No. ____

IN THE

Supreme Court of the United States

SHARON AUBOL, et al.,

Petitioners,

v.

ANDEAVOR LOGISTICS, L.P., et al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has recognized that, where Indians hold a possessory interest in land that derives exclusively from federal law rather than from state law, federal common law supplies a cause of action in trespass permitting the Indian owners to protect that federal right of possession. In the decision below, the Eighth Circuit recognized the existence of this "federal common law trespass cause of action." App.23a. But it understood this Court's prior cases to be limited to trespass claims brought by tribes asserting aboriginal title, and thus concluded that the cause of action is not available to petitioners here—individual Indian allottees with possessory rights based on a federal statute. The upshot is that the allottees in this case have no way to vindicate their own property rights against an undisputed, decade-long, still-continuing trespass. That result contravenes this Court's cases, decisions of the Ninth and Tenth Circuits, the considered position of the United States, and background principles of property law.

The question presented is:

Whether individual Indian allottees with a current right of possession conferred by federal law have a federal common-law cause of action for trespass on their allotments.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, listed below, were plaintiffs in the district court and plaintiffs-appellants in the court of appeals:

> Sharon Aubol; Margo Bean; Janet Benton; Amanda Bird Bear; Roger Bird Bear; Thomas Bird Bear; Inez Burr; Denise Cavanaugh; Doreen Charging; JoAnn Chase*; Heather Demaray; Joyce Eakin; Darlene Edley; Donovan Fast Dog; George Fast Dog; Gloria Fast Dog; Estate of Nelson Fredericks; Sandra Gillette; Elsie Hapip, in her capacity as Personal Representative of the Estate of Josephine Inez Parenteau, Deceased; Valeri Hosie; Mavis Huber; Karen Koite; Linda Kroupa; Jamie Lawrence; Evelyn Lone Bear; Betty Matthews; Joan Matthews; Kenneth Matthews, Sr.; Sheridan Matthews; Herbert Pleets; Monique Pleets; Marion Rasmuson; Deborah Staples; Darryl Turner; Anthony White Owl; Eugene White Owl; Eunice White Owl; Kathleen White Owl; Wilson White Owl; Albert Whitman; Rae Ann Williams; Tiffany Williams; Arnold Young Bird; Betty Young Bird; Joan Young Bird; Murphy Young Bird; Noreen Young Bird; and Waylon Young Bird.

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* Ms. Chase has passed away. A motion to appoint a personal representative of her estate is currently pending in New York state court. Once a representative is appointed, petitioners will move to substitute the representative as a party pursuant to Supreme Court Rule 35.1. Pursuant to Fed. R. Civ. P. 25(a)(1), petitioners have filed an unopposed notice advising the district court of Ms. Chase's death.

Respondents, listed below, were defendants in the district court and defendants-appellees in the court of appeals:

> Andeavor Logistics, L.P.; Andeavor, formerly known as Tesoro Corporation; Tesoro Logistics GP, LLC; Tesoro Companies, Inc.; and Tesoro High Plains Pipeline Company, LLC.

(Continued from previous page.)

Similarly, Josephine Inez Parenteau died on June 20, 2024, and on August 19, 2026, Elsie Hapip was appointed under the laws of the State of North Dakota as the personal representative of her estate. On September 10, 2026, the district court granted petitioners' unopposed motion to substitute Elsie Hapip, in her capacity as Personal Representative of the Estate of Josephine Inez Parenteau, Deceased, as a party in this matter. *See* D. Ct. Dkt. 153.

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court for the District of North Dakota:

- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 1:19-cv-00143-DLH-CRH (judgment entered Aug. 8, 2023)

U.S. Court of Appeals for the Eighth Circuit:

- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 20-1747 (judgment entered Sept. 13, 2021)
- *Chase et al. v. Andeavor Logistics, L.P., et al.*, No. 23-3019 (judgment entered Jan. 30, 2026; rehearing denied Apr. 13, 2026)

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Petitioners Sharon Aubol, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

"[T]he '*sine qua non*' of property" is "the right to exclude"; indeed, that right inheres in "the very idea of property." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149-50 (2021) (citation omitted). Just as fundamental is a means of enforcing that right: settled, centuries-old law holds that an individual with a right to possess a piece of property may, as an inherent aspect of that possessory interest, obtain judicial relief for unauthorized entries onto her land by an action in trespass. And that right has never depended upon the nature of the possessor's title in the disputed lands. The right to sue for trespass arises from a right of *possession*, not ownership.

Those principles apply equally to possessory interests in land held by Indian tribes and their members. In *Oneida Indian Nation of New York v. County of Oneida ("Oneida I")*, 414 U.S. 661 (1974), and *County of Oneida v. Oneida Indian Nation of New York ("Oneida II")*, 470 U.S. 226 (1985), this Court held that an Indian tribe holding a right of possession that federal law conferred and never extinguished—and thus which was not subject to state law—could bring a claim for trespass derived from federal common law to protect that possessory interest. Together, these cases hold that, where Indians assert "a current right to possession conferred by federal law, wholly independent of state law," *Oneida I*, 414 U.S. at 666, the "Indians have a federal common-law right to sue to enforce" that possessory right, *Oneida II*, 470 U.S. at 235.

That principle should have resolved this case. Petitioners are 48 individual Indians who possess and hold beneficial title to federal trust allotments on an Indian reservation in North Dakota. Since 2013, respondent Andeavor Logistics, L.P. and its co-defendants (collectively, "Andeavor") have maintained a crude-oil pipeline across petitioners' allotments without a valid right-of-way. No one disputes that Andeavor's occupation of that land is unauthorized or that petitioners have suffered over a decade of damages as a result. And no one disputes that petitioners' possessory interests derive only from federal, not state, law. In these circumstances, *Oneida I* and *II* recognize that petitioners may sue respondents for trespass under federal law.

Yet the Eighth Circuit held, over a dissent by Judge Grasz, that petitioners lack such a cause of action and therefore cannot sue to protect their vital interests. That decision leaves petitioners with a right of possession but no means of enforcing it, depriving petitioners of the judicial remedy this Court has held is "necessarily include[d]" in the "right of property." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 20 (1823) (emphasis omitted).

This Court should grant the petition and reverse.

At the outset, the Eighth Circuit's decision cannot be reconciled with this Court's cases. The panel majority acknowledged that this Court has recognized a federal common-law trespass cause of action for "Indians." But it believed this Court's cases did not control because (1) petitioners' possessory rights derive from a federal statute (rather than aboriginal title) and (2) petitioners are individual Indians (rather than tribes). But this Court's cases do not draw either purported distinction, and neither distinction supports denying petitioners a right to sue to protect their property rights.

On the first, the *Oneida* cases are not limited to possessory rights derived from aboriginal title; the Court expressly noted that the Oneidas' aboriginal right of possession was *also* confirmed by federal treaties and statutes, making the case directly applicable here. Moreover, privileging aboriginal title over trust title makes no sense. Both aboriginal title and trust title are conferred by federal law, and there is no reason for federal law to provide a right of action for one but not the other. Indeed, trust title is a *stronger* right than aboriginal title: aboriginal title does not qualify as "property" under the Fifth Amendment, while the trust title petitioners hold does. *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

On the second, this Court has never held that individual Indians lack power to enforce their possessory interests; to the contrary, the Court has noted that the "dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968); *see* App.44a (Grasz, J., dissenting) (calling majority's distinction "questionable").

By basing its decision on these artificial distinctions, the Eighth Circuit stripped petitioners of an enforceable right to exclude, in contravention of this Court's cases and centuries of settled property law.

The Eighth Circuit's decision also creates a split among the courts of appeals and openly departs from the considered position of the United States. Both the Tenth Circuit—in a decision joined by then-Judge Gorsuch—and the Ninth Circuit have recognized that, under this Court's precedents, individual Indian trust allottees possess a federal common-law trespass claim to protect their possessory interests. *See Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010) (holding that allottees have a "*federal* common-law trespass claim"); *Agua Caliente Band of Mission Indians v. Cnty. of Riverside*, 442 F.2d 1184, 1186 & n.6 (9th Cir. 1971) ("An Indian, as the beneficial owner of lands held by the United States in trust[,] has a right acting independently of the United States to sue to protect his property interests." (citing *Poafpybitty*)); *see also United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). The Eighth Circuit's contrary rule means that, while allottees in California and Oklahoma can maintain trespass claims, allottees in North Dakota cannot.

The United States rejected this untenable result in an amicus brief filed below. It explained that petitioners' statutorily conferred possessory interests are, "if anything, more deeply rooted in federal law" than the possessory interests conferred by aboriginal title, and that petitioners may sue to protect those interests under federal common law. Br. of the United States as Amicus Curiae in Supp. of Appellants and Reversal at 16, *Chase v. Andeavor Logistics, L.P.*, No. 23-3019 (8th Cir. Jan. 16, 2024), 2024 WL 248905 ("U.S. Br.").

The question presented is important and this case presents an ideal vehicle for resolving it. There are nearly 38,000 individual trust allotments, spanning nearly 2.7 million acres, in the Eighth Circuit alone. Under the decision below, the individual Indians who own those lands have no recourse of their own when a trespasser comes on their land or a right-of-way expires and the grantee simply stays put; they must wait, indefinitely, for an overburdened federal trustee to act—or not—on their behalf. The case presents a pure question of law that is outcome determinative and was fully briefed below (including by the United States). And the time to decide that question is now: the Eighth, Ninth, and Tenth Circuits—the three circuits split on the question presented—account for *99%* of trust allotments held by individual Indians nationwide. There is no reason for further delay.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 165 F.4th 1102 (8th Cir. 2026) and reproduced at App.1a-46a. The order of the Eighth Circuit denying panel and en banc rehearing is unreported but is available at 2026 WL 981215 and reproduced at App.96a-97a. The opinion of the United States District Court for the District of North Dakota is reported at 686 F. Supp. 3d 854 (D.N.D. 2023) and reproduced at App.47a-95a. The prior opinion of the Eighth Circuit in this case, *Chase v. Andeavor Logistics, L.P. ("Chase I")*, is reported at 12 F.4th 864 (8th Cir. 2021) and reproduced at App.98a-123a.

JURISDICTION

The Eighth Circuit entered judgment on January 30, 2026. App.2a. Petitioners timely sought rehearing en banc, which the Eighth Circuit denied on April 13, 2026.

App.96a-97a. On June 29, 2026, this Court extended the time for filing this petition to September 10, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of the Act of Mar. 3, 1891, ch. 543, § 23, arts. I-V, 26 Stat. 989, 1032-33, and of the U.S. Code, 25 U.S.C. §§ 323-325, 345, are reproduced in the appendix to this petition. *See* App.124a-30a.

STATEMENT OF THE CASE

A. Statutory and Historical Background

"[F]rom time immemorial," Indian tribes were "the undisputed possessors of the soil" in the territory that would one day become the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). With European arrival, "fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States." *Oneida I*, 414 U.S. at 667. But the Indians' possessory rights survived that transfer: "a right of occupancy in the Indian tribes was nevertheless recognized"—one "good against all but the sovereign" and "extinguishable only by the United States." *Id.* After the Founding, moreover, that right was "the exclusive province of the federal law." *Id.*

As the Nation expanded, the federal government acted to formally recognize Indians' possessory interests to protect them from state incursion. It did so primarily via treaties establishing formal reservations, usually on lands within the tribes' aboriginal territories. *See, e.g.*, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670 (1979)

("[P]art of land to which the Omahas had held aboriginal title … was … designated by the United States as a reservation and the Tribe's permanent home.").

In the late nineteenth century, during what is now called the Allotment Era, Congress reversed course, passing statutes that "carved reservations into allotments and assigned the land parcels to tribal members," *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017), to encourage individual land ownership and hasten assimilation, *see Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

Initially, allotment involved conveying parcels of reservation land in fee simple directly to individual Indians. *See County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). That approach proved disastrous: since allotted lands were freely alienable, many allottees "quickly lost their land through transactions that were unwise or even procured by fraud." *Id.* at 254; *see Hodel v. Irving*, 481 U.S. 704, 706-07 (1987). Congress responded in 1887 with the General Allotment Act (or Dawes Act), ch. 119, 24 Stat. 388, which replaced fee ownership with a trust model: the United States would hold allotted land in trust for a specified period during which the allottee could not alienate or encumber his parcel without federal approval; only after that period elapsed would the allottee receive fee title, *see Yakima*, 502 U.S. at 254. Lands allotted in trust remained subject to federal law; state law would apply only "at the expiration of the trust period." *Id.* at 255 (citation omitted); *see also United States v. Mitchell*, 445 U.S. 535, 540-41 (1980).

Under this trust arrangement, the United States retained legal title to allotted parcels, while Indian allottees received—in Senator Dawes's own words—the right to "occup[y] … the land and enjoy all its use." 13 Cong. Rec. 3211 (1882). The allottees' possessory rights were central to this arrangement: "Congress intended that," during the trust period, "the allottee would occupy the land as a homestead for his personal use in agriculture or grazing." *Mitchell*, 445 U.S. at 543. Thus, "the allottee, and not the United States, was to manage the land" and "control [its] use." *Id.* at 543-44.

Congress brought the Allotment Era to an end in 1934 with the Indian Reorganization Act ("IRA"), which halted all further allotments nationwide, indefinitely extended the trust periods for lands already allotted but not yet fee-patented, and provided that lands not yet allotted would be held in trust for the tribes. *See Yakima*, 502 U.S. at 255. As a result, lands allotted prior to 1934 which had not yet been fee patented never became subject to state property law. *Wilson*, 442 U.S. at 670-71 ("[W]here the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'" (quoting *Oneida I*, 414 U.S. at 677)). By contrast, the IRA did not affect allotted lands for which the trust period *already* elapsed; those lands *are* subject to state law. *See Yakima*, 502 U.S. at 254-55. The resulting "checkerboard of tribal, individual Indian, and individual non-Indian land interests," *Barboan*, 857 F.3d at 1105, complicated the siting of railroads, telegraph lines, pipelines, and other rights-of-way accompanying land expansion, *e.g.*, *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 958-59 (8th Cir. 1983).

Congress responded with a series of statutes empowering the Secretary of the Interior to grant rights-of-way across Indian trust land, including the Indian Right-of-Way Act of 1948 ("IRWA"), 25 U.S.C. §§ 323-328, which authorizes the Secretary to grant rights-of-way "for all purposes" across land held in trust for tribes or individual Indians, *id.* § 323. Crucially, consent of the Indian owner—whether tribe or individual—is needed. Where land is held in trust for a tribe, the Secretary must obtain "the consent of the proper tribal officials." *Id.* § 324. And when the Secretary wishes to grant a right of way "over and across lands of individual Indians," he must, except in specified circumstances not relevant here, obtain "the consent of the individual Indian owners" or, if "the land is owned by more than one person," the consent of owners holding a majority of the equitable interest in the tract, *id.*[1] In all cases, Congress provided that "[n]o

[1] IRWA's implementing regulations provide that, when "a grantee remains in possession after the expiration … of a right-of-way," the Bureau of Indian Affairs ("BIA") "may treat the unauthorized possession as a trespass under applicable law," and may, if renewal cannot be renegotiated, "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." 25 C.F.R. § 169.410. A similar provision states that where an entity uses Indian land without an authorized right-of-way, the agency may act to recover possession *and* "[t]he Indian landowners may pursue any available remedies under applicable law, including applicable tribal law." *Id.* § 169.413.

grant of a right-of-way shall be made without the payment of [just] compensation" to the Indian owners. *Id.* § 325.

B. Factual Background

This case concerns allotted trust lands on the Fort Berthold Reservation (the "Reservation") in North Dakota. The Reservation was first formally recognized as the permanent home of the Mandan, Hidatsa, and Arikara Tribes (together, the "Tribes") via executive order in 1870, *see* Exec. Order of April 12, 1870; App.2a n.1, nearly two decades before North Dakota's admission to the Union in 1889, *see Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 879 (1986). Then, by an 1891 statute approving an 1886 agreement, the Tribes agreed to cede part of the Reservation to the federal government. *See* Act of Mar. 3, 1891, ch. 543, § 23 ("1891 Act"), arts. I-II, 26 Stat. 989, 1032-33; *see* App.2a n.1. The same statute directed the Secretary of the Interior to allot the remaining Reservation lands to individual Indians on terms mirroring those in the Dawes Act: the United States would hold title in trust for 25 years before transferring fee ownership to the allottee. *See* 1891 Act, arts. III-IV, 26 Stat. at 1033. Allotted lands would become subject to state jurisdiction only once they were "patent[ed] … to said allottees" at the trust's expiration. *Id.*, art. V, 26 Stat. at 1033.

Petitioners are 48 individual Indians who possess and hold beneficial title to trust parcels of Reservation land under the 1891 Act. D. Ct. Dkt. 28 ("Am. Compl.") ¶¶7-54. Due to the IRA's indefinite extension of the trust, petitioners' allotments are not—and never have been—subject to state law. *See* App.46a (Grasz, J., dissenting).

Respondent Andeavor owns the High Plains Pipeline System, a roughly 500-mile pipeline for transporting crude oil across the Reservation—including across 35 trust allotments belonging to petitioners and similarly situated allottees. App.2a-3a; Am. Compl. ¶6. In 1953, pursuant to IRWA, the Secretary granted Andeavor's predecessor a 20-year pipeline right-of-way across the Reservation. App.3a. The right-of-way was renewed for two further 20-year terms, before finally expiring in 2013. *Id.* For years thereafter, Andeavor continued operating the pipeline across petitioners' allotments without a valid right-of-way. *E.g.*, Am. Compl. ¶96.

Although Andeavor reached a renewal agreement with the Tribes in 2017—paying roughly $2 million per acre in back trespass damages for lands possessed by the Tribes—it never obtained a renewed right-of-way over petitioners' individual tracts. *See id.* ¶¶92, 97. Yet the pipeline remains in place. *Id.* ¶98.

C. Proceedings Below

1. In October 2018, petitioners filed this putative class action against Andeavor for continuing trespass under federal common law, breach of the expired easement agreement, and unjust enrichment; they seek compensatory and punitive damages, an accounting of profits, disgorgement, and injunctive relief. App.3a-4a; *see generally* Am. Compl.

2. The district court dismissed the suit for failure to exhaust administrative remedies. App.4a. In September 2021, the Eighth Circuit reversed, holding that because IRWA does not authorize the BIA to award the remedies petitioners sought, exhaustion was not

required. *See* App.102a-06a. The *Chase I* panel deferred consideration of whether petitioners had a valid cause of action. *See* App.108a-16a, 116a n.6. It instead remanded, directing the district court to stay the case to allow the BIA to weigh in, because its "views … on these legal issues would obviously be important." App.119a-22a.

While *Chase I* was pending, the BIA took a series of shifting positions regarding Andeavor's trespass. In a July 2020 Notification of Trespass Determination, it found that Andeavor continuously trespassed on individual trust allotments for seven years, ordered it to cease operations, and awarded treble damages of $187.2 million. App.7a. The Assistant Secretary for Indian Affairs subsequently vacated that decision and remanded for a new decision. App.7a-8a. On remand, the BIA issued a decision reducing the trespass damages to around $4 million, and the Assistant Secretary later affirmed. App.8a. Andeavor paid that amount and ceased operations, but left the pipeline in place. *Id.*

In March 2021, the Acting Secretary of the Interior vacated all prior BIA actions in this matter. App.118a. Then, one of Andeavor's subsidiaries—Tesoro High Plains Pipeline Co.—sued the United States under the Administrative Procedure Act ("APA") to vacate that 2021 decision. *See id.*; *Tesoro High Plains Pipeline Co. v. United States*, No. 21-cv-90 (D.N.D. filed Apr. 23, 2021). In its answer in *Tesoro*, the United States, in its capacity as trustee, asserted counterclaims against Andeavor for federal common-law trespass and ejectment on behalf of individual allottees. App.8a-9a. The district court denied Andeavor's motion to dismiss the counterclaims but severed and stayed those claims pending resolution of Tesoro's APA claims, which remain pending. App.10a.

3. After the Acting Secretary's March 2021 vacatur, the district court, on remand from *Chase I*, granted Andeavor's renewed motion to dismiss, holding, as relevant here, that petitioners lacked a federal common-law cause of action for trespass. App.11a.[2]

4. A divided Eighth Circuit panel affirmed. App.1a-46a. The two-judge majority recognized that this Court authorized a federal common-law trespass cause of action in *Oneida I* and *II*. *E.g.*, App.22a. But it believed that "this case is distinguishable from *Oneida* in two significant respects": (1) "the alleged source of [petitioners'] ownership interests was federal statutory allotments, not necessarily Indian title"; and (2) petitioners are individual Indians, "not a tribe." App.20a. Because the majority stated it was "unaware of any Supreme Court or circuit court decision that affords allottees with equitable possessory interest to tribal lands held in trust an individual cause of action for trespass *under federal common law*," it concluded that petitioners lacked "standing to bring this federal common law trespass cause of action." App.22a-23a.[3]

The majority acknowledged that the United States, as amicus, agreed with petitioners that individual trust allottees can sue for trespass under federal common law.

[2] Separately, the district court denied petitioners' request to intervene in *Tesoro*. App.11a-12a.

[3] Despite the panel's repeated references to "standing," *e.g.*, App.20a, 23a, 43a, the panel majority held only that petitioners lack a cause of action, not that they lack Article III standing.

App.9a-10a. But it gave the government's submission "no deference or separate consideration," reasoning that the brief added "nothing of substance" beyond the parties' briefs and reflected only "the flip-flopping that has permeated the Secretary of Interior's actions in this complex dispute for more than a decade." App.10a-11a.[4]

Judge Grasz dissented on the trespass issue. He would have held that *Oneida II*'s reasoning indicates that individual allottees like petitioners—not just tribes asserting aboriginal title—can sue under federal common law to protect their possessory interests in land. *See* App.43a-46a. In Judge Grasz's view, when "*Oneida II* said 'Indians' had a federal common law right to sue to enforce their aboriginal land rights, it meant both tribes ***and individual tribe members***." App.44a. That is so, Judge Grasz explained, because this Court's precedents do not distinguish based on tribal versus individual ownership or aboriginal versus statutory title; they turn instead on whether the plaintiff's possessory interest arises solely under federal (rather than state) law. *See* App.44a-46a (citing *Wilson*, 442 U.S. at 670-71). Because the lands here "ha[ve] never left the ownership of the United States and [are] not subject to state law," Judge Grasz would have held that petitioners "have standing to bring a trespass claim under federal common

[4] Separately, the court dismissed petitioners' unjust-enrichment claim as derivative of their trespass claim, App.25a, and dismissed petitioners' breach-of-easement claim after finding that the United States was a required party that could not be joined, App.26a-34a. The court affirmed the denial of petitioners' motion to intervene in *Tesoro* but remanded for the district court to consider whether it should consolidate this case with *Tesoro*. App.34a-43a.

law." App.46a.

Petitioners sought rehearing en banc, which the Eighth Circuit denied. App.96a-97a.

REASONS FOR GRANTING THE PETITION

This Court's cases are clear: The right to bring a federal common-law cause of action for trespass runs to *all* Indians with possessory interests in land derived solely from federal law. In holding otherwise, a divided panel of the Eighth Circuit departed from this Court's precedents on Indian property rights and property principles more generally, split with the Ninth and Tenth Circuits, and wholly disregarded the position of the United States. The question presented is important and this case is an ideal vehicle. This Court should grant certiorari to clarify the scope of the federal common-law trespass cause of action, as only this Court can.

I. The Eighth Circuit's decision conflicts with this Court's precedents.

A. Under this Court's precedents, where Indians' possessory interests in land derive solely from federal law, a federal common-law trespass cause of action exists to protect those rights.

Where the United States holds land in trust for the benefit of individual Indians and has never parted with title, the Indians' possessory interests arise exclusively under federal law. As a result, under this Court's cases, a federal common-law cause of action for trespass exists to protect those federal possessory rights.

1. In *Oneida I*, this Court found federal question jurisdiction over the Oneida Nation's possessory claim

to millions of acres of land in New York because the possessory right asserted was exclusively "conferred by federal law, wholly independent of state law." 414 U.S. at 666-67. As the Court explained, the Oneidas "owned and occupied" the disputed lands "from time immemorial." *Id.* at 664. Then, after the Founding, the United States signed "various treaties" with the Oneidas "confirming [their] right to possession of their lands," which were later "implemented by [a] federal statute," the Nonintercourse Act. *Id.* These possessory rights—whether derived from aboriginal title or recognized title (that is, title formally granted by statute)—were "the exclusive province of the federal law." *Id.* at 667. And federal law recognized these possessory rights as protectable interests even though the Indians no longer had "fee title to the [disputed] lands," such title having "vested in the sovereign" by operation of law after "the colonists arrived." *Id.* *Oneida I* held that, because the Oneidas "assert[ed] a present right to possession under federal law," that claim presented a federal question over which the federal courts had jurisdiction under 28 U.S.C. §§ 1331 and 1362. 414 U.S. at 667, 675.

Although *Oneida I* held that the Oneidas' possessory claims presented federal-law questions creating federal-court jurisdiction, it did not decide what standard governed those claims. The Oneidas' claims could not be governed by state law, since "state law does not apply to the Indians except so far as the United States has given its consent," which it had not done. *Id.* at 674 (citation omitted). Nor was there any "federal statutory guidance" on the subject. *Id.* But the Court did not see the absence of a statute recognizing a cause of action as negating the existence of one. Instead, the Court held, "the governing rule of decision" should "be fashioned by the federal court in the mode of the common law." *Id.*

On remand, the lower courts took up that mantle, holding that "the Oneidas may assert a federal common law action to recover damages for the [] wrongful possession of their land." *Oneida Indian Nation of New York v. Cnty. of Oneida*, 719 F.2d 525, 530 (2d Cir. 1983); *see id.* at 531 (also recognizing common-law ejectment claim).

This Court affirmed that conclusion in *Oneida II*, holding that federal common law recognizes a cause of action for "Indians" to sue to enforce their federal "possessory rights." 470 U.S. at 230, 236. To reach that conclusion, the Court applied the "well-established" principle, traceable through over a century of this Court's cases, that when an Indian's possessory right derives exclusively from federal law, a federal common-law cause of action exists to protect it. *Id.* at 235-36 & nn.5-6 (citing, *inter alia*, *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850)).

Together, *Oneida I* and *II* resolve this case. Here, it is undisputed that petitioners have a right to possess the lands over which Andeavor's pipeline runs. *See* App.19a (recognizing petitioners' "possessory interest in lands held in trust by the United States"). It is undisputed, too, that this possessory interest derives exclusively from federal law. *See* App.20a (noting that petitioners' possessory rights "are based on federal statutes," not state law); App.46a (Grasz, J., dissenting) (noting that petitioners' lands are "not subject to state law"). Thus, because petitioners "assert[] a present right to possession under federal law," *Oneida I*, 414 U.S. at 675, they "can maintain [an] action for violation of th[ose] possessory rights based on federal common law," *Oneida II*, 470 U.S. at 236; *accord Marsh*, 49 U.S. at 232 (recognizing, as to lands to which the United States held title subject to a right of use and occupancy reserved by treaty to individual Indians, that it was "not open to question" that "an action of ejectment could be maintained on an Indian right to occupancy and use").

2. The panel majority resisted this conclusion because it believed this Court's prior decisions did not involve the precise facts here—claims asserting possessory rights derived from federal statutes (rather than aboriginal title) brought by individual Indians (rather than tribes). *See, e.g.*, App.20a ("[T]he Allottees are not a tribe, … and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title.").

Even if it were true that none of this Court's cases were directly on point, that would *begin* the analysis, not end it. Yet the Eighth Circuit saw that observation as dispositive. Regardless, neither of the two distinctions with this Court's prior cases that the panel majority saw as "critical," *id.*, justifies the result below.

a. It is irrelevant under this Court's cases that petitioners' "claimed possessory right is based on … a federal statutory grant" rather than "on aboriginal title." *Id.*

To begin, the line the panel drew between aboriginal and recognized title does not describe even the *Oneida* cases themselves. The trespass claim recognized in *Oneida II* was *not* based on possessory rights rooted solely in "aboriginal or Indian title." App.20a. Rather, the Oneidas claimed "a present right to possession based *in part* on their aboriginal right of occupancy" and *in part* on "treaties guaranteeing their possessory right" and on "the Nonintercourse Acts." *Oneida I*, 414 U.S. at 677-78 (emphasis added); *see id.* at 684 (Rehnquist, J., concurring) (noting that the Oneidas' possession was "based not solely on the original grant of rights in the land but also upon the Federal Government's subsequent guarantee" of those rights by treaty and statute). The Eighth Circuit was thus doubly wrong to assert that "[t]he distinction that mattered [in *Oneida II*] was whether the claimed possessory right is based on aboriginal title or a federal statutory grant." App.20a. *Oneida II* concerned possessory rights derived from *both* sources. And the Court did not see those subsequent federal actions recognizing the tribe's possessory rights as negating the availability of a federal cause of action. Instead, *Oneida I and II* together make clear that what matters is whether *federal* (rather than state) law—be it aboriginal title, treaties, statutes, or a combination thereof—grants the Indians the right "to the exclusive *possession* of their lands." *Oneida II*, 470 U.S. at 235 (emphasis added). Federal law grants petitioners here the very same right.

Oneida I and *II* aside, the panel's distinction—privileging aboriginal title over recognized trust title—flouts this Court's jurisprudence. As a general rule, "[t]he rights attaching to tribal title are unaffected" by whether it is "aboriginal title" or "derived from treaties, statutes, [or] executive orders." *Am. Indian Law Deskbook* § 3.1, Westlaw (updated May 2024). So, if aboriginal title includes a federal-law right to sue in trespass, as *Oneida II* holds, so must trust title.

That is particularly obvious because, in the sole respect in which these two forms of Indian title differ, trust title is the *stronger* of the two. Aboriginal title, however venerable, is not compensable property within the meaning of the Fifth Amendment's Takings Clause; thus, Congress may extinguish it without paying just compensation. *Tee-Hit-Ton*, 348 U.S. at 282-91. Trust title of the kind petitioners hold, by contrast, *is* a fully compensable property interest. *See Hodel*, 481 U.S. at 713-18; *see also* 25 U.S.C. § 325.

The upshot is that the panel majority got the hierarchy of Indian title exactly backwards. It held that a possessory interest that the Constitution protects from uncompensated appropriation (i.e., petitioners' beneficial title to their trust allotments) enjoys *less* protection against private trespass than a possessory interest that the sovereign may extinguish for nothing (i.e., aboriginal title). That cannot be right. If Congress's decision to place lands in trust reflects anything, it is a considered choice to provide allottees with *greater* protection than aboriginal title alone would supply. But in the majority's view, the creation of a federal trust has precisely the opposite effect, stripping allottees of one of the ordinary incidents of possession.

There is no reason to suppose Congress intended this backwards result. The general rule is that an "extinguishment" of "the rights which the [Indians] had in their ancestral home[s]…. cannot be lightly implied" from "doubtful expressions." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941) (citation and internal quotation marks omitted). As a result, because under *Oneida II* aboriginal title included the "right[]" to sue for trespass under federal common law, the executive order and statute that created and then allotted the Reservation here should not be deemed to have "extinguish[ed]" that right absent some "clear and plain indication" that Congress intended that result. *Id.* No such indication appears in relevant statutes.

To the contrary, Congress's statutes are uniformly solicitous of allottees' possessory rights. For example, in IRWA, Congress specified that, before granting a right-of-way over individual trust allotments, the Secretary generally must obtain "the consent of the individual Indian owners" or "a majority" thereof. 25 U.S.C. § 324; *see* 25 C.F.R. § 169.107(b)(1). That requirement presupposes that the owners' decision to withhold consent achieves something. Under the rule announced below, it does not. A party denied consent might simply carry on with its plans, knowing that the owner has no means of enforcing his denial of consent via trespass or ejectment; instead, the owner would need to persuade his overburdened trustee to act on his behalf. A consent requirement enforceable only at the option of a third party is not much of a consent requirement. This case proves the point: petitioners withheld their consent, yet Andeavor has remained on their land for thirteen years.

The Eighth Circuit's ill-conceived distinction could also yield unintended consequences. If, as the panel majority suggested, federal trespass claims are available only to protect possessory interests based on aboriginal title, *e.g.*, App.23a n.7, that rule would seem also to bar claims brought by *tribes* holding trust title. That rule would leave nearly 55,000 tribal trust parcels in the Eighth Circuit open to private trespasses.[5] And it would be directly at odds with a substantial body of circuit precedent adjudicating tribes' federal common-law claims for trespass on trust lands.[6]

b. To the extent the decision below can be read to suggest that it is separately significant that petitioners are individual allottees and "not a tribe," App.20a, that distinction, too, is irrelevant under this Court's cases. True, the plaintiff in the *Oneida* cases was a tribe. *See Oneida I*, 414 U.S. at 663. But the Court never deemed this fact significant. Just the opposite: as Judge Grasz noted, *Oneida II* cited a litany of this Court's prior cases

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[5] *See* Native Land Info. Sys., *BIA Land Area Totals for US Native Lands: 2019 Data from the United States Bureau of Indian Affairs*, https://nativeland.info/dashboard/land-area-totals-for-us-native-lands/ (last visited Sept. 9, 2026) ("NILS Dataset").

[6] *E.g.*, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, 184 F.4th 874, 886-87 (7th Cir. 2026) (affirming summary judgment for tribe on federal common-law trespass claim against pipeline that overstayed rights-of-way on trust parcels); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1146, 1153 (9th Cir. 2020) (adjudicating common-law trespass claim arising from expired right-of-way on reservation land "held in trust for the Tribe by the United States," and stating that "[t]ribes have a federal common law right to sue to protect their possessory interests" (citing *Oneida II*, 470 U.S. at 235-36)); *see also, e.g.*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 & n.8 (9th Cir. 1994) (recognizing, in a suit brought by the United States on behalf of a tribe and individual allottees, "a variety of federal common law causes of action to protect Indian lands from trespass").

for the proposition "that ***Indians*** have a federal common-law right to sue" to vindicate their possessory interests. App.43a-44a (quoting *Oneida II*, 470 U.S. at 235 (emphasis in App.43a)). Indeed, among the decisions *Oneida II* cited were *Fellows v. Blacksmith*, a trespass action brought by an individual Indian's estate, *see* 60 U.S. (19 How.) 366, 367 (1857), and *Marsh v. Brooks*, which concerned the availability of an ejectment action to individual Indians, *see* 49 U.S. at 232-33.

Nor did the Eighth Circuit ever explain *why* a cause of action available to a tribe should be unavailable to individual tribal members. In general, individuals have the same right to protect their possessory interests as collective entities, so if a tribe can sue to protect its trust land, an individual allottee can too. That is particularly so given the Indian Land Consolidation Act, which creates a statutory mechanism "to 'help tribes buy back lost land' after the fractionalization wrought by allotment." *Bad River*, 184 F.4th at 885 (citation omitted). On the Eighth Circuit's view, it would seem that the same trust land that could not be protected by a federal trespass claim in the hands of an individual allottee *could* be so protected once the tribe reacquires it, despite the fact that, in both cases, "the nature and source of the possessory rights" is the same: federal law. App.20a (quoting *Oneida I*, 414 U.S. at 667). That result makes no sense.

The panel majority's reliance on *Taylor v. Anderson*, 234 U.S. 74 (1914), for the proposition that "cases by allottees … are different from cases in which a *tribe* brings an ejectment claim," App.18a (emphasis added), is misplaced. The crucial distinction between *Oneida II* and *Taylor* was not that the Oneidas were a tribe while the *Taylor* plaintiffs were individuals; rather, it was that in *Taylor*, the individual allottees held *fee-patented* lands whose "incidents of ownership" were no longer "matters of" federal law, but rather of "local property law to be vindicated in local courts." *Oneida I*, 414 U.S. at 676-77 (describing *Taylor*); *see* App.44a-46a (Grasz, J., dissenting); *Taylor v. Anderson*, 197 F. 383, 385 (C.C.E.D. Okla. 1911). Because state law supplied the cause of action for "ejectment" in *Taylor*, the case presented no federal question. *Oneida I*, 414 U.S. at 665-66. By contrast, because the Oneidas' "right to possession … ar[ose] under federal law in the first instance," *id.* at 676, it followed that *federal law* had to supply a cause of action to protect that right, *see Oneida II*, 470 U.S. at 235. In reaching that conclusion, the Court nowhere indicated that the fact that the Oneidas were suing as a tribe rather than as individual Indians was relevant at all.

Here, as in *Oneida II* and unlike in *Taylor*, petitioners' possessory interests derive exclusively from federal law. *See Wilson*, 442 U.S. at 670-71. Thus, because petitioners "assert[] a present right to possession under federal law," *Oneida I*, 414 U.S. at 675, federal law supplies a cause of action to protect that right, *Oneida II*, 470 U.S. at 236.

The panel majority also misunderstood this Court's decision in *Poafpybitty*. There, the Court addressed whether individual Indian allottees holding restricted trust allotments could sue, independent of the United States, to enforce an oil-and-gas lease on their allotted land. 390 U.S. at 366. The Court answered that question yes, reasoning from the structure and purpose of the allotment system: "[T]he allotment system," the Court explained, "created interests in both the Indian and the United States," and that "dual purpose … would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." *Id.* at 369 (discussing *Heckman v. United States*, 224 U.S. 413 (1912)). The Court explained that "the general power of the United States to safeguard an allotment" does not "affect[] the capacity of the Indian to protect that allotment." *Id.* at 374. And it emphasized that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." *Id.*

Those principles further confirm that petitioners' status as individual allottees cannot negate their ability to invoke the cause of action recognized in *Oneida II*. The panel ignored *Poafpybitty*'s structural reasoning, instead reading it to stand only for the tautology that, where "both the United States and the individual Indian landowners [independently] ha[ve] standing to assert a claim …. [,] either may bring a lawsuit." App.21a-22a. But *Poafpybitty* did not treat the individual allottees' capacity to sue as dependent on some pre-existing entitlement to bring the claim; rather, it held that "the allotment system" *itself* "created interests in *both* the Indian and the United States," 390 U.S. at 369 (emphasis added), that were independently enforceable. Here, the Eighth Circuit acknowledged that the United States has a cause of action to sue in trespass. *See, e.g.*, App.23a. Yet it denied petitioners the parallel "capacity … to protect th[eir] allotment[s]" that *Poafpybitty* deemed inherent in the allotment system. 390 U.S. at 374.

B. The decision below also conflicts with the settled understanding that an enforceable right to exclude is a defining feature of property irrespective of the source of title.

The decision below is also irreconcilable with this Court's broader property jurisprudence.

As this Court has held, "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point*, 594 U.S. at 147. One "fundamental element" of property meriting such protection is "the right to exclude." *Id.* at 149-50 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). Indeed, that right inheres in "the very idea of property." *Id.*

Equally fundamental is a means of *enforcing* that right. The rule in England was that "every [unauthorized] entry upon another's lands[] … [w]as an injury or wrong, *for satisfaction of which an action of trespass will lie*." 3 W. Blackstone, *Commentaries on the Laws of England* 209 (1768) (emphasis added). That rule carried over to the United States. *See, e.g.*, *Green*, 21 U.S. at 20 (noting that "[a] *right* of property *necessarily includes* the right to recover the possession, … and to continue to possess undisturbed by others" (second emphasis added)). And the rule applied equally to lands held by Indians. *See Marsh*, 49 U.S. at 232 ("That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.").

Crucially, the inherent right to sue for trespass arises not from *title* in the underlying land, but from *possession* of it. *See Restatement (Second) of Torts*

§§ 157-158 (1965); *accord* 75 Am. Jur. 2d *Trespass* § 2, Westlaw (database updated Aug. 2026) ("The essence of the action [of trespass] is a violation of possession, not a challenge to title."). Thus, it is settled that lessees and tenants—who have possessory interests but no title—can bring trespass claims for interference with that right of possession. *See, e.g.*, 1 Dan B. Dobbs et al., *The Law of Torts* § 52 (2d ed. 2011) ("The plaintiff need not be an owner in fee; any legal, possessory interest will suffice. For instance, a tenant in possession has a claim for a trespassory entry."). As Oliver Wendell Holmes explained, both the owner and possessor of land have enforceable rights to exclude:

> The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one [i.e., the owner], and is accountable to no one but him.

Oliver Wendell Holmes, Jr., *The Common Law* 246 (1881) (Lecture VI ("Possession")).

The cause of action recognized in *Oneida II* aligns with these principles. That case holds that, because a possessory interest in property "necessarily includes" the right to protect that interest by a suit for trespass, *see Green*, 21 U.S. at 20, when federal law creates the possessory right, federal law also creates a concomitant cause of action for trespass, *see Oneida II*, 470 U.S. at 234-36, regardless of what *type* of federal law created the Indian's possessory interest or what type of title the Indian holds. By concluding that individual Indians with beneficial title in trust lands lack the means to enforce the right to exclude, the divided Eighth Circuit departed from centuries of established trespass law, creating a new, second-class type of property that lacks one of property's "fundamental element[s]." *Kaiser Aetna*, 444 U.S. at 179-80. This Court's review is warranted to clarify that federal law does not countenance that result.

II. The decision below creates a conflict among the courts of appeals.

The Eighth Circuit's holding not only misreads this Court's precedents, it also directly conflicts with the Ninth and Tenth Circuits on the question presented.

The Tenth Circuit. In *Nahno-Lopez v. Houser*, a decision joined by then-Judge Gorsuch, the Tenth Circuit held that individual Indian allottees stated a federal common-law claim for trespass on allotted land. 625 F.3d 1279 (10th Cir. 2010). The plaintiffs there, like petitioners here, held beneficial title to federal trust lands under a federal statute and sued to remedy an alleged trespass. *Id.* at 1280-81. Three holdings followed. First, the court explained that "Indian rights to a Congressional allotment are governed by federal—not state—law," so a claim resting on state law "cannot provide relief." *Id.* at 1282. Second, it held that 25 U.S.C. § 345 "does not create [a] cause of action or a standard for liability"; it supplies jurisdiction only. *Id.* Third, the court concluded that the allottees had "a *federal* common-law trespass claim, for which § 345 provides jurisdiction." *Id.* Nor did the court stop at recognizing the claim: it adjudicated it, borrowing Oklahoma trespass law as the federal rule of decision and affirming on the ground that the plaintiffs consented to the defendants' presence. *See id.* at 1282-84.

Likewise, in *Davilla v. Enable Midstream Partners*

L.P., the Tenth Circuit resolved a federal common-law trespass claim in the allottees' favor on facts materially identical to those here: individual Indians suing a pipeline operator that continued to occupy their trust allotments after its right-of-way expired. 913 F.3d 959, 962 (10th Cir. 2019). The Tenth Circuit reaffirmed that, "[w]hen a dispute arises over possessory rights in Indian allotted land, federal law governs." *Id.* at 965 (citing *Nahno-Lopez*, 625 F.3d at 1282). It then proceeded to define, as a matter of federal common law, the elements of the allottees' federal trespass claim, *id*. at 965-66, the availability of consent as a defense, *id*. at 966-68, and the standard governing injunctive relief, *id*. at 971-72.

The panel below sought to minimize the conflict with the Tenth Circuit by asserting that that court merely assumed without deciding that the cause of action existed. App.23a n.7. But *Nahno-Lopez* could not have been clearer. In finding jurisdiction proper, it stated: "We construe the complaint as stating a *federal* common-law trespass claim, for which [25 U.S.C.] § 345 provides jurisdiction." 625 F.3d at 1282 & n.1. *Nahno-Lopez* thus saw the cause of action's existence as necessary to its jurisdictional holding. And while the parties' agreement led the *Davilla* court to believe it was unnecessary to formally recognize that cause of action, *Davilla*'s detailed articulation of the federal trespass claim's "essential element[s]" and defenses, 913 F.3d at 965-71, betrays little skepticism about its existence.

The Ninth Circuit. The Ninth Circuit has likewise recognized that individual Indians, independent of the United States, may sue to protect their possessory interests in trust land. In *Agua Caliente Band of Mission Indians v. County of Riverside*, the Ninth Circuit held that "[a]n Indian, as the beneficial owner of lands held by the United States in trust[,] has a right acting independently of the United States to sue to protect his property interests." 442 F.2d 1184, 1186 & n.6 (9th Cir. 1971) (citing *Poafpybitty*).

Similarly, in *United States v. Milner*, the Ninth Circuit confirmed that "[f]ederal common law governs an action for trespass on Indian lands," without drawing a distinction based on the source of the plaintiff's possessory interest. 583 F.3d 1174, 1182 (9th Cir. 2009) (citing *Oneida II*, 470 U.S. at 235-36). The tidelands at issue in *Milner* were reserved for the Lummi Nation by executive order in 1873, not held under unextinguished aboriginal title, yet the Ninth Circuit did not think that fact relevant to whether federal common law furnished a trespass cause of action. *See id*. at 1180-81.

III. The decision below disregards the considered position of the United States.

The Eighth Circuit's decision is also at odds with the considered position of the United States—the trustee that holds legal title to petitioners' allotments and administers IRWA—as articulated in an amicus brief filed in support of petitioners below.

The United States saw the case much as petitioners do. In its view, "*Oneida I* and *Oneida II* control," and the rule they announce turns solely on the existence of a federally conferred possessory right to which state law does not apply: because petitioners undisputedly have "a valid present possessory interest in the[ir] … allotments based on federal trust title," "federal common law provides a cause of action for trespass." U.S. Br. 13-16, 21. The government rejected the precise distinction on which the panel majority's holding rests, explaining that petitioners' possessory "interests" based on statutory trust allotments "are, if anything, *more* deeply rooted in federal law than [the partially aboriginal-title-based interests] of the plaintiff Indian tribe in *Oneida*." *Id.* at 16 (emphasis added). And it explained that, because Congress never made North Dakota law applicable to petitioners' allotments, "the 'controlling law' remains 'federal law,' and federal courts *must* 'fashion[]' federal common law to govern the trespass." *Id.* (quoting *Oneida I*, 414 U.S. at 674 (emphasis added)).

The panel majority did not address these arguments on the merits. Instead, it expressed frustration at what it saw as the government's delay in weighing in and "[a]ccordingly" gave the United States's brief "no deference or separate consideration." App.10a-11a. The majority's impatience with the government's litigating conduct is no answer to its arguments. The Eighth Circuit's casual disregard for the considered position of the United States on such an important issue of federal Indian law confirms the need for this Court's review.

IV. The question presented is recurring and exceptionally important, and this case is an ideal vehicle for resolving it.

1. The question presented affects a vast body of Indian trust property. According to raw BIA data compiled by the Native Land Information System, in 2019 there were over 92,000 trust parcels, spanning nearly 10 million acres, in the Eighth Circuit alone—

approximately 38,000 tracts (2.7 million acres) held in trust for individual Indian allottees, with the other nearly 55,000 tracts (7.3 million acres) held in trust for tribes.[7] Under the Eighth Circuit's rule, the individual Indian owners of those 38,000 allotments have no means to protect their right to exclusive possession of their allotted lands.

As this litigation itself illustrates, the government's help may never arrive. Overseeing trust obligations for thousands of allotments strains the BIA's capacity: enforcement positions may shift over the years as resources and priorities change; the agency may act on behalf of some affected allottees but not others; or it may not act at all. The Court described nearly 60 years ago the BIA's "almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments." *Poafpybitty*, 390 U.S. at 374 (citation omitted). It was precisely that concern that drove the Court to observe that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." *Id.* Yet under the Eighth Circuit's rule, an allottee's right to sue depends on exactly that.

The end result will be this: individual Indian allottees in the Eighth Circuit have property in name only. The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna*, 444 U.S. at 176, but a right to exclude which the landowner cannot enforce is no right at all. Under the decision below, an intruder who wishes

[7] *See* NILS Dataset, *supra* note 5.

to enter allotted trust lands without consent—to lay a pipeline, plant crops, fell timber, sink a well, extract oil, gas, or minerals, or even build a house—faces no obstacle that the allottee herself can place in his path. He need only enter and stay. If the BIA does not sue, and this case shows how easily years may pass without suit, then the trespasser may occupy the allottee's land, enjoy its use, utilize its resources, and reap its profits, while the allottee can neither stop the taking nor recover for it. Congress placed these lands in trust to *protect* Indian owners from dispossession. Yet under the decision below, that trust status is now the very mechanism of the dispossession it was meant to prevent.

2. This case squarely and cleanly presents the question whether individual trust allottees possess a federal common-law cause of action for trespass. The question was pressed and passed upon at every stage below, and it benefits from the well-considered position of the United States as amicus in the court of appeals. The question is also case-dispositive: the Eighth Circuit's holding will result in petitioners' claim being dismissed, whereas if petitioners possess the trespass cause of action they assert, their case can proceed.

Nor does the case present any disputed issue of fact that could complicate this Court's consideration of the question presented. It is undisputed that petitioners hold a current possessory interest in their allotments that derives exclusively from federal rather than state law and that Andeavor's pipeline remained on petitioners' allotments even after its right-of-way expired. The sole question is the purely legal one that the parties, the United States, the panel majority, and

Judge Grasz debated at length: whether petitioners can remedy that undisputed trespass via a federal common-law claim.

3. No further percolation is warranted, and none is likely regardless. The Ninth and Tenth Circuits have already rejected the Eighth Circuit's approach, instead recognizing that this Court's prior cases command the result that, where Indians enjoy possessory interests conferred by federal law and not governed by state law, federal law supplies a trespass cause of action to protect those interests. And these three circuits—the Eighth, Ninth, and Tenth—together account for *99%* of trust allotments held by individual Indians nationwide.[8] The time for this Court's intervention is now.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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[8] *See* NILS Dataset, *supra* note 5.

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 23-3019

JoAnn Chase; Nelson Fredericks, estate of; Inez Burr; Sandra Gillette; Marion Rasmuson; Joan Matthews; Amanda Bird Bear; Roger Bird Bear; Thomas Bird Bear; Jamie Lawrence; Rae Ann Williams; Evelyn Lone Bear; Doreen Charging; Mavis Huber; Betty Young Bird; Noreen Young Bird; Joan Young Bird; Murphy Young Bird; Donovan Fast Dog; Joyce Eakin; Josephine Parenteau; George Fast Dog; Denise Cavanaugh; Karen Koite; Arnold Young Bird; Darryl Turner; Heather Demaray; Darlene Edley; Eunice White Owl; Linda Kroupa; Waylon Young Bird; Deborah Staples; Anthony White Owl; Eugene White Owl; Kathleen White Owl; Margo Bean; Albert Whitman; Herbert Pleets; Monique Pleets; Sharon Aubol; Janet Benton; Gloria Fast Dog; Valeri Hosie; Betty Matthews; Kenneth Matthews, Sr.; Sheridan Matthews; Wilson White Owl; Tiffany Williams

Plaintiffs - *Appellants*

v.

Andeavor Logistics, L.P.; Andeavor, formerly known as Tesoro Corporation; Tesoro Logistics GP, LLC; Tesoro Companies, Inc.; Tesoro High Plains Pipeline Company, LLC

Defendants - *Appellees*

United States of America

Amicus on Behalf of Appellant(s)

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: October 22, 2024
Filed: January 30, 2026

Before LOKEN, SMITH, and GRASZ, Circuit Judges.

LOKEN, Circuit Judge.

This is a protracted oil and gas pipeline dispute between Andeavor Logistics L.P. and affiliated co-defendants (collectively, "Andeavor") and individuals with beneficial ownership interests in Indian trust lands on the Fort Berthold Reservation in North Dakota (the "Allottees").[1] Andeavor owns and has operated the 500-

[1] "The term 'trust lands' in federal Indian law means lands purchased by the Secretary of the Interior under § 5 of the Indian Reorganization Act of 1934, title to which is 'taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.' Indian Reorganization Act of 1934, ch. 576, § 5, 48 Stat. 984, 985 (codified at 25 U.S.C. § 465, later transferred to § 5108)." *Mille Lacs Band of Ojibwe v. Madore*, 128 F.4th 929, 938 n.5 (8th Cir. 2025). The Fort Berthold Reservation was recognized by executive order in 1870 as tribal land reserved for the Mandan, Hidatsa, and Arikara Tribes, known as the Three Affiliated Tribes (the "Tribe"). *See* Treaty of Fort Laramie,

mile intrastate High Plains Pipeline System that transports crude oil eastward from the "oil patch" in western North Dakota. In 1953, acting under the Indian Right-of-Way Act of 1948 ("IRWA"), 25 U.S.C. §§ 323-28,[2] the Secretary of the Interior granted Andeavor's predecessor a 20-year right-of-way allowing the pipeline to cross Indian lands held in trust within the Reservation. *See* 25 C.F.R. § 169.5(a)(8) (authorizing rights-of-way for oil and gas pipelines crossing Indian lands). After two 20-year renewals, the right-of-way expired in 2013. Despite unsuccessful negotiations to obtain a new right-of-way agreement, Andeavor continued operating the pipeline over lands held in trust by the United States for the benefit of the Tribe and for the benefit of more than 35 individually-owned tracts.

The Allottees filed this putative class action in October 2018, alleging continuing trespass in violation of

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September 17, 1851, 11 Stat. 749 (1851); Exec. Order of April 12, 1870. The Reservation's current boundaries were established by an 1891 statute that approved a land cession agreement. *See* 1 C. Kappler, Indian Affairs, Laws and Treaties 881-83 (1904); Act of Mar. 3, 1891, Art. I, 26 Stat. 1032.

[2] IRWA authorizes the Secretary to grant "rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes." 25 U.S.C. § 323. For lands held in trust for the Tribe, IRWA provides that the Secretary must obtain tribal consent before granting a right-of-way; rights-of-way over lands held in trust for individual Indians may be granted without the consent of all owners if certain conditions are satisfied. *Id.* § 324. The Secretary's regulations, authorized by § 328, are currently found in 25 C.F.R. §§ 169.101 *et seq.*, part of the Secretary's regulations administered by the Department of the Interior's Bureau of Indian Affairs ("BIA"). The Secretary must guarantee fair compensation payments to Indian owners as deemed appropriate. § 325; 25 C.F.R. § 169.112(a).

their federal common law right to possess their individually-owned tracts, breach of the expired easement agreement, and unjust enrichment. They seek compensatory and punitive damages, an accounting of profits, disgorgement, and an injunction requiring Andeavor to cease operations, remove the pipeline, and restore the lands to their original condition.

Andeavor moved to dismiss, arguing the Allottees failed to state a valid cause of action and failed to exhaust administrative remedies. In April 2020, the district court granted Andeavor's motion in part, dismissing the case for failure to exhaust administrative remedies, without deciding many other issues. The Allottees appealed. In September 2021, we reversed the court's decision to dismiss, concluding the Allottees were not required to exhaust administrative remedies because IRWA and its implementing regulations do not grant the BIA authority to award trespass damages and other relief the Allottees seek. *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 868-70 (8th Cir. 2021) (*Chase I*). Noting that "any action the BIA now takes will be of significance in resolving the judicial dispute," and invoking the doctrine of primary jurisdiction, we directed the district court to stay but not dismiss the action "for a reasonable period of time to see what action the agency may take." *Id.* at 876-77. We declined to consider the Allottees' additional claims of breach of the easement agreement, unjust enrichment, and punitive damages. *Id.* at 878.

In 2023, the district court[3] reconsidered the Allottees' claims, applying our guidance in *Chase I*, and

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[3] The Honorable Daniel M. Traynor, United States District Judge for the District of North Dakota.

again dismissed all claims with prejudice. *Chase v. Andeavor Logistics, L.P*, 686 F. Supp. 3d 854 (D.N.D. 2023) (*Chase*). The court also denied their motion to intervene in a related case, *Tesoro High Plains Pipeline Co., LLC v. United States*, D.N.D. No. 1:21-CV-90 (*Tesoro*), agreeing with the United States that it adequately represents the Allottees' interests in *Tesoro* and allowing them to join would unduly delay and prejudice the litigation. *Chase*, 686 F. Supp. 3d at 877-79.[4]

The Allottees appeal the second dismissal of their trespass, unjust enrichment, and breach of easement agreement claims. They also appeal the court's denial of their motion to intervene and grant of a preliminary injunction in *Tesoro*, asserting the district court failed to decide whether consolidation of the two cases is appropriate. Prior background facts and the early procedural history of the dispute were reviewed in our prior opinion. *See Chase I*, 12 F.4th at 867-68. Resolution of the issues raised in this second appeal turns in large part on agency actions before and following our remand, which we next address.

We affirm the district court's decision to dismiss the Allottees' claims for trespass, breach of contract, and unjust enrichment; we remand for further consideration

[4] A different group of Allottees appealed the district court's denial of intervention and grant of a preliminary injunction in the separate *Tesoro* action. On October 16, 2025, we granted the government's unopposed motion to postpone oral argument and removed this case from our October oral argument calendar, to be rescheduled by the court at a later date that has not yet been determined. *Tesoro High Plains Pipeline Co., LLC v. Crows Heart*, No. 24-2860, Order.

of the Allottees' motion to consolidate this case and *Tesoro*.

I. Agency Proceedings Before Remand.

When the right-of-way easement agreement expired in 2013 and grantee Andeavor "remain[ed] in possession," the Secretary's regulations provide that the BIA may treat the "unauthorized possession as a trespass under applicable law" and, after determining that no good-faith negotiations exist, "may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action." 25 C.F.R. § 169.410.[5] In 2013, Andeavor sought to negotiate renewals of its rights-of-way, negotiating first with the Tribe at its request. In 2017, Andeavor and the Tribe reached agreement to renew the right-of-way over tribal lands for 28 years and to pay trespass damages of approximately $2 million per acre for operations conducted after the right-of-way expired. Andeavor then began negotiations with individual Indian beneficial landowners to renew access over their trust lands. Some Allottees declined to renew, and negotiations stalled.

In January 2018, the BIA issued Andeavor a 10-Day Show-Cause Letter stating that the pipeline had been trespassing on individually-owned Indian lands since the right-of-way expired in 2013. Andeavor responded that it was negotiating with individual landowners to secure their consent. Many Allottees confirmed that good-faith

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[5] The regulations also provide that "Indian landowners may pursue any available remedies under applicable law, including applicable tribal law," 25 C.F.R. § 169.413, as we discuss in Part IV.

negotiations were ongoing, and counsel for the Allottees requested that the BIA refrain from pursuing trespass remedies while negotiations continued. When negotiations again stalled, some 35 Allottees filed this putative class action.

The district court dismissed the action for failure to exhaust administrative remedies in April 2020. Between July 2020 and March 2021, with the Allottees' *Chase I* appeal pending, the BIA took a series of contradictory actions that dramatically changed the administrative landscape. *See Chase I*, 12 F.4th at 875-76. In July 2020, after the Allottees submitted their opening appeal brief, the Regional Director of the BIA's Great Plains Regional Office (which has jurisdiction over North Dakota) issued a formal Notification of Trespass Determination (the "Notice"). The Notice asserted that the pipeline had been trespassing on approximately 50 acres of individually-owned trust lands for seven years, that Andeavor failed to conduct good-faith negotiations, that continued pipeline operations were no longer in the best interest of the landowners, and ordered Andeavor to cease operations and pay treble damages totaling $187.2 million within 30 days.

Andeavor appealed this decision to the Interior Board of Indian Appeals ("IBIA"), arguing that it had maintained holdover status while actively negotiating with landowners, obtained fair-market appraisals, and offered a record-setting $66,000 per acre, and that the trespass damages assessed in the Notice were improperly calculated. The Assistant Secretary for Indian Affairs ("AS-IA"), exercising authority to assume jurisdiction, vacated the Notice and remanded to the Regional Director with instructions to issue a new decision under specified legal standards, relying on 25 C.F.R. § 169.410 and common law remedies. The AS-IA explained that federal common law authorizes the BIA to pursue judicial damage remedies on behalf of Indian landowners for a right-of-way holdover's trespass.

On remand from the AS-IA, the Regional Director issued a Second Notice in December 2020, reducing the trespass damages to just under $4 million, directing Andeavor to immediately cease pipeline operations, and warning that the BIA could refer the matter to the Department of Justice to pursue further remedies. Both Andeavor and the Allottees appealed the Second Notice to the IBIA. On January 14, 2021, the AS-IA again assumed jurisdiction, affirmed the Second Notice in full, and declared it a final agency action subject to judicial review. Andeavor then paid the damages required by the Second Notice, shut down pipeline operations, but left the pipeline in place.

In March 2021, following a change in administration, the BIA vacated all prior decisions related to the individually-owned trust lands, including the December 2020 Second Notice. Tesoro, a subsidiary of Andeavor, then filed a second action in the District of North Dakota against the BIA, the Department of the Interior, and the United States, challenging the vacatur and related agency actions under the federal Administrative Procedures Act (APA), *Tesoro High Plains Pipeline Co. v. United States*, Case No. 1:21-cv-00090 ("*Tesoro*"). *Tesoro* was assigned to District Judge Traynor but was not consolidated with the ongoing *Chase* lawsuit then pending on appeal. In mid-September 2021, we reversed the district court's decision to dismiss for failure to exhaust administrative remedies and remanded with directions to stay but not dismiss the action "for a reasonable period of time to see what action the [BIA] may take." *Chase I*, 12 F.4th at 877.

II. Proceedings Following Remand.

On remand, the district court stayed the case pending further action by the BIA and directed the parties to show cause why this case should not be joined with *Tesoro*. The Allottees supported joinder and consolidation or in the alternative intervention; Andeavor opposed joinder, consolidation, or intervention. The district court awaited BIA action, as our opinion in *Chase I* encouraged. In February 2022, the United States filed an answer in *Tesoro* for itself and the federal agency defendants, asserting counterclaims on behalf of the Allottees against Andeavor and its affiliates for federal common law trespass and ejectment. Andeavor moved to dismiss the counterclaims. In response, the United States argued it has authority to assert federal common law trespass trust claims on behalf of the beneficial owners, but declined to take a position on whether the Allottees can raise those claims in their individual capacities:

> The United States does not, at this time, make any assertions about the Allottees' ability to raise a federal common-law trespass claim. Nor is the Allottees' ability to raise such a claim currently before this Court. The only issue this Court must decide is whether the United States, in its duty as legal titleholder and trustee, can raise a claim for federal common-law trespass on federal trust land. For the aforementioned reasons, it can.

Tesoro, United States' Resp. in Opp'n to Plt.'s Mot. to Dismiss Counterclaim at 22 n.17 (Oct. 10, 2022). The district court, noting the counterclaims are distinct from Tesoro's APA challenges to BIA administrative actions, denied Tesoro's motion to dismiss the counterclaims and severed and stayed proceedings on those claims pending resolution of the underlying APA claims, which have not yet been decided. *Tesoro*, No. 1:21-cv-90, 2023 WL 7386388, at *3 (D.N.D. Nov. 8, 2023).

Tesoro remains unresolved. Indeed, it is far from resolved -- there is pending in our court an interlocutory appeal from the district court's grant of a preliminary injunction barring further administrative action until the court rules on the merits of the APA claims. *Tesoro*, No. 1:21-cv-90, 2024 WL 3359433 (D.N.D. July 10, 2024). Thus, our suggested stay of this action "for a reasonable period of time to see what action the [BIA] may take" has not been advanced by the BIA's actions in *Tesoro*.

By contrast, after our remand, the BIA took *no* further administrative action in this case and asserted *no* position in the district court regarding the Allottees' asserted federal common law claims. In the briefing and arguing of Andeavor's renewed motion to dismiss the Allottees' claims, the United States filed no pleading and did not seek to participate as *amicus*. But after the Allottees appealed the district court's unfavorable ruling, the United States filed an amicus brief in this court endorsing the Allottees' arguments but adding nothing of substance to their analysis, again reflecting the flip-flopping that has permeated the Secretary of Interior's actions in this complex dispute for more than a decade. The agency and its Department of Justice advocates have thumbed their noses at our request for agency assistance in resolving the difficult issues presented. Accordingly, we will give their amicus brief no deference or separate consideration apart from the actions taken by the BIA prior to our remand and in the *Tesoro* litigation after remand.

By June 2022, the parties appeared close to a settlement, but a minority of Allottees caused settlement talks to fail. The district court lifted the stay in June 2023, took up Andeavor's amended motion to dismiss, and permitted additional briefing limited to the Allottees' federal common law trespass claims. In August 2023, the district court dismissed the Allottees' claims and denied their request to intervene in *Tesoro*. *Chase*, 686 F. Supp. 3d at 879. Grounding its analysis in our *Chase I* decision, the court concluded that the Allottees failed to state a claim for trespass under federal common law. *Id.* at 862-75. The court determined that, unlike tribes that possess aboriginal title, no federal common law cause of action is available for individual Indians on lands held in trust by the United States. *Id.* at 868-72. The court declined the Allottees' invitation to create a federal common law claim if one does not exist. *Id.* at 873-75. The court dismissed the Allottees' breach of easement claim because the Allottees were not parties to the easement agreement and the United States as right-of-way grantor is an indispensable party. *Id.* at 875-76. It dismissed the claims for unjust enrichment and punitive damages because, without a valid underlying trespass claim, those claims failed. *See id.* at 876-77. The court denied Allottees' motion to intervene in *Tesoro*, concluding the United States adequately represents their interests and the Allottees did not demonstrate interests that differ from or conflict with the government's interests. *Id.* at 877-79.

III. The Federal Common Law Claims.

A. Continuing Trespass. Count I of the Allottees' First Amended Class Action Complaint alleges that Andeavor's conduct after the 1993 Easement expired "constitutes a continuing trespass upon Plaintiff's trust land in violation of the controlling federal statutes, regulations, and federal common law." In *Erie R.R. Co. v. Tompkins*, the Supreme Court held that there is "no federal general common law." 304 U.S. 64, 78 (1938). The Court has since recognized judicial authority to formulate "federal common law." *See United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). But "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Tex. Ind., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (citation omitted). "In the absence of congressional authorization [to formulate federal common law], common lawmaking must be 'necessary to protect uniquely federal interests.'" *Rodriguez v. F.D.I.C.*, 589 U.S. 132, 136 (2020), quoting *Radcliff*, 451 U.S. at 640. Neither the Supreme Court, this court, nor any of our sister circuits has decided whether individual allottees with equitable ownership of land held in trust by the United States have a federal common law trespass claim. *See Chase I*, 12 F.4th at 874-75 n.6.

In *Chase I*, we framed the federal common law issue:

> [I]f the Allottees have a valid claim for Andeavor's alleged trespass on Indian lands, without question it is a claim under

> federal law. But whether the Allottees' assertion of a federal *common law* cause of action states a claim on which relief can be granted is a core issue that at some point must be resolved by a federal court. It is a complex issue.

12 F.4th at 871 (emphasis in original). The "key question," we explained:

> is not whether federal law supplies Allottees a cause of action for trespass on individual Indian allotments, but whether there is a common law or statutory claim they have standing to assert and if so, what is the source of the law that will define whether continuing trespass is occurring and what remedies are available to what parties that have rights in the trust lands.
> *Id.* at 877.

The Constitution granted Congress "plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property." *Winton v. Amos*, 255 U.S. 373, 391 (1921). The initial federal approach to Indian land policy was to establish tribal reservations by treaty, an exercise of the President's power "with the Advice and Consent of the Senate, to make Treaties." Art. II, § 2. *See Mille Lacs Band*, 128 F.4th at 933 n.1. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

Treaties with Indian Tribes was a practice Congress discontinued in 1871. In the late 1800s, Congress adopted a policy of carving recognized reservations into allotments and assigning land parcels to individual tribal members, the goal being to "compel assimilation of Indians into society at large." *Chase I*, 12 F.4th at 872.[6] Initially, many Indians lost their allotted lands in unfair or fraudulent transactions. *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 963 (10th Cir. 2019). Congress responded by enacting the Dawes Act in 1887, replacing fee-simple-ownership allotments with a trust-based model that restricted alienation or encumbrance by the allottee. *Id.* "[T]he United States retained legal title of allotted parcels while Indian allottees received equitable title. *Id.* An allottee could secure a fee simple land patent only upon dissolution of the trust, which the government would allow after a term of years or by special determination." *Id.* at 963-64.

Congress abruptly ended the "Allotment Era" in 1934 by enacting the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461 *et seq* (transferred to §§ 5101 *et seq*). The IRA "returned to the principles of tribal self-determination and self-governance." *Chase I*, 12 F.4th at 873:

> Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal

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[6] Allotment alone does not revoke a reservation. *See United States v. Celestine*, 215 U.S. 278, 287 (1909).

> ownership . . . . Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented lands nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act.

Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 255-56 (1992); *see also* 25 U.S.C. §§ 5101-02, 5126. Under the IRA, the Secretary retained authority to remove trust restrictions and change allotted lands to fee ownership at the request of any allottee or heir. 25 U.S.C. § 392.

The Act of March 3, 1891 directed the Secretary of the Interior to allocate Fort Berthold Reservation lands to individual Indians, with the United States holding title in trust for 25 years before transferring patented ownership to the beneficiary or heir in fee without encumbrances. Art. III-IV, 26 Stat. 1033. Today, the Fort Berthold Reservation trust lands include tribal lands, over 35 tracts in which individual Allottees equitably own the beneficial interest, and a smattering of "fee-patented" tracts in which fee title is owned by individual Indians and non-Indians. *See Chase I*, 12 F.4th at 873.

The patchwork ownership of lands in Indian country that followed enactment of the IRA impacted the granting of rights-of-way across reservation lands. *See*

Neb. Pub. Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 958-59 (8th Cir. 1983). Our industrializing nation was expanding westward, and Congress sought to alleviate this obstacle by passing the IRWA, which authorizes the Secretary to grant "rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes." 25 U.S.C. § 323.

In *Taylor v. Anderson*, the Supreme Court held that an ejectment action by an individual allottee who owns allotted land in fee does not fall within federal question jurisdiction; it is a federal statutory defense, not a federal common law claim. 234 U.S. 74, 75 (1914). By contrast, for nearly two centuries, the Supreme Court has recognized that Indian *tribes* have "unquestioned" land rights rooted in their status as "time immemorial lords of the soil they occupy." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). These rights "have been solemnly designated and secured to them by treaty and by laws of the United States." *Id.* at 28. The tribal right to exclusive possession of their lands is known as "Indian title," "aboriginal title," or the "right of occupancy." *Id.* at 48; *see Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *Sims' Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 452 (1799).

In *Oneida Indian Nation of N.Y. v. Oneida Cnty., N.Y.*, 414 U.S. 661 (1974) (*Oneida I*), the Supreme Court upheld federal question jurisdiction over the Oneida Nation's claim of the right to possess some six million acres of land in two New York counties, confirmed by treaties with the United States in the late eighteenth century. The Court noted the "accepted doctrine in this

Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the [discovering] sovereign . . . a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign . . . . was extinguishable only by the United States." *Id.* at 667 (cleaned up).

"Given the nature and source of the possessory rights of Indian tribes, particularly when confirmed by treaty," the Court concluded in *Oneida I*, "it is plain that the [Oneida Nation's] complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both [28 U.S.C.] § 1331 and § 1362." *Id.* "Tribal rights were . . . entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the power of Congress is supreme." *Id.* at 669 (cleaned up); *see also Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345-47 (1941). In remanding for further federal court proceedings, the Supreme Court briefly addressed the governing law question:

> [A]s the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent. There being no federal statute making the statutory or decisional law of the State of New York applicable to the [Oneida] reservations, the controlling law remained federal law; and, *absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in*

> *the mode of the common law. Oneida I*, 414 U.S. at 674 (emphasis added; cleaned up).

Important to our decision in this case, the Court in *Oneida I* carefully distinguished its prior decision in *Taylor v. Anderson*, explaining that cases by allottees like *Taylor* are different from cases in which a tribe brings an ejectment claim. "[T]he [Tribe's] right to possession itself is claimed to arise under federal law *in the first instance*" based on aboriginal Indian title that is "guaranteed by treaty . . . [and] has never been extinguished." 414 U.S. at 676 (emphasis added). By contrast, *Taylor* concerned:

> lands allocated to individual Indians, not tribal rights to lands. . . . *Taylor* is more like those cases indicating that a controversy in respect to lands has never been regarded as presenting a Federal question merely because one of the parties to its has derived his title under an act of Congress. Once [fee] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts [which] is normally insufficient for 'arising under' jurisdiction.

Id. (quotation and citations omitted). Here, unlike *Taylor*, the Allottees have equitable ownership, not fee title; the United States has fee title and holds their lands in trust for their benefit. Thus, the Court's interpretation of *Taylor* does not resolve whether the Allottees have the federal common law claims they assert.

The Oneida Nation's possessory claims returned to the Supreme Court in *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) (*Oneida II*). A divided Court affirmed the Court of Appeals finding of liability under federal common law, rejecting the dissenters' contention that the Nation's tribal claims should be time-barred because they "waited 175 years before bringing suit to avoid a 1795 conveyance that the Tribe freely made, for a valuable consideration." *Id.* at 255 (Stevens, J., dissenting). As relevant to the issues on appeal, the Court in *Oneida II* noted that many prior cases had assumed that tribes have "a federal common-law right to sue to *enforce their aboriginal land rights*." *Id.* at 235 (emphasis added). The cornerstone principle providing tribes with a federal common law cause of action was "that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial." *Id.* at 233-34. This backdrop of "well-established principles" confirmed the conclusion in *Oneida I* that "the possessory right claimed by the Oneidas is a *federal* right to the lands at issue" and that tribes possessing aboriginal title could "maintain this action for violation of their possessory rights based on federal common law." *Id.* at 235-36.

The Allottees (and the United States as amicus) argue that federal common law provides them a cause of action for continuing trespass on their possessory interest in lands held in trust by the United States, relying primarily on the Supreme Court's opinions in *Oneida I* and *Oneida II* and disregarding our contrary tentative conclusion in *Chase I*. Without question, *if there is a claim* it is governed by federal law; the court, whether federal or state, will need to determine, as in *Oneida I*, whether the governing rule of decision should be fashioned "in the mode" of federal common law. *Oneida I*, 414 U.S. at 674; *see, e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-40 (1979) (fashioning federal common law in context of federal lending program liens). But in recognizing a federal common law cause of action by a tribe in *Oneida I*, the Supreme Court stressed "the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty . . . ." 414 U.S. at 667; *see Oneida II*, 470 U.S. at 236. The Allottees concede that their individual possessory interests are not based on individual claims of aboriginal or Indian title. Their equitable claims of possessory interests as Allottees are based on federal statutes from the Allotment and Post-Allotment eras, including the IRWA.

As we explained in *Chase I*, the key issue is not whether federal law supplies a cause of action for trespass on individual Indian allotments, but whether there is a common law or statutory trespass claim the Allottees have standing to assert. We reiterate that "this case is distinguishable from *Oneida* in two significant respects -- the Allottees are not a tribe, like the Oneida Nation, and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title." *Chase I*, 12 F.4th at 872. The Allottees characterize these contrasts as "artificial distinctions." But they are long-recognized, critical distinctions in Indian law. The Supreme Court in *Taylor*, *Oneida I*, and *Oneida II* did not distinguish tribal and individual Indian possessory land claims based on the land's ownership. The distinction that mattered was whether the claimed possessory right is based on aboriginal title or a federal statutory grant. We recognized the importance of this distinction in *Wolfchild v. Redwood County*, where we concluded that, lacking a claim of aboriginal title, individual Indians "failed to state a claim under the federal common law as set forth in the *Oneida* progeny." 824 F.3d 761, 768 (8th Cir.), *cert. denied*, 580 U.S. 980 (2016). Allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction, whereas federal common law claims arise when a tribe "asserts a present right to possession based on their aboriginal right of occupancy which was not terminable except by act of the United States." *Id.*, quoting *Oneida I*, 414 U.S. at 676-77 (cleaned up). *Wolfchild* has "direct bearing on whether the Allottees have the federal common law rights they assert, or whether they must instead find an alternative basis for their claims under federal law." *Chase I*, 12 F.4th at 874 (cleaned up).

The Allottees contend that they possess the same trespass claim under federal common law the United States has asserted in its *Tesoro* counterclaims, relying on *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). There, the Supreme Court held that individual Indians holding restricted trust allotments issued under the Dawes Act have standing to sue to enforce an oil and gas lease approved by the Department of the Interior for use on the land because the "dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." *Id.* at 369.

We agree with the district court that *Poafpybitty* does not control this case. In *Poafpybitty*, both the United States and the individual Indian landowners had standing to assert a claim under a federally approved lease. Here, the issue is whether the Allottees *have a trespass claim* under federal law. The Tribe's right under the *Oneida* cases to assert a trespass claim under federal common law based on its aboriginal title does not transfer to individual allottees suing to protect equitable possessory interests conveyed by federal statutes. As the district court explained:

> [I]f an action involving Indian land can be maintained by the protected Indians or Indian tribes and by the United States on their behalf, then it is settled law that the right to assert the sovereign interests at issue is equally available to either plaintiff. . . . *Poafpybitty* represents that where Indians (either tribes or individuals) *and* the United States may bring the same claim, then either may bring a lawsuit (subject to certain limitations). . . . *Poafpybitty* does not permit the Allottees to piggyback on the United States' alleged federal common law claim if the Allottees themselves do not have the independent right to bring the claim.

Chase, 686 F. Supp. 3d at 868. *Poafpybitty* may be an important precedent if the United States continues to oppose the Allottees' efforts to assert competing statutory claims for relief under the IRWA in this case or in *Tesoro*. But we remain unaware of any Supreme Court or circuit court decision that affords allottees with equitable possessory interest to tribal lands held in trust an individual cause of action for trespass *under federal common law*.[7]

We again conclude that the Allottees' position as equitable owners of tribal land held in trust by the United States does not provide standing to bring this federal common law trespass cause of action. This does not leave the Allottees with a right without a remedy. Their alleged injuries are redressable in federal court applying federal law, and the United States as trustee has asserted authority to pursue the claims for the Allottees' benefit in *Tesoro*. *See* 25 C.F.R. §§ 169.402, 169.407, 169.410, 169.413. Absent a statutory provision from Congress explicitly providing the Allottees a common law cause of action, when the United States and the BIA failed to take action to pursue federal statutory claims the Allottees have not pursued in this case, the district court did not err in deciding the federal common law issue consistent with our tentative analysis in *Chase I*. Courts do not have "authority to formulate federal common law by virtue of a grant of jurisdiction," "nor does the existence of congressional authority under [Article] I mean that federal courts are free to develop a common law to govern those areas until Congress acts."

[7] Allottees' continued reliance on *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), and *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), fails to address our evaluation of these cases in *Chase I*, 12 F.4th at 874 n.6. Allottees assert a circuit split will arise if we find no common law claim available. Not so. The Tenth Circuit's decision in *Davilla assumed* the common law right existed based on the parties' agreement. The court stated it was "unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment, or simply assumed such a claim's existence." 913 F.3d 959, 965 & n.2 (citing *Nahno-Lopez*). The court did not consider whether individual Indians' claims differ from tribal claims based on their lack of aboriginal title.

Radcliff, 451 U.S. at 640-41. The Supreme Court's silence on the ability of individual allottees to assert federal common law claims -- implicitly echoed by the BIA in defending its federal common law counterclaims in *Tesoro* -- is deafening. Absent previously recognized common law rights, we decline to create the extended federal common law cause of action the Allottees urge.

Allottees assert that trust title and aboriginal title equally produce a common law right for both tribes and individual Indians. But they extend cited precedents beyond their tenable reach. We agree that "trust allotments retain 'during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by federal legislation[.]'" *United States v. Ramsey*, 271 U.S. 467, 470 (1926) (quotation omitted). But Indian occupancy under federal statutory limitations is not the equivalent of aboriginal title.

Finally, the Allottees argue that the BIA's regulations under the IRWA confirm their ability to assert the same federal common law trespass claims as the United States. We disagree. In *Chase I*, we found "no express private right of action in the Indian Right-of-Way Act and the Supreme Court does not look with favor on implied rights of action." 12 F.4th at 877. The IRWA contains no express private right of action, nor does it include the kind of "rights-creating" language that would suggest an implied private remedy. *See Wolfchild*, 824 F.3d at 769 (finding no express private remedy for analogous 1863 Act). Rather, the Act vests the Secretary with discretionary authority ("[r]ights-of-way . . . may be granted") that does not support the existence of a private remedy. *Id.* Granting jurisdiction is insufficient to establish a cause of action. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979).

The Secretary's IRWA regulations include provisions that may permit the BIA and the Allottees to seek "additional remedies available under applicable law" against holdover right-of-way grantees such as Andeavor. *See* 25 C.F.R. §§ 169.410, 169.413. Those are open issues that may need to be resolved as this case and/or *Tesoro* proceed to a decision on the merits. But those would be federal statutory remedies. "The vesting of jurisdiction in the federal courts does not in and of itself give rise to" a federal common law claim. *Radcliff*, 451 U.S. at 640-41.

B. Unjust Enrichment. The district court dismissed the Allottees' claims for unjust enrichment because they depend on the validity of their common law trespass claims. On appeal, Allottees argue that, when a trespass occurs, federal common law provides a cause of action independent from the success of their trespass claim. The Appellees cite no case recognizing a federal common law claim for unjust enrichment; they cite only a single decision from the Supreme Court of North Dakota discussing the elements of a *state law* claim. Because we conclude the Allottees have no federal common law trespass claim, we likewise affirm dismissal of this claim.

Allottees assert that *Oneida II* demonstrates that a trespass action can give rise to additional independent common law claims other than trespass because it noted that "Indians have a common-law right of action for an accounting . . . against trespassers on their land." 470 U.S. at 235-36, citing *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 344 (1941). However, the right to an accounting is a remedy, not a cause of action. *See Santa Fe*, 314 U.S. at

359-60. In *Heckman v. United States*, 224 U.S. 413 (1912), the Supreme Court held that, "when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit . . . such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property." *Id.* at 446. The same principle should apply when the lands at issue are held in trust and the United States is seeking damages on their behalf in its *Tesoro* counterclaims.

C. Breach of the Expired Easement Agreement. The district court dismissed Allottees' common law breach of easement claim, concluding the United States is an indispensable required party in whose absence the action could not be maintained. *Chase*, 686 F. Supp. 3d at 875-76. We conclude the court did not err in agreeing with our conclusion in *Chase I*: "In a breach-of-contract action involving a right-of-way over individual trust allotments, the United States, as grantor, is an indispensable party." 12 F.4th at 878.

"Rule 19(a) [of the Federal Rules of Civil Procedure] defines 'required party,' and Rule 19(b) provides factors to consider to determine whether dismissal is required when joinder of such a party cannot feasibly be accomplished." *Two Shields v. Wilkinson*, 790 F.3d 791, 794 (8th Cir. 2015). (The original Rule 19(b) used the word "indispensable." Fed. R. Civ. P. 19(b), advisory committee's note to 1966 amendment.) We review conclusions of law underlying a district court's Rule 19(a) determination *de novo* and its Rule 19(b) decision to dismiss for failure to join an indispensable party for abuse of discretion. *Id.* at 794-95, 797-98. A court "abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *In re Cotter Corp., (N.S.L.)*, 22 F.4th 788, 793 (8th Cir. 2022), quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Allottees' breach of easement claim is governed by federal law, as Andeavor's rights-of-way were granted under a process almost entirely controlled, regulated, and protected under federal law, with the United States a party to the agreement. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134, 1136 (8th Cir. 2019); *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 574-75 (5th Cir. 2001); 25 U.S.C. §§ 323-328, 345; 25 C.F.R. § 169.410-413. The United States granted rights-of-way that Andeavor enjoyed until its easement expired in 2013. The 1995 Easement Agreement incorporated BIA regulations under 25 C.F.R. § 169.125(c)(5)(ix), requiring Andeavor to "[r]estore the land to its original condition, to the maximum extent reasonably possible, upon cancellation or termination of the right-of-way, or reclaim the land if agreed to by the landowners." When the rights-of-way easement expired in 2013, Andeavor continued operations and did not restore the land.

The Allottees argue they are entitled to bring suit for the alleged breach as third-party beneficiaries whose consent was required to create a valid right-of-way. *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371, 408-16 (1980). Andeavor does not meaningfully dispute this contention, except to note that the contract lacks a clear expression of intent to confer third-party beneficiary status. *See Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 773 F.3d 58, 64 (8th Cir. 2014) ("A nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend.").

We will assume without deciding that the Allottees may sue for breach as third-party beneficiaries of the agreement. But that does not resolve the issue. Consistent with *Chase I*, the district court concluded that the United States is a required party for Allottees' breach of easement claim.

"[D]etermining whether a non-party is an indispensable party is a two-step process. First, the court must determine whether the non-joined party is a 'required' (necessary) party under Rule 19(a)(1)." *Sorenson v. Sorenson*, 64 F.4th 969, 975 (8th Cir. 2023). Under Rule 19(a)(1), a party is required to be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If the United States "is necessary under Rule 19(a)(1), the court must [then] conduct a multi-factor analysis under Rule 19(b) to 'determine whether, in equity and good conscience,' the action should proceed or be dismissed." *Id.*, quoting Rule 19(b). The factors to be considered under Rule 19(b)include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

The Allottees argue the United States is not a required party because the alleged breach does not threaten any interest held by the government, whereas their suit advances the United States' interests by promoting compliance with federal regulations and enforcing the terms of an agreement to which the government was a party, citing *Sandobal v. Armour & Co.*, 429 F.2d 249, 257-58 (8th Cir. 1970). We disagree. First, the United States as trustee holding legal title to the allotted lands and grantor of the rights-of-way clearly has interests in this litigation that are almost certain to be impeded if it is excluded from this action. Under 25 C.F.R. § 169.410, when a right-of-way expires and is in holdover status, the BIA is the only identified entity empowered to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." In *Tesoro*, it has done just that. Permitting this separate action to continue undercuts the BIA's authority to "take action." § 169.410. Further, the district court has stayed the United States' trespass action in *Tesoro* pending resolution of this case. The United States' interest in resolving this issue on terms it considers consistent with the IRWA has been stalled and, should this action continue without its participation, perhaps stymied. *See Nichols v. Rysavy*, 809 F.2d 1317, 1331-34 (8th Cir. 1987); *Two Shields*, 790 F.3d at 796.

Second, "there can be no binding adjudication of a person's rights in the absence of that person," and permitting two unique claims for breach of agreement in Allottees' suit and trespass in *Tesoro* exposes all parties to potentially disconnected and incongruent outcomes. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 122 (1968); *Two Shields*, 790 F.3d at 796. The United States would not be bound, administratively or judicially, by any judgment in an action to which it was not a party, so its exclusion would raise a "substantial risk" of Andeavor facing multiple inconsistent obligations and remedies. *See* Rule 19(a)(1)(B)(ii).

Prior decisions support the district court's conclusion that the United States is an indispensable party. In *Minnesota v. United States*, the Supreme Court considered an action to condemn and take title to allottee trust lands. 305 U.S. 382, 383-85 (1939). The Court concluded that the United States was an indispensable party and "[i]n its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit." *Id.* at 388. Because the United States possesses "substantial powers and responsibilities with relation to the land," the Court emphasized that trust allotments are a "stronger case" for finding the United States is "an indispensable party to any suit to establish or acquire an interest in the lands" in order to ensure "effective relief." *Id.* at 386 n.1; *cf. Cheyenne River Sioux Tribe of Indians* *v. United States*, 338 F.2d 906, 909 (8th Cir. 1964) ("generally the Government is the indispensable party in an action which involves alienation or condemnation of Indian property.")

In *Nichols*, 809 F.2d at 1320, we dismissed Indian allottee claims for failure to join the United States under Rule 19. The allottees were descendants of Indians who had received "forced fee patents" -- land removed from trust without their ancestors' consent -- who lost or transferred fee title after receiving the patents. The descendants sued the United States, South Dakota, a county, and private parties to reclaim possession, restore trust status, and recover damages. *Id.* at 1321-22. We dismissed the claims against the United States as time-barred, *id.* at 1331, and then dismissed the suit under Rule 19, concluding the United States "as the allotting agent, is the appropriate defendant in suits involving the right to an allotment," *id.* at 1333 (quotation omitted). We noted the "claims [had] far reaching social, economic, and political ramifications," with expansive implications for the federal government. *Id.* As in *Nichols*, here the United States created rights-of-way across allotted Indian lands now held in trust; restrictions on its ability to manage litigation regarding violation of the government's easement agreement would undermine its broad regulatory responsibilities, particularly where the tracts are highly fractionated and unanimous allottee agreement is difficult. It "seems absurd to argue" that the BIA is charged with gathering consent from multiple Indian allottees, negotiating initial and renewal easement terms with grantees, and acting to protect the interests of numerous allottees, "and then assert that the United States is not indispensable." *Id.* at 1333. The presence of the United States in this type suit is required.

Allottees contend that our precedents and those from other circuits establish that the United States is not a necessary party when individual Indian allottees bring suits to protect their land. It is true that we have "reject[ed] the notion that the United States is an indispensable party to every case involving a dispute over Indian lands." *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 747 n.6 (8th Cir. 2001), *abrogated on other grounds by Wilkins v. United States*, 598 U.S. 152 (2023). In *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975), for example, successors to allotted land held in trust on the Fort Berthold Reservation sued the County as trust patentees (not holders of Indian title) for trespass for maintaining a road on a portion of the allotment without a required government approval. On appeal, the allottees, having lost in the district court, raised an argument "not raised in the district court" -- that the United States was an indispensable non-party to the suit. We summarily rejected the contention in a footnote, noting there was no risk of "multiple lawsuits or judgments" and the United States had declined an invitation to participate as amicus. *Id.* at 191-92 n.6. But in none of the cases Appellees cite was the United States the sole party to a contract that granted the rights-of-way at issue and retained statutory responsibility for administering them. The Allottees again rely on *Poafpybitty*, but in that case individual Indians, not the United States, were parties to the lease on allotted lands at issue. 390 U.S. at 372. ("Although the approval of the Secretary is required, he is not the lessor and he cannot grant the lease on his own authority."). Here, the United States granted the rights-of-way, bears statutory responsibility for monitoring and extending them, and has a statutory duty to protect the Allottees' interests in lands held in trust.

Though it is a required party, the United States cannot be joined in the suit. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."). "The United States enjoys sovereign immunity . . . and can decide itself when and where it wants to intervene." *Two Shields*, 790 F.3d at 799. Despite our invitation to help resolve the issues in *Chase I*, the United States chose not to intervene, but it has not affirmatively waived its immunity from suit.

Finally, Allottees argue that "equity and good conscience" require this contract claim to proceed even in the United States' absence as a required party. Applying the multi-factor test under Rule 19(b) for determining whether the action should proceed among existing parties, we conclude the district court did not abuse its discretion in dismissing the Allottees' claims. The multiple breach of easement agreement claims implicate multiple layers of federal government interest in this matter. "In the specific context of an immune sovereign entity that is a required party not amenable to suit, the Supreme Court has explained that the action must be dismissed if the claims of sovereign immunity are not frivolous and 'there is a potential for injury to the interests of the absent sovereign.'" *Two Shields*, 790 F.3d at 798, quoting *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008). In addition, the BIA's regulatory actions to recover damages and prevent further trespass on the trust lands and the United States' counterclaims in *Tesoro* likely provide the

Allottees with an adequate remedy based on the outcome of that suit. Carefully weighing these factors, we affirm dismissal of Allottees' breach of easement claim.

IV. The *Tesoro* Intervention and Consolidation Issues.

The Appellees argue the district court erred in denying their motion to intervene in *Tesoro*, either as of right or permissively, and in not granting their request to consolidate the two cases. Intervention is governed by Rule 24.

A. Intervention as of Right. The district court denied Allottees' motion to intervene as of right in *Tesoro*. *Chase*, 686 F. Supp. 3d at 877-78. Rule 24(a) entitles a party to intervene if (1) a federal statute gives the party "an unconditional right to intervene" or (2) the party "claims an interest relating to the property . . . that is the subject of the action, and . . . 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 Allottees do not claim a statutory right to intervene. The issue is whether the United States in *Tesoro* will adequately represent their interests, an issue we review *de novo*. *See North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 920 (8th Cir. 2015) (*Stenehjem*).

We apply a "tripartite test" to determine whether intervention as of right is appropriate: "1) the party must have a recognized interest in the subject matter of the litigation; 2) that interest must be one that might be impaired by the disposition of the litigation; and 3) the interest must not be adequately protected by the existing parties." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 997 (8th Cir. 1993) (*Mille Lacs*). The district court assumed that the Allottees possess a sufficient interest relating to the *Tesoro* litigation that would be impaired or impeded by the disposition of that case on the merits, but concluded the Allottees fail to demonstrate that the United States does not "adequately represent their interest." *Chase*, 686 F. Supp. 3d at 878.

In *Heckman*, the United States sued to cancel conveyances of allotted lands made by members of the Cherokee Nation. 224 U.S. at 425. The Supreme Court held that "the United States, representing the owners of restricted lands, is entitled to bring a suit of this character" and rejected the allottees' claim that they should be permitted to bring their own action:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

Id. at 444-45. For claims of intervention, there is a "presumption of adequate representation by the United States [that] can be overcome only by a strong showing of inadequate representation." *Stenehjem*, 787 F.3d at 922 (quotation omitted).

> Although the burden of showing inadequate representation usually is minimal, when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest, the bar is raised, because in such cases the government is presumed to represent the interests of all its citizens. The government represents the interests of a movant to the extent his interests coincide with the public interest.

Id. at 921 (quotations and citations omitted). The Allottees argue the presumption of adequate representation should not apply because their interests "differ from the United States" -- the government shares their interest in the outcome of *Tesoro*, but "for very different reasons." We disagree. "Although [the Allottees] may have different reasons than the government for seeking to defeat [Andeavor's] claims" in this case and in *Tesoro*, "the interests of the [Allottees] and the United States are aligned." *Stenehjem*, 787 F.3d at 921-22. The Allottees further argue the resolution they seek through litigation diverges significantly from the government's attempts to settle, and a "potential conflict of this sort is sufficient to satisfy [their] minimal burden of showing that representation of their interests by the existing parties may be inadequate." *Mille Lacs*, 989 F.2d at 1001.

However, the divergence in interests in *Mille Lacs* concerned fundamentally different forms of relief, not merely differing degrees of the same remedy. Here, the Allottees have not identified any concrete divergence between their desired outcome and what the government is pursuing by litigation or settlement.

The United States' representation, "which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care," safeguards Allottees' interests because it "recognizes no limitations that are inconsistent with the discharge of the national duty." *Heckman*, 224 U.S. at 444-45. "Absent . . . [a] clear dereliction of duty, . . . the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives of the party representing him." *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997). We conclude the district court did not err in denying the Appellees intervention as of right.

B. Permissive Intervention. The district court also denied the Appellees permissive intervention under Rule 24(b), which provides that a "court may permit anyone to intervene" if they are either "given a conditional right to intervene by a federal statute" or if they have "a claim or defense that shares with the main action a common question of law or fact." *See Chase*, 686 F. Supp. 3d at 878-79. The decision to deny permissive intervention is "wholly discretionary," with the "principal consideration" being whether the proposed intervention would "unduly delay or prejudice the adjudication of the parties' rights." *S.D. ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (*Barnett*). "Accordingly, we grant great deference to the district court's decision to deny a Rule 24(b) motion, reviewing it only for a clear abuse of discretion." *Id.* (citations omitted).

The Allottees argue that in cases where the United States acts as a representative for Indian tribes and may bind them to a judgment, "it is obvious that the Indians Tribes, at a minimum, satisfy the standards for permissive intervention." *Arizona v. California*, 460 U.S. 605, 614 (1983). However, the issue here differs from *Arizona* because the Allottees are not a tribe and do not have the ability to bring the common law cause of action they now seek to join. Moreover, even if their cited authority "probably would have persuaded us to grant the motion if we were . . . ruling on the motion in the first instance, we cannot say that the district court clearly abused its discretion in this case by not granting the motion." *Barnett*, 317 F.3d at 787, citing *Arizona*, 460 U.S. 605, 614-15.

"Reversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent." *Barnett*, 317 F.3d at 787 (citations omitted). In its discretion, the district court provided multiple reasons for denying Allottees' request -- intervention in *Tesoro* would unduly delay "an already prolonged case ripe for decision" with new filings, briefs, and motions, *Chase*, 686 F. Supp. 3d at 879; the Allottees were already adequately represented, which is a legitimate consideration, *see Barnett*, 317 F.3d at 787; and the claim brought by the United States in *Tesoro* is for trespass under federal common law, a cause of action Allottees lack standing to pursue. The district court did not abuse its substantial discretion in denying permissive intervention. "[W]hen the United States itself undertakes to represent the allottees of lands under restriction, and brings suit . . . such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property." *Heckman*, 224 U.S. at 446.

C. The Consolidation Issue. On March 30, 2020, counsel for the Allottees filed a Motion To Consolidate Pending Class Actions in the district court, arguing that a "substantially similar class action" was filed in the district court (*Tesoro*), the two putative class actions "involve common, if not identical, questions of law and fact," and consolidation "pursuant to Federal Rule of Civil Procedure 42(a)" was appropriate "because consolidation would further judicial efficiency, eliminate or reduce repetition and confusion, would be more convenient to the parties and non-party witnesses, and will not prejudice Defendants." The district court granted Andeavor's motion to dismiss a few days later, the Allottees appealed, and we remanded the case in *Chase I*. In September 2021 the district court ordered the parties "to brief whether joinder of this matter with *Tesoro* . . . is appropriate and warranted." The Allottees supported and Andeavor opposed intervention or consolidation, and counsel argued the issue at a telephonic status conference on June 8, 2023. The district court ruled: "I'm not going to have [counsel for Andeavor] reinvent the wheel. He's already filed a motion to dismiss that I'll consider based upon the common law issue." In the Order being appealed, the court "denie[d] the Allottees' motion to intervene in the *Tesoro* lawsuit," discussing intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). *Chase*, 686 F. Supp. 3d at 877-79. On appeal, the Allottees argue "the district court abused its discretion and prevented meaningful appellate review by failing to address consolidation."

Andeavor briefs this issue as though it turns on Rule 24(b) standards for permissive intervention. That is an "up or down" issue -- you're in the suit or you're not. None of the appeal briefs cite the *controlling* federal rule, Rule 42, which is titled "Consolidation; Separate Trials" and was the stated basis for the Appellees' initial Motion to Consolidate in March 2020. Rule 42(a) provides:

> **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court *may*:
>
> > **(1)** join for hearing or trial any or all matter at issue in the actions;
> >
> > **(2)** consolidate the actions; or
> >
> > **(3)** issue any other orders to avoid unnecessary cost or delay.

(emphasis added.) When actions involving a common question of fact or law are pending, Rule 42(a) grants broad discretion to "order all the actions consolidated [or] make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." *See Enterprise Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994).

This is the second interlocutory appeal in this case. Another panel is scheduled to hear argument in an interlocutory appeal of the district court's grant of a preliminary injunction in the separate *Tesoro* action. After seven years of litigation, neither case is even close to a final resolution of the merits unless firm case management actions are taken by the district court. The common issues are apparent. The need "to avoid unnecessary cost or delay" and the prospect of additional waste of judicial resources are likewise apparent.

On the merits, the two cases raise important and difficult common or overlapping issues of federal Indian law, with little if any controlling precedent. In *Chase I*, we noted the IRWA vests the Secretary of the Interior with discretionary authority ("[r]ights-of-way . . . may be granted") but contains no express private right of action, nor does it include the kind of "rights-creating" language that would suggest an implied private remedy. The Supreme Court does not look with favor on implied rights of action, and statutory language framed in such discretionary terms does not support the existence of a private remedy. *Chase I*, 12 F.4th at 877; *see Wolfchild*, 824 F.3d at 769. Yet the United States has asserted and the Allottees have alleged claims based on an implied right of action.

The United States counterclaims in *Tesoro* are based on an IRWA regulation that permits the BIA to seek "available remedies under applicable law" against holdover right-of-way grantees such as Andeavor. 25 C.F.R. § 169.410. The Allottees will doubtless argue that another IRWA regulation permitting them to "pursue any available remedies under applicable law," 25 C.F.R. § 169.413, affords them the same *statutory* trespass action (which they have alleged but not pursued in either case). Section 169.410 makes no mention of Indian landowners' ability to pursue trespass remedies on their own behalf, and the position taken by the United States in *Tesoro* suggests that it believes the BIA has *exclusive* statutory authority to obtain relief from a holdover grantee for the benefit of beneficial owners of trust land.

Andeavor's apparent position further complicates the legal landscape -- it argues in *Tesoro* (i) that the BIA's vacatur of the Second Notice violated the APA; (ii) that its compliance with the Second Notice satisfied any valid claims of holdover breach; and perhaps (iii) that any further attempt to recover based on the Secretary's regulations goes beyond the authority Congress delegated in the IRWA.

These are complex federal statutory issues that may need to be resolved in a decision on the merits of this case and/or *Tesoro*. Moreover, once the court determines who has a cause of action to obtain relief from a holdover grantee -- Andeavor has more or less conceded that it has an obligation to pay for its holdover use of the pipeline -- the proper damage and injunctive relief must be determined, which is the primary reason settlement talks have failed and may be difficult and time-consuming to litigate. The Allottees' interests as equitable owners of possessory rights to tribal land held in trust by the United States may well be redressable by the trespass counterclaims asserted by the United States in *Tesoro* as trustee representing the Allottees. *See* 25 C.F.R. §§ 169.402, 169.407, 169.410, 169.413. But the Allottees have expressed considerable frustration and disagreement with actions taken by the United States on their behalf. The decision in *Poafpybitty* that the United States' "power to sue [does not] affect the rights of the individual Indian" to bring the same claim, 390 U.S. at 370, suggests that the Allottees may have statutory standing to argue for additional remedies because the United States is not adequately representing their interests.

We review these potential complexities in resolving the merits of this dispute not to predict what the parties will argue and what the district court will need to decide, but to explain why we conclude that, in addition to affirming the district court's decision to dismiss the Allottees' common law claims, we will remand the case to determine whether these multiple common questions of fact and law warrant discretionary relief under Rule 42(a). With seven years experience with the issues and the parties, the district court is in a far better position to move this dispute to final resolution than we are.

GRASZ, Circuit Judge, dissenting in part.

I respectfully dissent from the court's judgment affirming the dismissal of the Allottees' trespass cause of action for lack of standing.

The Supreme Court has recognized "that ***Indians*** have a federal common-law right to sue to enforce their aboriginal land rights." *Oneida II*, 470 U.S. at 235 (emphasis added). But based on its interpretation of the *Oneida* cases and other precedent, today the court decides the Allottees do not have standing to assert a trespass claim under federal common law because, in its view, the Supreme Court meant "Indian tribes" when it said "Indians." I disagree. Because precedent does not require it, I would not deprive the individual Indians, to whom Congress allotted Indian land held in trust by the United States, the ability to enforce their property rights.

In *Oneida II*, the Supreme Court explained "[n]umerous" prior decisions, including *Fellows v. Blacksmith*, 60 U.S. 366 (1857), "recognized at least implicitly that ***Indians*** have a federal common-law right to sue to enforce their aboriginal land rights." 470 U.S. at 235 (emphasis added); *see also id.* n.6. Importantly, *Fellows* involved the estate of a Tonawanda Indian successfully bringing a trespass action against two individuals who had dispossessed him of a certain piece of land located on a reservation. 60 U.S. at 367. This suggests that when the Supreme Court in *Oneida II* said "Indians" had a federal common law right to sue to enforce their aboriginal land rights, it meant both tribes ***and individual tribe members.***[8] 470 U.S. at 235 (emphasis added).

The court reaches the opposite conclusion today in part by observing that in *Oneida I*, the Supreme Court distinguished its prior decision in *Taylor* because "cases by allottees like *Taylor* are different from cases in which a tribe brings an ejectment claim" in that the Tribe's right to possession arose based on "aboriginal Indian title" secured by treaty. *Ante*, at 14. But as discussed above, the significance of this distinction to the issue of whether a federal common law claim exists for individual tribe members is questionable.

Regardless, another distinguishing fact between *Taylor* and *Oneida I* is more significant — the Indian land at issue has been continuously controlled by the federal government. In *Taylor*, the land had already been transformed from federal land to privately-owned

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[8] *Fellows* is not controlling as it is unclear whether the trespass claim was brought under federal or state law. *See Fellows*, 60 U.S. at 366–67 (noting the case was brought in New York state courts). Nonetheless, it is meaningful when deciding what the Supreme Court in *Oneida II* meant when it said its case law implicitly recognized "Indians" had a federal common law right to sue. 470 U.S. at 235.

land and was, thus, rightly subject to state law. *See Taylor*, 234 U.S. at 74; *Oneida I*, 414 U.S. at 676–77 (explaining that in *Taylor* individual patents had issued and thus "the incidents of ownership" were mostly a "matter[] of local property law to be vindicated in local courts"). In *Oneida I*, by contrast, the land remained under federal control continuously and, therefore, federal law controlled. 414 U.S. at 676. As Justice Rehnquist explained in his *Oneida I* concurrence, "[i]n contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, ***has not placed the land beyond federal supervision***." 414 U.S. at 682, 684 (Rehnquist, J., concurring) (emphasis added). Given that federal law governed this land, "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. Thus, while the parties in *Taylor* had to resolve their claims in state court (because there was no federal jurisdiction), the "Oneidas c[ould] maintain [an] action for violation of their possessory rights based on federal common law" in federal court. *Oneida II*, 470 U.S. at 236.

Another case decided between the *Oneida* decisions underscores that a federal common law claim exists when there has been continuous federal control over Indian land. Indeed, in *Wilson v. Omaha Indian Tribe*, the Supreme Court applied federal law to claims brought by a tribe over the boundaries of its reservation following shifts in the Missouri River's course. 442 U.S. 653, 657–58, 670–71 (1979). The parties disputed whether federal or state law governed the suit, given the general principles that the mere origination of title to land in the United States did not mean federal common law governed the suit. *Id.* at 669–70. The Supreme Court held federal law applied based largely on the United States's continued ownership of the land. *Id.* at 670–71. It noted "where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'" *Id.* at 670 (quoting *Oneida I*, 414 U.S. at 677). The Supreme Court reasoned that the claims at issue were distinguishable from those brought by grantees whose lands were not held in trust by the United States, emphasizing "[t]his is not a case where the United States has patented or otherwise granted land to private owners in a manner that terminates its interest and subjects the grantees' incidents of ownership to determination by the applicable state law." *Id.* at 671. While the Court noted the Tribe's possessory interest was based on aboriginal title, *id.* at 670, its central focus was the United States's continued ownership of the land, which created a federal common law claim, *id.* at 670–71.

Here, as in *Oneida* and *Wilson*, the Indian land has never left the ownership of the United States and is not subject to state law. Thus, I would conclude the Allottees have standing to bring a trespass claim under federal common law.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

JoAnn Chase, Estate of Nelson Fredericks, Inez Burr, Sandra Gillette, Marion Rasmuson, Joan Matthews, Amanda Bird Bear, Roger Bird Bear, Thomas Bird Bear, Jamie Lawrence, Rae Ann Williams, Evelyn Lone Bear, Doreen Charging, Mavis Huber, Betty Young Bird, Noreen Young Bird, Joan Young Bird, Murphy Young Bird, Donovan Fast Dog, Joyce Eakin, Josephine Parenteau, George Fast Dog, Denise Cavanaugh, Karen Koite, Arnold Young Bird, Darryl Turner, Heather Demaray, Darlene Edley, Eunice White Owl, Linda Kroupa, Waylon Young Bird, Deborah Staples, Anthony White Owl, Eugene White Owl, Kathleen White Owl, Margo Bean, Albert Whitman, Herbert	Case No. 1:19-cv-00143

Pleets, Monique Pleets, Sharon Aubol, Janet Benton, Gloria Fast Dog, Valeri Hosie, Betty Matthews, Kenneth Matthews Sr., Sheridan Matthews, Wilson White Owl, and Tiffany Williams,

Plaintiffs,

vs.

Andeavor Logistics, L.P, Andeavor, f/k/a Tesoro Corporation, Tesoro Logistics, GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company, LLC,

Defendants.

ORDER GRANTING, IN PART, DEFENDANTS' AMENDED MOTION TO DISMISS

[¶1] THIS MATTER comes before the Court on reconsideration of the Amended Motion to Dismiss filed by Andeavor Logistics, L.P., and its co-defendants (collectively, "Andeavor") on August 7, 2019, after the Court of the Appeals for the Eighth Circuit reversed and remanded this Court's prior order. Doc. No. 73. *See also Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864 (8th Cir. 2021). JoAnn Chase and the other putative class action plaintiffs (collectively, the "Allottees"), filed their original opposition to the Motion on September 5, 2019 (Doc. No. 85), and a renewed opposition on June 20, 2023 (Doc. No. 134). Andeavor originally filed its reply on October 2, 2019 (Doc. No. 86), and submitted a supplemental reply on June 30, 2023 (Doc. No. 138). For the reasons set forth below, the Court **GRANTS, in part**, Andeavor's Motion.

BACKGROUND

[¶2] This case has proceeded through a long and tumultuous history spanning three different courts and approximately five years. The Court must now answer whether individual Indians who are equitable owners of allotted lands held in trust by the United States may assert a federal common law cause of action for trespass. In short, they may not.

[¶3] The alleged facts and history of this case have often been repeated. *See* Doc. No. 100; *see also Chase*, 12 F.4th at 866-68. Accordingly, the Court will only recount those alleged facts and details relevant to the instant Motion.

[¶4] Dating back to 1953, Andeavor's predecessor-in-interest operated an oil pipeline that crossed portions of Fort Berthold Indian Reservation in North Dakota. That predecessor-in-interest was granted a twenty-year right-of-way ("ROW") for the pipeline from the Department of the Interior, as is contemplated in 25 U.S.C. §§ 323, 324. Although the ROW was renewed for additional twenty-year terms in 1973 and again in 1995 (retroactively so in 1995, making its effective renewal in 1993), it expired in 2013. Despite this expiration, Andeavor continued to operate its 500-mile High Plains Pipeline System across both tribal lands and allotted lands held by individual Native Americans after 2013.[1]

[¶5] In 2017, the Mandan, Hidatsa, and Arikara Nation, known as the Three Affiliated Tribes, agreed to renew Andeavor's ROW—but only for the ROW through tribal

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[1] As the Parties already acknowledge, designation of a parcel as tribal land, "allotted," and/or held in fee or trust triggers significant legal ramifications. As the name implies, "tribal trust land" is land held in trust for an Indian tribe but owned by the federal government. *United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997). An "allotment" is a "term of art in Indian law, describing either a parcel of land owned by the United States in trust for an [individual] Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." *Id.* at 1571-72. (quoting Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* 615-16 (Rennard Strickland ed., 1982)). As further detailed later, many allotments were historically created due to the breaking up or segmentation of Indian reservations. *Id.* at 1572. That said, not all allotments resulted from the parceling of reservations. Some allotments were created from land held in the public domain, for instance, for individual Indians who did not reside on a reservation or whose tribe had no reservation. M. Brent Leonhard, *Criminal Jurisdiction in Indian County*, 69 DEP'T JUST. FED. L. & PRAC. 45, 76 (2021). Finally, "fee land" is non-allotted property "owned or patented in fee simple" and it does not carry the "type of restrictions on alienation found in a restricted fee allotment." *Id. See also* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1, 21 (1995) (noting the federal government also issued trust patents in addition to fee patents).

trust land. Andeavor's negotiations with individuals who owned allotted lands held in trust by the United States proved to be largely unfruitful, resulting in Andeavor not possessing a renewed ROW over significant portions of allotted lands. *See* 25 U.S.C. § 324 (allowing ROWs "over and across lands of individual Indians [to] be granted without the consent of the individual Indian owners" only when, for instance, "the owners or owner of a majority of the interests therein consent to the grant").

[¶6] Certain individual landowners of such allotments (i.e., the Allottees) rejected Andeavor's offers and proceeded to file the instant action in the Western District of Texas on October 5, 2018. *See* Doc. No. 1. Their original Complaint alleged claims for: (1) continuing trespass; and (2) constructive trust. *Id.* In response, Andeavor moved to dismiss the Allottees' Complaint on various grounds and also to transfer the case from the Western District of Texas to the District of North Dakota. *See* Doc. Nos. 17, 22. With the motions still outstanding, the Allottees filed their First Amended Complaint on January 25, 2019, adding new counts and theories. *See* Doc. No. 28. In the First Amended Complaint, the Allottees asserted claims of: (1) continuing trespass under federal common law; (2) breach of easement agreement; (3) unjust enrichment—imposition of constructive trust; and (4) punitive damages. *Id.*

[¶7] On July 9, 2019, the District Court for the Western District of Texas granted Andeavor's Motion to Transfer the case to the District of North Dakota and either denied or denied as moot the Parties' remaining motions. Doc. No. 67.

[¶8] Soon thereafter, Andeavor filed the instant Amended Motion to Dismiss, arguing there were four "separate, alternative, and independent grounds for dismissal" of the entire action. Doc. No. 73, p. 1 n.1. Specifically, Andeavor contended: (1) the Court lacked subject matter jurisdiction because the case did not invoke federal question jurisdiction; (2) the Allottees failed to state a claim upon which relief could be granted because they could not assert a federal common law claim for trespass; (3) the Allottees failed to join a necessary party under Federal Rule of Civil Procedure 19(a); and (4) the Allottees failed to exhaust their administrative remedies and there was a lack of primary jurisdiction. *Id.* at pp. 3-10.

[¶9] The Parties fully briefed the issues (*see* Doc. Nos. 85, 86, 87, 90, 91), and then the case was reassigned to the undersigned (Doc. No. 92). The Allottees proceeded to file their Renewed Motion for Class Certification on March 25, 2020. Doc. No. 93.

[¶10] On April 6, 2020, this Court granted, in part, Andeavor's Amended Motion to Dismiss. Doc. No. 100. The Court dismissed the First Amended Complaint on the ground that the Allottees failed to exhaust their administrative remedies and denied as moot Andeavor's remaining grounds for dismissal. *Id.* The Allottees appealed the Order to the United States Court of Appeals for the Eighth Circuit on April 7, 2020. Doc. No. 102.

[¶11] While awaiting the Eighth Circuit's decision, the Bureau of Indian Affairs ("BIA") took action about the instant matter, resulting in a back-and-forth drama:

On July 2, 2020, after the Allottees submitted their initial Brief on appeal [with the Eighth Circuit], the Regional Director of the BIA's Great Plains Regional Office (which covers North Dakota) sent a formal Notification of Trespass Determination to Andeavor (the "Notice"). The Notice stated that the pipeline had been trespassing on fifty acres of individually-owned trust lands for seven years, reflecting Andeavor's lack of good faith negotiations, and therefore the pipeline was no longer in the landowners' best interest. The BIA ordered Andeavor to immediately cease pipeline use and pay treble damages totaling $187.2 million within thirty days, a decision Andover could appeal to the Interior Board of Indian Appeals (IBIA). Andeavor appealed, arguing the Notice ignored that it was in holdover status while negotiating with landowners, ignored its substantial work to obtain fair-market value appraisals, disregarded its record-setting offer of $66,000 per acre to the landowners, and calculated damages based on inapplicable grazing regulations.

Before the IBIA could rule, the Assistant Secretary for Indian Affairs assumed jurisdiction over the appeal (as regulations allow), vacated the Notice, and remanded to the Regional Director to issue a new decision based on specified criteria. The Assistant Secretary's order asserted that federal common law applied to Andeavor's trespass. In later supplemental guidance, the Regional Director was advised to rely only on 25 C.F.R. § 169.410 and common law remedies to address the trespass. The guidance stated that federal common law authorizes the BIA to seek judicial remedies, including compensatory damages, on behalf of Indian landowners for trespass claims against right-of-way holdovers. It cited 28 U.S.C. § 2415(b), a statute of limitations that requires actions by the United States or its agencies on behalf of "a recognized tribe, band, or group of American Indians" to be brought "within six years and ninety days after the right of action accrues."

On remand, the Regional Director issued a Second Notice reducing the damages award to just under $4 million, ordering Andeavor to immediately cease operating the pipeline, and informing Andeavor the BIA might petition the Department of Justice to seek common law damages including an accounting of all rents and profits tied to its trespass. Both Andeavor and the Allottees appealed the Second Notice to the IBIA. On January 14, 2021, the Assistant Secretary again assumed jurisdiction over the appeal, affirmed the Second Notice in its entirety, and declared it judicially reviewable as a final agency action. The IBIA dismissed the parties' appeals.

On March 12, 2021, after the change in administrations, the Acting Secretary of the Interior issued a Decision vacating all prior BIA actions—from the Regional Director's First Notice to the Assistant Secretary's January 14 Decision—and returning the matter to the Regional Director with directions to:

1. take such action as is necessary to address [Andeavor's] continued occupation of the expired right-of-way.

> 2. provide each of the interested parties with a full and fair opportunity to be heard in this matter, and
>
> 3. issue a new decision, as may be necessary and appropriate.

Chase, 12 F.4th at 875-76 (second alteration in original). *See also* Doc. No. 104-1.

[¶12] After the change in administrations and the Acting Secretary of the Interior vacated the prior administrative decisions, Andeavor took matters into its own hands. A subsidiary of Andeavor—Tesoro High Plains Pipeline Company, LLC—proceeded to file its own action against the United States in order to have the Acting Secretary's vacatur, well, vacated under the Administrative Procedure Act, among other relief. *See Tesoro High Plains Pipeline, LLC v. United States*, No. 1:21-cv-00090 (D.N.D. Apr. 23, 2021) [hereinafter *Tesoro*].

[¶13] While the *Tesoro* action was still pending (which it still is, as of the date of this Order), the Eighth Circuit issued its opinion on September 13, 2021, reversing and remanding this Court's order from April 6, 2020. *See Chase*, 12 F.4th 864. The Eighth Circuit explained this Court erred in dismissing the case on the ground that the Allottees failed to exhaust their administrative remedies. *See id.* at 870. Before completing its analysis, the Eighth Circuit also provided some guidance regarding the various claims made by the Allottees. For instance, the Court noted the Allottees had dropped their claims for "Past Trespass" because they had "effectively acknowledg[ed] that the 1993 renewal [of the easement] was valid." *Id.* at 869 n.2. Given their acknowledgment, "their claims for damages and unjust enrichment for the pipeline's operation between 1993 and the easement's expiration in 2013 fail because a valid contract existed during that period." *Id.* (stating further this conclusion was "now law of the case"). The Eighth Circuit then reversed, remanded, and suggested this Court should stay the case "for a reasonable period of time to see what action the [BIA] may take" in the *Tesoro* litigation. *Id.* at 877.

[¶14] While awaiting the BIA's action, this Court issued an Order to Show Cause as to Joinder, requesting the Parties to brief the issue of whether this matter should be joined with *Tesoro*. Doc. No. 105. The Allottees favored consolidation and represented its brief in response to the Order to Show Cause "amount[ed] to a motion to intervene" either permissively or of right. Doc. No. 111, p. 3 n.1. In contrast, Andeavor opposed consolidation and the Allottees' intervention in *Tesoro*. Doc. No. 112.

[¶15] On February 8, 2022, the BIA filed a counterclaim in *Tesoro* for federal common law trespass on behalf of the Indian allottees whose land the United States owns in trust. *Tesoro*, No.1:21-cv-00090, ECF No. 28 (D.N.D. Feb. 8, 2022). In defending its counterclaim against a motion to dismiss in *Tesoro*, the BIA was clear it took no position on the Allottees' "ability to raise" a claim under the federal common law for trespass in the instant matter. *Tesoro*, No.1:21-cv-00090, ECF No. 62, p. 29 n.17 (D.N.D. Oct. 21, 2022).

[¶16] As the months progressed, a settlement between the Allottees and Andeavor seemed to be on the horizon. *See* Doc. Nos. 119, 120. Ultimately, the settlement talks failed. *See* Doc. No. 121.

[¶17] Following a status conference on June 8, 2023, this Court lifted the stay instituted by the Eighth Circuit. Doc. No. 130. The Parties agreed Andeavor's Amended Motion to Dismiss, insofar as it claimed the case should be dismissed because the Allottees could not assert a federal common law claim for trespass, was ripe but the Allottees requested additional briefing. *See* Doc. No. 129. The Court permitted additional briefing on that particular issue, and now it is before the Court.

ANALYSIS

I. Legal Standard

[¶18] When reviewing a motion to dismiss, the Court must accept as true the factual allegations set forth in the complaint. *See Nunn v. Satrom*, No. 2:12-cv-16, 2012 WL 12914317, at *3 (D.N.D. Oct. 26, 2012). A complaint that fails to "state[] a plausible claim for relief," however, will not survive dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

II. The Allottees Fail to State a Plausible Federal Common Law Claim of Trespass

[¶19] Andeavor argues "there is no recognized claim of federal common law trespass to land allotted to individual Indians." Doc. No. 75, pp. 6, 10. *See also* Doc. No. 138. Instead, Andeavor contends the Allottees merely have a "tort claim based on state common law of trespass, not federal common law." *Id.* at p. 10. In turn, the Allottees argue prior decisions of this Court establish their common law claim as well as the Supreme Court's case of *Poafpybitty v. Skelly Oil Company*, 390 U.S. 365 (1968). Doc. No. 134. Furthermore, the Allottees contend they and Indian tribes share the same right as equitable landowners to bring a federal common law claim for trespass. Finally, they rely on other circuits' cases as well as the Allottees' dealings with federal law to bolster their stance. *Id.* at p. 3 (citing cases). After having reviewed the Parties' arguments and relevant case law, the Court concludes the Allottees have no federal common law claim for trespass and the First Amended Complaint must be dismissed.

1. Relevant Historical & Legal Background

[¶20] The issue of whether the Allottees have a federal common law trespass claim is certainly "complex." *Chase*, 12 F.4th at 871. *See Grondal v. United States*, 682 F. Supp. 2d 1203, 1229 (E.D. Wash. 2010) (noting a "simple issue" of property rights and lease renewals quickly "becomes very complex when it involves allotment property" with fractured ownership and is "held in trust and controlled by the United States Bureau of Indian Affairs"). Indeed, centuries of history, Supreme Court decisions, and countless policy decisions involving Native Americans, allotments, federal law, and causes of action related to property rights have teed up the instant action.

[¶21] Given the history of allotted land directly and significantly shapes the arguments presented here, a summarized version is worth retelling:

> What is referred to as the "Allotment Era" began in the late 1800s, when Congress adopted a policy that carved reservations into allotments and assigned land parcels to individual tribal members. The goal was to extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large. In the early years of this policy, many tribal members lost

their allotted lands to non-Indians in unfair or fraudulent transactions. *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Congress responded by enacting the Indian General Allotment Act of 1887, known as the Dawes Act. The Dawes Act sought to prevent alienation of Indian-owned lands by replacing the fee-simple-ownership of early allotments with a trust-based model in which the President allotted tracts to individual Indian landowners. The United States held these allotments in trust for twenty-five years, after which the individual Indian landowners acquired fee-simple title to the property. *Id.*

Allotted lands held in trust under the Dawes Act proved to be "administratively unworkable and economically wasteful." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). In 1934, Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes-Act era," "halted further allotments," and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Yakima*, 502 U.S. at 255, citing the Indian Reorganization Act, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 *et seq.*; *see* §§ 5101, 5102. This statute did not affect the two-thirds of allotted Indian lands already acquired by non-Indians, resulting in a checkerboard of federally-held trust lands and privately-owned fee-simple lands that continues on many reservations today. *Upper Skagit Indian Tribe v. Lundgren*, ____ U.S. ____, 138 S. Ct. 1649, 1653 (2018); *see Yakima*, 502 U.S. at 255-56.

Chase, 12 F.4th at 872-73 (footnote omitted and cleaned up). *See Stands*, 105 F.3d at 1571-72 (explaining trust allotments are owned by the United States).

[¶22] Due to real property titles changing hands among tribes, individual Native Americans, the federal government, and other individuals and entities, property disputes inevitably ensued. Those disputes prompted questions as to which bases of relief could be sought by whom and in which forum. *See, e.g.*, *Oneida Indian Nation of N.Y. State v. Oneida Cnty.*, 414 U.S. 661 (1974) [hereinafter *Oneida I*]; *Poafpybitty*, 390 U.S. 365. Although the Supreme Court has not explicitly answered the question presented here, it certainly left behind clues. A synopsis of three of those decisions is necessary to understand the Eighth Circuit's decision in *Chase*, which is the most recent decision in this case that guides the analysis below.

[¶23] In the 1914 case of *Taylor v. Anderson*, the Supreme Court held it lacked federal question jurisdiction over a suit brought by individual Indian owners of allotments in fee (not in trust) for ejectment of individuals who allegedly removed the rightful Indian owners from their allotted property. 234 U.S. 74, 74-76 (1914). Citing the well-pleaded complaint rule, the Court concluded the allotment owners could not anticipatorily assert defenses based in federal law to make their ejectment claim fall within federal question jurisdiction. *Id.* at 75 (rejecting the contention the claim arose under federal law simply because federal law "restrict[ed] the alienation of Choctaw and Chickasaw allotments"). Accordingly, the *Taylor* Court made clear there is no federal question jurisdiction and, subsequently, no federal common law claim, when allottees (at least for those holding allotments in fee) assert claims for ejectment. *Id.*

[¶24] In contrast to *Taylor*, when tribes have brought claims related to possession of their alleged tribal lands, the Supreme Court has confirmed a federal common law right of action may exist. *See, e.g.*, *Oneida I*, 414 U.S. at 675 (holding there was federal subject matter jurisdiction over the tribe's claim); *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-236 (1985) [hereinafter *Oneida II*] (holding the Oneida Indian Nation possessed a federal common law claim). In *Oneida I*, the Supreme Court considered whether it had federal question jurisdiction over the Oneida Indian Nation's claim for possession and fair rental value of its alleged tribal lands. 414 U.S. at 663-64. There, the complaint alleged the Oneida's lands had been conveyed to the State of New York during the 1790s in contravention of federal law and treaties. *Id.* Interpreting the complaint as asserting a claim for possession of the land, the Court held the Oneida Indian Nation's claim for "possessory right[] . . . to [its] aboriginal lands, particularly when confirmed by treaty," fell within federal question jurisdiction. *Id.* at 667.[2]

[¶25] The *Oneida I* Court's use of the term "aboriginal" in its holding is of particular significance. *Id.* "Aboriginal title is a right of occupancy based on possession from time immemorial. Such title may be recognized or unrecognized." *Inupiat Cmty. of Arctic Slope v. United*

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[2] For a more detailed history of aboriginal title and the United States' legal treatment of such title, please see the United States Court of Appeals for the Tenth Circuit's case of *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1152-56 (10th Cir. 2015).

States, 680 F.2d 122 (Fed. Ct. Cl. 1982) (citation omitted). Prior to the creation of reservations, Indian nations, tribes, or bands "may have claimed the right [to the land] because of immemorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945) (citation omitted). This exclusive claim to the land "has come to be known as Indian title," *id.* at 339, which is synonymous with "[a]boriginal rights" or "aboriginal title," *Wolfchild v. Redwood Cnty.*, 824 F.3d 761, 767 n.2 (8th Cir. 2016) (quoting *Oneida I*, 414 U.S. at 667). Whether labeled as "aboriginal title" or "Indian title," that title solely gives the tribe possessory rights—not ownership—to the land in question. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) ("That description means mere possession not specifically recognized as ownership by Congress."). The fee title to aboriginal land remains with the United States as sovereign. *Oneida I*, 414 U.S. at 667.

[¶26] Returning to the Court's reasoning and emphasis on aboriginal title in *Oneida I*, the Supreme Court methodically and pointedly distanced *Taylor* from the Oneida Indian Nation's case on two primary bases. First, the Court highlighted the *Taylor* plaintiffs were individual Indians rather than a tribe like the Oneida Indian Nation. *Id.* at 676. Second, the Court categorized *Taylor* as a case that "concerned lands allocated to individual Indians, not tribal rights to lands" (i.e., there was no claim to aboriginal title). *Id.* Given the *Taylor* plaintiffs had alleged "right to possession" without any claimed ties to aboriginal title, the *Oneida I* Court placed *Taylor* alongside "those cases indicating that 'a controversy in respect of lands has never been regarded as presenting a [f]ederal question merely because one of the parties to it has derived his title under an act of Congress.'" *Id.* Accordingly, the Court relegated the remedies of the fee landholders in *Taylor* to matters of "local property law to be vindicated in local courts." *Id.* (quoting *Joy v. City of St. Louis*, 201 U.S. 332, 343-43 (1906)).

[¶27] In a subsequent case involving the Oneida Indian Nation and its continued quest for recovery of its alleged aboriginal lands, the Supreme Court moved past the jurisdictional question and discussed the nature of the Oneida Indian Nation's claim. *Oneida II*, 470 U.S. at 235-236. The Court discussed how "[n]umerous decisions of this Court prior to *Oneida I* recognized at least implicitly that Indian[] [tribes] have a federal common-law right to sue to enforce their aboriginal land rights." *Id.* at 235. Given the history of such cases and their "well-established principles" based in aboriginal title, the Court held the Oneida Indian Nation could maintain the "action for violation of their possessory rights based on federal common law." *Id.* at 235-36. *See id.* at 235 ("[T]he possessory right claimed by the Oneidas is a *federal* right to the lands at issue in this case." (alteration omitted) (quoting *Oneida I*, 414 U.S. at 671)).

[¶28] Despite these Supreme Court cases, the Allottees' question remains unanswered because they are individual equitable owners of allotted land—not owners of land in fee or otherwise a tribe. This Court is not without additional guidance, however. When the Allottees appealed this Court's Order, Granting, in Part, and Denying, in Part, the Motion to Dismiss (Doc. No. 100), the Eighth Circuit provided some direction on whether individual allottees of land held in trust by the United States could assert a "federal *common law* cause of action" without resolving that "complex issue," *Chase*, 12 F.4th at 871.

a. The Eighth Circuit's Case of *Chase v. Andeavor Logistics*

[¶29] The Eighth Circuit's *Chase* case strongly suggests the Allottees do not have a federal common law claim for trespass because they are not a tribe asserting aboriginal title. *Id.* at 872, 874. The Allottees argued before the Eighth Circuit that *Oneida II* supported their federal common law claim for trespass because they, like the Oneida Indian Nation, have exclusive possession of Indian trust land pursuant to federal law. *Id.* at 873. The Eighth Circuit rejected the argument because the *Oneida* cases arose from "a *tribe* 'assert[ing] a present right to possession based on their *aboriginal* right of occupancy.'" *Id.* at 874 (quoting *Wolfchild*, 824 F.3d at 768). Subsequently, the Court hinted the Allottees more closely resembled the individual Indian plaintiffs in *Taylor* for the same reasons the *Oneida* cases seemed not to fit: the Allottees are not a tribe and they have not asserted aboriginal title to the land. *Id.* The Court then highlighted its own case of *Wolfchild v. Redwood County* had affirmed individual Indians who owned land in fee simple "failed to state a claim under federal common law because they did not allege '*aboriginal* title'" and were not a tribe. *Chase*, 12 F.4th at 874 (quoting *Wolfchild*, 824 F.3d at 768). *See also Wolfchild*, 824 F.3d at 768 (affirming the individual Indians' "fail[ure] to state a claim under the federal common law as set forth in the *Oneida* progeny").

[¶30] In remanding the Allottees' case back to this Court, the Eighth Circuit clarified *Wolfchild* could not "directly control" the instant matter but its reasoning and reliance on the *Oneida* cases would have a "direct bearing" on the Allottees' claim. *Chase*, 12 F.4th at 874. *Wolfchild* was not dispositive of the Allottees' claim, the Eighth Circuit said, because the *Wolfchild* plaintiffs were allegedly owners of the land in fee simple rather than equitable owners of land held in trust by the federal government, like the Allottees. *Id.* The Eighth Circuit, however, invited the Parties to suggest different interpretations of *Wolfchild* and specifically opened the door for the BIA to express its view on whether "the distinction drawn in *Oneida I*" between tribes and individuals as well as allegations regarding aboriginal versus non-aboriginal title "applies to a right-of-way holdover situation." *Id.*

[¶31] Since the Eighth Circuit extended that invitation in 2021, *see id.*, the BIA has explicitly declined to "make any assertions about the Allottees' ability to raise a federal common-law trespass claim," *Tesoro*, No. 21-cv-00090, ECF 62 at p. 29 n.17. With that legal backdrop, the matter is now for this Court to resolve.

[¶32] The Court will address the Parties' arguments regarding subject matter jurisdiction and then proceed to the Allottees' contentions. The Allottees first assert prior decisions from the District of North Dakota affirm they have a federal common law claim for trespass. Second, they argue the Supreme Court's case of *Poafpybitty* grants them a federal common law claim because the United States has alleged the same against Tesoro (an Andeavor subsidiary) in the related *Tesoro* litigation. Third, the Allottees assert they are on equal footing with tribes who hold equitable title to land held in trust by the United States, like the Oneida Indian Nation, such that they must also have a federal common law claim for trespass. Alternatively, they argue they have sufficient ties to federal law to possess the right to bring a federal common law claim. Fourth and finally, the Allottees make the appeal that without a federal common law claim, they would be unjustly left without a direct remedy against Andeavor. For the reasons discussed below, the Allottees' arguments fail because they do not allege they hold aboriginal title to the allotments.

2. Subject Matter Jurisdiction

[¶33] The Allottees first contend the Court has subject matter jurisdiction over their claims pursuant to both 25 U.S.C. § 345 and 28 U.S.C. § 1331.[3] Doc. No. 134, p. 6 (citing *Nahno-Lopez*, 625 F.3d 1279). Andeavor, however, argues the Eighth Circuit's *Chase* case "held that the jurisdictional question collapsed into [the issue of whether the Allottees have the] capacity to assert federal common law claims." Doc. No. 138, p. 8. Based on the Eighth Circuit's direction, the Court agrees this case hinges on whether the Allottees have stated a claim

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[3] Section 345 of title 25 grants jurisdiction over "suits involving the interest and rights of the Indian in his allotment or patent after he has acquired it." *United States v. Mottaz*, 476 U.S. 834, 845 (1986) (internal quotation marks omitted) (quoting *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970)). That statute, however, "does not create [a] cause of action or a standard for liability." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010). *See also Chase*, 12 F.4th at 871 n.4 (citing *Nahno-Lopez*'s analysis regarding § 345).

upon which relief may be granted rather than purely a question of subject matter jurisdiction.

[¶34] Federal courts have a duty to evaluate whether they have jurisdiction over a case "even if the parties concede the issue." *Styczinski v. Arnold*, 46 F.4th 907, 911 (8th Cir. 2022) (quoting *United States v. O'Laughlin*, 31 F.4th 1042, 1043 (8th Cir. 2022)). That said, the Eighth Circuit has directed this Court that the Allottees' case does not present a "serious question of subject matter jurisdiction because if the Allottees have a valid claim for Andeavor's alleged trespass on Indian lands, without question it is a claim under federal law." *Chase*, 12 F.4th at 871. Pursuant to that guidance, the Court focuses on the crux of the case: whether the Allottees possess a "federal *common law* cause of action . . . on which relief can be granted." *Id.*

3. Prior Decisions from This District Are Not Dispositive

[¶35] The Allottees' cited cases from this District do not guarantee their claim's survival. *See* Doc. No. 134, p. 7 (arguing the Court has already "recognized individual Indian allottees' federal common law trespass claims and the jurisdiction it possesses over them"). *See also* *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1][d], p. 134-26 (3d ed. 2011))); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 865-66 (8th Cir. 2021) (quoting *Camreta*, 563 U.S. at 709 n.7). First, *Houle v. Central Power Electric Co-op., Inc.*, presumed without deciding jurisdiction existed for the Chippewa Indian allottees' trespass claim and the Court noted the "parties [had] not questioned the court's jurisdiction." No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. Mar. 24, 2011). *See also Fettig v. Fox*, No. 1:19-cv-096, 2020 WL 9848691, at *14 (D.N.D. Nov. 16, 2020) (suggesting, in dicta, a federal common law trespass claim may exist for allottees, but not discussing *Taylor* or *Oneida*). Additionally, *Houle* did not wrestle with *Taylor*'s implications and was decided prior to the Eighth Circuit's decisions in *Wolfchild* and *Chase*. *See Houle*, 2011 WL 1464918.

[¶36] Second, as Andeavor highlights, the Allottees conveniently omitted certain sentences of the Court's analysis in *Danks v. Slawson Exploration Company, Inc. See* No. 1-18-cv-186, 2021 WL 4783258, slip op. at *4 n.2 (D.N.D. Oct. 13, 2021). While it is true the Court in *Danks* previously concluded the "plaintiff allottees ha[d] federal common law claims for the torts of trespass and nuisance and that plaintiffs can pursue these claims without the United States[] . . . being a party," it reached that conclusion before the Eighth Circuit in *Chase* "open[ed] [the] question [about] whether the allottees have a common law claim under federal law." *Id.* Not only did *Danks* fail to discuss the *Oneida* or *Taylor* decisions, but also the Court found the situation in *Danks* was "distinguishable" from *Chase* and noted the question of whether allottees have a federal common law trespass claim triggers a fluctuating and "complex area" of law. *Id.* In sum, these cases were decided before the Eighth Circuit in *Chase* casted significant doubt on the possibility of plaintiffs like the Allottees having a federal common law trespass claim. Accordingly, these prior cases cannot guide the Court's decision.

4. *Poafpybitty* Does Not Establish the Allottees Possess a Federal Common Law Claim for Trespass

[¶37] The Allottees contend that because the United States has made a federal common law trespass counterclaim in the *Tesoro* litigation, so too they have such a claim here. Relying on the Supreme Court's case of *Poafpybitty*, the Allottees argue the United States' assertion of a federal common law trespass action in the related *Tesoro* case is proof positive their claim exists and is permissible here. Doc. No. 134, p. 4. *See also Tesoro*, No. 1:21-cv-00090, ECF 28, pp. 22-28. Andeavor contends *Poafpybitty* does not grant the Allottees a federal common law claim of trespass. Doc. No. 134. Even if the Allottees had a "valid basis for a claim," Andeavor argues *Poafpybitty* does not authorize the Allottees to assert a concurrent claim with the United States pursuant to the ROW holdover regulation, 25 C.F.R. § 169.410. Doc. No. 138, pp. 16-17, n.13. The Court agrees *Poafpybitty* does not extend a federal common law trespass claim to the Allottees.

[¶38] *Poafpybitty* raised the issue of whether individual Indians lessors had standing to sue—independent of the federal government—for breach of an oil and gas lease when the oil and gas was being extracted from allotted Indian land and the lease had been approved by the federal government. 390 U.S. at 366. The Supreme Court held the Indian lessors had standing to sue. *Id.* at 376. In reaching that conclusion, the Supreme Court "agree[d] that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official [did] not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights." *Id.* at 372. That said, the Indian's right to initiate a lawsuit to protect his or her land was subject to the United States' right to intervene and the Indian's lawsuit would not bind the United States unless it was a named party. *Id.* at 371. Nowhere, however, does *Poafpybitty* discuss federal common law claims or whether an individual Indian may bring such a claim.

[¶39] The Allottees' assumption that they possess a federal common law claim by virtue of the United States' pending claim is based on a misreading of *Poafpybitty*. In other words, the United States' position in the *Tesoro* litigation does not translate to the Allottees possessing a federal common law trespass claim here. [4] The Allottees have cited the District of Rhode Island case, *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, for another proposition to be discussed herein, but that case stated the rule of *Poafpybitty* in an almost "if-then" statement: if "an action involving Indian land can be maintained by the protected Indians or Indian tribes [and] by the United States on their behalf, [then] it is settled law that the right to assert the sovereign interests at issue . . is equally available to either plaintiff." 418 F. Supp. 798, 805 (D.R.I. 1976). Neither *Narragansett* nor *Poafpybitty* assert that if the United States has a claim, then that claim is also available to Indian allottees. Indeed, the United States in *Tesoro* explicitly disclaimed any "assertions about the Allottees' ability to raise a federal common-law trespass claim." *Tesoro*, No. 1:21-cv-00090, ECF 62, p. 29 n.17. However, *Poafpybitty* represents

[4] The Court expresses no opinion on the merits of the United States' federal common law counterclaim in the *Tesoro* litigation.

that where Indians (either tribes or individuals) *and* the United States may bring the same claim, then either may bring a lawsuit (subject to certain limitations). *See, e.g.*, *Poafpybitty*, 390 U.S. at 370-71 (noting the Indian's right to sue is subject to the United States' right to intervene). *Poafpybitty* does not permit the Allottees to piggyback on the United States' alleged federal common law claim if the Allottees themselves do not have the independent right to bring the claim.

5. The Allottees' Absent Allegation of Aboriginal Title Dooms Their Federal Common Law Claim for Trespass

[¶40] Seeking to position themselves as closely as possible to the tribal plaintiffs in the *Oneida* cases, the Allottees present a host of arguments about their similarities. Undoubtedly, the Allottees share some commonalities with the *Oneida* plaintiffs, such as allegedly possessing equitable title to land held in trust by the United States. Shared facts, however, cannot overcome the distinction that derails their case: the lack of an allegation of aboriginal title.

a. The Supreme Court & Eighth Circuit Do Not Erase Distinctions Between Tribes & Allottees Due to Them Both Possessing Lands Held in Trust

[¶41] "When it comes to Indian trust lands," the Allottees argue, "there is no legal difference between the status of a tribe and an individual Indian allottee." Doc. No. 134, p. 3. Taking a select quote from a District of Rhode Island case, the Allottees contend that because "the interests sought to be protected by Congress are the same" when it comes to Indian land, federal common law claims for trespass exist "no matter who the plaintiff may be." *Id.* (quoting *Narragansett Tribe of Indians*, 418 F. Supp. at 806). Andeavor refutes the Allottees' assertion by arguing the Allottees ignore the Eighth Circuit's extensive discussion of the "difference[s] between trespass claims by an Indian tribe, and trespass claims by individual Indian allottees." Doc. No. 138, p. 6. The Court agrees with Andeavor.

[¶42] First, the Rhode Island case does not propose all plaintiffs—whether individual Indians, tribes, or the United States—possess the same claims when Indian trust land is at stake. *See Narragansett Tribe of Indians*, 418 F. Supp. at 806. Instead, *Narragansett Tribe of Indians* discusses the well-established principle from the Supreme Court's case of *Poafpybitty* that "[w]here an action involving Indian land *can be* maintained by the protected Indians or Indian tribes as well as by the United States on their behalf, it is settled law that the right to assert the sovereign interests at issue here is equally available to either plaintiff." *Id.* at 805 (emphasis added) (citing *Poafpybitty*, 390 U.S. 365). The operative words are where an action "can be" asserted. *Id.* Notably, the *Narragansett Tribe of Indians* case was initiated by a tribe and is silent regarding what causes of action Indian individuals may possess. *Id.* Rather, the court merely reiterated that where a cause of action is already legally permissible and available to individual "Indians or Indian tribes as well as [to] the United States," then the individuals or tribes do not have to wait for the United States to bring suit before they may take legal action to protect Indian land. *Id.* This shared right to bring such a claim is because "the interests sought to be protected by Congress [relating to the Indian land] are the same, no matter who the plaintiff may be" and the alternative of forcing the United States to be the sole protector would impose an "almost staggering burden" on the federal government. *Id.* at 806 (first quoting *Capitan Grande Band v. Helix Irrigation Dist.*, 514 F.2d 465, 471 (9th Cir. 1975), and then quoting *Poafpybitty*, 390 U.S. at 374). In sum, *Narragansett Tribe of Indians* does not stand for the Allottees' expansive proposition of "come one, come all" when federal common law trespass claims are involved.

[¶43] Second, the Allottees' blurring of the lines between tribes and individual allottees has already been rejected by the Eighth Circuit. The Allottees presented a similar, if not the same, argument to the Eighth Circuit in *Chase* when they cited "*Oneida II* for the proposition that Indians have a federal common law trespass action against those who maintain an unauthorized presence on Indian trust land because the Indians' right to exclusive possession of their land is a federal right." *Chase*, 12 F.4th at 873 (internal quotation marks omitted). In other words, the Allotees contended they and the Oneida Indian Nation had equal footing because of their rights related to trust land. *Id.* The Eighth Circuit dismissed their argument as "not clearly supported" in either *Oneida I* or *Oneida II*. *Id.* at 873-74. Instead, the Eighth Circuit plainly separated tribes and allottees despite their trust land similarity: "[T]his case is distinguishable from *Oneida* in two significant respects—the Allottees are not a tribe, like the Oneida Nation, and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title." *Id.* at 872. Additionally, in the Eighth Circuit's earlier case of *Wolfchild*, the Court highlighted the "Supreme Court directly distinguished cases regarding 'lands allocated to *individual* Indians,'" from those involving a tribe asserting their aboriginal rights. 824 F.3d at 768 (quoting *Oneida I*, 414 U.S. at 676-77) (discussing the differences between individuals and tribes in *Oneida II*). The Allottees' suggestion of there being "no legal difference" is misplaced considering binding case law. Doc. No. 134, p. 3. Accordingly, that line of argument cannot further their quest for a federal common law trespass claim.

b. The Allottees' Interactions with Federal Law Cannot Grant Them a Federal Common Law Claim for Trespass

[¶44] Moving past arguments about tribal-allottee equality, the Allottees next contend they have sufficient legal ties to federal law and resemble the *Oneida* tribal plaintiffs just enough to also share in their ability to assert a federal common law claim. *Id.* The Allottees emphasize that Indian trust lands arise under federal law and the United States owes fiduciary duties to Indian landowners enshrined in federal law, ultimately arguing these facts should give rise to a trespass claim under federal common law. *Id.* Andeavor argues the Allottees wrongly ignore the "essential" distinction of *Oneida I* from *Taylor*: federal common law claims follow tribal claims to aboriginal title of land. Doc. No. 138. The Court agrees with Andeavor.

[¶45] The Allottees emphasize similarities the Supreme Court chose to overlook, and they overlook differences the Supreme Court opted to emphasize. Interestingly, the *Taylor* Court was unpersuaded jurisdiction—let alone a federal common law claim—existed by virtue of the land becoming allotted for individual Indians pursuant to federal law or else being subject to ongoing protection by federal statute. *Taylor*, 234 U.S. at 75 (noting federal statutes restricted the alienation of the individual Indians' lands and the land was allegedly held in fee). This same point rang true when it came to Indian trust land in *Oneida I*. 414 U.S. at 677. There, the Supreme Court said the mere fact "federal law now protects" the trust lands was an insufficient jurisdictional hook. *Id.* Rather, federal question jurisdiction required the ongoing federal protection of the land *plus* the unique circumstance that federal law had "continuously protected from the time of the formation of the United States, *possessory rights to tribal lands*." *Id.* (emphasis added). Stated plainly, the allegation of aboriginal title tipped the scale. *Id.* This is a point the Allottees kept absent from their briefs (*see* Doc. No. 85 (mentioning "aboriginal title" or "Indian title" five times and only while describing cases' reasoning)), likely because the Supreme Court's pages upon pages of analysis regarding aboriginal title in the *Oneida* cases do not fare well for their point of view, *see Oneida I*, 414 U.S. at 666-78.

c. Aboriginal Title Is Key Given Its Historical Significance

[¶46] "[T]he *nature* and *source* of the possessory rights" of Indians to land—namely, claiming aboriginal title[5]—is

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[5] Although the Supreme Court in *Oneida I* distinguished *Taylor* on the bases of (1) the *Taylor* plaintiffs were not a tribe, and (2) they failed to assert aboriginal title, *see Oneida I*, 414 U.S. at 676, dicta from case law suggests individual Indians could assert an aboriginal right to land, *see United States v. Dann*, 470 U.S. 39, 50 (1985) (recognizing individual Indians may have aboriginal rights "in certain contexts," but not explicitly discussing federal common law claims); *Cramer v. United States*, 261 U.S. 219, 227 (1923) (explaining the "essential spirit" of the policy to "respect the [tribal]

the undeniable key to having a federal common law claim. *Id.* at 667 (emphases added) (discussing jurisdiction but setting the groundwork for *Oneida II*). *See Delaware Nation v. Pennsylvania*, No. 4-CV-166, 2004 WL 2755545, at *11 (E.D. Penn. Nov. 30, 2004), (concluding the tribe failed to state a claim under federal common law because aboriginal title had been extinguished), *aff'd on other grounds*, 446 F.3d 410 (3d Cir. 2006). The Supreme Court's lengthy discussion of aboriginal title is understandable given that particular land status strikes a unique chord in the law due to its protection of an Indian tribe or nation's right to occupy certain land since "time immemorial." *Cherokee Nation v. Georgia*, 30 U.S. 1, 28 (1831). *See Johnson v. M'Intosh*, 21 U.S. 543, 563 (1823) (addressing tribes' aboriginal right of occupancy as it relates to the federal government's rights as sovereign). Lands subject to this special status were those "used by the Indians in their daily lives as hunters and gatherers as well as lands on which they actually resided." *Pueblo of Jemez*, 790 F.3d

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Indian right of occupancy" may also apply to "individual Indian occupancy as well"). *See also United States v. Santa Fe Pac. Ry. Co.*, 314 U.S. 339, 345-46 (1941) (detailing how the *Cramer* case seemed to equalize the treatment of individual and tribal claims to aboriginal title). Whether or not individual Indians may do so and whether or not such a right would then give rise to a federal common law cause of action, however, are questions this Court need not answer given the Allottees have not alleged they have an aboriginal right to the allotments. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.04 n.13 (Nell Jessup Newton et al. eds., 2023) ("[S]ubsequent cases indicate that individual tribal members have a federal common-law aboriginal right to some kinds of property, . . . [but] [t]he individual/tribal distinction has not been applied with respect to federal common-law actions involving tribal sovereignty." (citations omitted)).

at 1156. Recognition of aboriginal title by the United States is a sign of deference to the Indian tribe or nation's status and power "to use [the land] according to their own discretion" with "a legal as well as just claim to retain possession of it," subject to limitations set by the federal government. *Johnson*, 21 U.S. at 574. Aboriginal title's existence does not originate in "a treaty, statute, or other formal government action" because aboriginal title preceded the formation of the United States (and many, if not most, other nations, for that matter).[6] *Santa Fe Pac. Ry. Co.*, 314 U.S. at 347.

[¶47] In contrast to aboriginal title and its deference to tribes' governance of their ancient lands, the designation of "allotted" land is relatively new and purposed to separate the individual Indian from the tribe in an effort to "weaken[] tribal power." *1 Cohen's Handbook of Federal Indian Law* § 1.03 (Nell Jessup Newton et al. eds., 2023). *See Chase*, 12 F.4th at 873-74 (explaining allotments were part of a policy to "extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large"). Allotments were created by federal law in the "late nineteenth and early twentieth centuries, pursuant to the General Allotment Act, [which was intended to break] up Indian reservations into parcels to be held in trust by the United States for individual Indians."

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[6] Aboriginal title, however, is not timeless in the eyes of the law. It may be terminated only by an act of the sovereign, here, that being the United States. *See Oneida I*, 414 U.S. at 667 ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States."). Once aboriginal title is terminated, it is extinguished. *See Santa Fe Pac. Ry. Co.*, 314 U.S. at 347 ("The manner, method and time of such extinguishment raise political not justiciable issues.").

Stands, 105 F.3d at 1572. Not all allotments, however, were created from remnants of land subject to aboriginal title. Some individual Indians were assigned allotments generated from land held in the public domain with which they did not necessarily share any ancestral ties. *See* Leonhard, *supra*, at 76. Thus, at their core, allotments were meant to erase tribal ties to ancient lands—not enshrine those ties in American law, as is the case with aboriginal title.

[¶48] To conclude ancient tribal lands still under tribal power give rise to the same legal privileges as newly created parcels for individuals, as the Allottees propose, would cheapen the rich history of aboriginal lands and constitute a rejection of the Supreme Court's favored treatment of aboriginal title for two centuries. *See, e.g.*, *Johnson*, 21 U.S. at 563; *Cherokee Nation*, 30 U.S. at 28. The Court in *Oneida I* repeatedly emphasized the special status of aboriginal title in American jurisprudence. *See* 414 U.S. at 667 (premising its entire analysis on the "nature and source of the possessory rights of Indian tribes to their aboriginal lands"). Because "possessory and treaty rights of Indian tribes to their lands have been the recurring theme of many other cases," the *Oneida I* Court recognized aboriginal title had to play a significant role in its decision regarding whether the Oneida Indian Nation's claim for possession of the land arose "under federal law." *Id.* at 669-71, 675.

[¶49] Citing a multitude of cases about aboriginal title, the *Oneida I* Court highlighted those cases' role in "lend[ing] substance to petitioners' assertion that the possessory right claimed is a federal right to the lands at issue in this case." *Id.* at 671. That cited body of case law chastised states' attempts to forcibly remove tribes from their aboriginal lands, "tax reservation land," among other things, because of those tribes' aboriginal title. *Id.* at 671-72. *See, e.g.*, *In re New York Indians*, 72 U.S. 761, 769 (1866) ("[T]he two States possessed no power to deal with Indian rights or title."). Given the history of aboriginal title and its special treatment in federal law, the Court concluded: "Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." *Oneida I*, 414 U.S. at 675. *See also id.* at 684 (Rehnquist, J., concurring) ("The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse."). *See also Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019) ("A tribe's authority does not spring from federal law but rather derives from the 'inherent powers of a limited sovereignty which has never been extinguished.'" (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978)).

[¶50] Another item not to be ignored is the aboriginal title bedrock of *Oneida I* also formed the basis for the Oneida Indian Nation's federal common law claim in *Oneida II*. The Court in *Oneida II* stated: "In keeping with these well-established principles [regarding aboriginal title], we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Oneida II*, 470 U.S. at 236. To divorce the *Oneida* cases from aboriginal title and characterize them as being merely about trust lands or ongoing federal protections would leave those cases in shambles. *See, e.g.*, *Oneida I*, 414 U.S. at 677 (explaining the Court's jurisdiction rested on the allegation the tribal land had been "continuously protected from the time of the formation of the United States" by federal law); *Oneida II*, 470 U.S. at 236 (holding the Oneidas possessed a federal common law claim for possession due to the "well-established principles" of aboriginal title).

6. The Allottees' Newly Cited Cases Confirm Aboriginal Title Is the Necessary Ingredient for Developing a Federal Common Law Claim for Trespass

[¶51] The Allottees' citation to recent decisions from other courts only confirm aboriginal title is the necessary element for possessing a claim for trespass under federal common law. Those cases concern tribes seeking remedies for alleged trespass across their tribal lands. *See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. C15-0543RSL, 2023 WL 2646470, at *3, *6 (W.D. Wash. Mar. 27, 2023) (concluding, following a bench trial, the tribe had shown by a preponderance of the evidence that the railway company had trespassed on Indian lands held in trust by the federal government and "established by treaty"); *see also Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030, 1038, 1056-57 (W.D. Wis. 2022) (granting partial summary judgment in favor of the Bad River Band on its claim for trespass, among other claims, against an oil and natural gas owner and operator when they crossed tribal lands held in trust by the United States). Accordingly, these cited cases fail to further the Allottees' cause.

7. The Court Will Not Create a Federal Common Law Cause of Action for Trespass

[¶52] Given the Supreme Court explicitly and substantially relied on aboriginal title in the *Oneida* cases and made it a point of distinction for the *Taylor* decision, this Court declines to create a new federal common law cause of action for the Allotees when they have not claimed aboriginal title. *See Chase*, 12 F.4th at 877 (explaining the Allottees' alleged federal common law claim would have to arise "absent federal statutory guidance" (quoting *Oneida II*, 470 U.S. at 236)).

[¶53] The Court does not have license to create federal common law as it sees fit:

> The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.

Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) (citation omitted). Indeed, the Supreme Court has directed the realm of federal common law is "narrow," and may exist only when "the rights and obligations of the United States" are involved, certain matters of "interstate and international disputes" have arisen, or when admiralty law is concerned. *Id.* at 641 (footnotes omitted).

[¶54] The Supreme Court in the *Taylor* and *Oneida* cases made plain the federal government's ongoing interests in and obligations to Indian allotted land not subject to aboriginal title fail to give rise to a federal common law claim. *Id.* As already discussed, the *Taylor*

Court refused to find federal question jurisdiction (or otherwise create a federal common law claim) when claims arose regarding allotted land even when a federal statute explicitly protected individual Indians' allotments from undue alienation. 234 U.S. at 74-76. The Court in *Oneida I* and *Oneida II* repeated that understanding when it spelled out federal question jurisdiction and, ultimately, a federal common law claim, were the result of the Oneida's aboriginal claim to the land—not merely federal law's protection of that land. *See Oneida I*, 414 U.S. at 677 (explaining federal question jurisdiction was triggered due to the fact that "federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands"); *Oneida II*, 470 U.S. at 235-36 (holding a federal common law claim for possession resulted from the claim of aboriginal title).

[¶55] Courts facing similar requests by Indian allotee plaintiffs have, by and large, reached the same conclusion: allottees do not possess a federal common law claim for trespass. The Court is aware of only one exception from the Tenth Circuit. In *Nahno-Lopez v. Houser*, the Tenth Circuit concluded—with little analysis—individual Indian allottees had a federal common law trespass claim. 625 F.3d at 1282. Nine years later, the Tenth Circuit stated its earlier case of *Nahno-Lopez* seemed to be a situation where the court "simply assumed such a claim's existence" because it was "unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment." *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 965 n.2 (10th Cir. 2019). Notably, neither decision from the Tenth Circuit mentioned aboriginal title or the Supreme Court's case of *Taylor*.

[¶56] Turning to the Ninth Circuit, that court has not held individual allottees hold a federal common law trespass claim. *See Chase*, 12 F.4th at 874 n.6 ("But we have not found, nor do Allottees cite, a Ninth Circuit case holding that federal common law encompasses suits by *individual* Indian landowners."). Although the Ninth Circuit recognized "[f]ederal common law governs an action for trespass on Indian lands," *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009), its subsequent cases do not leap to the conclusion that allottees have a federal common law trespass claim. Indeed, in 2019, the District Court for the Northern District of California rejected an individual Indian allottee's trespass claim under federal common law due to the *Oneida* and *Taylor* decisions. *See Pacino v. Oliver*, No. 18-cv-06786, 2019 WL 13128558, slip op. at *4 (N.D. Cal. Aug. 29, 2019) ("Pacino fails to state a claim under the federal common law as set forth in the *Oneida* line of cases. In contrast to a claim for *aboriginal* title, Pacino's lawsuit concerns 'lands allocated to individual Indians, not tribal rights to lands.'" (quoting *Oneida I*, 414 U.S. at 676)). The court "readily" distinguished prior Ninth Circuit cases because they fell into one of several categories: (1) the United States brought a trespass claim on behalf of a tribe; (2) the United States brought, on behalf of individual allottees, a trespass action; (3) the United States plus the tribe brought a claim for trespass; (4) an individual Indian allottee asserted other grounds for federal question jurisdiction and tacked on a state common law claim for trespass; and (5) other cases were brought pursuant to federal statutes and regulations that protected allotments from improperly granted rights-of-way. *Id.* at *3 n.3 (citing cases). Ultimately, the Pacino court concluded the allottee had no federal common law trespass claim and labeled the Tenth Circuit's case of *Nahno-Lopez* an "outlier" among circuit court decisions. *Id. See also Chase*, 12 F.4th at 874 n.6 (explaining "neither the Ninth Circuit nor the Tenth Circuit has definitively resolved the issue").

[¶57] At least one district court within the Third Circuit has also agreed a federal common law claim for trespass does not exist apart from an allegation of aboriginal title. In *Delaware Nation v. Pennsylvania*, the District Court for the Eastern District of Pennsylvania recognized *Oneida II* gave "Native Americans [the] right to sue to enforce their *aboriginal title* against trespassers on their land" under the "federal common law," but the "element termed 'tribal land'" (i.e., "Indian title" or "aboriginal title") "is necessary" for a federal common law trespass claim. 2004 WL 2755545, at *10-11. Accordingly, even though the Delaware Nation—a federally recognized tribe—brought the suit, its failure to establish aboriginal title to the land was the demise of its claim. *See id.* at *11 ("[T]ribal land rights may not be revived, and without any tribal land rights in Tatamy's Place, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law.").

[¶58] Finally, the Eighth Circuit has also towed this same line. Although the *Wolfchild* case "does not directly control the issue in this case" because it involved Indian landowners in fee, *Chase*, 12 F.4th at 874, there, the Eighth Circuit emphasized the pivotal role of aboriginal title, *see Wolfchild*, 824 F.3d at 767-68. In affirming the alleged landowners held no federal common law claim, the Eighth Circuit made clear: "[F]ederal common law claims arise when a *tribe* 'assert[s] a present right to possession based . . . on their *aboriginal* right of occupancy which was not terminable except by act of the United States." *Id.* at 768 (second alteration in original). Where there is no claim to aboriginal title, there is no federal common law claim.

[¶59] In sum, for the reasons set forth above, the Court finds the Supreme Court and Eighth Circuit have closed the door for the Allottees' federal common law trespass claim because there has been no allegation pertaining to aboriginal title.

8. The Possibility of Allottees Not Having an Alternative Cause of Action Does Not Remedy Their Failure to State a Claim

[¶60] The Allottees make one final appeal for having a federal common law claim for trespass. Specifically, they contend without the federal common law claim they will unjustly have no cause of action and be stranded without a remedy "for Defendants' past and ongoing illegal and willful use of [the Allottees'] land." Doc. No. 134, p. 11. They cite cases and statutes prohibiting states from exercising jurisdiction over lawsuits involving allotments held in trust to support their assertion. *See id.* Andeavor argues the Allottees may have recourse by, among other things, potentially suing the BIA for alleged breach of its fiduciary duties with regards to its actions or inaction pertaining to the alleged trespass. Doc. No. 138. Regardless, Andeavor contends, the existence or non-existence of a remedy does not grant the Allottees a federal common law claim for trespass. *Id.* The Court agrees, to an extent, with Andeavor.

[¶61] Whether the Allottees have an alternative avenue of recourse other than a federal common law claim of trespass is a question not properly before this Court.

Additionally, the Allottees' focus on the hypothetical of not having a direct claim against Andeavor "confuses the issues and does not respond to the real question—whether the complaint states a federal claim" on which relief may be afforded. *Nw. S.D. Prod. Credit Ass'n v. Smith*, 784 F.2d 323, 326 n.4 (8th Cir. 1986) ("If no federal claim is stated, the federal forum cannot grant relief."). Here, for the reasons already discussed, the Allottees have failed to establish they possess a federal common law claim for trespass. As a consequence, the Court may not grant them relief on a non-existent claim.

[¶62] Accordingly, the Court **DISMISSES with prejudice** Count I of the First Amended Complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). *See also* Doc. No. 28.

III. The Allottees' Remaining Claims

[¶63] The Allottees' remaining claims must also be dismissed. Aside from the federal common law claim for trespass, the Allottees have asserted three additional claims: Count II (Breach of Easement Agreement); Count III (Unjust Enrichment—Imposition of Constructive Trust); and Count IV (Punitive Damages). Doc. No. 28. Their demise was already foretold by the Eighth Circuit in the *Chase* case.

[¶64] Andeavor originally argued, and repeats in its supplemental brief, that the Allottees' claim for breach of the easement agreement (Count II) must be dismissed because the Allottees are not parties to that agreement. *See* Doc. Nos. 73, 75. *See also* Doc. No. 138, p. 23 (incorporating arguments made in Doc. No. 73). It argues the Allottees are not parties to the easement agreement and the United States was the grantor, thus, the United States must be involved or else the claim is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to allege an essential element of the claim: that they are parties to the agreement. Doc. Nos. 73, 75. The Allottees tacitly admit they are not parties to the easement agreement by referring to themselves as "third-party beneficiaries" and citing cases about parties lacking privity of contract. *See* Doc. No. 85, p. 76. Instead, the Allottees originally contended, and now reiterate, the United States is not a necessary party because they are the beneficial owners of the land affected by the alleged breach. *Id. See also* Doc. No. 134, p. 13 (incorporating arguments from Doc. No. 85 as reasons to deny Andeavor's motion "in its entirety"). Given the direction from the Eighth Circuit, the Court agrees with Andeavor.

[¶65] In the *Chase* decision, the Eighth Circuit did not expressly rule on the Allottees' breach of easement claim, but pointedly said regarding the Allottee's arguments, "In a breach-of-contract action involving a right-of-way over individual trust allotments, the United States, as grantor, is an indispensable party." 12 F.4th at 878 (citing cases). Although the Eighth Circuit said so in dicta, it is a statement of law this Court ought not ignore. *See Wilson v. Zoellner*, 114 F.3d 713, 721 n.4 (8th Cir. 1997) (explaining the Eighth Circuit's dicta must be given respectful consideration and not disregarded) (citing *Fix Fuel & Material Co. v. Wabash R.R. Co.*, 243 F.2d 110, 114 (8th Cir. 1957)).

[¶66] This Court agrees with the Eighth Circuit's suggestion that the Allottees' failure to add the United States is fatal to its breach of easement claim. *See Chase*

12 F.4th at 878. A party asserting a breach of contract claim has the duty to allege three elements: (1) a contract existed between the plaintiff and defendant; (2) the contract was breached by the defendant; and (3) damages flowed from the breach. *Estvold Oilfield Servs., Inc. v. Hanover Ins.*, No. 1:17-cv-016, 2018 WL 1996453, at *2 (D.N.D. Apr. 27, 2018). The Allottees have not alleged they were a party to the contract (*see* Doc. Nos. 85, 134), which the Eighth Circuit has said cannot be excused under these circumstances, *Chase*, 12 F.4th at 878 (stating the United States is a required party to a breach of contract claim involving rights-of-way over Indian allotments held in trust). *See Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015) (affirming the dismissal of an action by Indian allottees for failure to join the United States as an indispensable party when initiating a suit involving an oil and gas leasing on their allotments). *See also Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906, 909-10 (8th Cir. 1964) ("The authorities support the view that generally the Government is the indispensable party in an action which involves alienation or condemnation of Indian property."); *Minnesota v. United States*, 305 U.S. 382, 387-88 (1939) (same). Accordingly, the Allottees' breach of easement claim is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because they cannot fulfill an essential element given they were not a party to the contract and the United States is a necessary party.

[¶67] The Allottees' final two claims for unjust enrichment and punitive damages also fail. Andeavor contends those claims "necessarily fail along with the trespass claim" because they both depend on the survival of the Allottees' federal common law claim for trespass. Doc. No. 73. The Allottees do not disagree those claims/remedies hinge on the success of their request for a federal common law claim of trespass. Doc. No. 85. *See* Doc. No. 28, pp. 28-30 (alleging the unjust enrichment claim arises from the "Defendants' enrichment and Plaintiffs' impoverishment through Defendants' trespass" and punitive damages is proper given the "Defendants' trespass on Plaintiffs' properties was intentional and was not in good faith"). The Court agrees with Andeavor. Given the Allottees do not possess a federal common law claim of trespass, their claims for unjust enrichment and punitive damages cannot survive dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).[7]

[¶68] Accordingly, the Allottees' remaining claims are **DISMISSED with prejudice**.

IV. The Allottees' Motion to Intervene Is Denied

[¶69] The Court also denies the Allottees' motion to intervene in the *Tesoro* lawsuit. *See* Doc. No. 111, p. 3 n.1 (representing the Plaintiffs' Response to Court's Order to Show Cause as to Joinder also "amounts to a motion to intervene"[8]). The Allottees argue they may intervene of right in the *Tesoro* litigation pursuant to Federal Rule of Civil Procedure 24(a) because their "property is central to the claims raised in the Tesoro APA Lawsuit

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[7] The Court further notes the Eighth Circuit in *Chase* highlighted the Allottees' "claims for damages and unjust enrichment for the pipeline's operation between 1993 and the easement's expiration in 2013 fail because a valid contract existed during that period." 12 F.4th at 869 n.2 (explaining this finding was "now law of the case").

[8] The Allottees have not filed a motion to intervene on the docket of *Tesoro*. *See Tesoro*, No. 1:21-cv-00090 (D.N.D. 2021). Although unconventional, the Court will address the motion to intervene filed here.

and the BIA does not adequately represent Plaintiffs' interest." *Id.* Alternatively, the Allottees contend they may permissively intervene under Rule 24(b) for the sake of judicial economy and convenience. *Id.* Andeavor (whose subsidiary is Tesoro) strongly opposes the Allottees' intervention. Doc. No. 112. It argues, among other things, the underlying claims are drastically different given the *Tesoro* case is, at its core, about whether the federal government complied with the Administrative Procedure Act—not about whether the Allottees possess a federal common law claim for trespass. *Id.* Andeavor continues that the Allottees' potential intervention would "fundamentally change the character of *Tesoro*," and, in any event, they fail to satisfy the conditions for intervention under either Rule 24(a) or (b). *Id.* at p. 21. The Court agrees with Andeavor.

[¶70] The Allottees fail to meet the threshold requirements for intervention of right under Federal Rule of Civil Procedure 24(a).[9] A party seeking to intervene of right has two avenues to achieve its goal under Rule 24(a): (1) it must prove a federal statute has given it an "unconditional right to intervene"; or else, (2) the party must have an "interest relating to the property or transaction that is the subject of the action," and disposing of the other action without the interested party would "impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a). One exception to the second avenue is that intervention is improper if

[9] The Allottees apparently abandoned their claim to intervene of right in their reply. *See* Doc. No. 115 (arguing solely for permissive intervention). The Court will, however, address both avenues of intervention.

"existing parties adequately represent [the movant's] interest." Fed. R. Civ. P. 24(a)(2). The Allottees opt for the second method of intervention because they fail to identify any statutory right to intervene. Doc. No. 111, p. 3 n.1. Accordingly, the Allottees bear the burden of establishing: (a) they have "a recognized interest in the subject matter of the litigation; ([b]) the interest might be impaired by the disposition of the case; and ([c]) the interest will not be adequately protected by the existing parties." *South Dakota ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

[¶71] Even assuming the Allottees satisfy the first two factors for intervention of right in the *Tesoro* action, they fail on the third because the United States adequately represents their interest in the litigation. *See* Fed. R. Civ. P. 24(a)(2). The United States is presumptively considered an adequate representative of its citizen's interests, including its citizens who are Indian. *See, e.g.*, *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 922 (8th Cir. 2015) ("The presumption of adequate representation by the United States can be overcome only by 'a strong showing of inadequate representation.'" (quoting *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004)). The Supreme Court has decried arguments to the contrary as "wholly untenable" because "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of [Indian allottees]." *Heckman v. United States*, 224 U.S. 413, 444 (1912) (holding the United States adequately represented the interests of Indian allottees in litigation concerning the allegedly illegal conveyances of allotted lands).[10]

[¶72] The Allottees have not defeated the presumption that the United States is an adequate representative of their interests because they have not shown their "interests actually differ from or conflict with the government's interests." *South Dakota ex rel. Barnett*, 317 F.3d at 786. Indeed, the Allottees highlight the United States, as their trustee, is asserting a trespass claim "on the same federal common law bases and [is seeking] the same remedies" as the Allottees. Doc. No. 115, p. 1 (categorizing the United States' claims as "materially indistinguishable" and "identical" to the Allottees' claims). Neither have they alleged or otherwise shown the United States has engaged in some "clear dereliction of duty" that might otherwise defeat the presumption of adequate representation. *North Dakota ex rel. Stenehjem*, 787 F.3d at 922 (quoting *Chiglo v. Preston*, 104 F.3d 185, 188 (8th Cir. 1997)). The Allottees' conclusory statement regarding the "BIA . . .

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[10] The Supreme Court in *Heckman* also instructed that when "United States itself undertakes to represent the allottees of lands under restriction, . . . such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property." *Heckman*, 224 U.S. at 446. Although this instruction from *Heckman* was not briefed by the Parties, it may serve as yet another basis to dismiss the Allottees' First Amended Complaint because the United States has brought a federal common law trespass claim related to the same property with similar, if not the same, facts. *See* Doc. No. 111 (recognizing "both cases involve the same questions of fact and law underlying Defendants' trespass of Plaintiffs' property, including the [BIA's] previous and pending decisions related to it," and "the BIA, as Plaintiffs' trustee, is also authorized to pursue trespass claims on Plaintiffs' behalf").

not adequately represent[ing]" their interests cannot and does not overcome the strong presumption to the contrary. Doc. No. 111, p. 3 n.1. *See also South Dakota ex rel. Barnett*, 317 F.3d at 786.

[¶73] Neither may the Allottees permissively intervene in the *Tesoro* action. Permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1) allows a court, upon a "timely motion," to permit "anyone to intervene" who either has a "conditional right" to do so pursuant to a federal statute or "a claim or defense that shares with the main action a common question of law or fact." The Court has significant discretion to allow or deny permissive intervention, even if the movant shares a question of law or fact with parties in the ongoing litigation. *See South Dakota ex rel. Barnett*, 317 F.3d at 787 ("The decision to grant or deny a motion for permissive intervention is wholly discretionary."). In making its decision, the district court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Additionally, although it may only play a "minor" role in the permissive intervention analysis, the Court should consider "the adequacy of protection afforded to the prospective intervenors by the existing defendants." *H.J. Martin & Son, Inc. v. Ferrellgas, Inc.*, No. 1:20-cv-054, 2020 WL 6122525 (D.N.D. Oct. 16, 2020) (quoting *Franconia Mins. (US) LLC v. United States*, 319 F.R.D. 261, 266 (D. Minn. 2017)).

[¶74] The Allottees' request would serve to unduly delay and prejudice the *Tesoro* litigation. They seek to litigate the claim this Court has found they do not possess: whether individual Indian allottees possess a federal common law claim of trespass. Indeed, this is a claim the United States in the *Tesoro* action explicitly declined to defend and represented to not be "before [the *Tesoro*] Court." *Tesoro*, No. 1:21-cv-00090, ECF No. 62, p. 29 n.17 ("The United States does not, at this time, make any assertions about the Allottees' ability to raise a federal common-law trespass claim."). The United States made clear in *Tesoro* its alleged right to assert a federal common law trespass claim is distinct from the Allottees' alleged right. *Id.* at p. 29 ("[N]one of the cases cited involve claims by the United States in its sovereign capacity as property owner and trustee[.]").

[¶75] Additionally, their intervention would sidetrack ongoing matters in the *Tesoro* case. Their proposed intervention would add months of time and expense due to them filing more briefs in an already prolonged case ripe for decision. Not to mention, the briefing would likely encompass matters unrelated to the litigation, such as class certification, and other issues the Allottees have expressed minor, if any, interest in (e.g., the claim pursuant to the Administrative Procedure Act upon which the case is built). Finally, the other matters about which the Allottees would seek to weigh-in on have already been adequately addressed by the United States on their behalf as trustee. *See H.J. Martin & Son, Inc.*, 2020 WL 6122525 (explaining adequacy of representation by existing defendants may be a factor to consider for permissive intervention). In sum, the Allottees' permissive intervention is improper because it would add undue delay and expense to that litigation. The Court, in its discretion, denies the Allottees' request to permissively intervene. *See* Fed. R. Civ. P. 24(b).

CONCLUSION

[¶76] For the foregoing reasons, the Court **GRANTS, in part**, the Defendants' Amended Motion to Dismiss insofar as it seeks to dismiss the Allotees' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, the First Amended Complaint is dismissed with prejudice.

[¶77] **IT IS SO ORDERED.**

DATED August 8, 2023.

Daniel M. Traynor, District Judge
United States District Court

Appendix C

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 23-3019

JoAnn Chase, et al.

Appellants

v.

Andeavor Logistics, L.P., et al.

Appellees

United States of America

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the
District of North Dakota – Western
(1:19-cv-00143-DMT)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

April 13, 2026

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

Appendix D

United States Court Of Appeals
For The Eighth Circuit

No. 20-1747

JOANN CHASE, ET AL.,

Plaintiffs-Appellants

v.

ANDEAVOR LOGISTICS, L.P., ET AL.,

Defendants-Appellees

Appeal from United States District Court
for the District of North Dakota – Western

Submitted: February 18, 2021
Filed: September 13, 2021

Before LOKEN, BENTON, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Andeavor Logistics L.P. and its co-defendants (collectively, "Andeavor") own and operate the High Plains Pipeline System, a 500-mile oil pipeline that transports oil from North Dakota's oil-rich Bakken region to a refinery in Mandan, North Dakota. In 1953, Andeavor's predecessor-in-interest obtained a twenty-year right-of-way from the Department of the Interior allowing the pipeline to cross lands on the Fort Berthold Indian Reservation. The right-of-way was renewed for successive twenty-year terms in 1973 and 1995 before expiring in 2013. Despite expiration, Andeavor continues to operate the pipeline across a mixture of tribal lands and individually-owned allotments, all held in trust by the United States. In 2017, Andeavor agreed with the Mandan, Hidatsa, and Arikara Nation, known as the Three Affiliated Tribes (the "Tribe"), to renew the right-of-way over tribal lands, and to pay trespass damages for continued operation of the pipeline after expiration. Andeavor then began renewal negotiations with individual Indian landowners. Some did not agree to renewal and the talks stalled.

In October 2018, certain landowners (the "Allottees") filed this putative class action against Andeavor in the United States District Court for the Western District of Texas, seeking compensatory and punitive damages for ongoing trespass and injunctive relief requiring Andeavor to dismantle the pipeline. The case was transferred to the District of North Dakota. The district court granted Andeavor's motion to dismiss, concluding the Allottees failed to exhaust administrative remedies with the Bureau of Indian Affairs ("BIA"). The Allottees appeal. The parties raise numerous complex issues regarding the right of individual Indians to obtain trespass relief in federal court. We conclude that the case turns on issues sufficiently within the primary jurisdiction of the BIA to warrant stay, rather than dismissal, to give the BIA opportunity to take further action.

I. Background Facts and Procedural History

Part of Andeavor's High Plains Pipeline System crosses the Fort Berthold reservation in western North Dakota, home to the Three Affiliated Tribes. Within reservation boundaries, the pipeline crosses tracts of Tribal land, individually-owned Indian lands, and jointly-owned lands, all held in trust by the BIA. The Indian Right-of-Way Act of 1948 authorizes the Secretary of the Interior to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes." Act of Feb. 5, 1948, Pub. L. No. 80-407, 62 Stat. 17, codified at 25 U.S.C. §§ 323-38. The Secretary may not grant a right-of-way on tribal lands without the tribe's consent but may grant a right-of-way on individual trust allotments without the landowner's consent if certain criteria apply. 25 U.S.C. § 324. The pipeline began operating in 1953 after the BIA (to which the Secretary has delegated this authority) granted Andeavor's predecessor a twenty-year right-of-way. In 1973, the agency renewed the right-of-way for another twenty years. The right-of-way expired in 1993, but in 1995, the BIA retroactively renewed it back to 1993. In June 2013, the right-of-way again expired. Andeavor has continued to operate the pipeline, presumptively trespassing on Indian lands.

Andeavor set out to negotiate right-of-way renewals to resolve its continuing trespass. At the Tribe's insistence, Andeavor refrained from negotiating with individual landowners until it completed negotiations with the Tribe. In February 2017, the Tribe and Andeavor agreed to renew the right-of-way and settle past trespass damages for Tribal land for roughly $2 million per acre. On January 30, 2018, the BIA sent Andeavor a 10-Day Show-Cause Letter stating the pipeline had been trespassing on individually-owned Indian lands since the right-of-way expired in 2013. On February 7, Andeavor informed the BIA that it was currently negotiating with individual landowners to obtain their consent for renewal. On April 10, the BIA asked the landowners to confirm that good-faith negotiations were in progress. Many did. Counsel for the Allottees requested that the BIA take no action to recover possession or seek trespass remedies while negotiations continued.

The negotiations did not bear fruit. In October 2018, the Allottees commenced this action in the Western District of Texas. The Amended Complaint alleged continuing trespass under federal common law, breach of the easement agreement, and unjust enrichment. They sought various forms of relief including compensatory and punitive damages, an accounting of profits, disgorgement, and an injunction requiring Andeavor to cease operations, remove the pipeline, and restore lands to their original conditions, as the easement agreement and federal regulations require.

After transfer to the District of North Dakota, Andeavor moved to dismiss on numerous grounds. The district court granted the motion based on the Allottees failure to exhaust administrative remedies under the BIA regulations. Alternatively, the court held that it would require the Allottees to seek administrative remedies before obtaining judicial review even if the regulations did not require exhaustion. The court did not address Andeavor's remaining grounds for dismissal.

The Allottees raise a host of issues in challenging the district court's dismissal of their Amended Complaint. Andeavor defends the judgment on numerous grounds. We review *de novo* the grant of a Rule 12 motion to dismiss, assuming all factual allegations in the pleadings are true and viewing them in the light most favorable to the nonmoving party. *Wolfchild v. Redwood Cnty.*, 824 F.3d 761, 767 (8th Cir.), *cert. denied*, 137 S. Ct. 447 (2016) (citations omitted). Dismissal is appropriate when the moving party is entitled to judgment as a matter of law. *Id.* (citations omitted).

II. Failure to Exhaust Administrative Remedies

In general, the well-established doctrine of administrative exhaustion requires a party to follow prescribed procedures for obtaining administrative remedies before seeking judicial relief. *See Klaudt v. United States Dep't of Interior*, 990 F.2d 409, 411 (8th Cir. 1993). Pursuant to explicit rule-making authority, *see* 25 U.S.C. § 328, the Secretary promulgated rules governing rights-of-way over Indian lands and authorized the BIA to administer the regime. See 25 C.F.R. pt. 169. Indian land includes land held in trust by the United States for a tribe ("Tribal land") and land owned by individual Indians in trust or restricted status ("individually owned Indian land"). § 169.2.

Part 169 applies to rights-of-way for oil and gas pipelines crossing Indian land. § 169.5(a)(8).[1] Non-owners applying for a pipeline right-of-way must receive the BIA's approval and "the consent of the owners of the majority interest in the land, and the tribe for tribal land." § 169.4(a). Applicants are responsible for negotiating with tribes and individual Indian landowners. If the right-of-way crosses Tribal land, the tribe can impose conditions or restrictions as it sees fit. § 169.107(a). Tribes generally may negotiate for any amount of compensation without interference from the BIA; the agency will provide a valuation analysis upon the tribe's request. § 169.110. For rights-of-way across individually-owned Indian land, an applicant must receive consent from the owners of the majority interest in each affected tract unless the BIA grants a right-of-way without individual landowner consent because specific criteria apply. § 169.107(b)(1)(i)-(iv); *see* 25 U.S.C. § 324. Upon request, the BIA will identify owners subject to the proposed right-of-way and may assist in contacting owners and facilitating negotiations. 25 C.F.R. § 169.106. Payments to individual landowners generally must be at least fair market value, as determined by a mandatory valuation. § 169.112.

Part 169 provides procedures for grantee violations of a right-of-way, continued use after it expires, and use

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[1] An earlier Act passed in 1904 authorizes the Secretary to grant easements lasting up to twenty years for oil and gas pipelines crossing tribal lands or individually-owned trust lands. *See* 25 U.S.C. § 321. The 1948 Act did not repeal the 1904 Act. *See Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058-59 (9th Cir. 1988); *see also* 25 U.S.C. § 326. The parties agree that the 1948 Act and its implementing regulations under Part 169 govern this dispute.

of Indian land without approval. 25 C.F.R. pt. 169, subpt. F. Unauthorized use includes "accidental, willful, and/or incidental trespass." § 169.401. Trespass is not defined. Section 169.410 specifically addresses grantee holdover situations:

> If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way, and is not accessing the land to perform reclamation or other remaining grant obligations, [BIA] may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified [BIA] in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, [BIA] may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action. The holdover time will be charged against the new term.

The district court noted that in *Klaudt*, which involved nonpayment of tribal taxes for cattle grazing, we held that the "clearly detailed administrative process and remedies" in 25 C.F.R. Part 2 "must be followed before seeking relief in the court system." 990 F.2d at 411. Here, the district court concluded, the Allottees did not exhaust these mandatory procedures by appealing the grant of the 1993 easement.[2] "As to the alleged

[2] On appeal, the Allottees represent they are dropping their "Past Trespass" claim, effectively acknowledging that the 1993 renewal was valid. Thus, their claims for damages and unjust enrichment for

holdover situation," the court ruled, "the BIA is apparently conducting its investigation [and] has not made a final determination."

The Allottees argue the district court erred in dismissing the Amended Complaint on exhaustion grounds because the BIA lacks the authority to grant all the relief they seek, and administrative exhaustion does not apply when an agency cannot grant the relief a party seeks. In *McCarthy v. Madigan*, the Supreme Court noted that exhaustion may not apply when "an agency may be competent to adjudicate the issue presented, but ... lack[s] authority to grant the type of relief requested." 503 U.S. 140, 148 (1992); *see id.* at 156 (Rehnquist, C.J., concurring) (exhaustion "improper" when litigant seeks relief that is unavailable as an administrative remedy); *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 937-38 (8th Cir. 2005).

On appeal, both parties agree the Indian Right-of-Way Act and its implementing regulations do not authorize the BIA to award the Allottees administrative trespass remedies. Section 169.410 only authorizes the BIA to seek administrative and judicial remedies on behalf of individual Indian landowners. The district court erred in not considering this exhaustion factor. The Allottees argue that lack of remedial authority is dispositive. Andeavor counters that the agency holdover process is not complete, that the "administrative remedy in itself is a remedy," and that it would be "untenable" if the case was not dismissed and the BIA approved a

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the pipeline's operation between 1993 and the easement's expiration in 2013 fail because a valid contract existed during that period. *See JN Expl. & Prod. v. W. Gas Res., Inc.*, 153 F.3d 906, 910 (8th Cir. 1998). This is now law of the case.

right-of-way while the Allottees were suing for trespass. Andeavor further notes the regulations provide procedures the Allottees may follow to appeal the BIA's decisions or its failure to act. *See* 25 C.F.R. §§ 2.6, 2.8, 169.13. And § 169.410, which the agency has described as "exclusive,"[3] authorizes the BIA to "recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law."

We find nothing in the Indian Right-of-Way Act, 25 U.S.C. §§ 323-28, or its implementing regulations, 25 C.F.R. pt. 169, authorizing the BIA to award the Allottees damages or injunctive relief for Andeavor's alleged ongoing trespass. They only appear to authorize the BIA to impose administrative sanctions for a holdover grantee's trespass, including an order that the grantee stop operating the pipeline, *see* § 169.404(b)(3), and to seek judicial remedies on behalf of individual Indian landowners. Accordingly, we conclude the district court erred in finding the Allottees failed to exhaust required administrative remedies. What is far less clear is whether in this situation the agency's inability to provide all the remedies the Allottees seek warrants the further conclusion that the district erred in exercising its judicial discretion to require non-mandatory exhaustion.

III. The Primary Jurisdiction Alternative

As Andeavor argued in its Brief, exhaustion of administrative remedies is not the only jurisdictional issue presented on this record:

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[3] *See* Rights-of-Way on Indian Lands, 80 Fed. Reg. 72492, 72523 (Nov. 19, 2015) ("The final rule addresses holdovers exclusively in FR 169.410 ....").

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulation duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956). "No fixed formula exists for applying the doctrine of primary jurisdiction." *Id.* at 64. "The advisability of invoking primary jurisdiction is greatest when the issue is already before the agency," and the agency's "informed opinion will be of material aid to the district court in the resolution of" remedial issues including damage claims. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976). Though the district court did not discuss this jurisdictional alternative and the Allottees did not refer to it in their initial Brief, "its invocation cannot be waived by the failure of the parties to argue it, since the doctrine exists for the proper distribution of power between judicial and administrative bodies." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988).

In their Reply Brief, the Allottees argue primary jurisdiction does not apply because "a trespass dispute does not fall outside the conventional competence of the courts" and because Congress granted them a cause of action to enforce allotment rights in 25 U.S.C. § 345.[4] To put the primary jurisdiction issue in proper perspective, it is necessary to discuss in some detail two additional aspects of the case: first, the historical background underlying the Allottees' assertion they have a federal common law claim for trespass on their individually owned Indian lands; second, the unusual series of actions taken by the BIA after the district court dismissed the Amended Complaint in April 2020.

A. Federal Common Law Claims by Indians. Andeavor argues that we lack subject matter jurisdiction because the Allottees do not have a federal common law trespass claim. The Allottees argue we have federal question jurisdiction under 28 U.S.C. § 1331 because their trespass claims arise under federal common law. The statutory grant of jurisdiction in § 1331 "will support claims founded upon federal common law as well as those of a statutory origin." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). In this case, we see no serious question of subject matter jurisdiction because if the Allottees have a valid claim for Andeavor's alleged trespass on Indian

[4] This 1894 statute grants district courts jurisdiction over "suits involving allotments." *United States v. Mottaz*, 476 U.S. 834, 845 (1986); *see Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010). We have held that when a plaintiff holds fee title to the land, a "complaint seeking relief for trespass does not state a claim contemplated by § 345." *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987). Nor does the statute preclude the doctrine of primary jurisdiction.

lands, without question it is a claim under federal law. But whether the Allottees' assertion of a federal *common law* cause of action states a claim on which relief can be granted is a core issue that at some point must be resolved by a federal court. It is a complex issue.

The Constitution granted Congress "plenary authority" to "legislate concerning tribal property." *Winton v. Amos*, 255 U.S. 373, 391 (1921). With its adoption, "Indian relations became the exclusive province of federal law." *Cnty. of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985) (*Oneida II*). The initial federal approach to Indian land policy was to establish tribal reservations by treaty. *See Leech Lake Band of Chippewa Indians v. Cass Cnty.*, 108 F.3d 820, 822 (8th Cir. 1997), *rev'd on other grounds*, 524 U.S. 103 (1998).

In *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 414 U.S. 661 (1974) (*Oneida I*), the Supreme Court reversed the dismissal for lack of subject matter jurisdiction of a suit by the Oneida Nation challenging the conveyance of lands that early federal treaties had reserved for the tribe. The Court noted the "accepted doctrine ... that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized." *Id.* at 667. "That right, sometimes called Indian title and good against all but the sovereign ... was extinguishable only by the United States." *Id.*; *see Wolfchild*, 824 F.3d at 767-68 n.2. "Tribal rights were ... entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the power of Congress is supreme." *Oneida I*, 414 U.S. at 669 (cleaned up). "[A]bsent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674; *see Oneida II*, 470 U.S. at 236.

Relying on the *Oneida* decisions, the Allottees argue that individual Indian landowners have federal common law claims against trespassers like Andeavor. But this case is distinguishable from *Oneida* in two significant respects -- the Allottees are not a tribe, like the Oneida Nation, and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title. In *Oneida I*, the Supreme Court carefully distinguished its prior decision in *Taylor v. Anderson*, 234 U.S. 74 (1914), which held that federal jurisdiction did not extend to an ejectment action by individual Indians based on lands they acquired under federal patents:

> *Taylor* is more like those cases indicating that *a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress*. Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for "arising under" jurisdiction merely to allege that ownership or possession is claimed under a United States patent.
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> * * * * *
>
> *Here, the Oneidas assert a present right to possession based in part on their aboriginal right of occupancy*

> *which was not terminable except by act of the United States*. Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States, and it is to these treaties that we must look to ascertain the nature of these Indian rights, and the extent of them. Finally, the complaint asserts a claim under the Nonintercourse Acts which put in statutory form what was or came to be the accepted rule -- that the extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

Id. at 676-78 (emphasis added; cleaned up). In a concurring opinion, Justices Rehnquist and Powell observed that the Oneidas' claimed right to possession "is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee" of those rights by statute. *Id*. at 684. When the case returned to the Supreme Court in *Oneida II*, the Court affirmed the finding of liability under federal common law, reaffirming "that Indians have a federal common law right to sue to enforce their aboriginal land rights." 470 U.S. at 235 (citations omitted). The Court noted that "*Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights," and that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id*. at 236.

What is referred to as the "Allotment Era" began in the late 1800s, when Congress adopted a policy that carved reservations into allotments and assigned land parcels to individual tribal members. The goal was to extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large. In the early years of this policy, many tribal members lost their allotted lands to non-Indians in unfair or fraudulent transactions. *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Congress responded by enacting the Indian General Allotment Act of 1887, known as the Dawes Act.[5] The Dawes Act sought to prevent alienation of Indian-owned lands by replacing the fee-simple-ownership of early allotments with a trust-based model in which the President allotted tracts to individual Indian landowners. The United States held these allotments in trust for twenty-five years, after which the individual Indian landowners acquired fee-simple title to the property. *Id.*

Allotted lands held in trust under the Dawes Act proved to be "administratively unworkable and economically wasteful." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). In 1934, Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes-Act era," "halted further allotments," and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Yakima*, 502 U.S. at 255, citing the Indian Reorganization Act, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 *et seq.*; *see* §§ 5101, 5102. This statute

[5] 24 Stat. 388, 25 U.S.C. § 331 *et seq.*, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, §§ 101-103, 114 Stat. 1991.

did not affect the two-thirds of allotted Indian lands already acquired by non-Indians, resulting in a checkerboard of federally-held trust lands and privately-owned fee-simple lands that continues on many reservations today. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1653 (2018); *see Yakima*, 502 U.S. at 255-56. The Allottees are equitable owners of allotted land that continues to be federally-owned trust land.

As the country industrialized and moved West, the "checkerboard" of lands owned by tribes, individual Indians, and individual non-Indians complicated the development of "train tracks, telegraph wires, and other conduits of modern commerce." *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 964 (10th Cir. 2019). Special access statutes limiting rights-of-way to cross Indian lands further complicated the problem. *See Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 958 (8th Cir. 1983). In response, Congress enacted the Indian Right-of-Way Act of 1948 to simplify the right-of-way granting process. *Id.* at 959. That statute governs the BIA's authority in resolving the Andeavor holdover dispute.

Andeavor argues that the Allottees have no federal common law trespass claims under *Oneida I* and *Oneida II*, which limit federal *common law* remedies to Indian tribal landowners whose present right to possession is based on an unextinguished Indian title (*aboriginal* right of occupancy). The Allottees counter, citing *Oneida II* for the proposition that "Indians have a federal common law trespass action against those who maintain an unauthorized presence on Indian trust land" because the "Indians' right to 'exclusive possession' of their land is 'a federal right.'" They further argue that 25 C.F.R. § 169.413 governs who may bring an action for trespass on Indian lands in federal court and allows either the BIA or the Allottees to independently do so, and that the BIA's ability to bring a claim on their behalf does not impair their individual rights to sue.

The Allottees' argument is not clearly supported by the Supreme Court's holding in *Oneida I* or *Oneida II*, as we expressly ruled in *Wolfchild v. Redwood County*. In *Wolfchild*, putative class-plaintiffs asserted federal common law ejectment and trespass claims against numerous defendants, alleging they owned exclusive title to individual parcels of land in southern Minnesota that the Secretary of the Interior, acting under an 1863 Act of Congress, set aside for their Mdewakanton Sioux ancestors. *See* 824 F.3d at 765-67. In affirming the district court's grant of motions to dismiss, we held that under *Oneida I*, "federal common law claims arise when a *tribe* 'assert[s] a present right to possession based on their *aboriginal* right of occupancy.'" *Id*. at 768 (emphasis and brackets in original) (quoting *Oneida I*, 414 U.S. at 677). The Wolfchild plaintiffs failed to state a claim under federal common law because they did not allege "*aboriginal* title," and the 1863 Act only concerned lands allocated to "*individual[s]* -- not a tribe." *Id*. at 768 (emphasis in original). The plaintiffs therefore failed to state a federal common law claim:

> [T]he language of the 1863 Act directly contradicts any claim that the loyal Mdewakanton had aboriginal title to the twelve square miles. ... Thus, assuming the twelve square miles were set apart for the loyal Mdewakanton, the land was for the benefit of each *individual* -- not a tribe. This lawsuit, therefore,

> concerns "lands allocated to individual Indians, not tribal rights to lands," and does not fall into the federal common law articulated in the *Oneida* progeny.

Id. (quoting *Oneida I*; emphasis in original). We went on to conclude that the 1863 Act did not provide a private federal remedy and affirmed the dismissal.

In their Brief on appeal, the Allottees argue that in *Wolfchild*, we "never addressed whether an Indian owner of allotted trust land has a cognizable claim for trespass under federal common law -- so *Wolfchild* has no direct bearing on whether, here, the Individual Landowners have a federal common law claim for trespass." We agree our decision in *Wolfchild* does not directly control the issue in this case because the plaintiffs in *Wolfchild* were fee simple owners of the land in question, whereas the Allottees are equitable owners of lands owned by the federal government in trust. But in *Oneida I*, the Supreme Court distinguished the Oneidas' claim at issue from the Indian landowner claim in *Taylor v. Anderson* that did not raise a federal question:

> Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. In *Taylor*, the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands. Individual patents had been issued with only the right to alienation being restricted for a period of time.

414 U.S. at 676. Thus, while the specific issue in this case was not "addressed" in *Wolfchild*, our reliance on the above-quoted reasoning has a "direct bearing" on whether the Allottees have the federal common law rights they assert, or whether they must instead find an alternative basis for their claims under federal law. Our analysis in *Wolfchild* is certainly open to interpretation, and the BIA's views as to whether the distinction drawn in *Oneida I* applies to a right-of-way holdover situation may be relevant and persuasive. So we decline to decide the issue at this time.[6]

B. Recent BIA Actions. On July 2, 2020, after the Allottees submitted their initial Brief on appeal, the Regional Director of the BIA's Great Plains Regional Office (which covers North Dakota) sent a formal Notification of Trespass Determination to Andeavor (the "Notice"). The Notice stated that the pipeline had been trespassing on fifty acres of individually-owned trust lands for seven years, reflecting Andeavor's lack of good faith negotiations, and therefore the pipeline was no longer in the landowners' best interest. The BIA ordered Andeavor to immediately cease pipeline use and pay treble damages totaling $187.2 million within thirty

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[6] The Allottees urge us to follow the lead of Ninth and Tenth Circuit decisions that contain dicta supporting the broad federal common law claim they assert. But we have not found, nor do Allottees cite, a Ninth Circuit case holding that federal common law encompasses suits by *individual* Indian landowners. And in *Davilla*, a pipeline trespass case, the Tenth Circuit assumed the common law right existed based on the parties' agreement but stated it was "unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment, or simply assumed such a claim's existence." 913 F.3d at 965 & n.2 (citing *Nahno-Lopez*). Thus, neither the Ninth Circuit nor the Tenth Circuit has definitively resolved the issue.

days, a decision Andover could appeal to the Interior Board of Indian Appeals (IBIA). Andeavor appealed, arguing the Notice ignored that it was in holdover status while negotiating with landowners, ignored its substantial work to obtain fair-market value appraisals, disregarded its record-setting offer of $66,000 per acre to the landowners, and calculated damages based on inapplicable grazing regulations.

Before the IBIA could rule, the Assistant Secretary for Indian Affairs assumed jurisdiction over the appeal (as regulations allow), vacated the Notice, and remanded to the Regional Director to issue a new decision based on specified criteria. The Assistant Secretary's order asserted that federal common law applied to Andeavor's trespass. In later supplemental guidance, the Regional Director was advised to rely only on 25 C.F.R. § 169.410 and common law remedies to address the trespass. The guidance stated that federal common law authorizes the BIA to seek judicial remedies, including compensatory damages, on behalf of Indian landowners for trespass claims against right-of-way holdovers. It cited 28 U.S.C. § 2415(b), a statute of limitations that requires actions by the United States or its agencies on behalf of "a recognized tribe, band, or group of American Indians" to be brought "within six years and ninety days after the right of action accrues."

On remand, the Regional Director issued a Second Notice reducing the damages award to just under $4 million, ordering Andeavor to immediately cease operating the pipeline, and informing Andeavor the BIA might petition the Department of Justice to seek common law damages including an accounting of all rents and profits tied to its trespass. Both Andeavor and the Allottees appealed the Second Notice to the IBIA. On January 14, 2021, the Assistant Secretary again assumed jurisdiction over the appeal, affirmed the Second Notice in its entirety, and declared it judicially reviewable as a final agency action. The IBIA dismissed the parties' appeals.

On March 12, 2021, after the change in administrations, the Acting Secretary of the Interior issued a Decision vacating all prior BIA actions -- from the Regional Director's First Notice to the Assistant Secretary's January 14 Decision -- and returning the matter to the Regional Director with directions to:

> 1. take such action as is necessary to address [Andeavor's] continued occupation of the expired right-of-way.
>
> 2. provide each of the interested parties with a full and fair opportunity to be heard in this matter, and
>
> 3. issue a new decision, as may be necessary and appropriate.

We are not aware of any further administrative actions the BIA has taken in this dispute. Nor are we aware the BIA has filed an action exercising its claimed authority to assert federal common law trespass claims against Andeavor on behalf of the Allottees. In April 2021, an Andeavor subsidiary filed suit against the United States in the District of North Dakota, seeking to set aside the Acting Secretary's vacatur. *See* Complaint, *Tesoro High Plains Pipeline Co. v. United States*, No. 1:21-cv-00090-DMT, ECF No. 1 (D.N.D. Apr. 23, 2021). That action is pending.

C. Primary Jurisdiction Analysis. Taking these additional factors into account, we conclude the record on appeal and relevant authorities present a situation where it is proper to invoke the discretionary judicial doctrine of primary jurisdiction and stay the action pending exercise of jurisdiction the agency has asserted, rather than invoke discretionary exhaustion principles and dismiss the action, which might delay determination of the Allottees' judicial claims indefinitely depending on what action, if any, the BIA determines is "necessary and appropriate."

First, the Allottees do not hold legal title to their lands. The federal government is the fee owner, holding the allotted lands in trust for the Allottees' benefit. The BIA's role as trustee is the core of the many protections Congress has provided for these Indian lands. *See* 25 U.S.C. §§ 2, 348. The BIA grants and administers rights-of-way over lands held in trust, and it protects those lands both from those invading without a right-of-way, and from grantees that violate their right-of-way, including holdovers. *See* § 169.410. The regulations require the BIA to "support tribal self-determination and self-governance ... and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land." 25 C.F.R. § 169.1(a). "The judicial determination of controversies concerning [allotted] lands has been commonly committed exclusively to federal courts." *Minnesota v. United States*, 305 U.S. 382, 389 (1939). But the BIA's extensive authority, protective role, and prior involvement in the controversy make this a prime example of when deferring to an agency's primary jurisdiction is appropriate. Though the Allottees' claims are cognizable in court, their sound determination requires resolution of issues that have been placed within the special competence of an administrative body and that are already before the agency. *Western Pac. R.R.*, 352 U.S. at 63.

Second, the BIA has not simply been involved in this controversy, it has taken action, now vacated, and the Acting Secretary of the Interior has directed the Regional Director to "issue a new decision, as may be necessary and appropriate." Because the BIA cannot afford the Allottees the full relief they seek, the district court need not stay this action until the administrative proceedings conclude. But any action the BIA now takes will be of significance in resolving the judicial dispute. For example, it is almost absurd to think the court will order Andeavor to remove a few miles of its 500-mile pipeline at the individual Allottee landowners' request if the BIA, the Tribe, or a significant portion of the other right-of-way beneficiaries object. This portion of the relief the Allottees seek must await agency action.

With respect to the Allottees' claim for common law damages, the BIA may take the position that it has the exclusive right to seek damages on behalf of the Allottees under 25 C.F.R. § 169.410. *See Rights-of-Way on Indian Lands*, 80 Fed. Reg. at 72523.[7] The Allottees argue their independent right to pursue trespass remedies is confirmed by 25 C.F.R. § 169.413:

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[7] Once a right-of-way is in use, it is the agency's responsibility to supervise the easement and determine when to renew it. It is also in the superior position, as the trustee for all Indian landowners, to pursue remedies that in its judgment advance their collective interest -- especially where, as here, many of the tracts at issue are highly fractionated, and unanimous agreement may be difficult to attain.

> If an individual or entity takes possession of, or uses, Indian land ... without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. ... [The BIA] may take action to recover possession ... and pursue any additional remedies available under applicable law. *The Indian landowners may pursue any available remedies under applicable law, including applicable tribal law.*

(Emphasis added.) This argument seems contrary to the Allottees' basic legal position, because a claim under § 169.413 would be a statutory claim, not a common law claim, and the Supreme Court held in *Oneida I*, 414 U.S. at 674, and repeated in *Oneida II*, 470 U.S. at 236, that the governing rule of decision is federal common law "absent federal statutory guidance." Congress has the power to create private rights of action. We find no express private right of action in the Indian Right-of-Way Act, and the Supreme Court does not look with favor on implied private rights of action. *Cf. Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1968). The views of the BIA on these legal issues would obviously be important.

Third, the Supreme Court noted in *McCarthy* that "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce useful record for subsequent judicial consideration, especially in a complex or technically factual context." 503 U.S. at 145. This factor supports invoking primary jurisdiction here, at least for a limited time. Not only is the judicial controversy within the BIA's area of expertise, the agency may have, or may be able to efficiently develop, facts that may be relevant to one or more legal issues, such as the extent to which the Allottees' rights as equitable owners of Indian land now held in trust derive from unextinguished aboriginal title as opposed to "lands allocated to individual Indians, not tribal rights to lands." *Wolfchild*, 824 F.3d at 768.

For these reasons, we conclude that primary jurisdiction, not exhaustion of BIA remedies, is the discretionary doctrine that should be invoked in this case at this stage of the proceedings. Ultimately, the key question is not whether federal law supplies Allottees a cause of action for trespass on individual Indian allotments, but whether there is a common law or statutory claim they have standing to assert and if so, what is the source of the law that will define whether continuing trespass is occurring and what remedies are available to what parties that have rights in the trust lands. The judicial process should be stayed to give the BIA a further opportunity to address these issues. But dismissal is not appropriate because the administrative process will not resolve the Allottees' claims. Rather, the district court should stay the action for a reasonable period of time to see what action the agency may take. The court can then lift the stay, or further suspend the judicial process depending on what action, if any, the agency takes. We leave the details of this process, including the solicitation of views from many parties with disparate interests, to the district court's discretion.

C. Remaining Issues. In addition to the trespass claims in Count I of their Amended Complaint, the Allottees asserted three additional claims: Breach of Easement Agreement (Count II); Unjust Enrichment -- Imposition of Constructive Trust (Count III); and

Punitive Damages (Count IV). Because the case must be remanded and stayed, we decline to consider these issues at this time. Among other reasons, the analysis of these issues would likely be affected if the BIA brings a breach-of-contract claim on behalf of the Allottees under the Right-of-Way Act. In a breach-of-contract action involving a right-of-way over individual trust allotments, the United States, as grantor, is an indispensable party. *Cf. Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906, 909 (8th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965); *see also Minnesota*, 305 U.S. at 388.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion. The Allottees' motion to dismiss Robin Fredericks as a plaintiff is denied.

Appendix E

Relevant Statutory Provisions

Act of Mar. 3, 1891, ch. 543, 26 Stat. 989

CHAP. 543.—An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes.

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SEC. 23. The following agreement, entered into on behalf of the United States, by John V. Wright, Jared W. Daniels, and Charles F. Larrabee, Commissioners, on December fourteenth, eighteen hundred and eighty-six, with the Indians of the Fort Berthold Agency, North Dakota, and now on file in the Interior Department, signed by said Commissioners on the part of the United States and by Pades-a-hish and others on the part of the Gros Ventres; and by Woka-se and others for the Mandans and Kun-nukh-to-wite and others on the part of the Arickarees, and is in the following words, to wit:

"This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Charles F. Larrabee, duly appointed commissioners on the part of the United States, and the Arickaree, Gros Ventre, and Mandan tribes of Indians, now residing on the Fort Berthold Reservation, in the Territory of Dakota, by the chiefs, head-men, and principal men, embracing a majority of all the adult male members of said tribes, Witnesseth that whereas it is the policy of the Government to reduce to proper size existing reservations when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have vastly more land in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry:

Therefore, it is hereby agreed and covenanted by the parties to this instrument, as follows:

ARTICLE I.

The Arickaree, Gros Ventre, and Mandan tribes of Indians, parties hereto, hereby cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion of the Fort Berthold Reservation, as laid down upon the official map of the Territory of Dakota, published by the General Land Office in the year eighteen hundred and eighty-five, 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.

ARTICLE II.

In consideration of the foregoing cession and relinquishment the United States shall advance and expend, under the direction of the Secretary of the Interior, the sum of eighty thousand dollars ($80,000), annually, for the period of ten (10) years from and after the ratification of this agreement, for such purposes and in such manner as shall best promote the civilization and well-being of said Indians, and as hereinafter provided.

ARTICLE III.

It is further agreed that the Secretary of the Interior shall cause the lands embraced within the diminished reservation, or such portion thereof as may be necessary, to be surveyed and, either through the agent, or such other person as he may designate, allot the same in severalty to the Indians of the several tribes, parties hereto, in quantity as follows:

To each head of a family, one hundred and sixty acres.

To each single person over eighteen years of age, eighty acres.

To each orphan child under eighteen years of age, eighty acres.

To each other person under eighteen years of age, forty acres.

Provided, That all allotments made under the provisions of this agreement shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selections, if they so desire.

ARTICLE IV.

That upon the approval of the allotments provided for in the foregoing article by the Secretary of the Interior, he shall cause patents to issue therefor, in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the Territory of Dakota, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

Provided, That the laws of descent and partition in force in said Territory shall apply thereto after the first patents therefor have been executed and delivered.

ARTICLE V.

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribes to whom allotments have been made shall have the benefit of and be subject to the laws of the Territory of Dakota in all offenses the penalty of which is death or imprisonment in the penitentiary; and said Territory shall not pass or enforce any law denying any such Indian the equal protection of the law.

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U.S. Code, Title 25

25 U.S.C. § 323

Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 324

Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2)

the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

25 U.S.C. § 325

Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

25 U.S.C. § 345

Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.