UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF MANDAN, HIDATSA AND ARIKARA NATION'S REPLY IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON QUIET TITLE CROSS-CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITES

Page(s)

Cases

Statutes

Plaintiff Mandan, Hidatsa, and Arikara Nation (the "MHA Nation") respectfully replies as follows to the opposition filed by the State of North Dakota ("State" or "North Dakota") to the federal defendant's motion for summary judgment on their quiet title cross-claim.

INTRODUCTION

"[T]he objective of summary judgment [is] to prevent unnecessary trials." *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000). Here a trial is unnecessary. Contrary to the State's belabored contentions, this Court does not need to hear testimony from the parties' dueling historians and surveyors to decide who holds title to the bed and banks of the Missouri River within the Fort Berthold Indian Reservation (the "Riverbed"). The answer is that the United States holds title to the Riverbed in trust for the benefit of the MHA Nation as a matter of law based on the documents creating the Reservation and the disclaimers North Dakota agreed to upon statehood. The *Alaska II* test is satisfied and no genuine issues of material fact preclude such a finding.

ARGUMENT

Title to the Riverbed is an issue of law that can be decided either on the basis of res judicata as set forth in the MHA Nation's motion for judgment on the pleadings or else under the two-step test of *Alaska v. United States*, 545 U.S. 75 (2005) ("*Alaska II*"). The State argues that a trial is necessary to resolve the *Alaska II* test. But trial here would serve no purpose. All of the relevant and material facts occurred before November 2, 1889, when North Dakota was admitted to the Union. No party can change those historical facts. The only witnesses at trial would be the parties' experts. The parties and their respective experts simply dispute the legal interpretation of the documents forming the Reservation and the weight to be given to historical facts. This expert debate is irrelevant because "interpretation [is a task] a court may just as easily undertake to carry out without the assistance of expert testimony." *Ford v. Panasonic Corp. of North*

America, 284 F. App'x 901, 904 (3d Cir. 2008). "An expert may be entitled to his opinion, but he is not entitled to a conclusion that his view of the facts necessarily precludes summary judgment." *Dalberth v. Xerox Corp.*, 766 F.3d 172, 189 (2d Cir. 2014).

Under *Alaska II*, the issue of title turns on whether (1) the United States clearly intended to include submerged lands within the Reservation; and (2) the United States expressed its intent to retain federal title to submerged lands within the Reservation. *See Alaska II*, 545 U.S. at 100. These are both issues of law which require the Court to interpret legal documents that need no expert explication. *See, e.g., Schmidt v. Int'l Playthings LLC*, 536 F. Supp. 3d 856, 915 (D.N.M. 2021) (noting that "experts may not testify on their interpretations of federal regulations and statutes, because such expert testimony invades the Court's role"). Further, the interpretation of material which bears on the concerns motivating Congress and congressional intent is a question of law. *See Quiban v. U.S. Veterans Admin.*, 724 F. Supp. 993, 1005 (D.D.C. 1989). As Judge Keeton explained, "that 'intent of Congress' as used in precedents does not refer to a state of mind is apparent when one takes account of the fact that no legal entity other than a natural person ever has a state of mind in a factual sense." *EEOC v. Com. of Massachusetts*, 680 F. Supp. 455, 459 (D. Mass. 1988). Instead, "it is apparent that a phrase such as 'Congressional intent' or 'intent of Congress' refers not to a state-of-mind standard but to an objective standard of interpretation that might also be described as the intent, aim, or design manifested in the statute itself (or in the statute together with legislative history when, under precedents, it is appropriate to look to legislative history)." *Id.*

I. There Are No Disputed Issues of Material Fact That Require A Trial.

North Dakota strains mightily—but fails—to manufacture a disputed issue of material fact that would require a trial. The State "disputes, among other things, [the opposing experts'] contentions regarding the interpretation of historical documents, their acontextual emphasis on

MHA uses of the River, the Congressionally understood purpose of [the Reservation] 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." (ECF 124 at 22-23). But none of these is a factual dispute; rather, they are all disputes about the interpretation of undisputed historical facts, or about which undisputed facts should be considered and what weight should be given to them. Such disputes do not require a trial to resolve.

A. The purpose of creating the Reservation is not a disputed issue of material fact.

The State contends that, "[a]t minimum, the purpose for the United States' creation of [the Reservation] is a disputed issue of fact making summary judgment improper." (ECF 124 at 34). But the Government's intent is not a factual issue—it is a legal one. *EEOC v. Com. of Massachusetts*, 680 F. Supp. at 459. The State cannot identify any disputed facts regarding the purpose of creating the Reservation because the historical record is undisputed. The historians simply disagree in their interpretations of the undisputed history. The Court's resolution of who holds title to the Riverbed will not be assisted by hearing the conflicting testimony of expert witnesses about their thoughts about why the Reservation was created.

Moreover, as the United States correctly notes in its reply brief (ECF 130 at 10), precedent establishes that "[t]he general purpose [of a reservation], to provide a home for the Indians, is a broad one and must be liberally construed." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). A tribal homeland presupposes that the tribe will continue its way of life, including hunting and fishing. *See Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 406 (1968) ("The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.").

North Dakota's granular approach to defining the purpose of the Reservation is artificial and is contrary to precedent. After all, "[t]he specific purposes of an Indian reservation . . . were often unarticulated." *Colville Confederated Tribes*, 647 F.2d at 47. In addition, North Dakota's restriction of the purpose of the Reservation to "Euro-American agricultural methods" would illogically exclude most other uses the MHA Nation made of the Reservation, such as hunting, fishing, trade, and spiritualism. It cannot be that the United States did not intend to permit those uses of the Reservation as well in creating a homeland for the MHA Nation.

North Dakota's self-servingly narrow construction of the purpose of the Reservation should be rejected as a matter of law. This is a legal issue and dueling expert testimony is neither relevant nor necessary to resolve it.

B. The precise extent of the MHA Nation's reliance on the Missouri River and Riverbed is not a material factual dispute.

North Dakota spends much of its brief attempting to gin up a factual dispute over the extent to which the MHA Nation used and relied on the Missouri River and Riverbed. It argues that the federal defendants and the MHA Nation "exaggerate" the historical evidence bearing on this issue. (*E.g.*, ECF 124 at 6.) This is not a material factual dispute that requires trial because North Dakota's argumentative interpretation of certain historical facts does not affect the outcome of the suit under *Alaska II*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (noting that a material dispute is one that "might affect the outcome of the suit under the governing law").

The State repeatedly contends that there is no historical evidence that the MHA Nation depended upon the River for its "subsistence," an elusive term that North Dakota never defines. This is not the applicable test for determining title. Instead, the test is whether (1) the United States clearly intended to include submerged lands within the Reservation; and (2) the United

States expressed its intent to retain federal title to submerged lands within the Reservation. Neither issue turns on the extent to which the Nation derived its caloric intake from fishing. Rather, they turn on the documents that directly demonstrate the United States' intent to include the Riverbed in the Reservation and its expression of that intent.

A tribe's use of, or reliance on, a river has been considered by the Supreme Court only to corroborate its interpretation of the relevant documents. That is what happened in *Montana v. United States*, 450 U.S. 544 (1981), upon which North Dakota principally relies. The Court reasoned that "[t]he Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Id.* at 553 (emphasis added). After examining the language of those treaties, the Court added "[m]oreover … at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Id.* at 556. It pointed to the relative unimportance of the Big Horn River to the Crow Tribe's diet and way of life simply to confirm its construction of the treaties at issue.

In *Idaho v. United States*, 533 U.S. 262 (2001), the Court took a similar approach although it reached a different conclusion. It explained that "we have looked to Congress's declarations and intent when we have had to resolve conflicts over submerged lands claimed to have been reserved or conveyed by the United States before statehood." *Id.* at 273. There the district court had "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.* at 274 (emphasis added). The Court noted that its decision in *United States v. Alaska*, 521 U.S. 1 (1997) ("*Alaska I*") had similarly concluded that a boundary following the ocean side

of offshore islands necessarily embraced submerged lands shoreward of the islands. *Id.* The Court added that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe," *id.*, but it used this historical fact simply to shed light on its construction of the documents that demonstrated Congress's intent.

Moreover, the Court did not focus on exactly how much the Coeur d'Alene Tribe used Lake Coeur d'Alene and the St. Joe River or exactly how dependent it was on them. Instead, it described the tribe's use of, and reliance on, them in general terms that are equally applicable here:

> Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. *Id.,* at 1099–1102. 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.

Id. at 265 (emphasis added). These same statements could be made about the MHA Nation's use of the Missouri River. In both cases, the tribe's historical use of the body of water and submerged land makes it logical that the United States would choose to reserve the submerged land for the tribe. But first and foremost, there must be language in the relevant documents that can fairly be construed as reserving the submerged land at issue.

Here the 1870 Executive Order explicitly made the Reservation boundary the left bank of the Missouri River, which indicates that the entire River and the Riverbed are included in the Reservation. And that construction of the Order is corroborated by the MHA Nation's historical use of the River.

North Dakota does not dispute that the MHA Nation used the River to fish and that it relied on fish for a part of its diet. Indeed, the State admits that the MHA Nation used the Riverbed itself for fishing, quoting Edwin Thompson Denig's statement that:

> [The Arikara] are, however, good fishermen, which they take by making pens out of willows planted in the Missouri eddies and meat thrown in. the fish entering, the

> door is closed upon them, and the men jump in and throw them out. In this way great numbers of fish are taken in the summer when they have but little else to occupy their time.

(N.D. Resp. to MHA Fact 136, ECF 124-1 at 54 (emphases added).) In other words, North Dakota acknowledges that MHA Nation fishers used fish traps anchored to the Riverbed to catch great numbers of fish. (*See also* N.D. Resp. to MHA Facts 135 and 137, ECF 124-1 at 54.) North Dakota also admits that fishing was considered a sacred activity. (*See, e.g.*, N.D. Resp. to U.S. Facts 56-57, ECF 124-1 at 23-24.)[1] While North Dakota's expert historian believes that fish made up a smaller portion of the tribal diet than the experts for the United States or the MHA Nation, that dispute is immaterial because it does not change the fact that the MHA Nation did, in fact, make use of the River and the Riverbed itself for fishing.

Similarly, North Dakota does not dispute that the MHA Nation used the River for agriculture, trade, firewood, hunting bison, and as a component of its spirituality. (*See, e.g.*, N.D. Resp. to MHA Facts 148 (admitting that the MHA Nation harvested drowned bison from the River during winter), 151-54 (admitting that the MHA Nation harvested a variety of crops, fruits, and vegetables from lands adjacent to the River and depended on proximity to the River for agriculture); 159-61 (admitting that the MHA Nation collected firewood and driftwood from the River and used the Riverbed to do so); 162-165 (admitting the River was crucial to the MHA Nation's heavy involvement in trade); 171 (disputing that the River was central to the MHA Nation's spirituality only by claiming that the MHA Nation had other beliefs that did not relate to the River).) Each of these uses of the River supports the conclusion that the 1870 Executive Order deliberately included the River and its submerged lands within the Reservation.

[1] Curiously, North Dakota claims to dispute MHA Fact 139 by citing back to its Response to U.S. Facts 56 and 57—which it did not dispute.

A trial to resolve North Dakota's alleged dispute over the precise extent to which the MHA Nation used and relied on the River would be pointless because it is immaterial to the *Alaska II* test. The plain language of the Reservation's description incorporated in the 1870 Executive Order clearly included the Riverbed within the Reservation, and the MHA Nation's traditional uses of the River simply support that interpretation.

C. Post-statehood evidence is irrelevant to the question of title.

The applicability of the equal footing doctrine is determined at the time of statehood. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012); *United States v. Utah*, 283 U.S. 64, 75 (1931). Thus, post-statehood evidence is necessarily irrelevant. *See U.S. v. Aam*, 887 F.2d 190, 195 (9th Cir. 1989) (in resolving equal footing claim, "post-statehood evidence was generally not relevant and hence not admissible"). In fact, North Dakota itself contends that evidence about allotments to MHA members are immaterial because they occurred after statehood (N.D. Resp. to MHA Facts 147, ECF 124-1 at 57), and it argues repeatedly that Tribal practices in the twentieth century are "not relevant" or "not material" to this dispute. (*Id.* 22, 33, 131, 132, 133, 134, 138, 141, 142, 172, 173).[2] North Dakota's post-statehood evidence, including the testimony of its surveyors,[3] does not create a genuine dispute of material fact.

[2] The MHA Nation did not offer post-statehood evidence as affirmative proof of the intent of the United States in establishing the Reservation. Dr. Lawson, as an expert, may consider otherwise inadmissible evidence in developing his opinions. Dr. Lawson properly relied on more recent interviews to support his interpretation of other historical sources concerning tribal practices, and the MHA Nation properly attached that evidence in support of Dr. Lawson's opinions.

[3] This includes the cadastral surveys relating to the taking of land for the creation of Lake Sakakawea. Whether the Riverbed was taken in 1949 and restored in 1984 is irrelevant and immaterial to the intent of the United States when it established the Reservation in 1870.

II. The Undisputed Historical Evidence Demonstrates That The U.S. Holds Title To The Riverbed In Trust For The MHA Nation.

The interpretation of treaties, statutes, and executive orders is an issue of law. *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000). No trial is required for the Court to construe those legal documents. And they are not construed in favor of North Dakota as the non-moving party on a motion for summary judgment. Those documents resolve the issue of title to the Riverbed.

A. The 1870 Executive Order that established the Reservation clearly included the width of the River and the Riverbed.

North Dakota has never managed to come up with a convincing explanation for why the description of the Reservation incorporated into the 1870 Executive Order specifically stated that the Reservation begins and ends "at a point on the Missouri River" and also used the left or outer bank of the River as the boundary of the Reservation. The fact that the Reservation boundary begins and ends on the River is self-evident. But the United States went further. By setting the boundary of the Reservation as the outer bank of the River, the United States necessarily included the Riverbed within the Reservation. *See Alaska II*, 545 U.S. at 100; *Idaho*, 533 U.S. at 273; *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); and *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), *cert denied*, 560 U.S. 918 (2010). The State quibbles that the 1870 Executive Order did not expressly mention the Riverbed itself, but the relevant documents in these other cases did not explicitly discuss the submerged lands either.

North Dakota argues that the outer bank of the River was used as the boundary of the Reservation to convey certain hunting and timber rights. (*See, e.g.*, State's Response to MHA Fact 119, ECF 124-1 at 48.) That makes no sense. Those timber and hunting grounds on the left bank of the river were expressly included in the Reservation and would have been included

regardless of whether the boundary along the remainder of the River was the left bank, right bank, or middle of the channel. Effectively, North Dakota asks this Court to rewrite the 1870 Executive Order to swap the left bank for the right bank. That is a patently unreasonable construction of the Order.

There is only one reasonable interpretation of the 1870 Executive Order: the width of the River, and therefore the Riverbed, was included within the Reservation. The 1870 Executive Order is the best evidence of the United States' intent in creating the Reservation.

As discussed above, that interpretation of the 1870 Executive Order is consistent with MHA Nation's historical uses of the River. Moreover, it is buttressed by the history of the negotiations between the MHA Nation and the United States. The 1851 Treaty of Fort Laramie was intended to make peace between the various Tribes by carving out territories south and west of the River. Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, 11 Stat. 749. But it did not disturb the MHA Nation's territory north and east of the River, and the MHA Nation expressly preserved its claim to its territory north and east of the River. *Id.* Art. V.

Subsequently, the MHA Nation claimed the River itself during discussions in 1866, four years before the Reservation was created. The Nation said:

> We consider ourselves under the laws of the whites. They can go up and down our rivers. We give them the rights of way. They cut our wood and pay no attention to us. We think it no more than right that the captains of the boats should pay us something for the wood they cut and bear off our lands. We are now giving you the right of way by river and by land, but we wish you would prevent the whites from bringing disease among us.

(N.D. Resp. to U.S. Facts 74, ECF 124-1 at 29 (emphases added).) The MHA Nation asserted that the rivers flowing through its lands—the most important of which was the Missouri River—belonged to it and that it had granted the United States only the right of way on those rivers. The

1870 Executive Order conforms with this perspective. The State's assertion that the MHA Nation never claimed ownership of the River overlooks this history.

B. The Enabling Act expresses the United States' intent to retain federal title to the Riverbed.

The second step of the *Alaska II* test is resolved by the Enabling Act. North Dakota's argument that the Enabling Act did not establish the requisite intent to retain federal title (ECF 124 at 35-36) is contrary to established precedent. The Ninth Circuit has concluded that the Enabling Act (which covers the Dakotas, Washington, and Idaho) satisfies the second step of the *Alaska II* test by making it "abundantly clear" that the new states "would not have title to the lands in question." *United States v. Milner*, 583 F.3d 1174, 1186 (9th Cir. 2009), *cert denied*, 560 U.S. 918 (2010). Likewise, in *Alaska II*, the Supreme Court held that "the provisions of the [Alaska Statehood Act] themselves suffice to overcome the state ownership presumption arising from the equal-footing doctrine." *Alaska v. United States*, 545 U.S. 75, 103-04 (2005). North Dakota contends that the Enabling Act must be construed in its favor as the non-moving party, but interpretation of the Enabling Act is a question of law for the Court, not a factual inference to be drawn in favor of the State.

CONCLUSION

The United States owns title to the Riverbed in trust for the Nation. This is established both by res judicata as set forth in the MHA Nation's motion for judgment on the pleadings, and by the undisputed material facts that govern the issue of title. Because all of the material facts are undisputed, a trial is unnecessary. The Court should issue judgment in favor of the United States on its quiet title cross-claim.

Dated this 12th day of May, 2025

Respectfully submitted,

ROBINS KAPLAN LLP

By: /s/ *Timothy Q. Purdon*
Timothy Q. Purdon (D.C. Bar No. ND0007)
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
Tel: (701) 255-3000
Fax: (612) 339-4181
TPurdon@RobinsKaplan.com

Timothy W. Billion (D.C. Bar No. SD0001)
150 East 4th Place, Suite 704
Sioux Falls, SD 57104
Tel: (605) 335-1300
Fax: (612) 339-4181
TBillion@RobinsKaplan.com

and

HOLLAND & KNIGHT LLP

Steven D. Gordon (D.C. Bar No. 219287)
Philip Baker-Shenk (D.C. Bar No. 386662)
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
steven.gordon@hklaw.com
philip.baker-shenk@hklaw.com
Tel: (202) 955-3000
Fax: (202) 955-5564

Attorneys for Plaintiff Mandan, Hidatsa, and Arikara Nation