No. 20-1747

IN THE U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JoAnn Chase, *et al.*,

Plaintiffs/Appellants,

v.

Andeavor Logistics, L.P., *et al.*,

Defendants/Appellees.

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from the U.S. Dist. Court for the Dist. of N.D.
No. 1:19-CV-00143
The Honorable Daniel M. Traynor

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ORAL ARGUMENT REQUESTED

SUMMARY OF THE CASE

This case is about a trespass on Indian land. In 1953, Appellees (collectively, "Andeavor") obtained a right-of-way for an oil pipeline that runs across Indian land held in trust by the United States. App. 15.[1] By law, Andeavor's easement lasted 20 years and was renewed in 1973. App. 15–16. There is some question about whether the easement was properly renewed again in 1993. App. 16. But it is undisputed that the 1993 Easement, if valid, expired in 2013 and was never renewed. App. 17–19. It is therefore indisputable that Andeavor has possessed and used Indian trust land—without authorization—since 2013.

Andeavor negotiated with the Three Affiliated Tribes for the renewal of the 1993 Easement—but Andeavor concealed these negotiations from Appellants (collectively, the "Individual Landowners") for five years. App. 17–18. The Individual Landowners are now suing Andeavor for trespass. App. 1, 25–26. But the district court dismissed the Individual Landowners' trespass action for failure to exhaust administrative remedies. Add. 1–17.

The district court erred because there are no administrative remedies to exhaust. This Court should grant 30-minute oral argument because this case raises important questions that this Court has not yet addressed, about the interpretation of federal regulations and an Indian's right to bring a trespass action under federal law.

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[1] "App." refers to Appellants' Appendix; "Add." refers to the Addendum.

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The district court dismissed the Individual Landowners' complaint for lack of jurisdiction, under Fed. R. Civ. P. 12(b)(1), based on failure to exhaust administrative remedies. Add. 17. Because this was a final ruling based on lack of jurisdiction, this Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Indian landowners are required to exhaust administrative remedies before bringing a trespass action against an entity for occupying Indian trust land without authorization.
    - 25 C.F.R. §§ 169.410, 169.413
    - *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968)
    - *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005)

2. Whether Indian landowners have a cognizable trespass action under federal common law, for an alleged trespass on land that is held in trust by the United States.
    - *Oneida Cnty. N.Y. v. Oneida Indian Nation of N.Y. State* ("*Oneida II*"), 470 U.S. 226 (1985)
    - *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968)
    - *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019)

3. Whether the district court has subject-matter jurisdiction over an Indian landowner's federal common-law trespass action.
    - 25 U.S.C. § 345
    - *United States v. Mottaz*, 476 U.S. 834 (1986)
    - *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968)

4. Whether the federal government must be joined as an indispensable party to an Indian landowner's trespass action.
    - *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968)
    - *Bird Bear v. McLean Cnty.*, 513 F.2d 190 (8th Cir. 1975)
    - *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-cv-021, 2011 WL 1464918 (D.N.D. March 24, 2011)

5. Whether the district court erred by dismissing the breach-of-contract claim without explanation.
    - *Twin City Const. Co. of Fargo v. Turtle Mountain Band of Chippewa Indians*, 911 F.2d 137 (8th Cir. 1990)
    - *Webb v. Pennington County Bd. of Com'rs*, 92 F. App'x 364 (8th Cir. 2003)

INTRODUCTION

This case asks whether individual owners of Indian land held in trust by the United States can bring a trespass action against a willful trespasser in federal court—or if the Indian landowners must wait indefinitely for the federal government to take action while the trespasser makes hundreds of millions of dollars off the Indians' land. The district court held that Indian landowners have no independent right to protect their own property interests, and instead must wait for the federal government to act on their behalf. But the district court erred as a matter of law.

In *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968), the Supreme Court recognized that the "purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment," and the Court held "there is nothing…requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own." *Id.* at 369, 373. The government's authority to sue on the Indian's behalf "d[oes] not diminish the Indian's right to sue on his own behalf." *Id.* at 370. And "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." *Id.* at 374. *Poafpybitty* therefore not only precludes the district court's conclusion but also makes clear why Indian landowners must be able to take independent action to protect their own property interests. The

alternative would be unbearable: a world in which an oil company could willfully trespass across Indian trust land, making hundreds of millions of dollars off that land, and the Indian landowners are unable to do anything but wait and beg for the federal government to take action.

The district court's ruling would make this unbearable world a reality. Because the district court's ruling is wrong as a matter of law, this Court should reverse the district court's judgment and remand this case for further proceedings on the Indian landowners' claims.

FACTUAL & PROCEDURAL BACKGROUND

This case is about a trespass on Indian trust land. Or, more precisely, it is about the property rights of individual Indians arising from the federal Indian allotment system, which was created by federal statute. An overview of the development of the legal framework that governs Indian trust land is beneficial to understanding this case, and is available in the Tenth Circuit's opinion in *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019), at 963–964.[2]

A. The federal government develops a policy and procedure for protecting allotted Indian land.

"Allotment" is a term of art in federal Indian law, used to describe two types of individual Indian land ownership. Originally, in a "trust allotment," the federal government held title to the land in trust, for the

[2] This case is very similar to *Davilla*.

benefit of the Indian(s), with the intent to convey title and fee-simple ownership to the Indian(s) at the end of the trust period. See *Adams v. Eagle Road Oil LLC*, No. 16-CV-0757-CVE-TLW, 2017 WL 1363316, at *3 (N.D. Okla. Apr. 12, 2017). And in a "restricted allotment," title was conveyed to the Indian(s) "but the land was subject to a restriction on alienation for a period of time." *Ibid.*; see also *United States v. Ramsey*, 271 U.S. 467, 470–471 (1926) (discussing differences between "trust allotment" and "restricted allotment").

The Plaintiffs/Appellants in this case hold (or inherited) allotments in North Dakota, on the Fort Berthold Reservation, which was allotted under the Dawes Act. But "Congress's allotment project came to an abrupt end [in 1934]...with passage of the Indian Reorganization Act [IRA]." *Davilla*, 913 F.3d at 964. Under the IRA, "Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992); see 25 U.S.C. § 5102;[3] see also *Davilla*, 913 F.3d at 964 (noting many allottees "never received a fee simple patent" and land is still held in trust under IRA). Thus, the land at issue in this case is Indian-owned, but still held in trust by the United States.

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[3] Originally codified at 25 U.S.C. § 461, *et seq.*, the IRA was transferred to 25 U.S.C. § 5101, *et seq.*, effective September 1, 2016.

After enacting the IRA, Congress enacted additional statutes and DOI promulgated regulations to protect trust allotments and to promote tribal self-determination. For example, in 1948 Congress enacted the Indian Right-of-Way Act (25 U.S.C. §§ 323–328), which authorizes the Department of Interior (DOI) to grant rights-of-way across trust allotments, under specified conditions. Under this statute, DOI has promulgated extensive regulations to govern when and how such rights-of-way may be obtained. See 25 C.F.R. §§ 169.1 *et seq*.[4] These regulations state explicitly that, where a right-of-way is required, the "unauthorized possession or use [of Indian trust land] is a trespass." 25 C.F.R. § 169.413. And either the DOI itself "may take action to recover possession [of the land]…on behalf of the Indian landowners" or "[t]he Indian landowners may pursue any available remedies under applicable law." *Ibid.*

B. Andeavor fails to properly renew a right-of-way across allotted Indian land and then overstays that right-of-way—so the Individual Landowners sue Andeavor for trespass.

Defendants/Appellees (collectively "Andeavor") own and operate an oil pipeline that crosses more than 35 trust allotments on the Fort Berthold Reservation. App. 14–16, 20 (¶104). The Bureau of Indian Affairs (BIA) granted the original 20-year right-of-way (*i.e.*, easement)

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[4] These regulations were originally issued in 1968 and have always been at 25 C.F.R., Part 169. See 80 Fed. Reg. 72491. The regulations were last revised September 1, 2016.

for the pipeline in 1953. App. 15 (¶72). The easement was renewed in 1973 for another 20 years. App. 16 (¶77). But the 1973 Easement expired in 1993 without being renewed; the BIA then purportedly renewed the easement in 1995, making it retroactive to 1993. App. 16 (¶78). At that time, the pipeline was owned by Amoco Pipeline Company. App. 16 (¶80). And Andeavor acquired the pipeline sometime between 1993 and 2013. *Ibid.*

The 1993 Easement expired by its own terms on June 18, 2013—and it is undisputed that the 1993 Easement has not been renewed. See App. 17 (¶84). Yet Andeavor has continued to operate its pipeline across Indian trust land, since 2013, without a right-of-way. App. 17–19.

Plaintiffs/Appellants (collectively, the "Individual Landowners") are individual Indians who have sued Andeavor on behalf of a putative class of individual landowners. App. 1, 20–25. They've alleged a "Past Trespass Claim" based on Andeavor's operation of the pipeline from 1993 to 2013, when the 1973 Easement expired and Amoco failed to get the Individual Landowners' consent for renewing the 1993 Easement. App. 16 (¶¶78–79), 25 (¶122). But even if the 1993 Easement was valid, Andeavor was required to remove its pipeline and to "[r]estore the land to its original condition, to the maximum extent reasonably possible," after the 1993 Easement expired in 2013. App. 17 (¶85); 25 C.F.R.

§ 169.125(c)(5)(ix).[5] So the Individual Landowners have also alleged a "Present Trespass Claim" based on Andeavor's continuing operation of the pipeline after the 1993 Easement expired, from 2013 to the present,. App. 17–19 (¶¶84–101), 25–26 (¶¶123–129).

After the 1993 Easement expired, Andeavor negotiated with the Three Affiliated Tribes (the "Tribe") located at Fort Berthold, and ultimately paid the Tribe about $2,000,000 per acre for a renewal of the right-of-way across the trust land owned by the Tribe. See App. 17–18 (¶¶87–92). But Andeavor did not negotiate with the Individual Landowners, who own undivided interests in the same tracts as the Tribe—and no payment was made to the Individual Landowners for a renewal of the right-of-way across individually owned trust land. App. 17–18 (¶¶88–94). Significantly, the Tribe owns the equivalent of only 26 acres of the trust land that the pipeline crosses, whereas the Individual Landowners (and the class members that they seek to represent) own the equivalent of 60 acres of the affected trust land. App. 17–18 (¶90).[6]

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[5] This regulation was previously at 25 C.F.R. § 169.3(a); it was renumbered as of April 21, 2016, without material alteration.

[6] Each owner of allotted trust land holds an undivided interest in the entire tract. See App. 20–21 (¶¶104–107). So the landowners do not own a number of actual, identifiable acres but rather "the equivalent of" a number of acres; for example, if a landowner holds a 10% interest in a 160-acre tract, she owns a 10% undivided interest in the entire 160 acres, or "the equivalent of" 16 acres—but not 16 identifiable acres.

The Individual Landowners have asserted their Past Trespass Claim and their Present Trespass Claim, and—alternatively—a claim for breach of the 1993 Easement agreement (assuming it was valid) based on Andeavor's failure to "restore the land to its original condition"; and the Individual Landowners seek to impose a constructive trust, to disgorge profits and recover for unjust enrichment, and to recover punitive damages based not only on Andeavor's willful and wanton trespass over federally protected trust land, but also on Andeavor's intentional efforts to conceal—for five years—its trespass and its negotiations with the Tribe from the Individual Landowners. App. 25–30.

The Individual Landowners originally sued Andeavor in the U.S. District Court for the Western District of Texas, where Andeavor is located. Add. 2; App. 1, 11 (¶56). But the case was transferred to the District of North Dakota, where the trust land and pipeline are located. Add. 2; App. 34.

Andeavor moved to dismiss the Individual Landowners' complaint, arguing (1) that the court lacked subject-matter jurisdiction; (2) that the Individual Landowners had failed to state a claim upon which relief can be granted; (3) that constructive trust and punitive damages are not independent causes of action; (4) that constructive trust is not available; (5) that the Individual Landowners' breach-of-easement claim is fatally deficient for lack of privity; (6) that the Individual Landowners had

failed to join the government as a necessary party under Rule 19; and (7) that the Individual Landowners had failed to exhaust administrative remedies. Add. 3 (¶5).

After briefing, the district court dismissed the Individual Landowners' complaint in its entirety, for failure to exhaust administrative remedies, and declined to reach any of Andeavor's alternative grounds for dismissal. Add. 3 (¶6), 16 (¶39).

The Individual Landowners timely appealed (App. 381) and now ask this Court to reverse the district court's judgment because there are no administrative remedies to exhaust.

SUMMARY OF THE ARGUMENT

Following well-established law, this Court has held that the exhaustion doctrine applies only "when the plaintiff's claim is 'cognizable in the first instance by an administrative agency **alone**,' and does not apply when the relevant agency is **unable to grant relief**." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 937 (8th Cir. 2005) (cleaned up; emphasis added) (quoting *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635, 638 (8th Cir. 2003), which in turn quotes *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)).

Here, the Individual Landowners have an independent right to bring an action for trespass in federal court, under federal common law (see Part 1.1, below)—so their Present Trespass Claim is not "cognizable in the first instance by an administrative agency **alone**." And there is no statute or regulation that provides an administrative procedure for resolving a trespass dispute, nor is the BIA able to award damages or injunctive relief for a trespass on Indian trust land (see Part 1.2, below)—so "the relevant agency is **unable to grant relief**."

For these reasons, under well-established law the exhaustion doctrine does not apply here, and the district court erred as a matter of law by dismissing the Individual Landowners' Present Trespass Claim for failure to exhaust administrative remedies.

ARGUMENT

The district court dismissed the Individual Landowners' complaint for failure to exhaust administrative remedies. Add. 16 (¶39), 17. Because the availability of administrative remedies is a matter of statutory interpretation, and because a dismissal for failure to exhaust is a dismissal for lack of jurisdiction, this Court reviews a dismissal for failure to exhaust *de novo*. See *Bartlett v. U.S. Dep't of Agric.*, 716 F.3d 464, 472 (8th Cir. 2013).

Notably, the district court declined to reach any of Andeavor's alternative grounds for dismissal. Add. 3 (¶6), 16 (¶39). Generally, this Court may affirm a judgment on any alternative ground that was raised in the district court. *Transcontinental Ins. Co. v. W.G. Samuels Co., Inc.*, 370 F.3d 755, 758 (8th Cir. 2004). So the Individual Landowners have addressed some of Andeavor's alternative grounds for dismissal at Parts 2–4, below. But the Individual Landowners reserve the right to respond to any alternative ground for dismissal that Andeavor might raise in its answering brief. See *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 729 (6th Cir. 2012) ("'When an appellee raises in its answering brief an alternative ground for affirmance, the appellant is entitled to respond in its reply brief.'" (cleaned up)) (quoting *United States v. Brown*, 348 F.3d 1200, 1213 (10th Cir. 2003)).

This Court should reverse the district court's judgment for the following reasons.

1. The district court erred by dismissing the Individual Landowners' entire complaint for failure to exhaust administrative remedies.

This trespass action includes two separate trespass claims based on two separate trespass periods. First, the Individual Landowners have alleged that Andeavor was in trespass from 1993 through 2013 because the 1993 Easement was "invalid and void *ab initio*." App. 25 (¶122). Second, the Individual Landowners have alleged that Andeavor has been in continuing, willful trespass from 2013 to the present because—even if the 1993 Easement was valid—the 1993 Easement expired by its own terms in 2013 and was never renewed. App. 25–26 (¶¶123–129). Thus, the Individual Landowners have brought a Past Trespass Claim for 1993–2013 and a Present Trespass Claim for 2013–present.

The district court recognized the distinction between the two trespass claims, referring to the Present Trespass Claim as "the holdover claim." Ad. 10, 12−14. But the district court nevertheless dismissed the Individual Landowners' entire complaint for failure to exhaust administrative remedies. App. 16 (¶39), 17.

In doing so, the district court's opinion reveals a fundamental misunderstanding of the Present Trespass Claim. The opinion repeatedly misconstrues the Present Trespass Claim as an effort to obtain "judicial review" of a BIA decision. See Add. 5−16. The district court supposed that "an administrative remedy is available" for the Present Trespass Claim—and further supposed that a "final decision"

by the BIA, about the Present Trespass Claim, "could very well…obviate the need for judicial review." Add. 14, 16. Based on these suppositions, the district court further supposed that it "must refrain from intervening" in the Present Trespass Claim—concluding that the Individual Landowners must await the BIA's "final decision" before bringing their Present Trespass Claim in federal court. Add. 10, 16. But these are all unsupported suppositions.

The district court erred as a matter of law.

In their Present Trespass Claim, the Individual Landowners do **not** seek "judicial review" of a BIA decision.[7] They seek judicial relief for Andeavor's continuing and willful trespass on their land. It is indisputable that—from 2013 to the present—Andeavor has continued to possess and use the Individual Landowners' land without a valid right-of-way. Under federal law, the Individual Landowners have a right of action for trespass. (See Part 1.1, below.) And contrary to the district court's suppositions, there are no administrative remedies for the Individual Landowners to exhaust—no forthcoming "final decision" by the BIA that might "obviate the need for judicial review"—because

[7] The Individual Landowners concede that their Past Trespass Claim, as pleaded, implies a challenge to the BIA's issuance of the 1993 Easement. The Individual Landowners therefore do not appeal the dismissal of their Past Trespass Claim, and they are no longer pursuing that claim in this case. This has no bearing on the viability of their Present Trespass Claim—or on this Court's review of the district court's dismissal of the Present Trespass Claim.

the BIA has no procedure or authority to award the damages or injunctive relief that the Individual Landowners seek through their Present Trespass Claim. (See Part 1.2, below.)

Because the Individual Landowners are entitled to bring their Present Trespass Claim against Andeavor without having to seek action or approval from the federal government—and because there are no administrative remedies available—this Court should reverse the district court's dismissal of the Individual Landowners' Present Trespass Claim and remand for further proceedings.

1.1. The Individual Landowners have a federal common-law trespass action against Andeavor and do not have to wait on the government before bringing this action.

It has long been established that Indians have a federal common-law trespass action against those who maintain an unauthorized presence on Indian trust land. *Oneida Cnty. N.Y. v. Oneida Indian Nation of N.Y. State* ("*Oneida II*"), 470 U.S. 226, 233–236 & n.6 (1985) (citing cases dating back to 1810). This Circuit has not yet had an opportunity to formally recognize this federal common-law cause of action. (See Part 3, below.) But the Ninth Circuit recently reiterated that Indians "have a federal common-law right to sue to protect their possessory interests in their lands." *Swinomish Indian Tribal Community v. BNSF Railway Co.*, 951 F.3d 1142, 1153 (9th Cir. 2020)

(citing *Oneida II*, 470 U.S. at 235–236).[8] And the Tenth Circuit recently acknowledged this right of action for individual Indian landowners, in a case that bears a strong resemblance to this one. See *Davilla*, 913 F.3d at 965–970 (citing *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), and affirming summary judgment for Indian plaintiffs).

The federal regulations that govern Indian trust land explicitly contemplate an Indian landowner's right to bring a trespass action against an entity that possesses or uses Indian trust land without permission. Section 413 states:

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

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[8] See also *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) ("Federal common law governs an action for trespass on Indian lands.") (citing cases); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994) ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass….") (citing *Oneida II*, 470 U.S. at 234, and other cases); *Loring v. United States*, 610 F.2d 649, 651 (9th Cir. 1979).

25 C.F.R. § 169.413 (emphasis added). Notably, Section 413 indicates that **either** the BIA "may take action…on behalf of the Indian landowners" **or** the Indian landowners themselves "may pursue any available remedies under applicable law."

In other words, the BIA can bring a trespass action on behalf of the Indian landowners, in federal court. See, *e.g.*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1504 (9th Cir. 1991) ("The United States brought a trespass action against the PUD on behalf of the Kalispel Indian Tribe and individual Kalispel Indian allottees,…seeking damages and injunctive relief."). Or the Indian landowners themselves can bring a trespass action against the trespasser, in federal court. See, *e.g.*, *Davilla*, 913 F.3d at 965–970 (involving suit for unauthorized use of land without right-of-way); *Swinomish*, 951 F.3d at 1154 (involving suit for unauthorized use of land within existing right-of-way); see also *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 470 (9th Cir. 1975) ("Indians may sue on their own behalf, with respect to property interests held in trust for them by the United States, even though the United States could have sued independently.") (citing *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968)).

Notably, the regulations also address situations in which the holder of a right-of-way "remains in possession [of the land] after the expiration, termination, or cancellation of [the] right-of-way." 25 C.F.R.

§ 169.410. In these so-called "holdover" situations—as in all situations under Section 413—the BIA "may treat the unauthorized possession as a trespass under applicable law" and "may take action to recover possession on behalf of the Indian landowners." *Ibid.* But the BIA also may refrain from taking action if the former holder of the right-of-way and the Indian landowners "are engaged in good faith negotiations to renew or obtain a new right-of-way"—and if the parties have notified the BIA of their negotiations. *Ibid.*

This window for negotiating the renewal of a right-of-way is the only thing that distinguishes a holdover situation (described in Section 410) from any other trespass situation (described in Section 413). In other words, if there is no ongoing negotiation for renewing the right-of-way, a holdover situation becomes an "unauthorized possession" like any other "unauthorized possession"—*i.e.*, a trespass like any other trespass. See 25 C.F.R. §§ 169.410 (describing "unauthorized possession" as "trespass"), 169.413 (same).

And in response to that trespass, the Indian landowner can bring a trespass action in federal court. See, *e.g.*, *Davilla*, 913 F.3d at 965–970 (recognizing Indian landowners had trespass claim because right-of-way had expired and was not renewed); see also *Capitan Grande Band*, 514 F.2d at 470 ("Indians may sue on their own behalf, with respect to property interests held in trust for them by the United States, even though the United States could have sued independently.").

The Supreme Court affirmed this proposition in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). In *Poafpybitty*, Indian landowners sued to protect their land interests under an oil-and-gas lease, and the Supreme Court recognized that individual Indian landowners can bring their own actions to protect their land interests without having to rely on the government to bring an action on their behalf. *Id.* at 370–374.[9] In other words, the government's ability to bring a claim on behalf of the Indian landowners "did not diminish the Indian's right to sue on his own behalf." *Id.* at 371 (citing cases). Moreover, though the government had "supervisory authority over oil-and-gas leases" on allotted land—and the power to impose and enforce restrictions on any mining that occurs on allotted land—the Supreme Court found "nothing in this regulatory scheme which would preclude [individual allottees] from seeking judicial relief for an alleged violation of the lease." *Id.* at 373. In other words, the Supreme Court found "nothing in the… regulations requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own." *Ibid.*

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[9] The plaintiffs in *Poafpybitty* brought their claims in Oklahoma state court—but the U.S. Supreme Court held that the plaintiffs had **federal** standing to bring claims to protect their property interests under **federal** law. 390 U.S. at 366, 370–372, 375–376 & n.9 (reversing Oklahoma Supreme Court's decision, which "rested solely on federal grounds," and noting federal rights of Indians "to maintain actions with respect to their lands are clearly recognized"). So it doesn't matter that *Poafpybitty* originally arose in state court.

Put plainly: "**The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment.**" *Id.* at 373–374 (emphasis added).

That last sentence is key. *Poafpybitty* involved the breach of an oil-and-gas lease rather than a trespass across surface land (*i.e.*, subterranean land rights rather than surface land rights). But that last sentence indicates that the same legal principles apply—regardless of the context of the trespass. Under *Poafpybitty*, the government's "general power…to safeguard an allotment" does not affect "the capacity of the Indian to protect that allotment." *Ibid.* In other words, the government's ability to bring a trespass action on behalf of an Indian landowner does not "diminish the Indian's right to sue on his own behalf." See *id.* at 371 (citing cases); 25 C.F.R. § 169.413 (recognizing both government's and Indian's ability to bring action for trespass); see also *Capitan Grande Band*, 514 F.2d at 470 ("Indians may sue on their own behalf, with respect to property interests held in trust for them by the United States, even though the United States could have sued independently.") (citing *Poafpybitty*).

In *Oneida II*, the Supreme Court reiterated that, "[w]ith the adoption of the Constitution, Indian relations became the exclusive

province of federal law," and that the Indians' right to "exclusive possession" of their land is "'a *federal* right.'" 470 U.S. at 234–236 (italics in original) (quoting *Oneida Indian Nation v. Cnty. Of Oneida* ("*Oneida I*"), 414 U.S. 661, 670–671 (1974)). Thus, Indians "can maintain [an] action for violation of their possessory rights based on federal common law." *Id.* at 236.[10] Here, this means that—under *Oneida II* and *Poafpybitty*—the Individual Landowners have a federal common-law right to sue Andeavor for trespassing, after the 1993 Easement expired in 2013, and they do not have to seek relief or approval from the government before bringing their Present Trespass Claim in federal court.

For these reasons alone, the district court's ruling that the Individual Landowners must exhaust administrative remedies before bringing their Present Trespass Claim is wrong as a matter of law.

1.2. The district court cannot require the Individual Landowners to exhaust administrative remedies that do not exist.

The exhaustion doctrine applies only "when the plaintiff's claim is 'cognizable in the first instance by an administrative agency alone,' and **does not apply** when the relevant agency is unable to grant relief."

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[10] See also *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941) (holding Indians have federal common-law right of action against trespassers on their land); *Marsh v. Brooks*, 8 How. 223, 232, 12 L.Ed. 1056 (1850) ("That an action of ejectment [can] be maintained on an Indian right to occupancy and use, is not open to question.").

Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 937 (8th Cir. 2005) (cleaned up; emphasis added) (quoting *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635, 638 (8th Cir. 2003), which in turn quotes *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). In other words, if the relevant agency "does not have the authority to award the compensatory and punitive damages sought by [the plaintiffs]," then the plaintiffs are "not required to refrain from litigation until some 'administrative process has run its course.'" *Id.* at 938 (quoting *Western Pac. R.R.*, 352 U.S. at 63) (cleaned up).[11]

Here, the relevant regulations—25 C.F.R., Part 169[12]—provide an administrative procedure for entities like Andeavor to obtain a right-of-way over Indian trust land. See 25 C.F.R. §§ 169.101–130. They also provide an administrative procedure for entities like Andeavor to

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[11] See also *NRLB v. Indus. Union of Marine & Shipbuilding Workers, AFL-CIO, Local 22*, 391 U.S. 418, 426 & n.8 (1968) (citing cases and K. Davis, Administrative Law Text § 20.07 (3d ed. 1972)); *Walker v. Southern Railway*, 385 U.S. 196 (1966) (holding exhaustion doctrine does not apply when an administrative remedy does not exist or is inadequate); *Belgium v. United States*, 551 F.3d 1339, 1349 (Fed. Cir. 2009) (holding exhaustion doctrine does not apply when there is no procedure to exhaust).

[12] The underlying statutes are 25 U.S.C. § 323 (stating the Secretary of Interior "is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes…") and 25 U.S.C. § 328 (authorizing the Secretary of Interior to "prescribe any necessary regulations"). Also, 25 U.S.C. § 324 provides that no right-of-way can be granted without the Indian landowners' consent.

amend or renew their right-of-way over Indian trust land. See 25 C.F.R. §§ 169.201–206. And they provide an administrative procedure for entities or Indian landowners to appeal a BIA decision about whether to grant or deny a right-of-way over Indian trust land. See 25 C.F.R. §§ 2.1–21, 169.13, 169.303, 169.412. But the relevant regulations provide **no administrative procedure** for an Indian landowner to obtain relief for an entity's trespass on Indian trust land.

An Indian landowner who believes that an entity like Andeavor is trespassing on Indian trust land may notify the BIA of the trespass, and the BIA "may investigate [the entity's] compliance with a right-of-way." See 25 C.F.R. § 169.402. And the BIA may send a "written notice of violation" to the trespasser—and "may take action to recover possession …on behalf of the Indian landowners." See 25 C.F.R. §§ 169.404, 169.410, 169.413. But the "action" that the BIA "**may**" take is to sue the trespassing entity in federal court, on behalf of the Indian landowners. See, *e.g.*, *Pend Oreille*, 926 F.2d at 1504.

In other words, there is **no administrative remedy** for the alleged trespass. There is only a judicial remedy—a trespass action—which "may" be pursued by the BIA on behalf of the Indian landowners, or by the Indian landowners themselves. (See Part 1.1, above.) Indeed, the BIA has recognized that it "**does not have authority** over disputes between individuals" and therefore **cannot administratively resolve** trespass disputes between Indian landowners and alleged trespassers.

See *Shade v. Acting Alaska Regional Director*, 67 IBIA 15, 20 n.9 (2019) (emphasis added) (citing *Cabazon Prop., LLC v. Pacific Regional Director*, 64 IBIA 27, 32–34 (2016)). Relatedly, there is no relevant statute or regulation that enables the BIA to award Indian landowners the compensatory or punitive damages—or the injunctive relief—that they might be entitled to, as the result of an entity's willful trespass on their land.

For these reasons, the exhaustion doctrine simply cannot apply to an Indian landowner's trespass claim. See *Alpharma*, 411 F.3d at 937 (stating exhaustion doctrine "does not apply when the relevant agency is unable to grant relief").

Here, it is undisputed that the 1993 Easement (if valid) expired in 2013, and that Andeavor has willfully continued to operate its pipeline on Indian trust land since then, without a right-of-way. As demonstrated above, there is no administrative relief available for Andeavor's trespass. So the only thing that the Individual Landowners can do—besides bringing their Present Trespass Claim—is wait for the BIA to bring a trespass claim on their behalf. See 25 C.F.R. §§ 169.410, 169.413. But the Supreme Court has held that the Individual Landowners do **not** have to wait for the BIA to bring an action on their behalf. *Poafpybitty*, 390 U.S. at 370–374 ("[T]he Indian's right to sue should not depend on the good judgment or zeal of a government attorney."); see *Capitan Grande Band*, 514 F.2d at 470 ("Indians may

sue on their own behalf, with respect to property interests held in trust for them by the United States, even though the United States could have sued independently.") (citing *Poafpybitty*). Indeed, under *Poafpybitty*, *Oneida II*, and the governing statutes and regulations, the Individual Landowners can sue Andeavor on their own behalf—even if there is an administrative remedy available. See Part 1.1, above; 25 U.S.C. § 345; 25 C.F.R. § 169.413.

The exhaustion doctrine applies only "when the plaintiff's claim is 'cognizable in the first instance by an administrative agency **alone**' and does not apply when the relevant agency is **unable to grant relief**." *Alpharma*, 411 F.3d at 937 (cleaned up; emphasis added). Here, the Individual Landowners' trespass claim is not "cognizable in the first instance by an administrative agency **alone**" because Indian landowners have an independent federal common-law right of action for trespass. (See Part 1.1, above.) Moreover, as demonstrated above, the BIA is "**unable to grant relief**" in a trespass dispute between private parties, so the exhaustion doctrine does not apply. For these reasons, this Court should reverse the district court's dismissal of the Individual Landowners' Present Trespass Claim for failure to exhaust administrative remedies.

1.3. Because the Individual Landowners have the right to sue, and because there are no administrative remedies to exhaust, the district court erred by dismissing the Present Trespass Claim for failure to exhaust.

Because the Individual Landowners have a federal common-law right of action for trespass (see Part 1.1, above)—and because there are no administrative remedies to exhaust (see Part 1.2, above)—the district court erred as a matter of law when it dismissed the Individual Landowners' Present Trespass Claim for failure to exhaust.

In its opinion, the district court began with the premise that the relevant regulations "require the [Individual Landowners] to exhaust administrative remedies" or "to complete the administrative appeal process prior to seeking judicial review." Add. 5. And to support this premise, the district court cited and discussed the regulations relevant to obtaining a right-of-way across Indian land, and to appealing the BIA's "decisions regarding rights-of-way." Add. 6–9. But this shows how deeply the district court misunderstood the nature of the Individual Landowners' Present Trespass Claim—because the Individual Landowners' Present Trespass Claim does not challenge any BIA decision "regarding rights-of-way."

To be clear, the Individual Landowners' **Past** Trespass Claim, as pleaded, does imply a challenge to the validity of the BIA's issuance of the 1993 Easement. See App. 25 (¶122). The Individual Landowners

therefore do not appeal the dismissal of their Past Trespass Claim. (See Note 7, above.)

But the district court appears to have conflated the Past Trespass Claim with the Present Trespass Claim, in dismissing both claims for failure to exhaust administrative remedies. The district court indicated that it understood the **chronological** distinction between the Past Trespass Claim and the Present Trespass Claim. See Add. 10, 12 (referring to the Present Trespass Claim as "the holdover claim"). But the district court failed to make a **legal** distinction between the two claims. Thus, the district court wrongly supposed that the Present Trespass Claim seeks "judicial review" of a BIA decision, and wrongly required the Individual Landowners to wait for a "final determination" by the BIA before they can bring their Present Trespass Claim in federal court. See Add. 5–16, especially 10, 12.

For all the reasons provided in Parts 1.1 and 1.2, above, the district court erred as a matter of law by dismissing the Present Trespass Claim for failure to exhaust administrative remedies.

In justifying its dismissal, the district court claimed that it is "of utmost importance to note that the BIA is apparently conducting its investigation"—and the district court suggested that this so-called "investigation" is the "administrative procedure" that must be completed before the Individual Landowners can proceed with their Present Trespass Claim. See Add. 10, 12–14 & n.5 (citing 25 C.F.R.

§§ 169.402, 169.410). And having supposed that the BIA has "not concluded its process" for "investigating and determining holdovers," the district court further supposed that the BIA "could very well conclude the Defendants are in trespass, thereby ruling *in favor* of the [Individual Landowners]." Add. 14 (italics in original). The district court then further supposed that, with such a "ruling," the BIA "could grant the [Individual Landowners] effective relief and [thereby] obviate the need for judicial review." *Ibid.*

But the district court cited **no authority** that supports these suppositions. Instead, these suppositions show that the district court fundamentally misunderstood the nature of the Present Trespass Claim, the nature of the BIA's so-called "investigation," and the nature of the "relief" available.[13]

The BIA is merely able to "investigate" whether Andeavor has overstayed its right-of-way. See 25 C.F.R. § 169.402 ("BIA may investigate compliance with a right-of-way."). If the BIA determines that Andeavor has overstayed its right-of-way, this does **not** constitute a "ruling in favor of the Individual Landowners," as the district court supposed; it constitutes merely a determination that Andeavor has overstayed its right-of-way. With this determination, the BIA may send

[13] Notably, from the time Andeavor's Present Trespass began in 2013 to the time the district court issued its order, nearly seven years had passed without any sort of BIA "investigation" that could produce a "ruling," yet the district court nevertheless supposed that one was ongoing.

Andeavor "a written notice of violation." 25 C.F.R. § 169.404; see App. 18 (¶94) (alleging BIA sent such notice to Andeavor). And subsequently the BIA "**may** take action to recover possession on behalf of the Indian landowners." 25 C.F.R. § 169.410 (emphasis added). But the "action" that the BIA "may take" refers to the BIA bringing a trespass action in federal court, on behalf of the Individual Landowners, in its capacity as the landowners' trustee. See, *e.g.*, *Pend Oreille*, 926 F.2d at 1504; see also Part 1.1, above.

In other words: contrary to the district court's unsupported suppositions, there is **no administrative procedure** by which the BIA might "rul[e] in favor" of the Individual Landowners or grant them "effective relief" for their Present Trespass Claim. See Part 1.2, above. The BIA can bring a trespass action on behalf of the Individual Landowners. But the Individual Landowners do not have to wait or rely on the BIA to take action. See Part 1.1, above.

For these reasons, the rest of the district court's reasoning and analysis is irrelevant—because it all stems from the court's flawed and unsupported supposition that an administrative remedy is available. See Add. 5–16. For example, the district court cited *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409 (8th Cir. 1993), to "scold" the Individual Landowners for "failing to take 'even the first steps of the administrative appeal process.'" Add. 9 (quoting *Klaudt*, 990 F.2d at 411). But here there is no "administrative appeal process" to be

pursued, as there was in *Klaudt*, because here—in their Present Trespass Claim—the Individual Landowners are not challenging a BIA decision. The district court ultimately concluded: "When an administrative remedy is available, that recourse must be pursued." Add. 16. But the district court erred in its presumption that an administrative remedy is available.

Because the Individual Landowners have a federal common-law right of action for trespass (see Part 1.1, above)—and because there is no administrative remedy for the Individual Landowners to exhaust (see Part 1.2, above)—the district court erred as a matter of law when it dismissed the Individual Landowners' Present Trespass Claim for failure to exhaust administrative remedies. This Court should therefore reverse the district court's judgment and remand this case for further proceedings.

2. The Individual Landowners have a cognizable trespass action under federal common law.

As demonstrated (see Part 1.1, above), it is well established that an Indian landowner's right to "exclusive possession" of his or her trust land is "'a *federal* right'"—and an Indian landowner "can maintain [an] action for violation of their possessory rights based on federal common

law." *Oneida II*, 470 U.S. at 234–236 (italics in original) (quoting *Oneida I*, 414 U.S. at 670–671).[14]

Notably, the Ninth Circuit has recognized an Indian's federal common-law right of action for trespass on Indian trust land many times. *E.g.*, *Swinomish*, 951 F.3d at 1153; *Milner*, 583 F.3d at 1182; *Pend Oreille*, 28 F.3d at 1549 n.8; *Loring*, 610 F.2d at 651. And the Tenth Circuit has likewise recognized this federal common-law right of action. *E.g.*, *Davilla*, 913 F.3d at 965–970; *Nahno-Lopez*, 625 F.3d at 1281–1283 & n.1. This Court implicitly recognized an Indian's right of action for trespass in *Bird Bear v. McLean Cnty.*, 513 F.2d 190 (8th Cir. 1975)—but did not explicitly address the question. And the district court, below, has previously recognized this federal common-law right of action. *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. March 24, 2011) (citing *Nahno-Lopez*, 625 F.3d at 1282).

Here, the district court did not reach this question. Add. 16 (¶39). But this case nevertheless presents this Court with an opportunity to join its sister circuits in formally recognizing an Indian's federal common-law right of action for trespass against an entity who has—

[14] See also *Santa Fe Pacific*, 314 U.S. 339 (holding Indians have federal common-law right of action against trespassers on their land); *Marsh*, 8 How. at 232, 12 L.Ed. 1056 ("That an action of ejectment [can] be maintained on an Indian right to occupancy and use, is not open to question.").

without authorization—possessed or used Indian land held in trust by the United States.[15]

In its motion to dismiss, Andeavor tried to argue that the Individual Landowners' Present Trespass Claim should be dismissed because it is not "legally cognizable." See App. 87–92 (arguing for dismissal under Fed. R. Civ. P. 12(b)(6)). But Andeavor's arguments are without merit. See App. 241–249. For starters, Andeavor misconstrued the Supreme Court's opinions in *Oneida I* and *Oneida II*. See App. 197–205, 241–242. Andeavor also misconstrued this Court's opinion in *U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273 (8th Cir. 1987). See Part 3, below. And Andeavor grossly misconstrued this Court's opinion in *Wolfchild v. Redwood Cty.*, 824 F.3d 761 (8th Cir. 2016)—claiming that *Wolfchild* stands for the absurd proposition that only tribes have federal common-law rights related to Indian-owned land, and that individual Indians have none. See App. 90–91. This is not at all what the Court held in *Wolfchild*.

In *Wolfchild*, descendants of "the Mdewakanton band of the Sioux tribe" brought a class action seeking "the right to title and possession of twelve square miles of land in southern Minnesota." 824 F.3d at 765.

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[15] There is no known split on this issue; while many circuits, including this one, have not yet addressed the issue, Appellants' counsel has found no case in which a federal appellate court has held that Indians do **not** have a federal common-law right of action for trespass on land held in trust by the United States. And the Supreme Court has clearly indicated they do.

The land at issue had been "set apart" by the DOI for "the loyal Mdewakanton" as "an inheritance to said Indians and their heirs forever." *Id.* at 765–766. The class plaintiffs sought a declaratory judgment that they—as descendants of "the loyal Mdewakanton"—owned "exclusive title" to the land; and they "brought ejectment and trespass claims" against the defendants under federal common law. *Id.* at 766–767.

Importantly, when the Court drew a distinction between the tribe and individual Indians in *Wolfchild*, the Court was **not** distinguishing between who has common-law property rights and who doesn't. Rather, the Court was distinguishing between a tribe's "claim of *aboriginal* title" and an individual Indian's claim of title based on government allotment. See *id.* at 767–768 (italics in original). As the Court explained, a tribe's claim of aboriginal-title is based on federal common law, whereas individual claims of allotment-title must be based on a treaty or statute granting the allotment. *Id.* at 768. And in *Wolfchild* the Court held that, because the land at issue had been "set apart" for—or allotted to—descendants of "the loyal Mdewakanton" under an 1863 statute, the class plaintiffs could not state a federal common-law claim for aboriginal title. *Ibid.* In other words, the Court distinguished between two alternative, mutually exclusive claims for title—**not** between who has common-law property rights and who doesn't.

In *Wolfchild*, the Court never addressed whether an Indian owner of allotted trust land has a cognizable claim for trespass under federal common law—so *Wolfchild* has no direct bearing on whether, here, the Individual Landowners have a federal common-law claim for trespass. But the Court did say that, because the plaintiffs could not state a claim for aboriginal title, they had established "no property rights upon which to base federal common-law claims for ejectment and trespass." *Id.* at 769. And this statement implies, conversely, that the plaintiffs would have established "property rights upon which to base federal common-law claims for ejectment and trespass," if only they had sufficiently pleaded a claim for title. Thus—to the extent *Wolfchild* has any applicability to this case—it implicitly supports recognizing the Individual Landowners' federal common-law claim for trespass, because here there is no dispute that the Individual Landowners own the land on which Andeavor is trespassing.

For these reasons—and under the authorities cited in Part 1.1, above—the Court should hold that the Individual Landowners have a cognizable federal common-law right of action for trespass based on Andeavor's unauthorized possession and use of the Individual Landowners' trust land.

3. The district court has subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim.

Because the Individual Landowners have a cognizable trespass action under federal common law (see Parts 1.1 & 2, above), the district court has subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim. It is well established that, under 28 U.S.C. § 1331, federal district courts have subject-matter jurisdiction over actions brought under federal common law. See, *e.g.*, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)). And—as demonstrated in Parts 1.1 and 2, above—Indians have a federal common-law trespass action against those who maintain an unauthorized presence on Indian land. See, *e.g.*, *Oneida II*, 470 U.S. at 233–236 & n.6 (citing *Oneida I*, 414 U.S. at 670–671, and other cases dating back to 1810).

Moreover, 25 U.S.C. § 345 states plainly that any Indian "entitled to an allotment of land…may commence and prosecute…any action…in relation to their right thereto in the proper district court of the United States." The Supreme Court has held that this includes "suits involving the interests and rights of the Indian in his allotment…after he has acquired it." *United States v. Mottaz*, 476 U.S. 834, 845 (1986) (cleaned up). And a common-law trespass action fits this description.

For these reasons, the district court has subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim.

In their motion to dismiss, Andeavor argued that the district court lacks subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim. App. 46–73. But—again—Andeavor's arguments are without merit. See App. 188–218. For starters, Andeavor—again—misconstrued the Supreme Court's opinions in *Oneida I* and *Oneida II*. See App. 197–205. And Andeavor likewise misconstrued this Court's opinion in *Kishell*—claiming (wrongly) that this Court has held that a federal district court lacks subject-matter jurisdiction over an Indian landowner's trespass action. See App. 63–65. This is not at all what the Court held in *Kishell*.

Kishell is inapposite for several reasons. First, *Kishell* was not a trespass dispute between an Indian landowner and a non-Indian interloper; it was an intratribal dispute between the tribal housing authority and the executor (named Kishell) of the estate of a deceased tribe member (named Tibbets). 816 F.2d at 1274. Second, neither the district court nor this Court considered whether there was a federal common-law action for trespass on Indian land held in trust by the United States. See *id.* at 1274–1276. Instead, the district court dismissed the case after determining that the dispute was "a purely internal tribal controversy, which the tribal court [was] uniquely situated to resolve," and concluding that Kishell should "exhaust

available tribal court remedies." *Id.* at 1276. On appeal, this Court briefly considered the possibility of federal-question jurisdiction under 25 U.S.C. § 345 but—importantly—noted that Tibbets (the Indian landowner) "held fee title to the land." *Id.* at 1275. In other words, though the land had been originally allotted under the government's allotment program (see *id.* at 1274), the land was no longer held in trust by the United States. And—because the government no longer held the land in trust—the Court held that Section 345 did not apply and could not provide grounds for federal subject-matter jurisdiction. *Ibid.*

Here, in contrast, it is undisputed that the Individual Landowners own **trust** land—*i.e.*, their land is still held in trust by the United States—so *Kishell* is inapposite and Section 345 applies to provide jurisdiction for "suits involving the interests and rights of the Indian in his allotment." See *Mottaz*, 476 U.S. at 845.

The Individual Landowners' right to "exclusive possession" of their trust land is "'a *federal* right.'" *Oneida II*, 470 U.S. at 234–236 (italics in original) (quoting *Oneida I*, 414 U.S. at 670–671). And the Individual Landowners "can maintain [an] action for violation of their possessory rights based on federal common law." *Ibid.* Other circuits have recognized a district court's jurisdiction over an Indian landowner's federal common-law trespass action. *E.g.*, *Nahno-Lopez*, 625 F.3d at 1281–1283 & n.1. And this Court implicitly recognized the district court's jurisdiction over an Indian landowner's trespass action in *Bird*

Bear, 513 F.2d 190—though it did not explicitly address the jurisdictional question.

For the reasons provided, this Court should hold that the district court has subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim.

4. The Individual Landowners are not required to join the government as a party under Rule 19.

Rule 19 does not require an Indian landowner to join the government in an action against a trespasser. Cf. Fed. R. Civ. P. 19. This Court has rejected the notion that the government is "an indispensable party to every case involving a dispute over Indian lands." *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 747 n.6 (8th Cir. 2001). And this Court has held that the government is **not** an indispensable party in cases involving an Indian landowner's trespass action against a trespassing entity. *E.g.*, *Bird Bear*, 513 F.2d at 191 n.6. The Supreme Court's opinion in *Mottaz* supports this conclusion. See 476 U.S. at 845–846 & n.9. As does the Supreme Court's opinion in *Poafpybitty*. See *Houle*, 2011 WL 1464918, at *24–25 (quoting *Poafpybitty*, 390 U.S. at 373–374, and explaining why *Poafpybitty* supports "the prevailing view in the Eighth Circuit and elsewhere" that the government "is not an indispensable party in cases where either Indian tribes or individual allottees are suing for trespass…to protect their beneficial interests in trust lands"). Thus, here, the Individual

Landowners are not required to join the government in their trespass action against Andeavor.

In their motion to dismiss, Andeavor argued that the government is an indispensable party. App. 99–132. But Andeavor's arguments are without merit. See App. 218–231. And even if Andeavor's arguments might've had some merit with respect to the Individual Landowners' **Past** Trespass Claim—because, as pleaded, the Past Trespass Claim implied a challenge to the BIA's issuance of the 1993 Easement—Andeavor proffered no valid argument for why the government should be considered an indispensable party with respect to the Individual Landowners' **Present** Trespass Claim.

Regarding the Present Trespass Claim, Andeavor argued only that the government is an indispensable party because the BIA "has the sole right and obligation to determine whether to treat a holdover possession as a trespass, and whether to take action to recover possession." App. 121 (citing 25 C.F.R. § 169.410). But this is just wrong—and misrepresents the relevant regulations.

As already demonstrated (see Part 1.1, above), the regulations define any "unauthorized possession" as "a trespass." 25 C.F.R. §§ 169.410, 169.413. In a so-called "holdover" situation, there is a window for the former right-of-way holder and the Indian landowner to negotiate a renewal of the right-of-way—and the BIA will refrain from taking action if the parties have notified the BIA of ongoing

negotiations. 25 C.F.R. § 169.410. But if there are no negotiations—or if the Indian landowner knows that the former right-of-way holder is continuing to possess or use the land without authorization—then the Indian landowner "may pursue any available remedies under applicable law." 25 C.F.R. § 169.413. Contrary to Andeavor's assertions, there is **nothing** in the regulations that gives the BIA the "sole right and obligation" to enforce the Indian landowner's possessory rights—and **nothing** that requires the Indian landowner to notify or rely on the BIA. See Parts 1.1 & 1.2, above.

For these reasons, the Court should hold that the government is not an indispensable party to the Individual Landowners' Present Trespass Claim. See *Bird Bear*, 513 F.2d at 191 n.6; *Houle*, 2011 WL 1464918, at *24–25 (quoting *Poafpybitty*, 390 U.S. at 373–374, and explaining why *Poafpybitty* supports "the prevailing view in the Eighth Circuit and elsewhere" that the government "is not an indispensable party in cases where either Indian tribes or individual allottees are suing for trespass").

5. The district court erred by dismissing the Individual Landowners' breach-of-contract claim without ever addressing it.

A district court abuses its discretion when it dismisses a claim without explaining why the claim should be dismissed. See *Twin City Const. Co. of Fargo v. Turtle Mountain Band of Chippewa Indians*, 911

F.2d 137, 139 (8th Cir. 1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); see also Fed. R. Civ. P. 12 (providing for dismissal for identified reasons); *Webb v. Pennington County Bd. of Com'rs*, 92 F. App'x 364, 366 (8th Cir. 2003) (reversing dismissal of *Bivens* claim as abuse of discretion because district court "failed to explain" why claim should be dismissed).

In addition—or as an alternative—to their Present Trespass Claim, the Individual Landowners alleged that Andeavor breached the 1993 Easement agreement by failing to "restore the land to its original condition" after the easement expired in 2013, as required by the agreement. App. 27–28.

The district court acknowledged the existence of this breach-of-contract claim. Add. 2 (¶2). But the court focused on the trespass claims and dismissed the Individual Landowners' complaint in its entirety, for failure to exhaust administrative remedies, without ever addressing the breach-of-contract claim or explaining why it should likewise be dismissed under the exhaustion doctrine. And because the there are no administrative remedies available for the breach-of-contract claim—which is analogous to the breach-of-lease claim in *Poafpybitty*—the breach-of-contract claim cannot be dismissed for failure to exhaust administrative remedies, for all the same reasons that the Present

Trespass Claim cannot be dismissed for failure to exhaust administrative remedies. See Parts 1.1–1.3, above.[16]

Because the district court erred by implicitly dismissing the breach-of-contract claim without providing any analysis or explanation for why it should be dismissed—and because, on its merits, the breach-of-contract claim should not be dismissed for all the same reasons that the Present Trespass Claim should not be dismissed—this Court should reverse the district court's judgment and remand for further proceedings on the Individual Landowners' breach-of-contract claim. See *Twin City*, 911 F.2d at 139 (citing *Foman*, 371 U.S. at 182); see also *Webb*, 92 F. App'x at 366.[17]

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[16] Because the breach-of-contract claim is perfectly analogous to the breach-of-lease claim in *Poafpybitty*, the district court also has subject-matter jurisdiction over the breach-of-contract claim for all the same reasons that it has subject-matter jurisdiction over the Present Trespass Claim. See Part 3, above. And the Individual Landowners do not have to join the government in their breach-of-contract claim for all the same reasons that they do not need to join the government in their Present Trespass Claim. See Part 4, above.

[17] The Individual Landowners also alleged "causes of action" for constructive trust and unjust enrichment, and for punitive damages. App. 28–30. Andeavor argued that these "actions" should be dismissed because they are more properly construed as remedies, rather than causes of action. App. 93. The district court did not analyze or address these "actions" in its order—yet the court implicitly dismissed these "actions" by dismissing the complaint in its entirety. See Add. 16–17. As with the breach-of-contract claim, the district court erred by implicitly dismissing these "actions" without explanation—so this Court should reverse and remand. See *Twin City*, 911 F.2d at 139 (citing *Foman*, 371 U.S. at 182); see also *Webb*, 92 F. App'x at 366.

CONCLUSION

For the reasons provided, the district court erred by dismissing the Individual Landowners' complaint in its entirety for failure to exhaust administrative remedies. The Individual Landowners do not challenge the dismissal of their Past Trespass Claim. But this Court should reverse the district court's dismissal of the Individual Landowners' remaining claims and remand this case for further proceedings.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 32 because it is in 14-point Century Schoolbook font and contains 9,440 words.

Also, under Local Rule 28A(h)(2), this brief and its Addendum have been scanned and are virus-free.

/s/ *Jason P. Steed*
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