IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANDAN, HIDATSA, AND ARIKARA NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants, and STATE OF NORTH DAKOTA, Intervenor-Defendant.	)	Civ. No. 1:20-cv-1918-ABJ

STATE OF NORTH DAKOTA'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

The Supreme Court has repeatedly affirmed the strong presumption of State title to the beds of navigable waters upon statehood, and the need for clear and substantial evidence to rebut that presumption. "The mere fact that the bed of a navigable water lies within the boundaries described in the treaty [creating a tribal reservation] does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Montana v. United States*, 450 U.S. 544, 554 (1981). The pleadings here fail to overcome the strong presumption of North Dakota's title. And they certainly do not demonstrate as a matter of law that the United States holds title to the riverbed in trust for the Mandan, Hidatsa, and Arikara Nation ("MHA"). The Court should deny MHA's motion for judgment on the pleadings and the United States' "partial joinder" to the motion (collectively, "Motion" and "Movants"), and allow this action to proceed as previously scheduled.

The Court should approach with skepticism Movants' contention that the limited excerpts of cherry-picked documents referenced in their pleadings prove MHA was given title to the Missouri riverbed. Besides controverting the constitutionally-based presumption of State title under the Equal Footing Doctrine, the notion that Congress *sub silentio* reserved to three specific tribes exclusive ownership of any stretch of the *Missouri River*—the longest river in the United States and arguably the United States' most important artery for Western expansion and free trade in the 19th century—is irrational on its face. Moreover, MHA fails to reconcile, if the pleadings were so clear, why riverbed title "is an issue that has festered for approximately 50 years" (ECF No. 110). And for its part, the United States has previously told the Court, in this very same case, that the Missouri riverbed was never reserved for MHA and is instead owned by North Dakota. *E.g.*, ECF No. 33 at 2 ("The riverbed passed to the State upon its admission to the Union."). The fact that the United States now has taken opposite positions on the exact same question suggests,

at a minimum, the question of title may not be as clear as MHA and the United States would have this Court believe.

Even more notably, the pleadings point to *nothing*—not a single document—even *mentioning* the Missouri riverbed, much less expressly reserving ownership of it for MHA. The limited passing references to the Missouri River that are in the documents cited by Movants merely identify the river as a naturally occurring boundary for then-unsurveyed territory. Those references also show that the intent of reserving land for MHA was to ensure it had sufficient timber and agricultural resources, and there is not a single mention of MHA receiving exclusive rights over the river or riverbed. Indeed, the Supreme Court already has held that one of Movants' cited treaties reserved no riverbed rights whatsoever. *See Montana*, 450 U.S. at 553 (discussing 1851 Fort Laramie treaty). What is more, North Dakota has disclosed two leading surveyor experts who independently have reviewed the Fort Berthold Indian Reservation ("FBIR") boundaries and produced detailed expert reports concluding that FBIR excludes the riverbed. Movants by contrast proffered no such title experts and instead seek through this Motion to avoid consideration of those reports (and many other data sources).

Movants provide no justification to constrict the Court's consideration of highly relevant evidence for determining riverbed title. That question of title turns on Congressional intent, which should be determined based on a full record of the facts specific to the history of FBIR and the Missouri River. Pertinent evidentiary topics include, but are not limited to: the full extent of executive and Congressional actions reserving MHA lands, the geographic bounds of FBIR, the scope of MHA's historic relationship to the Missouri River and riverbed, the parties' historical understandings and actions regarding the Missouri River and riverbed, and FBIR's ability to function without inclusion of the riverbed. While Movants purport to disavow the need for

"historical facts" (MHA Br. 7 n.2) and "additional evidence" (US Br. 8), the reality is that the excerpted treaties, statutes, and executive orders cited in Movants' pleadings are themselves historical evidence. Movants would apparently just prefer for the Court to consider them isolated from their pertinent historical context.

Movants' reliance on caselaw from other quiet title disputes involving submerged lands further defeats their Motion for judgment on the pleadings. They do not cite any case—not a single one—quieting title to a riverbed solely on the basis of the pleadings. Movants also omit the litany of facts that are analyzed in those other cases and necessary for the courts to adjudicate title. For example, other cases adjudicating title to the beds of navigable waters have looked to other tribes' substantial dependency on surface waters and submerged lands for continued subsistence—evidence lacking in the cited pleadings (and which is contradicted by extra-pleading evidence relevant to this case, as North Dakota ultimately will show). Moreover, Movants also invoke cases that did not involve tribes or navigable rivers and attempt to manufacture general propositions of law which courts have consistently rejected in favor of careful analysis of the individual circumstances of each quiet title dispute. Stripping a state of title to the beds of navigable waters within its boundaries is a substantial intrusion into its sovereignty under the Equal Footing Doctrine; courts do not reach that conclusion lightly, and without specific and clear evidence.

Finally, res judicata does not apply or quiet title here in favor of the United States or MHA. Tellingly, even the United States does not appear to join this argument.[1] For one, MHA was not in privity with the federal government in the 1979 Interior Board of Land Appeals ("IBLA") decision on which MHA relies for its claim of res judicata. For another, there is no common

[1] The United States does not explain the meaning of its "partial" joinder. As far as the State can discern, the United States' filing supports neither MHA's res judicata argument (*see* MHA Br. 13-17) nor MHA's requested injunctive relief on the pleadings (*see* MHA Br. 18; US Br. 12).

transaction or nucleus of operative facts between this litigation and the prior administrative appeal. And third, in any event, the IBLA cannot adjudicate riverbed title; only courts can adjudicate title disputes involving claims to beds of navigable waters.

In short, North Dakota will show in this case that there is no clear evidence of Congressional intent to confer MHA with ownership of the Missouri riverbed, and that the lack of any such evidence becomes even more clear when the relevant treaties, documents, and relationships are understood in their historical context. That information exists outside the pleadings, and, consistent with every other quiet title action, including those which Movants cite, North Dakota should not be deprived of the opportunity to present its case by a motion for judgment on the pleadings that presents an incomplete and erroneous interpretation of that historical data. Movants' Motion for judgment on the pleadings should be denied.

MOVANTS' PLEADED "FACTS" ARE DISPUTED OR INCOMPLETE.

Movants' purported "material facts not in dispute" mostly amount to selected quotes from, and characterizations of, documents that exist outside the pleadings and are the best evidence of their contents. Contrary to Movants' footnote suggestions, North Dakota has not admitted such allegations. *Contra* MHA Br. 2 n.1; US Br. 1 n.1. North Dakota answered each of them and responded that the documents speak for themselves.[2] North Dakota consistently clarified in its answers that "any allegations inconsistent with their plain meaning, language, and context are denied." *E.g.*, ECF No. 99 ¶¶ 12, 14, 19, 22, 24, 33, 35.

[2] MHA admits North Dakota answered each MHA allegation mirrored in the United States' crossclaim. MHA Br. 2-6. Moreover, MHA's second complaint (entitled "complaint in intervention on the quiet title crossclaim") was improperly filed and required no separate response given that the Court never sanctioned its filing beyond MHA's existing complaint, and that only the *United States* may file quiet title claims for the riverbed here in dispute. *See* ECF No. 102 at 2 n.1; ECF No. 79-1 at 7; 28 U.S.C. § 2409a; *Block v. North Dakota*, 461 U.S. 273 (1983).

Lest there be any doubt, North Dakota disputes the mischaracterizations and incompleteness of the Motion's alleged "facts," as further discussed *infra*. Indeed, the Motion goes beyond mere quotations and purports to interpret those documents—and it does so in manners that are patently incorrect or even misleading. For example:

- Movants assert that treaties in 1825 "acknowledged the Tribes' country" or "territory," but omit that they defined no such tribal lands or the riverbed. MHA Br. 3; US Br. 1.

- Movants discuss an 1851 treaty, but fail to mention the Supreme Court has held that treaty "did not by its terms formally convey any land to the Indians at all" and had "no bearing on ownership of the riverbed." *Montana*, 450 U.S. at 553; MHA Br. 3; US Br. 1-2.

- The United States points to an 1866 agreement with MHA, yet fails to mention that agreement was never ratified by Congress. US Br. 2.

- The United States misrepresents that an 1870 executive order "included a downstream reach of the river in the Reservation," when the document actually said no such thing. US Br. 2.

- The United States misstates that an agreement ratified by Congress in 1891, two years after North Dakota statehood, "merely reduc[ed] the total length of the Missouri River running through the Reservation," when what the agreement actually did was reallocate certain uplands located north and south of the river. US Br. 3.

- MHA asserts that "the United States took title to more than 150,000 acres encompassing the Missouri River within the Reservation," when in reality that taking of title for FBIR land *expressly excluded* any riverbed acreage. MHA Br. 5.

- MHA overstates the holding of a 1979 IBLA appeal, which involved a single company's (now-expired) mineral leases and did not purport to adjudicate title to the entire riverbed. MHA Br. 6.

Further, Movants' Motion fails to address disputed material facts alleged in the pleadings, and fails to plead certain material facts entirely, which would be necessary to overcome the strong presumption of the State's riverbed title under the Equal Footing Doctrine. For instance, as further discussed *infra*, and contrary to Movants' position, a tribe's historical uses of the river and riverbed are key considerations when deciding whether title to submerged lands was purportedly reserved by the United States. Tellingly, the United States' quiet title claim purports to describe the

"History and Culture of the Three Affiliated Tribes." ECF No. 97 at 23-25. North Dakota expressly denied these allegations. ECF No. 99 ¶¶ 37-50. And as also further discussed *infra*, facts regarding Congress' and the executive branch's purpose in creating and altering FBIR are crucial to determine if the United States actually reserved ownership of the Missouri riverbed in trust for MHA. All of those facts are either disputed or outside the pleadings, making this case highly improper for resolution on a Rule 12(c) motion.

STANDARD OF REVIEW

Contrary to Movants' cursory discussion of the "legal standard," Rule 12(c) is not an open invitation for plaintiffs to obtain early dispositive rulings based solely on their pleaded allegations. Fed. R. Civ. P. 12(c); *cf.* MHA Br. 6; US Br. 4. That is especially true in this case where the parties' negotiated case management schedule nowhere contemplated dispositive motions prior to factual development and the completion of discovery and expert reports.

In the D.C. Circuit, a party cannot prevail on a Rule 12(c) motion for judgment on the pleadings unless it can demonstrate both that "no material fact is in dispute and that it is entitled to judgment as a matter of law." *Waters v. District of Columbia*, No. 18-2652 (ABJ), 2022 WL 715474, at *8 (D.D.C. Mar. 10, 2022) (citing *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365, 1370 (D.C. Cir. 2008)). Assertions in the pleadings and any inferences derived from the pleadings must be viewed in the light most favorable to the *non*-moving party (here North Dakota), and all allegations by the *non*-moving party must be taken as true. *Id.* (citations omitted); *Lopez v. Nat'l Archives & Recs. Admin.*, 301 F. Supp. 3d 78, 84 (D.D.C. 2018) (same).[3]

A Rule 12(c) motion "must" be treated as a motion for summary judgment under Rule 56 if "matters outside the pleadings are presented to and not excluded by the court[.]" Fed. R. Civ.

[3] Typically, a motion for judgment on the pleadings is asserted by a *defendant* as a ground to dismiss a claim for relief, rather than by a party seeking early judgment on its own allegations.

P. 12(d). Critically, as Movants fail to mention, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.*

Based on Movants' own representations to this Court, the pending Motion is for judgment solely on the pleadings, *not* summary judgment. ECF No. 107 at 2 n.2, 5 (claiming Motion "is not" for summary judgment); ECF No. 108 at 2 (claiming Motion does not present "extra-pleadings evidence"). The Court likewise recognized this distinction in allowing immediate briefing of "another form of dispositive motion" and then a "period of discovery followed by summary judgment briefing." Minute Order, Oct. 30, 2024. And Movants urged to preserve that discovery and summary judgment schedule even while the Motion is pending. ECF Nos. 110, 113; *see also* Minute Order, November 13, 2024. Accordingly, to defeat the instant Motion, the State need only identify evidence outside the pleadings that is relevant to adjudication of the United States' quiet title claim.[4] And the State is able to do so in spades.

ARGUMENT

I. THE PLEADINGS DO NOT PROVE MHA TITLE TO THE RIVERBED.

The pleadings fail to prove that any document creating or modifying FBIR clearly had the legal effect of reserving the Missouri riverbed to the United States in trust for the MHA before North Dakota statehood. Nor do the pleadings prove any clear Congressional intent to defeat State title to the riverbed. Movants thus cannot obtain judgment on the pleadings.

Under the Equal Footing Doctrine, "the default rule is that title to land under navigable

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Indeed, courts have described the legal standard presuming the plaintiff will be defending, not bringing, a Rule 12(c) motion. *See, e.g.*, *Thompson v. District of Columbia*, 428 F.3d 283, 284 (D.C. Cir. 2005) ("As we must in reviewing a judgment on the pleadings, we view the complaint's allegations in the light most favorable to the *plaintiff*.") (emphasis added).

[4] Movants suggest "judicial notice" to consider materials outside the pleadings. US Br. 3 n.2; MHA Br. 2. This not only undercuts the idea that their Motion is based only on the contents of the pleadings, but also ignores that Movants have filed no request for judicial notice.

waters passes from the United States to a newly admitted State." *Idaho v. United States*, 533 U.S. 262, 272 (2001). The doctrine derives from the Constitution, and ownership of the land underlying navigable waters is considered "an incident of sovereignty" that is "strongly identified with the sovereign power" of the State.[5] *Montana*, 450 U.S. at 551-52 (citation omitted). Mere "conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed." *Id.* at 551 (citations omitted, emphasis in original).

Therefore, "'[a] court deciding a question of title to the bed of navigable water must … begin with a strong presumption' against defeat of a State's title." *Idaho*, 533 U.S. at 272-73 (citation omitted); *see also United States v. Alaska*, 521 U.S. 1, 34 (1997) ("*Alaska I*") (same). Due to this strong presumption, "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *see also Alaska v. United States*, 545 U.S. 75, 100 (2005) ("*Alaska II*") (same).

To ascertain whether Congress intended to strip a State of title to the bed of a navigable water, the Court must determine: (1) "whether the United States clearly intended to include submerged lands within the reservation," and only "[i]f the answer is yes," then (2) "whether the United States expressed its intent to retain federal title to submerged lands within the reservation." *Alaska II*, 545 U.S. at 100; *see also Idaho*, 533 U.S. at 273-74. In other words, the United States must have expressly intended both to (1) include submerged lands as part of the reservation and (2) withhold title from the state upon statehood. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). In applying this test, particularly in the context of executive branch actions, a court must consider "whether Congress was on notice that the Executive Order

[5] It is undisputed the historical Missouri River flowing through FBIR constituted navigable waters.

reservation included submerged lands, … and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Idaho*, 533 U.S. at 273-74. Thus, determining "the *purpose* of a conveyance or reservation is a critical factor in determining federal intent." *Alaska I*, 521 U.S. at 39 (emphasis in original); *see also Alaska II*, 545 U.S. at 99 (same). The pleadings alone fail to support Movants' heavy burden to defeat the State's presumptive title.

A. The Pleadings Include No Express Reservation of the Riverbed.

The pleadings contain *nothing* expressly mentioning the Missouri riverbed, much less rebutting the "strong presumption" that Congress intended for it to pass to North Dakota upon statehood. The Court's inquiry on the Motion may begin and end there.

MHA avers that it "originally held title to the Missouri River and the land on both sides based on aboriginal possession," and that later executive orders "expressly acknowledged" FBIR "still included the Missouri River and its bed." *See* MHA Br. 9-10. Yet, MHA fails to substantiate such claims with any express acknowledgement of MHA title to the Missouri riverbed.[6] They cite not a single historical document to substantiate that claim. And the United States' purported finding of an "express reference to the Missouri River and the Riverbed" instead actually references only the river, not the riverbed, and does so in the context only of referring to the river as a boundary. *Cf.* US Br. 9. The United States then cites the *Montana* case, but that decision did *not* conflate the "bed and banks" of a river into a "riverbed." *See id.*

Movants place emphasis on phrases from historical documents mentioning the "Missouri River" and its "left bank" in relation to the locations of MHA lands, neither of which conveyed

[6] Besides failing to provide any support for its claimed "aboriginal possession," MHA does not explain how it would be dispositive here. The caselaw on which MHA relies provided that "[o]ccupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345-47 (1941).

the river or were a proxy for the riverbed. *Cf.* MHA Br. 3-4; US Br. 2-3. In reality, the Missouri River and its tributaries served as obvious natural features demarcating easily discernable boundaries within an area that was not formally surveyed until after North Dakota's statehood. Movants cite no caselaw or authority establishing that a reservation of land on both sides of an identified river alone meant that the river and its underlying riverbed were included; rather, caselaw stands for the *opposite* conclusion. *See, e.g.*, *Alaska I*, 521 U.S. at 39 (caselaw "establish[es] that the fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved"); *Montana*, 450 U.S. at 554-55; *Holt State Bank*, 270 U.S. at 56-58.

And the United States' attempted summation of caselaw—stating that "describing a reservation's boundary to encompass navigable waters that are expressly referenced establishes that the submerged lands are 'necessarily' included in the reservation" (US Br. 8)—not only is a misstatement of the law, but also is inapposite here because the Missouri River is merely *referenced* by the documents to which the United States refers, and no document cited by Movants ever described the FBIR boundaries as "encompassing" the river or riverbed.

Upon examination, and when understood in their proper historical context, no document that Movants cite to support their Motion—even if those documents were somehow deemed to be within the pleadings—clearly defeats the strong presumption of the State's title to the riverbed:

- 1825 Treaties (7 Stat. 259; 7 Stat. 264; 7 Stat. 261) (cited at MHA Br. 3; US Br. 1). In 1825, the United States entered into similar peace treaties with each of the three MHA tribes (among others) who at the time were neither geographically nor politically united. Per Article 2 of each treaty, the tribes admitted that they reside within the United States' territorial limits, recognized the United States has supremacy, and claimed the United States' protection. Article 5

of each treaty references but does not define each tribe's "district of country." The treaties include no conveyance language and no property descriptions defining tribal rights.

- 1851 Treaty (11 Stat. 749) (cited at MHA Br. 3; US Br. 1-2). The 1851 Fort Laramie treaty established no reservation or land conveyance by the United States. *Montana*, 450 U.S. at 553. It merely was "a covenant among several tribes which recognized specific boundaries for their respective territories." *Id*. In doing so, the treaty referenced rivers and mountain ranges merely as recognizable geographic features. What is more, the treaty assigned territory to the MHA *only on one side* of the Missouri River (to the south and west). The treaty's approach of using rivers as boundary lines was not limited to the Missouri River—for example, the Heart River served as both the southern boundary of MHA territory and the northern boundary of Dakota Sioux territory, and the Yellowstone River defined the western extent of MHA territory and the eastern extent of Crow territory. The treaty's terms like "up," "down" and "along" are common phrases in geographic descriptions of this type. Specifically, the phrases "up the Missouri River" and "up the Yellowstone River" refer to navigable waters as public highways held in trust for the public to be granted to the State upon statehood. *See* 43 U.S.C. § 931. That contrasts with non-navigable waters for which ownership of the beds and banks are aligned. *See id.* Nothing therein suggested that the United States' selection of these landmarks to delineate tribal lands was clearly intended to include any submerged lands under the Missouri River. Indeed, the Supreme Court has already conducted the relevant interpretation of this treaty. *See Montana*, 450 U.S. at 553.[7]

- 1866 Unratified Agreement (cited at US Br. 2). The United States (but not MHA) claims that in 1866 MHA "agreed to cede to the United States certain lands that had been recognized as

[7] Moreover, the 1851 treaty did not "surrender the privilege of hunting, fishing, or passing over" lands outside territorial boundaries—text that would be surplusage if the Missouri River and its bed utilized by MHA were themselves MHA territory. *See id.*

part of their territory on the northeast side of the Missouri River." Any area north of the Missouri River was outside the scope of "recognized" MHA territory under the 1851 treaty. But the 1866 terms nowhere designated the river itself or the riverbed as MHA territory. And in any event, this agreement was never finalized and ratified by Congress—likely because the United States had not acknowledged the lands to be ceded were MHA-owned at all—and thus it is largely irrelevant.

- 1870 Executive Order (cited at MHA Br. 3, 9; US Br. 2, 9). President Grant's 1870 executive order established FBIR to protect MHA timber resources on both banks of the Missouri River and to provide adequate agricultural and grazing lands for MHA to become self-supporting agriculturalists. Movants ignore that emphasis, which is evident from the executive order's text: "(so as to include the wood and grazing around the village)." The same animating concern around timber and agriculture exists in contextual historical documents (existing outside the pleadings), which highlight the importance of securing those resources for MHA and FBIR. Consistently, the documentation supplied to the Secretary of the Interior and the President to support the creation of FBIR in 1870 (again, outside the pleadings) noted that the basis for the reservation was the 1851 treaty with an additional strip of land on the northern bank of the Missouri River. The 1870 executive order and contemporaneous documents did not mention the riverbed or clearly reserve the river or riverbed as part of FBIR.

- 1880 Executive Order (cited at MHA Br. 3-4, 9; US Br. 2-3, 9). President Hayes' 1880 executive order reduced FBIR's total size and provided additional land north of the Missouri River to compensate for the loss of land south of the river. The modification of FBIR's boundaries was done to accommodate the route of the Northern Pacific Railroad, as is evident from the executive order expressly referencing the railroad (as well as from contextual historical documents outside the pleadings). The executive order described the southern boundary of the FBIR addition as the

FBIR "present boundary," located along the left (north) bank of the Missouri River, thereby confirming the 1870 executive order's establishment of the timber tract boundary. It nowhere included the river or riverbed, consistent with the Missouri River's status as a public highway.

- 1886/1891 Ratified Agreement (26 Stat. 989, 1032) (cited at MHA Br. 4; US Br. 3). Two years after admitting North Dakota into the Union on equal footing with all other states in November 1889, Congress ratified an agreement with MHA to define the FBIR boundaries, which largely remain in place today. The agreement reduced FBIR's total size, and reserved lands valuable to MHA for grazing, timber, and agriculture. Like every other agreement or treaty referenced by Movants, that agreement nowhere mentioned the riverbed, and its only reference to the river (in Article I) was to identify land ceded to the United States several miles away from the "most westerly point of big bend of the Missouri River." The agreement also provided for official surveys to guide allotments to individual tribal members, consistent with the then-newly passed Dawes Act, 24 Stat. 388 (1887). But tellingly (as shown in documents outside the pleadings) the United States never allotted any part of the riverbed to an MHA member in the post-survey land transactions. And very notably, acreage calculations made by the United States indicate that the United States did not consider the riverbed to be part of FBIR.

To substantiate this information, as well as establish the impropriety of relying on Movants' cherry-picked and misinterpreted excerpts, the State has served detailed expert reports and extensive reference materials from two professional surveyors. Each expert independently opined that, based on property descriptions and other official survey evidence both before and after statehood, the Missouri River served merely as an obvious boundary and FBIR never included the riverbed. The State also served a third expert report from a professional historian who likewise independently concluded, based on exhaustive research on FBIR creation and MHA practices, that

Congress never reserved the riverbed for MHA. Meanwhile, the United States' single expert report is substantially the same as the report on which the United States relied to *concur* that the State owns the riverbed, before its sudden about-face during this litigation. And the MHA's single expert report simply repurposed a report prepared in 2021. The Court should deny the instant Motion and enable consideration of these expert opinions and the evidence on which they rely.[8]

B. Movants Cannot Avoid Extensive Historical Evidence Defeating MHA's Claim of Title.

Movants' contention that historical evidence is unnecessary to decide this title dispute is incorrect and contrary to the caselaw on which they rely (see *infra*). *Cf.* US Br. 9; MHA Br. 7 n.2. Under the Equal Footing Doctrine, the Court must consider what specific lands and waters were reserved for tribal use prior to statehood, the purposes of those reservations, and what Congress intended when ratifying the present FBIR boundaries. What Congress intended is inherently a function of what information it had when it acted. The same is true regarding what information the President had when issuing preceding executive orders. In particular, to prevail on the pleadings, Movants would need undisputed facts showing "the cultural and economic importance of the Missouri River to the MHA Nation" on which the President and Congress would have acted. *Cf.* MHA Br. 7 n.2. These core evidentiary issues cannot be discarded by a motion for judgment on the pleadings. And that helps explain why Movants cite no quiet title case—not a single one—decided on a motion for judgment on the pleadings.

Movants fail to plead any facts regarding the purposes and circumstances surrounding the creation and modification of the FBIR boundaries, particularly in relation to the Missouri River and riverbed. And to the extent the pleadings do include any alleged material facts regarding the

[8] Consistent with the operative scheduling order, discovery does not close until January 10, 2025. Expert reports were served on November 13, 2024, and rebuttal expert reports are due December 13, 2024. The parties have noticed deposition dates for experts for the week of January 6, 2025.

historical uses of the Missouri River and Congressional intent when creating FBIR, those facts are disputed, incomplete, and otherwise insufficient to grant Movants judgment on the pleadings.

Examples of the Motion's material evidentiary gaps abound. As discussed above, Movants ignore that the 1870 and 1880 executive orders and contemporaneous documents are full of concerns about the availability of MHA timber and agricultural resources, rather than any concern pertaining to MHA ownership or even use of the river or riverbed. Movants ignore that, prior to North Dakota's statehood, there is no evidence that the United States or MHA ever even *asserted* that riverbed title was held for MHA or would not pass to North Dakota upon statehood. The Motion also ignores that during the United States' years of western expansion, the Missouri River served as a critical artery of transportation, and it would have been entirely ahistorical for the United States to give ownership over a main artery of national commerce to a tribal nation.

And all of that is before considering that the Motion offers no facts on the MHA's historical relationship with the river and riverbed. Movants omit the critical facts, as extra-pleading evidence will further establish, that MHA historically did *not* rely (and was not understood as relying) on the river for subsistence fishing, and that there is very little evidence that MHA ever meaningfully utilized the riverbed in any capacity (as it is only in more recent years that oil and gas development underneath the river has become possible). The parties recently exchanged hundreds of pages of expert reports that address this exact topic, and expert discovery is ongoing. North Dakota should be allowed to present its expert and documentary evidence on these material issues of fact prior to any final determination of title.[9]

[9] Still more relevant facts outside the pleadings are implicated by the second count of the United States' quiet title claim, on which only MHA seeks judgment on the pleadings. *See* MHA Br. 18. That claim for injunctive relief seeks to enlist this Court in extensive, affirmative actions to cancel leases entered into by the State, compel accounting by non-party State and mineral producers, and oversee payments to MHA. Though because the Motion fails to present any argument or authority

C. Caselaw Quieting Title to Other Property Does Not Prove MHA Title Here.

Even setting aside all the material disputes of fact highlighted above, Movants do not cite a single quiet title case decided solely on the pleadings. Instead, the cases that Movants cite all support the proposition that Congressional intent must be determined based on a full evidentiary record. *E.g.*, *Idaho*, 533 U.S. at 277-78 (deciding quiet title action for submerged lands based on "the facts," "the evidence," and "the record"); *Alaska II*, 545 U.S. at 78 (Special Master report); *Alaska I*, 521 U.S. at 4 (same). These types of quiet title inquiries typically are not amenable even to summary judgment, much less judgment on the pleadings, and instead usually warrant trial proceedings. *E.g.*, 533 U.S. at 277 ("9-day trial" on submerged lands title); *United States v. Idaho*, 95 F. Supp. 2d 1094, 1099 (D. Idaho 1998) (district court opinion in *Idaho* recalling: "During a trial lasting nine days, the parties to this action presented evidence on the pertinent legal issues in the form of expert and lay testimony, written reports, scientific studies and historical documents.").

The relevant evidentiary inquiry here is specific to FBIR and the historical Missouri riverbed, so Movants cannot adjudicate the boundaries of FBIR by relying on cases and fact patterns involving entirely different properties. But the Motion tries to do precisely that. And that tactic is doubly wanting in this case, because Movants provide no factual analysis or accounting of either the cited historical documents in this case, or the evidence in the cases that they purport to analogize to this one. The Court would need to consider both types of evidence outside the pleadings to reliably conduct such comparisons. Without such a showing by Movants, there is no basis to defeat the strong presumption of State title under the Equal Footing Doctrine.

Moreover, several of Movants' invited comparisons do not even involve quieting title within navigable rivers or tribal reservations. For example, *Brewer-Elliott Oil & Gas Co. v. United*

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for seeking such relief on the pleadings, it is waived for present purposes. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014).

States (cited at MHA Br. 10-11; US Br. 8-9) involved a *non*-navigable river, whereas the Equal Footing Doctrine only applies to waters navigable at the time of statehood. 260 U.S. 77, 79-80 (1922); MHA Br. 10 (conceding same). *Donnelly v. United States* (cited at US Br. 7-8) was a murder case, not a quiet title action, let alone a quiet title action for navigable waters or submerged lands. 228 U.S. 243, 252 (1913). And the two *Alaska* cases on which Movants chiefly rely throughout their briefs also involved no tribal interests. Rather, they considered Presidential reservations of *coastal* lands as a national petroleum refuge, a national wildlife refuge, and a national monument (later a national park), and whether the environmental *conservation* purposes underlying those reservations would be impaired by omitting certain submerged lands. *Alaska I*, 521 U.S. at 4; *Alaska II*, 545 U.S. at 96.

Moreover, caselaw does *not* equate Movants' passing references to a river boundary with the express reservation of a riverbed that would be necessary to defeat state title. For instance, in *Montana*, relevant language creating the reservation was: "commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning …." *Montana*, 450 U.S. at 553 n.4 (citing Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650). The Supreme Court found that 1868 treaty, as well as the 1851 first Fort Laramie treaty discussed *supra*, "in no way expressly referred to the riverbed, … nor was an intention to convey the riverbed expressed in 'clear and especial words,' … or 'definitely declared or otherwise made very plain[.]'"[10] *Id.* at 554 (citation omitted). Likewise, in *Holt State Bank*,

[10] The United States notably cites the *dissenting* opinion in *Montana*. *See* US Br. 8.

the Supreme Court declared riverbed title for the state where the tribal reservation treaties at issue contained "nothing … which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy … of treating such lands as held for the benefit of the future state." 270 U.S. at 58-59. Specifically, those treaties did not contain "any attempted exclusion of others from the use of navigable waters." *Id.* at 58. And *Utah* found no federal reservation of the riverbed or containing "mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." 482 U.S. at 207-08. The same is true here.

In contrast, cases that have found tribal title to submerged lands involved language that is *far* more specific than the references to the "Missouri River" and "left bank" which Movants gesture toward here. For instance, in *Idaho*, the state "*conceded* that the 1873 Executive Order reservation included submerged lands" below portions of Lake Coeur d'Alene and the St. Joe River. 533 U.S. at 286 n.3 (emphasis added). In that case, the court also highlighted substantial evidence of written assurances by government officials to Congress, and to the tribe, that the tribe would own the submerged lands. *Id.* at 274-75. The Court further looked to official government surveys that included riverbed acreage within the reservation's acreage. *Id.* at 266-67. None of those factors are present here.

Similarly, in *Alaska I*, an executive order set a reservation boundary at the Arctic "coast line," measured along "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore." *Alaska I*, 521 U.S at 36. The reservation in *Alaska II* included "all of Glacier Bay's waters." *Alaska II*, 545 U.S. at 101. In *United States v. Milner*, an executive order extended the Lummi tribe's reservation to "the low-water mark on the shore of the Gulf of Georgia." 583

F.3d 1174, 1180 (9th Cir. 2009). And *Choctaw Nation v. Oklahoma* was not, as Movants claim, a case decided solely based on the "natural inference" from the grants in the relevant treaties and land patents (MHA Br. 11), nor was it a case where "submerged lands [were] included in reservation based solely on language of reserving documents" (U.S. Br. 9). Rather, the court in that case emphasized the federal government's express promise that no reservation lands, including the relevant riverbed, "shall ever be embraced in any Territory or State." 397 U.S. 620, 634-35 (1970); *see also Montana*, 450 U.S. at 555 n.5 (describing *Choctaw* as "based on very peculiar circumstances" and "the unusual history of the treaties there at issue"); *Utah*, 482 U.S. at 198 (same). Movants identify no similarly explicit reservation of the Missouri riverbed or peculiar circumstances here.

Those cases only help to illustrate the need to consider evidence outside the pleadings regarding the underlying purpose and context surrounding Movants' alleged reservation of title to the Missouri riverbed. Courts routinely consider historical uses of the relevant navigable water and its bed. For example, the holding of tribal title in *Idaho* was based substantially on the fact that "[a] right to control the lakebed and adjacent waters was traditionally important to the [Coeur d'Alene] Tribe, which emphasized in its petition to the Government that it continued to depend on fishing." *Idaho*, 533 U.S. at 274. And *Montana* determined the opposite for the Crow tribe, which never depended on fishing or made any other substantial use of the navigable water at issue. *Montana*, 450 U.S. at 556.[11] In *Choctaw*, the purpose for why the reservation was created, and why the United States made the promises it did, was of critical importance. 397 U.S. at 634-35. In *Milner*, the reservation of tidelands "served to promote the tribe's access to fishing and shellfish,

[11] Notably, as the State's expert reports will further establish, the MHA tribes share close familial, cultural, and historical ties and subsistence practices with the Crow Tribe, for whom the Supreme Court found fishing was not historically important.

and the welfare of the tribe more generally," as the relevant tribes there "have depended heavily on fishing and digging for shellfish as a means of subsistence." 583 F.3d at 1186. And in both *Alaska* cases, despite the clear conservation purposes of the executive reservations, substantial fact-finding still took place, culminating in detailed Special Master reports. *Alaska II*, 545 U.S. at 78; *Alaska I*, 521 U.S. at 4; *see also Utah*, 482 U.S. at 203 (finding no federal reservation where homesteading "concerns" that "motivated Congress" to act "had nothing to do with the beds of navigable rivers and lakes"). Movants offer no good reason to disregard such key considerations and evidence here.

Finally, Movants cannot invoke the mere existence of North Dakota's Enabling Act to somehow prove that Congress expressly intended to divest the State of riverbed title. MHA Br. 11-13; US Br. 10-11. While North Dakota's Enabling Act contained a requirement that the State "disclaim all right and title … to all lands lying within said limits [of the state] owned or held by any Indian or Indian tribes," it did not define such tribal lands—and it certainly did not identify the Missouri riverbed as lands to which the State was disclaiming title. 25 Stat. 676, ch. 180, Sec. 4. Movants' suggestion otherwise is simply begging the core question of this case: whether MHA owned the riverbed at the time of statehood.

Nor have courts found Congressional intent based solely on similar general disclaimers from other states' enabling acts. Instead, courts have found that, due to far more explicit language reserving specific submerged lands in particular cases, Congress necessarily must have been on notice that the enabling acts' disclaimer language was meant to include those submerged lands such that the state would not receive title to them. *See Alaska I*, 521 U.S. at 41-42; *Alaska II*, 545 U.S. at 104-10; *Milner*, 583 F.3d at 1186. Conversely, where explicit reservation language of that nature is absent, courts do not rely on general statehood disclaimers to strip a state of title to the

beds of navigable waters; rather, courts examine additional historical evidence for expressions of clear Congressional intent. *E.g.*, *Idaho* 553 U.S. 273-74.

At bottom, none of the cases cited by Movants are capable of establishing MHA ownership of the Missouri riverbed. And caselaw applying the Equal Footing Doctrine establishes that it is a fact-based inquiry. Resolution of that inquiry for this case is dependent on forthcoming evidence and expert testimony beyond the limited pleadings on which the pending Motion relies (and which the State will use to demonstrate there has been no clear assignment of riverbed title to MHA). Movants' attempt to bury historical evidence is an improper attempt to shortcut the process for adjudicating riverbed title, and to exclude relevant facts.

II. RES JUDICATA DOES NOT APPLY HERE.

Contrary to MHA's claim (MHA Br. 13-17), *Impel Energy Corp.*, 42 IBLA 105 (1979), is not res judicata for this case, and it certainly is not a valid basis to grant MHA judgment on the pleadings. Res judicata, or claim preclusion, bars a claim only if there has been prior litigation "(1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006).

Res judicata is typically raised by a *defendant* to "bar[] a second suit based on the same cause of action," rather than for offensive use, as MHA attempts to do here. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955). And MHA fails to appreciate its inherent contradiction in simultaneously claiming that the United States' quiet title action is barred by res judicata, yet also asking this Court to grant MHA relief on the pleadings on the United States' quiet title action rather than dismiss the action. Notably, the United States does not appear to join MHA in making

a res judicata argument.[12] But even if MHA's res judicata argument were proper (which it is not), MHA cannot carry its burden to meet all requisite factors.

A. MHA Was Not in Privity with the Federal Government in *Impel*.

MHA asserts, without any explanation or authority, that it "can invoke *Impel* as res judicata because it is in privity with the United States." MHA Br. 16. Privity exists where a party is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson Sch. of Soc. Sci. v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963). Here, even if MHA ever owned the riverbed—which it did not—MHA was not in privity with any party to the *Impel* matter.

MHA had no interest in the *Impel* matter because at that time (1978-79) the United States unquestionably did not own the riverbed in trust for MHA. Movants' own pleadings allege that the United States in 1949 took all purported MHA rights in the Missouri riverbed within FBIR for the Garrison Dam project, and did not restore to MHA any such taken rights until 1984. ECF No. 97 ¶¶ 54-59; ECF No. 1 ¶¶ 4-7. The IBLA also recognized as much in *Impel*. *See* 42 IBLA at 110. As such, the subject lands in *Impel* were being "administered by the Army Corps of Engineers," and not for any tribal purpose. *Id*. MHA did not participate in *Impel* in any capacity. Thus, MHA's res judicata argument is necessarily predicated on its purported interests arising only *after* the *Impel* decision (and which at no time actually encompassed the bed or minerals beneath the historical Missouri River). That lack of privity defeats any claim of res judicata.

Moreover, the Bureau of Land Management's ("BLM") position in *Impel* was directly *adverse* to MHA's position here. *Impel* was an appeal by a single company from an administrative

[12] Procedurally, the Court should also not even consider this res judicata argument in resolving the instant Motion, since it is not pleaded in the United States' crossclaim to quiet title; instead, the United States asserts res judicata only as an affirmative defense to Plaintiff MHA's original complaint. ECF No. 97 at 12-13.

BLM decision that BLM could not issue certain mineral leases because the United States *did not* own the Missouri riverbed, contrary to what MHA argues here. *See Impel*, 42 IBLA at 106-07.

Nor did the IBLA's administrative *Impel* decision result in an alignment of MHA and United States positions on riverbed title. Between 1979 (when *Impel* was decided) and 2023 (when the Interior Solicitor issued the department's latest opinion on the matter), the United States *never* recorded trust title for the MHA to the Missouri riverbed. That includes the period since 1984 when the United States allegedly restored mineral interests to MHA that the United States had taken in 1949 (which actually did not include riverbed acreage). And the United States' very recent administrative action to record trust title for MHA in 2022 does not actually confer legal title. *E.g.*, *MHA Nation v. United States Dep't of the Interior*, 66 F.4th 282, 285 (D.C. Cir. 2023). Even now, the United States has deemed it necessary to bring a quiet title action in federal court to adjudicate title. In any event, MHA's failure to establish even the privity criterion for res judicata alone requires rejection of its argument.

B. This Action Does Not Share the Same Transaction or Common Nucleus of Operative Facts with the *Impel* Appeal.

MHA also cannot satisfy the separate criterion that both the prior and subsequent litigations "arise from the same transaction" or "involve a common nucleus of operative facts." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020) (citations omitted). Where the subsequent claim involves "different legal theories[] and different conduct[,] occurring at different times," there is no common nucleus of operative facts, and res judicata does not apply. *Id*. at 415. Further, res judicata generally does not bar a claim predicated on events that postdate the initial complaint. *Id.* at 414.

The legal claim in *Impel* was not the same as the United States' current quiet title claim against the State. *Contra* MHA Br. 15. *Impel* was an appeal of BLM's denial of mineral leases

for one specific company, whereas the current action by the United States seeks to quiet title to the entire historical Missouri riverbed within FBIR. The "transaction" at issue in *Impel* thus was not the "same" as here. And despite some overlapping facts, they do not rise to a "common nucleus of operative facts." Applying the above relevant factors from *Lucky Brand Dungarees*, any decision by the Court in this case would also not impair any interests established in *Impel*.

C. The IBLA Lacks Legal Authority to Quiet Title.

Moreover, MHA's res judicata argument fails because it cannot show that the prior administrative decision from the IBLA was by "a court of competent jurisdiction." *Smalls*, 471 F.3d at 192. To create res judicata, the original adjudicating court must have subject-matter jurisdiction to decide the case before it. *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 92 (2017). But the IBLA does not have authority to adjudicate title to the Missouri riverbed. That power lies exclusively with the federal courts—requiring MHA's res judicata argument to fail for yet another reason.

The IBLA is not a court, but rather a board within the Department of the Interior's Office of Hearings and Appeals ("OHA"). 43 C.F.R. § 4.1(b)(2). OHA was created by regulation to exercise the review authority of the Secretary of the Interior. 43 C.F.R. § 4.1 ("The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary."). Yet, the Department of the Interior, including the IBLA, "lacks 'authority to adjudicate legal title to real property.'" *MHA Nation*, 66 F.4th at 285 (quoting *Southern Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 752 (10th Cir. 2005)). Adjudication of title "is a judicial, not an executive function." *Id*. (quoting same).

Even the IBLA has recognized as much. "[T]he Quiet Title Act, 28 U.S.C. § 2409a, provides that the exclusive basis for jurisdiction over suits challenging whether the United States holds title to real property lies with the Federal judiciary." *Henry Deaton*, 182 IBLA 274, 275 (June 21, 2012). Moreover, as the IBLA stated in another administrative appeal, navigability "must be decided finally by the courts, rather than in any administrative forum." *Ervin K. Terry*, 89 Interior Dec. 242, 247 (May 19, 1982) (citing *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935)). And because the Equal Footing Doctrine applies only to waters that are navigable at statehood, the IBLA thus lacks jurisdiction to quiet title to navigable waters twice over.

MHA's cited cases, standing alone or cobbled together, cannot manufacture authority for the IBLA to adjudicate title, much less defeat a state's title to the beds of navigable waters under the Equal Footing Doctrine. For example, *Silver Eagle Mining Co. v. State* (cited at MHA Br. 16) was a state court action brought by the same mining company who had initially applied for mineral leases and appealed the same to the IBLA. 280 P.3d 679, 684 (Idaho 2012). But here, rather than an appeal by a mining company that was denied mineral leases based on disputed land ownership, MHA is trying to invoke res judicata to resolve a riverbed title dispute, among different parties, continuing five decades after *Impel*.

MHA also cannot rely on the IBLA's 1979 *Impel* decision to forever bind the United States or foreclose application of the ensuing body of Supreme Court caselaw regarding the Equal Footing Doctrine (including nearly every quiet title case on which the Motion relies (e.g., *Montana*, *Idaho*, *Alaska I*, *Alaska II*)). *Contra* MHA Br. 17. Again, unlike in the cases MHA cites, nothing the Court decides here will disturb the particular decision or the subject leases at issue in *Impel*. *See id.* Moreover, courts may consider "an intervening 'change in legal principles.'" *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015) (citation

omitted). That is particularly relevant here given that the Supreme Court in *Montana*, two years after *Impel*, rejected that a river's mere location within a tribal reservation means it is part of the reservation—which, coincidentally, paralleled the flawed and cursory reasoning employed by the IBLA in its *Impel* decision. *Compare Montana*, 450 U.S. at 553-54, *with Impel*, 42 IBLA at 113-14. Finally, the Department of the Interior may reconsider its decisions, including those of the IBLA. 43 C.F.R. §§ 4.1, 4.5; *Spanish Int'l Broad. Co. v. FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967) ("The power to reconsider is inherent in the power to decide ….") (citation omitted). Indeed, the Interior Solicitor has utilized that authority to issue legal opinions on Missouri riverbed ownership decades after *Impel* and that are controlling on the IBLA. *See* 43 U.S.C. § 1455; 209 Departmental Manual 3, § 3.2A(11) (2020); Solicitor Memorandum on Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals (Jan. 18, 2001) (Opinion M-37003). There is no res judicata here.

CONCLUSION

For the foregoing reasons, the Court should deny MHA's Motion for Judgment on the Pleadings and Federal Defendants' partial joinder therein.

Dated: December 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ James Auslander
James Auslander