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

TEX HALL ET AL.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	
	§	
TESORO HIGH PLAINS PIPELINE COMPANY, LLC, TESORO LOGISTICS, GP, LLC, TESORO COMPANIES, INC. (TESORO) AKA ANDEAVOR, AND ANDEAVOR LOGISTICS, L.P.,	§	**CIVIL ACTION NO. 1:18-CV-00217**
	§	
DEFENDANTS.	§	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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Defendants file this Reply Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted.[1]

I. INTRODUCTION

Defendants demonstrate by their Motion and Reply that if Plaintiffs have an actionable trespass claim (which is denied)[2], it arises under state law, not federal common law. But, as confirmed by their Response[3], Plaintiffs allege trespass arising under federal common law (not state law), necessitating dismissal of their trespass claims. Indeed, both the United States Supreme Court and the Eighth Circuit have made abundantly clear that there are no legally cognizable federal common law rights, including federal common law trespass rights, for individual Indian allottees under 25 U.S.C. § 345 or otherwise. Plaintiffs do not even try to address the multiple cases in the Eighth Circuit that support Defendants' Motion. Instead, the Response acknowledges that 25 U.S.C. § 345—the sole basis of the federal common law trespass claim—"does not create a cause of action." Resp., 19.

As for the other "counts" alleged in the Complaint, Plaintiffs largely concede the arguments forming the basis of the Motion, and simply ignore controlling authority. Therefore, Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6).[4]

II. ARGUMENT AND AUTHORITIES

A. There is no legally cognizable federal common law trespass claim for individual allottees under 25 U.S.C. § 345 or otherwise (Counts One and Ten)

Plaintiffs' Response is based on a fundamentally flawed legal argument—an argument that has already been squarely rejected by the Eighth Circuit. Specifically, Plaintiffs argue that the Supreme Court, in its ruling granting subject matter jurisdiction in *Oneida I* and *II* (including pursuant

[1] *See* Docs. 20 and 22.
[2] Contrary to Plaintiffs' argument, Defendants do not "concede" an actionable trespass has occurred.
[3] *See, e.g.*, Resp., 23 ("The essential elements of federal common law trespass have been met…"), 24 ("Plaintiffs absolutely have a right to pursue their federal common law trespass claims…").
[4] Plaintiffs do not seek to re-plead, and doing so would be futile here.

to 28 U.S.C. § 1362)[5] to a **tribe** under federal common law to vindicate its **aboriginal rights**, was also by implication granting broad federal common law rights, including federal common law trespass rights, to **individual Indian allottees** pursuant 25 U.S.C § 345. *See, e.g.*, Resp., 21 (arguing, incorrectly, that *Oneida I* "supports federal law causes of action for Indian Allottees"). But the *Oneida* Court did **not** grant federal common law rights to individual allottees, and in fact, made that specific distinction in its holding—a distinction that has been reiterated by subsequent Eighth Circuit holdings. Plaintiffs' trespass and other claims arise, if at all, under state law. But Plaintiffs only allege **federal** common law trespass, thereby necessitating dismissal.[6]

1. As reiterated by the Eighth Circuit, the *Oneida* Court distinguished between common law claims of individual Indians related to their allotted land (arising under state law), on the one hand, and tribal claims related to protecting aboriginal rights (arising under federal law), on the other

Plaintiffs claim that Defendants "misinterpret[]" the *Oneida I* decision. Resp., 20-21. But it is Plaintiffs who contort the language of *Oneida* and ask this Court to broadly extend its holding to imply broad federal common trespass rights on behalf of individual Indian allottees—an attempt that has already been squarely rejected by the Eighth Circuit. The *Oneida* Court expressly based its holding on the unique "nature and source of the possessory rights of Indian **tribes** to their **aboriginal lands**, particularly when confirmed by treaty," holding that "it is plain that the complaint [there] asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362." *Oneida I*, 414 U.S. at 667 (emphasis added). Only after reciting pages of cases interpreting the unique nature of **tribal rights** with respect to title based on aboriginal

[5] *See Oneida I*, 414 U.S. at 664-65 (asserting jurisdiction under 1331 and 1362). § 1362 gives district courts original jurisdiction for actions brought by a tribe under the U.S. Constitution, laws, or treaties.
[6] Even if Plaintiffs had asserted state common law trespass, it would also fail. The Response reiterates Plaintiffs' contention that the pipeline's trespass began in 1993. *See, e.g.*, Resp., 2 n.1 ("Plaintiffs have alleged that the 1993 lease is void."), 13 (alleging Defendants have "been without a valid lease since at least 1993"), 22 (alleging Defendants "failed to follow federal law to obtain the 1993 Easement"), 23 (alleging Defendants have been "operating its pipeline without valid leases, going back to 1993"). *See also* Motion, 9 & n.10 (statute of limitations would defeat state law claim too).

possession (not individual Indian allottees' rights or federal common law trespass claims of same under 25 U.S.C. § 345), the Court concluded that "[e]nough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." *Id.* at 675.

Having reached that conclusion expressly with regard to **tribal rights**, however, the *Oneida* Court nonetheless distinguished its holding related to claims arising from "aboriginal title of an Indian tribe" which arise under federal law, from a "suit concern[ing] lands allocated to individual Indians, not tribal rights to lands," which does not. *Id.* at 676. Plaintiffs simply gloss over this, essentially ignoring the actual holding in *Oneida I*.[7]

And tellingly, Plaintiffs have **no response** whatsoever to the cases cited by Defendants that follow the *Oneida* decisions exactly as Defendants contend, holding that *Oneida I* and *II* apply to the specific claims of the tribe with respect to its aboriginal rights; not individual Indian allottees' common law trespass claims, which arise, if at all, under state law. Motion, at 10-18. Glaringly absent from Plaintiffs' Response is any mention of *Wolfchild v. Redwood County*, 824 F.3d 761, 767 (8th Cir.) *cert. denied*, 137 S. Ct. 447 (2016), whereby the court, **pursuant to Fed. R. Civ. P. 12(b)(6)**, specifically rejected federal common law claims for ejectment and trespass brought by

[7] In relying on *Oneida*'s holding related to rights of a **tribe**, Plaintiffs also ignore that allotted land is **not** tribal land. Courts have specifically held that once a trust allotment is granted, it is **not** tribal land. Under the General Allotment Act, lands were allotted "by patent" to individual Indians in "in trust for the sole use and benefit of the Indian," 25 U.S.C. § 348 (the current codification of the General Allotment Act, or Dawes Act), with each Indian allottee initially receiving a "trust patent." *See, e.g., U.S. v. Newmont U.S.A.*, 504 F. Supp. 2d 1050, 1065-66 (E.D. Wash 2007). Once allotted, courts have consistently held that the land is not tribal land. *United States v. State of Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *see also Newmont*, 504 F. Supp. 2d at 1065-66 (citing *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959). Also, the BIA specifically distinguishes between "tribal land" and "individually owned land". *See, e.g.*, 25 C.F.R. § 169.2 (BIA regulations defining and distinguishing "tribal land" from "individually owned land"). As reiterated by the Eighth Circuit in *Wolfchild*, it simply makes no sense to suggest that when the Supreme Court said a "tribe" may pursue a common law action (including under 28 U.S.C. § 1362) to vindicate aboriginal rights that it also meant by implication that individuals Indians could pursue (including under 25 U.S.C. § 345) common law trespass claims with respect to individually allotted land held in trust, including because individual allotted land held in trust by the United States is **not** tribal land.

individual Indian allottees (loyal Mdewakanton) for the express reason that their "lawsuit…concerns 'lands allocated to individual Indians, not tribal rights to lands," and therefore, "does not fall into the federal common law articulated in the *Oneida* progeny." *Id.* at 768. The Eighth Circuit expressly based its holding on the distinction between a tribe's aboriginal right of occupancy and lands allocated to individual Indians, finding that the individual Indian allottees (just like Plaintiffs here) had fundamentally misinterpreted *Oneida I* and *II* in believing they, as individual Indians, had federal common law rights similar to a tribe:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. *Oneida II*, 470 U.S. at 229–30. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their *aboriginal* rights." *Id.* at 236 (emphasis added). In so holding, the Supreme Court directly distinguished cases regarding "lands allocated to *individual* Indians," concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. *Oneida I*, 414 U.S. at 676–77 (emphasis added). Thus, federal 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 677.

Wolfchild, 824 F.3d at 767-68 (emphasis in original)(internal citations shortened). The Eighth Circuit could not have been more clear.[8] Plaintiffs do not even try to distinguish this important and binding case (or the other cases in accord with *Wolfchild*); in fact they never mention it. Motion, 10-11.

2. Recognizing that the binding precedent is fatal to their position, Plaintiffs ask the Court to create a meritless distinction; however, such a distinction would contradict Supreme Court, Congressional, and BIA precedent

And while courts **have** consistently recognized a stark distinction between the status of tribal land and allotted land (and did so expressly in *Oneida I* and *Wolfchild*), neither the Supreme Court nor Congress recognize a distinction based on the two types of allotments (trust and restrictive allotments). Desperate to avoid the fatal blow of the binding precedent to its position here, Plaintiffs

[8] Moreover, Plaintiffs' Response concedes that 25 U.S.C. § 345—Plaintiffs' alleged basis here for a federal common law trespass claim—"itself does not create a cause of action." Resp., 19.

ask the Court to create such a distinction. Resp., 21 (arguing, incorrectly, that when the *Oneida* Court distinguished claims related to allotted land, which arise under state law, by citing *Taylor v. Anderson*, 234 U.S. 74 (1974), it impliedly meant to only distinguish restrictive (but not trust) allotments).

This argument is contrary to Supreme Court, Congressional, and BIA precedent. The Supreme Court has long held that trust and restricted allotments have "**the same effect**" and any differences are "**not regarded as important**" under the law. *U.S. v. Ramsey*, 271 U.S. 467, 471 (1926) ("the difference between a trust allotment and a restricted allotment, so far as that **difference** may affect the status of the allotment as Indian country, was **not regarded as important**…."; per the Court, "[i]n practical effect, the control of Congress, until the expiration of the trust or the restricted period, **is the same**"). Congress and the BIA also treat them as identical as it relates to the Right-of-Way Act and regulations. 25 U.S.C. § 323 ("The [Secretary]… is empowered to grant rights-of-way … across any lands now or hereafter held **in trust by the United States for individual Indians… or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians**…."); 25 CFR § 169.2 ("**Individually owned land**" is defined in the Right-of-Way regulations as "any tract in which the surface estate…**is owned by…individual Indians in trust or restricted status**")(emphasis added). Also, the Eighth Circuit in *Wolfchild* did not make that unsupported distinction. *See, e.g., Wolfchild*, 824 F.3d at 769 (citing *Taylor* and not drawing any distinction). There simply is no basis to create a distinction between trust and restrictive allotments.

3. Plaintiffs' singular focus on the word "patent" in *Oneida I* is also a red herring—both trust and restrictive allotments are issued by patent

Again desperate to avoid the binding Supreme Court and Eighth Circuit precedent, Plaintiffs try to make something of the fact that the *Oneida I* Court used the word "patent", arguing (incorrectly) that only restrictive allotments are issued by patent when in fact both trust and restrictive allotments are issued by patent. Resp., 21. Plaintiffs' argument that the word "patent" must signify a restrictive allotment only is simply wrong because trust allotments, like restrictive allotments, are issued by

"patent." 25 U.S.C § 348 ("Upon the approval of the allotments provided for in this act by the [Secretary], **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) (bold added). Plaintiffs' attempt to call out Defendants for omitting the word "patent" from the quote in *Oneida I* (Resp., 21) is disingenuous; indeed, at least one other court (in an almost identical case) has likewise omitted the word "patent" from this quote as unnecessary.[9] The *Oneida* Court was quite clearly distinguishing between claims of individual Indian allottees (whether restrictive or trust allotments) and claims of a tribe, as the Court specifically explained. It did not make or discuss any distinction as to trust and restrictive allotments, as both are issued by patents. 25 U.S.C § 348.

4. Plaintiffs wrongly claim *Poafpybitty* is a "seminal" case for them; the claims of allottees there arose under state law, not federal common law

Plaintiffs inexplicably lead with an argument supposedly based on *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (Resp., 19), but it does not support Plaintiffs' argument that they have a federal common law trespass claim. In fact, *Poafpybitty* supports the opposite—the Court specifically recognized that the individual allottees' claims there arose under **state law**. *Id.* at 367 & n. 2, 376 (the Supreme Court remanding the case back to state court, whereby individual allottees were allowed to pursue state law claims). Aside from the Court's recognition that the claim could proceed in state court under state law, Plaintiffs' citation to *Poafpybitty* is totally misplaced here, as it does not address the existence of federal common law claims. For a more complete discussion of *Poafpybitty*, see Defendants' Reply in Support of Motion to Dismiss for Failure to Join a Required Party.

[9] The court in *Marek v. Avista Corp*., No. CV4-493, N EJL, 2006 WL 449259, at *2 (D. Idaho Feb. 23, 2006), a case that is virtually factually identical to the present case and also involved a trust allotment, but which Plaintiffs simply ignore, likewise omitted the word "patent" from the same quote as unnecessary verbiage. *See* Motion, 16-18, for a full discussion of *Marek*.

5. Plaintiffs completely ignore the Supreme Court's landmark decision in *Mottaz*, and the Eighth Circuit's controlling decision following it in *Kishell* which held that Plaintiffs, as individual allottees, have no federal common law trespass claim arising under 25 U.S.C. § 345

As to the test announced in *United States v. Mottaz*, 476 U.S. 845 (1986) and the overwhelming wealth of cases that **are on point** (**including in the Eighth Circuit)** applying *Mottaz* (and holding that individual allottees' trespass claims arise, if at all, under **state law** not federal law pursuant to 25 U.S.C § 345), Plaintiffs also simply ignore them altogether, offering **no response**.[10] Instead, Plaintiffs primarily rely on a single outlier case from the Tenth Circuit, *Nahno-Lopez v. Houser*. Resp., 19-20. That case, however, is (i) directly contradicted by the plethora of cases, including the binding Eighth Circuit precedent in *Kishell* and *Wolfchild*, to the contrary; (ii) of questionable, if any, precedential value even in the Tenth Circuit, and (iii) easily distinguishable.

Nahno-Lopez involved a dispute over real property allegedly leased by the Fort Sill Apache Tribe of Oklahoma, acting through its Tribal Business Committee. *Nahno-Lopez v. Houser*, 625 F.3d 1280 (10th Cir. 2010). It came before the Tenth Circuit on an appeal from summary judgment for defendants (officials of the Tribal Business Committee and the Manager of the Fort Sill Apache Casino), whereby plaintiffs had originally failed to respond to the motion altogether, but then were given leave to respond and nonetheless failed to controvert a single fact resulting in defendants' statement of undisputed facts being "deemed admitted."[11] The Tenth Circuit held that plaintiffs "failed to establish a genuine issue of material fact" and affirmed "solely on that basis." *Id*, 1281. The court analyzed the case-dispositive consent defense under Oklahoma **state law**. *Id*, 1284.

Importantly, the tribal business committee officials and tribal casino manager in *Nahno-Lopez*, having obtained summary judgment in the court below, simply conceded subject matter

[10] *See* Motion, 12-18 (discussing unaddressed cases to the contrary, including the Eighth Circuit, under 25 U.S.C. § 345).
[11] *See Nahno-Lopez v. Houser*, 2009 WL 10702853, * 2 (W.D. Okla. Oct. 13, 2009).

jurisdiction existed and, therefore, **neither party briefed federal question subject matter jurisdiction at all** before the Tenth Circuit.[12] Without the benefit of any briefing and certainly no challenge by defendants to jurisdiction, the court *sua sponte* engaged in a jurisdictional analysis, first correctly stating that section 345—the sole basis for Plaintiff's alleged federal common law trespass claim here—does not itself create a federal cause of action.[13]

But where the *Nahno-Lopez* court primarily went wrong (and diverged from the Eighth Circuit) was in its analysis of the common law trespass claim, incorrectly applying the *Oneida* case for the proposition that "Indian rights to a Congressional allotment are governed by federal—not state—law" without proper regard for the particular claim at issue in *Oneida*, namely, a trespass claim asserted by a ***tribe*** as to a right of possession based on the ***tribe's aboriginal right***. Thus, the *Nahno-Lopez* court appears to have (incorrectly, and contrary to the Eighth Circuit) assumed that a federal claim for trespass existed and that it provided a basis for jurisdiction. *Id*, at 1282; *see also Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 965 n. 2 (10th Cir. 2019) ("*Nahno-Lop*ez also concerned an alleged trespass on Indian allotted land. In that case, however, we affirmed summary judgment to the defendants due to a lack of evidence to prove an essential element. **It is therefore unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment, or simply assumed such a claim's existence**. *Cf., e.g., Gohier v. Enright*, 186 F.3d 1216, 1220–22 (10th Cir. 1999) (disposing of a claim under federal law without deciding whether to recognize that claim).")[14] (emphasis added; internal cites omitted).

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[12] *See, e.g.*, Brief of Appellee in the Tenth Circuit in *Nahno-Lopez*, published at 2010 WL 2504184, * 2 (conceding jurisdiction under section 345).

[13] A fact that Plaintiffs here concede. Resp., 19 ("…the Tenth Circuit found that 25 U.S.C. § 345, which itself does not create a cause of action…").

[14] The *Davilla* court affirmed summary judgment on a trespass claim after applying Oklahoma trespass law, noting as a preliminary matter that "although no act of Congress expressly creates a right of action for trespass on Indian allotted land, the parties agree such a right exists. See, Aplt. Br. at 16; Aple. Br. at 15," just as the parties had so agreed in *Nahno-Lopez*. *Davilla*, 913 F.3d at 965 (emphasis added). Thus, like *Nahno-Lopez*, there was no challenge to federal question jurisdiction

As discussed above, the Court in *Oneida I* held that federal common law governs a ***tribe's*** action to vindicate ***aboriginal*** rights, but that the rule does not apply to possessory claims regarding "lands allotted to individual Indians"—a distinction that the *Nahno-Lopez* court appears to have missed; while the Eighth Circuit, in *Wolfchild* and *Kishell*, did not. *Oneida II*, 470 U.S. at 229-230; *Oneida I*, 414 U.S. at 676-77; *see Wolfchild*, 824 F.3d at 767 ("the Supreme Court [in *Oneida*] directly distinguished cases regarding 'lands allocated to ***individual*** Indians,' concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. … Thus, federal common law claims arise when a ***tribe*** "assert[s] a present right to possession based... on their ***aboriginal*** right of occupancy"); *Kishell*, 816 F.2d at 1275 (affirming dismissal of common law trespass claim asserted by individual Indian and owner of allotment held in trust by the U.S., holding that "trespass action, alleging that the Housing Authority interfered with her use of the property,… does not state a claim as an action for an allotment under 25 U.S.C. § 345").

In addition to incorrectly interpreting *Oneida*'s holding that was limited to a **tribe's right to enforce aboriginal rights**, the *Nahno-Lopez* court also incorrectly relied on *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) (as Plaintiffs do as well, *see* Resp., 20), but *Milner* did not arise under section 345 and involved an action by the **United States** on behalf of a **tribe** (not by individual Indian allottees). *Milner*, 583 F.3d at 1181. The United States asserted three causes of action, including trespass. *Id*. The *Milner* court, addressing jurisdiction of claims by the **United States**, would have had no reason to apply section 345 (Actions for Allotments) or its own earlier decision in *Pinkham* (discussed in the Motion, 15-16, and holding that section 345 does not support a trespass

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or the existence of a federal common trespass claim, and therefore, its contains no analysis of those issues. Plaintiffs also cite the unreported case *Public Serv. Co. of NY v. Approx. 15.49 Acres of Land in in McKinley Cnty., NM*, 2016 WL 10538199, *5 (D. N.M April 4, 2016) (Resp., at 20), whereby the United States sought to dismiss under Rule 12(b)(1) for lack of jurisdiction, and the district court, sitting in the Tenth Circuit and without any independent analysis of the issues, followed *Nahno-Lopez* (and allowed a claim that, as the Tenth Circuit admitted in *Davilla*, as discussed above, may have been assumed to exist (as opposed to having been formally recognized) in *Nahno-Lopez*).

claim arising under federal law for individual trust allottees). Given that the **United States** was the plaintiff on behalf of the **tribe**, the *Milner* court did not need to look far for a basis for federal question jurisdiction. It simply found jurisdiction over the United States' trespass claim under 28 U.S.C. § 1345—which provides "district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States." *Milner*, at 1182; 28 U.S.C. § 1345. Thus, when the *Milner* court recited that federal common law governed the plaintiff's action for trespass, it was in the context of that case in which the plaintiff was the **United States** on behalf of **a tribe**, not individual allottees under 25 U.S.C. §345 or otherwise.[15]

Regardless of its flawed recognition of federal common trespass, the *Nahno-Lopez* court went on to hold that "Oklahoma trespass law provides the rule of decision for this federal claim" anyway, including the defense of consent to trespass, and affirmed the grant of summary judgment based on Oklahoma law. *Id.* at 1283-84. Thus, it appears to have been a result-driven holding—ultimately applying Oklahoma law to dispose of plaintiffs' claims, but holding that the district court had federal subject matter jurisdiction to reach its decision to affirm on summary judgment.

Plaintiffs also tellingly have no response to the Ninth Circuit's holding in *Pinkham* (discussed in the Motion, 15-16) [16], and instead misdirect the Court's attention to the Ninth Circuit's earlier decision in *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979). Resp., 20. But *Loring* was decided

[15] The *Nahno-Lopez* court also relies on an earlier version (2005) of the Handbook of Federal Indian Law § 16.03(3)(c) for the proposition that "state courts have no jurisdiction over allotment ownership disputes... ." But the updated 2012 edition at section 16.03(3) clarifies that while certain ownership disputes may be heard in federal court, "Federal courts will generally not have jurisdiction over allottees' claims for damages to their lands sounding in tort or other claims that do not involve ownership issues," and specifically cites *Kishell* and *Pinkham*. *See* Cohen's Handbook of Federal Indian Law § 16.03(3)(c) (Nell Jessup Newton ed., 2012).

[16] Plaintiffs also offer no response regarding *Marek v. Avista Corp*., No. CV04-493 N EJL, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006), a case nearly identical to this case, and which relies on *Kishell* and *Pinkham* in holding that section 345 (28 U.S.C. § 1353) did not provide subject matter jurisdiction for a trespass claim by individual Indians against a company as it related to trespass due to an expired right-of-way across their allotment and that their trespass claim arose, if at all, under state law.

in 1979, seven years **before** the Supreme Court's landmark decision in *Mottaz*, the case that expressly defined the limits of section 345 federal jurisdiction, the sole basis on which Plaintiffs claim a federal common law trespass claim exists here. *Pinkham*, decided two years **after** *Mottaz*, discusses *Mottaz* at length and relies on its holding to reject federal jurisdiction for a common law trespass claim by individual Indian allottees. *Pinkham*, 862 F.2d at 186-89. If that alone was not enough to eviscerate Plaintiffs' purported reliance on *Loring*, the *Pinkham* court itself distinguished the takings claims asserted in *Loring*, stating that "the claim in *Loring* did not sound in tort" but the trespass claim in *Pinkham* did. *Pinkham*, 862 F.2d at 187. Of course, here, Plaintiffs have asserted a trespass—not a takings—claim, thus, even in the Ninth Circuit, *Pinkham*—not *Loring*—would apply.[17]

6. "Federal regulations" do not support federal common law trespass

Finally, Plaintiffs wrongly claim that "Federal regulations" (specifically 25 C.F.R. § 169.413) give them a right to pursue their trespass claim under federal common law. Resp., 21-22. That is an incorrect statement of law, as detailed in Defendants' Motion at 29-31, to which Plaintiffs offer **no response**. To be clear, Part 169 of the Code of Federal Regulations (promulgated to guide the BIA under the authority of the General Right of Way Act of 1948, 25 U.S.C. §§ 323-328) creates no private right of action at all, and certainly not one to sue for federal common law trespass. *See* 25 U.S.C. § 328 ("The Secretary of Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title"); 25 CFR § 169.1 (part 169 streamlines the procedures and conditions under which BIA will consider rights-of-way requests, "by providing for the use of the broad authority under 25 U.S.C. 323-328"); *see Wolfchild,* 824 F.3d at

[17] Finally, Plaintiffs reference to *Houle v. Cent. Power Electric Coop., Inc*., No. 4:09-cv-021, 2011 WL 1464918 (D. N.D. Mar. 24, 2011) is equally misplaced as there, unlike here, the court held it had jurisdiction to determine whether the tribal court had exceeded its jurisdiction in condemning the plaintiffs' allotment within the meaning of 25 U.S.C. § 357, and under 25 U.S.C § 345 to hear the claim that the tribal court's order constituted an impermissible condemnation, and that once jurisdiction is established for one claim, the court likely has supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining state law claims, since they relate to the same case or controversy.

768 ("Because Appellants failed to state a claim under the federal common law, Appellants' claims only survive to the extent the 1863 Act provides a private remedy," which it does not).

Regardless, the regulation purportedly relied upon by Plaintiffs, 25 CFR § 169.413, does not even purport to "secure" a federal common law right, as Plaintiffs say. Resp., 21-22. First, as detailed in Defendants' Motion to Dismiss for Failure to Join Required Party (Doc. 22), §169.413 is inapplicable to this holdover. More importantly here, however, even if it did apply (it does not), §169.413 does not state or suggest that available remedies for a non-holdover trespass arise under **federal** law—it merely says that landowners may pursue "available remedies under applicable law."[18]

B. Plaintiffs concede there is no conversion of real property (Count Four), which is what their Complaint asserts; regardless, there is no legally recognized claim for conversion based on alleged monetary compensation owed either

Plaintiffs expressly "concede," as they must, that conversion "does not apply to real property claims" (Resp., 28), yet that is exactly what their Complaint undeniably asserts.[19] Plaintiffs now argue that what they meant to allege is conversion of "money or income" allegedly owed for use of their property (although they do not ask to re-plead). Resp., 28 (alleging that Defendants' failure to compensate Plaintiffs for the use of their property is a "conversion of the Allottees' money or income"). Although not at all what was pled, alleged conversion of money owed still does not assert a legally cognizable claim, because money owed (unless specifically identifiable) is intangible and not subject to a claim of conversion, as a matter of law. Tellingly, Plaintiffs cite no legal support for their claim that alleged conversion of money or compensation owed is a recognized claim for relief.

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[18] Plaintiffs spend the last few pages of their argument regarding trespass misconstruing the Motion. Contrary to their mischaracterizations (Resp., 22-24), the fact that Plaintiffs are not parties to the right-of-way agreements has to do with their lack of standing to assert a breach of contract here. *See infra* at 17-18. Plaintiffs' argument in this regard is simply misplaced.

[19] *See* Complaint, ¶¶ 62-68 ("Defendants converted Plaintiffs' property by utilizing the property without permission"; "Defendants have deprived Plaintiffs of their property by preventing…complete use and enjoyment of the property"; "Defendants' use of Plaintiffs' property without compensation or permission…constitutes conversion"; "Defendants' actions and/or omissions amount to a taking of Plaintiffs' lands" and seeking recovery of the "market value of the lands") (emphasis added).

In conversion actions, the plaintiff must plead and prove an interest in specific, identifiable property. *Butts v. InterSecurities, Inc.*, 2008 WL 901822, No. 3:07-cv-53, *6 (D.N.D. March 31, 2008) (citing *Napoleon Livestock Auction, Inc. v. Rohrich*, 406 N.W.2d 346, 354 (N.D. 1987)). Although the North Dakota Supreme Court has not specifically addressed the requirements to state a claim for conversion of money or funds, the general rule is that money is an intangible, and therefore, not subject to a conversion claim. *Id*; 90 C.J.S. Trover and Conversion § 16 (2018). The exceptions to this general rule—inapplicable here—are where the money is specific and capable of identification (like a bag of coins) or where there is a determinate sum that the defendant was entrusted to apply to a certain purpose (like an obligation to keep intact or deliver the specific money in question and where such money can be identified or described). 53A Am.Jur.2d Money § 21 (2008). Indeed, there can be no conversion of money unless there was an obligation on the part of the defendant to deliver **specific money** to the plaintiff; trover does not lie to enforce a mere obligation to pay money. *Id.*

C. Plaintiffs do not dispute that constructive trust and accounting (Counts Three and Seven) are dependent remedies; regardless, they have no response regarding lack of a confidential relationship and the existence of an adequate remedy at law

In their Response, Plaintiffs do not take issue with the fact that constructive trust and accounting are remedies, not independent causes of action.[20] Thus, it remains undisputed that the equitable remedies fail along with those underlying claims. *See supra* at §§ A & B.

None of Plaintiffs' cited cases support the imposition of a constructive trust remedy here. Resp., 26-27. Instead, Plaintiffs' cases arose wholly outside the context of allotment/ Indian lands altogether, and the cited federal court cases only relate to a federal constructive trust remedy when a Federal Act itself creates and defines the trust or in connection to bankruptcy proceedings—none of which applies here. *See, e.g., In re Magna Entm't Corp.*, 438 B.R. 380, 393 (D. Del. Bankr. 2010)

[20] Resp., 25-27 (offering no argument except that remedies must be pled; stating their position even if an accounting and constructive trust are held to be remedies; admitting the constructive trust and accounting remedies are based "on the benefit…gained through their unlawful trespass").

(in a bankruptcy context, an Act created a trust for all sums owed pursuant to 15 U.S.C. § 3001 *et seq.*, and the Court found the Act itself established a uniform law); *F.T.C. v. Network Services Depot, Inc.*, 617 F.3d 1127, 1141-43 (9th Cir. 2010) (the FTC Act endows the district court with authority to impose a constructive trust); *Abramowitz v. Palmer*, 999 F.2d 1274, 1279 (8th Cir. 1993) (applying a constructive trust in the bankruptcy context upon determination of fraud liability); *Hunter v. Philpott*, 373 F.3d 873, 876-77 (8th Cir. 2004) (simply stating that "fiduciary" in the context of bankruptcy discharge exceptions does not include trustees of constructive trusts imposed by law due to the trustee's malfeasance). The only North Dakota case cited by Plaintiffs, *Schroeder v. Buchholz*, 2001 ND 36, ¶ 9, 622 N.W.2d 202, 206, simply establishes what Plaintiffs concede—a confidential relationship is an essential element of constructive trust and accounting remedies. Resp., 27.

Similarly, as to an accounting, Plaintiffs' citation to *Oneida II* is also misplaced. Plaintiffs cite to *Oneida II* for the proposition that federal law is clear that Plaintiffs, as Indian allottees, are entitled to an accounting of any profits received. Resp., 26. However, as explained above, *Oneida II* and other cases involving federal common law claims of a **tribe** are inapplicable here; *Oneida II* did not create any federal common law rights for individual Indian allottees. *See supra*, at 1-12.

Regardless, Plaintiffs do not dispute that a fiduciary or confidential relationship is an essential element of the constructive trust and accounting remedies. Resp., 27. Neither the Complaint nor the Response allege any legally recognized basis for a confidential relationship. Instead, Defendants are alleged to be ***counterparties*** to the United States under an easement, and it is the United States—not Defendants—that, as a matter of law, serves as trustee for the Plaintiffs. *See e.g., Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981) (United States is the fee title owner and holds the lands in trust for the individual Indians). Although the Complaint purports to allege a duty of good faith and fair dealing as the basis for such confidential relationship, the Response does not dispute that no such duty of arises here as a matter of law. *See* Motion, 20 (demonstrating there is no duty of good faith

and fair dealing here). Plaintiffs simply assert (incorrectly and without support) that they have "plead the claim sufficiently well," even though they have wholly failed to plead the basis for any recognized confidential relationship (because none exists), necessitating dismissal.

Plaintiffs have also not disputed the fact that they have an adequate remedy at law—which defeats the imposition of equitable remedies, including an accounting. Motion, 22; Resp., 25-27.

D. Plaintiffs ignore multiple fatal deficiencies with their unjust enrichment count (Count Two)

Although incorrectly suggesting (without authority) that their unjust enrichment count arises under federal common law (it does not, *see supra*),[21] Plaintiffs concede that North Dakota state law would apply anyway. Resp., 24. Plaintiffs also do not contest Defendants' cited authority as to unjust enrichment being an equitable remedy, as opposed to an independent cause of action. *First Nat'l Bank of Belfield v. Burich*, 367 N.W.2d 148, 154 (N.D. 1985) ("the equitable ***remedy*** of unjust enrichment generally rests on the concept of quasi or constructive contract implied by law"); Resp., 24-25. Unjust enrichment fails with the underlying claim of breach of the "dut[y] of good faith and fair dealing" upon which it is apparently based. Complaint, ¶ 55. Plaintiffs do not dispute that a duty of good faith and fair dealing does not arise here. Motion, 22; Resp., 24-25.

Moreover, Plaintiffs concede that the 1993 Easement covers the same subject matter as their unjust enrichment count, thereby defeating the count if the easement is valid. Resp., 24 (acknowledging unjust enrichment only applies in absence of a contract), 25 ("If the 1993 easement was never valid, unjust enrichment will apply"). Plaintiffs allege a holdover of the 1993 Easement due to it not being renewed in 2013—allegedly a breach of the 1993 Easement due to Defendants'

[21] It is not clear the basis on which Plaintiffs claim that unjust enrichment is a federal common law claim. Indeed, Plaintiffs cite to North Dakota law for the purported basis of their unjust enrichment claim. Resp., 24. Plaintiffs offer no argument or authority that their unjust enrichment claim is a federal claim. Plaintiffs certainly cannot be arguing that unjust enrichment arises under 25 U.S.C § 345 as an action for an allotment of land, yet that is the only basis for federal question jurisdiction alleged in the Complaint.

alleged failure to enter into a new easement agreement and failure to restore the land to its original condition at the end of the easement. Complaint, ¶ 95.

Even if the 1993 Easement was found to be invalid, Plaintiffs' unjust enrichment count would still fail. In that case, Plaintiff would be alleging a holdover of the 1973 Easement due to it not being properly renewed in 1993—allegedly a breach of the 1973 Easement due to Defendants' alleged failure to enter into a new easement agreement and failure to restore the land to its original condition at the end of the easement. *Id*. Thus, to the extent the 1993 Easement was invalid, then the 1973 Easement would allegedly cover the same subject matters that Plaintiffs allege that the 1993 Easement covers—which Plaintiffs admit preclude their unjust enrichment count. Resp., 24-25. Thus, even under Plaintiffs' allegations, regardless of whether the 1993 Easement is found to be valid, Plaintiffs' unjust enrichment count fails. Any remedies must be pursued under the contract, if at all, and by the parties to that contract (not the Plaintiffs). *See infra* at section F (breach of contract).

Finally, Plaintiffs also do not dispute that the ongoing BIA proceeding provides an adequate remedy at law, thereby defeating unjust enrichment. *See* Motion, 23; Resp., 24-25 (admitting adequate remedy defeats the count; failing to refute that the BIA proceeding is an adequate remedy).[22]

E. Plaintiffs concede willful occupation (Count Five) is a state law remedy and not a cause of action, and completely ignore the statutory language demonstrating that the cited provisions are wholly inapplicable here

Plaintiffs concede that the statutory provisions cited are state law remedies, not causes of action. Resp., 28 ("The claim of wrongful occupation of property goes hand-in-hand with Plaintiffs' trespass claim. Plaintiffs are required to plead both their causes of actions and their requested remedies…"). Therefore, the remedy fails along with trespass, the underlying claim.

[22] Furthermore, if a legally cognizable claim for trespass or conversion had been asserted (it has not been), even if there was not an ongoing administrative proceeding, the unjust enrichment count would still fail.

Even as a remedy, alleged "willful occupation" fails based on the plain language of the statute—which Plaintiffs simply ignore. The Response ignores that the N.D.C.C § 32-03-22 remedy applies only for holdover of real property by a person who enters the property as "guardian or trustee for an infant or by right of an estate terminable with any life." There are no such allegations here.

N.D.C.C. § 32-03-29 does not apply either, because Plaintiffs have not made legally sufficient assertions as to Defendants having "forcibly eject[ed] or exclude[ed]" Plaintiffs from possession of their real property. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do."). Plaintiffs concede that their pleadings do not state a legally sufficient basis for forcible ejection or exclusion, and instead assert that discovery might "bear this out." Resp., 30. But Plaintiffs' bare bones conclusory allegations in the Complaint fail to give Defendants sufficient notice as to how they believe Defendants' used force (they have not), and/ or how an underground pipeline that has been in place for decades excludes them from their property (it does not).

F. Plaintiffs admit they are not party to the right-of-way contract on which they sue (Count Nine), and they do not qualify as third party beneficiaries

Plaintiffs concede they are not parties to the agreement(s) that forms the basis of their breach of contract claim. Resp., 32. Instead, Plaintiffs (incorrectly) contend that simply because the easement(s) is held in trust for the individual Indians and they benefit from the easement(s), they are necessarily third party beneficiaries with the right to enforce the agreements. That is simply not the law[23]—benefits alone do not create third party beneficiary status. As shown in the Motion (and uncontested), there must be an expression **on the face of the contract** of the contracting parties' intent to create a third party beneficiary, *i.e.*, an intent to grant Plaintiffs the right to be the claimant

[23] Plaintiffs cite no authority for their flawed argument on third party beneficiary status. Resp., 32.

in the event of a breach. Motion, 25, n.16. Plaintiffs do not plead third party beneficiary status, nor do they plead facts that would support it—because Plaintiffs are not. Indeed, the United States (by and through the BIA) is the party to the agreement, and the proper party to enforce it. Motion, 26.

Plaintiffs reference 25 CFR § 169.413 (Resp., 32), but it is inapplicable to the holdover situation alleged here.[24] Even if it were, it merely states that in a non-holdover situation, the Indian landowner may pursue "available remedies" for trespass under applicable law. It does not create a breach of contract remedy, much less one for a contract to which the landowner is not a party.

G. Plaintiffs cannot simply opt out of Rule 9(b)'s requirement that fraud (Count Eight) must be pled with specificity

Plaintiffs do not contest that they have failed to plead their fraud-based claim with specificity. Resp., 30. Although Plaintiffs cite applicable Rule 9(b), they suggest they can instead "exercise[] their notice pleading rights," and that "discovery will determine whether fraud may proceed." *Id*, 31-32. But Rule 9(b) is mandatory, not discretionary: "a party must state with particularity the circumstances constituting fraud." Plaintiffs here have admittedly failed to do so, necessitating dismissal. Tellingly, Plaintiffs do not ask to re-plead, because there are no facts that could be pled to support fraud here.

Plaintiffs suggest bare bones notice pleading of fraud is sufficient because, they say, "Tesoro has not denied that it is in trespass." *Id*, 31. To be clear, Defendants have not answered, much less conceded anything. Defendants do deny trespass. Defendants merely demonstrated by their Motion that, <u>if</u> Plaintiffs have a trespass claim, it arises, <u>if at all</u>, under state law, not federal law. Regardless, even if there was a trespass, it would not negate the mandates of Rule 9(b) as to a separate claim of fraud. Plaintiffs have not pled the time, place, and contents of false representations, who made such misrepresentation, and what was obtained or given up thereby. *BJC Health Sys. v. Columbia Cas.*

[24] For a complete discussion, see Motion to Dismiss for Failure to Join Required Party (Doc. 22).

Co., 478 F.3d 908, 917 (8th Cir. 2007). It is legally insufficient to simply assert that they currently have no such facts but that "discovery will determine whether fraud may proceed." Resp., 31-32.

Regardless, Plaintiffs offer no response as to the other independent reasons as to why they have no legally cognizable actual or constructive fraud claim. For example, no contract exists between the parties. *See supra* at 17-18. Plaintiffs also wholly ignore that constructive fraud requires a pre-existing fiduciary or confidential relationship, and none is alleged. *See supra* at 14-15 (regarding absence of a confidential or fiduciary relationship). Finally, Plaintiffs do not dispute that the deceit claim alleged does not relate to a person employed by a public utility, or their failure to plead the other requisite elements of their deceit claim, and therefore, it fails. N.D.C.C. § 49-22-16.1.

H. Plaintiffs arguments in the Response relative to alleged violation of federal law (Count Six) do not relate at all to the allegations made in the Complaint, nor do they address Defendants' Motion.

The Complaint alleges violation of 25 CFR § 169.125(5)[25] but that provision is not even mentioned anywhere in the Response. In fact, Plaintiffs' Response completely mischaracterizes Defendants' basis for dismissal. Resp., 30 (wrongly saying "Tesoro argues that plaintiffs have no cause of action because any violations of any right of way agreement are to be determined by the Tribe"). The basis for dismissal as set forth in the Motion is that there is no private right of action for alleged violation of regulations promulgated under the General Right-of-Way Act, which itself does not create a private right of action. Motion, 29-31. Plaintiffs' side-stepping of the issue is telling, as there is simply no plausible legal response. All of Part 169 of the Code of Federal Regulations (including but not limited to 25 C.F.R § 169.403 cited in the Response) was promulgated under the authority of the General Right of Way Act of 1948, 25 U.S.C. §§ 323-328, and those regulations create no private right of action in Plaintiffs. Plaintiffs never refute this point.

[25] Plaintiffs actually sue under "25 CFR § 169.25(5)(i), (vii)." Complaint, ¶ 73. *See* Motion, 29-30.

I. Plaintiffs concede punitive damages (Count 11) are merely a remedy, not a claim; therefore, the damages must be dismissed along with trespass

Plaintiffs concede that punitive damages are alleged as a remedy dependent upon trespass. Therefore, the punitive damages claim here fails along with trespass.

J. Plaintiffs provide no response to support FBALMOA standing

Finally, Plaintiffs totally mischaracterize the Motion as it relates to FBALMOA standing. Plaintiffs never address **any** of the points supporting dismissal. Motion, 32-33; Resp., 33-34. Plaintiffs only argument is that a representative of Defendants had appeared at FBALMOA meetings. Resp., 33-34. This fact alone, obviously, does not confer standing to an association with wide-ranging membership to assert trespass and related claims against Defendants. For the reasons stated in the Motion, and given that Plaintiffs wholly fail to otherwise refute or contest any of the points made in the Motion, the Court should dismiss FBALMOA. Motion, 32-33.

CERTIFICATE OF SERVICE

On June 12, 2019, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, District of North Dakota, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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