SUBMITTED WITHOUT ORAL ARGUMENT

No. 22-5185

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDAN, HIDATSA, AND ARIKARA NATION,

Appellee

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al*.,

Appellees,

STATE OF NORTH DAKOTA,

Appellant

On Appeal from the United States District Court for the District of Columbia in Case No. 1:20-cv-01918-ABJ, Amy Berman Jackson, United States District Judge

APPELLANT STATE OF NORTH DAKOTA'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.**

1. The State of North Dakota ("North Dakota" or the "State") was Intervenor-Defendant in the district court and is Appellant in this Court.

2. Mandan, Hidatsa, and Arikara Nation ("MHA Nation") is Plaintiff in the district court and is Appellee in this Court.

3. United States Department of the Interior; Debra A. Haaland, in her official capacity as Secretary of the United States Department of the Interior; and Robert Anderson, in his official capacity as Solicitor of the United States Department of the Interior (collectively "Federal Defendants") are Defendants in the district court and Appellees in this Court.

4. No amici have participated in the district court or this Court.

(B) **Ruling Under Review.** The ruling under review is the district court's Order, *Mandan, Hidatsa & Arikara Nation v. U.S. Department of the Interior*, *et al.*, No. 1:20-cv-01918-ABJ (D.D.C. June 21, 2022), ECF No. 63 (Hon. Amy Berman Jackson), Joint Appendix ("JA") 167-173. The citation to the official reporter is not available.

(C) **Related Cases.** North Dakota is not aware of any related cases regarding this appeal on intervention. This case was not previously before this Court or any other court other than the district court below. Plaintiff also filed a separate case related to the district court case in the U.S. Court of Federal Claims, *Mandan, Hidatsa, and Arikara Nation v. United States*, No. 20-cv-00859 (Ct. Cl., filed July 15, 2022), which presently is stayed while the district court case proceeds.

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*Authorities upon which Appellant North Dakota chiefly relies are marked with asterisks.

GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
JA	Joint Appendix
LTRO	BIA Land Titles and Records Office
MHA Nation	Mandan, Hidatsa, and Arikara Nation

STATEMENT OF JURISDICTION

Pursuant to Fed. R. App. P. 28(a)(4)(A)-(D):

(A) The district court had subject matter jurisdiction over this action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., and 28 U.S.C. § 1331.

(B) This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

(C) The filing dates establishing the timeliness of this appeal include the following: (i) on June 21, 2022, the district court issued an Order denying North Dakota's Supplemental Motion to Intervene (JA167-173); and (ii) on June 27, 2022, North Dakota filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(B) (JA174) from the Order.

(D) This appeal is not from an order or judgment that disposed of all parties' claims. This appeal is from an order denying intervention as of right and permissive intervention. "The denial of a motion for intervention as of right is an appealable final order . . . ." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003). The Court at the same time may review a contemporaneous denial of permissive intervention for abuse of discretion by the district court. *Alternative Rsch. & Dev. Found. v. Veneman*, 262 F.3d 406, 409 (D.C. Cir. 2001).

STATEMENT OF ISSUES PRESENTED

(1) Whether the district court erred in denying North Dakota's continued intervention as of right under Fed. R. Civ. P. 24(a)(2) on the sole ground that the State's interest in this case was eliminated by ministerial administrative recordation of trust title for MHA Nation as to certain Missouri Riverbed lands in reliance on Federal Defendants' newly-announced legal opinion.

(2) Whether the district court abused its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b) on the same ground as it denied intervention as of right.

INTRODUCTION

The district court erroneously extinguished the State's intervention as a Defendant in the ongoing district court case. At base, Plaintiff MHA Nation seeks a judicial determination of ownership and award of revenues derived from mineral production beneath Missouri Riverbed lands within the Fort Berthold Indian Reservation in North Dakota. Such relief would deprive North Dakota of its interests in the same riverbed mineral revenues. That is, if the district court were to award Plaintiff revenues from such mineral production, North Dakota would not receive those revenues. North Dakota thus intervened at the start of this litigation to defend its sovereign, contractual, proprietary, and financial interests in this case.

The State retains these same interests in this case today. Notwithstanding Federal Defendants' flip-flop during this litigation to now endorse MHA Nation's views, MHA Nation still holds no legally established ownership of the riverbed and associated revenues. The district court incorrectly regarded ministerial recordation of trust title by the Department of the Interior ("Interior") pursuant to Interior's newly expressed legal opinion as conferring legal title to MHA Nation, despite the fact that Federal Defendants admit that Interior cannot render a binding final determination of ownership. Such a judicial determination of ownership is a key element of each Count in MHA Nation's complaint before the district court. Denial of intervention in this litigation to defend the State's interests in the subject lands and mineral revenues is akin to forced acceptance of their forfeiture to MHA Nation, were it to ultimately prevail below on its remaining Counts.

This Court thus should reverse and allow the State's continued intervention in the underlying case. Reversal is especially important as Federal Defendants have begun to pay certain Missouri Riverbed mineral production revenues to MHA Nation, and the parties are excluding the State from notification of future payments and from case-related discussions implicating the State's interests. *See, e.g.*, July 25, 2022 Joint Status Report, JA176; Sept. 23, 2022 Joint Status Report, JA180.

STATEMENT OF THE CASE

North Dakota focuses on those facts relevant to its intervention. This appeal does not require resolution of the merits of the case before the district court.

In May 2020, the Interior Solicitor issued an M-Opinion that the State of North Dakota owns the historical Missouri Riverbed within the Fort Berthold Reservation. *Solicitor Jorjani's Opinion* M-37056 (May 26, 2020) (the "Jorjani M-Opinion"), ECF No. 39-2. Dissatisfied with this M-Opinion, and with Federal Defendants not taking actions to reflect ownership by MHA Nation rather than the State, MHA Nation filed this case against Federal Defendants. Via its lawsuit, MHA Nation seeks legal title to certain Missouri Riverbed lands and revenues from oil and gas production therefrom.

MHA Nation asserted four alternative and related theories for relief: Counts I and II – Alleging that the Jorjani M-Opinion violated the Administrative Procedure Act; Count III – Seeking an accounting of the trust property the U.S. Department of the Interior ("DOI") allegedly holds and manages for the benefit of MHA Nation; and Count IV – Seeking declaratory relief that MHA Nation is the beneficial owner of the Missouri riverbed and underlying mineral estate within the Reservation. JA28-32.

North Dakota promptly intervened to defend against MHA Nation's claims and protect the State's obvious interest in receipt of riverbed mineral revenues.

See North Dakota's Expedited Mot. to Intervene, ECF No. 10. North Dakota asserted no claim or counterclaim. North Dakota limited its initial intervention to Count I against the Jorjani M-Opinion because the district court had bifurcated Count I for adjudication first. JA35-37. The State explicitly reserved its right to intervene as to additional Counts when ripe for adjudication. *See* North Dakota's Mem. in Supp. of Expedited Mot. to Intervene at 2, ECF No. 10-1.

The district court granted the State intervention as of right on August 27, 2020. JA38-44. It did so despite MHA Nation's opposition; Federal Defendants did not oppose. JA40. The district court also precluded Federal Defendants' disbursement of any relevant mineral revenues it holds at least until resolution of Count I. JA37. The parties then completed briefing on cross-motions for summary judgment on Count I in October 2020, wherein Federal Defendants vigorously defended the Jorjani Opinion in the district court (*see* ECF Nos. 16-17, 20-21, 30-31, 33, 34). The district court never ruled on the merits of those motions.

After the Administration changed, Federal Defendants withdrew the Jorjani M-Opinion and issued a new M-Opinion reaching the opposite conclusion that MHA Nation, and not the State, owns the riverbed. *See* Joint Mot. for Extension of Time to File Joint Status Report (providing link to *Solicitor Anderson's Opinion* M-37073 (Feb. 4, 2022) (the "Anderson M-Opinion")), ECF No. 54. Pursuant to the Anderson M-Opinion, the Bureau of Indian Affairs ("BIA") shortly thereafter

also undertook the ministerial step of recording title in its Land Titles and Records Office ("LTRO"). *See* JA152. As a result, MHA Nation agreed to dismiss Counts I and II and part of Count IV as moot. JA104; JA155. MHA Nation declined to dismiss its remaining Counts III and IV and continues to seek relief in the district court. *See, e.g.*, *id.* The district court proceeded to dismiss Counts I and II in full and Count IV in part. JA125-127; JA10 (April 19, 2022 Minute Order).

The district court *sua sponte* indicated its inclination to allow North Dakota's intervention on MHA Nation's remaining claims even without so much as another motion to intervene. *See* JA127 ("In light of the Court's August 27, 2020 Opinion and Order [Dkt. # 15] granting North Dakota's motion to intervene as a defendant, it is this Court's view that the state need not file another motion seeking to intervene in the resolution of Counts III and IV. However, if any of the parties disagree, they should set forth their reasons in the status report."). Yet, MHA Nation renewed its opposition to the North Dakota's intervention. JA129. North Dakota thus formally moved to intervene as to MHA Nation's remaining Counts, on similar grounds as its granted initial motion to intervene. *See* North Dakota's Suppl. Mot. to Intervene, ECF No. 59. Once again, North Dakota asserted no claim or counterclaim, but only sought to defend against MHA Nation's claims. This time, Federal Defendants elected to join MHA Nation in opposition.

The district court denied the State intervention, either as of right or permissively. JA167-173. The district court found that North Dakota no longer had an interest in the case because BIA's subsequent administrative recordation of trust title pursuant to the Anderson M-Opinion had finally resolved ownership in favor of MHA Nation. JA173. Meanwhile, MHA Nation continues to pursue its lawsuit in the district court.

North Dakota filed an interlocutory appeal with this Court from the district court's denial of intervention. JA174. North Dakota seeks to retain its intervenor status to ensure that it may timely and meaningfully participate and defend its interests in the ongoing district court proceedings and any subsequent appeal therefrom.

SUMMARY OF ARGUMENT

The State of North Dakota is entitled to intervention as of right, or alternately warrants permissive intervention, on the remaining MHA Nation claims pending before the district court. North Dakota is a sovereign and the lessor of many oil and gas leases encompassing the historical bed of the Missouri River covered by MHA Nation's complaint. The district court previously found that North Dakota meets all Fed. R. Civ. P. 24(a)(2) standards for intervention as of

right on Count I in MHA Nation's complaint.[1] The surviving MHA Nation Counts implicate the very same State interests by raising alternate theories to arrogate riverbed mineral revenues to the exclusion of the State. The district court thus should have reached the same conclusion to grant intervention as to the remaining Counts.

The district court's denial of intervention is premised on a flawed interpretation of the legal implications of the Anderson M-Opinion and mere BIA recordation of title. The district court summarily and incorrectly found that BIA's mere recordation of title adhering to the Anderson M-Opinion mooted any question of ownership or property rights in the Missouri Riverbed or derived mineral revenues and thereby rendered the State a mere bystander. That was error as a matter of law. No court has yet rendered a binding determination that MHA Nation owns the riverbed lands, minerals, or revenues, and Interior cannot and has not conferred such legally established title to MHA Nation. To be sure, Federal Defendants in this case have never argued otherwise.

Regardless of administrative actions MHA Nation might persuade Federal Defendants to undertake, its district court lawsuit seeks *judicial relief*. The district court cannot award MHA Nation's requested declaratory, injunctive, or mandamus relief for riverbed mineral revenues if MHA Nation does not actually own the

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[1] Per D.C. Cir. Rule 28, the complete text of Fed. R. Civ. P. 24 appears in the Addendum to this brief.

riverbed and revenues. Because MHA Nation has not yet legally established this key threshold element of its remaining Counts, it cannot strip the State of its own interests in this case. The district court thus erred in denying North Dakota intervention on MHA Nation's remaining Counts.

STANDARD OF REVIEW

This Court reviews a denial of intervention as of right de novo on issues of law and for clear error on findings of fact. *Fund For Animals*, 322 F.3d at 732. In this appeal, de novo review applies because the district court erred as a matter of law, and the relevant material facts are undisputed. The Court reviews a denial of permissive intervention for an abuse of discretion. *Id.* The Court need not reach permissive intervention if it grants this appeal on intervention as of right.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE STATE OF NORTH DAKOTA INTERVENTION AS OF RIGHT.

Courts "must" grant intervention to "anyone" who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). This standard yields a four-part test in this Circuit: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten

to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Intervenor-defendants also must have constitutional standing. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

This Circuit has long employed a standard favoring intervention, including on the "interest" factor underlying the district court's denial here. *Nuesse v. Camp*, 385 F.2d 694, 701-702 (D.C. Cir. 1967) (reversing district court denial of intervention to a State of Wisconsin official). Rule 24(a)(2)'s "interest" language was "designed to liberalize the right to intervene in federal actions." *Id.* at 701. As this Court has explained, "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (quoting *Nuesse,* 385 F.2d at 700). Moreover, "[a]n intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit." *Id.*

Neither the district court nor Appellees questioned North Dakota's standing and satisfaction of all Rule 24(a)(2) criteria except the "interest" prong. Rather than applying the proper standard or any "practical guide," the district court

brushed aside all of North Dakota's interests in this case. The district court's sole rationale was that recent administrative actions had negated the State's legal interests. This Court should reverse that error of law.

A. The State Has a Clear Interest in This Case and the Relief Sought.

MHA Nation's claimed relief, if MHA Nation were to prevail, would impair North Dakota's interests in the lands, minerals, and revenues at issue. At stake for North Dakota are its sovereign interests, bound up in which are thousands of surface and mineral acres; its proprietary and contractual interests in 255 outstanding oil and gas leases covering 18,523 acres; its financial interests in well over a hundred million dollars in oil and gas revenues; and regulatory authority over myriad activities on and under the Missouri Riverbed. *See* JA160-61. These facts are undisputed, yet the district court ignored them.

Under these circumstances, where MHA Nation's lawsuit claims entitlement to the State's property, the "interest" prong is "readily dispatched." *Fund for Animals*, 322 F.3d at 735; *see, e.g.*, *id.* ("In any event, because the relevant 'property' is Mongolia's sheep and the relevant 'transaction' is the [agency's] decision to permit the importation of those sheep from Mongolia, there can be no question that [proposed intervenor] has the requisite interest."); *Nuesse*, 385 F.2d at 700 ("We should not be niggardly in gauging the interest of a state administrative officer in the validity of what his federal counterpart has done in an

area of overlapping fact and intertwined law."); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 6 (D.D.C. 2008) (recognizing that "land taken into trust by the United States for an Indian tribe or individual is exempt from state and local taxation" and results in "loss of sovereignty"). Here, if its litigation claims were to succeed, MHA Nation likely would disturb existing State leases and claim revenues that the State would otherwise receive. No recompense could repair the harm arising from North Dakota's inability to defend its interests while the underlying litigation proceeds without the State. *See Akiachak Native Cmty.*, 584 F. Supp. 2d at 6 (looking to "practical consequences of denying intervention" in finding State of Alaska had interest to intervene). North Dakota thus satisfies the Rule 24(a)(2) "interest" criterion for intervention, and this Court should reverse.

B. MHA Nation Has Not Established That It Owns the Riverbed Mineral Revenues.

North Dakota's interests in this case remain just as salient today as they were when the district court granted intervention. The district court treated LTRO "recordation" in line with the Anderson M-Opinion as "establishing legal title" in MHA Nation to the property covered in its complaint. JA172. That is wrong. Only a *court* can render a binding determination of legal title, and it is undisputed that no such judicial determination yet exists, including in the underlying district court case. By contrast, nothing Federal Defendants have said or done after MHA

Nation brought this case erases North Dakota's interests, including North Dakota's obvious interest in riverbed mineral revenues not flowing to MHA Nation rather than to the State.

As a matter of law, Interior—including the Solicitor and BIA—cannot displace the State as property owner, and the district court cited no such authority. Rather, Interior lacks "the authority to adjudicate legal title to real property," which "is a judicial, not an executive, function." *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 752 (10th Cir. 2005). For example, the Tenth Circuit held that another Interior agency, the Bureau of Land Management, could not render "binding determinations" of real property disputes involving certain rights-of-way across federally-managed lands, and only the courts could do so. *Id.* at 757. That court also cited another example case where "the boundary of an Indian reservation had become unsettled by movement of the Missouri River," and "rather than conducting an agency [BIA] adjudication of the issue, with an appeal on the record in the federal court, the United States went into federal court and sued to quiet title." *Id.* at 752 (citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 660 (1979)).

Interior itself has repeatedly recognized its limited authority to administratively declare title to land in other contexts. For example, "[q]uestions of navigability as it affects title to submerged lands must be decided finally by the

courts, rather than in any administrative forum." *Ervin K. Terry*, 89 Interior Dec. 242, 247 (1982) (citing *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935)). When Interior issues a decision about a river or lake's navigability, doing so may "establish the Department's position on title" but does "not finally adjudicate title." *Id.* at 247; *see also S. Utah Wilderness All.*, 425 F.3d at 752 (recognizing that "for over a century, in every Land Department or BLM decision in which parties sought a ruling on the validity of an R.S. 2477 [road right-of-way] claim, the agency maintained that this was a matter to be resolved by the courts"). Interior's adjudicatory bodies, including the Interior Board of Land Appeals, are similarly constrained. *City of San Antonio*, 65 IBLA 326, 330 (1982) ("[T]he Board—indeed, the Department of the Interior—cannot *finally* adjudicate the question of the Government's ownership of [property in question]." (emphasis in original)). So is the Interior Solicitor, as discussed *infra*.[2]

The importance of the courts' role in finally deciding property ownership disputes is particularly heightened in the present context of submerged lands. The Equal Footing Doctrine ensures state title to the beds of navigable waters within that state unless Congress *plainly* ordained otherwise prior to statehood. *Montana*

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[2] Likewise in this case, Federal Defendants previously argued to the district court that Interior cannot establish legal ownership. *E.g.*, Fed. Def. Cross-Mot. for Partial Summ. J. at 1, ECF No. 16 ("[W]hether the property in question belongs to the State or is held in trust by the Federal government is determined by the Constitution, Congressional and Executive acts, and the Supreme Court caselaw that interprets the Constitution and those acts—not an Interior opinion").

v. United States, 450 U.S. 544, 551-52 (1981); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). "The mere fact that the bed of a navigable water lies within the [reservation] boundaries described in the treaty does not make the riverbed part of the conveyed land . . . ." *Montana*, 450 U.S. at 554. States have often litigated to protect these interests, and courts recognize the interests as entitled to adjudication and legal protection. *E.g., id.*; *United States v. Alaska*, 521 U.S. 1 (1997). Indeed, "[a] government's loss of sovereignty over land within its jurisdiction is a legally protectable interest." *Akiachak Native Cmty.*, 584 F. Supp. 2d at 6. Agencies like BIA or BLM cannot assume this exclusive judicial function, nor have they purported to do so here. *See Ervin K. Terry,* 89 Interior Dec. at 247. Tellingly, MHA Nation has brought, and still maintains, a federal court lawsuit to adjudicate its interests and judicially award its requested relief.

We now turn to the specific agency actions underlying the district court's intervention order, i.e., the Anderson M-Opinion and LTRO recordation. There is no dispute that withdrawal of the Jorjani M-Opinion and issuance of the Anderson

M-Opinion do not legally establish title.[3] The district court stated that "the Court is not relying on the new M-Opinion as establishing legal title."[4] JA172.

Nor does BIA's recordation of title in its LTRO in reliance on the Anderson M-Opinion establish legal title in MHA Nation or divest the State of its interests. As MHA Nation concedes in its own complaint, BIA recordation of trust title is merely a "ministerial" act. JA125 (alleging that "it is incumbent upon the BIA to implement the Solicitor's opinion and accomplish the *ministerial act* of recording the MHA Nation's trust title in the Office of Land Titles and Records") (emphasis added); *In re Emerald Outdoor Advertising, LLC*, 444 F.3d 1077, 1084 (9th Cir. 2006) ("recording is a ministerial act") (quotation marks and citation omitted).

At base, recordation provides public notice of Interior's views of title for agency purposes. *See In re Emerald Outdoor Advertising*, 444 F.3d at 1081 ("The act of recording has no legal significance besides providing notice to interested parties of an interest in land."). BIA's applicable regulations clarify: "What is the purpose of the record of title? The record of title provides the BIA with a record of title documents to Indian land and provides constructive notice that the title

[3] Appellees conceded in briefing to the district court that M-Opinions do not determine title. *See* Fed. Def. Opp. to North Dakota's Suppl. Mot. to Intervene at 7 n.1, ECF No. 61; Pl. Opp. to North Dakota's Suppl. Mot. to Intervene at 5 n.2, ECF No. 60.

[4] The district court's earlier passing reference to "the Jorjani Opinion that established the state's property and sovereign interests in the minerals of the Missouri Riverbed" (JA168) does not mean that State held no such interests beforehand; it has since statehood in 1889.

documents exist." 25 C.F.R. § 150.101; *see also* 25 C.F.R. § 150.1. This LTRO recordation function has no greater import than when other governmental entities record title. For example, a North Dakota real estate statute provides: "Effect of recording. The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons." N.D. Cent. Code Ann. § 47-19-19.

But because Interior has no authority to legally determine title, LTRO recordation does not achieve that result either. And here, LTRO recordation of trust title was wholly based on the Anderson M-Opinion, which itself merely sets forth only an opinion. Federal Defendants said it best in their prior summary judgment briefing to the district court on Count I: "[T]he Department's *opinion* about ownership of property does not determine the ownership of that property—any legal rights to the subsurface lands at issue are determined by Congress and the Constitution, not Interior." Federal Defs.' Reply in Supp. of Cross-Mot. for Partial Summ. J. at 4, ECF No. 33 (emphasis in original). Neither the district court nor Appellees identified authority for Interior to finally adjudicate property disputes among competing claimants. Such an adjudication of title has never occurred here, including by the district court. Therefore, the State retains its interest in this case for intervention as of right.

C. Ownership of Riverbed Mineral Revenues Is a Necessary and Unproven Element of MHA Nation's Claims in This Case.

MHA Nation must establish riverbed ownership to obtain affirmative relief from this Court on each of the Counts of its complaint. As Plaintiff, MHA Nation bears the burden to prove all elements of its claims. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims[.]" (citation omitted)). While two plus years into this case MHA Nation and Federal Defendants now perceive a safer course to avoid adjudication of this threshold issue altogether, they and the district court cite nothing allowing them to collectively assume it away.

The district court found that "title is not at issue in either Count III or IV; it was recorded by the Bureau of Indian Affairs on April 4, 2022." JA172. The district court then opined that "Count III and the remaining part of Count IV concern Interior's trust obligations towards the plaintiff." *Id.* But as explained above, the district court's premise that title is legally settled by LTRO recordation is incorrect. In turn, it is axiomatic that Federal Defendants owe $0 to MHA Nation—whether under an "accounting," Administrative Procedure Act "agency action unlawfully withheld or unreasonably delayed," or "mandamus" claim under

MHA Nation's remaining Counts—if MHA Nation does not own the produced riverbed minerals. *See* JA30-31.

Indeed, in asserting its position on mootness, MHA Nation explained, "[a]lthough the cross motions [on Count I] are moot, the MHA Nation's legal arguments in the briefs remain relevant to the claims made in Counts III and IV of the Complaint." JA105. That is because while the M-Opinion at issue in Count I was withdrawn by Interior, which prompted the MHA Nation to agree to dismiss that count, the district court made no determination as to the ownership of the riverbed at issue. So, for example, while Count IV demands Federal Defendants to "collect, deposit and invest, or pay over funds *owing* to the MHA Nation from the extraction of mineral resources," the district court has not considered whether such funds are "owing" at all. *See* JA32; JA169, 172. Contrary to the district court's order, judicial relief ordering redirection of those funds to MHA Nation rather than the State would "threaten [the State's] claimed interest in the riverbed." *See* JA172. The State is entitled to intervene to maintain its defense to MHA Nation's extant claims.

The district court's observation that the case below does not "challenge" the Anderson M-Opinion misses the point.[5] *See* JA171. North Dakota did not so

[5] Though the district court did not find otherwise in its order, any possibility of a future action to challenge the Anderson M-Opinion or related agency actions is immaterial to North Dakota's interest in the pending district court case. *See, e.g.*,

move or file any such claim or counterclaim. To be clear, the State's interests in defending MHA Nation's remaining claims in this case, like the claims themselves, do not derive from or depend on any Interior Solicitor M-Opinion. The salient point is that MHA Nation refuses to dismiss the remainder of its lawsuit because it seeks relief *from the district court*, not merely Federal Defendants. To obtain such judicial relief, MHA Nation must prevail on each requisite element of its remaining Counts, beginning with legal ownership.

Because entitlement to revenues from riverbed mineral production based on ownership is necessarily a threshold issue for MHA Nation's remaining Counts, and because no binding determination of that issue yet exists, North Dakota has a protectable interest in this case. The district court erred in concluding otherwise.

II. ALTERNATIVELY, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE STATE OF NORTH DAKOTA PERMISSIVE INTERVENTION.

Alternately, North Dakota merits permissive intervention. Fed. R. Civ. P. 24(b) ("On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."). The district court's order allotted only two sentences to permissive

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Nuesse, 385 F.2d at 702 ("Should this court on appeal render a decision in the Commissioner's absence, and contrary to his view, he would presumably be hampered in seeking to vindicate his approach in another court. . . . [I]t is this fragmented approach to adjudication that the revitalized federal rules seek to avoid.").

intervention. JA173. That summary denial, particularly after initially granting North Dakota intervention, was an abuse of discretion.

Although the district court concluded that North Dakota "is not pursuing any claim or defense that shares a common question of law or fact with the claims pending before the Court," *see id.,* North Dakota indeed will defend against MHA Nation's remaining central legal claims and requested relief in this litigation and thereby protect the State's competing interests in funds derived from mineral production beneath the Missouri Riverbed. To the extent that the district court merged the criteria under Rule 24(a)(2) and Rule 24(b), that was also incorrect, and in any event the State has met the "interest" factor as discussed above. Finally, the State's management of oil and gas and other resources on and below the riverbed provides an independent basis to permissively intervene, yet the district court offered no response. *See* Fed. R. Civ. P. 24(b)(2).

CONCLUSION

For the reasons discussed herein, North Dakota respectfully requests that this Court reverse the district court and grant the State intervention as of right, and alternatively permissively, in the pending case.

Dated: September 28, 2022

Respectfully submitted,

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FED. R. APP. P. 32(g) CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.

/s/ James M. Auslander
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2022, I electronically filed the foregoing Appellant State of North Dakota's Opening Brief with the Clerk of Court using ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by ECF.

/s/ James M. Auslander
James M. Auslander

ADDENDUM: PERTINENT STATUTES, REGULATIONS AND RULES

	Page
Fed. R. Civ. P. 24	A-2

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

Currentness

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

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CREDIT(S)

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Fed. Rules Civ. Proc. Rule 24, 28 U.S.C.A., FRCP Rule 24
Including Amendments Received Through 9-1-22

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