

**No. 22-35140**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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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,*

vs.

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-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO  
No. 4:21-cv-00252-DCN  
THE HONORABLE JUDGE DAVID C. NYE, PRESIDING

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**BRIEF OF DEFENDANT-APPELLEES**

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LAWRENCE G. WASDEN, ATTORNEY GENERAL  
DARRELL EARLY, Chief of Natural Resources Division  
OWEN MORONEY (ISB # 9553), Deputy Attorney General  
600 S. Walnut Street, P.O. Box 25, Boise, ID 83707  
(208) 334-3715  
[owen.moroney@idfg.idaho.gov](mailto:owen.moroney@idfg.idaho.gov)  
*Counsel for Defendant-Appellees*

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## **JURISDICTIONAL STATEMENT**

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1362 to interpret the relevant treaty. The District Court entered final judgment on January 19, 2022, and the Northwestern Band of the Shoshone Nation (Northwestern Band) filed its notice of appeal on February 17, 2022, pursuant to Federal Rules of Appellate Procedure 3 and 4. This Court has jurisdiction under 28 U.S.C. § 1291.<sup>1</sup>

## **STATEMENT OF THE ISSUE**

Whether the Fort Bridger Treaty of 1868's requirement that the signatory tribes reside on reservation and make no permanent home elsewhere precludes the Northwestern Band from asserting hunting rights reserved under the treaty?

## **STATEMENT OF THE CASE**

The Shoshone people once roamed over eighty million acres in the present states of Wyoming, Colorado, Utah, Idaho, and Nevada. *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340 (1945); ER 116-17. There were an estimated fourteen different bands in the Shoshone nation with bands having chiefs and various sub-chiefs or headmen. *Nw. Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642, 644 (1942), *aff'd*, 324 U.S. 335 (1945); ER 117. In 1862,

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<sup>1</sup> This jurisdictional statement does not apply to the claims against the State of Idaho. As recognized by the District Court, the Eleventh Amendment was a jurisdictional bar to the claims against the State of Idaho and as a result the State of Idaho was dismissed from the case. ER 12-13. This ruling has not been appealed.

Congress appropriated money for negotiating a treaty with the Shoshone to secure safe passage for transportation and communication lines through Shoshone territory. *Nw. Bands of Shoshone Indians*, 324 U.S. at 341; ER 119. Before treaties could be negotiated, in January 1863 Colonel Patrick Conner led the Bear River Massacre, a gruesome event in which the army massacred members of a Shoshone band led by Chief Sanpitz. *See Nw. Bands of Shoshone Indians*, 95 Ct. Cl. at 653. Thereafter, the United States made several treaties to resolve disputes with the Shoshone nation. *Id.* at 341-42; ER 119. One of these treaties, known as the Box Elder Treaty, was made with “Northwestern” bands of Shoshone on July 30, 1863, and contains a promise of peace, but no reservation of hunting rights. *Treaty with the Shoshoni - Northwestern Bands*, 13 Stat. 663 (1863); ER 120.

As more settlers and railroads proceeded westward, in 1867 Congress authorized a commission, known as the Indian Peace Commission. *An Act to Establish Peace with Certain Hostile Indian Tribes*, 15 Stat. 17 (1867). A central duty of the Indian Peace Commission was to negotiate treaties with various tribes and select reservations that “shall be and remain permanent homes for said Indians to be located thereon . . . .” *Id.* This policy period, sometimes known as the Reservation Era, “reached its fullest expression in the post–Civil War years as Euro-American settlement spread west of the Mississippi River to lands once occupied only by tribes.” The Trade and Intercourse Acts period: 1789 to 1887,

American Indian Law Deskbook § 1:11. As part of this policy, the Indian Peace Commission negotiated the Fort Bridger Treaty of 1868 to place the Shoshone and Bannock tribes on reservations “where they would not interfere with the expanding railroad lines.”<sup>2</sup>

On July 3, 1868, the Indian Peace Commission, represented by General Christopher Auger, signed a treaty with the Eastern Shoshone and Bannock tribes. *Treaty with the Eastern Band Shoshoni and Bannock*, 15 Stat. 673 (1868) (hereinafter “Fort Bridger Treaty of 1868”); ER 121. The Fort Bridger Treaty of 1868 ceded Shoshone tribal territory and created two reservations in exchange for, among other things, payments and annuities and preserving off-reservation hunting rights for the Eastern Shoshone and Bannock tribes. 15 Stat. 673; ER 121.

Article 2 of the treaty describes the creation of two reservations, presently now known as the Fort Hall and Wind River Reservations. *Id.*; *Nw. Bands of Shoshone Indians*, 95 Ct. Cl. at 678; *see also* ER 122. The original boundaries of the Wind River Reservation are described in Article 2 of the Fort Bridger Treaty of 1868. 15 Stat. 673. In concert with the treaty, the Fort Hall Reservation was delineated through two executive orders signed by Andrew Johnson on June 14,

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<sup>2</sup> Oman, Kerry, *The Beginning of the End: The Indian Peace Commission of 1867-68*, 45 *available at* <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=3353&context=greatplainsquarterly>.

1867, and Ulysses S. Grant on July 30, 1869. 1 Kappler, *Indian Affairs: Laws and Treaties* 836-37, 838-39 (2d ed. 1904).

Article 4 of the Fort Bridger Treaty of 1868 addresses reserved hunting and fishing rights. Article 4 is expressly limited to “[t]he Indians herein named” (*i.e.*, the signatory Eastern Shoshone and Bannock tribes). 15 Stat. 673, Art. 4.

Consistent with Congress’s directive, Article 4 requires that the named tribes “make [the Fort Hall and Wind River] reservations their permanent home, and . . . make no permanent settlement elsewhere. . . .” *Id.* Only thereafter does Article 4 provide that “they shall have the right to hunt<sup>[3]</sup> 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.” *Id.*

The transcript from the treaty negotiations reflects the connection between residing on reservation (of central importance to the United States) and the reserving of tribal hunting rights (of central importance to the tribes). General Auger explained that the reserving of hunting rights, phrased as a “permission,” was tied to the U.S. government’s desire that the tribes go to the relevant reservation. General Auger stated: “[Y]our great father in Washington . . . wishes however to set apart a portion of [this country] for your permanent home and into

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<sup>3</sup> In *State v. Tinno* the Idaho Supreme Court ruled that the word “hunt” in the treaty referred to both hunting and fishing activities. 497 P.2d 1386, 1390 (Idaho 1972).

which no white men will be permitted to come or settle. Upon this reservation he 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.*”

Addendum 2, 152 (emphasis added); *see also State v. Cutler*, 708 P.2d 853, 857–58 (Idaho 1985). General Auger explained that services would be provided on-reservation such as an Indian agent, storehouses, saw mills, grist mills, schools, a blacksmith, carpenter, and physician. Addendum 2, 152. General Auger further explained the administrative efficiency of providing service on-reservation, stating: “It is desirable too, that as many Indians as possible be gathered together in one reservation. More can be done for them in this way than if they are scattered over the country in small reservations. He wishes that the Shoshones and Bannocks be together where you can have one agent to attend to you, and the benefit of the same men sent to instruct and care for you.” Addendum 2, 152. The tribes at the treaty negotiation agreed, but as part of his response, Chief Washakee stated “I want for my home [the Wind River Reservation] and want the privilege of going over the mountains to hunt when I please.” Addendum 2, 153.

By the 1870s, most bands of Northwestern Shoshone had integrated into the two reservations. *Nw. Bands of Shoshone Indians*, 324 U.S. at 345 n. 7 (describing how most Northwestern Shoshone had gone to the Fort Hall Reservation and some went to the Wind River and Duck Valley Reservations) (quoting *Nw. Bands of*

*Shoshone Indians*, 95 Ct. Cl. At 677–78); *see also* U.S. Amicus br. at 4-5.

However, as alleged by Plaintiff, one group of the Northwestern Shoshone, whose descendants comprise the group referred to in this brief as the Northwestern Band, did not move onto the reservations but rather “settled in northern Utah and adapted to an agrarian way of li[f]e.” ER 122. The United States now identifies this entity as the Northwestern Band, a federally recognized tribe, distinct from the Shoshone-Bannock Tribes of the Fort Hall Reservation and the Eastern Shoshone Tribe of the Wind River Reservation, which are also each federally recognized. *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554-01; ER 115. The Northwestern Band is a “sovereign Indian tribe,” and “[t]he Northwestern Band does not reside on the Fort Hall or Wind River Reservations.” ER 115, 122.

In 1962, pursuant to the Indian Claims Commission Act of 1946, 60 Stat. 1049, the Indian Claims Commission (“ICC”) addressed the Shoshone Tribe’s claim for compensation under the Fort Bridger Treaty of 1868, including the Northwestern Band’s claims. *Shoshone Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387 (1962). Resolution and payment of ICC claims constituted a “full discharge” and “forever bar” against the United States for such claims. 60 Stat. 1049, Sec. 22 (1946). The ICC concluded that the “famed chief Washakie” negotiated the treaty on behalf of several Shoshone bands, including the

Northwestern Shoshone. *Shoshone Tribe of Indians*, 11 Ind. Cl. Comm. at 403. The ICC found that although the Northwest band’s chief, Chief Pocatello, was “at times was reported not under Washakie’s control, this leader was in fact but a dissident band chief who tried but failed to take over leadership of the Shoshone Tribe from Washakie.” *Id.* at 402. The ICC described the boundaries of the large territory “aboriginally exclusively used and occupied” by the Shoshone Tribe, including the Northwestern Shoshone. *Id.* at 412. The ancestors of the Northwestern Band “were partial to that part of the tribe’s territory in southern Idaho and northern Utah.” *Id.* at 404. The ICC found that the Shoshone Tribe ceded the land to which it held aboriginal title through the Fort Bridger treaty of 1868, and that it was entitled to compensation for that land. *Id.* at 415. The amount of compensation was resolved through settlement. *Shoshone-Bannock Tribes v. United States*, 19 Ind. Cl. Comm. 3 (1968). The government paid \$1,375,000 plus earned interest and minus certain costs and fees to Northwestern Band members on a per capita basis. *An Act to Provide for the Apportionment of Funds*, 85 Stat. 737 (1971).

The connection between on-reservation residence and the reserving of hunting rights has been repeated in the decades and centuries after the treaty. It was reiterated once again in a subsequent agreement between the United States and the Shoshone and Bannock Tribes. In 1898, the United States entered into an agreement, ratified by Congress, with the “Shoshone and Bannock Indians of the

Fort Hall Reservation” where the tribes agreed to “dispose of part of their surplus lands in the State of Idaho, reserved as a home for them by a treaty concluded at Fort Bridger....” *An Act to Ratify an Agreement with the Indians of the Fort Hall Indian Reservation in Idaho*, 31 Stat. 672 (1900) (hereinafter “1898 Agreement”). Echoing the Fort Bridger Treaty of 1868, Article 4 of the 1898 Agreement included a requirement that the tribes live on the reduced reservation to exercise off-reservation hunting and fishing rights on ceded lands:

So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, *Indians belonging to the above-mentioned tribes, and living on the reduced reservation, shall have the right*, without any charge therefore, to cut timber for their own use, but not for sale, and to pasture their livestock on said public lands, and *to hunt thereon and to fish in the streams thereof*.

*Id.* (emphasis added).

The Shoshone-Bannock Tribes made the Fort Hall Reservation their permanent home, with recognized off-reservation hunting rights in Idaho under the Fort Bridger Treaty. To this day, the Shoshone-Bannock Tribes make individual members’ ability to exercise the Tribes’ off-reservation hunting rights contingent on the members’ residence on the reservation.<sup>4</sup> ER 42-43. Section 11-1-8(b) of the

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<sup>4</sup> *Also available at* Title 11, Law and Order Code Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho, *available at* [https://library.municode.com/tribes\\_and\\_tribal\\_nations/shoshonebannock\\_tribes/codes/the\\_law\\_and\\_order\\_code?nodeId=CD\\_TIT11FIGA](https://library.municode.com/tribes_and_tribal_nations/shoshonebannock_tribes/codes/the_law_and_order_code?nodeId=CD_TIT11FIGA) (last visited July 19, 2022).

Tribes' Tribal Code echoes the on-reservation residence requirement of the treaty, mandating:

Only 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, and subsequent agreements between the Shoshone-Bannock Tribes and the United States government.

*Id.*

Over 150 years after the Fort Bridger Treaty of 1868, on June 14, 2021, the Northwestern Band brought this lawsuit claiming hunting and fishing rights under the treaty. ER 125. This is the first time the Northwestern Band has gone to court to assert its alleged rights in Idaho. Individual Northwestern Band members, however, claimed reserved rights over twenty years ago in *State of Idaho v. Warner*, and an Idaho district court and magistrate court both held that the Northwestern Band did not have hunting rights under Fort Bridger Treaty of 1868. ER 104-113. The Shoshone-Bannock Tribes have opposed the Northwestern Band's assertion of hunting rights, appearing as *amicus curiae* in *Warner* and through a declaration in this lawsuit. ER 105; ER 40-45.

In the present suit, the Northwestern Band has sued the State of Idaho; Greg Wooten, Enforcement Bureau Chief of the Idaho Department of Fish and Game; Ed Schriever, Director of the Idaho Department of Fish and Game; and any unknown defendants (indicated as Does 1–10) (collectively “State Officials”). ER

114-25. Governor Brad Little of the State of Idaho was originally named as a defendant, but the parties stipulated to his dismissal. ER 10. State Officials brought a motion to dismiss under Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7) and 19. ER 83. State Officials argued for dismissal because the Northwestern Band failed to join the tribes who have maintained political cohesion with the recognized holders of treaty rights under the Fort Bridger Treaty of 1868, the Shoshone-Bannock Tribes. ER 88. State Officials also argued that the Northwestern Band's complaint failed to state a cognizable claim under the Fort Bridger Treaty of 1868, as the Northwestern Band admits it does not reside on the relevant reservations and admits it has not maintained political cohesion with the recognized signatory tribes. ER 89. Further, State officials argued the claims for relief against the State of Idaho are barred under the Eleventh Amendment of the U.S. Constitution. *Id.*

The District Court ultimately granted State Officials' motion to dismiss, ruling that the Northwestern Band failed to state a claim under the Fort Bridger Treaty of 1868 as it did not allege it resided on one of the reservations enumerated in the treaty. ER 7-27. The District Court also granted State Officials motion to dismiss the State of Idaho for lack of jurisdiction. ER 13. The District Court declined to rule on State Officials' other grounds for their motion to dismiss as the case was otherwise resolved. ER 7-27. The Northwestern Band now appeals, only challenging the dismissal of the case based upon the Northwestern Band's

admission that it did not reside on an enumerated reservation. Northwestern Band Br. at 4. The United States, the State of Utah, and Sacred Ground Legal Services, Inc. (Sacred Ground) (collectively “Amici”) have filed amicus briefs in support of the Northwestern Band’s appeal. Dkts. 14, 15, 17.

### **SUMMARY OF THE ARGUMENT**

This Court should affirm the District Court’s decision dismissing the case. No court has recognized the Northwestern Band as having treaty-reserved hunting and fishing rights. The Northwestern Band’s complaint failed to state a cognizable claim under the Fort Bridger Treaty of 1868. The Northwestern Band’s complaint admits the tribe did not make its permanent home on the relevant reservations, which the Treaty requires for reserving hunting rights off-reservation.

### **STANDARD OF REVIEW**

This Court reviews a district court’s dismissal for failure to state a claim under Rule 12(b)(6) de novo, accepting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to the nonmoving party. *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025 (9th Cir. 2021).

### **ARGUMENT**

#### **I. The Fort Bridger Treaty of 1868 requires residence on the relevant reservations.**

The District court correctly dismissed this case as the Northwestern Band’s complaint failed to state a claim upon which relief could be granted. Taking the facts

alleged in the complaint to be true, the Northwestern Band is not entitled to hunting and fishing rights under Article 4 of the Fort Bridger Treaty of 1868 because the Northwestern Band admits it has not made its permanent home on either of the relevant reservations. In its complaint, the Northwestern Band readily states: “The Northwestern Band does not reside on Reservations at Fort Hall, Idaho, or Wind River, Wyoming.” ER 122. The Northwestern Band also admits it “settled in northern Utah . . . ” *Id.* The Northwestern Band further elaborates that they are a distinct “political and cultural organization” with a relationship with other Shoshone bands that “is the same today as it was in 1868.” *Id.*

**A. The plain language of the Fort Bridger Treaty of 1868 conditions the reserving of hunting rights on residing on-reservation.**

Article 4 of the Fort Bridger Treaty of 1868 expressly conditions the right to hunt on the unoccupied lands of the United States on the signatory tribes making the two reservations named in the Treaty their permanent home, providing:

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.

15 Stat. 673, Art. 4 (emphasis added).

The District Court correctly concluded that the Northwestern Band’s admission that it never made either reservation its permanent home mandated

dismissal. Article 4 requires the “Indians herein named” to make the two named reservations their permanent homes. The “Indians herein named” refers to the sovereign governmental tribal bodies rather than individual members. 15 Stat. 673 (preamble describing how the treaty was entered into between United States and bands of Shoshones led by Chief Washakie). It is important to note that hunting and fishing rights are tribal rights: they vest in the tribe itself as a communal right. *United States v. State of Wash.*, 520 F.2d 676, 688 (9th Cir. 1975). Individual tribal members, or groups of tribal members, do not take such rights when they leave the tribe.<sup>5</sup> *Id.* In order to exercise treaty hunting and fishing rights, a group must demonstrate either that it is a tribal signatory to a treaty preserving such rights, or a successor in interest to such a tribal signatory.<sup>6</sup> *United States v. State of Or.*, 29 F.3d 481, 484-85 (9th Cir.), *amended*, 43 F.3d 1284 (9th Cir. 1994).

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<sup>5</sup> The U.S.’s argument that the District Court’s interpretation would “essentially confine Indians to the reservations . . . such that express permission would have to be given for them to leave” falls flat as the treaty is clearly referring to governmental tribal bodies rather than individual persons. *See* US Amicus br. at 14.

<sup>6</sup> Amicus curiae Sacred Ground’s assertion that Northwestern Band members would somehow be “disadvantaged” compared to citizens of a state with respect to the ability to hunt and fish is not correct. *See* Sacred Ground Amicus br. at 8. Tribal citizens also are citizens of states and have the same hunting and fishing rights as any other citizen of a state. *Puget Sound Gillnetters Ass’n v. U. S. Dist. Ct. for W. Dist. of Wash.*, 573 F.2d 1123, 1130 (9th Cir. 1978), *judgment vacated on other grounds*, 443 U.S. 658 (1979) (“An ethnic Indian who is not a member of a tribe with reserved fishing rights is in the same position with respect to . . . fish and game laws as any other citizen of the state.”).

For double emphasis, the treaty provides that the “Indians herein named” will (1) “make said reservations their permanent home” and (2) “will make no permanent settlement elsewhere.” After this double emphasized requirement, in the same sentence the treaty identifies an exception allowing hunting outside the reservations. The District Court correctly concluded that 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. *See* ER 15. The hunting right’s status as an exception conditioned upon the tribes residing on one of the two reservations is demonstrated by usage of the word “but” to begin the clause setting forth the hunting right. The word “but” in this case was not intended to begin a new sentence or introduce a new topic. “But” is a coordinating conjunction, joining the two clauses in a compound sentence. 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 . . . .”). As the District Court aptly held: “ ‘But’ rarely is used to

combine two distinct ideas that have no relation with each other, which is what the Northwestern Band claims the treaty does.”<sup>7</sup> ER 17.

The semicolon in Article 4 also does not make the two clauses independent, despite the Northwestern Band and Amici’s arguments to bend grammar to the contrary. *See* Northwestern Band br. at 25 n. 3; U.S. Amicus br. at 20; Utah Amicus br. at 10; Sacred Ground Amicus br. at 12. The District Court correctly observed “[i]t seems odd to claim that the Indians, a people that did not broadly emphasize reading and writing at the time of the 1868 Treaty, would have based their understanding of the treaty on the presence of a conjunction and a semicolon.” ER 19. The original, signed handwritten treaty does not even contain the semicolon. Addendum 1. The semi-colon seems to have been added in a later transcription in the U.S. Statutes at Large. *See* 15 Stat. 673, Art. 4. This legislative fact is properly before the Court and supports the District Court’s analysis that did

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<sup>7</sup> Sacred Ground’s assertion that the language of the treaty is ambiguous because the District Court referenced dictionaries is not well supported. *See* Sacred Ground Amicus br. at 6. This Court has routinely recognized that Courts may look to dictionaries in resolving the plain meaning of terms. *Metro One Telecommunications, Inc. v. Comm’r*, 704 F.3d 1057, 1061 (9th Cir. 2012). Sacred Ground also raises an argument that the State of Idaho is somehow estopped from defending itself in this litigation, citing *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 868 (9th Cir. 2021) and *Tinno*, 497 P. 2d 1386. *See* Sacred Ground Amicus br. at 15-16. This argument is without merit as this is the first time State Officials and the Northwestern Band have litigated whether the subject treaty rights apply to the Northwestern Band.

not ascribe great weight to this piece of punctuation. *See* Fed. R. Evid. 201 (Notes of Advisory Committee on Proposed Rules).

The District Court also correctly noted that the rest of the Fort Bridger Treaty of 1868 “reinforces” its conclusion that the term “but” is “always building upon, elaborating, or distinguishing the language before it.” ER 17. The term “but” occurs in four other places in the treaty: Article 1, Article 5, Article 6, and Article 9. 15 Stat. 673. In Article 1, the treaty essentially provides that the U.S. will reimburse individuals injured by “bad men” among the signatory tribes “but” payments will not be paid until verified by the Commissioner of Indian Affairs. *Id.* In Article 5, the treaty essentially provides that the “agent for said Indians” shall reside on the Wind River Reservation “but” shall supervise the Fort Hall Reservation. *Id.* Article 6 provides that the individual tribal members may select 320 acres for farming and such land will no longer be held in common “but” the land will be occupied exclusively by that tribal member. *Id.* Finally, Article 9 states that Congress may change its appropriation for clothing guaranteed under the treaty “but” in no event shall the amount of this appropriation be withdrawn or discontinued. *Id.* In each of the instances, consistent with the language in Article 4, the term “but” is used as a coordinating conjunction to build upon, elaborate, and distinguish the language before it.

Further, the District Court was correct to conclude that general rules of construction favoring Indian tribes are inapplicable when language is not ambiguous. *See* ER 19. While “legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe’s later claims.”<sup>8</sup> *Oregon Dep’t of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citations and internal quotation marks omitted). Here, the District Court was correct to interpret the issue before it in accordance with the plain language of the Fort Bridger Treaty of 1868 and dismiss the case. The Northwestern Band plainly never complied with Article 4’s requirement to reside on-reservation.

While the Northwestern Band and Amici argue that the District Court should have allowed for further factual development, the treaty language at issue is so clear that the District Court was correct to dismiss the case. *See* Northwestern Band br. at 16; Utah Amicus br. at 4; US Amicus at 19-21. The “meaning

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<sup>8</sup> While the District Court was correct to resolve the case on the treaty’s plain language, it is notable that 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. *See Confederated Tribes of Chehalis Indian Rsrv. v. State of Wash.*, 96 F.3d 334, 340 (9th Cir. 1996). The recognized holder of the hunting right at issue, the Shoshone-Bannock Tribes, have a long history of opposing the Northwestern Band’s claims. ER 40-45 (Declaration in this case); ER 105 (Shoshone-Bannock Tribes appearing as amicus in *Warner* in 2000). In *Warner*, an Idaho district court held the canons did not apply in that case “because of the countervailing interests of the Shoshone-Bannock.” ER 106.

of treaty language is a question of law . . . .” *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000), *aff’d*, 533 U.S. 262 (2001). Although it is true that various Indian law canons of construction exist and “legal ambiguities are resolved to the benefit of the Indians,” the canons do not constitute “a license to disregard clear expressions of tribal and congressional intent.” *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 447 (1975); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)(“The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.”). The Northwestern Band misreads the District Court’s decision in stating it did not apply the canon of construction that ambiguities should be resolved in favor of tribes because it “becomes complicated to apply when Indian tribes are suing each other.” *See* Northwestern Band br. at 39 n. 6. To the contrary, the District Court’s simply did not apply that canon because there was no ambiguity in the treaty. ER 019. Here, the District Court correctly dismissed the case based on the clear treaty language combined with the Northwestern Band’s admissions in its complaint.

**B. The Northwestern Band and Amici’s reading would render the on-reservation language superfluous.**

While the Northwestern Band argues the word “but” separates two distinct independent clauses, the Northwestern Band’s interpretation simply disregards the

first clause in the sentence. *See* Northwestern Band br. at 24-25. Amici also present various versions of this argument. US Amicus br. at 10, 15 (arguing “but” merely signals contrast); Utah Amicus br. at 12 (“ ‘but’ could also be understood as synonymous with “notwithstanding” or “except for the fact.”); Sacred Ground Amicus br. at 10-11. The problem with these readings is that the two clauses are plainly related as they are joined by a coordinating conjunction. The double emphasized requirement for the tribes to reside on reservation is in the same sentence as the hunting rights reservation, showing the concepts are connected and not merely fragmented concepts. The Northwestern Band and Amici’s readings would render the clear statement that the Indians “will make said reservations their permanent home, and they will make no permanent settlement elsewhere” superfluous. *See* Resp. br. at 16. The Northwestern Band and Amici’s readings would nullify a large portion of Article 4. As the District Court found:

It would make little sense to claim that the promise to live on the reservation is only reserved to Article 4 and does not apply to the rest of the treaty. It makes even less sense to claim, as the Northwestern Band does, that the promise does not even apply to the *rest of the sentence*. Reading the treaty in that way would render the treaty as a series of disjointed promises by the Federal Government . . . .

ER 17 (emphasis original). 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) (quoting *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988)).

**C. Historical circumstances show that the Shoshone Tribe understood the on-reservation requirement was connected to the hunting right reservation.**

The history of the Fort Bridger Treaty of 1868 shows an inextricable link between making a permanent home on a reservation and the reservation of off-reservation hunting rights. “[E]ven though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe’s later claims.” *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014) (quoting *Oregon Dep’t of Fish & Wildlife*, 473 U.S. at 774). A core purpose of the Indian Peace Commission, with whom General Auger was a delegate, was to pursue Congress’s Reservation Era policy of negotiating treaties so that reservations that “shall be and remain permanent homes for said Indians to be located thereon . . . .” 15 Stat. 17, Sec. 2. Consistent with Congress’s directive, at the treaty negotiation, the United States clearly explained its desire for the tribes to make a permanent home on-reservation and the tribes clearly responded by expressing a corresponding desire to continue hunting in traditional areas. Thus, General Auger explained how the United States desired that the tribes reside on reservation but in exchange the tribes would have “permission to hunt wherever you can find game.” Addendum 2, 152.

The factual history discussed in *Cutler* also supports this clear history. *See Cutler*, 708 P.2d at 858. There, the Idaho Supreme Court discussed how General Auger expressed the United States' desire for the tribes to move onto reservations and Chief Washakie's "only comment relevant to the reserved hunting rights term" was that he wanted "the privilege of going over the mountains to hunt where I please." *Id.* As referenced by that court, a historian had stated the following about the understanding of Chief Washakie concerning hunting:

Though born and reared a nomad and doubtless a passionate lover of the free life of the wild, he had the wisdom to see that the old days were doomed; that with the oncoming of the whites, game would disappear and that his people would be compelled to make their living by more settled modes of labor than the chase. He was doubtless the first among them to favor schools and other facilities for learning the white man's ways of life. Peacefully and without noted incident he brought his reluctant people into the new era.

*Id.* (quoting *Washakie*, Hebard, p. 23 (1930)). During negotiations on a previous unratified treaty in Soda Springs, Idaho, in 1867, the representative of the Bannock tribe present at the treaty negotiations, Chief Taghee, directly tied the hunting right to residing on a reservation. *Id.* Chief Taghee stated:

I am willing to go upon a reservation, but I want the privilege of hunting the buffalo for few years. When they are all gone far away we hunt no more; perhaps one year, perhaps two or three years; then we stay on the reservation all the time.

*Id.* (quoting *The Bannock of Idaho*, Madsen, p. 160 (1958)).

This interpretation is further supported by the 1898 Agreement between the Shoshone-Bannock Tribes and the United States that included the same condition for the exercise of fishing and hunting rights on lands ceded under that agreement. 31 Stat. 672, Art. 4. The Shoshone-Bannock Tribal Code also recognizes this condition by limiting the exercise of off-reservation hunting and fishing rights to members who make the Fort Hall Reservation their permanent home. Sec. 11-1-8(b), Shoshone-Bannock Tribal Code.

The Fort Bridger Treaty of 1868 was clearly negotiated with the signatory tribes and tribal members who divested from the signatory tribes would have understood that taking a separate path to a separate geographic area would not have positioned them to receive the benefits and reservations vested with the tribal entities that signed the treaties. Illustrative of this fact, by the 1870s most members of the Northwestern Shoshone went to reservations. *Supra* page 5. Services such as the furnishing of a physician, teachers, a carpenter, a miller, an engineer, a farmer, and a blacksmith were to be provided on-reservation. 15 Stat. 673, Art. 3, 10. By the 1880s annuities paid to the northwestern bands of Shoshone were comingled under the appropriation, “Fulfilling treaty with Shoshones” and “the identity of the Shoshone Indians which had been known as the ‘Northwestern Bands’ upon the Western Shoshone Reservation and other reservations . . . had been practically lost.” *Nw. Bands of Shoshone Indians*, 95 Ct. Cl. at 679.

While the Northwestern Band and Amici argue the Northwestern Band did not understand in 1868 that failure to go to a reservation would extinguish their hunting rights, this argument ignores the well-established circumstances involved in the treaty negotiation. *See* Northwestern band br. at 16; US Amicus br. at 23. The Northwestern bands of Shoshone, along with the rest of the Shoshone Tribe ceded aboriginal territory and rights in the Fort Bridger Treaty of 1868, with the exception of reserved rights held by the sovereign tribes under the terms of the treaty. These matters were finally adjudicated by the ICC. *Supra* pages 6-7. By not making a permanent home on-reservation, the Northwestern Band chose a different path, and has not maintained a status providing it with hunting rights. Though the U.S. argues there is no identified abrogation of the Northwestern Band's aboriginal hunting rights, the signing of the Fort Bridger Treaty of 1868 was such an abrogation to the extent claims were not reserved to the sovereign tribal entities signing the treaty. *See* U.S. Amicus Br. at 12; Fort Bridger Treaty of 1868, 15 Stat. 673, Art. 2 (relinquishing "all title, claims, or rights in and to any portion of the territory of the United States" except as otherwise reserved). Adjudication in the ICC process and the resultant full and final settlement leaves no doubt that the treaty had final effect on the Northwestern Band. The argument that the Northwestern Band has an unextinguished aboriginal hunting right does not take into account the fact that the signatory tribes relinquished the Shoshone nation's

claim to most of its territory, which would have included attendant rights such as hunting, fishing, and gathering rights. The Northwestern Band even admits this fundamental of Indian law. Northwestern Band br. at 26 (“When tribes ceded their territories to the United States, the tribes typically ceded their rights attendant to those lands, including hunting and fishing rights. Unless off-reservation hunting and fishing rights were reserved, tribal members would preserve only the aboriginal right to hunt and fish on the reservation (i.e., the land reservation).” While the Shoshone Tribe did reserve off-reservation hunting rights, this reservation went to the signatory entities and not individuals or groups who took paths away from the signatory entities.

The Northwestern Band’s argument that the District Court’s conclusion is undermined by the fact that there was “no deadline for compliance” for moving to Fort Hall also does not make sense. *See* Northwestern Band br. at 27. What was contemplated in the treaty was tribal members (at the time lead by Washakie) relocating to a reservation at Fort Hall “*when the agency house and other buildings shall be constructed.*” 15 Stat. 673, Art. 4 (emphasis added). There was a logical period in which the tribe needed to relocate and government had to fulfil its obligations. The agreement was that they would go to the reservation when prepared. This does not undermine the fact that eventually moving onto reservation was a condition for the negotiated reservation of off-reservation hunting rights.

The Court should reject the Northwestern Band and Amici's request to ignore the plain language of the treaty in light of this history context.

**D. The U.S. *amicus* brief and the solicitor's opinion do not determine treaty rights.**

The solicitor's opinion on the subject of Fort Bridger Treaty hunting rights relative to the Northwestern Band is not persuasive or precedential. *See* ER 69-78. 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. "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). "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, and entirely ignores the treaty language at issue on appeal. The opinion 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. As the district court put it: "The absence of such analysis . . . significantly undercuts the already limited usefulness of the . . . Memo in this case." ER 022.

Second, the opinion’s reasoning that ICC determinations are determinative of treaty rights is fundamentally unsound. Treaty rights and the ICC decisions are very different. The ICC 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*, 11 Ind. Cl. Comm. 387; *Shoshone-Bannock Tribes*, 19 Ind. Cl. Comm. 3. “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 the ICC determined Chief Washakie’s signature on the Fort Bridger Treaty bound the Northwestern 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 also 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, 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., 12 Stat. 975 (1855) *with* Fort Bridger Treaty of 1868, 15 Stat. 673.

To be clear, the intention of the parties “must control any attempt to interpret the treaties.” *Washington v. Washington State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979). While the U.S. submitted an amicus brief in this case, this brief cannot speak for the intention of the parties in 1868.<sup>9</sup> Though the U.S. seemingly argues it can simply waive the on-reservation requirement in Article 4 through an amicus brief, the U.S. amicus brief cannot waive a duly enacted treaty entered into by the President with the advice and consent of the Senate. *See* U.S. Amicus br. at 25; *see also* U.S. Const. art. II, § 2, cl. 2. Moreover, the U.S. should not be able to waive the on-reservation requirement when the hunting rights reservation vested in the Shoshone-Bannock Tribes, a sovereign entity which is not

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<sup>9</sup> Utah also attached an agreement to its brief. Utah Amicus br. at 7, Utah Addendum. This agreement is of dubious relevance to the legal issue before the Court, since it reflects a different position taken by the State of Utah relative to hunting by the Northwestern Band in that state. Notably, under that agreement, it is the State of Utah, and not the Northwestern Band, that is regulating hunting by Northwestern Band members, with Utah issuing state licenses and tags to Northwestern Band members. Utah Amicus br. at 7, Utah Addendum.

a party to this litigation.<sup>10</sup> For these reasons, the solicitor’s opinion and the U.S. amicus brief are not determinative of treaty rights.

**E. *Herrera v. Wyoming* did not address the issue in this litigation.**

Although the Supreme Court interpreted a similar Indian Peace Commission treaty with the Crow Tribe in *Herrera v. Wyoming*, it interpreted a distinctly different aspect of the treaty than the one presently before the Court.<sup>11</sup> 139 S. Ct. 1686 (2019). The main issue in *Herrera* was whether national forest land in Wyoming was “occupied,” and thus available for the exercise of treaty-reserved hunting rights. *Id.* The Supreme Court described the Crow Treaty (with language paralleling that of the Fort Bridger Treaty) as containing a promise to make a “permanent home” on reservation and make “no permanent settlement elsewhere” in “exchange” for certain promises including off-reservation hunting rights. *Id.* at 1692-93. Like the Shoshone-Bannock Tribes, the Crow Tribe has made its permanent home on the reservation as provided by its Treaty. Indeed, the Supreme

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<sup>10</sup>Unlike State Officials, the United States has the ability to directly bring the Shoshone-Bannock Tribes into a suit, thus, providing a mechanism to fully resolve the issues in this case. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994) (“[T]ribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers.”). However, the United States has not done so, choosing to appear for the first time in this matter as amicus on appeal, apparently without notice to the Shoshone-Bannock Tribes

<sup>11</sup> The Fort Bridger Treaty of 1868 (15 Stat. 673) was signed two months after the Crow Treaty (15 Stat. 650), which is the only other treaty with nearly identical language as to hunting rights and making a permanent home on a reservation.

Court noted the subject of the decision, Clayvin Herrera, resided on the Crow Reservation. *Id.* at 1693. The Crow Reservation created under the relevant Treaty *is the permanent home of the Crow Tribe*, while the Northwestern Band has by its own admission not made its permanent home on a reservation under the Fort Bridger Treaty. The *Herrera* decision examined a different question than that before this Court, and the decision's summary recitation of the exchange of promises linking a permanent home on the reservation to the reserving of hunting rights is actually consistent with the District Court's interpretation of the similarly worded Fort Bridger Treaty of 1868.

## **II. Remand is appropriate if the Court does not affirm.**

Alternatively, if the Court were to disagree with the District Court's reading of the treaty language as grounds for Rule 12(b) dismissal, remand would be appropriate. Remand to the District Court is appropriate for matters involving fact finding, which include resolving ambiguities in treaty language. *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996) (remanding for a district court to examine a factual treaty issue). The Court should reject the bare-bones requests to simply resolve the appeal in the Northwestern Band's favor. *See* U.S. Amicus br. at 28; Utah Amicus br. at 3, 4, 11.

Additionally, the district court would need to resolve other issues, including the political cohesion and failure to join an indispensable party issues. ER 23, 26

(declining to address political cohesion and holding the failure to join an indispensable party issue was moot); ER 29-38; 89-100 (briefing below). The political cohesion and failure to join an indispensable party issues are not even before the Court on appeal and the Court does not have the benefit of briefing on those issues or a ruling below. It is fundamental that treaty rights go to a tribe who signs a treaty as a sovereign government entity, not to individuals. *See Supra* page 13. There are serious questions regarding the ability of the Northwestern Band to join in the Shoshone-Bannock Tribes' treaty rights without the presence of that tribe. *See id.* There are also serious questions about whether a tribe can disassociate with the recognized signatory of a treaty and more than a century and a half later claim the recognized holder's rights are its own. *See id.* It would be plainly erroneous to resolve these issues on appeal without a remand if the Court finds an ambiguity.

### CONCLUSION

For these reasons, the State Officials ask this Court to affirm the District Court's dismissal of the case with prejudice in favor of State Officials.

Respectfully submitted,

/s/ Owen Moroney

OWEN MORONEY (ISB # 9553)

Deputy Attorney General

600 S. Walnut Street

P.O. Box 25

Boise, ID 83707

*Counsel for Defendant-Appellees*

### **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned is not aware of any other related cases.

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 19, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 19, 2022.

/s/ Owen Moroney

OWEN MORONEY (ISB # 9553)

Deputy Attorney General

600 S. Walnut Street

P.O. Box 25

Boise, ID 83707

*Counsel for Intervenor Defendant-Appellee  
State of Idaho*

### 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 8,597 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).

I certify that this brief (*select only one*):

☒ [X] complies with the word limit of Cir. R. 32-1.

☐ [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☐ [ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because

☐ [ ] it is a joint brief submitted by separately represented parties;

☐ [ ] a party or parties are filing a single brief in response to multiple briefs; or

☐ [ ] a party or parties are filing a single brief in response to a longer joint brief.

☐ [ ] complies with the length limit designated by court order dated \_\_\_\_\_.

☐ [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).


**Signature** /s/ Owen Moroney    **Date** August 19, 2022

**ADDENDUM 1**  
*Excerpts from Original Signed Treaty*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

**To all to whom these presents shall come. Greeting:**

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf,  
under the seal of the National Archives of the United States, that the attached reproduction(s) is a true and  
correct copy of documents in his custody.



SIGNATURE <i>T. Juliette Arai</i>	
NAME T. JULIETTE ARAI	DATE 7/6/22
TITLE CHIEF, ARCHIVES 1 REFERENCE BRANCH	
NAME AND ADDRESS OF DEPOSITORY The National Archives Washington, D.C. 20408	

NA FORM 14007A (10-86)

*Shoshone (Eastern Band)*  
*and*  
*Bannack Tribes of Indians*  
*Made the third*  
*day of July 1868.*  
*at Fort Bridger*  
*Utah Terr.*

of children can be induced by the Agent to attend School which shall not cost exceeding twenty five hundred dollars

The United States agrees further to cause to be erected on said Shoshone reservation near the other buildings herein authorized a good steam circular Saw Mill, with a Post Mill and Shingle Machine attached. The same to cost not more than eight thousand dollars.

Article IV 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.

Article V. The United States agrees that the Agent for said Indians, shall in the future make his home at the Agency building on the Shoshone reservation but shall direct and supervise affairs on the Bannack reservation, and shall keep an office open at all times for the purpose of prompt and diligent enquiring into such matters

Agent shall reside at Fort Bridger U.S.  
and their annuities shall be delivered to  
them at the same place in June of each  
year.

J. E. Taylor

W. J. Sherman

Wm. S. Hargree

John B. Sanborn

J. F. Tappan

C. C. Augur

Robert J. Gault

Commissioner

Refused. Terry

Attest

A. J. H. White  
Secretary

Shoshones,

Wash-a-Kiv X his mark

Kan-my-pitz X his mark

Coop-se-po-mot X his mark

Nar-Kok X his mark

Jabonsheya X his mark

Bazeel X his mark

Pan-to-she-ga X his mark

Ninny-bitse X his mark

Bannocks

Taggee X his mark

Jay-to-bat X his mark

He-rat-ze-nor-a-gen X his mark

Coo-sha-gow X his mark

over

Pau-sook-a-motse X his mark  
A-wite-etse X his mark

Witnesses:

Henry A. Monnow  
Lt. Col. 36 Infantry & Art. Col. U.S.A.  
Luther M. Adams  
U.S. Indian Agent  
W. A. Carter  
S. Van Allen Carter  
Interpreter

Excerpts from a Certified Copy of Articles of a Treaty with the Shoshonee (Eastern Band) and Bannock Tribes of Indians, pages 1, 6, 13, 14 (obtained July 6, 2022); *also available at* National Archives, <https://catalog.archives.gov/id/179036105> (last accessed July 28, 2022).

## ADDENDUM 2

### REPORT OF GENERAL AUGUR ON THE FORT BRIDGER TREATY

At the last meeting of this Commission held at Fort Laramie, D.T. May 9th, 1868 it was *Resolved*: "That General Augur proceed to Fort Bridger to make arrangements with the Snakes, Bannocks and other Indians along the line of the Union Pacific R.R. in Utah."

The arrangements referred to in the resolution were understood to be the making of a treaty with the tribes referred to, on the same basis as those made with the Sioux and other tribes already treated with by the Commission.

The Snakes and Bannocks were the only tribes it was supposed I would meet, and these had been notified through their agent to meet me at Fort Bridger on the 15th of June. Certain presents for them had been already ordered by the Commission and were then supposed to be on their way to them.

In pursuance of the above cited resolution I proceeded to Fort Bridger where I arrived on the 15th of June and found the Indians already assembled in that vicinity. But the presents had not arrived and it was found that by reason of bad roads and high waters they could not reach there under two weeks.

The Indians preferred to wait until their arrival before talking.

The goods eventually arrived and I held a council with the assembled tribes on the 3rd day of July. All of Wash-a-kees band of the Northeastern Band of Shoshones and which really constitutes the principal part of the Shoshone nation, and the larger part of the Bannocks under the head chief of the nation, Taggie, were present and participated in the council. Washakee claims in general terms as being the country of his people all the country lying between the meridian of Salt Lake City and the line of the North Platte rivers to the mouth of the Sweetwater. Taggie claims for the Bannocks in terms more general even, all the country about the Sado Springs, the Porte Neuf river, and the big Kansas prairie to the northwest of it.

I spoke to the chiefs as follows:

#### GENERAL AUGUR

*Washakee, Taggie and Chiefs of the Shoshones and Bannocks.*

*About a year ago the great council and your great father in Washington sent out a Commission to have a talk with the Indian tribes in the west—to make peace with such as were hostile and to arrange with all of them that hereafter there should be no more war between the white men and the Indians. His Commission has already made treaties of peace with the Cheyennes, Arapahoes, Kiowas, and Comanches, and most of the Sioux. Part of them are now treating with the remaining Sioux and part have gone to meet the Navajos in New Mexico.*

*I have been sent to meet and talk with you. The Shoshones and Bannocks are at peace with the whites and have been for years. All we have to do, therefor, is to arrange matters that there may never hereafter be cause of war between them. There are a great many white men in your country now and as soon as the Rail Road is completed there will be many more. They will wish to remain and make homes here and your great father desires that they should*

*do so and he will make the same arrangements for acquiring such title as you have to this country as the Commission had heretofore made with the other Indian tribes.*

*He wishes however to set apart a portion of it for your permanent homes and into which no white men will be permitted to come or settle. Upon this reservation he 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.*

*Your agent will live there with you, and you will be provided with storehouses and saw mills and grist mills to make your flour, and a place to teach your children. Men will be sent to teach you to cultivate your farm and a blacksmith and a carpenter will be sent to assist you, and a physician to cure you when sick so that in a few years your people will be able to live comfortably in their new homes. No people prosper who are continually at war. Your great Father desires therefore that you should remain at peace not only with white men but with all other Indian tribes. Should you be at war now with other tribes, or have cause of complaint against them, he will try to arrange matters between you, without your going to war, or continuing it.*

*It is desirable too, that as many Indians as possible be gathered together on one reservation. More can be done for them in this way than if they are scattered over the country in small reservations. He wishes the Shoshones and Bannocks to be together where you can have one agent to attend to you, and the benefit of the same men sent to instruct and care for you. I will have a treaty prepared embracing all that is proposed to be done for you. Its provisions will be carefully explained to you by the interpreter. I wish you to examine it carefully and to understand it before you sign it, for after it is signed and approved by your great Father and the great Council in Washington, we will all have to be guided by it. It will be the great bond of peace between us. I have now done and will hear you speak.*

The following minutes of the reply of Washakee and Taggie were taken down at the time and are substantially correct. Washakee, Chief of the Shoshones was apparently greatly pleased and spoke in effect as follows.

#### WASHAKEE

*I am laughing because I am happy. Because my heart is good. As I said two days ago, I like the country you mentioned then for us, the Wind River valley. Now I see my friends are around me and it is pleasant to meet and shake hands with them. I always find friends along the roads in this country, about Bridger, that is why I come here. It is good to have the Railroad through this country and I have come down to see it. When we want to grow something to eat and hunt, I want the Wind river Country.*

*In other Indian Countries there is danger, but here about Bridger all is peaceful for Whites and Indians and safe for all to travel. When the white man came into my country and cut the wood and made the road my heart was good and I was satisfied. You have heard what I want. The Wind River Country is the one for me. We may not for one, two or three years be able to till the ground. The Sioux may trouble us. But when the Sioux are taken care of, we can do well. Will the whites be allowed to build houses on our reservation? I do not object to traders coming*

*among us and care nothing about the miners and mining Country, when they are getting out gold. I may bye and bye get some of that myself. I want for my home the valley of Wind River and lands on its tributaries as far east as the Popo-agie and want the privilege of going over the mountains to hunt when I please.*

*Taggie, Chief of the Bannocks, then speaks.*

**TAGGIE**

*As far away as Virginia City our tribe has roamed. But I want the Porte-Neuf Country and Kansas Plains.*

**GENERAL AUGUR**

*Why cannot the Bannocks and Shoshones get on together on the same reservation?*

**TAGGIE**

*We are friends with the Shoshones and like to hunt with them, but we want a home for ourselves.*

**GENERAL AUGER**

*If you have a separate home, can you and the Shoshones get along with one agency, and come to the Shoshone reservation for your annuities, &c?*

**TAGGIE**

*We want to receive anything that is for us on our own ground.*

Taggie was then told that at present the Commission was not sufficiently acquainted with the Country they wanted to mark out a reservation, but that when the Bannocks were ready to go on a reservation the President would send someone to lay off one which shall include portions of the country they want, and that until the Shoshones go on their reservation in the Wind river valley, the goods for the Bannocks will be delivered at Bridger, separate from those for the Shoshones. Such buildings as the Government thinks they require will be built on the reservation. If hereafter the Bannocks and Shoshones agree to go on the same reservation, they will all have the same buildings.

**GENERAL AUGUR**

*Tomorrow, the 4th of July, the Commission wants all of the head men of the Shoshones and Bannocks to come here at twelve (12) o'clock to sign the treaty.*

*The great Father at Washington and the great Council have always known Washakee as a good friend of the white man and look upon him as Chief of the Shoshones and good advisor of all the peaceful tribes about here. He always gives them good advice and we hope they will always follow it.*

The following day the chiefs again assembled and the treaty was interpreted to them. Article by article. It was declared satisfactory to them and was signed by all the chiefs present. The treaty is herewith respectfully submitted to the Commission.

In connection herewith I desire to submit a copy of a memorandum made for me by Mr. Head, Superintendent of Indian Affairs of Utah.

#### MEMO

*On the 2d day of July 1863 Governor Doty pursuant to instructions from the Indian Bureau concluded a treaty with the eastern Shoshones providing for the payment of an annuity of \$10,000 -- they ceding rights of way, &c.*

*On the 30th of same month he concluded a treaty in all respects similar with N.W. Shoshones: they receiving an annuity of \$5,000, and Oct. 1 of same year a similar treaty with Western bands providing for same annuity.*

*After these treaties were concluded he made a similar treaty with the "mixed bands of Bannocks and Shoshones" at Soda Springs, Idaho, by which it was provided that they should share in the annuities of the Shoshones.*

*When this treaty went before the Senate for confirmation it was amended by the addition of a new article and directed to be resubmitted to the tribe for ratification which has never been done.*

*The treaty as made by Gov. Doty requires to be modified in two particulars -- 1st. By adding the new article pursuant to the requirement of the Senate.*

*2nd. By striking out the last ten words of Article 2 of said treaty and inserting in lieu thereof the words "receiving the same annuity as the Northwestern bands of the Shoshone nation."*

*It is impossible to reconcile the provisions of the treaty as made with good faith on the part of the government toward the Shoshones. It simply diverts from them a portion of their annuity without their consent.*

*The original treaty with Senate amendment are enclosed.*

*(Signed) T.H. Head.  
Supt.*

Under this defective arrangement the Bannocks have never received from the Government anything except a few casual presents the Superintendent was able to give them from funds of an incidental nature.

I am also advised by Superintendent Head and Agent Munn at Fort Bridger that it is a misnomer to call them "the mixed bands of Bannocks and Shoshones." That no such band exists and never did. The band treated with by Governor Doty as the Shoshonee Goship Band is not a band of Shoshones at all, but a band of Utes known as Gosho-Utes after their chief Gosha. Still they are drawing their annuities and have

been, as a band of Shoshones. I am also informed that the other bands of Shoshones known as the Northwestern and Southwestern bands are inconsiderable and that their annuities not being *per capita* are probably out of proportion to those given by present treaties to Shoshone band.

The presents to the Indians at Bridger were issued to them by their Agent and Colonel Morrow, Commanding Officer, Fort Bridger, and the necessary receipts are here presented. The issue was in the name of General Sanborn, as the purchases were made by him.

I also procured for him from the post of Fort Bridger thirty seven old arms and two thousand cartridges. These are invoiced also to General Sanborn.

On my (C.C. Augur) return from Fort Bridger I visited the Sweetwater mines which are about thirty miles south of the proposed reservation for the Shoshones. I found the miners there entirely satisfied with the location of the reservation, and in fact rather pleased as the location of friendly bands there would be a protection to them against the hostile Sioux and Blackfeet.

In connection with the recent departure of Spotted Tail and others for their reservation, I have to report that on the 6th of September I sent to Spotted Tail to come in as I wished to see him about going to the reservation. I also requested Colonel Denman, Superintendent of Indian Affairs, to have the other bands sent for to come in at the same time. I went on the 8th to North Platte to meet them:

Spotted Tail, with seventy three lodges

Swift Bear, with thirty lodges

Ogalallas, White Eyes, Walk under the ground, with thirty lodges

Brules, Iron Shell and Bad Hand, with twenty-four lodges

Lower Brules, Big Foot with eighteen lodges

Half Breeds, with eleven lodges

In addition there were many families living under bushes and pieces of canvas reported equivalent to twelve lodges, making altogether two hundred and three lodges, a little exceeding twelve hundred souls. Iron Shell I did not see, he being already on Thick wood creek. Spotted Tail claimed that by the arrangements at Laramie he and his people were to be permitted to remain on Republican this winter, and go to reservation next spring. I explained to him that had not the Indians commenced depredations there would have been no objections to carrying out this arrangement. But now that country would be filled with soldiers until the Indians were driven out, and that it would be impossible for him to remain there without becoming involved in war, and that I advised him to go at once with all his people to his reservation.

After some consultation among themselves he replied that he would go and all those with him. That he had separated himself from the Indians on the Republican, and would never have anything more to do with them -- that they had acted very badly and that he would never try to do anything more for them. I asked him what reasons those Indians assigned for their recent outbreak. He replied none. They did not

pretend to have any excuse or cause of complaint, that the Cheyennes, or most of their young men, had never wanted peace and were tired of it.

Superintendent Denman detailed interpreter Tod Randall to accompany these Indians to the reservation. I hired fifteen wagons for their use, to be paid the same that was paid for those that went with first party, and bought provisions and a small quantity of clothing and ammunition.

The provisions and what ammunition I gave them I placed under the charge of the interpreter. They left North Platte on the 18th September.

I submit copies of two letters just received from Laramie and Fetterman on the subject of Indian Affairs.

I neglected to mention in the proper connection that I found it impossible to induce the Shoshones and Bannocks to unite in accepting a common reservation. Although friendly and allies they each prefer to live in their own country. I do not think it improbable, however, that the Bannocks may be induced eventually to go to the Shoshone reservation, and that the latter will consent to this arrangement.

Respectfully Submitted.  
C.C. Augur,  
Commissioner

Headquarters  
Fort Laramie, D.T.  
September 23d, 1868

To the  
Adjutant General  
Department of the Platte

General:

*I have to report for the information of the Commanding General that I have this day had a talk with ten Northern Cheyennes who came in with fifteen lodges of that nation. They were part of one hundred lodges that were moving south and whom they left on the Little Horn. The northern Cheyennes and Arapahoes were to meet on Crazy Woman Fork.*

*Near Bear Butte they met ten lodges of Laramie Loafers under Grass. They said they were coming to Laramie to go with the halfbreeds on the reservation on the Missouri. Man-afraid-of-his-horses was also near Bear Butte with his village. All the Sioux's, Northern Cheyennes, and Arapahoes are to meet at Bear Butte and hold a council. Red Cloud with one hundred lodges was at the mouth of Rose Bud. If buffalo was plenty he would be the last at the council. If game was scarce he would come quickly. I could not learn the cause of this council. In reply to questions about the depredations recently committed they told me the following.*

*About three months ago five young Cheyennes went over to the Snakes and from there to Medicine Bow and stole over one hundred head of mules, amongst them is a bell mare – Iron Leg. These young men without any particular designation or name. The Lame Warrior or Tall Wolf recently stole fifteen mules on Powder River near where it goes in the mountains.*

Inst, for the Dev. of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, 151-56 (1975) (page 155 appears twice as a typo); *also available at* [https://books.google.com/books?id=SpErAQAAIAAJ&printsec=frontcover&source=gb\\_s\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=SpErAQAAIAAJ&printsec=frontcover&source=gb_s_ge_summary_r&cad=0#v=onepage&q&f=false) (last accessed August 10, 2022).