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.	)	Civ. No. 1:20-cv-1918-ABJ

STATE OF NORTH DAKOTA'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The crux of the United States' Motion for Summary Judgment (ECF No. 119) is that because the Missouri River flows within the boundaries of the Fort Berthold Indian Reservation (FBIR), then the Mandan, Hidatsa, and Arikara Nation (MHA) must possess title to that portion of the River and its riverbed.[1] But that fact of geography does not strip the State of North Dakota of its presumptive title to the beds of navigable rivers under the Equal Footing Doctrine. *E.g.*, *Montana v. United States*, 450 U.S. 544, 554 (1981) ("The mere fact that the bed of a navigable water lies within the boundaries described in the treaty [creating a tribal reservation] does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.").

The United States' and MHA's proffered "additional evidence" for summary judgment also is neither "undisputed" nor capable of establishing the clear Congressional intent necessary to have reserved ownership of the Missouri River's riverbed for MHA upon North Dakota's statehood. *See* ECF No. 119-1 at 1 (US Br.); ECF No. 121 at 1 (MHA Br.). In fact, the historical evidence supports the *opposite* conclusion: that the Missouri riverbed has always belonged to the State. And in any event, at minimum, genuine disputes of material fact abound—including conflicting expert opinions—and those disputes must be construed in the State's favor as the non-moving party. Accordingly, the Court should deny summary judgment for the United States and MHA.

The applicable legal standard underscores the inadequacy of the United States' Motion. As the United States acknowledges, "[u]nder the equal footing doctrine, it is presumed that 'title

[1] The "riverbed" at issue in this case refers to the submerged lands underlying the Missouri River as they existed immediately prior to construction of the Garrison Dam in the 1950s (which inundated the area to create Lake Sakakawea, one of the largest man-made reservoirs in the nation).

to land under navigable waters passes from the United States to a newly admitted State' at the time of statehood." US Br. at 17 (citation omitted). That "strong presumption" cannot be defeated unless prior to statehood Congress's contrary "intention was definitely declared or otherwise made very plain." *Alaska v. United States*, 545 U.S. 75, 79, 100 (2005) (*Alaska II*). In other words, the United States can't simply offer plausible evidence of MHA title to the riverbed (which it does not even do here). Instead, to strip the State of title to the bed of a navigable river, the United States would need to offer evidence of Congressional intent to do so that is "clear," "definit[ive]," or otherwise "very plain." *Id*. It has not, and cannot, here. Especially not on summary judgment.

Nor can the United States sidestep its evidentiary burden based on "Indian law canons of construction." *Cf.* US Br. at 18-20. That is because such canons are only triggered when there is an ambiguity capable of being construed in favor of Indians or Indian nations; however, in the context of a dispute involving the Equal Footing Doctrine, any such ambiguity would *ipso facto* establish the very lack of clarity that would defeat an attempt to strip a State of title to the bed of a navigable river. In other words, the Equal Footing Doctrine's specific presumption of State riverbed title controls over any general Indian law canon of construction. Consequently, regardless of their applicability in other contexts, the Supreme Court's Equal Footing cases have *not* relied upon Indian law canons to strip States of title to the beds of navigable rivers. Indeed, the United States previously *disavowed* the applicability of such canons in this very case. *See* ECF No. 17 at 21-22 (United States' brief in support of its prior motion for partial summary judgment); ECF No. 33 at 15 (United States' reply in support of same).

Furthermore, the United States' flip-flopping over riverbed ownership after North Dakota's statehood undermines any claim that this quiet title dispute is amenable to summary disposition. The Department of the Interior's Solicitor has issued multiple, contradictory legal opinions

regarding the State's ownership of the disputed riverbed within just two years. *Compare, e.g.*, M-37056 (May 26, 2020 opinion that the State owns the riverbed) *with* M-37073 (February 2, 2022 opinion that the United States owns the riverbed in trust for MHA).[2] And those fluctuating opinions have resulted in the United States taking different positions in this very litigation. *Compare, e.g.*, ECF No. 33 at 2 ("[t]he riverbed passed to the State upon its admission to the Union") *with* US Br. at 20 ("the United States intended to reserve and retain title to the Riverbed"). And only a couple weeks ago, the United States revised its position yet again. On February 28, 2025, the Interior Acting Solicitor suspended its most recent opinion favoring MHA title (M-37073, as well as its March 19, 2021 M-37066 opinion that first withdrew M-37056) pending "thorough review," and directed that, in the interim, "no unit of the Department of the Interior should rely on those M-Opinions as authoritative and binding."[3] MHA has also complained that this riverbed title dispute "has festered for approximately 50 years." ECF No. 110 at 1. But there would be no need for such a long-running dispute if resolving the riverbed's ownership were as simple as looking at a map to see whether the Missouri River flowed within FBIR's boundaries.

It also should not be overlooked that this case involves the bed of not just any waterway, but the *Missouri River*—the United States' longest river and arguably its most critical artery for western expansion and free trade in the 19th Century. Thus, any notion that title to the riverbed was *clearly* reserved for MHA through Congressional silence should be rejected.

Turning to the alleged facts—which the United States presents as undisputed but are in fact very much the subject of dispute—the United States' Motion engages in revisionist history. Most

[2] Interior Solicitor M-Opinions are available at https://www.doi.gov/solicitor/opinions.

[3] *See* G. Zerzan, Dep't of the Interior, Memorandum suspending M-Opinions numbered M-37065 through M-37084 for review, Feb. 28, 2025, publicly available at https://www.doi.gov/sites/default/files/documents/2025-03/m-opinion-suspension-review0.pdf (J. Auslander Decl. Exhibit 1).

of the United States' assertions are based on inferences rather than facts, and inferences on summary judgment must be construed in favor of the State as the non-movant. Moreover, the United States' cherry-picked citations cannot gloss over the myriad factual disputes that exist in this case, as further detailed below and addressed in detail in the State's statement of genuine issues responding to the United States' and MHA's statements of material facts.

First, the documents establishing FBIR do not expressly mention the riverbed—as the United States conceded in written discovery—much less clearly reserve it for MHA. The FBIR boundaries are merely on both sides of the Missouri River; the River and riverbed do *not* (and did not) constitute part of FBIR. The United States' myopic focus on a couple references to the "left bank" of the River, originally found in correspondence from government officials, as being an exterior boundary for prior iterations of FBIR does not change that. Instead, the historical record establishes that: (1) an 1851 Treaty designated land for MHA that was entirely on the south and west side of the River and excluded any riverbeds (as the Supreme Court has already ruled in a different case); (2) an 1870 Executive Order established FBIR by following the 1851 Treaty boundaries and adding a strip of land north of the River; (3) an 1880 Executive Order modified the lands on either side of the River, overall reducing FBIR's size; and (4) the final 1886 Agreement, ratified by Congress in 1891, further reduced FBIR's size—and wholly excluded the portion of the Missouri River (including its "left bank" west of the Little Knife River) on which the United States' Motion primarily relies. None of those documents referred to the Missouri River's riverbed. Nor did they limit the 1861 Dakota Territory Act's reservation of lands for the future State of North Dakota, before creation of any FBIR for MHA. 12 Stat. 239 (Mar. 2, 1861).

Relatedly, there are sharp divergences of opinion from the experts retained in this case regarding FBIR's creation and whether the riverbed was or was not included in that reservation.

The State's three independent experts—historian Dr. Jennifer Stevens and professional surveyors Dr. Charles Nettleman and Mr. John Stahl—each reviewed the relevant FBIR evidence, identified no clear intent to reserve the riverbed for MHA, and concluded that riverbed title passed to the State when it entered the Union. *See* Stevens Declaration; Nettleman Declaration; Stahl Declaration. Meanwhile, the United States' rebuttal expert surveyor, Mr. Joshua Alexander (an employee of the United States), opined otherwise, as did MHA's rebuttal expert surveyor, Mr. Daniel Fischer (though it was revealed in deposition that Mr. Fischer did not even know the present FBIR boundaries). The United States' historian expert, Dr. Keith Zahniser, offered no opinion on riverbed ownership, while MHA's historian expert, Dr. Michael Lawson, agreed with MHA's position based on the river flowing through FBIR. Given this divergence of expert opinions, the United States' inferences create, at best, factual disputes that do not make this case proper for resolution on summary judgment.

Second, the United States is wrong that FBIR's "purpose" included the riverbed. Rather, overwhelming evidence demonstrates that Congress's purpose for creating FBIR was to facilitate MHA's adoption of Euro-American agricultural methods. Thus, even if MHA had traditionally relied upon the River or riverbed for its subsistence (which available evidence does not support), the historical record does not support the conclusion that FBIR was intended to preserve such practices. The United States' and MHA's repeated references to FBIR as an MHA "permanent homeland" overlook that this is true of *all* tribal reservations and say nothing about the riverbed's role therein. Also, reserving to MHA the ownership of the River or the riverbed to protect any traditional uses of the River would have been unnecessary given that the 1851 Treaty, and later documents, expressly preserved MHA's ability to use the River for fishing, travel, drinking, and other uses separately and apart from any land designations. In short, the State's ownership of the

historical Missouri River riverbed in no way thwarted FBIR's purpose or function.

Third, the United States' Motion exaggerates the historical evidence regarding MHA's traditional uses for, or reliance on, the River and riverbed. Historical evidence indicates that fishing was not essential for MHA subsistence, and in fact constituted only a small part of MHA's diet and was conducted by only a small number of MHA members. And the other claimed MHA traditional uses of the River, such as agriculture, occurred *adjacent* to the River. Thus, the historical record does not support the conclusion that ownership of the River, let alone ownership of the riverbed, would have been implicitly understood and accepted for any land reservation based on MHA's traditions. Moreover, historical evidence does not support the conclusion that even MHA understood FBIR to include the riverbed in the late 1800s, or that ownership of the riverbed was an important concern to MHA at the relevant times. Instead, the historical record indicates that MHA expressed concerns to the United States primarily pertaining to timber, trade, and protection from Sioux attacks. Only decades later, with the discovery of oil and gas in the region, did MHA first assert riverbed ownership. At absolute minimum, there are genuine and material factual disputes among historians and experts about the relative importance of the River and riverbed to MHA in the late 1800s, and about Congress's understanding thereof.

Fourth, the United States' arguments about the conditions placed on North Dakota's statehood under federal statute and by North Dakota's Constitution are circular, as the arguments presume that the State disclaimed the riverbed because MHA owned it. In reality, MHA never owned it, and the State never recognized MHA as owning it. Consequently, enabling provisions that disclaimed State title to land held by Indian nations don't answer the core question presented by this case: whether MHA owned the riverbed at the time of North Dakota's statehood.

Fifth, substantial post-statehood evidence corroborates the historical evidence indicating

that the State was understood to own the riverbed at the time of receiving statehood. For example, all of the official surveys for FBIR occurred after North Dakota achieved statehood, and not a single one of them designates the River or riverbed as owned by MHA or MHA members. When the United States took and compensated MHA for FBIR land necessary to create the Garrison Dam and Lake Sakakawea in the 1940s and 1950s, the United States excluded River acreage. And, as recently as 2007, the U.S. Army Corps of Engineers opined that North Dakota owned the riverbed. Only in 2022 did the United States switch its position and administratively record MHA trust title for the riverbed following an Interior Solicitor's new legal opinion (which is now suspended).

Finally, similar to its arguments for judgment on the pleadings, the United States' heavy reliance on other quiet title cases does not establish its entitlement to summary judgment here. The United States ignores that quiet title cases, including those that it cites, typically involve detailed fact-finding that considered expert testimony and documentary evidence. Fact patterns and court findings for wholly distinct properties do not dictate ownership of the specific riverbed for which the United States seeks to quiet title here. The United States' Motion also relies heavily on *Idaho v. United States*, which is odd given that case's emphasis on the state's *concession* of the United States' intent to reserve submerged lands for a tribe, as well as extensive written correspondence, official land surveys, and transactions involving submerged lands which all demonstrated tribal ownership thereof. 533 U.S. 262, 266-67, 274-75 (2001). Such evidence is entirely lacking here, and the State has not conceded any Congressional intent to reserve the Missouri riverbed for MHA.

These issues preclude summary judgment in this case, and the United States' Motion (and MHA's support thereof) should be denied.[4]

[4] The United States and the MHA repeatedly purport to incorporate by reference their prior briefing in support of judgment on the pleadings. *See* US Br. at 1, 22, 29, 32-34; MHA Br. at 1. That is

FACTUAL BACKGROUND

Both the United States and MHA proffer factual narratives that are at best incomplete, and at worst misleading. Disputes of material facts are set forth more fully in Argument Section III (*infra)* but below is a short explanation of the background of this case.

The FBIR boundaries at the time of North Dakota's statehood were established through an Agreement between the United States and MHA, reached on December 14, 1886, and ratified by Congress on March 3, 1891. State of North Dakota's Statement of Genuine Issues of Material Facts (SOF) 103, 114.[5] That agreement reduced the size of the preexisting FBIR, explicitly retaining only the lands that were valuable for grazing, timber, and agriculture. There was no mention of the Missouri riverbed, and only a single reference to the River, in the 1886 Agreement. SOF 103. Nor was there any mention of the riverbed in the recorded negotiations for that Agreement. *Id*. Rather, FBIR land simply existed on both sides of the Missouri River. And nothing in the final FBIR Agreement ratified by Congress clearly expressed any Congressional intent to reserve the River or riverbed for MHA. *Id*.

So instead of focusing on the operative FBIR created by the 1886 Agreement, the United States and MHA prefer earlier history and boundary descriptions for prior, superseded iterations of FBIR. However, that approach still yields the same factual endpoint: there has never been a

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an improper attempt to conflate separate motions and evade page limits on summary judgment. Indeed, the United States and MHA made clear that the prior motion was *not* for summary judgment. ECF No. 107 at 3, 5; ECF No. 108 at 2. Regardless, to the extent that the Court considers such cross-referenced arguments on summary judgment, the State likewise incorporates by reference its briefing opposing judgment on the pleadings. *See* ECF No. 116.

[5] For clarity, North Dakota herein adopts the United States' same numbering of its proffered factual statements (SOF [#]). *See* US Br. at 2 n.1. North Dakota cites those same numbered statements to include its responses thereto, and then continues that SOF numbering to include and respond to MHA's proffered additional factual statements.

clear expression of intent by the United States, or by the State, to reserve the riverbed of the Missouri River for MHA's use or ownership. SOF 181.

Historically, MHA led a semi-sedentary lifestyle, splitting their time between cultivating crops in the bottomlands adjacent to the River and hunting bison primarily on the plains. SOF 3-4. This lifestyle followed a seasonal cycle: MHA planted crops in the spring, hunted bison in the summer, returned in the fall to harvest and trade crops, and hunted again until winter, when they would settle in sheltered villages. SOF 4. There is no historical evidence that MHA ever relied upon fishing for their substance; historical evidence instead indicates that fishing was never more than a small part of the MHA diet. SOF 14.

MHA were well-known for their agriculture, which included multiple varieties of corn, beans, squash, and other items. SOF 8. Their crops provided half of the calories in the MHA diet, with bison making up the vast majority of the remainder. SOF 4. As demand grew for MHA crops within the large network of intertribal trade that ran along the River, MHA moved from exclusively hunting bison to producing an excess of crops to facilitate trade for bison meat and materials from the entirely nomadic hunting tribes. SOF 9. This demand for crops extended beyond other tribes and into the non-Indian fur trade based along the River. SOF 44-46. Ultimately, the growing tide of emigrants traveling up the River via steamboat cut out MHA from such trade, and decimated two resources on which MHA heavily depended: bison and timber. SOF 44, 80.

Prior to the 1886 Agreement that was ratified by Congress, FBIR's boundaries were rooted in the territorial designations under the 1851 Fort Laramie Treaty, which the United States negotiated with numerous tribes to designate respective tribal lands and ensure the safety of emigrants in the Upper Missouri Valley. SOF 62-65. The 1851 Treaty referenced rivers as natural boundaries between different tribes' designated lands—for example, the Missouri River served as

the northeastern boundary of MHA territory; the Heart River served as both the southern boundary of MHA territory and northern boundary of Dakota Sioux territory; and the Yellowstone River defined the western extent of MHA territory and the eastern extent of Crow territory. SOF 65, 67. The 1851 Treaty designated MHA land only south and west of the River. SOF 68. However, the 1851 Treaty did *not* reserve or convey land for any tribe. *Montana*, 450 U.S. at 553 (1851 Treaty "did not by its terms formally convey any land to the Indians at all"). Most importantly for this case, the Supreme Court has held that the 1851 Treaty did *not* designate any beds of navigable waters as tribal land. *Id.* (1851 Treaty had "no bearing on ownership of the riverbed").

The 1851 Treaty separately protected the signatory tribes' continued uses of rivers, including MHA's traditional uses of the Missouri River, outside their designated boundaries. SOF 28. Specifically, it did not "surrender the privilege of hunting, fishing, or passing over" lands outside territorial boundaries. *See Montana*, 450 U.S. at 553 (quoting 1851 Treaty).

MHA abided by the 1851 Treaty designations. SOF 82. Some historical records indicate that, around 1866, MHA discussed ceding to the United States certain lands on the eastern side of the Missouri River; however, there was no established ownership of MHA lands east of the River, no such land was ceded, and no 1866 agreement was ever ratified by Congress. SOF 73.

In 1869, MHA chiefs expressed concerns to the federal government that they were unable to obtain sufficient timber and bison due to non-Indian presence on the plains, and that they had to depend on federal government rations to survive. SOF 80. MHA were also facing Sioux attacks, including from across the Missouri River. *Id*. At the same time, the United States had transitioned to a reservation-based approach to address tribal interests. SOF 102. Based on MHA concerns, federal government officials recommended creating a reservation for MHA that was "sufficiently large for them to cultivate, to procure fuel, and hunt on, if possible, without encroaching too much

on the public lands." SOF 80. In response, President Grant established the first FBIR via Executive Order in 1870. SOF 86.

The boundaries set in the 1870 Executive Order were derived from the 1851 Treaty. SOF 87. Indeed, correspondence from the Commissioner of Indian Affairs to the Secretary of the Interior described the 1870 FBIR as "a part of the country belonging to [MHA], according to the [1851] treaty of Laramie." *See* S. Ex. Doc. No. 36 at 2, 48th Cong., 2d sess. (Message from President to Congress) at 2 (January 8, 1884 letter); *see also id.* at 5 (similar text in 1870 letter).[6] The only identified "addition" of MHA land in 1870 was "a strip of land east of the Missouri River" that included grazing and timber lands. *Id*. This addition was to ensure the tribes had enough land to cultivate, hunt, and graze. SOF 81. There was no mention of the historical Missouri riverbed in the 1870 Executive Order or in available related correspondence. SOF 87. That silence is noteworthy because the 1851 Treaty did not include beds of navigable waters per the Supreme Court, nor did the 1870 Executive Order clearly add any riverbeds to the reserved lands.

In 1872, the federal government approved a route for the Northern Pacific Railroad that would require MHA to cede a substantial portion of FBIR's southern lands. SOF 94. Indian agents advocated that the farming and grazing lands in the southern FBIR were needed to continue implementing the federal policy of making tribes self-sufficient, but that advocacy was unsuccessful. SOF 29. The FBIR boundaries were then amended in 1880, also by Executive Order, to accommodate lobbying from the Railroad. Lands on the south side of the reservation were placed back in the public domain, and additional land on the north side of the River was added to the reservation. SOF 94. As with the 1870 Executive Order, the 1880 Executive Order

6 *https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=4648&context=indianserialset.*

and associated correspondence did not mention, much less clearly add, the Missouri riverbed to the FBIR lands. *Id*. And when the boundaries of FBIR were again adjusted based on an 1886 Agreement between the MHA and United States that was eventually ratified by Congress, that Agreement again did not mention the riverbed. In fact, as the United States' surveyor expert concedes, the final FBIR boundaries *wholly omitted* the part of the Missouri River that was referenced in the 1870 and 1880 FBIR descriptions.[7] SOF 103, 182, 202; ECF No. 119-4, Attachment D, at 19 (map included in U.S. surveyor expert report illustrating this point).

Neither MHA nor the United States asserted MHA ownership of the Missouri riverbed until many decades after North Dakota became a State, when oil and gas development under the riverbed became possible. SOF 194-195, 198. The United States' issuance of an administrative legal opinion agreeing that title to the riverbed vested with North Dakota upon its entry into the Union is what prompted MHA to initiate this litigation against the United States several years ago. ECF No. 1. Then, while this litigation was pending, the United States switched its position and filed a quiet title crossclaim against the State. ECF No. 97. MHA then filed a motion for judgment on the pleadings, which the United States joined.[8] In that separate motion, the moving parties argued that no facts outside the pleadings bear on this dispute. ECF Nos. 103, 112. Now on summary judgment, the moving parties contend that such facts are material, but they contend those material facts are uniformly undisputed and favor MHA title. And as noted above, the Department of the Interior recently suspended, pending a "thorough review," its prior legal opinion upon which the United States' change in litigation position was based.

[7] A final small adjustment to FBIR's boundaries was made in 1892 but is not alleged to have any bearing on this case. SOF 117.

[8] As of this filing, MHA's motion for judgment on the pleadings remains pending.

STANDARD OF REVIEW

Summary judgment is appropriate only where "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." Fed. R. Civ. P. 56(a) (emphasis added); *see also Keefe Co. v. Americable Int'l, Inc.*, 169 F.3d 34, 38 (D.C. Cir. 1999) ("A court may dispose of a case on summary judgment before trial only where there is no genuine issue as to any material fact.") (citation omitted).

A fact is material if it is capable of affecting the substantive outcome of the litigation, and a dispute is genuine if the evidence is such that a verdict could reasonably be returned for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987).

The party seeking summary judgment "bears the initial responsibility" of "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quotation marks omitted). The non-moving party need only "designate[s] specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation marks omitted). Summary judgment review is based on "the record taken as a whole." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up, citation omitted). "Where more than one plausible inference can be drawn from the undisputed facts, summary judgment is not appropriate." *Keefe*, 169 F.3d at 38.

Relatedly, summary judgment is not an occasion for judicial fact-finding or resolving disputed questions of fact. *Stoe v. Barr*, 960 F.3d 627, 638-39 (D.C. Cir. 2020) ("[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the

facts are not the functions of the court" on summary judgment) (cleaned up, citation omitted); *see also* 10A Wright & Miller, *Fed. Practice & Procedure* § 2728 (4th ed. 2022) ("Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits."). A disagreement between witnesses is a "classic 'genuine dispute as to [a] material fact.'" *Chenari v. George Washington Univ.*, 847 F.3d 740, 747 (D.C. Cir. 2017) ("At summary judgment, a court 'may not … believe one witness over another if both witnesses observed the same event in materially different ways.") (citation omitted).

ARGUMENT

The "controlling question here is whether the United States can rebut [the] presumption" that the title to the riverbed of the Missouri River flowing through FBIR passed to North Dakota upon its statehood under the Equal Footing Doctrine. *Alaska II*, 545 U.S. at 100. MHA's motion for judgment on the pleadings failed to do so, as the State explained (ECF No. 116), and the moving parties' second bite at the apple on summary judgment does not do so either.

On summary judgment, the United States attempts to diminish its burden of proof by invoking "Indian law canons" and suggesting that the *State* must *disprove* that the United States reserved the riverbed for MHA. But that legal position turns the Equal Footing Doctrine on its head—as the United States itself previously explained to this Court when disavowing the applicability of "Indian law canons" in this case. *See* ECF No. 17 at 21-22; ECF No. 33 at 15.

Tellingly, the United States and MHA do not point to any FBIR reservation document or associated historical evidence even mentioning the riverbed, let alone showing that Congress clearly reserved its ownership for MHA. Instead, what they rely on are: inferences, based mainly on historical FBIR maps and land descriptions physically surrounding the Missouri River; selected statements about the River; embellishment of MHA's traditional reliance on non-subsistence fishing; and comparisons to other quiet title cases involving distinct property and facts. However,

when considered in full and in context, the historical evidence readily refutes their narrative and supports the State's title to the riverbed under the Equal Footing Doctrine.

There also exist multiple genuine disputes of material fact that bear on riverbed title and preclude summary judgment for the United States. Indeed, different expert historians and surveyors have arrived at different conclusions based on available facts—and during deposition the United States' and MHA's experts retreated from many of their previously expressed opinions.

Other cases involving the Equal Footing Doctrine typically involve fact-intensive analysis that is based on expert testimony and extensive fact-finding by the trial court. *See, e.g.*, *United States v. Idaho,* 95 F. Supp. 2d 1094, 1099 (D. Idaho 1998) ("During a trial lasting nine days, the parties to this action presented evidence on the pertinent legal issues in the form of expert and lay testimony, written reports, scientific studies and historical documents."); *United States v. Montana*, 457 F. Supp. 599, 600 (D. Mont. 1978) (decision based on "the evidence adduced at trial, the testimony of the witnesses, and the exhaustive legal arguments"); *Montana v. Talen Montana LLC*, No. 23-3050, 2025 WL 679811, *4 (9th Cir. Mar. 4, 2025) ("10-day bench trial that included hundreds of exhibits and testimony from 15 expert witnesses" to quiet title to different riverbeds in Montana); *Alaska II*, 545 U.S. at 78 (appointment of Special Master and detailed report); *United States v. Alaska*, 521 U.S. 1, 4 (1997) (*Alaska I*) (same).

I. THE EQUAL FOOTING DOCTRINE CREATES A STRONG PRESUMPTION OF STATE TITLE TO THE BEDS OF NAVIGABLE WATERS.

The United States and MHA cannot satisfy their heavy burden to defeat the State's presumptive riverbed title. It is undisputed that the historical Missouri River flowing through FBIR constituted navigable waters. Under the Equal Footing Doctrine, which derives from the U.S. Constitution, "the default rule is that title to land under navigable waters passes from the United States to a newly admitted State." *Idaho*, 533 U.S. at 272. That is because ownership of

the land underlying navigable waters is considered "an incident of sovereignty" and "strongly identified with the sovereign power" of the State. *Montana*, 450 U.S. at 551-52 (citation omitted).

Mere "conveyance by the United States of land riparian to a navigable river carries no interest in the riverbed." *Id.* at 551 (cleaned up, citations omitted). Consequently, "'[a] court deciding a question of title to the bed of navigable water must … begin with a strong presumption' against defeat of a State's title." *Idaho,* 533 U.S. at 272-73 (citation omitted); *see also Alaska I*, 521 U.S. at 34 (same). Due to this strong presumption, "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *see also Alaska II*, 545 U.S. at 100 (same). Congressional intent to defeat state title is found only in "exceptional" and the "most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) (quoting *Holt State Bank*, 270 U.S. at 55).

A State cannot be divested of its entitlement to the bed of a navigable water in favor of a tribal reservation unless: (1) "the United States *clearly intended* to include *submerged lands* within the reservation," and, only "[i]f the answer is yes," then also (2) "the United States *expressed its intent* to retain *federal title to submerged lands* within the reservation." *Alaska II*, 545 U.S. at 100 (emphasis added); *see also Idaho*, 533 U.S. at 273-74. In other words, the United States must have expressly intended both to (1) include submerged lands as part of the reservation and (2) withhold title to those submerged lands from the State upon statehood. *See Utah*, 482 U.S. at 202. As reflected by the body of caselaw quieting title to submerged lands, this inquiry is inherently fact-driven based on the unique property and circumstances of each case.

The United States and MHA try to downplay this demanding standard to suggest that it only requires looking to a navigable water's physical location within the exterior boundaries of a

reservation. *E.g.*, US Br. at 35 (arguing that "where Congress was on notice that the reservation embraced *navigable waters*, it was also on notice that the reservation included *submerged lands*") (emphasis in original). But that is not the law. Rather, Supreme Court precedent is remarkably clear that the simple presence of a navigable river within the boundaries of a reservation does *not* mean that its riverbed ineluctably is part of the reservation. *Montana*, 450 U.S. at 554 ("The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land …."); *Alaska I*, 521 U.S. at 38 (caselaw "establish[es] that the fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved"); *see also* ECF No. 17 at 18 (United States' prior summary judgment motion recognizing same).

The United States selectively quotes *Idaho* (which pre-dates *Alaska II*) to aver that 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." US Br. at 17. But the United States omits *Idaho*'s very next sentences, which emphasize the context-specific nature of the Equal Footing Doctrine inquiry. Particularly in the context of executive branch actions—like the historical FBIR Executive Orders on which the moving parties rely here—courts consider "whether Congress was on notice that the Executive Order reservation included submerged lands, … and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Idaho*, 533 U.S. at 273-74. Thus, determining "the *purpose* of a conveyance or reservation is a critical factor in determining federal intent." *Alaska I*, 521 U.S. at 39 (emphasis in original); *see also Alaska II*, 545 U.S. at 99 (same).

Similarly, the United States' and MHA's experts largely based their opinions on the mere fact that the historical Missouri River flowed through FBIR. SOF 201; *see also* J. Auslander Decl.

Exhibit 2, Lawson Dep. 52:17-24 ("Q. Is it your opinion that the bed of navigable waters that lies within the boundaries described in the document creating a reservation makes the riverbed part of the conveyed lands? A. Yes. Q. Even where there is no express reference to the riverbed? A. Yes."); *id*. at 119:11-16 ("Q. … It is your opinion that any time a river or a portion of a river was contained within the boundaries that had been reserved to a tribe, the river itself was reserved -- and its bed were reserved to the tribe within those boundaries? A. Yes."); J. Auslander Decl. Exhibit 3, Zahniser Dep. 60:6-10 ("Q. Is it your opinion that the Missouri River was included in the Reservation to the MHA because it lay within the boundaries that were reserved to the MHA? A. Yes.").

This Court should decline the United States' and MHA's invitation to disregard binding Supreme Court precedent and reduce the Court's role to merely glancing at a map to see whether a river flows through a reservation.[9] Rather, the State presumptively holds riverbed title, unless the challengers can provide clear evidence to the contrary.

II. "INDIAN LAW CANONS OF CONSTRUCTION" DO NOT DISPLACE THE EQUAL FOOTING DOCTRINE'S PRESUMPTION OF STATE TITLE.

Faced with a heavy evidentiary burden under the Equal Footing Doctrine, the United States attempts to flip its burden of proof by invoking "Indian law canons of construction." *See* US Br. at 18-20. The United States asserts that "[i]f 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." US Br. at 20. That

[9] If the Equal Footing Doctrine standard were as simple as the moving parties and their experts claim here, then the bed of every navigable water within the boundaries of a reservation created prior to statehood would be held in trust for a tribe, unless the reserving documents expressly stated that they did not convey riverbed title to the reservation. The Equal Footing Doctrine and its jurisprudence would thereby lose all meaning in any case involving a tribal reservation—potentially engendering countless new quiet title disputes.

is, instead of the burden being on the United States and MHA to show that Congress "definitely declared" or made a "very plain" expression of intent to defeat the State's title to the riverbed, *Alaska II*, 545 U.S. at 100, 10-3, the United States asserts it is the *State's* burden to show that "Congress … express[ed] a plain and unambiguous intent to extinguish [*MHA's*] title." US Br. at 32; *see also id.* at 38-39 ("[U]nder the Indian law canons of construction, Congress would have had to express a plain and unambiguous intent to extinguish [MHA] title."). Not so.

Tellingly, the United States did not make this argument for judgment on the pleadings. And the United States has also previously represented to this Court, in this very case, that Indian law canons are inapplicable to the Equal Footing Doctrine inquiry. *See* ECF No. 17 at 22 ("[T]he Supreme Court has not used the Indian canons of construction to adjudicate disputes of this nature since developing the two-part test applicable here."). MHA likewise makes no such argument in its brief supporting the United States' Motion. *Cf.* ECF No. 104 (MHA Mot. for Judgment on Pleadings) at 10 n.5 (containing only a passing mention of an "Indian canon" in a footnote and arguing that "[i]n this case, however, resort to these canons is not necessary").

The United States was correct the first time. The Equal Footing Doctrine standard articulated by the Supreme Court does not differentiate between cases involving tribal versus other types of reservations (e.g., for environmental protection). *Compare Idaho*, 533 U.S. at 272-74 (tribal reservation) *with Alaska II,* 545 U.S. at 100 (non-tribal reservation). The United States cites no case setting aside the established Equal Footing Doctrine standard or employing a relaxed standard favoring tribes in disputes involving State title to the beds of navigable waters within reservations. As its Motion illustrates, the Supreme Court's most recent invocation of Indian law canons in the context of a submerged lands dispute was in 1970—preceding the Supreme Court's

modern formulation of the Equal Footing Doctrine standard in cases like *Montana*, *Idaho*, *Alaska I*, and *Alaska II*. *See* US Br. at 19-20 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)).

Caselaw supporting the United States' theory is lacking for good reason, as it would eviscerate the presumption of State title under the Equal Footing Doctrine in any cases involving tribal reservations. As the United States admits, the trigger for general application of Indian law canons is "when documents involving Indian tribes are indeed ambiguous." *Id.* at 19. But any such ambiguity is *inherently fatal* to challenging State title under the Equal Footing Doctrine, because the evidence of Congressional intent must be *clearly expressed* to defeat State title to the beds of navigable waters under that Doctrine. *E.g.*, *Alaska II*, 545 U.S. at 100. The United States' argument also focuses exclusively on "traditional notions of [Indian] sovereignty," US Br. at 18 (citation omitted), while ignoring the aspects of *State sovereignty* that are expressly protected by the Equal Footing Doctrine and would be extinguished by its attempted rewrite of the standard. Thus, regardless of their general applicability in other situations, Indian law canons are immaterial in the specific context of defeating a State's title to the beds of navigable waters.[10]

Consequently, courts have declined to adopt the argument the United States presses here to subordinate the Equal Footing Doctrine to Indian law canons. For example, in *Montana*, the United States sought to defeat state riverbed title by pressing the same arguments, and citing the same caselaw on Indian law canons, that it cites in its Motion here. *See* Brief for the United States, *Montana v. United States*, No. 79-1128, 1980 U.S. S. Ct. Briefs LEXIS 2055, at *36-37 (Sept. 27, 1980) (citing, *inter alia*, *Choctaw Nation*, 397 U.S. at 631 and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)). The tribe in *Montana* also argued that "[t]he question is what the

[10] The United States' footnote suggesting that "legal presumptions" in "other contexts" have bowed to Indian law canons is irrelevant to their application in this case, which specifically involves the Equal Footing Doctrine. *Cf.* US Br. at 20 n.6.

United States intended, and that may be construed according to what the Tribe understood, following well settled canons of construction." Brief for the Crow Tribe, *Montana v. United States*, No. 79-1128, 1980 U.S. S. Ct. Briefs LEXIS 2054, at *5-16 (Sept. 26, 1980). But the majority opinion in *Montana* did not even mention Indian law canons, much less rely on them. Instead, the majority found that there was insufficient evidence to defeat the State's strong presumption of riverbed title under the Equal Footing Doctrine. *See Montana*, 450 U.S. at 556. Furthermore, the concurring opinion in *Montana* expressly addressed and rejected the United States' characterization of *Choctaw Nation* as "indicat[ing] that the strong presumption against dispositions by the United States of land under navigable waters in the territories is not applicable to Indian reservations." *Id.* at 567-68 (Stevens, J., concurring) ("I do not so read the *Choctaw Nation* opinion."). Similarly, the tribe in *Idaho* argued Indian law canons to the Supreme Court, and the majority opinion did not invoke them. *See* Brief for Coeur D'Alene Tribe, *Idaho v. United States*, No. 00-189, 2001 WL 276554, at *23-24 (Mar. 16, 2001); *Idaho*, 533 U.S. at 274.

Moreover, even if this Court were to consider Indian law canons in this Equal Footing Doctrine case, the result would not be summary judgment for the United States and MHA, but rather the need for fact-finding that would preclude summary judgment. That is because courts applying Indian law canons examine the particular facts and circumstances in each case rather than simply presuming that a tribe prevails on ambiguity, consistent with courts' general avoidance or narrowing of constitutional questions. *See, e.g.*, *Al-Hela v. Biden*, 66 F.4th 217, 226 (D.C. Cir. 2023) ("[E]ven when a constitutional question must be joined, courts must choose the narrowest constitutional path to decision.") (citations omitted).

For instance, in one of the United States' older cited cases, the Supreme Court considered whether specific treaty terms and factual circumstances—which the Supreme Court later deemed

"very peculiar" and "unusual"[11]—were sufficient to divest a state of riverbed title. *Choctaw Nation*, 397 U.S. at 634-35; *see also id.* at 631 ("the Treaty of Dancing Rabbit Creek itself provides that 'in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.' 7 Stat. 336."). In another, the Supreme Court upheld state title to the bed of the Columbia River, while also preserving a tribe's treaty-based, non-exclusive uses of the river and shore lands, which did not require tribal ownership. *United States v. Winans*, 198 U.S. 371, 384 (1905). That is, stripping the state of riverbed title was unnecessary to effectuate the treaty's purpose. Here too, irrespective of Indian law canons, MHA's traditional uses of the Missouri River and riverbed may continue absent MHA's ownership of it.

In sum, no Indian law canons subvert the Equal Footing Doctrine's strong presumption of State title to the beds of navigable waters like the Missouri River, and they certainly do not replace a presumption that is the polar opposite. Rather, the burden rests solely with the United States to provide clear evidence of Congressional intent that title to the Missouri riverbed would not pass to North Dakota upon its admission to the Union. *Alaska II*, 545 U.S. at 100. And in any event, at a minimum, the facts of this case are heavily disputed and the United States' invocation of "Indian law canons" cannot dictate the outcome of those factual disputes on summary judgment.

III. MULTIPLE GENUINE DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

In support of summary judgment, the United States and MHA present a cherry-picked set of facts that lack crucial context, they overemphasize irrelevant points, and they disregard essential information. It is only by ignoring and mischaracterizing the larger historical record that the United States and MHA claim that their alleged facts are purportedly undisputed. North Dakota disputes, among other things, their contentions regarding the interpretation of historical

[11] *Montana*, 450 U.S. at 555 n.5; *Utah*, 482 U.S. at 198.

documents, their acontextual emphasis on MHA uses of the River, the Congressionally understood purpose of FBIR and MHA's understanding of its boundaries, the meaning of North Dakota's enabling act and Constitution, and the omission of corroborative federal actions post-statehood.

There is no dispute that the riverbed is geographically within FBIR's boundaries. But the parties' agreement largely ends there, as the moving parties appear to equate that fact and scant other evidence with a clear Congressional intent to strip North Dakota of title to the riverbed. In opposing summary judgment, the State does not need to prove any of its factual assertions, or disprove the moving parties' assertions. The existence of genuine disputes of material facts alone requires the denial of summary judgment. And here, there are many genuine disputes of material fact, which are further discussed in the accompanying SOF (which includes the State's responses to the United States' and MHA's factual assertions).

A. The Historical Documents Creating FBIR Did Not Clearly Convey or Reserve Ownership of the Missouri Riverbed for MHA.

The parties agree that there has been no explicit conveyance of the historical Missouri riverbed to MHA in the operative FBIR reserving documents—namely, the 1870 and 1880 Executive Orders, and the 1886 Agreement that was negotiated between the United States and MHA and ratified by Congress in 1891. SOF 181. Absent any explicit conveyance, the moving parties draw inferences that the River's location within the boundaries of the reservation is enough to reserve riverbed trust title for MHA. It is not. *See* Argument Section I *supra*. And the evidence of FBIR's creation does not clearly reserve the riverbed for MHA.

As explained in the Factual Background *supra*, the operative 1886 Agreement—which reflects the FBIR's intended scope at the time of North Dakota statehood—never mentions the Missouri riverbed, and indeed never even mentions the River except as a reference point for marking FBIR's western boundary "six miles west of the most westerly point of the big bend of

the Missouri River." SOF 103. Nor is there evidence that the River was discussed during the negotiation process or Congressional hearings. SOF 102, 107, 190. When the 1886 Agreement was negotiated, it explicitly retained only the lands within FBIR that were valuable for grazing, timber, and agriculture. SOF 103. The 1886 Agreement returned two-thirds of the then-existing FBIR back to the public domain by removing lands that had no value for grazing, timber, and agriculture. SOF 101-103. The FBIR under the 1886 Agreement included land on both sides of the River, but did not clearly reserve the riverbed. SOF 103, 181. And because this quiet title action turns on what Congress understood to have been reserved for FBIR upon North Dakota's statehood (which was reflected in the 1886 Agreement), the Court's inquiry can stop there to deny summary judgment for the United States.

To the extent the United States attempts to marginalize the 1886 Agreement because Congress ratified it in 1891 (two years after North Dakota's statehood in 1889), that tack misses the mark. *Cf.* US Br. at 13-16, 32. There is no real dispute that the 1886 Agreement represented Congress's (and MHA's) understanding of the intended scope of FBIR at the time of statehood. Consistent with the United States' own alleged facts, the 1886 Agreement was presented to Congress in 1887, Congress worked on its ratification prior to statehood without meaningful changes, and Congress's final ratification substantively adhered to the 1886 Agreement. SOF 107, 114-116. The United States' pleadings likewise do not limit the 1886 Agreement's import based on the timing of its final ratification by Congress. *See* ECF No. 98 ¶¶ 24, 72 (US Crossclaim). Any suggestion by the United States that Congress intended to ignore the 1886 Agreement when admitting North Dakota into the Union is unfounded and unsupported by the historical record. And at minimum, it is a disputed issue of material fact precluding summary judgment.

Furthermore, the moving parties' trip further back in time to FBIR land descriptions that were superseded and replaced by the 1886 Agreement fails to yield a different conclusion. As described in the Factual Background *supra*, the first FBIR boundaries were set by an 1870 Executive Order, and then were amended via an 1880 Executive Order. SOF 86-87, 94. No action by the United States prior to 1870 reserved any land for MHA, including the 1851 Treaty.

The 1870 Executive Order did not include boundary descriptions. Instead, it referred to "the lands indicated in the accompanying diagram." SOF 87. The diagram accompanying the 1870 Executive Order did not clearly mark a boundary on a particular side of the River. SOF 87. And an accompanying letter from a government official identified part of the Missouri River as a northern boundary. SOF 87, 89. During this period, prior to any surveying of the reservation lands, rivers and other large natural features were frequently used as identifiable boundaries. SOF 89. Using a portion of the Missouri River as a northern boundary for a portion of the reservation made clear to MHA, other tribes, and emigrants where FBIR began and ended. *Id*.

The 1880 Executive Order merely referenced and preserved the 1870 FBIR's then "present boundary" that referenced the Missouri River for a portion of FBIR's northern boundary. The 1880 Executive Order shortened the length of that partial boundary referencing the River because that Order added more FBIR land around and north of the River (which partially offset removal of land south of the River). SOF 94-97.

As chronicled *supra*, official correspondence within the executive branch that was later shared with Congress amply supports the conclusion that references to the River were merely used as a boundary for a portion of the reservation at the time. SOF 87. For example, the United States stated that the boundaries for the original FBIR were, with one exception, within the bounds of the 1851 Treaty, which had reserved no lands or riverbed for signatory tribes. SOF 87; *Montana*, 450

U.S. at 553. And while the 1870 Executive Order added a strip of land on the north and east side of the River (which extended beyond the territories identified in the 1851 Treaty), this land was included for an explicit purpose "to include the wood and grazing around the village." SOF 87. The addition of land on the other side of the River was for an explicit purpose—"wood and grazing"—that was not to reserve for MHA's ownership any portion of the River or the riverbed surrounded by FBIR. SOF 87.

The moving parties make much of a reference to the "left bank" of the River originating in the letter from a government official accompanying the 1870 Executive Order. SOF 87, 89-91. But there are multiple problems with their extensive reliance upon that reference.

For one, the portion of FBIR to which that "left bank" reference was directed was entirely excised from FBIR under the 1886 Agreement. The moving parties have presented no evidence that, whatever intent or understanding was behind the government officials' reference to the "left bank" in the 1870 or 1880 iterations of FBIR, that such an intent or understanding was carried forward *sub silentio* into the 1886 Agreement that was ultimately ratified by Congress. The 1886 FBIR is the iteration relevant to the question of whether the State received title to the Missouri Riverbed upon admission to the Union. That lack of evidence is especially notable given that MHA negotiated the 1886 Agreement (unlike the previous Executive Orders unilaterally levied by Presidents) and could have asserted riverbed ownership but did not. SOF 102-103, 190.

And for another, the State disputes the moving parties' interpretation of that reference to the "left bank." The United States' only cited correspondence discussing the "left bank" relates to a dispute regarding whether timber north of the Missouri River had been reserved for MHA. *See* US Br. at 12, 28-29; SOF 92-93. That correspondence makes clear that the width of the River was physically within the reservation, but goes no further. To the extent that this correspondence

between two federal employees (whose ability to bind the government is questionable)[12] provides a reason for including the left bank in the description of the River, that reason had nothing to do with fishing or use of the riverbed—it had to do with non-Natives' ability to procure timber. SOF 92-93. And it only opined that timber north of that portion of the River was *excluded* from the reservation, rather than whether the River or riverbed was reserved. *Id*. Thus, even under the United States' theory that the 1880 Executive Order controlled or reflected Congress's intent at the time of North Dakota's statehood in 1889, rather than the 1886 Agreement, the iteration of FBIR created by the 1880 Executive Order did not clearly reserve MHA ownership of the riverbed.

In sum, the United States asks the Court to make multiple inferences of increasing attenuation, each of which is disputed, to conclude that the historical documents creating FBIR clearly conveyed, *sub silentio*, an intent to reserve the riverbed for MHA's ownership. Those inferences are insufficient for the United States to prevail on summary judgment.

B. MHA's Traditional Reliance on the River Is Overstated and Does Not Depend on Ownership of the Riverbed.

Substantial historical evidence also refutes the moving parties' characterization of MHA as a "riverine" or river-dependent tribe. SOF 4. MHA did not behave in ways typical of a tribe dependent on a river for survival, and there is no indication in the historical record that the federal government understood MHA to be dependent on the Missouri River. To the contrary, the federal government was aware that resources either adjacent or unrelated to the River were the keys to MHA survival. SOF 80-81, 87. Indeed, what distinguished MHA was their agricultural practices, which took place on the bottomlands adjacent to the River, and necessitated that MHA spend

[12] *See, e.g., Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 741-43 (8th Cir. 2001), abrogated on other grounds by *Wilkins v. United States*, 598 U.S. 152 (2023) (an informal memorandum by an agency employee was not capable of "bind[ing] the government, nor establish[ing] the government's position" for purposes of a lakebed quiet title dispute).

portions of their year in set villages to plant and harvest crops. SOF 3-4. As the moving parties' experts admit, "bottomlands/floodplains did not encompass any part of the River itself, including the bed." SOF 2. MHA's crops and timber did not grow in the River or riverbed. SOF 8, 12.

Moving parties are also unable to point to any historical evidence establishing that MHA depended on the River for subsistence. Their Motion and experts do not even define "subsistence," despite invoking that term *passim*. Historical evidence establishes that MHA used the River for a supplemental aspect of their diet and for certain cultural practices. SOF 8-21, 25-26, 32, 36-41, 50-51, 55-60, 123, 126-130, 174. And other traditional uses of the River by MHA for drinking, domestic, agricultural, travel, and trade purposes were neither exclusive nor unique from many non-MHA people then-present along the River. SOF 35, 42. But in any event, even if the relative importance of those traditional uses was not subject to dispute, maintaining those traditional uses of the River did not depend upon or require MHA's ownership of the riverbed.[13] *Id.*; SOF 13, 43.

1. MHA's Diet Predominantly Depended on Agriculture and Bison.

The misleading narratives by the moving parties create the impression that MHA life revolved around fish. That is simply not true. In reality, fish were not critical to MHA; as one scholar found, "fish was never an important factor" in the Mandan and Hidatsa diet. SOF 20, 25. Rather, crops and bison historically were the two pillars of MHA's survival. SOF 4.

The moving parties recognize that MHA lived a "semi-sedentary existence," but omit what this semi-sedentary lifestyle entailed. SOF 3-4, 122-123. MHA were renowned among the nomadic plains tribes for their quantities and varieties of crops. SOF 8-9. In addition to crops, bison dominated MHA life prior to their near-extinction in the 1860s, and were used for their meat,

[13] By contrast, in cases involving tribes that were dependent on water bodies—like the Coeur d'Alene tribe in *Idaho*—evidence of such dependence was ubiquitous, and extensive historical research to prop up limited, vague citations was unnecessary. *See* SOF 27, 139, 190.

hides, bones, and sinew. SOF 4. MHA followed a seasonal cycle: they lived in villages and planted crops in the spring, hunted bison in the summer, returned to their villages in the fall to harvest and trade crops, and hunted again until winter, when they would settle in sheltered villages. *Id.* Permanent villages were located overlooking the River, which allowed easy access to the bottomlands for agriculture and the plains for hunting, but protected them from the frequent flooding of the River during the spring and summer. *Id.* During the winter, temporary villages were located within the timber on the bottomlands, which allowed increased protection from the winter weather. *Id.* Though MHA had lived on both sides of the River, they primarily lived to the south and west of the River, where the bison herds were most plentiful. SOF 3. Consequently, those were the territories designated for MHA under the 1851 Treaty. SOF 68.

Given the MHA villages' location near the River, it is unsurprising that tribal members engaged in occasional fishing. SOF 21, 25, 56-57, 136. But the historical record shows that MHA fishing practices were supplemental to their diet of crops and bison; they did not rely on fish for subsistence. SOF 14, 125. Fish never played more than a minor role in the MHA diet. SOF 14, 21. Indeed, the River was not conducive to an abundance of fish due to its swift waters. SOF 20, 25. Though fish consumption varied between tribes and villages, archaeological evidence shows that the maximum amount of fish bones found in one village was a mere 12 percent of total animal bones. SOF 21. Evidence of fish consumption or fishing is far lower in other villages, if it exists at all. *Id.* MHA did not preserve fish or engage in ice fishing. SOF 9, 38. Scholars have recorded that Arikara fishing was practiced only by elderly men, and that they only fished in the summer "when they had little else to occupy their time." SOF 16, 136.

In fact, as the demand for MHA crops increased within the intertribal trade network along the Missouri River, MHA crop production increased to trade for additional bison meat and balance

their traditional diet. SOF 9. But there is no corresponding record of MHA trading fish or trading for fish. *Id.* Similarly, as bison herds became scarce due to Euro-American overhunting, MHA became increasingly dependent on government rations to survive, even reporting to the United States that the tribes were "starving," and needed additional rations. SOF 13, 21. But even when MHA was reporting to the government that its members were starving, available documents did not mention fish or fishing, and there is no evidence that MHA turned to any substantial level of fishing to fill the gap left by the loss of bison in their diet. *Id*.

And in any event, fishing does not require riverbed ownership. For the relevant periods, MHA had riparian access to the River, which was ensured by the 1851 Treaty. SOF 28, 69. There is no evidence that MHA's ability to continue fishing (or making any other alleged traditional use of the River) was dependent on MHA owning the riverbed. Indeed, reservations frequently encompass certain rights of use or occupancy short of exclusive title. *See, e.g.*, *Winans*, 198 U.S. at 384 (upholding a tribe's non-exclusive treaty right to use "shore lands"); *see also* 1851 Treaty of Fort Laramie, art. 5, 11 Stat. 749 (preserving signatory tribes' fishing and other uses of the Missouri River separately from designated lands of each tribe).

2. MHA's Religious Beliefs and Ceremonies Did Not Uniformly Revolve Around the Missouri Riverbed or Require Ownership of It.

The narrow focus of the moving parties' cherry-picked narrative regarding MHA's spiritual practices, and the alleged importance of the River to those practices, obscures the varied nature of those practices which honored their entire environment. SOF 50. Regardless, the relative importance of those practices to MHA does not establish what Congress intended to reserve.

While some MHA beliefs and ceremonies did involve the River, many of them, including creation stories, did not. SOF 50-51. The historian experts for the moving parties conceded as much during their depositions. *Id*. For example, the primary Mandan ceremonies did not involve

the River at all; instead, they held multiple ceremonies to worship bison and corn, including Mother Corn. SOF 50. And although the moving parties ascribe much import to MHA tribes' names and their names for the Missouri River, those meanings vary significantly; different bands of each tribe claim different meanings of each name. SOF 53, 54. In any event, these names at most show that, as their spiritual practices reflected, MHA used and worshipped the entirety of the environment in which they lived. SOF 50. Their spirituality or worship was not entirely centered on the River, nor on fish. *Id*. And MHA could, and did, continue their spiritual traditions involving the River despite their not holding exclusive ownership rights to the riverbed.

C. The Federal Government's Purpose for Creating the Reservation Was to Stimulate MHA's Adoption of Euro-American Styles of Farming.

Determining why Congress created FBIR is critical, because the Equal Footing Doctrine entails consideration of "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the state." *Idaho*, 533 U.S. at 274. And here, FBIR's purpose was clearly stated by federal officials at the time: to "civilize" MHA through converting them to a Euro-American farming lifestyle. SOF 102. Congress's purpose, for better or worse, was not to preserve MHA's traditional ways. *See* SOF 81, 102-103, 175, 177. Nor was Congress's purpose to accelerate, accentuate, or even preserve riverine aspects of MHA culture, which were never predominant to begin with. *Id*.; *see also* SOF 4.

Despite the clearly stated purpose for establishing FBIR, the United States' Motion claims that "the historical evidence confirms … that the exclusion of the submerged lands would have undermined the purpose of the reservation," and argues that the purpose was "to provide a permanent and livable homeland that allows the Indians who live there to continue their way of life." US Br. at 23. Similarly, MHA now argues that "[p]ermitting 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"—without specifying what that purpose is or how it was frustrated. MHA Br. at 11. But there are at least two problems with that.

For one, that is a reversal from what the United States claimed was the purpose of the reservation at the beginning of this litigation—namely, that "the federal purpose of the Reservation was to provide adequate lands to 'support the Nation with farming, livestock, and, to a lesser extent, hunting and forestry.'" ECF No. 17 at 23 (citation omitted); *see also id.* at 23-26.

And more fundamentally, these claims are contradicted by the historical evidence. During the relevant periods, federal policy was to encourage tribes to adopt a Euro-American way of life. SOF 102. That intent was the same during all iterations of FBIR, including under the 1870 Executive Order, the 1880 Executive Order, and the 1886 Agreement. *Id*. Indeed, FBIR was created for the specific purpose of ensuring that MHA would be provided with land for cultivating, hunting, and grazing, such that MHA could become self-sufficient farmers and ranchers, as well as to protect timber for MHA use. *Id*. The fertile bottomlands adjacent to the River were the best farmland on the reservation. SOF 11. The timber needed by MHA also grew along the bottomlands. SOF 2. Protecting these resources and ensuring the purpose of the reservation was served did not require that MHA own title to the riverbed.

Documentary evidence confirms as much. Prior to the 1870 Executive Order, MHA was starving due to diminishing bison herds, the timber they depended on was cut down to fuel steamboats traveling the River, and they were suffering from Sioux raids. SOF 13, 44. When these MHA concerns reached Major General Hancock, the military commanding officer for the Department of Dakota, he charged Captain Wainwright with creating a "reservation sufficiently large for [MHA] to cultivate, to procure fuel, and to hunt on." SOF 80. Captain Wainwright identified lands that were sufficient "to give [MHA] enough land to cultivate and for hunting and

grazing purposes." SOF 81. The federal correspondence during the time between the proposal of the reservation boundaries and the Executive Order establishing the reservation—including letters to the Secretary of the Interior and the President—detail a focus on protecting timber for MHA. SOF 80, 82, 87. And, after the reservation was created, agents at Fort Berthold encouraged MHA to transition to farming Euro-American vegetables and grains on the bottomlands, and to begin raising livestock. SOF 102. Not once in this, or in any other, available correspondence did a federal official raise a concern that the reservation must ensure MHA were able to use the River or riverbed, let alone for a specific purpose such as fishing or to the exclusion of other persons.

When FBIR's boundaries were altered in 1880 by Executive Order, it was not for any MHA benefit, but to appease the Northern Pacific Railroad. SOF 94. The lands making up the southern portion of FBIR had also been granted to the Railroad in prior legislation, and, in 1879, the railroad requested that the President issue an Executive Order amending the reservation boundaries to accommodate its claims. *Id*. Discussions of MHA impacts from reducing FBIR's size exhibited concern with MHA's retention of farmland for self-sufficiency, not the riverbed. SOF 29, 94.

Furthermore, the 1886 Agreement and Congress's ratification in 1891 introduced allotment to FBIR, another piece of evidence that the purpose of FBIR was not to continue the traditional MHA way of life. SOF 98, 103, 115. Allotment was "a device to break down tribalism, force tribal members to abandon traditional ways, and induce them to adopt 'American' and 'Christian' habits of private landownership and agricultural labor." SOF 98, 103. Consistent with this policy, and as explicitly stated, the only lands retained within FBIR were those valuable for grazing, timber, and agriculture. SOF 103. Since allotment sought to allocate a plot of land to each tribal member or family advantageous for agriculture or grazing, the 1886 Agreement was the first time the United States transferred "rights to the soil," or ownership of the land, to the individual tribal

members upon completion of allotment. SOF 98, 115. This was consistent with the general federal policy toward reservations at the time. SOF 103. The allotments did not purport to transfer any acreage of riverbed lands to any tribal members. SOF 191. Likewise, patents issued to individual tribe members, all of which occurred post-statehood, include the upland area adjacent to the Missouri River bank and exclude any exchange of title to the riverbed. *Id*.

The moving parties have provided no evidence establishing that the purpose of FBIR's creation was to encourage MHA's traditional ways of life, or to encourage MHA to embrace a riverine existence. Instead, the express purpose was to shift MHA toward a Euro-American agricultural existence. At minimum, the purpose for the United States' creation of FBIR is a disputed issue of fact making summary judgment improper.

D. MHA's Historical Understanding of FBIR's Boundaries Did Not Encompass Riverbed Ownership.

MHA's understanding of the reservation's boundaries is not relevant to this dispute under the Supreme Court's Equal Footing Doctrine standard, which only considers the United States' intent in reserving the land. *See* Argument Section II *supra*. Regardless, according to the evidence MHA did not assert ownership over the Missouri riverbed until well after North Dakota's statehood, coinciding with oil and gas developments. The evidence instead confirms MHA never expressed to federal officials any expectation of, or need for, riverbed ownership.

MHA never attempted to exercise or enforce exclusive use of the Missouri River either before or after FBIR was created. SOF 196. Members of other tribes used the River as part of a large intertribal trade network, traveling to MHA villages to trade bison products for MHA's renowned crops. SOF 9. And as Euro-American traffic on the River became more frequent, MHA traded with both Native and non-Native peoples, until they were effectively forced out of the trade network by Euro-Americans. SOF 44. No evidence suggests that MHA attempted to stop any of

these non-MHA River uses, even as they began to negatively affect their traditional ways of life: decimating bison herds, cutting down timber, and bringing deadly illness. *Id.*; SOF 196.

Further, there is no historical evidence that MHA advocated for ownership of the riverbed or of the River to be included with the reservation, or that MHA ever demanded that the boundaries of FBIR be amended to ensure inclusion of the River or riverbed. SOF 190. Instead, MHA's advocacy in and around the time of North Dakota's statehood focused on ensuring timber access and protecting timber from non-MHA use. SOF 80. MHA chiefs also advocated for increased government rations and requested that the steamboats stop bringing sickness to their villages, but there is no historical evidence that they ever asserted or requested ownership over the riverbed, or that they ever requested that the steamboats stop traveling on the River. SOF 74, 80, 195. MHA conceded in written discovery that they could not exclude traffic from the River. SOF 74.

In short, there is no evidence that MHA historically understood the River to be owned by them; instead, their actions were consistent with an understanding that the River was a communal resource shared with other Native and non-Native peoples.

E. North Dakota Consistently Claimed Ownership of the Missouri Riverbed.

North Dakota has claimed ownership of the Missouri riverbed since before any iteration of FBIR existed. SOF 183. The moving parties' claim that North Dakota somehow disclaimed this ownership through a standard provision required in its statehood enabling act and Constitution ignores all evidence to the contrary and is circular. *Cf.* US Br. at 15, 32 (citing 50 Cong. Ch. 180, 25 Stat. 676; N.D. Const. of 1889, art. 16, § 203, ¶ 2 (1889)); SOF 111, 112. Because the Missouri riverbed was never reserved for MHA ownership before North Dakota's statehood, any generic disclaimer of title to lands owned by tribes is irrelevant to the question of riverbed ownership.

The moving parties' only evidence for their allegation that North Dakota disclaimed Missouri riverbed ownership is the language of the enabling act admitting North Dakota and

several other states (including Montana) into the Union, and similar language in North Dakota's Constitution. SOF 111, 112. Like other states, the terms of North Dakota's entry into the Union required it to disclaim ownership of lands "owned or held by any Indian tribe" generally, as such lands would remain under control of Congress. SOF 111. North Dakota's Constitution consequently contained that disclaimer. SOF 112. But North Dakota's Constitution, like the enabling act, includes no specific disclaimer of the historical Missouri riverbed, nor any mention of MHA, the Missouri River, or its riverbed. SOF 111, 112. The generic disclaimer is not evidence that the State disclaimed ownership of the riverbed unless it was understood that MHA already "owned or held" title to the riverbed. To quote the Supreme Court, reliance on this generic disclaimer: "simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches." *Montana*, 450 U.S. at 554. And once again, the United States also contradicts its prior statements to this Court.[14]

What is more, North Dakota has claimed ownership of the historical Missouri riverbed since December 1865—when it was still the Dakota Territory—stating that owners of land adjacent to a navigable lake take rights only "to the edge of the lake at low-water mark," and that islands and other land accumulations that form in beds of navigable streams belong to the Territory. SOF 183. The Dakota Territorial legislature reaffirmed this ownership in 1877, adding a clause that "all navigable rivers shall remain and be deemed public highways." *Id.* Given these explicit steps, the argument that North Dakota then implicitly, and silently, disclaimed ownership of the riverbed through its Constitution's recitation of generic language required by the enabling act is

[14] "The Nation's citation in its Complaint to the North Dakota Constitution is similarly unavailing, because, though it disclaims any ownership over Indian lands within the state, the North Dakota Constitution is silent as to what the 'Indian lands' in question are…. To the contrary, the state constitution's mere reference to undefined 'Indian lands,' as in *Montana*, 'simply begs the question of the precise extent of the conveyed lands.' 450 U.S. at 554." ECF No. 17 at 19.

tenuous. And in any event, at a minimum, any inferences from North Dakota's statehood enabling act and its Constitution must be drawn in the light most favorable to North Dakota as the non-moving party on summary judgment.

F. Federal Actions Post-Statehood Reflect State Ownership of the Riverbed.

Federal actions after North Dakota's 1889 entry into the Union similarly corroborate a lack of Congressional intent to have reserved ownership of the Missouri riverbed in trust for MHA at statehood. Rather, federal actions for most of the 20th and 21st centuries support the conclusion that the United States understood the State to own the riverbed. The United States is silent on such facts in its Motion, despite including them in its pleadings. *See* ECF No. 98 ¶¶ 51-63.

For example, riverbed acreage was not included in the United States' calculations when it took certain FBIR lands for creating the Garrison Dam and compensated MHA accordingly. SOF 179. Similarly, when the mineral rights taken in 1949 for the Garrison Dam were returned to MHA in 1984, mineral rights to the riverbed acreage (which had not been taken to begin with) were not included. SOF 180. The United States' and MHA's pleadings (in error) appear to dispute these facts, but that just further defeats summary judgment. ECF No. 98 ¶¶ 54-63; ECF No. 1 ¶¶ 4-7.

Moreover, the U.S. Army Corps of Engineers, as recently as 2007, concluded that North Dakota owns the historical Missouri riverbed. SOF 197. And the United States did not record administrative trust title for MHA for any portion of the Missouri riverbed until 2022, after this litigation had already been underway for years, and based on an administrative legal opinion from the Department of Interior that, as of the date of this filing, is no longer in effect. SOF 199, 203.

* * *

Put simply, the parties' evidence on summary judgment, at a minimum, raises genuine disputes as to nearly every material factual issue in this litigation. The facts as framed by the moving parties do not support their narrative that Congress clearly intended to reserve the

historical Missouri riverbed in trust for MHA upon North Dakota's statehood. Accordingly, the United States and MHA cannot prevail on summary judgment.

IV. CASELAW INVOLVING OTHER PROPERTY DOES NOT RESOLVE THE MISSOURI RIVERBED TITLE DISPUTE PRESENTED HERE.

Apart from its evidentiary shortcomings for summary judgment, the United States relies on inapt analogies to other cases. The United States overlooks that cases quieting title to submerged lands, including those it cites, turn on highly fact-specific analyses, and thus the outcome of one case does not prescribe the outcome in another as a matter of law. As discussed *supra*, the disputed issues in this case militate strongly against granting summary judgment.

Moreover, the United States is incorrect about which prior cases most resemble the facts in this case. In particular, the United States chiefly relies on the *Idaho* decision—ostensibly because the Supreme Court there ultimately found title to submerged lands was held by a tribe and not a state. *See* US Br. at iii (citing *Idaho* "passim"), 25-26, 34-40. But the circumstances here are markedly differ from *Idaho*, and in fact more closely align with *Montana*.

First and foremost, as the United States acknowledges, the State of Idaho "conceded" that Congress intended for the tribal reservation at issue in that case to include submerged lands below Lake Coeur d'Alene. US Br. at 35. That is a very significant concession. No such concession exists in this case. That alone suffices to distinguish *Idaho*.

Even so, Idaho's concession marked only the beginning of the judicial analysis in that case. The Court then spent nine paragraphs recounting an elaborate array of facts collectively demonstrating that "the negotiating history, not to mention subsequent events, make it 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 here." *Idaho*, 533 U.S. at 275-81 (cleaned up, citation omitted). Such additional facts present in *Idaho* included:

- The tribe had "emphasized in its petition to the Government that it continued to depend on fishing," *id.* at 274;
- The "District Court found that the acreage determination of the reserved area in 1883 necessarily included the area of the lakebed within the unusual boundary line crossing the lake from east to west," *id.*;
- The Senate in 1888 requested advice from the Secretary of the Interior about the Tribe's rights over the "'navigable waters of Lake Coeur d'Alene and the Coeur d'Alene and St. Joseph Rivers,' … [which] the Secretary answered in the affirmative," *id.* at 276;
- An Act of Congress prior to both statehood and ratification of the reservation, required "that the Tribe be compensated for … [a] right-of-way," *id.* at 277, "part of which crossed over navigable waters within the reservation," *id.* at 269;
- Congress chose in 1886 and 1889 to require tribal consent and compensation to the tribe for cessions of portions of the tribe's reservation, despite Congress's authority to reduce the reservation by "fiat" if it so chose, *id.* at 277;
- Congress ratified the reservation eight months after Idaho's statehood enabling act included a provision confirming the tribe's sale of submerged riverbed land, demonstrating an absence of state title because "[c]onfirmation would have been beyond Congress's power if title to the submerged riverbed had already passed to the State," *id.* at 279; and
- An "Act of Congress ced[ed] the portion of reservation land for the townsite of Harrison," where the "Tribe (and no one else) was compensated for a cession whose bounds suggested inclusion of submerged lands . . . [which] simply could not have conveyed if it had passed

to Idaho at the time of statehood," *id.* at 280.

These extensive and unique facts, developed at trial in *Idaho*, demonstrated not only that Congress was on notice that submerged lands were included within the reservation, but also that Congress repeatedly treated the Tribe as holding title to those submerged lands, both before and after the statehood enabling act and ratification of the reservation.

Comparing the above *Idaho* record after trial to the limited evidence proffered in support of the United States' Motion for summary judgment, *Idaho* is not analogous to this case. No FBIR mapping or calculated acreage includes the riverbed as part of FBIR. SOF 185. MHA was not compensated for riverbed acreage when the United States took certain FBIR lands to construct the Garrison Dam, SOF 179, or to provide land for the Northern Pacific Railroad, SOF 94. No evidence exists of any direct exchange with Congress to clarify the disposition of the Missouri River or its riverbed within FBIR's exterior boundaries. SOF 189. No other transactions ceding territory from MHA to public entities or private individuals would have required title to the Missouri riverbed to be held by the United States in trust for MHA. Accordingly, the United States' assertion that "[t]he circumstances here match those in *Idaho* and other cases considering congressional notice" does not withstand even a cursory level of scrutiny. *Cf.* US Br. at 35.

Another reason *Idaho* is inapposite is because, unlike the Coeur d'Alene tribe that showed actual dependence on fishing, a dispute in this case concerns whether MHA depended on fishing at all, let alone to the extent of riverine tribes like the Coeur d'Alene in *Idaho*. *Cf.* US Br. at 23-24. Again, *Idaho* found that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing." 533 U.S. at 274. *Idaho* also found that "[t]he Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored

in riverbeds and banks." *Id.* at 265. A government surveyor there likewise observed that "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians." *Id.* at 277 (citation omitted). Here, there exists no historical evidence of such dependence on fishing.

The United States' reliance on other cases with fishing-dependent tribes likewise falls flat. US Br. at 24-25. For starters, neither *Alaska Pacific Fisheries* nor *Donnelly* implicated the Equal Footing Doctrine at all—the former was decided before Alaska even became a state, while the latter was a murder case and held, based on state law, that the river at issue was not even navigable. In any event, in each case fishing was essential for the tribes, not merely supplemental. The tribe in *Donnelly* had not just "established themselves along the river in order to gain a subsistence by fishing" as the United States quotes, but the historical evidence there "abound[s] in references to fishing as their *principal* subsistence …." *Donnelly v. United States*, 228 U.S. 243, 259 (1913) (emphasis added). Likewise, in *Alaska Pacific Fisheries*, the tribe had been forced to relocate from their homelands and agreed to relocate to islands only due to their rich coastal fishing resources.[15] 248 U.S. at 88-89. Also, the tribe had built an extensive commercial fishing and canning operation upon which the tribe depended nearly entirely for its economic subsistence. *Id.*

In contrast, the historical evidence here establishes that MHA subsisted on agriculture, bison, and trade; MHA's limited amount of fishing, even when *combined* with other hunting and gathering activities, comprised *no more than 15 percent of their diet* at the time of North Dakota's

[15] "[The Metlakahtlans] 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 and a promising opportunity for industrial and commercial development…. The Indians could not sustain themselves from the use of the upland alone. … Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation." *Id.*

statehood. SOF 32. Indeed, the United States' prior summary judgment motion recognized the traditionally limited role of MHA fishing. *See* ECF No. 33 at 16-17 ("[T]here exists in the historical record only one passing reference to fishing, and that reference notes that the Reservation 'is not so well adapted to farming, grazing, fishing and hunting and other necessities of the Indians.' … [T]his 'appears to be the only written consideration of fishing made by the Executive in connection with designing the Reservation.'"). While the present record contains other references to fishing, they remain sparse compared with the omnipresent record references to fishing in the other cases that the United States unavailingly tries to equate here.

The United States also cites two Ninth Circuit cases where cultural and religious significance of the navigable waters to the tribe factored into the court's analysis. *See* US Br. at 24-25. Notably, the United States cites no binding precedent, or even persuasive cases in more than one circuit, on this point. Moreover, the United States' own discussion of its cited cases reveals that cultural and religious significance is at most one factor and should only be considered in the context of the broader circumstances and evidence. In *Puyallup Indian Tribe v. Port of Tacoma*, tribal members "were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes …. Anadromous fish was the great staple of their diet and livelihood." 717 F.2d 1251, 1259 (9th Cir. 1983). Further in that case, the original treaty had to be amended to include the Puyallup River due to hostilities caused by a lack of access to "the Tribe's traditional fishing areas and villages along the Puyallup River." *Id.* at 1260. And in *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, the court found at least six different facts supported reservation of a riverbed for the tribe, the most important of which was that, "unlike the situation in *Montana*, … the Muckleshoot Reservation was expanded at the insistence of the Indians

specifically to include a section of the White River on which the Tribe could continue to exercise its traditional fishing lifestyle." 713 F.2d 455, 458 (9th Cir. 1983).

The United States cites nothing standing for its proposition that spiritual reverence for a river causes the river or its riverbed to be tribal property. And in any event, in this case, the relative importance of the Missouri River, let alone its riverbed, to MHA's traditional spiritual practices is disputed. There also is no evidence that MHA access to the River for such practices was contingent on its ownership of the riverbed or was thwarted by State ownership of the riverbed. On summary judgment, the United States and MHA cannot establish that the Missouri River and riverbed were widely understood to be of such central importance to MHA that Congress plainly intended to reserve ownership of them for MHA.

Conversely, the United States' contention that "*Montana* is easily distinguishable" from this case resists reality. US Br. at 26-27. In fact, the United States previously argued the opposite. ECF No. 33 at 19. To support that claim of "easy" distinction, the United States now relies on its asserted facts about "the Riverbed's importance to the Nation" and that "fishing was important to the [MHA's] diet and way of life"—alleged facts, which are, as discussed *supra*, exaggerated and in any event disputed. *Cf.* US Br. at 26.

The United States claims that for the Crow tribe in *Montana*, unlike for the MHA here, "fishing was not important to their diet or way of life." *Id.* (citations omitted). However, the MHA tribes share close familial, cultural, and historical ties and subsistence practices with the Crow Tribe—including lack of dependency on fishing. SOF 4. And although the Crow did not emphasize agriculture, MHA did not use the River or riverbed itself for those activities. Rather, as discussed *supra*, MHA relied on adjacent bottomlands for agriculture and nearby plains uplands for hunting. SOF 2, 4. This reality is materially similar to the Crow in *Montana*, where the Crow

fished as a supplement to their diet but primarily depended on non-aquatic sources of food.[16] A lack of dependence on fish for subsistence, despite some evidence of fishing, is the same fact pattern presented here.[17] *See* 450 U.S. at 556. Like in *Montana*, there is no evidence pre-statehood that MHA understood FBIR to include MHA's exclusive use of the riverbed itself. Nor is there evidence that such ownership was necessary for the continuance of MHA's traditional activities relating to the River. *Cf. Winans*, 198 U.S. at 384.

The United States also misrelies on *Alaska I* and *Alaska II* to assert arguments (mostly recycled from earlier in its Motion) that documents creating the State of North Dakota and the FBIR defeated the State's title to the Missouri riverbed. *Cf.* US Br. at 31-40.

For one, as addressed *supra*, the citation of a general disclaimer in North Dakota's enabling act and Constitution is wholly circular and did not encompass the Missouri riverbed.

For another, *Alaska I, Alaska II,* and other caselaw cited by the United States, do not announce any general rule—contrary to the Equal Footing Doctrine—that because the core purpose of reservations is to create a "permanent homeland" for tribes they must *ipso facto* include title to submerged waters within their boundaries. *Cf.* US Br. at 33-34. Rather, those cases rely on extensive analysis of the reserving documents and historical evidence. *Alaska II*, for example,

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[16] *See* Brief for the Crow Tribe, *Montana v. United States*, 1980 U.S. S. Ct. Briefs LEXIS 2054, at *12 (Sept. 26, 1980) ("A major question at trial was the extent to which the Crows traditionally fished. The trial court found that 'fishing was not a central part of the Crow diet.' … The Tribe takes no exception to this finding other than to note that the Crows did eat fish to supplement their main diet of buffalo meat . . . and continue to fish in modern times for personal use ….") (citations to record omitted); Brief for the United States, *Montana v. United States*, 1980 U.S. S. Ct. Briefs LEXIS 2055, at *9 (Sept. 27, 1980) ("Like the Sioux, their traditional enemy, the Crow subsisted mainly by hunting buffalo. In times of scarcity, they supplemented their diet with fish ….").

[17] The United States' Motion quotes a parenthetical from *Idaho* that paraphrases *Montana*'s discussion of the importance of fishing, but also adds a reference to "use of navigable water." US Br. at 26 (quoting *Idaho*, 533 U.S. at 274). This is a misleadingly presented parenthetical, as the quoted portion of *Montana* contains no discussion about the Crow's use of navigable water.

recounted three of the primary purposes of the reservation at issue: to engage "scientific study of the majestic tidewater glaciers surrounding the bay," to "study and to preserve the remnants of interglacial forests, which can be found both above and below the tideline," and "to safeguard[] the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem." 545 U.S. at 102 (cleaned up) (quoting Special Master's report). Similarly, *Alaska I* turned on a reservation of coastal waters with a boundary reference that included tidelands and also included references to "the habitat of various species along the coast *and beneath inland waters*." 521 U.S. at 61 (emphasis added). But here, at minimum, factual disputes exist as to whether the FBIR's purpose included tribal ownership of the riverbed. And unlike here, in neither of the *Alaska* cases did Congress supersede an executive branch reservation with a different reservation.

Finally, the State's retention of its riverbed title entails no "act of bad faith" by Congress. *Cf.* US Br. at 38-40. This is yet another example of circular arguments being made by the United States. State title does not "strip[] the [MHA] of the Riverbed by silent operation of unsettled law" because it has not been established that Congress ever clearly intended to convey ownership of the riverbed to MHA to begin with. The burden is on the United States to show clear Congressional intent to defeat the State's riverbed title, not the other way around. And in any event, because all inferences on summary judgment must be construed against the United States, this argument, as with the rest of the arguments in its Motion, fails.

CONCLUSION

This case presents genuine disputes over nearly every material fact bearing on title to the Missouri riverbed. The United States and MHA fail on the present record to defeat the Equal Footing Doctrine's strong presumption of State title to the riverbeds of navigable rivers. The State of North Dakota respectfully requests that the Court deny summary judgment.

Dated: March 18, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ James Auslander
James Auslander