No. 22-35140

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWESTERN BAND OF THE SHOSHONE NATION,
Plaintiff/Appellant,

v.

STATE OF IDAHO, et al.,
Defendants/Appellees,

and

BRAD LITTLE, Governor,
Defendant.

Appeal from the United States District Court for the District of Idaho,
No. 4:21-cv-00252 (Hon. David C. Nye)

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF NORTHWESTERN BAND OF THE SHOSHONE NATION AND REVERSAL

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The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The United States entered into a Treaty with the Northwestern Band of the Shoshone Nation ("Northwestern Band" or "Band") at Fort Bridger in 1868 and maintains a government-to-government relationship with the Northwestern Band. The United States has an interest in the proper interpretation of that Treaty, including the hunting rights reserved in Article IV.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing for failure to state a claim the Northwestern Band's Complaint seeking a declaratory judgment that its members retain off-reservation hunting rights under the Fort Bridger Treaty of 1868 based on the court's conclusion that the word "but" in Article IV of the Treaty unambiguously conditions the Indians' hunting rights on their settlement on one of the reservations specified in the Treaty.

STATEMENT OF THE CASE

A. Historical background

Before contact with white settlers, many related Shoshone-speaking hunting-and-gathering groups occupied a large territory centered in "eastern Nevada, southern Idaho, northern Utah and western Wyoming." *Shoshone Tribe of Indians*

of the Wind River Reservation v. United States (Docket No. 326), 11 Ind. Cl. Comm. 387, 390 (1962); *see also Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340 (1945) (the "Northwestern bands" were part of a "nomadic Indian nation" that "roamed over eighty million acres of prairie, forest and mountain in the present states of Wyoming, Colorado, Utah, Idaho and Nevada").

After gold was discovered in California, conflicts arose between the Shoshone and the white travelers and settlers who had caused "the Indians' game [to] disappear[] from their hunting grounds," reducing the Shoshone to a state of "misery." *Northwestern Bands*, 324 U.S. at 341.

In 1863, federal treaty commissioners entered into five peace treaties with Shoshone bands in which the Indians guaranteed safe travel to settlers through their specified lands and the United States pledged certain financial support. *Id.* at 341-44; *see also Shoshone Tribe*, 11 Ind. Cl. Comm. at 395-400. Of relevance here, the "Eastern Bands" entered into the Treaty of July 2, 1863, 18 Stat. 685, at Fort Bridger in Utah Territory as to their claimed lands. *See Shoshone Tribe*, 11 Ind. Cl. Comm. at 395-96; *see also Northwestern Bands*, 324 U.S. at 342 n.6. The "northwestern bands of Shoshonee Indians," led by "Pokatello," entered into the Treaty of July 30, 1863, 13 Stat. 663, at Box Elder in Utah Territory as to their claimed lands, which were described as being "bounded on the west by Raft River

and on the east by the Porteneuf Mountains." *See Shoshone Tribe*, 11 Ind. Cl. Comm. at 396-397; *see also Northwestern Bands*, 324 U.S. at 343-44. The "mixed bands of Bannocks and Shoshonees occupying the valley of Shoshonee River" entered into the Treaty of October 14, 1863, 5 Kappler 693, at Soda Springs in current-day Idaho as to their claimed lands. *See Shoshone Tribe*, 11 Ind. Cl. Comm. at 398.

The United States then entered into the Treaty of July 3, 1868 ("1868 Treaty" or "Treaty"), 15 Stat. 673, at Fort Bridger with the "Shoshonee (eastern band) and Bannack tribes of Indians." *See* Addendum. The Treaty was executed by Washakie and seven other representatives of the "Shoshonees" and six representatives of the "Bannacks." 15 Stat. 677. The Indian Claims Commission ("ICC") found that the Northwestern Band was represented by Washakie, as explained below (p. 5).

In Article II of the Treaty, the United States agreed to "set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians" a reservation in the Wind River area of present-day Wyoming. 15 Stat. 674. The United States also agreed that "whenever the Bannacks desire a reservation to be set apart for their use," the President would establish a suitable reservation for them. *Id*. In exchange, the "said Indians" agreed to "relinquish all title, claims, or rights" to their lands beyond those reservations. *Id*.

Notwithstanding the land cession in Article II, the Indians reserved their right to hunt beyond the reservations. Article IV states:

> 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. 674-75.

The second reservation contemplated in Article II was established in the Fort Hall area of present-day Idaho by Executive Order dated July 30, 1869.

In holding that the Northwestern Band was not entitled to compensation for the asserted taking of its land under the 1863 peace treaty (claimed to be about 15 million acres), the Court of Claims and the Supreme Court analyzed the Band's history following that treaty. *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642 (1942), *aff'd*, 324 U.S. 335 (1945). The Commissioner of Indian Affairs had appointed a commission in 1873 to investigate the Indian groups in northern Utah, northern Nevada, and southern Idaho in order to determine "the probability of gathering them upon one or more reservations where they could be more immediately under the care of the government." *Northwestern Bands*, 324 U.S. at 345 n.7 (quoting 95 Ct. Cl. at 677). The commission found that, as of 1873, an indefinite number of Northwestern Shoshones had moved to

the Wind River Reservation, 400 resided on the Fort Hall Reservation, and 400 resided in southern Idaho. *Id*. In addition, in 1873, an Indian agent assigned roughly 300 Northwestern Shoshones who had gathered in northeastern Nevada to a small tract there, which was established as a reservation for the Northwestern Shoshones by Executive Order in 1877. *Id*. However, that reservation was terminated in 1879, and they were moved west to the Duck Valley Indian Reservation established for the Western Shoshone Indians. 324 U.S. at 345 n.7.

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 1868 Treaty. The ICC found, based on the historical record before it, that "the famed chief Washakie" negotiated the 1868 Treaty on behalf of the several bands comprising the "Shoshone Tribe," which included "the eastern bands parties to the Treaty of July 2, 1863; the northwestern bands parties to the Treaty of July 30, 1863; and the so-called 'mixed bands of Bannocks and Shoshonees' parties to the Treaty of October 14, 1863." *Shoshone Tribe*, 11 Ind. Cl. Comm. at 403. The ICC found that "[w]hile Pocatello's band 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 in Finding 20 the boundaries of the large territory "aboriginally exclusively used and occupied" by the Shoshone Tribe, including the Northwestern Band. *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 in the 1868 Treaty the land to which it held aboriginal title, described in Finding 20, and that it was entitled to compensation for that land. *Id*. at 415; *see Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 299 U.S. 476, 485 (1937) (stating that over 41 million acres of land was ceded in the 1868 Treaty).[1] The amount of compensation was resolved through settlement. *Shoshone-Bannock Tribes v. United States*, 19 Ind. Cl. Comm. 3 (1968).

The federal government maintains separate government-to-government relationships with the Eastern Shoshone Tribe, the Shoshone-Bannock Tribe, and the Northwestern Band of the Shoshone Nation. *See* 87 Fed. Reg. 4,636 (Jan. 28, 2022). The Eastern Shoshone Tribe resides on the Wind River Reservation. The

[1] The Court of Claims had found that only the "Eastern bands of the Shoshone Tribe" were parties to the 1868 Treaty and only they ceded their lands in that Treaty, 95 Ct. Cl. at 677, a finding the Supreme Court recited, 324 U.S. at 345. However, the jurisdictional statute in that case authorized the Court of Claims to consider only claims arising out of the 1863 peace treaties of Fort Bridger and Box Elder, an 1874 statute, and any subsequent federal actions, with no mention of the 1868 Treaty, and the Northwestern Band did not base its claim on the 1868 Treaty. 324 U.S. at 337-38.

Shoshone-Bannock Tribe resides on the Fort Hall Reservation. The Northwestern Band "does not reside" on either reservation, but instead "settled in northern Utah and adapted to an agrarian way of li[f]e." ER122.

In 1985, the Northwestern Band asked the Bureau of Indian Affairs within the U.S. Department of the Interior to confirm that the Band had reserved off-reservation hunting and fishing rights in the 1868 Treaty. Lawrence E. Cox, Acting Regional Solicitor, Pacific Northwest Region, concluded in a March 20, 1985 memorandum ("Cox Memorandum"), that "the Northwestern Band does possess treaty protected hunting and fishing rights which may be exercised on the unoccupied lands within the area acquired by the United States pursuant to the 1868 Treaty of Fort Bridger." ER69. Interior relied on the ICC's finding that Chief Washakie represented the Northwestern Band in the treaty negotiations and that the Band was a party to the 1868 Treaty even though its leader, Pocatello, was not a treaty signatory. ER71-72.

B. District court proceedings

The Northwestern Band filed a Complaint against the State of Idaho and state officials in their official capacities seeking a declaratory judgment that the Band's members have hunting rights under Article IV of the 1868 Treaty, 15 Stat. 674. ER121, 123-24. The Complaint describes as factual background the aboriginal territory and social organization of the Shoshone bands and the

circumstances surrounding the 1863 peace treaties and the 1868 Treaty. ER116-22. The Band also describes two occasions when Idaho prosecuted tribal members for state-law hunting violations: (1) the 1997 citation and subsequent conviction of Shane and Wayde Warner, and (2) the 2019 citation of Wyatt Athay and Shanelle Long. ER122-23. The Northwestern Band claims that the State is unlawfully depriving Band members of their federal treaty hunting rights and seeks a declaration that the Northwestern Band possesses such rights. ER123-24.

As the Northwestern Band explained in its Opening Brief (at 12-13), the State moved to dismiss the Complaint on numerous grounds under Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7), and 19, devoting only limited briefing to its textual treaty-interpretation argument that the hunting right in the second clause of Article IV was contingent on living on a reservation as required in the first clause of Article IV. On that point, the Northwestern Band argued in response that the State misinterpreted the text of Article IV and that the Treaty had to be interpreted as the Band would have understood it, noting that the court had to accept as true the factual allegations in the Complaint for purposes of the State's motion under Rule 12(b)(6) and suggesting that factual development would be needed to resolve the case. ER61-65.

The district court granted the State's motion to dismiss the Complaint in its entirety for failure to state a claim. ER13-23. In the court's view, "[t]he plain

language of the 1868 Treaty clearly indicates that a necessary condition of receiving Hunting Rights was living on the Fort Hall Reservation or the Wind River Reservation." ER14. The court focused on the "conjunctive" word "but" in Article IV and examined its "common usage." ER15-16. The court concluded that the word "but" made the hunting right in the second clause contingent on fulfilling the promise to live on a reservation in the first clause. ER16. And because the Northwestern Band does not live "on one of the appropriate reservations," the court held that the Band "cannot receive Hunting Rights" under the 1868 Treaty. ER18.[2]

SUMMARY OF ARGUMENT

I. The district court erred in concluding that the "plain language" of Article IV of the 1868 Treaty precludes the Northwestern Band's claim to treaty hunting rights. This Court should instead conclude that the hunting right in the second clause of Article IV is not contingent on the reservation-residence provision in the first clause of Article IV, for three reasons.

First, the Supreme Court recently interpreted the materially identical hunting-right provision in the 1868 Crow Treaty and concluded that the hunting right would terminate only if the situations identified in the *second clause* no

[2] The district court also granted the State's motion to dismiss the State of Idaho as a defendant based on the Eleventh Amendment, a holding not challenged in this appeal. ER12-13.

longer existed. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019). The district court's holding is inconsistent with that precedent.

Second, the district court misconstrued the word "but" between the first and second clauses in Article IV. The ordinary meaning of "but" merely signals a contrast between the two parts of the sentence that it connects. The district court incorrectly read "but" to make the second clause contingent on the first clause.

Third, the district court improperly failed to read the 1868 Treaty as a whole. The government's objective in the 1868 Treaty was to enable white settlement in the Shoshone territory. The promise to move to a reservation was not, as the district court concluded, the only material consideration the party tribes gave the United States. Achieving the government's objective primarily depended on the tribes' promises to cede their vast territory other than the reserved lands (Article II) and to thereafter maintain the peace (Article I and the second clause of Article IV).

II. The district court acknowledged that it needed to consider the Northwestern Band's understanding of the 1868 Treaty, but it did not actually do so. It failed to accept the relevant factual allegations in the Complaint as true and to consider the available evidence, both of which show that the Band would have understood that, after ceding its lands, it would maintain its hunting rights so long as it maintained the peace with the white settlers, which it did.

III. The district court misplaced reliance on some "contextual reasons" that provide no support for its misguided treaty interpretation. An Idaho district court decision rejecting the Northwestern Band's treaty hunting right based on a similarly deficient analysis is of no consequence. And the district court improperly dismissed Interior's 1985 conclusion that the Northwestern Band possesses hunting rights under Article IV of the 1868 Treaty, which the United States now reaffirms by filing this amicus brief.

Accordingly, the judgment of the district court should be reversed.

ARGUMENT

I. The plain language of the 1868 Treaty provides for reserved hunting rights without regard to residence on the Wind River or Fort Hall reservation.

A. The Supreme Court so interpreted materially identical treaty language in *Herrera v. Wyoming*.

The Supreme Court recently interpreted a hunting right materially identical to the one at issue here contained in the Treaty Between the United States of America and the Crow Tribe of Indians ("Crow Treaty"), May 7, 1868, 15 Stat. 649.[3] *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). The Court explained that

[3] There are no differences of material consequence between the two treaties, signed just two months apart. The only substantive difference is that the 1868 Treaty provides in Article II for the potential establishment of a second reservation. The only textual differences in Article IV of the two treaties are that the Crow Treaty, 15 Stat. 650, refers to "the reservation" (singular); has a comma, rather than a

"[t]he Shoshone-Bannock Treaty," *i.e.*, the 1868 Treaty at issue here, "and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language *reserving* an off-reservation hunting right." *Id*. at 1694 (emphasis added). It is long-established that such provisions in treaties are not a *grant* of a right to the Indians, but rather are simply a reservation of a right that they already had. *See United States v. Winans*, 198 U.S. 371, 381 (1905). The question presented in *Herrera* was whether that reserved hunting right survived, that is, "whether Congress has expressly abrogated [it] or whether a termination point identified in the treaty itself has been satisfied." 139 S. Ct. at 1696.

The Supreme Court identified no congressional abrogation of the Crow hunting right, and likewise none has been suggested for the Northwestern Band hunting right. Of relevance here, the Supreme Court interpreted the language of the Crow Treaty to "identif[y] four situations that would terminate the [Tribe's hunting] right: (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 Crow Treaty, art. IV, 15 Stat. 650).

There is no basis to construe the 1868 Treaty differently. Like the Crow Treaty, the 1868 Treaty expressly identifies only four situations that would

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semicolon, before the "but"; and says "as long as," rather than "so long as," "peace subsists."

terminate the Indians' hunting right. Two of those situations—(1) and (2)—appear in the description of where the Indians may hunt (*i.e.*, "unoccupied lands of the United States"). The other two situations—(3) and (4)—appear as conditions on the hunting right, following the words "so long as"—words commonly used to introduce a condition. Living on a reservation is not one of the specified conditions.

The district court impermissibly grafted a fifth condition onto the hunting right in the 1868 Treaty at issue here. If the parties to the Treaty had wanted to make the hunting right contingent on living on a reservation, they could have easily done so, using the same "so long as" language. But they did not do so in this Treaty or the treaty at issue in *Herrera*.

B. The word "but" does not make the reserved hunting right contingent on settlement on a reservation.

The district court focused on the "conjunctive" word "but," which appears after the semicolon in Article IV of the 1868 Treaty (and in the analogous location in the Crow Treaty at issue in *Herrera*). ER15. The court explained that "the language preceding the term 'but' in a sentence is related in some fashion to the language following the term." *Id.* "In common usage," according to the court, "but" signifies an "exception to," "limitation of," or "addition to" the preceding language. ER16-17. In the court's view, "the most reasonable reading" is that "but" introduces "an exception to the promise to stay on the reservation in the first

independent clause, as the second independent clause explains the rights under which those Indians who live on the reservation may leave the reservation and still receive the benefits of the treaty." ER16.

The district court's interpretation suggests that the first clause of Article IV expresses the government's intent to essentially confine Indians to the reservations that were reserved for their benefit, such that express permission must be given for them to leave for any purpose. That was not the intent in the 1868 Treaty or other reservation-establishing treaties, although hunting and fishing rights in ceded lands must be expressly reserved as in the second clause of Article IV. Rephrased more benignly, the district court concluded that the reserved hunting right is *contingent on* living on a reservation. But that conclusion does not follow from the common usage of "but" it described.

The fact that "but" is a conjunction does not require that conclusion. Both "but" and "and" are conjunctions. If Article IV had said "and" instead of "but," no one would think that, in connecting the two parts of the sentence separated by the semicolon, it was making what comes after the "and" contingent on what comes before. How then is "but" different from "and"? As the district court's own use of "but" in its opinion shows, "but" both connects two parts of a sentence and contrasts those two parts, without making the second contingent on the first:

- "Governor Brad Little of the State of Idaho was originally named as a defendant, *but* the parties stipulated to his dismissal early on." ER10

(emphasis added). Using "and" instead of "but" would not change the meaning of the sentence, but using "but" highlights the contrast between the Governor's status in the case *originally* and his status in the case *later on*.

- "A complaint 'does not need detailed factual allegations,' *but* it must set forth 'more than labels and conclusions, and a formulaic recitation of the elements.'" ER11 (citation omitted; emphasis added). Using "and" instead of "but" would not change the meaning of the sentence, but using "but" highlights the contrast between what a complaint *need not* include and what a complaint *must* include.

- "The Warners, members of the Northwestern Band, admitted to hunting elk outside of the state season *but* asserted that their actions were protected by their Hunting Rights." ER20 (emphasis added). Using "and" instead of "but" would not change the meaning of the sentence, but using "but" highlights the contrast between the substance of the Warners' admission (they were hunting out of season) and the substance of their assertion (they were *nevertheless* not liable).

Article IV of the 1868 Treaty likewise uses "but" to indicate a contrast. The second clause draws a contrast between what the Indians may do *on reservation* (make it their "permanent home") and what they may do *off reservation* (hunt in certain places and under certain conditions). The second clause also draws a contrast between what the Indians *may not* do off reservation (make a "permanent settlement") and what they *may* do off reservation (hunt).

The district court incorrectly read "but" to do something more—namely, to make what comes after the word *contingent* on what comes before. That reading does not find any support in the ordinary meaning of "but," which merely signals a contrast between the two parts of the sentence that it connects. None of the court's own uses of the word quoted above makes the second part of the sentence

contingent on the first. And, as noted above (p. 13), the court had explained that "but" commonly signifies "an exception to," a "limitation of," or an "addition to" the immediately preceding language, ER16-17, all of which are different from signifying that the preceding language is an *express condition* of the following language.

If the district court were correct to read "but" to make the second part of a sentence contingent on the first, the meaning of the sentence would change if the order of the parts were flipped. But in ordinary English, flipping the order of the clauses around a "but" does not change the sentence's basic meaning. Looking again at the examples above (pp. 14-15) from the court's own opinion, reversing the order of the clauses in each of the sentences would not change anything. The same is true here. If Article IV said that "the Indians may hunt off reservation, but they must settle on a reservation when the government completes the specified buildings" the meaning of Article IV would be the same. Yet, on the court's understanding of "but," the meaning would change: the Indians' settlement on the reservations (the second clause) would somehow be contingent on their right to hunt off reservation (the first clause). That reading would not make sense.

The district court stated that the use of "but" in Articles I, V, VI, and IX "reinforces" its interpretation of "but" in Article IV. ER17 ("the language following the term 'but' is always building upon, elaborating, or distinguishing the

language before it"). But in none of those provisions is the text after "but" contingent on the text before it.

C. The district court failed to read the 1868 Treaty as a whole.

As part of its "plain language" analysis, ER14, the district court stated that "[t]he promise to live on the reservation was the most significant promise made by the Indians in that treaty," ER17. The court asserted, without citation, that "the promise to live on a reservation … was viewed as the solution to the wars between the settlers and the Indians." ER18. In the court's view, the other consideration the Indians gave for the hunting right was "*de minimis* consideration, at best." ER17; *see also* ER18 ("It would make little sense for the government to grant Hunting Rights but not receive anything in exchange."). The court misunderstood the bargain. As explained above (p. 12), the government did not "grant" the off-reservation hunting right but instead recognized that the Band would *retain* that pre-existing right. The district court also ignored the other significant promises the Indians made in the 1868 Treaty.

It is a fundamental principle of construction that a document (whether a treaty, a statute, or a contract) must be read as a whole. *See Ysleta del Sur Pueblo v. Texas*, 2022 WL 2135494, at *8 (S. Ct. June 15, 2022) (statutes must be construed "so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant" (quoting *Corley v. United States*,

556 U. S. 303, 314 (2009)). Remarkably, the district court failed to acknowledge the Indians' cession of their aboriginal lands in the final clause of Article II: "henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits [of the reservations] aforesaid." Through that clause, the Indians ceded to the United States over 41 million acres, including that portion of the land that the Northwestern Band had occupied and used. *See supra* p. 6. That cession, which was not contingent on future settlement on the Wind River or Fort Hall Reservation, plainly was not "*de minimis*."

Moreover, the district court ignored two other treaty provisions that expressly address maintaining the peace. In Article I, the United States and the Indians both "pledged" their "honor" to maintain "peace," including by agreeing to deliver "bad men" among the whites and the Indians to the United States for prosecution. 15 Stat. 673-74. And, most importantly, the off-reservation hunting right in the second clause of Article IV was expressly conditioned on maintaining the peace—"so long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 675.

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For all of these reasons, this Court should hold that the district court erred in concluding "that the Hunting Rights were inextricably tied to the promise to live

on the reservation, and a tribe cannot receive Hunting Rights without living on one of the appropriate reservations." ER18. The district court's conclusion that the text of Article IV expressly conditioned the hunting right on reservation residence is inconsistent with the Supreme Court's interpretation of the materially identical provision of the Crow Treaty in *Herrera*, ascribes an implausible meaning to the word "but," is premised on the misunderstanding that the government affirmatively "granted" off-reservation hunting rights, and fails to read the Treaty as a whole. To the contrary, the plain language conditions the reserved hunting right on only the four factors specified in the *second clause* of Article IV.

II. The available evidence supports the conclusion that the Northwestern Band would not reasonably have understood that its reserved hunting right was contingent on moving to a reservation.

The district court separately erred by assuming, without a record basis, that its reading of the Treaty was consistent with the Northwestern Band's historical understanding. The district court correctly stated the Indian canon of construction that treaties must be construed "in the sense in which Indians understood them." ER18 (quoting *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017)). But its analysis failed to apply that rule.

Without considering any evidence of negotiation history or other historical context, the court simply stated that "[c]onstruing treaties in a manner in which the Indians understood them at the time of signing is fairly straightforward," *id*., and

quickly concluded that "the Court's interpretation aligns with how the 1868 Treaty would be understood by the Indians at the time it was written," ER19. The court's sole basis for that conclusion was its view of the unlikelihood 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." *Id*.

The court was apparently referring to the Band's argument in its Response to the Motion to Dismiss, that " 'but' separates two independent clauses (made more apparent by the existence of the semicolon immediately preceding the word 'but') indicating a contrasting clause from one that has already been asserted." ER62. But the Band there was responding to the *State's* textual interpretation, not asserting that the Band so understood English grammar in 1868. Determining the *Northwestern Band's* contemporaneous understanding, as the Band correctly argued, requires consideration of the historical circumstances surrounding the Treaty that were alleged in the Complaint and that would be developed as the case proceeded. ER63-64.

The district court erred in rejecting the Northwestern Band's understanding of the Treaty based on very limited briefing on a motion to dismiss. Even though the district court had doubts about the Band's claimed Treaty right, the court should have allowed the Band to develop a factual record relevant to its

understanding at the time of signing, as other trial courts have done. *See*, *e.g.*, *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").

The Supreme Court has repeatedly rejected the apparent meaning of treaty text when there is evidence that the Indians understood the words differently at the time of the treaty. In deciding whether the 1855 Yakama Treaty bars a state tax on tribal fuel importers, the Court recently explained that although "[t]he words 'in common with' on their face could be read to permit application to the Yakamas" of certain state statutes, the Court had "concluded the contrary" in four prior cases construing the treaty in other contexts "because that is not what the Yakamas understood the words to mean in 1855." *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019). The parties and the Court were able to draw on historical evidence of the Yakamas' understanding of that treaty that had been developed in prior litigation. *Id*. at 1012, 1016 (relying on unchallenged factual findings from a prior case involving restrictions on logging operations).

The district court's error was particularly egregious because the available historical evidence supports the Band's reading of the Treaty. The State had cursorily asserted that its textual interpretation of the 1868 Treaty was supported by the Treaty's negotiation history, citing *State v. Cutler*, 708 P.2d 853, 857-58 (Idaho 1985). ER97. The district court did not mention *Cutler*. The portion of the negotiation history quoted in *Cutler* is actually more supportive of the Band's Treaty interpretation.

The question in *Cutler* was whether the land on which Shoshone-Bannock Tribe members had hunted was "unoccupied lands of the United States" within the meaning of Article IV of the 1868 Treaty. The Idaho Supreme Court quoted a portion of General Auger's explanation of the Treaty's purposes. *Id*. General Auger explained to the tribal representatives that a reservation was being established so that: (1) the land outside the reservation would be available for the homes of white settlers; (2) the Indians would have a home where white men would not be "permitted to come or settle"; and (3) the Indians would learn to live by growing crops and raising livestock because the day was coming when the game on which they depended would be gone. *Id*. General Auger said that the government "wishes you to go [to the reservation] with all your people as soon as possible," but he did not use words of command or specify a date. *Id*.

It is significant that the Indians did not promise in the 1868 Treaty to settle on a reservation immediately. The Treaty provided that settlement of the Wind River reservation would follow the government's construction of the specified agency buildings, and as for the contemplated second reservation, the government first had to establish a reservation and then construct agency buildings. 15 Stat. 674. The Treaty did not set a deadline for the Indians to settle on either reservation. Article IV did not preclude the Indians from exercising their reserved hunting rights *before* they settled on a reservation. The only question is whether the Indians understood that the hunting rights would *terminate* at some unspecified future date if they did not move to a reservation.

The historical record developed in prior litigation reflects no such understanding. To the contrary, it indicates that the Northwestern Band would have thought that ceding its lands and keeping the peace would fulfill its part of the bargain as explained by General Auger. The Band made land available for white settlers by ceding its expansive lands in the 1868 Treaty, and we are aware of no evidence that its occupation of a modest amount of land in Utah on which it has maintained an agrarian lifestyle was ever viewed as an obstacle to that settlement. And as for peace, the Court of Claims found that the Band's "depredations" were caused by their "starving condition"—resulting from the destruction of their livelihood—and "the acts and conduct of certain unscrupulous whites," but that

"[a]fter the making of [the 1863 peace] treaties and the furnishing of annuities in goods and provisions, the Indians remained peaceful and did not cause the United States or the white settlers any serious trouble." *Northwestern Bands*, 95 Ct. Cl. at 686-88.

The Indians could reasonably have understood General Auger to be describing the reservation as a *benefit* provided to them. It is not apparent why the Indians would have thought that their hunting rights would terminate if they did not avail themselves of that benefit. And in the 1870s, as explained above (pp. 4-5), the government set aside additional land in Nevada for the Northwestern Band and did not order them to move to the Wind River or Fort Hall Reservation, further weighing against a conclusion that the Indians understood that their hunting rights would terminate if they did not move to a reservation specified in the 1868 Treaty.

The most reasonable conclusion from the available evidence is that the Northwestern Band understood that its hunting right after the cession depended only on its maintaining peace with white settlers "on the borders of the hunting districts"—the condition stated in the second clause of Article IV—wherever it

made its home. There is no serious question that the Northwestern Band fulfilled that express condition.[4]

The district court declined to apply the related Indian canon of construction requiring ambiguous provisions in treaties to be interpreted for the benefit of the Indians, *see*, *e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), because, in its view, the 1868 Treaty unambiguously conditioned the treaty hunting right on residence on one of the reservations provided for in the Treaty.

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[4] Under general contract-law principles, a party's breach of one provision may potentially excuse the other party from performing under another contract provision even without an express condition: "[I]t is a condition of each party's remaining duties to render performance to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." Restatement (Second) of Contracts § 237 (Westlaw May 2022 update); *see id*. at cmt. a (referring to such conditions as "constructive conditions of exchange"). The standard of materiality is "necessarily imprecise and flexible" because "[i]t is to be applied in the light of the facts of each case in such a way as to further the purpose of securing for each party his expectation of an exchange of performances." Restatement (Second) of Contracts § 241, cmt. a. The facts here do not lead to a conclusion that the Northwestern Band's failure to move to a reservation was "material" to its hunting rights.

The State did not argue that the Band's decision not to settle on the Wind River or Fort Hall Reservation is a material breach of a constructive condition that relieves the United States from honoring the Band's reserved hunting rights. Nor could it. 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—in litigation or by force—to remove the Indians; non-Indians claiming a right to the land may not do so. *See Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 370-72 (1856). Similarly here, what (if any) consequences should attach to the Northwestern Band's failure to move to one of the reservations is for the United States to decide.

ER18-19. As explained, however, that is not a reasonable interpretation, let alone the unambiguously correct interpretation. A proper textual interpretation, supported by a fair analysis of how the Northwestern Band would have understood the Treaty, leads to a decision in the Band's favor without regard to this Indian canon. But if any doubt remains, ambiguity should be resolved in the Band's favor.

III. The district court misplaced reliance on three "contextual reasons."

While ignoring the relevant historical context of the 1868 Treaty, the district court thought that its asserted plain-language interpretation was "[r]einforced" by three other "[c]ontextual [r]easons." ER19. None of those reasons is persuasive.

First, the district court found support in a state district court's rejection of the treaty-hunting-right defense of Northwestern Band members Shane and Wayde Warner in their prosecution for hunting elk out of season. ER19-21 (discussing *State v. Warner*, Idaho Case Nos. CR-98-00014 and CR-98-00015 (Idaho Dist. Ct. 2000), ER104-13). But the state court's treaty analysis was similarly deficient. The state court first held that the 1868 Treaty extinguished the Northwestern Band's aboriginal title, accepting the ICC's finding that Chief Washakie signed the 1868 Treaty on behalf of the Northwestern Band. ER108-09. But it then held that the treaty hunting rights "vested" only in the Eastern Shoshone and Shoshone-Bannock Tribes, and that the Northwestern Band failed to prove its "political

cohesion" with those two tribes under the analysis in *United States v. Oregon*, 29 F.3d 481, 484, 486 (9th Cir. 1994), amended by 43 F.3d 1284 (9th Cir. 1994). ER109-11. The state court also stated, however, that the "Northwestern Band has violated th[e] condition" in the first clause of Article IV, which is something the Band could do only if it had reserved hunting rights. ER111. This inconsistent analysis does nothing to bolster the decision below.

Second, the district court drew an adverse inference from what it viewed as the Band's belated attempt to "regain" its treaty hunting rights in the *Warner* case. ER21. But, as explained, a tribe retains the rights it has not ceded in a treaty and it need not litigate its reserved rights until they are denied. The district court's unwarranted inference provides no support for its erroneous "plain language" treaty interpretation.

Third, the district court rejected the Northwestern Band's reliance on the Cox Memorandum because (1) Interior's Treaty interpretation did not bind the court, (2) the 1985 memorandum predated this Court's political-cohesion analysis in *Oregon*, and (3) Interior assertedly did not consider "the Northwestern Band's decision to not live on a reservation." ER21-22. None of those points justifies ignoring the Cox Memorandum.

While the Cox Memorandum does not bind the district court, the United States is a party to the 1868 Treaty and Interior's conclusion that the Northwestern

Band is a party to the Treaty with off-reservation hunting rights is entitled to serious consideration. Moreover, *Oregon* addressed the materially different text and historical context of the treaties at issue in that Columbia River treaty-fishing-rights litigation as well as the specific post-treaty histories of the many involved tribes. *See* 29 F.3d at 484-87. Understanding that the *Oregon* analysis is "very fact driven," the district court declined to rule on the State's argument that the Northwestern Band had no treaty hunting rights because it had not maintained political cohesion with the other treaty tribes. ER22-23. And while noting in the Cox Memorandum that Northwestern Band members did not live on a reservation, Interior correctly focused on the conditions in the second clause of Article IV and concluded that they could hunt on "unoccupied lands of the United States" as long as game could be found there, provided that they remained at peace with white settlers. ER69, ER71. The United States, having now considered all the arguments in this case, is filing this amicus brief in support of the Northwestern Band and reversal.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the Complaint should be reversed. Indeed, for those reasons, this Court may declare that the Northwestern Band reserved its hunting rights under the 1868 Treaty subject to the conditions in the second clause of Article IV. The case should be

remanded to the district court for the determination of all other issues presented in this case.

Respectfully submitted,

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June 28, 2022
DJ Number 90-12-16551

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 6,989 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) because it has been prepared using 14-point Times New Roman font.

/s/ Mary Gabrielle Sprague
MARY GABRIELLE SPRAGUE

ADDENDUM

Treaty of July 3, 1868, 15 Stat. 673

Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians; Concluded, July 3, 1868; Ratification advised, February 16, 1869; Proclaimed, February 24, 1869.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA, July 3, 1868.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble. WHEREAS a treaty was made and concluded at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Wash-a-kie, Wau-ni-pitz, and other chiefs and headmen of the Eastern Band of Shoshonee Indians, and Tag-gee, Tay-to-ba, and other chiefs and headmen of the Bannack tribe of Indians, on the part of said band and tribe of Indians respectively, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, made the third Day of July, 1868, at Fort Bridger, Utah Territory.

Contracting parties. Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

War to cease and peace to be kept. ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Offenders against the Indians to be arrested, &c. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Wrong-doers against the whites to be punished. If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other

treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Damages.

Reservation.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along middle of channel of Owl creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Boundaries.

Certain persons not to enter or reside thereon.

Buildings on reservation.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building so soon as a sufficient number 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 Shoshonee reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

Indians to make reservations their permanent home when, &c.

Hunting.

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.

Agent's residence, office, and duties.

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 Shoshonee 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 inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Heads of families may select lands for farming.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Others may select land for cultivation.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

Surveys.

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

Alienation and descent of property.

Education.

ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Children to attend school.

Schoolhouses and teachers.

Seeds and agricultural implements.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each

succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

Instruction in farming

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Delivery of goods in lieu of money or other annuities.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

Clothing.

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper.

Other necessary articles.

Appropriation to continue for ten years.

And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

Army officer to attend the delivery.

United States to furnish physician, teachers, mechanics, &c.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

No treaty for cession of reservation to be valid, unless, &c.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI. of this treaty.

Presents for best crops.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

Agent to reside at Fort Bridger, until, &c.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall

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

N. G. TAYLOR, [SEAL.]
W. T. SHERMAN, [SEAL.]
Lt. Genl.
WM. S. HARNEY, [SEAL.]
JOHN B. SANBORN, [SEAL.]
S. F. TAPPAN, [SEAL.]
C. C. AUGUR, [SEAL.]
Bvt. Major Genl. U. S. A., Commissioners.
ALFRED H. TERRY, [SEAL.]
Brig. Gen. and Bvt. M. Gen. U. S. A.

Attest:
A. S. H. WHITE, *Secretary.*

Shoshonees:

WASH-A-KIE.	his -- mark.
WAU-NY-PITZ.	his -- mark.
TOOP-SE-PO-WOT.	his -- mark.
NAR-KOK.	his -- mark.
TABOONSHE-YA.	his -- mark.
BAZEEL.	his -- mark.
PAN-TO-SHE-GA.	his -- mark.
NINNY-BITSE.	his -- mark.

Bannacks:

TAGGEE.	his + mark.
TAY-TO-BA.	his + mark.
WE-RAT-ZE-WON-A-GEN.	his + mark.
COO-SHA-GAN.	his + mark.
PAN-SOOK-A-MOTSE.	his + mark.
A-WITE-ETSE.	his + mark.

Witnesses:
HENRY A. MORROW,
Lt. Col. 36th Infantry and Bvt. Col. U. S. A., Comdg. Ft. Bridger.
LUTHER MANPA, *U. S. Indian Agent.*
W. A. CARTER.
J. VAN ALLEN CARTER, *Interpreter.*

Ratification.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixteenth day of February, one thousand eight hundred and sixty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 16, 1869.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Shoshonee (eastern band) and Bannack tribes of Indians, made and concluded at Fort Bridger, Utah Territory, on the third July, 1868.

Attest:
GEO. C. GORHAM,
Secretary.

Proclamation.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and con-

sent of the Senate, as expressed in its resolution of the sixteenth of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-
[SEAL.] nine, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD,
Secretary of State.