United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

May 26, 2020

M-37056

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Assistant Secretary – Land and Minerals Management

From: Solicitor

Subject: Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)

On January 18, 2017, the Solicitor issued M-37044, addressing ownership of minerals located beneath the original bed of the Missouri River where it flows through the Fort Berthold Indian Reservation ("Reservation") within the State of North Dakota ("State"), as well as ownership of minerals beneath uplands flooded by the construction of Garrison Dam and the subsequent formation of Lake Sakakawea. On June 8, 2018, the Solicitor issued M-37052, a partial suspension and temporary withdrawal of M-37044, in order to ensure a thorough legal and factual basis for M-37044 through review of the underlying historical record by a professional historian, a task not performed prior to completion of M-37044.

Since the issuance of M-37052, professional historians employed by Historical Research Associates, Inc. produced a comprehensive report on this matter titled "Historical Examination of the Missouri River within the Fort Berthold Indian Reservation, Precontact-1902" ("HRA Report"). After reviewing the HRA Report and reconsidering relevant judicial precedent and statutes in light of the historical context, I am permanently withdrawing those portions of M-37044 that address ownership of minerals located beneath the original bed of the Missouri River and replacing that analysis with this opinion. For the reasons set forth below, I have concluded that the State of North Dakota is the legal owner of submerged lands beneath the Missouri River where it flows through the Reservation.[1]

This opinion alters previous Departmental decisions related to this issue and supersedes guidance provided in Solicitor's Opinion M-28120 in 1936, and by the Interior Board of Land Appeals

[1] Those portions of M-37044 that address the ownership of minerals beneath the flooded uplands remain affirmed, as stated in M-37052.

("IBLA") in 1979.[2] These decisions were not informed by the facts provided in the HRA Report, and did not account for subsequent United States Supreme Court ("Supreme Court") jurisprudence in *Montana v. United States*,[3] *United States v. Alaska*,[4] and *Idaho v. United States*.[5] In these cases, the Supreme Court perfected its reasoning with regard to federal reservations of submerged lands. As such, the Department's earlier administrative decisions must be reexamined.[6]

I. The Equal Footing Doctrine establishes a strong presumption in favor of State ownership of submerged lands, as reflected in Supreme Court decisions considering the issue.

The Equal Footing Doctrine, also referred to as "equality of the states," is the constitutional principle that each state admitted to the Union enters on an equal footing with the original thirteen states. As early as 1845, the Supreme Court interpreted this principle to establish a default rule that the "shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively."[7] The original thirteen states maintained possession of submerged lands upon entrance to the Union, and all "new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[8] The Equal Footing Doctrine thus creates a constitutional presumption in favor of state ownership that sets the stage for the submerged lands analysis we undertake here.

Notwithstanding this presumption, Congress does possess authority to "convey land beneath navigable waters, and to reserve such land (…) for a particular national purpose such as a[n] (…) Indian reservation."[9] If Congress does so prior to statehood, the Equal Footing Doctrine's presumption of state title to submerged lands may be defeated.[10] However, due to the public importance of navigable waterways, ownership of the land underlying such waters is "strongly identified with the sovereign power of government,"[11] and the Supreme Court instructs us that the presumption in favor of state ownership is a weighty one. Generally speaking, "lands

---

[2] *See* 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); *Impel Energy Corp.*, 42 IBLA 105 (Aug. 16, 1979).
[3] 450 U.S. 544 (1981).
[4] 521 U.S. 1 (1997).
[5] 533 U.S. 262 (2001).
[6] Note, for instance, that the IBLA relied in part on *United States v. Finch*, 548 F.2d 822 (1976), as support for its ruling in favor of tribal ownership of submerged lands. *See Impel Energy Corp.*, 42 IBLA 105, 113. *Finch* was a Ninth Circuit case proceeding nearly parallel with *Montana v. United States* and was ultimately reversed. This administrative proceeding was precipitated by the Bureau of Land Management analysis applying fundamental judicial precedent regarding states' rights to submerged land in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and *Shively v. Bowlby*, 152 U.S. 1 (1894) to reject applications for oil and gas leasing beneath the Missouri River on the ground that the lands sought for leasing were owned by the State, not by the federal government. We again endorse that initial position of the Department through this opinion, and we note that the IBLA did not have the benefit of reference to later Supreme Court cases on the issue, including *Montana*, *Alaska*, and *Idaho*.
[7] *Lessee of Pollard v. Hagan*, 44 U.S. at 212, 230 (1845).
[8] *Ibid.*
[9] *See Idaho v. United States*, 533 U.S. 262, 272 (2001).
[10] *Id.* at 272-73.
[11] *Montana v. United States*, 450 U.S. 544, 552 (1981).

underlying navigable waters within territory acquired by the [federal] Government are held in trust for future States and [] title to such lands is automatically vested in the States upon admission to the Union."[12] As the Supreme Court explained in *United States v. Holt State Bank*,

> the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in *exceptional instances* when impelled to particular disposals by some international duty or *public exigency*. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was *definitely declared* or *otherwise made very plain*.[13,14]

The Supreme Court has considered several times whether an intent to reserve submerged lands has been so "definitely declared or otherwise made very plain" when the government makes an initial reservation of land prior to statehood, such as in the form of a wilderness reserve or an Indian reservation. Because the act of reserving submerged lands by the United States does not necessarily imply an intent "to defeat a future State's title to the land,"[15] the Supreme Court undertakes a two-step inquiry in such cases. That test, as expressed in the Supreme Court's analysis in *Idaho v. United States*, asks "[1] whether Congress intended to include land under navigable waters within the federal reservation and, if so, [2] whether Congress intended to defeat the future State's title to the submerged lands."[16]

In the case of land initially reserved by the Executive Branch, the *Idaho* court explained that 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."[17] The *Idaho* court then inquired as to "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."[18] Where this purpose would have been compromised, the Supreme Court has ruled that "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area."[19]

---

[12] *Arizona v. California*, 373 U.S. 546, 597 (1963).
[13] 270 U.S. 49, 55 (1926) (emphasis added), citing *Shively v. Bowlby*, 152 U.S. 1 (1894).
[14] We note 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. Consistent with the constitutionally-based presumption that submerged lands are conveyed to the State at the moment of statehood, the Supreme Court has instead relied exclusively on federal intent at the time of reservation establishment, Congressional notice of this intent, and whether the purpose of the reservation would have been compromised if submerged lands had passed to the State at the time of reservation establishment.
[15] *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987).
[16] 533 U.S. 262, 273 (2001).
[17] *Id.* (emphasis added).
[18] *Id.* at 273-74 (internal citations omitted).
[19] *United States v. Alaska*, 521 U.S. 1, 39-40 (1997).

II. The history of executive actions establishing and modifying the Reservation does not demonstrate a clear intent to include submerged lands under Step One of the *Idaho* test.

a. The record is silent regarding the riverbed itself.

The description and modification of the Reservation through an 1870 Executive Order,[20] an 1880 Executive Order,[21] and through an 1886 Agreement (ratified by Congress in 1891, subsequent to statehood)[22] is well-documented. The Executive Orders and the 1886 Agreement included language that defined the boundaries of the Reservation to include the Missouri River, and used the river as the boundary line between the Reservation and the State in certain places. For example, the boundary description in the 1870 Executive Order 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.[23]

The use of the term "left bank" meant the north and east sides of the Missouri River,[24] and thus this description includes the span of the river within the Reservation's boundaries. However, the inclusion of a river within the geographic boundaries of a reservation does not of necessity mean that submerged lands underlying the river are also included. The Supreme Court made this point abundantly clear in *Montana*:

> The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.[25]

---

[20] Exec. Order (Apr. 12, 1870), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 881 (2d ed. 1904) (hereinafter "1870 Executive Order").
[21] Exec. Order (July 13, 1880), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 881 (2d ed. 1904) (hereinafter "1880 Executive Order" and together with the 1870 Executive Order, "Executive Orders").
[22] Act of March 3, 1891, 26 Stat. 989 at 1032 (hereinafter "1886 Agreement").
[23] 1870 Executive Order.
[24] 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.").
[25] 450 U.S. 544, 554 (1981).

After reviewing the HRA Report and its exhaustive analysis of the records created in conjunction with the Executive Orders and the 1886 Agreement, it is plain that the Executive never made any express reference to the riverbed itself. While the Missouri River is obviously included within the *geographic* boundaries of the Reservation, the record is silent regarding whether the Reservation was intended to *include* the riverbed. These are entirely different legal questions.

Without any express reference to the riverbed, and without any other contemporaneous evidence suggesting that the Executive intended to include the riverbed within the Reservation, we cannot find that the Reservation "*clearly* includes submerged lands" as required by the Supreme Court in *Idaho*.[26] Here, the Executive's intent to include submerged lands is far from clear, falling well below the threshold necessary to overcome the strong presumption of State ownership.

b. The record does not show an intent to protect uses of the riverbed, including fishing.

1. Farming, Grazing, Hunting, and Timber

In contrast to the historical record's silence with regard to the riverbed, there is substantial evidence that the Executive did have in mind a clear purpose in setting aside lands for the Mandan, Hidatsa, and Arikara Nation ("Nation"). The Executive was actively considering the amount of land sufficient to support the Nation with farming, livestock, and, to a lesser extent, hunting and forestry. This was the core of executive intent here, not the river and its fishing resources.

Long before the federal government's relationship with the Nation, tribal members practiced extensive subsistence farming. "Being skilled agriculturists, the Upper Missouri tribes might grow hundreds of bushels of corn, beans, and squash in productive years."[27] Bureau of Indian Affairs ("BIA") agents sought to encourage more farming, actively urging tribal members to move away from the centralized village on the river ("Like-a-Fishhook" village) to take up individual farms.[28] BIA agents assisted tribal members in breaking farming ground, and in 1885, they relocated nearly a third of tribal members to farming allotments.[29]

---

[26] 533 U.S. 262, 273 (2001).

[27] HRA Report at 27.

[28] "Bureau of Indian Affairs (BIA) agents were also encouraging the Indians to move out of Like-a-Fishhook village, which they deemed crowded and unsanitary, to take up individual farms. In 1882, Agent Jacob Kauffman persuaded some families to relocate upriver of Like-a-Fishhook, where agency officials had broken farm land for them. . . . In 1885, Agent Abram Gifford relocated about 100 Indians to allotments. This coincides with the recollection of Edward Goodbird (Hidatsa) that '[i]n the summer of my sixteenth year nearly a third of my tribe left to take up allotments.'" HRA Report at 19-20, citing Letter from Courtenay to Comm'r of Indian Affairs, August 19, 1879, ARCIA *1879*, 30; Letter from Jacob Kauffman, Indian Agent, Fort Berthold Agency, to Comm'r of Indian Affairs, August 9, 1883, ARCIA *1883*, 32–33; Letter from Abram J. Gifford, Indian Agent, Fort Berthold Agency, to Comm'r of Indian Affairs, August 18, 1885, ARCIA *1885*, 30.

[29] *See ibid.* Note that these allotments were different from those made pursuant to the 1886 Agreement, which was ratified by the Act of March 3, 1891, 26 Stat. 989 at 1032. Allotment under the 1886 Agreement occurred between 1894 and 1895. *See* Roy W. Meyer, THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDANS, HIDATSAS, AND ARIKARAS, (University of Nebraska Press, 1977), 137–38.

These actions on the part of the BIA are consistent with statements made by the architects of the Reservation. In 1869, Major General Winfield Scott Hancock "instructed the Commanding Officer at [Fort] Stevenson to examine the country about Berthold and to recommend what portion should be set off for [the Nation] (…). I think they should have a reservation sufficiently large for them to cultivate, to procure fuel, and hunt on, if possible, without encroaching too much on the public lands."[30]

The required surveying work was accomplished by Captain S. A. Wainwright, who proposed the boundaries adopted by President Grant in the 1870 Executive Order defining the Reservation.[31] A letter in the record from Captain Wainwright to his commanding officer, forwarded to the Commissioner of Indian Affairs, then to the Secretary of the Interior, and then to the President, described the Captain's work and intentions in defining the boundaries of the Reservation as agreed to in the 1870 Executive Order. This letter does not list the riverbed, or fishing, as a consideration for the Reservation. Rather, Captain Wainwright writes that he has "endeavored in this proposed reservation to give [the Nation] land enough to cultivate and for hunting and grazing purposes."[32]

The military and Department staff also showed an intent to protect the Nation's timber resources. For instance, in 1872, BIA Agent John E. Tappan wrote a letter to a "saw log and cordwood contractor," informing the contractor that "[i]n pursuance of instructions received from Dept. of Interior I hereby furnish you with the boundaries of the reservation laid off for the Indians of this Agency, and would inform you that all persons are strictly forbidden by the War Dept. and Dept. of Interior to cut wood upon any of the land set apart for reservations for Indians unless the consent of the Indian is obtained, and they paid for their wood."[33]

The Executive's focus on agriculture, husbandry, hunting, and forestry was again reflected in the record supporting the 1880 Executive Order. In considering a diminishment to the Reservation, Commissioner of Indian Affairs Rowland E. Trowbridge wrote to BIA Agent Alexander Gardner in April 1880, requesting information and asking Agent Gardner to "designate clearly upon the enclosed maps, what part [tribal members] occupy, and also what part they principally use for hunting purposes[.]"[34] In Agent Gardner's reply, he concluded with a description of the government's general purposes for the Reservation:

> It is the policy of the Government to encourage Indians in agricultural pursuits, and assist them in becoming self supporting, and for this purpose, it is absolutely necessary that their reservation should contain *good [arable?] and grazing lands*. To diminish the reservation of these Indians west of the Missouri River, would deprive them of nearly all their *good farming lands and timber*. No compensation for this loss could be given by increasing the reservation east of the Missouri

[30] HRA Report at 53, quoting Letter from General Hancock to General Hartsuff, July 21, 1869, 5.
[31] HRA Report at 53.
[32] Letter from S. A. Wainwright to Bvt. Brig. Gen. O. D. Greene (Sept. 25, 1869).
[33] HRA Report at 58-59, quoting Letter from Tappan to Saw-Log and Cordwood Contractor, January 11, 1872.
[34] HRA Report at 66, quoting Letter from Trowbridge to Gardner, April 5, 1880.

> River, as the land is poor and barren, and without water or timber—especially the latter.[35]

Finally, the United States' focus on agriculture and husbandry was expressed in the preamble to the Congressional bill ratifying the 1886 Agreement, which largely maintained the lands set aside through the Executive Orders. The preamble explained Congress's purposes for the Reservation:

> [I]t is the policy of the Government to reduce to proper size existing reservations when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have vastly more land in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the *cultivation of the soil* and other *pursuits of husbandry*[.][36]

Thus, repeatedly and consistently, the record demonstrates a consonant Executive and Congressional purpose for the Reservation to support the Nation's agricultural and grazing activities, and to a lesser extent its hunting and timber resources.

The Supreme Court has instructed that "the *purpose* of a conveyance or reservation is a critical factor in determining federal intent."[37] Here, the primary purpose of the Reservation was to support tribal farming and the raising of livestock. Neither activity requires the use of the riverbed, and the record supplies no evidence of federal intent to reserve the riverbed for the Nation.

2. Fishing and Other Uses of the Riverbed

While the HRA Report includes substantial historical evidence of the Nation's use of the Missouri River for fishing, for capturing "float bison," and for trade and security, there is little evidence that these uses were prominent in the Executive's consideration of the Reservation, and no evidence that Congress was on notice or aware of these uses at all. In 1880, Agent Gardner wrote that the "character of the reservation outside of the grant to the Railroad Co. is not so well adapted to farming, grazing, fishing and hunting and other necessities of the Indians."[38] This ancillary reference to fishing appears to be the only written consideration of fishing made by the Executive in connection with designing the Reservation.

Other contemporaneous evidence indicates that fishing was not the primary source of subsistence for the Nation. The HRA Report indicates that by 1890—one year after statehood—seventy

---

[35] *Ibid.*, quoting Letter from Gardner to Trowbridge, April 13, 1880 (emphasis added). Gardner included a map with his letter marked with handwritten notations indicating which parts of the reservation tribal members used for hunting.
[36] 1886 Agreement (emphasis added).
[37] *United States v. Alaska*, 521 U.S. 1, 39 (1997) (emphasis in original).
[38] HRA Report at 66, quoting Letter from Gardner to Trowbridge, April 13, 1880.

percent (70%) of tribal subsistence came from farming, stock raising, or wage labor; fifteen percent (15%) from government rations; and fifteen percent (15%) from the combined activities of "[h]unting, fishing, root-gathering, etc."[39] Considering the evidence in the record showing the importance of hunting to the Nation, it is likely that food derived from hunting bison and other game comprised the majority of this combined subsistence category.

Ultimately, the Supreme Court, in determining whether submerged lands were reserved in such a way as to defeat the Equal Footing Doctrine, requires an inquiry as to "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State."[40] The historical record indicates that both the Executive and Congress intended the Nation to develop further agriculture and livestock raising practices, pursuits unaffected by ownership of submerged lands in the Missouri River. As such, I conclude that the Reservation's purpose would not have been compromised if submerged lands passed to the State.

Finally, while acknowledging that fishing—to include the use of traps and weirs affixed to the riverbed—was a traditional source of subsistence for the Nation, these uses do not require that the riverbed and all submerged lands be included in the federal reservation. Open-water fishing does not require ownership of submerged lands. The existence of fish traps located in shallow water near the banks of the river does not necessitate a finding that the riverbed was held for the Nation. This is especially so where the record does not indicate Executive and Congressional knowledge of such activities.

A reservation of submerged lands must not be lightly inferred. Here, the federal government never definitely declared its intentions regarding the submerged lands beneath the Missouri River; it is uncontested that the record is silent regarding the riverbed itself. Executive intent to deprive the State of the submerged lands has not been "made very plain" as required by *Holt State Bank*. Thus, without any statement or reference regarding the riverbed, Congress could not conceivably have been placed on notice, as the *Idaho* court instructed,[41] of an Executive intent to reserve submerged lands for the beneficial use of the Nation.

III. The balance of judicial precedent favors State ownership of submerged lands beneath the Missouri River.

After considering the historical record in light of Supreme Court precedent as it relates to the Equal Footing Doctrine, I conclude that the circumstances here are most similar to those cases where the Supreme Court has held that submerged lands were *not* reserved by the federal government.

The Nation's claim to the submerged lands beneath the Missouri River is not dissimilar to that of the Red Lake Band of Chippewa Indians' ("Red Lake") failed claim on Mud Lake in *Holt State Bank*. The record in *Holt State Bank* similarly reveals no express reference to the lakebed or submerged lands by the United States when establishing the reservation. The Supreme Court

[39] HRA Report at 21, citing "Table relating to population, dress, intelligence, dwellings, and subsistence of Indians, together with religious, vital, and criminal statistics," ARCIA *1890*, 450–51.
[40] *Idaho v. United States*, 533 U.S. 262, 274 (2001).
[41] 533 U.S. 262, 273-74 (2001).

explained 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."[42] Here, the Executive Orders and 1886 Agreement that established the Reservation contain language similar to that found in the treaty reserving land in Minnesota for Red Lake, in that it was "reserve[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory."[43] The Executive Orders and the 1886 Agreement are principally boundary-setting documents, composed mostly of technical language setting the metes and bounds of the Reservation. In line with the facts at issue in *Holt State Bank*, the Executive Orders and 1886 Agreement lack any specific set aside of the riverbed or exclusion from the use of the river as a navigable water.

The conclusion that the submerged lands passed to the State is further supported by the reasoning in *Utah Division of State Lands v. United States*.[44] There, the United States Geological Survey had reserved Utah Lake and lands circling the lake in order to prevent homesteading that might interfere with future water resource projects. Because the purpose of that reservation did not require use of the lakebed (*i.e.*, the lakebed was not available for settlement), the Supreme Court concluded that "little purpose would have been served by the reservation of the bed of Utah Lake."[45] Here, too, the purpose of the Reservation did not of necessity require the use of the riverbed. And while I recognize the historic importance of fishing to the Nation, such facts are insufficient to show a federal purpose to reserve the riverbed in the absence of support for this understanding in the Executive or Congressional record. This is particularly so considering the strong presumption in favor of State ownership.

This matter is perhaps most closely analogous to the facts in *Montana v. United States*.[46] There, the Supreme Court considered the Crow Tribe of Montana's ("Crow Tribe") claim to the bed and banks of the Bighorn River. While the river was clearly contained within the geographic boundaries of the Crow Indian Reservation, the "mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance."[47] As here, the treaty conveying the land to the Crow Tribe was bare of language setting apart, referencing, or even impliedly invoking the riverbed. The *Montana* court found the riverbed passed to the State of Montana, relying on the analysis of *Holt State Bank* and characterizing that opinion as finding "nothing in the treaties 'which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy (…) of treating such lands as held for the benefit of the future State.'"[48] As in *Montana*, it is uncontested that there is no "express reference" to the Missouri riverbed in any part of the Executive or Congressional record.

The *Montana* court concluded that the lack of reference to the riverbed was sufficient to find State ownership, and then noted that "[m]oreover, even though the establishment of an Indian

---

[42] *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926).
[43] *Ibid.*
[44] 482 U.S. 193 (1987).
[45] *Id.* at 203.
[46] 450 U.S. 544 (1981).
[47] *Id.* at 554.
[48] *Id.* at 552.

reservation can be an 'appropriate public purpose' (…) justifying a congressional conveyance of a riverbed (…)[,] 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."[49] While unlike the Crow Tribe, there is evidence that the Nation relied in some part on fishing, it is also true that the vast majority of the Nation's subsistence stemmed from farming, livestock, government assistance, and hunting, dwarfing the importance of fishing to tribal members.[50] Thus, the *Montana* court's "moreover" rationale does not change the outcome vis-à-vis the Nation.

In contrast to the Crow Tribe and the Nation, the Coeur d'Alene Tribe's ("Coeur d'Alene") reliance on fishing and its persistent negotiation for rights over Lake Coeur d'Alene featured prominently in *Idaho v. United States*.[51] In *Idaho*, Coeur d'Alene petitioned the United States to set aside its reservation, arguing that its previous boundaries were unsatisfactory, "due in part to their failure to make adequate provision for fishing and other uses of important waterways."[52] In a second petition to the Commissioner of Indian Affairs, Coeur d'Alene requested a reservation that included certain river valleys because "we are not as yet quite up to living on farming" and "for a while yet we need have some hunting and fishing."[53] The *Idaho* court found that Coeur D'Alene relied "on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks."[54]

Notably, the United States Senate directly queried the Secretary regarding the Coeur d'Alene's claims to the waterways, adopting a resolution that directed the Secretary to "inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho," including "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers."[55] The Secretary replied, placing Congress on notice of the importance of the waterways to the Coeur d'Alene.

These clear references to fishing and the river valleys in *Idaho* indicate the importance of the question to the Executive and Congress. Indeed, it was a vital issue for federal consideration and addressed the fundamental purpose of the reservation. Last, and potentially dispositive to the Supreme Court's analysis, in *Idaho* the State of Idaho conceded that the 1873 Executive Order describing the reservation did, in fact, include submerged lands in the reservation. No such concession and no such plain evidence of tribal petition and negotiation for waterways and fishing resources is present at the Fort Berthold Indian Reservation. The matter here considered is thus distinguishably weaker for the Nation than it was for the Coeur d'Alene in *Idaho*.

Other cases where tribal reliance on fishing was critical to judicial decision making on ownership of submerged lands demonstrate an even stronger necessity and reliance on fishing. In *Alaska Pacific Fisheries Co. v. United States*, a tribal reservation was established on the Annette Islands,

---

[49] *Id.* at 556.
[50] *See supra* note 39.
[51] 533 U.S. 262 (2001).
[52] *Id.* at 266.
[53] *Ibid.*
[54] *Id.* at 265.
[55] *Id.* at 268, citing Senate Misc. Doc. No. 36, 50th Cong., 1st Sess., 1 (1888).

an Alaskan island chain that offered few other means of subsistence besides fishing.[56] The islands bore timber but "only a small portion of the upland is arable," and the tribal members "were largely fishermen and hunters" who had "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[.]"[57] In *Alaska Pacific Fisheries*, the Supreme 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."[58] This reliance on fishing as a primary and essential source of subsistence eclipses the ancillary nature of fishing for the Nation and draws a necessary contrast to the "purpose of the reservation" inquiry articulated in *Idaho*.

This contrast is also on display in *Donnelly v. United States*.[59] There, the Supreme Court inquired as to the Klamath Indians' reliance on fishing. The *Donnelly* majority explained that the Klamath Indians "established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence[.]"[60] Again, this tribe's reliance on fishing was amply documented and demonstrably far greater than that of the Nation.

The tribes in *Alaska Pacific Fisheries* and *Donnelly* sustained themselves on the abundant anadromous and marine fisheries present in the Pacific Northwest. Neither this level of fishery biomass nor the routine annual harvest of migrating salmonids is present here. Even in the unlikely case that previously-acknowledged State ownership of submerged lands would have affected the Nation's fishery, the federal purpose for the Reservation would not have been compromised.

Finally, in *United States v. Alaska*, the Supreme Court ruled that the federal government reserved submerged lands in both the National Petroleum Reserve and the Arctic National Wildlife Range. The Supreme Court reached this conclusion after a review of the Executive and Congressional records, which indicate clear and specific purposes for each reserve that necessarily required federal ownership of the submerged lands.[61] First, the National Petroleum Reserve was set aside by Executive Order in 1923 with the goal of securing a supply of oil for the Navy as "at all times a matter of national concern."[62] The Executive Order "sought to retain federal ownership of land containing oil deposits,"[63] reciting that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast."[64] This language plainly implied a federal purpose that demanded ownership of submerged lands, necessary to obtain the oil and gas present in subsurface deposits. "The purpose of reserving in federal ownership all oil and gas deposits within the Reserve's boundaries would have been undermined if those deposits

---

[56] 248 U.S. 78 (1918).
[57] *Id.* at 88 (emphasis added).
[58] *Id.* at 89.
[59] 228 U.S. 243 (1913).
[60] *Id.* at 259.
[61] *United States v. Alaska*, 521 U.S. 1 (1997).
[62] *Id.* at 39, citing Exec. Order 3797-A (Feb. 27, 1923).
[63] *Ibid.*
[64] *Ibid.*

underlying lagoons and other tidally influenced waters had been excluded."[65] Thus, the *Alaska* court concluded that "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area."[66]

This fundamental federal purpose, complemented by multiple direct statements regarding the need for subsurface mineral deposits in the National Petroleum Reserve, is supported by an entirely different and greater order of evidence in favor of federal ownership than at the Missouri River. The bare statement of boundaries expressed in the Executive Orders and 1886 Agreement fail to demonstrate the clear federal purpose necessary to overcome the State's presumptive ownership.

Similarly, the United States' statement of justification in *Alaska* for the Arctic National Wildlife Range expressly references "countless lakes, ponds, and marshes" as nesting grounds for migratory birds and "river bottoms with their willow thickets" furnishing habitat for moose.[67] The Supreme Court explained that this statement of justification "illustrates that the Range was intended to include submerged lands beneath bodies of water (…)[;] the drafters of the application would not have thought that the habitats mentioned were only upland."[68] Finding that the "express reference to bars and reefs and the purpose of the proposed Range" distinguished the Arctic National Wildlife Range from the circumstances in *Montana* and *Utah Division of State Lands*, the Supreme Court ruled the United States had reserved submerged lands within the Range.[69]

As discussed above, the historical record at Fort Berthold is much more analogous to *Montana* and *Utah Division of State Lands* than to *Alaska Pacific Fisheries*, *Donnelly*, or *Idaho*. The express language and clear federal purpose in *Alaska* regarding the Range is strongly supportive of federal ownership of submerged lands, whereas here, the Executive Orders merely describe the boundaries of the Reservation with no stated purpose. Similarly, the ratified 1886 Agreement includes a Congressional preamble pointing only to agriculture and livestock—not fishing or riverbed use—as the key federal purpose. As the federal government desired the Nation to sustain itself on agriculture and livestock alone, I can find no express language or fundamental federal purpose in favor of tribal ownership of the submerged lands beneath the Missouri River.

IV. The United States' taking of tribal lands for the Garrison Dam project has no bearing on State ownership of submerged lands beneath the Missouri River.

Through the Flood Control Act of 1944, Congress authorized the Pick-Sloan Missouri Basin Program ("Program"), seeking to conserve and control water resources through a series of reservoirs and dams along the Missouri River. Downstream of the Reservation, the Army Corps of Engineers built Garrison Dam to further the Program, which created the impoundment now known as Lake Sakakawea and flooded a portion of the Reservation. To effect this taking of the

[65] *Ibid.*
[66] *Id*. at 40.
[67] *Id.* at 51.
[68] *Ibid.*
[69] *Ibid.*

Nation's land, Congress enacted a statute in 1949 that included the uplands surrounding the future lake.[70]

Importantly, the Takings Act applies only to the Nation, without specific reference to the State. The Takings Act's first section states that if the Nation votes in favor of the Program, "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," and in return the United States would monetarily compensate the Nation. The Takings Act is thus in the nature of a bargain with the Nation alone, not a general purpose civil condemnation proceeding applying to all property rights within the Taking Area. By express statutory language, Congress was entering into a bargain solely with the Nation to acquire its lands, including its subsurface rights, and not any other entity. If the United States had brought a civil condemnation action in the courts and acquired title to everything within the bounds of the Taking Area, then it might have been possible to take lands even where the United States and the courts misidentified the owner.[71] However, that was not the case here. The United States received only what she bargained and paid for—tribal interests in the Taking Area, not State interests.

The Department supported the Takings Act through discussions with the Nation on appropriate compensation and through survey and appraisal of the proposed flooded lands.[72] While the Department's appraisal meticulously catalogued the loss of each parcel of dry lands surrounding the Missouri River, there was no consideration or suggested compensation for loss of submerged lands, likely because there was no commercial value to the submerged lands at the time.[73] Because of this, there was no spotlight shone on ownership of the riverbed, perhaps contributing to the overall failure to consider whether the State held property interests within the Taking Area. Discussion of State property was not considered in the appraisal, the Congressional record, or the text of the Takings Act.

Because the Takings Act expressly applies only to the "right, title, and interest" of the Nation and its members, and not to any other party, I conclude that any property interests belonging to the State at the time of the taking – including its interests in submerged lands – were left undisturbed. I find it implausible that the United States would engage in a lengthy public process and technical appraisal for tribal land, yet intend to silently take State property without compensation in the same action.

---

[70] 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) ("Takings Act").

[71] *See, e.g.*, *Houser v. United States*, 9 Cl. Ct. 35, 39 (1985) (quoting *United States v. 416.81 Acres of Land*, 525 F.2d 450, 452 (7th Cir. 1975)) (where the United States condemned land for a dam project and paid the State of Idaho, but certain individuals later asserted that they were the true owners, the United States' title could not be altered because "there are no indispensable parties" to an eminent domain action and "[t]he failure to join a party will not defeat the condemnor's title to the land").

[72] 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).

[73] *See id.*

This conclusion is consistent with the 1984 Fort Berthold Reservation Mineral Restoration Act ("1984 Act"), which returned to the Tribe the subsurface tribal property interests taken in 1949.[74] That 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.[75]

By its terms, the 1984 Act dealt only with those mineral interests acquired in 1949. Such interests included, by the express language of the 1949 Takings Act, only *tribal* mineral interests. Thus, the 1984 Act does not disrupt the conclusion that the Takings Act considered only tribal interests in the Taking Area. This view is supported by section 204(a) of the 1984 Act, which provides that "[n]othing in this title shall deprive any person (other than the United States) of any right, interest, or claim which such person may have in any minerals prior to the enactment of this Act." Further, any argument that the United States silently took State land without compensation in 1949, then granted to the Nation mineral rights to such land in 1984, is inconsistent with the Executive's contemporaneous actions and the Congressional record.

V. Conclusion.

In reaching the conclusion that submerged lands were not reserved for the Nation and thus passed to the State at the moment of statehood, I remain cognizant of the strong presumption in favor of this outcome, stemming from constitutional principles of the equality of the states as the Supreme Court has repeatedly instructed. The Supreme Court has explained that submerged lands are held for the benefit of the future states, and are not disposed of "save in exceptional instances" when the United States is impelled to do so by an "international duty" or "public exigency."[76] Federal reservations of submerged lands "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."[77]

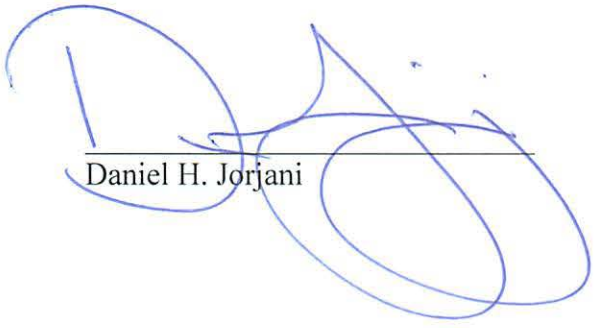
Here, unarguably, the United States never "definitely declared" an intention to reserve submerged lands, and our extensive review of the historical record shows that such an intent was not "otherwise made very plain." To the contrary, the record shows a consistent federal intent to encourage agriculture and husbandry, not fishing or any other use of the riverbed. In such circumstances and in the face of the strong presumption in favor of the State, I find that under the first step of *Idaho*'s two-step inquiry, Congress did not intend to include land under navigable waters within the Reservation.

---

[74] Pub. L. No. 98-602, tit. 2, 98 Stat. 3149, 3152 (1984).
[75] *Id.* at § 202.
[76] *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).
[77] *Ibid.*

This conclusion is bolstered by our examination of the relevant judicial precedent. This is not a case where fishing was the primary and essential source of tribal subsistence, as in *Alaska Pacific Fisheries* or *Donnelly*, or a case where tribal fishing rights and interest in the waterways was repeatedly and consistently communicated to the Executive and Congress, as in *Idaho*. Nor is this a matter in which a fundamental federal purpose would be compromised by granting the riverbed to the State, as in *Alaska*'s National Petroleum Reserve and Arctic National Wildlife Range.

I advise the Bureau of Indian Affairs and the Bureau of Land Management to take any actions deemed necessarily to comply with this opinion, to include the withdrawal of any existing oil and gas permits for extraction in submerged lands beneath the Missouri River.



Daniel H. Jorjani