

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 BRIEF IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT ON CROSSCLAIM**

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Plaintiff Mandan, Hidatsa, and Arikara Nation (the “MHA Nation”) respectfully submits this memorandum in support of the Federal Defendants’ motion for summary judgment on the quiet title crossclaim against the State of North Dakota. (ECF 119.) Title to the bed and banks of the Missouri River within the Fort Berthold Indian Reservation (the “Riverbed”) should be quieted in favor of the United States in trust for the benefit of the MHA Nation.

INTRODUCTION

On October 17, 2024, the MHA Nation moved for judgment on the pleadings on the Federal Defendants’ crossclaim. (ECF 103, 104.) As set forth in that motion, which is pending, the United States holds title to the Riverbed in trust for the benefit of the MHA Nation for two reasons. First, the relevant Treaties, Statutes and Executive Orders creating the reservation establish (1) that the United States clearly intended to include submerged lands within the reservation; and (2) the United States expressed its intent to retain federal title to submerged lands within the reservation. *See Alaska v. United States*, 545 U.S. 75, 100 (2005) (“*Alaska IP*”). Second, North Dakota’s claim to the Riverbed is barred by res judicata because it was adjudicated in *Impel Energy Corp.*, 42 IBLA 105 (August 16, 1979). North Dakota intervened in *Impel*, lost, and did not appeal. Thus, the IBLA’s decision in *Impel* precludes North Dakota from relitigating its equal footing argument.

In addition, the Federal Defendants have moved for summary judgment. The MHA Nation joins the Federal Defendants’ motion and submits this memorandum to identify additional evidence and argument supporting it.

DISCUSSION

I. The MHA Nation’s historical use of the River and the Riverbed supports the conclusion that the United States intended to include them within the Fort Berthold Reservation to preserve a homeland for the Nation.

The first inquiry in the *Alaska II* test is “whether the United States clearly intended to include submerged lands within the reservation.” *Alaska II*, 545 U.S. at 100. As discussed in the motion for judgment on the pleadings, the 1870 Executive Order establishing the Fort Berthold Reservation included the Riverbed within the Reservation by starting and ending at a point on the river itself and by using the left, or outer, bank of the river as the exterior boundary of the reservation.

Furthermore, the historical evidence confirms this conclusion. It demonstrates that the MHA Nation used and relied on both the River and the Riverbed throughout its history and that exclusion of the submerged lands would have undermined the purpose of the reservation. (*See* Federal Defendants’ SOF 7-60.)

In addition to the historical evidence supplied by the Federal Defendants, the MHA Nation retained its own historical expert, who concluded, among other things, that:

[T]he Missouri River and its riverine environment have been integral to the culture, lifeway, and economy of the three tribes. The River was central to the three tribes’ creation stories, cultural traditions, and sacred rituals. The three tribes used the resources of the River and its bottomlands. They relied heavily on the River for hunting, fishing (including traps and pens), collecting driftwood, and transportation. They were greatly dependent on the River as a source of water for bathing, drinking, cooking, and other domestic purposes. They were active participants in a complex trading network that relied primarily on the River.

Declaration of Dr. Michael L. Lawson, ¶ 4(b); *see also id.* Ex. A (the “Lawson Report”). There are abundant historical facts and evidence that support this conclusion.

The MHA Nation lived in sedentary villages along the River itself. (Lawson Report 25-29; Federal Defendants’ SOF ¶¶ 1-6.)¹ This sedentary lifestyle distinguished the three Tribes comprising the MHA Nation (also referred to as the “Three Tribes”) from the more nomadic Plains tribes. (Lawson Report 28.) By locating their villages on the River, the Three Tribes were able to develop advanced agricultural techniques and complex trade networks precisely because they relied on the River and its many resources. (Lawson Report 28-29.)

A. Fishing in the River and using the Riverbed was an important food source.

The MHA Nation relied on the River as an important food source.² “Unlike the roving tribes of the northern Plains, the Three Tribes people were fond of eating fish, and fishing was a supplemental part of their subsistence pattern. They obtained catfish, sturgeon, and other species of fish from the Missouri River, as well as turtles and fresh water mussels.” (Lawson Report 96; *see also* Edwin Thompson Denig, *Five Indian Tribes of the Upper Missouri* at 48-49 (Univ. of Okla. Press, 1961) (Billion Decl. Ex. B); Roy W. Meyer, *The Village Indians of the Upper Missouri* at 2 (Univ. of Neb. Press 1977) (Billion Decl. Ex. C); Elizabeth A. Fenn, *Encounters at the Heart of the World* at 15 (Hill and Wang 2014) (Billion Dec. Ex. D).) Indeed, Dr. Lawson concluded that “[f]ish were a staple of Mandan, Hidatsa, and Arikara diets.” (Lawson Report 422; Federal Defendants’ SOF ¶ 14.)

¹ Citations to the Lawson Report cite to the page number in the upper corner of the Report itself to be consistent with the Report’s table of contents.

² The MHA Nation expects that North Dakota will argue that the MHA Nation did not depend on fishing for a majority of its diet. But the *Alaska II* test imposes no such requirement. North Dakota does not—and cannot—dispute that the MHA Nation relied on fish for a part of its diet. (Stevens Depo. Tr. 151:22-152:11 (Billion Decl. Ex. A).) Furthermore, North Dakota cannot dispute that the MHA Nation used the Riverbed itself for trap fishing (*id.* 152:5-8) and that such fishing was considered a sacred activity. (*Id.* 153:12-155:3.) These uses contradict the notion that the United States excluded the submerged lands from the reservation it created as a permanent homeland for the MHA Nation.

Archaeological evidence confirms that the MHA Nation fished regularly. Excavations conducted in the 1930s and 1940s “uncovered fish bones, bone and horn fishhooks, and clam and unio shells.” (Lawson Report 105, George F. Will and Thad C. Hecker, *Upper Missouri River Valley Aboriginal Culture in North Dakota*, North Dakota Historical Quarterly, vol. 11 nos. 1-2, at 25-26 (Billion Decl. Ex. E).) Later excavations at Like-A-Fishhook village and Fort Berthold “uncovered significant evidence of fishing activity in those settlements.” (Lawson Report 105.)

In addition to documentary and archaeological evidence of fishing, oral histories confirm the importance of fishing to the MHA Nation. (See Federal Defendants’ SOF ¶¶ 14, 21-25, 27-34.) One tribal member recalled “we depended on the river and whatever else was in there, like of course the fish . . . My dad did a lot of hunting and fishing. I remember he went every day and set his lines.” (Alice Harwood and Ramona Two Shields, interview, August 1, 2019, at 1 (Billion Decl. Ex. F).) A different tribal member “recalled eating fish daily.” (Lawson Report 422; Pete Fredericks, Jr., interview, July 31, 2019, at 1 (Billion Decl. Ex. G).) Dr. Lawson’s Report recounts a large number of tribal members who passed down oral histories of the importance and prevalence of fishing to the MHA Nation. (See Lawson Report 422-24; Harry Sitting Bear, interview, July 31, 2019, at 6 (Billion Decl. Ex. H); Calvin Grinnell, interview, July 28, 2019, at 2, 10 (Billion Decl. Ex. I); Keith Mandan and Clarysa Mandan, interview, July 30, 2019, at 3 (Billion Decl. Ex. J); Ed Hall, interview, August 19, 2019, at 3 (Billion Decl. Ex. K); Mercy Walker, interview, American Indian Curricula Development Program, Fort Berthold Community College (Billion Decl. Ex. L).)

Fishers from the Three Tribes caught fish using wooden traps anchored into the Riverbed itself. (See Federal Defendants’ SOF ¶¶ 15-19, 26.) The Arikara in particular were “good fishermen” and would catch “large numbers” of fish “by placing pens made of willows in the

eddies of the Missouri.” (Lawson Report 97; F.V. Hayden, *Contributions to the Ethnography and Philology of the Indian Tribes of the Missouri Valley* at 354 (2001 ed.) (Billion Decl. Ex. M).) The Mandan and Hidatsa also used traps affixed to the Riverbed to catch fish. (Lawson Report 98-99; G. Hubert Smith, *Like-A-Fishhook Village and Fort Berthold*, National Park Service, Department of the Interior, at 34-35, 37, 42, 50, 58 (1972) (Billion Decl. Ex. N).) One Hidatsa trap is shown in Figure 2 of the Lawson Report:



(Bella Weitzner, *Notes on the Hidatsa Indians Based on Data Recorded by the Late Gilbert L. Wilson*, Vol. 56, Part 2, at 199-202 (Am. Museum of Natural Hist. 1979) (Billion Decl. Ex. O).) Aside from the documentary evidence, oral histories also described these fish traps as effective and commonly used fishing methods. (Calvin Grinnell, interview, July 28, 2019, at 10 (Billion Decl. Ex. I); Keith Mandan and Clarysa Mandan, interview, July 30, 2019, at 3 (Billion Decl. Ex.

J); Ed Hall, interview, August 19, 2019, at 3 (Billion Decl. Ex. K); Mercy Walker interview (Billion Decl. Ex. L).)

Fish trapping was so important to the MHA Nation that only people with specific knowledge granted by ownership of the appropriate sacred bundle were allowed to construct fish traps and perform the associated ceremonies. (See Lawson Report 411, 421-24; Weitzner, *Notes on the Hidatsa Indians*, at 200-209 (discussing the concept of a fish trap being a living thing and the spirituality of the fish trap) (Billion Decl. Ex. O); see also Federal Defendants' SOF ¶¶ 56-57.) Similarly, "[t]he Hidatsa also held special ceremonies to bless the trapping of fish." (Lawson Report 100; Frank Henderson Stewart, *Hidatsa*, published in *Handbook of North American Indians*, Vol. 13 Part 1, at 335 (William C. Sturtevant, gen. ed., Smithsonian Institution 2001) (Billion Decl. Ex. P).) One tribal elder, interviewed in 1973, discussed the responsibility of a bundle keeper:

He had this fish trap and the community got their fish from this trap. In connection with the medicine that this individual possessed there were many taboos and restrictions . . . When there was a large amount of fish caught, all this was distributed within the neighborhood. I know this for a fact because I have seen and witnessed the large catches that were distributed.

(Mercy Walker interview (Billion Decl. Ex. L); see also Lawson Report 424; see also Lawson Report 411 (tribal elder discussing learning how to build traps); Keith Mandan and Clarysa Mandan interview, July 30, 2019, at 3 (Billion Decl. Ex. J).) Noting the redistributive and communal nature of fishing, one tribal member observed that those tribal members with the right to use fish traps "had to share with the community. There was a cultural taboo against hoarding. They recognized this rule as providing subsistence to their tribal members." (Calvin Grinnell, interview, July 28, 2019, at 10 (Billion Decl. Ex. I).) While the MHA Nation enjoyed other sources of food as well, fishing was an important part of the Three Tribes' diet, life, community, and spirituality.

B. The River was important for hunting.

The MHA Nation relied on its riverine environment for hunting as well as fishing. (See Federal Defendants’ SOF ¶¶ 37-41.) Specifically, the Three Tribes hunted bison and other game in the River bottomlands. (Lawson Report 28 (“They balanced their agricultural production by hunting bison and other game, both on the Plains and in the River bottomlands”).) Even after allotment, “tribal members continued to benefit from the resources of their riverine environment to help provide for their subsistence: hunting, collecting timber and wild fruits and vegetables from the bottomlands, and fishing from the River.” (Lawson Report 52.) In fact, most of the first allottees chose parcels of land close to the River—illustrating the MHA Nation’s connection to and dependence on the River. (Lawson Report 52; Meyer, *The Village Indians*, at 138 (Billion Decl. Ex. C).)

The Tribes also developed a unique practice of harvesting bison that had drowned in the River during winter. These bison would break through the ice and drown, where they remained frozen until spring. The community would gather the bison carcasses by going out onto the ice and bringing them ashore. (Lawson Report 106-110; Denig, *Five Tribes of the Upper Missouri*, at 49 (Billion Decl. Ex. B); Fenn, *Encounters at the Heart of the World*, at 15, 68 (Billion Decl. Ex. D); *Waheenee: An Indian Girl’s Story*, Gilbert L. Wilson, ed., at 26-27 (Univ. of Neb. Press 1981) (Billion Decl. Ex. Q).) In addition to harvesting dead bison from the River, the MHA Nation would actively hunt bison in the River as well. (Lawson Report 107.) The MHA Nation’s hunters often used the River to transport animals killed elsewhere to their villages. (Lawson Report 427; Harry Sitting Bear, interview, July 31, 2019, at 6 (Billion Decl. Ex. H).)

C. The River was essential for agriculture.

The MHA Nation grew a variety of crops on the River's bottomlands, including beans, peas, squash, melons, vegetables, fruit, and corn. (Lawson Report 427-30; Delvin Driver Sr. and Marvin Driver, interview, August 19, 2019, at 1 (Billion Decl. Ex. R); Marilyn Youngbird, interview, August 20, 2019, at 4 (Billion Decl. Ex. S); Jerome Dancing Bull, interview, August 22, 2019, at 2 (Billion Decl. Ex. T); *see also* Federal Defendants' SOF ¶¶ 8-13.) This was possible because the River's periodic flooding produced fertile soil. (*See* Lawson Report 195 (noting that the bottomlands of the River were regularly replenished by floods and had accessible water for agriculture). In short, the success of the MHA Nation's agriculture depended on proximity to the River. Further, the River's bottomlands provided wild fruits and vegetables that were part of the Tribal diet.

One Tribal elder summarized the importance of the River and its plentiful bottomlands to the MHA Nation:

The bottomlands would be what is . . . what was around the original riverbed . . . everything centered around there. . . . There was large thickets of plums and Juneberries, raspberries, chokecherries. Our wild potatoes. Our best gardens were down below with our best things that we grew for centuries – they were all down on the bottom. And then with that much plant life down there, there was a lot of animal life down there – so a lot of wild chickens, pheasants, turkeys, you know, deer for meat. So there was a lot there and it pretty much sustained everybody so it was really rare to hear of anybody going hungry.

(Lawson Report 388; Harry Sitting Bear, interview, July 31, 2019, at 1 (Billion Decl. Ex. H); *see also* Alice Harwood and Ramona Two Shields, interview, August 1, 2019, at 1 (Billion Decl. Ex. F); Keith Mandan and Clarysa Mandan, interview, July 30, 2019, at 1 (Billion Decl. Ex. J).)

Further, the MHA Nation relied on its agricultural success for trade goods as well as food. The Three Tribes traded their crops for buffalo and other animal products. (Lawson Report 125; Fenn, *Encounters at the Heart of the World*, at 230 (Billion Decl. Ex. D); Stewart, *Hidatsa*,

at 334 (Billion Decl. Ex. P); Douglas R. Parks, *Arikara*, published in *Handbook of North American Indians*, William C. Sturtevant, gen. ed., Vol. 13 Part 1, at 370 (William C. Sturtevant, gen. ed., Smithsonian Institution 2001) (Billion Decl. Ex. U).)

D. The River was a source of raw materials, water, and medicine.

The MHA Nation also relied on the River for raw materials, water, medicine, and other means of daily living. (Lawson Report 397-421; *see also* Federal Defendants’ SOF ¶ 43.) “There was ample wood in the bottomland and coal beds in several locations for fuel supply; timber for logs to build homes, barns, and fence posts; shelter for wintering stock, and wild fruits and vegetables, game, and fish to balance the food supply.” (Lawson Report 56.) Driftwood and floating trees provided a major source of firewood for the MHA Nation. (Lawson Report 91-92; Donald J. Lehmer, *Introduction to Middle Missouri Archaeology*, at 55 (National Park Service, Department of Interior 1971) (Billion Decl. Ex. V); M. Charles MacKenzie, *The Mississouri Indians*, at 338 (1960) (Billion Decl. Ex. W).) Capturing driftwood involved entering the River and walking on the Riverbed, as well as anchoring a hook to a tipi pole to draw in the logs as they floated by. (*See* Lawson Report 95; Weitzner, *Notes on the Hidatsa*, at 270-71 (Billion Decl. Ex. O).)

E. The River was essential for transportation and trade.

All three Tribes of the MHA Nation were heavily involved in trade and intercourse along the Missouri River, and the river was their trade highway. (*See* Federal Defendants’ SOF ¶¶ 44-49.) The Mandan, Hidatsa, and Arikara villages were located on both sides of the Missouri River. (*See* Federal Defendants’ SOF ¶ 71; *see also* Alfred W. Bowers, *Mandan Social and Ceremonial Organization*, at 8-14 (Univ. of Chicago Press 1950) (Billion Decl. Ex. X).) These villages along the river served as important trade centers. (*See* Parks, *Arikara*, at 370 (Billion

Decl. Ex. U.) As more Europeans came up the Missouri river in the early 1800s, trade became even more important to the Three Tribes. In fact, the Arikara War of 1823, the first military conflict with the Indians west of the Mississippi River, was fought over trade on the River. (See Roger L. Nichols, *Backdrop for Disaster: Causes of the Arikara War of 1823*, South Dakota Historical Society, South Dakota History, Vol. 14 No. 2, at 93-98 (June 27, 1984) (Billion Decl. Ex. Y).) The 1825 treaties with the Mandan Hidatsa and Arikara were negotiated with the United States following the Arikara war, in which the Tribes agreed to “peace,” “friendly intercourse,” and an exclusive trade relationship with the United States “under mild and equitable regulations,” at a time when the United States and Great Britain were still competing for trade on the upper Missouri.³

The Three Tribes built and used bull boats “to transport people and goods both across and down the Missouri River[.]” (Lawson Report 110; *see also* Denig, *Five Indian Tribes of the Upper Missouri*, at 52 (Billion Decl. Ex. B); Federal Defendants’ SOF ¶ 58.) This activity was so important that it was regulated by custom. In order to construct a bull boat, a tribal member had to purchase the right from an owner of the sacred bundle incorporating that activity. (Lawson Report 111-113; Stewart, *Hidatsa*, at 339, Fig. 4 (Billion Decl. Ex. P).)

³ The trade and intercourse provisions of the 1825 treaties were laid out in Articles 1-2 and 4-5. 7 Stat. 264 (Mandan); 7 Stat. 261 (Hidatsa); 7 Stat. 259 (Arikara). All three treaties were proclaimed on February 6, 1826. *Id.* Even prior to the Arikara war, the three tribes of the MHA Nation were willing to fight to keep the Missouri river open to trade. One historical account describes a party of nearly 300 Mandan Hidatsa and Arikara warriors going down the Missouri to escort a white trading party north to their villages. (See Nichols, *Backdrop for Disaster*, at 105 (Billion Decl. Ex. Y).)

F. The River was central to the MHA Nation’s spirituality and belief systems.

The River was also central to the MHA Nation’s spirituality and belief systems. (Lawson Report 456-68; *see also* Federal Defendants’ SOF ¶¶ 50-60.) The River is not only sacred—it is a still-living presence. (*See* Delvin Driver, Sr. and Melvin Driver, interview, August 19, 2019, at 1 (Billion Decl. Ex. S).) The River also remains a crucial aspect of the MHA Nation’s ceremonies through the specialized sacred bundles. (Lawson Report 462-63; Weitzner, *Notes on the Hidatsa Indians*, at 200-209 (Billion Decl. Ex. O); Calvin Grinnell, interview, July 28, 2019, at 10 (Billion Decl. Ex. I).)

In sum, the MHA Nation’s subsistence depended on the resources of the River (including the Riverbed) and its bottomlands. The United States was aware of the MHA Nation’s dependence on the River when it established the boundaries of the Fort Berthold Reservation in the 1870 Executive Order. It is readily apparent why the 1870 Executive Order included the River within the Fort Berthold Reservation. Permitting title to the River and Riverbed to pass to North Dakota would have frustrated the purpose of setting aside the Fort Berthold Reservation as a permanent homeland for the MHA Nation.

II. The historical evidence confirms that the United States intended to defeat North Dakota’s title to the Riverbed.

The United States correctly notes that its intent to retain title to the Riverbed is established by both the terms of the Enabling Act and by the Reservation’s purpose as a permanent tribal homeland, which would be compromised or undermined without the Riverbed. (*See generally* Federal Defendants’ SOF ¶¶ 62-117.)

The Enabling Act required that North Dakota “disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” 25 Stat. 676,

ch. 180, Sec. 4. The Act further provided that no “lands embraced in Indian, military, or other reservations of any character [shall] be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.” *Id.*, Sec. 10. Established nearly two decades before the State of North Dakota, “the Fort Berthold Reservation included the Missouri River and its bed within its boundaries.” (Lawson Report 494.)

Further, the purpose of creating the Fort Berthold Reservation was to permanently reserve a homeland for the MHA Nation, and that purpose required that the United States defeat North Dakota’s title. As Dr. Lawson summarized:

The seemingly ideal solution then, and one that accommodated both the goals and intentions of the Federal Government and the desires of the Tribes, was to create a Reservation that would allow this tribal entity to have a permanent home within the aboriginal lands on which their culture and economy had previously thrived. On these reserved lands, their tenure would be protected by trust title; their security protected by Federal law and by military force, if necessary; and their subsistence and further development of an agricultural economy supplemented and supported by the Government goods and services they received in exchange for ceding a portion of their traditional areas of use and occupation to the United States.

(Lawson Report 213.) Because the MHA Nation’s subsistence depended on the resources of the River (including the Riverbed), it would have frustrated the very purpose of the reservation to transfer those vital resources to North Dakota only twenty years later. This “would have amounted to an act of bad faith accomplished by unspoken operation of law.” *Idaho v. United States*, 533 U.S. 262, 278-79 (2001). This cannot have been the intention of the United States.

CONCLUSION

The documents setting aside the Fort Berthold Reservation as a permanent homeland for the MHA Nation in 1870 clearly included the River and Riverbed within the Reservation. Because the River and Riverbed were central to the MHA Nation’s subsistence, culture, and

lifestyle, including those areas within the Reservation is essential to the purpose of the Reservation. The Court should grant the MHA Nation's motion for judgment on the pleadings or alternatively grant the Federal Defendants' motion for summary judgment and quiet title to the Riverbed in the United States for the benefit of the MHA Nation.

Dated this 14h day of February, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 14, 2025, he served a true and correct copy of the following document:

PLAINTIFF MANDAN, HIDATSA AND ARIKARA NATION'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CROSSCLAIM

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