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

JoAnn Chase, Estate of Nelson Fredericks, Inez Burr, Sandra Gillette, Marion Rasmuson, Joan Matthews, Amanda Bird Bear, Roger Bird Bear, Thomas Bird Bear, Jamie Lawrence, Rae Ann Williams, Evelyn Lone Bear, Doreen Charging, Mavis Huber, Betty Young Bird, Noreen Young Bird, Joan Young Bird, Murphy Young Bird, Donovan Fast Dog, Joyce Eakin, Josephine Parenteau, George Fast Dog, Denise Cavanaugh, Karen Koite, Arnold Young Bird, Darryl Turner, Heather Demaray, Darlene Edley, Eunice White Owl, Linda Kroupa, Waylon Young Bird, Deborah Staples, Anthony White Owl, Eugene White Owl, Kathleen White Owl, Margo Bean, Albert Whitman, Herbert Pleets, Monique Pleets, Sharon Aubol, Janet Benton, Gloria Fast Dog, Valeri Hosie, Betty Matthews, Kenneth Matthews Sr., Sheridan Matthews, Wilson White Owl, and Tiffany Williams,

Plaintiffs,

vs.

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.

Case No. 1:19-cv-00143

ORDER GRANTING, IN PART, DEFENDANTS' AMENDED MOTION TO DISMISS

[¶1] THIS MATTER comes before the Court on reconsideration of the Amended Motion to Dismiss filed by Andeavor Logistics, L.P., and its co-defendants (collectively, "Andeavor") on August 7, 2019, after the Court of the Appeals for the Eighth Circuit reversed and remanded this Court's prior order. Doc. No. 73. See also Chase v. Andeavor Logistics, L.P., 12 F.4th 864 (8th Cir. 2021). JoAnn Chase and the other putative class action plaintiffs (collectively, the "Allottees"), filed their original opposition to the Motion on September 5, 2019 (Doc. No. 85), and a renewed opposition on June 20, 2023 (Doc. No. 134). Andeavor originally filed its reply on October 2, 2019 (Doc. No. 86), and submitted a supplemental reply on June 30, 2023 (Doc. No. 138). For the reasons set forth below, the Court **GRANTS, in part**, Andeavor's Motion.

BACKGROUND

[¶2] This case has proceeded through a long and tumultuous history spanning three different courts and approximately five years. The Court must now answer whether individual Indians who are equitable owners of allotted lands held in trust by the United States may assert a federal common law cause of action for trespass. In short, they may not.

[¶3] The alleged facts and history of this case have often been repeated. See Doc. No. 100; see also Chase, 12 F.4th at 866-68. Accordingly, the Court will only recount those alleged facts and details relevant to the instant Motion.

[¶4] Dating back to 1953, Andeavor's predecessor-in-interest operated an oil pipeline that crossed portions of Fort Berthold Indian Reservation in North Dakota. That predecessor-in-interest was granted a twenty-year right-of-way ("ROW") for the pipeline from the Department of the Interior, as is contemplated in 25 U.S.C. §§ 323, 324. Although the ROW was renewed for additional twenty-year terms in 1973 and again in 1995 (retroactively so in 1995, making its effective renewal in 1993), it expired in 2013. Despite this expiration, Andeavor continued to

operate its 500-mile High Plains Pipeline System across both tribal lands and allotted lands held by individual Native Americans after 2013.[1]

[¶5] In 2017, the Mandan, Hidatsa, and Arikara Nation, known as the Three Affiliated Tribes, agreed to renew Andeavor's ROW—but only for the ROW through tribal trust land. Andeavor's negotiations with individuals who owned allotted lands held in trust by the United States proved to be largely unfruitful, resulting in Andeavor not possessing a renewed ROW over significant portions of allotted lands. See 25 U.S.C. § 324 (allowing ROWs "over and across lands of individual Indians [to] be granted without the consent of the individual Indian owners" only when, for instance, "the owners or owner of a majority of the interests therein consent to the grant").

[¶6] Certain individual landowners of such allotments (i.e., the Allottees) rejected Andeavor's offers and proceeded to file the instant action in the Western District of Texas on October 5, 2018. See Doc. No. 1. Their original Complaint alleged claims for: (1) continuing trespass; and (2) constructive trust. Id. In response, Andeavor moved to dismiss the Allottees' Complaint on various grounds and also to transfer the case from the Western District of Texas to the District of

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[1] As the Parties already acknowledge, designation of a parcel as tribal land, "allotted," and/or held in fee or trust triggers significant legal ramifications. As the name implies, "tribal trust land" is land held in trust for an Indian tribe but owned by the federal government. United States v. Stands, 105 F.3d 1565, 1572 (8th Cir. 1997). An "allotment" is a "term of art in Indian law, describing either a parcel of land owned by the United States in trust for an [individual] Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." Id. at 1571-72. (quoting Felix S. Cohen, Cohen's Handbook of Federal Indian Law 615-16 (Rennard Strickland ed., 1982)). As further detailed later, many allotments were historically created due to the breaking up or segmentation of Indian reservations. Id. at 1572. That said, not all allotments resulted from the parceling of reservations. Some allotments were created from land held in the public domain, for instance, for individual Indians who did not reside on a reservation or whose tribe had no reservation. M. Brent Leonhard, *Criminal Jurisdiction in Indian County*, 69 DEP'T JUST. FED. L. & PRAC. 45, 76 (2021). Finally, "fee land" is non-allotted property "owned or patented in fee simple" and it does not carry the "type of restrictions on alienation found in a restricted fee allotment." Id. See also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1, 21 (1995) (noting the federal government also issued trust patents in addition to fee patents).

North Dakota. See Doc. Nos. 17, 22. With the motions still outstanding, the Allottees filed their First Amended Complaint on January 25, 2019, adding new counts and theories. See Doc. No. 28. In the First Amended Complaint, the Allottees asserted claims of: (1) continuing trespass under federal common law; (2) breach of easement agreement; (3) unjust enrichment—imposition of constructive trust; and (4) punitive damages. Id.

[¶7] On July 9, 2019, the District Court for the Western District of Texas granted Andeavor's Motion to Transfer the case to the District of North Dakota and either denied or denied as moot the Parties' remaining motions. Doc. No. 67.

[¶8] Soon thereafter, Andeavor filed the instant Amended Motion to Dismiss, arguing there were four "separate, alternative, and independent grounds for dismissal" of the entire action. Doc. No. 73, p. 1 n.1. Specifically, Andeavor contended: (1) the Court lacked subject matter jurisdiction because the case did not invoke federal question jurisdiction; (2) the Allottees failed to state a claim upon which relief could be granted because they could not assert a federal common law claim for trespass; (3) the Allottees failed to join a necessary party under Federal Rule of Civil Procedure 19(a); and (4) the Allottees failed to exhaust their administrative remedies and there was a lack of primary jurisdiction. Id. at pp. 3-10.

[¶9] The Parties fully briefed the issues (see Doc. Nos. 85, 86, 87, 90, 91), and then the case was reassigned to the undersigned (Doc. No. 92). The Allottees proceeded to file their Renewed Motion for Class Certification on March 25, 2020. Doc. No. 93.

[¶10] On April 6, 2020, this Court granted, in part, Andeavor's Amended Motion to Dismiss. Doc. No. 100. The Court dismissed the First Amended Complaint on the ground that the Allottees failed to exhaust their administrative remedies and denied as moot Andeavor's remaining grounds

for dismissal. Id. The Allottees appealed the Order to the United States Court of Appeals for the Eighth Circuit on April 7, 2020. Doc. No. 102.

[¶11] While awaiting the Eighth Circuit's decision, the Bureau of Indian Affairs ("BIA") took action about the instant matter, resulting in a back-and-forth drama:

> On July 2, 2020, after the Allottees submitted their initial Brief on appeal [with the Eighth Circuit], the Regional Director of the BIA's Great Plains Regional Office (which covers North Dakota) sent a formal Notification of Trespass Determination to Andeavor (the "Notice"). The Notice stated that the pipeline had been trespassing on fifty acres of individually-owned trust lands for seven years, reflecting Andeavor's lack of good faith negotiations, and therefore the pipeline was no longer in the landowners' best interest. The BIA ordered Andeavor to immediately cease pipeline use and pay treble damages totaling $187.2 million within thirty days, a decision Andover could appeal to the Interior Board of Indian Appeals (IBIA). Andeavor appealed, arguing the Notice ignored that it was in holdover status while negotiating with landowners, ignored its substantial work to obtain fair-market value appraisals, disregarded its record-setting offer of $66,000 per acre to the landowners, and calculated damages based on inapplicable grazing regulations.
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> Before the IBIA could rule, the Assistant Secretary for Indian Affairs assumed jurisdiction over the appeal (as regulations allow), vacated the Notice, and remanded to the Regional Director to issue a new decision based on specified criteria. The Assistant Secretary's order asserted that federal common law applied to Andeavor's trespass. In later supplemental guidance, the Regional Director was advised to rely only on 25 C.F.R. § 169.410 and common law remedies to address the trespass. The guidance stated that federal common law authorizes the BIA to seek judicial remedies, including compensatory damages, on behalf of Indian landowners for trespass claims against right-of-way holdovers. It cited 28 U.S.C. § 2415(b), a statute of limitations that requires actions by the United States or its agencies on behalf of "a recognized tribe, band, or group of American Indians" to be brought "within six years and ninety days after the right of action accrues."
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> On remand, the Regional Director issued a Second Notice reducing the damages award to just under $4 million, ordering Andeavor to immediately cease operating the pipeline, and informing Andeavor the BIA might petition the Department of Justice to seek common law damages including an accounting of all rents and profits tied to its trespass. Both Andeavor and the Allottees appealed the Second Notice to the IBIA. On January 14, 2021, the Assistant Secretary again assumed jurisdiction over the appeal, affirmed the Second Notice in its entirety, and declared it judicially reviewable as a final agency action. The IBIA dismissed the parties' appeals.

> On March 12, 2021, after the change in administrations, the Acting Secretary of the Interior issued a Decision vacating all prior BIA actions—from the Regional Director's First Notice to the Assistant Secretary's January 14 Decision—and returning the matter to the Regional Director with directions to:
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> 1. take such action as is necessary to address [Andeavor's] continued occupation of the expired right-of-way.
>
> 2. provide each of the interested parties with a full and fair opportunity to be heard in this matter, and
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> 3. issue a new decision, as may be necessary and appropriate.

Chase, 12 F.4th at 875-76 (second alteration in original). See also Doc. No. 104-1.

[¶12] After the change in administrations and the Acting Secretary of the Interior vacated the prior administrative decisions, Andeavor took matters into its own hands. A subsidiary of Andeavor—Tesoro High Plains Pipeline Company, LLC—proceeded to file its own action against the United States in order to have the Acting Secretary's vacatur, well, vacated under the Administrative Procedure Act, among other relief. See Tesoro High Plains Pipeline, LLC v. United States, No. 1:21-cv-00090 (D.N.D. Apr. 23, 2021) [hereinafter Tesoro].

[¶13] While the Tesoro action was still pending (which it still is, as of the date of this Order), the Eighth Circuit issued its opinion on September 13, 2021, reversing and remanding this Court's order from April 6, 2020. See Chase, 12 F.4th 864. The Eighth Circuit explained this Court erred in dismissing the case on the ground that the Allottees failed to exhaust their administrative remedies. See id. at 870. Before completing its analysis, the Eighth Circuit also provided some guidance regarding the various claims made by the Allottees. For instance, the Court noted the Allottees had dropped their claims for "Past Trespass" because they had "effectively acknowledg[ed] that the 1993 renewal [of the easement] was valid." Id. at 869 n.2. Given their acknowledgment, "their claims for damages and unjust enrichment for the pipeline's operation between 1993 and the easement's expiration in 2013 fail because a valid contract existed during

that period." Id. (stating further this conclusion was "now law of the case"). The Eighth Circuit then reversed, remanded, and suggested this Court should stay the case "for a reasonable period of time to see what action the [BIA] may take" in the Tesoro litigation. Id. at 877.

[¶14] While awaiting the BIA's action, this Court issued an Order to Show Cause as to Joinder, requesting the Parties to brief the issue of whether this matter should be joined with Tesoro. Doc. No. 105. The Allottees favored consolidation and represented its brief in response to the Order to Show Cause "amount[ed] to a motion to intervene" either permissively or of right. Doc. No. 111, p. 3 n.1. In contrast, Andeavor opposed consolidation and the Allottees' intervention in Tesoro. Doc. No. 112.

[¶15] On February 8, 2022, the BIA filed a counterclaim in Tesoro for federal common law trespass on behalf of the Indian allottees whose land the United States owns in trust. Tesoro, No.1:21-cv-00090, ECF No. 28 (D.N.D. Feb. 8, 2022). In defending its counterclaim against a motion to dismiss in Tesoro, the BIA was clear it took no position on the Allottees' "ability to raise" a claim under the federal common law for trespass in the instant matter. Tesoro, No.1:21-cv-00090, ECF No. 62, p. 29 n.17 (D.N.D. Oct. 21, 2022).

[¶16] As the months progressed, a settlement between the Allottees and Andeavor seemed to be on the horizon. See Doc. Nos. 119, 120. Ultimately, the settlement talks failed. See Doc. No. 121.

[¶17] Following a status conference on June 8, 2023, this Court lifted the stay instituted by the Eighth Circuit. Doc. No. 130. The Parties agreed Andeavor's Amended Motion to Dismiss, insofar as it claimed the case should be dismissed because the Allottees could not assert a federal common law claim for trespass, was ripe but the Allottees requested additional briefing. See Doc. No. 129. The Court permitted additional briefing on that particular issue, and now it is before the Court.

ANALYSIS

I. Legal Standard

[¶18] When reviewing a motion to dismiss, the Court must accept as true the factual allegations set forth in the complaint. See Nunn v. Satrom, No. 2:12-cv-16, 2012 WL 12914317, at *3 (D.N.D. Oct. 26, 2012). A complaint that fails to "state[] a plausible claim for relief," however, will not survive dismissal. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

II. The Allottees Fail to State a Plausible Federal Common Law Claim of Trespass

[¶19] Andeavor argues "there is no recognized claim of federal common law trespass to land allotted to individual Indians." Doc. No. 75, pp. 6, 10. See also Doc. No. 138. Instead, Andeavor contends the Allottees merely have a "tort claim based on state common law of trespass, not federal common law." Id. at p. 10. In turn, the Allottees argue prior decisions of this Court establish their common law claim as well as the Supreme Court's case of Poafpybitty v. Skelly Oil Company, 390 U.S. 365 (1968). Doc. No. 134. Furthermore, the Allottees contend they and Indian tribes share the same right as equitable landowners to bring a federal common law claim for trespass. Finally, they rely on other circuits' cases as well as the Allottees' dealings with federal law to bolster their stance. Id. at p. 3 (citing cases). After having reviewed the Parties' arguments and relevant case law, the Court concludes the Allottees have no federal common law claim for trespass and the First Amended Complaint must be dismissed.

1. Relevant Historical & Legal Background

[¶20] The issue of whether the Allottees have a federal common law trespass claim is certainly "complex." Chase, 12 F.4th at 871. See Grondal v. United States, 682 F. Supp. 2d 1203, 1229 (E.D. Wash. 2010) (noting a "simple issue" of property rights and lease renewals quickly "becomes very complex when it involves allotment property" with fractured ownership and is "held in trust

and controlled by the United States Bureau of Indian Affairs"). Indeed, centuries of history, Supreme Court decisions, and countless policy decisions involving Native Americans, allotments, federal law, and causes of action related to property rights have teed up the instant action.

[¶21] Given the history of allotted land directly and significantly shapes the arguments presented here, a summarized version is worth retelling:

> What is referred to as the "Allotment Era" began in the late 1800s, when Congress adopted a policy that carved reservations into allotments and assigned land parcels to individual tribal members. The goal was to extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large. In the early years of this policy, many tribal members lost their allotted lands to non-Indians in unfair or fraudulent transactions. See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992). Congress responded by enacting the Indian General Allotment Act of 1887, known as the Dawes Act. The Dawes Act sought to prevent alienation of Indian-owned lands by replacing the fee-simple-ownership of early allotments with a trust-based model in which the President allotted tracts to individual Indian landowners. The United States held these allotments in trust for twenty-five years, after which the individual Indian landowners acquired fee-simple title to the property. Id.
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> Allotted lands held in trust under the Dawes Act proved to be "administratively unworkable and economically wasteful." Hodel v. Irving, 481 U.S. 704, 707 (1987). In 1934, Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes-Act era," "halted further allotments," and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." Yakima, 502 U.S. at 255, citing the Indian Reorganization Act, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 *et seq.*; see §§ 5101, 5102. This statute did not affect the two-thirds of allotted Indian lands already acquired by non-Indians, resulting in a checkerboard of federally-held trust lands and privately-owned fee-simple lands that continues on many reservations today. Upper Skagit Indian Tribe v. Lundgren, ___ U.S. ____, 138 S. Ct. 1649, 1653 (2018); see Yakima, 502 U.S. at 255-56.

Chase, 12 F.4th at 872-73 (footnote omitted and cleaned up). See Stands, 105 F.3d at 1571-72 (explaining trust allotments are owned by the United States).

[¶22] Due to real property titles changing hands among tribes, individual Native Americans, the federal government, and other individuals and entities, property disputes inevitably ensued. Those disputes prompted questions as to which bases of relief could be sought by whom and in

which forum. See, e.g., Oneida Indian Nation of N.Y. State v. Oneida Cnty., 414 U.S. 661 (1974) [hereinafter Oneida I]; Poafpybitty, 390 U.S. 365. Although the Supreme Court has not explicitly answered the question presented here, it certainly left behind clues. A synopsis of three of those decisions is necessary to understand the Eighth Circuit's decision in Chase, which is the most recent decision in this case that guides the analysis below.

[¶23] In the 1914 case of Taylor v. Anderson, the Supreme Court held it lacked federal question jurisdiction over a suit brought by individual Indian owners of allotments in fee (not in trust) for ejectment of individuals who allegedly removed the rightful Indian owners from their allotted property. 234 U.S. 74, 74-76 (1914). Citing the well-pleaded complaint rule, the Court concluded the allotment owners could not anticipatorily assert defenses based in federal law to make their ejectment claim fall within federal question jurisdiction. Id. at 75 (rejecting the contention the claim arose under federal law simply because federal law "restrict[ed] the alienation of Choctaw and Chickasaw allotments"). Accordingly, the Taylor Court made clear there is no federal question jurisdiction and, subsequently, no federal common law claim, when allottees (at least for those holding allotments in fee) assert claims for ejectment. Id.

[¶24] In contrast to Taylor, when tribes have brought claims related to possession of their alleged tribal lands, the Supreme Court has confirmed a federal common law right of action may exist. See, e.g., Oneida I, 414 U.S. at 675 (holding there was federal subject matter jurisdiction over the tribe's claim); Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 235-236 (1985) [hereinafter Oneida II] (holding the Oneida Indian Nation possessed a federal common law claim). In Oneida I, the Supreme Court considered whether it had federal question jurisdiction over the Oneida Indian Nation's claim for possession and fair rental value of its alleged tribal lands. 414 U.S. at 663-64. There, the complaint alleged the Oneida's lands had been

conveyed to the State of New York during the 1790s in contravention of federal law and treaties. Id. Interpreting the complaint as asserting a claim for possession of the land, the Court held the Oneida Indian Nation's claim for "possessory right[] . . . to [its] aboriginal lands, particularly when confirmed by treaty," fell within federal question jurisdiction. Id. at 667.[2]

[¶25] The Oneida I Court's use of the term "aboriginal" in its holding is of particular significance. Id. "Aboriginal title is a right of occupancy based on possession from time immemorial. Such title may be recognized or unrecognized." Inupiat Cmty. of Arctic Slope v. United States, 680 F.2d 122 (Fed. Ct. Cl. 1982) (citation omitted). Prior to the creation of reservations, Indian nations, tribes, or bands "may have claimed the right [to the land] because of immemorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food." Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 338-39 (1945) (citation omitted). This exclusive claim to the land "has come to be known as Indian title," id. at 339, which is synonymous with "[a]boriginal rights" or "aboriginal title," Wolfchild v. Redwood Cnty., 824 F.3d 761, 767 n.2 (8th Cir. 2016) (quoting Oneida I, 414 U.S. at 667). Whether labeled as "aboriginal title" or "Indian title," that title solely gives the tribe possessory rights—not ownership—to the land in question. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) ("That description means mere possession not specifically recognized as ownership by Congress."). The fee title to aboriginal land remains with the United States as sovereign. Oneida I, 414 U.S. at 667.

[¶26] Returning to the Court's reasoning and emphasis on aboriginal title in Oneida I, the Supreme Court methodically and pointedly distanced Taylor from the Oneida Indian Nation's case

[2] For a more detailed history of aboriginal title and the United States' legal treatment of such title, please see the United States Court of Appeals for the Tenth Circuit's case of Pueblo of Jemez v. United States, 790 F.3d 1143, 1152-56 (10th Cir. 2015).

on two primary bases. First, the Court highlighted the Taylor plaintiffs were individual Indians rather than a tribe like the Oneida Indian Nation. Id. at 676. Second, the Court categorized Taylor as a case that "concerned lands allocated to individual Indians, not tribal rights to lands" (i.e., there was no claim to aboriginal title). Id. Given the Taylor plaintiffs had alleged "right to possession" without any claimed ties to aboriginal title, the Oneida I Court placed Taylor alongside "those cases indicating that 'a controversy in respect of lands has never been regarded as presenting a [f]ederal question merely because one of the parties to it has derived his title under an act of Congress.'" Id. Accordingly, the Court relegated the remedies of the fee landholders in Taylor to matters of "local property law to be vindicated in local courts." Id. (quoting Joy v. City of St. Louis, 201 U.S. 332, 343-43 (1906)).

[¶27] In a subsequent case involving the Oneida Indian Nation and its continued quest for recovery of its alleged aboriginal lands, the Supreme Court moved past the jurisdictional question and discussed the nature of the Oneida Indian Nation's claim. Oneida II, 470 U.S. at 235-236. The Court discussed how "[n]umerous decisions of this Court prior to Oneida I recognized at least implicitly that Indian[] [tribes] have a federal common-law right to sue to enforce their aboriginal land rights." Id. at 235. Given the history of such cases and their "well-established principles" based in aboriginal title, the Court held the Oneida Indian Nation could maintain the "action for violation of their possessory rights based on federal common law." Id. at 235-36. See id. at 235 ("[T]he possessory right claimed by the Oneidas is a *federal* right to the lands at issue in this case." (alteration omitted) (quoting Oneida I, 414 U.S. at 671)).

[¶28] Despite these Supreme Court cases, the Allottees' question remains unanswered because they are individual equitable owners of allotted land—not owners of land in fee or otherwise a tribe. This Court is not without additional guidance, however. When the Allottees appealed this

Court's Order, Granting, in Part, and Denying, in Part, the Motion to Dismiss (Doc. No. 100), the Eighth Circuit provided some direction on whether individual allottees of land held in trust by the United States could assert a "federal *common law* cause of action" without resolving that "complex issue," Chase, 12 F.4th at 871.

a. The Eighth Circuit's Case of Chase v. Andeavor Logistics

[¶29] The Eighth Circuit's Chase case strongly suggests the Allottees do not have a federal common law claim for trespass because they are not a tribe asserting aboriginal title. Id. at 872, 874. The Allottees argued before the Eighth Circuit that Oneida II supported their federal common law claim for trespass because they, like the Oneida Indian Nation, have exclusive possession of Indian trust land pursuant to federal law. Id. at 873. The Eighth Circuit rejected the argument because the Oneida cases arose from "a *tribe* 'assert[ing] a present right to possession based on their *aboriginal* right of occupancy.'" Id. at 874 (quoting Wolfchild, 824 F.3d at 768). Subsequently, the Court hinted the Allottees more closely resembled the individual Indian plaintiffs in Taylor for the same reasons the Oneida cases seemed not to fit: the Allottees are not a tribe and they have not asserted aboriginal title to the land. Id. The Court then highlighted its own case of Wolfchild v. Redwood County had affirmed individual Indians who owned land in fee simple "failed to state a claim under federal common law because they did not allege '*aboriginal* title'" and were not a tribe. Chase, 12 F.4th at 874 (quoting Wolfchild, 824 F.3d at 768). See also Wolfchild, 824 F.3d at 768 (affirming the individual Indians' "fail[ure] to state a claim under the federal common law as set forth in the *Oneida* progeny").

[¶30] In remanding the Allottees' case back to this Court, the Eighth Circuit clarified Wolfchild could not "directly control" the instant matter but its reasoning and reliance on the Oneida cases would have a "direct bearing" on the Allottees' claim. Chase, 12 F.4th at 874. Wolfchild was not

dispositive of the Allottees' claim, the Eighth Circuit said, because the Wolfchild plaintiffs were allegedly owners of the land in fee simple rather than equitable owners of land held in trust by the federal government, like the Allottees. Id. The Eighth Circuit, however, invited the Parties to suggest different interpretations of Wolfchild and specifically opened the door for the BIA to express its view on whether "the distinction drawn in Oneida I" between tribes and individuals as well as allegations regarding aboriginal versus non-aboriginal title "applies to a right-of-way holdover situation." Id.

[¶31] Since the Eighth Circuit extended that invitation in 2021, see id., the BIA has explicitly declined to "make any assertions about the Allottees' ability to raise a federal common-law trespass claim," Tesoro, No. 21-cv-00090, ECF 62 at p. 29 n.17. With that legal backdrop, the matter is now for this Court to resolve.

[¶32] The Court will address the Parties' arguments regarding subject matter jurisdiction and then proceed to the Allottees' contentions. The Allottees first assert prior decisions from the District of North Dakota affirm they have a federal common law claim for trespass. Second, they argue the Supreme Court's case of Poafpybitty grants them a federal common law claim because the United States has alleged the same against Tesoro (an Andeavor subsidiary) in the related Tesoro litigation. Third, the Allottees assert they are on equal footing with tribes who hold equitable title to land held in trust by the United States, like the Oneida Indian Nation, such that they must also have a federal common law claim for trespass. Alternatively, they argue they have sufficient ties to federal law to possess the right to bring a federal common law claim. Fourth and finally, the Allottees make the appeal that without a federal common law claim, they would be unjustly left without a direct remedy against Andeavor. For the reasons discussed below, the Allottees' arguments fail because they do not allege they hold aboriginal title to the allotments.

2. Subject Matter Jurisdiction

[¶33] The Allottees first contend the Court has subject matter jurisdiction over their claims pursuant to both 25 U.S.C. § 345 and 28 U.S.C. § 1331.[3] Doc. No. 134, p. 6 (citing Nahno-Lopez, 625 F.3d 1279). Andeavor, however, argues the Eighth Circuit's Chase case "held that the jurisdictional question collapsed into [the issue of whether the Allottees have the] capacity to assert federal common law claims." Doc. No. 138, p. 8. Based on the Eighth Circuit's direction, the Court agrees this case hinges on whether the Allottees have stated a claim upon which relief may be granted rather than purely a question of subject matter jurisdiction.

[¶34] Federal courts have a duty to evaluate whether they have jurisdiction over a case "even if the parties concede the issue." Styczinski v. Arnold, 46 F.4th 907, 911 (8th Cir. 2022) (quoting United States v. O'Laughlin, 31 F.4th 1042, 1043 (8th Cir. 2022)). That said, the Eighth Circuit has directed this Court that the Allottees' case does not present a "serious question of subject matter jurisdiction because if the Allottees have a valid claim for Andeavor's alleged trespass on Indian lands, without question it is a claim under federal law." Chase, 12 F.4th at 871. Pursuant to that guidance, the Court focuses on the crux of the case: whether the Allottees possess a "federal *common law* cause of action . . . on which relief can be granted." Id.

3. Prior Decisions from This District Are Not Dispositive

[¶35] The Allottees' cited cases from this District do not guarantee their claim's survival. See Doc. No. 134, p. 7 (arguing the Court has already "recognized individual Indian allottees' federal

[3] Section 345 of title 25 grants jurisdiction over "suits involving the interest and rights of the Indian in his allotment or patent after he has acquired it." United States v. Mottaz, 476 U.S. 834, 845 (1986) (internal quotation marks omitted) (quoting Scholder v. United States, 428 F.2d 1123, 1129 (9th Cir. 1970)). That statute, however, "does not create [a] cause of action or a standard for liability." Nahno-Lopez v. Houser, 625 F.3d 1279, 1282 (10th Cir. 2010). See also Chase, 12 F.4th at 871 n.4 (citing Nahno-Lopez's analysis regarding § 345).

common law trespass claims and the jurisdiction it possesses over them"). See also Camreta v. Greene, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p. 134-26 (3d ed. 2011))); Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 865-66 (8th Cir. 2021) (quoting Camreta, 563 U.S. at 709 n.7). First, Houle v. Central Power Electric Co-op., Inc., presumed without deciding jurisdiction existed for the Chippewa Indian allottees' trespass claim and the Court noted the "parties [had] not questioned the court's jurisdiction." No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. Mar. 24, 2011). See also Fettig v. Fox, No. 1:19-cv-096, 2020 WL 9848691, at *14 (D.N.D. Nov. 16, 2020) (suggesting, in dicta, a federal common law trespass claim may exist for allottees, but not discussing Taylor or Oneida). Additionally, Houle did not wrestle with Taylor's implications and was decided prior to the Eighth Circuit's decisions in Wolfchild and Chase. See Houle, 2011 WL 1464918.

[¶36] Second, as Andeavor highlights, the Allottees conveniently omitted certain sentences of the Court's analysis in Danks v. Slawson Exploration Company, Inc. See No. 1-18-cv-186, 2021 WL 4783258, slip op. at *4 n.2 (D.N.D. Oct. 13, 2021). While it is true the Court in Danks previously concluded the "plaintiff allottees ha[d] federal common law claims for the torts of trespass and nuisance and that plaintiffs can pursue these claims without the United States[] . . . being a party," it reached that conclusion before the Eighth Circuit in Chase "open[ed] [the] question [about] whether the allottees have a common law claim under federal law." Id. Not only did Danks fail to discuss the Oneida or Taylor decisions, but also the Court found the situation in Danks was "distinguishable" from Chase and noted the question of whether allottees have a federal common law trespass claim triggers a fluctuating and "complex area" of law. Id. In sum, these

cases were decided before the Eighth Circuit in Chase casted significant doubt on the possibility of plaintiffs like the Allottees having a federal common law trespass claim. Accordingly, these prior cases cannot guide the Court's decision.

4. *Poafpybitty* Does Not Establish the Allottees Possess a Federal Common Law Claim for Trespass

[¶37] The Allottees contend that because the United States has made a federal common law trespass counterclaim in the Tesoro litigation, so too they have such a claim here. Relying on the Supreme Court's case of Poafpybitty, the Allottees argue the United States' assertion of a federal common law trespass action in the related Tesoro case is proof positive their claim exists and is permissible here. Doc. No. 134, p. 4. See also Tesoro, No. 1:21-cv-00090, ECF 28, pp. 22-28. Andeavor contends Poafpybitty does not grant the Allottees a federal common law claim of trespass. Doc. No. 134. Even if the Allottees had a "valid basis for a claim," Andeavor argues Poafpybitty does not authorize the Allottees to assert a concurrent claim with the United States pursuant to the ROW holdover regulation, 25 C.F.R. § 169.410. Doc. No. 138, pp. 16-17, n.13. The Court agrees Poafpybitty does not extend a federal common law trespass claim to the Allottees.

[¶38] Poafpybitty raised the issue of whether individual Indians lessors had standing to sue—independent of the federal government—for breach of an oil and gas lease when the oil and gas was being extracted from allotted Indian land and the lease had been approved by the federal government. 390 U.S. at 366. The Supreme Court held the Indian lessors had standing to sue. Id. at 376. In reaching that conclusion, the Supreme Court "agree[d] that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official [did] not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights." Id. at 372. That said, the Indian's

right to initiate a lawsuit to protect his or her land was subject to the United States' right to intervene and the Indian's lawsuit would not bind the United States unless it was a named party. Id. at 371. Nowhere, however, does Poafpybitty discuss federal common law claims or whether an individual Indian may bring such a claim.

[¶39] The Allottees' assumption that they possess a federal common law claim by virtue of the United States' pending claim is based on a misreading of Poafpybitty. In other words, the United States' position in the Tesoro litigation does not translate to the Allottees possessing a federal common law trespass claim here.[4] The Allottees have cited the District of Rhode Island case, Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., for another proposition to be discussed herein, but that case stated the rule of Poafpybitty in an almost "if-then" statement: if "an action involving Indian land can be maintained by the protected Indians or Indian tribes [and] by the United States on their behalf, [then] it is settled law that the right to assert the sovereign interests at issue . . is equally available to either plaintiff." 418 F. Supp. 798, 805 (D.R.I. 1976). Neither Narragansett nor Poafpybitty assert that if the United States has a claim, then that claim is also available to Indian allottees. Indeed, the United States in Tesoro explicitly disclaimed any "assertions about the Allottees' ability to raise a federal common-law trespass claim." Tesoro, No. 1:21-cv-00090, ECF 62, p. 29 n.17. However, Poafpybitty represents that where Indians (either tribes or individuals) *and* the United States may bring the same claim, then either may bring a lawsuit (subject to certain limitations). See, e.g., Poafpybitty, 390 U.S. at 370-71 (noting the Indian's right to sue is subject to the United States' right to intervene). Poafpybitty

[4] The Court expresses no opinion on the merits of the United States' federal common law counterclaim in the Tesoro litigation.

does not permit the Allottees to piggyback on the United States' alleged federal common law claim if the Allottees themselves do not have the independent right to bring the claim.

5. The Allottees' Absent Allegation of Aboriginal Title Dooms Their Federal Common Law Claim for Trespass

[¶40] Seeking to position themselves as closely as possible to the tribal plaintiffs in the Oneida cases, the Allottees present a host of arguments about their similarities. Undoubtedly, the Allottees share some commonalities with the Oneida plaintiffs, such as allegedly possessing equitable title to land held in trust by the United States. Shared facts, however, cannot overcome the distinction that derails their case: the lack of an allegation of aboriginal title.

a. The Supreme Court & Eighth Circuit Do Not Erase Distinctions Between Tribes & Allottees Due to Them Both Possessing Lands Held in Trust

[¶41] "When it comes to Indian trust lands," the Allottees argue, "there is no legal difference between the status of a tribe and an individual Indian allottee." Doc. No. 134, p. 3. Taking a select quote from a District of Rhode Island case, the Allottees contend that because "the interests sought to be protected by Congress are the same" when it comes to Indian land, federal common law claims for trespass exist "no matter who the plaintiff may be." Id. (quoting Narragansett Tribe of Indians, 418 F. Supp. at 806). Andeavor refutes the Allottees' assertion by arguing the Allottees ignore the Eighth Circuit's extensive discussion of the "difference[s] between trespass claims by an Indian tribe, and trespass claims by individual Indian allottees." Doc. No. 138, p. 6. The Court agrees with Andeavor.

[¶42] First, the Rhode Island case does not propose all plaintiffs—whether individual Indians, tribes, or the United States—possess the same claims when Indian trust land is at stake. See Narragansett Tribe of Indians, 418 F. Supp. at 806. Instead, Narragansett Tribe of Indians discusses the well-established principle from the Supreme Court's case of Poafpybitty that "[w]here an

action involving Indian land *can be* maintained by the protected Indians or Indian tribes as well as by the United States on their behalf, it is settled law that the right to assert the sovereign interests at issue here is equally available to either plaintiff." Id. at 805 (emphasis added) (citing Poafpybitty, 390 U.S. 365). The operative words are where an action "can be" asserted. Id. Notably, the Narragansett Tribe of Indians case was initiated by a tribe and is silent regarding what causes of action Indian individuals may possess. Id. Rather, the court merely reiterated that where a cause of action is already legally permissible and available to individual "Indians or Indian tribes as well as [to] the United States," then the individuals or tribes do not have to wait for the United States to bring suit before they may take legal action to protect Indian land. Id. This shared right to bring such a claim is because "the interests sought to be protected by Congress [relating to the Indian land] are the same, no matter who the plaintiff may be" and the alternative of forcing the United States to be the sole protector would impose an "almost staggering burden" on the federal government. Id. at 806 (first quoting Capitan Grande Band v. Helix Irrigation Dist., 514 F.2d 465, 471 (9th Cir. 1975), and then quoting Poafpybitty, 390 U.S. at 374). In sum, Narragansett Tribe of Indians does not stand for the Allottees' expansive proposition of "come one, come all" when federal common law trespass claims are involved.

[¶43] Second, the Allottees' blurring of the lines between tribes and individual allottees has already been rejected by the Eighth Circuit. The Allottees presented a similar, if not the same, argument to the Eighth Circuit in Chase when they cited "Oneida II for the proposition that Indians have a federal common law trespass action against those who maintain an unauthorized presence on Indian trust land because the Indians' right to exclusive possession of their land is a federal right." Chase, 12 F.4th at 873 (internal quotation marks omitted). In other words, the Allotees contended they and the Oneida Indian Nation had equal footing because of their rights related to

trust land. Id. The Eighth Circuit dismissed their argument as "not clearly supported" in either Oneida I or Oneida II. Id. at 873-74. Instead, the Eighth Circuit plainly separated tribes and allottees despite their trust land similarity: "[T]his case is distinguishable from Oneida in two significant respects—the 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. at 872. Additionally, in the Eighth Circuit's earlier case of Wolfchild, the Court highlighted the "Supreme Court directly distinguished cases regarding 'lands allocated to *individual* Indians,'" from those involving a tribe asserting their aboriginal rights. 824 F.3d at 768 (quoting Oneida I, 414 U.S. at 676-77) (discussing the differences between individuals and tribes in Oneida II). The Allottees' suggestion of there being "no legal difference" is misplaced considering binding case law. Doc. No. 134, p. 3. Accordingly, that line of argument cannot further their quest for a federal common law trespass claim.

b. The Allottees' Interactions with Federal Law Cannot Grant Them a Federal Common Law Claim for Trespass

[¶44] Moving past arguments about tribal-allottee equality, the Allottees next contend they have sufficient legal ties to federal law and resemble the Oneida tribal plaintiffs just enough to also share in their ability to assert a federal common law claim. Id. The Allottees emphasize that Indian trust lands arise under federal law and the United States owes fiduciary duties to Indian landowners enshrined in federal law, ultimately arguing these facts should give rise to a trespass claim under federal common law. Id. Andeavor argues the Allottees wrongly ignore the "essential" distinction of Oneida I from Taylor: federal common law claims follow tribal claims to aboriginal title of land. Doc. No. 138. The Court agrees with Andeavor.

[¶45] The Allottees emphasize similarities the Supreme Court chose to overlook, and they overlook differences the Supreme Court opted to emphasize. Interestingly, the Taylor Court was

unpersuaded jurisdiction—let alone a federal common law claim—existed by virtue of the land becoming allotted for individual Indians pursuant to federal law or else being subject to ongoing protection by federal statute. Taylor, 234 U.S. at 75 (noting federal statutes restricted the alienation of the individual Indians' lands and the land was allegedly held in fee). This same point rang true when it came to Indian trust land in Oneida I. 414 U.S. at 677. There, the Supreme Court said the mere fact "federal law now protects" the trust lands was an insufficient jurisdictional hook. Id. Rather, federal question jurisdiction required the ongoing federal protection of the land *plus* the unique circumstance that federal law had "continuously protected from the time of the formation of the United States, *possessory rights to tribal lands*." Id. (emphasis added). Stated plainly, the allegation of aboriginal title tipped the scale. Id. This is a point the Allottees kept absent from their briefs (see Doc. No. 85 (mentioning "aboriginal title" or "Indian title" five times and only while describing cases' reasoning)), likely because the Supreme Court's pages upon pages of analysis regarding aboriginal title in the Oneida cases do not fare well for their point of view, see Oneida I, 414 U.S. at 666-78.

c. Aboriginal Title Is Key Given Its Historical Significance

[¶46] "[T]he *nature* and *source* of the possessory rights" of Indians to land—namely, claiming aboriginal title[5]—is the undeniable key to having a federal common law claim. Id. at 667

[5] Although the Supreme Court in Oneida I distinguished Taylor on the bases of (1) the Taylor plaintiffs were not a tribe, and (2) they failed to assert aboriginal title, see Oneida I, 414 U.S. at 676, dicta from case law suggests individual Indians could assert an aboriginal right to land, see United States v. Dann, 470 U.S. 39, 50 (1985) (recognizing individual Indians may have aboriginal rights "in certain contexts," but not explicitly discussing federal common law claims); Cramer v. United States, 261 U.S. 219, 227 (1923) (explaining the "essential spirit" of the policy to "respect the [tribal] Indian right of occupancy" may also apply to "individual Indian occupancy as well"). See also United States v. Santa Fe Pac. Ry. Co., 314 U.S. 339, 345-46 (1941) (detailing how the Cramer case seemed to equalize the treatment of individual and tribal claims to aboriginal title). Whether or not individual Indians may do so and whether or not such a right would then give rise to a federal common law cause of action, however, are questions this Court need not answer given

(emphases added) (discussing jurisdiction but setting the groundwork for Oneida II). See Delaware Nation v. Pennsylvania, No. 4-CV-166, 2004 WL 2755545, at *11 (E.D. Penn. Nov. 30, 2004), (concluding the tribe failed to state a claim under federal common law because aboriginal title had been extinguished), aff'd on other grounds, 446 F.3d 410 (3d Cir. 2006). The Supreme Court's lengthy discussion of aboriginal title is understandable given that particular land status strikes a unique chord in the law due to its protection of an Indian tribe or nation's right to occupy certain land since "time immemorial." Cherokee Nation v. Georgia, 30 U.S. 1, 28 (1831). See Johnson v. M'Intosh, 21 U.S. 543, 563 (1823) (addressing tribes' aboriginal right of occupancy as it relates to the federal government's rights as sovereign). Lands subject to this special status were those "used by the Indians in their daily lives as hunters and gatherers as well as lands on which they actually resided." Pueblo of Jemez, 790 F.3d at 1156. Recognition of aboriginal title by the United States is a sign of deference to the Indian tribe or nation's status and power "to use [the land] according to their own discretion" with "a legal as well as just claim to retain possession of it," subject to limitations set by the federal government. Johnson, 21 U.S. at 574. Aboriginal title's existence does not originate in "a treaty, statute, or other formal government action" because aboriginal title preceded the formation of the United States (and many, if not most, other nations, for that matter).[6] Santa Fe Pac. Ry. Co., 314 U.S. at 347.

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the Allottees have not alleged they have an aboriginal right to the allotments. See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.04 n.13 (Nell Jessup Newton et al. eds., 2023) ("[S]ubsequent cases indicate that individual tribal members have a federal common-law aboriginal right to some kinds of property, . . . [but] [t]he individual/tribal distinction has not been applied with respect to federal common-law actions involving tribal sovereignty." (citations omitted)).

[6] Aboriginal title, however, is not timeless in the eyes of the law. It may be terminated only by an act of the sovereign, here, that being the United States. See Oneida I, 414 U.S. at 667 ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States."). Once

[¶47] In contrast to aboriginal title and its deference to tribes' governance of their ancient lands, the designation of "allotted" land is relatively new and purposed to separate the individual Indian from the tribe in an effort to "weaken[] tribal power." 1 Cohen's Handbook of Federal Indian Law § 1.03 (Nell Jessup Newton et al. eds., 2023). See Chase, 12 F.4th at 873-74 (explaining allotments were part of a policy to "extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large"). Allotments were created by federal law in the "late nineteenth and early twentieth centuries, pursuant to the General Allotment Act, [which was intended to break] up Indian reservations into parcels to be held in trust by the United States for individual Indians." Stands, 105 F.3d at 1572. Not all allotments, however, were created from remnants of land subject to aboriginal title. Some individual Indians were assigned allotments generated from land held in the public domain with which they did not necessarily share any ancestral ties. See Leonhard, supra, at 76. Thus, at their core, allotments were meant to erase tribal ties to ancient lands—not enshrine those ties in American law, as is the case with aboriginal title.

[¶48] To conclude ancient tribal lands still under tribal power give rise to the same legal privileges as newly created parcels for individuals, as the Allottees propose, would cheapen the rich history of aboriginal lands and constitute a rejection of the Supreme Court's favored treatment of aboriginal title for two centuries. See, e.g., Johnson, 21 U.S. at 563; Cherokee Nation, 30 U.S. at 28. The Court in Oneida I repeatedly emphasized the special status of aboriginal title in American jurisprudence. See 414 U.S. at 667 (premising its entire analysis on the "nature and source of the possessory rights of Indian tribes to their aboriginal lands"). Because "possessory and treaty rights of Indian tribes to their lands have been the recurring theme of many other cases,"

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aboriginal title is terminated, it is extinguished. See Santa Fe Pac. Ry. Co., 314 U.S. at 347 ("The manner, method and time of such extinguishment raise political not justiciable issues.").

the Oneida I Court recognized aboriginal title had to play a significant role in its decision regarding whether the Oneida Indian Nation's claim for possession of the land arose "under federal law." Id. at 669-71, 675.

[¶49] Citing a multitude of cases about aboriginal title, the Oneida I Court highlighted those cases' role in "lend[ing] substance to petitioners' assertion that the possessory right claimed is a federal right to the lands at issue in this case." Id. at 671. That cited body of case law chastised states' attempts to forcibly remove tribes from their aboriginal lands, "tax reservation land," among other things, because of those tribes' aboriginal title. Id. at 671-72. See, e.g., In re New York Indians, 72 U.S. 761, 769 (1866) ("[T]he two States possessed no power to deal with Indian rights or title."). Given the history of aboriginal title and its special treatment in federal law, the Court concluded: "Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." Oneida I, 414 U.S. at 675. See also id. at 684 (Rehnquist, J., concurring) ("The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse."). See also Coeur d'Alene Tribe v. Hawks, 933 F.3d 1052, 1055 (9th Cir. 2019) ("A tribe's authority does not spring from federal law but rather derives from the 'inherent powers of a limited sovereignty which has never been extinguished.'" (quoting United States v. Wheeler, 435 U.S. 313, 322 (1978)).

[¶50] Another item not to be ignored is the aboriginal title bedrock of Oneida I also formed the basis for the Oneida Indian Nation's federal common law claim in Oneida II. The Court in Oneida II stated: "In keeping with these well-established principles [regarding aboriginal title], we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law." Oneida II, 470 U.S. at 236. To divorce the Oneida cases from aboriginal title and

characterize them as being merely about trust lands or ongoing federal protections would leave those cases in shambles. See, e.g., Oneida I, 414 U.S. at 677 (explaining the Court's jurisdiction rested on the allegation the tribal land had been "continuously protected from the time of the formation of the United States" by federal law); Oneida II, 470 U.S. at 236 (holding the Oneidas possessed a federal common law claim for possession due to the "well-established principles" of aboriginal title).

6. The Allottees' Newly Cited Cases Confirm Aboriginal Title Is the Necessary Ingredient for Developing a Federal Common Law Claim for Trespass

[¶51] The Allottees' citation to recent decisions from other courts only confirm aboriginal title is the necessary element for possessing a claim for trespass under federal common law. Those cases concern tribes seeking remedies for alleged trespass across their tribal lands. See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., No. C15-0543RSL, 2023 WL 2646470, at *3, *6 (W.D. Wash. Mar. 27, 2023) (concluding, following a bench trial, the tribe had shown by a preponderance of the evidence that the railway company had trespassed on Indian lands held in trust by the federal government and "established by treaty"); see also Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., 626 F. Supp. 3d 1030, 1038, 1056-57 (W.D. Wis. 2022) (granting partial summary judgment in favor of the Bad River Band on its claim for trespass, among other claims, against an oil and natural gas owner and operator when they crossed tribal lands held in trust by the United States). Accordingly, these cited cases fail to further the Allottees' cause.

7. The Court Will Not Create a Federal Common Law Cause of Action for Trespass

[¶52] Given the Supreme Court explicitly and substantially relied on aboriginal title in the Oneida cases and made it a point of distinction for the Taylor decision, this Court declines to create

a new federal common law cause of action for the Allotees when they have not claimed aboriginal title. See Chase, 12 F.4th at 877 (explaining the Allottees' alleged federal common law claim would have to arise "absent federal statutory guidance" (quoting Oneida II, 470 U.S. at 236)).

[¶53] The Court does not have license to create federal common law as it sees fit:

> The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.

Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) (citation omitted). Indeed, the Supreme Court has directed the realm of federal common law is "narrow," and may exist only when "the rights and obligations of the United States" are involved, certain matters of "interstate and international disputes" have arisen, or when admiralty law is concerned. Id. at 641 (footnotes omitted).

[¶54] The Supreme Court in the Taylor and Oneida cases made plain the federal government's ongoing interests in and obligations to Indian allotted land not subject to aboriginal title fail to give rise to a federal common law claim. Id. As already discussed, the Taylor Court refused to find federal question jurisdiction (or otherwise create a federal common law claim) when claims arose regarding allotted land even when a federal statute explicitly protected individual Indians' allotments from undue alienation. 234 U.S. at 74-76. The Court in Oneida I and Oneida II repeated that understanding when it spelled out federal question jurisdiction and, ultimately, a federal common law claim, were the result of the Oneida's aboriginal claim to the land—not merely federal law's protection of that land. See Oneida I, 414 U.S. at 677 (explaining federal question jurisdiction was triggered due to the fact that "federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands");

Oneida II, 470 U.S. at 235-36 (holding a federal common law claim for possession resulted from the claim of aboriginal title).

[¶55] Courts facing similar requests by Indian allotee plaintiffs have, by and large, reached the same conclusion: allottees do not possess a federal common law claim for trespass. The Court is aware of only one exception from the Tenth Circuit. In Nahno-Lopez v. Houser, the Tenth Circuit concluded—with little analysis—individual Indian allottees had a federal common law trespass claim. 625 F.3d at 1282. Nine years later, the Tenth Circuit stated its earlier case of Nahno-Lopez seemed to be a situation where the court "simply assumed such a claim's existence" because it was "unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment." Davilla v. Enable Midstream Partners L.P., 913 F.3d 959, 965 n.2 (10th Cir. 2019). Notably, neither decision from the Tenth Circuit mentioned aboriginal title or the Supreme Court's case of Taylor.

[¶56] Turning to the Ninth Circuit, that court has not held individual allottees hold a federal common law trespass claim. See Chase, 12 F.4th at 874 n.6 ("But we have not found, nor do Allottees cite, a Ninth Circuit case holding that federal common law encompasses suits by *individual* Indian landowners."). Although the Ninth Circuit recognized "[f]ederal common law governs an action for trespass on Indian lands," United States v. Milner, 583 F.3d 1174, 1182 (9th Cir. 2009), its subsequent cases do not leap to the conclusion that allottees have a federal common law trespass claim. Indeed, in 2019, the District Court for the Northern District of California rejected an individual Indian allottee's trespass claim under federal common law due to the Oneida and Taylor decisions. See Pacino v. Oliver, No. 18-cv-06786, 2019 WL 13128558, slip op. at *4 (N.D. Cal. Aug. 29, 2019) ("Pacino fails to state a claim under the federal common law as set forth in the Oneida line of cases. In contrast to a claim for *aboriginal* title, Pacino's lawsuit concerns

'lands allocated to individual Indians, not tribal rights to lands.'" (quoting Oneida I, 414 U.S. at 676)). The court "readily" distinguished prior Ninth Circuit cases because they fell into one of several categories: (1) the United States brought a trespass claim on behalf of a tribe; (2) the United States brought, on behalf of individual allottees, a trespass action; (3) the United States plus the tribe brought a claim for trespass; (4) an individual Indian allottee asserted other grounds for federal question jurisdiction and tacked on a state common law claim for trespass; and (5) other cases were brought pursuant to federal statutes and regulations that protected allotments from improperly granted rights-of-way. Id. at *3 n.3 (citing cases). Ultimately, the Pacino court concluded the allottee had no federal common law trespass claim and labeled the Tenth Circuit's case of Nahno-Lopez an "outlier" among circuit court decisions. Id. See also Chase, 12 F.4th at 874 n.6 (explaining "neither the Ninth Circuit nor the Tenth Circuit has definitively resolved the issue").

[¶57] At least one district court within the Third Circuit has also agreed a federal common law claim for trespass does not exist apart from an allegation of aboriginal title. In Delaware Nation v. Pennsylvania, the District Court for the Eastern District of Pennsylvania recognized Oneida II gave "Native Americans [the] right to sue to enforce their *aboriginal title* against trespassers on their land" under the "federal common law," but the "element termed 'tribal land'" (i.e., "Indian title" or "aboriginal title") "is necessary" for a federal common law trespass claim. 2004 WL 2755545, at *10-11. Accordingly, even though the Delaware Nation—a federally recognized tribe—brought the suit, its failure to establish aboriginal title to the land was the demise of its claim. See id. at *11 ("[T]ribal land rights may not be revived, and without any tribal land rights in Tatamy's Place, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law.").

[¶58] Finally, the Eighth Circuit has also towed this same line. Although the Wolfchild case "does not directly control the issue in this case" because it involved Indian landowners in fee, Chase, 12 F.4th at 874, there, the Eighth Circuit emphasized the pivotal role of aboriginal title, see Wolfchild, 824 F.3d at 767-68. In affirming the alleged landowners held no federal common law claim, the Eighth Circuit made clear: "[F]ederal 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 768 (second alteration in original). Where there is no claim to aboriginal title, there is no federal common law claim.

[¶59] In sum, for the reasons set forth above, the Court finds the Supreme Court and Eighth Circuit have closed the door for the Allottees' federal common law trespass claim because there has been no allegation pertaining to aboriginal title.

8. The Possibility of Allottees Not Having an Alternative Cause of Action Does Not Remedy Their Failure to State a Claim

[¶60] The Allottees make one final appeal for having a federal common law claim for trespass. Specifically, they contend without the federal common law claim they will unjustly have no cause of action and be stranded without a remedy "for Defendants' past and ongoing illegal and willful use of [the Allottees'] land." Doc. No. 134, p. 11. They cite cases and statutes prohibiting states from exercising jurisdiction over lawsuits involving allotments held in trust to support their assertion. See id. Andeavor argues the Allottees may have recourse by, among other things, potentially suing the BIA for alleged breach of its fiduciary duties with regards to its actions or inaction pertaining to the alleged trespass. Doc. No. 138. Regardless, Andeavor contends, the existence or non-existence of a remedy does not grant the Allottees a federal common law claim for trespass. Id. The Court agrees, to an extent, with Andeavor.

[¶61] Whether the Allottees have an alternative avenue of recourse other than a federal common law claim of trespass is a question not properly before this Court. Additionally, the Allottees' focus on the hypothetical of not having a direct claim against Andeavor "confuses the issues and does not respond to the real question—whether the complaint states a federal claim" on which relief may be afforded. Nw. S.D. Prod. Credit Ass'n v. Smith, 784 F.2d 323, 326 n.4 (8th Cir. 1986) ("If no federal claim is stated, the federal forum cannot grant relief."). Here, for the reasons already discussed, the Allottees have failed to establish they possess a federal common law claim for trespass. As a consequence, the Court may not grant them relief on a non-existent claim.

[¶62] Accordingly, the Court **DISMISSES with prejudice** Count I of the First Amended Complaint for "failure to state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6). See also Doc. No. 28.

III. The Allottees' Remaining Claims

[¶63] The Allottees' remaining claims must also be dismissed. Aside from the federal common law claim for trespass, the Allottees have asserted three additional claims: Count II (Breach of Easement Agreement); Count III (Unjust Enrichment—Imposition of Constructive Trust); and Count IV (Punitive Damages). Doc. No. 28. Their demise was already foretold by the Eighth Circuit in the Chase case.

[¶64] Andeavor originally argued, and repeats in its supplemental brief, that the Allottees' claim for breach of the easement agreement (Count II) must be dismissed because the Allottees are not parties to that agreement. See Doc. Nos. 73, 75. See also Doc. No. 138, p. 23 (incorporating arguments made in Doc. No. 73). It argues the Allottees are not parties to the easement agreement and the United States was the grantor, thus, the United States must be involved or else the claim

is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to allege an essential element of the claim: that they are parties to the agreement. Doc. Nos. 73, 75. The Allottees tacitly admit they are not parties to the easement agreement by referring to themselves as "third-party beneficiaries" and citing cases about parties lacking privity of contract. See Doc. No. 85, p. 76. Instead, the Allottees originally contended, and now reiterate, the United States is not a necessary party because they are the beneficial owners of the land affected by the alleged breach. Id. See also Doc. No. 134, p. 13 (incorporating arguments from Doc. No. 85 as reasons to deny Andeavor's motion "in its entirety"). Given the direction from the Eighth Circuit, the Court agrees with Andeavor.

[¶65] In the Chase decision, the Eighth Circuit did not expressly rule on the Allottees' breach of easement claim, but pointedly said regarding the Allottee's arguments, "In a breach-of-contract action involving a right-of-way over individual trust allotments, the United States, as grantor, is an indispensable party." 12 F.4th at 878 (citing cases). Although the Eighth Circuit said so in dicta, it is a statement of law this Court ought not ignore. See Wilson v. Zoellner, 114 F.3d 713, 721 n.4 (8th Cir. 1997) (explaining the Eighth Circuit's dicta must be given respectful consideration and not disregarded) (citing Fix Fuel & Material Co. v. Wabash R.R. Co., 243 F.2d 110, 114 (8th Cir. 1957)).

[¶66] This Court agrees with the Eighth Circuit's suggestion that the Allottees' failure to add the United States is fatal to its breach of easement claim. See Chase 12 F.4th at 878. A party asserting a breach of contract claim has the duty to allege three elements: (1) a contract existed between the plaintiff and defendant; (2) the contract was breached by the defendant; and (3) damages flowed from the breach. Estvold Oilfield Servs., Inc. v. Hanover Ins., No. 1:17-cv-016, 2018 WL 1996453, at *2 (D.N.D. Apr. 27, 2018). The Allottees have not alleged they were a

party to the contract (see Doc. Nos. 85, 134), which the Eighth Circuit has said cannot be excused under these circumstances, Chase, 12 F.4th at 878 (stating the United States is a required party to a breach of contract claim involving rights-of-way over Indian allotments held in trust). See Two Shields v. Wilkinson, 790 F.3d 791 (8th Cir. 2015) (affirming the dismissal of an action by Indian allottees for failure to join the United States as an indispensable party when initiating a suit involving an oil and gas leasing on their allotments). See also Cheyenne River Sioux Tribe of Indians v. United States, 338 F.2d 906, 909-10 (8th Cir. 1964) ("The authorities support the view that generally the Government is the indispensable party in an action which involves alienation or condemnation of Indian property."); Minnesota v. United States, 305 U.S. 382, 387-88 (1939) (same). Accordingly, the Allottees' breach of easement claim is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because they cannot fulfill an essential element given they were not a party to the contract and the United States is a necessary party.

[¶67] The Allottees' final two claims for unjust enrichment and punitive damages also fail. Andeavor contends those claims "necessarily fail along with the trespass claim" because they both depend on the survival of the Allottees' federal common law claim for trespass. Doc. No. 73. The Allottees do not disagree those claims/remedies hinge on the success of their request for a federal common law claim of trespass. Doc. No. 85. See Doc. No. 28, pp. 28-30 (alleging the unjust enrichment claim arises from the "Defendants' enrichment and Plaintiffs' impoverishment through Defendants' trespass" and punitive damages is proper given the "Defendants' trespass on Plaintiffs' properties was intentional and was not in good faith"). The Court agrees with Andeavor. Given the Allottees do not possess a federal common law claim of trespass, their claims for unjust

enrichment and punitive damages cannot survive dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).[7]

[¶68] Accordingly, the Allottees' remaining claims are **DISMISSED with prejudice**.

IV. The Allottees' Motion to Intervene Is Denied

[¶69] The Court also denies the Allottees' motion to intervene in the Tesoro lawsuit. See Doc. No. 111, p. 3 n.1 (representing the Plaintiffs' Response to Court's Order to Show Cause as to Joinder also "amounts to a motion to intervene"[8]). The Allottees argue they may intervene of right in the Tesoro litigation pursuant to Federal Rule of Civil Procedure 24(a) because their "property is central to the claims raised in the Tesoro APA Lawsuit and the BIA does not adequately represent Plaintiffs' interest." Id. Alternatively, the Allottees contend they may permissively intervene under Rule 24(b) for the sake of judicial economy and convenience. Id. Andeavor (whose subsidiary is Tesoro) strongly opposes the Allottees' intervention. Doc. No. 112. It argues, among other things, the underlying claims are drastically different given the Tesoro case is, at its core, about whether the federal government complied with the Administrative Procedure Act—not about whether the Allottees possess a federal common law claim for trespass. Id. Andeavor continues that the Allottees' potential intervention would "fundamentally change the character of Tesoro," and, in any event, they fail to satisfy the conditions for intervention under either Rule 24(a) or (b). Id. at p. 21. The Court agrees with Andeavor.

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[7] The Court further notes the Eighth Circuit in Chase highlighted the Allottees' "claims for damages and unjust enrichment for the pipeline's operation between 1993 and the easement's expiration in 2013 fail because a valid contract existed during that period." 12 F.4th at 869 n.2 (explaining this finding was "now law of the case").

[8] The Allottees have not filed a motion to intervene on the docket of Tesoro. See Tesoro, No. 1:21-cv-00090 (D.N.D. 2021). Although unconventional, the Court will address the motion to intervene filed here.

[¶70] The Allottees fail to meet the threshold requirements for intervention of right under Federal Rule of Civil Procedure 24(a).[9] A party seeking to intervene of right has two avenues to achieve its goal under Rule 24(a): (1) it must prove a federal statute has given it an "unconditional right to intervene"; or else, (2) the party must have an "interest relating to the property or transaction that is the subject of the action," and disposing of the other action without the interested party would "impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a). One exception to the second avenue is that intervention is improper if "existing parties adequately represent [the movant's] interest." Fed. R. Civ. P. 24(a)(2). The Allottees opt for the second method of intervention because they fail to identify any statutory right to intervene. Doc. No. 111, p. 3 n.1. Accordingly, the Allottees bear the burden of establishing: (a) they have "a recognized interest in the subject matter of the litigation; ([b]) the interest might be impaired by the disposition of the case; and ([c]) the interest will not be adequately protected by the existing parties." South Dakota ex rel. Barnett v. United States Dep't of Interior, 317 F.3d 783, 785 (8th Cir. 2003).

[¶71] Even assuming the Allottees satisfy the first two factors for intervention of right in the Tesoro action, they fail on the third because the United States adequately represents their interest in the litigation. See Fed. R. Civ. P. 24(a)(2). The United States is presumptively considered an adequate representative of its citizen's interests, including its citizens who are Indian. See, e.g., North Dakota ex rel. Stenehjem v. United States, 787 F.3d 918, 922 (8th Cir. 2015) ("The presumption of adequate representation by the United States can be overcome only by 'a strong showing of inadequate representation.'" (quoting Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 378 F.3d 774, 780 (8th Cir. 2004)). The Supreme Court has decried arguments to the contrary

[9] The Allottees apparently abandoned their claim to intervene of right in their reply. See Doc. No. 115 (arguing solely for permissive intervention). The Court will, however, address both avenues of intervention.

as "wholly untenable" because "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of [Indian allottees]." Heckman v. United States, 224 U.S. 413, 444 (1912) (holding the United States adequately represented the interests of Indian allottees in litigation concerning the allegedly illegal conveyances of allotted lands).[10]

[¶72] The Allottees have not defeated the presumption that the United States is an adequate representative of their interests because they have not shown their "interests actually differ from or conflict with the government's interests." South Dakota ex rel. Barnett, 317 F.3d at 786. Indeed, the Allottees highlight the United States, as their trustee, is asserting a trespass claim "on the same federal common law bases and [is seeking] the same remedies" as the Allottees. Doc. No. 115, p. 1 (categorizing the United States' claims as "materially indistinguishable" and "identical" to the Allottees' claims). Neither have they alleged or otherwise shown the United States has engaged in some "clear dereliction of duty" that might otherwise defeat the presumption of adequate representation. North Dakota ex rel. Stenehjem, 787 F.3d at 922 (quoting Chiglo v. Preston, 104 F.3d 185, 188 (8th Cir. 1997)). The Allottees' conclusory statement regarding the "BIA . . . not adequately represent[ing]" their interests cannot and does not overcome the strong presumption to the contrary. Doc. No. 111, p. 3 n.1. See also South Dakota ex rel. Barnett, 317 F.3d at 786.

[10] The Supreme Court in Heckman also instructed that when "United States itself undertakes to represent the allottees of lands under restriction, . . . such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property." Heckman, 224 U.S. at 446. Although this instruction from Heckman was not briefed by the Parties, it may serve as yet another basis to dismiss the Allottees' First Amended Complaint because the United States has brought a federal common law trespass claim related to the same property with similar, if not the same, facts. See Doc. No. 111 (recognizing "both cases involve the same questions of fact and law underlying Defendants' trespass of Plaintiffs' property, including the [BIA's] previous and pending decisions related to it," and "the BIA, as Plaintiffs' trustee, is also authorized to pursue trespass claims on Plaintiffs' behalf").

[¶73] Neither may the Allottees permissively intervene in the Tesoro action. Permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1) allows a court, upon a "timely motion," to permit "anyone to intervene" who either has a "conditional right" to do so pursuant to a federal statute or "a claim or defense that shares with the main action a common question of law or fact." The Court has significant discretion to allow or deny permissive intervention, even if the movant shares a question of law or fact with parties in the ongoing litigation. See South Dakota ex rel. Barnett, 317 F.3d at 787 ("The decision to grant or deny a motion for permissive intervention is wholly discretionary."). In making its decision, the district court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Additionally, although it may only play a "minor" role in the permissive intervention analysis, the Court should consider "the adequacy of protection afforded to the prospective intervenors by the existing defendants." H.J. Martin & Son, Inc. v. Ferrellgas, Inc., No. 1:20-cv-054, 2020 WL 6122525 (D.N.D. Oct. 16, 2020) (quoting Franconia Mins. (US) LLC v. United States, 319 F.R.D. 261, 266 (D. Minn. 2017)).

[¶74] The Allottees' request would serve to unduly delay and prejudice the Tesoro litigation. They seek to litigate the claim this Court has found they do not possess: whether individual Indian allottees possess a federal common law claim of trespass. Indeed, this is a claim the United States in the Tesoro action explicitly declined to defend and represented to not be "before [the Tesoro] Court." Tesoro, No. 1:21-cv-00090, ECF No. 62, p. 29 n.17 ("The United States does not, at this time, make any assertions about the Allottees' ability to raise a federal common-law trespass claim."). The United States made clear in Tesoro its alleged right to assert a federal common law trespass claim is distinct from the Allottees' alleged right. Id. at p. 29 ("[N]one of the cases cited involve claims by the United States in its sovereign capacity as property owner and trustee[.]").

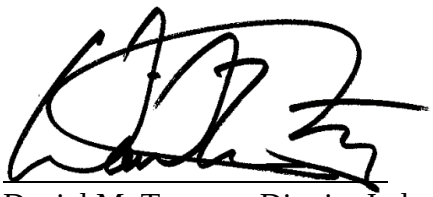
[¶75] Additionally, their intervention would sidetrack ongoing matters in the Tesoro case. Their proposed intervention would add months of time and expense due to them filing more briefs in an already prolonged case ripe for decision. Not to mention, the briefing would likely encompass matters unrelated to the litigation, such as class certification, and other issues the Allottees have expressed minor, if any, interest in (e.g., the claim pursuant to the Administrative Procedure Act upon which the case is built). Finally, the other matters about which the Allottees would seek to weigh-in on have already been adequately addressed by the United States on their behalf as trustee. See H.J. Martin & Son, Inc., 2020 WL 6122525 (explaining adequacy of representation by existing defendants may be a factor to consider for permissive intervention). In sum, the Allottees' permissive intervention is improper because it would add undue delay and expense to that litigation. The Court, in its discretion, denies the Allottees' request to permissively intervene. See Fed. R. Civ. P. 24(b).

CONCLUSION

[¶76] For the foregoing reasons, the Court **GRANTS, in part**, the Defendants' Amended Motion to Dismiss insofar as it seeks to dismiss the Allotees' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, the First Amended Complaint is dismissed with prejudice.

[¶77] **IT IS SO ORDERED.**

DATED August 8, 2023.



Daniel M. Traynor, District Judge
United States District Court