IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA (WESTERN)

JOANN CHASE ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIV. NO. 1:19-CV-00143-DLH-CRH**
	§	
ANDEAVOR LOGISTICS, L.P., ANDEAVOR, F/K/A TESORO CORPORATION, TESORO LOGISTICS, GP, LLC, TESORO COMPANIES, INC., and TESORO HIGH PLAINS PIPELINE COMPANY, LLC,	§	
	§	
Defendants.	§	

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

NORTON ROSE FULBRIGHT US LLP

Jeffrey A. Webb
Texas State Bar No. 24053544
jeff.webb@nortonrosefulbright.com
111 W. Houston Street
San Antonio, TX 78205-3792

Mark Emery
District of Columbia Bar No. 988017
mark.emery@nortonrosefulbright.com
799 9th Street NW, Suite 1000
Washington, DC 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules, Statutes, and Regulations

Other Authorities

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

Plaintiffs' Additional Response in Opposition (Doc. 133, "**Response**") to Defendants' Amended Motion to Dismiss (Doc. 73, "**Motion**") again confirms that Plaintiffs, individual Indian allottees, have no legally cognizable federal common law claim of trespass. Plaintiffs' Complaint should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6).[1]

At the request of Plaintiffs, the Court allowed the parties to submit updated briefing on the issue of whether individual Indian allottees may assert a federal common law claim of trespass. Doc. 130. Plaintiffs requested this additional briefing to address any developments in the case law since the parties' original briefing was submitted in late 2019. However, Plaintiffs' supplemental Response simply re-urges the same arguments that were already made in 2019 and that the Eighth Circuit has already initially addressed with sharp skepticism in its September 2021 opinion in this very case. *See Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864 (8th Cir. 2021). Remarkably, Plaintiffs do not even attempt to address the issues and concerns with Plaintiffs' arguments raised by the Eighth Circuit in that 2021 opinion; indeed, the only reference to the opinion in their Response relates to the holdings pertaining to exhaustion of remedies and the stay. ***Not a single word in the Response discusses the Eighth Circuit's more than six-page discussion of the Allottees' assertion they have a federal common law claim for trespass***. Instead of addressing this most relevant development since the 2019 briefing, Plaintiffs instead make the same

[1] In accord with the Court's order entered June 8, 2023, Defendants limit this reply to the existence of a federal common law action for trespass. *See* Doc. 130, at 2. But Defendants continue to assert all the grounds urged in their Motion. *See generally* Doc. 73. Importantly, Plaintiffs do not request leave to amend their Complaint, Plaintiffs have already had an opportunity to amend their complaint once, and amendment would be futile. Therefore, the Amended Complaint should be dismissed in its entirety.

arguments relying largely on the same case law, and the few new cases they cite do not change the long-standing case law that individual Indian allottees do not have federal common law trespass claims.

There is a critical distinction that Plaintiffs tried to ignore in their 2019 briefing and continue to ignore in their supplement briefing, despite the Eighth Circuit discussing the distinction at length in its 2021 opinion. *See* Doc. 133 at 3 ("When it comes to Indian trust lands, there is no legal difference between the status of a tribe and an individual Indian allottee."); *cf. Chase*, 12 F.4th at 872 (explicitly distinguishing the *Oneida I* case[2] from this case in two "significant" respects – the Plaintiffs "are not a tribe, like the Oneida Nation," and Plaintiffs' alleged source of ownership interests was allotments); *id.* (noting *Oneida* "carefully distinguished" the Supreme Court's prior decision in *Taylor*,[3] which held federal jurisdiction did not exist for the individual Indians' claims); *id.* at 873-74 (noting that Plaintiffs' argument of a federal common law trespass action for individual Indians "is not clearly supported by *Oneida I* or *Oneida II*,[4] as we expressly ruled in *Wolfchild*"[5] and emphasizing that in *Wolfchild* they had distinguished between claims asserted by a tribe to vindicate aboriginal rights and claims that only concerned lands allocated to individuals); *id.* at 874 (rejecting Plaintiffs' argument that *Wolfchild* has no direct bearing on whether Plaintiffs have the federal common law trespass claim they assert, and again noting that *Oneida I* distinguished tribal claims from the individual Indian claims in *Taylor*). The critical distinction is the difference between trespass claims by an Indian Tribe, and trespass claims by individual Indian allottees. Many federal precedents from the Supreme Court, the Eighth Circuit,

[2] *Oneida Indian Nation of N.Y.New York v. Cnty. of Oneida*, 414 U.S. 661 (1974).

[3] *Taylor v. Anderson*, 234 U.S. 74 (1914).

[4] *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985).

[5] *Wolfchild v. Redwood Cnty.*, 824 F.3d 761 (8th Cir. 2016), *cert. denied,* 137 S. Ct. 447 (2016).

and other courts establish that individual Indian allottees, in contrast to Tribes, have no federal common law claims for trespass. The reason for this distinction lies in longstanding historical antecedents, and the law is clear and should be applied here to dismiss the Plaintiffs' case.

I. BACKGROUND

Plaintiffs filed the original Complaint in this case in late 2018. Doc. 1. That filing followed substantial dealings with the local tribe to secure a right of way renewal and ***years*** of attempts by Defendants to secure consent from a majority of the allottees for each and every parcel of land that Defendants' pipeline crosses, which parcels Defendants and their predecessors in interest have previously secured rights-of-way running back to the 1950s.[6]

Defendants promptly moved to dismiss on multiple grounds and, because this case was originally filed in Texas, moved to transfer the case to this Court. Docs. 17, 22. Plaintiffs amended their complaint, and Defendants again moved to dismiss. Docs. 28, 43. In July, 2019, the case was transferred to this Court, and Defendants again moved to dismiss. Docs. 67, 73.

Defendants asserted, *inter alia*, that the Amended Complaint should be dismissed for lack of subject matter jurisdiction, for failure to state a claim, and for failure to exhaust. Doc. 73, at 3-6, 8-10. Both of the first two grounds turned centrally on Defendants' contention that Plaintiffs, as individual Indian allottees, could not assert a trespass claim under federal common law, which ultimately left this Court without jurisdiction to hear their claims. The Court granted dismissal on exhaustion grounds and denied dismissal on the remaining grounds as moot. Doc. 100, at 16.

[6] For a full account of the history leading up to this case, see the operative complaint in *Tesoro High Plains Co., LLC v. United States of America et al.*, No. 1:21-cv-00090-DMT-CRH (D.N.D. filed Apr. 23, 2021) ("*THPP*"). Even after this case was filed, Defendants have engaged in extensive attempts to secure consent for each and every allotted parcel but have been stymied by several holdouts. Doc. 121, at 1-3.

Plaintiffs appealed, and the Eighth Circuit ultimately reversed on the exhaustion issue. *See* generally *Chase*, 12 F.4th 864.

The Eighth Circuit's September 2021 opinion in this case is critical to this Court's present consideration of the issue of federal common law trespass. The Eighth Circuit held that while exhaustion was not required, this case should nonetheless be stayed to give the Bureau of Indian Affairs ("**BIA**") a fair chance to address Plaintiffs' complaints and mark a path forward.[7] *Id.* at 868-78. While the Eighth Circuit declined to ultimately decide at that time whether Plaintiffs could assert claims under federal common law—an alternative ground for affirmance—it did discuss at length its own precedents and those from the Supreme Court, emphasizing the distinction between claims by tribes to vindicate aboriginal rights and claims by individual Indian allottees. The Eighth Circuit ultimately held that the jurisdictional question collapsed into Plaintiffs' capacity to assert federal common law claims and noted that prior precedent may well foreclose any such capacity. *Id.* The Eighth Circuit remanded the case "for further proceedings not inconsistent with [its] opinion." *Id.* at 878. That issue is now squarely before this Court.

[7] While *Chase* was pending, Defendants filed their own claims against the BIA and others in *THPP*, and the United States counterclaimed to assert trespass claims regarding the same parcels at issue here. *See THPP*, Docs. 1, 28. Defendants moved to dismiss the counterclaim there, and that motion remains pending. *See THPP*, Doc. 54. As discussed *infra*, the United States has expressly declined the Eighth Circuit's invitation to weigh in on the specific issue before this Court—whether Plaintiffs themselves have the ability to raise a federal common law trespass claim. *THPP*, Doc. 62 at 22 n.17.

II. ARGUMENT

A. Plaintiff's Supplemental Response Does Not Provide Any Basis to Avoid Dismissal

1. Plaintiff's supplemental Response re-urges the same flawed arguments that they already made in their original response and that the Eighth Circuit already rejected or critically addressed with skepticism.

Rather than address new cases decided since their original response filed in October 2019 or since the Eighth Circuit's decision in September 2021, Plaintiffs' supplemental Response retreads the same ground (which has already been addressed by the Eighth Circuit in this very case), based on the same distinguishable or wholly-irrelevant cases (the primary ones of which have already been distinguished, addressed, and/or rejected by the Eighth Circuit in this very case), and premised on the same failure to recognize or acknowledge the critical distinction between claims asserted by tribes and individual Indian allottees (which distinction has been recognized in numerous long-standing Supreme Court and Eighth Circuit jurisprudence and was emphasized again by the Eighth Circuit in *Chase*). Despite the Eighth Circuit's extensive critical discussion of the arguments and cases that Plaintiffs previously asserted for their purported federal common law trespass claim, Plaintiffs' supplemental Response utters not one word to acknowledge the Eighth Circuit's analysis. Instead, Plaintiffs parrot the same arguments and cases as if the Eighth Circuit had not issued its 2021 opinion (and as if the contrary longstanding Supreme Court, Eighth Circuit, and other relevant cases had not come before it).

For example, Plaintiffs' Response continues to rely on a flawed interpretation of the *Oneida* cases. *See* Doc. 133 at 5 (citing *Oneida II*, 470 U.S. at 235-36). But the Eighth Circuit was already critical of Plaintiffs' reliance on the *Oneida* decisions, since "this case is distinguishable from *Oneida* in two significant respects" – the Plaintiffs are not a tribe, and the alleged source of Plaintiffs' ownership interest was federal statutory allotments (as opposed to aboriginal rights). *Chase*, 12 F.4th at 872. Indeed, the Eighth Circuit reiterated in *Chase* the

fundamental distinction between claims of tribes and individual Indian allottees that has long been recognized by the Supreme Court in *Oneida* itself and its prior Eighth Circuit jurisprudence. *Id.* (discussing the Supreme Court's "careful[] distin[ction]" in *Oneida I* from its prior decision in *Taylor* which held that federal jurisdiction did not extend to an individual Indian allottees' ejectment claim); *id.* at 873-74 (holding "[t]he Allottees' argument is not clearly supported by the Supreme Court's holding in *Oneida I* or *Oneida II*, as we expressly ruled in *Wolfchild v. Redwood County*" and noting *Wolfchild's* discussion of the same distinction between claims by a tribe in *Oneida* and claims of individual Indians in *Taylor*).

Plaintiffs also continue to rely heavily on decisions from other circuit and district courts, all of which are also distinguishable and none of which hold that individual Indian allottees have a federal common law trespass claim as to allotted lands. *See* Doc. 133, at 4-11 (discussing, *inter alia*, *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010); *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019); *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009); *Houle v. Cent. Power Elec. Co-op, Inc.*, 2011 WL 1464918 (D.N.D. Mar. 24, 2011); *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty., NM*, 2016 WL 10538199 (D.N.M. Apr. 4, 2016)). Defendants addressed these cases at length in prior filings. *E.g.*, Doc. 90, at 3 n.3, 10-11, 15-18; Doc. 64, 9-11, 13-17. And more importantly, the Eighth Circuit also addressed Plaintiffs' primary cases in *Chase*, and the Court need not retread that ground to reject Plaintiffs' position. *See Chase*, 12 F.4th at 874 n.6 (noting neither the Ninth Circuit nor the Tenth Circuit has definitively resolved the issue as to individual Indians, and rejecting the application of *Davilla* and *Nahno-Lopez*)[8]; *see also* Chase Appellee Brief, 2020 WL 5215216 (8th Cir. Aug. 21,

[8] Incredibly, despite the Eighth Circuit in *Chase* already (i) rejecting the Ninth and Tenth Circuit cases urged by Plaintiffs, including *Nahno-Lopez* and *Davilla*, to support the "broad" federal

2020) (addressing, *inter alia*, *Davilla*, *Milner*, and *Nahno-Lopez*); Doc. 75. The Eighth Circuit has already rejected Plaintiffs' urging to follow the out-of-circuit decisions, so this Court need not do any different.[9]

2. The only three new cases cited by Plaintiffs do not change the result.

Nor do the only three cases Plaintiffs cite that were decided since *Chase* change the result. *See* Doc. 133, at 7-10 (discussing *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, --- F. Supp. 3d ----, 2023 WL 2646470 (W.D. Wash. Mar. 27, 2023); *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, 626 F. Supp. 3d 1030 (W.D. Wis. 2022); *Danks v. Slawson Expl. Co., Inc.*, 2021 WL 4783258 (D.N.D. Oct. 13, 2021)).

Plaintiffs' attempt to rely on *Danks*, the only new case they cite from this district, borders on misrepresentation. *See* Doc. 133, at 7-8. There, this Court did note that it had ***previously*** found federal question jurisdiction "based upon plaintiff allottees having federal common law claims for the torts of trespass and nuisance," 2021 WL 4783258, at *4 n.2, in the portion of the opinion Plaintiffs quote. Doc. 133, at 8. But Plaintiffs inexplicably omit the Court's further statement that "***since [this Court] reached [that] conclusion***[], the Eighth Circuit recently stated in [*Chase*] that ***it is an open question whether the allottees have a common law claim under federal law and declined to rule on the issue***." *Id.* Accordingly, *Danks* provides no support for Plaintiffs'

---

common law claim they assert, and (ii) expressly noting that they "have not found, nor do [Plaintiffs] cite, a Ninth Circuit case holding that federal common law encompasses suits by *individual* Indian landowners," *Chase*, 12 F.4th at 874 n.6 (emphasis in original), Plaintiffs still contend that (i) cases such as *Nahno-Lopez* and *Davilla* have "squarely addressed" the issues and have uniformly held there is federal question jurisdiction, Doc. 133, 4-9, and (ii) every court which has actually looked at whether there is a right of action for trespass on allotted lands has agreed that there is, *id* at 11. The Eighth Circuit in *Chase* clearly disagreed.

[9] The Court should likewise reject Plaintiffs' attempt to rely on district court cases, *see* Doc. 133, at 7-8, that directly rely on these out-of-circuit precedents the Eighth Circuit has already distinguished. *See, e.g., Pub. Serv. Co.*, 2016 WL 10538199, at *5 (relying on *Nahno-Lopez* to hold that individual Indians had a cause of action); *Houle*, 2011 WL 1464918, at *3 n.1 (similar).

assertions here, and instead recognizes that *Chase*—***this very case***, in a controlling opinion Plaintiffs nowhere even cite for its relevant discussions—***at least*** called their position into question.

The only other two new cases are from districts outside of the Eighth Circuit and involved claims of ***tribes***, *Swinomish Indian Tribal Cmty.*, 2023 WL 2646470, at *5; *Bad River Band*, 626 F. Supp. 3d at 1040, which makes them irrelevant for all the reasons explained below. *Infra* 8-9.

3. The Court should reject Plaintiffs' invitation to erroneously conflate Tribal and individual Indian allottee claims.

One needs to look no further than the first sentence of the argument section of Plaintiffs' supplemental Response to identify the fundamental flaw in Plaintiffs' position. *See* Doc. 133 at 3 ("When it comes to Indian trust lands, there is no legal difference between the status of a tribe and an individual Indian allottee."). This flawed proposition runs throughout their Response, *see id.* at 4-11; *infra* 9-10 (explaining that Plaintiffs' cited cases nearly all involve tribal claims), and it is therefore the central flawed premise on which their opposition to dismissal is based.

Plaintiffs are wrong. As shown herein, the Supreme Court long ago distinguished rights of tribes founded on aboriginal claims to ownership from individual Indians allottees' rights. *Infra* 11-15 (discussing *Oneida I*). That distinction was essential to the Supreme Court's holding in *Oneida I* that tribes could assert claims under federal common law despite prior case law holding that individual allottees could not. 414 U.S. at 676-77 (distinguishing *Taylor v. Anderson*, 234 U.S. 74 (1914)). As the Supreme Court explained, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts" such that it is "normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent." *Id.* at 676-77. That distinguished allottees'

claims from tribal claims because the "aboriginal title of an Indian tribe" was "guaranteed by treaty and protected by statute" and had "never been extinguished." *Id.* at 676.

Plaintiffs cite no case that supports their attempt to conflate tribal and individual claims. *Cf.* Doc. 133, at 3. *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976), not only involved claims by a ***tribe***, but also involved a dispute over ***ownership***. *Id.* at 804-05. *Inter Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199 (9th Cir. 1995), likewise involved claims by ***tribes*** related to a land ***transfer*** that allegedly violated a federal statute. *Id.* at 201-02. Finally, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), does not involve a dispute over allotted land at all, but instead deals with claims against the federal government regarding "Individual Indian Money" accounts that the federal government allegedly mishandled. *Id.* at 1086. None supports Plaintiffs' broad claim that there is "no legal difference between the status of a tribe and an individual Indian allottee," nor does (or could) any overcome the distinctions recognized by the Supreme Court in *Oneida I* and again by the Eighth Circuit in *Wolfchild* and *Chase*, which Plaintiffs nowhere address.

B. Nothing Plaintiffs Cite (or Re-Cite) or Argue (or Re-Argue) Changes the Fact that Individual Indian Allottees Do Not Have Federal Common Law Trespass Claims: Plaintiffs Fail to State A Claim For Which Relief Can Be Granted

1. There is no legally cognizable federal common law trespass claim for individual Indian allottees.[10]

Plaintiffs' supplemental Response provides no basis to overcome the fact that Plaintiffs fail to state a legally cognizable claim upon which relief can be granted, because individual Indian allottees cannot claim federal common law trespass as it relates to allotted land, including under 25 U.S.C. §§ 323-328 (General Right-of-Way Act), 25 U.S.C. § 345, 28 U.S.C. § 1353, or any

[10] While the Court requested further briefing solely on the existence of this claim, the absence of such a claim would leave this Court without jurisdiction. *See* Doc. 74.

regulation promulgated under any of these statutes, as alleged. *See, e.g., U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987) (affirming dismissal of common law trespass claim asserted by member of the Turtle Mountain Band of Chippewa Indians and owner of allotment held in trust by the United States within the reservation, holding that the "trespass action, alleging that the Housing Authority interfered with her use of the property,… does not state a claim as an action for an allotment under 25 U.S.C. § 345"); *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184, 188-89 (9th Cir. 1988) (affirming dismissal of trespass claim asserted by members of the Nez Perce Tribe and owners of allotted land held in trust by the United States on the Nez Perce Indian Reservation against an irrigation district, holding that "section 345, and its companion provision 28 U.S.C. § 1353, provide no subject-matter jurisdiction for such a tort claim."); *see also Marek v. Avista Corp.*, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006) (dismissing common law trespass claim brought under section 345 and other federal law governing rights-of-way, by owners of an allotment upon which an expired transmission and distribution line crossed, holding that "the claim is not based upon a specific protection of federal law but, instead, the law of trespass which is available to any landowner"). A claim for common law trespass on allotted land therefore is not based on any protection of federal law, but instead arises—if at all—under the common law of trespass available under state law.[11]

[11] Moreover, any such state law claim related to the holdover of a right-of-way must be brought by the BIA, not the individual Indian landowner. *See* 25 C.F.R. § 169.410 (providing the BIA is the one that must make the determination whether to treat a holdover as trespass, and if so, what actions to take and remedies, if any, to pursue on behalf of the individual Indian landowners for whom the United States, as trustee, is holding the land in trust); *see also Chase*, 12 F.4th at 869 ("Section 169.410 specifically addresses grantee holdover situations[.]"); *id.* ("Section 169.410 only authorizes the BIA to seek administrative and judicial remedies on behalf of individual Indian landowners."); *id.* at 873 (noting Plaintiffs argue 25 C.F.R. § 169.413 governs who may bring an action for trespass); *id.* at 875 (noting the BIA protects allotted lands from grantees who violate the right-of-way, including holdovers, citing Section 169.410); *id.* at 877 (noting Plaintiffs'

There is a fundamental distinction—which Plaintiffs continue to try to ignore despite the Eighth's Circuit's 2021 *Chase* opinion—between ***tribal*** lands for which the United States has recognized aboriginal rights and other lands allotted to ***individual*** Indians. The Supreme Court recognized this distinction long ago in *Oneida I*, where it affirmed the holding in *Taylor* that suits concerning lands allocated to individual Indians, as opposed to tribal rights to land, do not state claims arising under the laws of the United States. 414 U.S. at 676-77. That same distinction is reflected in other case law. *See Marek*, 2006 WL 449259, at *3-4 (individual claim of common law trespass on allotted lands is not based on any protection of federal law); *see also Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348-49 (N.D. Cal. 1995) (reiterating Supreme Court decision in *Oneida I* holding "the identities of the parties to an action is a significant factor in determining the federal interest… [s]ince the determination of whether federal interest exists controls the applicability of federal common law…," requiring the Court look "to whether the party is an Indian tribe or an individual member of the tribe," and holding "actions involving an Indian tribe as a party claiming a possessory right in land arising under federal law should be adjudicated by the federal courts," but "actions which involve individual members of tribes where the underlying action does not involve an Indian tribe's possessory rights should be adjudicated by state courts.") (emphasis added) (citing, *inter alia*, *Oneida I*, 414 U.S. at 676-77; *Taylor*, 234 U.S. at 74).

Indeed, in affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of federal common law claims asserted by individual Native Americans concerning "lands allocated to individual Indians,

---

argument they have an independent right to pursue trespass remedies under Section 169.413 "seems contrary to the Allottees' basic legal position…"); *id.* at 877 n.7 ("[The BIA] is also in the superior position, as the trustee for all Indian landowners, to pursue remedies that in its judgment advance their collective interest – especially where, as here, many of the tracts at issue are highly fractionated, and unanimous agreement may be difficult to attain.").

not tribal rights to lands," the Eighth Circuit in *Wolfchild* specifically recognized and discussed this dispositive distinction. The court expressly based its holding dismissing federal common law claims on the distinction between a tribe's aboriginal rights and individual Indians' rights to allotted lands, finding that the individual Indian allottees, like Plaintiffs here, had fundamentally misinterpreted *Oneida I* and *II* in believing individual Indians had federal common law rights similar to a tribe:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. *Oneida II*, 470 U.S. at 229-30. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." *Id.* at 236. In so holding, the Supreme Court directly distinguished cases regarding "lands allocated to ***individual Indians***," concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. *Oneida I*, 414 U.S. at 676-77. Thus, federal common law claims arise when a ***tribe*** "assert[s] a present right to possession based... on their aboriginal right of occupancy which was not terminable except by act of the United States." *Id.* at 677.

Wolfchild, 824 F.3d at 767-68 (emphasis in original) (cleaned up). *Wolfchild* could not have been more clear in dismissing the purported federal common law trespass asserted by individual Indians pursuant to Rule 12(b)(6).

Nor can Plaintiffs claim that a federal common law trespass claim arises by virtue of the land having originally been granted by the United States or otherwise under the General Right-of-Way Act of 1948, 25 U.S.C §§ 323-328, and regulations promulgated thereunder at Part 169 of Title 25 of the Code of Federal Regulations. *See* Doc. 28 ¶ 64; Doc. 133 at 10-11 (arguing that allottees have common law trespass claims arising under federal law because Indian trust lands arise under federal law). That is because "a controversy in respect of lands has ***never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress***. Once patent issues, ***the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts***, and in such situations it

is normally insufficient for arising under jurisdiction merely to allege that ***ownership or possession*** is claimed under a United States patent." *Oneida I*, 414 U.S. 676-77 (1974) (citations and internal quotations omitted) (emphasis added); *see also Marek*, 2006 WL 449259, at *2-3 (rejecting plaintiffs' argument that their claims arose under federal law "because allotments are creatures of federal statute" and "any right-of-ways granted or not sought would have to meet the requirements of federal law," and holding that the distinction described in *Oneida I* hinges on whether the claimed right of possession sought to be enforced arises from state law or federal law, and for common law trespass, the claim "seeks remedies for the individuals as landowners not based on any grant, treaty or statute of federal origin," but on state law alone).

The Eighth Circuit has already noted that Plaintiffs have misinterpreted the *Oneida* decisions to argue that individual Indian landowners have federal common law claims against trespassers. *Chase*, 12 F.4th at 872. The Eighth Circuit explained that "this case is distinguishable from *Oneida* in two significant respects – the [Plaintiff] Allottees are not a tribe, like the Oneida Nation, and the alleged source of their ownership interests was federal statutory allotments, not necessarily Indian title." *Id.* The Eighth Circuit further discussed the *Oneida* decisions, emphasizing the distinctions between claims of a Tribe and those of individual Indians as to allotted lands. *Id.* 872-73.

The Eighth Circuit noted Plaintiffs' citation to *Oneida II* as support for their position that individual Indians have a federal common law trespass action against trespassers, but explained that their "argument [wa]s not clearly supported by the Supreme Court's holding in *Oneida I* or *Oneida II*, as we expressly ruled in [*Wolfchild*]." *Id.* 873-74. The Eighth Circuit went on to explain:

> In affirming the district court's grant of motions to dismiss, we held that under *Oneida I*, "federal common law claims arise when a ***tribe*** 'assert[s] a present right

> to possession based on their ***aboriginal*** right of occupancy.'" *Id.* at 768 (emphasis and brackets in original) (quoting *Oneida I*, 414 U.S. at 677, 94 S.Ct. 772). The Wolfchild plaintiffs failed to state a claim under federal common law because they did not allege "***aboriginal*** title," and the 1863 Act only concerned lands allocated to "***individual[s]*** -- not a tribe." *Id.* at 768 (emphasis in original). The plaintiffs therefore failed to state a federal common law claim:
>
> > [T]he language of the 1863 Act directly contradicts any claim that the loyal Mdewakanton had aboriginal title to the twelve square miles. ... Thus, assuming the twelve square miles were set apart for the loyal Mdewakanton, the land was for the benefit of each ***individual*** -- not a tribe. This lawsuit, therefore, concerns "lands allocated to individual Indians, not tribal rights to lands," and does not fall into the federal common law articulated in the *Oneida* progeny.
>
> *Id.* (quoting *Oneida I*; emphasis in original). We went on to conclude that the 1863 Act did not provide a private federal remedy and affirmed the dismissal.

Id. at 874 (alterations and emphasis in original). To the Eighth Circuit, Plaintiffs argued that *Wolfchild* "never addressed whether an Indian owner of allotted trust land has a cognizable claim for trespass under federal law – so *Wolfchild* has no direct bearing on whether, here, the Individual Landowners have a federal common law claim for trespass." *Id.* While the Eighth Circuit agreed that *Wolfchild* did not "directly control the issue," it returned to *Oneida I*, where the Supreme court "distinguished" the Oneidas' ***tribal*** claims the ***landowner*** claim in *Taylor v. Anderson* that did not raise a federal question:

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

Id. (quoting *Oneida I*, 414 U.S. at 676). The Eighth Circuit then concluded: "Thus, while the specific issue in this case was not addressed in *Wolfchild*, our reliance on the above-quoted reasoning has a 'direct bearing' on whether Plaintiffs have the federal common law rights they assert, or whether they must instead find an alternative basis for their claims under federal law."

Id. Plaintiffs have failed to provide any alternative basis for their claims under federal law. *See, e.g., id.* at 877 (noting Plaintiffs' argument that 25 C.F.R. § 169.413 confirmed their independent right to pursue trespass remedies "seems contrary to the Allottees' basic legal position, because a claim under § 169.413 would be a statutory claim, not a common law claim…," "find[ing] no express private right of action in the Indian Right-of-Way Act," and noting that "the Supreme Court does not look with favor on implied private rights of action."); *see also THPP*, Doc. 62, at 10 (United States agreeing that "[t]he ROW Act and implementing regulations do not provide a statutory cause of action for trespass claims.").

In sum, the Eighth Circuit's recent interpretation of *Wolfchild's* logic with respect to this very dispute strongly indicates that any trespass action relating to lands allotted to individual Indians does not arise under federal common law. Moreover, the Eighth Circuit noted that that is a "core issue" that will ultimately need to be decided by a court. *Id.* at 871, 874 (deferring decision on whether federal common law supplies a right of action regarding allotted lands).

2. The United States has not taken a position on whether Plaintiffs themselves have the ability to raise a federal common law trespass claim.

While the Eighth Circuit deferred a decision on the "core issue" only to give the BIA an opportunity to weigh in on the issue first, the United States (at the BIA's request) has only put at issue its own capacity to assert trespass under federal common law in *THPP*. *See generally* Counterclaim, *THPP*, Doc. 28. More importantly, the United States has expressly declined the Eighth Circuit's invitation to weigh in on the specific issue before this Court—whether Plaintiffs themselves have the ability to raise a federal common law trespass claim.[12] *THPP*, Doc. 62 at 22 n.17 ("The United States does not, at this time, make any assertions about the Allottees' ability to

[12] Indeed, Plaintiffs' assertion that "[t]he Department of Interior has now made a decisive determination that there does indeed exist a right of action for a trespass claim against Defendants" is misleading, at best. Doc. 133, 2.

raise a federal common-law trespass claim. Nor is the Allottees' ability to raise such a claim currently before this Court. The only issue this Court must decide is whether the United States, in its duty as legal titleholder and trustee, can raise a claim for federal common-law trespass on federal trust land.").

In addition, the United States has claimed that the jurisdictional question as to the United States' claims is different than the jurisdictional question as to the Plaintiffs' claims. *See id*, at 20 ("The authority on which THPP relies deals exclusively with claims brought by allottees, not by the United States. Jurisdiction is proper here because the Counterclaim constitutes a civil action by the United States as Plaintiff."). Thus, try as they might, Plaintiffs cannot find any support for their position based on the United States' actions. Doc. 133 at 2. The Court can therefore decide the issue without further delay, and it should dismiss the Amended Complaint for failure to state a claim upon which relief can be granted.

C. Plaintiffs Still Have a Remedy if the Court Does Not Create a Federal Common Law Trespass Claim and Dismisses Their Lawsuit.

If the Court declines Plaintiffs' invitation to create a federal common law trespass claim for individual Indian allottees and dismisses the lawsuit, Plaintiffs will still have a remedy here. As the Eighth Circuit recognized in *Chase*, "Section 169.410 specifically addresses grantee holdover situations[.]" *Chase*, 12 F.4th at 869. "And § 169.410, which the agency has described as 'exclusive,' authorizes ***the BIA*** to 'recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." *Id*. at 870 & n.2 (emphasis added) (citing Rights-of-Way on Indians Lands, 80 Fed. Reg. 72,492, 72,523 (Nov. 19, 2015) ("The final rule addresses holdovers exclusively in FR 169.410… .")).[13] The Eighth Circuit likewise

[13] Citing *Poafpybitty*, Plaintiffs' incorrectly argue they have a right to bring a concurrent suit with the BIA. Doc. 133, at 3-4. But *Poafpybitty* says nothing about whether Plaintiffs have a federal

acknowledged that Tesoro noted the implementing regulations of the Indian Right-of-Way Act provide procedures the Allottees may follow to appeal the BIA's decisions or its failure to act. *Id.* at 869-70 (citing 25 C.F.R. §§ 2.6, 2.8, 169.13); *see also* Doc. 77, at 6-7 (describing rights and processes under 25 C.F.R. § 169.410 and contrasting it with 25 C.F.R. § 169.413); Doc. 87, at 4-8 (same).

If the BIA failed to act, Plaintiffs could have followed the appeals process under the Right-of-Way Act. But Plaintiffs need not be concerned with the BIA's failure to act. As Plaintiffs acknowledge, the BIA, Plaintiffs' trustee with respect to the allotted lands held in trust for Plaintiffs, has already filed a counterclaim against Tesoro asserting a trespass claim on their behalf.[14] Doc. 133, at 2 ("[T]he United States has filed the precise claim as Plaintiffs here as a counterclaim for trespass in a related action."). Of course, if Plaintiffs believe the BIA, as trustee, has somehow breached its fiduciary duties to Plaintiffs, as beneficiaries, with respect actions it took or failed to take as to Tesoro, then Plaintiffs can bring suit against the United States for alleged breach of their duty.

---

common law claim for trespass. For all the reasons set forth herein, they do not. Moreover, even if Plaintiffs had asserted a valid basis for a claim here (and they have not), *Poafpybitty* says nothing about whether Plaintiffs can assert a claim concurrently with the United States under the applicable right-of-way holdover regulation, 25 C.F.R. § 169.410. *See, e.g.,* Doc. 87 at 8-9. *Poafpybitty* arose in a different context—allottees there were suing for breach of an oil and gas lease to which they were a party, and therefore, an entirely different set of regulations were involved. *Poafpybitty* at 366-67, 372-73. Here, the separate set of regulations specific to rights-of-way applies (specifically, 25 C.F.R. § 169.410, which exclusively deals with grantee holdovers as the Eighth Circuit noted in *Chase*), and it provides that only the BIA may bring an action on behalf of the allottees. Moreover, in *Poafpybitty*, the BIA had not taken any action. Here, the BIA has asserted a claim for trespass against Tesoro on behalf of the Plaintiffs.

[14] Despite Plaintiffs' suggestion otherwise, Defendants have never conceded that the United States could assert a trespass claim under federal common law regarding allotted lands. *Cf.* Doc. 133, at 3 (citing Doc. 77). To the extent the United States can assert a trespass claim against Tesoro here, it must be "under applicable law," which would be state law. *See* Doc. 77, at 7 n.9 (noting "the 'applicable law' for a trespass claim would be state common law."); *see also THPP*, Doc. 55, at 16 n.7.

Plaintiffs' argument that they do not have a remedy since they purportedly cannot sue in state court because of 28 U.S.C. § 1360 is likewise unavailing. First, as to the issue that the Court allowed supplemental briefing on, Plaintiffs admit that § 1360 does not function as a grant of jurisdiction to the federal courts. Doc. 133, at 13; *see, e.g., K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1028 (9th Cir. 2011) ("The district court correctly concluded that § 1360(b)… does not confer jurisdiction on federal courts") (emphasis added). Thus, it cannot form the basis of any federal right for Plaintiffs' to bring a trespass action. Second, as explained above, Plaintiffs' remedy is through the specific regulation related to grantee holdovers of rights-of-way, 25 C.F.R. § 169.410: an action by the BIA to recover possession on behalf of the Indian landowners to pursue "remedies available under applicable law," to the extent the BIA decides to pursue it, which, here, they have. Third, even if the individual Indian allottees had a tort claim for trespass, that does not involve an ownership dispute so the exclusion from state law ***jurisdiction*** discussed in 28 U.S.C. § 1360(b) would not apply. *Compare, e.g., Alaska Dep't of Pub. Works v. Agli*, 472 F. Supp. 70, 72-74 (D. Alaska 1979) (holding 28 U.S.C. § 1360(b) barred state court jurisdiction when the complaint in the case was "an attempt to determine the validity of a claim to a Native allotment….") *with Round Valley Indian Hous. Auth.*, 907 F. Supp. at 1348-49 ("[A]ctions which involve individual members of tribes where the underlying action does not involve an Indian tribe's possessory rights should be adjudicated by the state courts."). The statute does not take away any existing remedies, or somehow leave Plaintiffs without the state remedy, if any, they had in the first place.

***

In sum, Plaintiffs offer no grounds to support their asserted federal common law cause of action. The Eighth Circuit's opinion in *Chase*—which Plaintiffs completely ignore—left their

case in serious doubt, and it is no answer to reason from authorities that the Eighth Circuit has already addressed. And because the issue is ripe for decision and Plaintiffs have raised no ground either to forestall that decision or to rule in their favor, this Court should hold that Plaintiffs have no federal common law claims and dismiss the Amended Complaint.

III. CONCLUSION

For all of the reasons stated in this Supplemental Reply, as well as Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b)(6) (Doc. 73), the Court should dismiss Plaintiffs' First Amended Complaint, in its entirety.

Dated: June 30, 2023

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

/s/ Jeffrey A. Webb

Jeffrey A. Webb
Texas State Bar No. 24053544
jeff.webb@nortonrosefulbright.com
111 W. Houston Street
San Antonio, TX 78205-3792

Mark Emery
District of Columbia Bar No. 988017
mark.emery@nortonrosefulbright.com
799 9th Street NW, Suite 1000
Washington, DC 20001

Counsel for Defendants

CERTIFICATE OF SERVICE

On June 30, 2023, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court of North Dakota, Western Division, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

/s/ Jeffrey A. Webb
Jeffrey A. Webb