United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

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M-37044

Memorandum

To: 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 responds to your request for an opinion regarding who owns the minerals located beneath the original bed of the Missouri River as it flows through the Fort Berthold Indian Reservation (Reservation) otherwise within the bounds of 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]--have 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 opinion also considers and reaffirms the 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.

The Missouri River has been of great importance to the Tribes throughout their histories. The river has always provided sustenance and served cultural purposes, as well as 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, a component of the U.S. Army Corps of Engineers (Corps) 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 both prior to and 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 flowing roughly southeast to and off the southeast edge of the Reservation. The Little Missouri River, originating in Wyoming, flowed generally northeast

[1] The "original" bed, for purposes of this Opinion, is the historic river bed on the Reservation as it existed prior to impoundment of the Missouri River created by Garrison Dam and is implied to be an ambulatory feature. Although I recognize that various disputes with the State regarding the Missouri River may exist, 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.

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 Garrison Dam, Lake Sakakawea now inundates the original riverbed and additional tribal lands within the Reservation boundaries.[3]

The question of current ownership of minerals beneath the bed of the Missouri River first turns on 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 Garrison Dam and the Lake affected tribal mineral ownership. Pursuant to the 1949 Takings Act, Congress vested title to certain lands from the Reservation in a "Taking Area" solely in the United States as long as the MHA Nation accepted the provisions of the legislation within six months of enactment.[4] The taken land would then be flooded following construction of Garrison Dam by the Corps. Unlike later legislation used to acquire land from other tribes for Pick-Sloan Project dams,[5] the 1949 Takings Act did not reserve mineral rights to the MHA Nation. 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.[6] Thus, as long as the riverbed did not pass to the State in 1889, the MHA 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 did or did not pass to the State in 1889.

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

[3] 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 developed from BIA information. The map shown in Attachment 2 comes from the following website: *Fort Berthold Reservation in 1950*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1197 (last visited Jan. 11, 2017). For further information, see *infra* notes 76 and 89. These maps and others attached to this Opinion are included for illustrative purposes only and are not intended to represent wholly accurate or authenticated depictions.

[4] 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).

[5] *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).

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

belonged to the Nation in trust rather than title being held by the State.[7] 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.[8] The State, a party to that proceeding, asserted the Equal Footing Doctrine and did not prevail.[9] The State never appealed or sought further review of this decision, and IBLA decisions generally bind the Department.[10]

For the reasons presented in this Opinion, I reaffirm and elaborate on the conclusions reached in both the 1936 M-Opinion and 1979 IBLA decision. The legal analysis herein updates the longstanding position and analysis of the Department to incorporate more recent Supreme Court precedent. Specifically, the Court's decision in *Idaho v. United States* supports the conclusion reaffirmed here.

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. Later Executive Orders in 1870 and 1880, as well as an 1886 Agreement ratified in 1891, modified that territory and set the Reservation boundaries.[11] The Executive Orders, as modified by the 1886 Agreement, ultimately 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 ultimately settling within territories adjacent to each other along and near the Missouri River in present-day North Dakota, South Dakota, and Montana.[12] The Hidatsa traditional territory, once the Tribes came to reside near each other, ranged along the Missouri River north of Square Buttes as well as west of the river, extending roughly to the mouth of the Yellowstone River, in present-day North Dakota and Montana.[13] 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

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[7] 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).

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

[9] *Id.* at 107.

[10] The IBLA is empowered to decide matters under its jurisdiction. *See* 43 C.F.R. § 4.1, 4.1(b)(2).

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

[12] 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).

[13] 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 12, at 18-19.

Dakota.[14] The Arikara settled south of the other two tribes along the Missouri.[15] Over the long term, the three tribes began to confederate and share territory.[16]

1. Tribal Settlements and Trade Centers along the Missouri River

Notwithstanding the three tribes' differing origins, they shared a common facet of daily life along the Missouri River, making theirs the general exception to other tribes in the vicinity: settlement in villages rather than continuation of a nomadic way of life.[17] As one author explained regarding the Mandan: the "size and concentration of their villages" near the mouth of the Heart River and "semisedentary nature" were two factors that "distinguished them from the nomadic buffalo hunters when European explorers first reached the Northern Plains."[18]

This settled riverine lifestyle saw the three tribes' villages serving as important centers of trade for their nomadic neighbors.[19] For example, 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.[20] Later, the Mandan and Hidatsa began to develop a trade network with other tribes, exchanging goods for European wares the other tribes had received through their own fur trading.[21] By at least 1738, French traders made contact with the Mandan while seeking water passage up the Missouri River.[22] 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.[23] "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."[24] 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.[25]

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[14] AHLER ET AL., *supra* note 13, at 12-13; *see* CASH & WOLFF, *supra* note 12, at 5-6.

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

[16] 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 13, at 57-60.

[17] *See* AHLER ET AL., *supra* note 13, 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 12, at 18-19 (Henry F. Dobyns & John I. Griffin eds., 1974).

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

[19] *See* AHLER ET AL., *supra* note 13, at 61; 13:1 SMITHSONIAN INSTITUTION, HANDBOOK OF NORTH AMERICAN INDIANS 248, 260 (Raymond J. DeMallie ed., 2001).

[20] AHLER ET AL., *supra* note 13, at 61-62.

[21] *Id.* at 64; *see also* SMITHSONIAN INSTITUTION, *supra* note 19, at 268.

[22] AHLER ET AL., *supra* note 13, at 64; *see also* SMITHSONIAN INSTITUTION, *supra* note 19, at 267-69.

[23] AHLER ET AL., *supra* note 13, 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.*

[24] *Id.* at 64.

[25] *Id.* at 65-66; *see also* SMITHSONIAN INSTITUTION, *supra* note 19, at 268.

Later, particularly from 1780 to 1810, the Mandan and Hidatsa villages also served as the intersectional trading points for horses and guns.[26] The Mandan and Hidatsa traded to obtain horses from nomadic Indians and weapons from Canadian traders.[27] The villages then traded these goods to other nomadic tribes, becoming both affluent and influential in the region.[28] 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. 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.[29]

After the Lewis and Clark expedition passed through the Knife River villages,[30] American traders began to travel up the Missouri River in greater numbers.[31] At this time, the Mandan and Hidatsa villages at the mouth of the Knife River and the 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.[32] 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.[33] The Tribes' settlements on the Missouri River served as the very framework for that trade.

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[26] AHLER ET AL., *supra* note 13, at 66; SMITHSONIAN INSTITUTION, *supra* note 19, at 252; *see also id.* at 260-61.

[27] AHLER ET AL., *supra* note 13, 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 19, at 248.

[28] AHLER ET AL., *supra* note 13, at 66.

[29] SMITHSONIAN INSTITUTION, *supra* note 19, at 252.

[30] Lewis and Clark's expedition wintered near the Knife River villages in 1804-1805. AHLER ET AL., *supra* note 13, 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.

[31] AHLER ET AL., *supra* note 13, at 67.

[32] 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).

[33] *See* AHLER ET AL., *supra* note 13, at 67. Although an amalgamated and fictionalized version of events, THE REVENANT—a motion picture released in 2015 which garnered three Academy Awards, including Best Actor for Leonardo DiCaprio's portrayal of frontiersman Hugh Glass—depicted a fur trading expedition up the Missouri River and through Arikara territory in the early 1820s. The Arikara (also known as Sahnish, Arikaree, or Ree) controlled trade though the area, and a dispute between them and Glass's group led to an initial skirmish (during which Glass was wounded and several others were either killed or wounded) and then 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. 17, 2017). The dispute ultimately led to a peace and friendship treaty between the United States and the Arikara, which in part allowed for the regulation of trade (authorizing trade with only those licensed by the United States and confirming tribal protection of traders and their

Aside from the important role their villages and settlements along the river played in trade, the Missouri River itself was an important resource more broadly for all three Tribes.[34] The river served as a transportation artery for the Tribes.[35] The river also played an important seasonal role in hunting: because antelope herds would cross the Missouri at roughly the same locations each year when moving between wintering grounds and summer grounds, the crossing made the animals more vulnerable to tribal hunters.[36] Additionally, when the river rose in the spring and winter ice left, the Mandan and Hidatsa would spend several days salvaging the carcasses of drowned buffalo that floated downriver.[37] The tribes also salvaged "large quantities of driftwood for fuel and building materials."[38] Finally, the Mandan, Hidatsa, and Arikara "also obtained part of their food supply from the river,"[39] as discussed in greater detail below.

2. *History, Methods, and Importance of Fishing*

Early Plains Village peoples near Knife River, both Mandan and Hidatsa,[40] tended to establish their villages on the terraces located slightly above the floodplain of the Missouri River.[41] "Such a position allowed ready access to several natural resources critical to maintenance of the village."[42] Among these included "[t]he river itself [which] provided important fish resources, water, and a trafficway through the region."[43] Both the Mandan and Hidatsa, as well as the Arikara, engaged in fishing.[44] Although the Hidatsa hunted buffalo similar to nomadic tribes in the area, their settled lifestyle meant they also relied on farming and engaged in fishing activities.[45] The same can be said generally for the Mandan and Arikara.[46] The Mandan, Hidatsa, and Arikara all made use of fish traps to take primarily catfish and sturgeon from the Missouri River, and they also occasionally gathered shellfish from the riverbed.[47] The three Tribes were also among those known to fish both with hook and line[48] and with double-pointed

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property while "within the limits of their district" and safe passage "through their country") and forbade the tribe from arming enemies of the United States "with guns, ammunition, or other implements of war." 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).

[34] *See* SMITHSONIAN INSTITUTION, *supra* note 19, at 253.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 248.

[38] *Id.*

[39] *Id.* at 253.

[40] From A.D. 1200 to 1450, settlements near Knife River included both Mandan and Hidatsa peoples in the early archeological record, but came to be predominantly Hidatsa after that. AHLER ET AL., *supra* note 13, at 31. Later, the Mandan re-settled in the area once more, cooperating with the Hidatsa. *See* BOWERS, *supra* note 30.

[41] AHLER ET AL., *supra* note 13, at 31.

[42] *Id.*

[43] *Id.*

[44] MEYER, *supra* note 16, at 63.

[45] *See* AHLER ET AL., *supra* note 13, at 16-17.

[46] *See* MEYER, *supra* note 16, at 63.

[47] *Id.* at 65.

[48] The archeological records show widespread use of bone fishhooks among Indians of the Plains. SMITHSONIAN INSTITUTION, *supra* note 19, at 51; *see also* MEYER, *supra* note 16, at 5.

gorges.[49] Freshwater mussels were also commonly found at villages and campsites.[50] Thus, although not the primary source of food, fish—particularly catfish—and shellfish made up part of all three Tribes' diets.[51]

Fish were abundant in the Missouri River.[52] 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."[53] The most common fish in the river were various species of catfish, including the blue, flathead, and channel.[54]

Each of the three Tribes employed both fish traps and weirs to take fish.[55] The traps and weirs "were anchored in shallow waters near the stream bank, [and] baited."[56] 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."[57] Education in the construction and use of fish traps was often passed down from a lodge "grandfather" to a boy.[58] 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."[59] Older men in Mandan villages typically managed the fish traps, with each village having a number of traps.[60]

Similarly, the Arikara looked to fishing as a summer food source.[61] For the Arikara, "[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."[62]

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[49] SMITHSONIAN INSTITUTION, *supra* note 19, 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 which need only catch the interior of a fish's mouth. *See id.*

[50] SMITHSONIAN INSTITUTION, *supra* note 19, at 52.

[51] *Id.* at 52-53. The inclusion of fish in tribal members' diets here stands in contrast to the Supreme Court's evaluation—arguably mistaken—of the Crow Tribe's historical river usage and reliance on fish as described in *Montana v. United States*. *See* discussion *infra* Section II.B.

[52] SMITHSONIAN INSTITUTION, *supra* note 19, 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.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* Photographs showing a Hidatsa fish trap, albeit from 1929, are included as Attachment 5.

[57] SMITHSONIAN INSTITUTION, *supra* note 19, at 355.

[58] BOWERS, *supra* note 18, at 61.

[59] *Id.*

[60] *Id.* at 97.

[61] SMITHSONIAN INSTITUTION, *supra* note 19, at 371.

[62] *Id.*; *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, however, good fishermen" and "[t]he stationary Indians are fond of fish.").

Not only did fishing provide a critical food source and serve as a regular part of the three Tribes' lifestyle, but the act and methods employed also carried cultural and religious significance. The Mandan and Hidatsa both practiced a variety of ceremonial rites involving an associated medicine "bundle."[63] Members of these tribes inherited rites and bundles in various ways, contributing to continuity of ceremonial organization.[64] Among the variety of ceremonies, both the Mandan and Hidatsa practiced a fish-trapping ceremony.[65] 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.[66] Historians note that, in 1890, some men were continuing to employ the ancient rites with respect to fish traps.[67] The traps involved sinking posts into the bed of the river and even smoothing the bed itself when necessary.[68] 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."[69]

In addition to fishing methods that required use of the riverbed, the Tribes' preferred fish also made use of the bed and banks of the Missouri River. Catfish, generally speaking, can be found inhabiting 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.[70] 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.[71]

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.[72] Because of gold discoveries to the west, non-Indians began migrating across areas once

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[63] *See* BOWERS, *supra* note 30, at 19-20; CASH & WOLFF, *supra* note 12, at 14-15. A sacred medicine bundle can generally be described as a bundle of objects which "provided a special contact with the supernatural." CASH & WOLFF, *supra* note 12, at 14-15.

[64] BOWERS, *supra* note 30, at 19-20.

[65] *Id.* at 20.

[66] *Id.* at 27, 215-23.

[67] *Id.* at 105.

[68] *Id.* at 257, 259. In addition to the example presented previously, *see supra* note 56, further photographs of a Hidatsa fish trap are included as Attachment 6.

[69] BOWERS, *supra* note 30, at 259.

[70] *See NatureServe Explorer: Comprehensive Report Species – Pylodictis olivaris*, NATURESERVE, http://explorer.natureserve.org/index.htm (search "catfish"; then follow "Pylodictis olivaris" hyperlink) (last visited Nov. 22, 2016) (Flathead Catfish); *NatureServe Explorer: Ictalurus punctatus*, NATURESERVE, http://explorer.natureserve.org/index.htm (search "catfish"; then follow "Ictalurus punctatus" hyperlink) (last visited Nov. 22, 2016) (Channel Catfish); *NatureServe Explorer: Ictalurus furcatus*, NATURESERVE, http://explorer.natureserve.org/index.htm (search "catfish"; then follow "Ictalurus furcatus" hyperlink) (last visited Nov. 22, 2016) (Blue Catfish).

[71] *See supra* note 70. In fact, old muskrat burrows are often explicitly part of the river bank, 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 Muskrats – Living with Wildlife*, WASH. DEP'T OF FISH & WILDLIFE fig. 5, http://wdfw.wa.gov/living/muskrats.html (last visited Nov. 22, 2016).

[72] 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).

occupied exclusively by a variety of tribes, including the Mandan, Hidatsa, and Arikara.[73] "Prior to the year 1851 costly Indian wars had been experienced," and the United States sought to promote peace and safe travel for migrants.[74] Thus, in 1851, the parties entered into the Treaty of Fort Laramie (1851 Treaty), which provided, *inter alia*:

> 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.[75]

Included with this Opinion as Attachment 7 is an illustrative map showing generally the territory described by the 1851 Treaty.[76]

As stated by one of the U.S. treaty commissioners during negotiations of the 1851 Treaty, 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."[77] Although the various Indian signatories to the 1851 Treaty promised to cease warring with each other, most did not.[78] The Mandan, Hidatsa, and Arikara, however, generally abided by the promises of peace and made numerous complaints to the United States that,

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[73] *Indians of Ft. Berthold Indian Reservation v. United States*, 71 Ct. Cl. 308, 311 (1930).
[74] *Id.*
[75] 1851 Treaty, *supra* note 72. Prior to 1943, the Hidatsa at times had been mistakenly referred to as Gros Ventre. *See* MEYER, *supra* note 16, at 204-05.
[76] *Fort Berthold Reservation, 1851*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1185 (last visited Jan. 9, 2017) (included as Attachment 7). This map was 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.
[77] *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*).
[78] MEYER, *supra* note 16, 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.*

although the Tribes observed the terms, they were neglected.[79] 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."[80]

In 1866, the three 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[.]"[81] That agreement, however, was never ratified by Congress.[82] Regardless, the 1866 Agreement's cession of only lands on the "northeast side of the Missouri River" reflects a consistent United States' intent to maintain Tribal control over the river.

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.[83] 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.[84]

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.[85] On April 12, 1870, President Grant adopted the recommendation.[86] 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.[87]

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[79] MEYER, *supra* note 16, at 105-06.
[80] *Id.* at 107.
[81] *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).
[82] 71 Ct. Cl. at 317; 1866 Agreement, *supra* note 81, 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 16, at 111. *Compare* 1866 Agreement, *supra* note 81, at 1055 ("northeast side of the Missouri River") *with* 1851 Treaty, *supra* note 72, at 2 KAPPLER 594 (no territory described to the east or northeast of Missouri River).
[83] 71 Ct. Cl. at 316-17.
[84] *Id.* at 317.
[85] *Id.* at 318.
[86] *Id.*; 1870 Executive Order, *supra* note 11.
[87] 1870 Executive Order, *supra* note 11 (emphasis added); *see also* Attachment 11, *infra* note 89 (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 IV.A.1.

Use of the term "left bank" meant the north and east sides of the Missouri River,[88] thereby drawing the line on the far side of the river and necessarily including the width of the river within the 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.[89]

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]."[90]

The five years following the 1870 Executive Order saw some 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

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[88] 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. 10, 2017); *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 89.

[89] Attachment 7 depicts the boundaries created by the 1851 Treaty. *Fort Berthold Reservation, 1851*, *supra* note 76. Attachment 8 depicts the 1870 Executive Order Reservation boundaries. *Fort Berthold Reservation, 1870*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/11856 (last visited Jan. 9, 2017). Attachment 9 depicts the 1880 Executive Order Reservation boundaries. *Fort Berthold Reservation, 1880*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1187 (last visited Jan. 9, 2017). Attachment 10 depicts the boundaries created by the 1886 Agreement, ratified in 1891. *Fort Berthold Reservation, 1891*, DISCOVERING LEWIS & CLARK, http://www.lewis-clark.org/article/1188 (last visited Jan. 9, 2017). As noted *supra* note 76, 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, http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/demographics_land.html (last visited Jan. 11, 2017).

[90] 1870 Executive Order, *supra* note 11, at 882.

recognized as the Tribes' territory in 1851.[91] 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.[92]

The article continued: the Tribes "say, too, that this treaty was subsequently recognized in 1865, when Commissioners were again sent to treat with them."[93] Aside from offering an opportunity to express the Tribes' understanding of what land made up their reservation—namely all of the river and both sides—the report went on to note that taking further land from the Tribes could be fraught with peril:

> 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.[94]

Later, in 1875, members of the Tribes gathered at Fort Lincoln along with 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."[95] 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."[96]

The 1870 Executive Order eliminated a large portion of the reservation in the south and southwest.[97] 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.[98]

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[91] 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.

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

[93] *Id.*

[94] *Id.*

[95] *Treaty of Peace Between the Sioux and Berthold Indians*, BISMARCK TRIB., June 2, 1875, at 4.

[96] *A Reverend Rascal*, ST. PAUL DAILY GLOBE, Aug. 17, 1878, at 4.

[97] 1870 Executive Order, *supra* note 11.

[98] *Indians of Fort Berthold Reservation v. United States*, 71 Ct. Cl. 308, 319-21 (1930).

The new southern boundary set by the 1880 Executive Order tracks the modern southern boundary, although it also extended further 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.[99]

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.[100]

Here, the 1880 Executive Order's use of the "left bank" of the Missouri River again meant the north and east sides of the 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 it was extending 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.

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[99] 1870 Executive Order, *supra* note 11 (emphasis added).

[100] 1880 Executive Order, *supra* note 11 (emphasis added); *see also* Attachment 11, *supra* note 89 (showing Little Knife River location).

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.[101] The Tribes and the United States entered the agreement recognizing that it was "the policy of the Government to reduce to proper size existing reservations . . . with the consent of the Indians, and upon just and fair terms."[102] 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."[103] 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 on the Reservation, but instead merely reduced the total length of the river stretches enclosed within the Reservation.

Congress did not ratify the 1886 Agreement until March 3, 1891, after North Dakota's entry into the Union in 1889.[104] By its terms, the 1886 Agreement was made pursuant to a congressional 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 and fair terms."[105] 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,[106] as discussed later in Section II.B.2. 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.[107] 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,[108] the Eighth Circuit has repeatedly held that the 1910 Act did not diminish the boundaries of the Reservation.[109] Accordingly, the 1910 Act is not relevant to the analysis here.[110]

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[101] *See* Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032 (1891) (ratifying 1886 Agreement). The 1886 Agreement also provided for the allotment of land to individual tribal members. *See also* 71 Ct. Cl. at 321.
[102] 26 Stat. at 1032.
[103] *Id.*
[104] *Id.*; Proclamation No. 292, (Nov. 2, 1889); *see also* 71 Ct. Cl. at 321.
[105] 26 Stat. at 1032 (emphasis added).
[106] Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 989, 1027 (1891).
[107] 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.
[108] Act of June 1, 1910, Pub. L. No. 61-197, 36 Stat. 455 (1910).
[109] *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); *see also infra* at 36 and note 258.
[110] The Attorney General of North Dakota 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

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.[111] 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 (1949 Takings Act).[112] The Takings Act contained a lengthy, detailed description of the takings area, but it generally operated to draw an area around the Missouri and Little Missouri Rivers within the boundaries of the Reservation and explicitly noted that the area was indeed within the Reservation.[113] This explicit recognition is of additional importance because, in two passages within the description, the takings 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.[114]

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.[115] Congress rectified this omission in 1984, passing legislation and placing all subsurface mineral interests originally taken in 1949 into trust for the Nation.[116] 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—
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> (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.[117]

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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.

[111] 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).

[112] 1949 Takings Act, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026, 1027 (1949).

[113] *Id.* at 1028-47 (Sec. 15, Part A, introduced: "The Taking Area is described as follows: Part A—Within Reservation Boundaries").

[114] *Id.* at 1034, 1044. Detailed discussion follows *infra* at Section IV.B.

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

[116] 1984 Mineral Restoration Act, Pub. L. No. 98-602, tit. 2, 98 Stat. 3149, 3152 (1984).

[117] *Id.* at 3152.

The referenced subsection (b) exempts particular townships and certain lands lying east of the former Missouri River.[118] The exempted lands under subsection (b) 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."[119] 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.[120] First, such documents "must be interpreted as [the Indians] would have understood them."[121] Second, ambiguities or "any doubtful expressions in [those documents] should be resolved in the Indians' favor."[122] Third, [such documents] must be liberally construed in favor of the Indians.[123] 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."[124] Attention should also be paid to traditional lifestyles contemporary with the passage or execution of such documents, as evidenced by oral history and archaeology.[125] 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.[126]

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[118] *Id.*

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

[120] *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* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 113-15 (Nell Jessup Newton ed., 2012).

[121] *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).

[122] 397 U.S. at 631.

[123] *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").

[124] *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").

[125] *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).

[126] *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

B. The Equal Footing Doctrine and Recent Supreme Court Cases Involving Indian Tribes

Although 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,"[127] Congress also has authority to "convey land beneath navigable waters, and to reserve such land . . . for a particular national purpose such as a[n] . . . Indian reservation."[128] If Congress does so prior to statehood, the Equal Footing presumption of state title to submerged lands is defeated.[129]

The Supreme Court has decided two relatively recent cases pertaining to ownership of lands under navigable waterways within the boundaries of Indian reservations, both of which were decided after Solicitor Margold's M-Opinion and the IBLA's decision in *Impel Energy*.[130] In

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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).

[127] *See, e.g., Idaho v. United States*, 533 U.S. 262, 272 (2001). Determination of navigability in the United States uses the "navigability in fact" test. *E.g., PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (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 susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 1226-27, 1228 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)). Navigability for title also should not be confused with navigability for purposes of 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." 132 S. Ct. at 1227-28, 1229. Although navigability of the Missouri River has not generally been raised as an issue, 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, and thus I would only need to analyze the 1949 Takings Act and 1984 Mineral Restoration Act, discussed in Section IV.B. Solicitor Margold similarly recognized the irrelevance of the navigability question. *See* M-28120, *supra* note 7.

[128] *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* Thomas H. Pacheco, *Indian Bedlands Claims: A Need to Clear the Waters*, 15 HARV. ENVTL. L. REV. 1, 14 (1991).

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

[130] Unlike in the Ninth Circuit, the question of title to river beds located on Indian reservations has rarely arisen in the Eighth Circuit, particularly after *Montana*. One series of cases involving the Little Missouri River in North Dakota reached both the Eighth Circuit and Supreme Court, but the two lines of cases are ultimately unhelpful to the analysis here. In both lines, North Dakota brought a challenge under the Quiet Title Act (QTA) to the United States ownership of portions of the bed of the Little Missouri River. *See North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*, 972 F.2d 235, 236-37 (8th Cir. 1992) (explaining procedural history). In the first line, the Supreme Court ultimately held that the QTA's statute of limitations applicable at the time applied to states, remanding to the district court but not passing on the merits of whether the Little Missouri River was navigable at statehood—a key pre-requisite for application of the Equal Footing Doctrine. *Block v. North Dakota*, 461 U.S. 273, 277 (1983). Upon remand and subsequent appeal, the Eighth Circuit found North Dakota's claim time-barred. *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Block*, 789 F.2d 1308, 1312 (8th Cir. 1986). Congress later amended the QTA, exempting states from the limitations period for certain purposes, 972 F.2d at 237, and North Dakota filed the claim anew. *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*, 770 F. Supp. 506 (D.N.D. 1991). Upon a new trial, the district court, not bound by the prior litigation, found the river non-navigable and concluded the United

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.[131] 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.[132] 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.

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.[133] The Supreme Court began "with a strong

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States retained title to the bed of the Little Missouri River. *Id.* The Eighth Circuit affirmed. 972 F.2d 235. Perhaps of greatest note in these cases, the Supreme Court recognized the Three Affiliated Tribes' potential interest in the Little Missouri River as it existed on the Reservation. 461 U.S. at 279 n.8.

Given the lack of analysis in the Eighth Circuit regarding ownership of submerged lands on Indian reservations, it is worth noting the extensive case law found in the Ninth Circuit post-dating *Montana*. In cases where the record demonstrated tribal reliance on the waterways at issue, the Ninth Circuit found in favor of the tribes and the United States. *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 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 the *CSKT v. Namen* case, 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. Similarly, in both the *Puyallup* and *Muckleshoot* cases, the Supreme Court 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).

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

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

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

presumption against conveyance by the United States" to the Tribe, and then applied the principles established in *Shively v. Bowlby*[134]and *United States v. Holt State Bank*[135] 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.[136]

The Court first looked to the treaties with the Crow Tribe. The first treaty with the Crow is the same 1851 Treaty to which the Mandan, Hidatsa, and Arikara were also signatories.[137] Although the Crow Reservation was established before Montana statehood, the Court concluded that the treaties alone, which made no specific mention of the riverbed, were insufficient to overcome the Equal Footing Doctrine's presumption.[138] The Court focused particularly on the Second Treaty of Fort Laramie, entered into between the United States and Crow Tribe in 1868 (1868 Treaty), as the Court interpreted this later treaty to have conveyed land to the Crow Tribe; however, the Court found that the treaty "in no way expressly referred to the riverbed" or otherwise made plain any intent to convey the riverbed.[139] 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.[140] It found that the Crow Tribe was nomadic and depended primarily on buffalo; "fishing was not important to their diet or way of life."[141] 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

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[134] *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.

[135] *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.

[136] *Montana*, 450 U.S. at 552.

[137] 1851 Treaty, *supra* note 72. Although the Court held against the Crow Tribe in *Montana*, this subsection discusses potential flaws with that opinion, and further discussion in Section IV.A.1 provides reasons to distinguish that case from the situation at hand.

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

[139] *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.

[140] *Montana*, 450 U.S. at 553.

[141] *Id.* The *Montana* Court's analysis regarding Crow fishing habits is not as comprehensive as it could have been. In a prior, related proceeding, 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 federal 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 circuit court's opinion with respect to fishing, merely concluding that the criminal defendant had indeed 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 Crow Tribe had not shown any meaningful historical evidence of fishing, stating that the Ninth Circuit's opinion in *Finch* had been vacated and that the district judge disagreed 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, however, 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.

ownership of beds under navigable waters for the future States."[142] Accordingly, title passed to Montana upon its entry into the Union.[143]

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."[144] Some commentators have suggested that the Court misread *Holt State Bank*.[145] Ultimately, I find the situation here to be factually distinct from *Montana*, as discussed in Section IV.A; however, the critiques are compelling and present a supporting reason why the conclusion in this Opinion is not controlled by *Montana*.

The Court first explained that *Holt State Bank* addressed a claim to the bed of a navigable lake that "lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union."[146] The *Montana* Court noted that "[i]n these treaties the United States promised to 'set apart and withhold from sale, for the use of' the Chippewas, a large tract of land . . . and to convey 'a sufficient quantity of land for the permanent homes' of the Indians."[147] The Court then characterized the *Holt* 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." Rather, "[the] effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory."[148]

The Court had already concluded that the Crow Tribe's 1868 Treaty contained no intent to convey riverbed, *inter alia*, in a way "definitely declared or otherwise made very plain" and effectively dismissed the treaty's actual language of "absolute and undisturbed use and occupation" as not having any literal meaning when the United States itself obviously retained a navigational servitude. Accordingly, it could then swiftly characterize the Crow as "a nomadic tribe dependent chiefly on buffalo," for whom "fishing was not important to their diet or way of

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[142] 450 U.S. at 556.
[143] *Id.* at 556-57.
[144] *Id.* at 554.
[145] *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).
[146] 450 U.S. at 552.
[147] *Id.* (internal citation omitted).
[148] *Id.* at 552-53 (omission in original).

life," and conclude based on *Holt State Bank* that the reservation was one made "in a general way" and therefore insufficient to overcome the Equal Footing Doctrine's presumption.[149]

But the *Montana* Court misread the history presented in *Holt State Bank* and, although invoking its language, oversimplified the logic of that case. First, *Holt State Bank* involved a tribe—the Red Lake Band of Chippewa—that had *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. Although confusingly worded, the Court in *Holt State Bank* explained that the Red Lake Band's reservation had actually come 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*."[150] "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."[151] In other words, as explained more clearly in the Court's citation to *Minnesota v. Hitchcock* (which makes clear that no formalities are needed for a reservation to exist), the United States never created a reservation by formal document, but rather one came to be recognized with respect to the remainder—*i.e.*, the *non-ceded* area—of the tribe's aboriginal territory.[152]

Adding to the confusion, however, the *Holt State Bank* Court cited to the treaties representing the last two Chippewa land cessions prior to statehood in order to focus on their *timing*, not effect.[153] The *Montana* Court tried to analogize to the language within these treaties when it concluded that the Crow Tribe's 1868 Treaty established the tribe's reservation "in a general way," as the Court had described the Red Lake Band's reservation in *Holt State Bank.*[154] But neither of the two treaties discussed by the *Holt State Bank* Court actually involved the Red Lake Band or their aboriginal land.[155] The *Holt State Bank* Court used those treaties only to illustrate the final cessions that created a reservation of the remaining Chippewa land ultimately recognized as the Red Lake Indian Reservation, as held in *Hitchcock.*[156] The *Holt State Bank* Court in fact pointed out in a footnote 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"[157]—a mistake which the *Montana* Court committed nonetheless. The *Holt State Bank* Court cited to the post-statehood treaty by which the United States recognized the Red Lake and Pembina bands' reservation to illustrate this difference.[158] The *Montana* Court either missed, misread, or ignored these statements and therefore used an inapposite case as the foundation of its analysis.

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[149] *Id.* at 554 (quoting *Holt State Bank*, 270 U.S. 49, 58 (1926)).
[150] *Holt State Bank*, 270 U.S. at 58 (emphasis added).
[151] *Id.* (emphasis added).
[152] *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).
[153] *Holt State Bank*, 270 U.S. at 58.
[154] 450 U.S. at 552-53.
[155] *Holt State Bank*, 270 U.S. at 58. The Court cited to treaties of September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165, neither of which involved creation of a reservation for the Red Lake Band. *See* 10 Stat. 1109 (1855); 10 Stat. 1165 (1855); 13 Stat. 667 (1863); Barsh & Henderson, *supra* note 146, at 677 & n.321.
[156] *Holt State Bank*, 270 U.S. at 58.
[157] *Id.* at 58 & n.*.
[158] *Id.*

With this understanding in mind, it is clear that the logic and meaning of *Holt State Bank* is thus unrelated to the situation faced by the *Montana* Court: among a series of treaties ceding land, but never reserving land, there was nothing indicating any intent to diverge from the general policy against disposing of submerged land prior to statehood. Moreover, *Holt State Bank* can be read to hold only that the title went to the State rather than the United States after a *post-statehood* cession occurred.[159] Yet the *Montana* Court relied upon language of reservation from irrelevant treaties that involved different bands to conclude that such language was "general" and therefore insufficient to rebut a presumption against conveying submerged land to the Crow Tribe.[160]

Finally, the *Montana* Court distinguished *Choctaw Nation v. Oklahoma*,[161] which had held that the United States reserved the bed of the Arkansas River on behalf of the petitioner Indian tribes.[162] In doing so, the *Montana* Court seemed to find decisive the fact that the *Choctaw Nation* Court "placed special emphasis on the Government's promise that the reserved lands would never become part of any State."[163] 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."[164] Montana's constitution included such a provision (and still does).[165] Thus, notwithstanding the importance apparently ascribed by the Court to promises not to pass Indian lands to a state, the *Montana* Court generally ignored Montana's disclaimer. By contrast, the *Idaho* Court later, as discussed below, found it important that the State of Idaho had disclaimed Indian lands.

Given that the facts in *Montana* are distinguishable from the situation at issue here, as well as questions concerning a possible misreading of *Holt State Bank* and its subsequent application, this Opinion further distinguishes the present situation from *Montana* in Section IV.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.[166] This time, with a more robust analysis, the Court found in favor of tribal ownership.

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[159] The question of title to the lake bed in *Holt State Bank* was only posed once the land involved was ceded in 1889, roughly 41 years after Minnesota became a state. 270 U.S. at 52, 55.

[160] Additionally, there is an argument that the *Montana* Court improperly imported the presumption as well, citing as it did only to cases involving presumptions against conveyances to singular, private, non-Indian individuals. *See Montana v. United States*, 450 U.S. 544, 551-52 (1981).

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

[162] 450 U.S. at 555 n.5.

[163] *Id.*

[164] 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).

[165] MONT. CONST. art. I, § 1.

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

The Coeur d'Alene Tribe:

> 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.[167]

The United States acquired through a treaty with Great Britain an area including the aboriginal territory of the Coeur d'Alene Tribe.[168] 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."[169] An 1873 executive order established the Coeur d'Alene Reservation within the boundaries described in the agreement between the Tribe and the United States.[170] Through later agreements, the Tribe ceded portions of its reservation, including the northern portion of Lake Coeur d'Alene.[171] Congress ratified these later agreements in 1891, less than one year after passing the Idaho Statehood Act.[172]

The Court in *Idaho* formulated the following "two-step enquiry" 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"?[173] 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.[174] 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."[175] 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[.]"[176]

Applying step one, the Court found that Congress was on notice that the reservation included submerged lands. The State of Idaho conceded, and contemporaneous congressional and executive documents demonstrated, that Congress likely knew that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[177] The Court also noted

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[167] *Id.* at 265 (internal citations omitted).
[168] *Id.* The United States received from Great Britain title "subject to the aboriginal right of possession held by resident tribes." *Id.*
[169] *Id.* at 266.
[170] *Id.*
[171] *Id.* at 269-70.
[172] *Id.* at 270-71.
[173] *Id.* at 273.
[174] *Id.* at 273-74.
[175] *Id.* at 273.
[176] *Id.* at 273-74 (citing *United States v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997)).
[177] *Id.* at 274.

the "unusual" boundary that crossed Lake Coeur D'Alene and cited comparatively *United States v. Alaska* for the proposition that drawing a boundary on "the ocean side of offshore islands necessarily embraced submerged lands shoreward of the islands."[178] Accordingly, the Court concluded that Congress intended to include the submerged lands as part of the reservation.[179]

Next, the Court noted that Congress's dealings with the Coeur d'Alene 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."[180] 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."[181] 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.[182]

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

The Equal Footing Doctrine's presumption was developed outside the context of Indian law.[183] 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.[184] When the Court has faced the interplay of the Equal Footing Doctrine and title to lands beneath navigable waters in the Indian law context, however, the Court has applied the presumption while sometimes explicitly invoking the canons and at other times making no mention of them.[185]

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[178] *Id.*

[179] *Id.*

[180] *Id.* at 276.

[181] *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. *Id.* at 274-81.

[182] *Id.* at 281.

[183] *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).

[184] *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).

[185] *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.[186] But neither case overturned prior precedent making explicit use of the canons, such as *Choctaw Nation v. Oklahoma*.[187] In *Choctaw Nation*, the Court held that the United States had intended to and did transfer the relevant bed of the Arkansas River to the Cherokee, Choctaw, and Chickasaw Nations.[188] 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."[189]

On the basis of the Court's precedent, then, 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 of construction where appropriate to the facts.[190] The presence of an intent to include lands beneath navigable waters in a reservation and the presence of an accompanying intent to defeat future state title to such lands are necessarily factual inquiries that turn on interpretation of both the controlling documents—here, treaties, agreements, and executive orders—as well as the historical circumstances surrounding those documents. Interpretation of these types of documents are at the heart of the canons, and nothing in recent Supreme Court precedent has stated that the canons should not be used in such an interpretation.[191] Thus, I will proceed within the framework of *Idaho*'s equal footing analysis with an eye toward applying the canons where interpretation of the documents is necessary.

Upon reaching a conclusion with respect to the Equal Footing Doctrine, analysis of the implications of the 1949 Takings Act and the 1984 Mineral Restoration Act is relatively simple. The question of ownership of the original bed of the Missouri River is answered at the Equal Footing Doctrine stage, and the statutes are straightforward in their meaning with respect to uplands taken in order to impound water behind Garrison Dam.

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

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

[188] 397 U.S. at 635.

[189] *Id.* at 634.

[190] *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.").

[191] 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 Tribe. 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 Tribe.

IV. ANALYSIS

The question presented is whether the United States holds in trust on behalf of the MHA Nation the mineral interests underlying the original riverbed of the Missouri River within the Reservation boundaries. The 1949 Takings Act is explicit regarding the upland taken, and the 1984 Mineral Restoration Act is explicit as to restoring to trust for the Nation the mineral interests underlying that upland.[192] Thus, the question to answer is whether these two acts sought to acquire and subsequently return the underlying mineral interests of the original riverbed of the Missouri River. An Act of Congress could only divest the MHA Nation of the mineral interests in the original riverbed and subsequently restore the mineral interests if the original riverbed belonged to the Nation in the first instance. Thus, it is essential to determine the identity of the party holding title prior to 1949. The answer to that question turns on application of the Equal Footing Doctrine. I begin there.

A. The Executive Orders of 1870 and 1880, as well as the 1886 Agreement Ratified by Congress, Consistently 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 1979 IBLA decision 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 rather remained held by the United States in trust for the Nation. Although both decisions can be read narrowly to apply only to specific portions of the river, their logic is applicable broadly to the Missouri River within the entire Reservation and, along with reaffirming these conclusions, I expand the analysis accordingly and update the conclusion guided by more recent precedent.

In 1936, Solicitor Margold issued an opinion determining that a certain island in the Missouri River within the boundaries of the Reservation was a part of the Reservation.[193] The island formed from the bed of the Missouri River after North Dakota's admission to the Union. The Solicitor posed the question as whether the bed of the river had been made part of the Reservation prior to statehood, citing *Holt State Bank.*[194] Distinguishing *Holt State Bank* and having previously noted 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."[195] Thus, Solicitor Margold concluded that the riverbed was part of the Reservation, that the State disclaimed all right and title to Indian lands upon admission to the Union, that the islands formed from the bed retained the original status of the bed, and that islands then must also be part of the Reservation.[196]

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[192] This Opinion does not address land excepted under the 1984 Act. *See* 98 Stat. at 3152.
[193] M-28120, *supra* note 7.
[194] M-28120, *supra* note 7, at 617.
[195] *Id.*
[196] *Id.* at 618.

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 15 oil and gas leases within the Missouri River.[197] The applications involved lands set apart for the MHA Nation in the 1870 Executive Order, lands that had not been further altered by subsequent executive orders or agreements.[198] BLM rejected the applications because it took 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.[199] Impel appealed, and the State intervened to oppose the corporation's position that the lands were held by the United States.[200] The IBLA rejected both of North Dakota's arguments asserting that the State held title: the State argued that the United States was simply without power to transfer submerged lands to Indian tribes[201] and that it had obtained title by virtue of the Equal Footing Doctrine.[202] Citing to *Finch*,[203] the 1936 M-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.[204] North Dakota did not appeal.[205]

Moving to the present analysis, the Supreme Court in *Idaho* began with the recognition that the United States acquired title to the lands of the Oregon Territory through treaty with Great Britain[206] and subject to the aboriginal right of possession enjoyed by peoples already residing on that land.[207] Similarly, the United States here acquired title to the lands at issue by way of the Louisiana Purchase.[208] As with land acquired from Great Britain, the United States took possession of French lands through the Louisiana Purchase subject to the aboriginal right of possession held by tribes residing there.[209] As discussed previously, the Court in *Idaho*

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

[198] *Id.* at 109 n.3. North Dakota even admitted this fact in its own briefing. *See id.*

[199] *Id.* at 107.

[200] *Id.* at 110.

[201] *Id.* at 110-12. It is now strongly 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).

[202] 42 IBLA at 113-14.

[203] *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 142.

[204] 42 IBLA at 113-14.

[205] Consistent with the IBLA's conclusion, BLM subsequently issued to Impel Energy the leases at issue, initially held as Federal leases until the 1984 Mineral Restoration Act restored mineral interests to the Nation. BLM then transferred the relevant leases to the BIA, recognizing that they had become Indian leases.

[206] Treaty With Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

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

[208] Treaty Between the United States and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

[209] Both the French and the Spanish—who held the territory for some forty years after French possession and up until a transfer back to France in 1801—recognized aboriginal rights of possession. *E.g.*, *Sac & Fox Tribe of Indians v. United States*, 383 F.2d 991, 996 (Ct. Cl. 1967) ("By virtue of the Louisiana Purchase . . . the United States acquired from France, subject to the present Indian right of occupancy, a vast expanse of territory") (quoting and implicitly accepting portion of *Iowa Tribe of the Iowa Reservation in Kan. & Neb. v. United States*, 6 Ind. Cl. Comm. 496, 501-02 (1958) (Dkt. No. 135, Opinion of the Commission)); *Alabama-Coushatta Tribe v. United States*, 1996 U.S. Claims LEXIS 128, at *29, *132 (Fed. Cl. July 22, 1996) (explaining French and Spanish recognition of aboriginal title).

established a two-part inquiry to determine whether a federal reservation includes riverbed title and overcomes the presumption in favor of title passing to the State under the Equal Footing Doctrine: whether Congress intended to include submerged lands within a reservation and, if so, whether Congress intended to defeat state title (*e.g.*, by looking to whether the purpose of the reservation would be compromised if title passed to the state).[210] When a reservation is created by Executive Order, "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."[211] As explained more fully below, I find that the circumstances surrounding the reservation of land here that included the Missouri River within its bounds meet that two-part test. Accordingly, I conclude that the original riverbed underlying the Missouri River within the boundaries of the Reservation did not pass to North Dakota at statehood.

1. Intent to Include Riverbeds in the Reservation

The 1851 Treaty itself does not contain express language regarding the setting aside of riverbeds, but did establish the Tribes' territory as surrounding the Missouri River, which the Tribes relied on for many aspects of their life and cultural identity. As discussed above, subsequent Executive Orders evince a clear intent to include the riverbed of the Missouri River within the Reservation. First, 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,"[212] 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.[213]

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, 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, implicitly recognizing in view of the Indian canons that the title to river was held in trust for the Tribes given that the United States was purporting to recognize both sides of the river as belonging to the Tribes; 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; and 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 the land added to the Reservation.[214] These demarcations either to include or exclude river stretches in boundary descriptions illustrates quite clearly that the United States

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[210] *Idaho*, 533 U.S. at 272-73.
[211] *Id.* at 273.
[212] *Id.* at 266.
[213] Relatedly, the Eight 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); *see also infra* at 35 & note 258.
[214] 1866 Agreement, *supra* note 81, at 1055; 1870 Executive Order, *supra* note 11; 1880 Executive Order, *supra* note 11.

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.

Furthermore, the Indian canons of construction provide added weight in favor of interpreting the United States intent consistent with this understanding. The *Idaho* Court cited with approval *United States v. Alaska*, which the *Idaho* Court described as "concluding that a boundary following the ocean side of offshore islands necessarily embraced submerged lands shoreward of the islands."[215] The logic of necessary inclusion in both cases is equally applicable here. By using precise language in drawing boundaries on the far side of the Missouri River, those boundaries *necessarily* embraced the submerged land on the reservation side of the lines.

The broader history of reservations created for tribal signatories to the 1851 Treaty also supports a conclusion that the United States intended to include the bed of the Missouri River within the Reservation. For example, the subsequent 1868 Treaty established the original boundaries of the Great Sioux Reservation, setting the eastern boundary as "commencing on the east bank of the Missouri River . . . thence along low-water mark down said east bank."[216] The earlier 1851 Treaty had set the eastern boundary of Sioux territory as "commencing the mouth of the White Earth River, on the Missouri River," and ultimately ending "thence down the Missouri River to the place of beginning."[217] Congress then passed legislation in 1889 removing territory and dividing the remainder into smaller reservations for various Sioux bands, setting the eastern border of the Cheyenne River, Standing Rock, and Lower Brule Sioux Reservations as "the center of the main channel" of the Missouri River.[218] This progression strongly suggests that Congress recognized that Sioux territory included the entirety of the Missouri River in 1851, as reflected by an unchanged boundary made explicit in 1868 and then by a deliberate reduction to the middle of the Missouri River in 1889. The three Tribes here were not parties to the 1868 Treaty or subject to the 1889 legislation. Yet there is no reason to believe that Congress took a different view of what territory belonged to the Tribes in 1851 or that subsequent executive orders changed this view, having drawn explicit boundaries along the far bank of the Missouri River and having never made a reduction of boundaries to the mid-line of the river. The bed of the Missouri River was always intended to fall within the boundaries of the Reservation.

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 with respect to the second prong of *Idaho*, 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 *Idaho*, the Supreme Court found that the Coeur d'Alene Tribe's well-established reliance on fishing clearly satisfied the first part of the test.[219] The Court noted that the Coeur d'Alene Tribe "depended on submerged lands for everything from water potatoes harvested from the lake to

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[215] *Id.* (citing and summarizing *United States v. Alaska*, 521 U.S. 1, 39 (1997)).
[216] 1868 Treaty, *supra* note 139.
[217] 1851 Treaty, *supra* note 72.
[218] 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).
[219] 533 U.S. at 274.

fish weirs and traps anchored in riverbeds and banks."[220] The Court also recounted that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[221] Similarly here, the Mandan, Hidatsa, and Arikara, 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.

The factual situation of the MHA Nation can be distinguished from that of the Crow Tribe, at least as the *Montana* Court characterized the Crow. First, in focusing on the Crow Tribe's subsequent 1868 Treaty, the Court placed great weight on the fact that the treaty made no mention of the bed of the Bighorn River or an intention to convey the riverbed.[222] But unlike *Montana*, each executive order here explicitly mentioned river banks in drawing boundaries. Second, 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."[223] By contrast to *Montana*'s characterization of the Crow, fishing *did* have an important place in both the diets and the cultural way of life practiced by the three Tribes. 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 as well.[224] Thus, the Tribes' reliance on riverbeds distinguishes this situation from *Montana* and supports the conclusion that each executive order expressly recognized an intention to include 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."[225] 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."[226]

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 state constitution complying with the enabling act.[227] The enabling act required:

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[220] *Id.* at 265.

[221] *Id.* at 274.

[222] *Montana v. United States*, 450 U.S. 544, 553-54 (1981).

[223] *Id.* at 556.

[224] *Supra* at 6-8.

[225] M-28120, *supra* note 7, at 617.

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

[227] 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).

> 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.[228]

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."[229] Accordingly, upon admission of North Dakota to the Union on November 2, 1889,[230] the State forever disclaimed title to any lands held by Indian tribes, including as relevant here the submerged lands held by the MHA Nation. Solicitor Margold found this fact important to his conclusion in 1936, as did the IBLA in 1979.[231] The *Idaho* Court likewise noted such a provision in Idaho's constitution.[232] Taking into account the Indian canons, there is no reason to believe, absent explicit Supreme Court statements to the contrary, that Congress and state constitutions mean something other than what they say.

Under *Idaho*'s second-prong analysis, the Court considered both 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.[233] Here, Congress was certainly on notice with respect to the inclusion of riverbeds in the Reservation by executive order 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."[234] 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."[235] Congress explicitly authorized the commissioners to negotiate the agreement on its behalf and, in doing so, it recognized that the Tribes' Reservation established by successive executive orders was just that, a pre-existing Reservation. By recognizing the Tribes' Reservation prior to negotiation of the later agreement, it implicitly

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[228] *Id.* at 677.
[229] N.D. CONST. art. XIII, § 4.
[230] Proclamation No. 292, (Nov. 2, 1889).
[231] M-28120, *supra* note 7; *Impel Energy Corp.*, 42 IBLA at 113.
[232] *Idaho v. United* States, 533 U.S. 262, 270 (2001). Although the Court in *Montana* made no mention of nearly identical language in the Montana enabling act and state 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. *Montana v. United States*, 450 U.S. 544, 554 (1981). Without a reservation of land prior to statehood (per the *Idaho* first step), there was no Indian-held land to disclaim. In other words, the disclaimer is relevant to *Idaho*'s second step, and the *Montana* Court had no reason to reach that inquiry. *See Idaho*, 533 U.S. at 274 (comparing first-prong intent to reserve regarding Coeur D'Alene Tribe with *Montana* which found "no intent to include submerged lands within a reservation where the tribe did not depend on fishing or use of navigable water.").
[233] 533 U.S. at 273-74.
[234] Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032 (1891).
[235] *E.g.*, H. EX. DOC. NO. 49-1, pt. 5, vol. 2 at 550, 551 (1885).

accepted the boundaries and land included within the Reservation by the previous executive orders, including submerged lands. Moreover, congressional recognition of the pre-existing Reservation is sufficient to evidence Congress' knowledge of and intent as to the inclusion of submerged land within it. There is no reason to believe—particularly viewed through the lens of the Indian canons of construction—that, when Congress recognized the three Tribes' pre-existing Reservation, it was picking and choosing only parts of the Reservation to recognize. Nothing in the agreement indicates that Congress recognized 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."[236]

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.[237] There,

> 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.[238]

Given the clear reservation of submerged land by prior executive orders, it would be equally implausible here, as in *Idaho*,[239] 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 intending to strip the Tribes of culturally and religiously significant riverbed by secret or silent operation of unstated law. The level of implausibility rises considering the importance of the river to the Tribes' creation of a trade nexus reliant on the river, tied up as this fact was with their identities. The purpose of the 1886 Agreement was only a reduction in size of the Reservation because of the Tribes having "vastly more land in their present reservation than they need or will ever make use of."[240] In fact the agreement, after providing for allotment,

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[236] *Id.* at 256.

[237] *Idaho*, 533 U.S. at 276-77.

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

[239] *Id.*

[240] Act of Mar. 3, 1891, ch. 543, § 23, 26 Stat. 989, 1032 (1891).

required that the remainder--after 25 years--be conveyed to the Tribes in common; Congress ultimately modified this provision to state instead that "the residue of lands within said diminished reservation, after all allotments have been made . . . shall be held by the said tribes of Indians as a reservation."[241] Congress made the modification despite the opinion of the Commissioner of Indian Affairs that it would be better to sell off such unallotted residue rather than to keep it with the Tribes in common.[242] The congressional modification illustrates the lack of any intent to dispossess the Tribes of anything that was already theirs, except for the land explicitly ceded outside of the new boundaries.

Further, the objective of consensual cession arguably lessens the importance of the notice aspect in the *Idaho* analysis: Congress affirmatively recognized that what land had already been reserved to the Tribes should not be further reduced without consent. Thus, so long as prior executive orders had reserved submerged land—as established by the preceding discussion—Congress must have accepted and recognized such reservation if it did not intend to strip the Tribes of what was considered theirs.

Moreover, 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*.[243] 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."[244]

Beyond the general 1886 Agreement objective of negotiating a cession of land only by consent, the *Idaho* analysis is also concerned with whether passage of submerged lands to the state would otherwise compromise the purpose of the reservation. Since the MHA Nation's territory was first laid out in the 1851 Treaty, a major purpose of the Reservation had been to establish the boundaries of a tribal homeland, one that would not be trespassed upon by either neighboring tribes or non-Indian migrants. Historical evidence, discussed previously, establishes the Nation's use of fish trapping both for food and as a ceremonially important activity. Fish trapping required individuals to anchor trap and weir structures in the bed of the Missouri River. The Arikara's willow pens similarly required the walls to be planted in eddies or backwaters. Not only did fishing for sustenance require use of the riverbed, but traps also played an integral role in fish trapping ceremonies practiced by the Mandan and Hidatsa. The Mandan believed that the first fish traps were introduced to the people by the storied hero, Black Wolf. Thus, it would be implausible to believe that the Tribes would have considered a reservation to be an acceptable homeland which did not allow them to carry on these activities. Agents of the executive branch

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[241] *Id.* at 1035.
[242] *See* S. EXEC. DOC. NO. 49-30, 2d Sess., at 5 (1887) (letter from Commissioner of Indian Affairs, included in transmittal of treaty to Congress by President Cleveland).
[243] 26 Stat. at 1027.
[244] *Idaho*, 533 U.S. at 280-81.

recognized this,[245] reporting the Tribes' refusal at one point of a proposal to remove them to Indian Territory in what is now Oklahoma: "'they love their own country; their dead are buried there' . . . and that they did not care 'to incur the risk of moving from the country they had so long called their home.'"[246]

Based on the foregoing, I find that Congress intended that the bed of the Missouri River located within the Reservation should not pass to North Dakota upon statehood. I make this conclusion based on Congress's recognition of the reservations made by executive order, including the entirety of the Missouri River in the description of the Reservation boundaries; its intent to pursue a final cession of additional land only by consent; and 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

B. The Mineral Interests Underlying the Original Bed of the Missouri River, as Well as the Interests Underlying Dry Uplands Taken and then Restored Pursuant to the 1949 Takings Act and 1984 Mineral Restoration Act, 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."[247] Section 15 of the Act provided a lengthy and detailed description of the takings area, including three passages of use in the analysis here.

First, Congress drew the takings area across the far side of the Missouri River near the southeast boundary of the Reservation.[248] Second, in the northwest where the Missouri River flows onto the Reservation, the takings area is described as following the northern boundary of the Reservation to the east, then crossing and including the Missouri River and continuing downstream.[249] This description means that, whereas the homesteaded area to the east of the river was not taken by the 1949 Takings Act, the takings area *did* include the entire width of the Missouri River in this area. Finally, in excluding particular lands from the takings area,

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[245] *Indians of Ft. Berthold Reservation v. United States*, 71 Ct. Cl. 308, 326 (1930) (April 13, 1880 report of Indian agent that "the character of the reservation outside the grant to the railroad company is not so well adapted to farming, raising, *fishing*, and hunting, *and the other necessities* of the Indians . . . . In my judgment, any alteration or change in the present reservation would greatly militate against the interest of the Indians." (emphasis added)).

[246] *Id.* at 324.

[247] 1949 Takings Act, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026 (1949).

[248] *Id.* at 1034 (emphasis added).

[249] *Id.* at 1044 (emphasis added).

Congress excepted four areas along the Missouri River of interest here.[250] One excepted the land "less erosions,"[251] another excepted a particular lot "plus accretions,"[252] and two more areas along the river were excepted "plus accretions."[253]

These three examples illustrate two points: (1) the takings area explicitly embraced the riverbed;[254] and (2) Congress recognized that, in areas where the Missouri 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,[255] 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.

Having determined that the Equal Footing Doctrine did not operate to pass title of the Missouri River bed to the State, the doctrine loses any further relevance.[256] Furthermore, it cannot be disputed that taken uplands belonged to the Nation. There are neither facts nor legal precedent to suggest 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 Congress clearly expressing intent to abrogate after a careful consideration of the conflict with extant rights.[257] Between the time of statehood and the 1949 Takings Act, there were no congressional acts purporting to abrogate Indian property rights within the takings area.[258] Having then taken those lands in 1949, along with the mineral interests, there can be no 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."[259] Thus, when Congress passed the 1984 Mineral Restoration Act, the mineral interests underlying the uplands were taken into trust for the MHA Nation.[260] 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

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[250] *Id.* at 1045, 1047.
[251] *Id.* at 1045.
[252] *Id.*
[253] *Id.* at 1047.
[254] *Id.* at 1045.
[255] The Act notes the total acreage of the takings area, but states that the number is "less water surface." 1949 Takings Act, 63 Stat. at 1045. However, 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.
[256] *See United States v. Alaska*, 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.").
[257] *Supra* note 126.
[258] 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 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).
[259] 1949 Takings Act, 63 Stat. at 1026.
[260] Note that Congress exempted some land from operation of the Mineral Restoration Act. 98 Stat. at 3152.

the boundary of the Reservation and formed one of the bases supporting the need for the legislation.[261]

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 reasons, either being sufficient. 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.[262] As discussed above, the 1949 Takings Act explicitly contemplated inclusion of the riverbed within the takings 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. On the other hand, if the Act did operate to take the riverbed, explicitly included as it was within the takings 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.[263]

The exempted lands under subsection (b) did not include land making up the original bed of the Missouri River.[264] Thus, the combination of the 1949 Takings Act and 1984 Mineral Restoration 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.

V. CONCLUSION

Based on the foregoing, I reaffirm the 1936 M-Opinion and 1979 IBLA 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. This

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[261] 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.").

[262] 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)).

[263] 98 Stat. at 3152.

[264] *See id.*

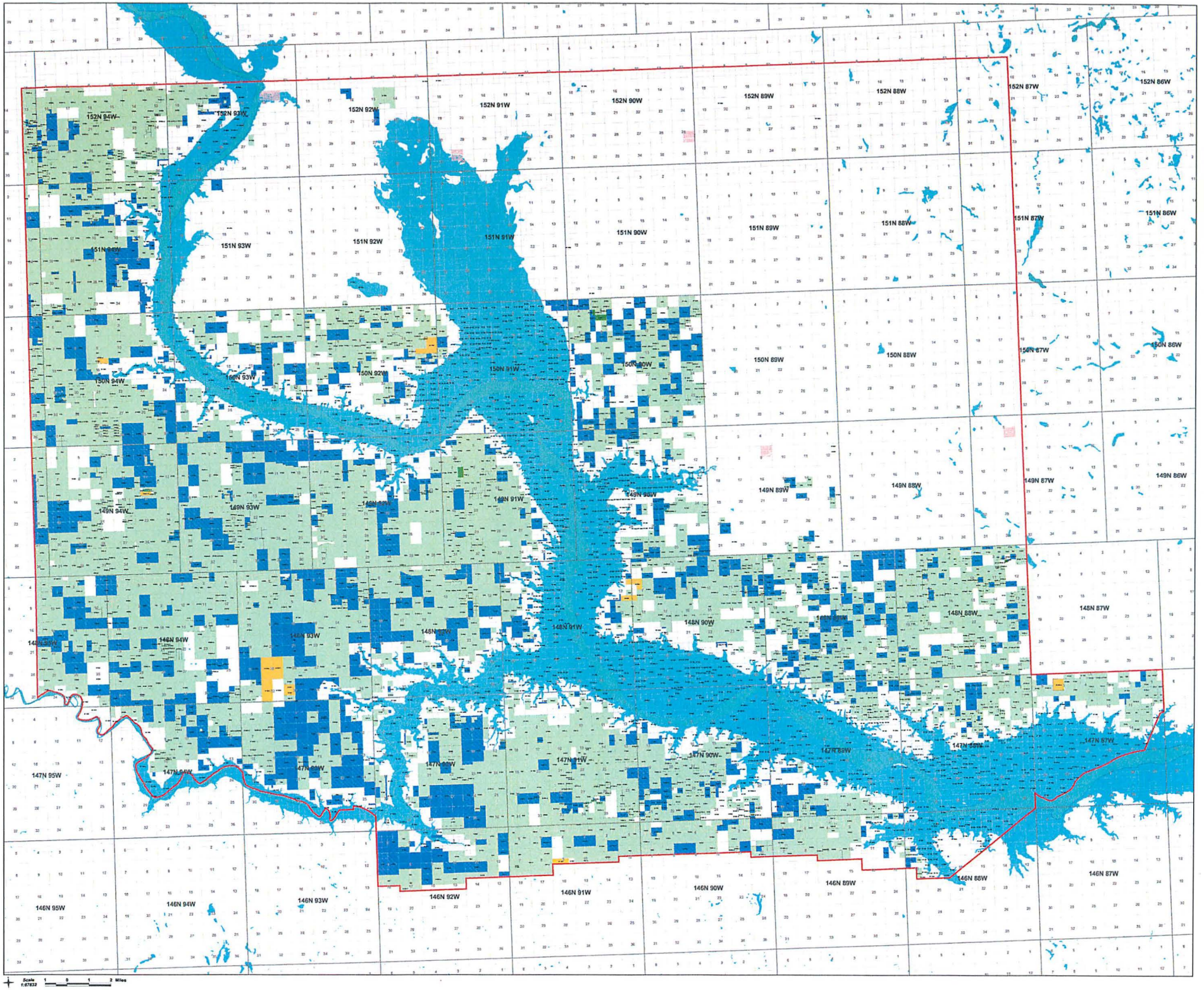
conclusion, updating the Department's position going back 80 years, is supported by the most recent Supreme Court precedent on the matter, *Idaho v. United States*. Based upon this determination, I further conclude that the mineral interests underlying the original bed of the Missouri River, as well 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 MHA Nation.[265]

Hilary C. Tompkins

Attachments

[265] This Opinion would not have been possible without the stellar legal research and drafting of Attorney-Advisor Andrew Engel and the critical review and editing of Assistant Solicitor Scott Bergstrom, both in the Division of Water Resources. In addition to the numerous others within the Office who helped provide peer review and useful comments, special recognition also goes to Deputy Solicitor for Water Resources Ramsey Kropf and Associate Solicitor for Indian Affairs Eric Shepard for their coordinating the efforts for this Opinion.

ATTACHMENT 1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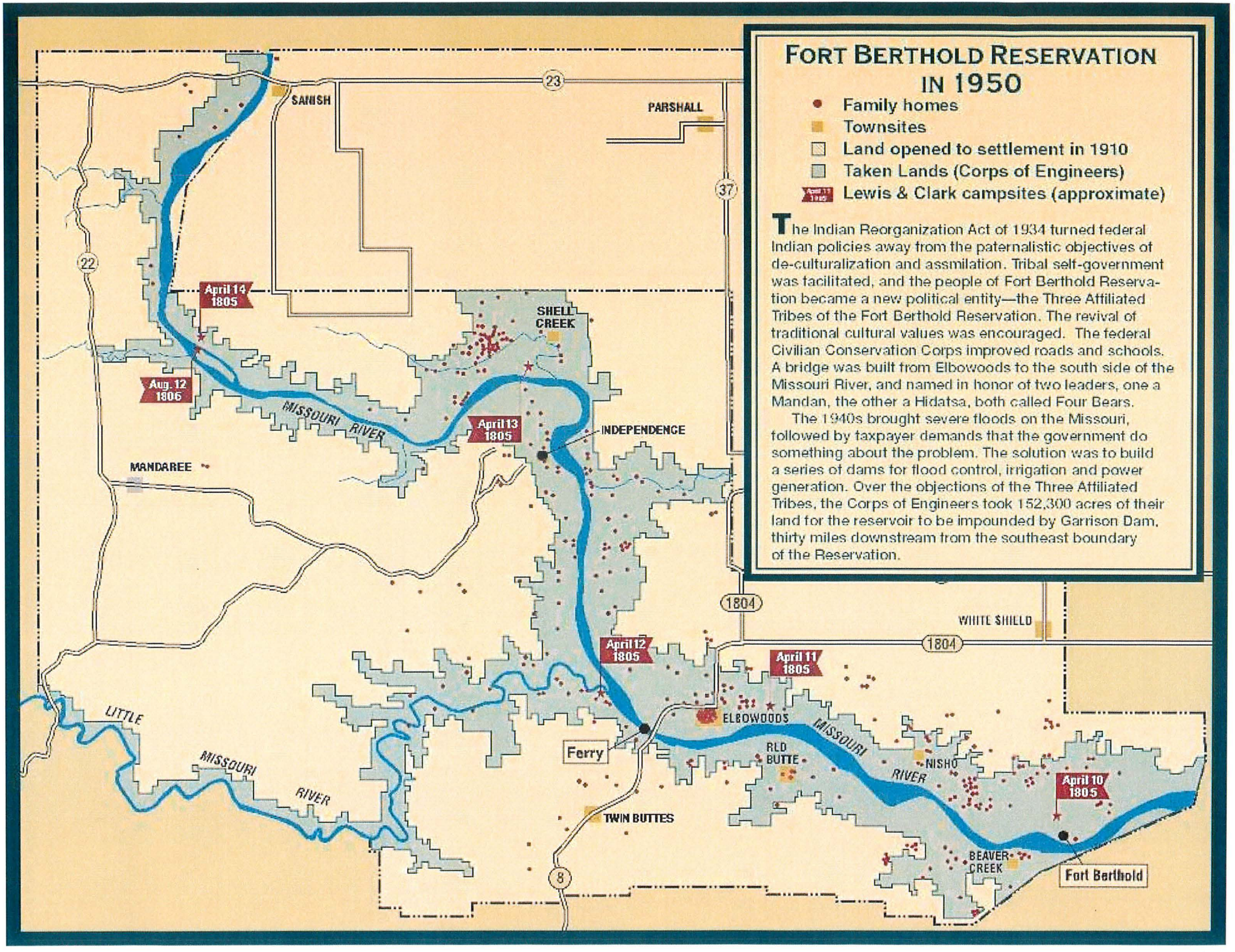
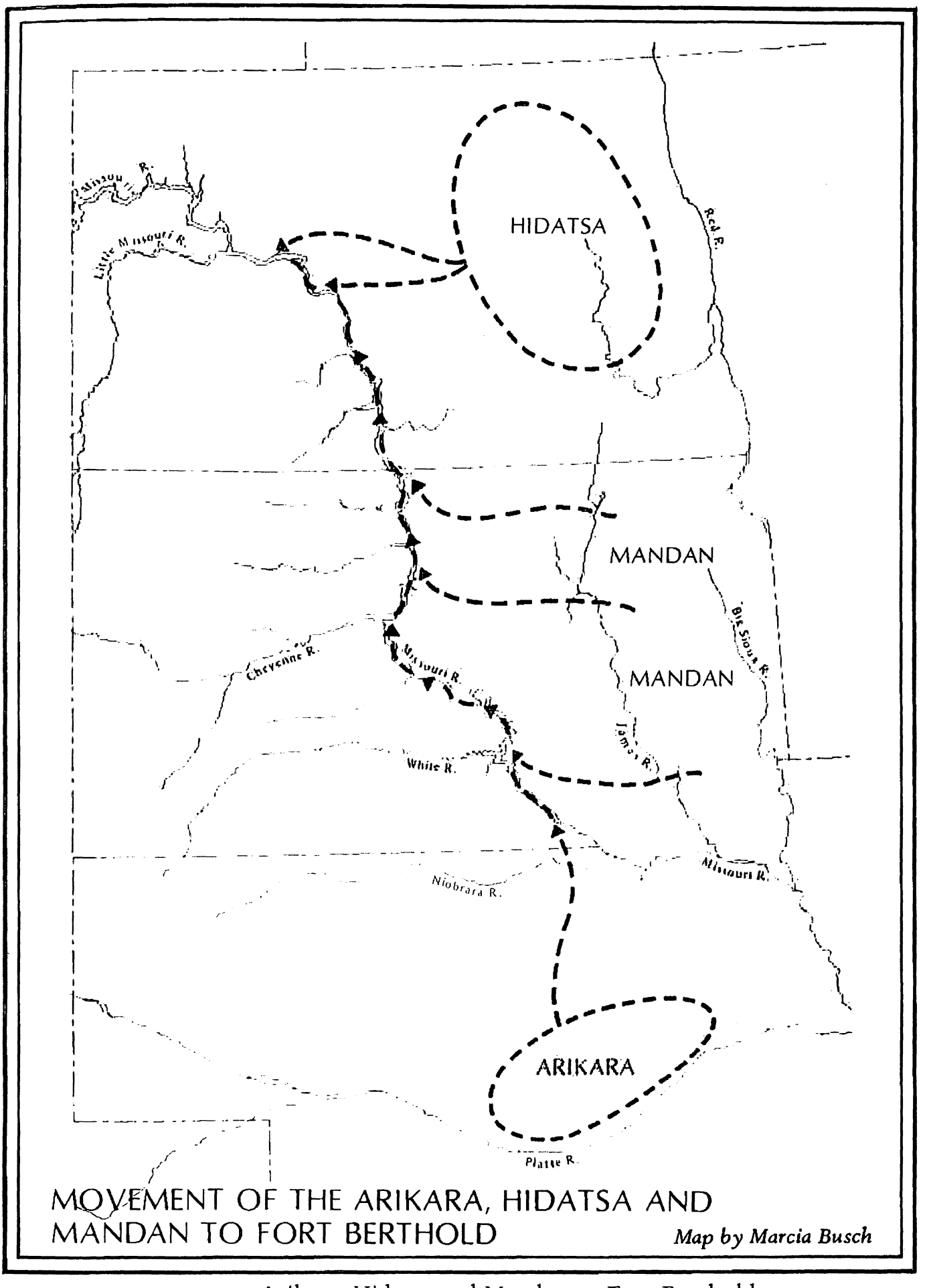
ATTACHMENT 2

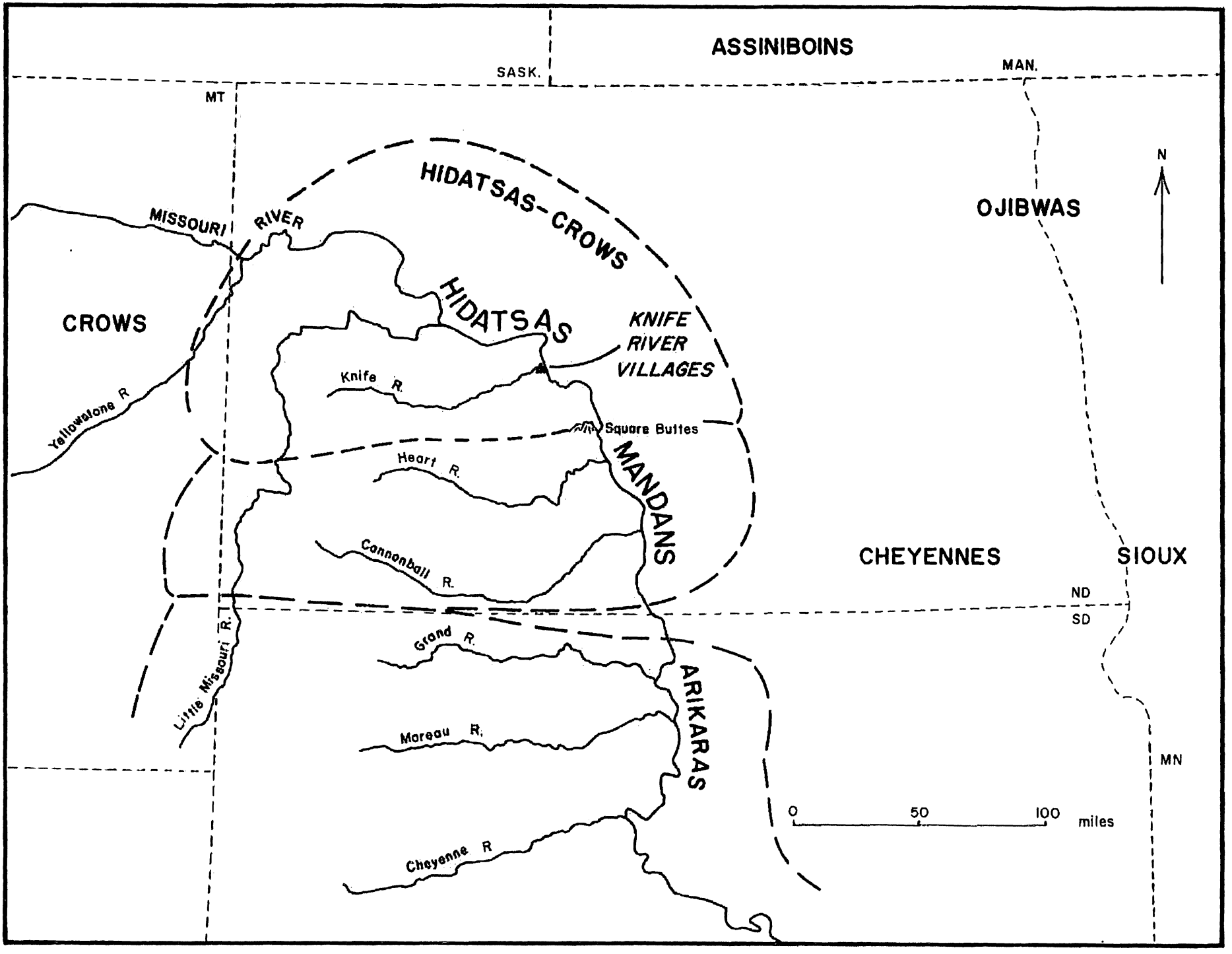

FORT BERTHOLD RESERVATION IN 1950
Family homes
Townsites
Land opened to settlement in 1910
Taken Lands (Corps of Engineers)
Lewis & Clark campsites (approximate)
The Indian Reorganization Act of 1934 turned federal Indian policies away from the paternalistic objectives of de-culturalization and assmilation. Tribal self-government was facilitated, and the people of Fort Berthold Reservation became a new political entity—the Three Affiliated Tribes of the Fort Berthold Reservation. The revival of traditional cultural values was encouraged. The federal Civilian Conservation Corps improved roads and schools. A bridge was built from Elbowoods to the south side of the Missouri River, and named in honor of two leaders, one a Mandan, the other a Hidatsa, both called Four Bears.
The 1940s brought severe floods on the Missouri, followed by taxpayer demands that the government do something about the problem. The solution was to build a series of dams for flood control, irrigation and power generation. Over the objections of the Three Affiliated Tribes, the Corps of Engineers took 152,300 acres of their land for the reservoir to be impounded by Garrison Dam, thirty miles downstream from the southeast boundary of the Reservation.
SANISH
PARSHALL
23
37
22
April 14 1805
SHELL CREEK
Aug. 12 1806
MISSOURI RIVER
April 13 1805
INDEPENDENCE
MANDAREE
1804
WHITE SHIELD
April 12 1805
April 11 1805
ELBOWOODS
LITTLE MISSOURI RIVER
Ferry
RLD BUTTE
NISHO
MISSOURI RIVER
April 10 1805
TWIN BUTTES
BEAVER CREEK
Fort Berthold
8

ATTACHMENT 3



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

ATTACHMENT 4



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

ATTACHMENT 5

State Histl. Soc. of N. Dak., Bismarck: left, #16; right, #17.

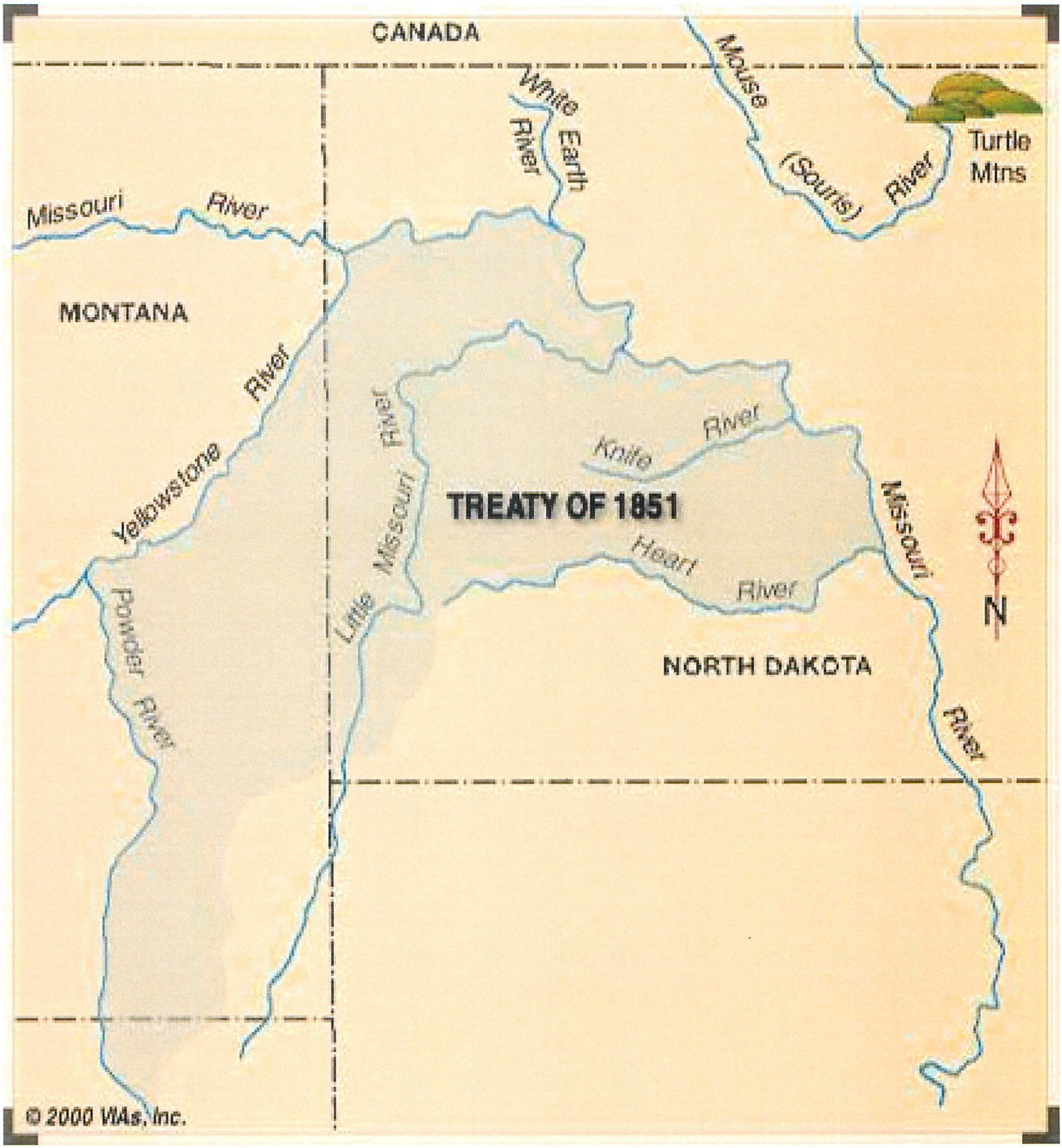
Fig. 4. Fish trap made by Black Bear, Hidatsa, near the mouth of Shell Creek, south of Van Hook, N. Dak., in the Missouri R. right, Close-up of same trap. Photographs by Russell Reid, Aug. 1929.

ATTACHMENT 6

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

FIG. 39.—Black Bear closing the diamond willow gate. (Courtesy of the North Dakota Historical Society.)

ATTACHMENT 7


CANADA
White Earth River
Mouse (Souris) River
Turtle Mtns
Missouri River
MONTANA
Yellowstone River
Powder River
Little Missouri River
Knife River
TREATY OF 1851
Heart River
Missouri River
N
NORTH DAKOTA
River
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ATTACHMENT 8


CANADA
Mouse (Souris) River
White Earth River
Turtle Mtns
Missouri River
MONTANA
1870
FORT BERTHOLD
RESERVATION
Yellowstone River
Little Missouri River
Knife River
Missouri River
Heart River
N
Powder River
NORTH DAKOTA
River
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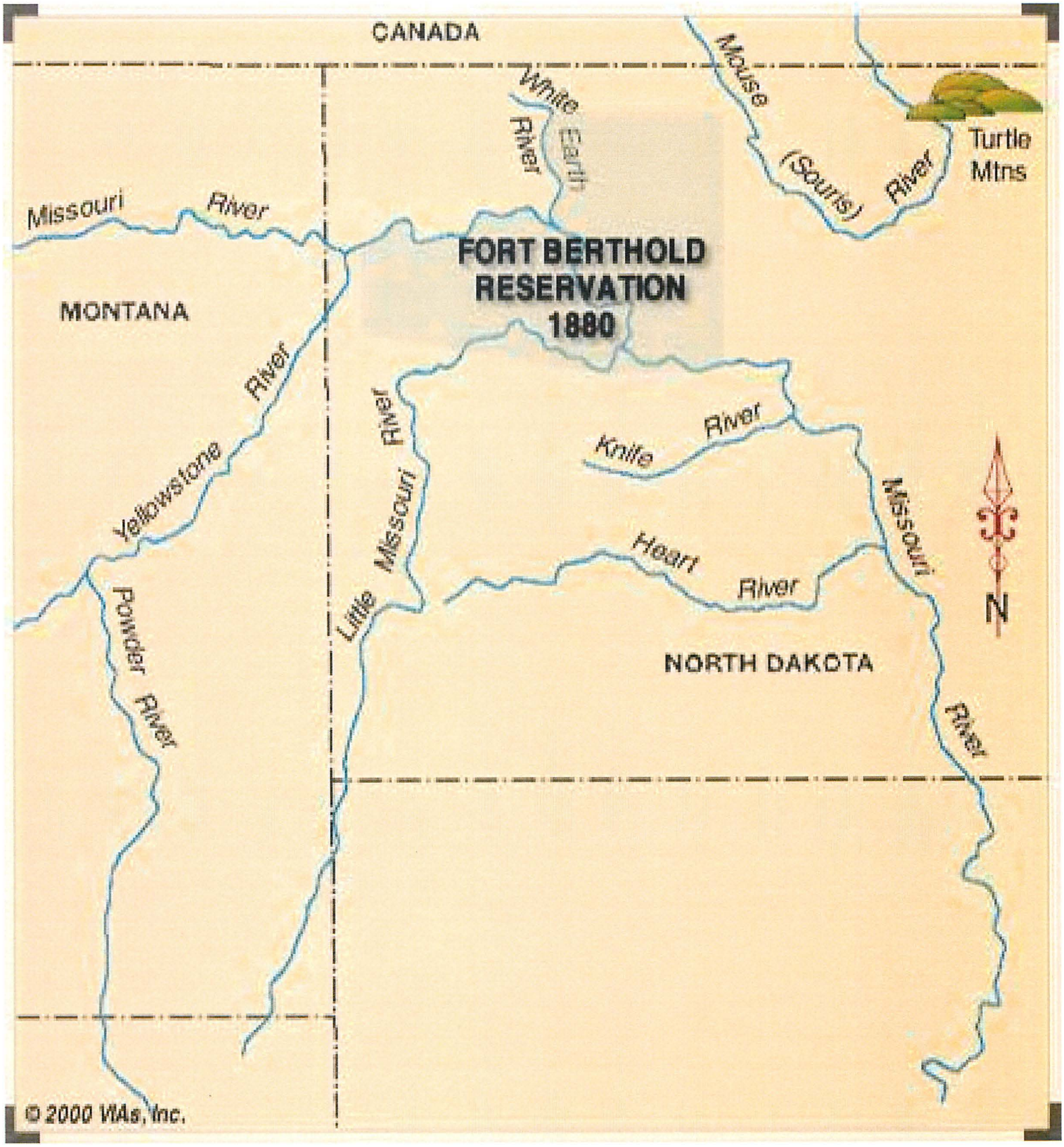
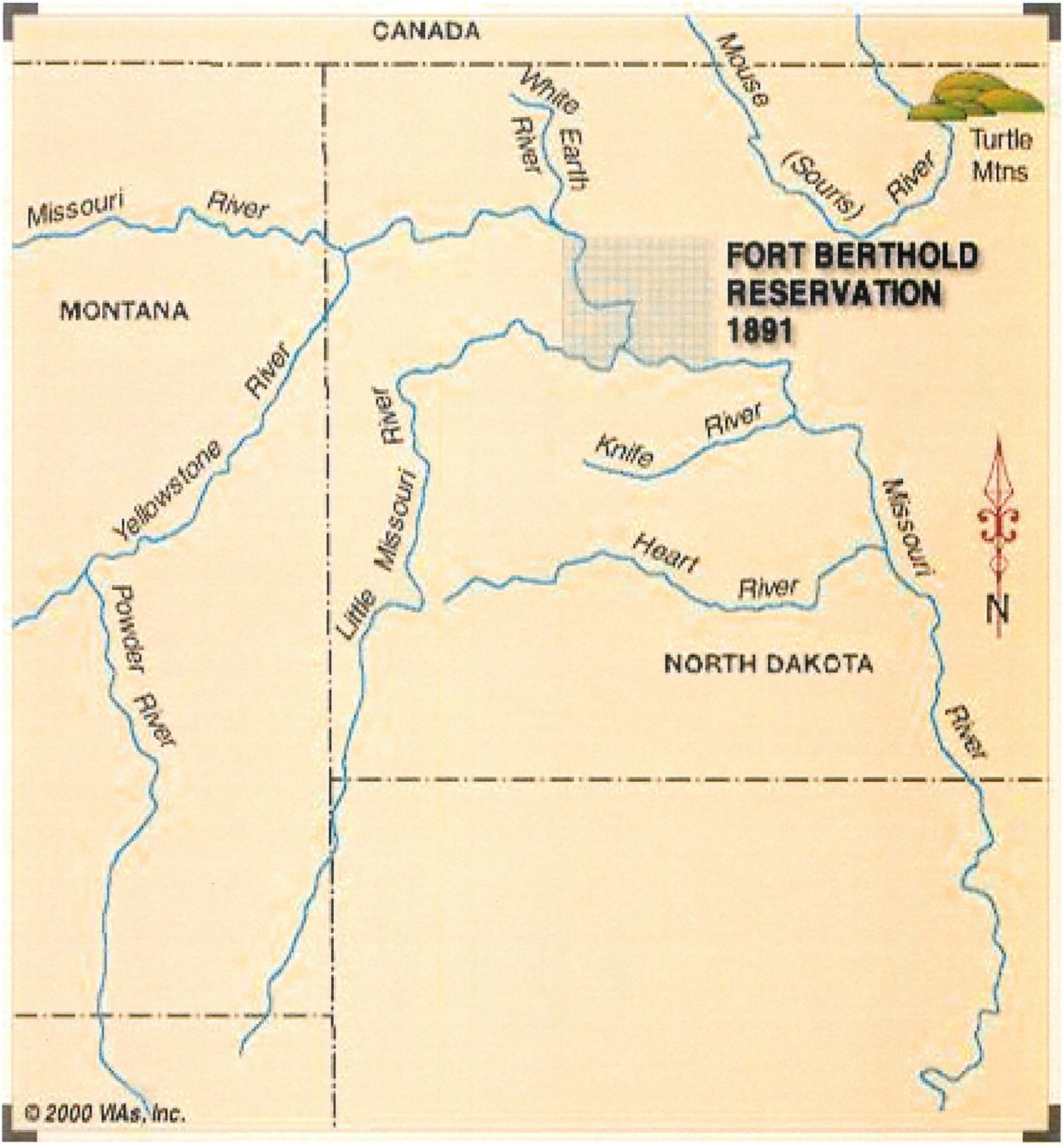
ATTACHMENT 9


CANADA
White Earth River
Mouse (Souris) River
Turtle Mtns
Missouri River
FORT BERTHOLD RESERVATION 1880
MONTANA
Yellowstone River
Knife River
Little Missouri River
Heart River
Missouri River
N
NORTH DAKOTA
Powder River
River
© 2000 MAs, Inc.

ATTACHMENT 10


CANADA
Mouse (Souris) River
White Earth River
Turtle Mtns
Missouri River
FORT BERTHOLD RESERVATION 1891
MONTANA
Yellowstone River
Little Missouri River
Knife River
Heart River
Missouri River
N
NORTH DAKOTA
Powder River
River
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ATTACHMENT 11

LAND CESSIONS BY THE THREE TRIBES
1870–1886