ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2023

No. 22-5185

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDAN, HIDATSA AND ARIKARA NATION,
Plaintiff/Appellee,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,
Defendants/Appellees

and

STATE OF NORTH DAKOTA,
Movant/Appellant.

Appeal from the United States District Court for the District of Columbia
No. 2:20-cv-01918 (Hon. Amy Berman Jackson)

BRIEF FOR FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. Appellant State of North Dakota was Intervenor-Defendant in the district court as to Count I and moved for intervention as to Counts III and IV.

2. Appellee Mandan, Hidatsa, and Arikara Nation is the Plaintiff.

3. Appellees United States Department of the Interior, Debra A. Haaland in her official capacity as Secretary of the United States Department of the Interior, and Robert Anderson, in his official capacity as Solicitor of the United States Department of the Interior, are the Defendants.

4. There are no amici.

B. Rulings Under Review

Appellant State of North Dakota seeks review of the district court's Order of June 21, 2022 denying its motion to intervene. Joint Appendix 167–73.

C. Related Cases

This case was not previously before this Court or any other court other than the district court below. The Mandan, Hidatsa, and Arikara Nation filed a related case in the United States Court of Federal Claims, *Mandan, Hidatsa, and Arikara Nation v. United States*, No. 20-cv-00859 (filed July 15, 2020), which presently is stayed while the district court case proceeds.

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INTRODUCTION

The Mandan, Hidatsa, and Arikara Nation ("MHA Nation" or "Nation") sued the United States Department of the Interior and Interior officials in their official capacities (collectively "Federal Defendants" or "Interior") challenging a 2020 legal opinion of the Solicitor of the Department of the Interior ("Solicitor"). That opinion concluded that the State of North Dakota (the "State" or "North Dakota") holds title to the historical riverbed of the Missouri River within the Fort Berthold Indian Reservation in North Dakota (the "Missouri riverbed" or the "historical riverbed"), including the minerals underlying the historical riverbed (the "riverbed minerals"). The district court allowed North Dakota to intervene as a defendant under Federal Rule of Civil Procedure 24(a)(2) to defend its claim to title.

Thereafter, however, the current Solicitor withdrew the 2020 opinion and in 2022 issued an opinion that the United States holds title to the historical riverbed and the riverbed minerals in trust for the MHA Nation. The district court dismissed as moot the Nation's claims against Interior relating to title (Counts I and II and part of Count IV). The district court denied North Dakota's motion to intervene as to the remaining counts, concluding that there was no longer a live controversy between the Nation and Interior as to title, that the State was thus not entitled to litigate its claim to title in the Nation's suit against Interior, and that the

court was able to adjudicate the Nation's remaining claims against Interior without impairing the State's claim to own the historical riverbed and riverbed minerals.

The State does not demonstrate any error by the district court. This Court should affirm the district court's denial of North Dakota's motion for intervention of right under Rule 24(a)(2) and for permissive intervention under Rule 24(b).

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331 because the claims of the MHA Nation arise under federal law, including the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Joint Appendix ("JA") 28–29.

The district court denied North Dakota's motion to intervene on June 21, 2022. JA167–73. North Dakota timely filed a notice of appeal on June 27, 2022. JA174. *See* Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction over the district court's denial of intervention of right under 28 U.S.C. § 1291. *Karsner v. Lothian*, 532 F.3d 876, 884 n.7 (D.C. Cir. 2008). The denial of a motion for permissive intervention "is not normally appealable in itself," but the Court may exercise its pendent appellate jurisdiction over the denial of permissive intervention where, as here, those issues are "inextricably intertwined" with the issues of intervention of right. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000) (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 574–75 (D.C. Cir. 1997)).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that North Dakota did not satisfy the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2).

2. Whether the district court abused its discretion in denying North Dakota permissive intervention under Fed. R. Civ. P. 24(b).

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and rules are contained in the addenda bound with the Brief for North Dakota and the Brief for the MHA Nation.

STATEMENT OF THE CASE

A. Factual background

Land status. The Fort Berthold Indian Reservation in central North Dakota is the home of the MHA Nation. The Reservation was established in the Dakota Territory by an Executive Order of President Grant dated April 12, 1870. North Dakota was later granted statehood in 1889.

The Missouri River flows through the Reservation from northwest to southeast. In 1944, Congress authorized the construction of several dams and reservoirs along the Missouri River. The Garrison Dam, constructed just downstream of the Reservation by the Army Corps of Engineers, flooded a portion of the Reservation, now known as Lake Sakakawea. The historical riverbed of the Missouri River is within Lake Sakakawea. Through a Joint Resolution, Pub. L.

No. 81-437, ch. 790, 63 Stat. 1026 (1949), Congress took the land needed for the construction, operation, and maintenance of the Garrison Dam and Reservoir Project and provided compensation to the Nation. In 1984, Congress restored to the MHA Nation the mineral interests in the taken lands through the Fort Berthold Reservation Mineral Restoration Act, Pub. L. No. 98-602, tit. 2, § 202(a)(1), 98 Stat. 3149, 3152 (1984).

The Reservation currently includes land held in trust by the United States for the benefit of the MHA Nation or individual tribal members as well as other land owned by the United States, land owned by the State, and land owned in fee by various Indian and non-Indian entities and individuals. The Indian trust land within the Reservation is administered by the Bureau of Indian Affairs of the Department of the Interior. The State-owned land within the Reservation is administered by the North Dakota Department of Trust Lands, which is overseen by the North Dakota Board of University & School Lands ("State Land Board"). JA160.

Competing claims to the historical riverbed. Interior has addressed the question whether the United States or North Dakota holds title to the historical riverbed of the Missouri River within the Fort Berthold Reservation in a number of contexts beginning in 1936.

In 2017, then-Solicitor Hilary Tompkins issued an opinion concluding that the United States reserved the Missouri riverbed when it established the Fort Berthold Reservation in 1870 and that title therefore did not pass to the State upon statehood under the Equal Footing Doctrine.[1] M-37044, *Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Reservation (North Dakota)* (Jan. 18, 2017) ("Tompkins M-Opinion").[2] That conclusion relied in part on a 1936 opinion by Solicitor Nathan Margold, M-28120, concluding that the United States holds the bed of the Missouri River in trust for the MHA Nation. Solicitor Tompkins also concluded that the United States holds in trust for the benefit of the MHA Nation the minerals underlying the adjacent uplands within the Reservation that were flooded when Garrison Dam created Lake Sakakawea.

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[1] The Equal Footing Doctrine is a presumption that "title to land under navigable waters passes from the United States to a newly admitted State." *See*, *e.g.*, *Idaho v. United States*, 533 U.S. 262, 272 (2001). However, if Congress "reserv[es] lands for a particular national purpose such as a[n] . . . Indian reservation," that presumption is defeated. *Id*. at 272–73.

[2] An M-Opinion is a final legal interpretation by the Solicitor which is binding on Interior offices and officials unless overruled or modified by the Solicitor, the Deputy Secretary, or the Secretary. *See* 209 Departmental Manual § 3.2A (11) (2020). Solicitor's Opinions since 1993 are available at https://www.doi.gov/solicitor/opinions.

On June 8, 2018, then-Acting Solicitor Daniel Jorjani suspended and temporarily withdrew the portions of the Tompkins M-Opinion addressing ownership of minerals beneath the historical riverbed, but he affirmed the portions addressing ownership of minerals beneath the flooded uplands. M-37052, *Partial Suspension and Temporary Withdrawal of Solicitor Opinion M-37044*. Solicitor Jorjani then issued an opinion concluding that the State holds title to the historical riverbed. M-37056, *Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)* (May 26, 2020) ("Jorjani M-Opinion"). As explained below, the MHA Nation filed this lawsuit in response to the Jorjani M-Opinion.

On March 19, 2021, the Principal Deputy Solicitor withdrew the Jorjani M-Opinion. M-37066, *Permanent Withdrawal of M-37056*; *see* JA101. On February 4, 2022, Solicitor Robert Anderson issued an opinion concluding—based on the Tompkins M-Opinion and additional analysis—that the United States holds the historical riverbed and riverbed minerals in trust for the MHA Nation. M-37073, *Opinion Regarding the Status of Mineral Ownership Underlying the Missouri River Within the Boundaries of the Fort Berthold Reservation (North Dakota)* ("Anderson M-Opinion").

Oil and gas development. A highly productive oil and gas reservoir underlies the Reservation. Wells are sited on dry land, but well bores can extend

horizontally for several miles from the drill site, including under Lake Sakakawea. Oil and gas operators must enter into mineral leases with the owners of the mineral estates from which the oil and gas will be extracted.

Leases of minerals held in trust for an Indian tribe must be approved by the Bureau of Indian Affairs under the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a–396g, or the Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108, regardless of the ownership of the surface estate.

B. Proceedings below

The MHA Nation's Complaint, filed July 16, 2020, asserted four claims against Interior. JA28-32. Count I alleged that the Jorjani M-Opinion was arbitrary, capricious, and contrary to law because it was contrary to Interior precedent and the historical record, and Count II alleged that it was arbitrary, capricious, and contrary to law because it was the result of improper political pressure. JA28–29. In both counts, the MHA Nation asked the court to set aside the Jorjani M-Opinion under the APA, 5 U.S.C. § 706(2)(A).

Count III alleged that Interior has a duty to account for the property that it holds in trust for the Nation, and the revenues therefrom, and it sought an order under the APA, 5 U.S.C. § 706(1), directing Interior to provide an accounting of the "production and extraction of [the riverbed minerals], and all royalties due and/or collected on such minerals." JA30. Count IV sought an order under 5

U.S.C. § 706(1) and the mandamus statute, 28 U.S.C. § 1361, compelling Interior: (a) "to document that the MHA Nation is the beneficial owner of the Missouri Riverbed and the underlying mineral estate within the Reservation"; (b) "to administer and account for" those mineral rights; and (c) "to collect, deposit and invest, or pay over funds owing to the MHA Nation from the extraction of mineral resources, including oil and gas, from the lands underlying the Missouri Riverbed within the Reservation." JA31–32.

In a motion for preliminary injunction filed the same day, the MHA Nation asked the court to prevent Interior from implementing the Jorjani M-Opinion pending the disposition of the case on the merits. At scheduling conferences on July 23 and 29, 2020, the parties agreed that the motion for preliminary injunction would be treated as plaintiff's motion for partial summary judgment on Count I. JA36–37. Based on representations by government counsel, the court ordered Interior to defer modifying title records or disbursing any revenues from riverbed minerals as specified in the order, and the court deferred further consideration of the motion for preliminary injunction. JA37.

On August 10, 2020, North Dakota filed a limited motion to intervene as a defendant as to issues raised in Count One. *See* JA5; JA40. It supported its motion with the Declaration of David Shipman, Director of Minerals Management with the North Dakota Department of Trust Lands. Mr. Shipman stated: (1) that

the "Land Board has issued approximately 255 oil and gas leases" for riverbed minerals within the Reservation; (2) that wells drilled on land bordering Lake Sakakawea "have been producing minerals subject to the state leases for a number of years"; and (3) that royalties from those riverbed minerals have not been paid to the State because of the title dispute and that "[s]ome of the unpaid royalties are being held by operators of wells producing the disputed minerals and some have been paid into an escrow account." JA160–61.

The district court ruled on August 27, 2020 that the State satisfied the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2) based on its claim to hold title to the historical riverbed and riverbed minerals as stated in the Jorjani M-Opinion. JA38–44 (the "2020 Order").

Interior and North Dakota answered the Complaint (JA50–91), and all parties briefed cross-motions for partial summary judgment on Count I. Before the district court ruled on the cross-motions, the Principal Deputy Solicitor withdrew the Jorjani M-Opinion on March 19, 2021, in order to review it. *See* JA101. All parties, including North Dakota, agreed that the withdrawal of the Jorjani M-Opinion mooted Counts I and II. JA104–18. In an Order dated August 2, 2021, the district court dismissed Counts I and II as moot, denied the MHA Nation's motion for preliminary injunction as moot, and denied those portions of the cross-motions for partial summary judgment addressing Counts I and II as moot.

JA125–27. The court noted its "view that the state need not file another motion seeking to intervene in the resolution of Counts III and IV," but stated that parties could express their disagreement in the next status report. JA127.

In a Joint Status Report dated August 13, 2021, the MHA Nation stated that it opposed the State's intervention on the remaining counts on the ground that, once the Jorjani M-Opinion was withdrawn, the State's adverse claim of title was barred by the Indian lands exception to the Quiet Title Act's waiver of the United States' sovereign immunity, 28 U.S.C. § 2409a(a). JA129–30. The State disagreed stating, among other reasons, that the mere withdrawal of the Jorjani M-Opinion "did not express any federal claim of title." JA131. The Federal Defendants noted that intervention as to the remaining counts "may require a different showing" than the State had made as to Count I. *Id*.

Following the issuance of the Anderson M-Opinion, the parties informed the district court on March 4, 2022 that Interior would record title to the historical riverbed in trust for the MHA Nation in the Bureau of Indian Affairs Land Titles and Records Office no sooner than April 4, 2022. JA147–51. Interior proceeded to record trust title on April 4, 2022. *See* JA152–53. On April 18, 2022, the parties informed the district court that the title recordation mooted subparagraph 89.a of Count IV, but that Count III and subparagraphs 89.b and 89.c of Count IV remained. JA154–58.

On April 29, 2022, the State—which was no longer a party to the suit—filed a supplemental motion to intervene as to those remaining counts (Supplemental Appendix ("SA") 1–13), supported by the same Declaration of David Shipman that it had submitted in support of its earlier motion to intervene as to Count I (JA160–61). The State explained that it wanted to intervene to argue that it owned the historical riverbed and riverbed minerals. SA4–5. Both the MHA Nation and Interior opposed the motion, arguing that ownership was no longer in dispute between the Nation and Interior, that a nonparty cannot intervene to raise additional issues, and that, in any event, the Indian lands exception to the Quiet Title Act's waiver of the United States' sovereign immunity precluded the district court's adjudication of the State's adverse claim of title. ECF Nos. 60 and 61 (filed May 16, 2022).

The district court denied the State's supplemental motion to intervene in an Order dated June 21, 2022. JA167–73 (the "2022 Order"). The district court concluded that the State had not established the requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) because it "has not demonstrated that it has a legally protected interest in the subject of this action that the remaining claims threaten to impair." JA173. Although the State's interest in title to the historical riverbed and riverbed minerals was implicated in the claims that were dismissed, the court disagreed with the State's contention that the

remaining claims "assert alternative theories to deprive North Dakota of its title to the bed of the Missouri River and underlying minerals" within the Reservation. JA170–71. To the contrary, the court explained, "Count III and the remaining part of Count IV concern the DOI's trust obligations towards the plaintiff," and "there is no longer a live controversy before the Court" on whether the United States or the State owns title to the Missouri riverbed and underlying minerals within the Reservation. JA172. The court explained that a motion to intervene may not be used to enlarge the issues being litigated between the parties, citing *Illinois Bell Telephone Co. v. F.C.C.*, 911 F.2d 776, 786 (D.C. Cir. 1990), and other precedent. JA171–72. The court also declined to exercise its discretion to grant permissive intervention under Federal Rule of Civil Procedure 24(b) because the State "is not pursuing any claim or defense that shares a common question of law or fact with the claims pending before the Court." JA173.

The proceedings in the district court have been stayed through February 10, 2023. Minute Order (Dec. 12, 2022).

C. Court of Federal Claims suit

One day before the MHA Nation filed its Complaint in this action, the Nation sued the United States in the United States Court of Federal Claims seeking damages for the United States' asserted breach of its trust obligations to the Nation relating to the historical riverbed and riverbed minerals. *Mandan, Hidatsa, and*

Arikara Nation v. United States, No. 20-cv-00859 (C.F.C., filed July 15, 2020). The Court of Federal Claims has stayed that suit pending the termination of this action.

SUMMARY OF ARGUMENT

I. The district court correctly concluded that the State failed to establish that it has satisfied the requirements for intervention of right under Federal Rule of Civil Procedure 24(a).

A. As its primary argument, the State challenges a holding the district court never made. The district court acknowledged the State's claimed interests in the Missouri riverbed and riverbed minerals and did not hold that the State's claimed interests had been finally resolved against it when Interior recorded the MHA Nation's beneficial interest in its administrative land records. The United States does not argue otherwise.

B. Turning to the district court's actual decision, the State incorrectly argues that the district court erred in holding that title is not "the subject of the action" in either Count III, seeking an accounting, or the remaining part of Count IV, seeking an injunction requiring Interior to collect revenues from riverbed minerals. The district court correctly rejected the State's effort to enlarge the issues being litigated by the parties. The court may permissibly address Count III and the remaining part of Count IV based on the shared premise of the parties to the case—

the MHA Nation and Interior—that the United States holds title to the Missouri riverbed and riverbed minerals. The court's resolution of the claims based on that shared premise will not result in any judicial findings as to who owns the riverbed and riverbed minerals. Indeed the district court cannot adjudicate title because a litigant may "adjudicate a disputed title to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), only as specified in the Quiet Title Act. That statute does not waive the United States' sovereign immunity to adjudicate title where, as here, the United States claims to hold title in trust for an Indian tribe.

C. The State similarly fails to demonstrate that adjudicating the Nation's remaining claims based on the premise that the United States holds title to the Missouri riverbed for the benefit of the Nation threatens to impair its claimed interest in the riverbed mineral revenues. The State has not even argued that the accounting sought in Count III—*i.e.*, the provision of relevant information about riverbed mineral revenues—could impair its interests. And the State has not demonstrated any error in the district court's conclusion that it can adjudicate Count IV without impairing the State's claimed interest in riverbed title. A district court has considerable discretion in deciding whether to grant injunctive relief and the scope of any such relief. And here, the district court lacks jurisdiction over the nonparties holding the riverbed mineral revenues, and the Attorney General has

discretion whether to file one or more separate actions to resolve the question of ownership of the Missouri riverbed and riverbed minerals.

II. The State's cursory argument in the district court and in this Court that it is entitled to permissive intervention under Rule 24(b) falls far short of meeting its burden to demonstrate that the district court abused its discretion in denying permissive intervention.

STANDARD OF REVIEW

In reviewing a district court's denial of a motion to intervene as of right under Rule 24(a), this Court reviews "pure issues of law" de novo. *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003). It reviews findings of fact for clear error. *Id*. And those determinations that "involve a measure of judicial discretion" are reviewed for abuse of discretion. *Id*.

This Court reviews a district court's denial of permissive intervention under Rule 24(b) for abuse of discretion. *In re Vitamins Antitrust Class Actions*, 215 F.3d at 31.

ARGUMENT

I. The district court correctly held that North Dakota failed to establish that it is entitled to intervention of right on Count III and the remaining part of Count IV.

The State has failed to establish that it has satisfied the requirements for intervention of right under Federal Rule of Civil Procedure 24(a). That rule

requires a district court to grant intervention to anyone who, "on timely motion": "(1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The State does not argue that any federal statute affords it an unconditional right to intervene, and relies solely on Rule 24(a)(2).

This appeal raises three questions presented by the text of Rule 24(a)(2): (1) whether the State has an existing claim to ownership of the historical riverbed and riverbed minerals; (2) whether ownership of the historical riverbed and riverbed minerals is "the subject of the action"; and (3) whether the district court's disposition of the remaining claims may "impair or impede the [State's] ability to protect its interest" in the historical riverbed and riverbed minerals.[3] The party seeking to intervene as of right has the burden to show that it has satisfied these

[3] We break the first clause of Rule 24(a)(2) into two questions because of the way the State structured its arguments in the Opening Brief. The third question addresses the second clause of Rule 24(a)(2). We did not argue in the district court that the supplemental motion to intervene was untimely. Nor did we argue that the Federal Defendants could adequately represent the State's claimed interest in the historical riverbed had title been at issue in the remaining claims.

requirements. *Alt. Rsch. & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001).

The interest the State claims is ownership of the Missouri River's historical riverbed and riverbed minerals. But the State agreed that Counts I and II of the Complaint were mooted by the withdrawal of the Jorjani M-Opinion (JA110), and it has not challenged on appeal the district court's dismissal of subparagraph 89.a of Count IV as moot based on the issuance of the Anderson M-Opinion and Interior's subsequent recordation of the MHA Nation's beneficial title in Interior's land records. The State has never sought to file a counterclaim against the MHA Nation or a cross-claim against Interior asserting its adverse claim of title, but now seeks to intervene as a defendant to argue in opposition to the Nation's remaining claims against Interior. The State's intervention must thus be based on the MHA Nation's remaining claims against Interior—Count III and subparagraphs 89.b and 89.c of Count IV. The district court addressed the State's supplemental motion to intervene in that context. JA169–72.

The district court properly applied Rule 24(a)(2) by: (1) acknowledging that the State has a legally protected interest—its claim to own the historical riverbed and riverbed minerals; (2) holding that the State's ownership interest could not be adjudicated in the instant action because there is no longer a live controversy between the MHA Nation and Interior on that subject; and (3) holding that the

court could address the Nation's remaining claims without impairing the State's ability to protect its claimed interest. JA170–73. The State's Opening Brief does not demonstrate that the district court erred.

The State argues that this Court takes a liberal approach to intervention, "including on the 'interest' factor underlying the district court's denial here." Opening Brief 10; *see also id*. at 11–12. But the district court did not deny that the State claims an interest in the historical riverbed. It instead held that the argument the State wants to make—that the State holds title, not the United States in trust for the MHA Nation—is no longer "the subject of the action" and that the court could decide the Nation's remaining claims without threatening that interest. The decisions the State cites do not support a right to indiscriminate intervention.

Rule 24 "continues to set bounds that must be observed." 7C Wright & Miller Fed. Prac. & Proc. Civ. § 1904, 270 & n.5 (3d ed. 2007). Crucially, "[t]he original parties have an interest in the prompt disposition of their controversy," which "must be taken into account in deciding whether intervention in a particular case is authorized by Rule 24." *Id.* at n.6 (citing *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969)). This Court explained in *Smuck* that "[t]he decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming

fruitlessly complex or unending." 408 F.2d at 179. In this case, the district court properly denied the State intervention of right because it would have complicated resolution of the remaining claims and served no useful purpose.

A. The district court acknowledged the State's claimed interest in the Missouri riverbed and riverbed minerals and did not hold that the State's claimed interests had been finally resolved against it.

The State begins its argument by complaining that the district court "brushed aside" and "ignored" all of North Dakota's interests in the Missouri riverbed and underlying minerals, as set forth in the Declaration of David Shipman (JA160–61). Opening Brief 11. That is incorrect. Those interests were the basis for the district court's grant of intervention to the State in 2020 to defend against the MHA Nation's challenge to the Jorjani M-Opinion relating to title to the Missouri riverbed (Count I). The district court did not simply overlook those interests when it addressed the State's supplemental motion to intervene. It instead explained why intervention under Rule 24(a)(2) had been appropriate in 2020 but was not appropriate in 2022: "The State's interests in the disputed portions of the Missouri River riverbed were implicated in plaintiff's requests for relief" that were dismissed as moot, but the Anderson M-Opinion with which the State disagrees "is not the subject of this lawsuit, and a motion to intervene is not the means to challenge it." JA171. The district court does not call into doubt the State's interest, and it does not foreclose other means through which the State could

dispute federal title. It instead explains that the MHA Nation's remaining claims "concern [Interior's] trust obligations towards the plaintiff" and do not "require[] this Court to resolve a title dispute." *See infra* Section I.B.

The State largely ignores the district court's actual explanation for denying intervention, and devotes much of its Opening Brief to arguing that the district court should be reversed based on an asserted holding that the district court never made. Pointing out that "[o]nly a *court* can render a binding determination of title" (Opening Brief 12), the State argues that the district court erred as a matter of law by assertedly holding in footnote 2 of the 2022 Order (JA172) that Interior's recordation of the MHA Nation's beneficial title in Interior's land records finally resolved the ownership dispute against the State without the need for a final judicial determination of title.[4] The district court did not so hold. The State misreads the 2022 Order.

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[4] The State repeatedly asserts this incorrect characterization as to a district court holding on title. *See*, *e.g.*, Opening Brief 3 ("The district court incorrectly regarded ministerial recordation of trust title by [Interior] pursuant to Interior's newly expressed legal opinion as conferring legal title to MHA Nation . . . ."); *id.* at 7 ("The district court found that North Dakota no longer had an interest in the case because [the Bureau of Indian Affairs'] subsequent administrative recordation of trust title pursuant to the Anderson M-Opinion had finally resolved ownership in favor of MHA Nation."); *id.* at 8 ("The district court summarily and incorrectly found that [the Bureau of Indian Affairs'] mere recordation of title adhering to the Anderson M-Opinion mooted any question of ownership or property rights in the Missouri Riverbed or derived mineral revenues . . . ."); *id.* at 11 ("The district court's sole rationale was that recent administrative actions had negated the State's legal interests."); *id.* at 12 ("The district court treated [Land Titles and Records

The district court explained in the body of the 2022 Order that it did not have "to resolve a title dispute" in order to address Count III and the remaining part of Count IV because "there is no longer a live controversy before the Court on that issue." JA172. The district court's footnote 2 addressed the State's argument that "an M-Opinion does not establish legal title." *Id*. (quoting N.D. Reply Brief (ECF No. 62) at 5). The court explained in that footnote that "the Court is not relying on the new M-Opinion as establishing legal title; the recordation accomplished that." *Id*. That statement is fairly read in context to mean that the recordation resolved the question of title *as between the parties in the action*, not that it finally resolved title *as against the State*. That reading is confirmed by the following sentence in which the court held that the State "has not demonstrated that it has a legally protected interest *in the subject of this action that the remaining claims threaten to impair*." JA173 (emphasis added). The district court did not hold that there was no hypothetical action in which the State might be able to adjudicate its interest.[5] The district court's reference in footnote 2 of the 2022

Office] 'recordation' in line with the Anderson M-Opinion as 'establishing legal title' in MHA Nation to the property covered in its complaint.") (quoting footnote 2 of the 2022 Order (JA172)); *id.* at 18 ("the district court's premise that title is legally settled by [Land Titles and Records Office] recordation is incorrect").

[5] This reading is also supported by the district court's similar statement in its 2020 Order—referring to "the Jorjani Opinion that established the state's property and sovereign interests in the minerals of the Missouri riverbed"—which the district court quoted in its 2022 Order. *See* JA168. The district court obviously was not saying that the Jorjani M-Opinion finally resolved ownership of the riverbed

Order to the recordation of the MHA Nation's interest cannot bear the weight the State places on it.

Because we do not disagree with the State's legal point that "[o]nly a *court* can render a binding determination of title," or with its factual assertion that "no such judicial determination yet exists, including in the underlying district court case" (Opening Brief 12), it is unnecessary to further address the State's discussion at pages 12–17 of its Opening Brief.

B. Ownership of the Missouri riverbed and riverbed minerals is no longer a "subject of the action."

The question in this appeal is not whether the State claims an interest in ownership of the Missouri riverbed and riverbed minerals, but whether that claimed ownership remained a "subject of the action" under Rule 24(a)(2) following the withdrawal of the Jorjani M-Opinion in 2021. The State has not shown that the district court erred in rejecting its contention that the court had to "resolve a title dispute" in order to address the MHA Nation's remaining claims against the Federal Defendants. *See* JA172. And the State has failed to address the argument of the MHA Nation and the Federal Defendants in the district court that title cannot be a subject of the action because the Quiet Title Act has not waived

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minerals, but only that the M-Opinion had established the State's ownership for the purpose of the MHA Nation's claims against the Federal Defendants in this action. Indeed, the State itself characterizes the quoted phrase as a "passing reference" to the Jorjani M-Opinion, noting that it has claimed interests in the Missouri riverbed since statehood. Opening Brief 16 n.4.

the United States' sovereign immunity from a suit to contest the United States' claim to hold title to the Missouri riverbed and riverbed minerals in trust for the MHA Nation. *See supra* p.11. Although the district court did not find it necessary to address that issue in denying the State's supplemental motion to intervene, this Court cannot conclude that the State is entitled to intervene in this action under Rule 24(a)(2) without determining that the United States has waived its sovereign immunity with respect to the State's adverse claim of title. As explained below, the United States has not done so.

1. The district court correctly determined that the State is not entitled to insert into this action the issue of title to the Missouri riverbed.

The district court correctly denied the State's supplemental motion to intervene in this action in order to argue title where the existing parties agree that the United States holds title to the Missouri riverbed and riverbed minerals in trust for the MHA Nation. The district court relied on the principle stated in this Court's decision in *Illinois Bell* that "an intervening party may join issue only on a matter that has been brought before the court by another party." JA171 (quoting *Illinois Bell*, 911 F.2d at 786). This Court has described that principle as "well-established." *Ala. Mun. Distribs. Grp. v. F.E.R.C.*, 300 F.3d 877, 879–80 (D.C. Cir. 2002). The State's Opening Brief does not mention *Illinois Bell* or other cases applying that rule, but instead argues that the district court erred in holding that

"title is not at issue in either Count III or IV." Opening Brief 18 (quoting JA172). The State is incorrect.

The district court may address Count III and the remaining part of Count IV based on the shared premise of the parties—the MHA Nation and the Federal Defendants—that the United States holds title to the Missouri riverbed in trust for the MHA Nation. The State incorrectly asserts that the MHA Nation, Interior, and the district court "cite nothing allowing them to collectively assume [the question of title] away." *See* Opening Brief 18. To the contrary, the district court explained that "there is no longer a live controversy" between the parties "before the Court"—the MHA Nation and Interior—"on that issue." *See* JA172. And it correctly rejected the State's characterization of Count III and the remaining part of Count IV as "alternative theories to deprive North Dakota of its title." JA172 (quoting N.D. Mot. at 2 (SA2)). In addition, the State ignores the arguments of the MHA Nation and Federal Defendants that the Quiet Title Act does not waive the United States' sovereign immunity for an adjudication of title, as discussed in Section I.B.2 below.

The State's sole support for its argument that the district court must decide ownership of the riverbed minerals as a "necessary" element of the MHA Nation's remaining claims is *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005), which does not address intervention but simply states the proposition that plaintiffs

bear the burden of persuasion "on the elements in their claims." Opening Brief 18. That case, which addresses the burden of persuasion under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., does not call into question the district court's determination that disposition of the plaintiff's remaining claims in this case does not require an adjudication of title.

To be sure, this Court has explained that the "general rule" of *Illinois Bell* is a "prudential restraint," and that intervention is appropriate where the issue the nonparty raises is "an essential predicate to the question" before the court. *Synovus Fin. Corp. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 952 F.2d 426, 434 (D.C. Cir. 1991). In *Synovus*, the Court determined that intervention should have been granted to address the nonparty's argument that the Federal Reserve Board did not have jurisdiction to make the decision at issue (an argument with which the Court agreed). *Id*. But the question whether the United States holds title is not a jurisdictional predicate or other "essential" predicate to the MHA Nation's claims against Interior regarding its trust duties. And this Court has emphasized that it "waive[s] the *Illinois Bell* requirement only in extraordinary cases." *State of N.Y. v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992) (internal quotation marks omitted). The State has not shown that this is such an extraordinary case.

Adjudicating the Nation's remaining claims on the shared premise of the parties would not result in any judicial findings or any preclusive holding on the

question of title. The question of ownership would simply be a premise assumed *arguendo* by the court, and that premise could not be used against the State in any future litigation. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (a prior case "is not a binding precedent" as to an issue not raised in briefs or discussed in opinion); *see also Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 257 (D.C. Cir. 1992) (the doctrine of issue preclusion prohibits the relitigation of an issue actually determined and necessary to the judgment). The district court's 2022 Order makes clear that it has not adjudicated, and will not adjudicate, title in this action. JA172.

The State's other arguments in Part I.C of its Opening Brief are similarly unpersuasive. The State unfairly asserts that "two plus years into this case, MHA Nation and Federal Defendants now perceive a safer course to avoid adjudication of this threshold issue," implying that the change in the subject of the action was a litigation strategy. *See* Opening Brief 18. To the contrary, the State agreed that the district court should dismiss Counts I and II as moot following Interior's withdrawal of the Jorjani M-Opinion. JA110. The MHA Nation had challenged the Jorjani M-Opinion. That M-Opinion was no longer in effect.

And the State incorrectly suggests that a short statement in the MHA Nation's April 2, 2021 filing—noting that unspecified legal arguments in its briefs on the cross-motions for partial summary judgment "remain relevant" even though

Counts I and II were mooted by the withdrawal of the Jorjani M-Opinion—is inconsistent with its current position that title is not at issue. *See* Opening Brief 19 (quoting JA105). Among other reasons, when the MHA Nation made that statement, its request in subparagraph 89.a of Count IV for an order directing Interior to record title had not yet been resolved.

2. The Indian lands exception to the Quiet Title Act precludes North Dakota from challenging in this action the United States' claim to own the Missouri riverbed in trust for the MHA Nation.

This Court can affirm the district court's denial of the State's supplemental motion to intervene to argue its claimed title based on the foregoing analysis. In addition, both the MHA Nation and Interior timely raised the Quiet Title Act, 28 U.S.C. § 2409a, in opposition to the State's motion. *See supra* p.11.

The State was granted intervention in 2020 to defend its claim to title against the MHA Nation's Count I challenging the Jorjani M-Opinion, which supported State ownership of the Missouri riverbed and riverbed minerals. But the landscape changed when the Jorjani M-Opinion was withdrawn in 2021 and the current Solicitor subsequently issued the Anderson M-Opinion concluding that the United States holds title to the historical riverbed and the riverbed minerals in trust for the MHA Nation. The Nation's suit no longer includes a dispute over the Jorjani M-Opinion.

Importantly, the Quiet Title Act waives the United States' sovereign immunity from suits "asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting 28 U.S.C. § 2409a(d)). Unlike the MHA Nation's challenge to the Jorjani M-Opinion which did not seek a judicial determination of title to property in which the United States claimed an interest, as a result of the Anderson M-Opinion the State's supplemental motion to intervene does seek a judicial determination of title to property in which the United States claims an interest. But that relief is not available in this suit because the Quiet Title Act's waiver of immunity from suit "does not apply to trust or restricted Indian lands," 28 U.S.C. § 2409a(a), a provision known as the "Indian lands exception."

As discussed above, the district court correctly denied the State's supplemental motion to intervene without any need to address the Quiet Title Act. If this Court disagrees with the district court's analysis, however, it must either address the Quiet Title Act or remand the matter to the district court for it to do so in the first instance.

Because the Anderson M-Opinion reaffirmed Interior's earlier position that the United States holds title to the riverbed in trust for the MHA Nation, there is no remaining title question at issue in the Nation's suit, and the Indian lands exception

bars the State from intervening in order to inject into this suit its adverse claim to title.[6] The Quiet Title Act is the exclusive means for any party—including a state—to dispute title to real property in which the United States claims an interest. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 285–86 (1983) (holding that the Act was the exclusive means for North Dakota to assert title based on the Equal Footing Doctrine to the bed of the Little Missouri River). In *Block*, the Supreme Court recognized that Congress included the Indian lands exception to be consistent with the "'specific commitments' it had made to the Indians through treaties and other agreements," and it further explained that the exception was one of "the carefully-crafted provisions of the [Quiet Title Act] [that Congress] deemed necessary for the protection of the national public interest[.]" *Id.* at 283–84 (citation omitted). The Court also recognized that some litigants may seek to avoid the exception through artful pleading, *id*. at 285, including by filing an official-capacity suit under the APA, *id*. at 286 n.22. Indeed, the Court emphasized that "[i]f we were to allow claimants to try the Federal Government's

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[6] So long as Interior's claim to title is "colorable" or non-frivolous, any challenge to that claim of title falls under the Quiet Title Act, and, if it relates to Indian trust or restricted land, the Indian lands exception applies to preserve the United States' immunity from suit. *See Alaska Dep't of Nat. Res. v. United States*, 816 F.3d 580, 585–86 (9th Cir. 2016); *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1231–32 (10th Cir. 2010). Although there is a difference of position between the Tompkins M-Opinion and Anderson M-Opinion on the one hand and the Jorjani M-Opinion on the other, none of those analyses can fairly be characterized as frivolous.

title to land under an officer's suit theory, the Indian lands exception to the [Quiet Title Act] would be rendered nugatory." *Id*. at 285.

The Supreme Court again cautioned that it would not approve "end-run[s] to the [Quiet Title Act's] limitations" in *Patchak*, 567 U.S. at 216. The Court noted that Section 702 of the APA, which limits the APA's waiver of sovereign immunity where "any other statute . . . expressly or impliedly forbids the relief which is sought," effectively "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Id*. at 215 (quoting 5 U.S.C. § 702). The Court explained that the Indian lands exception to the Quiet Title Act's waiver of sovereign immunity bars a plaintiff's suit under the APA challenging Interior's decision to take land into trust on the ground that he owned the property at issue, although it does not bar a challenge on other grounds. *Id*. at 216. The Court permitted the plaintiff's APA suit to proceed because the plaintiff "d[id] not claim any competing interest" in the property. *Id*. at 217. Here, in contrast, the State has made clear that it wants to intervene in order to argue that it owns the Missouri riverbed and riverbed minerals, and has not identified any separate arguments that it would make as an intervenor.

The State argued in the district court that no waiver of sovereign immunity was needed because it sought intervention only to defend against the MHA Nation's claims and did not seek to assert any claim of its own, including a cross-

claim against Interior asserting its own title. ECF No. 62, N.D. Reply Brief at 7 (filed May 23, 2022). That argument is unpersuasive because the State's so-called defense would necessarily consist of an effort to demonstrate that it has superior title, and that is precisely what the Indian lands exception disallows. The State did not identify any case specifically addressing whether the Indian lands exception applies where an intervenor-defendant intends to argue its own title as a defense notwithstanding the parties' agreement that the United States holds title in trust for an Indian tribe, nor have we found such a case. But the Supreme Court's resistance in *Block* and *Patchak* to procedural maneuvers intended to "end-run" the Indian lands exception to the Quiet Title Act's waiver of sovereign immunity supports a conclusion here that the United States has not waived its sovereign immunity, whether the State styles its request to litigate title as a cross-claim or a defense. That conclusion is further supported by the general principle that a "waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

* * *

In sum, the district court correctly concluded that it could not adjudicate the State's claim to own the Missouri riverbed and riverbed minerals in the context of the MHA Nation's suit against Interior because there is no longer a live

controversy between the parties on that issue and the State is not entitled to intervene to enlarge the issues before the district court. The United States' sovereign immunity, which has not been waived by the Quiet Title Act, provides an independent basis for that conclusion. The State therefore failed to meet its burden to establish that title is a "subject of the action" under Rule 24(a)(2).

C. The district court can dispose of Count III and the remaining part of Count IV without impairing or impeding the State's interest in revenues from the riverbed minerals.

The State has similarly failed to show that the district court erred in concluding that it can dispose of the MHA Nation's remaining claims against Interior without impairing the State's asserted interest in the Missouri riverbed and underlying minerals. The State asserts that its "interest in receipt of riverbed minerals" is "obvious" (Opening Brief 4), but it is not obvious that its interest is threatened by the district court's disposition of the MHA Nation's remaining claims.

The State does not argue in the Opening Brief that the "accounting" relief the MHA Nation seeks in Count III and subparagraph 89.b of Count IV threatens its claimed interest, and, as explained below, it does not. The State instead appears to focus on subparagraph 89.c of Count IV, in which the MHA Nation claims that it is entitled to an order "under the APA and/or 28 U.S.C. § 1361" compelling Interior "to collect, deposit and invest, or pay over funds owing to the MHA

Nation" from the riverbed minerals.[7] As explained below, the district court can adjudicate that claim without impairing the State's interest because it has considerable discretion in deciding whether to afford injunctive relief. In addition, the district court has no jurisdiction to order the nonparties holding riverbed mineral revenues to pay over those funds, and the MHA Nation cannot satisfy the stringent standard for obtaining injunctive relief against the federal government.

1. Count III

The "accounting" the Nation seeks from Interior in Count III and subparagraph 89.b of Count IV (JA30–31) is factual information about riverbed mineral revenues. An accounting would not in and of itself authorize or require Interior to take any specific action in response to that information.

The issues to be litigated between the MHA Nation and Interior on Count III are whether Interior has a duty to account to the Nation in these circumstances,

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[7] Opening Brief 2 ("Such relief would deprive North Dakota of its interests in the same riverbed revenues."); *id.* at 3 ("Denial of intervention in this litigation to defend the State's interests in the subject lands and mineral revenues is akin to forced acceptance of their forfeiture to MHA Nation, were it to ultimately prevail below on its remaining Counts."); *id.* at 11 ("MHA Nation's claimed relief, if MHA Nation were to prevail, would impair North Dakota's interests in the lands, minerals, and revenues at issue."); *id.* at 12 ("Here, if its litigation claims were to succeed, MHA Nation likely would disturb existing State leases and claim revenues that the State would otherwise receive."); *id.* at 19 ("Contrary to the district court's order, judicial relief ordering redirection of those funds [from the extraction of mineral resources] to MHA Nation rather than the State would 'threaten [the State's] claimed interest in the riverbed.'").

and, if so, the scope of the information that Interior must provide. *See*, *e.g.*, *Fletcher v. United States*, 854 F.3d 1201, 1204 (10th Cir. 2017) (describing the scope of the information that would properly be included in an accounting as relevant to plaintiffs' claim for misdistribution of trust assets); *Cobell v. Norton*, 240 F.3d 1081, 1104–06 (D.C. Cir. 2001) (describing steps that Interior would reasonably have to take to provide adequate information about certain trust accounts as relevant to plaintiffs' claim for breach of trust); *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 204–05 (2020) (a "[t]ribe may seek an accounting in federal district court . . . and proceed with an action [in the Court of Federal Claims] if it discovers any financial impropriety") (internal quotation marks omitted). It appears that the MHA Nation seeks information in support of its separate claim for injunctive relief in Count IV and/or its claim against the United States for damages pending in the Court of Federal Claims.

As with other asserted trust responsibilities, the existence and scope of a duty to account is defined by statutes and an agency's implementing regulations. *See generally United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (Indian tribes may sue to enforce only those trust responsibilities that the United States has "expressly accept[ed]"). The MHA Nation lists in paragraph 48 of the Complaint a number of statutes and regulations that assertedly impose an accounting duty on Interior. JA23–24. Whatever the district court decides about

Interior's duty to account under those statutes and regulations, the court did not err in concluding that it can dispose of that claim seeking information from Interior about riverbed mineral revenues without threatening to impair the State's claimed interest in those revenues. *See* JA173.

2. Count IV

Nor did the district court err in concluding that intervention was not required as to the MHA Nation's claim in subparagraph 89.c of Count IV seeking an order "under the APA and/or 28 U.S.C. § 1361" compelling Interior "to collect, deposit and invest, or pay over funds owing to the MHA Nation" from the riverbed minerals (JA31–32). We understand Count IV to address revenues from leases that Interior has not approved. The MHA Nation's own leases that Interior has approved do not include riverbed minerals (*see* JA15), and revenues from those approved leases have been routinely disbursed to the MHA Nation.[8] Interior

[8] The State asserts in the Introduction to its Opening Brief (at 3) that "[r]eversal is especially important as Federal Defendants have begun to pay certain Missouri Riverbed mineral production revenues to MHA Nation," apparently referencing revenues from the MHA Nation's own leases. The State notes the district court's order of July 31, 2020 precluding Interior from disbursing riverbed mineral revenues it held until after the court resolved the cross-motions for summary judgment on Count I. Opening Brief 5 (citing JA37). Even though Interior did not approve the extraction of riverbed minerals, following the district court's 2020 order, out of an abundance of caution, Interior temporarily withheld from disbursement a portion of the revenues it held under certain approved leases to ensure that it did not inadvertently disburse revenues potentially attributable to riverbed minerals. After the district court dismissed Count One as moot, Interior determined that it was no longer necessary to withhold those revenues and so

would only need to "collect" revenues from leases that it has not approved and that are currently held by oil and gas operators or in escrow accounts. *See supra* pp. 8-9. Adjudicating this part of Count IV would not threaten the State's claimed interest in the riverbed mineral revenues for several reasons.

As an initial matter, a district court has discretion to control the course of proceedings before it, and in particular enjoys considerable discretion in deciding whether to afford injunctive relief and the scope of any such relief. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 495–96 (2001). The district court decided to proceed with the litigation after the claims involving title were mooted, but made no decision whether to afford relief or the scope of any relief. At a minimum, the district court's discretionary consideration of relief under Count IV would have to take into account the fact that there has been no final determination of title to the Missouri riverbed and riverbed minerals and that title cannot be adjudicated in this action for the reasons explained in Section I.B.2 above.

In addition, the district court lacks jurisdiction to order Interior *to collect* revenues from the entities holding the revenues because the district court cannot

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advised the State. *See* SA8. The State fails to note that it moved, in conjunction with its supplemental motion to intervene, to extend the order prohibiting Interior from disbursing funds (*see* SA1, 7–8), but that the district court did not grant that motion in ruling on the supplemental motion to intervene (JA167–73). The State has not raised the district court's failure to grant the motion as an issue in this appeal, and it is therefore forfeited.

compel the parties who hold the revenues—parties who are not before the district court in this action—*to turn them over*. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))); *see also Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered."). While Rule 24(a)(2) does not ordinarily require a district court to assess the merits of a claim in deciding whether to grant intervention with respect to that claim, the flaw in the MHA Nation's claim for relief in Count IV is jurisdictional in nature and clear on the face of the Complaint.

And while there might be some circumstances in which a district court could perhaps order an agency to take some action *in an effort to collect* monies from nonparties, no such order would be proper in this case. In seeking to compel the Federal Defendants to perform "statutory, regulatory, and fiduciary duties" allegedly owed to it, the MHA Nation relies on APA § 706(1) and the mandamus statute, 28 U.S.C. § 1361. JA31. But the Nation cannot meet the stringent standard for such relief. Prospective injunctive relief may be awarded in APA actions to "compel agency action unlawfully withheld or unreasonably delayed"

under 5 U.S.C. § 706(1). An order compelling governmental action is "normally limited to enforcement of a specific, unequivocal command"—*i.e.*, "the ordering of a precise, definite act about which an official ha[s] no discretion whatever." *Norton v. Sw. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (brackets, citations, ellipsis, and internal quotation marks omitted). The mandamus statute, 28 U.S.C. § 1361, is the equivalent of 5 U.S.C. § 706(1). Section 1361 provides that "[t]he district courts shall have original jurisdiction in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." "As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought" and "a plainly defined and nondiscretionary duty on the part of the defendant to honor that right." *Ganem v. Heckler*, 746 F.2d 844, 852 (D.C. Cir. 1984).

That stringent standard is not satisfied here. The MHA Nation lists in paragraph 48 of the Complaint a number of statutes and regulations that assertedly impose on Interior "an obligation to ensure the prompt and proper collection and disbursement of royalties." JA24. And it lists in paragraph 49 of the Complaint a number of statutes and regulations that assertedly "impose fiduciary obligations on [Interior] to collect funds owing to the MHA Nation from the lease or use of Tribal land, resources or assets." *Id*. None of the cited statutes or regulations authorize an administrative process through which Interior could collect revenues generated

by mineral leases that Interior did not approve.[9] Accordingly, the federal government could take control of those riverbed mineral revenues held by nonparty oil and gas operators and escrow agents only by commencing a judicial action.

The federal government has discretion to decide whether to file a judicial action seeking to collect revenues from riverbed minerals under unapproved leases, who to name as defendants, what claims to assert, and when to file, among other decisions. As the Supreme Court explained in *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" that is "presumed immune from judicial review." Recognizing "the Attorney General's authority to control the course of the federal government's litigation" in "both civil and criminal cases," this Court has rejected a claim by an Indian tribe seeking to compel the United States to file certain claims on its behalf. *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995); *see also Falkowski v. E.E.O.C.*, 783 F.2d 252, 253 (D.C. Cir. 1986) ("recogniz[ing] both

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[9] 25 C.F.R. Part 115 addresses the management of Individual Indian Money accounts, trust fund accounts, tribal accounts, and special deposit accounts, not the collection of revenues from unapproved leases to deposit into those accounts. 25 C.F.R. Parts 211 and 225 specify the process for Bureau of Indian Affairs approval of leases. And the regulations formerly codified at 30 C.F.R. Parts 202 and 206 (currently codified as Parts 1202 and 1206) apply to leases under the Federal Oil and Gas Royalty Management Act, which are leases "issued or approved by the United States," 30 U.S.C. § 1702(5).

the entirely discretionary nature of the power and the breadth of [the Attorney General's] discretion" to represent the United States' interests in court). Congress has not cabined the Attorney General's discretion with respect to the matters at issue in Count IV. On this issue, there does not appear to be any difference in the interests of the State and the Federal Defendants, and the Federal Defendants can "adequately represent that interest" under Rule 24(a)(2).[10]

As to the State's desire to achieve final resolution of the question of title to the Missouri riverbed and riverbed minerals, it remains an option for the United States to file one or more judicial actions to finally resolve title, including by filing a quiet title action against the State. While the Quiet Title Act waives the United States' sovereign immunity for suits against the United States only in limited circumstances not present here, the United States would be free to file its own action against the State to quiet title to the Missouri riverbed. *See Block*, 461 U.S. at 291–92 ("Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits."). But the district court cannot compel the United States to initiate an action against the State to quiet title or to

[10] In the district court the State did not identify any arguments that it wanted to make as intervenor apart from the argument that it holds title to the riverbed. Had the State suggested that it wanted to make other arguments relevant to Count IV, including those just discussed, the parties could have briefed, and the district court could have addressed, the propriety of intervention with respect to such issues.

initiate any other action against nonparties holding riverbed revenues. Among the options potentially available for resolving the dispute about the riverbed minerals, adjudicating title *in this action* is simply not one of them.

* * *

In sum, the State has failed to show, or even argue, that the district court's adjudication of Count III could impair its interests. And the State has not demonstrated that the district court erred in concluding that it could adjudicate Count IV without impairing the State's interest.

II. The district court did not abuse its discretion in denying permissive intervention.

The State similarly has not shown that the district court abused its discretion in declining to permit the State to intervene under Rule 24(b)(1), which provides that a "court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." The State does not argue that any federal statute affords it a conditional right to intervene, and relies solely on Rule 24(b)(1)(B). *See* Opening Brief 20–21. Rule 24(b) affords the district court "considerable discretion," and "[r]eversal of a district court's denial of permissive intervention is a 'very rare bird indeed.'" *E.E.O.C. v. Nat'l Child.'s Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998) (quoting *United States v. Pitney Bowes, Inc.*, 25

F.3d 66, 73 (2nd Cir. 1994)). The State has not presented any basis for such a rare reversal here.

The State unfairly criticizes the district court for its "summary denial." *See* Opening Brief 21. The part of the State's brief supporting its supplemental motion for permissive intervention was only four sentences long and cited no authority other than the text of Rule 24(b). SA7.

The State gave two reasons for seeking permissive intervention. First, it said that it "will defend against Plaintiff's central legal claims and sought relief in this litigation, protect its competing rights, and seek to uphold the integrity of the Equal Footing Doctrine vesting the State with the rights to funds derived from mineral production beneath the Missouri Riverbed." *Id.* But the only specific issue the State said it intended to raise if granted permissive intervention—the Equal Footing Doctrine—relates to title (the subject of the dismissed counts), not to Interior's trust obligations (the subject of the remaining counts).

Second, the State said that its "management of oil and gas and other resources on and below the riverbed also provides a basis to permissively intervene," citing Rule 24(b)(2). *Id.* Rule 24(b)(2) provides for permissive intervention by a federal or state government officer or agency "if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made

under the statute or executive order." The State did not contend that either the MHA Nation's claims or Interior's defenses were based on any such legal authority administered by the State. Given the State's failure even to outline how Rule 24(b)(2) might apply, its criticism of the district court for "offer[ing] no response" (Opening Brief 21) is unwarranted.

In sum, the State has offered no reason that justifies reversing the district court's denial of permissive intervention for abuse of discretion.

CONCLUSION

For these reasons, this Court should affirm the district court's Order denying the State's supplemental motion to intervene.

Respectfully submitted,

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