IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treaties, Statutes, and Executive Orders

Other Authorities

INTRODUCTION

Federal Defendants filed a Crossclaim (ECF No. 98) against the State of North Dakota ("State" or "North Dakota"), seeking to quiet title to the bed and banks of the Missouri River ("River") within the Fort Berthold Indian Reservation ("Riverbed"), including the mineral interests underlying the Riverbed, as held by the United States in trust for the Mandan, Hidatsa, and Arikara Nation ("Nation"). Because the pleadings established that the United States owns title to the Riverbed and the underlying mineral interests in trust for the Nation as a matter of law, the Nation filed a *Motion for Judgment on the Pleadings as to Crossclaim* (ECF No. 103, "MJP"), which Federal Defendants joined in part. *See* ECF No. 112 ("Joinder in MJP"); ECF No. 118 ("Federal Defendants' MJP Reply"). Federal Defendants incorporate by reference their briefing on the MJP, which remains pending.

Federal Defendants now move for summary judgment. The Court should grant summary judgment in favor of Federal Defendants' Crossclaim for the same reasons it should grant judgment on the pleadings: Congressional Acts and other documents establishing the Reservation demonstrate the United States' intent to reserve and retain title to the Riverbed. Additional evidence outside the pleadings only further supports that conclusion at summary judgment. The United States' intent to reserve title to the Riverbed, for example, is supported by the purpose of the Fort Berthold Indian Reservation ("Reservation") as a permanent homeland for the Nation. Because the Nation historically used and relied on the River and Riverbed, the Reservation's permanent homeland purpose would have been compromised and undermined without the Riverbed. Also supporting the United States' intent to reserve the Riverbed is the Nation's understanding, shared by high-ranking federal officials at the time, that the documents establishing the Reservation included the River (and thus the Riverbed) within the Reservation.

The United States' intent to retain title to the Riverbed is also established by Congress requiring North Dakota to disclaim title to all Indian lands within the State as a prerequisite to entering the Union. In addition, an intent to retain title is independently established by the United States creating the Reservation as a permanent homeland for the Nation, which included an intent that the Reservation continue in perpetuity so that title to all land within the Reservation, including title to any submerged lands, would not pass to the future state. Moreover, federal officials were aware of the importance of the River and Riverbed to the Nation, and Congress was on notice of the Reservation—and that the Riverbed was included within it—before it recognized and ratified it. And because the United States included the Riverbed in the Reservation, Congress would have had to express a clear and unambiguous intent to abrogate the Nation's title to the Riverbed. Congress never did. To the contrary, in authorizing negotiations with the Nation to reduce the size of the Reservation, Congress expressed an intent to pursue cession of land from the Reservation only by tribal consent. Given the Riverbed's importance, the Nation never consented to the Riverbed being removed from the Reservation. For these reasons and those set forth below, the Court should grant Federal Defendants' Motion for Summary Judgment on the Crossclaim.

FACTUAL BACKGROUND

I. The Nation Historically Used and Relied on the River and Riverbed.

The Mandan, Hidatsa, and Arikara Tribes settled in the Upper Missouri Valley and lived along the River in northwestern North Dakota for centuries, long before European contact in the eighteenth century. SOF 1.[1] The River and its fertile bottomlands enabled agriculture, and

[1] Federal Defendants' Statement of Material Facts in Support of Motion for Summary Judgment, filed simultaneously herewith, recites individual factual statements, including references to the parts of the record relied on to support each statement. This Memorandum cites to those individual factual statements as SOF [#] where appropriate.

floodplain forests and wetlands provided timber and aquatic resources for the Tribes, as well as habitat for many animals. SOF 2. Given these abundant resources, the Tribes largely settled in villages along both sides of the River and lived a semi-sedentary existence unique among surrounding nomadic tribes. SOF 3. By dwelling in the bottomlands surrounding the River, and using the River for food and other resources, the Nation subsisted as a semi-sedentary riverine culture—unlike other Plains Indians like the Crow, who had abandoned "horticulture in favor of the nomadic lifestyle based on the hunting of bison." SOF 4. For decades prior to European contact, the three Tribes moved progressively upstream along the River largely due to greater horticultural potential. SOF 5. In the eighteenth century, in part due to smallpox epidemics and for self-defense, the Tribes began to migrate further northward, confederate, and share territory. SOF 6.

The Nation's use and reliance on the River and Riverbed is evident throughout its history. SOF 7-60. For example, the Nation grew a variety of crops on the River's fertile bottomlands, including corn, beans, and squash. SOF 8. The Nation depended on these bottomland crops, preserved and stored the surplus, and traded these agricultural products for meat, hides, and other items. SOF 9. The historical record documents the Nation's agricultural success, which was possible due to the River's regular flooding and subirrigation of the soil making the bottomlands more conducive to agriculture than the surrounding, higher plains. SOF 10. As John Tappan, Indian Agent at Fort Berthold from 1871 to 1873, explained to the Commissioner of Indian Affairs ("Commissioner"), "for agricultural purposes only the lower lands seem to be available," where "the soil is rich and rendered tolerably moist by percolation from the river, and because the melted snow and rain and water from overflows are retained long on the surface . . . ." SOF 11. Tribal members continued to grow crops in the River's bottomlands, and federal officials

continued to tout the productivity of the bottomlands, until at least the 1890s. SOF 12. According to the State's expert historian, however, "[b]y the late 1880s, the Fort Berthold agents were starting to recognize what the MHA had known for generations. Crops alone were not enough to sustain life on the Plains." SOF 13.

Because crops alone were not enough, the Nation also relied on the River for a variety of aquatic resources, such as fish (including catfish, bullhead, eel, flatfish, buffalo fish, sturgeon, and paddlefish), turtles, and freshwater mussels that "provided supplemental food sources" and "played essential roles in the subsistence economies of Plains societies." SOF 14. The Nation's fishing practices made use of the Riverbed itself. SOF 15-26. Tribal members did "some hook and line fishing" but primarily used fish traps made of willow mats that were embedded in the Riverbed. SOF 16-17; *see* SOF Figure 9 (Black Bear, a Hidatsa, inside his fish trap, 1929). Tribal members placed rotten meat in the middle of the traps to entice fish through the opening, after which they would close the door and trap the fish. SOF 18; *see* SOF Figure 10 (Black Bear, tying the gate closed on his fish trap, 1929). As many as 100 fish could be caught in a single night using fish traps, which was enough to provide fish to an entire village. SOF 19. The Nation's preferred fish—various species of catfish—used the Riverbed for habitat. SOF 20. Fishing became consistently more important over time, as tribal members became more sedentary, although use of fish varied from village to village. SOF 21.

Scholars have stressed the importance of fishing to the Mandan. SOF 23. As one anthropologist noted, "[c]atfish bones are found on the earliest cultural horizon at [an ancient Mandan village site], in sufficient quantities to indicate that fish comprised a significant part of their diet." SOF 24. Another anthropologist reported that, "according to some informants, the Mandan preferred fishing to hunting." SOF 25. All three Tribes used fish traps anchored in the

Riverbed to trap fish. SOF 26.

Federal officials also recognized the importance of fishing to the Nation. SOF 27-32. In the 1851 Treaty of Fort Laramie, for example, the United Statues guaranteed all signatory tribes, including the Nation, "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Treaty of Fort Laramie with the Sioux, etc., 1851, art. 5, 11 Stat. 749 (Sept. 17, 1851) ("1851 Treaty"); *see* SOF 28. In 1880, Indian Agent Robert P. Gardner listed fishing—alongside farming, grazing, and hunting—as a "necessity" of the Nation. SOF 29. Because the Reservation was required for these "necessities," Gardner explained that reducing the Reservation as it existed in 1880 would "greatly militate against the interests of the Indians." SOF 30; *see* SOF 30 (State's expert historian noting a "general acknowledgment in these communications that the MHA hunted, fished, and gathered for subsistence"). Indian Agent Thomas H. B. Jones later noted in 1889 that a Hidatsa band refusing to accept government annuities "have managed to exist all this time by fishing and hunting." SOF 31. As late as 1890, the Commissioner reported to the Secretary of the Interior ("Secretary") and Congress that 15-percent of Hidatsa subsistence came from "[h]unting, fishing, root-gathering, etc.," with similar numbers for the Mandan and Arikara. SOF 32. Tribal members continued to catch fish and turtles using traditional fish traps, as well as more modern fishhooks, into the twentieth century. SOF 33. As the State's expert historian explained, although "the critical importance" of bison to Native Americans living on the Great Plains cannot be overstated, "a wide assortment of other mammals, birds, reptiles, fish, and freshwater mussels also played an essential role in the subsistence economies of Plains societies." SOF 34.

The Nation depended on the River for other subsistence activities as well. SOF 35-60. A tribal member writing in the twentieth century noted the many uses, including fishing, that the

Tribes made of the River and its bottomlands: "We hunted deer, rabbits, and prairie chickens and ate fish from the river. Along the Missouri we gathered bushels of plums and chokeberries and bullberries." SOF 22. Tribal members also traveled up and down the River in search of bison herds, preferring to hunt upstream so they could float meat downstream in unique vessels called "bull boats," made of willows and buffalo hides. SOF 36; *see* SOF Figure 12 (Bull boat, n.d.); SOF Figure 13 (Mandan woman paddling a bull boat, ca. 1908). The River assisted the Nation's hunting in other ways too. When herds were close to the River, tribal hunters would use the River to build corrals that allowed them to quickly and easily kill a large number of animals. SOF 37. In the winter, hunters would drive buffalo onto the frozen River, hoping they would fall through thin ice and drown. SOF 38. And each spring, tribal members would collect the carcasses of drowned buffalo that had been trapped in the ice of the River during the winter. SOF 39. According to a Hidatsa woman named Buffalo-Bird Woman,

> Our brave young men, leaping upon the ice cakes, poled the carcasses to shore. We were glad to get such carcasses. Buffaloes killed in the spring were lean and poor in flesh; but these, frozen in ice, were fat and tender.

SOF 40. These frozen bison, or "float bison," were a special delicacy for tribal members; they would boil it "into a 'bottle green' soup that the Mandans 'reckoned delicious.'" SOF 41.

The River was also a source of drinking water for the Nation's villages. SOF 42. And the River provided water for cooking and bathing; a place for social interaction and community; security from enemies; and driftwood and timber used for firewood and building materials, as well as to sell. SOF 43; *see* SOF 43 (State's expert historian noting the Nation used "timber in the river bottoms" for "fuel for fires and materials for lodge construction," which "was critical to the survival of the village"); SOF 43 (State's expert historian noting the Nation "historically used the Missouri River" for "drinking/cooking/bathing water, timber in the form of driftwood, drowned bison, fish, and mussels").

The River also served as "a great artery of intertribal commerce" for the Nation, facilitating trade and transportation. SOF 44. The Nation occupied the middle of a trade network centered on the River. SOF 45. Through this trade network, the Nation used bull boats to travel up and down the river, trading crops grown in the bottomlands for items they could not get from their immediate surroundings; by trading with intermediary tribes, the Nation received goods from as far away as the Atlantic and Gulf Coasts, as well as the Pacific Ocean. SOF 46. As trade intensified with non-Indians, the use of bull boats for trade continued, and may have increased. SOF 47. In the 1850s and 1860s, travelers on the Missouri recorded large numbers of bull boats carrying "astonishing" quantities of meat, robes, and furs. SOF 48. The River continued to be an important means of travel after the 1870 Executive Order established the Reservation. SOF 49.

The importance of the River to the Nation is further demonstrated by the Nation's "religious and spiritual connections" to it. SOF 50; *see* SOF 50 (State's expert historian stating "ethnographic and anthropological studies indicate the [the Nation's] spiritualties and lifestyles included the water and resources of the Missouri River"). The River was featured in religious traditions and ceremonies of the Nation, including creation stories, ceremonial offerings to river spirits, burial practices, and religious beliefs about the afterlife. SOF 51. The very names of the three Tribes of the Nation confirm the cultural importance of the River to them. SOF 52. The name Hidatsa reportedly meant "willows" and was given to members of one of the Hidatsa villages "because the god Itsikama 'hidic promised that the villagers should become as numerous as the willows of the Missouri river," and the Mandan were often referred to as "Mi-ah'-ta-nes" or "people on the bank." SOF 53. Similarly, the Arikara called the Missouri the "Holy River" or "the Mysterious River." SOF 54.

Specific uses of the River like fish trapping and traveling the River by bull boats had religious and ceremonial importance to the Nation as well. SOF 55-60. Fish were considered "powerful gods" with "great mystery power," and only people with specific knowledge granted by ownership of the appropriate sacred bundle were allowed to construct fish traps and perform the associated ceremonies. SOF 56. The rights to a sacred bundle were either passed down through a family or purchased from a knowledgeable elder. SOF 57. Like fish traps, bull boats could only be built by a person who owned the necessary sacred bundle. SOF 58. The Arikara had ceremonies that associated women, in particular, with construction and use of bull boats. SOF 59. The Mandan and Hidatsa sang prayers to Grandfather Snake, a god who lived in the River, when building a bull boat, and sought protection and guidance from the Old Woman Who Never Dies when navigating the River. SOF 60. The historical record leaves no doubt that the Nation used and relied on the River for centuries, to meet basic human needs including food, water, shelter, and transportation, and for religious and spiritual purposes, among other things. SOF 1-61.

II. Establishment of the Reservation.

A. *The 1851 Treaty of Fort Laramie and 1886 Agreement.*

In 1851, the United States negotiated the Treaty of Fort Laramie with the Nation and other tribes, in part due to a lack of established and recognized boundaries between the territories of the various tribes in the area. 1851 Treaty, 11 Stat. 749; *see* SOF 62. Two years earlier, Commissioner Orlando Brown had recommended treaties with the tribes, including the Nation, who would sign the 1851 Treaty, noting that the "Indians of the prairies . . . consider the whole country as their own, have regarded with much jealousy the passing of so many of our people through it, without any recognition of their rights, or any compensation for the privilege." SOF 63. He issued instructions "to hold a treaty with the different tribes . . . for the unrestricted

right of way through their country . . . .” SOF 64. After Congress authorized the treaty negotiations, Commissioner Luke Lea outlined the desired goals, which included compensating the Indians for “the unrestricted right of way through the country,” and “to establish for each tribe some fixed boundaries.” SOF 65. And at the outset of negotiations of the 1851 Treaty, one of the U.S. treaty commissioners assured the tribes (including the Nation) that “it is not intended to take any of your lands away from you, or to destroy your rights to hunt, or fish, or pass over the country, as heretofore.” SOF 66.

Article 5 of the 1851 Treaty provided that the signatory tribes would “recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories.” 1851 Treaty, art. 5, 11 Stat. 749; *see* SOF 67. Article 5 recognized the Nation’s territory as:

> commencing at the mouth of the Heart River, thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River; and thence down Heart River to the place of beginning.

1851 Treaty, art. 5, 11 Stat. 749 (emphasis added); *see* SOF 68; SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892). However, Article 5 also provided that, “in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.” *Id.*; *see* SOF 69. The Nation accordingly reserved any claims that they owned lands beyond those described in the 1851 Treaty, and they also believed that the 1851 Treaty had unfairly given some of their traditional lands to other tribes. SOF 70. Consistent with the Nation’s reservation of claims to additional lands, the State’s expert historian reports that the Nation “historically lived in villages on both sides of the Missouri.” SOF 71; *see* SOF 72 (1851

Treaty "did not accurately reflect the MHA's historical occupation of both banks of the river, or the fact that Like-A-Fishhook was on the east and north banks of the river . . . .").

The Nation entered into a second agreement with the United States in 1866, although Congress never officially ratified it.[2] In the 1866 Agreement, the Nation granted rights of way through "their country" and ceded certain lands situated "on the northeast side of the Missouri River," SOF 73; *see* SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892), while retaining ownership of the River itself. According to the transcript of the negotiations, Hidatsa chief Crow's Breast stated that: "We consider ourselves under the laws of the whites. They can go up and down our rivers. We give them the rights of way." SOF 74. Crow's Breast reiterates this same point a few sentences later: "We are now giving you the right of way by river and by land . . . ." *Id.* Major General S. R. Curtis, negotiating for the United States, expressed his agreement: "By the Laramie treaty you gave your Great Father the right of way through your country and he paid you for it and you have received the amount in goods . . . ." SOF 75. One of the U.S. treaty commissioners negotiating for the United States similarly stated, "these boats have a right to go up the river; they go up on their own account. The Great Father sends your goods on a boat but the others go on their own business; and this is what you have your annuities for." SOF 76.

B. *The 1870 and 1880 Executive Orders.*

In July 1869, Major General Winfield S. Hancock "instructed the Commanding Officer at [Fort] Stevenson to examine the country about Berthold and to recommend what portion should

[2] Although Congress never officially ratified the 1866 Agreement, the Nation abided by its terms, and Congress appropriated the promised annuities starting in 1867, eventually paying the Nation even more than promised. SOF 78. Nearly 100 years later, Congress determined that each side had fulfilled the terms of the treaty, which was therefore "ratified by the conduct of the parties thereto." SOF 79.

be set off for [the Nation]," stating that, "I think they should have a reservation sufficiently large for them to cultivate, to procure fuel, and hunt on, if possible . . . ." SOF 80. Two months later, Captain S. A. Wainwright, commander at Fort Stevenson, wrote that he had interviewed the Nation's chiefs, and "consulted the best guides and obtained all available information in addition to my own examination as far as it was practicable in regard to a reservation for the [Nation]." SOF 81. Based on his examination, he proposed reservation boundaries for the Nation. *Id.*

On November 1, 1869, the Nation sent a letter of grievances to Major General Hancock describing their lands in terms similar to the 1851 Treaty. The letter stated that they had agreed to live on a reservation:

> commencing at the mouth of the Heart River, thence following up the Missouri, including the timber on both its banks, to the mouth of the Yellowstone, thence up the Yellowstone to the mouth of Powder River, thence by the Headwaters of the Little Missouri to the Headwaters of Heart River, thence down Heart River to the place of beginning.

SOF 82. The Nation asked General Hancock "to procure for us a confirmation of our reservation to us in accordance with our first treaty with the Commissioners sent to us by our Great Father." SOF 83. And the Nation told General Hancock: "For until our Father and Friend has given us a reservation all the land lying within the boundaries mentioned in our first treaty belong to us (except Fort Stevenson Military Reservation) . . . ." SOF 84.[3]

On April 12, 1870, President Ulysses S. Grant issued an Executive Order creating the Reservation and adopting the boundaries proposed and recommended by Wainwright, which had

[3] The Nation also noted to General Hancock that in 1865 the United States had negotiated for land on both sides of the River where "Fort Stevenson now stands," and pointed out that "[h]ad the Country not been ours our Great Father, through his Commissioners, would not (we think) have treated with us for the occupation or use of any portion of it, nor would we have been right to grant any such privilege." SOF 85; *see also* SOF Figure 14 (Fort Stevenson Military Reservation, 1885).

been agreed to by the Commissioner and the Secretary. SOF 86. Specifically, the 1870 Executive Order described the Reservation boundaries as:

> From a point on the Missouri River four miles below the Indian village (Berthold), in a northeast direction three miles (so as to include the wood and grazing around the village); from this point a line running so as to strike the Missouri River at the junction of Little Knife River with it; thence along the left bank of the Missouri River to the mouth of the Yellowstone River, along the south bank of the Yellowstone River to the Powder River, up the Powder River to where the Little Powder River unites with it; thence in a direct line across to the starting point four miles below Berthold.

SOF 87 (emphasis added); *see* Figure 1 (Map depicting land cessions by the Nation, 1851-1892).

Based on this legal description of the Reservation in the 1870 Executive Order, the Missouri River was bounded on both sides by Reservation land from below Fort Berthold to the Missouri's conjunction with the Little Knife River. SOF 88. From the point at which the Little Knife River met the Missouri on the Missouri's north bank, the boundary continued westerly "along the left bank of the Missouri River to the mouth of the Yellowstone River." SOF 89. For the described portion of the Missouri River between the Little Knife and Yellowstone Rivers, the left bank is synonymous with the north bank of the River. SOF 90. And in context of the Reservation's boundaries, the left bank would be the far side of the River, such that the entire width of the River was included within the exterior boundaries of the Reservation. SOF 91.

In 1872, Commissioner F. A. Walker explained to Indian Agent Tappan that "you are in error in stating that 'the boundary is laid on the right hand, or south side of the stream.' The left bank is clearly stated in the text, and defined to be the North bank of the Missouri." SOF 92. Commissioner Walker concluded that "[t]he object in mentioning the left or north bank of the Missouri as the boundary line of the reservation was simply to include the whole of the Missouri river, between the mouth of Little Knife River & the mouth of the Yellowstone, within the limits of the reserve . . . ." SOF 93.

In 1880, a subsequent Executive Order issued by President Rutherford B. Hayes removed land in the southern and western portions of the Reservation for railroad construction while adding land on the north and east sides of the White Earth and Missouri Rivers. SOF 94. Describing the land to be added to the Reservation, the 1880 Executive Order stated:

> And it is further ordered that the tract of country in the territory of Dakota, lying within the following-described boundaries, viz, beginning on the most easterly point of the present Fort Berthold Indian Reservation (on the Missouri River); thence north to the township line between townships 158 and 159 north; thence west along said township line to its intersection with the White Earth River; thence down the said White Earth River to its junction with the Missouri River; thence along the present boundary of the Fort Berthold Indian Reservation and the left bank of the Missouri River to the mouth of the Little Knife River; thence southeasterly in a direct line to the point of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the [Nation], as an addition to the present reservation in said Territory.

SOF 95 (emphasis added); see SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892). Because the 1880 Executive Order equated the "present boundary of the reservation" with the "left bank" of the River, the entire width of the River was included within the Reservation's boundaries following the 1880 Executive Order, just as it had been in 1870. SOF 96.

C. *The 1886 Agreement, 1891 Act, and North Dakota statehood.*

In January 1884, President Chester Arthur submitted a draft bill to Congress recommending that lands on the Reservation be allotted to tribal members. SOF 98. The draft bill and supportive correspondence, which included the text of the 1870 and 1880 Executive Orders, was transmitted to the Senate and House of Representative, and "read and referred to the Committee on Indian Affairs and ordered to be printed." *Id.* Although the draft bill never passed, opening the Reservation to allotment became an article in the agreement negotiated with the Nation two years later. *Id.* Similarly, in 1885, both houses of Congress received the annual report from the Commissioner with information regarding the Reservation. SOF 99. The Commissioner's report made clear that the 1870 and 1880 Executive Orders constituted "treaty,

law, or other authority establishing by which reservations were established." *Id.* The same report also quoted an 1885 letter from Indian Agent Abram J. Gifford, who stated that "[t]he Indians regard this whole section of the country as theirs . . . ." SOF 100.

In 1886, Congress appropriated funds for the Secretary "to negotiate with the various bands or tribes of Indians in Northern Montana and at Fort Berthold, in Dakota, for a reduction of their respective reservations." Act of May 15, 1886, 49 Cong. Ch. 333, 24 Stat. 29, 44; *see* SOF 101. The Secretary appointed the Northwest Indian Commission to undertake these negotiations, which instructed the U.S. treaty commissioners negotiating the treaty that "it should be our aim to effect an agreement with said Indians for such reduction of their reservation as should be found desirable after a thorough investigation, and upon just and equitable terms as to compensation." SOF 102.

The 1886 Agreement reduced the size of the Reservation. Specifically, the Nation agreed to:

> cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion of the Fort Berthold Reservation, as laid down upon the official map of the Territory of Dakota, published by the General Land Office in the year eighteen hundred and eighty-five, lying north of the forty-eighth parallel of north latitude, and also all that portion lying west of a north and south line six miles west of the most westerly point of the big bend of the Missouri River, south of the forty-eighth parallel of north latitude.

SOF 103; *see* SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892). The 1885 General Land Office ("GLO") Map referenced by the 1886 Agreement depicted the Reservation as defined by the 1880 Executive Order. SOF 104. Despite the Reservation's diminished size, the Missouri River from below Fort Berthold to the Little Knife River continued to flow through and remain part of the Reservation. SOF 105. Lastly, the 1886 Agreement made clear that it "shall not be binding on either party until ratified by Congress." SOF 106.

The President presented the 1886 Agreement to Congress for approval in January 1887, but Congress did not approve it until 1891. SOF 107, 114. Between 1887 and 1891, Congress passed several other laws relevant to the Reservation. On February 8, 1887, Congress passed the General Allotment Act, which authorized the President to survey and allot any Indian reservation created "either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use . . . ." Act of February 8, 1887, 49 Cong. Ch. 119, 24 Stat 388; *see* SOF 108. A week later, on February 15, 1887, Congress approved a right-of-way for the Saint Paul, Minneapolis, and Manitoba Railway Company "through the lands in Northwestern Dakota set apart for the use of the [Nation] by executive order dated July thirteenth, eighteen hundred and eighty, commonly known as the Fort Berthold Indian Reservation . . . ." Act of February 15, 1887, 49 Cong. Ch. 130, 24 Stat. 402; *see* SOF 110.

In 1889, North Dakota became a state. In the Act of February 22, 1889, 50 Cong. Ch. 180, 25 Stat. 676 ("Enabling Act"), Congress set the conditions for North Dakota and several other states to be admitted into the Union. *See* SOF 111. The Enabling Act required the people of each state, including North Dakota, to:

> forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Enabling Act, 25 Stat. 676 at 677; *see* SOF 111. As required by the Enabling Act, the North Dakota constitution pledged that the people of the State would "forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes." N. D. Const. of 1889, art. 16, § 203, ¶ 2 (1889); *see* SOF 112. On November 2, 1889, President

Benjamin Harrison admitted North Dakota into the Union by presidential proclamation. 1889 Pres. Proc. No. 5, Proclamation 5, 26 Stat. 1548; *see* SOF 113.

Finally, on March 3, 1891, Congress ratified the 1866 Agreement. Act of March 3, 1891, 51 Cong. Ch. 543, 26 Stat. 989 at 1035; *see* SOF 114. Congress modified article six to read "[t]hat the residue of lands within said diminished reservation, after all allotments have been made as provided in article three of this agreement, shall be held by the said tribes of Indians as a reservation." *Id.* at 1035; *see* SOF 115. Congress also added a preamble, which noted that the purpose of the 1886 Agreement was in part "to reduce to proper size existing reservations . . . , with the consent of the Indians, and upon just and fair terms . . . ," because they "have vastly more land in their present reservations than they need or will ever make use of . . . ." *Id.* at 1032 (emphasis added); *see* SOF 116. For the Nation, because the 1886 Agreement was not ratified until 1891, reference to the "existing" or "present" reservation would have to mean the Reservation as defined in 1880. SOF 106.[4]

LEGAL STANDARDS

I. The Legal Standard Governing Motions for Summary Judgment.

Motions for summary judgment are governed by Federal Rule of Civil Procedure 56, which provides that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The mere existence of a factual dispute is insufficient to preclude summary judgment. *Id.* at 247-48. A dispute is "genuine" only if a

[4] A final addition of land north of the Missouri River by an 1892 Executive Order resulted in the Reservation's present-day boundaries. SOF 117; SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892).

reasonable factfinder could find for the nonmoving party, and a fact is "material" only if it is capable of affecting the outcome of the litigation. *Id.* at 248; *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

I. The Equal Footing Doctrine.

Under the equal footing doctrine, it is presumed that "title to land under navigable waters passes from the United States to a newly admitted State" at the time of statehood. *Idaho v. United States*, 533 U.S. 262, 272 (2001). However, that presumption is defeated if, as here, the United States reserved and retained the submerged land of navigable waters "for a particular national purpose such as a[n] . . . Indian reservation" prior to statehood. *Id.* at 272-73.

The Supreme Court has formulated a two-step test to determine whether a new State gains title to submerged land within a federal reservation. First, the Court considers whether "the United States clearly intended to include submerged lands within the reservation"; and second, the Court considers whether "the United States expressed its intent to retain federal title to submerged lands within the reservation" and "defeat a future State's title." *Alaska v. United States*, 545 U.S. 75, 100 (2005) ("*Alaska II*"). Accordingly, the two-step test in *Alaska II* is satisfied when the reservation "clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Idaho*, 533 U.S. at 273-74.

II. The Indian Law Canons of Construction.

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The Supreme Court has "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) (citations omitted). The Court has developed three primary rules of construction applicable to statutes, executive orders, treaties, and agreements involving Indian tribes.[5] First, such documents "must be interpreted as [the Indians] would have understood them." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Washington State Dep't of Licensing v. Couger Den, Inc.*, 586 U.S. 347, 358 (2019) (same); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999) (same); *see also United States v. Winans,* 198 U.S. 371, 380-81 (1905) (treaties are not a grant of rights *to* the Indians, but *from* them). Second, ambiguities or "any doubtful expressions in [those documents] should be resolved in the Indians' favor." *Choctaw Nation*, 397 U.S. at 631; *Herrera v. Wyoming*, 587 U.S. 329, 345 (2019) (same). And third, such documents must be liberally construed in favor of the Indians. *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020) ("treaty rights are to be construed in favor, not against, tribal rights"); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties with Indian tribes "are not to be interpreted narrowly, as

[5] These canons apply to non-treaty sources as well. *See, e.g.*, *Parravano v. Masten*, 70 F.3d 539, 544 (9th Cir. 1995)("Executive orders, no less than treaties, must be interpreted as the Indians would have understood them 'and any doubtful expressions in them should be resolved in the Indians''favor.").

sometimes may be writings expressed in words of art employed by conveyancers . . . ."). Given these rules, Congress must express a "plain and unambiguous" intent to extinguish tribal treaty and property rights. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941); *see* 25 U.S.C. § 177 (Non-Intercourse Act).

"There is no need to consult extratextual sources when the meaning of a statute's terms is clear." *McGirt*, 591 U.S. at 916. "The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)); *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-44, 351-54 (1998) (statutory language is the "most probative evidence" of congressional intent). However, when documents involving Indian tribes are indeed ambiguous, courts may "look beyond the written words to the larger context that frames the [document]." *Mille Lacs Band*, 526 U.S. at 196. Intent may be evidenced by "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). And attention should also be paid to the traditional lifestyles contemporary with the passage or execution of such documents, as evidenced by oral history and archeology. *See United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974) (examining the pre-treaty role of fishing), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

The Supreme Court has explicitly invoked these principles in the context of the equal footing doctrine. *See Choctaw Nation*, 397 U.S. 620 (1970) (interpreting treaties as tribe would have understood them, and resolving doubtful expressions in favor of Indians, while still acknowledging presumption found in equal footing doctrine); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (appealing to liberal construction in favor of Indians to determine that United States reserved submerged lands); *see also, e.g.*, *Puyallup Indian Tribe v. Port of*

Tacoma, 717 F.2d 1251, 1257 (9th Cir. 1983) ("[W]hen faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river."); *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (same). If the Court concludes that the language of the documents creating the Reservation are ambiguous as to whether the Riverbed was included, it must use the Indian law canons of construction to interpret those documents.[6]

ARGUMENT

The Court should grant summary judgment in favor of Federal Defendants on the Crossclaim because, as demonstrated below, the United States intended to reserve and retain title to the Riverbed. That intent is made clear by the reserving documents and other acts of Congress, and it is further supported by additional historical evidence that is undisputed.

I. There is no Genuine Issue of Material Fact That the United States Clearly Intended to Include the Riverbed Within the Reservation.

Under the first step of *Alaska II*, the Court must consider whether "the United States clearly intended to include submerged lands within the reservation." *Alaska II*, 545 U.S. at 100. The United States' intent to include the Riverbed within the Reservation is necessarily established by the plain and unambiguous language of the reserving documents themselves

[6] In other contexts, the Court has given different (and sometimes no) weight to legal presumptions that, like the equal footing doctrine, may be in conflict the Indian law canons. *See Mille Lacs*, 526 U.S. at 194 n.5 (declining to apply presumption of legality of executive orders where it conflicted with Indian law canon); *Montana,* 471 U.S. at 765-66 (presumption against repeals by implication did not apply because "standard principles of statutory construction do not have their usual force in cases involving Indian law"); *see also Equal Emp't Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001) (setting aside normal presumption that omission from Age Discrimination in Employment Act of a Title VII provision indicates deliberate choice by Congress).

(Section I.A, *infra*). Although additional evidence other than the language of the reserving documents is not needed to grant summary judgment, the United States' intent to include the Riverbed within the Reservation is supported by undisputed evidence regarding the purpose of the Reservation as a tribal homeland for the Nation and the Nation's historic reliance on the River and Riverbed (Section I.B, *infra*). Moreover, under the Indian law canons of construction, the reserving documents must be interpreted as the Nation would have understood them, with any ambiguities resolved in favor of the Nation; undisputed evidence shows that the Nation understood the Riverbed to be included within the Reservation (Section I.C, *infra*).

A. *The language of the reserving documents establishes an intent to include the Riverbed within the Reservation.*

It is undisputed that the 1870 Executive Order described the boundaries of the Reservation as beginning and ending at a point "on the Missouri River" and "along the left bank of the Missouri River." SOF 87. Because the "left bank" of this portion of the River is the north or far side of the River, the entire width of the River was within the exterior boundaries of the Reservation. SOF 90-91. The 1880 Executive Order reaffirmed the Reservation's boundaries as "beginning . . . on the Missouri River," and as "along the present boundary of the [Reservation] and the left bank of the Missouri River to the mouth of the Little Knife River." SOF 95. In other words, the 1880 Executive Order continued to recognize that the boundary set in the 1870 Executive Order was on the far side of the River, meaning the entire width of the River continued to be within the exterior boundaries of the Reservation. SOF 96. Although the 1886 Agreement, ratified by Congress in 1891, reduced the size of the Reservation by ceding lands to the north but adding lands to the south, the River continued to flow through a part of the Reservation. SOF 105. It is the Riverbed underlying this portion of the River that continued to flow through the Reservation that the United States seeks to quiet title to in this case.

As Federal Defendants explained in MJP briefing, incorporated by reference here, the language of the reserving documents establishes as a matter of law that the United States intended to include the Riverbed within the Reservation. *See* Joinder in MJP at 5-10. Specifically, by tailoring the Reservation's boundary to include the River, the description of the boundary itself is sufficient to establish the United States' intent to include the Riverbed. *Id.* Cases finding an intent to reserve title to submerged lands involve language akin to that of the reserving documents here, whereas cases finding no such intent do not involve such language. *See* Federal Defendants' MJP Reply at 3-13. And where the language of the reserving documents expresses an intent to include submerged lands, additional evidence is not needed. *Id.* at 13-18. Based on the language of the reserving documents alone, the Court should grant summary judgment in favor of Federal Defendants and hold that the United States intended to reserve title to the Riverbed.

B. *The purpose of the Reservation supports an intent to include the Riverbed within the Reservation.*

Although the language of the reserving documents alone establishes an intent to include the Riverbed within the Reservation, the purpose of a federal reservation may—as it does here—serve as additional support. Specifically, if the purpose of the reservation would have been "compromised" or "undermined" without the submerged lands, then "it is simply not plausible that the United States sought to reserve only the upland portions of the area." *See, e.g.*, *Idaho*, 533 U.S. at 274 (citing *United States v. Alaska*, 521 U.S. 1, 39-40 (1997) ("*Alaska I*")); *see also* *Alaska II* Special Master's Report, 2004 WL 5809425 (Mar. 2004) at *243 (rejecting higher standard that primary purpose must be "entirely defeated"); *Alaska II*, 545 U.S. at 110 (overruling Alaska's objection to exception to the Special Master's recommendation to reject higher standard).

The purpose of an Indian reservation is to provide a permanent and livable homeland that allows the Indians who live there to continue their way of life. *See Winters v. United States*, 207 U.S. 564, 566-67 (1908); *Arizona v. California*, 373 U.S. 546, 599 (1963); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-06 (1968). This "permanent homeland" purpose "is a broad one and must be liberally construed." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (considering "need" of Indian tribes "to maintain themselves under changed circumstances" and concluding that agriculture "was not the only purpose for creating the reservation" because the tribe "traditionally fished for both salmon and trout"); *see also United States v. Adair,* 723 F.2d 1394, 1408-09 & n.13 (9th Cir. 1983) (encouraging broad interpretation of the purposes of an Indian reservation in furtherance of Indian self-sufficiency). The Reservation here, like other Indian reservations, was established to create a tribal homeland—a fixed and permanent home where the Nation could continue their way of life and be self-sustaining. As the United States explained during treaty negotiations with the Nation in 1866, if the Nation wanted to "relinquish your claims to surrounding lands, and settle down on a reservation," the United States would provide a "reserve to settle down and live on forever." SOF 77.

An Indian tribe's relationship to and use of navigable waters can show that the purpose of the Indian reservation would have been compromised or undermined without inclusion of submerged lands. In *Idaho*, for example, the Coeur d'Alene Tribe "traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities," and "depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." 533 U.S. at 265. The Supreme Court noted that this dependence "on fishing and use of navigable water," along with the "unusual

boundary line crossing the lake from east to west," supported the State of Idaho's "sound" concession that the United States intended to reserve the lakebed. *Id.* at 274.

In two earlier cases, the Supreme Court similarly held that a tribe's use of navigable waters for fishing supported the United States' intent to reserve the submerged lands. In *Donnelly v. United States*, the Indians had "established themselves along the river in order to gain a subsistence by fishing." 228 U.S. 243, 259 (1913). And in *Alaska Pacific Fisheries*, tribal members "were largely fishermen and hunters" who "looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence . . . ." 248 U.S. at 88. The Court explained that the "Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential." *Id.* at 89.

Also important is the cultural and religious significance of navigable waters to a tribe. In *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, the Ninth Circuit held that the United States intended to reserve the riverbed of the White River as part of the Muckleshoot Reservation. 713 F.2d 455, 458 (9th Cir. 1983). The Ninth Circuit noted that fishing was "an essential source of [the Indians'] food supply" that depended "not only on the waters in which they found the fish, but also the lands beneath these waters on which they constructed their fish traps and weirs." *Id.* The Ninth Circuit also emphasized, however, that "the focus of the Muckleshoot's world was on the rivers along which they lived," and that they "depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices." *Id.* Similarly, in *Puyallup*, the Ninth Circuit held that the United States intended to reserve the riverbed of the Puyallup River as part of the Puyallup Reservation. *Puyallup*, 717 F.2d at 1253, 1261. In addition to noting that the Puyallup Tribe built

"wiers and traps" that "spanned the width of the river [and] were firmly implanted in the bed of the river," the Ninth Circuit also explained that "the fresh water courses of the area . . . were the center of their world and their lives," that they "conceived of their territory as the Puyallup River and the surrounding land," and that their "spiritual, religious and social life centered around the river." *Id.* at 1259, 1261.

In each of these cases, the tribe's relationship to the navigable waters and submerged lands is comparable to the Nation's relationship to the River and Riverbed. Undisputed evidence here shows that the Nation depended on the River and Riverbed for its physical, cultural, religious, and spiritual needs. SOF 1-61. Tribal members caught and trapped fish, both as a food source and as part of long-held cultural and religious ceremonies, by affixing structures into the Riverbed itself. SOF 15-33. Tribal members gathered freshwater mussels and caught bottom-dwelling fish that used the Riverbed for habitat. SOF 14, 20, 24, 43. And tribal members captured float bison each year in the early spring, a critically lean time of year. SOF 41. The River also provided water for drinking, bathing, and swimming; fertile bottomlands for growing crops; driftwood and timber for fuel and building materials; and a center for trade and transportation. SOF 2-4, 7-13, 42-49. Each of these activities required use of the River. Federal officials recognized that fishing in particular was a "necessity" for the Nation, as were other activities dependent on the River, and fishing became more important over time. SOF 21, 29-30. Moreover, the River had cultural, religious, and spiritual significance to the Nation—as did activities associated with using the River and Riverbed, such as fish trapping and building bull boats. SOF 50-60. Clearly, without the resources of the River and Riverbed, the Reservation's purpose as a permanent homeland for the Nation would have been compromised and undermined. Given the importance of the River and Riverbed to the Nation, "[i]t is simply not

plausible" that the United States did not intend to include the Riverbed within the Reservation. *See Idaho*, 533 U.S. at 274.

In stark contrast to the Nation's relationship to the Missouri River is the Crow Tribe's relationship to the Bighorn River as it was described in *Montana v. United States*, 450 U.S. 544 (1981)—an easily distinguishable case that the State nevertheless relied on heavily in MJP briefing. *See* MJP Joinder at 7-9; Federal Defendant's MJP Reply at 3-5, 6-7. In holding that the United States did not intend to reserve the riverbed of the Bighorn River, the *Montana* Court described the Crow Tribe at the time of the relevant treaty as "a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." 450 U.S. at 556.

The circumstances of the Nation were entirely different. First, the Nation was not nomadic precisely because it relied on the River and its many resources. SOF 1-4. By dwelling in the fertile bottomlands surrounding the River, and using the River for food and other resources, the Nation subsisted as a semi-sedentary riverine culture—unlike other Plains Indians like the Crow, who had abandoned "horticulture in favor of the nomadic lifestyle based on the hunting of bison." SOF 4-13. Second, as just explained, fishing was important to the Nation's diet and way of life. SOF 14-34. 50-58. Tribal members anchored fish traps in the Riverbed itself—a practice that they passed down from generation to generation, and which carried cultural and religious significance that further demonstrates the Riverbed's importance to the Nation. *Id*. Gathering mussels and capturing float bison from the River, analogous to fishing, were also important to the Nation's subsistence. SOF 14, 34-49. *Montana* is easily distinguishable for all these reasons and more. *See Idaho*, 533 U.S. at 274 (distinguishing *Montana*, "where the tribe did not depend on fishing or use of navigable water"); *Alaska I*, 521 U.S. at 38-41 (distinguishing *Montana* and *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), "where the disputed submerged

lands were unnecessary for achieving the federal objectives").

C. *The Nation understood the Riverbed to be included within the Reservation, and any ambiguity must be resolved in favor of the Nation.*

If the Court concludes that the language of the reserving documents is ambiguous, it must nevertheless interpret the documents as the Nation understood them, with any ambiguity resolved in favor of the Nation. *See, e.g.*, *Choctaw Nation*, 397 U.S. at 631. For evidence of the Nation's understanding, the Court may look to the larger context, including the history and negotiation of treaties and other documents, and the practical construction adopted by the parties. *See id.*; *Mille Lacs Band*, 526 U.S. at 196. All such evidence supports that the Nation understood the Riverbed to be included within the Reservation, consistent with the view of high-ranking federal officials at the time and a plain language reading of the reserving documents.

To start, the undisputed facts establish that the Nation understood the River to be included within the territory delineated for it in the 1851 Treaty of Fort Laramie. The United States started negotiations of the 1851 Treaty by assuring the Nation that the United States did not intend "to take any of your lands away from you, or to destroy your rights to hunt, or fish, or pass over the country, as heretofore." *Crow Tribe of Indians v. United States,* 284 F.2d 361, 366-67 (Ct. Cl. 1960). The Nation's views regarding what it had granted and reserved in the 1851 Treaty are made evident in subsequent negotiations of the unratified 1866 treaty. In the 1866 negotiations between the United States and the Nation, tribal leaders considered the rivers (including the Missouri River) to be "our rivers," and that they had granted the United States a right-of-way to use those rivers in the 1851 Treaty. SOF 74. As Hidatsa chief Crow's Breast stated, "They can go up and down our rivers. We give them the rights of way." *Id.* General Curtis agreed that the Nation had provided this "right of way through your country." SOF 75; *see* SOF 76. In 1866, both tribal and federal negotiators clearly understood that, under the 1851 Treaty,

the Nation had granted a right-of-way through their "country," and that the River was part of the Nation's territory.

Three years later, in 1869, the Nation reiterated to General Hancock its understanding that it owned the River. In that letter, tribal leaders described their lands as "following up the Missouri, including the timber on both its banks, to the mouth of the Yellowstone." SOF 82. They also stated that, "until our Father and Friend has given us a reservation, all the land lying within the boundaries mentioned in our first treaty belong to us." SOF 84. And they asked for "confirmation of our reservation to us in accordance with our first treaty . . . ." SOF 83. It should be noted, however, that the 1851 Treaty explicitly reserved the Nation's claims to other lands, consistent with their historical occupation of both sides of the River. SOF 69-72. Again, in the Nation's view, a reservation in accordance with the 1851 Treaty would have included the River.

The Nation's request for confirmation of a reservation led to the 1870 Executive Order, which described the Reservation's boundary as "the left bank of the Missouri River." SOF 87. The Nation would have naturally interpreted that language as confirming their ownership of the River, consistent with their understanding of the 1851 Treaty. *See Muckleshoot*, 713 F.2d at 458 ("Muckleshoot ancestors, placed by the United States government on a reservation along the banks of a particular river, would naturally assume that the river belonged to them for their communal use."); *Namen*, 665 F.2d at 962 ("It would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians."). Just two years after the 1870 Executive Order, Commissioner Walker expressed his view that "[t]he object in mentioning the left or north bank of the Missouri as the boundary line of the reservation was simply to include the whole of the Missouri river, between the mouth of Little Knife River & the

mouth of the Yellowstone, within the limits of the reserve . . . .” SOF 92-93. Commissioner Walker’s view is consistent with (and thus supports) the Nation’s understanding, and it is the most natural reading of the 1870 Executive Order’s plain language. *See* Joinder in MJP at 5-10; Federal Defendants’ MJP Reply at 3-13.

Under a plain language reading of the 1870 Executive Order, setting the boundary as the “left bank” requires including the Riverbed within the Reservation. But even if ambiguity remained, the Court must still construe the language in the Nation’s favor, particularly where, as here, federal officials were aware of the importance of the navigable waters to the tribe. *Puyallup*, 717 F.2d at 1258 (“the Government's awareness of the importance of the water resource to the Tribe taken together with the principle of construction resolving ambiguities in transactions in favor of the Indians warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is ‘otherwise made very plain’ . . . .”). And reading the reference to the “left bank” as including the Riverbed within the Reservation is consistent with the Nation’s preexisting understanding that, in the 1851 Treaty, it had retained ownership of the River and simply granted the United States a right-of-way to use it. Accordingly, that is how the 1870 Executive Order must be read. *See Namen*, 665 F.2d at 962 (“Certainly the most natural and intelligible way of understanding the boundary description is to infer an intent to convey the southern lake bed. This natural interpretation should be adopted, in view of the Supreme Court's very frequent admonitions that doubtful language in Indian treaties must be construed in favor of the Indians and given the sense the Indians would have understood it to convey.”).

The 1880 Executive Order reaffirmed that the boundary continued to be “along the present boundary of the [Reservation] and the left bank of the Missouri River,” SOF 95-96, which would have further confirmed the Nation’s understanding that the entire width of the

River was included within the Reservation. The 1880 Executive Order also added land north of the River, after which a larger portion of the length of the River was flanked on both sides by Reservation uplands. SOF 97. All this indicates a continuing intent to include the entire width of the River (and thus reserve the Riverbed) as it flowed through the Reservation. If federal officials had instead intended to not reserve the Riverbed and thus exclude it from the Reservation in 1870, contrary to Commissioner Walker's view in 1872, then the 1880 Executive Order could have clarified that point. It did not. The Nation would have therefore understood the 1880 Executive Order as continuing to reserve the Riverbed just like the 1870 Executive Order. That the Nation had such an understanding of the 1880 Executive Order is supported by Indian Agent Gifford's report to the Commissioner in 1885 that "[t]he Indians regard this whole section of the country as theirs . . . ." SOF 100.

Although the 1886 Agreement, ratified by Congress in 1891, diminished the size of the Reservation in other areas, the River continued to flow through a part of the Reservation just as it had under the 1870 and 1880 Executive Orders. Congress's stated intent in the 1891 Act—consistent with instructions given to the U.S. treaty commissioners negotiating the 1886 Agreement (SOF 102)—was to reduce the size of the Reservation only "with the consent of the Indians, and upon just and fair terms." Act of Mar. 3, 1891, Ch. 543, § 23, 26 Stat. 989, 1032; *see* SOF 116. Accordingly, the Nation would not have expected (and certainly did not consent) to the Riverbed being silently removed in 1891 after it was so carefully included within the Reservation in 1870 and 1880. To the contrary, the Nation would have understood that title to the Riverbed continued to be reserved after Congress ratified the 1886 Agreement in 1891.

* * *

In sum, there is no genuine dispute of material fact that the United States intended to

include the Riverbed within the Reservation, thereby satisfying the first step of *Alaska II*. Not only does the language of the reserving documents establish an intent to include the Riverbed within the Reservation, that intent is supported by additional evidence regarding the purpose of the Reservation as a permanent homeland for the Nation, as well as the Nation's understanding, confirmed by high-ranking federal officials at the time, of the reserving documents. For all these reasons, the Court should grant summary judgment as to the United States' intent to reserve title to the Riverbed.

II. There is no Genuine Issue of Material Fact That the United States Clearly Intended to Defeat the State's Title to the Riverbed.

The second step of *Alaska II* requires a finding that the United States intended to retain title to submerged lands within the reservation. *Alaska II*, 545 U.S. at 100 (citing *Alaska I*, 521 U.S. at 36). Because the United States' intent to include and thus reserve submerged lands is established at the first step of *Alaska II*, the only question at step two is whether the United States intended to retain title to the submerged lands, such that it did not pass to the state at statehood. Such intent is well established in this case.

Here, the United States' intent to retain title to the Riverbed is established by the Enabling Act, in which Congress required North Dakota to disclaim all right and title to all Indian lands as a prerequisite to statehood (Section II.A, *infra*). An intent to retain title is also independently demonstrated by the United States establishing the Reservation as a permanent tribal homeland, which would be compromised or undermined without the Riverbed (Section II.B, *infra*). Considering additional evidence of the United States' intent only bolsters what the Enabling Act and permanent homeland purpose of the Reservation make obvious—that the United States intended to retain title to the Riverbed. Such additional evidence includes that Congress was on notice that the Reservation included the Riverbed when it recognized the

Reservation as established by Executive Order (Section II.C, *infra*). Lastly, under the Indian law canons of construction, because step one establishes that the United States included and thus reserved title to the Riverbed for the Nation, Congress must express a plain and unambiguous intent to extinguish that title; Congress did not do so, and in fact expressly provided that any future reduction to the size of the Reservation would require tribal consent (Section II.D, *infra*).

A. *The Enabling Act establishes an intent to retain title to the Riverbed.*

As Federal Defendants explained in MJP briefing, incorporated by reference here, the Enabling Act alone establishes the United States' intent to defeat the State's title to the Riverbed. *See* Joinder in MJP at 10-11; Federal Defendants' MJP Reply at 18-20. By requiring North Dakota to disclaim all Indian lands before statehood, which the State did in its constitution in 1889, Congress clearly intended to retain title to all Indian lands that had been reserved for the Nation, including the Riverbed. *Id.* Moreover, because Congress did not ratify the 1886 Agreement until 1891, the State disclaimed title to all Indian lands included within the Reservation as defined by the 1880 Executive Order. Although Congress later ratified the 1886 Agreement, the River continued to flow through the Reservation from below Fort Berthold to the Little Knife River. It is the Riverbed underlying this portion of the River continuing to flow through the Reservation that the United States seeks to quiet title to in this case. The Court should grant summary judgment as to the United States' intent to defeat state title to the Riverbed for all the same reasons it should grant judgment on the pleadings as to that issue. *Id.*

B. *The United States intended to retain title when it established the Reservation as a permanent tribal homeland.*

Just as the purpose of a reservation may support a conclusion at the first step of *Alaska II* that the United States intended to include submerged lands within the Reservation, it may also bolster a conclusion at step two that the United States intended to retain title to submerged lands.

See Idaho, 533 U.S. at 274 (considering at step two "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State"). Allowing the Riverbed to be removed from the Reservation at North Dakota's statehood, like not reserving it in the first place, would have compromised and undermined the Reservation's purpose as a permanent homeland for the Nation. *See* Section I.B, Argument, *supra*.

Moreover, as Federal Defendants stated in MJP briefing, incorporated by reference here, where the reservation's purpose involves concepts of permanency, a powerful inference arises establishing an intent to defeat state title to submerged lands that are reserved. *See* Joinder in MJP at 11 n.4; Federal Defendants' MJP Reply at 20. In *Alaska I*, the Court approvingly cited the Special Master's finding that the application for the Arctic National Wildlife Refuge ("ANWR") "reflected an intent to defeat Alaska's title" because ANWR was "meant to have permanent effect." 521 U.S. at 49. Similarly, in *Alaska II*, the Court strongly suggested that an intent to defeat state title can be found where the President is empowered to create reservations intended to continue in perpetuity. 545 U.S. at 103. Because the President had authority under the Antiquities Act to reserve national monuments for the purpose of conservation, and to "leave them unimpaired for the enjoyment of future generations," the Court concluded, "it would require little additional effort to reach a holding that the Antiquities Act itself delegated to the President sufficient power not only to reserve submerged lands but also to defeat a future State's title to them." *Id.*[7]

[7] The U.S. District for the District of Alaska recently followed the logic of *Alaska I* and *II*, holding the Secretary's withdrawal of Mendenhall Lake Scenic and Recreation Area "independently clearly expresses the United States' intent to defeat the State's title" because "the public purpose of withdrawing . . . was to conserve the land, including submerged lands, for scenic and recreational purposes." *See Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 at 35 (D. Alaska Dec. 9, 2024).

Again, the purpose of an Indian reservation is to provide a permanent tribal homeland. *See, e.g.*, *Winters*, 207 U.S. at 566-67. That doctrine applies with equal force to reservations created by Executive Order. *Arizona*, 373 U.S. at 598 (1963); *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 469-75 (1915) ("The Executive . . . withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power . . . ."). Consistent with *Alaska I* and *Alaska II*, establishment of the Reservation to serve as a permanent homeland for the Nation provides a powerful inference that Congress intended to defeat state title to submerged lands within it, thereby satisfying step two. *See, e.g.*, *Alaska II*, 545 U.S. at 103.

C. *Congress was on notice that the Reservation included the Riverbed when it recognized and ratified the Reservation.*

Although step two is satisfied where Congress requires a state to disclaim a category of reserved lands (such as all Indian lands) or where the United States establishes a reservation intended to continue in perpetuity, an intent to defeat state title may also be found where Congress was on notice that the Executive Order reservation included submerged lands at the time Congress recognized and ratified it. *See Idaho*, 533 U.S. at 274 (citing *Alaska I*, 521 U.S. at 42, 45, 56). Congress was on notice here.

The clear language and intent of the 1870 and 1880 Executive Orders themselves placed Congress on notice that the Reservation included the Riverbed. *See* Federal Defendants' MJP Reply at 18-20; *see also Alaska I*, 521 U.S. at 44-45 (executive order's "clear intent to include submerged lands within the Reserve . . . placed Congress on notice that the President had . . . set aside uplands and submerged lands in the Reserve," and "Congress acknowledged the United

States' ownership of and jurisdiction over the Reserve" in the Alaska Statehood Act); *Alaska II*, 545 U.S. at 104-08 (holding that presidential proclamations creating and expanding Glacier Bay National Monument were ratified by the Alaska Statehood Act).[8] In *Idaho*, the State of Idaho conceded that "Congress was on notice that the Executive Order reservation included submerged lands" based on the Secretary's report to Congress "that the reservation embraced nearly 'all the navigable water of Lake Coeur d'Alene.'" 533 U.S. at 275. The Supreme Court noted that Idaho's concession was "prudent" even though the Secretary's report was silent as to the submerged lands. *Id.* Accordingly, as *Alaska I*, *Alaska II*, and *Idaho* make clear, where Congress was on notice that the reservation embraced *navigable waters*, it was also on notice that the reservation included *submerged lands*.

The circumstances here match those in *Idaho* and other cases considering congressional notice: Congress was on notice that the Reservation included submerged lands when it recognized and ratified the Reservation. Annual reports from the Commissioner, included in the Secretary's annual reports to Congress, relayed the existence of the Reservation and the language of the 1870 and 1880 Executive Orders, both of which set the boundary as the "left bank" of the River to explicitly include the entire width of the River within the Reservation. SOF 87-93, 95-96. One such report from the Commissioner in 1985 made clear that the 1870 and 1880 Executive Orders constituted "treaty, law, or other authority establishing [a] reserve." SOF at 99. That same report conveyed that the Nation understood the *entirety* of the Reservation to be their land. SOF 100 ("The Indians regard this whole section of the country as theirs . . . ."). Congress

[8] *See also Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 at 24 n.106 (D. Alaska Dec. 9, 2024) (rejecting Alaska's argument "that Congress was not on notice of the withdrawal" of submerged lands where the reserving document itself clearly showed an intent to reserve submerged lands).

also received notice of the Reservation's existence in January 1884, when President Chester Arthur submitted to both houses of Congress a draft bill and supportive correspondence proposing allotment of the Reservation to tribal members. SOF at 98. The bill and correspondence, which included the text of the 1870 and 1880 Executive Orders describing the boundaries of the Reservation, was "read and referred to the Committee on Indian Affairs and ordered to be printed." *Id.* By having notice that the Reservation's boundaries embraced the River, Congress was also on notice that the Reservation included the Riverbed.

Congress received further notice of the Reservation and its inclusion of the Riverbed in 1887, when the President presented the 1886 Agreement to Congress. SOF at 107. In describing the lands to be removed, the 1886 Agreement, which Congress ratified in 1891, referred to the existing Reservation "as laid down upon" the official GLO map of the Territory of Dakota. SOF at 103. That GLO map depicted the Reservation as defined by the 1880 Executive Order, including the northern boundary as the left bank of the River. SOF at 104. The map also showed the River flowing through the part of the Reservation remaining after the 1886 Agreement. *Id.* Just as the Supreme Court remarked in *Idaho*, citing the district court, "it would be difficult to imagine circumstances that could have made it more plain to Congress that submerged lands were within the reservation." 533 U.S. at 276; *see Alaska I*, 521 U.S. at 56 (Congress was on notice where Secretary "informed Congress that the application for the reservation was pending and submitted maps showing the areas as a federal enclave embracing submerged lands").[9]

Having notice that the Reservation included the Riverbed, Congress recognized and ratified the Reservation. In 1886, for example, Congress authorized the Secretary to negotiate a

[9] *See also Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 at 23-26 (D. Alaska Dec. 9, 2024) (notice to Congress by including reserve on written list of withdrawals with map of approximate location "was at least as complete" as in *Alaska I*).

reduction of the Reservation, implicitly recognizing the Reservation as defined by the 1880 Executive Order. *See* Act of May 15, 1886, 24 Stat. 29, 44; *see* SOF at 101. Congress also recognized and ratified the Reservation as defined by the 1880 Executive Order in two bills passed in February 1887. Congress granted to the Saint Paul, Minneapolis, and Manitoba Railway Company a right-of-way "through the lands in Northwestern Dakota set apart for the use of the [Nation] by executive order dated July thirteenth, eighteen hundred and eighty, commonly known as the Fort Berthold Indian Reservation. . . . ." Act of February 15, 1887, 24 Stat. 402; *see* SOF at 110; *Idaho*, 533 U.S. at 277 (noting Congress "honored the reservation's recently clarified boundaries by requiring that the Tribe be compensated for the Washington and Idaho Railroad Company right-of-way . . . ." (citation omitted)). And in the General Allotment Act, Congress expressly recognized all Executive Order reservations existing at the time, which would have included the Reservation as defined by the 1880 Executive Order. Act of February 8, 1887, 24 Stat. 388; *see* SOF at 108-109. Not until 1891, after North Dakota had already become a state, did Congress ratify the 1886 Agreement's reduction of the Reservation.

Lastly, in *Idaho*, even though the State of Idaho had conceded congressional notice based on the reservation clearly embracing navigable waters, the Court considered additional evidence that Congress was on notice that the reservation included submerged lands. The Court recounted, for example, the federal government's negotiations with the Coeur d'Alene Tribe, in which the importance of Lake Coeur d'Alene and submerged lands were apparent to federal negotiators "throughout the period prior to congressional action confirming the reservation and granting Idaho statehood." 533 U.S. at 275-76. Because Congress had authorized such negotiations, received some reports regarding them, and ultimately endorsed the outcome of the negotiations by ratifying the Coeur d'Alene Reservation, the Court imputed an awareness of the lake's

importance to Congress as well. *Id.* at 277-78.[10]

Just as federal officials were aware of the importance of Coeur d'Alene Lake to the Coeur d'Alene Tribe, *see Idaho*, 533 U.S. at 277-78, federal officials were aware of the importance of the River to the Nation. SOF at 27-32. As early as the 1851 Treaty, federal officials recognized the importance of fishing by guaranteeing the Nation's fishing rights. SOF at 28. They continued to recognize the importance of fishing throughout the 1880s, during the time that the 1886 Agreement was being negotiated. *See* SOF at 29-30 (in 1880, Indian Agent Gardner listed fishing as "necessity" for the Nation). And at times they communicated the importance of fishing to Congress itself. SOF at 31 (Commissioner's annual report in 1889 stating that Hidatsa band "have managed to exist all this time by fishing and hunting"); SOF at 32 (Commissioner's annual report in 1890 stating that 15-percent of Hidatsa subsistence came from "[h]unting, fishing, root-gathering, etc.," with similar numbers for the Mandan and Arikara). Consistent with the River's importance, nothing in the 1886 Agreement indicated an intent to exclude the Riverbed underlying the portion of the River that still flowed through the Reservation. And Congress ultimately endorsed the outcome of the negotiations by ratifying the 1886 Reservation in 1891.

D. *Instead of expressing a clear and unambiguous intent to extinguish the Nation's title to the Riverbed, Congress provided that any future reduction to the size of the Reservation would require tribal consent.*

Further supporting the United States' intent to retain title to the Riverbed is that, under the Indian law canons of construction, Congress would have had to express a plain and

[10] Other courts have similarly focused on what the "United States" or the "government" knew at the time, not Congress. *See, e.g.*, *Muckleshoot*, 713 F.2d at 458 (noting what "[t]he Government" and its "Indian agents understood"); *Puyallup*, 717 F.2d at 1258 (noting "the Government's awareness of the importance of the water resource to the Tribe . . . .").

unambiguous intent to extinguish that title. *See Santa Fe Pac. R.R.*, 314 U.S. at 346. The United States reserved title to the Riverbed in the 1870 and 1880 Executive Orders. The 1886 Agreement, which Congress did not ratify until 1891, must be understood in reference to the 1880 Reservation. The 1886 Agreement described an area of land that the Nation agreed to "cede, sell, and relinquish." SOF at 103. The portion of the River from below Fort Berthold to the Little Knife River, however, was not within the 1886 description of land to be ceded. SOF at 105; *see* SOF Figure 1 (Map depicting land cessions by the Nation, 1851-1892). Congress never expressed an intent to extinguish the Nation's beneficial title to that part of the Riverbed, which had been reserved in 1870 and continued to be included within the Reservation after the 1886 Agreement was ratified in 1891.

Rather than expressing a clear and unambiguous intent to extinguish title to the Riverbed, Congress expressed the opposite intent, reflected in the instructions given to the U.S. treaty commissioners negotiating the 1886 Agreement (SOF at 102) and plainly stated in the 1891 Act, "to reduce to proper size of existing reservations . . . with the consent of the Indians, and upon just and fair terms." Act of Mar. 3, 1891, Ch. 543, § 23, 26 Stat. 989, 1032 (emphasis added); *see* SOF at 116. As noted by the *Idaho* Court, this policy shows that Congress intended to retain title to the Riverbed. Congress "made it expressly plain that its object was to obtain tribal interests only by tribal consent," "an objective flatly at odds with Idaho's view that Congress meant to transfer the balance of submerged lands to the State in what would have amounted to an act of bad faith accomplished by unspoken operation of law." *Idaho*, 533 U.S. at 277-79. It would have been "an act of bad faith" and "implausible" for Congress to express an intent to reduce the size of the Reservation only with tribal consent while at the same time stripping the Nation of the Riverbed by silent operation of unsettled law. *Id.* at 278-79. And Congress's objective of

"negotiated consensual transfer . . . would have been defeated if Congress had let parts of the reservation pass to the State before the agreements with the Tribe were final." *Id.* at 281. "Any imputation to Congress of either bad faith or of secrecy in dropping its express objective of consensual dealing" with the Nation "is at odds with the evidence." *Id.*

* * *

In sum, the United States' intent to retain title to the Riverbed is established by Congress requiring the State to disclaim title to all Indian lands and the United States establishing the Reservation as a permanent homeland for the Nation. Moreover, an intent to retain title is supported by the undisputed facts, which make plain that Congress was on notice that the Reservation included the Riverbed, that federal officials were aware of the importance of the River to the Nation, and that Congress expressly provided that any future reduction to the size of the Reservation would require tribal consent. *Id.* at 277. Just as the Nation would not have expected the Riverbed to be silently removed, *see* Section I.C, Argument, *supra*, there is no reason to believe Congress intended the Riverbed, so carefully included within the Reservation, to pass out of federal hands through silent operation of law. As the *Idaho* Court put it, because "Congress was aware that the submerged lands were included and clearly intended to redefine the area of the reservation that covered them only by consensual transfer," it was very plain that "Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands at issue . . . ." *Idaho*, 533 U.S. at 280-81. Congress similarly intended to bar passage of title to the Riverbed to North Dakota.

CONCLUSION

For all these reasons, Federal Defendants respectfully request that the Court grant their Motion for Summary Judgment and enter the Proposed Order provided herewith.

Dated: January 17, 2025

Respectfully submitted,

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