M-37073 Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River Within the Boundaries of the Fort Berthold Reservation (North Dakota)

United States Department of the Interior
OFFICE OF THE SOLICITOR
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M-37073

Memorandum

To: Secretary
Assistant Secretary – Land and Minerals Management
Assistant Secretary – Indian Affairs
Director, Bureau of Indian Affairs

From: Solicitor

Subject: Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River Within the Boundaries of the Fort Berthold Reservation (North Dakota)

This memorandum addresses the ownership of minerals located beneath the original bed of the Missouri River as it flows through the Fort Berthold Indian Reservation (Reservation) in North Dakota.[1] Because substantial oil and gas reserves (and thus existing and potential royalties) are at stake, the Mandan, Hidatsa, and Arikara Nation—federally recognized as the Three Affiliated Tribes of the Fort Berthold Reservation (MHA Nation, Nation, or Tribes)[2]—asked the United States to confirm its position with respect to mineral ownership. The MHA Nation has asserted ownership of the riverbed minerals and hence a right to royalties, and the State of North Dakota (State or North Dakota) has made a competing claim.

This Office has addressed this matter several times during the past five years. Solicitor Tompkins issued M-37044 in January 2017 (Tompkins Opinion),[3] reaffirming the longstanding position of the Bureau of Indian Affairs (BIA) that minerals beneath the flooded uplands that created Lake Sakakawea, located within the Reservation, are held in trust for the Tribes. The Tompkins Opinion also reaffirmed the Department's similarly longstanding position that the submerged lands beneath the original bed of the Missouri River had not passed to North Dakota at the time of statehood and that the minerals underlying those submerged lands were likewise held in trust for the Nation. The Tompkins Opinion was partially suspended and temporarily

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[1] The "original" bed, for purposes of this Opinion, is the historic riverbed on the Reservation as it existed prior to impoundment of the Missouri River created by Garrison Dam. This Opinion focuses only on the Reservation and the mineral interests underlying the Missouri River and associated uplands.

[2] Because at various times in history the three Tribes were not necessarily acting as a single entity which use of the term "MHA Nation" or "Nation" would imply, I have variously used "Tribes" as well where appropriate.

[3] Solicitor Tompkins, U.S. Dep't of the Interior, M-37044, *Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Reservation (North Dakota)* (January 18, 2017).

withdrawn in June 2018 (Jorjani Opinion)[4] and then mostly superseded by Solicitor Jorjani in May 2020 when he issued M-37056, concluding instead that the State held title to submerged lands beneath the Missouri River where it flows through the Reservation.[5] Now, after a thorough review of the historical record and the legal analyses presented in these previous M-Opinions, as well as earlier opinions and decisions related to this matter, I conclude that the minerals underlying the submerged lands in question here are held in trust for the Nation, consistent with the Department's position since at least 1936.

This conclusion finds additional support through historical evidence, including a historical report provided by the Nation (not considered in the Jorjani Opinion) as well as the report prepared by Historical Research Associates, Inc. (HRA Report) at the request of the Department. Although the Jorjani Opinion considered the HRA Report, further review of that report reveals no deviation from the history outlined in the original Tompkins Opinion; in fact, the HRA Report actually bolsters and lends further support to the legal conclusions therein. Conversely, the Jorjani Opinion took an insupportably narrow view of the Reservation's purposes, inconsistent with tribal, federal executive, and congressional history; Supreme Court precedent on the Equal Footing Doctrine and its exceptions; and the Indian canons of construction.

Based on this information and as developed further below, I conclude that the Tribes negotiated for a reservation that included the Missouri River and—considering the critical importance of the river and its bed in terms of subsistence, transportation, economy, culture, and spirituality—the Tribes would not have agreed to a reservation that did not include the submerged lands. Given the Tribes' historical reliance on the river, the logical conclusion is that the Executive and Congress had an intention of including the riverbed in the Reservation in 1870, 1880, and 1886 when negotiating a "safe and secure" homeland for the Tribes. Accordingly, I agree with the conclusions of the Tompkins Opinion and the Department's longstanding position on this matter. Because this opinion closely aligns with the Tompkins Opinion, I have incorporated substantial components of it while supplementing with additional historical background and legal reasoning.

This analysis first acknowledges that the Missouri River has been of paramount importance to the Tribes throughout their histories. The river has always provided sustenance and served transportation, cultural, and spiritual purposes, and it placed the Tribes in an important position to conduct and facilitate trade both prior to and after the arrival of white trappers and settlers. In the 1950s, Garrison Dam (Dam), a component of the U.S. Army Corps of Engineers Pick-Sloan Project, created the impoundment on the river now known as Lake Sakakawea. A major portion of the Lake lies within the Reservation's boundaries, tracing an expanded footprint of the original bed of the Missouri River as it flowed through the heart of the Reservation prior to and

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[4] Acting Solicitor Jorjani, U.S. Dep't of the Interior, M-37052, *Partial Suspension and Temporary Withdrawal of Solicitor Opinion M-37044, "Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Reservation (North Dakota)"* (June 8, 2018).

[5] Solicitor Jorjani, U.S. Dep't of the Interior, M-37056, *Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)* (May 26, 2020). The Jorjani Opinion was withdrawn in 2021. Principal Deputy Solicitor Anderson, U.S. Dep't of the Interior, M-37066, *Permanent Withdrawal of M-37056, "Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)"* (March 19, 2021). Neither M-37052 nor the Jorjani Opinion disturbed the Tompkins Opinion's conclusion that the United States holds in trust minerals beneath the flooded uplands that created Lake Sakakawea.

after North Dakota's entry into the Union. The original course of the Missouri River entered the current Reservation in the northwest, flowing south, bending east, turning south again, and then roughly southeast to and off the southeast edge of the Reservation. The Little Missouri River, originating in Wyoming, flowed generally northeast until it reached what is now the southwest corner of the Reservation, then flowed roughly east until turning north and northeast to join the Missouri River in the middle of the Reservation. The east-flowing, southernmost on-Reservation stretch of the Little Missouri formed part of the southwest boundary of the Reservation. After impoundment of both rivers through construction of the Dam, Lake Sakakawea now inundates the original riverbed and additional tribal lands within the Reservation boundaries.[6]

As the Tompkins Opinion laid out, the question of current ownership of minerals beneath the bed of the Missouri River can be resolved first by determining whether the bed of the Missouri River passed to North Dakota at statehood or was reserved by the United States for the benefit of the Tribes. If the bed, and thus the underlying minerals, were reserved for the Tribes in 1889, then I must consider whether subsequent congressional acts related to the Dam and Lake affected mineral ownership. Pursuant to the 1949 Takings Act,[7] the United States took title to certain lands in a "Taking Area" on the Reservation, but only if the MHA Nation accepted the provisions of the legislation within six months of enactment. The taken land would then be flooded following construction of the Dam. Unlike later legislation used to acquire land from other tribes for Pick-Sloan Project dams, the 1949 Takings Act did not reserve mineral rights to the Nation.[8] But in 1984, Congress restored to trust status on behalf of the Nation the mineral interests in those lands taken pursuant to the 1949 Takings Act.[9] Thus, if the riverbed did not pass to the State in 1889, the Nation has beneficial ownership of the mineral interests underlying the bed of the Missouri River within its Reservation. The Equal Footing Doctrine provides the framework for determining whether the riverbed passed to the State in 1889.[10]

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[6] Two maps illustrating the present-day Reservation, showing Lake Sakakawea overlying the original bed of the Missouri River, are included as Attachments 1 and 2. Attachment 1 is an *ad hoc* map based on BIA information. Attachment 2 comes from the website *Fort Berthold Reservation in 1950*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1197 (last visited Jan. 18, 2022). These and others attached to this Opinion are included for illustrative purposes only and are not intended to represent wholly accurate or authenticated depictions.

[7] A Joint Resolution to vest title to certain lands of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, in the United States, and to provide compensation therefor, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026 (1949) (1949 Takings Act).

[8] *See id.*; Peter Capossela, *Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENVTL. LAW & LITIG. 143, 164-68 (2015); MICHAEL L. LAWSON, DAMMED INDIANS 61, 99-100, 104, 121, 123 (1982); *cf.* Act of Sept. 3, 1954, Pub. L. No. 83-776, § 6, 68 Stat. 1191, 1192 (Cheyenne River Sioux Tribe & Oahe Dam); Act of Sept. 2, 1958, Pub. L. No. 85-915, § 6, 72 Stat. 1762, 1763 (Standing Rock Sioux Tribe & Oahe Dam); Act of Sept. 2, 1958, Pub. L. No. 85-923, § 3, 72 Stat. 1773, 1773 (Lower Brule Sioux Tribe & Fort Randall Dam); Act of Sept. 2, 1958, Pub. L. No. 85-916, § 3, 72 Stat. 1766, 1766 (Crow Creek Sioux Tribe & Fort Randall Dam); Act of Oct. 3, 1962, Pub. L. No. 87-734, § 7, 76 Stat. 698, 700 (Lower Brule Sioux Tribe & Big Bend Dam); Act of Oct. 3, 1962, Pub. L. No. 87-735, § 7, 76 Stat. 704, 706 (Crow Creek Sioux Tribe & Big Bend Dam).

[9] Fort Berthold Reservation Mineral Restoration Act, Pub. L. No. 98-602, tit. 2, 98 Stat. 3149, 3152 (1984) (1984 Mineral Restoration Act).

[10] As discussed later, trust title for the minerals could also be established through aboriginal title or the operation of the 1949 Takings Act on land that might otherwise have passed to the State. Although the Jorjani Opinion erred at minimum by failing to address the question of aboriginal title, I find no need to address either that or the Takings Act further here based on my conclusion that the Tompkins Opinion correctly applied the Equal Footing Doctrine.

The Department has long taken the position that the riverbed had always been held in trust for the Nation prior to the 1949 Takings Act. In 1936, Solicitor Margold issued an M-Opinion, determining that islands formed from the bed of the Missouri River subsequent to statehood belonged to the Nation in trust rather than title being held by the State.[11] The Interior Board of Land Appeals (IBLA) reached a similar and wider-ranging conclusion in 1979, holding that the entire bed of the Missouri River within the boundaries of the Reservation did not pass to North Dakota at statehood and that the Department therefore had authority to issue oil and gas leases in the riverbed.[12] The State, a party to that proceeding, asserted the Equal Footing Doctrine, did not prevail,[13] and never appealed or sought further review of this decision.[14]

In 2017, Solicitor Tompkins reaffirmed and elaborated on the conclusions reached in both the 1936 M-Opinion and 1979 IBLA decision, updating the longstanding position of the Department to incorporate more recent Supreme Court precedent. In altering this conclusion, the Jorjani Opinion interpreted that precedent too narrowly, misapplied certain cases, and did not acknowledge historical studies developed to support the analysis. It also ignored almost 86 years of consistent prior positions by the United States upon which the Tribes, courts, industry, and landowners have relied. Reversing such a longstanding precedent should not have been done so lightly, especially given that the Nation and oil and gas producers have developed the riverbed with an understanding of and reliance upon the Nation's ownership. Through this Opinion, I return to a position consistent with the historic understanding and conclude that the minerals underlying the bed of the Missouri River where it flows through the Reservation are held in trust for the Nation. In doing so, I am informed by the Department's own research, the HRA Report, and historical research submitted by the State[15] and the Tribes.[16]

I. BACKGROUND

The MHA Nation's territory was originally recognized in the 1851 Treaty of Fort Laramie (1851 Treaty), which broadly delineated the territories of various Indian tribes, including the Mandan, Hidatsa, and Arikara. Executive Orders in 1870 and 1880 and an 1886 Agreement ratified in

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The Supreme Court in *Idaho v. United States*, 533 U.S. 262, 274 n.5 (2001), likewise noted the aboriginal title issue but did not resolve it, concluding that Congress intended to reserve lakebed ownership on behalf of the Coeur d'Alene Tribe.

[11] Solicitor Margold, U.S. Dep't of the Interior, M-28120, *Title to island in the Missouri River within the Fort Berthold Indian Reservation, reprinted in* 1 DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 616 (Mar. 31, 1936) (Margold Opinion).

[12] *Impel Energy Corp.*, 42 IBLA 105, 114 (Aug. 16, 1979).

[13] *Id.* at 107.

[14] The IBLA is empowered to decide matters under its jurisdiction. *See* 43 C.F.R. § 4.1, 4.1(b)(2). IBLA decisions generally bind the Department as to the particular dispute before the Board.

[15] JENNIFER STEVENS AND AMALIA BALDWIN, A BRIEF HISTORY OF THE MHA NATION, THE STATE OF NORTH DAKOTA, THE UNITED STATES, AND THE MISSOURI RIVER (May 7, 2021) (Stevens Report).

[16] MICHAEL LAWSON AND MICHELLE LEA KIEL, HISTORICAL ANALYSIS OF OWNERSHIP OF THE BED OF THE MISSOURI RIVER WITHIN THE FORT BERTHOLD RESERVATION, NORTH DAKOTA 120 (Apr. 12, 2020) (Lawson Report).

1891 subsequently modified that territory.[17] The Executive Orders, as modified by the 1886 Agreement, set the Reservation's present-day boundaries with the exception of a partial township added north of the Missouri River by an 1892 Executive Order.

A. Pre-Treaty History

The Mandan, Hidatsa, and Arikara originally occupied different lands in North America before settling within territories adjacent to each other along and near the Missouri River in present-day North Dakota, South Dakota, and Montana.[18] The Hidatsa traditional territory, once the Tribes came to reside near each other, ranged along the Missouri River north of Square Buttes and west of the river, extending roughly to the mouth of the Yellowstone River, in present-day North Dakota and Montana.[19] Mandan territory was located south of Square Buttes, also along the Missouri and particularly near the mouth of the Heart River in present-day North Dakota.[20] The Arikara settled south of the other two tribes along the Missouri.[21] Over the long term, the three tribes began to confederate and share territory.[22]

1. Tribal Settlements and Trade Centers along the Missouri River

Notwithstanding their differing origins, the three tribes shared a common facet of daily life that put the Missouri River at the heart of their civilizations, making theirs the general exception to other tribes in the vicinity: settlement in riverside villages rather than continuation of a nomadic way of life.[23] As one author explained: the "size and concentration of [Mandan] villages" near the Heart River mouth and "semisedentary nature" were factors that "distinguished them from the nomadic buffalo hunters when European explorers first reached the Northern Plains."[24]

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[17] Exec. Order (Apr. 12, 1870), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 881-83 (2d ed. 1904) (1870 Executive Order); Exec. Order (July 13, 1880), *reprinted in* 1 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 883 (1880 Executive Order); Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032 (1891).

[18] JOSEPH H. CASH & GERALD W. WOLFF, THE THREE AFFILIATED TRIBES: MANDAN, ARIKARA, AND HIDATSA 30 (Henry F. Dobyns & John I. Griffin eds., 1974) (map included as Attachment 3).

[19] STANLEY A. AHLER ET AL., PEOPLE OF THE WILLOWS: THE PREHISTORY AND EARLY HISTORY OF THE HIDATSA INDIANS 12 (Stanley A. Ahler ed., 1991); *see* CASH & WOLFF, *supra* note 18, at 18-19.

[20] AHLER ET AL., *supra* note 19, at 13; *see* CASH & WOLFF, *supra* note 18, at 5-6.

[21] AHLER ET AL., *supra* note 19, at 13; CASH & WOLFF, *supra* note 18, at 12. A map of these general territories, including an approximate location of Square Buttes, published in PEOPLE OF THE WILLOWS, *supra* note 19, is included as Attachment 4.

[22] ROY W. MEYER, THE VILLAGE INDIANS OF THE UPPER MISSOURI, THE MANDANS, HIDATSAS, AND ARIKARAS 83 (1977). This confederation was particularly a result of smallpox epidemics and the need for self-defense in the face of declining populations. AHLER ET AL., *supra* note 19, at 57-60.

[23] *See* AHLER ET AL., *supra* note 19, at 12 (all three tribes settled in permanent villages along the Missouri River or tributaries); *id.* at 27 ("a sedentary lifeway supplanted the earlier nomadic pattern" for Mandan and Hidatsa peoples); *see* Joshua Pilcher, *The Indian Tribes of the Upper Missouri*, *in* EXPLORING THE NORTHERN PLAINS 1804-1876 74 (Lloyd McFarling ed., 1955) (noting Mandan and Hidatsa lifestyle distinct from other tribes on the plains); CASH & WOLFF, *supra* note 18, at 18-19.

[24] ALFRED W. BOWERS, MANDAN SOCIAL AND CEREMONIAL ORGANIZATION 8 (Univ. of Neb. Press 2004).

This settled riverine lifestyle saw the three tribes' villages serving as important centers of trade for their nomadic neighbors.[25] Mandan and Hidatsa villages near and at the mouth of the Knife River, where it meets the Missouri River, played an important role in the pre-historic trade of flint.[26] This example was only part of a much larger web of pre-contact Tribal exchange. "Perhaps three centuries before they first came into direct contact with Euro-Americans, the Three Tribes became major participants in an expansive and amazingly complex inter-tribal trade network."[27] Their location on the Missouri River and its tributaries allowed the Tribes to "function as a nexus for this trade."[28] Later, with the advent of Euro-American trade with the Tribes, the Missouri River became yet more important, recognized as a "critical transportation artery"[29] that continued to benefit them.[30] The Tribes also exchanged goods for European wares that other tribes had received through their own trading.[31] By at least 1738, French traders made contact with the Mandan while seeking water passage up the Missouri River.[32] Further French visits ensued, and European trading contact with both the Mandan and Hidatsa increased after French cession of North American colonies to Great Britain.[33] "The key role that the Knife River villages played in the intertribal trade network made them an ideal place for the Canadian traders to obtain not only the furs trapped by the Hidatsas and Mandans themselves, but also the furs that the villagers traded from nomadic Indian groups."[34] These villages served such an important role along the river that traders commonly resided in the villages, either while working for a trading company or independently after discharge from a company.[35]

Later, particularly from 1780 to 1810, Mandan and Hidatsa villages also served as intersectional trading points for horses and guns.[36] The Mandan and Hidatsa traded to obtain horses from nomadic Indians and weapons from Canadian traders.[37] The villages traded these goods to other nomadic tribes, becoming both affluent and influential in the region.[38] As one author observed:

> During the eighteenth century the Mandan, Hidatsa, and Arikara filled the role of brokers in an intertribal trade network that reached from Hudson Bay to Mexico.

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[25] *See* Stevens Report, *supra* note 15, at 9 ("A trade network developed between the nomadic hunting tribes and the [MHA] village tribes whereby the hunting tribes would supply the MHA with meat and buffalo robes in exchange for some of their crops."); AHLER ET AL., *supra* note 19, at 61; 13:1 SMITHSONIAN INSTITUTION, HANDBOOK OF NORTH AMERICAN INDIANS 248, 260 (Raymond J. DeMallie ed., 2001).

[26] AHLER ET AL., *supra* note 19, at 61-62.

[27] Lawson Report, *supra* note 16, at 120.

[28] *Id.*

[29] Stevens Report, *supra* note 15, at 10.

[30] *See* Lawson Report, *supra* note 16, at 131 ("Because the Missouri River eventually became a primary transportation route for this [Euro-American and Tribal fur] trade, the Tribes greatly benefitted from their strategic locations along this waterway[.]").

[31] AHLER ET AL., *supra* note 19, at 64; *see also* SMITHSONIAN INSTITUTION, *supra* note 25, at 268.

[32] AHLER ET AL., *supra* note 19, at 64; *see also* SMITHSONIAN INSTITUTION, *supra* note 25, at 267-69.

[33] AHLER ET AL., *supra* note 19, at 64. "British and Canadian traders began to filter into the region from the St. Lawrence River valley near Montreal and from Hudson's Bay Company forts." *Id.*

[34] *Id.*

[35] *Id.* at 65-66; *see also* SMITHSONIAN INSTITUTION, *supra* note 25, at 268.

[36] AHLER ET AL., *supra* note 19, at 66; SMITHSONIAN INSTITUTION, *supra* note 25, at 252; *see also id.* at 260-61.

[37] AHLER ET AL., *supra* note 19, at 66. Generally speaking, late summer to early winter were seasons seeing "large scale trade with the High Plains tribes" among the Mandan and Hidatsa because, although traders visited year-round, this time period saw the abundant availability of garden produce. SMITHSONIAN INSTITUTION, *supra* note 25, at 248.

[38] AHLER ET AL., *supra* note 19, at 66.

> Their villages became warehouses where horses from western tribes were held to be exchanged for guns, ammunition, and other trade goods brought in by northern and eastern tribes.[39]

After the Lewis and Clark expedition—famously guided by Sacagawea, an Indian woman recruited by Lewis and Clark from a Hidatsa village[40] and for whom the Lake is named—passed through the Knife River villages,[41] American traders began to travel up the Missouri River in greater numbers.[42] At this time, Mandan and Hidatsa villages at the mouth of the Knife River and Arikara villages at the mouth of the Grand River, downstream along the Missouri, served as the two most important trade centers in the northern Dakotas.[43] In 1816, Congress enacted legislation forbidding Canadian trade on American soil, and by roughly 1818 the non-Indian trade with the Tribes was conducted solely by Americans.[44] The Tribes' settlements on the Missouri River served as the very framework for that trade.

Recognizing the importance of these settlements, in 1824 Congress authorized two Indian agents to be placed "on the waters of the Upper Missouri" and charged them with designating locations for trade with the Tribes.[45] "William Clark, serving as the St. Louis Superintendent of Indian Affairs, reported in 1824 that he and his agents had carried out the law, designating specific locations at which trade with the tribes could occur and even granting trade licenses to various entities."[46] In 1825, the United States entered into a peace and friendship treaty with the Arikara, which, *inter alia*, created a system regulating trade limited to only those licensed by the United States and confirmed tribal protection of traders and their property while "within the limits of *their* district" and safe passage "through *their* country[.]"[47]

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[39] SMITHSONIAN INSTITUTION, *supra* note 25, at 252.

[40] Lawson Report, *supra* note 16, at 33.

[41] Lewis and Clark's expedition wintered near the Knife River villages in 1804-05. AHLER ET AL., *supra* note 19, at 68; *see also* Attachment 4 (map showing Knife River villages location). By this time, the Mandan had migrated from the Heart River region and concentrated into two village groups just downstream of the Hidatsa at the mouth of the Knife River. ALFRED W. BOWERS, BUREAU OF AMERICAN ETHNOLOGY, BULLETIN 194: HIDATSA SOCIAL AND CEREMONIAL ORGANIZATION 216 (U.S. Government Printing Office 1965). From this point forward, the two tribes closely assisted each other. *Id.* at 216-17. Around 1837, the Arikara moved north near the Mandan and Hidatsa, and all three tribes began to cooperate. *Id.* at 217.

[42] AHLER ET AL., *supra* note 19, at 67.

[43] W. RAYMOND WOOD, BUREAU OF AMERICAN ETHNOLOGY, RIVER BASIN SURVEYS PAPERS: NO. 39—AN INTERPRETATION OF MANDAN CULTURE HISTORY 18 (Robert L. Stephenson ed., U.S. Government Printing Office 1967); *see also* Attachment 4 (map showing Knife River and Grand River locations).

[44] *See* AHLER ET AL., *supra* note 19, at 67.

[45] *See* Stevens Report, *supra* note 15, at 10 (citing An Act to Enable the President to Hold Treaties with Certain Indian Tribes, and for Other Purposes, ch. 146, 4 Stat. 35 (1824)).

[46] *Id.* at 10 (citing "General Abstracts of Licenses Granted to Trade with the Different Indian Tribes under the Superintendency of William Clark Superintendent of Indian Affairs in the Year from the 1st of September 1824 to the 1st of September 1825," 1825, Microcopy No. 234, Letters Received by the Office of Indian Affairs, 1824-81, Roll 747, U.S. National Archives; "Abstract of Licenses Issued to Traders from the Office of the Superintendent of Indian Affairs at St. Louis from 1st October 1840 to 31st December 1841," 1841, Microcopy No. 234, Letters Received by the Office of Indian Affairs, 1824-81, Roll 753, U.S. National Archives).

[47] Treaty with the Arikara Tribe, July 18, 1825, 7 Stat. 259, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 237 (2d ed. 1904) (emphasis added). Although an amalgamated and fictionalized version of events, THE REVENANT—a motion picture which garnered three Academy Awards—depicted a fur trading expedition up the Missouri River and through Arikara territory in the early 1820s. The Arikara controlled trade

2. Use of the Missouri River for Transportation, Hunting, and Firewood

Aside from the important role their villages and settlements along the river played in trade, the Missouri River was a critical, central resource more broadly for all three Tribes in many other ways.[48] It is hard to understate the importance of the river to the Tribes' cultures. For example, the name Hidatsa reportedly meant "willows" and "was given to the members of one of the Hidatsa villages 'because the god Itsikama'hidic promised that the villagers should become as numerous as the willows of the Missouri river . . . . Similarly, the Mandan were often referred to as *Mi-ah'-ta-nes*, or 'people of the bank.'"[49] Historians and declarations from Tribal members indicate that, "[i]n everything from the food they ate to the ceremonies they performed, the Missouri River played an integral role in the life of each of the three tribes."[50]

The river's importance to the Tribes is exemplified by its serving as a critical transportation artery.[51] "The Three Tribes developed a unique vessel to transport people and goods across and down the Missouri River; the ubiquitous bull boat."[52] These boats (made of willows and buffalo hide) hauled loads of firewood, dried meat and hides, and other goods as well as men, women, and children.[53] "Being light and strong, bull boats were well adapted for their special uses, and could carry heavy loads even in shallow water."[54] The access the boats gave to the Missouri River as a transportation highway was essential for transporting meat from hunting upriver and other goods necessary for tribal life. Without them, substantial tribal subsistence from buffalo hunts would seem impossible, as demonstrated by this representative anecdote:

> After several days of travel, which included crossing the Missouri in bull boats several times, scouts spotted a herd of bison and a successful hunt ensued. The women of the party cut up and cured the bison meat, which was wrapped in skins and transported in small bales to their temporary camp on the banks of the Missouri. There, Buffalo Bird Woman and the rest of the party packed their bull boats full of the bison meat and hides and set off to return to Like-a-Fishhook village, several days' journey downstream.[55]

The river itself also played a direct role in hunting. Because antelope herds would annually cross the Missouri at roughly the same locations when moving between wintering and summer grounds, the crossing made the animals more vulnerable to tribal hunters.[56] Additionally, in the spring when winter ice melted, the Mandan and Hidatsa would salvage the carcasses of drowned

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though the area, and a dispute between them and frontiersman Hugh Glass's group led to an initial skirmish and ultimately to the first deployment of U.S. Army troops against Indians west of the Mississippi River. *See, e.g*, Scott Walker, *Arikara Battle – The Real Story of Hugh Glass*, Museum of the Mountain Man, Sublette County Historical Society, http://hughglass.org/arikara-battle-2/ (last visited Jan. 18, 2022). The dispute also led to the 1825 treaty.

[48] *See* SMITHSONIAN INSTITUTION, *supra* note 25, at 253.

[49] HISTORICAL RESEARCH ASSOCIATES, INC., HISTORICAL EXAMINATION OF THE MISSOURI RIVER WITHIN THE FORT BERTHOLD INDIAN RESERVATION, PRECONTACT-1902, at 3-4 (HRA Report).

[50] *Id.* at 4.

[51] *E.g.*, *id.* at 26.

[52] Lawson Report, *supra* note 16, at 110.

[53] *Id.* at 111-12.

[54] *Id.* at 113.

[55] HRA Report, *supra* note 49, at 22.

[56] SMITHSONIAN INSTITUTION, *supra* note 25, at 253.

buffalo that floated downriver.[57] These "float bison" served a key part of tribal subsistence, especially critical in early spring when food stores were depleted. "Even after herds of bison began to diminish in the mid-1800s, the three tribes would wait for the ice on the Missouri to break in the spring and gather any bison trapped in the ice over the winter . . . . The frozen bison were a special delicacy for the tribes living along the river."[58]

The tribes also salvaged from the river "large quantities of driftwood for fuel and building materials."[59] These materials appear to have been considerably more important than any standing forests nearby; trader Jean Baptiste Trudeau, who visited Arikara and Mandan villages in 1794, reported that "for fuel and the building of their cabins these nations use *only* the driftwood which is piled up by the rising waters of the Missouri."[60] Another trader explained:

> This [drift]wood they collect in the spring when the Ice breaks up, and when great quantities of this wood floats down and the natives being such expert swimmers and so very active in managing the large trees, that there is scarcely one that escapes them until they have a sufficient stock for the year, although the drifting of the Ice at the same time would make such attempts appear almost impracticable to people unaccustomed to it. I observed laying opposite to each village an immense pile of this wood, and some trees of an amazing size.[61]

Given the relative scarcity of available wood, this spring bounty was key to tribal life. A Hidatsa woman named Waheenee explained that "[g]etting fuel in a prairie country was not always easy work."[62] Anthropologist Bella Weitzner wrote: "[S]carcity of wood near Like-a-fishhook village made the driftwood in the Missouri River especially desirable. In early spring and in June when the melting snows caused the Missouri to rise and incidentally carry with it an abundance of driftwood, the Hidatsa spent the short 10-day season gathering as much wood as possible."[63]

Taken together, these uses of the river make it clear that the river was central to Tribal life. But the Mandan, Hidatsa, and Arikara also relied on the river directly as a food source, obtaining an essential part of their food supply from the river[64] as discussed in greater detail below.

3. History, Methods, and Importance of Fishing

Early Plains Village peoples near Knife River, both Mandan and Hidatsa,[65] tended to establish their villages on the terraces located slightly above the floodplain of the Missouri River.[66] "Such

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[57] Lawson Report, *supra* note 16, at 106.
[58] HRA Report, *supra* note 49, at 22-23.
[59] SMITHSONIAN INSTITUTION, *supra* note 25, at 248.
[60] Lawson Report, *supra* note 16, at 91-92 (emphasis added).
[61] *Id.* at 92.
[62] *Id.* at 94-95.
[63] *Id.* at 95.
[64] SMITHSONIAN INSTITUTION, *supra* note 25, at 253.
[65] From A.D. 1200 to 1450, settlements near Knife River included both Mandan and Hidatsa, but predominantly Hidatsa after that. AHLER ET AL., *supra* note 19, at 31. Later, the Mandan re-settled in the area again, cooperating with the Hidatsa. *See* BOWERS, *supra* note 41.
[66] AHLER ET AL., *supra* note 19, at 31.

a position allowed ready access to several natural resources critical to maintenance of the village."[67] Among these included "[t]he river itself [which] provided important fish resources, water, and a trafficway through the region."[68] The Tribes "obtained catfish, sturgeon, and other species of fish from the Missouri River, as well as turtles and fresh water mussels."[69] All three Tribes relied on fishing.[70]

a. Evidence of fishing

"Archeological excavations of prehistoric and early historic tribal villages have uncovered fish bones, as well as a number of fishhooks."[71] Fish were abundant in the Missouri River.[72] Limited archaeological identification of fish species is available, but "[t]here was undoubtedly as much variation in size of the fish taken as in the species harvested."[73] The most common were various species of catfish (including blue, flathead, and channel),[74] but bullheads, buffalo fish, flatfish, paddlefish, eels, sturgeon, and other species were also targeted. Archaeologists have found "an abundance of fish bones at the Heart River village sites, especially of catfish."[75] "Extensive fish remains also were discovered in excavations and pits of the Arikara settlement that developed on the site of the old Fort Berthold military post in the 1860s."[76] An expansive excavation and examination of 145 earthlodge village sites of the Tribes found "numerous cache pits and refu[s]e piles [in which] they uncovered fish bones, bone and horn fishhooks, and clam and unio shells."[77] Freshwater mussels were commonly found at villages and campsites.[78] Thus, fish—particularly catfish—and shellfish made up an important part of all three Tribes' diets.[79]

Contemporaneous observers also evidenced the Tribes' fishing practices. In the 1850s, one observer wrote that the Arikara were "good fishermen" who caught "great numbers" of fish; and in the 1860s, another observer noted that the Arikara were "good fishermen, and take the fish by placing pens made of willows in the eddies of the Missouri."[80] In 1880, Special Indian Agent Gardner objected to a reduction of the Reservation, explaining that remaining lands were not as good for "farming, grazing, fishing and hunting, and other necessities of the Indians."[81] Fort

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[67] *Id.*
[68] *Id.*
[69] Lawson Report, *supra* note 16, at 96.
[70] MEYER, *supra* note 22, at 63.
[71] Lawson Report, *supra* note 16, at 96.
[72] SMITHSONIAN INSTITUTION, *supra* note 25, at 51. Fish were in such abundance, in fact, that archaeologists have discovered fishhooks even at prehistoric village sites on small, secondary creeks that flow only during rainy weather, "suggesting that a millennium ago, with a higher water table, these streams may have been much more dependable for fishing." *Id.*
[73] *Id.*
[74] *Id.*
[75] Lawson Report, *supra* note 16, at 98.
[76] *Id.* at 96-97.
[77] *Id.* at 105.
[78] SMITHSONIAN INSTITUTION, *supra* note 25, at 52.
[79] *Id.* at 52-53. The inclusion of fish in tribal members' diets stands in contrast to the U.S. Supreme Court's evaluation of the Crow Tribe's historical river usage and reliance on fish as described in *Montana v. United States*. *See infra* Section II.B.1.
[80] SMITHSONIAN INSTITUTION, *supra* note 25, at 97.
[81] Robert Gardner, Special U.S. Indian Agent in Charge, to Hon. R.E. Trowbridge, Commissioner of Indian Affairs (Apr. 13, 1880).

Berthold Indian Agent John Murphy later described a band of Hidatsa as reliant on hunting, fishing, and bone-selling for their subsistence and income.[82]

b. Use of the riverbed in fishing methods

All three tribes made use of fish traps and weirs to take primarily catfish and sturgeon from the Missouri River, and also gathered shellfish from the riverbed.[83] The Tribes were also among those known to fish both with hook and line[84] and with double-pointed gorges.[85]

The Tribes' traps and weirs "were anchored in shallow waters near the stream bank, [and] baited."[86] For the Mandan, "[t]he importance of fishing is attested to by the large quantities of catfish bones found in Heart River village sites. A fish trap was used with appropriate ceremonies by men, though women made the traps and cleaned the fish."[87] Similarly, the Arikara fished as a summer food source, for which "[t]he most common technique for catching fish was to plant willow pens, shaped round to symbolize the earth lodge, in eddies or backwaters of the Missouri and lure the fish into the traps with small pieces of meat."[88] The Hidatsa too employed traps, which offered a substantial source of food in the case of all three tribes: "As many as 100 fish might be caught in a single night using this method, enough to provide fish to an entire village."[89]

c. Importance of fishing and methods utilizing the riverbed

Not only did fishing provide a critical food source and serve as a regular part of the Tribes' lifestyles, but the act and methods employed also carried cultural and religious significance.[90] The importance of fishing was reflected in the education, ceremony, and specialized fishing privileges practiced by tribal members. For example, Mandan education in the construction and use of fish traps was often passed down from a lodge "grandfather" to a boy.[91] If the grandfather had a fish trap, "his grandsons did much of the work of carrying willows to the bank for weaving into sections for the walls, and he would permit them to bail the fish out of the trap."[92] Older

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[82] *See* Stevens Report, *supra* note 15, at 25 n.99 (citing John S. Murphy, Indian Agent, "Annual report to the Honorable Commissioner of Indian Affairs" (Aug. 31, 1890)).
[83] MEYER, *supra* note 22, at 65.
[84] The archeological records show widespread use of bone fishhooks among Indians of the Plains. SMITHSONIAN INSTITUTION, *supra* note 25, at 51; *see also* MEYER, *supra* note 22, at 5.
[85] SMITHSONIAN INSTITUTION, *supra* note 25, at 253. A double-pointed gorge and line is essentially a double-pointed pin or rod fastened (in the middle of the gorge) to the end of a line. *See* ANNEKA WRIGHT & WILLIAM B. FOLSOM, NAT'L MARINE FISHERIES SERV., NEPTUNE'S TABLE: A VIEW OF AMERICA'S OCEAN FISHERIES 78 (2002). A fish must swallow the gorge, as opposed to a hook that needs only to catch the interior of a fish's mouth. *See id.*
[86] SMITHSONIAN INSTITUTION, *supra* note 25, at 51. Photographs showing a Hidatsa fish trap, albeit from 1929, are included as Attachment 5.
[87] *Id.* at 355.
[88] *Id.* at 371; *see also* EDWIN THOMPSON DENIG, FIVE INDIAN TRIBES OF THE UPPER MISSOURI: SIOUX, ARICKARAS, ASSINIBOINES, CREES, CROWS 48-49 (John C. Ewers ed., 1961) (Arikara are "good fishermen" and "[t]he stationary Indians are fond of fish.").
[89] HRA Report, *supra* note 49, at 23.
[90] The Jorjani Opinion's analysis ignored this historical fact.
[91] BOWERS, *supra* note 24, at 61.
[92] *Id.*

men in Mandan villages typically managed the fish traps, with each village having a limited number of traps.[93]

Similarly, the Mandan and Hidatsa both practiced a variety of ceremonial rites involving an associated medicine "bundle."[94] Tribal members inherited rites and bundles in various ways, contributing to continuity of ceremonial organization.[95] Among ceremonial practices, both the Mandan and Hidatsa practiced a fish-trapping ceremony.[96] The Mandan in particular believed that the traps had been used since Black Wolf, a hero of Mandan belief, had introduced their use to the people.[97] Historians note that, in 1890, some men were continuing to employ the ancient rites with respect to fish traps.[98] The traps involved sinking posts into the bed of the river and smoothing the bed itself when necessary.[99] An account of the ceremony described preparation of the riverbed: "When the river bottom was sloping or there were branches imbedded in the sand, we smoothed the bottom and carried out all the wood before setting the trap down."[100]

In addition to fishing methods and ceremonies that required use of the riverbed, the Tribes' preferred fish also made use of the bed and banks of the Missouri River. Catfish generally inhabit river bottom areas, whether firm- or mud-bottomed, and some species can be found on a river bottom using a sit-and-wait approach to feeding during the day.[101] Use of submerged land is also important to catfish for breeding purposes: these fish often lay eggs in dark, sheltered places such as holes in the riverbank, undercut banks, or even abandoned muskrat burrows.[102]

Fishing's centrality to tribal life continued well into the twentieth century, persisting until the Missouri River was dammed and became Lake Sakakawea. The Lawson Report describes how tribal members continued to rely on a diet of "catfish, walleye, bullhead, paddlefish, goldeye, buffalo fish and sturgeon," caught not only with drags and hook-and-line techniques, but also

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[93] *Id.* at 97.

[94] *See* BOWERS, *supra* note 41, at 19-20; CASH & WOLFF, *supra* note 18, at 14-15. A sacred medicine bundle can generally be described as a bundle of objects that "provided a special contact with the supernatural." CASH & WOLFF, *supra* note 18, at 14-15.

[95] BOWERS, *supra* note 41, at 19-20.

[96] *Id.* at 20. Among the Hidatsa for example, "only people with specific knowledge granted by ownership of the appropriate sacred bundle, were allowed to construct the traps and perform the associated ceremonies." HRA Report, *supra* note 49, at 25.

[97] BOWERS, *supra* note 41, at 27, 215-23.

[98] *Id.* at 105.

[99] *Id.* at 257, 259. Photographs of a Hidatsa fish trap are included as Attachment 6.

[100] *Id.* at 259.

[101] *See NatureServe Explorer: Comprehensive Report Species – Pylodictis olivaris*, NATURESERVE, https://explorer.natureserve.org/ (search "catfish"; then follow "Pylodictis olivaris" hyperlink) (last visited Jan. 18, 2022) (Flathead Catfish); *NatureServe Explorer: Ictalurus punctatus*, NATURESERVE, https://explorer.natureserve.org/ (search "catfish"; then follow "Ictalurus punctatus" hyperlink) (last visited Jan. 18, 2022) (Channel Catfish); *NatureServe Explorer: Ictalurus furcatus*, NATURESERVE, https://explorer.natureserve.org/ (search "catfish"; then follow "Ictalurus furcatus" hyperlink) (last visited Jan. 18, 2022) (Blue Catfish).

[102] *See supra* note 101. In fact, old muskrat burrows are often explicitly part of the riverbank, consisting of a tunnel burrowed upward into the submerged soil of the bank from inside the river, below the water surface, until the tunnel reaches dry soil above the water table and can be cleared out to form a den. *See Muskrat – Living with wildlife*, WASH. DEP'T OF FISH & WILDLIFE, https://wdfw.wa.gov/species-habitats/species/ondatra-zibethicus#living (last visited Jan. 18, 2022).

importantly with the continuing tradition of fish traps embedded in the riverbed.[103] Tribal members interviewed in modern times recalled how fish trapping was part of the tribal communities' redistributive networks. They explained that the fish bundle keeper "had this fish trap and the community got their fish from this trap" and that the "people who had the right to build the fish traps—there were rules and regulations to that—who they distributed those fish to. So, primarily they would . . . probably make sure that an elder lady who's widowed or a family that's having a tough time, they got precedent, so these fish trap owners had to share with the community[.]"[104] The tradition of fishing and its place in tribal subsistence persevered, demonstrating its lasting importance to tribal life. Although the Jorjani Opinion and the Stevens Report note the federal push towards a primarily agrarian lifestyle,[105] farming was already a centuries-old practice of the Tribes. Conversely, the record contains no evidence of an intent to cut off the Tribes' similarly ancient reliance on the river for fish and other resources. That reliance remained prevalent throughout the mid-twentieth century and provided a core plank of the Tribes' ability to sustain itself in the region.

4. Spiritual Relationship with the Missouri River

In addition to its importance in matters of subsistence, trade, transportation, building and fuel, the Missouri River also occupied a central place in the spirituality of all three Tribes. The Tribes' "religious traditions also reflected the river's importance to them. The Arikara, for example, called the Missouri 'Holy River' and 'the Mysterious River' and incorporated the river directly into many of their most important ceremonies."[106] All of the tribal peoples that became the MHA Nation "formed a profound spiritual connection with the Missouri and its riverine environment, including in its transformative state as Lake Sakakawea."[107]

Certain origin stories directly involve the Missouri River. For instance, a merged Hidatsa and Mandan creation story[108] tells that "at the beginning, the world was covered with water. First Creator and Lone Man, the only two people living on earth, worked together" with animal spirits to create the world.[109] "Lone Man divided the earth and gave half to First Creator. First Creator made the lands on the west side of the Missouri from the Rockies to the ocean while Lone Man made the land on the other or east side[.]"[110] Thus, the Missouri comprised "the central dividing point of the new land," and the first people settled near the confluence of the Missouri River and Heart River.[111] The River "framed Mandan and Hidatsa cosmography and is a source or an embodiment of supernatural beings."[112]

Beyond its role as a center of tribal cosmography, Mandan and Hidatsa spiritual traditions placed powerful spirits in the river. "The Missouri River was the home of Grandfather Snake, chief of

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[103] Lawson Report, *supra* note 16, at 422.
[104] *Id.* at 424.
[105] *See* Jorjani Opinion, *supra* note 5, at 6-8; Stevens Report, *supra* note 15, at 16-17.
[106] HRA Report, *supra* note 49, at 3.
[107] Lawson Report, *supra* note 16, at 57.
[108] *Id.* at 59-61 (describing merger of traditions between the Hidatsa's First Creator and the Mandan's Lone Man).
[109] HRA Report, *supra* note 49, at 34-35.
[110] *Id.* at 35.
[111] *Id.*
[112] Lawson Report, *supra* note 16, at 60.

the river spirits. Grandfather Snake maintained the level of the Missouri River and, when given the appropriate offerings, provided for good hunting along its banks."[113] Tribal members "regularly made offerings" to the river gods.[114] The Arikara have similar stories and describe the Missouri River as "Holy Water," proclaiming that throughout their history the Arikara have "migrated upstream, guided by Mother Corn toward the river's source." "[W]hen a member of the tribe died, his body would be lain out with feet pointed upstream, so that when Mother Corn should revive him, and call him to the next life, he should rise up with his face directed in the path of manifest destiny of the Arikara race."[115] Similarly, the Arikara considered the river to be a link to the past, connecting them with their ancestors, and "at the end of the festival of the Holy Cedar Tree, the Arikara would carry to the Missouri the tree that had been standing outside the village's sacred lodge" and place it in the current where it would "travel downstream passing successively, in reverse chronological order of their occupation, the ancient village sites of the Arikara, carrying to each of them the message of the Arikara people that their tribe still lives."[116]

Ultimately, the river occupied a central place in tribal spirituality, intimately connected with the river's central place in daily life. "The cultural traditions of the people of the Three Tribes maintain that the Missouri embodies several sacred spirits who are the source of, or inspiration for, a wide variety of ceremonial rites and knowledge that was related to traditional utilitarian aspects of daily life, ranging from crafting pottery and constructing bull boats to rainmaking and . . . ensuring success in hunting, fishing, and planting."[117] The spiritual connection shared by the Tribes underlines the river's central importance to tribal life and culture and sheds light on how critically important they considered the river and its bed in the nineteenth century and today. "As historian Angela Parker has written: The story of the land would not exist without its river, and the story of the river and its land would not exist without the people."[118]

B. The 1851 Treaty of Fort Laramie and Subsequent Executive Actions

The United States first entered into treaty relations with the three tribes of the MHA Nation in 1851.[119] Because of gold discoveries to the west, non-Indians began migrating across areas once occupied exclusively by several tribes, including the Mandan, Hidatsa, and Arikara.[120] "Prior to the year 1851 costly Indian wars had been experienced," and the United States sought to promote peace and safe travel for migrants.[121] Thus, in 1851, the parties entered into the Treaty of Fort Laramie (1851 Treaty), which provided, *inter alia*:

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[113] HRA Report, *supra* note 49, at 36.
[114] *Id.*
[115] *Id.* at 37.
[116] *Id.* (internal quotation omitted).
[117] Lawson Report, *supra* note 16, at 57-58.
[118] *Id.* at 79 (internal quotation omitted).
[119] Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, 11 Stat. 749, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594 (2d ed. 1904) (1851 Treaty). Attachment 7 is an illustrative map showing generally the territory described by the 1851 Treaty from *Fort Berthold Reservation, 1851*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1204#toc-3 (last visited Jan. 18, 2022). This website is funded in part by the Challenge Cost Share Program of the National Park Service and maintained by the non-profit Lewis & Clark Fort Mandan Foundation.
[120] *Indians of Ft. Berthold Indian Reservation v. United States*, 71 Ct. Cl. 308, 311 (1930).
[121] *Id.*

> The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace. . . .
>
> The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: . . .
>
> The territory of the Gros Ventre, Mandan, and Arrickaras Nations, commencing at the mouth of the Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River; and thence down Heart River to the place of beginning.[122]

As stated by one of the U.S. treaty commissioners during negotiations, in dividing the various tribes' territories into geographical districts, "it is not intended to take any of your lands away from you, or to destroy your rights to hunt, or fish, or pass over the country, as heretofore."[123] Although the Indian signatories to the 1851 Treaty promised to cease warring with each other, most did not.[124] The Mandan, Hidatsa, and Arikara, however, generally abided by the promises of peace and made numerous complaints that, although the Tribes observed the terms, they were neglected.[125] Although the Tribes may not have avoided hostilities entirely, particularly the Arikara, "the real basis for the anger was the government's refusal either to protect the Indians against their enemies or to allow them to defend themselves in violation of treaty stipulations."[126]

In 1866, the Tribes entered into an agreement with the United States granting rights-of-way to the United States through "their country" and ceding "certain lands situated on the northeast side of the Missouri River[.]"[127] That agreement, however, was never ratified.[128] Regardless, the

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[122] 1851 Treaty, *supra* note 119. Prior to 1943, the Hidatsa at times had been mistakenly referred to as Gros Ventre. *See* MEYER, *supra* note 22, at 204-05.

[123] *Crow Tribe of Indians v. United States*, 284 F.2d 361, 366-67 (Ct. Cl. 1960) (quoting account of proceedings published in St. Louis newspaper, *The Republican*).

[124] MEYER, *supra* note 22, at 105-06. In 1862, war broke out between the Sioux and the United States. The Mandan, Hidatsa, and Arikara did not participate. *See Indians of Ft. Berthold Indian Reservation v. United States*, 71 Ct. Cl. 308, 316 (1930). "Frontier settlements were attacked, communications between the Mississippi Valley and the Pacific coast were interrupted and emigrant trains were attacked and destroyed." *Id.* In 1865, United States military operations ended, and peace was restored. *Id.*

[125] MEYER, *supra* note 22, at 105-06.

[126] *Id.* at 107.

[127] *Id.* at 317; Agreement at Fort Berthold, 1866, art. 3 & addenda, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 1053, 1055 (2d ed. 1904) (1866 Agreement).

[128] 71 Ct. Cl. at 317; 1866 Agreement, *supra* note 127, at 1052. Congress may not have ratified the agreement and recognized the Tribes' claim because the ceded land fell outside the original territory delineated in the 1851 Treaty. MEYER, *supra* note 22, at 111. *Compare* 1866 Agreement, *supra* note 127, at 1055 ("northeast side of the Missouri River") *with* 1851 Treaty, *supra* note 119, at 2 KAPPLER 594 (no territory described to the east or northeast of Missouri River).

1866 Agreement's cession of lands only on the "northeast side of the Missouri River" reflects the United States' consistent intent to maintain the river and its bed within Tribal lands.

After the 1866 Agreement, confusion remained about the validity of those prior agreements—especially the 1851 Treaty—and thus the rights and interests of the three Tribes.[129] In reply to a report from the major general in charge of the Dakota military department, the Commissioner of Indian Affairs "advised the military commander . . . of the 'boundaries of the reservation for the [three tribes],' as set out in the treaty of Fort Laramie," as well as the provisions in the 1866 Agreement, but noted that no treaty stipulations for a reservation had been ratified.[130]

After consultation with guides, discussions with the Tribes' chiefs, and a proposal of reservation boundaries, the commanding officer at Fort Stevenson forwarded the proposed reservation and report to the Commissioner of Indian Affairs.[131] On April 12, 1870, President Grant adopted the recommendation.[132] As proposed and adopted, the Reservation boundary description reads:

> From a point on the Missouri River 4 miles below the Indian village (Berthold), in a northeast direction 3 miles (so as to include the wood and grazing around the village); from this point a line running so as to strike the Missouri River at the junction of Little Knife River with it; thence *along the left bank of the Missouri River* to the mouth of the Yellowstone River, *along the south bank of the Yellowstone River* to the Powder River, up the Powder River to where the Little Powder River unites with it; thence in a direct line across to the starting point 4 miles below Berthold.[133]

Use of the term "left bank" meant the north and east sides of the Missouri River,[134] drawing the line on the far side of the river and necessarily including the width of the river within the

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[129] 71 Ct. Cl. at 316-17.

[130] *Id.* at 317.

[131] *Id.* at 318.

[132] *Id.*; 1870 Executive Order, *supra* note 17.

[133] 1870 Executive Order, *supra* note 17 (emphasis added); *see also* Attachment 11, *infra* note 135 (showing Little Knife River location). By drawing the boundaries explicitly along particular banks, the United States illustrated that it knew how to include or exclude riverbed, as discussed later in Section III.A.1.

[134] The "left" or "right" banks of a river have, since at least 1851, been determined by public lands surveyors by looking downstream from the center of the river and then indicating the left or right side from that viewpoint. *E.g.*, U.S. DEP'T OF THE INTERIOR, GENERAL LAND OFFICE, INSTRUCTIONS TO THE SURVEYORS GENERAL OF PUBLIC LANDS OF THE UNITED STATES FOR THOSE SURVEYING DISTRICTS ESTABLISHED IN AND SINCE THE YEAR 1850, at viii, 12, https://glorecords.blm.gov/reference/manuals/1855_Manual.pdf (Regarding meandering navigable streams, "Standing with the face looking *down* stream, the bank on the *left* hand is termed the 'left bank' and that on the *right* hand the 'right bank.' These terms are to be universally used to distinguish the two banks of [a] river or stream."); *see also generally* BUREAU OF LAND MANAGEMENT, *Reference – BLM GLO Records: Surveying Manuals*, https://glorecords.blm.gov/reference/default.aspx#id=05_Appendices|07_Surveying_Manuals (last visited Jan. 18, 2022); *Left Bank*, GLOSSARY OF B.L.M. SURVEYING AND MAPPING TERMS 35 (Cadastral Survey Training Staff ed., 1980); *id.* at 57 ("right bank"). The Missouri River generally flows from west to east and north to south as it makes its way from its headwaters in Montana to its confluence with the Mississippi River in Missouri. Following the actual calls made in the 1870 Executive Order and comparing them to the area's topography further support this conclusion, *i.e.* the call prior to the "left bank" referred to the junction of the Little Knife River, which enters the Missouri River from the northeast and thus would expressly include the Missouri River within the boundary description of the Reservation. *See, e.g.*, Attachment 11, *infra* note 135.

Reservation boundaries. Because the history of reservation reductions is complicated, maps illustrating the history of the boundaries are included for reference as Attachments 7 to 11.[135]

In transmitting and recommending adoption of these boundaries, the Commissioner of Indian Affairs wrote, even in the face of supposed confusion regarding the existence of a reservation following the 1851 Treaty and 1866 Agreement, that "[i]t is proper here to state that the reservation as proposed . . . is a part of the country belonging to the [Arikara, Hidatsa], and Mandan Indians, according to the agreement of Fort Laramie [in 1851]."[136]

The five years following the 1870 Executive Order saw increased tensions between the Tribes and white settlers because of continuing pressure to reduce the Tribes' land base. Congress had passed legislation in 1864 granting land for creation of the Northern Pacific Railroad and providing for extinguishment of relevant Indian title—in this case, to include land recognized as the Tribes' territory in 1851.[137] According to one newspaper, railroad representatives did not inform the Tribes until September 1870 (after the 1870 Executive Order), and the Tribes subsequently made known their understanding as to their rights in land:

> The Indians claim that Commissioners from Washington, several years ago, agreed, on condition of their leaving the greater part of their hunting grounds and the graves of their dead, and living in peace with the whites, to give a reservation which was to commence at the mouth of Heart River, follow up the Missouri River, *including all the river on both sides of it*, to the mouth of the Yellowstone; hence up the Yellowstone to the mouth of Powder River; thence across to the headwaters of Heart River.[138]

The article continued: the Tribes "say, too, that this treaty was subsequently recognized in 1865, when Commissioners were again sent to treat with them."[139] Besides expressing the Tribes' understanding of what land made up their reservation (*i.e.*, the entire river and both sides), the report went on to note that taking additional land from them could be fraught with peril:

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[135] Attachment 7 depicts the boundaries created by the 1851 Treaty. *Fort Berthold Reservation, 1851*, *supra* note 119. Attachment 8 depicts the 1870 Executive Order Reservation boundaries. *Fort Berthold Reservation, 1870*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1204#toc-4 (last visited Jan. 18, 2022). Attachment 9 depicts the 1880 Executive Order Reservation boundaries. *Fort Berthold Reservation, 1880*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1204#toc-5 (last visited Jan. 18, 2022). Attachment 10 depicts the boundaries created by the 1886 Agreement that Congress ratified in 1891. *Fort Berthold Reservation, 1891*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1204#toc-6 (last visited Jan. 18, 2022). As noted, *supra* note 119, these maps were produced for the website Discovering Lewis and Clark, a site funded in part by the Challenge Cost Share Program of the National Park Service and maintained by the non-profit Lewis & Clark Fort Mandan Foundation. Attachment 11 depicts the history of Reservation boundaries in a single map and can be found on the North Dakota Studies website, a publication of the State Historical Society of North Dakota. *Three Affiliated – Demographics – Land Base and Land Status*, NORTH DAKOTA STUDIES, https://www.ndstudies.gov/curriculum/high-school/mandan-hidatsa-sahnish/data-mha (last visited Jan. 18, 2022).

[136] 1870 Executive Order, *supra* note 17, at 882.

[137] An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route, ch. 217, § 2, 13 Stat. 365, 367 (July 2, 1864); 71 Ct. Cl. at 319-21.

[138] *The Indians: The Dakotas and Northern Pacific Railroad*, INDIANAPOLIS J., Oct. 28, 1870, at 4 (emphasis added).

[139] *Id.*

> An attempt to build the [rail]road on the route proposed and a refusal to recognize any of the rights which they claim will undoubtedly lead to trouble, and that of a serious kind. The three tribes number fully 2,500 persons, and their bravery is unquestioned . . . . They seem slow to go to war, and their confidence in the Government is strong; but if this confidence is once entirely destroyed they may become determined and persistent enemies.[140]

Later, in 1875, members of the Tribes gathered at Fort Lincoln along with the Standing Rock Sioux Tribe to sign a treaty of peace. Although a brief news article suggested that the tribal members involved may have had "exag[g]erated ideas of the result of the treaty . . . [,] they pretty plainly intimated that they wanted the whites to stay on the east bank of the river."[141] In 1878, dissatisfaction with the Indian Agent also surfaced: "The Indians have threatened to kill him if he is not removed. They are violent in their denunciations. . . . Their firing on the steamer Josephine and killing a soldier last week is a surprise to the whole community."[142]

The 1870 Executive Order eliminated a large portion of the reservation in the south and southwest.[143] In 1880, the boundaries of the reservation were altered further by another Executive Order that extinguished Indian title to additional lands in order to allow railroad construction.[144] The new southern boundary set by the 1880 Executive Order tracks the modern southern boundary, although it also extended farther west than present day. The reduction that occurred through the 1880 Executive Order is described *in toto*:

> [B]eginning at a point where the northern forty-mile limit of the grant to the Northern Pacific Railroad intersects the present southeast boundary of the Fort Berthold Indian Reservation; thence westerly with the line of said forty-mile limit to its intersection with range line, between ranges 92 and 93, west of the fifth principal meridian; thence north along said range line to its intersection with *the south bank of the Little Missouri River*; thence northwesterly *along and up the south bank of said Little Missouri River*, with the meanders thereof to its intersection with the range line between ranges 96 and 97 west of the fifth principal meridian; thence westerly in a straight line to the southeast corner of the Fort Buford Military Reservation; thence west along the south boundary of said military reservation to the south bank of the Yellowstone River, the present northwest boundary of the Fort Berthold Indian Reservation; thence along the present boundary of said reservation *and the south bank of the Yellowstone River* to the Powder River; thence up the Powder River to where the Little Powder River unites with it; thence northeasterly in a direct line to the point of beginning.[145]

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[140] *Id.*
[141] *Treaty of Peace Between the Sioux and Berthold Indians*, BISMARCK TRIB., June 2, 1875, at 4.
[142] *A Reverend Rascal*, ST. PAUL DAILY GLOBE, Aug. 17, 1878, at 4.
[143] 1870 Executive Order, *supra* note 17.
[144] *Indians of Fort Berthold Reservation v. United States*, 71 Ct. Cl. 308, 319-21 (1930).
[145] 1870 Executive Order, *supra* note 17 (emphasis added).

The south bank of the Little Missouri River in this instance referred to the far side of the river with respect to the remainder of the Reservation at that time, *i.e.*, the reduction removed only land on the opposite side of the river and retained the width of the Little Missouri within the Reservation boundaries. Conversely, the 1880 Executive Order also added land to the reservation in the north:

> [B]eginning on the most easterly point of the present Fort Berthold Indian Reservation (on the Missouri River); thence north to the township line between townships 158 and 159 north; thence west along said township line to its intersection with the White Earth River; thence down the said White Earth River to its junction with the Missouri River; thence *along the present boundary of the Fort Berthold Indian Reservation and the left bank of the Missouri River* to the mouth of the Little Knife River; thence southeasterly in a direct line to the point of beginning.[146]

Here, the 1880 Executive Order's use of the "left bank" again meant the north and east sides of the Missouri River, as well as equating that line with the "present boundary" of the Reservation. Thus, the 1880 Executive Order continued to recognize that the boundary set in the 1870 Executive Order—which the 1880 Executive Order extended by adding adjacent land—was on the far side of the river, opposite the remainder of the prior Reservation land base and thus including the width of the river within the original (and new) bounds of the Reservation.

Finally, the three Tribes and United States entered into an 1886 Agreement that reduced the boundaries in the north and west to those currently in effect.[147] The parties entered the agreement recognizing "the policy of the Government to reduce to proper size existing reservations . . . with the consent of the Indians, and upon just and fair terms."[148] The agreement ceded certain lands: "lying north of the forty-eighth parallel of north latitude, and also all that portion lying west of a north and south line six miles west of the most westerly point of the big bend of the Missouri River, south of the forty-eighth parallel of north latitude."[149] This language effectively kept the lines of the Reservation's eastern and southern boundaries mostly intact while drawing new northern and western boundaries along straight lines that intersected and shortened the original eastern and southern boundaries. Thus, the 1886 Agreement did not disturb any prior understandings with respect to the bed and banks of rivers flowing through the Reservation; it merely reduced the total length of the river stretches within the Reservation.

Congress did not ratify the 1886 Agreement until March 3, 1891, after North Dakota's entry into the Union in 1889.[150] By its terms, the 1886 Agreement was made pursuant to an act authorizing commissioners to act on behalf of the United States and restating the policy of the government "to reduce to proper size *existing reservations . . . with the consent of the Indians*, and upon just

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[146] 1880 Executive Order, *supra* note 17 (emphasis added); *see also* Attachment 11, *supra* note 135 (showing Little Knife River location).

[147] *See* Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032 (ratifying 1886 Agreement). The 1886 Agreement also provided for the allotment of land to individual tribal members. *See also* 71 Ct. Cl. at 321.

[148] § 23, 26 Stat. at 1032.

[149] *Id.*

[150] *Id.*; Proclamation No. 292 (Nov. 2, 1889); *see also* 71 Ct. Cl. at 321.

and fair terms."[151] The 1891 Act ratifying the 1886 Agreement was the same legislation by which Congress ratified numerous other agreements, including one between the United States and the Coeur d'Alene Indian Tribe.[152] Thus, the 1886 Agreement set boundaries fully encompassing the Missouri River as it passed through and within the Reservation.

Two final matters relate to the Reservation's boundaries. First, in 1892, President Harrison made a small addition to the Reservation north of the Missouri River.[153] Second, although Congress opened the area to the north and east of the Missouri River to homesteading with passage of a 1910 surplus lands act,[154] the Eighth Circuit has held that the 1910 Act did not diminish the Reservation's boundaries.[155] Accordingly, the 1910 Act is not relevant to the analysis here.[156]

C. 1949 Takings Act and 1984 Mineral Restoration Act

In 1944, Congress passed legislation authorizing dams on the Missouri River for flood control, irrigation, and other purposes.[157] Known as the Flood Control Act of 1944, the legislation authorized, *inter alia*, the Garrison Dam, which ultimately flooded a vast portion of the Reservation. In 1949, Congress passed legislation to take Reservation land for construction and flooding purposes, vesting title solely in the United States and compensating the Nation.[158] The 1949 Takings Act contained a detailed description of the "Taking Area," but generally operated to draw an area encompassing the Missouri and Little Missouri Rivers within the boundaries of the Reservation and explicitly noted that the area was indeed within the Reservation.[159] This explicit recognition is of additional importance because, in two passages within the description, the Taking Area is drawn on the far side of the Missouri River, illustrating the continued recognition that the entire width of the river lies within the Reservation.[160]

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[151] § 23, 26 Stat. at 1032 (emphasis added).
[152] *Id.* § 19, 26 Stat. at 1027. *See infra* Section II.B.2.
[153] Exec. Order (June 17, 1892), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 883-84 (2d ed. 1904). The addition consisted of all land in Township 147 North, Range 87 West lying north of the Missouri River not otherwise part of the Fort Stevenson military reservation or for which title or other valid existing rights had passed from the United States prior to the Order.
[154] Act of June 1, 1910, Pub. L. No. 61-197, 36 Stat. 455.
[155] *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation*, 27 F.3d 1294, 1296-98 (8th Cir. 1994); *New Town v. United States*, 454 F.2d 121 (8th Cir. 1972).
[156] The State's Attorney General issued an opinion in 2002 suggesting, but not concluding, that the 1949 Takings Act might have diminished from the Reservation the area taken to create Lake Sakakawea. I do not need to address or resolve that issue because issues of diminishment touch only on jurisdiction, not land ownership. Moreover, two other courts have held that no diminishment occurred in similar contexts. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 820-23 (8th Cir. 1983) (Lower Brule Sioux Reservation not diminished by takings acts for Big Bend or Fort Randall projects); *United States v. Wounded Knee*, 596 F.2d 790, 792-96 (8th Cir. 1979) (Crow Creek Sioux Reservation not diminished by takings act for Big Bend Dam and Reservoir). Regardless, the land here would nevertheless have been taken by the United States and the mineral interests later restored to trust for the MHA Nation pursuant to the authority of Congress. Thus, any such acts by the United States would have no effect on the analysis presented herein.
[157] An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes, Pub. L. No. 78-534, 58 Stat. 887 (1944) (Flood Control Act of 1944).
[158] 1949 Takings Act, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026, 1027.
[159] *Id.* at 1028-47 (Sec. 15, Part A, introduced: "The Taking Area is described as follows: Part A—Within Reservation Boundaries").
[160] *Id.* at 1034, 1044. Detailed discussion follows *infra* at Section III.B.

The 1949 Takings Act represented the first stage of Pick-Sloan projects. Unlike later compensation acts involving other affected tribes, the 1949 Takings Act did not reserve to the MHA Nation the subsurface mineral rights beneath lands taken.[161] Congress rectified this omission in 1984, passing legislation and placing into trust for the Nation all subsurface mineral interests taken in 1949.[162] The 1984 Mineral Restoration Act provided:

> [A]ll mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which—
>
> (1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project, and
>
> (2) are not described in subsection (b),
>
> are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.[163]

The referenced subsection (b) exempts particular townships and certain lands lying east of the former Missouri River.[164] The exempted lands do not include land making up the original bed of the Missouri River or the flooded uplands taken by the 1949 Act.

II. LEGAL BACKGROUND

There are two sets of operative legal principles regarding these historical facts, which must be reconciled with care. First, treaties, statutes, and other formal documents concerning Indian tribes must generally be construed liberally in favor of tribes. Second, in the context of the Equal Footing Doctrine, courts begin with a presumption that title to the beds of navigable waters passes to the state upon admission to the Union.

A. Indian Law Canons of Construction

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law."[165] The Supreme Court has developed three primary rules of construction applicable to Indian treaties. These canons of construction also apply when interpreting statutes, executive orders, regulations, and agreements intended for the benefit of Indians.[166] First, such

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[161] *See* 1949 Takings Act, 63 Stat. 1026.

[162] 1984 Mineral Restoration Act, Pub. L. No. 98-602, tit. 2, 98 Stat. 3149, 3152.

[163] *Id.* at 3152.

[164] *Id.*

[165] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

[166] *E.g.*, *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'"); *see also Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) ("The rule of construction applicable to executive orders creating Indian reservations is the same as that governing the interpretation of Indian treaties. Executive orders, no less than treaties, must be interpreted as the Indians would have understood them 'and any doubtful expressions in them should be resolved in the Indians' favor.'"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 113-15 (Nell Jessup Newton ed., 2012).

documents "must be interpreted as [the Indians] would have understood them."[167] Second, ambiguities or "any doubtful expressions in [those documents] should be resolved in the Indians' favor."[168] Third, [such documents] must be liberally construed in favor of the Indians.[169] The Supreme Court has repeatedly upheld these principles, reaffirming the sweeping power of the canons as recently as 2020 when the Court stated broadly: "treaty rights are to be construed in favor, not against, tribal rights."[170] Intent in this context is typically a question of fact and may be evidenced by "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[171] Attention should also be paid to traditional lifestyles contemporary with the passage or execution of such documents, as evidenced by oral history and archaeology.[172] Additionally, treaty rights can be abrogated only by a subsequent act in which Congress clearly expresses intent to abrogate after a careful consideration of the conflict with extant rights.[173]

B. The Equal Footing Doctrine and Recent Supreme Court Cases

The Equal Footing Doctrine generally establishes a presumption that "title to land under navigable waters passes from the United States to a newly admitted State" at the moment of statehood.[174] However, Congress also has authority to "convey land beneath navigable waters,

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[167] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (noting among other things that treaties are not a grant of rights *to* the Indians, but *from* them).

[168] *Choctaw Nation v. Oklahoma*, 397 U.S. at 631.

[169] *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians").

[170] *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020) (citing *Solem v. Bartlett*, 465 U.S. 463, 472 (1984)). *McGirt* followed two more contemporary Supreme Court cases reasserting the power of the canons: *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), and *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019). In *Herrera*, the Court reiterated that "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians,' and the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" 139 S. Ct. at 1699 (quoting *Mille Lacs Band*, 526 U.S. at 206, and *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)). Similarly, the *Cougar Den* Court once again stated that, in repeatedly interpreting treaty language with the Confederated Tribes and Bands of the Yakama Nation, "each time [the Court] has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855." 139 S. Ct. at 1011 (citing four prior cases).

[171] *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Mille Lacs Band*, 526 U.S. at 196 ("we look beyond the written words to the larger context that frames the Treaty").

[172] *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (examining the pre-treaty role of fishing), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[173] *Mille Lacs Band*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (requiring "clear evidence" Congress considered the conflict and chose to resolve it by abrogating the treaty); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate tribal property rights must be "plain and unambiguous"); *see also Cobell v. Norton*, 240 F.3d 1081, 1102-03 (D.C. Cir. 2001) (holding Indian canons trump deference to agency interpretation); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (same).

[174] *See, e.g., Idaho v. United States*, 533 U.S. 262, 272 (2001). Determination of navigability for determining submerged land ownership in the United States uses the "navigability in fact" test. *E.g., PPL Mont., LLC v. Montana*, 565 U.S. 576, 590 (2012). Unlike the definition of navigability used in English common law that relied on distinguishing between tidal and non-tidal waters, the test here requires evidence that waters "are used, or are

and to reserve such land . . . for a particular national purpose such as a[n] . . . Indian reservation."[175] If Congress does so prior to statehood, the Equal Footing presumption of state title to submerged lands is defeated.[176]

The Supreme Court has decided two cases analyzing ownership of lands under navigable waterways within the boundaries of Indian reservations since Solicitor Margold's M-Opinion and the IBLA's decision in *Impel Energy*. In *Montana v. United States*, the Court concluded that the bed and banks of the Bighorn River within the Crow Indian Reservation passed to the State of Montana upon statehood because they were not reserved for the Crow Tribe.[177] Conversely, in *Idaho v. United States*, the Court determined that the United States held in trust for the benefit of the Coeur d'Alene Indian Tribe the bed and banks of Lake Coeur d'Alene and the St. Joe River within the boundaries of the Coeur d'Alene Reservation and that title did not pass to the State of Idaho upon its entry into the Union.[178] In both cases, the importance of fishing and use of the waterways to the tribes' diets and ways of life played key roles in the Court's conclusions.[179]

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susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 589-90, 91-92 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)). Navigability for title also should not be confused with navigability for regulatory purposes such as the Clean Water Act. *See generally* 33 U.S.C. § 1251 et seq. (Clean Water Act). For equal footing cases, navigability is to be determined as of the time of statehood and "on a segment by-segment basis." *PPL Mont.*, 565 U.S. at 591, 593. This Opinion focuses on the test for determining title to lands underlying navigable rivers because, even if the stretches of the Missouri River at issue here were not navigable at statehood, it would make no difference to the conclusion. The Equal Footing Doctrine operates to pass title of a riverbed to a state *only* if navigable; were the Missouri River non-navigable at statehood it would necessarily have stayed with the Tribes. *See also* Margold Opinion, *supra* note 11.

[175] *Idaho*, 533 U.S. at 272-73. The Equal Footing Doctrine is not explicit in the Constitution. In contrast, the property clause explicitly confers on Congress the authority to reserve or dispose of federally held land. *Compare* U.S. CONST., art. IV, § 3, cl. 1 (permitting admission of new states into the Union) *with* U.S. CONST., art. IV, § 3, cl. 2 (granting Congress exclusive authority to reserve or dispose of federal property). *See also* John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 510 (2018) ("Constitution makes no general reference to states being on an 'equal footing' with each other, . . . or for that matter, anything else[,]" and the framers had excised such a provision from earlier drafts.); James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 56 & n.215 (1997) (noting that the Equal Footing Doctrine's presumption has common-law origins).

[176] *Idaho*, 533 U.S. at 272-73.

[177] *Montana v. United States*, 450 U.S. 544 (1981).

[178] *Idaho*, 533 U.S. 262.

[179] The question of title to submerged lands on Indian reservations has rarely arisen in the Eighth Circuit. In *North Dakota ex rel. Board of University & School Lands v. United States*, 770 F. Supp. 506 (D.N.D. 1991), the State challenged United States ownership of portions of the bed of the Little Missouri River. The court ruled that the river was non-navigable and concluded the United States retained title to the bed of the River. *Id.* at 512-13. The Eighth Circuit affirmed. *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*, 972 F.2d 235 (8th Cir. 1986). In contrast to the Eighth Circuit, the Ninth Circuit has decided several cases after *Montana* regarding submerged lands ownership on Indian reservations. *See United States v. Milner*, 583 F.3d 1174, 1186 (9th Cir. 2009) (United States owns tidelands in trust for the benefit of the Lummi Tribe where the Tribe depended on use of the tidelands, earlier decisions quieted title in the United States, and the facts satisfied the *Idaho* two-step inquiry (discussed below)); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983) (Puyallup Tribe is beneficial owner of former riverbed where Puyallup Reservation was enlarged to include a segment on the river), *cert. denied*, 465 U.S. 1049 (1984); *Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (Muckleshoot Tribe is beneficial owner of former riverbed where Muckleshoot Reservation was enlarged to include Tribe's traditional fisheries), *cert. denied*, 465 U.S. 1049 (1984); *United States v. Washington*, 694 F.2d 188 (9th

These two decisions provide the analytical framework that follows. In the course of the discussion, I also point out flaws in Solicitor Jorjani's analysis and discuss other relevant Supreme Court precedent.

1. Montana v. United States

In 1975, the United States filed suit to quiet title to the bed and banks of the Bighorn River in the United States as trustee for the Crow Tribe.[180] The Supreme Court began "with a strong presumption against conveyance by the United States" to the Tribe, and then applied the principles established in *Shively v. Bowlby*[181] and *United States v. Holt State Bank*[182] to determine whether the establishment of the Crow Reservation constituted a "public exigency" such that title to the riverbed did not pass to the State upon statehood.[183]

The Court first looked to the treaties with the Crow Tribe.[184] Although the Crow Reservation was established before Montana statehood, the Court concluded that the treaties alone, which

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Cir. 1982) (Quinault Indian Nation owns the bed of the Quinault River), *cert denied*, 463 U.S. 1207 (1983); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (bed of south portion of lake owned by United States in trust for Confederated Salish & Kootenai Tribes where application of *Montana* analysis does not support overturning earlier Ninth Circuit cases recognizing Tribes' beneficial title), *cert. denied*, 459 U.S. 977 (1982). *But see United States v. Aam*, 887 F.2d 190, 196-98 (9th Cir. 1989) (tidelands not held in trust for Suquamish Tribe where the disputed tidelands did not supply a significant amount of the Tribe's fishery needs and, thus, no public exigency existed); *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir. 1983) (riverbed not held in trust for the Colorado River Indian Tribes where congressional intent to depart from the Equal Footing Doctrine could not be inferred because record did not show history of tribal dependence on river). With respect to *CSKT v. Namen*, the Supreme Court denied *certiorari* notwithstanding the Ninth Circuit's reliance on a case pre-dating *Montana*. *Polson v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (1982). In their petition for *certiorari*, the State of Montana and Mr. Namen explicitly argued that the circuit court had relied on a case, *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), that was irreconcilable with *Montana*. Petition for Writ of Certiorari at 16-19, *Namen v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (No. 82-22). The Court denied the petition, disregarding the petitioners' claim that *Namen*'s result "would virtually eviscerate the Equal Footing Doctrine in most of our Western states." *Id.* at 19. In both the *Puyallup* and *Muckleshoot* cases, the Court likewise denied *certiorari* even though the petitioners raised alleged inconsistencies with *Montana*. *See* Petition for Writ of Certiorari, *Port of Tacoma v. Puyallup Indian Tribe*, 465 U.S. 1049 (No. 83-958); Petition for Writ of Certiorari, *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 465 U.S. 1049 (No. 83-833).

[180] *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978).

[181] *Shively v. Bowlby*, 152 U.S. 1 (1894). *Shively v. Bowlby* established the general rule that, pursuant to the Equal Footing Doctrine, land under navigable water passes to newly admitted states at statehood. *Id.* at 26-50. Although *Montana* described the Equal Footing Doctrine's presumption as a "strong" one, various scholars have recognized that its basis is not a constitutional one but rather a "common law evidentiary presumption." Rasband, *supra* note 175, at 56; *see also* Leshy, *supra* note 175, at 509-10, 551-52. The only stated requirement for overcoming the presumption is reservation for a public purpose, *Shively*, 152 U.S. at 48, an otherwise "extremely slight limitation on Congress' power, akin to the rational basis test under the commerce clause." Rasband, *supra* note 175, at 56 n.215.

[182] *United States v. Holt State Bank*, 270 U.S. 49 (1926). *Holt State Bank* held generally that there must be shown some minimum level of intent to dispose of submerged lands to another party (there an Indian tribe) prior to statehood in order to defeat operation of the Equal Footing Doctrine. *Id.* at 57-59. The precise extent and context of the holding is open to interpretation and is discussed later in this section.

[183] *Montana v. United States*, 450 U.S. 544, 552 (1981).

[184] The first treaty is the same 1851 Treaty to which the three Tribes were also signatories. 1851 Treaty, *supra* note 119. Although the Court held against the Crow Tribe in *Montana*, this subsection discusses potential flaws with that opinion, and further discussion in Section III.A.1 provides reasons to distinguish that case from the situation here.

made no specific mention of the riverbed, were insufficient to overcome the Equal Footing Doctrine's presumption.[185] The Court focused on the Second Treaty of Fort Laramie, entered into between the United States and Crow Tribe in 1868 (1868 Treaty), interpreting it to have conveyed land to the Crow Tribe but finding that the treaty "in no way expressly referred to the riverbed" or otherwise made plain any intent to convey the riverbed.[186] The Court then briefly analyzed whether the situation of the Crow Tribe at the time of treating constituted a public exigency such that congressional intent to depart from the Equal Footing Doctrine could be inferred.[187] It found that the Crow Tribe was nomadic and depended primarily on buffalo; "fishing was not important to their diet or way of life."[188] Thus, the Court concluded that "the situation of the Crow Indians . . . presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States."[189] Accordingly, title passed to Montana upon its entry into the Union.[190]

The Court analogized the Crow Tribe's 1868 Treaty to the situation in *Holt State Bank*, stating that the 1868 Treaty merely "reserve[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory."[191] Ultimately, I find the situation here to be factually distinct from *Montana*, as discussed further in Section III.A, *infra*. The Jorjani Opinion, however, relied on language from and comparison to *Holt State Bank* in an inaccurate manner.[192] A discussion of *Holt State Bank* is useful, and I briefly address below the *Montana* Court's treatment of *Choctaw Nation* as well.

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[185] *Montana*, 450 U.S. at 554-55.

[186] *Id.* at 548, 554-55. *See* Treaty between the United States of America and different Tribes of Sioux Indians, 15 Stat. 636 (1868) (1868 Treaty). The Mandan, Hidatsa, and Arikara were not parties to the 1868 Treaty, and it is therefore inapplicable to the analysis here.

[187] 450 U.S. at 553.

[188] *Id.* The *Montana* Court's analysis regarding Crow fishing habits is not as comprehensive as it could have been. In a prior, related proceeding, former Justice Anthony Kennedy, then sitting as Judge on the Ninth Circuit, wrote the majority opinion in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), reversing the district court's conclusion that the Crow Tribe had not shown sufficient evidence of historical fishing. In reversing and vacating the decision of the Ninth Circuit, the Supreme Court made no mention of the court's opinion with respect to fishing, merely concluding that the criminal defendant had been subject to double jeopardy. *Finch v. United States*, 433 U.S. 676 (1977). Afterward, in the near-parallel proceeding of *United States v. Montana*, the district court again ruled that the Tribe had not shown any meaningful historical evidence of fishing, stating that the Ninth Circuit's opinion in *Finch* had been vacated and otherwise disagreeing with then-Judge Kennedy's reasoning. *United States v. Montana*, 457 F. Supp. 599, 600 n.1 (D. Mont. 1978). The Ninth Circuit reversed again, essentially adopting its prior conclusion. *United States v. Montana*, 604 F.2d 1162, 1166 (9th Cir. 1979). This time, the Supreme Court simply incorporated the district court's characterization of the record without analysis, leaving it to a single sentence. 450 U.S. at 556.

[189] 450 U.S. at 556.

[190] *Id.* at 556-57.

[191] *Id.* at 554.

[192] The inaccuracies track those pointed out by commentators discussing *Montana*. *See* John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW STORIES 535, 572-74 (Carole E. Goldberg et al. eds., 2011); Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 677-78, 681-82 (1981); *see also* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 118 n.126 (2002); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte *Young, Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787, 816 n.111 (1999).

a. Holt State Bank

The Jorjani Opinion read *Holt State Bank* to stand for the proposition that a "very plain" intent to reserve submerged land requires express reference to submerged lands, interpreting the record in *Holt State Bank* to reveal "no express reference to lakebed or submerged lands by the United States when establishing the reservation" leading to a negative finding in that case.[193] The Jorjani Opinion misreads *Holt State Bank*, however, confusing the underlying, complicated history of treaties and reservation establishment at issue there.

Holt State Bank involved the Red Lake Band of Chippewa, a tribe that never entered into a treaty with the United States to reserve land and therefore did not have *any* treaty establishing its reservation prior to Minnesota's statehood. The Court explained that the Red Lake Band's reservation came into existence "through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy *to the surrounding lands*."[194] "There was *no formal setting apart* of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters."[195] As explained more clearly in the Court's citation to *Minnesota v. Hitchcock*, the United States never created a reservation by formal document; rather one came to be recognized with respect to the remainder (*i.e.*, the *non-ceded* area) of the tribe's aboriginal territory.[196]

Where the Court did cite treaty language, it cited to treaties representing the last two Chippewa land cessions prior to statehood in order to focus on their *timing*, not their effect.[197] Neither of the two treaties discussed in *Holt State Bank* actually involved the Red Lake Band or its aboriginal land, and the Court used those treaties simply to illustrate that the final cessions resulted in the remaining Chippewa land being recognized as the Red Lake Indian Reservation (as the Court detailed in *Hitchcock*).[198] The *Holt State Bank* Court even noted that "[o]ther reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it."[199] The lack of any treaty language at all led the Court to deem the reservation occurred "in a general way" and was thus insufficient to reserve submerged land. But the Jorjani Opinion mistakenly relied upon the essentially irrelevant treaties, treated the non-Red Lake Band treaties' language as "general," and thereby effectively analogized to an inapposite case.

With the facts clarified, *Holt State Bank* stands for the proposition that, among a series of treaties *ceding* land (but never reserving land), nothing established an intent to diverge from the general policy against disposing of submerged land prior to statehood. The Jorjani Opinion instead analogized to language of reservation from irrelevant treaties involving other bands—language which the *Holt State Bank* Court never determined to be "general" even if it were relevant—in order to cast reservation language here as similarly general. That misreading expanded the scope

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[193] *See* Jorjani Opinion, *supra* note 5, at 8-9.
[194] *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926) (emphasis added).
[195] *Id.* (emphasis added).
[196] *See Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902) (analyzing whether a reservation existed and noting that formal cession or a formal setting apart of tracts is not necessary).
[197] *Holt State Bank*, 270 U.S. at 58.
[198] *Id.*
[199] *Id.* at 58 n.1.

of what constitutes a "general" reservation and mistakenly concluded that the Tribes' reservation documents here—those explicitly referring not just to the Missouri River, but specifically its banks—were in fact merely a reservation "made in a general way."[200]

b. Choctaw Nation *and constitutional disclaimer*

The *Montana* Court also distinguished *Choctaw Nation v. Oklahoma*,[201] which had held that the United States reserved the bed of the Arkansas River on behalf of certain Indian tribes.[202] In doing so, the *Montana* Court seemed to find decisive the fact that *Choctaw Nation* "placed special emphasis on the Government's promise that the reserved lands would never become part of any State."[203] Although unclear whether the issue was briefed, Congress authorized creation of the State of Montana in the 1889 Enabling Act with certain conditions, including that the state "forever disclaim all right and title . . . to all lands lying within said limits [of the state] owned or held by any Indian or Indian tribes."[204] Montana's constitution included such a provision (and still does).[205] Notwithstanding the importance ascribed by the Court to promises not to pass Indian lands to a state, the *Montana* Court did not discuss Montana's disclaimer. Conversely, as discussed below, the *Idaho* Court later found it important that the State there had disclaimed Indian lands.

In sum, the Jorjani Opinion erred in adopting and directly applying the *Montana* Court's apparent misreading of *Holt State Bank*. Although it is important to correct the misapplication of *Holt State Bank* in the Jorjani Opinion, *Montana* itself remains precedent with respect to the Court's holding that the Crow Tribe had not retained beneficial title to the bed of the Bighorn River. Putting aside proper application of *Holt State Bank*, the facts in *Montana* are distinguishable from the situation at issue here, as discussed in Section III.A.1.

2. Idaho v. United States

Twenty years after *Montana*, the Supreme Court resolved a quiet title action brought by the United States against the State of Idaho asserting the Coeur d'Alene Tribe's beneficial ownership of submerged lands within its Indian reservation.[206] This time, with a more robust analysis, the Court found in favor of tribal ownership.

The Coeur d'Alene Tribe:

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[200] The Jorjani Opinion's reading of *Holt State Bank* largely tracks a misreading that commentators have raised with respect to *Montana*. *See supra* note 192. The Tribes' situation is sufficiently distinct from the facts of *Montana* and its actual holding that the potential misreading of *Holt State Bank* does not factor into my application of *Montana*. But in applying *Holt State Bank* to the facts here as the Jorjani Opinion did, I need not follow the same misreading and misapply its holding when rebutting erroneous conclusions made in the prior opinion.

[201] *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

[202] *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981).

[203] *Id.*

[204] Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (providing for division of the Dakotas and enabling North Dakota, South Dakota, Montana, and Washington to form constitutions and be admitted to the Union).

[205] MONT. CONST. art. I, § 1.

[206] *Idaho v. United States*, 533 U.S. 262 (2001).

> traditionally used [Lake Coeur d'Alene] and its related waterways for food, fiber, transportation, recreation, and cultural activities. 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.[207]

The United States acquired through a treaty with Great Britain an area including the aboriginal territory of the Coeur d'Alene Tribe.[208] Thereafter, the Tribe agreed to cede to the United States most of its aboriginal territory, reserving for its exclusive use an area including "part of the St. Joe River . . . and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary."[209] An 1873 executive order established the Coeur d'Alene Reservation within the boundaries described in the agreement between the Tribe and the United States.[210] Through later agreements, the Tribe ceded portions of its reservation, including the northern portion of Lake Coeur d'Alene.[211] Congress ratified these later agreements in 1891, less than one year after passing the Idaho Statehood Act.[212]

The Court in *Idaho* formulated the following two-step test for determining whether the establishment of an Indian reservation defeats the Equal Footing Doctrine's presumption: (1) did "Congress intend[] to include land under navigable waters within the federal reservation"?; and, (2) did "Congress intend[] to defeat the future State's title to the submerged lands"?[213] If both are answered affirmatively, then the presumption is rebutted. Analogous to the situation here, the Executive Branch had initially established the Coeur d'Alene Tribe's reservation, giving the Court the opportunity to explain how the two-step test is met when a reservation is first made by executive order.[214] Referring to its prior decision in *United States v. Alaska*, the Court wrote: "the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title."[215] The Court stated that it "considered whether Congress was on notice that the Executive reservation included submerged lands, and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State[.]"[216]

Applying step one, the Court explained that the State of Idaho had conceded that the executive reservation clearly included submerged lands. The Court called the concession "a sound one," noting that contemporaneous congressional and executive documents demonstrated that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[217] Perhaps more importantly, the Court also noted the "unusual" boundary that crossed Lake Coeur D'Alene and cited comparatively to *United States v. Alaska*, discussed in detail below, for the

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[207] *Id.* at 265 (internal citations omitted).
[208] *Id.* The United States received from Great Britain title "subject to the aboriginal right of possession held by resident tribes." *Id.*
[209] *Id.* at 266.
[210] *Id.*
[211] *Id.* at 269-70.
[212] *Id.* at 270-71.
[213] *Id.* at 273.
[214] *Id.* at 273-74.
[215] *Id.* at 273.
[216] *Id.* at 273-74 (citing *United States v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997)).
[217] *Id.* at 274.

proposition that drawing a boundary on "the ocean side of offshore islands necessarily embraced submerged lands shoreward of the islands."[218] Accordingly, the Court accepted Idaho's concession and quickly moved to step two: congressional intent to defeat Idaho's title.[219]

Although not as clearly delineated as in *Alaska I* (or the yet-to-issue *Alaska II*), the Court applied step two by looking both to congressional notice of whether the reservation embraced submerged lands and to the purpose of the reservation.[220] The Court began its discussion by noting another concession that Idaho had made: Congress was on notice that the executive reservation included submerged lands, at least after an 1888 report from the Secretary of the Interior stating that the reservation "embraced nearly 'all the navigable water of Lake Coeur d'Alene.'"[221] The Court considered the concession "prudent in light of the District Court's findings of fact," noting that the lower court had "not merely impute[d] to Congress knowledge of the land survey" but also recognized the continuous importance of "submerged lands and related water rights" to the Tribe. The Court also relied on the finding that the United States was prompted to negotiate with the Tribe "in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement" and that it "could only achieve its goals . . . by agreeing to a reservation that included the submerged lands."[222] The Court further noted that Congress's dealings with the Tribe "show[ed] clearly that preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation."[223] Finding no such agreement by the Tribe to relinquish beneficial ownership of the submerged lands, the Court determined Congress "underst[ood] that the . . . reservation's submerged lands had not passed to the State."[224] Accordingly, the Court held: "Congress recognized the full extent of the . . . reservation . . . it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands" within that reservation.[225]

Although the congressional record referenced waterways in *Idaho* because of conflict in negotiations between the Tribe and the federal government, both there and here nothing explicitly references submerged lands. There, congressional and executive documents were silent as to the lakebed yet plain in inclusion of certain portions of the lake and other waterways within the reservation; the Secretary's report to Congress simply noted that the reservation embraced "navigable waters," and the Secretary later responded to an inquiry from the Senate that the Tribe had rights over "navigable waters."[226] The lower courts and ultimately the Supreme Court concluded that these generic references to water features equated with being on notice that submerged lands were included in the reservation. Notwithstanding this silence with respect to submerged lands, the Court further determined that "the purpose of the reservation

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[218] *Id.*
[219] *Id.*
[220] *Id.* at 275-79.
[221] *Id.* at 275.
[222] *Id.* at 275-76.
[223] *Id.* at 276.
[224] *Id.* at 279. Also important to the Court's analysis was the course of dealing between the United States and the Coeur d'Alene Tribe, which included Acts of Congress in 1886, 1888, and 1889 that acknowledged tribal ownership of its reservation. *Id.* at 276-81.
[225] *Id.* at 281.
[226] *Id.* at 275-76.

would have been compromised if the submerged lands had passed to the State," and thus the Court concluded that the submerged lands were reserved for the Coeur D'Alene Tribe, despite the fact that Congress formally established the reservation eight months after statehood.[227]

3. United States v. Alaska (Alaska I)

In *United States v. Alaska*, the Supreme Court held that the federal government reserved and thus defeated future state title to submerged lands in both the National Petroleum Reserve (Reserve) and the Arctic National Wildlife Refuge (ANWR).[228] Although this case did not address Indian lands, the legal concepts underlying the Equal Footing Doctrine remain the same.

In *Alaska I*, the Court reviewed the reserving documents, executive and congressional records, and Alaska's statehood enabling act. The executive order creating the Reserve "described a boundary following the Arctic 'coast line,' measured along 'the ocean side of the sandspits and islands forming the barrier reefs[.]'"[229] As originally described in the Bureau of Sport Fisheries and Wildlife withdrawal application, the ANWR boundary began "from 'the line of extreme low water of the Arctic Ocean' . . . and follow[ed] 'westerly along the said line of extreme low water, including all offshore bars, reefs, and islands.'"[230] Foreshadowing the two-step process more formally outlined in *Idaho*, the Court in *Alaska I* approached the matter first by determining whether submerged lands were in fact included within the reservations and then by determining whether the United States intended to defeat future state title to those lands.[231]

a. Inclusion of submerged lands within the reservations

As in *Idaho*, no direct or express references to "submerged lands" existed in the record. Nonetheless, the Court found that the relevant documents reserved submerged lands and that the federal government's purposes for each reserve also required federal ownership of those lands.[232]

The Reserve was set aside by Executive Order in 1923 to secure an oil supply for the Navy as "at all times a matter of national concern."[233] The Order "sought to retain federal ownership of land containing oil deposits," recognizing "large seepages of petroleum . . . and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast."[234] No part of that Order specifically mentioned submerged lands, however. Moreover, contrary to the Jorjani Opinion's view, the language did not necessarily implicate submerged lands. The "Arctic Coast" could have simply meant the dry coastline and shore of the Reserve, especially in light of the Reserve's enormous region of upland and interior land—a land area approximately the size of Indiana.

The *Alaska I* Court determined that the Reserve's explicit boundary call, such that it "follows the ocean side" of various islands, meant that it "necessarily includes tidelands landward of the

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[227] *See id.* at 273-81.
[228] *United States v. Alaska*, 521 U.S. 1 (1997) [hereinafter *Alaska I*].
[229] *Id.* at 36.
[230] *Id.* at 51.
[231] *See, e.g., id.* at 36, 41, 45-46, 55.
[232] *See id.* at 32-62.
[233] *Id.* at 39 (citing Exec. Order 3797-A (Feb. 27, 1923)).
[234] *Id.*

islands" and thus "necessarily embraced certain submerged lands."[235] This conclusion contrasts with *Montana*'s view that the presence of navigable waters within reservation boundaries does not in itself mean the submerged lands were reserved.[236] Given that neither the documents reserving the Crow Reservation nor the Reserve mention "submerged lands," the distinction drawn in *Alaska I* appears to turn on specific boundary calls: the obvious reference to water features, including some waters and excluding others, indicated that submerged lands falling within the boundaries were clearly included in the reservation.[237] Further, the Court explained that "[t]he purpose of reserving in federal ownership all oil and gas deposits within the Reserve's boundaries would have been undermined if those deposits underlying lagoons and other tidally influenced waters had been excluded."[238] Thus, the *Alaska I* Court concluded that "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area."[239]

Similarly, ANWR's reserving document expressly referenced "countless lakes, ponds, and marshes" as nesting grounds for migratory birds and "river bottoms with their willow thickets" furnishing habitat for moose.[240] But as with the Reserve, nowhere was there an express reference to submerged lands. The boundary description did, however, contain an explicit reference to the low water line, again showcasing careful thought about whether and which submerged lands to include. The Court concluded that, "[b]ecause the boundary follows the line of extreme low water, [ANWR] necessarily encompasses the periodically submerged tidelands."[241] Once again, the Court also looked behind those words to ANWR's purpose, explaining that its justification "illustrates that [ANWR] was *intended* to include submerged lands beneath bodies of water . . . [and that] the drafters of the application *would not have thought* that the habitats mentioned were only upland."[242] Like the Reserve, the Court held that ANWR's application reflected "a clear intent to reserve submerged lands" because its "boundary was drawn so that the periodically submerged tidelands were necessarily included within it," and the description also referred to submerged features like bars and reefs; "[m]oreover, the purpose of the federal reservation . . . supported inclusion of submerged lands."[243]

b. Intent to defeat future state title

Moving to the precursor of *Idaho*'s second step, the *Alaska I* Court relied primarily on Alaska's

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[235] *Id.* at 36, 38-39.
[236] *See id.* at 38-39 (characterizing *Montana* Court's statement).
[237] *See id.* at 40 ("The boundary by its terms embraces certain coastal features.").
[238] *Id.* at 39.
[239] *Id.* at 40. The Court also rejected the State of Alaska's argument that, even if submerged lands were clearly intended to be included in the reservation, the President lacked authority to include them. *Id.* at 43. Although not relevant to the issues here, the Court stated that, because the reservation clearly included submerged lands, "[t]hat instrument placed Congress on notice that the President had construed his reservation authority to extend to submerged lands." *Id.* at 45. The corollary is that an executive order which satisfies *Idaho*'s first step is sufficient to place Congress on notice that submerged lands have been included.
[240] *Id.* at 51.
[241] *Id.*
[242] *Id.* (emphasis added).
[243] *Id.* at 55.

statehood enabling act and its requiring disclaimer of the lands at issue.[244] With respect to the Reserve, the Alaska Statehood Act contained a provision, Section 11(b), stating:

> Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States . . . for the exercise by the Congress of the . . . power of exclusive legislation . . . over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military . . . purposes, including naval petroleum reserve numbered 4.[245]

The Court agreed with the Special Master that the provision "clearly contemplate[d] continued federal ownership of the Reserve," and therefore Congress "expressed a clear intent to defeat state title."[246] In rejecting Alaska's exceptions to the Special Master's Report, the Court noted that Section 11(b) recognized "that the United States 'owned' the Reserve" and that, because the Reserve included submerged lands under step one, "Section 11(b) thus reflects a clear congressional statement that the United States owned and would continue to own submerged lands included within the Reserve."[247] Although the statehood act's disclaimer made apparent that it applied to the Reserve by virtue of its explicit mention, the disclaimer made *no* particular mention of submerged lands. Thus, as long as *Idaho*'s first step concludes that a reservation includes submerged lands, a disclaimer related to that reservation *generally* also disclaims submerged lands and is sufficient to satisfy *Idaho*'s second step.

Similarly, the statehood act contained a disclaimer relevant to ANWR. Section 5 generally provided that the United States would retain title to all property to which it already held title, except as provided in a later section.[248] Property used for conservation and protection of fisheries and wildlife would pass to Alaska, with the exception "[t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."[249] On this point, the Special Master determined that the "application reflected an intent to defeat Alaska's title" because it was "'meant to have permanent effect,' [and] not merely to hold whatever submerged lands were made part of [ANWR] until Alaska's admission to the Union."[250] The Court agreed, stating that "an intent to defeat state title to submerged lands must be clear" and that "the operative provision of the Alaska Statehood Act . . . reflects a very clear intent to defeat state title."[251] As with the Reserve, the Court effectively held that, so long as a reservation includes submerged lands under *Idaho*'s first step, a disclaimer applicable to the

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[244] *Id.* at 41-43, 55-61. *See also* Leshy, *supra* note 175, at 560-61 (discussing cases in which the U.S. Supreme Court has enforced statehood enabling act provisions related to public lands and Congress's plenary authority under the Constitution's Property Clause to attach property-related enabling conditions without offending notions of state admission under "full equality").

[245] An Act to Provide for the Admission of the State of Alaska into the Union, Pub. L. No. 85-508, § 11(b), 72 Stat. 339, 347 (1958); 521 U.S. at 41.

[246] 521 U.S. at 41.

[247] *Id.* at 42.

[248] *Id.* at 55.

[249] *Id.* (alteration in original) (quoting Alaska Statehood Act § 6(e)).

[250] *Id.* at 49. The Special Master determined for other reasons that submerged lands within ANWR had passed to Alaska. *Id.* The Court rejected the Master's conclusion in this regard. *Id.* at 57.

[251] *Id.* at 57.

reservation in general is sufficient to defeat state title.[252]

4. Alaska v. United States (Alaska II)

In *Alaska II*, the State filed suit against the United States to quiet title to several large areas of submerged lands located southeast of Alexander Archipelago as well as submerged lands within Glacier Bay National Monument (Monument).[253] "Alaska's claims rest[ed] on the Equal Footing Doctrine and the Submerged Lands Act of 1953[.]"[254] The ruling regarding the Monument provides a useful post-*Idaho* example and illustrates the continuity of theory from *Alaska I* through *Idaho* to *Alaska II*.[255]

The State claimed title to "all the lands underlying marine waters within the boundaries of" the Monument, and the federal government argued that it retained title to the submerged lands.[256] Initially created in 1925 through Presidential proclamation under the Antiquities Act and later expanded,[257] the Monument protected a natural area of significant ecological and scientific interest. The United States argued that "Congress expressly retained federal ownership of the submerged lands within the boundaries" of the Monument in the statehood act, and thus the presumption of State ownership was overcome.[258]

The Court appointed a Special Master who prepared an extensive report recommending summary judgment in favor of the United States.[259] Alaska's Monument-related exceptions to the report did not challenge *Idaho*'s first step. Nonetheless, the Court acknowledged "ample support" for the step-one conclusion, and the Master's determination that the Monument "clearly included the submerged lands within its boundaries" is useful.[260] The Master looked to the text of the three proclamations (1925, 1939, and 1955) for evidence of the inclusion of submerged lands within the reservation that could provide notice to Congress.[261] As in *Alaska I* and *Idaho*, no explicit mention of submerged lands existed, yet the Master found that the 1925 and 1939 proclamations clearly included waters within the boundaries of the Monument; the lines were carefully drawn to cut across, and bend to include, certain waters.[262] The 1939 proclamation also drew particular boundary lines across an inlet to "the principal channel," then "southerly along the center of the

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[252] *See id.* ("Congress clearly contemplated continued federal ownership of certain submerged lands . . . so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'").
[253] *Alaska v. United States*, 545 U.S. 75 (2005) [hereinafter *Alaska II*].
[254] Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title, *Alaska II*, 545 U.S. 75 (2005) (No. 128), 2004 WL 5809425, at *3 (Mar. 2004) ("Special Master's Report" or "*Alaska II* Special Master's Report").
[255] The resolution of Alaska's claim to submerged lands in and around Alexander Archipelago were resolved without the need to perform an equal footing analysis and are therefore not relevant to the issues in this Opinion.
[256] Special Master's Report, 2004 WL 5809425 at *227 (quoting Pl.'s Amended Complaint ¶ 61).
[257] *Id.* at *227-28. Glacier Bay National Monument is now called Glacier Bay National Park and Preserve.
[258] *Id.* at *228.
[259] *Alaska II*, 545 U.S. 75, 78 (2005).
[260] *Id.* at 101-02.
[261] Proclamation No. 1733, 43 Stat. 1988 (1925); Proclamation No. 2330, 4 Fed. Reg. 1661 (1939); and Proclamation No. 3089, 20 Fed. Reg. 2103 (1955). *See* Special Master's Report, 2004 WL 5809425 at *232-42.
[262] Special Master's Report, 2004 WL 5809425 at *233-38 (noting the boundary crosses Glacier Bay so as to include bay waters within the reserve and bends to include certain waters and islands within the reserve).

principal channel" to a junction with another water body, and then "along the center" of a further series of water bodies.[263]

The Special Master also considered the "effect of excluding submerged lands on the purpose of the Monument."[264] The Master concluded that the proper standard is "whether excluding the submerged lands from the Monument would 'compromise' or 'undermine' the purposes of the Monument," not the State's higher standard that would require exclusion to "*entirely defeat* a primary purpose of the reservation."[265] The Master's recommendations provided "that the Court look[] for an impairment of the purposes of the Monument, not a complete thwarting of them."[266] The Master found that the Monument's purposes included studying tidewater glaciers, which terminate in the sea, and their study might include "long-term mooring of vessels" in the waters nearby.[267] Similarly, some remnants of interglacial forests reserved for study might "rest on submerged lands," while another purpose was to protect wildlife.[268] Because wildlife like brown bears "eat barnacles and rye and sedge grasses on tidelands and swim to islands to gather seabird eggs," the Master concluded that protecting wildlife necessarily required protecting submerged lands.[269] The Court upheld the Master's recommendations.[270]

Regarding *Idaho*'s second step, the Court's overruling of Alaska's exceptions further illustrates the importance of disclaimers when evaluating intent to defeat state title. The State abandoned the broad arguments previously rejected in *Alaska I*, urging instead that the Alaska Statehood Act should be read narrowly such that reservations made under the Antiquities Act (like the Monument) were not included within its disclaimer.[271] The Court rejected that argument and reiterated its holding in *Alaska I* that the disclaimer "expressed congressional intent to retain title to a reservation . . . and that the statute's declaration of intent was sufficient to defeat Alaska's presumed title."[272] Quoting *Alaska I*: "Congress clearly contemplated continued federal ownership of certain submerged lands . . . so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'"[273] *Alaska II* thus makes plain that, when Congress makes disclaiming particular lands a prerequisite of statehood, such disclaimers defeat state title to submerged lands within those descriptions.

Finally, the Court included useful dicta regarding congressional intent to defeat future state title, proposing that the requisite intent might be found in executive reservations themselves without need to rely on the statutory disclaimer.[274] The Court described two premises: the Antiquities Act empowered the President to reserve submerged lands; and such monuments inherently included the essential purpose of conservation and enjoyment in ways "as will leave them

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[263] *Id.* at *237.
[264] *Id.* at *242.
[265] *Id.* at *243 (emphasis in original).
[266] *Id.*
[267] *Id.* at *245-47.
[268] *Id.* at *251, *253.
[269] *Id.* at *254, 264.
[270] *Alaska II*, 545 U.S. 75, 110 (2005).
[271] *Id.* at 106.
[272] *Id.* at 105.
[273] *Id.* (citing Alaska Statehood Act § 6(e)); *see also supra* Section II.B.3.b (disclaimer discussions in *Alaska I*).
[274] 545 U.S. at 103.

unimpaired for the enjoyment of future generations."[275] "From these two premises it would require little additional effort to reach a holding that the Antiquities Act itself delegated to the President sufficient power not only to reserve submerged lands but also to defeat a future State's title to them."[276] Although the Court ultimately determined that the statehood act disclaimer sufficed to show the requisite congressional intent, the Court strongly suggested that, when Congress delegates to the executive authority to create reservations intended to continue in perpetuity, the act of reservation alone satisfies both steps of the *Idaho* analysis.[277]

5. Synthesizing Alaska I, Idaho, and Alaska II

Idaho provided a formalized statement of the "two-step" process for analyzing Equal Footing Doctrine questions in the context of executive reservations and did so while confirming its applicability to Indian reservations. That being said, it should be viewed as one in a series of companion cases beginning with *Alaska I*, through *Idaho*, and concluding with *Alaska II* that employ the same framework for analysis.

The first step assesses whether submerged lands were clearly intended to be included in the reservation prior to statehood. Although an element of intent exists here, it should not be mistaken for the intent at issue in step two.[278] The terms of the reservation boundaries can themselves illustrate the requisite intent and need not mention submerged lands, riverbeds, or the like; instead, simply referencing particular waters or water features in a way that shows the reservation purposefully includes some waters (and when it excludes other waters) is sufficient to establish that the reservation included the underlying submerged lands. The purpose of the reservation is also relevant, but may simply serve as additional support.[279] As the Special Master described and the Court upheld in *Alaska II*, the proper standard is whether the purpose would have been compromised or undermined, not that it would be *entirely defeated*.[280]

The second step assesses whether Congress intended to defeat future state title to those lands. *Idaho* broke this step into two inquiries—notice and purpose of the reservation—but *Alaska I & II* make clear that, when a state has disclaimed land as a prerequisite for entry into the Union, the disclaimer controls.[281] The reservation's purpose may further support the conclusion, but *Alaska*

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[275] *Id.*

[276] *Id.*

[277] This conclusion is further supported by the Court's earlier comments in *Alaska I*, in which it cited approvingly the Special Master's report that found the application for ANWR "reflected an intent to defeat Alaska's title" because "the reservation was 'meant to have permanent effect,' not merely to hold whatever submerged lands were made part of [ANWR] until Alaska's admission to the Union." *Alaska I*, 521 U.S. 1, 49 (1997).

[278] *See infra* note 340.

[279] The analysis in *Alaska I* substantially implies that the terms used to draw the boundaries in that case were sufficient alone to establish step one, as it emphasized that the executive order there, "in describing a boundary following the ocean side of offshore islands and reefs, . . . created a Reserve that *necessarily* embraced certain submerged lands." *Alaska I*, 521 U.S. 1, 39 (1997) (emphasis added; emphasis in original removed).

[280] Special Master's Report, 2004 WL 5809425 at *243.

[281] *Idaho* recognized a similar constitutional disclaimer, but it did not rest its step two conclusion on the disclaimer as in *Alaska I & II*. Given the dissent's view that the disclaimer "simply begs the question," *Idaho v. United States*, 533 U.S. 262, 285 n.2 (2001), and given the wealth of other correspondence available to evidence congressional intent, perhaps the majority simply avoided the issue. The return to reliance on a disclaimer in *Alaska II* shows that *Idaho* did not otherwise cast doubt on the relevance of disclaimers.

I & II illustrate that a disclaimer itself shows clear evidence of congressional intent and extends to submerged lands so long as the disclaimer applies to the reservation generally and the lands were included within the reservation under step one.[282]

Although the *Idaho* Court appeared to assess under step two whether Congress had notice that the executive reservation included submerged lands, its treatment does not make clear that it fits neatly into either step. Regardless of under which step the "notice" question falls, that standard is not so high as to *require* the evidence of correspondence presented in *Idaho*. Instead, these three cases show sufficient notice occurs so long as step one has been satisfied. In *Alaska I*, the Court found the executive order (which under step one "reflected a clear intent to include submerged lands within the Reserve") was sufficient to "place[] Congress on notice" that the President had reserved submerged lands in the Reserve;[283] maps submitted by the Secretary of the Interior, with no particular language but merely reflecting reservation boundaries, placed Congress "on notice" that ANWR included submerged lands.[284] In *Alaska II*, the Special Master analyzed "notice" under the first step, focusing entirely on the Monument reservation's terms and specified boundaries.[285] Even in *Idaho*, the secretarial report to Congress, which led the state to concede notice, mentioned only that the reservation embraced navigable waters (not submerged lands),[286] and the same was evident from the terms and boundaries of the executive reservation.

Finally, with respect to assessing the reservation's purpose under step two, both *Alaska I & II* suggest that concepts of permanency underlying the reservation's purpose support inferring congressional intent to defeat future state title. *Alaska I* noted that the Special Master found the application for ANWR "reflected an intent to defeat Alaska's title" because the reservation was "meant to have permanent effect;"[287] *Alaska II*'s dicta regarding finding delegated authority under the Antiquities Act sufficient was based upon the Act's stated intent of ensuring monuments remain unimpaired for the enjoyment of future generations.[288] Certainly, the permanency of homelands for Indian tribes provides a similarly powerful inference of intent to defeat future state title.[289]

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[282] Implicit in the Court's precedent is the rejection of the *Idaho* dissent's concerns about state constitutional disclaimers "beg[ging] the question" of whether submerged lands are "owned or held," *Idaho v. United States*, 533 U.S. 262, 285 n.2 (2001). This result also suggests that state disclaimers of land remove the question from the Equal Footing Doctrine analysis: the doctrine applies at the moment of statehood; however, when Congress has made disclaimer of land a *prerequisite* to statehood, state ownership of such land has already been disclaimed and thus falls outside the scope of the Equal Footing Doctrine. The first step of *Idaho* likely remains a framework in specific cases to make factual determinations regarding whether particular submerged land has in fact been disclaimed.

[283] *Alaska I*, 521 U.S. at 45.

[284] *Id.* at 56.

[285] Special Master's Report, 2004 WL 5809425 at *232-42.

[286] *Idaho*, 533 U.S. at 275.

[287] *Alaska I*, 521 U.S. at 49.

[288] *Alaska II*, 545 U.S. 75, 103 (2005).

[289] *See, e.g., Winters v. United States*, 207 U.S. 564, 566-67 (1908). "The general purpose [of an Indian 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); *see also United States v. Adair*, 723 F.2d 1394, 1408-09 (9th Cir. 1983).

6. Donnelly and Alaska Pacific Fisheries

The Jorjani Opinion relied on two other cases in which the Supreme Court found submerged lands included in the tribal reservations based on the importance of fishing. In *Alaska Pacific Fisheries v. United States*, a tribal reservation was established on the Annette Islands, an Alaskan island chain where fishing provided the most prominent means of subsistence.[290] The islands bore timber but "only a small portion of the upland is arable," and the tribal members "were largely fishermen and hunters" who "looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence[.]"[291] The Court held that the "Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential."[292]

In *Donnelly v. United States*,[293] the Court concluded that the Klamath River within the boundaries of the then-Hoopa Valley Reservation was reserved for the Indians of the reservation. *Donnelly* explained that they "established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents . . . to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence[.]"[294]

Although the Tribes here also relied on fishing and other uses of the riverbed, the Jorjani Opinion attempted to distinguish *Alaska Pacific Fisheries* and *Donnelly* by arguing that tribal reliance on fishing in those cases exceeded the Tribes' reliance on fishing here and thus submerged lands could not have been necessary for the Fort Berthold Reservation. I reject this reasoning as a far too narrow, prescriptive rendering of the Supreme Court's "purpose" analysis and also contrary to the historical record here. Fishing and fish trapping, shellfish gathering, use of driftwood, and other uses involving the submerged lands and waters of the Missouri River provided a core plank of the Tribes' lifeways and subsistence. Moreover, the annual capture of float bison in early spring, a critically lean time of year, parallels neatly with the tribe's reliance on harvest of the annual salmon runs in *Donnelly*.

Even if, *arguendo*, the *Alaska Pacific Fisheries* and *Donnelly* tribes were more reliant on their

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[290] *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918).
[291] *Id.* at 88.
[292] *Id.* at 89.
[293] *Donnelly v. United States*, 228 U.S. 243 (1913). *Donnelly* involved an area originally set aside as the Klamath River Reservation (inhabited primarily by Yurok Indians) by executive order dated November 12, 1855. I CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 816-17 (2d ed. 1904). The reservation extended approximately twenty miles up the Klamath River from the Pacific Ocean and included lands one mile in width on either side of the river. Because of confusion regarding the status of the original Klamath River Reservation after the later establishment of the Hoopa Valley Reservation (centered on the Trinity River, a tributary to the Klamath, primarily for Hupa Indians), President Harrison issued an executive order in 1891 forming the "Joint" or "Extended" Hoopa Valley Reservation, encompassing the Klamath River Reservation, the original Hoopa Reservation, and an additional strip of land along the Klamath River that connected the two. *Id.* at 815; *see also Donnelly*, 228 U.S. at 253; S. Rep. No. 564, 100th Cong., 2d Sess. at 4-7 (1988) (Senate Report for 1988 Act). Section 2 of the 1988 Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988 Act), partitioned the Joint Hoopa Valley Reservation between the Hoopa Valley and Yurok Tribes, establishing the original Klamath River Reservation and connecting strip (the area at issue in *Donnelly*) as the Yurok Reservation. *See also* Solicitor Leshy, U.S. Dep't of the Interior, M-36979, *Fishing Rights of the Yurok and Hoopa Valley Tribes* (Oct. 3, 1993).
[294] *Donnelly*, 228 U.S. at 259.

fisheries for subsistence than the Tribes were here on their fisheries, shellfish, and float bison, the Jorjani Opinion creates a new rule from whole cloth that Tribes must be *primarily* dependent on fishing in order to justify a finding that submerged lands were reserved. Nowhere has the Supreme Court so decided. Moreover, the Coeur d'Alene Tribe's reliance on fishing in *Idaho* compares favorably to the MHA Nation's practices as well, both relying on "fish weirs and traps anchored in riverbeds and banks."[295] Even if fishing were only one plank in the Tribes' ability to sustain themselves, one cannot remove a central plank in a people's subsistence and expect them to thrive or even survive in a self-sustaining manner. Review of the historical information available since the Jorjani Opinion confirms that adaptable, dynamic use of resources was necessary to live a subsistence lifestyle in the area. "[S]ubsistence through farming alone was a tall order on the northern plains,"[296] and other river-dependent resources were necessary.

Taken together, these cases stand for the proposition that tribal reliance on fisheries serves a prominent and accepted reason to find that a reservation's purpose supports including submerged lands. No threshold or benchmark exists in the law for how reliant an Indian tribe must be on fishing in order to find a reservation of submerged lands. Rather, the analysis should take the historical record—including its evidence (or lack thereof) on tribal fishing practices and other river-dependent uses—into account holistically.

C. Interplay of Indian Law Canons and the Equal Footing Doctrine

The Equal Footing Doctrine's presumption was developed outside the context of Indian law.[297] In cases in which other legal presumptions might apply, the Court has set them aside or given them a different weight when arising in the context of and in conflict with Indian law.[298] When the Court has faced the interplay of the Equal Footing Doctrine and title to lands beneath navigable waters in the Indian context, however, the Court has applied the presumption while sometimes explicitly invoking the canons and at other times making no mention of them.[299]

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[295] *Idaho v. United States*, 533 U.S. 262, 265 (2001).

[296] Stevens Report, *supra* note 15, at 18.

[297] *See Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894) (discussing origin of doctrine in English common law); *see also Pollard v. Hagan*, 44 U.S. 212, 228-30 (1845) (title to non-coastal tidelands pass to state upon admission to Union; non-Indian-law case). For an interesting and extensive critique of *Pollard*, including how *Shively* and numerous other cases have narrowed its holding, see Leshy, *supra* note 175, at 531-41, 551-53.

[298] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999) (presumed legality of executive orders not given same weight in face of required resolution of treaty ambiguities in favor of Indians); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985) (dealing with presumption against repeals by implication); *see also Equal Emp't Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001) (setting aside normal presumption that omission from ADEA of a Title VII provision indicates deliberate choice by Congress); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (typical *Chevron* deference not applied).

[299] *Compare Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (applying rule that treaties be interpreted as tribe would have understood and resolving doubtful expressions in favor of Indians, while still acknowledging presumption found in Equal Footing Doctrine), *and Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (appealing to liberal construction in favor of Indians in face of question as to whether United States reserved submerged lands adjacent to islands), *with Idaho*, 533 U.S. 262 (applying the "default" rule presuming passage of navigable stream bed title to states), *and Montana v. United States*, 450 U.S. 544 (1981) (applying presumption without mention of canons by majority).

As noted above, *Montana* and *Idaho* each applied the Equal Footing Doctrine's presumption without analysis of the Indian canons.[300] But neither case overturned prior precedent making explicit use of the canons, such as *Choctaw Nation*.[301] In *Choctaw Nation*, the Court held that the United States intended to and did transfer the relevant bed of the Arkansas River to the Cherokee, Choctaw, and Chickasaw Nations.[302] The Court wrote that "nothing in the *Holt State Bank* case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor."[303]

On the basis of the Court's precedent, the analysis in circumstances like these begins with the presumption that title to lands beneath navigable waters passes to the state. In determining whether that presumption is overcome, the inquiry should apply the Indian law canons where appropriate to the facts.[304] An intent to include lands beneath navigable waters in a reservation and an accompanying intent to defeat future state title are necessarily factual inquiries that turn on interpretation of controlling documents—here, treaties, agreements, and executive orders—as well as historical circumstances surrounding those documents. Interpretation of these types of documents are at the heart of the canons, and nothing in recent precedent has stated that the canons should not be used.[305] Thus, I will proceed within the framework of *Idaho*'s equal footing analysis with an eye toward applying the canons where interpretation of ambiguities in the documents is necessary. Some ambiguity exists here: the relevant documents explicitly include the river within the reservation, but do not explicitly address the riverbed or submerged land.

I find this approach to be the correct one despite its abandonment in the Jorjani Opinion. There, in a footnote, the opinion claimed that the "Supreme Court has not invoked the Indian canon of construction since development of its two-part test to defeat Equal Footing on Executive Order reservations."[306] Technically true, but this reasoning is inherently flawed: the Court finished

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[300] *See* 450 U.S. 544; 533 U.S. 262.

[301] *See* 450 U.S. at 567-68 (Stevens, J., concurring); 533 U.S. 262.

[302] *Choctaw Nation v. Oklahoma*, 397 U.S. at 635.

[303] *Id.* at 634.

[304] *See United States v. Idaho*, 210 F.3d 1067, 1073 (9th Cir. 2000), *aff'd, Idaho*, 533 U.S. 272 ("Juxtaposed in this case are two principles, both of which must be accorded due weight: the canon of construction favoring Indians and the presumption under the Equal Footing Doctrine that a State gains title to submerged lands within its borders upon admission to the Union."). Also relevant is the rule that tribal property rights, including aboriginal title, continue to exist until explicitly extinguished. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 114 (Nell Jessup Newton ed., 2012); Leshy, *supra* note 175, at 517 (noting that land acquisitions by the United States were subject to Indian or aboriginal title and that only the United States could extinguish such title).

[305] The canons are rooted in otherwise standard common-law presumptions regarding treaties: "treaties are construed more liberally than private agreements, and to ascertain their meaning [courts] look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 198 (1999). Analogues to these rules exist in contract law and property law, which also favor a construction benefitting the Tribes. For example, contracts are to be construed against the drafter. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d. 1465, 1486 (D.C. Cir. 1997); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). Here the drafter would be the United States. In property law, a deed is construed against the grantor. *See, e.g., New York Indians v. United States*, 170 U.S. 1, 25-26 (1898). Applying these rules, the United States was the entity recognizing title in the Tribes.

[306] Jorjani Opinion, *supra* note 5, at 3 n.14.

developing its test in *Idaho* and, to our knowledge, has not had occasion to employ it since then. Although the Court did not explicitly employ the canons in *Idaho*, a reasonable interpretation is that the majority did not feel it necessary to reach their conclusion. Canons of interpretation help resolve ambiguities, and the Court did not appear to perceive any ambiguity in *Idaho*. Indeed, even the State apparently conceded that "Congress was on notice that the Executive Order reservation included submerged lands."[307] That the Court did not use the Indian canons in *Idaho* in no way abrogates its applicability here or in other Indian reservation cases.

As described below, the relevant documents and historical context suffice to show "clear intent" to include submerged lands in the Reservation as required under *Idaho* even without application of the Indian canons. Thus, even if the canons were inapplicable, abundant evidence remains to find that these lands are reserved for the Nation. The application of the Indian canons where appropriate both buttresses this conclusion and provides, should it be required, an independent line of reasoning sufficient to find that the relevant documents reserved submerged lands.

III. ANALYSIS

The first question to consider is whether, under the Equal Footing Doctrine, the United States continued to hold in trust on behalf of the MHA Nation the mineral interests underlying the original riverbed of the Missouri River within the Reservation boundaries. Because the answer to that question is yes, the second question is how the 1949 Takings Act and the 1984 Mineral Restoration Act affected the Nation's mineral interests underlying reservation trust lands.[308] Ultimately, I conclude that application of the Equal Footing Doctrine requires finding that the original riverbed of the Missouri River did not pass to the State of North Dakota and that the 1949 Act either never took the riverbed out of trust, or in the alternative, the 1984 Act has restored the riverbed minerals to trust.[309]

A. Congress Reserved the Bed of the Missouri River within the Boundaries of the Reservation such that Title to the Riverbed Did Not Pass to the State of North Dakota under the Equal Footing Doctrine.

For the reasons set forth below, I reaffirm the conclusions reached in the 1936 M-Opinion and 2017 Tompkins Opinion that, at the time of North Dakota's entry into the Union, the bed of the Missouri River as it flows within the Reservation did not pass to the State but remained held by the United States in trust for the Nation. I have updated the analysis with research presented to the Department after 2017. I note that this conclusion is consistent with the IBLA's 1979 analysis as well. Although the IBLA cannot adjudicate the question of the government's ownership of mineral rights with finality, the IBLA may "hear the dispute and rule finally for the Department on whether the determination that it owns" certain minerals is "rationally based."[310]

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[307] *Idaho v. United States*, 533 U.S. 262, 275 (2001).

[308] This Opinion does not address land excepted under the 1984 Act. *See* 98 Stat. at 3152; Section I.C, *supra.*

[309] Alternatively, an argument exists that the 1949 Takings Act could act upon the riverbed even if held by the State of North Dakota. The Jorjani Opinion explicitly concludes otherwise. Although I disagree with the reasoning of the Jorjani Opinion on this point, I need not address the issue here, finding as I do in favor of the Nation under the Equal Footing Doctrine.

[310] *See, e.g., City of San Antonio, Texas*, 65 IBLA 326, 330-331 (July 15, 1982).

In 1936, Solicitor Margold issued an opinion determining that a certain island in the Missouri River within the boundaries of the Reservation was part of the Reservation.[311] The island formed from the bed of the Missouri River after North Dakota's admission to the Union. The Solicitor posed the question as: "Was the bed of the Missouri River a part of that territory which was reserved to the Fort Berthold Indians prior to the admission of North Dakota to the Union?"[312] Using the 1851 Treaty as a starting point and then noting that the 1870 Executive Order included territory on both sides of the Missouri River, the Solicitor explained that "there was, very clearly, a formal setting apart to the Indians of territory on both sides of the river bed here in question."[313] Thus, Solicitor Margold concluded that, because the riverbed was part of the Reservation prior to statehood and because the State disclaimed all right and title to Indian lands upon admission to the Union, islands formed from the bed of the river retained the original status of the bed and must also be part of the Reservation.[314]

The question arose again, more broadly, in 1979 when Impel Energy Corporation appealed from a decision of the Bureau of Land Management (BLM) rejecting the corporation's application for fifteen oil and gas leases in the bed of the Missouri River.[315] The applications involved lands set apart for the MHA Nation in the 1870 Executive Order and that had not been further altered by subsequent executive orders or agreements.[316] BLM rejected the applications, taking the position that the bed of the Missouri River had passed to North Dakota at statehood and that the minerals beneath the riverbed were therefore unavailable for federal leasing.[317] Impel appealed, and the State intervened to oppose the corporation's position that the lands were held by the United States.[318] The IBLA rejected North Dakota's arguments asserting that it held title, namely that the United States was without power to transfer submerged lands to Indian tribes[319] and that the State had obtained title by virtue of the Equal Footing Doctrine.[320] Citing *Finch*,[321] the Margold Opinion, and the Indian canons, the IBLA held that title to the submerged lands of the Missouri River within the Reservation (to the extent included as part of Impel's applications) had not passed to North Dakota at statehood.[322] North Dakota did not appeal.[323]

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[311] Margold Opinion, *supra* note 11.
[312] *Id.* at 617.
[313] *Id.*
[314] *Id.* at 618. The Jorjani Opinion failed to explain the sudden invalidity of Solicitor Margold's *Holt State Bank* analysis. *Montana* did not alter *Holt State Bank*; it merely applied its logic to the Crow Tribe's reservation. No intervening change in the law or other justification is given in the Jorjani Opinion for disagreeing with that decision over 80 years later. Similarly, the Jorjani Opinion does not address why the State's constitutional disclaimer should no longer be given effect as in the Margold Opinion.
[315] *Impel Energy Corp.*, 42 IBLA 105 (Aug. 16, 1979).
[316] *Id.* at 109 n.3. North Dakota admitted this fact in its brief. *See id.*
[317] *Id.* at 107.
[318] *Id.* at 110.
[319] *Id.* at 110-12. It is now settled law that the United States may convey submerged lands prior to statehood for particular purposes. *E.g.*, *Idaho v. United States*, 533 U.S. 262, 272-73 (2001).
[320] *Id.* at 113-14.
[321] *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), was the Ninth Circuit case proceeding nearly parallel with *Montana* and ultimately reversed. *See supra* note 188.
[322] 42 IBLA at 113-14.
[323] Consistent with the IBLA's conclusion, BLM subsequently issued to Impel Energy the leases, initially held as Federal leases until the 1984 Mineral Restoration Act restored mineral interests to the Nation. BLM then transferred

In 2017, Solicitor Tompkins wrote a comprehensive opinion, building on this departmental history of findings in favor of tribal reserved lands, and aptly explained the analysis involved in a submerged lands Equal Footing Doctrine question. As explained below, I too conclude that the original riverbed underlying the Missouri River within the boundaries of the Reservation did not pass to North Dakota at statehood.[324]

1. Intent to Include Riverbeds in the Reservation

The 1851 Treaty itself does not contain express language regarding the setting aside of submerged lands but did establish the Tribes' territory as surrounding the Missouri River, which the Tribes relied on for many aspects of their subsistence, lifeways, and cultural identity as has been abundantly demonstrated in the historical record, including the deep spiritual connection described in the Lawson Report and referenced in Section I.A.3.c and A.4. As discussed above, subsequent Executive Orders evince a clear understanding on the part of the executive branch that the submerged lands of the Missouri River were within the Reservation. As in *Idaho*, where the reservation boundaries "covered part of the St. Joe River . . . and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary,"[325] each successive reservation boundary description involved here, beginning with the 1870 Executive Order and culminating in the boundary set in 1886, enclosed the entire stretch of the Missouri River at issue.[326]

Moreover, each executive order explicitly drew boundaries along particular banks of rivers, whether by cardinal direction or the use of a left-right bank distinction commonly used by government surveyors. Among other explicit references in the relevant documents, three instances stand out. First, the unratified 1866 Agreement purported to cede "lands situated on the northeast side of the Missouri River," while granting rights-of-way to the United States over the Tribes' land elsewhere.[327] This combination of cession and rights-of-way implicitly recognized that title to the riverbed was held in trust for the Tribes: the United States was purporting to recognize both sides of the river as belonging to the Tribes, and the Indian canons would resolve any lingering ambiguity in favor of the Tribes. Second, the 1870 Executive Order drew part of the northern boundary "along the left bank of the Missouri River," *i.e.*, the far side of the river and thus inclusive of the river within the Reservation boundaries.[328] Third, the 1880 Executive Order recognized that part of the northern boundary was along "the left bank of the Missouri River," again the far or opposite side of the river and adjacent to land added to the

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the leases to the BIA, recognizing that they had become Indian leases. This history shows again that tribal ownership is the settled position on which the Nation and industry have relied for decades.

[324] Although I agree with and reaffirm the conclusion reached in the Tompkins Opinion with respect to the Equal Footing Doctrine, I should note that the Jorjani Opinion, in coming to the opposite conclusion, failed to address the issue of aboriginal title. As in *Idaho* (*see* 533 U.S. at 274 n.5), it is not necessary to address aboriginal title because the standard Equal Footing Doctrine analysis already supports the Nation's beneficial title; but it was not sufficient for the Jorjani Opinion to make a determination in favor of the State without addressing this alternative argument.

[325] *Idaho*, 533 U.S. at 266.

[326] Relatedly, the Eighth Circuit has repeatedly held that the boundaries set in 1886 have never been diminished. *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation*, 27 F.3d 1294, 1296-98 (8th Cir. 1994); *New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972).

[327] 1866 Agreement, *supra* note 127, at 1055.

[328] 1870 Executive Order, *supra* note 17.

Reservation.[329] These demarcations either to include or exclude river stretches in boundary descriptions illustrate clearly that the United States knew exactly whether and how to include rivers within reservation boundaries and that the entire width of the Missouri River was in fact included within the Reservation.

These circumstances are much like those addressed by the Supreme Court in *Idaho* and *Alaska I & II*, in which no express reference to submerged lands, lakebed, or riverbed occurred. Contrary to the Jorjani Opinion, explicit reference to the riverbed by the executive or congressional record is not required in order to find intent to include the riverbed. The Court made this clear in *Idaho*, easily finding an intent to include the lakebed when the executive language at issue and the congressional record discussed the inclusion of navigable waterways but was silent regarding submerged lands.[330] The Court found inquiries regarding the "navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers," taken in context, sufficient to find the submerged lands were also reserved for the Coeur d'Alene Tribe.[331]

Here, the executive language and historical record also consistently and plainly included the span of the river, which likewise appears to have been quite clear to the Tribes after their negotiations with federal officers as they described that their lands "follow up the Missouri River, *including all the river on both sides of it*" and as "following up the Missouri, including all the timber on both its banks."[332] Similarly, the *Alaska I* Court determined that the government intended to include submerged lands in ANWR and the Reserve from boundary calls—*e.g.*, the "ocean side" of islands and "extreme low water" lines—that plainly included waterways, as here, but were entirely silent as to their submerged lands.[333] *Alaska II* likewise found, despite silence as to the submerged lands within the Monument, that the intentional drawing of boundary lines to include certain navigable waters—particularly calling to and following the center-line of the "principal channel"—meant that the federal government intended to include the submerged lands.[334]

Furthermore, the Indian canons provide added weight in favor of interpreting intent consistent with this understanding. The federal government may have introduced ambiguity into relevant agreements here by explicitly including the span of the river within the reservation yet not directly addressing submerged lands. As in *Alaska I & II*, submerged lands were both necessary to fulfill the federal government's purpose for the reservation and necessarily embraced within a boundary line drawn with careful specificity to be geographically inclusive of submerged land. Ambiguities must be interpreted in favor of the Tribes.[335]

This situation also stands in marked contrast to that in *Montana*. There, after acknowledging that the government may reserve submerged lands beneath navigable waters to "carry out other

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[329] 1880 Executive Order, *supra* note 17; *see supra* notes 133-34.
[330] *See Idaho*, 533 U.S. at 262.
[331] *See id.* at 268-70.
[332] *The Indians: The Dakotas and Northern Pacific Railroad*, INDIANAPOLIS J., Oct. 28, 1870, at 4 (emphasis added); HRA Report, *supra* note 49, at 44 & n.226 (citing Letter from Chiefs of Three Affiliated Tribes to General Hancock (Nov. 1, 1869)).
[333] *See Alaska I*, 521 U.S. 1, 39-40 (2001).
[334] *See Alaska II* Special Master's Report, *supra* note 254, at *233-35, *242.
[335] *See* Section II.A, *supra*.

public purposes appropriate to the objects for which the United States hold the Territory,"[336] the Court stated that the mere inclusion of a riverbed within the boundaries of a reservation is not itself sufficient to overcome the presumption against conveyance to a State.[337] But in *Montana*, it does not appear that the Bighorn River was referenced in any particular manner. The 1868 Treaty was the first agreement to lay out the reservation with particularity. It provided that:

> The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named[.][338]

Thus, although the Yellowstone River was used as a geographic marker, the treaty was silent as to the Bighorn River, which lies within the territory described but was not referenced in any way. In marked contrast and as described above, the Missouri River was consistently and specifically called out in the establishing documents here, used purposefully multiple times as the boundary for the Reservation, and tailored to include certain portions of the river definitely and plainly within the lands of the MHA Nation.[339] No such language evincing the importance of the river existed for the Bighorn. The Jorjani Opinion failed to draw these distinctions, reading *Montana* to mean that specific references to a river are meaningless.[340]

In *Idaho*, the Supreme Court found that the Coeur d'Alene Tribe's well-established reliance on fishing supported the state's concession that the executive order reservation clearly included submerged lands.[341] The Court noted that the Coeur d'Alene Tribe "depended on submerged

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[336] *Montana v. United States*, 450 U.S. 544, 551 (1981) (quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)).
[337] *Id.* at 554.
[338] Treaty with the Crows, Aug. 12, 1868, 15 Stat. 649, at Article 2.
[339] The history of reservation boundaries for other tribal signatories to the 1851 Treaty compare favorably. The 1851 Treaty originally set the eastern boundary of Sioux territory with references similar to those used for the Tribes here, *i.e.*, "commencing the mouth of the White Earth River, on the Missouri River" and ending "thence down the Missouri River to the place of beginning." 1851 Treaty, *supra* note 119. The Great Sioux Reservation boundaries were subsequently set as "commencing on the east bank of the Missouri River . . . thence along low water mark down said east bank," and the later-sub-divided reservations' boundaries altered to "the center of the main channel" of the Missouri River. 1868 Treaty, *supra* note 186; An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, ch. 405, §§ 3, 5, 25 Stat. 888, 889 (1889) (Cheyenne River, Standing Rock, Lower Brule Sioux Reservations). This progression shows Congress understood the 1851 Treaty boundaries to encompass the entirety of referenced rivers and that it knew how to reduce a full-width call to something less than that. Congress never made such reduction with respect to the Tribes here.
[340] The Jorjani Opinion effectively required reservation documents or contemporaneous communications explicitly include the words "bed" or "submerged land." It mistakenly took as its object of inquiry whether the Executive itself held an "intent" to defeat future state title. Although *Idaho* supported the concessions regarding clear inclusion by stating, "Idaho has conceded that 'the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands,'" 533 U.S. at 274, it did not create an executive "intent" requirement. Instead, the Court agreed with the concession by pointing to the traditional importance of the lakebed to the Tribe and the conspicuous inclusion of the bed "within the unusual boundary line." *Id.*
[341] 533 U.S. at 274.

lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks."[342] The Court also recounted that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[343] Similarly, the Tribes here, unique among the surrounding nomadic tribes, relied on submerged lands for fish trapping—both as a food resource and as part of long-held cultural and religious ceremonies.[344]

Additionally, fulfilling the purposes of the Reservation necessarily required reserving the bed of the Missouri River to the Tribes. As discussed in greater detail below, the goals of providing a tribal homeland with both the necessary physical and cultural resources required a reservation that included the bed of the Missouri River. In light of this homeland purpose, the clear fact of inclusion cannot be doubted.

Moreover, the factual situation of the MHA Nation can be easily distinguished from that of the Crow Tribe, at least as the *Montana* Court characterized the Crow. The *Montana* Court supported its determination by stating that "the situation of the Crow Indians at the time of the treaties presented no 'public exigency'" requiring Congress to depart from its policy of reserving riverbeds for future states because "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."[345] The situation of the Mandan, Hidatsa, and Arikara could not be more different. First, the three Tribes were not nomadic, in contrast to many other Plains Indians, precisely because of their proximity to and reliance on multiple resources provided by the Missouri River. By dwelling in the fertile bottomlands surrounding the river and using the river for fuel, food, trade, and transportation, the Tribes were able to be self-sustaining as settled riverine cultures without the need to migrate in pursuit of game. The historical reports provided to the Department make this fact abundantly clear.[346] Second, fishing as well as shellfish gathering and float bison capture played an important part in the diets and the cultural way of life practiced by the Tribes.[347] Importantly, the Tribes practiced methods of fishing that required anchoring structures in the riverbed; they passed these practices down from generation to generation; and these practices carried cultural and religious importance.[348]

That the Tribes did not *exclusively* control the river is of no import, and I find the Stevens Report's discussions of the navigational uses of the river irrelevant to the core legal question.[349] The fur trade and Euro-American migration and development in the north meant the Missouri River became fairly heavily trafficked in the nineteenth century,[350] and thus the Tribes shared the waterway with other travelers. Although *Idaho* found it noteworthy that a "right to control the

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[342] *Id.* at 265.
[343] *Id.* at 274.
[344] *See* Section I.A.3.c and A.4, *supra*.
[345] *Montana v. United States*, 450 U.S. 544, 556 (1981).
[346] *See, e.g.*, HRA Report, *supra* note 49, at 14-15 (describing the Missouri River valley as "a kind of elongated oasis, where environmental conditions were more conducive to agriculture than on the [Great] plains proper"); Lawson Report, *supra* note 16, at 468-88 (detailing, through a discussion of the impacts of the loss of the river on the Tribes, tribal members' riverine lifestyle and the abundant resources available to them).
[347] *See supra* Section I.A.2, A.3.
[348] *See supra* Section I.A.3, A.4. The Jorjani Opinion left these facts unaddressed.
[349] *See* Stevens Report, *supra* note 15, at 10-15, 29-32.
[350] *See id.* at 10-11.

lakebed and adjacent waters was traditionally important to the Tribe,"[351] the Court did not establish a rule requiring control let alone requiring *exclusive* control. Neither *Idaho* nor any other Supreme Court precedent makes exclusive control of waterways a necessary element, or the lack of exclusive control a relevant factor, in the Equal Footing Doctrine analysis. The facts of *Alaska I* showed no indication that the United States intended to restrict travel along the large parts of Alaska's northern coastline at issue.[352] *Donnelly* likewise did not require any evidence that the tribe restricted or controlled travel on the Klamath River, which was trafficked during nineteenth century California gold mining. The existence of the federal navigational servitude makes clear how unlikely it would be that any tribe (or any state for that matter) could ever satisfy a standard of *exclusive* control.[353] In addition, a finding that Euro-American use or passage through Indian land could affect tribal ownership, similar to a form of adverse possession, is plainly inconsistent with the law. The Court has held repeatedly that only Congress may diminish a reservation, and the actions of individuals or states on tribal land are not controlling.[354]

These conclusions are further strengthened by the depth of the historical analysis from the HRA and Lawson Reports. As discussed above in Section I, those reports show in great detail that the Missouri River was central to the lifeways of the Tribes, providing fuel, building materials, a locus for transportation and trade, and subsistence through fishing, shellfish gathering, and capturing float bison, all activities that required substantial use of the River and the riverbed.

The Stevens Report does not meaningfully undermine this historical record. That report claims, without citation, that environmental disruption caused by Euro-American settlement caused "traditional sources of Tribal food—such as bison—[to decline], making the MHA increasingly reliant on the U.S. government for sustenance."[355] Even assuming the veracity and relevance of such statements, this argument echoes the claim that fishing was irrelevant to the Tribe and the federal government in developing the Reservation because it did not serve as the primary source of subsistence. As discussed above,[356] no decision has held that a tribe must be entirely reliant on a particular food source for it to be a meaningful part of the reservation's purpose. Fishing served as a central plank of the Tribe's lifeways and subsistence, and the Lawson Report demonstrated that it remained part of tribal life and subsistence well into the twentieth century until the river ecosystem was significantly altered by the Garrison Dam project.[357]

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[351] *Idaho v. United States*, 533 U.S. 262, 274 (2001).
[352] *See Alaska I*, 521 U.S. 1 (1997).
[353] *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1110 (Fed. Cir. 1992) (discussing congressional powers to assert navigational servitude over Indian lands). I note that this confusion appears several times in the Stevens Report, which describes, for instance, how U.S. Commissioner Henry Reed "told the Tribes that he was unable to stop the other boats, and that 'these boats have a right to go up the river; they go up on their own accord.'" Stevens Report, *supra* note 15, at 12 (quoting Newton Edwards, President of the Commission, "Proceedings of the Board of Commissioners Appointed to Negotiate a Treaty or Treaties with the Hostile Indians of the Upper Missouri" (July 24, 1866)); *see also* Stevens Report, *supra* note 15, at 29-32. The federal navigational servitude, opening navigable waterways to commerce, has nothing to do with ownership of submerged lands. If that were the case, the same argument would contend that the States' failure to defend exclusive control over navigable waterways affects their ownership of submerged lands. That is not the law.
[354] *See, e.g., McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462-64 (July 9, 2020).
[355] Stevens Report, *supra* note 15, at 27.
[356] *See supra* Section II.B.6.
[357] *See* Lawson Report, *supra* note 16, at 422-25.

The Stevens Report also points out that the Tribes suffered from disease and crop failures as well as severe hardship from Sioux aggression that "penned" them into Like-a-Fishhook village and prevented them from hunting for buffalo; these pressures resulted in requests for government assistance, including food.[358] None of these factors lessened the historic importance of the river to the Tribes and thus its importance to the purpose of the reservation; rather, the opposite is more likely. If the Tribes could not be sustained from farming and hunting, fisheries and shellfish gathering from their riverfront village would have been yet more important.

Last, the Stevens Report argues that the government could not have intended to protect the Tribes' riverine uses through the Reservation because there was very little correspondence among Indian Affairs officers and Congress regarding the Tribes' fishing, shellfish gathering, fuel and building material collection, and float bison capture. Besides offering a legal conclusion beyond the scope of a historical report, that conclusion misapplies the legal standard. *Idaho*'s second step addresses whether Congress intended to defeat state title, not whether Congress intended to protect particular activities on the Reservation. One inquiry under step two is whether the reservation's purpose would be compromised if title were to pass to the state; if so, an *inference* arises that Congress could not have intended for title to pass. Analyzing whether the purpose would be compromised involves examining tribal uses of the riverbed but does not require that Congress have explicit knowledge of those uses.

The Court has confirmed the inclusion of submerged lands in a reservation in many other cases where, though lacking any direct reference in correspondence to submerged lands, it was plain that the federal purpose would be undermined without those lands. In *Alaska I*, the Court ruled that submerged lands were required by wildlife in ANWR, although correspondence regarding wildlife's direct use of submerged lands was absent.[359] In *Alaska II*, the Court deduced that submerged lands were necessary in part to study glaciers, not because related correspondence plainly stated an intent to reserve submerged lands, but because the federal purpose of interglacial forest and wildlife research and conservation, among other things, would have been undermined without access to them.[360] Similarly here, I find that the government's purpose of providing the Tribes a sustainable homeland would have been seriously compromised without the inclusion of submerged lands. As the Special Master found in *Alaska II*, the proper standard for determining whether there is sufficient impact on the federal purpose in order to find submerged lands were reserved is to look only "for an impairment of the purposes of the [reservation], not a complete thwarting of them."[361] The Supreme Court affirmed and stated that "[t]he Special Master, in our view, had ample support for his conclusions that [scientific study and conservation] were purposes for creation of the monument, and each would be compromised were it to be determined that submerged lands were not included in the monument."[362]

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[358] *See* Stevens Report, *supra* note 15, at 27.
[359] *See Alaska I*, 521 U.S. 1, 51 (1997) (statement of justification references importance of waterbodies for birds but does not mention submerged lands).
[360] *See supra* Section II.B.4; *Alaska II* Special Master's Report, *supra* note 254, at *242-253.
[361] Special Master's Report, *supra* note 254, at *243.
[362] *Alaska II*, 545 U.S. 75, 102 (2005).

Also important is that much of the historical record is based on writings of Indian agents, negotiators, and other Euro-Americans familiar with the practices of the Tribes. The Jorjani Opinion found a lack of direct references to use of the riverbed in the record as evidence against tribal ownership. Given what we now know about life on the Reservation at the time of its establishment, I find such views to be a far too narrow interpretation of the history. Euro-Americans engaged in negotiating and drafting the Executive Orders and Agreement, visiting or living alongside the Tribes, were well aware of the importance of the river to tribal life and the Tribes' many uses of the river, including core subsistence needs. It is implausible that, with this knowledge, federal representatives would have intended to remove the river and its bed from the Reservation, and impossible that the Tribes would have agreed to this in negotiation. Moreover, by expressly and repeatedly including the span of the river within the Reservation but not directly addressing submerged lands, the federal government otherwise created an ambiguity in its agreements that, pursuant to the Indian canons, should be construed in favor of the Tribes.

Thus, the very particular boundary calls and the Tribes' reliance on riverbeds distinguish this situation from *Montana* and supports the conclusion that each executive order clearly included the bed of the Missouri River within the Reservation. As Solicitor Margold emphasized in 1936, "there was, very clearly, a formal setting apart to the Indians of territory on both sides of the river bed."[363] As the IBLA later held, the 1870 Executive Order "discloses an intention to include the lands underlying the Missouri River, insofar as it runs through the Fort Berthold reservation, among the lands of the reservation itself."[364]

2. Intent to Defeat State Title

The next step under *Idaho* is to determine whether the requisite congressional intent existed to defeat North Dakota's claim of title to the Missouri River. First, Congress passed legislation on February 22, 1889, enabling creation of the State and setting the conditions for admission to the Union upon adoption of a constitution complying with the enabling act.[365] The enabling act required:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits [of the state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.[366]

In conformance with the 1889 Act, North Dakota's constitution states that all provisions in that act "are continued in effect as though fully recited and continue to be irrevocable without the consent of the United States and the people of this state."[367] Accordingly, upon admission to the

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[363] Margold Opinion, *supra* note 11, at 617.
[364] *Impel Energy Corp.*, 42 IBLA 105, 114 (Aug. 16, 1979).
[365] Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (providing for division of the Dakotas and enabling North Dakota, South Dakota, Montana, and Washington to form constitutions and be admitted to the Union).
[366] *Id.* at 677.
[367] N.D. CONST. art. XIII, § 4.

Union on November 2, 1889,[368] the State forever disclaimed title to any lands held by Indian tribes, including here the submerged lands held by the MHA Nation. North Dakota's statehood was contingent upon disclaiming the submerged land at issue here, making operation of the disclaimer effective *before* statehood and prior to operation of the Equal Footing Doctrine.

Even if the literal operation of the disclaimer were not enough to disclaim the bed of the Missouri River, the requirement that North Dakota make such disclaimer prior to its entry into the Union is otherwise sufficient to satisfy the step two inquiry into congressional intent. Solicitor Margold found the disclaimer important to his conclusion in 1936, as did the IBLA in 1979.[369] The *Idaho* Court likewise noted such a provision in Idaho's constitution.[370] But perhaps most important, both *Alaska I* and *II* clearly and consistently teach that when Congress makes such a disclaimer a prerequisite to statehood, coupled with evidence of the reservation's inclusion of submerged lands from step one of the inquiry, that is itself sufficient to establish congressional intent to defeat future state title.[371]

No credence should be given to arguments that the Equal Footing Doctrine accomplished the "extinguish[ment] by the United States" of tribal land ownership referenced in the constitutional disclaimer. The Doctrine does not by itself extinguish others' rights in favor of a new state. Rather, it recognizes that states may acquire title to submerged lands beneath navigable waters, but only if the state's future interest has not been extinguished by congressional action prior to statehood.

Although the Court relied heavily on disclaimers in *Alaska I* and *II*, *Idaho* primarily considered whether Congress was on notice that the reservation included submerged lands and whether the purpose of the reservation would have been compromised had submerged lands passed to the state.[372] The *Alaska* Courts addressed both questions as well, albeit to slightly different effect: they treated questions of notice as either belonging to step one or generally satisfied where step one was otherwise established; and they also addressed reservation purposes, but mostly to bolster the conclusion established by the disclaimers.

Regardless, Congress was certainly on notice here with respect to the inclusion of riverbeds in the Reservation. Following *Alaska I* and the Special Master's analysis in *Alaska II*, the clear intent to include the riverbed reflected in the terms of the executive orders alone placed Congress on notice that the Reservation here included submerged lands. Similarly, in *Idaho* the secretarial report which the state conceded placed Congress on notice mentioned only the reservation's embrace of navigable waters, a fact just as abundantly clear here from the executive orders.

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[368] Proclamation No. 292 (Nov. 2, 1889).
[369] Margold Opinion, *supra* note 11; *Impel Energy Corp.*, 42 IBLA at 113.
[370] *Idaho v. United States*, 533 U.S. 262, 270 (2001). Although *Montana* made no mention of nearly identical language in the State's enabling act and constitution, Act of Feb. 22, 1889, 25 Stat. at 677; MONT. CONST. art. I, that omission is not surprising because the Court there found that Congress had not intended to reserve the bed for the tribe prior to statehood. *Montana v. United States*, 450 U.S. 544, 554 (1981). Without a reservation of land prior to statehood (per *Idaho* step one and putting aside the fact that *Montana* did not address aboriginal title), there was no Indian-held land to disclaim. *See also supra* note 282 (discussing disclaimer versus equal footing).
[371] *See supra* Section II.B.3, 4, 5.
[372] 533 U.S. at 273-74.

Additional evidence bolsters this conclusion. Congress had notice by the time it authorized the 1886 Agreement, which set newly reduced boundaries. The agreement states that "it is the policy of the Government to reduce to proper size existing reservations . . . with the consent of the Indians, and upon just and fair terms."[373] Prior to entering the 1886 Agreement, reports to Congress from the Commissioner of Indian Affairs clearly marked out that the 1870 and 1880 Executive Orders constituted "treaty, law, or other authority establishing [a] reserve."[374] Congress explicitly authorized the commissioners to negotiate on its behalf and, in doing so, recognized that the Tribes' Reservation established by successive executive orders was just that, a pre-existing Reservation. Moreover, congressional representatives conducting negotiations—the commissioners' staffs—were present on the Reservation, and in the case of Indian agents lived there long-term, witnessing and recording the Tribes' practices. These representatives must have been well aware of the centrality of the river to tribal life and subsistence.

By recognizing the Tribes' Reservation prior to negotiation of the 1886 Agreement, Congress implicitly accepted the Reservation boundaries and included land as established by prior executive orders, including submerged lands. There is no reason to believe—particularly viewed through the lens of the Indian canons—that, when Congress recognized the Tribes' existing Reservation, it was picking and choosing only parts of the Reservation to recognize. Neither Congress, its representatives through the Indian Affairs commissioners, nor the Tribes would have expected that the Missouri River, so carefully included within the Reservation, might pass out of federal hands through silent operation of law.

Nothing in the 1886 Agreement indicates that Congress intended to recognize the Tribes' Reservation with the exception of submerged lands. Indeed, Congress had been receiving regular reports from the Commissioner of Indian Affairs, conveying messages that the Tribes understood the entirety of the Reservation to be *their* land. For example, the 1885 report stated:

> Great consternation has arisen among the Indians during the past year from the fact of so many white men settling on or near the reservation. . . . The Indians regard this whole section of country as theirs, and in the absence of surveyors' marks of boundary it is difficult to impress upon them the true boundary, and they imagine that gradually their reserve is fast falling into the hands of the whites without their knowledge or consent.[375]

Congress' stated policy in the 1886 Agreement of reducing reservations only by consent also provides evidence that the purpose of the Reservation would have been compromised had the bed of the Missouri River passed to North Dakota upon statehood. The Supreme Court in *Idaho* linked Congress's "complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation" with an additional congressional desire to do so only by agreement and consent of the Coeur d'Alene Tribe.[376] There,

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[373] Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032.
[374] *E.g.*, H. EX. DOC. NO. 49-1, pt. 5, vol. 2 at 550, 551 (1885).
[375] H. EX. DOC. NO. 49-1, pt. 5, vol. 2 at 256.
[376] *Idaho*, 533 U.S. at 276-77.

> The intent . . . was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit, an objective flatly at odds with Idaho's view that Congress meant to transfer the balance of submerged lands to the State in what would have amounted to an act of bad faith accomplished by unspoken operation of law.[377]

Given the clear reservation of submerged land by prior executive orders, it would be equally implausible here, as in *Idaho*,[378] that Congress intended on the one hand to obtain an agreed-upon reduction of land only by consent and on just terms while on the other hand simultaneously intended to strip the Tribes of culturally and religiously significant riverbed by secret or silent operation of unstated law.

Nor does the timing of Congress's action ratifying the reservation alter the outcome. The situation presented here is identical to *Idaho*, wherein it was not legally significant that Congress ratified the Tribes' 1886 Agreement after statehood. The legislation by which Congress ratified the 1886 Agreement is the same legislation by which it ratified the Coeur d'Alene Tribe's agreement at issue in *Idaho*.[379] It was of no consequence to the *Idaho* Court that Congress had not taken the final step of ratification until post-statehood where Congress signaled no intent differing from that evidenced before statehood and particularly where holding otherwise would impute to Congress either "bad faith or [] secrecy in dropping its express objective of consensual dealing with the Tribe."[380]

Beyond the general 1886 Agreement objective of negotiating a cession of land only by consent, the *Idaho* analysis at step two is also concerned with whether passage of submerged lands to the state would otherwise compromise the reservation's purpose. As the Special Master determined in *Alaska II*, that purpose need not be entirely defeated by passage to the state in order to satisfy step two. *Alaska I & II* also strongly suggested that, where the reservation's purpose relates to or relies upon concepts of permanency, a powerful inference arises of intent to defeat state title. As discussed above at length in Section III.A.1, the record here demonstrates that the federal government's purpose in establishing the reservation was to create a tribal homeland—a fixed and permanent home where the Tribes could be self-sustaining. The Tribes were a riverine people dependent on the Missouri River and its riverbed: fish trapping for sustenance and

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[377] *Id.* at 278-79.

[378] *Id.*

[379] Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1027.

[380] *Idaho*, 533 U.S. at 280-81. The Court's dicta in *Alaska II*, *see supra* Section II.B.4, 5, also suggests that congressional intent under step two may have been satisfied simply by ratifying the creation of the Reservation and adopting the Executive's own intent to create a permanent reservation—a reservation that, per step one, included submerged lands. Executive order reservations were implicitly ratified by Congress prior to 1887. *Arizona v. California*, 373 U.S. 546, 598 (1963); *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-75 (1915) ("The Executive . . . withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power[.]"). The General Allotment Act further expressed congressional ratification of then-existing executive order reservations. 24 Stat. 388, § 1 (1887) ("any reservation created for [Indians'] use, either by treaty stipulation or by virtue of an . . . Executive order setting apart the same for their use."). Thus, while not an express delegation of power, executive authority to create Indian reservations was implicitly approved by Congress; and most if not all reservations, but certainly for the Tribes here, contained an underlying purpose of providing a permanent homeland.

ceremonial purposes required affixing structures to the riverbed; shellfish gathering and bottom-dwelling fish required riverbed habitat; and float bison, driftwood, trade, transportation, and other river uses were central to the Tribes' self-sustainment. Removing the river and its bed from the reservation would have compromised the reservation's purpose here.

Based on the foregoing, I find that Congress intended that the bed of the Missouri River located within the Reservation would not pass to North Dakota upon statehood. I make this conclusion based on the literal operation of North Dakota's disclaiming any right to submerged lands held by the Tribes; the clear expression of congressional intent to defeat the State's title contained in that prerequisite to statehood; the fact that a failure to retain the Tribes' beneficial ownership of submerged land would be inconsistent with the Tribes' historic use of and dependence upon the river and their concept of a permanent homeland; congressional notice that the Reservation included the bed of the Missouri River; and congressional intent to pursue a final cession of additional land only by consent.

Thus, I conclude that, as reasoned here and in part III.A.1, both steps one and two of the *Idaho* test demonstrate that the Missouri riverbed did not pass to the State of North Dakota under the Equal Footing Doctrine, but instead remained in trust for the Tribes.

B. The Mineral Interests Underlying the Original Bed of the Missouri River and the Interests Underlying Dry Uplands Are Held in Trust For the Benefit of the MHA Nation.

Having established that the bed of the Missouri River was reserved to the MHA Nation and did not pass to North Dakota upon its admission to the Union, I next analyze the impact of the 1949 Takings Act and 1984 Mineral Restoration Act. I conclude that the minerals underlying both the original bed of the Missouri River and the relevant portions of taken upland are held in trust by the United States for the benefit of the Nation.

When Congress passed the 1949 Takings Act, it specified that, after acceptance of the Act's provisions by the MHA Nation, "all right, title and interest of said tribes, allottees and heirs of allottees in and to the lands constituting the Taking Area described in section 15 (including all elements of value above or below the surface) shall vest in the United States of America."[381] Section 15 of the Act provided a lengthy and detailed description of the Taking Area, including three passages of use in the analysis here.

First, Congress drew the Taking Area across the far side of the Missouri River near the southeast boundary of the Reservation.[382] Second, in the northwest where the Missouri River flows onto the Reservation, the Taking Area is described as following the northern boundary of the Reservation to the east, then crossing and including the Missouri River and continuing downstream.[383] This description means that, whereas the homesteaded area to the east of the river was not taken by the 1949 Takings Act, the Taking Area *did* include the entire width of the Missouri River in this area. Finally, in excluding particular lands from the Taking Area,

[381] 1949 Takings Act, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026.
[382] *Id.* at 1034 (emphasis added).
[383] *Id.* at 1044 (emphasis added).

Congress excepted four areas along the Missouri River of interest here.[384] One excepted the land "less erosions,"[385] another excepted a particular lot "plus accretions,"[386] and two more areas along the river were excepted "plus accretions."[387] Thus, where parcels along the river were excepted from the Taking Area, the riverbed itself was very carefully retained within the area despite the exception of adjoining dry land.

These references to eroded areas and accretions demonstrate that Congress was aware that the riverbed was implicated in the taking because: (1) the Taking Area explicitly embraced the riverbed;[388] and (2) Congress recognized that, in areas where the Missouri River ran along the Reservation boundary, the river was in fact on the Reservation. Although it may be somewhat ambiguous whether the Takings Act took the bed of the Missouri or left it with the Nation,[389] that Congress at least included the riverbed within the area in an act dealing solely with the Nation and *not* with North Dakota illustrates Congress' understanding that the State did not control the riverbed. At no time was the State the subject of legislation taking or paying for the value of this riverbed.[390]

As shown above, the Equal Footing Doctrine did not operate to pass title to submerged lands of the Missouri River to the State.[391] Furthermore, it cannot be disputed that taken uplands belonged to the Nation. Neither facts nor legal precedent suggests that, prior to passage of the 1949 Takings Act, the Nation somehow lost title to the dry lands taken and paid for by the United States. As described previously, the Indian canons provide a rule against abrogation of tribal property without clearly expressed congressional intent and after a careful consideration of the conflict with extant rights.[392] Between the time of statehood and the 1949 Takings Act, there were no congressional acts purporting to abrogate Indian property rights within the Taking Area.[393] Having then taken those lands in 1949, along with the mineral interests, there can be no

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[384] *Id.* at 1045, 1047.
[385] *Id.* at 1045.
[386] *Id.*
[387] *Id.* at 1047.
[388] *Id.* at 1045.
[389] The Act notes the total acreage of the Taking Area, but states that the number is "less water surface." 1949 Takings Act, 63 Stat. at 1045. While I disagree with the reasoning and conclusions on this point as laid out in the Jorjani Opinion, it is not necessary to this Opinion to determine whether the mineral interests were taken and then restored to the Tribes or were simply never taken from the Tribes in the first instance.
[390] Testimony at a Senate hearing regarding the 1984 Mineral Restoration Act revealed that, "[p]rior to 1951, it was the Army's policy to acquire fee simple title to all lands required for project purposes, including all mineral rights." *Hearing on S. 2480 and S. 2663 Before the Select Comm. on Indian Affairs*, 98th Cong. 51 (1984) (prepared statement of William J. Cronin, Chief, Legislative Services Office, Directorate of Real Estate, Office of Chief of Engineers, Department of the Army). Had the United States believed the strip of minerals underlying the original riverbed belonged to North Dakota, the Army Corps would surely have sought to acquire those rights per its policy.
[391] *See Alaska I*, 521 U.S. 1, 42 (1997) (focusing inquiry on action prior to statehood); *see also Alaska v. United States*, 213 F.3d 1092, 1097 (9th Cir. 2000) ("The key moment for the determination of title is the instant when statehood is created.").
[392] *See supra* note 173.
[393] For clarity, Congress did pass surplus lands legislation in 1910, opening certain lands to entry and settlement by non-Indians. Act of June 1, 1910, Pub. L. No. 61-197, 36 Stat. 455. However, that act neither included riverbed land, nor was any of that land subject to the 1949 Takings Act or 1984 Mineral Restoration Act. Further, the Eighth Circuit has repeatedly held that the 1910 Act did not diminish the Reservation. *Duncan Energy Co. v. Three*

dispute that the United States held title to the minerals. The Takings Act was clear that all elements of value below the surface "vest[ed] in the United States of America."[394] Thus, when Congress passed the 1984 Mineral Restoration Act, the mineral interests underlying the uplands were taken into trust for the MHA Nation.[395] This conclusion is further buttressed by reference in the Senate report regarding the Mineral Restoration Act's recognizing that land under the lake and shores of Lake Sakakawea was within the boundary of the Reservation and formed one of the bases supporting the need for the legislation.[396]

With respect to the original bed of the Missouri River, the mineral interests beneath those lands are likewise held in trust for the benefit of the MHA Nation for one of two alternative reasons. Either the United States did not take the original bed of the river itself, meaning the underlying mineral interests have remained with the Nation since the time of first reservation; or the United States took the bed by operation of the 1949 Act and returned the mineral estate by operation of the Mineral Restoration Act, recognizing that the provision exempting some estates from restoration did not operate to exempt restoration of estates underlying the original bed.[397] As discussed above, the 1949 Takings Act explicitly contemplated inclusion of the riverbed within the Taking Area. I have already determined that the riverbed was beneficially owned by the Nation prior to passage of the Act. Thus, even if the Act's acreage discussion is read to mean that the Act did not operate to take the riverbed, it would have simply remained held in trust for the Nation.[398] On the other hand, if the Act did operate to take the riverbed, explicitly included as it was within the Taking Area, then that land would have clearly become subject to the 1984 Mineral Restoration Act:

> [A]ll mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which—
>
> (1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project, and
>
> (2) are not described in subsection (b),
>
> are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.[399]

The exempted lands under subsection (b) did not include land making up the original bed of the Missouri River.[400] Thus, the combination of the 1949 Takings Act and 1984 Mineral Restoration

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Affiliated Tribes of the Ft. Berthold Reservation, 27 F.3d 1294, 1296-98 (8th Cir. 1994); *New Town v. United States*, 454 F.2d 121 (8th Cir. 1972).

[394] 1949 Takings Act, 63 Stat. at 1026.

[395] Note that Congress exempted some land from operation of the Mineral Restoration Act. 1984 Mineral Restoration Act, Pub. L. No. 98-602, tit. 2, § 202(b), 98 Stat. 3149, 3152.

[396] S. REP. NO. 98-606, at 3 (1984) ("Virtually, all of the Reservation part of Lake Sakakawea is under lease, and in the Lake and along its shorelines within the Reservation private companies recently have conducted about 500 miles of seismic exploration.").

[397] 98 Stat. at 3152 (restoration shall not apply respecting "lands located in township 152 north or township 151 north of range 93 west of the 5th principal meridian *which lie east of the former Missouri River*") (emphasis added).

[398] I note again my disagreement with the reasoning and conclusions in the Jorjani Opinion regarding the 1949 Takings Act, particularly in regard to whether the Act could operate to take the riverbed from the State. However, I need not resolve such issues for purposes of this Opinion.

[399] 98 Stat. at 3152.

[400] *See id.*

Act clearly took upland previously held by the Nation and then returned the mineral interests to trust status while either doing the same for the original bed of the Missouri River or simply leaving it and its mineral interests in trust as was the case prior to 1949. In sum, the mineral interests underlying the original bed of the Missouri River, and Lake Sakakawea as described in the 1949 and 1984 Acts, are held in trust for the MHA Nation.

I also note that the Jorjani Opinion reviewed the Bureau of Indian Affairs' 1949 appraisal of the relevant lands here and found that this appraisal did not include any compensatory value for the riverbed.[401] Upon review of that appraisal, I have not determined that the riverbed was assessed as compensable, but I agree with Solicitor Tompkins that the riverbed itself was included within the delineated Taking Area. Another reasonable conclusion based on these facts is that the BIA did not appraise the riverbed for compensation because it did not believe it had any value. This was, after all, approximately thirty years before the oil and gas production began that motivated Impel Energy to pursue riverbed leasing. The appraisal and subsequent acquisition may not have directly referenced the riverbed because of this seeming lack of value, while Congress may have still intended to take the riverbed as it did everything else within the established Taking Area. In any event, as discussed above, whether Congress did in fact take the riverbed from the Tribes here is less important than the conclusion that Congress returned everything that it took from the Tribes in 1984 through the Mineral Restoration Act. The minerals underlying the riverbed were either held by the Tribes throughout the twentieth century or else returned in 1984.

IV. CONCLUSION

After carefully re-examining this matter, with the benefit of additional extensive historical surveys including the HRA Report and the historical report developed by the Nation, I reaffirm the 1936 Margold Opinion and 2017 Tompkins Opinion, both in alignment with IBLA's 1979 decision, concluding that the original bed of the Missouri River within the boundaries of the Fort Berthold Indian Reservation did not pass to North Dakota by operation of the Equal Footing Doctrine. The Jorjani Opinion's disruption of this longstanding precedent was insufficiently supported by law and by the historical facts regarding the tribal use of the Missouri River and the purpose of the Reservation.

My conclusion reaffirms the Department's position dating back nearly 86 years and is supported by recent and past Supreme Court precedent on the matter. Based upon this determination, I further conclude that the mineral interests underlying the original bed of the Missouri River, as well as the interests underlying dry uplands taken and then restored as stated in the 1949 Takings Act and 1984 Mineral Restoration Act, respectively, are held in trust for the benefit of the Nation.

This Opinion was prepared with the substantial assistance and contributions from Associate Solicitor Eric Shepard, Assistant Solicitor, Environment and Lands, John Hay, and attorney

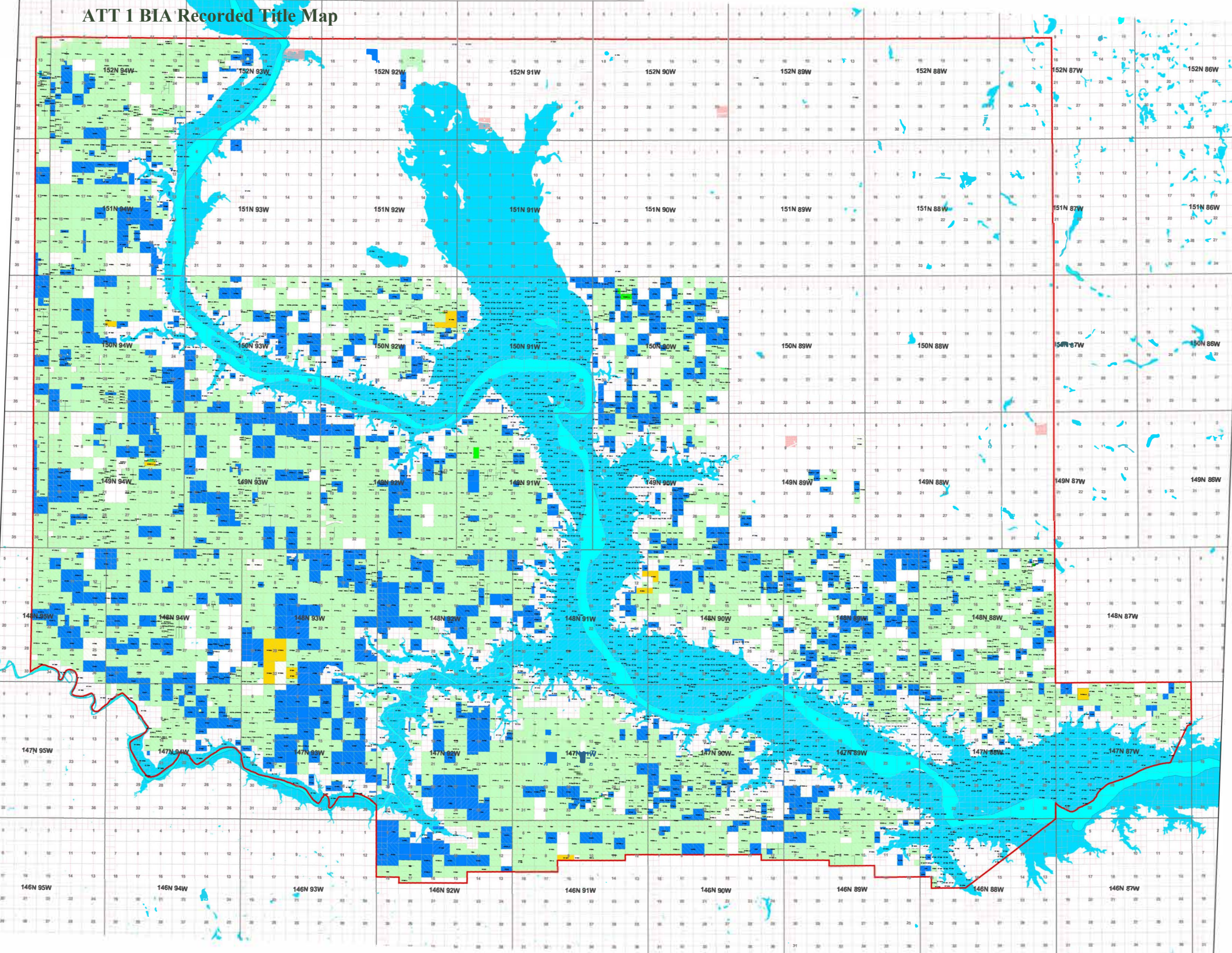
[401] Jorjani Opinion, *supra* note 5, at 13 (citing Bureau of Indian Affairs, MISSOURI RIVER BASIN INVESTIGATIONS, APPRAISAL: LAND, IMPROVEMENTS, SEVERANCE DAMAGES, AND TIMBER TAKING AREA OF GARRISON RESERVOIR, FORT BERTHOLD INDIAN RESERVATION, NORTH DAKOTA, Report No. 96 (June 30, 1949)).

Brandon Sousa of the Division of Indian Affairs, as well as Assistant Solicitor, Indian Water Resources, Scott Bergstrom and attorney Andrew Engel of the Division of Water Resources.

Robert T. Anderson

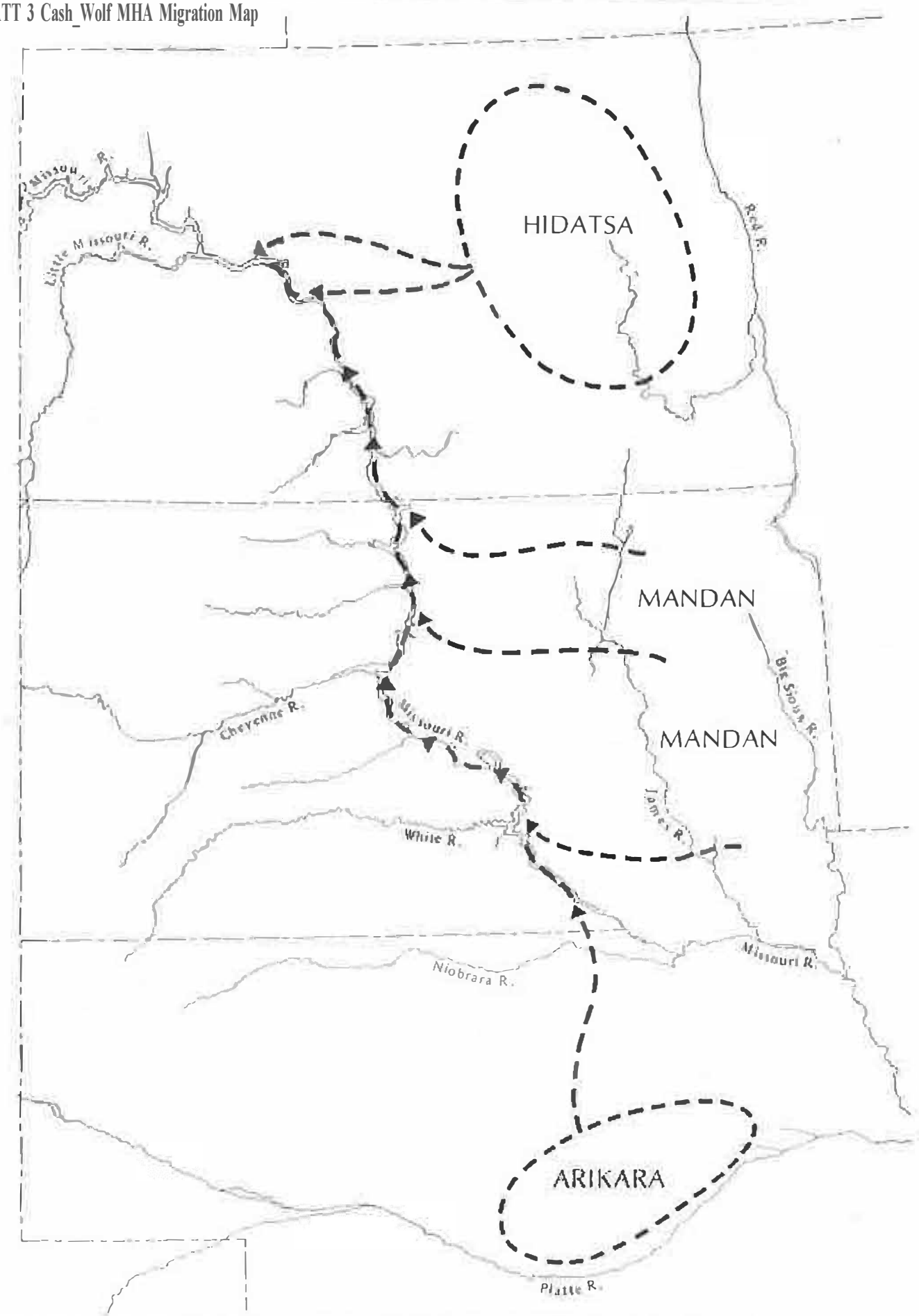
Attachments

ATT 1 BIA Recorded Title Map



ATT 2 - 1950 Reservation (with takings) (Disc L_C)

ATT 3 Cash_Wolf MHA Migration Map

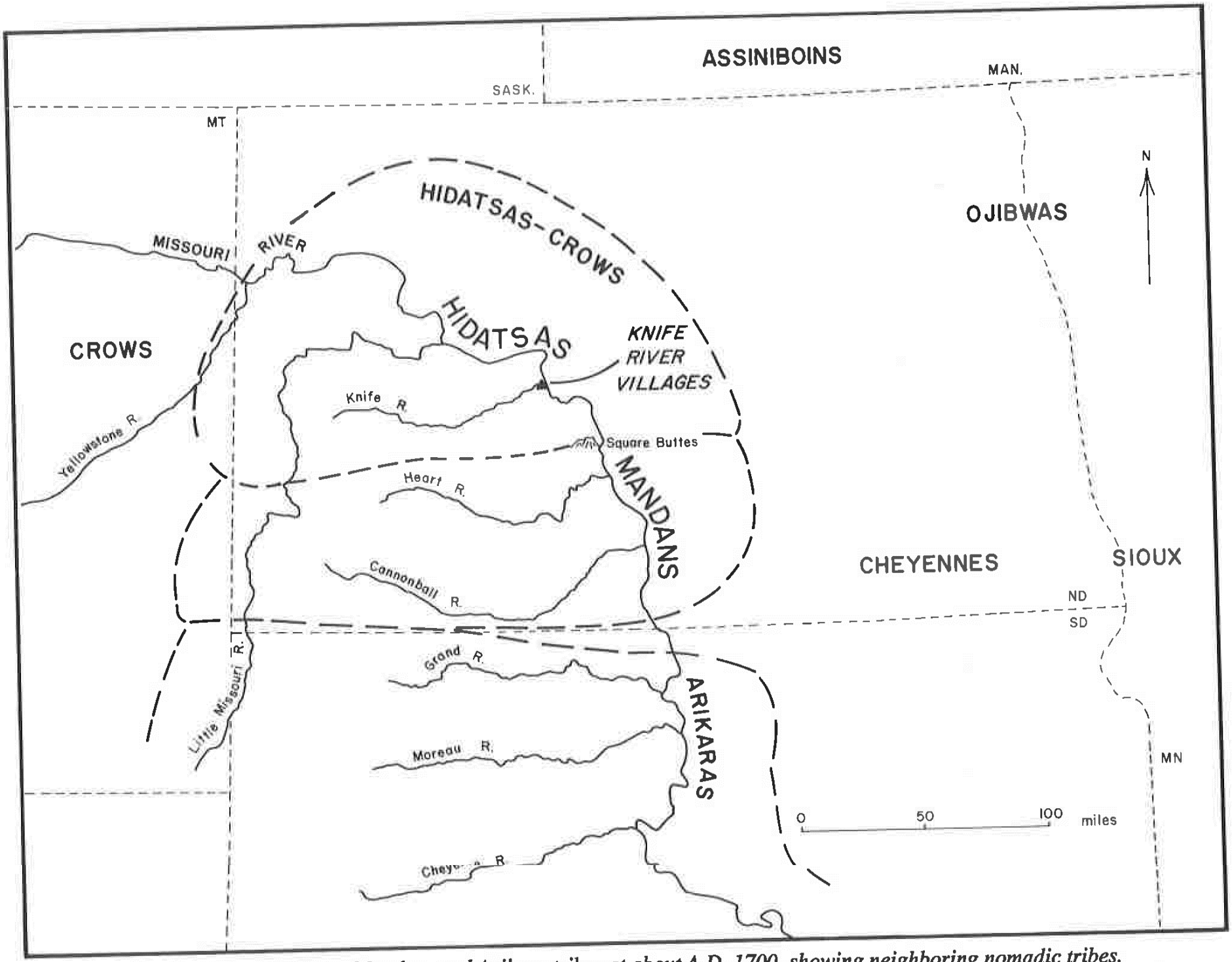


MOVEMENT OF THE ARIKARA, HIDATSA AND MANDAN TO FORT BERTHOLD

Map by Marcia Busch

MOVEMENT OF THE Arikara, Hidatsa and Mandan to Fort Berthold.

ATT 4 TAT 1700 AD Territory Map (People of the Willow) at 12

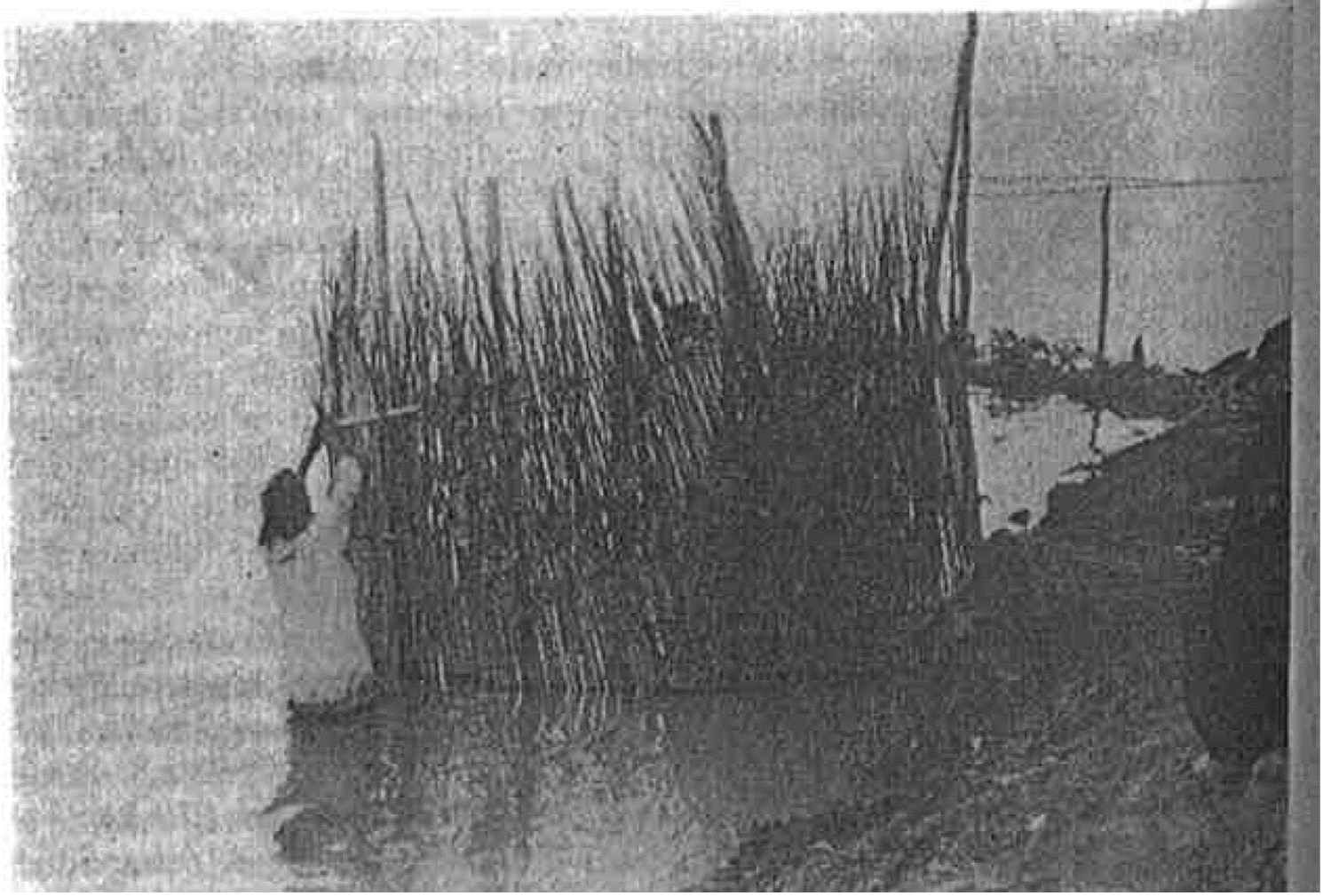


Territory of the Hidatsa, Mandan, and Arikara tribes at about A.D. 1700, showing neighboring nomadic tribes.

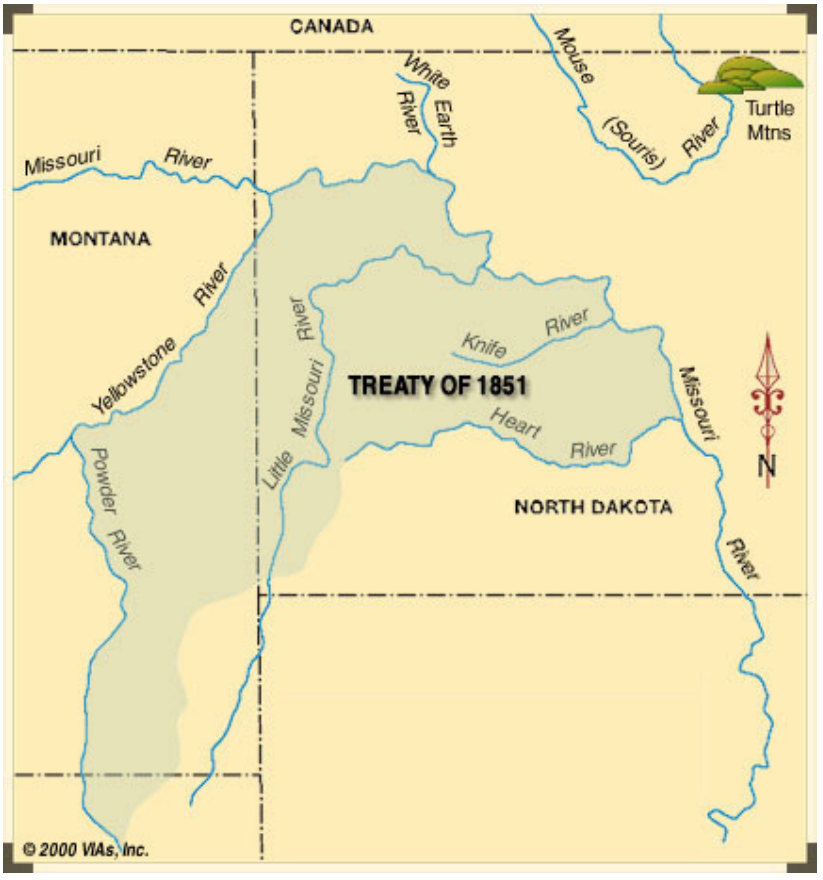
ck: left, #16; right, #17.

Black Bear, Hidatsa, near the mouth of Shell Creek, south of Van Hook, N. Dak., in the Miss
by Russell Reid, Aug. 1929.

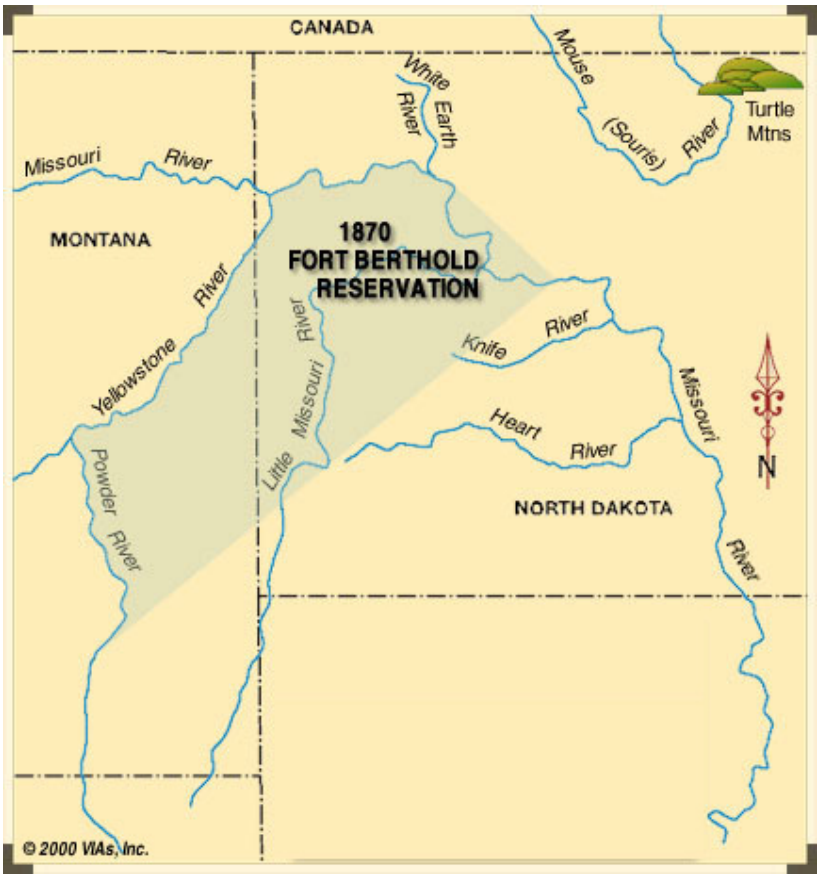
FIG. 38.—Black Bear inside the catfish trap with one of the fish baskets. (Courtesy of the North Dakota Historical Society.)



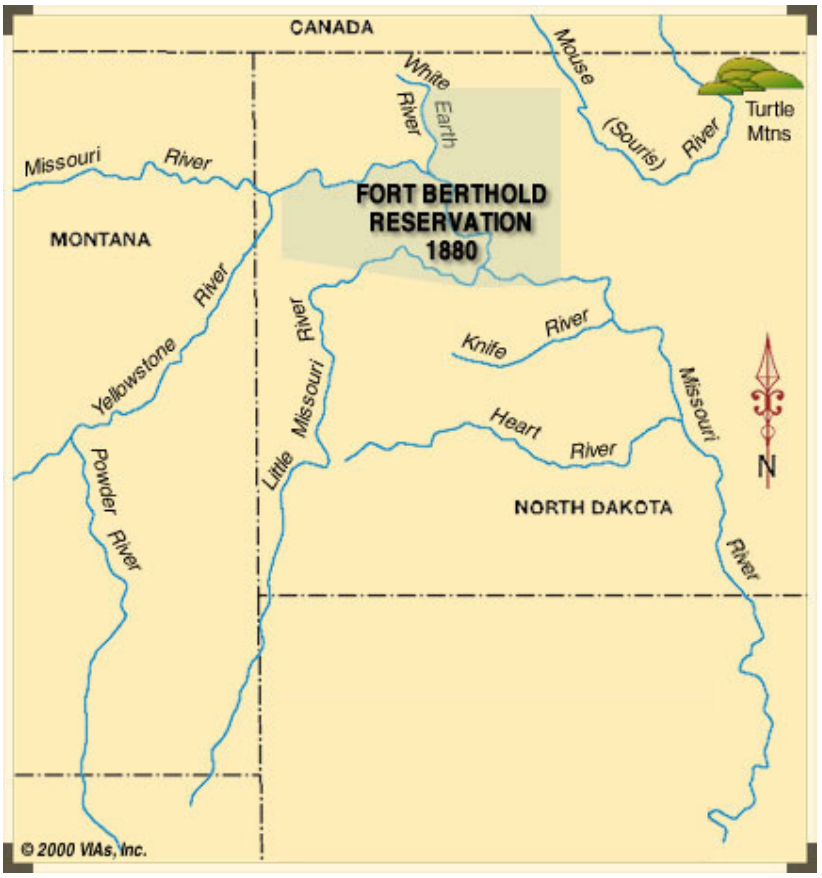
ATT 7 - 1851 Reservation (Disc L_C)



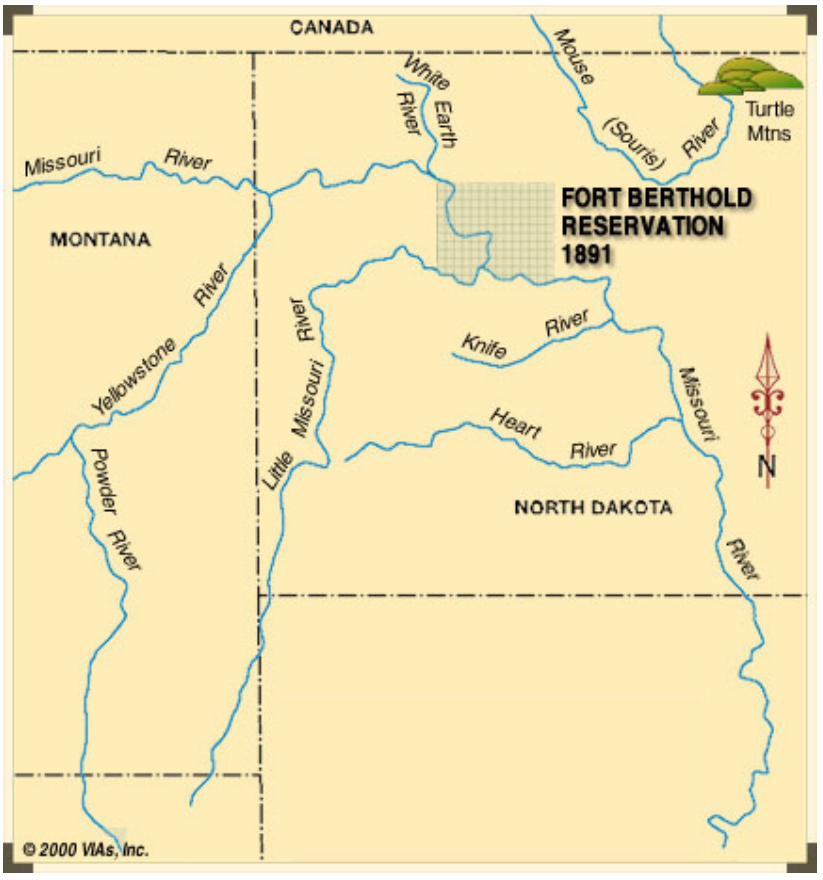
ATT 8 - 1870 Reservation (Disc L_C)



ATT 9 - 1880 Reservation (Disc L_C)



ATT 10 - 1891 Reservation (Disc L_C)



ATT 11 - Reservation Boundary History Map