802 (9th Cir. 1934); *see also, e.g., Fowler v. LAC Minerals (USA), LLC*, 694 F.3d 930, 933 (8th Cir. 2012) ("'Forfeitures and condition subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention ... to that effect.'" (quoting *DeHaven v. Hall*, 753 N.W.2d 429, 435 (S.D. 2008)); *Cummings v. United States*, 409 F.Supp. 1064, 1069 (M.D. N.C. 1976) ("Typical words introducing the estate of fee simple subject to a condition subsequent are: 'on condition that,' 'provided that,' 'to be null and void if,' or 'to be forfeited if' a certain event occurs or fails to occur.") (internal citation and quotation omitted));[1] *Boughton v. Socony Mobil Oil Co.*, 231 Cal.App.2d 188,

[1] The Navajo Treaty of June 1, 1868. 15 Stat. 667, established a reservation for the Navajo Tribe in the area of northeastern Arizona/northwestern New Mexico where many of the tribal members were already living (unlike the 1868 Treaty which established reservations in areas where members of the Northwestern Band were not already living). Article XIII of the Navajo Treaty includes some provisions that are similar to provisions in Article IV of the 1868 Treaty, including a promise by the Navajo Tribe to make its permanent home on the reservation while "reserving the right to hunt on the lands adjoining the said reservation." 15 Stat. 671. But Article XIII of the Navajo Treaty also includes a forfeiture provision that is not found in the 1868 Treaty: "and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation

41 Cal.Rptr. 714, 717 (1964) ("A condition subsequent is not favored in the law because a breach involves a forfeiture…"). Nowhere in Article IV, nor in the Treaty generally, is there unambiguous language expressly conditioning the hunting rights on relocation to a reservation. (*See generally* 1868 Treaty, Art. IV.)

Terms used to impose conditions were not used in Article IV in relation to reservations, *e.g.*, "if," "on condition that," or "provided." *See Vogt-Nem, Inc. v. M/V Tramper*, 263 F.Supp.2d 1226 (N.D. Cal. 2002).[2] Here, the only conditions on the Tribe's ***exercise*** of hunting rights are enumerated in conditional language: "***so long as*** game may be found [and] ***so long as*** peace subsists." (1868 Treaty, Art. IV (emphases added).) Similar language conditioning hunting rights on the Relocation Promise was not used.

Idaho argues that the inclusion of both the Relocation Promise and the hunting rights in a single sentence separated by a "but" signals that the second clause of Article IV is conditioned on the first. (Appellee's Br. at 14-16.) It is undisputed that the "but" between the first and second clauses is a conjunction; however, the "but" does not make the first clause a ***condition*** of the second. Idaho

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herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty." *Id*. While each treaty must be interpreted in the context of its specific historical circumstances, the omission of such an express provision in the 1868 Treaty signed a month after the Navajo Treaty undercuts the District Court's purported plain-language interpretation.

[2] *See* Sacred Ground Amicus Br. at 11.

acknowledges that the second clause should be read as an "exception" to the promise to relocate to a reservation. (Appellee's Br. at 14.) That means that relocation to a reservation does not preclude the Tribe's off-reservation hunting rights. That is not the same as ***conditioning*** the hunting rights on relocation to a reservation. Idaho simply ignores the United States' explanation that the conjunction "but" connects and contrasts two parts of a sentence without making the second part contingent on the first. (*See* U.S. Amicus Br. at 13-16.)

Whether the original transcription of the 1868 Treaty had a semicolon or a comma between the first and second clauses does not change the fact that the "but" does not create a condition. (*See* Appellee's Br. at 15-16.) Article IV of the Crow Treaty in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), was printed in the U.S. Statutes at Large with a comma between the clauses rather than a semicolon. Relying on identical language, the Supreme Court concluded that the tribe's hunting rights could be extinguished only in one of four circumstances: "(1) the lands are no longer 'unoccupied'; (2) the lands no longer belong to the United States; (3) game can no longer 'be found thereon'; and (4) the Tribe and non-Indians are no longer at 'peace . . . on the borders of the hunting districts.'" *Id.* at 1699 (quoting Art. IV of Crow Treaty, 15 Stat. 650). The Supreme Court did not identify relocation to a reservation as a condition to maintaining the reserved hunting rights. *See id.* The fact that there was originally a comma between the

first and second clauses in Article IV of the 1868 Treaty at issue here does not make the first clause a condition of the second clause.

Moreover, the term "but" used in four other places in the 1868 Treaty may "reinforce[]" the District Court's conclusion that the "but" "build[s] upon, [e]laborate[es], or distinguish[es] the language before it," (Appellee's Br. at 16), but that is not the same as making the prior language a condition of the subsequent language. None of those other uses of "but" in the 1868 Treaty creates a condition. Article I does not condition reimbursement for injury by "bad men" on verification; it provides that the amount must be verified before it is paid. Article V does not condition the agent's supervision of the Fort Hall Reservation on the agent residing on the Wind River Reservation. Article VI does not condition the individual's selection of farming acreage on the exclusive occupation by that individual. Article IX provides that Congress can use the appropriation specified for clothing for another purpose, but that it cannot discontinue the appropriation.

Article IV's language expressly contemplates continuance of the hunting rights after the 1868 Treaty was signed and the territory was ceded. The second clause of Article IV provides that the "Indians herein named … ***shall*** have the right to hunt on the unoccupied land of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the border of the hunting districts." (1868 Treaty, Art. IV (emphasis added).) Use of "shall"

supports the conclusion that the hunting rights were intended to continue so long as the conditions expressly stated in the second clause were met.

Idaho mischaracterizes the second clause of Article IV as "granting hunting rights." (Appellee's Br. at 14.) But Idaho does not dispute our demonstration that Article IV instead *reserved* the tribes' aboriginal hunting rights that existed before the 1868 Treaty. *See* Appellant's Opening Br. at 21; *see also Herrera*, 139 S. Ct. at 1704 n.1. It would not make sense for the 1868 Treaty to condition a right the Tribe already possessed on the occurrence of a future event (moving to a reservation once the government had established them and constructed the specified buildings). Idaho instead seems to argue that relocating to a reservation was a condition subsequent for the continuation of that right once the government fulfilled its promise to construct the specified buildings there. (Appellee's Br. at 24-25.) But there is no express language terminating hunting rights if the Tribe had not relocated to a reservation by some future date. Article IV of the 1868 Treaty does not make the Relocation Promise a condition precedent or a condition subsequent of the hunting rights.

In short, the plain language of Article IV reserves the Tribe's hunting rights. Those hunting rights are not conditioned on the relocation of the Tribe or tribal members to a reservation. The District Court's dismissal of the Tribe's lawsuit should be reversed.

B. The District Court did not Interpret the 1868 Treaty in Accordance with the Tribe's Understanding.

1. The Indian Canon of Treaty Construction Requires Interpretation According to the Tribe's Understanding.

Courts must interpret "treaty terms" as "'they would naturally be understood by the Indians'" (the "Understanding Canon"). *Herrera*, 139 S. Ct. at 1701 (quoting *Wash. v. Wash. State Comm. Passenger Fishing Vessel Assn.*, 443 U.S. 658, 676 (1979)); *see also, e.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-12 (2019). This Indian canon of treaty construction requires a court to give effect to the Indians' understanding even when a court reads the treaty's language to have a particular or different meaning. *See, e.g.*, *Cougar Den, Inc.*, 139 S. Ct. at 1011-12. The Understanding Canon is distinct from the Indian canon that ambiguities in treaties and statutes are to be liberally interpreted and are "'resolved to benefit the Indians'" (the "Ambiguities Canon"). *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

Idaho incorrectly ignores the Understanding Canon and relies solely on the Ambiguities Canon. (Appellee's Br. at 17-18.) Idaho relies on the portions of three Supreme Court decisions that discuss the Ambiguities Canon only: *Or. Dep't of Fish & Wildlife*m 473 U.S. at 774; *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 447 (1975); and *So. Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 508 (1986). The plain language of the 1868 Treaty is not reasonably

read to condition the reserved hunting rights on the Relocation Promise. The District Court should have acknowledged that that interpretation was at least plausible and should thus have applied the Ambiguities Canon. Moreover, the District Court plainly erred by disregarding the Understanding Canon and failing to interpret the 1868 Treaty in accordance with the Tribe's historical understanding. *See Tribes v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020).[3] Thus, the court improperly dismissed the lawsuit, preventing the Tribe from developing the history of the 1868 Treaty and the Tribe's understanding.

2. Idaho Does not Fairly Characterize the Historical Circumstances of the 1868 Treaty.

Idaho's effort to recount the historical circumstances bearing on the Tribe's understanding of its reserved hunting rights is woefully inadequate. (*See* Appellee's Br. at 20-24.) Idaho quotes a single statement by General Auger (the U.S. Treaty delegate)—a statement included in a report that was not even before the District Court (*id.* at 20, referencing Addendum 152)—and a single statement by Chief Washakie (*id.* at 21). Those selected statements do not demonstrate that the Tribe understood that its hunting rights were conditioned on moving to a

[3] This Court must accept pleadings as true on review and construe allegations favorable to the Tribe. *See Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025 (9th Cir. 2021). The District Court was required to accept as true legal conclusion that could be reasonably drawn from the allegations. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (internal citation omitted). The District Court did not and erred.

reservation. Nor is Idaho's quotation of a passage from a secondary source about Chief Washakie and a statement by Bannock Chief Taghee at a separate treaty negotiation in 1867, (Appellee's Br. at 21), a substitute for a thorough analysis of the historical circumstances of the 1868 Treaty.[4]

The Tribe's historical evidence supports the position of the Tribe and the United States that the Tribe would not have understood reserved hunting rights were conditioned on moving to a reservation. Although the State relies on the recitation of negotiation history in *State v. Cutler*, 708 P.2d 853 (Idaho 1985), the historical account supports the Tribe's position.

Idaho ignores General Auger's explanation of Article IV "to the Indian chiefs" before signing the 1868 Treaty:

> Upon this reservation [the President] *wishes* you to go with all your people as soon as possible, and to make it your permanent home, *but with permission to hunt wherever you can find game*. In a few years the game will become scarce, and you will not find sufficient to support your people. You will then have to live in some other way than by hunting and fishing. He *wishes* you therefore to go to this reservation now, and commence to grow wheat and corn, and raise cattle and horses, *so that when the game is gone you will be prepared to live independently of it*.

Id. at 857-58 (emphases added). This explanation—that it was only the only the

[4] Idaho misplaces reliance on the terms of an agreement accepted by the Shoshone-Bannock Tribes thirty years after the 1868 Treaty when they ceded a part of the Fort Hall Reservation (Appellee's Br. at 22), an agreement that sheds no light on the Tribe's understanding in 1868, and on the Shoshone-Bannocks actions in how that tribe internally handles its own hunting rights.

wish of the President that the Tribe go on the reservation, but notwithstanding that *wish*, the tribes still had reserved hunting rights "wherever" game could be found—could reasonably have been understood to mean that the hunting rights ***were not*** conditioned on residing on any reservation.

Moreover, the issue in *Cutler* "center[ed] on the meaning of the words 'unoccupied lands of the United States.'" *Id.* at 857. Affirming the lower court ruling that game violations occurred on lands that were "occupied," the *Cutler* Court discussed the Shoshones' understanding of occupation:

> Article 2 of the treaty describes a tract of land in the millions of acres to be set aside for the "occupation of the Shoshonee Indians" … Under the treaty a relatively few Indians were to "occupy" millions of acres of land within the meaning of the treaty, *which suggests that the signatory Indians' understanding would not necessarily require actual physical presence or use to change land from an "unoccupied" to an occupied status*. The extrinsic evidence reveals that the tribal leaders had visited federal military outposts and settlements in the northwest, including Fort Bridger, Fort Laramie, and Salt Lake City, and from those settlements *undoubtedly understood that a governmental unit could "occupy" lands within the meaning of the treaty*. Therefore, the mere fact that the State of Idaho owns the ranch and no one physically resides on the property year round does not necessarily mean that Sand Creek Ranch is "unoccupied lands."

Id. (emphasis added). By that reasoning, the signatories of the Treaty (including the Tribe) could have understood that making a home on a reservation did not "necessarily require actual physical presence."

Idaho's concise reference to select historical facts supports reversal, not affirmance, of the District Court's erroneous plain-language interpretation. If the

Court does not conclude that the plain language of the Treaty requires a judgment in favor of the Tribe, the Court should remand the case to determine the Tribe's understanding through a proper analysis of the historical record.

3. This Court Should Reject Idaho's Effort to Weave its Political Cohesion Argument into this Appeal.

In the District Court, as an alternative to its argument about the meaning of the 1868 Treaty, Idaho argued that "the Northwestern Band has not maintained political cohesion with the tribes who signed the Fort Bridger Treaty" (meaning the Eastern Shoshone Tribe and the Shoshone-Bannock Tribes), and that it accordingly has no rights under the 1868 Treaty. (ER-98, citing *United States v. Oregon*, 29 F.3d 481, 484-85 (9th Cir.), *amended*, 43 F.3d 1284 (9th Cir. 1994)). The Tribe argued that Idaho's political cohesion argument raised factual issues that were not suited for resolution on a motion to dismiss. ER-64-65. The District Court agreed with the Tribe and declined to address that argument. ER-22-23.

Although Idaho admits that its political cohesion argument is not before the Court in this appeal (Appellee's Br. at 30), Idaho nonetheless weaves parts of that argument into its argument about treaty interpretation. The political cohesion argument provides no support for Idaho's textual interpretation.

Idaho presents the argument by asserting that a "group[] of tribal members" who leave a tribe with treaty hunting and fishing rights surrender those rights. (Appellee's Br. at 13.) In addition to citing *United States v. Oregon*, Idaho cites

United States v. State of Wash., 520 F.2d 676, 688 (9th Cir. 1975), which did not address the scenario of tribal members leaving a tribe. This Court instead decided the different issue that off-reservation fishing rights under the Stevens treaties were permissibly apportioned on a 50/50 basis between the white settlers and the treaty tribes on a communal basis but that each tribal member did not have the "right to compete for fish on equal terms as an individual with each individual settler." *Id.* Regardless, the Tribe seeks recognition of its *tribal* hunting rights as reserved in the 1868 Treaty.

Idaho then argues hunting rights were reserved only for "the signatory entities and not individuals or groups who took paths away from the signatory entities." (Appellee's Br. at 24.) Idaho characterizes the Tribe as a rogue group who chose "a different path" by "not making a permanent home on-reservation." (Appellee's Br. at 23.) This argument should be rejected because it is entirely premised on Idaho's incorrect interpretation that the Relocation Promise is an express condition for exercising the reserved hunting rights under Article IV.

Idaho does not fairly present the relevant facts. The Northwestern Band is a federally-recognized Indian tribe whose current members indisputably descend from persons who were members of the Band in 1868 and who were represented at the 1868 Treaty negotiations by Chief Washakie. *Shoshone Tribe of Indians*, 11 Ind. Cl. Comm. at 403. Idaho accepts the Indian Claims Commission's ("ICC")

conclusion that the Tribe was a party to the 1868 Treaty and represented by Chief Washakie for the purpose of ceding its land. The Tribe is a "signatory" to the 1868 Treaty, although the Band's leader, Pocatello, did not sign the treaty. ER-71-72.

Idaho makes much of the fact that after the 1868 Treaty some members of the Northwestern Band moved to the Wind River and Fort Hall Reservations and some moved to the Duck River Reservation established for the Western Shoshone.[5] (Appellee's Br. at 5-6, 22-24.) The descendants of Northwestern Band members who integrated into the federally-recognized tribes residing on the Fort Hall and Wind River Reservations are no longer members of the federally-recognized Northwestern Band and possess hunting rights under the 1868 Treaty as members of those tribes. This case is brought by the descendants of the 400 Northwestern

[5] By the 1870s, many Northwestern Shoshone "had integrated into" the Wind River and Fort Hall Reservations. (Appellee's Br. at 5.) The Court of Claims found that about 400 Northwestern Shoshone relocated to the Fort Hall Reservation, including "a part" of Pocatello's band, a part of Toomontso's band, and "remnants" of the bands under San Pitz and Saigwits. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 345 n.7 (1945). An unquantified, but much smaller number, relocated to the Wind River Reservation, including Tav-i-wun-shea's "small band" and "an indefinite number" of Toomontso's band. *Id*. Idaho incorrectly asserts that "most Northwestern Shoshone had gone to the Fort Hall Reservation." (Appellee's Br. at 5.) The Court of Claims accounted for more than 1100 Northwestern Shoshone: (1) 400 who relocated to the Fort Hall Reservation, (2) an unquantified number who relocated to the Wind River Reservation, (3) 300 who relocated to a small reservation in northeastern Nevada and were removed in 1879 to the Duck Valley Reservation set aside for the Western Shoshone Indians, and (4) 400 who remained "in southern Idaho" (the ancestors of the federally recognized Northwestern Shoshone Band). *See Northwestern Bands*, 324 U.S. at 345-46 n.7.

Shoshone who remained in southern Idaho in the years following the 1868 Treaty—the Northwestern Band of Shoshone Indians with whom the United States maintains a government-to-government relationship despite its lack of a reservation. Idaho incorrectly suggests that only the Northwestern Shoshone who relocated to the Fort Hall or Wind River Reservations are entitled to the benefit of the United States' promise in the 1868 Treaty to protect reserved hunting rights. (Appellee's Br. at 22-24.) The United States has never agreed with that contention. The fact that some persons availed themselves of the benefits of residence on a reservation does not mean that the reserved hunting rights were expressly conditioned on relocating to a reservation.

C. The Supreme Court has Already Interpreted Identical Treaty Language in *Herrera v. Wyoming*.

Idaho fails to show that the Supreme Court's interpretation of Article IV of the Crow Treaty of 1868 (the "Crow Treaty") should not be followed. (*See* Appellee's Br. at 28-29.) Idaho does not dispute that the Crow Treaty contained "identical language" to the 1868 Treaty "***reserving*** an off-reservation hunting right." *Herrera*,139 S. Ct. at 1694 (emphasis added); Appellee's Br. at 28-29. Nor does Idaho dispute that the Supreme Court concluded that the Crow Treaty "identifies four situations that would terminate the right." *Herrera*, 139 S. Ct. at 1699; *see also* Appellee's Br. at 28-29. None of them involves moving to a reservation. *See Herrera*, 139 S. Ct. at 1699.

Idaho mischaracterizes discussions of the Crow Treaty, (*id.* at 1692-93), arguing that *Herrera* supports the District Court's interpretation. On the contrary, the Supreme Court did not determine that the promise to make a "permanent home" on a reservation and to make "no permanent home elsewhere" was "in 'exchange'" for "certain promises," including "off-reservation hunting rights." (*See* Appellee's Br. at 28.) Rather, the Supreme Court recognized that the Crow Tribe's promise to make a permanent home on the reservation was made in exchange for the United States' promises to, among other things, construct buildings on the reservation, provide seeds and farming implements, and furnish clothing and other goods. *See Herrera*, 139 S. Ct. at 1692-93. The Supreme Court recognized that the Crow Tribe's "'right to hunt on the unoccupied lands of the United States" was "[i]n exchange" for ceding most of the Crow Tribe's territory. *Id.* at 1691.

The Crow Tribe's hunting rights were preserved by Article IV of the Crow Treaty, "memorializ[ing] Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation." *Id.* at 1693. The Court quoted the portion of Article IV identifying the circumstances required for the continuation of the reserved off-reservation hunting rights: "'The Indians … shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the

hunting districts.'" *Id*. (*quoting* Art. IV). Conspicuously absent from the quote was the first clause regarding living on a reservation. *See id.*

Idaho inconsistently argues that *Herrera* is inapposite because the "main issue" in that case was whether national forest land in Wyoming was "unoccupied" land on which Mr. Herrera had a right to hunt under Article IV of the Crow Treaty. (*See* Appellee's Br. at 28.) That argument is similarly unpersuasive. Other important issues were also covered in *Herrera*, including "whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid" after Wyoming became a state.[6] 139 S. Ct. at 1694-1700. In addressing whether the Crow Treaty expired under its own terms upon statehood, the Supreme Court enumerated the four circumstances for expiration of the off-reservation hunting rights. *See id.* at 1699. The Court apparently intended that enumeration to be comprehensive: "The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them." *Id*. at 1700. Similarly, failure to relocate to a reservation is not one of them. *See id.* The *Herrera* case is highly persuasive, supporting the Tribe's interpretation of the 1868 Treaty and its preservation of hunting rights.

[6] Idaho argues that the 1868 Treaty "abrogat[ed]" the Tribe's aboriginal hunting rights to the extent that they were not reserved in the treaty. (Appellee's Br. at 23.) The United States can abrogate a right recognized in a treaty through a later congressional action, but Idaho does not point to any such action. Idaho is apparently arguing that the Tribe's aboriginal hunting rights were terminated under the express terms of the Treaty. That is incorrect for the reasons explained above.

D. The Reservation Relocation Promise is not Superfluous.

Idaho incorrectly argues that the first clause is "superfluous" if it is not a condition to the second clause. (Appellee's Br. at 18-19.) The first clause does not have to be a condition of the hunting rights to have meaning. Idaho fails to address the United States' argument (U.S. Amicus Br. at 25) that the first clause may be a promise to relocate to a reservation, but it is not an express condition of the hunting rights.

Conditions are distinguished from promises. The failure of a condition may extinguish a contractual duty of the other party. *See, e.g., United States v. Hyde*, 520 U.S. 670, 678, 117 S. Ct. 1630, 1634 (1997) ("[A] binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent." (citing J. Calamari & J. Perillo, Law of Contracts, § 11-7 at 441 (3d ed. 1987); 3A A. Corbin, Corbin on Contracts, § 628 at 17 (1960))). A condition "creates no right or duty of and in itself, but is merely a limiting or modifying factor. If it is breached or does not occur, the promisee acquires no right to enforce the promise." *United States v. Schaeffer*, 319 F.2d 907, 911 (9th Cir. 1963). Conversely, a "promise raises a duty to perform and its breach subjects the promisor to liability and damages, but does not necessarily excuse performance by the other party." *Id.* As it is not a condition, *see* Section I(A) *supra*, any purported failure of the promise in the first clause of Article IV does not eviscerate the Tribe's hunting rights.

(*Compare* 1868 Treaty, Art. IV *with* the forfeiture language of Article XIII of the Navajo Treaty discussed in footnote 1, *supra*.)

Idaho lacks standing to allege breach of the first clause of Article IV as Idaho is not a party. As the United States explained (U.S. Amicus Br. at 25 n.4), what consequences (if any) should attach to the Tribe's failure to move to one of the reservations is for the United States to decide. When an Indian tribe has agreed in a treaty to remove to another place but has not done so, only the United States, the other signatory to the treaty, may take action. Non-parties have no right to do so. *See Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 370-72 (1856).

The United States has not taken action to declare the Tribe in breach. The United States' objective in the 1868 Treaty was to facilitate white settlement of most of the Shoshone-occupied land. The Tribe, along with the other Shoshone and Bannock bands, ceded over 40 million acres of their aboriginal land, *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 485 (1937), and promised peace. The fact that the Tribe's ancestors did not relocate to a reservation did not impede the white settlement of their aboriginal lands. Given that the Tribe has not breached the peace or otherwise impeded non-Indian settlement of its aboriginal territory—the United States objectives—no federal officer has ever seen fit to deny the benefits of the 1868 Treaty to the Tribe.

II. THE 1985 DOI MEMORANDUM IS PERSUASIVE AND SHOULD BE GIVEN DUE CONSIDERATION.

None of Idaho's attacks on the United States' interpretation of the 1868 Treaty has merit. The 1985 DOI Memorandum, drafted by the Department of Interior ("Interior"), an agency of the United States (party to the 1868 Treaty) tasked with supervision and management of Indian affairs, is persuasive and should be given considerable weight. *See Stuart v. U.S. By and Through Dep't. of the Interior, Bureau of Indian Affairs*, 109 F.3d 1380, 1387 (9th Cir. 1997). Consistent with that analysis, the United States has treated the Tribe as having off-reservation hunting and fishing rights under Article IV of the 1868 Treaty. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1478 (D.C. Cir. 1995).

Idaho begins its discussion of the 1985 DOI Memorandum with *McMaster v. United States*, 731 F.3d 881, 891 (9th Cir. 2013), in which this Court held that a Solicitor's Opinion relating to the issuance of mining patents was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), but warranted respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). (Appellee's Br. at 25.) No one argues the 1985 DOI Memorandum is entitled to deference under step two of *Chevron*. Interior's reasoning is, however, entitled to respect under *Skidmore*. The Tribe does not argue the 1985 DOI Memorandum is mandatory authority. (*See* Appellant's Opening Br. at 35-39.) The Tribe, along with the United States, argue the District

Court's criticisms of the 1985 DOI Memorandum were unwarranted and it erred in failing to give the analysis any weight. At a minimum, the analysis shows that there is an ambiguity requiring further factual development.

Idaho criticizes the 1985 DOI Memorandum for not reading the 1868 Treaty like it does—"that only tribes who make the reservations their permanent home shall enjoy off-reservation hunting and fishing rights." (Appellee's Br. at 25.) Interior carefully considered Article IV of the 1868 Treaty, but like the Supreme Court in *Herrera*, did not read the first clause of Article IV to be a condition of the reserved off-reservation hunting rights in the second clause. That Interior reached a different conclusion from Idaho is no basis for disregarding its analysis.

Idaho also criticizes Interior's reliance on decisions of the ICC. Although Idaho appears to accept the ICC's conclusion that Chief Washakie represented the Tribe in the 1868 Treaty and that its lands were ceded through that Treaty, (Appellee's Br. at 26; *see also id.* at 6-7), Idaho seems to suggest (*id.* at 26) that Chief Washakie did not similarly represent the Tribe with respect to the reservation of its hunting and fishing rights. Although Idaho asserts that "the Commission's decision does not speak to the hunting and fishing rights reserved in that treaty," (*id.* at 26), there is no question that Chief Washakie also negotiated the provision reserving the Tribe's hunting rights in the ceded lands. Idaho's citation to *Shoshone Tribe of Indians*, 11 Ind. Cl. Comm. at 415, sheds no light on its

argument, and the passage it quotes from *United States v. Washington*, 641 F.3d 1368, 1374 (9th Cir. 1981), addressing applicability of the doctrines of res judicata and collateral estoppel to the question whether non-recognized groups of Indians could assert treaty fishing rights in the specific circumstances of that case, is hardly a general rejection of the ICC's findings when analyzing the Treaty's meaning.

In connection with this criticism, Idaho also argues (Appellee's Br. at 26) that "the events that have transpired in the more than 150 years" after the 1868 Treaty, "including failure to move onto reservations, are determinative," but that the ICC did not consider them. Idaho's point is unclear. Interior was aware that the ancestors of the federally-recognized Tribe did not move to a reservation, and Idaho does not explain what other "post-treaty facts" are determinative. The question before this Court is whether the District Court erred in holding that Article IV of the 1868 Treaty unambiguously conditioned the off-reservation hunting rights on moving to a reservation. Post-treaty events—particularly those occurring long after 1868—do not bear on that question.[7]

Idaho's argument (Appellee's Br. at 27) that the United States' Amicus Brief "cannot speak for the intention of the parties in 1868" misses the mark. As a

[7] Some events occurring within a number of years after the 1868 Treaty could potentially shed light on whether the Tribe understood that relocating to a reservation was a condition of maintaining the reserved hunting rights once the reservations were established and the promised buildings constructed. Idaho has pointed to no such events and, in our view, that post-treaty history favors the Tribe's interpretation.

Treaty party, the United States may state its position on the proper interpretation of the language at issue. A court must "give a treaty a meaning consistent with the shared expectations of the contracting parties." *In re the Matter of The Search of The Premises Located At 840 140th Ave. Ne*, 634 F.3d 557, 568 (9th Cir. 2011) (internal citation and quotation omitted); *see also Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 675 ("[I]t is the intention of the parties … that must control any attempt to interpret the treaties."). The United States routinely assists courts in interpreting treaties to which it is a party by providing evidence and argument about the parties' understanding based on the text and historical circumstances of a treaty.

Contrary to Idaho's argument (Appellee's Br. at 27-28), the United States did not argue that it can "waive the on-reservation requirement in Article 4 through an amicus brief." The question is whether the promise to live on a reservation is an *express condition* of off-reservation hunting rights. The Tribe and the United States have explained why it is not. The United States explained (U.S. Amicus Br. at 25 n.4), however, that it is for an authorized federal officer to determine whether the Tribe's failure to move to a reservation as promised in the first clause of Article IV is material to the United States' promises in the 1868 Treaty in light of the specific facts of the case. As explained in Section I(D) above, no federal officer has ever seen fit to deny the benefits of the 1868 Treaty to the Tribe. Idaho's bare

citation to the treaty-making clause of the Constitution (art. II, § 2, cl. 2) does not answer the United States' argument.

The fact that multiple tribes have hunting rights under the 1868 Treaty does not preclude the United States from arguing that the District Court erred in its interpretation of the 1868 Treaty. There is no necessary conflict between the Northwestern Band's rights and those of the Eastern Shoshone Tribe and Shoshone-Bannock Tribes. As Interior explained in the 1985 DOI Memorandum, "[i]f conflicts develop between the Northwestern Band and the tribes of the Fort Hall and Wind River Reservations," the scope of each tribe's rights would have to be resolved. ER-74. In seeking recognition of its hunting rights, the Tribe is not asking that any other tribe's hunting rights be reduced or altered. Recognizing the Tribe's hunting rights does not infringe on or affect any other tribe's hunting rights.

III. IDAHO'S BRIEF SUPPORTS THAT AT LEAST AN AMBIGUITY COULD EXIST PRECLUDING DISMISSAL.

Based on the arguments provided, if the Court is not inclined to find that the Treaty language clearly supports the Tribe's reserved hunting rights, it should conclude that an ambiguity exists precluding judgment for Idaho.

The Court should remand the case to the District Court for a factual record to be developed that will allow for a proper analysis of the Tribe's understanding of the 1868 Treaty. As the United States aptly points out in its Amicus Brief,

"[e]ven though the district court had doubts about the [Tribe's] claimed Treaty right, the court should have allowed the [Tribe] to develop a factual record relevant to its understanding at the time of signing, as other trial courts have done." *See* U.S. Amicus Rr. at 20-21 (citing *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 199 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998) (denying the State's motion to dismiss the tribe's claims of off-reservation treaty hunting and fishing rights before factual development because "I cannot say with certainty that plaintiff will not be able to demonstrate that the treaties could have been understood reasonably by plaintiff's leaders to mean something other than what they seem to say"); *see also Cougar Den, Inc.*, 139 S. Ct. at 1011.

This is even more true in light of the historical account surrounding the negotiations of the Treaty, as well as the importance of the sacred aboriginal right of hunting and fishing in general, which supports the Tribe's interpretation of the Treaty. Accordingly, and at the very least, the District Court's decision should be overturned and remanded so that a factual record can be developed and the 1868 Treaty interpreted in light of the applicable Indian canons of construction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded.

Date: October 5, 2022.

Kirton McConkie

/s/ Ryan B. Frazier
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

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

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Signature */s/ Ryan B. Frazier* **Date** October 5, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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

I am the attorney or self-represented party.

This brief contains 6,385 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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