No. 20-1747

IN THE

United States Court of Appeals for the Eighth Circuit

JOANN CHASE, et al.,

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

On Appeal from the United States District Court for the District of North Dakota
Civil Action No. 1:19-CV-00143-DMT
Hon. Daniel M. Traynor, United States District Judge

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

This is a case about whether Indian allottees, owners of beneficial interests in land held in trust by the United States, may sue Appellees (collectively, "Tesoro") for trespass and breach of contract before the Bureau of Indian Affairs ("BIA") makes a final determination under its regulations as to whether a trespass has occurred, and if so, what action to take on behalf of the Indian allottees. The agency is currently reviewing these issues at multiple levels and the administrative appeal process has not been exhausted.

Appellants ("Plaintiffs") are 48 individual Indian allottees who brought a class action lawsuit alleging that Tesoro's oil pipeline trespasses on allotted lands and/or breaches its right-of-way. Since the end of the last right-of-way's term, Tesoro has been in a regulatorily-permitted holdover status while it seeks renewal of the right-of-way. The same threshold issues raised by this case are being addressed by the BIA, the Interior Board of Indian Appeals, and/or the Assistant Secretary of Indian Affairs, and Plaintiffs seek to circumvent the administrative process and the BIA's trustee role. The district court correctly dismissed Plaintiffs' suit because administrative remedies had not been exhausted. This Court should affirm on this ground or any of other independent grounds not reached by the district court. The issues are straightforward; Tesoro does not believe oral argument is necessary, but will participate if the Court desires to have oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Appellees disclose the following:

Appellee Andeavor Logistics LP was formerly publicly traded on the New York Stock Exchange under the ticker symbol ANDX. On July 30, 2019, MPLX LP acquired Andeavor Logistics LP by merger. MPLX LP is a master limited partnership publicly traded on the New York Stock Exchange under the ticker symbol MPLX. Certain general partner and the limited partner unitholders of MPLX LP are owned, directly or indirectly, by Marathon Petroleum Corporation, which is publicly traded on the New York Stock Exchange under the ticker symbol MPC.

Appellee Andeavor f/k/a/ Tesoro Corporation was a predecessor to Andeavor LLC and was formerly publicly traded under the ticker symbol ANDV. Andeavor LLC is a wholly owned subsidiary of Marathon Petroleum Corporation, a publicly traded corporation.

The remaining appellees, Tesoro Logistics GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company LLC, are not publicly traded but are indirectly owned by Marathon Petroleum Corporation, a publicly traded corporation. There are no other publicly-held corporations that own 10% or more of the stock of any of Appellees.

/s/ Jeffrey A. Webb
Counsel for Appellees

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JURISDICTIONAL STATEMENT

Plaintiffs asserted only federal question jurisdiction under 28 U.S.C. § 1331. Tesoro contested jurisdiction and moved to dismiss under Rule 12(b)(1). *See* Aplt. App. 46–75, 188–218, 308–38. The district court did not rule on Tesoro's 12(b)(1) motion, electing to exercise its discretion to dismiss all claims for failure to exhaust administrative remedies and denying all other dismissal grounds as moot. Aplt. App. 364-80. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'") (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (court can dismiss for non-merits reasons without determining jurisdiction)). Lack of subject matter jurisdiction is an alternative ground on which the judgment below can be affirmed. *United States v. Sager*, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984).

Plaintiffs appealed from the final judgment under 28 U.S.C. § 1291. Tesoro does not dispute this Court's appellate jurisdiction.

STATEMENT OF ISSUES

1. Whether the district court properly determined that the BIA regulations require exhaustion of administrative remedies prior to judicial review.

   The applicable regulations, 25 C.F.R. Part 169, prescribe an administrative process for issuance and renewal of rights-of-way by the BIA, and remedies for a right-of-way holdover, which involves the BIA determining whether to treat holdovers as trespass. 25 C.F.R. § 169.410. Appeals from BIA decisions under Part 169 are taken by interested parties under 25 C.F.R. Part 2, and

Plaintiffs are "interested parties." 25 C.F.R. § 169.13. The applicable regulations prescribe appellate procedures by which the Interior Board of Indian Appeals ("IBIA") or the Assistant Secretary – Indian Affairs reviews BIA Area Director's decision. 25 C.F.R. §§ 2.20 and 2.4(e); 43 C.F.R. Part 4, subpart D.

The regulations mandate that no decision subject to appeal to a superior authority in the Department of the Interior ("DOI") is considered a reviewable final action until the time to appeal lapses or the appellate process is complete. 25 C.F.R. § 2.6; 43 C.F.R. § 4.314. The regulations also prescribe an administrative process for interested parties to appeal an official's inaction. 25 C.F.R. § 2.8. Plaintiffs did not challenge BIA inaction. The BIA Regional Director has issued a notification that seeks to treat Tesoro's holdover as a trespass, assess penalties, and order corrective action. Tesoro has timely appealed to the IBIA.

- *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409 (8th Cir. 1993)
- *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002)
- *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920 (10th Cir. 1994)

2. Alternatively, if the Court finds the BIA regulations do not mandate exhaustion of administrative remedies, whether the district court abused its discretion by dismissing Plaintiffs' claims for failure to exhaust administrative remedies, when the BIA's administrative process is incomplete.

- *McKart v. United States*, 395 U.S. 185 (1969)
- *McCarthy v. Madigan*, 503 U.S. 140 (1992)
- *Peters v. Union Pac. Ry. Co.*, 80 F.3d 257 (8th Cir. 1996)
- *Hayes v. Chesapeake Operating, Inc.*, 249 F. App'x 709 (10th Cir. 2007) (unpublished)

3. Alternatively, whether the discretionary doctrine of lack of primary jurisdiction supports affirmance of the judgment below in deference to the BIA's ongoing administrative process.

- *United States v. W. Pac. R.R. Co.*, 352 U.S. 59 (1956)

- *Fed. Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972)
- *Burlington N., Inc. v. Chicago & N. W. Transp. Co.*, 649 F.2d 556 (8th Cir. 1981)

4. Alternatively, whether the judgment should be affirmed because Plaintiffs' claims were subject to dismissal for lack of subject matter jurisdiction.
   - *Oneida Indian Nation of New York v. Cnty. of Oneida*, 414 U.S. 661 (1974)
   - *Wolfchild v. Redwood Cnty.*, 824 F.3d 761 (8th Cir. 2016)
   - *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273 (8th Cir. 1987)

5. Alternatively, whether the judgment should be affirmed because Plaintiffs' claims were subject to dismissal for failure to join the United States as a necessary and indispensable party.
   - Federal Rule of Civil Procedure 19
   - *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015)

STATEMENT OF THE CASE

A. The BIA's Statutory and Regulatory Framework for Determining Whether to Treat Right-of-Way Holdovers as Trespass and to Pursue Remedies on Behalf of Allottees.

The Constitution grants Congress broad general authority—"plenary and exclusive" powers—over the administration of Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress has delegated authority for day-to-day administration of Indian affairs to the President or the Secretary of the Interior ("Secretary"). *See* 25 U.S.C. §§ 2, 9. Much of this authority has been re-delegated to the BIA. *See* 25 U.S.C. §§ 1, 1a, 2; 43 U.S.C. § 1457.

Fee title to Indian trust lands, including the subject allotments, is vested in the United States, which holds the lands in trust for individual beneficial Indian landowners. *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981). Under an Act of February 5, 1948, 25 U.S.C. §§ 323–28 (the "1948 Act"), the Secretary has authority to grant—generally, but not always, with Indian landowner consent—"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. The 1948 Act empowers the Secretary to promulgate regulations for implementing and administering the Act. 25 U.S.C. § 328. Thus, the BIA has promulgated right-of-way regulations, appearing at 25 C.F.R. Part 169.

The right-of-way regulations are comprehensive and exhaustive. Subpart F of Part 169 pertains to "Compliance and Enforcement." Regarding the particular situation Plaintiffs allege here—a "holdover," *i.e.*, a company remaining in possession of Indian trust land after a right-of-way's expiration—the BIA has promulgated a specific rule carving out an exclusive role for itself to determine how to proceed and what remedies, if any, to pursue on behalf of Indian landowners:

> **§ 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?**
>
> 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, we 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 us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, we 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.

25 C.F.R. § 169.410. Consequently, the BIA consults with "the Indian landowners," but the BIA makes "the determination" whether to "treat" the holdover "as a trespass" and proceed accordingly. *Id.*

The holdover regulation stands in sharp contrast to 25 C.F.R. § 169.413, which is irrelevant here because it concerns situations where a party takes possession of trust land while never having had a right-of-way in the first instance. In those non-holdover situations, the possession is ***automatically*** treated by the regulation as a trespass, without any BIA "determination." In those non-holdover situations (unlike § 169.410), the Indian landowners are themselves free to "pursue any available remedies under applicable law," in addition to the remedies that may be pursued by the BIA. *Id.*

B. The Pipeline Has Operated on the Reservation for Decades Under a Series of Renewed Rights-of-Way.

The pipeline at issue is a segment of the Tesoro High Plains Pipeline System, which transports crude oil over 500 miles through the Bakken Region to various points, including a refinery. Aplee. App. 2–3.

The pipeline crosses a 15-mile section of the Fort Berthold Reservation ("Reservation"), traversing more than 35 tracts owned by the United States in trust for more than 400 allottees, the tribe, or both. The pipeline segment on the Reservation was constructed more than 65 years ago pursuant to a 20-year right-of-way granted by the BIA in 1953. Aplt. App. 15. In June 1973, the BIA renewed the easement for another 20-year term, which expired in 1993. Aplt. App. 16. In 1995, the BIA renewed the easement for an additional 20-year term (retroactive to 1993, the "1993 Easement" or "1993 Right-of-Way")[1] extending to June 18, 2013. Aplt. App. 16.

C. Plaintiffs' Putative Class Action Claims for Trespass and Breach of Contract.

Plaintiffs are 48 individuals who claim to be enrolled members of the Three Affiliated Tribes and owners of beneficial interests in allotments within the Reservation. Aplt. App. 2–11.

Plaintiffs' lawsuit alleged that Tesoro has been trespassing on allotted lands and/or breaching the right-of-way by failing to remove its pipeline and restore the land following the right-of-ways' expiration. Tesoro contends it has instead been in

[1] Plaintiffs initially denied the validity of the 1993 Easement, claiming the BIA had improperly issued the easement without requisite allottee consent. Aplt. App. 16. In this appeal, Plaintiffs have now abandoned and waived these arguments and any claim based on the alleged invalidity of the 1993 Easement. Aplt. Br. 21 n.7, 33–34, 50. Thus, the Court should affirm the dismissal of claims premised on the alleged invalidity of the 1993 Easement.

regulatorily-permitted holdover status while seeking to renew the right-of-way. These, and other fundamental threshold issues directly implicated by Plaintiffs' claims, are being addressed by the BIA, and its own appellate body, the IBIA, and/or the Assistant Secretary of Indian Affairs. Agency action is not final; administrative proceedings are ongoing.

Plaintiffs styled their lawsuit claims as "Counts" for trespass for failure to remove the pipeline and restore the land upon the right-of-way's termination (Count I), breach of the 1993 Easement (if it is "determined to be valid") for failure to remove the pipeline and restore the land (Count II), unjust enrichment (Count III), and punitive damages (Count IV). Aplt. App. 25–30. They sought various relief, including damages and an injunction requiring the pipeline's removal. Aplt. App. 30–31. Plaintiffs brought their suit as a putative class action, seeking to represent a class of all other owners of beneficial interests in allotted tracts the pipeline crosses. Aplt. App. 11, 20–25. No class was certified.

D. Tesoro's Efforts to Obtain a Renewed Right-of-Way During the Regulatorily-Permitted Holdover.

As is customary in the operation of pipeline infrastructure and fully contemplated by BIA regulations, Tesoro embarked on the complex and time-consuming process of renewing its right-of-way by negotiating with Tribal government and Indian landowners and seeking BIA approval of the right-of-way renewal while it remained in "holdover" status. In 2013, Tesoro commenced

discussions with the Chairman of the Three Affiliated Tribes who insisted Tesoro conclude negotiations with the tribe before approaching individual allottees to seek their consent to renewal. Aplee. App. 5. Negotiations with the tribe culminated in a pipeline right-of-way renewal agreement in February 2017, which was retroactively effective June 18, 2013. Aplee. App. 25–37.

In 2016, Tesoro began meeting with the hundreds of individual allottees through a tribally-approved contact to obtain renewal consents for each allotment. Aplee. App. 7. In preparation, Tesoro engaged a land services company and requested title status reports for the pertinent allotments from the BIA in 2013. Aplee. App. 7. To inform allottees of the fair market value of the right-of-way in connection with their negotiations, Tesoro proactively commissioned third-party appraisals and provided them to the BIA in 2014, and updated them for re-submission on several occasions, including in 2016 and 2018.[2] Aplee. App. 8–9. At the tribe's request, Tesoro also funded safety and environmental studies. Aplee. App. 74–75. Throughout, Tesoro kept the BIA apprised of the status of discussions with both the tribe and allottees. Aplee. App. 7, 9.

[2] At the time, the BIA had a duty to provide allottees appraisal information. 25 C.F.R. § 169.12 (2015).

E. The BIA Commences Administrative Actions on Behalf of Allottees.

Despite Tesoro's efforts, on January 30, 2018, the Superintendent of the BIA's Fort Berthold Agency, issued Tesoro a "10-Day Show-Cause" letter. Aplee. App. 62–73. The letter stated the Fort Berthold Agency "is responsible for investigating and responding to allegations of trespass, assessing penalties, and ensuring that the trespasser rehabilitates the damaged land at his expense" and that it had investigated and found Tesoro had not rehabilitated the allotments or obtained a new right-of-way, resulting in "unauthorized occupancy," due to expiration of the 1993 Right-of-Way. Aplee. App. 62. Tesoro was given ten days to show cause "as to why the determination of trespass in [sic] in error." *Id*. at 63.

On February 7, 2018, Tesoro responded that it was "currently engaged in good-faith negotiations with the landowners to obtain their consent to a new right-of-way." Aplee. App. 74.

On April 10, 2018, the Superintendent wrote to each allottee, informing them the BIA "may" treat Tesoro's holdover as a trespass and of BIA's authority to address the holdover:

> Unless the parties (landowners) have notified us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action. *See* 25 C.F.R. § 169.410.

Aplee. App. 76 (emphasis removed). The Superintendent asked the allottees to notify the BIA if they were engaged in good faith negotiations with Tesoro so the BIA "can proceed with [its] determination." Aplee. App. 76.

In response, numerous parties notified the BIA in writing that they were engaged in good faith negotiations with Tesoro to renew or obtain a new right-of-way. *See, e.g.*, Aplee. App. 93. Even Plaintiffs' counsel provided notice of good faith negotiations for 37 of the 48 named plaintiffs. Aplee. App. 81–83.

In a May 21, 2018 letter, the Superintendent provided information regarding the Three Affiliated Tribes' negotiated compensation for renewal of the right-of-way, and extended the date for informing the BIA of good faith negotiations. Aplee. App. 86–88. In a July 30, 2018 letter, she informed allottees that the Department's Appraisal and Valuation Services Office ("AVSO") was reviewing the appraisals submitted by Tesoro, and that the BIA would provide the allottees those appraisals if the AVSO approved them. Aplee. App. 91–92. The letter further advised that until BIA had approved appraisals, it "cannot grant right-of-way approval or assess trespass damages." Aplee. App. 92. Each of the Superintendent's letters invited the allottees to address any questions about the holdover to the Superintendent or another BIA official. Aplee. App. 77, 86, 92.

F. The District Court's Dismissal for Failure to Exhaust Administrative Remedies.

Appraisals were still under review in the AVSO and good faith negotiations ongoing—with the BIA monitoring the situation—when Plaintiffs filed suit on October 5, 2018, in the Western District of Texas. Aplee. App. 9. On Tesoro's motion, the Texas court transferred the case to the District of North Dakota. Aplee. App. 116–37. Following transfer, Tesoro filed an amended motion to dismiss raising the following grounds: lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; failure to join a required party; and failure to exhaust administrative remedies or, alternatively, lack of primary jurisdiction. Aplt. App. 35–45.

On April 6, 2020, the district court granted Tesoro's motion to dismiss for failure to exhaust administrative remedies, without reaching the other grounds. Aplt. App. 364–79. Regarding the holdover, the court explained that the BIA's "special status as trustee" and invocation of "its administrative procedures to address the Defendants' alleged holdover"—along with "administrative safe guards" available to Plaintiffs to challenge agency inaction—weighed in favor of requiring Plaintiffs to await completion of the BIA process. Aplt. App. 375–79. The court found exhaustion was required and indicated it would use its judicial discretion to require exhaustion even if it were not, reasoning that exhaustion promoted judicial economy and respect for agency autonomy, among other benefits. Aplt. App. 373, 375–77.

G. The BIA's Continued Administrative Actions and Tesoro's Administrative Appeal.

On July 2, 2020, while this appeal was pending, a BIA Regional Director issued a "Notification of Trespass Determination" ("Notification") stating that "[t]he BIA has determined that a pipeline owned and utilized by Andeavor/Tesoro (Pipeline) is encroaching on trust lands without an approved right-of-way, resulting in trespass." Aplee. App. 138–47 (emphasis removed).[3] The Notification concerned 23 allotted tracts the pipeline crosses, including tracts in which some Plaintiffs own a beneficial interest. Aplee. App. 139–41, 147; Dkt. 38 at 92-93, 105 (affidavits showing ownership).

The Notification stated "Andeavor/Tesoro" "must immediately cease and desist the use of the Pipeline," but the pipeline must remain in place, and Tesoro High Plains must pay $187,158,636 within 30 days. Aplee. App. 143–44. The Notification explicitly required exhaustion of administrative remedies through

[3] Appellants have not notified the Court of this supplemental authority that has been issued since they filed their brief. Fed. R. App. P. 28(j). This Court may take judicial notice of the Notification and Tesoro's filings in the administrative appeal. *See* Fed. R. Evid. 201; *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997) (court may take judicial notice of public records); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (court may take judicial notice of agency documents); *In re Indian Palms Assocs.*, 61 F.3d 197, 205 (3d Cir. 1995) ("'Judicial notice may be taken at any stage of the proceeding,' … including on appeal …."). Accordingly, Tesoro has included the Notification, its Notice of Appeal, and Statement of Reasons in the appendix for the Court's convenience. Aplee. App. 138–47, 148–59, 160–327.

appeal to the IBIA in accordance with 43 C.F.R. §§ 4.310–4.340 prior to any judicial review. Aplee. App. 144.

Tesoro has filed its Notice of Appeal and Statement of Reasons with the IBIA, Aplee. App. 148–59, 160–327, commencing a process where the exact fundamental threshold issues raised by Plaintiffs' complaint will be reviewed administratively, with the BIA, as trustee, representing allottees' interests. Due to the IBIA appeal, the Notification does not constitute or reflect ***final*** agency action. 25 C.F.R. § 2.6(a); 43 C.F.R. § 4.314.

Importantly, the Notification also stated further action would be taken related to the remainder of the allotted tracts, including additional tracts in which various Plaintiffs own a beneficial interest. Aplee. App. 139; Dkt. 38 at 92-93, 105. As of this date, no second notice has yet been issued, but this demonstrates that—in addition to the pending administrative appeal of the first notice—the agency is continuing its process for evaluating alleged trespass on multiple levels.

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed on the exhaustion grounds upon which the court entered judgment. Fundamental threshold issues that are the subject of Plaintiffs' lawsuit are being addressed by the BIA—the federal agency that (i) serves as trustee for the hundreds of Indian allottees who own interests in the allotments and (ii) is designated by regulation as responsible for determining

whether the holdover will be treated as a trespass, and if so, what action and remedies to seek on behalf of the allottees. Although BIA regulations require exhaustion of administrative remedies, exhaustion has not yet occurred. Even if exhaustion were not mandated by the BIA regulations (and it is), the district court properly exercised its discretion to require exhaustion, noting that Plaintiffs failed to assert or prove any applicable exceptions to the exhaustion doctrine.

In the event this Court did not affirm based on the exhaustion doctrine, the judgment could be affirmed on multiple other independent grounds raised in Tesoro's motion to dismiss.

The Court can affirm the judgment under the doctrine of primary jurisdiction, which promotes orderly relationships between the courts and administrative agencies charged with particular regulatory duties. The BIA has extensive duties related to rights-of-way over Indian lands, and discharges those duties pursuant to its extensive regulatory program (including its recently revised holdover regulation) and as trustee for the Indian allottees. Plaintiffs' lawsuit should cede to the BIA's ongoing agency action under the primary jurisdiction doctrine, if not exhaustion.

Plaintiffs asserted only federal question jurisdiction, on the basis that as individual Indian allottees they have a federal common law trespass claim. However, this Court's precedents make clear that individual Indian allottees have no such claim, as a trespass claim (if any) brought by individual Indian allottees would

arise under state, not federal, law. Therefore, the judgment could also be affirmed for lack of subject matter jurisdiction.

The United States is a required party, given that Plaintiffs' lawsuit seeks to displace the BIA from its role as trustee for the allottees and as the one agency under the BIA regulations that decides on behalf of all allottees (including the hundreds who are not named plaintiffs here) whether to treat a regulatorily-permitted holdover as a trespass, and if so, what actions to take. Because the United States cannot be joined, dismissal is required under Rule 19; therefore, the judgment could also be affirmed on this basis.

For each of these reasons, the Court should affirm the judgment below.

ARGUMENT

I. The District Court Properly Determined that the BIA Regulations Require Exhaustion of Administrative Remedies.

Plaintiffs incorrectly contend "there is no statute or regulation that provides an administrative procedure for resolving a trespass dispute." Aplt. Br. 18. They argue that if they are not allowed to plow ahead with their lawsuit, it would lead to an "unbearable" result because the "Indian landowners are unable to do anything but wait and beg for the federal government to take action." Aplt. Br. 11. They are wrong.

The BIA has exercised its Congressionally-delegated authority to create an administrative process for addressing alleged trespass-by-holdover, and has sound

reasons for handling the issues in this manner, rather than allowing allottees to file their own suits. Section 169.410 is the centerpiece of the administrative process, where the BIA has committed its own regulatory power and discretion to determine whether Tesoro's occupancy of the allotments constitutes trespass or a regulatorily-permitted holdover. 25 C.F.R. § 169.410.[4]

The BIA is actively engaged in exercising its authority to represent the Plaintiffs, including by issuing its Notification, which purports to (i) deem the holdover as a trespass, (ii) require Tesoro to immediately cease and desist from use of the pipeline, and (iii) order Tesoro to pay $187 million. Aplee. App. 138, 143–44. It is undisputed that the BIA's process for making a determination of trespass for holdovers and to pursue remedies is incomplete—Plaintiffs simply want to

[4] By contrast, the inapplicable regulatory provision principally relied on by Plaintiffs, 25 C.F.R. § 169.413, permits individual landowners to pursue remedies themselves, but only when an individual or entity takes possession of or uses land without a right-of-way or other proper authorization in the first instance—this is not the holdover scenario presented in this case. If section 169.413 applied to holdovers, then section 169.410 would largely be surplusage, especially the part about the action the BIA "may take" in response, as section 169.413 contains almost identical verbiage. *Cammarano v. United States*, 358 U.S. 498, 505 (1959) (rejecting party's reading of regulations that render provisions "pure surplusage."); *Criger v. Becton*, 902 F.2d 1348, 1352 (8th Cir. 1990) (rejecting interpretation that would render phrase surplusage, stating "That is not how we read the regulations."). Additionally, section 169.413 cannot apply to holdovers because section 169.410 provides that the BIA is to make a "determination" whether to "treat" a holdover "as a trespass," whereas section 169.413 provides that the type of possession it addresses "is a trespass." The only reasonable reading of the two sections, therefore, is that they address mutually exclusive scenarios.

circumvent the process. The district court correctly ruled that the BIA regulations mandate exhaustion of administrative remedies before any judicial action can occur. *See* Aplt. App. 368–73. Because those administrative remedies are still ongoing and not exhausted, dismissal was required.

Agencies may create exhaustion requirements through their regulations, and the BIA has done so here in order to ensure it can exercise its authority in an orderly manner. *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 411 (8th Cir. 1993); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924–25 (10th Cir. 1994); *Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002). As the district court correctly held, Aplt. App. 369–73, the applicable regulations require appeals from BIA decisions under 25 C.F.R. Part 169 to be taken by interested parties under 25 C.F.R. Part 2; and Plaintiffs are "interested parties." 25 C.F.R. §§ 169.13, 2.3(a). If Plaintiffs wish to contest delays in BIA's progress, the regulations prescribe an administrative process for interested parties to make an official's inaction the subject of appeal. 25 C.F.R. § 2.8.

BIA regulations clearly specify when the agency's action is complete. *Klaudt*, 990 F.2d at 411; *Coosewoon*, 25 F.3d at 924–25; *Davis*, 199 F. Supp. 2d at 1179. 25 C.F.R. Part 2 mandates that no decision subject to appeal to a superior DOI authority shall be considered final so as to constitute judicially-reviewable DOI action, and decisions made by BIA officials shall not be effective when a notice of appeal has

been filed. 25 C.F.R. § 2.6. And the IBIA is to decide, pursuant to the provisions of 43 C.F.R. Part 4, Subpart D, appeals from a decision made by a BIA Area Director. 25 C.F.R. § 2.4(e). Importantly, 43 C.F.R. Part 4, Subpart D prescribes that no decision of a BIA official that is subject to appeal to the IBIA will be considered reviewable final agency action. 43 C.F.R. § 4.314(a).

Allowing this suit to proceed in federal court while the BIA's administrative process and appeals are ongoing would undermine the agency's regulations and delegated duties and cause significant legal and practical problems. Plaintiffs' alleged injuries—that Tesoro has failed to remove the pipeline and restore the land—are explicitly and directly addressed by BIA regulations and are subject to an ongoing agency process. Whether the right-of-way is granted for one or more allotments must also be determined by the BIA. 25 C.F.R. Part 169.

If the right-of-way is not ultimately granted by the BIA and the BIA makes a final decision to treat the holdover possession as a trespass, the BIA must determine which remedies, if any, to pursue on behalf of the allottees. 25 C.F.R. § 169.410. The BIA's final action may differ from, or even conflict with, the district court's. *See e.g.,* Aplt. App. 26, 31 (Plaintiffs seek removal of Tesoro's pipeline); Aplee. App. 143 (BIA's Notification orders Tesoro to leave the pipeline in the ground); Aplt. App. 165–66 (Plaintiffs' counsel demanding the BIA and AVSO cease review

of AVSO appraisals and withhold appraisal opinions so value of right-of-way and trespass damages can be decided in litigation).

If the BIA's final decision is to not treat the holdover as a trespass, to allow Tesoro to remain in holdover as negotiations continue, and to grant Tesoro a right-of-way for one or more allotments, then the BIA's regulations mandate that the right-of-way be retroactive to the prior expiration; and thus, no trespass of the allotments or breach of the right-of-way will have—nor could have—occurred. 25 C.F.R. § 169.410 ("The holdover time will be charged against the new term."); *see also* Aplt. App. 16. (retroactive effect of 1993 Easement granted in 1995). If the lawsuit were not dismissed, the untenable scenario could occur where BIA approves a right-of-way while Plaintiffs are suing Tesoro for trespass on the same approved right-of-way. The orderly way to proceed, consistent with—and as required by—BIA's regulations, is to wait for the BIA's final agency action, and if Plaintiffs are unhappy with the result, they can seek judicial review of it in federal court.[5]

Numerous other scenarios could ultimately play out under the BIA's regulations. The critical point is that the BIA is addressing the very issues raised by this lawsuit through its administrative process, which will not be complete until the

[5] Plaintiffs' assertion that they are not challenging a BIA decision, Aplt. Br. 20–21, also lacks merit. There is not yet any final decision to challenge—which is precisely the point of the exhaustion doctrine.

administrative appeal has allowed the BIA to undertake full review, as the regulations contemplate.

Plaintiffs' complaint that they lack any remedies through the BIA for trespass or breach of the right-of-way, *see* Aplt. Br. 10–11, mischaracterizes the agency process. The BIA is actively taking action on trespass allegations, but even if it were not doing so to Plaintiffs' liking, their remedy is to contest agency inaction under 25 C.F.R. § 2.8. This administrative remedy in itself is a remedy that must be exhausted prior to judicial review. *Klaudt*, 990 F.2d at 411; *Coosewoon*, 25 F.3d at 924–25; *Davis*, 199 F. Supp. 2d at 1179. *See also Prima Expl., Inc. v. LaCounte*, No. 1:18-CV-116, 2018 WL 4702153, at *3–*4 (D.N.D. Oct. 1, 2018) (unpublished) (case cited by district court that likewise dismissed on exhaustion grounds despite plaintiffs arguing BIA could not provide relief sought).

In sum, the process for making a BIA decision final is not complete. The BIA has not yet determined in a reviewable final agency action whether to allow the holdover to continue while further good faith negotiations occur, whether to grant the rights-of-way, or whether to treat the holdover as trespass, and if so, what actions and remedies to pursue.[6] Therefore, the Court correctly dismissed the case based on

[6] While Tesoro's IBIA appeal contests the unauthorized actions and remedies that the Notification seeks, Tesoro does not contest that BIA's regulations, specifically 25 C.F.R. § 169.410, prescribe the authorized actions and remedies. Aplee. App. 154, 256–57, 162–66. Unlike with a section 169.413 trespass, a trespass

this mandatory exhaustion requirement, and the judgment should be affirmed on this basis alone.

II. Even if Exhaustion Were Not Mandated by the BIA Regulations, the District Court Did Not Abuse Its Discretion to Dismiss This Lawsuit for Lack of Exhaustion.

While the district court held that "relevant BIA regulations require exhaustion" prior to judicial review, it also stated it would dismiss the case as a matter of judicial discretion if exhaustion were not required as a legal matter. Aplt. App. 373 ("Even if this Court were to find that no statute or regulation required Plaintiffs to exhaust their administrative remedies, the Court would do so using its judicial discretion."). In an entire section of the district court's order that goes largely unaddressed by Plaintiffs, the court concluded that "the Government's interests in exhaustion outweigh the Plaintiffs' need for immediate judicial review." Aplt. App. 373. The district court properly exercised its discretion to dismiss this case because the administrative process has not concluded.

A. Abuse of Discretion Standard of Review.

The Court reviews the judgment below for abuse of discretion, as it relates to the court exercising its discretion to dismiss on exhaustion grounds. *Thermal Sci.,*

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determination in a holdover situation, as is the case here, does not allow the Indian landowners to pursue concurrent legal action.

Inc. v. U.S. Nuclear Regulatory Comm'n, 184 F.3d 803, 805 n.3 (8th Cir. 1999); *Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 175 (1st Cir. 2016).

B. The District Court Did Not Abuse Its Discretion.

The firmly established doctrine of exhaustion provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *McKart v. United States*, 395 U.S. 185, 193 (1969). "Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *Id*.

This Court has identified four primary purposes of the exhaustion doctrine: (1) it respects agency authority by discouraging the "deliberate flouting" of agency processes; (2) it protects agency autonomy by allowing the agency to apply its expertise and correct its own errors; (3) it furthers effective judicial review by developing key facts in an administrative proceeding; and (4) it promotes judicial economy by avoiding needless repetition. *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 263 n.3 (8th Cir. 1996).

Here, the district court reasonably exercised its discretion to dismiss the case after concluding the BIA process to address the holdover would serve these purposes. The district court demonstrated a clear intent to allow the BIA to address the threshold issues, applying its expertise and discretion, and correcting any errors that may occur as a result of actions by lower-ranking BIA officials. Aplt. App.

375–76 ("Most importantly, the regulations provide that BIA decisions may be appealed under Part 2, which provides the BIA with the opportunity to re-evaluate its decisions and make corrections if needed. Allowing the BIA to employ these procedures promotes 'agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors.'"). This is particularly important when, as here, the BIA is in the early years of interpreting its regulations, including section 169.410 which was promulgated in 2016.

1. Exhaustion Promotes Respect for the BIA's Exclusive Authority over Holdovers and Protects Its Autonomy in Addressing the Situation as an "Active Participant."

Congress delegated broad authority for administering Indian affairs to the Executive Branch, and, in the 1948 Act, tasked the Secretary with granting and administering rights-of-way over Indian trust lands. *See supra* at 4. Much of this delegated authority, including the 1948 Act powers, is vested in the BIA. Consistent with this, the BIA has promulgated regulations, found at 25 C.F.R. Part 169, governing "Rights-of-Way over Indian Land."

The district court correctly observed that the right-of-way regulations reflect BIA's intent to be an "active participant" in dealing with right-of-way holdovers. *See* Aplt. App. 375–76. To that end, the regulations unambiguously reserve for the BIA the sole authority to decide how to proceed with a holdover. Section 169.410

states that if a holdover occurs, the BIA will consult with the Indian landowners and make a "determination whether to treat the unauthorized possession as a trespass." 25 C.F.R. § 169.410. The rule also reserves for the BIA the option to pursue any remedy available under applicable law on behalf of the Indian landowners. *Id.* Significantly, the rule (unlike section 169.413) says nothing about Indian landowners taking matters into their own hands to address a holdover. *Id.*

There is good reason to have reserved sole discretion in the BIA to administer the special case of holdovers. A holdover occurs when a party's infrastructure, such as a pipeline, remains in place after a duly issued right-of-way has yet to be renewed or expires. That party might well prefer to obtain a renewed right-of-way rather than incurring the cost of removing the infrastructure and making other plans. Absent that infrastructure, the economic benefits enjoyed by all of the Indian landowners who benefit from the pipeline's right-of-way would be irretrievably lost without the BIA having an opportunity to consider input from all affected Indian landowners and proceeding in their collective best interest.

However, renewing a right-of-way is a long multi-faceted process, involving appraisals, appraisal review, tribal negotiations, identification of interest owners, negotiations with hundreds of allottees, environmental studies, safety studies, BIA reviews, and so forth. *See* Aplee. App. 5–9, 79–80, 89–90. That holdovers occur as a result of the lengthy process, including negotiations and approvals, is hardly

surprising. If individual Indian landowners could sue as soon as a right-of-way expires—or worse, sue after years of negotiations, claiming damages in the interim—it would readily scuttle an already fragile process.

This is particularly so in cases, like here, where there are dozens of separate allotments with over 400 allottees along the right-of-way. Accordingly, the BIA's regulatory intent is to retain control for managing holdover situations itself, speaking with one voice on behalf of all Indian landowners. And BIA officials have made decisions, pursuant to section 169.410 and subject to exhaustion requirements, to ensure the opportunity to apply its regulations properly, including through appeal, before a decision ripens into final agency action. 25 C.F.R. § 2.6.

Allowing individual allottee lawsuits would reduce the BIA from "active participant" to mere bystander, and turn the section 169.410 holdover regulation upside down and subvert the regulatory process. The district court was correct, and certainly well within its discretion, in applying the exhaustion doctrine to Plaintiffs' holdover claims because it respects the BIA's autonomy to exercise its discretion in managing holdovers on behalf of all allottees. *Peters*, 80 F.3d at 263 n.3.

2. Requiring Exhaustion Also Promotes Judicial Economy.

Judicial economy further supports the district court's application of the exhaustion doctrine to Plaintiffs' claims. *Id.* Prior to Plaintiffs' suit, the BIA has been taking steps to address the holdover on behalf of all allottees. The BIA has

issued the Notification, Tesoro has appealed, and the BIA is reviewing the same issues raised by Plaintiffs as a participant before the IBIA. Depending on the outcome, the BIA's final agency action could be diametrically-opposed to what Plaintiffs seek in their lawsuit. Or it could be similar. Or anywhere in between.

Dismissal of Plaintiffs' claims means that future court action on behalf of Plaintiffs concerning allegations of trespass by Tesoro will benefit from an administrative record compiled in the IBIA proceeding. *Klaudt*, 990 F.2d at 411. Because exhaustion will promote judicial efficiency in addition to respecting the agency's authority and process, the district court's dismissal order was well within its discretion.

C. Plaintiffs' Arguments Regarding Their Purported "Independent Right" to Sue Miss the Mark.

Contrary to Plaintiffs' argument, Aplt. Br. 22–28, they do not possess the legal prerogative to obtain a judicial determination that a right-of-way holdover is a trespass. That is BIA's prerogative, as trustee for the allottees and pursuant to statutory and regulatory authority.

Where the government undertakes to represent allottees, the Supreme Court has held that there is no room for allottees to take matters into their own hands:

> [W]hen the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property.

Heckman v. United States, 224 U.S. 413, 446 (1912). This principle is equally applicable here, where the United States, through the BIA, has commenced an administrative action on behalf of allottees, and even if it had not, allottees have a regulatory path to seek recourse against agency inaction, 25 C.F.R § 2.8. *Coosewoon*, 25 F.3d at 924–25; *Davis*, 199 F. Supp. 2d at 1179. None of the authorities cited by Plaintiffs address whether allottees have an independent right to sue for trespass-by-right-of-way-holdover, when the BIA has by regulation reserved the issue for its own administrative processes. Nor do any of Plaintiffs' cases involve a situation where the BIA, in its role as trustee of the allottees, is addressing administratively the exact allegations the plaintiff is making, as the BIA is doing for Plaintiffs here.

Whether Indian allottees have a federal common law right of action to sue for trespass is irrelevant to exhaustion. The exhaustion question is whether Indian allottees should await the outcome of the BIA process before bringing any claim they may have with respect to the alleged trespass. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds* ("The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking.").

Plaintiffs' principal case, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), is of no help to them. Aplt. Br. 26–28. *Poafpybitty* was not an exhaustion case, but dealt with whether Indian allottees had capacity to sue for breach of an oil and gas lease independently of the United States. Significantly, the BIA was not going to take action for the alleged breach; it expressly approved the Indians' suit and retention of counsel, allowing the attorneys to be paid out of "restricted trust funds." *Poafpybitty*, 390 U.S. at 366–67 & n.1.

Moreover, the Supreme Court examined the regulations applicable to oil and gas leases on Indian land, thereby acknowledging that a particular regulatory scheme ***could*** preclude a suit by the Indians themselves: "[W]e find nothing in this regulatory scheme which would preclude petitioners from seeking judicial relief for an alleged violation of the lease." *Id.* at 373. The court cited no applicable regulation akin to the holdover regulation in section 169.410, as the United States' only specific role with respect to the breach alleged—waste of gas—was to determine, if requested by the lessee, whether the waste was sanctioned by law. *Id.* There was no regulation providing that the United States would consult with Indian landowners about the waste, decide upon a particular remedy from any available under applicable law, and then pursue it on the Indians' behalf. Nor did the regulatory scheme involve dozens of contiguous allotments for pipeline use necessitating a uniform government approach. In short, *Poafpybitty* has no application here, where

the regulatory scheme clearly indicates the BIA's intent to address holdovers itself, and no intent to authorize allottees to sue on their own in federal court.

D. Plaintiffs' Argument That There Are No Remedies or Procedures to Exhaust Is Without Merit.

Citing *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 937 (8th Cir. 2005), Plaintiffs argue that the exhaustion doctrine cannot apply because the BIA is "unable to grant" the damages and injunctive relief they seek in their lawsuit. Aplt. Br. 28–31. This case is distinguishable and actually highlights why dismissal was appropriate.[7]

In *Alpharma*, plaintiff sued for false advertising and unfair competition, asserting that the defendant had misrepresented it had FDA approval for certain uses of its animal feed additive. The district court dismissed the case under the exhaustion doctrine in deference to the FDA, which was considering product approval for

[7] In claiming there is no administrative remedy, Plaintiffs cite *Shade v. Acting Alaska Regional Director*, 2019 I.D. Lexis 72, 67 IBIA 15, 20 n.9 (2019), in which they assert the BIA "recognized that it 'does not have authority over disputes between individuals.'" Aplt. Br. 30–31. But Plaintiffs misread *Shade*. *Shade* involved an appeal brought by an heir to an allotment interest who wanted the BIA to advise a neighboring allottee not to interfere with or trespass on a right-of-way he claimed to have on her allotment. In dismissing the appeal, ***the IBIA*** noted that it, ***the IBIA***, lacked "authority over disputes between individuals." 2019 I.D. Lexis 72, at *10 n.9. The IBIA made no comment denigrating the authority of the BIA to pursue enforcement against individuals on behalf of Indian landowners, which is the remedy here. This was no remedy for the appellant in *Shade*, however, because "BIA's trust duty is to the Indian landowner," and "BIA's rights-of-way regulations in 25 C.F.R. Part 169 do not provide for BIA enforcement against an Indian landowner." *Id.*

defendant. This Court reversed, stating that "the FDA does not have the authority to award the compensatory and punitive damages sought by [the plaintiff] in the present lawsuit." *Id.* at 938.

Plaintiffs read *Alpharma* too broadly to mean that the exhaustion doctrine can only apply if an agency has authority to grant a self-executing damages or other court-like remedy. Plaintiffs are correct that the BIA, like the FDA in *Alpharma*, does not have authority simply to "award" damages or injunctive relief. But unlike the FDA, the BIA here, as trustee for the Plaintiffs, is expressly empowered by its regulations to pursue this relief for them, *see* 25 C.F.R. § 169.410, and in fact, that is precisely what the BIA is doing, as evidenced most recently by the Notification.

Whereas the FDA in *Alpharma* was never going to sort through and address the plaintiff's unfair competition claims, the BIA here is addressing the very fundamental threshold issues raised by Plaintiffs' complaint. There is a mechanism for relief here that did not exist in *Alpharma*. It arises, as the district court noted, by virtue of the BIA's "special status as trustee," Aplt. App. 375, which provides a remedy for allottees, albeit a remedy that BIA—not the allottees—may pursue in litigation on behalf of all allottees. That remedy may not be what Plaintiffs want, but it is what the BIA regulations prescribe.

The Tenth Circuit holds that the BIA's investigatory and enforcement functions must conclude before a suit by interested landowners can be filed in federal

court. In *Hayes v. Chesapeake Operating, Inc.*, 249 F. App'x 709 (10th Cir. 2007) (unpublished), Hayes, filed a civil complaint requesting damages from the defendant, Chesapeake, in connection with Chesapeake's activities under oil and gas leases covering "restricted Indian lands regulated by [DOI]." *Id.* at 710. Hayes, who was heir to those lands, alleged Chesapeake had violated the lease and regulations. *Id.* Although Hayes made attempts to seek recourse within the DOI, he ultimately ignored the DOI solicitor's and the IBIA's referral of the matter to the appropriate BIA officials, opting instead to proceed directly to court himself. *Id.* at 710–11. The district court, noting the BIA's power to investigate and audit lease compliance and pursue enforcement for Indian landowners, dismissed Hayes' lawsuit for failure to exhaust administrative remedies. *Hayes v. Chesapeake Operating, Inc.*, No. CIV-06-627-W, 2007 WL 9711279, at *4 (W.D. Okla. Jan. 4, 2007). The Tenth Circuit affirmed, finding "neither abuse of discretion nor legal error in the district court's determination that Mr. Hayes failed to exhaust administrative remedies and was therefore not entitled to judicial review." 249 F. App'x at 711.

The upshot of *Hayes* is that when the BIA stands ready to address a matter—or is addressing a matter, as here—affecting trust or restricted Indian lands, an Indian landowner must allow that administrative process to run its course. *Hayes* was not *Poafpybitty*, where the BIA was not acting and had no intent to act. This case is also

not *Poafpybitty*, as the district court rightly observed. Aplt. App. 378 ("This is not a case where the BIA has completely failed to act.").

Finally, Plaintiffs suggest there must be some elaborate set of procedures for the exhaustion doctrine to apply. *See* Aplt. Br. 29–30, 35–36. But this is not true either. The BIA regulations dictate that for a holdover, the Indian landowners and BIA will consult. The BIA then makes a "determination" whether to treat the holdover as a trespass, and, if so, the BIA may decide to pursue remedies on the allottees' behalf. 25 C.F.R. § 169.410. And if the BIA unreasonably delays in making "the determination" how to proceed, then there are, as the district court noted, "administrative safe guards" available to landowners whereby they can challenge the inaction. *See, e.g.,* 25 C.F.R. § 2.8.

The district court was within its discretion in holding this administrative process is subject to exhaustion.

E. The District Court Properly Dismissed the Breach of Contract Claim.

Contrary to Plaintiffs' argument, the district court committed no error or abuse of discretion by dismissing the breach of contract claim "without explaining why the claim should be dismissed." Aplt. Br. 47. The same reasons that support dismissal of the holdover trespass claim likewise support dismissal of the breach of contract claim, and Plaintiffs have waived arguments to the contrary.

Plaintiffs' breach of contract claim is predicated on the regulations of Part 169 being incorporated into all rights-of-way granted by the BIA, including the requirement to restore the land upon the right-of-way's expiration. *See* Aplt. App. 27–28. The relief Plaintiffs sought by the breach claim—requiring Tesoro to restore the land to its original condition—is effectively the same as the relief they sought with their trespass claim—compelling Tesoro to restore the land and remove the pipeline. Aplt. App. 26–28; *see also* Aplt. Br. 11 ("This is a case about a trespass on Indian trust land."). The breach claim addressed the same issue—the holdover—and was certainly within the BIA's purview under 25 C.F.R. § 169.410.[8] The same potential conflicting outcomes are also possible as to the breach claim. *See supra* at 18–19. Thus, the breach claim did not warrant individualized or separate discussion by the district court.

Plaintiffs themselves did not argue below that their breach claim should be treated differently from the trespass claim for purposes of exhaustion.[9] *See* Aplt.

[8] Plaintiffs assert their breach claim is "perfectly analogous" to the breach of lease claim in *Poafpybitty*. Aplt. Br. 48, 49 n.16. That is wrong. For one thing, the breach claim here relates to a holdover the BIA is actively addressing, unlike the situation in *Poafpybitty* where the government was not involved. Moreover, here the BIA is the easement's grantor and thus the proper party to sue for enforcement. 25 U.S.C. § 323. In *Poafpybitty*, the allottees were the lease's grantors. 390 U.S. at 372.

[9] Nor did they mention their other "claims" that they now complain the district court did not address. *Compare* Aplt. Br. 49 n.17 *with* Aplt. App. 231–40. These "claims" were in reality remedies Plaintiffs sought for the holdover. Like the breach claim, they did not warrant separate treatment by the district court.

App. 231–40. They have therefore waived the argument that the breach claim is not subject to the exhaustion requirement. *Eagle Tech. v. Expander Ams., Inc.*, 783 F.3d 1131, 1138 (8th Cir. 2015) ("It is well settled that we will not consider an argument raised for the first time on appeal.").

Additionally, Plaintiffs pleaded their breach of contract claim hypothetically, dependent on the outcome of their claims challenging the 1993 Easement. Aplt. App. 27. Thus, the breach claim was closely intertwined with the issue of whether the 1993 Easement was valid (an issue that Plaintiffs have since dropped in this appeal), which the district court ruled could not be addressed due to exhaustion. Thus, the district court had every reason to dismiss the breach claim along with the challenge to the 1993 Easement.

III. Alternatively, Lack of Primary Jurisdiction Supports Affirmance.

If this Court were to conclude that the doctrine of exhaustion did not apply here, it could still affirm the district court's judgment under the related doctrine of primary jurisdiction.

The doctrine of primary jurisdiction promotes orderly relationships between the courts and administrative agencies charged with particular regulatory duties. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). Primary jurisdiction, unlike the exhaustion doctrine, applies when a claim is originally cognizable in the courts as well as the administrative agency, but adjudication of the claim requires

the resolution of issues which have been placed within the special competence of an administrative agency pursuant to a regulatory scheme. *Id.* at 64.

Application of the doctrine of primary jurisdiction is discretionary, and no fixed formula exists. *Id.* Assertion of primary jurisdiction is particularly appropriate in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952). In addition to preserving the proper relative roles between administrative agencies and the courts, the doctrine of primary jurisdiction serves to promote uniformity and consistency in the regulation of business entrusted to a particular agency. *Id.*

The need to apply primary jurisdiction is at its greatest when the precise issue brought before the court is already in the process of adjudication by an administrative agency. *Fed. Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972). The court's restraint not only preserves the proper role of agencies and courts, but helps maintain uniformity of regulation. *Burlington N., Inc. v. Chicago & N. W. Transp. Co.*, 649 F.2d 556, 558 (8th Cir. 1981). As a general rule, court actions should not be used to circumvent administrative procedures. *Id.* at 559. Further, if the court did not stay its hand during the pendency of an administrative procedure and the court and agency reached different results, affected parties could

be placed in an untenable position. *Kocolene Oil Corp. v. Ashland Oil, Inc.*, 509 F. Supp. 741, 743 (S.D. Ohio 1981). The doctrine's rationale is compelling:

> A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end. Where a statute confers jurisdiction over a general subject matter to an agency and that matter is a significant component of a dispute properly before the court, it is desirable that the agency and the court go down the same track—although at different times—to attain the statute's ends by their coordinated action.

Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 59 (2d Cir. 1994).

The BIA has regulatory authority in the event of a right-of-way holdover on Indian land to make a "determination" whether to treat the holdover as a trespass and if so, what actions to take. These are discretionary matters, entrusted to the BIA as part of its statutory role overseeing rights-of-way on Indian land. The BIA's charge is to resolve these matters in the collective best interest of all Indian landowners—here, hundreds of landowners; not just the 48 named plaintiffs. Under the primary jurisdiction doctrine, a court should not proceed with a suit like Plaintiffs' without first hearing from the agency taking final action on the discretionary matters entrusted to it.

The primary jurisdiction doctrine allows for uniformity of regulation. The BIA naturally has an interest in applying consistent policies for managing holdovers that occur during right-of-way renewal, as that will encourage parties to pursue projects and do business in Indian country. But the BIA cannot accomplish this if

Indian landowners are allowed to sue in court and move full steam ahead before the agency has even had a chance to complete the administrative process.

The BIA's Notification is under appeal to the IBIA,[10] and as such is not final. 25 C.F.R. § 2.6; 43 C.F.R. § 4.314. The IBIA will perform an adjudicatory function, considering and deciding the exact same issues Plaintiffs desired the district court to consider and decide. In so doing, the IBIA will build a factual record that would be of use in any subsequent court action, including on issues where agency input may be relevant.

For these reasons, if the Court does not affirm dismissal of Plaintiffs' lawsuit based on exhaustion, it should affirm based on the BIA's primary jurisdiction.

IV. The Judgment Below Can Be Affirmed on Other Dismissal Grounds Not Reached by the District Court.

Tesoro raised a series of additional grounds for dismissal that the district court did not reach. Aplt. App. 46–75, 76–98, 99–135, 277–91, 308–38, 339–63. This Court need not reach these grounds either, but they also support affirmance of the district court's judgment. Tesoro addresses some additional grounds discussed in

[10] The Assistant Secretary – Indian Affairs ("AS-IA") could also elect to take jurisdiction from the IBIA and issue a decision in the appeal or assign responsibility for doing so to a Deputy. 25 C.F.R. § 2.20. The BIA regulations prescribe the appeal process for such decisions. *Id*. If the AS-IA does not timely decide, any party—including Plaintiffs—can move the IBIA to re-assume jurisdiction. *Id*.

Plaintiffs' brief, including: lack of subject matter jurisdiction and failure to join a necessary and indispensable party.

1. The District Court Lacked Subject Matter Jurisdiction Because Allottees Lack a Federal Trespass Claim.

Plaintiffs allege as their sole basis for federal subject matter jurisdiction that "this action arises from violations of the ***federal common law of trespass*** on Indian Lands" pursuant to 25 U.S.C. § 345,[11] giving rise, they say, to jurisdiction pursuant to 28 U.S.C. § 1331. Aplt. App. 13; *see also* Aplt. Br. 42. But Plaintiffs' jurisdictional arguments (Aplt. Br. 22–24; 37–45) rest on an incorrect premise—that the Supreme Court in *Oneida I* and *II*, in holding that there is federal subject matter jurisdiction over a ***tribe's*** suit to vindicate ***aboriginal rights***, was by implication also holding that individual Indian allottees have federal common law trespass rights enforceable in federal court. *Oneida Indian Nation of New York v. Cnty. of Oneida* ("*Oneida I*"), 414 U.S. 661 (1974); *Oneida Cnty. v. Oneida Indian Nation of New York* ("*Oneida II*"), 470 U.S. 226 (1985). The *Oneida* opinions themselves actually

[11] Plaintiffs' complaint also referenced 25 U.S.C. §§ 323–28 (the 1948 Act), 1360 (providing state civil jurisdiction in certain actions), and the federal regulations promulgated under the 1948 Act. While Tesoro addressed in its district court briefing why those provisions do not support "arising under" jurisdiction either, they appear to have been dropped by Plaintiffs on appeal and that argument is now waived. *FTC v. Neiswonger*, 580 F.3d 769, 775 (8th Cir. 2009) ("Claims not raised in an opening brief are deemed waived."). Regardless, they do not support federal "arising under" jurisdiction for all the reasons briefed below.

demonstrate the opposite, as specifically confirmed by this Court's own subsequent holdings.

In *Oneida I* and *II*, the Oneida tribe brought suit to enforce tribal aboriginal rights under 28 U.S.C § 1362, which grants district courts original jurisdiction over a ***tribe***. Thus, *Oneida* did not even arise under 25 U.S.C § 345, on which Plaintiffs rely. Moreover, Plaintiffs ask the Court to interpret the *Oneida* cases in a way the Eighth Circuit has expressly rejected. The very cases Plaintiffs cite demonstrate the point that the *Oneida* rule applies to ***tribes*** enforcing ***aboriginal rights***, not individual allottees suing for alleged trespass. Federal common law provides no basis for federal "arising under" jurisdiction under 28 U.S.C. § 1331 or 25 U.S.C. § 345, nor is "federal common law of trespass" a cognizable claim upon which relief can be granted.[12]

a. Plaintiffs' Untenable Reading of the *Oneida* Decisions Is Directly Contrary to This Court's Precedent.

Plaintiffs misleadingly state that the *Oneida* cases "established that Indians have a federal common law trespass action against those who maintain an unauthorized presence" on their land, Aplt. Br. 22, but the Supreme Court actually made clear that is ***not*** the case as it relates claims arising out of ownership and possession of individually-held allotments, like here. In *Oneida I*, the Supreme

[12] Tesoro moved to dismiss this and Plaintiffs' other "Counts" under Federal Rule of Civil Procedure 12(b)(6). Aplt. App. 76–98.

Court held that even where the underlying right to possession of land arises under federal law, as it does here under 25 U.S.C. § 345,

> 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 [Federal law]***.

Oneida I, 414 U.S. at 675 (citations/quotations omitted; emphasis added). Here, like in *Taylor v. Anderson*, 234 U.S. 74 (1914), Plaintiffs' suit concerns lands allotted to individual Indians, not tribal rights to lands, which is a critical distinction. *Oneida I* expressly affirmed *Taylor*'s holding that suits concerning lands allocated to individual Indians ***do not*** state claims arising under the laws of the United States. *Oneida I*, 414 U.S. at 676.[13]

The *Oneida I* Court expressly based its holding that the Oneida tribes' complaint asserted a claim "arising under" federal law on the unique "nature and source of the possessory rights of Indian ***tribes to their aboriginal lands***, particularly when confirmed by treaty." *Id.* at 667 (emphasis added). Only after reciting pages of cases interpreting the unique nature of ***tribal rights*** with respect to title based on

[13] Plaintiffs argued below that because the allotment in *Taylor* was a restrictive allotment as opposed to a trust allotment, only restrictive allottees lack federal common law rights. That is wrong; the Supreme Court, Congress, and the BIA have all consistently treated both types of allotments the same and have never created such distinction. Aplt. App. 318–20.

aboriginal possession, the Court concluded 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***, the Court 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 wrongly cite *Oneida II*, broadly arguing that "***Indians*** have a federal trespass action," Aplt. Br. 22 (emphasis added), but *Oneida II* must be read in the context of the earlier jurisdictional ruling in *Oneida I*. The Court in *Oneida II* made this point crystal clear: "as we concluded in *Oneida I*, 'the possessory right claimed [by the Oneidas] is a federal right to the lands at issue in this case.'" *Oneida II*, 470 U.S. at 235 (quoting *Oneida I*, 414 U.S. at 671) (brackets in original). Therefore, when the *Oneida II* Court was discussing "Indians" enjoying federal common law rights, it was referring to the tribe (the Oneidas), ***not*** individual allottees. *Id.* at 236. The Court held that "the ***Oneidas*** can maintain this action for violation of their possessory rights based on federal common law." *Id.* (emphasis added).

In affirming dismissal of federal common law trespass claims asserted by individual Indians related to allotted lands, this Court in *Wolfchild v. Redwood Cnty.*, 824 F.3d 761, 767 (8th Cir.), *cert. denied*, 137 S. Ct. 447 (2016), recognized the important distinction made in the *Oneida* decisions. *Wolfchild* held that the

individual Indian allottees there (like Appellants 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. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." 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. 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."

Wolfchild, 824 F.3d at 767–68 (citations omitted; italics original; bold added). The Court concluded: "This lawsuit … concerns 'lands allocated to individual Indians, not tribal rights to lands,' *Oneida I*, 414 U.S. at 676, and does not fall into the federal common law articulated in the *Oneida* progeny." *Wolfchild*, 824 F.3d at 768.

Although Plaintiffs try mightily to change or ignore this binding holding, Aplt. Br. 39–41, this Court could not have been more clear: "federal common law claims arise [under *Oneida I* and *II*] when a *tribe* 'assert[s] a present right to possession based ... on their *aboriginal* right of occupancy…,'" but "*individual* Indians" do not enjoy the same federal jurisdiction arising under common law. *Wolfchild*, 824 F.3d at 768 (emphasis original). Allottees must find a separate statutory basis for a private

right of action (other than federal common law), which did not exist in *Wolfchild* and does not exist here. *Wolfchild*, 824 F.3d at 768.[14]

Plaintiffs' out-of-circuit cases further demonstrate their fundamental flaw—they involve claims of a ***tribe***, not claims of an individual allottee. For example, *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), involved the claims of the ***United States*** on behalf of a ***tribe***, not individual allottees. *Swinomish Indian Tribal Community v. BNSF Railway Co*., 951 F.3d 1142 (9th Cir. 2020), and *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir. 1994), involved federal common law claims of a ***tribe*** and of the ***United States*** on behalf of a ***tribe***, respectively. Aplt. Br. 38.[15] But most misleading is Plaintiffs' failure to mention *Pinkham v. Lewiston Orchards Irrigation District*, where the Ninth Circuit, expressly following this Court, rejected federal "arising under" jurisdiction for

[14] Plaintiffs are flat wrong that this Court implicitly recognized a federal common law trespass claim in *Bird Bear v. McLean Cnty.*, 513 F.2d 190 (8th Cir. 1975), Aplt. Br. 38, as that case arose under section 8 of the Highway Act of 1866, 43 U.S.C § 932, and did not mention any federal common law right of an individual allottee.

[15] The old Supreme Court cases that Plaintiffs misleadingly cite at footnotes 10 and 14 are equally misplaced, as neither involve claims regarding land allotted to ***individual*** Indians; both involve claims of ***tribal*** title to land based on ***aboriginal possession***. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1934) (suit by United States as guardian of tribe to enjoin interference with tribal land based on aboriginal possession); *Marsh v. Brooks*, 49 U.S. 223 (1850) (on writ of error from Iowa Supreme Court, suit for ejectment involving competing claims of title to land reserved to "half-breeds of the Sac and Fox Tribes" pursuant to 1834 Treaty and 1836 Act of Congress).

individual Indian allottees' claims of trespass on their allotted land held in trust by the United States. 862 F.2d 184, 188–89 (9th Cir. 1988).

Finally, Plaintiffs cite *Poafpybitty*, Aplt. Br. 26, 49, n.16, but it does not support their federal common claim. In fact, *Poafpybitty* supports the opposite—the Court specifically recognized that the individual allottees' breach of lease claims arose under state law. 390 U.S. at 367 & n.2, 376 (remanding case back to state court, where allottees could pursue state law claims).

b. 25 U.S.C. § 345 Does Not Provide Subject Matter Jurisdiction for Common Law Trespass on Allotted Lands.

Plaintiffs' faulty argument that trust allottees enjoy broad federal common law rights supporting federal "arising under" jurisdiction pursuant to 25 U.S.C § 345 (a jurisdictional statute not at issue in the *Oneida* cases) is inconsistent with the specific limits imposed by Congress under that statute, as interpreted by the Supreme Court in *United States v. Mottaz*, 476 U.S. 834 (1986). The *Mottaz* Court explained that section 345 affords jurisdiction only to suits involving (1) issuance of an allotment or (2) interests and rights in the allotment itself after it is issued (such as a suit to quiet or recover title to the allotment after it was originally acquired). *Mottaz*, 476 U.S. at 845. Plaintiffs assert that "a common law trespass action fits [the] description" of the second prong of the *Mottaz* test, Aplt. Br. 42, but this Court has expressly rejected that notion. *See, e.g.*, *United States ex rel. Kishell v. Turtle*

Mountain Hous. Auth., 816 F.2d 1273, 1275 (8th Cir. 1987) (relying on *Mottaz* in refusing to allow an individual plaintiff's claim of common law trespass on allotted property to proceed under section 345). The second prong of *Mottaz* has been limited to actions that challenge the holder's right to the allotment itself, such as quiet title suits, and courts have held it specifically does ***not*** extend to common law trespass claims. *Id*. at 1275 (a "prerequisite to federal jurisdiction under section 345 is an issue concerning plaintiff's right to ownership of specific land under an allotment").

Contrary to Plaintiffs' suggestion, Aplt. Br. 42–44, *Kishell* directly addressed subject matter jurisdiction of an allottees' trespass claim as a threshold matter, holding that the owner of an allotment seeking relief for trespass to her allotment does not state a claim contemplated by section 345, and concluded that the statute could not be used as grounds for federal question jurisdiction because the individual allottee's trespass action did not seek the issuance of an original allotment, nor did it seek to recover title within the meaning of *Mottaz*. 816 F.2d at 1275. Plaintiffs suggest the *Kishell* Court sidestepped the federal subject matter jurisdiction issue by ruling the plaintiff had failed to exhaust tribal remedies, Aplt. Br. at 42–43, but the Court actually addressed subject matter jurisdiction under section 345 first and foremost. 816 F.2d. at 1275 (affirming dismissal for lack of subject matter jurisdiction).

Plaintiffs also speculate that the allotment in *Kishell* was no longer a trust allotment,[16] Aplt. Br. at 44, but the Court specifically recited that it was: "Ruth M. Tibbets, now deceased, … was the successor in title and interest to an allotment… held in trust by the United States." 816 F.2d at 1274.

Other courts have cited *Kishell* for exactly the reason Tesoro does. In *Pinkham*, 862 F.2d at 188 n.4, and *Marek v. Avista Corp.*, No. CV04-493 N EJL, 2006 WL 449259 (D. Idaho Feb. 23, 2006) (unpublished), which is factually indistinguishable from this case, the claims involved existing ***trust allotments***. Those courts specifically relied on *Kishell* to hold that section 345 does not create federal court "arising under" subject matter jurisdiction over individual allottees' claims for common law trespass. *See also* Cohen's Handbook of Federal Indian Law § 16.03(3)(c) (Nell Jessup Newton ed., 2012) (citing *Kishell* and *Pinkham*, and stating, "Federal courts will generally not have jurisdiction over allottees' claims for

[16] When the *Kishell* Court stated that "there is no claim that the property was subject to a restriction against alienation imposed by the United States," it was merely establishing that "[25 U.S.C.] Section 1322(b)'s provision permitting suit [in federal court] for improper alienation of trust land is inapplicable to this case." *Kishell*, 816 F.2d at 1275. *Kishell* does not state the land was no longer an Indian trust allotment. In any event, nothing in *Kishell* suggests the status of the allotment was dispositive. To the contrary, the *Kishell* Court simply clarified that the complaint did not involve a challenge to title of Tibbets' estate, making section 345 inapplicable under the second prong of *Mottaz*. *See id.*

damages to their lands sounding in tort or other claims that do not involve ownership issues"). Allottees' claims create no federal question jurisdiction.

c. The Rationale of the Tenth Circuit in the Decisions Cited by Plaintiffs Is Not Persuasive.

After making the wholly incorrect statement that the Eighth Circuit has never addressed the issue, Aplt. Br. 38, 44–45, Plaintiffs completely sidestep the controlling Eighth Circuit authority (*Wolfchild*, *Kishell*), and ask the Court instead to follow the Tenth Circuit decisions in *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), and *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019) (which simply applied the prior *Nahno-Lopez* holding, there being no dispute by the parties). The Court should decline the invitation.

Nahno-Lopez involved a dispute over real property allegedly leased by the Fort Sill Apache Tribe of Oklahoma. 625 F.3d at 1280. It came before the Tenth Circuit on an appeal from summary judgment. The Tenth Circuit held that the plaintiffs "failed to establish a genuine issue of material fact" and affirmed "solely on that basis." *Id.* at 1281. With respect to jurisdictional issues, however, the defendants in *Nahno-Lopez*, having obtained summary judgment in the court below, simply conceded subject matter jurisdiction existed, and, therefore, ***neither party briefed subject matter jurisdiction at all*** before the Tenth Circuit.[17] Without the

[17] *See, e.g.*, Brief for Appellees, *Nahno-Lopez v. Houser*, No. 09-6258, 2010 WL 2504184, at * 2 (10th Cir. filed June 11, 2010) (conceding jurisdiction).

benefit of any briefing and certainly no jurisdictional challenge, the court *sua sponte* engaged in a jurisdictional analysis, first correctly stating that section 345 does not itself create a cause of action.

But then the *Nahno-Lopez* court diverged from the Eighth Circuit and went wrong by incorrectly citing the *Oneida* case for the proposition that "Indian rights to a Congressional allotment are governed by federal—not state—law." 625 F.3d at 1282. The Tenth Circuit failed to limit *Oneida* to what it decided: a trespass claim asserted by a ***tribe*** as to a right of possession based on the ***tribe's aboriginal right***. *Nahno-Lopez* appears to have (incorrectly) assumed that a federal claim for trespass existed and that it provided jurisdiction. *Id.* The Tenth Circuit has since appeared to question the breadth of its holding. *See Davilla*, 913 F.3d at 965 n.2 ("*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.***") (citation omitted; emphasis added).

The Supreme 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 the Tenth Circuit appears to have missed in *Nahno-Lopez* (and *Davilla*), but which the

Eighth Circuit (*e.g.*, in *Wolfchild*) grasped. *See Oneida II*, 470 U.S. at 229–30; *Oneida I*, 414 U.S. at 676–77; *Wolfchild*, 824 F.3d at 767. The Tenth Circuit also cited to a version of Cohen's Handbook of Federal Indian Law that is no longer accurate (*see supra* at 46-47 for current text), and, like Plaintiffs here (Aplt. Br. 38), relied on *Milner*, even though *Milner* was an action by the United States on behalf of a tribe (arising under 28 U.S.C. § 1345, suits by the United States). *See Nahno-Lopez*, 625 F.3d at 1282; *cf. Milner*, 583 F.3d at 1182. Simply put, the Tenth Circuit's reasoning is not persuasive.

In sum, Plaintiffs lack federal "arising under" jurisdiction, so this Court may affirm for lack of subject matter jurisdiction.

2. Dismissal Was Warranted for Failure to Join a Necessary and Indispensable Party.

As a further independent dismissal ground, Tesoro argued below that the United States was a necessary and indispensable party that could not be joined. Aplt. App. 40–41, 99–135, 339–63. Although not reached by the district court, this ground also supports affirmance.

Plaintiffs cite a smattering of cases they claim demonstrate the United States is not an indispensable party here, Aplt. Br. 45–47, but the cases merely reject a proposition Tesoro has never argued: that the United States is ***automatically*** an indispensable party to ***every*** suit involving Indian trust lands ***simply by virtue of its status as trustee***. Importantly, the cases do not hold that the United States could

never be an indispensable party.[18] Moreover, none involved a factual scenario similar to this case, where an Indian's suit will interfere with an ongoing administrative proceeding to address the same issues raised by the lawsuit.

Contrary to what Plaintiffs assert, Aplt. Br. 46, Tesoro fully demonstrated how the United States was an indispensable party with respect to the holdover claims—and in doing so, Tesoro did ***not*** rely solely on an argument that the BIA has exclusive authority to address holdovers (though it does). *See* Aplt. App. 121–25, 127–31, 351–57, 358–61; *see also Two Shields v. Wilkinson*, 790 F.3d 791, 796–97 (8th Cir. 2015). Tesoro argued, in the alternative, that "[e]ven if the regulations did not make the United States the sole decision-maker in all instances, the United States would still be a required party ***in this instance*** because it has decided to investigate and respond to the alleged holdover on behalf of the allottees." Aplt. App. 355 (italics original; bold added). Tesoro also argued that Plaintiffs' breach of easement claim rendered the United States a required party given that it is the grantor of the easement. Aplt. App. 351–52; *see also McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party" under Rule 19).

[18] To the contrary, *Spirit Lake* affirmed the district court's ruling that the United States was indeed indispensable in that case. *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 746–48 (8th Cir. 2001).

The reality is, Plaintiffs' lawsuit would interfere with the BIA's ongoing efforts to address the holdover itself. For example, Plaintiffs seek to obtain an injunction requiring removal of Tesoro's pipeline. Aplt. App. 26, 31. The BIA prefers a different approach, however, as its Notification purports to order Tesoro to leave the pipeline in the ground. Aplee. App. 143. A court order requiring its removal would foreclose the BIA's preferred approach entirely. Because of its administrative efforts to address the holdover and its status as grantor of the right-of-way, among other reasons, the BIA has an interest in this lawsuit that renders it a necessary and indispensable party.

As trustee and under 25 C.F.R. § 169.410, the BIA is the representative of more than 400 allottees, and in that capacity, it has been fully engaged in addressing the holdover. By their class action lawsuit, Plaintiffs sought to push aside the BIA and have themselves installed as the decision-makers for all allottees (approximately a hundred of whom have already consented to the renewal of the right-of-way), an outcome that would frustrate and short-circuit the BIA's efforts. Given this, if Plaintiffs are to proceed at all, the United States must be joined to the lawsuit to protect its interests; but because it cannot be joined—there was no dispute about this in the court below, *see* Aplt. App. 357–58—dismissal of Plaintiffs' lawsuit in favor of the BIA's proceeding is the appropriate result.

CONCLUSION

This Court should affirm the district court's judgment, and grant Appellees all other and further relief to which they may be entitled at law or in equity.

Dated: August 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman typeface.

Dated: August 19, 2020

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CIRCUIT RULE 28A(h) CERTIFICATION

I hereby certify that I have filed electronically, pursuant to 8th Cir. R. 28A(h), a version of the brief in printed PDF format, and that the brief has been scanned for viruses and is virus-free.

Dated: August 19, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Eighth Circuit using the Court's CM/ECF system. I further certify that I served the following counsel of record for Appellants via the Court's CM/ECF system:

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