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

APPELLANTS' REPLY

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[1] Issue #6 was raised in Appellees' response (at 34–37).

SUMMARY OF APPELLANTS' REPLY

Tesoro[2] agrees this case is about whether the Individual Landowners can sue Tesoro for trespass (and for breach of contract) without having to wait for the BIA to take action on the Individual Landowners' behalf. See Appellees' Br. i. The Supreme Court's opinion in *Poafpybitty* answers this question, stating plainly 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 holding "there is nothing…requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own." *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 369, 373 (1968). Under *Poafpybitty*, even if some kind of administrative process exists for addressing Tesoro's trespass on Indian land, the Individual Landowners do **not** have to defer to or wait on that process before bringing this action against Tesoro.

Tesoro dismisses *Poafpybitty* and contends that the Individual Landowners must defer to the BIA, and must wait for the BIA to exhaust its administrative process before they can do anything to protect their own interests in their land. See Appellees' Br. i, 11–32. But Tesoro's exhaustion arguments are based on a deliberate

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[2] The Individual Landowners referred to Appellees as "Andeavor" in their opening brief, but Appellees are referring to themselves as "Tesoro."

misreading of the right-of-way regulations and on an exaggeration of the import of the BIA's administrative determinations.

The BIA's determinations—that Tesoro is trespassing and that Tesoro's trespass has caused $187 million in damages to Indian landowners—do not constitute an administrative "remedy." They are merely proceedings that precede a possible BIA lawsuit against Tesoro, which the BIA can bring on behalf of the Indian landowners. See 25 C.F.R. § 169.410; *e.g.*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991). **Tesoro admits this when it admits the BIA cannot award any damages or injunctive relief for Tesoro's trespass, but can only "pursue this relief" on the Individual Landowners' behalf.** See Appellees' Br. 30.

Tesoro's admission ends the exhaustion argument. Because there is no administrative remedy to exhaust, the district court erred by dismissing the complaint for failure to exhaust. See *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 937 (8th Cir. 2005). As the regulations and the Supreme Court have made clear, the Individual Landowners do **not** have to wait for the BIA to complete its administrative process or to file suit on the Individual Landowners' behalf before the Individual Landowners can take action on their own. 25 C.F.R. § 169.413; *Poafpybitty,* 390 U.S. at 373.

Tesoro's exhaustion arguments, if adopted as law, would relegate the Individual Landowners to second-class status—as the only

landowners in America who cannot bring an action to enforce their most basic property rights without deferring to and waiting on Government bureaucracy. Because the Individual Landowners are **not** second-class citizens, and because they have a right—as a matter of law—to bring this trespass action against Tesoro without having to wait for the Government to bring an action on their behalf, the district court erred when it dismissed the Individual Landowners' complaint.

For these reasons, this Court should reverse the district court's judgment and remand this case for further proceedings.

STANDARD OF REVIEW

Because the availability of administrative remedies is a matter of statutory interpretation, and because a dismissal for failure to exhaust administrative remedies 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).

Tesoro contends that an abuse-of-discretion standard should apply. Appellees' Br. 21–28. But Tesoro's contention presumes the existence of an administrative remedy. See *ibid.* In other words, Tesoro presumes that an administrative remedy exists, then contends that the district court "did not abuse its discretion" by dismissing the Individual Landowners' complaint "until the prescribed administrative remedy has been exhausted." *Id.* at 21–22. But Tesoro not only fails to demonstrate

that an administrative remedy exists, Tesoro admits that an administrative remedy does **not** exist. See Appellees' Br. 30 (admitting BIA cannot award damages or injunctive relief).

The cases that Tesoro cites for applying an abuse-of-discretion standard do **not** support the application of this standard when the question is whether an administrative remedy exists. Instead, they support the application of this standard when an administrative remedy exists but there is no "statutorily-imposed administrative exhaustion requirement." See *Thermal Science, Inc. v. U.S. Nuclear Regulatory Com'n*, 184 F.3d 803, 805 n.3 (8th Cir. 1999); *Anversa v. Partners Healthcare System, Inc.*, 835 F.3d 167, 175 (1st Cir. 2016). In other words, there are two questions: (1) whether the statutory and regulatory scheme provides an administrative remedy; and if so, (2) whether the scheme requires the exhaustion of that administrative remedy. Answering these two questions is a matter of statutory interpretation, which is reviewed *de novo*. See *Bartlett*, 716 F.3d at 472. But if (1) an administrative remedy exists and (2) exhaustion is not statutorily required, then the district court's decision to nevertheless require exhaustion would be reviewed for abuse of discretion. See *Thermal Science*, 184 F.3d at 805 n.3; *Anversa*, 835 F.3d at 175.

By invoking and arguing the abuse-of-discretion standard, Tesoro misconstrues what is at issue in this appeal. Here, the Individual Landowners do **not** contend that the district court abused its discretion

by requiring exhaustion when there was no "statutorily-imposed" exhaustion requirement; instead, the Individual Landowners contend that the district court erred as a matter of law by requiring exhaustion when there is no administrative remedy to exhaust. See Appellants' Br. 18–22, 28–37. In other words: here, the answer to the first question (*Does the statutory and regulatory scheme provide an administrative remedy?*) is "no." **Tesoro admits this**. See Appellees' Br. 30. Yet Tesoro nevertheless invokes the abuse-of-discretion standard by focusing on the "no" answer to the second question (*Does the scheme require exhaustion?*). See Appellees' Br. 21–26. The Court should reject Tesoro's effort at misdirection.

As Tesoro admits (*id.* at 30), the regulations do **not** provide an administrative remedy for Tesoro's trespass. They provide an administrative procedure for Tesoro to obtain or renew a right-of-way across Indian land. 25 C.F.R. §§ 169.101–130, 169.201–206. And they enable the BIA to "investigate [Tesoro's] compliance with a right-of-way" and to issue a "notice of violation." 25 C.F.R. §§ 169.402, 169.404. But there are **no** regulations providing an actual administrative remedy for Tesoro's trespass. Instead, the regulations provide that the BIA "may take action…on behalf of the Indian landowners"—and the Indian landowners "may pursue any available remedies under applicable law." 25 C.F.R. §§ 169.410, 169.413. In other words, the BIA can file suit on the Indian landowners' behalf. *E.g.*, *Pend Oreille*, 926

F.2d at 1504. Or the Indian landowners can file suit on their own. *E.g.*, *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 965–970 (10th Cir. 2019).

Because the question on appeal is whether an administrative remedy exists in the first place (see Part 1, below) and **not** whether certain factors favor exhaustion, Tesoro's argument about factors that favor exhaustion (Appellees' Br. 21–26) is irrelevant. The standard of review is *de novo*.

APPELLANTS' REPLY

1. The district court erred by dismissing the Individual Landowners' entire complaint for failure to exhaust administrative remedies.[3]

As Tesoro admits (Appellees' Br. 30), there is no administrative remedy to exhaust, so the district court erred by dismissing the Individual Landowners' complaint for failure to exhaust. For the reasons provided below, this Court should reverse and remand.

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

Under *Poafpybitty* (and other case law), the Individual Landowners have a right to bring this trespass action against Tesoro regardless of the Government's ability to take action on the Individual Landowners'

[3] Headings are reiterated from the Individual Landowners' opening brief and continue to track the Issues Presented.

behalf. See Appellants' Br. 20–28. Tesoro offers no real response to *Poafpybitty*, because it has none. The core holding in *Poafpybitty* is that the Government's power to enforce Indian land rights does not diminish the Indian landowner's power to safeguard her own land rights. See 390 U.S. at 373–374. In *Poafpybitty*, the Court reached this conclusion because it "found nothing in [the oil and gas] regulatory scheme which would preclude [the Indian landowners] from seeking judicial relief." *Id.* at 373. And the same is true here: there is nothing in the right-of-way regulatory scheme that precludes the Individual Landowners from seeking judicial relief from Tesoro's trespass. To the contrary, Section 169.413 explicitly provides that the Individual Landowners "may pursue any available remedies under applicable law."

Tesoro claims this case is distinguishable from *Poafpybitty* because Section 169.410 precludes the Individual Landowners from seeking judicial relief. See Appellees' Br. 28. But Section 169.410 does no such thing. Section 169.410 merely states:

> If a grantee [like Tesoro] remains in possession [of Indian land] after the expiration…of a right-of-way,…[the BIA] may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified [the BIA] in writing that they are engaged in good faith negotiations to renew or obtain a new right-

> of-way, [the BIA] may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

In short, Section 169.410 merely enables the BIA to "take action" on behalf of the Indian landowners. Section 169.410 says **nothing** that precludes the Indian landowners from taking action on their own. And Section 169.413 says the Indian landowners can take action on their own, to recover for a trespass on their land.[4]

Because there is "nothing in [the right-of-way] regulatory scheme which would preclude [the Indian landowners] from seeking judicial relief," the BIA's power to take action on the Indian landowners' behalf

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[4] Tesoro's assertion that Section 169.413 is limited to "situations where a party takes possession of trust land while never having had a right-of-way in the first instance" (Appellees' Br. 5) is an effort to rewrite the regulatory text to manufacture a distinction between the word "trespass" in Section 169.413 and the word "trespass" in Section 169.410. But there is no textual basis for creating two separate meanings for "trespass." Under Section 169.413, the Individual Landowners are entitled to take action to recover for any trespass on their land. And under Section 169.410, Tesoro is trespassing by overstaying the expiration of its right-of-way. So, under Sections 169.410 and 169.413, the Individual Landowners are entitled to take action on Tesoro's trespass.

Tesoro makes a "holdover" argument that essentially amounts to arguing that pipeline companies are allowed to overstay their rights-of-way for however long it takes to negotiate a renewal with the Indian landowners. See Appellees' Br. 7. But again, there is no textual basis for Tesoro's argument. Section 169.410 says the BIA can choose not to construe Tesoro's overstay as a "trespass" if the parties are negotiating in good faith. But the landowners themselves can decide Tesoro's overstay is a trespass and take action.

does not "diminish the Indian's right to sue on his own behalf." See *Poafpybitty*, 390 U.S. at 370–374. Tesoro's effort to construe Section 169.410 as precluding the Individual Landowners from taking action on their own behalf is a distortion of the plain text of Section 169.410.

Tesoro also claims that *Poafpybitty* is distinguishable because, in *Poafpybitty*, the Government "was not acting and had no intent to act" on the landowners' behalf, whereas here the BIA appears to have taken some administrative action. See Appellees' Br. 28, 31–33 & n.8. But Tesoro misconstrues the whole point of *Poafpybitty*, which is that the Indian landowners' right to take action on their own behalf is **independent** of the Government's power to act on their behalf—so it does not matter whether the Government has taken action on the Indian landowners' behalf. Indeed, the Supreme Court said the "existence" of the Government's power to take action cannot diminish the Indians' right to take action—and "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney"—so it cannot matter whether the Government has or has not decided to take action. See *Poafpybitty*, 390 U.S. at 373–374. Under *Poafpybitty*, the Individual Landowners have the right to act for themselves.[5]

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[5] Tesoro claims that, if the Government was refusing to take action, the Individual Landowners could challenge the inaction and demand action. Appellees' Br. 20 (citing 25 C.F.R. § 2.8). But there is no textual basis for this, and it is wrong as a matter of law. The BIA "may take action" on a trespass (25 C.F.R. § 169.410)—but it is **not** obligated to do so. See *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 575 (Cl. Ct.

This is consistent with the actual regulations at issue. Together, Sections 169.410 and 169.413 make it clear that both the BIA and the Individual Landowners have power to take action to recover for Tesoro's trespass. And under *Poafpybitty*, the Government's power to take action on the Individual Landowners' behalf does **not** diminish or deprive the Individual Landowners of their right to take action on their own behalf. For these reasons, the Court should reject Tesoro's invitation to misconstrue and disregard *Poafpybitty*.

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." *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)). 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

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1990). The BIA is not obligated to take action because the Individual Landowners are free to take action on their own. See 25 C.F.R. § 169.413; *Poafpybitty*, 390 U.S. at 371–374.

course.'" *Id.* at 938 (quoting *Western Pac. R.R.*, 352 U.S. at 63) (cleaned up).

Here, **Tesoro admits the BIA has no authority to award damages or injunctive relief for Tesoro's trespass.** Appellees' Br. 30. This ends the exhaustion argument because there is no administrative remedy to be exhausted. See *Alpharma*, 411 F.3d at 937–938. The BIA has administratively determined that Tesoro's trespass has caused $187 million in damages to Indian landowners—but Tesoro has administratively appealed this determination on the grounds that the BIA "is not authorized" to make it. See Appellees' App. 145–185. According to Tesoro, "there is no regulation authorizing the BIA to assess 'damages' or penalties…for a right-of-way holdover [*i.e.*, trespass]." *Id.* at 178. While the Individual Landowners would argue that the BIA can make whatever administrative findings or determinations that it wants to make, they agree with Tesoro that "there is no regulation authorizing the BIA to [award] 'damages.'" So—according to Tesoro's own admission, and under *Alpharma*—the exhaustion doctrine **does not apply** here because there is no administrative remedy to be exhausted.

For these reasons, the district court erred by dismissing the Individual Landowners' complaint for failure to exhaust, and this Court should reverse and remand for further proceedings.

Of course, though Tesoro admits the regulations do not authorize an administrative remedy for Tesoro's trespass, Tesoro nevertheless argues at length that the regulations "require exhaustion of administrative remedies." See Appellees' Br. 15–20. But Tesoro cannot point to any regulation that requires the exhaustion of administrative remedies—because there is none. As Tesoro knows, there is no available administrative remedy in the first place. See Appellees' Br. 30; Appellees' App. 178. So there is no administrative remedy to be exhausted.

Tesoro nevertheless represents to this Court that Section 169.410 is the "centerpiece" of an administrative remedy that is supposedly available to the Individual Landowners. Appellees' Br. 16. But—again—Section 169.410 merely states:

> If a grantee [like Tesoro] remains in possession [of Indian land] after the expiration…of a right-of-way,…[the BIA] may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified [the BIA] in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, [the BIA] may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

Plainly, this section provides **no administrative remedy** for Tesoro's trespass; it merely enables the BIA to "take action…on behalf of the Indian landowners"—meaning it merely enables the BIA to file suit on behalf of the Indian landowners.[6] See, *e.g.*, *Pend Oreille*, 926 F.2d at 1504. This is **not** an administrative remedy—it is the pursuit of a judicial remedy by an administrative entity. Thus, Section 169.410 does **not** provide the Individual Landowners with an administrative remedy for Tesoro's trespass.

In further attempting to convince this Court that an administrative remedy exists (even while admitting that it doesn't), Tesoro points to the regulations that provide for an administrative appeal from the BIA's decisions. See Appellees' Br. 17–18. But the primary purpose of the right-of-way regulations is to provide an administrative procedure for entities like Tesoro to obtain or renew a right-of-way across Indian land. See 25 C.F.R. §§ 169.101–130, 169.201–206. The administrative appellate process exists so that interested parties can appeal the BIA's decisions about granting or denying a right-of-way—and this has nothing to do with creating an administrative remedy for trespass. To be sure, Section 169.410 does enable the BIA to determine for itself

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[6] Section 169.410 plainly refers to the BIA filing suit on behalf of the landowners because it refers to pursuing "remedies available under applicable law, such as a forcible entry and detainer action"—and a "forcible entry and detainer action" is a cause of action brought by filing suit. See, *e.g.*, *Schaefer v. Putnam*, 827 F.3d 766, 768 (8th Cir. 2016).

whether an entity like Tesoro is "trespass[ing]" by overstaying its right-of-way. But it is not at all clear that the administrative appellate process was meant to enable Tesoro to appeal the BIA's simple determination that Tesoro is in trespass. And more importantly, the administrative determination that Tesoro is in trespass is not, itself, a remedy for that trespass. So Section 169.410 and the administrative appellate process cannot, together, be construed as providing an administrative remedy for Tesoro's trespass—especially when Tesoro admits the BIA has no authority to provide any actual remedy for Tesoro's trespass. See Appellees' Br. 30.

In short, Tesoro is trying to have it both ways. It is telling the BIA that the BIA cannot provide an administrative remedy, while simultaneously telling this Court that the Individual Landowners must exhaust a nonexistent administrative remedy before they can pursue this lawsuit. See Appellees' Br. 16–20. The Court should reject Tesoro's blatant duplicity.

As the Individual Landowners have argued from the start, there is no administrative remedy for Tesoro's trespass. The BIA is authorized (under 25 C.F.R. § 169.402) to "investigate" whether Tesoro is in compliance with its right-of-way and (under 25 C.F.R. § 169.410) to determine for itself whether Tesoro is in "trespass." And the BIA is free to make whatever administrative determinations that it wishes to make, in the course of investigating and determining whether to "take

action" on behalf of Indian landowners. But the BIA's determination that Tesoro's trespass has caused $187 million in damages is akin to a party's expert report.[7] In other words, Tesoro is right: there is nothing in the statutory or regulatory scheme that authorizes the BIA to award damages or to enforce its assessment like a judgment. Instead, if the BIA wishes to recover anything on behalf of Indian landowners, then the BIA would have to "take action" by filing suit on behalf of the Indian landowners. See 25 C.F.R. § 169.410. And this is precisely why the Individual Landowners do **not** have to defer to or wait on the BIA's actions—because their right to sue does not depend on "the good judgment or zeal of a government attorney"; they are entitled to take action on their own. See *Poafpybitty*, 390 U.S. at 371–374.

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 Tesoro admits there is no administrative remedy and because the BIA is unable to grant relief, the exhaustion doctrine does not apply and the district court erred by dismissing the Individual

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[7] Notably, the BIA's damages assessment includes some Indian land that is not at issue in this suit—and it does not include some of the Indian land that is at issue in this suit. So the BIA's assessment is not entirely applicable to the trespass claims that are at issue in this suit. This is yet another reason why the Individual Landowners should not have to "exhaust" the BIA's administrative proceedings before pursuing their claims against Tesoro.

Landowners' complaint for failure to exhaust. See *Alpharma*, 411 F.3d at 937. This Court should therefore reverse and remand for further proceedings.

Tesoro fails to cite any case requiring Indian landowners to exhaust administrative remedies before bringing a trespass action against a private entity. Tesoro's whole argument that an administrative remedy exists (see Appellees' Br. 29–32 & n.7) is belied by Tesoro's own admission (and argument to the BIA) that the BIA lacks authority to provide any administrative remedy. See Part 1.2, above. Tesoro tries to claim that the existing administrative remedy is that the BIA "is expressly empowered…to pursue…relief for [the Individual Landowners]." Appellees' Br. 30. But this is an admission that the BIA is merely empowered to file suit on behalf of the Individual Landowners. This is not an administrative remedy—it is a judicial remedy pursued by an administrative entity. And the Individual Landowners do not have to wait for the BIA to act on their behalf. See Parts 1.1 & 1.2, above.

Tesoro relies heavily on an unpublished case from another circuit, applying the exhaustion doctrine in inapposite circumstances. See Appellees' Br. 29–32 (citing *Hayes v. Chesapeake Operating, Inc.*, 249 F. App'x 709 (10th Cir. 2007)). And Tesoro repeatedly relies on other inapposite cases. See Appellees' Br. 17, 20 (citing *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409 (8th Cir. 1993); *Coosewoon v. Meridian Oil Co.*,

25 F.3d 920 (10th Cir. 1994); *Prima Exploration, Inc. v. LaCounte*, No. 1:18-CV-116, 2018 WL 4702153 (D.N.D. Oct. 1, 2018); *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002)). But these cases are all inapposite because they involve the application of the exhaustion doctrine when a party is challenging a Government decision—and here, the Individual Landowners are **not** challenging a Government decision. They are suing Tesoro directly, for trespassing on their land by overstaying the expiration of a right-of-way. As demonstrated (see Part 1.2, above), there is no administrative remedy for Tesoro's trespass, so there is nothing to exhaust.

Because Tesoro has admitted the BIA has no authority to provide an administrative remedy—and because there is, indeed, no available administrative remedy—the district court erred by dismissing the Individual Landowners' complaint for failure to exhaust. This Court should therefore reverse the district court's judgment and remand for further proceedings.

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

As demonstrated in the Individual Landowners' opening brief (at 22–28, 37–41), the Individual Landowners have a federal common-law cause of action to protect their land against trespass, as owners of Indian land that (i) was allotted to them by federal statute or treaty and (ii) remains held in trust by the United States.

As the Individual Landowners explained in their opening brief (at 11–12), in a "trust allotment," the United States holds title to the land, in trust, for the benefit of the Indian landowner. Until a patent issues, and title and fee-simple ownership are conveyed to the Indian landowner, the United States retains its role as trustee. See *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) ("Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands."); *Davilla*, 913 F.3d at 964 (noting many allottees "never received a fee simple patent" and land is still held in trust). This detail is important because it highlights the difference between "allotted" land that is now fully owned by the landowner and "allotted" land that remains held in trust by the United States. This difference flows from whether a patent has issued.

Regarding the Individual Landowners' right to bring a federal action for trespass, Tesoro goes to great lengths (Appellees' Br. 38–49) to misconstrue the case law—misconstruing the Supreme Court's opinions in *Oneida I* and *Oneida II*, this Court's opinions in *Wolfchild* and *Kishell*, and the Tenth Circuit's opinions in *Nahno-Lopez* and *Davilla*, among others—all in the hopes of convincing this Court that the Individual Landowners have no federal action for trespass. But the Individual Landowners stand by the arguments that they made in their

opening brief—and by the language of the actual opinions at issue—and will be happy to further discuss this case law at oral argument.

At the heart of Tesoro's argument is Tesoro's misguided notion that there is a distinction between a tribe's right to protect tribe-owned property and an individual's right to protect individually-owned property. See Appellees' Br. 38–49. Tesoro appears to have drawn this notion from *Oneida I*—but *Oneida I* does not support drawing any such distinction between tribal and individual land rights.

Tesoro quotes a large passage from *Oneida I* to suggest that there is a "critical distinction" between tribal and individual land rights, and that "suits concerning lands allocated to individual Indians do not state claims arising under the laws of the United States." Appellees' Br. 40 (quoting and citing *Oneida Indian Nation of N.Y. State v. Oneida County, N.Y.* ("*Oneida I*"), 414 U.S. 661, 676 (1974)). But Tesoro either misunderstands or deliberately misrepresents the "critical distinction" that was at issue in *Oneida I*.

As the Supreme Court made clear, the critical distinction in *Oneida I* was **not** about whether the land was tribally owned or individually owned; the critical distinction was about whether title and ownership continued to be "guaranteed by [federal] treaty and protected by [federal] statute"—or whether "patents had been issued" so that the "incidents of ownership," including "the underlying right to possession," had become mere "matters of local property law." *Oneida I*, 414 U.S.

at 676. The block passage that Tesoro quotes—and specifically the sentence that Tesoro emphasizes in bold italics—says, "**Once patent issues**, the incidents of ownership are, for the most part, matters of local property law…." Appellees' Br. 40 (quoting *Oneida I*; emphasis altered). This shows that the "critical distinction" is the issuing of patents—because once a patent has issued, title is no longer held in trust by the United States, and thus no longer "guaranteed by [federal] treaty and protected by [federal] statute"; instead, the land is fully owned and possessed by the landowner. This conveyance of title and fee-simple ownership is what removes any action for trespass from federal jurisdiction—**not** the fact that the land is individually (rather than tribally) owned.

The rest of Tesoro's prolonged misreading of the case law stems from its misreading of *Oneida I*. Tesoro claims that this Court recognized Tesoro's distinction between tribal and individual property rights in *Wolfchild v. Redwood Cty.*, 824 F.3d 761 (8th Cir. 2016). See Appellees' Br. 41–42, 48–49. But the Individual Landowners have already explained how Tesoro misreads *Wolfchild*. See Appellants' Br. 39–41. This Court did **not** misinterpret or misapply *Oneida I* in *Wolfchild*, in the way that Tesoro says it did—nor should this Court adopt Tesoro's misinterpretation now.

Tesoro's effort to distinguish all the other cases cited by the Individual Landowners stems from Tesoro's misguided distinction

between tribal and individual property rights—a distinction that does not exist and is unsupported by an accurate reading of the case law. Because the allotted land at issue remains held in trust by the United States, the Individual Landowners' property rights remain "guaranteed by [federal] treaty and protected by [federal] statute" (see *Oneida I*, 414 U.S. at 676), and the Individual Landowners have a federal common-law cause of action for trespass under 25 U.S.C. § 345—for all the reasons provided in the Individual Landowners' opening brief. See Appellants' Br. 22–28, 37–41.

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 Part 2, above), the district court has subject-matter jurisdiction over the Individual Landowners' Present Trespass Claim. See Appellants' Br. 42–45. Tesoro's arguments to the contrary, which are based on Tesoro's misreading of the case law, are already addressed in the Individual Landowners' opening brief and in Part 2, above. The Individual Landowners are happy to discuss the case law further at oral argument.

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, for all the reasons presented in the Individual Landowners' opening brief (at 45–47).

Tesoro's argument to the contrary is based on Tesoro's misguided notion that Section 169.410 makes the BIA the sole arbiter of trespass claims after the expiration of a right-of-way. See Appellees' Br. 49–51. But Section 169.410 does no such thing—as evidenced by the plain text of the regulation itself and as demonstrated by the explication of that text provided in Parts 1.1 and 1.2, above. Tesoro essentially turns its Rule 19 argument into another version of its exhaustion argument. See Appellees' Br. 51 (arguing this lawsuit "interfere[s] with the BIA's ongoing efforts to address the holdover"). But Tesoro's argument is unsupported by any applicable authority—and Tesoro offers no response to the authorities cited by the Individual Landowners, such as *Bird Bear v. McLean Cnty.*, 513 F.2d 190 (8th Cir. 1975), and *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-cv-021, 2011 WL 1464918 (D.N.D. March 24, 2011).[8]

For these reasons, dismissal under Rule 19 would be error.

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[8] Tesoro's reliance on *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015), is unavailing because the Individual Landowners have dropped their Past Trespass Claim and are not challenging any BIA decision. The Individual Landowners agree that the Court should affirm the dismissal (without prejudice) of their Past Trespass Claim. See Appellees' Br. 6 n.1.

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 *Webb v. Pennington County Bd. of Com'rs*, 92 F. App'x 364, 366 (8th Cir. 2003); cf. *Twin City Const. Co. of Fargo v. Turtle Mountain Band of Chippewa Indians*, 911 F.2d 137, 139 (8th Cir. 1990). For the reasons provided in the Individual Landowners' opening brief, the district court erred by dismissing the Individual Landowners' breach-of-contract claim without explanation. See Appellants' Br. 47–49.

Tesoro claims that the breach-of-contract claim should be dismissed for the "same [failure-to-exhaust] reasons" that the trespass claim should be dismissed—so there was no need for the district court to provide a "separate discussion" of the breach-of-contract claim. Appellees' Br. 32–33. But Tesoro's exhaustion argument for the trespass claim is based on the BIA's ability to determine (under Section 169.410) whether Tesoro is "trespass[ing]" by overstaying the expiration of its right-of-way. Section 169.410 does enable the BIA to determine "trespass," but it provides **no textual basis** for the BIA to determine whether Tesoro has breached any terms of the Easement Agreement (besides overstaying the expiration date). Moreover, because Tesoro admits that there is no actual administrative remedy for the trespass claim (see Part 1.2, above), Tesoro cannot argue that the breach-of-

contract claim should be dismissed for the "same [failure-to-exhaust] reasons" as the trespass claim.

For these reasons, the district court erred by dismissing the Individual Landowners' breach-of-contract claim.

6. The primary jurisdiction doctrine does not apply.

The primary jurisdiction doctrine is reserved for cases involving "issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion." *Access Telecomm. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (citing *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)). "It is inappropriate to invoke the doctrine of primary jurisdiction in a case in which Congress, by statute, has decided that the courts should consider the issue in the first instance." *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984). And even where Congress has not expressly reserved the matter for the courts, this Circuit is reluctant to invoke the doctrine because of the added expense and undue delay that may result. *Access Telecomm.*, 137 F.3d at 608.

The primary jurisdiction doctrine does not apply here because Congress has legislated that "[a]ll persons who are in whole or in part of Indian blood or descent…who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence

and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States." 25 U.S.C. § 345.[9] The Individual Landowners claim to have been partially excluded from their allotments by Tesoro's ongoing trespass. Appellants' App. 2, 13. And because Congress has said such claims may be brought in federal court, the primary jurisdiction doctrine does not apply.

Moreover, even if 25 U.S.C. § 345 did not expressly give this trespass dispute to the courts, a trespass dispute does not fall outside the "conventional competence" of the courts, so the invocation of the primary jurisdiction doctrine is unwarranted. In *Pend Oreille*, the Kalispel Indian Tribe argued that the Secretary of the Interior had primary jurisdiction over claims that a utility district had trespassed by flooding the tribe's land during the construction of a dam, in violation of the applicable license, and the tribe requested that the action—which had been initiated by the United States as the Tribe's trustee—be stayed to allow the Secretary to make a damages determination. *Pend Oreille*, 28 F.3d at 1549. But the Ninth Circuit rejected this argument, holding that "[t]he doctrine of primary jurisdiction [was] inapplicable" to the Tribe's trespass claim because Congress had not "placed the [trespass] damages issue 'within the special competence of an

[9] Notably, Section 169.413's provision allowing the Individual Landowners to "pursue any available remedies under applicable law" is consistent with 25 U.S.C. § 345.

administrative body' under a regulatory scheme." *Ibid.* (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956)). Similarly, here, there is nothing about the Individual Landowners' trespass (or breach-of-contract) claim that is not within the conventional competence of the courts—or that has been placed within the "special competence" of the BIA. So there is no basis for applying the primary jurisdiction doctrine.

The regulations themselves reaffirm that the BIA itself does not have to resolve any "special" issue related to the trespass. Sections 169.410 and 169.413 state plainly that Tesoro is in trespass if it is using Indian land without authorization—*i.e.*, without a current right-of-way. This is not something the courts are incapable of deciding. And Tesoro admits that the BIA itself cannot award damages or injunctive relief. Appellees' Br. 30. This, too, can—and must—be decided by the court. Indeed, the regulations state that the remedies at issue are "any available remedies under applicable law." 25 C.F.R. § 169.413. The BIA has no special competence for determining these remedies—and, as Tesoro admits, the BIA has no actual authority to award any remedy. So there is no basis for applying the primary jurisdiction doctrine.

Tesoro claims that the Court should apply the primary jurisdiction doctrine because the BIA is "already in the process of adjudication" and the courts should not "circumvent administrative procedures" or create the risk of "different results." Appellees' Br. 35–37. But Tesoro also admits that the BIA has no authority to award any damages or

injunctive relief for Tesoro's trespass (*id.* at 30)—so it is unclear what "adjudication" might be "circumvented," or what "different result" might be reached. Ultimately, the only thing that the BIA can do is file a separate lawsuit on behalf of the Indian landowners (see Part 1, above)—and this still hasn't happened. Indeed, the BIA's seven-year delay in taking **any** action on Tesoro's trespass is yet another reason to reject the application of the primary jurisdiction doctrine. See *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 136 (D.D.C. 2007) (finding application of primary jurisdiction doctrine was inappropriate, given delay in agency action).

For these reasons, there is no basis for delaying or deferring the Individual Landowners' trespass action any longer, under the primary jurisdiction doctrine. Tesoro has been in trespass on Indian land—making millions of dollars illegally off Indian land—for **seven years**. The Individual Landowners must be allowed to take action without having to wait on Government bureaucracy.

CONCLUSION

For the reasons provided, the Court should reverse the district court's judgment and remand for further proceedings.

Respectfully submitted,

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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 6,495 words.

Also, under Local Rule 28A(h)(2), this brief has been scanned and is virus-free.

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