UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANDAN, HIDATSA, AND ARIKARA NATION, *Plaintiff and Intervenor Crossclaim Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.* *Defendants and Crossclaim Plaintiffs*, and THE STATE OF NORTH DAKOTA, *Intervenor Defendant and Crossclaim Defendant.*	Civil Action No. 1:20-cv-01918-ABJ

PLAINTIFF MANDAN, HIDATSA AND ARIKARA NATION'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AS TO CROSSCLAIM

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INTRODUCTION

The quiet title cross-claim is ripe for decision on two separate grounds. First, North Dakota's claim of title to the bed of the Missouri River within the Fort Berthold Indian Reservation (the "Riverbed") fails because the United States (1) clearly intended to include submerged lands within the reservation; and (2) expressed its intent to retain federal title to submerged lands within the reservation. These conclusions necessarily flow from the 1870 Executive Order that created the Reservation and the Enabling Act under which North Dakota was admitted to statehood. North Dakota's allegation that these are "cherry-picked" sources misses the mark; rather, they are the obvious and dispositive authorities. North Dakota cannot dispute the plain language of these documents. And although North Dakota repeatedly claims that unidentified but forthcoming factual information will be revealed later, the Court does not need the opinions of North Dakota's proffered expert witnesses to interpret those documents and can discern the intent of the United States as a matter of law.

Second, ownership of the Riverbed is res judicata. North Dakota voluntarily chose to litigate its "equal footing" claim of title to the Riverbed before the Interior Board of Land Appeals (IBLA), which rejected that claim. North Dakota then chose not to appeal that decision. North Dakota "deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one [it] subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). Contrary to North Dakota's contentions, all of the prerequisites for application of res judicata are satisfied here.

ARGUMENT

I. North Dakota's claim of title under the equal footing doctrine fails.

North Dakota offers hyperbole, rather than careful analysis, in support of its claim of title to the Riverbed. It argues that "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." (ECF 116 at 1). This specious argument ignores that the United States always controls navigation on the Missouri River because it "retains a navigational easement in [all] navigable waters … for the benefit of the public, regardless of who owns the riverbed." *Montana v. United States*, 450 U.S. 544, 555 (1981). That North Dakota is willing to press such an argument illustrates the weakness of its position.

The Court should enter judgment in favor of the United States and the Nation on the quiet title claim because the Nation and the United States satisfy both elements of the *Alaska II* test.

A. The 1870 Executive Order clearly included the Riverbed within its boundaries.

North Dakota's primary argument, repeated throughout its brief, is that "[t]he pleadings contain *nothing* expressly mentioning the Missouri riverbed[.]" (ECF 116 at 9 (emphasis in original).) But "express mention" of the Riverbed is not the applicable test. Instead, the test is whether the United States clearly intended to include the Riverbed as part of the reservation. *See Alaska v. United States*, 545 U.S. 75, 100 (2005) (*Alaska II*); *Idaho v. United States*, 533 U.S. 262, 273 (2001).[1] If express mention of the Riverbed is required, as North Dakota suggests, then the Supreme Court incorrectly decided *Idaho, Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922). These decisions refute the State's attempt to reframe the applicable test.

[1] The Supreme Court said, in *Montana v. United States*, that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty 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." 450 U.S. at 554. But the Court did not establish "express reference" as the applicable test, which is confirmed by its subsequent decisions in *United States v. Alaska*, 521 U.S. 1 (1997) (*Alaska I*), *Alaska II*, and *Idaho*. North Dakota invokes the *Montana* decision at every turn, without taking account of these later decisions.

In cases addressing the equal footing doctrine, it is typical that "the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed." *Choctaw Nation*, 397 U.S. at 633-34. Nonetheless, the Supreme Court has repeatedly concluded that treaties or executive orders that do not explicitly discuss a riverbed (or other submerged land) nonetheless express the clear intent of the United States to include that submerged land within a federal reservation. The Court focuses closely on how the boundaries of the reservation are described. For example, in *Alaska I*, the Court concluded that a boundary following the ocean side of offshore islands necessarily embraced submerged lands shoreward of the islands. 521 U.S. at 39.

Here, the United States' intent to include submerged lands within the Reservation is clear from the language of the 1870 Executive Order. The Order describes the boundary as starting at a point on the Missouri river and running northeast for three miles then turning and rejoining the river and proceeding along the "left" or outer bank to the mouth of the Yellowstone River. In other words, the Reservation extends beyond the river at its starting point and then narrows to run along its left bank. North Dakota's assertion that the 1870 Executive Order "did not mention the riverbed or clearly reserve the river or riverbed as part of the FBIR" (ECF 116 at 12), conveniently ignores this plain language.

Designating one bank of a river as the boundary between two nations or states, rather than the river itself, is legally significant. Chief Justice Marshall explained the significance of using a particular side of a river as a boundary in *Handly's Lessee v. Anthony*, 5 Wheat. 374, 379, 5 L.Ed. 113 (1820) (declaring that when territory is granted on only one side of a river, the original owner "retains the river within its own domain"). Similarly, because the northerly edge of the Ohio River, rather than the river itself, was designated as the southern boundary of Ohio,

the Court held that Virginia and later Kentucky was entitled to the river's expanse. *See Ohio v. Kentucky*, 444 U.S. 335, 338 (1980).

Likewise, in *Brewer-Elliott,* the Osage Reservation was bounded on one side by "the main channel of the Arkansas river." 260 U.S. at 81. The Supreme Court held that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carry the title to that line." *Id.* at 87. Here, the title of the MHA Nation, as granted by the 1870 Executive Order, included the entire bed of the Missouri river "because the words of the grant expressly carry the title to that line." *See id.* This grant was confirmed by the 1880 Executive Order which reiterated that the left bank of the Missouri River was the boundary of the Reservation.

North Dakota does not explain why the 1870 Executive Order's designation of the left bank of the river as the outer boundary of the Reservation should be disregarded. It does not discuss *Handly's Lessee* at all. It purports to distinguish *Brewer-Elliot* by arguing that it did not involve a navigable river within a reservation. (ECF 116 at 16-17.) But the Supreme Court subsequently said that the analysis in *Brewer-Elliot* is equally applicable to navigable rivers. *See Choctaw Nation*, 397 U.S. at 633 (observing that "the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands"); *id.* at 634 (discussing *Brewer-Elliot* and stating that the language at issue "expressly conveyed title to the river bed").

Recently, the Ninth Circuit applied the two-step test to determine whether tidelands were owned by the United States in trust for the Lummi tribe or passed to the state of Washington under the equal footing doctrine. *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), *cert denied*, 560 U.S. 918 (2010). The boundary of the reservation had been designated by an executive order as "the low-water mark on the shore of the Gulf of Georgia." *Id.* at 1180.

Although the executive order in *Milner* did not specifically use the term "tidelands," by setting the boundary at the low-water mark it "explicitly expanded the reservation to include the tidelands of the relevant area." *Id.* Thus, "[t]he first part of the [*Alaska II*] test is easily met." *Id.* at 1185. The Ninth Circuit added that this conclusion was buttressed by the tribe's historical uses of the tideland area. "But even were there no such precedent, the executive order reserving the tidelands . . . indicates a clear intent to prevent title from passing to the state of Washington." *Id.* at 1186.

So too here. The 1870 Executive Order explicitly designates the boundary of the Reservation as the outer bank of the Missouri river, extends a portion of the boundary beyond the river for some distance, and bounds the Reservation by ending on the river. In so doing, it clearly included the Riverbed as part of the Reservation. North Dakota does not rebut or distinguish *Milner* or its implications for this case.

North Dakota's argument that the Missouri river was merely used as a general geographical boundary (ECF 116 at 10) is not persuasive. Had the United States intended to use the river simply as a generic boundary, it would not have specified the boundary of the Reservation as the river's "left" bank. The teaching of *Handly's Lessee*, *Brewer-Elliot* and *Milner* is that designating this specific boundary indicates a clear intent to include all property up to that line, including submerged lands, as part of the Reservation. The Executive Order's description of the boundary as beginning and ending "at a point on the Missouri River" makes this conclusion irrefutable.

North Dakota contends, in effect, that the 1870 Executive Order means the opposite of what it says, *i.e.*, that although it explicitly designates the left or outer bank of the river as the boundary of the Reservation, it effectively made the right, or inner, bank of the river the

boundary. This "would have amounted to an act of bad faith accomplished by unspoken operation of law." *Idaho*, 533 U.S. at 278-79. Doing so would undermine the sovereignty of the Nation for which the Reservation was created.

Seeking to avoid this conclusion, North Dakota argues that it is premature to determine whether the United States clearly intended to include the Riverbed within the Reservation. The State argues that there is no precedent for deciding title on the pleadings,[2] that a trial should be conducted, and that the intent of the United States with respect to the Riverbed "should be determined based on a full record of the facts specific to the history of [Reservation] and the Missouri River." (ECF 116 at 2). According to North Dakota, the Court should hear evidence regarding "the full extent of executive and Congressional actions reserving MHA lands, the geographic bounds of [the Reservation], 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 [the Reservation's] ability to function without inclusion of the riverbed." (*Id.*).

That exhaustive exercise is not needed where the Executive Order establishing the federal reservation expressly places the Missouri River within the boundaries of the Reservation, as it does here. The best evidence of what the United States intended to do with the Riverbed is the document that established the Reservation, i.e., the 1870 Executive Order. North Dakota fails to explain why resort to extraneous sources is necessary or material, or how it could alter the interpretation of the language of the Executive Order.

[2] Whether other cases were decided after trial or on summary judgment does not explain why more facts are needed in this case. Notably, the federal district court in the District of Alaska just quieted title to submerged lands in favor of the United States on a motion to dismiss. *Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 at 1, n.1 (D. Alaska Dec. 9, 2024) (granting Rule 12(c) motion to dismiss state's equal footing doctrine claim). Moreover, the court decided the title question in *Milner* on summary judgment, 583 F.3d at 1181-1182, and the legal test for summary judgment is the same as for a motion for judgment on the pleadings. *Lopez v. CIA*, 301 F. Supp. 3d 78, 83-84 (D.D.C. 2018).

In *Alaska I*, for example, although the special master considered all the evidence submitted by the parties, he ultimately relied on the 1923 Executive Order creating the Reserve at issue. He concluded that this Executive Order "reflected a clear intent to reserve all submerged lands within the boundaries of the Reserve and to defeat the State's title to the submerged lands in question." 521 U.S. at 33. Because the boundary in the 1923 Executive Order followed the ocean side of the islands at issue, it "necessarily includes the tidelands landward of the islands." *Id.* at 36.

Neither step of the *Alaska II* test requires an analysis of historical purpose.[3] Historical purpose might be relevant to the United States' intent if that intent were not already clear. That is not the case here. The express references to the outer bank of the Missouri river and the beginning and ending points "on the Missouri River" clearly and necessarily place the Riverbed within the Reservation, and no historical uses of the Riverbed would permit North Dakota to rewrite the clear language of the 1870 Executive Order.

Title to the Riverbed here turns on documents that are already before the Court, namely the 1870 Executive Order that establishes the boundaries of the Reservation. Additional discovery or evidence from "experts" will not alter the language of this Executive Order. Accordingly, the Court should construe the meaning of the 1870 Executive Order now, based on the established principles for deciding this issue of law.

B. The conditions of North Dakota's statehood clearly reserve the submerged lands within the reservation.

The second prong of the *Alaska II* test is also satisfied here by the Enabling Act of 1889 governing North Dakota's admission to statehood. That Act required North Dakota to "forever

[3] Similarly, the fact that other cases, pre-*Alaska II*, may have been decided after a trial is not relevant here. *Alaska II* sets out a clear test and the Nation satisfies it without the need to resort to historical evidence beyond the treaties, Executive Orders, and statutes contained in the pleadings.

disclaim all right and title to … all lands … owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, … said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 676, 677 (1889). North Dakota incorrectly asserts that Congressional intent to defeat a state's title cannot be found from an enabling act. (ECF 116 at 20.) That argument is disproved by the very cases North Dakota cites.

In *Alaska I*, the Supreme Court found that "the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title." *Alaska I*, 521 U.S. at 57. Section 6(e) withheld from state title "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Id.* at 55. The Court reiterated this point in *Alaska II*, stating that "the provisions of the [Alaska Statehood Act] themselves suffice to overcome the state ownership presumption arising from the equal-footing doctrine …." *Alaska II*, 545 U.S. at 103-04. The language of the Enabling Act of 1889 is every bit as strong and direct as the comparable language of the Alaska Statehood Act. Further, the Enabling Act clearly states that lands within the Reservation are not subject to the grant of lands to the State under the equal footing doctrine: "nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain." 25 Stat. 676, 677 Sec. 10 (1889) (emphasis added). Thus, it clearly withheld Indian reservation lands from passing to North Dakota.

Moreover, *Milner* is on all fours with this case. As here, that case involved an Indian reservation established by executive order. The Ninth Circuit ruled that Congress was aware that the submerged tidelands were included in the reservation based on the executive order. *Milner*,

583 F.3d at 1185 (the executive order placed Congress on notice of the President's actions). And *Milner* involved the very same Enabling Act of 1889, which governed the admission of Washington as well as North Dakota. The Ninth Circuit ruled that the Enabling Act "made it abundantly clear here that Washington would not have title to the lands in question, thereby satisfying the second step of the congressional intent test." *Id.* at 1186. The instant case is indistinguishable from *Milner* and the same conclusion obtains here.

The language in the 1870 Executive Order could not be clearer. The boundaries are described as beginning and ending "at a point on the Missouri River" and the description expressly established the outer bank of the Missouri river within the Reservation as the boundary. The 1880 Executive Order did not disturb these boundaries—it reinforced them. Congress was on notice of those Executive Orders when it admitted North Dakota to the Union. It required North Dakota to disclaim any lands within existing Indian reservations, thereby making it crystal clear that North Dakota would not receive title to lands within the Fort Berthold Reservation. Based on the holdings in *Alaska I*, *Alaska II*, and *Milner*, the second step of the congressional intent test is met here as well.

II. Ownership of the Riverbed is res judicata.

The issue of title is also resolved by the doctrine of res judicata. While North Dakota disputes this conclusion, the State cannot and does not assert that it is premature to decide this issue.

North Dakota contends that res judicata is typically raised as a defense and that the Nation "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." (ECF 116 at 21). This argument misstates both the facts and the law. The Nation does not assert that the

quiet title cross-claim is barred by res judicata; rather it invokes res judicata affirmatively to resolve the quiet title claim, just as the United States did in *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897). There is no contradiction in invoking res judicata to decide the quiet title claim and seeking relief pursuant to the quiet title claim.

North Dakota also contends that the Nation cannot enforce *Impel Energy Corp.*, 42 IBLA 105 (1979) as res judicata for three reasons: because, in its view, the Nation is not in privity with the United States; this case does not involve the same cause of action as *Impel*; and the IBLA lacked subject-matter jurisdiction. North Dakota is wrong on all three points.

A. The Nation is in privity with the United States with respect to the Riverbed.

North Dakota argues that the MHA Nation is not in privity with the United States because the United States took title to the Riverbed in 1949 and did not restore it to trust status until 1984. Without citing any authority, North Dakota suggests that the Nation was required to have property rights in the Riverbed at the time *Impel* was decided in 1979 to invoke its holding.

On the contrary, it is well-accepted that a judgment involving real property binds non-party successors in interest to that property. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008); *Crowder v. Bierman, Geesing, & Ward LLC*, 713 F. Supp. 2d 6, 10 (D.D.C. 2010); *Restatement (Second) of Judgments* § 43. To conclude otherwise "would be to deny the victor any assurance of repose and expose every judgment to defeat by simple conveyance." C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4462 (3d ed.). Here, as the current beneficial owner of the Riverbed, the Nation is a successor in interest to the United States and may enforce *Impel* as res judicata. *See First Nat. Bank of Holdenville v. Ickes*, 154 F.2d 851, 853 (D.C. Cir. 1946) (noting that a tribe has property interests in land held in trust for it by the United States).

North Dakota also contends that the Nation lacks privity with the United States because in *Impel*, the United States took the position that North Dakota owned the Riverbed. Again,

North Dakota cites no case law to support this argument. *Impel* ruled that the United States owns the Riverbed and rejected North Dakota's claim of title pursuant to the equal footing doctrine. Thereafter, in 1984 the United States made the Nation the beneficial owner of its property interests in the Riverbed. As the successor in interest to the Riverbed, the Nation is entitled to enforce *Impel* as res judicata regardless of who made what arguments during the course of the *Impel* litigation.

B. This case involves the same underlying issues as *Impel*.

North Dakota next argues that this litigation does not arise from the same transaction or common nucleus of operative facts as *Impel* because *Impel* was an appeal of the BLM's denial of oil and gas leases for one specific company, whereas the current action seeks to quiet title to the entire Riverbed. But it is the underlying facts, not the legal theory, that determines whether two cases involve the same causes of action.

"The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring 'claims arising from the same transaction.'" *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 n.22 (1982)). This test is "based on facts rather than relief." *Id.* Thus, a party may not reopen decided issues by advancing new legal theories. *NRDC v. EPA*, 513 F.3d 257, 261 (D.C. Cir. 2008). "[C]laims to relief may be the same for the purposes of claim preclusion if, among other things, 'a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action.'" *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 413 (2020) (quoting Wright & Miller § 4407)).

North Dakota intervened in *Impel* to assert its claim of ownership over the Riverbed under the equal footing doctrine. Thus, the legal issue and the operative facts in *Impel* are the

same as those at issue here. It is immaterial that *Impel* involved specific leases for portions of the Riverbed, whereas this case involves the entire Riverbed. An adjudication of title for smaller tracts within a larger tract of land is res judicata with respect to a subsequent suit over the larger tract, where the same issue is decisive of both. *See Houston Terminal Land Co. v. Westergreen*, 119 Tex. 204, 209-10 (1930). Moreover, a different judgment in this action would destroy the rights established by the judgment in *Impel*. Accordingly, the causes of action in this case and *Impel* are the same for purposes of res judicata.

C. The IBLA had subject-matter jurisdiction over *Impel*.

Finally, North Dakota contends that the IBLA did not have subject-matter jurisdiction to decide the issue of title as between North Dakota and the United States. This argument does not withstand scrutiny.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *U. S. v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. at 107. "The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity. *Id.* (citation omitted).

North Dakota argues that the IBLA lacks authority to adjudicate legal title to real property, and so the *Impel* decision cannot be res judicata as to the quiet title claim. But this argument is wide of the mark. The issue is whether the applicability of the equal footing doctrine

was properly before the IBLA in *Impel*, not whether the IBLA has general jurisdiction to adjudicate title to real property. Because the equal footing doctrine was properly before the IBLA, and within its jurisdiction, the IBLA's decision is entitled to preclusive effect.

The Department of the Interior has "plenary authority over the administration of public lands, including mineral lands . . . ." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). "The IBLA is Interior's review authority charged with deciding - on behalf of the Secretary - matters relating to the use and disposition of public lands and their resources." *Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 700 n.1 (D.C. Cir. 2009) (citing 43 C.F.R. § 4.1(b)(3)). Accordingly, it "must necessarily consider and determine what are public lands . . . ." *Kirwan v. Murphy*, 189 U.S. 35, 53 (1903); *see also UOP v. United States*, 99 F.3d 344, 350 (9th Cir. 1996).

The Secretary of the Interior—and, hence, the IBLA—was authorized by the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, to act upon Impel's application for a lease of lands that allegedly belonged to the United States. The IBLA has always taken the position that the Secretary (and therefore it) has the authority to determine what lands are public lands. *E.g., Stanley G. West*, 14 IBLA 26, 27 (Nov. 28, 1973); *Joe S. Dent*, 18 IBLA 375, 376 (Jan 30, 1975). In this context, North Dakota chose to intervene in the IBLA proceeding to litigate whether the Missouri riverbed within the Reservation is public land.[4] The State thereby waived its sovereign immunity and submitted itself to the jurisdiction of the IBLA. *See New Hampshire v. Ramsey*, 366 F.3d 1, 16-17 (1st Cir. 2004). Accordingly, there is no question that the IBLA

[4] Other states have also invoked the jurisdiction of the IBLA or the Interior Board of Indian Appeals to litigate issues relating to the "equal footing" doctrine. See *State of* Montana, 11 IBLA 3, 8 (1973); *State of* Montana, 88 IBLA 382, 384 (1985); *State of* Kansas *v. Acting Southern Plains Regional Director*, 36 IBIA 152, 155 (2001); *Arizona* State *Land Department, et al. v. Western Regional Director*, 43 IBIA 158 (2006).

had the requisite authority to decide the equal footing issue presented in *Impel*. The IBLA's determination that title did not pass to North Dakota was necessary to its decision that Impel's lease applications involved public land.

Adjudications by the IBLA relating to title to real property have been given preclusive effect in subsequent litigation. *See Underwood Livestock, Inc. v. United States*, 417 F. App'x 934, 937-38 (Fed. Cir. 2011) (party bound by IBLA decision that its predecessors-in-interest lacked a valid right-of-way); *Silver Eagle Mining Co. v. Idaho*, 280 P.3d 679, 683 (Idaho 2012) (IBLA decision precluded subsequent quiet title action in state court). Similarly, federal courts have held that IBLA adjudications related to land title are binding and (while subject to appeal via the Administrative Procedure Act) cannot be collaterally attacked. *See, e.g.*, *Hoefler v. Babbitt*, 139 F.3d 726, 728 (9th Cir. 1998) (concluding that the IBLA did not exceed the scope of its jurisdiction by determining the validity of an unpatented mining claim, and that the determination could be challenged only under the APA, not the Quiet Title Act); *Alaska v. United States*, 3:22-CV-00103-SLG, 2024 WL 4654241, at *1 (D. Alaska Nov. 1, 2024) (Alaska could not use the Quiet Title Act to collaterally attack the BLM's determination that certain lands had not passed to Alaska under the equal footing doctrine, in part because Alaska failed to appeal the determination to the IBLA); *Mannatt v. United States*, 48 Fed. Cl. 148, 152 (2000) (noting that "[t]he court will refrain from determining title to lands when the agency involved in a takings claim has already made such determination in a formal adjudicatory proceeding" and that such a determination is properly challenged under the APA).

North Dakota's argument that the IBLA lacked jurisdiction to adjudicate its equal footing claim is hypocritical since it voluntarily chose to intervene in *Impel* and adjudicate that claim before the IBLA. The State could have simply ignored the IBLA proceeding and not been bound

by whatever decision the IBLA reached. But, having chosen to intervene and submitted to the jurisdiction of the IBLA, the State's current argument that the IBLA lacked jurisdiction to issue a decision binding it is simply wrong.

North Dakota also argues that *Impel* is not binding because the Department of the Interior may reconsider its decisions. This is not so. Although an agency is generally free to revise its legal interpretations, it cannot do so where it is bound by the doctrine of res judicata. *See Baltimore and Annapolis R. Co. v. Wash. Metro. Area Transit Comm.*, 642 F.2d 1365, 1370 (D.C. Cir. 1980); *see also Duvall v. Atty. Gen. of U.S.*, 436 F.3d 382, 390 (3d Cir. 2006) (collateral estoppel bars relitigation of an issue in proceedings before the agency itself).

Nor can North Dakota evade res judicata here by arguing that the law interpreting the equal footing doctrine has changed since *Impel*. If there has been any such change—which the Nation disputes—it is irrelevant. On "rare occasions," a court may "override the bar of res judicata for reasons of compelling public policy," such as an intervening change in "paramount questions of constitutional law or exclusive jurisdiction." *Hardison v. Alexander*, 655 F.2d 1281, 1288–89 (D.C. Cir. 1981). But in the vast majority of cases, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The Supreme Court has observed that "[o]ur reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open." *Arizona v. California*, 460 U.S. 605, 620 (1983). North Dakota's equal footing claim to the Riverbed was fully and fairly litigated before the IBLA 45 years ago. The Court should reject North Dakota's attempt to relitigate that claim in this case.

CONCLUSION

Title to the bed of the Missouri river within the Fort Berthold Reservation is conclusively established in the United States for the benefit of the Nation by the 1870 Executive Order and the Enabling Act of 1889. By setting the boundary of the Reservation on the left bank of the Missouri river, the 1870 Executive Order necessarily included the Riverbed as part of the Reservation. And the Enabling Act made clear that no portion of the Reservation was being transferred to North Dakota.

Furthermore, North Dakota's claim to the Riverbed under the equal footing doctrine was fully litigated before the IBLA and rejected. That decision is res judicata and precludes the State from now relitigating its claim of title.

For these reasons, the Court should grant the Nation's motion for judgment as a matter of law on the United States' claim to quiet title to the Riverbed in favor of the United States for the benefit of the Nation.

Dated this 20th day of December, 2024.

Respectfully submitted,

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