IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTRODUCTION

Federal Defendants' motion for summary judgment (ECF No. 119) ("MSJ") is not a "second bite at the apple." *See* ECF No. 124 ("Response") at 14. Federal Defendants have been clear that the question of title to the bed and banks of the Missouri River ("River") within the Fort Berthold Indian Reservation ("Riverbed"), including the mineral interests thereunder, can be decided on the pleadings. ECF No. 112 ("MJP Joinder") at 5-11. Specifically, Congressional Acts and other documents establishing the Fort Berthold Indian Reservation ("Reservation") demonstrate the United States' intent to reserve and retain title to the Riverbed for the benefit of the Mandan, Hidatsa, and Arikara Nation ("Nation" or "MHA"). Additional evidence presented in the MSJ only supports that conclusion. ECF No. 119-1 ("MSJ Brief") at 1. Unable to genuinely contend with this reality, the State of North Dakota ("State" or "North Dakota") is left with nothing but distortion to try and preclude summary judgment: distortion of the summary judgment standard, of Federal Defendants' arguments, and of the applicable legal tests and material facts. *See* Response & ECF No. 124-1.[1] Because each effort fails, summary judgment should be granted in favor of Federal Defendants.

ARGUMENT

I. North Dakota Distorts and Disregards the Summary Judgment Standard.

The purpose of summary judgment is to weed out issues that do not warrant the expense of a trial. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). The State claims it "does not need to prove any of its factual assertions" to defeat summary judgment. Response at 23. But that

[1] ECF No. 124-1 is the State's alleged statement of genuine issues of material facts, which includes Federal Defendants' statements of material fact (ECF No. 119-2), the State's responses to those statements, and the State's additional statements. In Exhibit 1, Federal Defendants reply to each of the States's responses and additional statements, showing why they do not create a genuine issue for trial. Citations herein to Federal Defendants' statements are "US SOF X," citations to the State's responses or additional statements are "ND SOF X," and citations to Federal Defendants' replies are "US Reply SOF X."

is not the standard. Because Federal Defendants' evidence shows the material facts are not genuinely disputed, the State must point "to particular parts in the record" that show a genuine issue exists for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); Fed. R. Civ. P. 56(c). The Court's local rules require even more: an opposition to summary judgment "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement." LCvR 7(h). When an opponent's "statement of genuine issues" fails to identify specific parts of the record, the Court "is under no obligation to sift through the record in order to evaluate the merits of a party's case." *Waterhouse v. District of Columbia*, 298 F.3d 989, 992 (D.C. Cir. 2002) (citation omitted).

In many instances, the State fails to point to any part of the record and, when it does, fails to explain how the evidence shows the existence of any genuine issue of a material fact.[2] Instead, the State's alleged disputes are often disagreements with the governing law, which are legal issues for the judge, not factual questions for trial. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 148, 153 (D.C. Cir. 1996) ("Blending factual assertions with argument regarding their legal significance" cannot create a genuine dispute of material fact). "Each courtroom comes equipped with a 'legal expert,' called a judge,'" who can

[2] As shown in Exhibit 1, for more than half of the State's additional statements, the State failed to include any citation to the record. *See* ND SOFs 178–180, 187–190, 192–197, 203. The same is true for many of the State's responses to the US SOFs. *See, e.g.*, ND SOFs 19, 46-47, 53, 55, 74, 97. Even where the State includes a citation for its assertion, that citation is sometimes an illusion—relying on undisputed US SOFs to disingenuously dispute another (*e.g.*, ND SOFs 55–60), pointing to a document outside the record (*e.g.*, ND SOF 50), or blatantly mischaracterizing the record (*e.g.*, ND SOFs 74, 181–182, 185, 201–02). These "[c]onclusory assertions offered without any factual basis in the record cannot create a genuine dispute sufficient to survive summary judgment." *Stewart v. FCC*, 279 F.Supp.3d 209, 216 (D.C. Cir. 2017).

determine "the relevant legal standards." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.C. 1997). A trial would be necessary only if the State showed that the material facts under the governing law are genuinely disputed—which it fails to do.

II. North Dakota Distorts Federal Defendants' Arguments.

The first sentence of the Response distorts Federal Defendants' argument, falsely asserting: "The crux of the United States' [MSJ] . . . is that because the Missouri River flows within the boundaries of the [Reservation], then the [Nation] must possess title to that portion of the River and its riverbed." Response at 1. Relying on a straw man fallacy, the State urges the Court to deny summary judgment because "that fact of geography does not strip the [State] of its presumptive title to the beds of navigable rivers under the Equal Footing Doctrine." *Id.* (citing *Montana v. United* States, 450 U.S. 544, 554 (1981)). The State repeats this distortion as if repetition makes it true. *See id.* at 3, 16-17, 18, 18 n.9, 23.[3]

Federal Defendants have never said that "resolving the riverbed's ownership" is as simple "as looking at a map" or "that the historical documents creating [the Reservation] clearly conveyed, *sub silentio*, an intent to reserve the Riverbed." *See id.* at 3, 26-27. Instead, Federal Defendants have clearly explained that the United States' intent to include the Riverbed in the Reservation is established by: (1) the 1870 Executive Order expressly describing the Reservation's southern boundary as beginning and ending at a point "on the Missouri River" and

[3] The State cherry picks deposition testimony to suggest that Federal Defendants' expert opined that the Riverbed was included in the Reservation simply "because it lay within the boundaries that were reserved to the [Nation]." Response at 18. Not true. *See* US Reply SOF 201. Regardless, any expert testimony on whether the Riverbed passed to the State at statehood should be excluded as inadmissible legal opinion. *See Mossey v. Pal–Tech,* 231 F.Supp.2d 94, 98 (D.D.C. 2002). Contrary to the State's argument, *see* Response at 9-10, divergence of expert opinion on the ultimate legal question does not create a factual dispute that precludes summary judgment. *Burkhart,* 112 F.3d at 1213. Plus, the State essentially concedes the testimony of their two professional surveyor experts is cumulative. Response at 5; *see* Fed. R. Evid. 403.

setting the northern boundary as the River's "left bank" (MJP Joinder at 2, 9-10[4]; MSJ Brief at 1, 10-12); (2) the 1880 Executive Order reaffirming "the present boundary" as "the left bank" of the River (MJP Joinder at 9-10; MSJ Brief at 21); (3) the 1886 Agreement, ratified by Congress in 1891, merely reducing the total length of the River running through the Reservation (MJP Joinder at 3; MSJ Brief at 14, 21); (4) Congress requiring the State to disclaim title to all Indian lands as a prerequisite to statehood (MJP Joinder at 10-11; MSJ Brief at 32); and (5) the purpose of the Reservation as a permanent homeland (MJP Joinder at 11 n.4; MSJ at 32-34). Additional evidence only supports that interpretation. That evidence includes: (1) the Nation's historic use of the River; (2) the Nation's understanding, confirmed by high-ranking federal officials, that the Riverbed was included in the Reservation; (3) federal officials' recognition of the importance of the River to the Nation; (4) Congress being on notice that the Riverbed was included when it recognized and ratified the Reservation; and (5) Congress's express policy of requiring tribal consent to reduce the size of the Reservation. MSJ Brief at 22-40. Asking the Court to analyze all this evidence is not simply asking the Court to glance at a map and conclude that the Riverbed was silently reserved.[5]

III. North Dakota Fails to Identify a Genuine Issue of Material Fact.

Under the governing law, the Court must first determine whether "the United States clearly intended to include submerged lands within the reservation" and then whether "the

[4] The State's complaint (Response at 8 n.4) that Federal Defendants incorporate MJP briefing by reference should be dismissed because the State does the same thing. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 7 (D.C. Cir. 2019); *Phillips v. Mabus*, 319 F.R.D. 36, 37-38 (D.D.C. 2016). Given the circumstances of this case, the Court must consider the MJP and MSJ briefing together, as arguments made in the MJP support summary judgment as well. *See* ECF No. 113 at 2.

[5] Other erroneous claims exacerbate the State's distortions, *e.g.*, that the parties "agree that there has been no explicit conveyance of the historical Missouri riverbed to MHA in the operative [Reservation] reserving documents . . . ." *See* Response at 23; US Reply SOF 181.

United States expressed its intent to retain federal title." *Alaska v. United States*, 545 U.S. 75, 100 (2005) ("*Alaska II*"). The State largely ignores and conflates these two steps, invents new legal requirements in hopes of turning irrelevant facts into material ones, and distorts material facts to pretend they are disputed. These efforts fail to preclude summary judgment.

A. *The State fails to identify a genuine issue of material fact regarding the United States' intent to reserve title to the Riverbed.*

1. The State fails to genuinely dispute the significance of "the left bank" language.

The State raises at least six arguments attempting to eliminate the significance of "the left bank language" in the reserving documents, all of which amount to legal arguments that do not create a genuine issue of material fact for trial. *See Jackson*, 101 F.3d at 153. First, the State argues that "the left bank" language is insignificant because "the documents establishing [the Reservation] do not expressly mention the riverbed . . . much less clearly reserve it for MHA," and that none of the reserving documents "referred to the Missouri River's riverbed." Response at 4, 14. This is misleading because, as discussed above, the 1870 and 1880 Executive Orders expressly referred to the River and its "left bank." In any event, controlling precedent is more than clear that an express mention of submerged lands is not required for those lands to be clearly reserved. ECF No. 118 ("US MJP Reply") at 2-7; MSJ Brief at 20-22. Tellingly, the State does not cite a single example of such express language being used, even in the many cases in which courts have found an intent by the United States to defeat state title to submerged lands.

Second, the State argues that the 1886 Agreement, which does not explicitly use "the left bank" language, is the only "operative" reserving document that reflects the "intended scope" of the Reservation at statehood. Response at 8, 23, 24, 25, 26, 27. Not so. The parties agree that the Reservation was created in 1870. *Id.* at 11; MSJ Brief at 11-12. Accordingly, the 1870 and 1880 Executive Orders, which include "the left bank" language, must be analyzed to understand the

1886 Agreement. The "left bank" language establishes that, in 1870 and 1880, the United States intended to include the whole of the River (and thus the Riverbed) as it flowed through the Reservation. MSJ Brief at 21. The 1886 Agreement did not "supersede[] or replace[]" the existing Reservation (*see* Response at 25)—it described lands, not including the Riverbed, to be removed. *Id.* at 14. Title to the Riverbed was therefore not expressly abrogated by the 1886 Agreement, as required by both the Indian law canons of construction and Congress's express policy of requiring tribal consent to reduce the Reservation. *Id.* at 2, 32; *see infra*, Section III.D. For these reasons, it simply does not matter that the portion of the Riverbed being referenced by "the left bank" language is no longer within the Reservation. *See* Response at 4, 12, 26.[6]

Third, the State downplays "the left bank" language as just "a couple references . . . in correspondence from government officials." *Id.* at 4. But the State concedes that the 1870 Executive Order adopted "the boundaries proposed and recommended" by Captain S.A. Wainwright, as agreed to by the Commissioner of Indian Affairs ("Commissioner") and Secretary of the Interior ("Secretary"), ND SOF 86, and that, per Wainwright's "legal description of the Reservation in the 1870 Executive Order," the "entire width of the River was included within the exterior boundaries of the Reservation," ND SOFs 88-91. Indeed, the State's experts all agree that the reference to "the left bank" set the Reservation's northern boundary "such that the width of the [R]iver was included within that boundary." *See* US Reply SOF 88-91.

[6] The State's assertion that Federal Defendants suggest "Congress intended to ignore the 1886 Agreement when admitting North Dakota into the Union" is yet another distortion. *See* Response at 24. Federal Defendants repeatedly rely on the 1886 Agreement as support for their arguments in MSJ briefing. MSJ Brief at 13-16, 21, 30, 32, 36-40.

Nevertheless, in a remarkable self-contradiction, the State asserts that "[t]he 1870 Executive Order did not include boundary descriptions." Response at 25.[7] The State points to "[t]he diagram accompanying the 1870 Executive Order [that] did not clearly mark a boundary on a particular side of the River." *Id.*; ND SOF 87. The State does not explain how the diagram would create an issue of material fact, however, so any argument to that effect is deemed waived. *See Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013). Regardless, such an argument conflicts with the State's own expert's opinion that a written legal description would control over a map depicting the property, *see* US Reply SOF 87, and the State's repeated concessions that Wainwright provided the "legal description of the Reservation in the 1870 Executive Order," *see* ND SOF 86, 88-90.

Fourth, the State similarly alleges that the Reservation's "boundaries are merely on both sides of the Missouri River." Response at 4, 8. It is unclear what the State means by this, but coupled with its assertion that "natural features were frequently used as identifiable boundaries," *see id.* at 25, it appears to be arguing that somehow both the left and right banks of the River were northern boundaries of the Reservation. This argument distorts the plain "left bank" language and attempts to add language where none exists. The choice to specify the "left bank," when the Executive Orders could have referred to the right bank or to the River without specifying a bank (as the same Executive Orders referred to other rivers), can only be understood as a deliberate decision to include the entirety of the Riverbed. *See* US MJP Reply at 10.

Fifth, the State asserts that "official correspondence within the executive branch that was later shared with Congress amply supports the conclusion that references to the River were

[7] As shown in Exhibit 1, the State often does not rely on its experts and instead makes legal argument interpreting documents, *see, e.g.*, ND SOFs 22, 28, 33, 34, 111-112, or as here, contradicts its experts' testimony, *see, e.g.*, ND SOFs 87, 89, 96.

merely used as a boundary for a portion of the reservation at the time." Response at 25. The State cites the Commissioner's explanation to the Secretary, later shared with Congress, that the 1870 Reservation embraces "a part of the country belonging to [MHA], according to the [1851] treaty of Laramie." *Id.* at 11. Because Article 5 of the 1851 Treaty "designated MHA land only south and west of the River" and thus "excluded" it from the Nation's territory, the State argues, the Riverbed could not have been included in the Reservation per the Commissioner's explanation. *See id.* at 4, 9-10, 29. But the Treaty did not set a boundary on a particular bank. Instead, Article 5 recognizes that the Nation's territory followed "up the Missouri River." *See* US Reply SOF 68.

The State's reliance on *Montana* to support this argument is also misplaced. The State cites the *Montana* Court's statement that Article 5, which provided "that the Crow Indians 'do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described,'" had "no bearing on ownership of the riverbed." Response at 10 (citing 450 U.S. at 553). But this statement was specific to the Big Horn River, which simply flows through the Crow Reservation and was not mentioned in the 1851 Treaty. It is a far stretch to read this statement as the Court implicitly ruling that the Treaty "excluded" the Riverbed from the Nation's territory. As the State admits, the Treaty did not "reserve or convey land for any tribe," *id.*, and Article 5 also provided that the Nation did "not hereby abandon or prejudice any rights or claims they may have to other lands." US SOF 69. The State's interpretation of the Treaty is even more unpersuasive in light of evidence, not genuinely disputed, that the Nation understood it had retained ownership of the River after the Treaty. *See* MSJ Brief at 27-31; *infra*, Section III.A.3; *see* US Reply SOF 74-86.

And sixth, the State cites an 1872 letter from Commissioner F.A. Walker to Indian Agent Tappan explaining that "[t]he left bank is clearly stated in the text, and defined to be the North

bank of the Missouri." Response at 26; US SOF 92. The State does not dispute the accuracy of the quotation but makes a legal argument that Walker could not provide "a binding interpretation." Response at 27 (citing *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 741-43 (8th Cir. 2001)); ND SOFs 92, 93, 99, 109. In *Spirit Lake Tribe*, the court concluded that an Associate Solicitor, who lacked authority to abandon the federal government's claim to a particular lakebed, could not bind the government with a memorandum opining that the lakebed had been reserved for a tribe. 262 F.3d at 741-43. Here, Federal Defendants do not claim that Walker's conclusion (or any other federal officials' opinion) is binding. It is simply evidence of the Commissioner's view shortly after creation of the Reservation—consistent with the plain language of the reserving documents and understanding of other federal officials (*see infra*, Section III.A.3)—supporting the United States' intent to include the River (and thus the Riverbed). Moreover, the State's assertion that "[t]he correspondence had nothing to do with the riverbed" (Response at 27) is simply false. *See* US SOF 93 (Walker writing that "[t]he object in mentioning the left or north bank of the Missouri as the boundary line of the reservation was simply to include the *whole* of the Missouri river . . . within the limits of the reserve" (emphasis added)).[8] That is especially true in light of controlling case law holding that a reservation boundary tailored to encompass navigable waters that are expressly referenced establishes an intent to include submerged lands in the reservation. *See* US MJP Reply at 2; MSJ Brief at 22.

[8] The State's suggestion that the Reservation boundaries were set "to protect timber for MHA use," *see* Response at 10-11, 26, 32-33, is belied by the Walker correspondence itself, which reveals that "the left bank" boundary did not protect timber for the Nation but allowed non-natives to harvest the timber at that location. US Reply SOF 92. That Tappan was inquiring whether timber north of the River was excluded from the Reservation, and thus harvestable by non-Natives, does not affect Walker's conclusion.

2. The State fails to genuinely dispute the purpose of the Reservation and the Nation's fishing and other uses of the River.

a. The State defines the purpose of the Reservation too narrowly.

At step one, the purpose of a reservation may inform whether the United States intended to reserve submerged lands. *See, e.g.*, MSJ at 22-27. The State defines the Reservation's purpose too narrowly, urging the Court to disregard all the ways that the Nation used the River because "Congress's purpose for creating [the Reservation] was to facilitate MHA's adoption of Euro-American agricultural methods." Response at 5, 31, 34. The State asserts that, because promoting agriculture was an explicit purpose of the Reservation, "preserv[ing] MHA's traditional ways" could not have been an implicit one. *Id.* at 8, 31, 34. That is wrong and should be rejected as a matter of law. As the State recognizes, agriculture was part of the Nation's traditional ways of life, and the River was essential for agriculture on the Reservation. *See, e.g.*, ND SOFs 4 (noting MHA's "agricultural prowess"), 8, 9, 12 (tribal members continued to grow crops in bottomlands until at least the 1890s). The Reservation's explicit purpose of promoting agriculture therefore cuts in favor of the Riverbed being included, not against it.

In any event, the essential purpose of all Indian reservations is to provide a "permanent home and abiding place" for Indian people. *United States v. Winters*, 207 U.S. 564, 565 (1908). That general purpose "is a broad one and must be liberally construed." *E.g.*, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). Accordingly, an Indian reservation's purpose cannot be limited to agriculture or other purposes just because they are explicitly stated in the reserving documents. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-06 (1968) (Indian reservation "for a home" implicitly includes "the right to fish and hunt"); *Walton*, 647 F.2d at 47 n.9 ("Congress envision[ing] agricultural pursuits as only a first step in the 'civilizing' process . . . implies a flexibility of purpose."); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 74-76 (Ariz.

2001) (refusing to limit Indian reservation's purpose to agriculture in part because "many Indian reservations were pieced together over time" and "many documents do not accurately represent the true reasons for which Indian reservations were created").

b. The Nation's use of the River supports an intent to include the Riverbed in the Reservation.

The State also insists that fishing must have been "essential for MHA subsistence" to support an intent to include the Riverbed. Response at 5-6, 28, 30-31, 44. That is not true for several reasons. First, as already explained, if the Court concludes that the reserving documents themselves establish an intent to reserve the Riverbed, then the Nation's reliance on the River does not matter. *See* MSJ Joinder at 8-9; US MJP Reply at 13-14; MSJ Brief at 22.

Second, it is not necessary for fishing to be "essential for MHA subsistence" for the Nation's fishing practices to support an intent to reserve the Riverbed. *See* Response at 6. For a reservation's purpose to support an intent to include submerged lands, it only needs to be "compromised" or "undermined" without them. *See, e.g.*, *Idaho v. United States*, 533 U.S. 262, 274 (2001) (citing *United States v. Alaska*, 521 U.S. 1, 39-40 (1997) ("*Alaska I*")). The Supreme Court has expressly rejected the State's argument for a higher standard requiring the purpose to be "entirely defeated." *See* MSJ Brief at 22 (citations omitted). Even in *Montana*, on which the State principally relies, the Court merely concluded that "fishing was not *important* to [the Crow Tribe's] *diet or way of life*." 450 U.S. at 556 (emphasis added). Use of the word "or" shows that fishing does not even have to be important to a tribe's diet, much less necessary for physical survival; fishing can be "important" in other ways. *See* US Reply SOF 4.

Even so, North Dakota admits "the historical record shows that MHA fishing practices were supplemental to their diet of crops and bison," *see* Response at 29, and that is enough. The State pretends to dispute "the Riverbed's importance to the Nation" and that "fishing was

important to the Nation's diet and way of life." *See id.* at 43. However, the Nation's many undisputed uses of the River, including fishing, show that any alleged dispute of the River's importance is not genuine and based on unreasonable inferences "at war with the undisputed facts." *United Fire & Case Ins. Co. v. Garvey*, 419 F.3d 743, 746 (8th Cir. 2005) (citation omitted); *see also Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019); *Rodriquez v. Encompass Health Rehabilitation Hosp. of San Juan, Inc.*, 126 F.4th 773, 784 (1st Cir. 2025). In any event, whether the Nation's undisputed uses of the River are enough to make it "important to their diet or way of life" is a legal question the Court can decide. *See Jackson*, 101 F.3d at 153.

Third, even if the Nation's use of the River for fishing did not support the United States' intent to include the Riverbed, all of the Nation's uses of the River combined would. Just as relevant as fishing is the Nation's use of the River for activities like agriculture, trade, and collecting float bison. *See* MSJ Brief at 2-8, 25. With all the Nation's uses of the River in mind, the River was clearly "important" to the Nation's "diet or way of life"—as well as "essential" to the Nation's "subsistence," however strictly the State would like the Court to define those words as a legal matter. This is another reason that the State's attempt to create a dispute over the meaning of the term "subsistence" can be dismissed as immaterial.[9]

Moreover, although the State resorts to arguing that only fishing or other uses of the Riverbed *itself* are relevant, *see* Response at 41-43, that argument is inconsistent with case law. Courts routinely consider uses of navigable waters that do not involve the submerged lands

[9] That is not to say the dispute is genuine—in seeking to define "subsistence" as narrowly as possible, the State contradicts its own expert. *Compare* ND SOFs 14, 23, 26, 31, 32, 34 (State claiming that record does not support the Nation fishing for "subsistence") *with* US SOF 30 (State's expert acknowledging that "there was general acknowledgment in these communications [between federal officials] that the MHA hunted, fished, and gathered for *subsistence*" (emphasis added)).

themselves, including traditional fishing, as support for the United States' intent to reserve the submerged lands. *See, e.g.*, *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1259-60 (9th Cir. 1983) (noting tribe had village sites near river and "spiritual, religious, and social life centered around the river"). In fact, the State admits that the Nation's religious and spiritual use of the River is "one factor" to be considered "in the context of the broader circumstances and evidence." *See* Response at 42-43.[10]

For all these reasons, comparison to controlling case law clearly demonstrates that the Nation's many uses of the River support an intent to include the Riverbed in the Reservation. The State fails to distinguish *Idaho*, *see id.* at 40-41, where the tribe "depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks." 533 U.S. at 265. There could not be a more apt comparison to how the Nation depended on the Riverbed here. *See* MSJ Brief at 4-6, 25. The State argues that, in *Idaho*, the tribe "emphasized in its petition to the Government that it continued to depend on fishing," and a government surveyor observed that "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians." Response at 40-41 (citing *Idaho*, 533 U.S. at 274, 277). Here, there is similar evidence, not genuinely disputed, of federal officials acknowledging the Nation's dependence on fishing and the Nation's understanding that its territory included the River (and thus the Riverbed). *See* MSJ Brief at 5, 11, 37-38; *see also infra*, Section III.A.3.

[10] Nevertheless, the State attempts to discount the religious and spiritual importance of the River to the Nation. For example, despite acknowledging that "some MHA beliefs and ceremonies did involve the River," North Dakota qualifies that "many . . . did not." Response at 30-31. So what? Even if some of the Nation's beliefs and ceremonies did not involve the River, the United States' intent to include the Riverbed would still be supported by the Nation's dependence on the River "not only for food and materials, but also in their manner of self-identification, language and religious practices." *See Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983); *see also Puyallup*, 717 F.2d at 1259. Those facts are not and cannot be genuinely disputed by the State. *See* US Reply SOFs 50-61.

Even if there were less evidence of the Nation petitioning for inclusion of the Riverbed, that would not be surprising given that, unlike in *Idaho*, the Riverbed had been included all along.

Nor is *Montana*, as the State claims, "the same fact pattern presented here." *See* Response at 43-44. There is far more evidence of the importance of fishing to the Nation than "eat[ing] fish to supplement their main diet" and "fish[ing] in modern times." *See id.* at 44 n.16 (citation omitted). Moreover, even if the Nation's fishing practices were similar to the Crow Tribe's, there is no evidence that the Crow Tribe used navigable waters in all the ways that the Nation used the River. *See* MSJ Brief at 26. Confusingly, the State complains (Response at 44 n.17) that Federal Defendants quoted the *Idaho* Court's description of the facts in *Montana*: "the tribe did not depend on fishing *or use of navigable water*." *Idaho*, 533 U.S. at 274 (emphasis added). That description shows, however, that fishing is not the only relevant use of navigable water; that the use does not have to involve the submerged lands themselves; and that, unlike here, no other such uses were identified in *Montana*. The Ninth Circuit, applying *Montana*, has held similarly. *See, e.g.*, *Puyallup*, 717 F.2d at 1259-60; *Muckleshoot*, 713 F.2d at 458.[11]

[11] The State dismisses *Puyallup* and *Muckleshoot*, as well as *Donnelly v. United States*, 228 U.S. 243 (1913), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), by arguing that the tribes in those cases relied on fish more heavily than the Nation. Response at 41-42. But as the Ninth Circuit explained, the specific circumstances of those cases are not "the only circumstance in which the United States may be found to have granted the bed of a navigable water to an Indian tribe . . . ." *Puyallup*, 717 F.2d at 1258 n.7 (citing *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 961-62 (9th Cir. 1982)); *see also Muckleshoot*, 713 F.2d at 457 n.2 (same). Those cases clearly show that fishing *and* other uses of navigable water are relevant to the United States' intent to include submerged lands in an Indian reservation. Even if other tribes were more reliant on fishing than the Nation, the Nation's other uses of the River make its relationship to the River comparable. *See* MSJ Brief at 24-25. Moreover, although *Alaska Pacific Fisheries* was decided before Alaska statehood, it analyzed the tribe's use of the navigable waters to determine that the submerged lands were included in the reservation. 248 U.S. at 87-89. And Federal Defendants have already addressed the State's attempt to dismiss *Donnelly* as "a murder case." *See* US MJP Reply at 10 n.5.

c. The State invents other legal requirements related to the Nation's use of the River that should be rejected.

Also incorrect is the State's recurring argument that the Nation's use of the River is irrelevant if it could have continued without ownership of the Riverbed. *See, e.g.*, Response at 22, 28, 30-31 (noting that Nation retained fishing rights in the 1851 Treaty), 44. This argument fails because, again, the purpose of a reservation need only be "compromised" or "undermined," not "entirely defeated," to support an intent to reserve submerged lands. The State's reliance on *United States v. Winans*, 198 U.S. 371, 384 (1905), is also misplaced. *See* Response at 22, 30, 44. In *Winans*, the Court held that the United States has the power to "fix[] in the land such easements" to effectuate a tribe's off-reservation right to "tak[e] fish at all usual and accustomed places." 198 U.S. at 383-84. But the Court did not address whether a tribe's fishing pursuant to its treaty right supports an intent to reserve submerged lands. Courts faced with that question have had no trouble concluding that a tribe's fishing supports an intent to reserve submerged lands notwithstanding the tribe's treaty fishing right. *See, e.g.*, *Puyallup*, 717 F.2d at 1253, 1260-61; *Muckleshoot*, 713 F.2d at 456, 458.

Lastly, no court has held that a tribe must attempt to enforce exclusive control over navigable waters for submerged land to be reserved, *see* Response at 34-35, or that there is a heightened standard under the equal footing doctrine for navigable waters that are perceived to be important, *see id.* at 3. Neither argument makes sense given the federal navigational servitude, which gives the federal government authority to open any navigable waters to commerce no matter which sovereign owns the submerged lands. *See* US MJP Reply at 16 (citations omitted).

3. The State fails to genuinely dispute the Nation's understanding, confirmed by high-ranking federal officials, that the Riverbed was included in the Reservation.

The State contradicts itself by asserting "MHA's understanding of the [R]eservation's boundaries is not relevant to this dispute" while also presenting the Nation's understanding that

the Riverbed was included as a factual issue precluding summary judgment. *See* Response at 4, 34-35. If the Court does not decide ownership based on the reserving documents, then the Nation's understanding is relevant to the United States' intent to include the Riverbed. *See* MSJ Brief at 1, 27-31; *see also infra*, Section III.D. Regardless, the State's attempt to create a dispute of the Nation's understanding, and federal officials' confirmation of that understanding, fails.

Without citation, the State asserts that "historical evidence does not support" that the Nation understood the Riverbed to be included "in the late 1800s, or that ownership of the riverbed was an important concern to MHA at the relevant times." Response at 6, 35 (citing ND SOFs 190 and 195, which in turn cite nothing). The State also asserts, without citation to anything supportive, that the Nation did not claim ownership of the Riverbed until "many decades" post-statehood when "oil and gas development under the riverbed became possible." *Id.* at 6, 12, 34. Again without citation, the State contends "MHA never expressed to federal officials any expectation of, or need for, riverbed ownership." *Id.* at 34.

The State's unsupported assertions should be disregarded, *Waterhouse*, 298 F.3d at 992, and are belied by their own admissions. The State admits that, in negotiating the unratified 1866 agreement, tribal leaders referred to the rivers (including the Missouri) as "our rivers," and stated that they had granted the United States a right-of-way to use those rivers in the 1851 Treaty. *See* MSJ Brief at 27; US Reply SOF 74. The State admits that, in the same negotiations, General Curtis agreed that the Nation had provided this "right of way through your country." ND SOF 75. The State admits that, in 1869, the Nation asked General Hancock for "confirmation of our reservation to us in accordance with" the 1851 Treaty. MSJ Brief at 28; ND SOFs 82-84. And the State's admissions concerning Walker's statements about "the left bank" language are discussed above. Given these admissions, the State cannot genuinely dispute that both the Nation

and federal officials understood the Riverbed to be included in the Reservation. *See, e.g.*, *United Fire & Case Ins. Co.*, 419 F.3d at 746. In any event, what the undisputed facts say about the Nation's understanding is a legal question for the Court to decide. *See Jackson*, 101 F.3d at 153.

B. *The State fails to identify a genuine issue of material fact regarding the United States' intent to retain title to the Riverbed.*

1. The State continues to conflate step one and step two to argue that the Enabling Act and the Reservation's permanent homeland purpose do not establish an intent to retain title to the Riverbed.

Next the State continues to conflate the first and second step of *Alaska II* with regard to the Enabling Act. *See* Response at 6, 35-36, 44. The State insists that citing the Enabling Act as evidence of the United States' intent to retain title to the Riverbed is "circular" because "the [Riverbed] was never reserved for MHA ownership before North Dakota's statehood," and both the Enabling Act and disclaimer in North Dakota's constitution "includes no specific disclaimer of the [Riverbed], nor any mention of MHA . . . ." *Id.* at 35-36. Federal Defendants have already addressed this argument. MJP Joinder at 10-11; US MJP Reply at 18-20. In short, whether the United States intended to reserve the Riverbed is the step one question, and Federal Defendants only cite the Enabling Act as evidence at step two. Because other evidence establishes the United States' clear intent to reserve the Riverbed, the Enabling Act shows an intent to retain title to the Riverbed just like all other Indian lands that had been reserved.

The State now cites—and once again misquotes—*Montana*. *Cf.* US MJP Reply at 3-4 (discussing State's previous misquoting of *Montana*). According to North Dakota, the Supreme Court rejected reliance on the State of Montana's constitutional disclaimer of title to all Indian lands because "reliance on this generic disclaimer: 'simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches.'" Response at 36 (quoting *Montana*, 450 U.S. at 554). That is not what *Montana* said. Instead, referring to a treaty provision that "gave the Crow Indians the sole right to use and occupy the reserved land," the

Court said that "respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches." 450 U.S. at 554. The Court did not so much as mention Montana's constitutional disclaimer—which makes perfect sense given the Court's inability to find an intent to reserve the submerged lands at step one. The State also ignores subsequent case law holding that Congress requiring a state to disclaim a category of reserved land is sufficient by itself to defeat state title to submerged lands within that category. *See, e.g.*, US MJP Reply at 19-20 (citations omitted).

The State's assertion that it claimed ownership of the Riverbed when it was a territory, and thus could not have disclaimed it at statehood, is wrong. *See* Response at 36. Whether the Territory of Dakota claimed to own the Riverbed is not a factor to be considered under the equal footing doctrine because the Territory had no power to prevent the United States from reserving it. In other words, neither the Territory's intent in making a claim nor the State's intent in disclaiming title is important. What is important is that Congress meant what it said when it required the State, through the Enabling Act, to disclaim title to *all* Indian lands. And the State does not explain how Congress's intent could be affected by the Territory's generic statement that "all navigable rivers" are deemed "public highways" (Response at 36), which is simply the presumption already baked into the equal footing doctrine itself.[12]

[12] The State also makes a single passing reference to the 1861 Dakota Territory Act, 12 Stat. 239 (Mar. 2, 1861) ("1861 Act"), noting the Act came "before creation" of the Reservation and arguing that none of the reserving documents limit its "reservation of lands for the future State of North Dakota" Response at 4; *see* US Reply SOF 182. That undeveloped legal argument is waived. *See Johnson*, 953 F. Supp. 2d at 250. Moreover, the State ignores the Act's provision expressly saying it cannot impair rights of Indian property or "the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise."1861 Act, § 1. Tellingly, other Territory Acts have not prevented the United States from reserving submerged lands. *See, e.g.*, *Idaho*, 533 U.S. 262 (submerged lands reserved after creation of Territory of Idaho, 12 Stat. 808 (Mar. 3, 1863)).

The State again conflates the first and second step in attempting to rebut the importance of the Reservation's permanent homeland purpose at step two. *See* Response at 44-45. Federal Defendants never argued 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." *See id.* at 44 (citing MSJ Brief at 33-34). Instead, Federal Defendants explained that, if the Riverbed had been reserved at step one (which it was), then the Reservation's permanent homeland purpose creates a powerful inference establishing an intent to defeat state title to the Riverbed. *See* MSJ Brief at 32-34 (citing *Alaska I*, 521 U.S. at 49; *Alaska II*, 545 U.S. 103); MJP Joinder at 10-11; US MJP Reply at 18-20; *see also Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 at 35 (D. Alaska Dec. 9, 2024). In a failed attempt to distinguish *Alaska I* and *Alaska II*, the State points to evidence cited in those cases at step one, completely ignoring the portions strongly suggesting that at step two an intent to defeat state title can be found in the creation of an executive order reservation intended to continue in perpetuity.

2. The State fails to genuinely dispute that Congress was on notice that the Riverbed was included in the Reservation.

Next the State contends that Congress was not on notice that the Riverbed was included when it ratified the Reservation. Response at 17, 38-40. To begin, the State appears to argue that congressional notice is a strict requirement. *Id.* at 17. It is not. Just as an intent to reserve submerged lands can be established at step one without considering the purpose of the reservation, *see* supra, Section III.A.2.b, step two can be satisfied where Congress requires a state to disclaim title to a category of reserved lands or a reservation is intended to continue into perpetuity. *See, e.g.*, MSJ Brief at 31-35. Demonstrating congressional notice is just one of many ways to establish an intent to defeat state title.

Regardless, controlling precedent shows that Congress had notice here. Congressional notice was provided by the language of the 1870 Executive Order itself. *See* MSJ Brief at 34-35 (citing *Idaho*, 533 U.S. at 275). The State argues 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." Response at 17. Again, Federal Defendants have not argued otherwise. *See supra*, Section II. But as *Idaho* makes clear, if Congress had notice that navigable waters were included in a reservation, it necessarily had notice that submerged lands were included as well.

The State also fails to distinguish *Idaho* in other ways that show Congress was on notice. Response at 38-40.[13] The State points out that Congress required "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 39 (citing *Idaho*, 533 U.S. at 277). So too here. *See* MSJ Brief at 39-40. The State also claims that "Congress required 'that the Tribe be compensated for . . . [a] right of way,' . . . 'part of which crossed over navigable waters within the reservation." Response at 39 (citing *Idaho*, 533 U.S. at 269, 277). There is no indication in *Idaho*, however, that the tribe was compensated for "riverbed acreage" specifically. *Id.* at 40. Regardless, as in *Idaho*, Congress recognized the Reservation as established by the Executive Orders, and compensated the Nation for a railroad right-of-way through it. *See* MSJ Brief at 37 (citations omitted). Next the State notes that, in *Idaho*, "an acreage determination . . . necessarily included the area of the lakebed within the unusual boundary line crossing the lake from east to west," and that the Secretary advised the Senate that the reservation included navigable waters. Response at 39. Here, the State does not genuinely dispute that the Secretary

[13] The circumstances here match those in *Idaho*, but that does not mean each fact must be identical. Each case will have "unique" facts. The Court can decide on summary judgment whether the undisputed facts show Congress was on notice. *See* MSJ Brief at 34-38.

similarly provided Congress not only the clear language of the reserving documents, but also an 1885 General Land Office map of the Territory of Dakota, which depicted the River flowing through what would become the 1886 Reservation. *See* MSJ Brief at 36. Lastly, like Congress's cession of a portion of reservation land for a townsite in *Idaho*, *see* Response at 39-40, the negotiation for cession of land for Fort Stevenson suggests the Nation must have owned land on both sides of the River (and thus the Riverbed), *see* MSJ Brief at 11 n.3.

C. *Post-statehood evidence is largely irrelevant and at most mixed.*

The State makes much of "federal actions" post-statehood that it says support its ownership of the Riverbed. Response at 7, 37. However, "[e]vidence of the subsequent treatment of the disputed land by Government officials has 'limited interpretative value.'" *Nebraska v. Parker*, 577 U.S. 481, 493 (2016) (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998)); *see also McGirt v. Oklahoma*, 591 U.S. 894, 914-16 (2020). Accordingly, Federal Defendants have found only a single equal footing case so much as mentioning any post-statehood evidence. In *Idaho*, the Court noted post-statehood evidence "merely to confirm what Congress's prestatehood actions already make clear." *Idaho*, 533 U.S. at 279-80, n.8, & n.9 (citing Congress's post-statehood ratification of agreement with tribe and other evidence "[o]nly three years after the Act confirming the reservation"). Unlike in *Idaho*, however, much of what North Dakota cites is far removed from statehood—decades or over a century later. That evidence says nothing about the United States' intent prior to and at the time of statehood.[14]

[14] For example, recent M-Opinions (and Federal Defendants' previous statements in this litigation defending an M-Opinion being challenged under the Administrative Procedure Act) say nothing about the United States' intent prior to and at the time of statehood. Moreover, the M-Opinions are irrelevant now that this Court has jurisdiction to determine the underlying question of Riverbed ownership. *See* ECF No. 88 at 16 (crossclaim filed "to both facilitate a full and final resolution on the question of ownership . . . ."). Nor does the recent "suspension" of certain M-Opinions "revise" Federal Defendants' legal position in this case. *See* Response at 3.

To the extent post-statehood evidence is relevant, the State's arguments are mostly mischaracterizations of the record, or without any citation, and do not create a genuine issue of material fact. The State argues that the United States did not "switch its position" until it recorded title to the minerals underlying the Riverbed in 2022. Response at 7. That is simply incorrect.[15] The State also claims, without citation, that "official surveys" of the Reservation after statehood do not "designate[] the River or riverbed as owned by MHA or MHA members," and that "allotments" and "patents issued" after statehood "did not purport to transfer any acreage of riverbed lands to any tribal members." *Id.* at 7, 34; *see* ND SOF 191. Even if the State had properly supported its assertions, they would have no bearing on Riverbed ownership. Similar surveys of submerged lands included in Indian reservations did not designate which sovereign owned them, and including riverbed acres in allotments to tribal members would be against not only the purpose of reserving the Riverbed (to retain title in trust for the Nation), but also the purpose of the allotments themselves (to provide irrigable acres to tribal members for agriculture). *See* US Reply SOF 191.

[15] In 1936, the Solicitor issued a legal opinion concluding that the Riverbed was held by the United States in trust for the Nation. ECF No. 98 at 21 ¶ 29. Without citation, the State claims that the opposite position was taken by Congress in the 1949 Takings Act, the Bureau of Land Management ("BLM") in 1979, and the Army Corps of Engineers in 2007. Response at 7, 37; ND SOF 197. Each claim is a mischaracterization. First, even if Congress did not take the minerals underlying the Riverbed in 1949, as the State claims, that would say nothing about ownership because the United States did not take any portion of the riverbed for Garrison Dam, or compensate any owner of it, even outside the Reservation. *See* US Reply SOFs 179-80. The State cites no evidence otherwise. Second, the Indian Board of Land Appeals ("IBLA") overruled BLM's 1979 decision. *See Impel Energy Corp.*, IBLA 78-422, 1979 WL 16246 at *7-8 (Aug. 16, 1979); *see also Freeman v. U.S. Dep't of Interior*, 37 F. Supp. 3d 313, 322 (D.D.C. 2014) (IBLA's decisions "constitute final agency action" and "the Secretary of the Interior's final decision." (citations omitted)). And third, at the request of North Dakota's State Engineer, BLM simply included a passing reference to ownership in a master plan for the Garrison Dam/Lake Sakakawea project. *See* U.S. Army Corps of Eng'rs, Garrison Dam/Lake Sakakawea Master Plan with Integrated Programmatic Env't Assessment at E-14-16 (Dec. 14, 2007), *available* at https://archive.org/details/DTIC_ADA635438/mode/1up.

In any event, there is also post-statehood evidence supporting the United States' ownership of the Riverbed. For example, as noted in *Idaho*, Congress ratified the Reservation after statehood "with no signal that some of the land over which the parties to those agreements had negotiated had passed in the interim to [North Dakota]." *Idaho*, 533 U.S. at 279. And if federal actions far removed from statehood are to be considered, there are more instances of officials taking the position that the United States owns the Riverbed than the other way around. *See, e.g.*, ECF No. 98 at 21-22, ¶¶ 29-30; *see also* ECF No. 126 at PDF 181 (State's expert recognizing that federal officials "advocated positions that were inconsistent, at best"). At the very least, post-statehood evidence is mixed, and it cannot be used to overcome clear evidence of an intent to include the Riverbed in the Reservation. *Cf. Parker*, 577 U.S. at 493.

D. *The Indian law canons of construction may be applied notwithstanding the equal footing doctrine.*

The State insists that the Indian law canons of construction cannot be applied "because the Equal Footing Doctrine's specific presumption of State riverbed title controls" and "the Supreme Court's Equal Footing cases have not relied upon Indian law canons." Response at 2, 14, 18-22. To the contrary, in both *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Alaska Pacific Fisheries*, the Court employed the Indian law canons in the context of the equal footing doctrine. *See* MSJ Brief at 19-20.[16] So has the Ninth Circuit, which "accord[s] appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river." *Puyallup*, 717 F.2d at 1257 (citing *Namen*, 665 F.2d at 962); *see also Muckleshoot*, 713 F.2d at 458.

[16] In general, the Court has had no problem applying the Indian law canons in cases involving sovereign interests of states. *See, e.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Faced with this inconvenient case law, the State ignores the Ninth Circuit cases, and dismisses *Choctaw Nation* and *Alaska Pacific Fisheries* as preceding and thus somehow being implicitly overruled by *Montana* and *Idaho*. *See* Response at 19-20. But the Indian law canons are not rendered inapplicable just because they are not explicitly invoked in subsequent cases with no need for them. *See Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016); *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In *Montana*, the Court concluded that the reservation did not include submerged lands without identifying any ambiguities that the Indian law canons would help resolve.[17] Moreover, in *Idaho*, although the Court did not need to explicitly invoke the Indian law canons to conclude that submerged lands were included in the reservation, it emphasized—consistent with the Indian law canons—that silently removing submerged lands would be contrary to congressional policy requiring tribal consent, and "would have amounted to an act of bad faith accomplished by unspoken operation of law." 533 U.S. at 278-79, 280-81.[18]

Federal Defendants have been clear that this Court does not need to apply the Indian law canons because the reserving documents and other evidence clearly establish that the United States intended to include the Riverbed. *See* MJP Joinder; US MJP Reply; MSJ Brief at 21-22, 32-34. However, if the Court does identify an ambiguity in the Congressional Acts or reserving documents, the Indian law canons should be applied to resolve it. That does not mean the presumption of the equal footing doctrine is set aside—it simply means that in determining whether the United States clearly intended to include the Riverbed, appropriate weight must also

[17] The State cites Justice Stevens's concurrence in *Montana*, which said that the presumption of the equal footing doctrine applies to Indian reservations. 450 U.S. at 567-68 (Stevens, J., concurring). That is true, but appropriate weight must be given to the Indian law canons as well.

[18] Even though *Idaho* emphasized Congress's policy of requiring tribal consent, the State dismisses it as a "circular argument[]." *See* Response at 45. This is yet another example of the State conflating the first and second step of *Alaska II* to avoid clear evidence of the United States' intent to retain title to the Riverbed. *See supra*, Section III.B.2.

be accorded to the principles of construction favoring Indians, as well as Congress's express policy of requiring tribal consent to reduce the size of the Reservation. *See* MSJ Brief at 38-40. Those principles of construction can make the United States' intent clear if it is not already.[19]

The State retreats to arguing that, "even if this Court were to consider Indian law canons in this Equal Footing Doctrine case, the result would . . . [be] the need for fact-finding that would preclude summary judgment." Response at 21-22. Again, not true. Although courts applying Indian law canons must examine the particular facts and circumstances in each case, a trial is not necessarily required to do so. A trial is only required if there is a genuine dispute of material fact, and in discussing the Indian law canons the State does not even attempt to identify a dispute that needs to be resolved. Instead, the State cites *Choctaw Nation* to argue a trial is always necessary to apply the Indian law canons (an apparent contradiction of its previous position that the Court has never relied on the Indian law canons in an equal footing case). *Id*. There, however, the district court granted "a judgment on the pleadings . . . in favor of the State," which the Court eventually reversed in favor of the tribes—all without trial. 397 U.S. at 621-22.[20]

CONCLUSION

The pleadings and evidence establish that the United States owns title to the Riverbed in trust for the Nation. Because the State has not identified a genuine issue of material fact for trial, Federal Defendants respectfully request that the Court grant summary judgment in their favor.

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[19] The State argues that Federal Defendants "did not make this argument for judgment on the pleadings." Response at 19. That is because application of the Indian law canons requires additional evidence beyond the pleadings, which the Court now has through MSJ briefing.

[20] The State string cites other cases that did go to trial, *see* Response at 14-15, but Federal Defendants have already explained why trial occurring in another case does not necessitate trial here. *See* US MJP Reply at 15-16; *see also Alaska v. United States*, No. 3:22-cv-0240-SLG, Dkt. No. 44 (D. Alaska Dec. 9, 2024) (granting motion to dismiss equal footing claim). Now the State cites *Montana v. Talen Mont. LLC*, No. 23-3050, 2025 WL 679811, *4 (9th Cir. Mar. 4, 2025). There, a trial was held to determine whether water was navigable, which is not an issue here.

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Respectfully submitted,

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