**UNITED STATES DISTRICT COURT**
**DISTRICT OF NORTH DAKOTA (WESTERN)**

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| **JOANN CHASE ET AL.,** | § | |
| | § | |
| **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.** | § | **Civil Action No. 1:19-cv-00143-DLH-CRH** |
| | § | |
| **Defendants.** | § | |

**AMENDED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(7) FOR FAILURE TO JOIN A PARTY REQUIRED UNDER RULE 19**

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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 "**Defendants**"), refile this Amended Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(7) for Failure to Join a Party Required Under Rule 19 ("**Motion**") (*see* Doc. 73).[1] As shown below, the Court should dismiss this case because the United States is a required party that has not and cannot be joined here, and this case cannot, in equity and good conscience, proceed in its absence. Fed. R. Civ. P. 19.

Plaintiffs have already amended their Complaint. *See* Plaintiffs' First Amended Class Action Complaint (Doc. 28) (the "**Amended Complaint**" or "**FAC**"). Because their amendments serve only to further bolster the need to dismiss this lawsuit because the United States is a required party that has not and cannot be joined here, Plaintiffs should not be granted leave to further amend as it would be futile.

## INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs are 48 individuals who claim to be enrolled members of the Three Affiliated Tribes and owners of beneficial interests in allotments within the Fort Berthold Reservation, held in trust by the United States. Plaintiffs brought this suit alleging that Defendants have, since 1993, trespassed on Plaintiffs' allotted tracts by maintaining and operating a crude oil pipeline on those tracts without their consent. To allege trespass dating to 1993, Plaintiffs contend that a pipeline

[1] Defendants file this Motion concurrently with their Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74), Amended Rule 12(b)(6) Motion to Dismiss (Doc. 75), and Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies and Lack of Primary Jurisdiction (Doc. 77). Out of an abundance of caution and to avoid any argument that Defendants' additional independent grounds of dismissal should not be considered at the outset of this lawsuit, in the unlikely event that (1) jurisdiction is found to exist, and (2) it is found that Plaintiffs have asserted a legally cognizable claim, this Motion provides alternative, additional grounds to dismiss Plaintiffs' lawsuit.

easement issued by the Bureau of Indian Affairs ("**BIA**") for Plaintiffs' tracts covering the period 1993 to 2013 (the "**1993 Easement**") was invalid and "void *ab initio*."

On January 4, 2019, Defendants filed a Motion to Dismiss, including pursuant to Rule 12(b)(7) for failure to join a required party under Rule 19 (*see* Docs. 17 and 20), demonstrating that this lawsuit should be dismissed because the United States is a required party that has not and cannot be joined here, and this case cannot, in equity and good conscience, proceed in its absence. Recognizing the impending demise of their original Complaint due to the case-dispositive grounds raised in Defendants' Motion to Dismiss, Plaintiffs filed an Amended Complaint on January 25, 2019, in hopes of finding a way to escape dismissal.

However, the effect of Plaintiffs' amendments is exactly the opposite—the amendments provide ***additional*** reasons why the United States is a required party and this case must be dismissed. For example, Plaintiffs add an alternative "Count" alleging breach of the 1993 Easement. However, it is the United States (acting by and through the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs)—not Plaintiffs—that is the grantor of the 1993 Easement. *See, e.g.*, FAC ¶¶ 77 (alleging the 1993 Easement was renewed ***by the BIA***[2]), 130-36 (asserting a cause of action for breach of the 1993 Easement); *see also* Affidavit of James R. Sanford (the "**Sanford Aff.**") (Doc. 20-1), Ex. D (copy of 1993 Easement). To the extent any party is entitled to assert a claim for breach of the 1993 Easement, it is the United States, the grantor of the 1993 Easement; and clearly no such claim should proceed in its absence.

[2] Plaintiffs allege that the original 20-year easement for the pipeline was granted by the BIA in 1953, and the pipeline was built shortly thereafter. FAC ¶ 72. The easement was renewed by the BIA in 1973 for another 20-year term. FAC ¶ 77. Plaintiffs allege that, in 1995, the BIA "purported to approve" renewed easements for the pipeline "effective retroactively from June 18, 1993 and continuing through June 18, 2013." FAC ¶ 78. However, Plaintiffs allege that the 1993 Easement was wrongfully issued by the BIA, and therefore, "void *ab initio*." FAC ¶ 79.

Plaintiffs also now seek injunctive relief, specifically removal of the pipeline, including under their purported breach of easement agreement "Count." *See, e.g.*, FAC ¶¶ 129, 136. But Plaintiffs' attempt to obtain this relief brings them into direct conflict with the United States—specifically, the BIA—which, as trustee of the Indian lands, has the sole authority and discretion to determine (i) whether to treat Defendant's pipeline as being in trespass under applicable law, and (ii) if so, what actions to take and remedies, if any, to pursue on behalf of the Indian landowners based on what is in the best interest of all Indian landowners. *See* 25 C.F.R. § 169.410. In fact, the BIA has initiated administrative proceedings to address the allegations of trespass regarding Defendant's pipeline. By this lawsuit, Plaintiffs—a small self-appointed group that claims to own but tiny fractions of the overall beneficial interests in the tracts at issue[3]—seek to usurp the BIA's role and decide for all other Indian landowners (and the United States itself) what action to take and what remedies to seek. Plaintiffs simply cannot do this. They certainly cannot do it in the complete absence of the United States, the grantor of the 1993 Easement and the trustee representing the individual Indian beneficial interest owners.

In short, Plaintiffs' amendments provide ***additional*** reasons why the United States is a required party and this case must be dismissed.

Following the filing of Plaintiffs' Amended Complaint, and while this case was still pending in the Western District of Texas, Defendants filed an Amended Motion to Dismiss

[3] According to their declarations, none of the five Plaintiffs who seek to be appointed class representatives claims a beneficial interest in more than one of the 35-plus tracts allegedly at issue. *See* Doc. 40, at Ex. G, and Doc. 40-1, at Exs. H-J (declarations). In fact, one of these Plaintiffs, Margo Bean, only claims a beneficial interest of ***0.00833% in one of the tracts***, and another, Eunice White Owl, only claims a beneficial interest of ***2.0408% in another***. Doc. 40-1, at Exs. J (Bean Declaration) and I (Owl Declaration). According to Bean's Declaration, "at least" 60 other beneficiaries own the remaining 99.167% of just the one tract that she claims an interest in. *Id.* Plaintiffs allege there are more than 35 tracts affected. FAC ¶ 104.

directed to the new complaint. *See* Docs. 43-47. The Texas court never reached the Amended Motion to Dismiss, as it elected to consider transfer first, and, upon deciding that transfer was appropriate, further concluded that the remaining motions pending before it were "best addressed by the receiving court after the transfer." Doc. 67 at 5-6, 21-22. The Texas court denied Defendants' Amended Motion to Dismiss without prejudice to refiling here. *Id.* at 21-22.

Now that the case has been transferred, and in accordance with the schedule adopted by this Court (Doc. 70), Defendants file this Motion directed to Plaintiffs' Amended Complaint.[4]

## FACTUAL AND LEGAL BACKGROUND

Plaintiffs are 48 individuals who allege they are enrolled members of the Three Affiliated Tribes and owners[5] of beneficial interests in allotments within the Fort Berthold Reservation. FAC ¶¶ 1-3, 6-54. Plaintiffs allege that the pipeline at issue has been in trespass on their allotted tracts since a right-of-way easement granted by the BIA expired in 1993—or, alternatively, since 2013 "if the 1993 Easement is determined to be valid." *See* FAC ¶¶ 2, 71, 96, 98-99, 134. On behalf of themselves and a putative class of all other owners of beneficial interests in allotted tracts the pipeline crosses, Plaintiffs purport to assert "Counts" for trespass (Count I), breach of the 1993 Easement Agreement (if it is "determined to be valid") for failure to remove the pipeline and restore the land upon the easement's expiration (Count II), unjust enrichment—imposition of

[4] In the interest of efficiency and because nothing in the Amended Complaint requires any further proof from Defendants, Defendants are not re-filing the affidavit and exhibits that were filed with their original Motion to Dismiss and Memorandum in Support. Instead, this Motion simply hereby incorporates and cites to the affidavit and exhibits originally filed and already in the Court's record. *See* Doc. 20-1.

[5] 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).

constructive trust as to the alleged trespass period (Count III), and punitive damages (Count IV). FAC ¶¶ 55, 121-49. For these purported claims, Plaintiffs seek damages and other relief, including an injunction requiring Defendants to remove the pipeline from the allotted tracts. FAC ¶¶ 126-29, 135-36, 139, 145-49.

At the present time, the issue of whether the pipeline is in trespass, and if so, what actions or remedies to pursue, is squarely before the BIA as part of an ongoing administrative proceeding undertaken in accordance with BIA regulations.

## I. The United States Holds the Subject Lands in Trust and Is Responsible for Granting Rights-of-Way Over and Across Them.

As Plaintiffs acknowledge, they are ***beneficial*** owners of the allotments at issue. *See, e.g.*, FAC ¶¶ 2, 3, 6. The federal government of the United States is the actual fee title owner and holds the lands in trust for the individual Indians. *See e.g.*, *Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981). In this capacity, the federal government, acting through the BIA, is responsible for approving and issuing rights-of-way over and across allotted lands. *See* 25 U.S.C. § 323 ("The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ."). Certain statutory requirements circumscribe the BIA's ability to grant a right-of-way in some instances. *Id.* § 324.

The BIA's right-of-way regulations appear at 25 C.F.R. Part 169. Responsibility for investigating compliance with rights-of-way is expressly delegated by Congress to the BIA, not individual beneficial Indian landowners. 25 C.F.R. § 169.402 (prescribing investigative authority only to the BIA and the tribe). If an individual beneficial Indian landowner suspects a right-of-way has been violated, he or she is to notify the BIA, which will "initiate an appropriate investigation." 25 C.F.R. § 169.402(a)(1). The regulations permit the Indian landowners to

***negotiate*** remedies with respect to right-of-way violations, 25 C.F.R. § 169.403(b), but ultimately it is up to the BIA to decide what to do about a violation of a right-of-way, *see* 25 C.F.R. § 169.404.

## II. Plaintiffs Allege That the United States Wrongfully Granted Defendants a Pipeline Easement for the Period Beginning in 1993.

The pipeline at issue was constructed some 65 years ago, pursuant to an easement duly approved and granted by the BIA on September 18, 1953. FAC ¶ 72. The original easement had a term of 20 years. The BIA renewed this easement for another term of 20 years on June 18, 1973 (the "**1973 Easement**"). *See* FAC ¶ 77.

Significantly, as to the 1993 Easement, Plaintiffs allege that in February 1995, the BIA "purported to approve" renewal of the easements for the pipeline "effective retroactively from June 18, 1993 and continuing through June 18, 2013." FAC ¶ 78; *see also* Sanford Aff. (Doc. 20-1) ¶ 6, Ex. D (copy of 1993 Easement). While they acknowledge the existence of the 1993 Easement, Plaintiffs challenge its validity. Plaintiffs claim this easement was "void *ab initio*" as to the individual allotments "because consent was not obtained from a majority of the beneficial owners of" those tracts. FAC at ¶ 79. Thus, Plaintiffs assert that ***the BIA wrongfully issued the 1993 Easement***. Indeed, this allegation of governmental wrongdoing is the very premise for Plaintiffs' claim that "the Pipeline has been in trespass since 1993." FAC ¶ 122.

## III. The United States, as Trustee, Is the One That Must Determine Whether to Treat Alleged Holdover Possession as a Trespass.

Plaintiffs also claim trespass for the period since June 2013, when Plaintiffs allege that the 1993 Easement expired by its own terms. While maintaining their position that the 1993 Easement was "void *ab initio*," Plaintiffs contend that Defendants made no attempt to renew that easement. FAC ¶ 84. Thus, Plaintiffs allege that since 2013, Defendants have "willfully maintain[ed] and operate[d] the Pipeline across Plaintiffs' property in violation of law." FAC ¶ 98.

Whether the pipeline constitutes a trespass is not for Plaintiffs to say, however. Plaintiffs' complaint of trespass is, in reality, a complaint of "holdover" possession, which occurs when a grantee retains possession after expiration of a right-of-way.[6] Significantly, the pertinent regulations provide that ***the BIA***, as trustee, is empowered to determine how and whether to proceed in the case of a holdover possession involving Indian lands:

> If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way, and is not accessing the land to perform reclamation or other remaining grant obligations, we may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action. The holdover time will be charged against the new term.

25 C.F.R. § 169.410. As the foregoing states, the BIA, in consultation with the Indian landowners, makes "the determination" of whether to treat holdover possession as a trespass, and if so, what actions or remedies to pursue on behalf of all of the Indian landowners. *Id.*

Here, the BIA has been actively engaged in exactly this process of deciding whether to treat the matter as a trespass. On January 30, 2018, for example, the Superintendent of the BIA's Fort Berthold Agency issued a "10-Day Show-Cause" letter to Tesoro High Plains requesting that Tesoro High Plains show cause why its pipeline was not in trespass. Sanford Aff. (Doc. 20-1) ¶ 21, Ex. N. Therein, the BIA's Superintendent stated that "[t]he Fort Berthold Agency (FBA) is responsible for investigating and responding to allegations of trespass, assessing penalties, and

[6] Plaintiffs challenge the validity of the 1993 Easement, but they are still alleging holdover possession because they acknowledge the pipeline was constructed pursuant to an easement that, with one renewal, lasted until June 1993. Indeed, Plaintiffs are alleging holdover possession as to both the 1973 Easement and the 1993 Easement—a holdover of the 1973 Easement as a result of the BIA improperly granting the renewal in 1993, and if the 1993 Easement was not "void *ab initio*," a holdover of the 1993 Easement due to it not being renewed in 2013.

ensuring that the trespasser rehabilitates the damaged land at his expense." *Id.* Superintendent Danks further noted that the FBA had not yet made a "final determination of trespass," but indicated that if Tesoro "fail[ed] to show-cause," the FBA "would proceed with Notice of Trespass, which will include: (a) corrective actions that must be taken, (b) timeframes for taking corrective actions, and (c) potential consequences and penalties for failure to take corrective actions." *Id.*

## IV. The United States Has Deferred Making a Final Determination as to Trespass to Allow, Among Other Things, Negotiations with Indian Landowners to Proceed.

By letter dated February 7, 2018, Defendant Tesoro High Plains responded to the show-cause letter, informing the BIA that "Tesoro is currently engaged in good-faith negotiations with the landowners to obtain their consent to a new right-of-way." *Id.* ¶ 22, Ex. O. The letter also detailed various other actions Tesoro High Plains had taken in connection with renewal of the right-of-way. *Id.* These included reaching agreement with the Three Affiliated Tribes as to a "new right-of-way over tribal lands and tribal interests in allotted lands." *Id.*

On April 10, 2018, the BIA sent each of the individual Indian allottees a letter to update them on the status of the holdover issue. *Id.* at ¶ 23, Ex. P. The April 10 letter enclosed a copy of Tesoro High Plains' February 7 response to the show-cause letter, and asked each allottee to notify the BIA in writing within 45 days if he or she was engaged in good faith negotiations for a new right-of-way, as that information would allow the BIA to "proceed with our determination" of whether to treat the holdover possession as a trespass. *Id.* In requesting the information, the BIA Superintendent noted the pertinent regulation's proviso indicating the BIA will ***not*** take action to recover possession or pursue other remedies "if the parties have notified us in writing that they are engaged in good faith negotiations to renew or obtain a new right-of-way," 25 C.F.R. § 169.410. *See* Sanford Aff. (Doc. 20-1) ¶ 23, Ex. P. Indeed, Superintendent Danks advised that if the BIA

did not receive written notices of good faith negotiations, the BIA "**may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action**." *Id*. (bolded emphasis in original; underline supplied).

On or about May 21, 2018, the BIA sent another letter to the individual allottees, this time to forward them information it had received from the Three Affiliated Tribes as to the "Tribe's negotiated compensation for right-of-way renewal of Tesoro's existing pipeline." *Id.* ¶ 25, Ex. R. The letter also extended the recommended response date for reporting good faith negotiations to July 31, 2018. *Id*.

In response to the above-described communications, numerous Indian landowners have notified the BIA in writing that they are indeed engaged in good faith negotiations with Tesoro High Plains concerning right-of-way renewal. *Id.* ¶¶ 24-28, Exs. Q, U. In fact, counsel for the Plaintiffs in this lawsuit provided just such a notice to the BIA. *Id.* ¶ 24, Ex. Q. In a letter dated May 14, 2018, Plaintiffs' counsel informed the BIA that 37 of the plaintiffs named in this lawsuit were engaged in negotiations with Tesoro High Plains, and stated, in accordance with 25 C.F.R. § 169.410, that ***"[b]ecause the landowners are in negotiations, the BIA should not take action to recover possession on behalf of or seek remedies affecting these landowners in relation to the trespassing pipeline***." *Id.* ¶ 24, Ex. Q (emphasis added). Now, through this lawsuit and in direct contradiction of the very process that Plaintiffs have invoked, Plaintiffs improperly seek to remove the pipeline and recover damages, even though other individual allottees are still in negotiations and the BIA's administrative process continues. *See, e.g.*, FAC, ¶ 125, 129. Other individual allottees who are not parties to this lawsuit have also notified the BIA in writing that they are in good faith negotiations with Tesoro High Plains. Sanford Aff. (Doc. 20-1) ¶ 28, Ex. U.

By letter dated July 26, 2018, Tesoro High Plains updated the BIA as to the progress of negotiations and communicated its intent to continue working diligently to achieve a negotiated resolution with all affected landowners. *Id.* ¶ 26, Ex. S.

To facilitate the negotiations, and in coordination with the BIA, appraisals were commissioned with respect to the allotted tracts over which the pipeline runs. *Id.* ¶ 29. These appraisals were provided to the BIA in 2014, and voluntarily updated and submitted again in 2016 and 2018. *Id.* The appraisals are pending further work and review by the Department of the Interior's Appraisal and Valuation Services Office ("**AVSO**").[7] *Id.* Upon completion of that work and review, the AVSO is expected to render an opinion as to appraisals of the allotted tracts. *Id.* On July 30, 2018, the BIA sent a letter to the individual allottees informing them, among other things, that the AVSO was in the process of reviewing the appraisals submitted. *Id.* ¶ 27, Ex. T.

With good faith negotiations ongoing and review of the appraisals pending, the BIA has deferred any determination of whether to treat Defendant's possession as a trespass and is holding in abeyance any further action in connection with its January 30, 2018 show-cause letter. *Id.* ¶ 30.

## V. Through Their Amended Complaint, Plaintiffs—Who Are Not Parties to the 1993 Easement Agreement—Have Now Added a Claim for Breach of the Easement Agreement, But It Is the United States, as Grantor Under That Agreement and Trustee, Who Is the Proper Party to Any Such Claim.

In their Amended Complaint, Plaintiffs added a "Count" for Breach of Easement Agreement. However, it is the United States (acting by and through the BIA)—not Plaintiffs—that is the grantor of the 1993 Easement. *See, e.g.*, FAC ¶¶ 77 (alleging the 1993 Easement was

[7] Indeed, Plaintiffs have also recently tried to interfere with these ongoing appraisals being conducted in connection with the BIA right-of-way negotiation and renewal process, which demonstrates not only the ongoing nature of the process and those negotiations with other Indian landowners but also the Plaintiffs' improper attempts through this lawsuit to usurp the BIA's role and decide for all other Indian landowners (and the United States itself) what action to take and remedies to seek. *See* Ex. A hereto.

renewed ***by the BIA***), 130-36 (asserting a cause of action for breach of the 1993 Easement); *see also* Sanford Aff. (Doc. 20-1), Ex. D (copy of 1993 Easement, of which the United States of America, acting by and through the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, Department of the Interior, New Town, North Dakota, is the "Grantor"). Plaintiffs improperly seek to pursue this breach of agreement claim in the complete absence of the United States—the "Grantor" under the 1993 Easement and the party that serves as Plaintiffs' trustee. *Id*.

## VI. Through Their Amended Complaint, Plaintiffs Now Seek Injunctive Relief, Including Removal of the Pipeline, in Direct Conflict with the BIA's Legally-Mandated Role as Trustee and the BIA's Ongoing Administrative Proceedings.

In their Amended Complaint, Plaintiffs now also seek injunctive relief, including removal of the pipeline. FAC ¶¶ 129, 136. Such injunctive relief and removal of a pipeline that has been in use and generating income for the individual allottees for over 65 years is an extraordinary remedy in its own right, but even more so here when (i) such relief would be in direct conflict with the BIA's legally-mandated role as trustee and the administrative proceedings that the BIA has initiated under its regulations that are in place to handle this very situation, and for which the BIA has been delegated sole authority (*see* 25 C.F.R. § 169.410), and (ii) it is being sought by a small self-appointed group that owns but tiny fractions of the overall beneficial interests in the tracts.

In connection with the ongoing administrative proceedings, it is the United States, acting through the BIA, that determines (i) whether to treat the matter as a trespass under applicable law, and (ii) if so, what actions to take and remedies, if any, to pursue on behalf of the Indian landowners based on what is in the best interest of all Indian landowners. 25 C.F.R. § 169.410. Given the BIA's actions to date, the United States apparently prefers to allow a negotiated resolution that will include the pipeline remaining in operation. Certainly, that is what other Indian landowners who are presently engaged in good faith negotiations with Tesoro High Plains prefer—which is not surprising since, according to the Department of the Interior and Plaintiffs themselves, it is

"difficult, if not impossible, to use the land for any beneficial purpose." *See* Sanford Aff. (Doc. 20-1) ¶ 28, Ex. U.; *see also* FAC ¶ 105 (citing the Department of the Interior).

Yet, here, this small self-appointed group of Plaintiffs (in which two of the proposed class representatives only claim a beneficial interest of ***0.00833% in one of the tracts*** and ***2.0408% in another***, respectively) seeks relief in this lawsuit requiring removal of the pipeline from all of the affected tracts. FAC, ¶¶ 129, 136; *see* Doc. 40, at Ex. G, and Doc. 40-1, at Exs. H-J (declarations). If this lawsuit is allowed to proceed in the United States' absence and Plaintiffs are successful, the United States' and other Indian landowners' desired path of a negotiated resolution and renewal of the easement will be forever foreclosed—for everyone.

Thus, this lawsuit not only attempts to circumvent the BIA; it is also a direct threat to the BIA's ability, as trustee, to decide on a course of action that is in best interests of all beneficial owners—stripping the United States (specifically, the BIA) of the authority solely delegated to it. By this lawsuit, Plaintiffs and their counsel seek to decide for all other Indian landowners (and the United States and BIA itself) what action to take and what remedies to seek. But under the law, it is the United States (through the BIA) that must fulfill this role. Plaintiffs simply cannot take these actions, much less seek to impose them on the United States and all other Indian landowners, and certainly not in the complete absence of the United States.

It is against this backdrop that Plaintiffs filed the instant lawsuit on October 5, 2018. Plaintiffs amended their Complaint on January 25, 2019, after Defendants filed their Motion to Dismiss, including for failure to join the United States, a required party. The lawsuit still does not name the United States as a party, a glaring omission given (i) Plaintiffs' allegations of wrongdoing by the BIA in issuing the 1993 Easement; (ii) the BIA's involvement and interest in this matter as the trustee and the one that is to make "the determination" as to whether to treat Defendant's

possession as a trespass, and if so, what actions to take and remedies, if any, to pursue on behalf of the individual Indian landowners for whom the United States, as trustee, is holding the land in trust; (iii) Plaintiffs' new assertion of a breach of the 1993 Easement, of which the United States (not Plaintiffs) is the grantor; and (iv) Plaintiffs' new request for injunctive relief, including removal of the pipeline, which is in direct conflict with the BIA's legally-mandated role as trustee and the administrative proceedings that the BIA has initiated under its regulations that are in place to handle this very situation. 25 C.F.R. § 169.410; Sanford Aff. (Doc. 20-1) ¶ 6, Ex. D (copy of 1993 Easement).

## APPLICABLE STANDARDS

Federal Rule of Civil Procedure 12(b)(7) provides that a defendant may move to dismiss litigation for failure to join a required party pursuant to Federal Rule of Civil Procedure 19. Dismissal is appropriate under Rule 19 if: (1) an absent party is a required party according to Rule 19(a); (2) the court cannot join the absent, required party; and (3) the case cannot proceed "in equity and good conscience" in the absence of the required party. Fed. R. Civ. P. 19(b); *see also Two Shields v. Wilkinson*, 790 F.3d 791, 797-98 (8th Cir. 2015).

A party is required under Rule 19(a) when (1) the court cannot accord complete relief among existing parties, ***or*** (2) the absent party claims an interest relating to the subject of the action and is so situated that disposing of the action in the party's absence may (i) as a practical matter impair or impede the absent party's ability to protect the interest, or (ii) leave an existing party subject to risk of incurring inconsistent obligations. Fed. R. Civ. P. 19(a)(1).

When an absent party is required, the court must join that party if feasible. If the required party cannot be joined, the court must determine "in equity and good conscience" whether the action should proceed in the party's absence or be dismissed. Fed. R. Civ. P. 19(b); *Pembina*

*Treaty Comm'n v. Lujan*, 980 F.2d 543, 544-45 (8th Cir. 1992). Rule 19(b) identifies four factors for the court to consider in making this determination:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice can be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(b).

In ruling on a motion to dismiss for failure to join a required party, the Court may go outside the pleadings and look to extrinsic evidence such as documents and affidavits. *Davis Cos v. Emerald Casino, Inc.*, 268 F.3d 477, 480 n.4 (7th Cir. 2001); *McShan v. Sherrill*, 283 F.2d 462, 463-64 (9th Cir. 1960); *Young v. Garrett*, 149 F.2d 223, 225 n.1 (8th Cir. 1945). Rule 19 requires a pragmatic approach, allowing the district court to freely consider various harms that the parties and absentees might suffer. *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986) (applying Rule 19 calls for "a highly practical, fact-based decision"); *see also Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 746 (8th Cir. 2001) (evaluation of Rule 19(b) factors and interests is not formalistic and depends on the context of the litigation).

## ARGUMENT

### I. The United States Is a Required Party Under Rule 19(a).

The United States is a required party under Rule 19(a) because it has significant interests in the subject matter of this lawsuit, and proceeding in the United States' absence would impair

the United States' ability to protect these interests and potentially leave Defendants subject to inconsistent obligations. Fed. R. Civ. P. 19(a). The United States' interests in this lawsuit concern (i) Plaintiffs' allegation that the BIA wrongfully issued the 1993 Easement, an allegation that is central to Plaintiffs' claim of trespass for the period beginning in 1993; (ii) the United States' legally-recognized role as the one that must make "the determination" whether to treat the current situation (alleged holdover of either the 1973 Easement or the 1993 Easement) as a trespass, and if so, what actions to take and remedies, if any, to pursue on behalf of the individual Indian landowners for whom the United States, as trustee, is holding the land in trust; (iii) Plaintiffs' assertion of a claim for breach of the 1993 Easement, of which the United States (not Plaintiffs) is the grantor; and (iv) Plaintiffs' request for injunctive relief, including to remove the pipeline, when the United States has decided to allow the individual Indian landowners to continue their good-faith negotiations with Defendant and has not sought to remove the pipeline (which would deprive the United States' trust beneficiaries of their ability to continue to benefit from the pipeline and easement) in its legally-recognized role as the one that determines whether to treat Defendant's current possession as a trespass, and if so, what actions to take and remedies, if any, to pursue on behalf of the individual Indian landowners. Each of these interests is discussed below.

### A. Plaintiffs Allege Wrongdoing by the United States, Which Gives the United States a Significant Interest in This Case.

The United States has a significant interest in a case when its alleged wrongdoing is at issue in it. *See Nichols v. Rysavy*, 809 F.2d 1317, 1333 (8th Cir. 1987) (holding that the United States' absence required dismissal where the underlying issue was whether the United States violated federal law; "the government's liability cannot be tried 'behind its back'"). Here, Plaintiffs allege that the BIA wrongfully issued the 1993 Easement without the consent of the individual Indian

allottees, in violation of 25 U.S.C. § 324. *See* FAC ¶¶ 70, 79. As a result, according to Plaintiffs, the pipeline has been in trespass since 1993.

There can be no question that the BIA disputes Plaintiffs' allegation. Indeed, the BIA Superintendent said as much in her April 10, 2018 letter to all landowners. Sanford Aff. (Doc. 20-1) ¶ 23, Ex. P at n.1 ("On June 18, 1973, and again on June 18, 1993 the Superintendent approved two separate pipeline ROW renewals for Amoco Pipeline Company (now Tesoro), each for a term of 20-years."). And other evidence supports the BIA's position. *See, e.g.*, Sanford Aff. (Doc. 20-1) ¶¶ 6-11, Ex. D (1993 Easement, executed by the BIA Superintendent for the Fort Berthold Agency, wherein the "United States of America, acting by and through the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs . . . pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17, 25 U.S.C. 323-328), and Part 169, Title 25, Code of Federal Regulations . . . does hereby grant to Amoco Pipeline Company[8] . . . an easement for the right of way for the renewal of a pipeline right-of-way for a period of 20 years, effective June 18, 1993"), Ex. E (Amoco Pipeline's Right-of-Way Application), Ex. F (Oct. 28, 1994 Amoco Pipeline letter), Ex. G ("Official Receipt" executed by the BIA Collections Officer reflecting the BIA Fort Berthold Agency's receipt of payment in the amount of $47,839.00 from Amoco Pipeline for "consideration payment for the renewal of Pipeline Easement within the Fort Berthold Reservation (Grant commencing from 6/18/93 for twenty (20) years @ $10 per linial [*sic*] rod)"), Ex. H (Three Affiliated Tribes Resolution of its Tribal Business Council approving the 1993 Easement), Ex. I (Amoco Pipeline check to the Three Affiliated Tribes in payment for "Administration cost for a 20-year easement within Fort Berthold Reservation (3551-105 thru 142)").

[8] Amoco was a predecessor owner of the pipeline at issue. FAC ¶ 80.

Plaintiffs' attack on the 1993 Easement in this case renders the United States a necessary party under Rule 19(a). As the Eighth Circuit stated in affirming this Court's dismissal in *Two Shields v. Wilkinson*, 790 F.3d 791, 796 (8th Cir. 2015), any judgment declaring the actions of the government illegal or void could have "potentially far reaching effects" that undermine the United States' interests.[9] *See id.* Thus, in *Two Shields*, the United States was a necessary (and indispensable) party to claims brought by allottees against private parties based on allegations that the BIA had ***improperly approved*** oil and gas leases on the allottees' lands. *See id.* at 792-93, 796. Here, the same result should obtain where Plaintiffs seek to visit liability on Defendants based on allegations that the BIA ***wrongfully issued*** the 1993 Easement. Simply put, proceeding in the absence of the United States would impair the United States' ability to protect its interest in defending the propriety of its actions in issuing the 1993 Easement. *See id.* at 797 ("To prevail here, [the plaintiffs] must prove that the United States breached its fiduciary duty to ensure that the mining leases they signed were in the best interests of the Indians. . . . [T]he United States has an interest in that determination, and its ability to protect its interest would be impaired or impeded by its absence.").

Apart from its own actions, the United States also has an interest simply in defending the validity of its instruments and conveyances. *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1472 (10th Cir. 1987) ("It is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee."); *see also Two Shields*, 790 F.3d at 796 (the United States has an interest "in actions

[9] For example, Plaintiffs or other Indian landowners could attempt to use a favorable outcome in this case to try to support a future claim against the United States, arising from the United States' status as trustee under federal law. Such a claim might be brought in the Court of Federal Claims. *See infra* at 23-24.

which 'indirectly attack' its administrative decisions"); *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010) ("A public entity has an interest in a lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices."). Allowing Plaintiffs to seek a judicial determination in the United States' absence that the 1993 Easement was "void *ab initio*" would impair the United States' ability to protect this interest.

Additionally, proceeding without the United States would subject Defendants to the risk of inconsistent obligations. Defendant (and predecessor owners of the pipeline) relied, as it was legally entitled to do, on the BIA's approval and granting of the 1993 Easement as authority for maintaining the pipeline on Plaintiffs' allotments. A predecessor owner of the pipeline paid the United States[10] what was owed under the easement, and Defendant fully complied with the easement. Sanford Aff. (Doc. 20-1) ¶¶ 6-11, Exs. D-I. There are no allegations to the contrary. Now, after Defendant has fully complied with the 1993 Easement, Plaintiffs seek to change the rules entirely and subject Defendant to large damages awards for maintaining the pipeline on Plaintiffs' property during at least some portion of the period covered by the 1993 Easement, as if that easement granted by the BIA never existed.

The United States—specifically, the BIA Fort Berthold Agency—is in the best position to defend and answer for the 1993 Easement: the government presumably has official records of its decision to approve and issue the 1993 Easement, and it is best situated to explain and defend its

[10] The United States was responsible for distributing the payments to the individual beneficial landowners. *See* Sanford Aff. (Doc. 20-1) ¶¶ 8-9, Ex. F (indicating that the consideration payment by Amoco for the 1993 Easement would be $47,839.00 to be "divided among all interest landowners"), Ex. G (Official Receipt wherein BIA acknowledged receipt of payment by Amoco in the amount of $47,839.00 for the 1993 Easement, which payment the BIA would place "in Special Deposits pending distribution"); *see also* 25 C.F.R. §§ 169.14, 169.116-17 (1997).

own decision-making, policies, and processes. Indeed, Plaintiffs have already asserted in this lawsuit that the Court will likely not have access to the records, information, and personnel of the BIA as a non-party. *See* Plaintiffs' Response to Defendants' Motion to Transfer Venue (Doc. 40), at pp.13-16. According to Plaintiffs, the Department of the Interior, which includes the BIA, is not subject to compulsory process, and the Department of the "Interior's decision on whether to produce documents is governed by its own regulations" and "[t]hose regulations make clear that 'it is the Department's general policy not to allow its employees to testify or to produce Department records upon request or by subpoena.'" *Id.* In addition, Plaintiffs have also asserted that the BIA's personnel are likely not subject to subpoena power, and therefore, the Court cannot compel them to testify. *Id.* at p. 18. *See also* Order (Doc. 67), at 13 n.8 (discussing the Department of the Interior's general policy of not allowing its employees to testify or to produce documents). Simply put, if the validity of the 1993 Easement is to be litigated in this case, the participation of the United States as a party defendant is essential.

For these reasons, the United States is a required party under Rule 19(a).

**B. The United States' Role in Determining Whether to Treat Holdover Possession as a Trespass and What Actions to Take and Remedies, if Any, to Pursue as Trustee on Behalf of the Individual Indians Also Gives the United States a Significant Interest in This Case.**

The United States is also a required party under Rule 19(a) because this case alleges trespass as a result of a "holdover." As outlined above, the United States (specifically the BIA) has the sole right and obligation to determine whether to treat a holdover possession as a trespass, and whether to take action to recover possession or pursue other remedies on behalf of all of the individual Indian landowners for whom it serves as trustee. *See* 25 CFR § 169.410. As the BIA stated in its January 30, 2018 show-cause letter, it, ***the BIA***, "is responsible for investigating and responding to allegations of trespass, assessing penalties, and ensuring that the trespasser

rehabilitates the damaged land at his expense." Sanford Aff. (Doc. 20-1) ¶ 21, Ex. N. Therefore, the United States irrefutably has a direct interest related to the subject matter of this suit.

In this instance, the BIA has thus far decided ***not*** to treat Defendant as being in trespass, and has instead opted to defer any action to recover possession or seek other remedies on behalf of the individual Indian landowners. In its capacity as trustee, the BIA has quite obviously decided the best course for the affected Indians at this time is to allow the parties to continue working toward a negotiated resolution that will include renewal of the easement and the pipeline remaining in operation.[11] However, with their lawsuit alleging trespass and seeking various remedies, including an injunction requiring Defendants to remove their pipeline from the land, Plaintiffs are taking the exact opposite approach. If Plaintiffs have their way in this lawsuit, the pipeline will be removed and there will be no renewed easement, and the ongoing negotiations that BIA has been advised of, and has decided should continue, will become moot.[12] Thus, proceeding here in the absence of the United States will impair the United States' ability to protect its legally-recognized interest as trustee in fashioning and executing the response to a holdover situation on behalf of the Indian landowner beneficiaries.

That Plaintiffs have brought their lawsuit as a class action underscores the threat it poses to the United States' interests. In pursuing a class action, Plaintiffs seek to speak for, and represent, all of the individual Indian allottees. That role, however, is reserved to the United States as trustee and fiduciary. Under the law, it is the United States acting through the BIA—not a self-appointed

[11] Existing regulation reflects the BIA's judgment that this is the best approach when negotiations are ongoing. *See* 25 C.F.R. § 169.410 (indicating the BIA "may" take action to recover possession and pursue additional remedies "unless" the parties provide written notice that they are engaged in good faith negotiations).

[12] *See, e.g.*, Sanford Aff. (Doc. 20-1) ¶ 28, Ex. U (July 31, 2018 letter from a Bismarck attorney to BIA Superintendent providing written notice that his five clients who beneficially own 75% interest in five allotted tracts were engaging in discussions with Tesoro High Plains' attorneys).

group of individual Indians—that is to weigh the options and decide how to proceed in the best interest of all. With this lawsuit, then, Plaintiffs are attempting nothing less than to usurp the legally-recognized role and authority of the BIA. Such an action cannot proceed behind the BIA's back without severely compromising the United States' ability to protect its interests in this regard.

Even if this case were not brought as a class action, Plaintiffs' claims would still amount to an attempt to usurp the BIA's role because those claims are in conflict with the desires of other affected allottees who wish to negotiate a new easement and not have the pipeline removed as Plaintiffs seek. Again, it is the BIA's role to consider the options and select the approach it believes is in the best interest of all allottees. But with their claims in this lawsuit—which seek to remove the income-producing pipeline and foreclose the easement renewal option others prefer—Plaintiffs and their counsel are effectively trying to substitute their judgment as to what is best for that of the BIA. Allowing Plaintiffs to proceed without the United States will severely impair the United States' ability to protect its interests in selecting and pursuing the course it decides is best for all of its trust beneficiaries.

Proceeding in the United States' absence would also subject Defendants to a substantial risk of inconsistent or double obligations. As the statutory and regulatory provisions discussed above indicate, the United States is fully empowered to "treat the unauthorized possession as a trespass under applicable law" and to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." 25 C.F.R. § 169.410. Thus, there is the real possibility that Defendants might at some point find themselves in another proceeding, this one brought by the United States, seeking different or additional remedies for the alleged trespass. The multiplicity of related litigation naturally carries the risk of inconsistent outcomes.

For these reasons, too, the United States is a required party under Rule 19(a).[13]

**C. The United States' Role as the Grantor of the 1993 Easement, on Which Plaintiffs—Who Are Not Parties to the Easement Agreement—Seek to Bring a Breach of Agreement Claim, Also Gives the United States a Significant Interest in This Case.**

The United States is also a required party under Rule 19(a) because Plaintiffs now assert a breach of easement agreement claim with respect to the 1993 Easement, but it is the United States (not Plaintiffs) that is the grantor party under that easement agreement. As "Grantor" of the 1993 Easement and trustee for all individual Indians, the United States is the proper party to any claim seeking to enforce or remedy any breach of the easement agreement. *See* 25 CFR § 169.404 and § 169.410.

Here, the BIA has thus far decided ***not*** to assert any claims or seek any remedies under the easement agreement, or to treat Defendant as being in trespass. Instead, the BIA has opted to defer any action under the easement agreement or to recover possession or seek other remedies on behalf of the individual Indian landowners. In its capacity as the grantor party under the easement agreement and as trustee, the BIA has quite obviously decided the best course for the affected Indians at this time is to allow the parties to continue working toward a negotiated resolution that will include renewal of the easement and the pipeline remaining in operation.

However, with their lawsuit alleging a breach of the easement agreement and seeking removal of the income-producing pipeline from the land, Plaintiffs are taking the exact opposite approach. If Plaintiffs have their way in this lawsuit, the income-producing pipeline and easement renewal option will be forever destroyed—to the detriment of all. Thus, proceeding here in the

[13] In addition, given the United States' status as trustee and its legally-recognized authority to take action in respect of the Indian lands, the Court cannot, in the United States' absence, "accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). If there is to be a full, complete resolution of this matter, the United States must be a party to it.

absence of the United States will severely impair the United States' ability to protect its legally-recognized interest as the grantor party to the 1993 Easement and as trustee in fashioning and executing the response to a holdover situation on behalf of the Indian landowner beneficiaries.

Again, the fact Plaintiffs have brought their lawsuit as a class action underscores the threat it poses to the United States' interests. Plaintiffs are attempting nothing less than to usurp the legally-recognized role and authority of the BIA with respect to an easement agreement to which the United States is a party, but the Plaintiffs are not. Such an action cannot proceed behind the BIA's back without severely compromising the United States' ability to protect its interests under the easement agreement. Even if this case were not brought as a class action, Plaintiffs' claims would still amount to an attempt to usurp the BIA's role because those claims are in conflict with the desires of the BIA and other affected allottees who wish to negotiate an easement renewal and not have the pipeline removed as Plaintiffs seek. Again, it is the BIA's role to consider the options and select the approach it believes is in the best interest of all allottees. Allowing Plaintiffs to proceed without the United States will severely impair the United States' ability to protect its (and the Indian landowners') interests under the easement agreement.

For the same reasons as discussed above, proceeding in the United States' absence would also subject Defendants to a substantial risk of inconsistent or double obligations.

Thus, the United States is a required party under Rule 19(a).

**II. The United States Cannot Be Joined in This Court.**

Because the United States is a required party under Rule 19(a), it "must be joined as a party" if "feasible." Fed. R. Civ. P. 19(a)-(b). But joining the United States in this case is not feasible—certainly not with respect to any claim that the United States damaged Plaintiffs by wrongfully issuing the 1993 Easement in violation of 25 U.S.C. § 325. Indeed, under the Tucker Act, 28 U.S.C. § 1491, ***the Court of Federal Claims*** has exclusive jurisdiction over monetary

claims against the United States premised on federal law when the value of the claim exceeds $10,000.00. *See also* 28 U.S.C. § 1346 (granting district courts concurrent jurisdiction over claims against the United States when the amount in controversy does not exceed $10,000.00).

More generally, the United States enjoys sovereign immunity from suits in district court. *See Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) ("'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'"). Courts must strictly construe in favor of the sovereign any statutes purporting to waive sovereign immunity. *See id.* at 261. Any such waiver must be "unequivocally expressed" in the statutory text. *See id.*

Plaintiffs bring this action pursuant to 28 U.S.C. § 1331. FAC ¶ 64. Even if Plaintiffs could establish jurisdiction under 28 U.S.C. § 1331 (it has not and cannot), this statute "does not, in and of itself, create substantive rights in suits brought against the United States." *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999). If 28 U.S.C. § 1331 "is to be used to secure relief against the United States, it must be tied to some additional authority which waives the government's sovereign immunity." *Id.* Plaintiffs cite no such authority. Plaintiffs invoke 25 U.S.C. § 345 as a legal basis for this suit.[14] FAC ¶ 64. But according to the Supreme Court, Section 345 "waives the Government's immunity only with respect to . . . cases . . . seeking an original allotment." *See United States v. Mottaz*, 476 U.S. 834, 845-46 (1986). It does not waive the government's immunity in a case such as the present one, where Plaintiffs are not seeking an original allotment.[15]

[14] In reality, 25 U.S.C. § 345 provides no legal basis for jurisdiction under 28 U.S.C. § 1331 in this case. *See* Defendant's Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74).

[15] Another provision Plaintiffs cite, 28 U.S.C. § 1353, is simply a recodification of part of Section 345, and does not waive sovereign immunity to any greater extent. *Scholder v. United States*, 428 F.2d 1123, 1125-26, 1126 n.2 (9th Cir. 1970).

Plaintiffs have pled no statutes that waive sovereign immunity in this case. Accordingly, this Court has no jurisdiction to join the United States as a party.

## III. Under Rule 19(b), This Case Cannot Proceed in Equity and Good Conscience in the United States' Absence.

When a party is a required party under Rule 19(a) but cannot be joined, Rule 19(b) requires dismissal if the case cannot proceed "in equity and good conscience" without the required party. Fed. R. Civ. P. 19(b). In *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015), the Eighth Circuit noted that "[i]n the specific context of an immune sovereign entity that is a required party not amenable to suit, the Supreme Court has explained that the action must be dismissed [under Rule 19(b)] if the claims of sovereign immunity are not frivolous and 'there is a potential for injury to the interests of the absent sovereign.'" *Id.* at 798 (citing *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)); *see also Two Shields*, 2013 WL 11320222 at *4 (Hovland, J.) (same). Here, for precisely the reasons discussed above, the United States is indeed immune, and its interests will be impaired or impeded if this case proceeds in its absence.

*Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), provides additional, strong support for dismissal under Rule 19(b). In *Nichols*, the appellants were descendants of Indian allottees who had received from the United States "forced fee patents" that allowed them to transfer their allotments to others. *Id.* at 1320, 1322. The appellants sued various parties, including private landowners who now held the land allotments at issue. *Id.* at 1320. Among other things, the appellants sought return of the allotments from the current landowners and damages for wrongful possession. *Id.* The appellants' theory was that the fee patents "were illegally issued to their forebears, thus voiding all later transfers of the property." *Id.*

The court concluded that the United States was a required party, but that it could not be joined because the statute of limitations barred any claims against it. *Id.* at 1331. The court then

considered whether the action could proceed in the United States' absence, and readily concluded it could not. *See id.* at 1331-34. Perhaps chief among the reasons cited by the court as justifying dismissal was the fact that the appellants' claim was premised on the assertion that the United States had acted wrongfully. *See id.* at 1333 ("[T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents . . . . 'In short the government's liability cannot be tried 'behind its back.'"). Because Plaintiffs also make an assertion of governmental wrongdoing, dismissal is warranted in this case as well. *See also Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 1001 (9th Cir. 2011) (concluding that the absence of the United States in a case where the plaintiff had accused federal agents of wrongdoing "militates against allowing this case to proceed"); *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015) (affirming this Court's dismissal under Rule 19(b) of lawsuit alleging improper conduct of the BIA in approving leases on Indian allottees' lands).

There are additional reasons why the Court should dismiss this case under Rule 19(b) in the United States' absence. The Supreme Court has identified four "interests" for courts to consider in a Rule 19(b) analysis:

(1) the plaintiff's interest in having a forum;

(2) the defendant's interest in avoiding multiple litigation, inconsistent relief, or sole obligation for liability shared with another;

(3) the interests of the absent party; and

(4) the interest of the courts and public in complete, consistent, and efficient resolution of controversies.

*Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968); *see also Nichols v. Rysavy*, 809 F.2d 1317, 1332 (8th Cir. 1987). Here, the balance of these interests weighs strongly in favor of dismissal.

As to the first interest, dismissal here would not deprive Plaintiffs of a forum for having their concerns heard and addressed. Indeed, the law provides that the BIA has authority to "take action . . . on behalf of the Indian landowners" in this situation, and the BIA is obliged to "communicate with the Indian landowners in making the determination" as to how to proceed. 25 C.F.R. § 169.410. Thus, dismissal of this case will not prejudice Plaintiffs; instead, it will allow this matter to proceed as the law requires, with the BIA acting for all affected Indian landowners, including Plaintiffs.

As to the second interest, if this case were allowed to proceed in the United States' absence, Defendants would indeed face the prospect of multiple litigation and inconsistent relief, as has been discussed. Moreover, Defendants would face further prejudice in that they would be forced to defend the actions of the United States in issuing the 1993 Easement, something the United States should answer for instead. *Paiute-Shoshone Indians*, 637 F.3d at 1001 ("To achieve the relief that Plaintiff seeks, Plaintiff must prove that agents of the United States violated the 1937 Act . . . . The City cannot reasonably be expected to defend the actions of an entirely different entity over which the City had no control. Proceeding with this suit in the absence of the United States therefore would prejudice the City . . . .").

Further compounding the prejudice and problems if the Defendants are forced to defend the United States' actions in its absence, Defendant did not acquire the pipeline until 2001—more than five years after Plaintiffs allege the BIA's wrongful conduct occurred. The problem is even further compounded here, where Plaintiffs have already asserted that Defendants will not be able to compel access to the records, information, and personnel of the BIA, including with respect to its conduct and decision-making in 1993. *See* Plaintiffs' Response to Defendants' Motion to Transfer Venue (Doc. 40), at pp. 13-16. According to Plaintiffs, the Department of the Interior's

"regulations make clear that 'it is the Department's general policy not to allow its employees to testify or to produce Department records upon request or by subpoena.'" *Id*. *See also* Order (Doc. 67), at 13 n.8 (discussing the Department of the Interior's general policy of not allowing its employees to testify or to produce documents).

And should Plaintiffs prevail, including on their theory of the alleged invalidity of the 1993 Easement, Defendants would be faced with shouldering sole liability for the wrongful and illegal acts of the BIA (for which Defendants are not responsible). Thus, the second interest strongly favors dismissal.

So, too, does the third interest—that of the absent party. As discussed, the interest of the United States in not having the validity of its instruments adjudicated behind its back, and its liability tried *in absentia*, is significant. The United States also has a significant interest in not having this case proceed because of both its role as the grantor party to the 1993 Easement and its legally-recognized role as the one that is to make "the determination" how to proceed here on behalf of, and in the best interest of, all of its trust beneficiaries. 25 C.F.R. § 169.410. As discussed, the United States has thus far elected not to make a final determination of trespass and is, instead, deferring any legal action so as to allow the process, including negotiations, to continue. Plaintiffs' suit, including its claim of breach of the 1993 Easement and pursuit of removal of the pipeline, undermines and frustrates—and in fact would destroy—the BIA's approach and seeks to substitute Plaintiffs' judgment for that of the BIA.

As for the fourth interest—the interest of the courts and the public in complete, consistent, and efficient resolution of controversies—it will best be served here by dismissal. The legally-prescribed procedures for this situation authorize ***the BIA***, not individual Indians, to determine if, when, and how to proceed and what remedies to seek. These procedures reflect the considered

judgment of the government that tasking the BIA with managing situations of "holdover" possession will result in complete, consistent, and efficient resolution of those controversies in the best interests of all of the hundreds of affected landowners. The alternative—allowing individual Indian landowners to pursue their own claims and removal of the pipeline—would surely result in a multiplicity of litigation, different approaches, and inconsistent outcomes. The filing of a second putative class action in this district concerning Defendant's pipeline[16] proves this point exactly, as does Plaintiffs' pursuit of removal of the pipeline despite other individual Indian landowners still engaging in negotiations to keep the pipeline. Of course, the other individual Indians' efforts to retain the pipeline are not frivolous, particularly when, according to the Department of the Interior and Plaintiffs themselves, it is "difficult, if not impossible, to use the land for any beneficial purpose." FAC ¶ 105 (citing the Department of Interior). In short, the fourth interest, like the others, weighs heavily in favor of dismissal, which will allow the legally-prescribed BIA process to proceed on behalf of all affected landowners so that a complete, consistent, and efficient resolution is reached.

[16] A different group of Indian landowners has brought suit complaining that the pipeline is trespassing on the allottees' lands. *See* Sanford Aff. (Doc. 20-1) ¶ 31, Ex V. That suit is currently pending before this Court as Civil Action No. 1:18-cv-00217.

## CONCLUSION

For the foregoing reasons, the Court should dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(7). Defendants also request any further relief to which they are justly entitled.

Dated: August 7, 2019

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, Western District of Texas, 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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