Northwestern Band of the Shoshone Nation v. Wooten, --- F.4th ---, 2023 WL 6823177 (9th Cir., Oct. 17, 2023).

- **Holding**: The 1868 Fort Bridger Treaty with certain Shoshone bands and the affiliated Bannock Tribe did not make exercise of the hunting right reserved by the Tribes contingent upon residency on one of the two reservations contemplated by the Treaty.
- **Summary**: In 2019, the State of Idaho cited two members of the Northwestern Band of the Shoshone Nation (NWB) for hunting without a state-issued license. Prior litigation in state court involving other tribal members had established that members of the NWB did not have treaty hunting rights under the 1868 Treaty of Fort Bridger Treaty because such rights were limited to the Indians who relocated to the two reservations contemplated in the Treaty, thus creating two tribal entities (now known as the Eastern Shoshone Tribe of the Wind River Reservation and the Shoshone-Bannock Tribes of the Fort Hall Reservation) that held the hunting rights, and the NWB had not maintained political cohesion with either tribal entity.

  Following the 2019 citations, the NWB brought an action against the State of Idaho (eventually dismissed on 11th Amendment grounds) and Idaho officials, arguing that the NWB retained hunting rights pursuant to Article IV of the 1868 Treaty of Fort Bridger Treaty, which provides:

  > The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

  Idaho's position was that the second clause in Article IV, introduced with the conjunctive "but," made exercise of the hunting right therein conditional upon compliance with the first clause, requiring the Indians to make the two reservations their permanent homes. The court rejected the argument for several reasons. First, Article IV contains two express conditions introduced by the "phrase "so long as:" the Indians may hunt only so long as game is found, and only so long as peace subsists among the whites and Indians on the borders of the hunting districts. The court also identified as "conditions" the requirement that the land must belong to the United States, and must be unoccupied. The court concluded that if the parties had intended to make residency on one of the two reservations a condition, "they could have easily done so … by using the same clear language that they used to impose other conditions on the hunting right."

  Second, reading Article IV in conjunction with Article II led to the conclusion "that the parties did not intend to make the hunting right contingent on permanent residence on a reservation," because Article II, which established the Wind River Reservation, also provided that the "United States … would create a second reservation for the Bannock 'whenever' either the Bannock 'desire[d] a reservation' or the President 'deem[ed] it advisable.'" Because, "at the time of the Treaty signing, it was uncertain that a second reservation for the Bannock would be created … we conclude that the Indians would not have understood Article IV to mean that the

Bannock (or any Shoshone band) would forfeit its reserved hunting right if it did not reside on a reservation."

The court further rejected the district court's reasoning that the promise to live on a reservation would be "superfluous" unless a breach of that promise resulted in forfeiture of the hunting right. The court found such reasoning to violate the fundamental premise that treaty hunting rights are not a grant of rights to a tribe, but a reservation of rights by the tribe. The court further concluded that "the promise to reside on a reservation was *not* critical or material to the parties' agreement. The critical promises made by the Tribes were the promise to maintain peace and the promise to relinquish their land claims," as demonstrated by the fact that Article IV "expressly made the reserved hunting right contingent on maintaining peace."

Accordingly, the district court was reversed, and the case remanded for consideration of the Idaho officials' alternative argument that the hunting rights could only be exercised by Indians that had maintained political cohesion with the two tribal entities contemplated by the Treaty, and its argument that the complaint should be dismissed for failure to join a necessary and indispensable party that cannot be joined due to sovereign immunity, the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation.

- **Relevant (2023) Deskbook Section**: 9:11