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.	§	

DEFENDANTS' AMENDED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND PROCEDURAL BACKGROUND 3

II. ARGUMENT AND AUTHORITIES 7

A. The Supreme Court Holds That Suits Concerning Lands Allocated to Individual Indians Do Not State Claims Arising Under the Laws of the United States 7

B. The Court Lacks Jurisdiction Under 28 U.S.C. § 1331 and 25 U.S.C. § 345 11

1. Relying on *Mottaz*, Circuit Courts, including the Eighth Circuit, Specifically Hold That Common Law Trespass Does Not State a Federal Claim Contemplated by 25 U.S.C. § 345, and Section 345 Cannot Serve as Grounds for Federal Question Jurisdiction Under 28 U.S.C. § 1331 13

2. *Marek v. Avista* Aptly Demonstrates Under Similar Facts Why Section 345 Does Not Provide Subject Matter Jurisdiction Here 16

C. The Court Also Lacks Jurisdiction Under The General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, and the Regulations Promulgated Under the Act 19

1. The *Marek* Court Aptly Describes Why the Right-of-Way Act and Its Regulations Do Not Create Arising Under Jurisdiction for Common Law Trespass 20

2. The General Right-of-Way Act Does Not Provide a Private Right of Action 21

III. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001)....21, 22

Arenas v. United States,
322 U.S. 419, 64 S.Ct. 1090, 88 L.Ed. 1363 (1944)....13

Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.,
551 F.3d 812 (8th Cir. 2009)....8

Chuska Energy Co. v. Mobil Expl. & Producing N. Am., Inc.,
854 F.2d 727 (5th Cir. 1988)....10

Frazier v. Turning Stone Casino,
254 F. Supp. 2d 295 (S.D. N.Y. 2003)....7

Fredericks v. Mandel,
650 F.2d 144 (8th Cir. 1981)....5

Freeman v. Fahey,
374 F.3d 663 (8th Cir. 2004)....22

Gully v. First Nat'l. Bank,
299 U.S. 109 (1936)....8, 9

K2 Am. Corp. v. Roland Oil & Gas, LLC,
653 F.3d 1024 (9th Cir. 2011)....7

U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.,
816 F.2d 1273 (8th Cir. 1987)....13, 14, 16, 18

Marek v. Avista Corp.,
No. CV04-493 N EJL, 2006 WL 449259 (D. Idaho Feb. 23, 2006)....16, 17, 18, 20, 21

Oneida County, N.Y. v. Oneida Indian Nation of New York State ("Oneida II"),
470 U.S. 226 (1985)....11, 19

Oneida Indian Nation of New York v. County of Oneida ("Oneida I"),
414 U.S. 661 (1974)....9, 10, 11, 18, 19, 21

Pinkham v. Lewiston Orchards Irr. Dist.,
862 F.2d 184 (9th Cir. 1988)....15, 16

Round Valley Indian Hous. Auth. v. Hunter,
907 F. Supp. 1343 (N.D. Cal. 1995)....7, 10

Scholder v. United States,
428 F.2d 1123 (9th Cir. 1970)....7, 13

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998)....8

Stewart v. Bernstein,
769 F.2d 1088 (5th Cir. 1985) 22

Taylor v. Anderson,
234 U.S. 74, 34 S. Ct. 724 (1914)....9, 10

United States v. Milner,
583 F.3d 1174 (9th Cir. 2009) 19

United States v. Mottaz,
476 U.S. 834 (1986)....7, 12, 13, 14

United States v. Pierce,
235 F.2d 885 (CA9 1956) 13

Univs. Research Ass'n, Inc. v. Coutu,
450 U.S. 754 (1981)....21

Weeks Constr., Inc. v. Oglala Sioux Housing Auth.,
797 F.2d 668 (8th Cir. 1986) 9

Wolfchild v. Redwood Cty.,
824 F.3d 761 (8th Cir.), *cert. denied sub nom.*, *Wolfchild v. Redwood Cty., Minn*., 137 S. Ct. 447 (2016) 10, 11, 19, 22

Rules and Statutes

25 U.S.C.

§§ 323-328 ....2, 17, 20, 21, 23
§ 345....8, 18, 20
§ 348....9

28 U.S.C.

§ 1331....1, 2, 8, 15, 23
§ 1349....10
§ 1353....2, 15, 23
§ 1360....6, 7, 10, 23

Cohen's Handbook of Federal Indian Law § 16.03(3)(c)
(Nell Jessup Newton ed., 2012) 11

Other Authorities

25 C.F.R.

§ 169..6, , 17, 20
§ 169.1..6
§ 169.9..23

Defendants, named as Andeavor Logistics, L.P., Andeavor, f/k/a Tesoro Corporation, Tesoro Logistics, GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company, LLC (collectively referred to herein as "**Defendants**"), refile this Amended Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(1) for Lack of Subject Matter Jurisdiction (*see* Doc. 43), as directed in the transfer order of the Western District of Texas.[1] The Court lacks subject matter jurisdiction to hear each of Plaintiffs' claims as alleged in the First Amended Class Action Complaint (Doc. 28) ("**FAC**" or "**Amended Complaint**") for the same reasons the Court lacked subject matter jurisdiction based on the original Complaint.[2] Docs. 1, 18. Plaintiffs' Amended Complaint continues to assert federal question jurisdiction, 28 U.S.C. § 1331, as the sole purported basis for the Court's subject matter jurisdiction in this action. *Id*, ¶ 64. However, none of Plaintiffs' asserted claims arise under any of the federal statutes or regulations cited by Plaintiffs (FAC, ¶¶ 64-66) and, therefore, the Court lacks subject matter jurisdiction. Plaintiffs' Amended Complaint purports to assert "Counts" for federal common law trespass[3] (Count I), breach of easement agreement as to the 1993 Easement[4] (Count II), unjust enrichment during the trespass

[1] In its Order dated July 10, 2019, wherein the Court in the Western District of Texas granted Defendants' motion to transfer this case to the District of North Dakota, and the Court denied Defendants' Amended Motion to Dismiss *without prejudice* to Defendants' refiling of the same upon transfer of the case to this Court. *See* Doc. 67. Because the Court granted Defendants' motion to transfer, and the Court—at Defendants' request (*see, e.g.,* Doc. 43, at 2-3 n. 2, and Doc. 67)—addressed that motion to transfer prior to addressing any of Defendants' motion to dismiss grounds, the Court in the Western District of Texas never reached or considered Defendants' motion to dismiss grounds. *Id*. Instead, the Court noted that the issues raised in the Amended Motion to Dismiss "are best addressed by the receiving court after the transfer." *Id*.

[2] Upon the filing of Defendants' original Motion to Dismiss (Docs. 17-21) that was directed at Plaintiffs' original Complaint, Plaintiffs filed a First Amended Complaint (Doc. 28); and therefore, Defendants subsequently filed their Amended Motion to Dismiss (Docs. 43-47).

[3] The multiple reasons why there is no federal question subject matter jurisdiction with respect to Plaintiffs' common law trespass claim are discussed in detail throughout this Motion.

[4] Plaintiffs do not assert any federal statute or regulation that creates federal question subject matter jurisdiction with respect to such breach of contract claim or otherwise assert how such claim arises under any federal law. FAC, ¶¶ 130-36. Because it does not. Instead, Plaintiffs seem to be

period– imposition of constructive trust[5] (Count III), and punitive damages[6] (Count IV). FAC, ¶¶ 121-49.

As demonstrated herein, none of the asserted Counts state a claim arising under 25 U.S.C. §§ 323-328 (General Right-of-Way Act of 1948), 345 (Actions for Allotments) or 28 U.S.C. §§ 1353 (the "recodification" of section 345's jurisdictional provision), 1360 (providing state civil jurisdiction in certain actions), and therefore, those statutes cannot serve as grounds for federal question jurisdiction under 28 U.S.C. § 1331 for any of Plaintiffs' claims. Nor do the federal regulations promulgated under the authority of the General Right-of-Way Act create a right of action in Plaintiff allottees or a basis for "arising under" federal question jurisdiction in this action. Indeed, none of Plaintiffs' causes of action "arise under" any federal law, but instead are simply based, if at all, on state common law. For example, Plaintiffs' claim of common law trespass is not based on any protection of federal law, but instead the common law of trespass which is available to any landowner under state law.

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attempting to assert a breach of contract claim based on the 1993 Easement. *See* Doc. 20-1 at Ex. D (copy of 1993 Easement); *see also* Doc. 20-1 at Ex. E. Of course, such claim fails for multiple reasons, not the least of which is that the United States—not Plaintiffs—is the party to the 1993 Easement. Regardless, such breach of contract claim clearly does not arise under federal law, but is instead simply based, if at all, on state common law. Of course, the breach of contract claim fails for other reasons as well. *See, e.g.,* concurrently filed memoranda (Docs. 75, 76, and 77).

[5] Similarly, Plaintiffs do not assert any federal statute or regulation that creates federal question subject matter jurisdiction with respect to such "unjust enrichment – imposition of constructive trust" "Count" or otherwise assert how such purported claim arises under any federal law. FAC, ¶¶ 137-45. Because it, too, does not. Such "Count" clearly does not arise under federal law, but is instead simply based, if at all, on state common law. Of course, such "Count" fails for other reasons as well. *See, e.g.,* concurrently filed memoranda (Docs. 75, 76, and 77).

[6] Similarly, Plaintiffs do not assert any federal statute or regulation that creates federal question subject matter jurisdiction with respect to such "punitive damages" "Count" or otherwise assert how such purported claim arises under any federal law. FAC, ¶¶ 146-49. Because it, too, does not. Such "Count" clearly does not arise under federal law, but is instead simply based, if at all, on state common law. Of course, such "Count" fails for other reasons as well. *See, e.g.,* concurrently filed memoranda (Docs. 75, 76, and 77).

Because Plaintiffs have already attempted to amend their Complaint and it still fails to confer upon this Court federal question subject matter jurisdiction, Plaintiffs should not be granted leave to further amend as it would be futile.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs, 48 individuals, filed their original Complaint on October 5, 2018, alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331, asserting that their action was based on "violation of the federal common law of trespass on Indian lands." Doc. 1, at ¶ 61. On January 4, 2019, Defendants filed a Motion to Dismiss, including pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction (*see* Docs. 17 and 18), demonstrating that there is no federal common law of trespass giving rise to federal question jurisdiction in this action. Recognizing the impending demise of their original Complaint due to the case-dispositive grounds raised in Defendants' Motion to Dismiss, on January 25, 2019, Plaintiffs filed their Amended Complaint. *See* Doc. 28. As in the original Complaint, Plaintiffs incorrectly maintain in the Amended Complaint that the Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action "arises from violations of the federal common law of trespass on Indian lands," with citation to additional statutes (and regulations promulgated thereunder)—none of which create any right of action or provide federal "arising under" subject matter jurisdiction in this lawsuit. FAC, ¶ 64.[7]

[7] By way of summary, paragraph 64 of the Amended Complaint purports to state the statutory basis for subject matter jurisdiction, "for violations of the federal common law of trespass on Indian lands," and paragraphs 65-66 presumably purport to explain (incorrectly) why Plaintiffs believe the statutes and regulations support federal jurisdiction—supposedly because, in addition to the original grant of allotment of land being made by the United States, the "ongoing guarantees and protections" afforded by the subsequent statutes and regulations cited support "arising under" jurisdiction for their common law claims. *See* FAC, ¶¶ 65-66 ("This action is not based only on the original grant of land rights by the United States to Plaintiffs' predecessors, but is premised on the ongoing guarantees and protections afforded… by the subsequent statutes and regulations promulgated by the federal government, which are enforceable separate and apart from state law" and which statutory and regulatory protections, according to Plaintiffs, "are subject to Federal laws"). But as demonstrated herein, ***none*** of the additional statutory provisions or regulations

In short, Plaintiffs have not asserted any basis for federal question subject matter jurisdiction for any of their asserted claims. The original Complaint did not, the Amended Complaint has not, and further amendment cannot.

Thus, apparently hoping that a quantity-over-quality approach might give the appearance of federal question subject matter jurisdiction, Plaintiffs have grasped to include cites to additional statutes and regulations in its Amended Complaint. However, the additional statutes and regulations likewise do not confer upon the individual Plaintiff allottees any right of action, and do not confer on this Court federal question subject matter jurisdiction. Therefore, the Amended Complaint fails for the same reasons as the original Complaint.

As demonstrated herein, the basis for dismissal of the Amended Complaint remains the same[8]—there is no federal common law of trespass to allotted Indian lands here giving rise to federal question jurisdiction, and each of the individual Plaintiffs' purported causes of action arise, if at all, under state law. The Amended Motion also addresses Plaintiffs' futile attempt to now rely on additional federal statutes, including the General Right-of-Way-Act of 1948 and the regulations promulgated thereunder at part 169 of Title 25 of the Code of Federal Regulations, but

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cited in the Amended Complaint create ***any*** enforceable private right in the individual Plaintiff allottees at all (they are directives to the Secretary of the Interior), and ***none*** are essential elements of Plaintiffs' claims or otherwise afford federal "arising under" subject matter jurisdiction here for common law trespass or any other of their asserted claims.

[8] Although the parties agreed that Defendants would re-file their Motion to Dismiss to address Plaintiffs' Amended Complaint, including for the convenience of the Court (*see* Docs. 29 and 30), the Amended Complaint changes nothing as it relates to the Court's lack of subject matter jurisdiction. If anything, the Amended Complaint strengthens Defendants' grounds for dismissal. In the interest of efficiency, Defendants are not re-filing the affidavit and exhibits that were filed with its original Motion to Dismiss and Memorandum in Support or its Amended Motion to Dismiss and Amended Memorandum in Support. Instead, this re-filed amended Motion hereby incorporates the affidavit and exhibits originally filed in connection with, and in support of, Defendants' original Motion to Dismiss and Defendants' Amended Motion to Dismiss, and Defendants will simply cite to such affidavits and exhibits already in the Court's record.

none of them creates any right of action or federal "arising under" subject matter jurisdiction for common law trespass (or otherwise). *See* FAC, ¶¶ 64-66.

All 48 Plaintiffs assert that they are beneficial surface interest owners[9] in one or more of 35 allotted tracts at the Fort Berthold Reservation in North Dakota, over which the pipeline crosses. Plaintiffs purport to sue individually and on behalf of a putative class of individuals who also hold or have held a beneficial surface interest in land held in trust by the United States within the Fort Berthold Reservation over which the pipeline runs.[10] The Amended Complaint alleges that since expiration of a pipeline easement in 1993, Defendants' pipeline has been trespassing on Plaintiffs' and the putative class members' individually allotted tracts. FAC, ¶ 122.

Plaintiffs purport to assert a claim for a continuing trespass allegedly based on "controlling federal statutes, regulations, and federal common law," and claim that Defendants have been "unjustly enriched" and the Court should therefore impose a constructive trust on the profits earned

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[9] For ease of reference, this Motion sometimes refers to Plaintiffs as "owners," "landowners," "beneficial owners," and the like. However, ownership is actually vested in the United States, in trust for the individual Indian allottees. *See e.g.*, *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981); *see also* FAC ¶ 2-3 (recognizing that the tracts at issue are held in trust by the United States for Plaintiffs' benefit).

[10] Another related putative class action lawsuit has been filed against the same Defendants, also in the United States District Court for the District of North Dakota. This lawsuit was brought by the former Chairman of the Three Affiliated Tribes, Tex Hall, and certain other individual allottees ("**Hall Lawsuit**"). *See* Affidavit of James R. Sanford (the "**Sanford Aff.**"), Exhibit 1 thereto), at ¶ 3, Ex. V (the "**Hall Complaint**"), which is part of the Court's record and filed with the original motion to dismiss, *see* Doc. 18-1. Plaintiffs in the Hall Lawsuit filed an Amended Complaint on January 8, 2019. *See* Ex. A hereto (a true and correct copy of the Hall Amended Complaint). The Hall Lawsuit likewise asserts claims for trespass, breach of contract, unjust enrichment, constructive trust, and punitive damages, as well as other purported claims. Defendants have already filed Rule 12(b) motions to dismiss in the Hall Lawsuit on March 29, 2019 (*See* Docs. 20-22 in the Hall Lawsuit) and the briefing on those motions is complete and before the court for consideration (*see* Docs. 34-35, Defendants' reply briefs in the Hall Lawsuit). Unlike Plaintiffs here, the Plaintiffs in the Hall Lawsuit also assert jurisdiction based on diversity of citizenship. Hall Amended Complaint ¶ 10.

by Defendants "as a result of their trespass," and award punitive damages. FAC, at ¶¶ 121-129; 144-145, 146-49.[11]

In the Amended Complaint, Plaintiffs purport to add an "alternative" claim for breach of the 1993 Easement granted to Defendants' predecessors by the United States (by and through the Bureau of Indian Affairs ("**BIA**")) by allegedly failing to "restore the land to its original condition" or "reclaim the land" pursuant to a BIA regulation. *Id*, at ¶¶ 130-36. But the administrative regulation (25 CFR 169.125(c)(5)(ix)) referenced by Plaintiffs is simply a guideline for the BIA as it relates to BIA's (not Plaintiff allottees') issuance, administration, and enforcement of right-of-way easements,[12] to which Plaintiffs are not even a party, and the regulation does not create any private right of action in Plaintiff allottees. In fact, the issue of holdover /renewal of the 1993 Easement is currently the subject of an ongoing administrative proceeding initiated by the BIA, the grantor party of the 1993 Easement and the party granted the authority under 25 CFR Part 169 and which has responsibility for the issue of renewal or non-renewal of the 1993 Easement.[13]

As the sole basis for subject matter jurisdiction in the Amended Complaint, Plaintiffs allege a federal question pursuant to 28 U.S.C. § 1331 based on "the federal common law of trespass," citing 25 U.S.C. §§ 323-328, 345, part 169, Title 25 of the Code of Federal Regulations, and 28 U.S.C. § 1360, which is a statute conferring state, not federal, court jurisdiction.[14] FAC, ¶ 64-66.

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[11] Plaintiffs purport to assert, as a separate "Count," "unjust enrichment – imposition of a constructive trust" in relation to profits during the alleged trespass period; however, this "claim" would fail even if the Court had subject matter jurisdiction (it does not). *See, e.g.,* Rule 12(b)(6) Amended Motion to Dismiss, filed concurrently herewith.

[12] *See generally* 25 C.F.R. § 169.1 (entitled "What is the purpose of this part?").

[13] *See generally* Amended Motion to Dismiss for Failure to Join a Required Party and Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies, filed concurrently herewith (Docs. 76 and 77).

[14] Indicative of Plaintiffs' desperation to try to create the appearance of federal question subject matter jurisdiction, Plaintiffs reference 28 U.S.C. 1360(b) in the Amended Complaint at ¶ 66, but

None of these statutory provisions or regulations create a federal cause of action, and section 345—the same basis for federal question jurisdiction cited in Plaintiffs' ill-fated original Complaint—is a jurisdictional statute for an action for an allotment, which does not apply here. Pursuant to the Supreme Court's holding in *United States v. Mottaz*, 476 U.S. 834, 845 (1986), and controlling Eighth Circuit authority interpreting it, 25 U.S.C, § 345 does not provide jurisdiction for this matter because this is not a suit seeking the issuance of an allotment, nor a suit involving rights of the Indian in his or her acquired allotment (such as a suit to recover title to the allotment after it was originally acquired). Instead, the gravamen of Plaintiffs' suit is simply a tort claim based on state common law of trespass, for which this Court lacks federal question jurisdiction, as demonstrated below.

II. ARGUMENT AND AUTHORITIES

A. The Supreme Court Holds That Suits Concerning Lands Allocated to Individual Indians Do Not State Claims Arising Under the Laws of the United States

Common law trespass does not "arise under" the federal statutes (or BIA regulations promulgated thereunder) that Plaintiffs cite as the alleged basis for federal question jurisdiction

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that statute confers ***state court jurisdiction***, and plainly creates no grounds for federal court jurisdiction and does not expand existing limits of federal jurisdiction and is, therefore, irrelevant here and requires no further discussion. *K2 Am. Corp. v. Roland Oil & Gas, LLC,* 653 F.3d 1024, 1028 (9th Cir. 2011) ("The district court correctly concluded that § 1360(b) limits the exercise of state jurisdiction; it does not confer jurisdiction on federal courts"); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 304 (S.D. N.Y. 2003) ("Both 28 U.S.C. § 1360 and 25 U.S.C. § 233 concern state court jurisdiction. Nothing in these statutes suggests that they create grounds for this Court to exercise federal question jurisdiction over this action or overrule the existing limits on federal jurisdiction."); *Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348-49 (N.D. Cal. 1995) (holding that 28 U.S.C. ¶ 1360(b) does not apply to suits involving the possessory rights of individual members of the tribe because the federal interest in protecting Indian trust land is not affected or implicated). *See also infra* n. 19. Plaintiffs also assert 28 U.S.C. § 1353, which is simply the "recodification" of section 25 U.S.C. § 345's jurisdictional provision, and is addressed in the cases discussed herein along with section 345. *See, e.g., Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970).

under 28 U.S.C. § 1331. *See* FAC, ¶ 64-66. Specifically, Plaintiffs allege that this Court has jurisdiction over a common law trespass claim under 25 U.S.C. §§ 323-328 (the General Right-of-Way Act of 1948),[15] 25 U.S.C. § 345 (Actions for Allotments) and 28 U.S.C. § 1353 (the recodification of section 345's jurisdictional provision).[16] But none of these statutes create a federal cause of action, and none are an essential element of Plaintiffs' common law trespass claim (or any other asserted claim). Therefore, there is no "arising under" federal subject matter jurisdiction in this case.

Jurisdiction must be established as a threshold matter. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). The burden of establishing federal jurisdiction rests on the party seeking the federal forum, in this case Plaintiffs. *See, e.g., Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009) (plaintiff bears the burden of establishing that the court has subject matter jurisdiction).

Section 1331 provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. For a case to "arise under" the Constitution, laws, or treaties of the United States within the meaning of 28 U.S.C. § 1331, ***a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action***. *Gully v. First Nat'l. Bank*, 299 U.S.

[15] The General Right-of-Way Act, however, was enacted to delegate authority to the Secretary of the Interior for the granting of rights-of-way and further provides that the Secretary of the Interior is authorized to prescribe all necessary regulations for the purpose of administering the provisions of sections 323 to 328 of title 25. *See generally* 25 U.S.C. §§ 323-328. Those regulations are published at part 169 of title 25 of the Code of Federal Regulations. As discussed more fully herein at section II.B & C, neither the Act nor the regulations create a federal cause of action in the allottees and cannot form the basis of federal question jurisdiction in this case. *See* FAC, ¶ 65 (alleging, incorrectly, that the statute and regulations are "enforceable [by Plaintiffs] separate and apart from state law").

[16] *See supra* n 14.

109, 112 (1936); *see Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 672 (8th Cir. 1986). Where the underlying right to possession of land arises under federal law, "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,***[17] ***the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for arising under jurisdiction merely to allege that ownership or possession is claimed under [Federal law].***" *Oneida Indian Nation of New York v. County of Oneida ("Oneida I")*, 414 U.S. 661, 675 (1974) (citations and internal quotations omitted) (emphasis added).

Here, Plaintiffs' trespass claim arises under state law, and Plaintiffs' jurisdictional allegation that the "present suit involves the possessory interests and rights of the allottees in their trust allotments secured by Act of Congress for which the United States, as title holder, has enacted continuing and ongoing protections" (FAC, ¶ 64) is facially insufficient to support federal question "arising under" jurisdiction, pursuant to the Supreme Court test articulated in *Oneida I*. *Oneida I*, 414 U.S. at 675; *see also Gully*, 299 U.S. at 112 (a right created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action). Here, like in *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724 (1914), Plaintiffs' suit concerns lands allotted to individual Indians, not tribal rights to lands,[18] which is an important distinction. *Oneida I* expressly affirmed

[17] Trust allotments are issued by "patent." 25 U.S.C. § 348 (current codification of The Dawes Act) ("Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause **patents to issue** therefor in the name of the allottees, which **patents** shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, **in trust** for the sole use and benefit of the Indian to whom such allotment shall have been made…") (emphasis added).

[18] *See, e.g.,* FAC, ¶ 6 ("Plaintiffs are each individual beneficial owners of surface interests in allotted land at the Fort Berthold Reservation, over which Defendants' Pipeline runs."), ¶ 6

Taylor v. Anderson's holding that suits concerning lands allocated to individual Indians do not state claims arising under the laws of the United States. *Oneida I*, 414 U.S. at 676.

In affirming dismissal of federal common law claims asserted by individual Native Americans concerning "lands allocated to individual Indians, not tribal rights to lands," the Eighth Circuit in *Wolfchild v. Redwood Cty.*, 824 F.3d 761, 767 (8th Cir.), *cert. denied sub nom.*, *Wolfchild v. Redwood Cty., Minn.*, 137 S. Ct. 447 (2016) specifically recognized and discussed this important distinction.[19] Indeed, the court expressly based its holding dismissing federal common law claims on the distinction between a tribe's aboriginal right of occupancy and lands allocated to individual Indians, finding that the individual Indian allottees there (like Plaintiffs here) had fundamentally

(referring to "allotted trust tracts"), ¶¶ 7-54 (asserting that each of the Plaintiffs and putative class members are individual members who own beneficial interests in individually allotted tracts), ¶ 64 (alleging that the present suit involves "rights of allottees in their trust allotments"), ¶ 70 (distinguishing between land allotted to individual Indians at issue here and tribally owned land), ¶ 79 (distinguishing the individually allotted tracts at issue here from the lands held in trust for the Tribe, and alleging that "consent was not obtained from a majority of the beneficial owners of the individually allotted tracts that the Pipeline crosses"), ¶ 86 (alleging that "the individual allotted interest holders" were not informed that the easements to operate the Pipeline across "Plaintiffs' land" had expired), ¶¶ 87-88 (alleging "the individual allottees" were not contacted to initiate negotiations, as distinguished from the Tribe), ¶ 90 (distinguishing between land owned by the Three Affiliated Tribes and "60 acres of land beneficially owned by members of the putative class, including Plaintiffs"), ¶¶ 102-120 (describing the putative class as individual owners of beneficial surface interests in allotted tracts), ¶ 124 (alleging "a continuing trespass upon Plaintiffs' land"), and ¶¶ 117-123 (seeking a constructive trust due to alleged trespass to "Plaintiffs' properties").

[19] *See also Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995) (dismissing for lack of subject matter jurisdiction, court holds "actions 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" and "[b]ecause the tribe's possessory interests are not implicated here, the federal interest in protecting Indian trust land is not affected. Based on the foregoing, state court is the proper place in which to adjudicate the present [eviction] action.") (citing *Taylor*, 234 U.S. at 74; *Chuska Energy Co. v. Mobil Expl. & Producing N. Am., Inc.*, 854 F.2d 727, 730 (5th Cir. 1988)). In its holding, the court in *Round Valley* specifically makes clear that 28 U.S.C. ¶ 1360(b), referenced in the Amended Complaint at ¶66, does not apply to suits involving the possessory rights of individual members of the tribe because the federal interest in protecting Indian trust land is not affected or implicated. *Id.* at 1349.

misinterpreted *Oneida I* and *II* in believing they as individual Indians had federal common law rights similar to a tribe:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. *Oneida II*, 470 U.S. at 229–30, 105 S. Ct. 1245, 84 L. See Cohen's Handbook of Federal Indian Law § 16.03(3)(c) (Nell Jessup Newton ed., 2012) Ed. 2d. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." *Id.* at 236, 105 S. Ct. 1245 (emphasis added). 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, 94 S. Ct. 772, 39 L. Ed. 2d (emphasis added). 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, 94 S. Ct 772.

Wolfchild, 824 F.3d at 767-68 (emphasis in original). The court in *Wolfchild* could not have been more clear. It is against this important Supreme Court backdrop that courts, including the Eighth Circuit, have long rejected the claim that common law trespass asserted by individual Indian allottees arises under federal law.

B. <u>The Court Lacks Jurisdiction Under 28 U.S.C. § 1331 and 25 U.S.C. § 345</u>

Plaintiffs, who are individual Indians, allege federal question jurisdiction because, they say, this "action arises from violations of the federal common law of trespass on Indian lands" pursuant to… 25 U.S.C. § 345." FAC, ¶ 64. But 25 U.S.C. § 345 is a jurisdictional statute, not a federal cause of action, and it does not provide jurisdiction in this case. Section 345 provides jurisdiction to district courts over certain limited suits involving the right to any allotment, but it does not create a federal cause of action for common law trespass. Section 345 provides, in pertinent part, as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been

> unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendants)....

The Supreme Court interpreted the scope of jurisdiction granted by section 345 in the widely cited case of *United States v. Mottaz*, 476 U.S. 834, 845 (1986). In that case, respondent owned an interest in three Indian allotments, title to which was held in trust by the United States. In 1954, the Government sold the allotments to the U.S. Forest Service despite lack of express consent from every person who held an interest in the allotments, resulting in the respondent filing suit against the United States in federal court, claiming jurisdiction under 25 U.S.C. § 345 and 28 U.S.C § 1331, among other statutes, and arguing that the sale of her interests was void, and that the property had been taken without just compensation. *Mottaz,* 476 U.S. at 836-38. The case made its way to the Supreme Court on the issue of whether the claims were barred by the statute of limitations applicable to claims against the United States, but the Supreme Court first noted that it must decide which, if any, of the statutes conferred jurisdiction on the district court in order to determine whether the suit was brought within the relevant time period. *Id.* at 841.

The respondent in *Mottaz* had sought to avoid the limitations period under the Quiet Title Act by characterizing her suit as a claim for an allotment under section 345 of the General Allotment Act of 1887, which grants jurisdiction to the district court over suits "involving the rights… to any allotment." *Id.* at 844 & n. 8. The Court disagreed, concluding that the "respondent cannot use § 345 for a quiet title action against the Government," and in doing so established the

limited parameters for section 345 jurisdiction that have since been widely cited and relied upon by lower courts. The Court held:

> Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. **Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment**, *see, e.g., Arenas v. United States*, 322 U.S. 419, 64 S.Ct. 1090, 88 L.Ed. 1363 (1944), **and suits involving "'the interests and rights of the Indian in his allotment or patent after he has acquired it,'"** *Scholder v. United States*, 428 F.2d 1123, 1129 (CA9), *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970), quoting *United States v. Pierce*, 235 F.2d 885, 889 (CA9 1956).

Mottaz, 476 U.S. at 845 (emphasis added). The Court also held that section 345 only waives governmental immunity for the former class of cases—"those seeking an original allotment." *Id.* at 846. Given that the respondent in *Mottaz* was not seeking the issuance of an original allotment, the court held the respondent must challenge the title of the United States under the Quiet Title Act, with a 12 year statute of limitations. *Id.*

Courts have long relied on the Supreme Court's analysis in *Oneida I* and *Mottaz* in refusing to allow an individual plaintiff's claim of common law trespass on Native American allotted property to proceed under the jurisdiction of section 345, as Plaintiffs allege here. In reaching that conclusion, courts, including the Eighth Circuit, hold that trespass claims related to an allotment already issued arise under state law, not federal law.

1. **Relying on *Mottaz,* Circuit Courts, including the Eighth Circuit, Specifically Hold That Common Law Trespass Does Not State a Federal Claim Contemplated by 25 U.S.C. § 345, and Section 345 Cannot Serve as Grounds for Federal Question Jurisdiction Under 28 U.S.C. § 1331**

The Eighth Circuit Court of Appeals, in *U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987), held that a complaint by the owner of an allotment seeking

relief for trespass to her allotment does not state a claim contemplated by section 345, and concluded that the statute could not be used as grounds for federal question jurisdiction. In that case, a member of the Turtle Mountain Band of Chippewa Indians and successor in title to an allotment held in trust by the United States within the Turtle Mountain Indian Reservation in North Dakota brought a trespass suit against the Turtle Mountain Housing Authority, a corporation created to provide low-income housing on the reservation. *Id.* at 1274-75. The defendant corporation had constructed housing units on the plaintiff's allotment without her required consent. *Id*. The district court dismissed the complaint for lack of subject matter jurisdiction, and the Eighth Circuit affirmed. *Id.*

As for federal question jurisdiction, the *Kishell* court held that plaintiff allottee's "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." *Id.* at 1275. As a basis for its decision, the court emphasized that "the Supreme Court has made it clear that section 345 contemplates two kinds of proceedings related to allotments over which federal district courts have jurisdiction: suits seeking the issuance of an allotment and suits involving 'the interests and rights of the Indian in his [sic] allotment or patent after he [sic] has acquired it.'" *Id.* (quoting *Mottaz*, 476 U.S. at 845). The court concluded that the individual allottee's trespass action did not seek the issuance of an original allotment, nor did it seek to recover title on behalf of the allottee's estate. *Id.*

Accordingly, the *Kishell* court held that a complaint seeking relief for trespass, like Plaintiffs' Complaint in the present suit, "does not state a claim contemplated by section 345, and that statute also cannot serve here as grounds for federal question jurisdiction." *Kishell*, 816 F.2d at 1275. For the same reasons that the Eighth Circuit found that the district court in *Kishell* lacked

subject matter jurisdiction over an individual allottee's claim of trespass on allotted land, this Court likewise lacks jurisdiction to hear Plaintiffs' trespass case.

In accord with and expressly relying on *Kishell*, the Ninth Circuit reached a similar result in *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184, 189 (9th Cir. 1988), affirming a district court's dismissal for lack of subject matter jurisdiction. In that case, enrolled members of the Nez Perce Tribe and the beneficial owners of an undivided share of allotted land held in trust by the United States on the Nez Pearce Indian Reservation brought a trespass action against the Lewiston Orchards Irrigation District for damages caused by the flooding of water onto their allotted land allegedly caused by the breaking of a canal owned by the United States and maintained by the irrigation district. *Id.* at 185.[20]

Just like Plaintiffs here, plaintiffs in *Pinkham* asserted federal subject matter jurisdiction under 28 U.S.C §§ 1331 and 1353 (the recodification of section 345's jurisdictional provision), and 25 U.S.C. § 345. *Pinkham*, 862 F.2d at 186. The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction under Federal Rule 12(b)(1). The plaintiffs argued on appeal that the district court had jurisdiction to hear an action brought by Indian allottees to protect their allotments. *Id.* They contended that the flooding had made portions of their allotment no longer usable for farming and pasture, thereby effectively denying or excluding them from their right to possess and use their trust allotment. *Id.*

The Ninth Circuit rejected plaintiffs' arguments, and after citing the relevant provisions of section 345, the court emphasized that the Supreme Court in *Mottaz* has interpreted those

[20] The plaintiffs also sued the United States, but the United States was later dismissed from the appeal (effectively disposing of a takings claim unless the irrigation district was a quasi-governmental entity, which plaintiffs did not allege). The complaint alleged trespass and gross negligence.

provisions to mean that district courts have subject-matter jurisdiction over just two types of cases: "suits seeking the issuance of an allotment ... and suits involving 'the interest and rights of the Indian in his allotment or patent after he has acquired it.'" *Id.* at 186 (quoting *Mottaz*). The issue in *Pinkham*, according to the court, was "whether the plaintiffs' allegations, which essentially amount to a tort, involve the interests and rights of the plaintiffs in their allotment after they acquired it, thereby giving rise to subject-matter jurisdiction under section 345." *Id.* The court held they did not. *Id*. The court held that section 345 did not give rise to subject matter jurisdiction because, as is the case here, damages caused by the irrigation district's alleged negligence and trespass simply sound in tort. *Id.* at 186-87. Therefore, "section 345, and its companion provision 28 U.S.C. § 1353, provide no subject-matter jurisdiction for such a tort claim." *Pinkham*, 862 F.2d at 188-89. In reaching its decision, the *Pinkham* court specifically cited to and relied on the Eighth Circuit's earlier decision in *Kishell,* holding that "a complaint seeking relief for trespass does not state a claim contemplated by section 345, and [therefore] cannot serve here as grounds for federal question jurisdiction." *Pinkham*, 862 F.2d at 188 n. 4 (citing and discussing *Kishell*, 816 F. 2d at 1275).

As in *Kishell* and *Pinkham*, Plaintiffs in the present case do not seek to protect or preserve the allotment that has been issued, such as a suit to recover title; instead, they seek damages caused by the alleged tortious invasion of their property interest—a trespass. *Kishell* and *Pinkham* hold that section 345 does not provide subject matter jurisdiction for this tort claim; a common law trespass claim arises, if at all, under state law.

2. ***Marek v. Avista* Aptly Demonstrates Under Similar Facts Why Section 345 Does Not Provide Subject Matter Jurisdiction Here**

Lack of jurisdiction here is aptly demonstrated by the district court's decision in *Marek v. Avista Corp*., No. CV04-493 N EJL, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006), a strikingly

analogous case that relies on *Mottaz, Kishell*, and *Pinkham* to hold that section 345 (28 U.S.C. § 1353) did not provide subject matter jurisdiction for a trespass claim by individual Native Americans against a transmission company as it related to trespass due to an expired right-of-way across their allotment, and that the trespass claim arises, if at all, under state law. Specifically, the plaintiffs in *Marek* were alleged to be part owners of an allotment upon which Avista Corporation ("Avista") and Clearwater Power Company each owned and operated transmission and distribution lines. *Id.* at *1. Plaintiffs claimed that Avista, the owner of the larger transmission line, had a right-of-way issued but it expired and was not properly renewed or extended. *Id.* As such, the plaintiffs alleged that the lines were trespassing on their land. Avista filed a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), which the court granted. *Id.*

Just as Plaintiffs have in the present case, plaintiffs in *Marek* cited various grounds for jurisdiction, including 25 U.S.C. § 345, 28 U.S.C. § 1331, and 28 U.S.C. § 1353, alleging that the relief sought was based upon federal statutes and the claims arose under federal law as provided in section 1331, and also arguing, as Plaintiffs argue here, that any rights-of-way granted to cross the allotment would have to meet the requirements of federal law and regulation.[21] *Id.* at *1-2. Avista argued that the plaintiffs' claims did not allege any violation of the Constitution, laws, or treaties of the United States to give rise to federal question jurisdiction, and instead asserted claims "based on state trespass law, not federal law." *Id.* at *2. The court agreed with Avista that plaintiffs did not assert "arising under" jurisdiction because for there to be federal question jurisdiction "a right or immunity created by the Constitution or laws of the United States must be an essential

[21] *See infra* at section II.C.1, for a further discussion of *Marek* and why the fact that rights-of-way have to meet the requirements of federal law and regulation (25 U.S.C. §§ 324-328 and part 169 of Title 25 of the Code of Federal Regulations) does not create "arising under" jurisdiction for a common law trespass claim.

element of the plaintiff's cause of action." *Id.* (quoting the Eight Circuit in *Kishell*, 816 F.2d at 1275).

The *Marek* court also quoted from the Supreme Court's landmark decision in *Oneida I*, discussed *supra*, for the proposition that even where the underlying right to possession of land arises under federal law, "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 [issued][22], the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for arising under jurisdiction merely to allege that ownership or possession is claimed under [Federal law]." *Id.* (quoting *Oneida I*, 414 U.S at 675).

The court then analyzed the plaintiffs' claimed jurisdiction under 25 U.S.C. § 345 and 28 U.S.C § 1353. *Id.* at *3-4. Having cited the standard applicable under *Mottaz*, discussed above, the *Marek* court found the trespass claim did not constitute a suit seeking the issuance of an allotment or a suit involving "the interest and rights of the Indian in his allotment or patent after he has acquired it." *Id.* at *4. The court's decision was "based upon the [trespass] claim itself and whether that claim raises the interests contemplated under § 345." *Id.* The court found 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." *Marek,* 2006 WL 449259, at *4.

Here, for the same reason as in *Marek*, the Court lacks subject matter jurisdiction because Plaintiffs' claims arise, if at all, under state law, namely common law trespass, available to any landowner.

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[22] Brackets /omitted text in original.

The Eighth Circuit's *Kishell* opinion, as well as the *Pinkham* and *Marek* courts opinions relying on it, likely explain Plaintiffs' unsuccessful efforts to avoid the proper venue for this case in North Dakota, which sits in the Eighth Circuit. Defendants urge the Court to follow the Supreme court's decisions in *Oneida I* and *Mottaz*, and to follow the well-reasoned decisions applying them in the Eighth Circuit, as the district court in *Marek* did, which requires dismissal.[23]

C. The Court Also Lacks Jurisdiction Under The General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, and the Regulations Promulgated Under the Act

In a desperate attempt to try to color its ill-fated original Complaint in a different light and try to overcome Defendants' original motion to dismiss based on lack of subject matter jurisdiction (Doc. 18), Plaintiffs' Amended Complaint adds a reference to the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328 (and to regulations promulgated under the statute at part 169 of Title 25 of the C.F.R.), an Act which affords no private right of action, but instead directs and grants

[23] Plaintiffs' prior briefing cited to the outlier and non-binding decision of the Tenth Circuit in *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1280, 1282 (10th Cir. 2010), but that case is distinguishable factually and procedurally, incorrectly interprets the Supreme Court's landmark decisions in *Oneida I* and *II,* and *Mottaz,* and improperly relies on *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009), a case that pre-dates *Mottaz* and did not even arise under section 345 and involved an action—not by individual Indian allottees—but instead by the **United States** on behalf of a **tribe**. This result is less surprising recognizing that the case came before the court on appeal of a motion for summary judgment, not jurisdiction, and the defendants simply conceded jurisdiction on appeal. *Nahno-Lopez*, 625 F.3d at 1282. Although the court correctly noted that section 345 is jurisdictional and does not itself create a cause of action, where the *Nahno-Lopez* court primarily went wrong was in its analysis of the common law trespass claim, incorrectly interpreting the *Oneida* cases and concluding that "Indian rights to a Congressional allotment are governed by federal—not state—law" thereby recognizing a federal common law trespass within the jurisdiction of section 345. *Id.* As recognized by the Eighth Circuit, *Oneida,* however, held that federal common law governs a ***tribe's*** action to vindicate ***aboriginal*** rights, but that the rule does not apply to possessory claims regarding "lands allotted to individual Indians," a distinction that the *Nahno-Lopez* court (but not the Eighth Circuit) appears to have missed. *See Oneida II,* 470 U.S. at 229-230; *Oneida I*, 414 U.S. at 676-77; *Wolfchild*, 824 F.3d at 767 (dismissing federal common law claims asserted by individual Native Americans concerning "lands allocated to individual Indians, not tribal rights to lands," and holding that under *Oneida I* and *II*, federal common law claims only 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.")(emphasis in original).

authority to the ***Secretary of the Interior*** on approval of rights-of-way across tribal and allotted lands, and further grants the Secretary the authority to prescribe regulations to carry out its provisions. Plaintiffs claim, incorrectly and without any support, that the "guarantees and protections" afforded by this Act and regulations promulgated thereunder create federal question jurisdiction for common law trespass. FAC, ¶¶ 64-66 (citing 25 U.S.C. §§ 324-328 and regulations at 25 CFR part 169). But as the court in *Marek* made clear, federal law guiding the issuance and renewal of rights-of-ways are not essential elements of a common law trespass claim and, therefore, do not support "arising under" subject matter jurisdiction. Indeed, because the Right-of-Way Act plainly does not provide a private remedy for these Plaintiffs, they cannot rely on it (or regulations promulgated under its authority) to support federal "arising under" subject matter jurisdiction here.

1. The *Marek* Court Aptly Describes Why the Right-of-Way Act and Its Regulations Do Not Create Arising Under Jurisdiction for Common Law Trespass

The *Marek* court rejected the same jurisdictional claim Plaintiffs make here as it relates to the alleged guarantees and protections afforded by the right-of-way grant and renewal process. Specifically, plaintiff allottees in *Marek* argued that their claims arose under federal law, in part, "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."[24] 2006 WL 449259, at *2. Rejecting this basis for federal question jurisdiction, and relying on *Oneida I*, the *Marek* court held 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. As for common law trespass, the claim "seeks

[24] The "federal law" related to the creation of allotments is 25 U.S.C § 345 (Actions for Allotments), and the "federal law" related to right-of-way granting and renewal is 25 U.S.C. §§ 323-328 (General Right-of-Way Act), which are the same statutory grounds relied on by Plaintiffs in this case. *See* FAC, ¶¶ 64-65.

remedies for the individuals as landowners not based on any grant, treaty or statute of federal origin," but on state law alone. *Marek*, 2006 WL 449259, at *2-3 (citing *Oneida I*, 414 U.S. at 675) ("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 [issued], the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts") (bracketed text in original).

Plaintiffs' common law trespass claim, like the trespass claim in *Marek* which similarly arose from an allegedly expired right-of-way across allotted Indian land, does not allege any violation of the Constitution, laws, or treaties of the United States to give rise to federal question jurisdiction, and instead asserts claims based on state trespass law, not federal law. Plaintiffs' claim is not based upon a specific protection of federal law "but, instead, the law of trespass which is available to any landowner." *Marek,* 2006 WL 449259, at *4.

2. **The General Right-of-Way Act Does Not Provide a Private Right of Action**

Indeed, the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, does not create a private right of action or remedy in the allottee landowners,[25] but instead provides for the delegation of authority to the Secretary of the Interior to grant rights-of-way for all purposes across lands held in trust by the United States for Indian tribes or individual Indians, and further authorizes the Secretary of the Interior to prescribe any necessary regulations for the purpose of administering the provisions. 25 U.S.C. §§ 323-328; *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (congressional intent to create a federal private remedy is manifested by the inclusion of "rights creating" language); *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981)

[25] *See* FAC, ¶ 65 (claiming, incorrectly, that the cited statutes and regulations "are enforceable" by Plaintiffs separate from state law).

(statutory provisions phrased as general commands to a federal agency are unlikely to give rise to a private remedy). There is no "rights creating" language in the Right-of-Way Act to support any federal claim in Plaintiff allottees; instead, the language grants certain authority to the Secretary of the Interior.[26] Accordingly, because the Act itself does not create a right of action, the regulations promulgated under the Act to guide the BIA in the approval process (part 169 of Title 25 of the Code of Federal Regulations) cannot create a right of action either. *Alexander*, 532 U.S. at 276 (a regulation cannot conjure up a private cause of action that has not been authorized by Congress); *Freeman v. Fahey*, 374 F.3d 663, 665 n. 2 (8th Cir. 2004) (regulations cannot create a private right of action because regulations may not create a right that Congress has not) (citing *Alexander*); *Stewart v. Bernstein*, 769 F.2d 1088, 1093 n. 6 (5th Cir. 1985) ("federal regulations cannot themselves create a cause of action; this is a job for the legislature").[27] Therefore, neither

[26] *See also Wolfchild*, 824 F.3d at 778-79 (in holding that the Act of 1863, which set apart eighty acres to each individual Sioux, did not create a private remedy to individual loyal Mdewakanton, the court found that although "Congress intended to benefit the loyal Mdewakanton when it passed Section 9 of the 1863 Act, the statute does not contain "rights-creating language" and instead "the statutory language focuses on steps the Secretary of the Interior could take to provide land to the loyal Mdewakanton, but does not create any specific rights for the loyal Mdewakanton") (citing *Alexander*, 532 U.S. at 286–87).

[27] Referencing 25 CFR 169.125(c)(5)(ix), Plaintiffs purport to assert an "alternative" breach of easement claim for Defendants' alleged failure to restore land to its original condition upon cancellation or termination of a right-of-way. *See* FAC, ¶¶ 130-136. However, as stated previously, Plaintiffs do not assert any federal statute or regulation that creates federal question subject matter jurisdiction with respect to such breach of contract claim or otherwise assert how such claim arises under any federal law. 25 CFR 169.125(c)(5)(ix) is simply a regulation promulgated to guide the BIA, and for the reasons stated above that regulation does not create a private right of action in the Plaintiff allottee landowners. Plaintiffs' purported breach of easement claim is simply based, if at all, on state breach of contract common law. Moreover, as to the alleged holdover of Defendants beyond the expiration of the term of the Easement and any duty to restore the land if a renewal is not issued, that issue is currently and squarely the subject of an ongoing administrative proceeding initiated by the BIA in accordance with the BIA regulations. *See* Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies, filed concurrently herewith (Doc. 77). Furthermore, Plaintiffs are not parties to the Easement, and therefore have no standing to assert breach. *See* Rule 12(b)(6) Amended Motion to Dismiss, filed concurrently herewith (Doc. 75).

the Act nor the regulations promulgated under the Act support "arising under" federal subject matter jurisdiction for common law trespass (or any other asserted claims) here.[28]

III. CONCLUSION

Plaintiffs, individuals who allege to own beneficial interests in allotted land in the Fort Berthold Reservation in North Dakota, assert federal question subject matter jurisdiction based on a common law trespass claim against Defendants. Plaintiffs' common law trespass claim (and all other claims attempted to be asserted in the Amended Complaint) arises under state law, not federal common law. For all of the reasons stated above, 25 U.S.C. §§ 323-328, 345 and 28 U.S.C. §§ 1331, 1353, and 1360(b) do not support subject matter jurisdiction in this case, the only bases for jurisdiction asserted by Plaintiffs in the Complaint. Therefore, the Court should dismiss the case for lack of jurisdiction over the subject matter pursuant to Federal Rule of Civil Procedure 12(b)(1).

[28] Plaintiffs' reference in the Amended Complaint to 25 CFR § 169.9 (FAC, ¶ 66) is equally misplaced. As stated above, the regulations do not (and cannot) create a cause of action, nor is that provision an essential element of any of Plaintiffs' claims. Instead, 25 CFR § 169.9 merely clarifies that the granting of rights-of-way by the United States under the authority of 25 U.S.C. §§ 323-328 are "subject to" applicable federal laws. 25 CFR 169.9 ("rights-of-way approved under this part: (a) Are subject to all applicable Federal laws"). In other words, it is a directive to the BIA that all rights-of-way approved by the BIA under 25 U.S.C § 324 cannot violate (are "subject to") any other applicable federal law (*i.e.,* reflecting the Secretary of the Interior's understanding that Congress intended the Right-of-Way Act to coexist with other applicable federal statutes). It affords no rights or authority to individual Native American allottees to sue in trespass (or otherwise) under federal law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 7, 2019, 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).

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