UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

JOANN CHASE, et al., Plaintiffs, v. ANDEAVOR LOGISTICS, L.P., et al., Defendants.	)	Civ. No. 1:19-CV-00143-DLH-CRH

PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS (ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case, at its core, is rather simple. The United States holds lands in trust for the benefit of the putative plaintiff class. Defendants own and operate a pipeline that traverses Plaintiffs' lands. Since at least June 18, 2013, Defendants' easement (to the extent it was valid originally) expired by its own term, and Defendants did not renew the easement and did not remove their pipeline. This is, without question, a trespass. Further, Defendants make billions of dollars annually—profiting from their trespass.

Despite the fact that the United States presently holds title to the lands in question in trust for Plaintiffs' benefit, and Plaintiffs hold the beneficial interests in said lands, Defendants contend that the Courts of the United States do not have jurisdiction to hear this action. This is not the law. Indeed, Defendants' argument is based entirely on gross misstatements of the law, including misconstruction of relevant case-law and wholly ignoring governing federal statutes and regulations. In short, as demonstrated in greater specificity below, the law is clear that this trespass action "arises under" the laws of the United States and hence this Court enjoys subject matter jurisdiction.

Defendants' motions to dismiss Plaintiffs' claims for failure to join the United States as an indispensable party under Rules 12(b)(7) and 19, and for failure to exhaust administrative remedies, also fail. Defendants, astonishingly, do not cite or explain how the seminal Supreme Court case, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), does not foreclose their contentions. Therein, the Court held that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney," and that individual Indians may bring claims arising from their beneficial interests in trust land without the involvement of the United States. *Id*. at 374. *Poafpybitty* directly controls several aspects of this case. The fact that it has now been more than six years since Defendants' easement expired without any action by the Bureau of Indian

Affairs ("BIA") to address Defendants' trespass exemplifies why the Supreme Court held as it did in *Poafpybitty*.

Defendants also attempt to obfuscate the BIA regulations which make clear that the Bureau "may" bring a trespass action to protect Plaintiffs' interests, but expressly provide that "***[t]he Indian landowners may pursue any available remedies under applicable law***...." 25 C.F.R. § 169.413 (emphasis added). In short, the governing case law, statutes, and regulations make plain that Plaintiffs are entitled to assert these claims to protect their lands held in trust by the United States.

Finally, Defendants' arguments under Rule 12(b)(6) are equally meritless. These arguments are largely redundant of the arguments made in Defendants' other motions, and fail for the same reasons. Defendants also assert arguments under state law that conflict with federal decisions on the claims available to Indians under the facts of this case, and the available remedies for Indian land claims.

In sum, Defendants attempt to escape their obligations under federal law and negate the fundamental federal nature and trust status of Plaintiffs' land. But their arguments are unmoored from the law. Plaintiffs rights arise under federal law. Accordingly, Defendants' "kitchen sink" motions to dismiss should be denied.

II. BACKGROUND

This action involves the legal rights of individual Indians arising from the federal Indian allotment system, which was created by federal statute, and which has since been protected by additional federal statutes and regulations that govern the issuance, renewal, and use of rights-of-way across those allotments. Defendants do not discuss the history of the United States' Indian allotment system, but understanding that history, the legal framework governing allotments, and

how it has evolved, is essential to understanding Plaintiffs' claims in this case and the cases that have addressed individual Indians' land rights through the years.[1]

The History of the United States' Allotment Acts

"After the formation of the United States, the Indian tribes became 'domestic dependent nations,' subject to plenary control by Congress." *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 963 ("*Davilla III*") (10th Cir. 2019) (citing *Puerto Rico v. Sanchez Valle*, __ U.S. __, 136 S. Ct. 1863, 1872 (2016)) (alteration omitted). In the late nineteenth and early twentieth centuries, Congress exercised that power by "carving Indian reservations into allotments and assigning the land parcels to tribal members." *Id.* (alterations and citation omitted). The initial objectives of allotment were "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). "Many of the early allottees quickly lost their land through transactions that were unwise or even procured by fraud." *Davilla III*, 913 F.3d at 963 (citation omitted). In 1887, Congress passed the Dawes Act, also known as the General Allotment Act, which authorized the President to allot reservation land *in trust* rather than granting immediate, fee simple ownership.[2] *Id.*

Today, "allotment" is a term of art in federal Indian law, and is generally used to describe two types of individual Indian land ownership. Originally, in a "trust allotment" the federal

[1] Much of this history is documented in federal court decisions and/or legislative history. However, the Court may also consider the additional facts presented herein for purposes of resolving Defendants' motion to dismiss for lack of subject matter jurisdiction. *See Satz v. ITT Financial Corp.*, 619 F.2d 738, 742 (8th Cir. 1980).

[2] The history of the Dawes Act and the other Acts of Congress that have affected ownership and the rights of Indians in trust allotments is discussed in numerous court decisions. *See, e.g.*, *Cnty. of Yakima*, 502 U.S. at 254-56; *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104-05 (10th Cir. 2017).

government held title to the land in trust for the benefit of the Indian(s), with the intent that title and fee simple ownership would be conveyed to the Indians at the end of the trust period. *See Adams v. Eagle Road Oil LLC*, No. 16-CV-0757-CVE-TLW, 2017 WL 1363316, at *3 (N.D. Okla. Apr. 12, 2017). The other method of allotting land to individual Indians was "known as a 'restricted allotment,' in which title was immediately conveyed to the individual, but the land was subject to a restriction on alienation for a period of time." *Id.*; *see also United States v. Ramsey*, 271 U.S. 467, 470-71 (1926) (discussing the differences between a "trust allotment" and a "restricted allotment"); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076-77 (10th Cir. 1993) (distinguishing between restricted land and trust allotments, and holding that the former did not qualify as "Indian country" for purposes of exemptions from state taxation under 18 U.S.C. § 1151).[3]

The Fort Berthold Reservation where Plaintiffs' allotments are located was allotted pursuant to the Dawes Act. *See Two Shields v. Wilkinson*, 790 F.3d 791, 792-93 (8th Cir. 2015) (discussing application of the Dawes Act to Fort Berthold allotments); *Two Shields v. United States*, 119 Fed. Cl. 762, 767-69 (2015) (same). Under the Dawes Act, allotments were to be held in trust for twenty-five years, subject to the President's power to extend the trust period, and "at the expiration of said period the United States [was to] convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance [sic] whatsoever." 24 Stat. 388 (hereafter "Dawes Act") (Pls.' App., Ex. A) § V.[4] As originally

[3] *Ramsey* addressed the treatment of trust and restricted allotments for purposes of criminal jurisdiction, and held that they are treated similarly for those purposes. As illustrated by *Buzzard*, whether trust and restricted allotments are treated the same or differently depends on the legal issue being examined.

[4] Currently codified at 25 U.S.C. § 348.

enacted, the Dawes Act provided that once allotments were issued, the Indian beneficiaries would be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Dawes Act § VI. However, following the Supreme Court's decision in *In re Heff*, 197 U.S. 488 (1905), "Congress promptly altered that disposition in the Burke Act of 1906, 34 Stat. 182, decreeing that state civil and criminal jurisdiction would lie 'at the expiration of the trust period … when the lands have been conveyed to the Indians by patent in fee.'" *Cnty. of Yakima*, 502 U.S. at 255 (alteration in original); *see also* Pls.' App., Ex. B (34 Stat. 182 (hereinafter "Burke Act"), codified at 25 U.S.C. § 349). The Burke Act expressly provided that "until the issuance of fee-simple patents all allottees to whom trust patents shall be issued ***shall be subject to the exclusive jurisdiction of the United States***." Burke Act § VI (emphasis added); 25 U.S.C. § 349.

"The allotment policy quickly proved disastrous for the Indians." *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997) (citation and internal quotation marks omitted). Approximately 90 million acres were lost to Indian landowners through the allotment policy. *See Cnty. of Yakima*, 502 U.S. at 276 (Blackmun, J., concurring in part and dissenting in part).[5] By the 1920s, instead of issuing fee patents as envisioned by the Dawes Act, the executive branch began exercising its authority to extend the trust period for most allotments under 25 U.S.C. § 348 and 25 U.S.C. § 391

[5] Justice Blackmun noted in his dissent in *County of Yakima* the following statement from the Commissioner of Indian Affairs to Congress in 1934:

> It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties.

Id. at 251.

(authorizing extensions of the trust period prior to its expiration). *See Babbitt*, 519 U.S. at 237; *United States v. Jackson*, 280 U.S. 183, 189-90 (1930).

Extensions and Continuations of Federal Protections Afforded
Trust Allotments Under the 1934 Reorganization Act and After

"Congress's allotment project came to an abrupt end ... with passage of the Indian Reorganization Act" in 1934. *Davilla III*, 913 F.3d at 964 (quoting *Cnty. of Yakima*, 502 U.S. at 255). Under the 1934 Indian Reorganization Act ("IRA"), "Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Cnty. of Yakima*, 502 U.S. at 255 (parenthetical in original); *see also* 25 U.S.C. § 5102.[6]

The IRA "reversed [the United States'] assimilation policy and directed BIA to rebuild the tribal communities and government structures." *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). Pursuant to the IRA's self-determination policy, the United States protected the millions of acres allotted in trust to individual Indians under the Dawes Act, by permanently continuing the trust status of those allotments. 25 U.S.C. § 5102; *see also Cobell*, 91 F. Supp. 2d at 8-9 (noting that in 1999 the United States was trustee for approximately 11 million acres of individual trust allotments); *Davilla III*, 913 F.3d at 964 (due to the IRA, many allottees "never received a fee simple patent" and their land is still held in trust by the United States).

In the years following the passage of the IRA, the United States passed numerous additional statutes and regulations protecting trust allotments to promote tribal self-

[6] Originally codified at 25 U.S.C. § 461, *et seq*., the Indian Reorganization Act was transferred to 25 U.S.C. § 5101, *et seq*., effective September 1, 2016.

determination. In 1948, for example, Congress enacted 25 U.S.C. §§ 323-328 (the "General Right-of-Way Act," also known as the "Indian Right-of-Way Act"), which authorized the Secretary of the Interior to grant rights-of-way across both trust and restricted allotments, under specified conditions. (First Amended Complaint [Dkt. 28] ("FAC") ¶ 69.) Pursuant to these statutes, Interior has promulgated comprehensive regulations, currently codified at 25 C.F.R. § 169.1, *et seq*.,[7] that govern when and how rights-of-way across individual allotments may be obtained. (FAC ¶¶ 69-70.)

In 1953, Congress also enacted 28 U.S.C. § 1360. Section 1360, as amended, authorizes six states to exercise jurisdiction over civil causes of action between Indians or to which Indians are parties: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 28 U.S.C. § 1360(a). Even as to Indian civil claims arising in those select states Congress made clear that it was not conferring state jurisdiction over claims involving the "encumbrance … of any real or personal property … belonging to any Indian or any Indian tribe … that is held in trust by the United States" and claims that seek "to adjudicate … the ownership or right to possession of such property or any interest therein." 28 U.S.C. § 1360(b); *see also* FAC ¶ 66.

Defendants' Pipeline and the Trust Allotments at Issue in This Case

Defendants currently own and operate the oil pipeline that is the subject of Plaintiffs' Complaint, which crosses more than 35 trust allotments on the Fort Berthold Reservation. (FAC ¶¶ 2-3, 6.) The original easement for the pipeline was issued in 1953. (FAC ¶ 72.) The last easement for the pipeline was issued in 1995 (retroactive to 1993) and was limited to a twenty-year term, pursuant to 25 U.S.C. §§ 323-328 (the Indian Right-of-Way Act) and Part 169, Title

[7] Interior's regulations governing rights-of-way across Indian trust land were originally issued in 1968, and have always been found at 25 Code of Federal Regulations, Part 169. *See* 80 Fed. Reg. 72491. These regulations were last revised effective September 1, 2016.

25, code of Federal Regulations. (FAC ¶¶ 73-78.) The pipeline was then owned by Amoco Pipeline Company ("Amoco"). (FAC ¶ 80.) Defendants acquired the pipeline sometime between 1993 and 2013. (*Id.*)

Plaintiffs allege that the pipeline has been in trespass since 1993, when Amoco failed to acquire the individual allottees' approval for the easement, as required by 25 U.S.C. § 324 and 25 C.F.R. § 169.107. Plaintiffs also allege that Defendants further trespassed, and are still trespassing, by continuing to operate the pipeline on Plaintiffs' individual trust allotments after the 1993 Easement expired by its own terms on June 18, 2013. (FAC ¶¶ 84-85.) Upon expiration or termination of the 1993 Easement, Defendants were required to "[r]estore the land to its original condition, to the maximum extent reasonably possible." (FAC ¶ 75 (citing 25 C.F.R. § 169.125(c)(5)(ix)[8]), ¶ 85.) This would have involved, *inter alia*, removing the pipeline.

Plaintiffs allege, and Defendants have admitted, that after the 1993 Easement expired Defendants negotiated with the Three Affiliated Tribes ("Tribes") located at Fort Berthold, and ultimately paid the Tribes (for their interests only) approximately $2,000,000 per acre for a renewal of the easement across allotments owned in whole or part by the Tribes. (FAC ¶¶ 87-93; Affidavit of James Sanford ("Sanford Aff.") [Dkt. 25-1] ¶ 20, Ex. J (MHA Nation Pipeline Easement and Right-Of-Way Agreement Terms and Conditions, signed 2/7/17).) Yet, no negotiations were held with Plaintiffs or other individual Indians who own undivided interest in the same tracts as the Tribes, and no payment was made to Plaintiffs for any renewal across the many individually owned allotments that the same pipeline crosses. Significantly, Plaintiffs own undivided interests in many of the same tracts the Tribes have been compensated for, and the

[8] Previously 25 C.F.R. § 169.3(a), renumbered effective April 21, 2016, without substantive modification.

Tribes only own the equivalent of 26 acres of trust land the pipeline crosses, whereas individual Indians, including Plaintiffs, own the equivalent of 60 acres of the affected trust tracts. (FAC ¶ 90; Sanford Aff. ¶ 9, Ex. J, App. A (maps of trust tracts crossed by the pipeline, showing the relative tribal/individual ownership interests).)[9]

Plaintiffs' Claims

Based on the forgoing, Plaintiffs assert four claims against Defendants, on their own behalf and on behalf of other similarly situated allottees.

Count I asserts claims against Defendants for trespass under federal common law. (FAC ¶¶ 121-29.) Plaintiffs assert that there are two trespass periods: 1993 through 2013, when the pipeline was operated under an improperly issued easement, and 2013 through the present, when Defendants knowing and willfully operated the pipeline without any easement—thus in blatant and willful trespass. (FAC ¶¶ 122-23, 128.) To protect their possessory rights to their allotments, Plaintiffs seek an injunction requiring Defendants to cease using the pipeline and to remove it from Plaintiffs' allotments. (FAC ¶ 129.) Plaintiffs also seek remedies that are well-established for federal common law trespass, including damages and an accounting for profits. *See United States v. Pend Oreille Pub. Utility Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994) ("[t]he Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages"); *see also Davilla v. Enable Midstream Partners, L.P.*, No. CIV-15-1262-M, 2016 WL 6952356, at *3 & n.2 ("*Davilla I*") (W.D. Okla. Nov. 28, 2016) (holding that allottees were

[9] While it is often easier to speak in terms of relative acres owned in a particular tract, each owner of an allotment holds an undivided interest in the entire tract. (FAC ¶ 105.) For example, if the Tribes hold a 10% interest in a one hundred and sixty acre allotment, they own a 10% undivided interest in all of the land included within the allotment, not 16 discrete acres.

entitled to pursue claims for ejectment, damages, and an accounting based on their claims for federal common law trespass).

Count II, pled in the alternative, asserts claims for Defendants' breach of the 1993 Easement, assuming that the 1993 Easement is determined to be valid. (FAC ¶¶ 130-36.) Specifically, if the 1993 Easement is valid, Defendants violated 25 C.F.R. § 169.125(c)(5)(ix) (and/or the predecessor version of this regulation), which is incorporated into the easement by reference and operation of law by failing to "restore the land to its original condition" upon expiration of the easement in 2013. (FAC ¶ 134.) Plaintiffs seek injunctive relief in the form of specific performance to require Defendants to remove the pipeline, as well as damages. (FAC ¶ 135-36.)

Count III asserts a claim for unjust enrichment—to prevent Defendants from benefiting from their illegal operation of the pipeline during the trespass period—and seeks the related remedy of a constructive trust on the benefits Defendants have earned from their illegal operation of the pipeline. (FAC ¶¶ 137-45.)

Count IV asserts a claim for punitive damages based on Defendants' willful and wanton trespass on protected trust land, and their efforts to conceal their trespass and negotiations with the Tribes from the individual allottees. (FAC ¶¶ 146-49.)

III. ARGUMENT AND CITATION OF AUTHORITIES

A. This Court Has Subject Matter Jurisdiction Over All Plaintiffs' Claims Because Those Claims Arise Under Federal Law—Both Federal Common Law and Federal Statutes and Regulations.

Plaintiffs' claims in this case arise from multiple independent and overlapping federal statutes, as well as federal common law that has protected Indian land rights since the founding of the United States. In short, for the many reasons explained below, federal question jurisdiction exists over Plaintiffs' claims. Defendants attempt to confuse the law on this issue by selectively

citing factually inapplicable cases, misrepresenting the holdings of key cases, and taking non-dispositive *dicta* out of context.

1. Legal standard for Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Of course, a complaint that only anticipates a federally created defense does not create federal question jurisdiction. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936).

Defendants do not dispute that Plaintiffs have pled a plethora of federal statutes and regulations that apply to their trust land and which Plaintiffs allege were violated by the issuance of the 1993 Easement. They also concede that their status as trespassers based on the continued presence of the pipeline since 2013 is dictated by federal law (although they mistakenly contend that only the BIA may sue for breach of that law). Thus, there is no dispute that substantial federal questions are evident from the face of Plaintiffs' Complaint.

Yet, Defendants contend that notwithstanding the comprehensive federal control Congress has exerted over these trust allotments and the interlocking web of federal statutes and regulations that must be grappled with in resolving Plaintiffs' claims, Plaintiffs' claims do not "arise under" Federal Law. Defendants fundamentally misconceive the scope of federal question jurisdiction, and they overlook the fact that Congress has enacted a specific statute—25 U.S.C. § 345—granting federal courts jurisdiction over Indian land claims.

2. Claims involving trespass to or leasing of Indian trust land arise under federal law.

It is "well settled" that the grant of jurisdiction under § 1331 "will support claims founded upon federal common law as well as those of a statutory origin." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). As the Supreme Court has stated:

> [I]n order to invoke a federal district court's jurisdiction under § 1331, it [is] not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It [is], however, necessary to assert a claim 'arising under' federal law.

Id. "The party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' (federal law) by his declaration or bill." *First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank*, 627 F.2d 843, 849 (8th Cir. 1980) (quoting *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)).

The Supreme Court has held that 'arising under' jurisdiction existed, for example, in *National Farmers* for a claim brought by a Montana school district and its insurance carrier for an injunction against the enforcement of a default judgment obtained against the district in tribal court by a member of the Crow Tribe. The claim in the tribal court was based on a motorcycle accident in the school's parking lot. *Id*. at 847. The district court granted the requested injunction, holding that the tribal court did not have jurisdiction over the tort claim that was the basis for its judgment. *Id*. at 848-49. The Ninth Circuit reversed, holding that the federal district court did not have subject matter jurisdiction under § 1331 over the injunction claim. *Id*. at 849.

The Supreme Court reversed, holding that the District Court correctly concluded that it had subject matter jurisdiction under § 1331 over the plaintiffs' federal common law claim for injunctive relief. *Id*. at 852-53. In doing so, the Court noted that "[f]ederal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *Id*. at 850. The Court also held that the common law claim plaintiffs asserted in *National*

Farmers arose under federal law, in large part, because "the power of the Federal Government over the Indian tribes is plenary." *Id*. at 851. Thus, "[f]ederal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes." *Id*. Accordingly, the Court held that because plaintiffs had asserted claims that depended on the scope of federal law, and required the district court to determine whether the United States had curtailed the powers of the tribe, this "afforded [plaintiffs] the basis for the relief they [sought] in a federal forum," even though no specific statute or regulation created their cause of action. *Id*. at 852-53.

Federal courts have routinely held that the statutes pled in Plaintiffs' Complaint unquestionably give rise to federal question jurisdiction, particularly when individual Indians are pursuing claims to obtain, or retain, possession of trust allotments and are seeking to remove trespassers therefrom. Further, despite Defendants' efforts to contort the holdings of *Oneida I* & *II*, and other federal court decisions following them, make clear that individual Indians who hold interests in trust allotments (which are created and protected by federal law, and are the exclusive province of federal law) have a federal common law claim for trespass and ejectment, which forms an independent basis for subject matter jurisdiction in federal court.

3. A long line of cases makes clear that this Court has subject matter jurisdiction over Plaintiffs' federal common law claims for Trespass to their trust allotments.

Cases that have squarely addressed whether there is § 1331 jurisdiction over federal common law trespass claims similar to Plaintiffs'—where the land at issue is held in trust by the United States—have uniformly held that there is federal question jurisdiction over such claims. For example in *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), the plaintiffs were individual members of the Comanche Tribe and held beneficial title to allotted trust land in Fort Sill, Oklahoma. *Id*. at 1280. Plaintiffs entered into a five-year lease for their allotments with the

Business Committee of the Comanche Tribe. *Id*. The plaintiffs later claimed that the Secretary of the Interior never approved the lease, as required by 25 U.S.C. § 348 and BIA's regulations. Plaintiffs ultimately brought suit, asserting several claims against the individual members of the Business Committee. *Id*. at 1280-81. Two counts survived the initial motion to dismiss: a claim for violation of 25 U.S.C. § 345 and a claim for common law trespass, which plaintiffs pled under Oklahoma law. *Id*. The trial court granted summary judgment in defendants' favor on those claims, and plaintiffs appealed.

On appeal, the Tenth Circuit specifically considered whether subject matter jurisdiction existed over the plaintiffs' claims. *Id*. at 1281-83. It held that while § 345 itself did not create a cause of action, it did provide a basis for federal court jurisdiction over the plaintiffs' trespass claim. *Id*. Although that trespass claim in that case had been pled under state law, the Tenth Circuit held that "Indian rights to a Congressional allotment are governed by federal—not state—law.… Thus, to the extent that Plaintiffs ground their trespass claim in state common law, it cannot provide relief."[10] *Id*. at 1282 (internal citations and emphasis omitted).

The court then held that:

> Plaintiffs' two claims, however, can be fairly construed to articulate a viable claim over which we have jurisdiction. They contend that § 345 was "violated" in the sense that Defendants' presence on their property constituted trespass and was thus "unlawful" within the meaning of § 345. They combine this with a claim for common-law trespass. We construe the complaint as stating a *federal* common-law trespass claim, for which § 345 provides jurisdiction.

Id. (emphasis in original) (citing, *inter alia*, *Oneida Cnty., N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 235-36 ("*Oneida II*") (1985)[11]). The court additionally held that "[t]he district court

[10] *See* Section III(A)(5), *infra*, regarding the application of state law to claims relating to trust allotments.

[11] The federal common law basis for Indian trespass claims under the *Oneida* decisions is addressed further in Section III(A)(3)(a), *infra*.

also had subject-matter jurisdiction under 28 U.S.C. § 1331, as a federal common-law suit provides federal question jurisdiction."[12] *Id*., n.1 (citing *Nat'l Farmers*, 471 U.S. at 850); *see also Gilmore v. Weatherford*, 694 F.3d 1160, 1176 (10th Cir. 2012) (holding that federal question jurisdiction existed for individual Indians' common law claim for conversion of mine tailings ("chat") from Indian trust land).

Plaintiffs' claims in this case are indistinguishable from those asserted in *Nahno-Lopez*, except that here Plaintiffs have expressly pled that their trespass claims arise under § 345 and federal common law. (FAC ¶¶ 1, 64, 124, 127.) Thus, this Court has subject matter jurisdiction over Plaintiffs' trespass claims under both § 345 and § 1331 because Plaintiffs' claims arise under federal common law.

The Tenth Circuit is also not, as Defendants suggest, an "outlier" on the issue of federal court jurisdiction over claims by individual Indians arising from trust land. (Dkt. 74 ("Defs.' SMJ Br.") at 19 n.23.) The Ninth Circuit, for example, has expressly held that "[f]ederal common law governs an action for trespass on Indian lands." *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). And, decades prior to *Nahno-Lopez*, the Ninth Circuit directly

[12] Trying to diminish the Tenth Circuit's holding in *Nahno-Lopez*, Defendants state 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." (Dkt. 74 ("Defs. SMJ Br.") at 19 n.23). Defendants are plainly wrong. "Not only may a party never waive the court's jurisdictional authority to hear a case, but [federal courts] 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.'" *Nyffeler Const., Inc. v. Sec'y of Labor*, 760 F.3d 837, 841 (8th Cir. 2014) (quoting *Arbaugh v. Y 7 H Corp.*, 546 U.S. 500, 514 (2006)). Considering that the Tenth Circuit thoroughly examined the question of subject matter jurisdiction and concluded that two separate jurisdictional bases existed, Defendants' suggestion that the court did not truly consider this issue is simply wrong. Further, in *Davilla III*, the Tenth Circuit affirmed the district court's grant of partial summary judgment on liability against a trespassing pipeline operator on individual Indians' federal common law trespass claims. *See Davilla III*, 913 F.3d at 970-71. The Court could not have affirmed a liability ruling in favor of the Indian landowners in *Davilla III* if the district court did not have subject matter jurisdiction over the common law trespass claims.

addressed subject matter jurisdiction over such claims in *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979), reaching the same conclusion as the Tenth Circuit. The plaintiffs in *Loring* were individual members of the Salt River Pima-Maricopa Indian Community who owned trust land along the western edge of the Salt River Indian Reservation, which had been illegally taken by the United States and the City of Scottsdale. *Id*. at 649. Although written consents for the taking of the land had been obtained, plaintiffs contended that they were fraudulent and were not approved by the Secretary of the Interior. *Id*. The district court dismissed the claims against both defendants for lack of subject matter jurisdiction. *Id*. at 650.

On appeal, the Ninth Circuit affirmed the dismissal of the claim against the United States because it was not brought within the six-year statute of limitations contained in 28 U.S.C. § 2401(a). *Id.* But the court reversed as to the plaintiffs' claims against the City. Rejecting the City's argument that plaintiffs "had wholly failed to indicate why this action can belong in federal rather than state court," the Ninth Circuit held that "Plaintiffs' claims here arise under 25 U.S.C. §§ 323-325, which serve to protect Indian lands against improvident grants of rights-of-way." *Id*. at 650. Specifically, the Ninth Circuit held that the plaintiffs' allegations implicated 25 U.S.C. § 325, which requires the Secretary to approve rights of way, and the regulations promulgated thereunder. *Loring*, 610 F.2d at 650. In conclusion, the Ninth Circuit held that "***[t]hese provisions, protecting the Indian allotment against improvident grants of rights-of-way, give rise to rights appurtenant to the allotted lands. Federal jurisdiction under 25 U.S.C. § 345 and 28 U.S.C. § 1353 exists to entertain an action brought to preserve these rights.***" *Id*. at 651 (emphasis added).

Other federal courts have consistently affirmed that they have subject matter jurisdiction over individual Indians' claims for trespass to trust allotments, including this Court which has

acknowledged that "[j]urisdiction under § 345 may exist for the trespass and related claims for declaratory relief" brought by individual allottees. *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. March 24, 2011) (citing *Nahno-Lopez*, 625 F.3d at 1282).[13] In *Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley Cty., New Mexico*, No. 15 CV 501 JAP/CG, 2016 WL 10538199, at *5 (D.N.M. Apr. 4, 2016), the court held that individual Indian "[p]laintiffs may bring their trespass claim under § 345, and the Court has federal subject-matter jurisdiction." The individual Indian landowners in *Public Service Co*. were indistinguishable from Plaintiffs in this case—they were pursuing claims for trespass to two trust allotments. *See id*. at *2. Similarly, in *Davilla I*, 2016 WL 6952356, at *2, the court held that "federal common law govern[ed the individual Indian plaintiffs'] claim for continuing trespass" to their trust allotment. Later in the same case, the court granted summary judgment in the plaintiffs' favor on liability for the federal common law trespass claim, and that grant of summary judgment was affirmed on appeal. *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233, 1238 ("*Davilla II*") (W.D. Okla. 2017), *aff'd in part, rev'd in part on other grounds* by *Davilla III*, 913 F.3d 959 (10th Cir. 2019).

In *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998), the court also held that it had subject matter jurisdiction over individual Indians' claims for breach of trust in the

[13] Even the attorney who represented Defendants before the BIA with respect to the initial easement negotiations acknowledges that subject matter jurisdiction exists over individual Indians' claims for trespass to trust land. *See* ***Colby Branch***, ACCESSING INDIAN LAND FOR MINERAL DEVELOPMENT, 2005 No. 5 RMMLF-Inst. Paper No. 3, at 22 (Rocky Mountain Mineral Law Foundation 2005) ("An action for trespass on trust lands may be brought by the United States, as trustee for the Indian owner, or by the Indian himself. Jurisdiction for either action is proper in federal district court."); Dkt. 38 at 61-62 (Letter from ***Colby Branch*** to the BIA regarding Defendants' negotiations with landowners).

administration of trust assets, because those claims, in part, "arise under the federal common law." *See id*. at 38-39 (citing *Oneida II*, 470 U.S. at 233, and collecting other cases).

Try as they might, Defendants cannot escape the fact that every aspect of Indians' rights to trust land is created, regulated, and governed by federal law. Indeed, Defendants concede that the United States could bring an action for trespass to the trust allotments at issue in this case.[14] Plaintiffs agree that there is no question that federal question jurisdiction would exist if the United States, as the trustee, brought these claims on Plaintiffs' behalf. What Defendants fail to accept is that jurisdiction does not change just because Plaintiffs assert the same rights on their own behalf. As the court recognized in *Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), when Indian land is at issue, "the interests sought to be protected by Congress are the same, no matter who the plaintiff may be." *Id*. at 806 (quoting *Capitan Grande Band of Mission Indians v. Helix Irr. Dist.*, 514 F.2d 465, 471 (9th Cir 1975)).

In sum, there is no question that Plaintiffs' rights in their trust allotments "arise under" federal statutes, are protected on an ongoing basis by federal statutes and regulations, and that federal common law provides the means by which Plaintiffs can assert and protect those rights. Under these statutes, including § 345 and the Indian Right of Way Act, and the federal common law cause of action for trespass in Indian land, this Court has subject matter jurisdiction over the Plaintiffs' trespass claims.

[14] *See* Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies [Dkt. 77]—arguing that only the United States can bring the trespass claims asserted in this case.

4. Defendants' efforts to avoid the plethora of authorities upholding individual Indians' rights to sue in federal court to protect their rights in trust allotments are without merit.

Faced with overwhelming authority that forecloses their arguments regarding federal common law trespass, Defendants resort to misconstruing and taking out of context snippets from cases inapposite to this one. It is evident that cases Defendants rely on either confirm that this Court has subject matter jurisdiction over Plaintiffs' trespass claims or are wholly distinguishable.

a. The *Oneida* decisions defeat Defendants' arguments.

Defendants' most egregious error is their contorted interpretation of *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661 ("*Oneida I*") (1974), which is premised on multiple fallacies, misunderstandings about the foundations of that decision, and an outright misrepresentation of *Oneida I*'s holding aided by improper deletion of key words that—if not deleted—would quite obviously defeat Defendants' argument. In their Subject Matter Jurisdiction Brief, Defendants assert that the Supreme Court stated in *Oneida I* that "***Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for arising under jurisdiction merely to allege that ownership or possession is claimed under [Federal law].***" (Defs.' SMJ Br. at 9 (quoting *Oneida I*, 414 U.S. at 675) (emphasis and alterations in Defs.' Br.)).

Defendants' alteration to this quotation is more than material, it is dispositive. The unaltered quote reads:

> Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under ***a United States patent***.

Oneida I, 414 U.S. at 676-77 (citations omitted) (emphasis added). Defendants disingenuously edit out the reference to the claim of ownership under a patent because this is a critical event that eliminates the trust status of the allotment, terminates federal supervision, and conveys (for the first time) state court jurisdiction over claims related to the land. In other words, Defendants edit this passage to falsely create the impression that the Supreme Court held that state law always applies to claims related to allottees' land.

The opposite is true. The Supreme Court has held that "trust allotments retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by federal legislation…." *Ramsey*, 271 U.S. at 470 (citation and internal quotation marks omitted); *see also United States. v. Pelican*, 232 U.S. 442, 447 (1914) ("That the lands, being so held [in trust], continued to be under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians, is not open to controversy.").

Additionally, under the Dawes Act, and particularly the 1906 Burke Act amendment that Congress made to Section V of the Dawes Act after the Supreme Court's decision in *In re Heff*, federal law exclusively applies to trust allotments "until the issuance of fee-simple patents." Burke Act § VI; 25 U.S.C. § 349. Accordingly, "state civil and criminal jurisdiction would lie" only "at the expiration of the trust period … when the lands have been conveyed to the Indians

by patent in fee."[15] *Cnty. of Yakima*, 502 U.S. at 255; *see also Larkin v. Paugh*, 276 U.S. 431, 439 (1928) (holding that "[w]ith the issue of the patent, the title [to allotted trust land] not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated.")

Nothing in *Oneida I* is to the contrary. In *Oneida I*, the Court distinguished *Taylor v. Anderson*, 234 U.S. 74 (1914), noting that in *Taylor*, "[i]ndividual patents had been issued ***with only the right to alienation being restricted*** for a period of time." *Oneida I*, 414 U.S. at 676 (emphasis added). The Supreme Court also noted that the lands at issue in *Taylor* had been "allocated to individual Indians" under 32 Stat. 641. *Oneida I*, 414 U.S. at 676. That statute was specific to the Choctaw and Chickasaw tribes; it exclusively created restricted allotments, and provided that the lands allotted thereunder became fully alienable after five years, or in the case of homestead allotments, after 21 years. *See* 32 Stat. 641 §§ 12, 16 (1902) (Pls.' App., Ex. C).

While Defendants gloss over these details, they are critical to the holding in *Taylor* because *Taylor* involved plaintiffs that at the time they filed their complaint "were owners ***in fee***." *Taylor*, 234 U.S. at 74 (emphasis added). Thus, the land at issue in *Taylor* was not held in trust by the United States—it was land that had been originally allotted but had passed out of

[15] Defendants argue in a footnote that because trust allotments are issued by trust patent, the holding in *Taylor*, which is the basis for the discussion Defendants cite in *Oneida I*, applies to trust land and not just land owned in fee like the tract at issue in *Taylor*. (Defs.' SMJ Br. at 9 n.17.) Stated differently, Defendants attempt to conflate trust patents and the fee patent that was issued to the landowners in *Taylor*. These two types of patents are fundamentally different, the latter serving to remove the land completely from any trust obligation by the United States (and thus governance by federal law). *Oneida I* did not discuss the differences between trust and fee patents because the issue was not presented in that case. However, other decisions, including *In re Heff* and *County of Yakima* make it clear that federal law governs trust allotments until a ***fee patent*** is issued.

trust at a time when this was a common occurrence.[16] Thus, the plaintiffs in *Taylor* stood on par with any other landowner. Accordingly, they did not plead any right to possession that arose under federal law, because they could not.[17]

The distinction between land patented in fee to an Indian owner, such as the allotment at issue in *Taylor*, or those subject only to restrictions on alienation, and allotments that have continually remained in trust—like the land at issue in this case—is a dispositive one that is addressed in many federal decisions. For example, in *Buzzard* the Tenth Circuit held that lands subject restrictions on alienation are not exempted from state laws in the same way as trust allotments. 992 F.2d at 1077. This is because for fee or restricted land, "[t]he federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land. At most it has agreed to approve transactions disposing the land." *Id*. at 1076. Thus, restricted land is not subject to the same "[s]uperintendency over the land" and "active involvement of the federal government" that applies to trust allotments. *Id*. In sum, "when the federal government agrees to hold land in trust, it is prepared to exert jurisdiction over the land," to the exclusion of state governments. *Id*.

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[16] Moreover, *Taylor* was decided in 1914, well prior to the enactment of the Indian Reorganization Act, the indefinite extension of the trust status of allotments, and decades before the Indian Right of Way Act was passed—a series of statutes through which Congress unmistakably assumed continuing federal superintendence of individual trust lands.

[17] The only federal statute pled in the *Taylor* complaint was alleged "to anticipate and avoid a defense"—that the defendants' deed was invalid under an Act of Congress. *Id*. Accordingly, most courts, including the Eighth Circuit, recognize that *Taylor* merely reflects the now well-accepted rule that pleading a federal issue in anticipation of a defense does not create federal question jurisdiction. *See Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 96 (8th Cir. 1956) (citing *Taylor* for the proposition that federal question jurisdiction requires a genuine controversy that is "disclosed on the face of the complaint, unaided by the answer or by the petition for removal"); *Catawba Indian Tribe of South Carolina v. South Carolina*, 865 F.2d 1444, 1456 (4th Cir. 1989) (holding that *Taylor* did not apply to a claim to "possession under a claim of Indian title" because in *Taylor* "the plaintiffs did not allege Indian title, but only that the defendant's title was void because of an Act restricting alienation of Choctaw and Chickasaw allotments").

The remainder of the *Oneida I* decision confirms that the Court did not draw an arbitrary distinction between land claims made by tribes as opposed to those made by individual Indians. Rather, the Court held that where federal law creates and protects the Indians' land rights, those Indians' land claims arise under federal law. Distinguishing the case before it from those where a land patent was issued by the United States, the Court observed:

> In the present case, however, the assertion of a federal controversy does not rest solely on the claim to a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

Oneida I, 414 U.S. at 677-78 (internal citations and alterations omitted); *see also id*. at 684 (Rehnquist, J., concurring) (agreeing that federal question jurisdiction existed because the United States "has not placed the land beyond federal supervision" and the right to possession being asserted "is based not solely on the original grant of rights in the land but also upon the Federal Government's subsequent guarantee" as distinguished from "claims of land grantees for whom the Federal Government has taken no such responsibility").[18]

This same rationale applies to this case. The key issue is whether or not the lands owned by a tribe or individual Indian are subject to the protection of the United States, including the federal courts. In *Oneida I*, the tribe's lands were subject to the protections of the United States pursuant to both aboriginal occupancy and treaty. Here, Plaintiffs' lands are subject to federal control and supervision because they are held in trust status and supervised by the United States

[18] In *Oneida I*, the tribe was pursuing aboriginal land claims and claims based on treaty rights. It was not asserting claims regarding trust allotments, which would be governed by 25 U.S.C. § 345 and the Indian Right-of-Way Act, statutes that create subject matter jurisdiction independent from federal common law principles. *See* Section III(A)(2), *supra*, and Section III(A)(3)(b), *infra*.

as trustee. It is true that under Congress' initial plan, such federal superintendence was to last a mere 25 years and then a fee patent should issue. However, through the IRA and subsequent statutes and regulations recited in Plaintiffs' Amended Complaint, the United States changed law and policy in 1934 and has since "continuously protected" Plaintiffs' allotments, which are still held in trust today. *Oneida I*, 414 U.S. at 677-78. This makes the claims asserted by Plaintiffs indistinguishable in any material respect from the federal common law claims recognized in *Oneida I*.

Defendants also largely ignore that *Oneida I* was not the Supreme Court's last statement on federal common law trespass claims asserted by Indians. The Court returned to this issue and expanded on its reasoning a few years later in *Oneida II*. An examination of *Oneida II* makes clear that individual Indians may bring trespass claims under federal common law.

Oneida II involved the appeal following trial of the land claims that were remanded in *Oneida I*. *Oneida II*, 470 U.S. at 229-33. On the second appeal, the defendants challenged whether the Oneidas had a substantive right of action for violation of the 1794 treaty that reserved their reservation. *Id*. at 233. The parties stipulated below that the reservation protected by the treaty included the land at issue. *Id*. at 231. The Oneidas contended that they had a federal common law right of possession and an implied statutory cause of action under the Nonintercourse Act of 1793. *Id*. at 229, 235. The Supreme Court did not reach the latter question because it found that "the Indians' common-law right to sue is firmly established." *Id*. at 233.

The Court started by reiterating that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Id*. at 234 (citations omitted). The Court noted that the "Indians' right of occupancy need not be based on treaty, statute, or other formal

Government action" and that the Oneidas could rely on their aboriginal claim to the land at issue to pursue their claims under federal common law. *Id*. at 236.

The Court then turned to the question of whether New York's statute of limitations barred the Oneidas' claims, which related to transactions—the allegedly unlawful occupation of their land—that occurred in 1795. *Id*. at 229, 240-44. The Court held that "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." *Id*. at 240. The Court stated that "[i]n the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, ***provided that the application of the state statute would not be inconsistent with underlying federal policies***." *Id*. (emphasis added). However, the Court then held that for Indian land claims, "***the borrowing of a state limitations period in these cases would be inconsistent with federal policy***. Indeed, on a number of occasions Congress has made this clear with respect to Indian land claims." *Id*. at 241 (emphasis added). The Court then examined the repeated occasions when it and Congress have confirmed that "Indian land claims were exclusively a matter of federal law." *Id*. at 241-42 (citations omitted).

As part of its analysis, the Court examined the legislative history of Indian Claims Limitation Act and its amendments ("Claims Limitation Act"). The Claims Limitation Act was originally passed in 1966 and was repeatedly amended to preserve Indian land claims—both those belonging to tribes and individual Indians—the most recent amendment being passed in 1982. *See id*. at 241-43. As the Court noted, the Claims Limitation Act created a statutory scheme imposing time limitations on tort and contract claims brought by the United States on behalf on Indians, and time limitations on claims included on lists of known existing claims published by the Secretary of Interior. *See id*.; 28 U.S.C. § 2415(b). The latter category of claims

(those listed by the Secretary) were barred unless they were pursued by the United States or the affected Indian landowners within the prescribed time periods. *Oneida II*, 470 U.S. at 242-43.

Importantly, one of the categories of claims recognized by Congress in the Claims Limitation Act, and which is covered by the holding in *Oneida II*, are "action[s] to recover damages resulting from a trespass on lands of the United States … ***on behalf of an individual Indian whose land is held in trust or restricted status***…." 28 U.S.C. § 2415(a), (b) (emphasis added); *see also Oneida II*, 470 U.S. at 242-43 (discussing the application of the Claims Limitation Act to "tort and contract claims for damages brought by individual Indians and Indian tribes"). The Claims Limitation Act also exempted from the federal statutes of limitations it created any "action to establish the title to, or right to possession of, real or personal property." 28 U.S.C. § 2415(c); *see also Oneida II*, 470 U.S. at 243 n.15 (recognizing that if the Oneidas' claims invoked the "right to possession" of the land at issue, they would be exempt from the Claims Limitation Act's statute of limitations).

The Court concluded that "we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances." *Id*. at 244.

The Supreme Court's holding on this issue is significant beyond the statute of limitations question. In holding that Congress recognized that Indians—both tribes and individuals—had a federal common law right of action that was not subject to states' statutes of limitations, the Court explicitly acknowledged the existence of the underlying federal cause of action. That holding applies directly to this case, and the inclusion of individual Indian land claims in the 1982 version of the Claims Limitation Act (28 U.S.C. § 2415) and the analysis in *Oneida II*

conclusively refutes Defendants' argument that *Oneida I* held that federal common law land claims can only be brought by tribes.

b. Defendants misconstrue the holding of *Mottaz*.

Defendants also argue that *United States v. Mottaz*, 476 U.S. 834 (1986), *abrogated on other grounds by Irwin v. Dep't of Veterans Affairs*, 476 U.S. 834 (1986), limits the scope of federal question jurisdiction for Indian land claims. (Defs.' SMJ Br. at 12-13). But *Mottaz* is fatal to Defendants' arguments because it held that federal question jurisdiction exists over "***suits involving the interests and rights of the Indian in his allotment or patent after he has acquired it***." *Id*. at 845 (emphasis added). Jurisdiction thus exists over Plaintiffs' claims, which seek to protect their interests and rights in their trust allotments.

Mottaz involved a claim for quiet title brought by individual allottees against the United States. *Id*. at 836. The primary issue in the case was whether the United States had waived its sovereign immunity from suit under any of the statutes relied on, including whether the allottees' claims had been brought within the prescribed limitations periods under those statutes. *See id*. at 841 ("[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity") (citation omitted). One of the statutes examined was 25 U.S.C. § 345, one of the statutory grounds for jurisdiction pled in Plaintiffs' Amended Complaint. *Mottaz*, 476 U.S. at 845; (FAC ¶ 64). The Supreme Court held that:

> 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, ***and suits involving the interests and rights of the Indian in his allotment or patent after he has acquired it***.

Mottaz, 476 U.S. at 845 (internal quotation marks and citations omitted) (emphasis added).

The Court held that the United States had waived sovereign immunity only for the former category of claims (actions for issuance of an allotment), and that because the allottees in that case were not seeking issuance of an allotment, § 345 did not provide an applicable wavier. *Id.* at 845-47. Of course, the sovereign immunity aspects of *Mottaz*, which were informed by the strict construction applied to statutes authorizing suit against the United States, do not affect this case. However, the Court's holding that federal courts have jurisdiction over the second category of claims—those involving ***the interests and rights of an Indian in his allotment or patent after he has acquired it***—is directly on point.

The Supreme Court's interpretation of § 345 in *Mottaz* is consistent with principles of statutory construction that apply to laws affecting Indians' rights. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida II*, 470 U.S. at 247. Generally referred to as the Indian Cannon of Construction, it is well-established that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also Narragansett Tribe*, 481 F. Supp. at 806 ("Congress' unique fiduciary obligation toward the Indians … [is] embodied in an extensive statutory scheme which is to be construed liberally … and never to the Indians' prejudice." (internal citations and alterations omitted)).

Not surprisingly, courts rely on *Mottaz* when holding that § 345 provides federal question jurisdiction over Indians' federal common law trespass claims. *See Nahno-Lopez*, 625 F.3d at 1282; *Public Service Co.*, 2016 WL 10538199, at *5. While Defendants recite the holding from *Mottaz*, they fail to distinguish it in any way, because they cannot. (Defs.' SMJ Br. at 13.)

c. Defendants' other cases are readily distinguishable.

Defendants also rely on a spate of inapplicable cases in an attempt to buttress their faltering subject matter jurisdiction arguments. Each is quickly dispatched.

Defendants spend considerable energy discussing the Eighth Circuit's decisions in *Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273 (8th Cir. 1987), and *Wolfchild v. Redwood County*, 824 F.3d 761 (8th Cir. 2016). (Defs.' SMJ Br. at 10-11, 13-15.) Neither decision aids their cause.

Kishell, like *Taylor*, concerned fee land, not trust land. The court made clear that "although Tibbet's right to possession of the land did ***originate*** under the federal allotment statutes, there is no claim that the property was subject to a restriction against alienation imposed by the United States."[19] *Kishell*, 816 F.2d at 1275 (emphasis added). The court also explained that "[o]n the record before us, it is undisputed that Tibbets held ***fee title*** to the land."[20] *Id*. (emphasis added). To be sure, the court discussed jurisdiction under § 345—but that discussion is entirely inapplicable to this case because Plaintiffs have pled that their land is held in trust, and have pled the applicable protections of multiple federal statutes that govern trust land. No one here contends that § 345 creates jurisdiction over claims related to lands held in fee. *Id*. at 1275-76.

[19] Indeed, it appears, at least based on the pleadings in *Kishell*, that the land at issue was not even subject to any restriction on alienation. Thus, it no longer qualified as even a restricted allotment.
[20] Earlier in the opinion, the court notes that the plaintiff "was the *successor in title and interest* to an allotment of approximately fifteen acres of land held in trust by the United States." *Id*. at 1274 (emphasis added). Thus, the plaintiff in *Kishell* pled that the land was originally allotted in trust, but that she held fee title when the suit was filed, and the court analyzed jurisdiction over her claims on that basis.

Moreover, likely because the land was held in fee and not in trust, the plaintiff in *Kishell* failed to plead ***any*** federal statutes as the jurisdictional basis for her claims.[21] *See id*. at 1275. Thus, *Kishell* does not address *Oneida I* or *II*, federal common law, or the Indian Right-of-Way Act. Accordingly, it is impossible to read *Kishell*, as Defendants urge—as a rejection of federal court jurisdiction over Plaintiffs' claims based on federal common law or the statutory bases for jurisdiction over claims related to trust land pled in the Complaint in this action.

Wolfchild is similarly devoid of any claims arising from Indian trust land. There, the court addressed claims by an unrecognized band[22] of the Sioux Tribe known as the loyal Mdewakanton,[23] against a number of other Sioux bands, municipalities, entities and individuals, claiming a right to possess twelve square miles that they contended were set aside for them by the Secretary of the Interior under Section 9 of the Act of February 16, 1863 (the "1863 Act"). *Wolfchild*, 824 F.3d at 766-67. However, to have a federal common law claim, Indian landowners must have property rights that are protected by federal law. The court in *Wolfchild* found that the Secretary never exercised his authority under the 1863 Act to set aside the

[21] The plaintiff in *Kishell* pled diversity jurisdiction, but the district court held that because the suit was against a tribal housing authority it should defer to the jurisdiction of the tribal court. *See id*. at 1276. Thereafter, the plaintiff in *Kishell* changed horses on appeal to argue for federal question jurisdiction over her claims. *Id*.

[22] Only specific Indian tribes are federally recognized. *See* 80 Fed. Reg. 1942-48 (Jan. 14, 2015) (listing the federally recognized Indian tribes).

[23] The *Wolfchild* case had a "long, complicated history" which is discussed in greater detail in the opinion dealing with the loyal Mdewakanton's suit against the United States—*Wolfchild v. United States*, 731 F.3d 1280 (Fed. Cir. 2013). *Id*. at 765. By way of brief explanation, the loyal Mdewakanton sided with the United States and protected settlers during a Sioux revolt in 1862. *See id*. at 766. This band's loyalty to the United States led to the promised provision of land to them in the 1863 Act, discussed *infra*.

promised 12 square miles of land for loyal Mdewakanton.[24] *Id*. at 766-67. At best, he "attempted to use his authority under the 1863 Act," but failed to set aside the land. *See id*. at 766. The Eighth Circuit held that "[b]ecause the loyal Mdewakanton ***are not entitled to a declaration of the exclusive right and title of the twelve square miles under the 1863 Act, the loyal Mdewakanton have no property rights upon which to base federal common law claims for ejectment and trespass***." *Id*. at 769 (emphasis added) (citing *Oneida I*, 414 U.S. at 671).

While there is discussion in *Wolfchild* about federal common law claims brought by individual Indians versus tribes, *id*. at 768, that discussion again relates to claims brought by individual Indians that had no claims based on trust land. Claims based on trespass to fee land (as in *Taylor* and *Kishell*) or claims where the Indians had no federal land rights at all (*Wolfchild*) would not arise under federal law. However, claims for trespass to trust land—land subject to federal superintendence, *Buzzard*, 992 F.2d at 1077, that has been "continuously protected" by the United States and federal law, *Oneida I*, 414 U.S. at 677-78—give rise to federal question jurisdiction.

Defendants also rely on *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184 (9th Cir. 1988). (Defs.' SMJ Br. at 15-16.) In that case, the plaintiffs claimed that jurisdiction existed under § 345, but asserted only claims for money damages based on flooding of their allotments. *Id*. at 185-86. There was no ongoing trespass and no trespasser to be removed.

A closer read of *Pinkham* shows that it is yet another case cited by Defendants that ***supports*** subject matter jurisdiction here. In analyzing the tort claim asserted in *Pinkham*, the

[24] It is also not clear whether this land would have been allotted to the loyal Mdewakanton in trust under the 1863 Act, or whether fee patents would have been issued, similar to the land at issue in *Taylor*. Notably, the 1863 Act at issue in *Wolfchild* was passed more than two decades before the United States adopted the trust allotment system in the Dawes Act of 1887.

Ninth Circuit discussed its previous decision in *Loring* (*see* Section III(A)(2), *supra*), and reinforced that federal question jurisdiction unquestionably exists in cases like this one, where violations of the federal statutes and ongoing occupation of trust land by a trespasser are alleged. The court in *Pinkham* stated:

> In contrast to plaintiffs' claim here, however, the claim in *Loring* did not sound in tort. Instead, ***it arose under federal statutes and regulations that specifically protected Indian allotments against improvident grants of rights-of-way***. Because such provisions gave rise to rights appurtenant to allotted lands, federal question jurisdiction under sections 345 and 1353 existed to entertain an action brought to preserve those rights. An essential element in *Loring* was thus preservation of the Indian's ownership of the allotted lands and rights appurtenant to the allotment.

Id. at 187 (citing *Loring*, 610 F.2d at 650) (internal quotation marks omitted) (emphasis added). The right to remove a trespasser that is occupying one's land is one of the critical "rights appurtenant" to ownership of that land. *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (The "right to exclude others" from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."). Accordingly, *Pinkham* only buttresses the Ninth Circuit's holding in *Loring* that claims that are asserted to protect possessory rights in trust allotments, including to remove trespassers, arise under federal law.

Finally, Defendants rely on an unpublished decision from the District of Idaho, *Marek v. Avista Corp.*, No. CV4-493, N EJL, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006).[25] (Defs.' SMJ Br. at 17-19.) There, the court "agree[d] with the plaintiffs that a claim does not fall outside of § 345 simply because it is a tort claim," rejecting the defendants' reliance on *Pinkham*. *Id*. at *4. However, the plaintiff did not plead the Indian Right of Way Act (25 U.S.C. §§ 323-328) or the related regulations, which were the basis for jurisdiction in *Loring*. *See Marek*, 2006 WL

[25] In the more than thirteen years since it was decided, *Marek* has never been cited by another court.

440259 at *2 (finding that the complaint cited "25 U.S.C. §§ 345, 3713, 28 U.S.C. §§ 1353, 1331, 2201, and 2202" to support jurisdiction).[26] In contrast, Plaintiffs in this case have pled violations of the Indian Right-of-Way Act—thus, the claims in this case "arise from federal regulations and statutes specifically protecting Indian allotments." *Marek*, 2006 WL 449259 at *4; *see also Loring*, 610 F.2d at 650. Accordingly, *Marek* actually supports subject matter jurisdiction over this case.

In sum, Defendants cannot escape the fact that Congress has extensively legislated in the area of rights-of-way over Indian trust land. In additional to federal common law, the Indian Right-of-Way Act (25 U.S.C. §§ 323-328) creates specific protections for Indian owners of trust allotments, and § 345 and § 1353 unquestionably grant federal courts jurisdiction over claims to enforce those protections.

5. This Court independently has subject matter jurisdiction over Plaintiffs' claims for breach of the 1993 Easement.

In addition to having subject matter jurisdiction over Plaintiffs' trespass claims, the Court also has federal question jurisdiction over Plaintiffs' alternative claim for breach of the 1993 Easement (Count II) and over Plaintiffs' unjust enrichment claim (Count III). Plaintiffs have pled that if the 1993 Easement is held to be valid, Defendants breached it when they failed to remove the pipeline from Plaintiffs' allotments when it expired, as required by the terms of the easement and 25 C.F.R. § 169.125(c)(5)(ix). (FAC ¶¶ 130-36.)

The Eighth Circuit recently held that claims for breach of leases "on federally-held Indian trust land are governed by federal law." *Kodiak Oil & Gas (USA) Inc. v. Burr*, ___ F.3d ___

[26] 25 U.S.C. § 3713 is part of the American Indian Agricultural Resources Act. 28 U.S.C. §§ 2201 and 2202 are part of the federal Declaratory Judgment Act, which does not provide an independent basis for jurisdiction. *See Marek*, 2006 WL 449259 at *2, 4. These statutes are not at issue here.

2019 WL 3540423, *6 (8th Cir. 2019) (holding that claims based on oil and gas leases on Indian trust land are governed by federal law). In *Burr*, Indian landowners had filed suit in tribal court at Fort Berthold for breach of oil and gas leases, alleging that Kodiak and other lessees had violated the leases by excessively flaring natural gas. *Id*. at *1. In response, the lessees filed a declaratory judgment action in federal court seeking an injunction to prevent the tribal court from adjudicating the breach of contract claims. The lessees' argument for an injunction was that the tribal court lacked jurisdiction over the landowners' claims because those claims—for breach of the oil and gas leases—was a federal cause of action, and, as such, was outside the tribal court's jurisdiction. *Id*. at *4-5.

The District Court granted the injunction, and the Eighth Circuit affirmed. In doing so, the Eighth Circuit held that the tribal court was not a court of general jurisdiction, and "lack[ed] jurisdiction to adjudicate federal causes of action absent congressional authorization"—which it found had not been given. *Id*. at *5. The Court also agreed with the lessees that "the tribal court plaintiffs' claim for relief [for breach of the lease agreements] is based on federal law." *Id*. The Court held that "[u]nlike routine contracts that are governed by general common law principles of contract, oil and gas leases on federally-held Indian trust land are governed by federal law." *Id*. at *6 (quoting *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 573-75 (5th Cir. 2001)); *see also Naegele Outdoor Advert. Co. v. Acting Sacramento Area Dir., Bureau of Indian Affairs*, 24 IBIA 169, 177 (Interior Bd. of Indian Appeals 1993) ("[T]he construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law."); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 575 (10th Cir.

1984) (holding that federal question jurisdiction existed over action to enforce oil and gas lease that incorporated Interior's regulations).

Under *Burr*, and the other cases cited above that have reached the same result, there is no question that Plaintiffs' claim in this case for breach of the 1993 Easement arises under federal, not state, law. Just like the leases at issue in *Burr*, the 1993 Easement is not a routine contract. It was issued pursuant to the Indian Right-of-Way Act and regulations promulgated thereunder, and it expressly incorporates those regulations. 1993 Easement (stating that it was issued "pursuant to the provision 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"); *see also Loring*, 610 F.2d at 650-51 (claims by Indian landowners involving the protections created by the Indian Right of Way Act, 25 U.S.C. § 323, *et seq*., and the regulations promulgated thereunder, arise under federal law and create federal question jurisdiction). The 1993 Easement was also executed on the landowners' behalf by the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, under delegation of authority from the Secretary of Interior, acting in his fiduciary capacity. 1993 Easement; *Naegele*, 24 IBIA at 177 (federal law governs "contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity"). In short, Plaintiffs' claims under the 1993 Easement provide a separate, independent basis for federal question jurisdiction.

6. This Court also has subject matter jurisdiction over Plaintiffs' unjust enrichment claims.

Federal question jurisdiction additionally exists over Plaintiffs' claim for unjust enrichment. (FAC ¶¶ 137-45.) The courts that have addressed the question have held that, just as federal question jurisdiction exists over Indians' common law claims for trespass, federal courts likewise have jurisdiction over related common law claims that involve significant issues of federal law. *Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012), is instructive on this point.

In *Gilmore*, individual Indians that owned restricted interests in mine tailings (or "chat") produced from their allotments brought suit against several parties—including the United States and private parties—to stop removal of chat produced from their land and to recover damages and an accounting for the chat already removed. *Id*. at 1164. The district court dismissed the claims against the United States, and then held that it did not have jurisdiction over plaintiffs' common law claim for conversion against the private parties. *Id*. On appeal, the Tenth Circuit reversed and remanded as to the common law conversion claim. *Id*.

The court held that the plaintiffs' conversion claim presented a "substantial question of federal law" such that the district court had subject matter jurisdiction under § 1331 to hear that claim. *Id*. at 1164, 1170-71, 1173-75 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)). The court also held that "the conversion claim necessarily raises a stated federal issue" because the Secretary of the Interior was required to approval removal of all restricted Indian property, including the chat. *Id*. at 1173. Thus, absence of the Secretary's approval was an essential element of the plaintiffs' conversion claim. *See id*.

Addressing the defendants' argument that this federal issue was not "substantial," and thus did not qualify for federal question jurisdiction, the court found that the federal issue of the Secretary's approval was sufficiently central to plaintiffs' claim because plaintiffs "cannot win unless the court answers that question" in their favor. *Id*. at 1176-77. The court also found that asserting federal jurisdiction would not "disturb any congressionally approved balance of federal and state judicial responsibilities" because while "claims that touch on restricted Indian personalty arise with some degree of frequency … hearing such claims in federal court will portend only a microscopic effect on the federal-state division of labor.'" *Id*. (quoting *Grable*,

545 U.S. at 314). In so finding, the court noted that "many claims relating to Indian property arise under federal common law." *Id*. at 1176 (citing *Nahno-Lopez*, 625 F.3d at 1282).

Similarly, in *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), *aff'd and remanded*, 572 U.S. 782 (2014), the Sixth Circuit held that federal common law claims aimed at preventing an Indian community from operating of a casino raised substantial federal issues, and finding that "there is no reason to think Congress would prefer this question to be resolved by state courts … [because] Indian law is primarily the province of the federal courts." *Id*. at 413.

Subject matter jurisdiction lies in this court over Plaintiffs' unjust enrichment claim just as it did over conversion claim asserted in *Gilmore* and the federal common law claims in *Bay Mills*.[27] Plaintiffs' unjust enrichment claim protects the same interests in Indian trust land as the trespass claims, and therefore arises from federal common law as well. Even if this cause of action is construed as arising solely under state law, federal question jurisdiction exists because Defendants' presence on Plaintiffs' trust land without the consent of the majority of the interest owners, and after 2013 without the approval of the Secretary, violates 25 U.S.C. §§ 324, 325, and the underlying regulations. Significantly, Secretarial approval and majority landowner consent are required by federal statutes for lawful occupation of Plaintiffs' trust property and control over any more lenient standards that might be imposed by state law. *See Davilla III*, 913 F.3d at 967-68 (rejecting the argument that consent from a minority of interest owners in an allotment is an effective defense to Indian trespass claims because, if this were the case, "there

[27] The plaintiffs in *Gilmore* did not allege until their reply brief on appeal that their conversion claim had a basis in federal common law under *Oneida I*. *See Gilmore*, 694 F.3d at 1170 n.2. Therefore the court did not address that argument. In this case, Plaintiffs have pled that all of their claims arise under federal common law, but even if the unjust enrichment claim arises under state law, federal question jurisdiction exists because of the embedded federal issues.

would be no point to fulfilling the more stringent requirements of securing a right-of-way under federal statute"). Thus, lack of the requisite consent and lack of approval by the Secretary (for 2013 forward) are essential elements of Plaintiffs' unjust enrichment cause of action. And hearing this claim in federal court does not upset any balance of judicial responsibilities between federal and state court because disputes regarding the occupation of Indian trust land are frequently, if not exclusively, the province of the federal courts.[28] *See Gilmore*, 694 F.3d at 1176-77; *Nahno-Lopez*, 625 F.3d at 1282.

For these reasons, federal question jurisdiction additionally exists over Plaintiffs' alternative claim for breach of the 1993 Easement and their claim for unjust enrichment.

7. Accepting Defendants' subject matter jurisdiction arguments would leave Plaintiffs' without a remedy because claims regarding Indian trust land cannot be brought in state court.

The final, and equally problematic, issue with Defendants' subject matter jurisdiction arguments is that they would leave Plaintiffs without a remedy for Defendants' trespass. Defendants contend that Plaintiffs' claims arise solely from state law and cannot be pursued in federal court. However, Congress has expressly legislated regarding the scope of state court jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country …." 28 U.S.C. § 1360(a). Under § 1360(a), Congress granted civil jurisdiction over claims involving Indians arising in specified areas of Indian country to six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id*. But, even as to those states' jurisdiction, Congress stated that:

> Nothing in this section shall authorize the … encumbrance … of any real or personal property … belonging to any Indian or any Indian tribe … that is held in

[28] Even if the Court were to determine that some of Plaintiffs' claims arise under state law, the Court has supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367, because all of Plaintiffs' claims "form part of the same case or controversy." 28 U.S.C. § 1367(a).

> trust by the United States … or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate … the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b).

The Supreme Court analyzed § 1360(b) (which is the codification of Pub. L. 240 § 4(b) in *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976). In that case, the Supreme Court held that "the express prohibition of any 'alienation, encumbrance, or taxation' of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies involving reservation Indians pursuant to [§ 1360(b)] from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property" and any other reading "would simply make no sense." *Id*. at 391 (quoting Pub. L. 240 § 4(b)). Other courts have similarly held that § 1360(b) prevents state courts from assuming jurisdiction over suits that involve trust allotments. For example, in *Alaska Dep't. of Public Works v. Agli*, 472 F. Supp. 70 (D. Alaska 1979), the court agreed that "state courts do not have jurisdiction to adjudicate the right to the possession or ownership of interest of property held in trust for Alaskan Natives." *Id*. at 72. "Where the dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply," including actions for "ejectment." *Id*. at 73 (citing *In re Humbolt Fir, Inc*., 426 F. Supp. 292, 296 (N.D. Cal. 1977)). The court in *Alaska Dep't. of Public Works* also noted that "the statutes that do grant jurisdiction over 'any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty' place that jurisdiction in the federal courts." *Id*. (citing 28 U.S.C. § 1353, 25 U.S.C. § 345); s*ee also All Mission Indian Hous. Auth. v. Silvas*, 680 F. Supp. 330, 332 (C.D. Cal. 1987) (holding § 1360 prevented application of state law to action to evict Indian residents from trust land, and that federal common law governed the

ejectment claim); *Heffle v. State*, 633 P.2d 264, 268 (Alaska 1981) ("courts have strictly interpreted section 1360 against a broad grant of state jurisdiction over allotment lands" and holding that the state court did not have jurisdiction over claims for a restraining order related to a right-of-way over an allotment).

It is no answer for Defendants to say that § 1360 is irrelevant and "requires no further discussion" because it deals with the limits of state court jurisdiction. (Defs.' SMJ Br. at 6-7 n.14.) It is true that § 1360 does not function as a grant of jurisdiction to the federal courts. However, the fact that § 1360 expressly carves out from state court jurisdiction claims relating to the "encumbrance … ownership or right of possession" of Indian trust land shows that Congress understands—consistent with *Oneida I*, *Oneida II*, *Bryan*, and multiple other precedents—that such claims are already the province of the federal courts.

In sum, this is a case about Indian trust land—long held to be the province of federal law. All of Plaintiffs' claims arise under federal common law, present substantial federal issues, and/or are based on federal statutes. Defendants cannot avoid the pervasive effect of federal law on this case. Their motion to dismiss for lack of subject matter jurisdiction should be denied.

B. There Are No Grounds to Dismiss Plaintiffs' Claims for Failure to Join the United States.

Defendants' argument that all of Plaintiffs' claims should be dismissed under Rule 19 because the United States is not a party (Dkt. 76 ("Defs.' Joinder Br.")) is also contrary to Supreme Court precedent. Defendants make no attempt to distinguish—or even to cite—this authority, and federal courts have routinely rejected the very argument Defendants are making. This Court should likewise reject Defendants' argument.

Defendants move for dismissal under Rule 12(b)(7), which provides for dismissal of a case for "failure to join a party under Rule 19." Rule 19(a) requires the joinder—"if feasible"—

of all parties whose presence is necessary for the fair and complete resolution of the case. *See* Fed. R. Civ. P. 19(a); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 671 (8th Cir. 2015). If a party's joinder is necessary but not feasible, then Rule 19(b) "permits" dismissal for failure to join; but "courts are generally 'reluctant to grant motions to dismiss of this type.'" *Id.* (quoting *16th & K Hotel, LP v. Commonwealth Land Title Ins. Co.*, 276 F.R.D. 8, 12 (D.D.C. 2011), in turn quoting 5C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1359 (3d ed. 2004)); Fed. R. Civ. P. 19(b).

By its own terms, Rule 19 requires a two-step analysis. First, under Rule 19(a), the Court must determine whether the absent party "must be joined." Second, under Rule 19(b), if joinder is required but not feasible, the Court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."

Here, Defendants' motion to dismiss fails at the first step because the Government is not a necessary party. This is an action against Defendants for trespass, breach of an easement agreement, unjust enrichment, and punitive damages. (FAC ¶¶ 121-149.) Even if the United States could be construed as a joint tortfeasor in this action, "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Lustgraaf v. Behrens*, 619 F.3d 867, 885 (8th Cir. 2010) (refusing to dismiss under Rule 19). And the Eighth Circuit has expressly rejected the notion that the United States is "an indispensable party to every case involving a dispute over Indian lands." *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 747 n.6 (8th Cir. 2001) (citing, *e.g.*, *Sokaogon Chippewa Cmty. V. State of Wis.*, 879 F.2d 300, 304–305 (7th Cir. 1989) (holding United States was not necessary party)).

In *Poafpybitty*, the Supreme Court confirmed that individual Indian landowners *or* the federal government may bring an action to protect allottees' interests in lands that are held in

trust by the federal government for their benefit. 390 U.S. at 368-70. The Supreme Court held that individual allottees' right to bring suit is subject only to the federal government's right to intervene in such an action. *Id.* at 371. Notably, the Court recognized that, if an allottee were required to rely on the United States to bring an action or to be part of the action, it would likely eliminate the allottee's ability to protect his or her interest in the land. *Id.* at 370-74.

Likewise, in *Mottaz*, the Supreme Court held that the United States does not have to be named as a party for claims brought by Indians under 25 U.S.C. § 345 to protect rights in their allotments. "To hold that in *all* cases brought under § 345 the United States must be named as a party defendant would restrict the access to federal courts afforded Indians raising claims … involving their land entitlements because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various Allotment Acts." *Mottaz*, 476 U.S. at 845-46 & n.9 (emphasis in original).

Even before *Poafpybitty* and *Mottaz*, courts had rejected the argument that allottees must join the United States to protect their interest in trust land. In *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), for instance, the Tenth Circuit recognized that Indians' "capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to such an action, since the joinder of the United states cannot be compelled." *Id.* at 459-60.

And, since *Poafpybitty* and *Mottaz* were decided, federal courts have consistently rejected the argument that only the United States can protect allottees' interest in land, and have allowed allottees to pursue their own land claims without joining the United States. *E.g.*, *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) ("[T]he rule is clear…that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is

a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." (emphasis in original)) (citing *Seitz*, 193 F.2d at 460-61); *Agua Caliente Band of Mission Indians v. Riverside Cnty.*, 442 F.2d 1184, 1186 (9th Cir. 1971) ("An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests.") (citing *Poafpybitty*, 390 U.S. 365); *see also Oneida Indian Nation of N.Y. State v. Oneida County*, 434 F.Supp. 527, 544-45 (N.D.N.Y. 1977) (citing *Poafbybitty*, 390 U.S. 365, *Seitz*, 193 F.2d at 460-61, and other cases); *Davilla I*, 2016 WL 4440240 at *2-3 (granting allottees' motion to strike Rule 19 affirmative defense—failure to join the BIA as a party—which was asserted in response to trespass claims).

Defendants do nothing to address this case law, and fail to even cite *Poafpybitty*, which is the controlling Supreme Court precedent on this issue. Again, in *Poafpybitty* the Supreme Court plainly held that individual allottees (here, Plaintiffs) are not required to join the United States as a party to this action. *See* 390 U.S. at 370-74. In ignoring this controlling precedent and arguing for dismissal under Rule 19, Defendants fail to cite a single case that has held that the United States is a required party for the type of claims being brought in this case.

1. Defendants' arguments under Rule 19(a) are meritless.

Ignoring precedent, Defendants make several arguments for why the United States is a necessary party under Rule 19(a). Each of these arguments is wrong.

At the outset, Defendants on the one hand argue that the United States is the proper party to bring this suit (Defs.' Joinder Br. at 22), but argue on the other hand that the United States has an interest as a defendant because it is potentially liable (*id*. at 21). In other words, Defendants cannot decide which side of the "v." the United States is "required" to appear on under Rule 19(a). That Defendants cannot decide in what capacity the United States should appear shows

that the United States is not a required party and exposes the "kitchen sink" nature of Defendants' motions to dismiss.

Defendants argue that the United States is a required party because Plaintiffs have alleged that the BIA wrongfully issued the 1993 Easement without consent of the individual allottees, which makes the 1993 Easement invalid. (*Id*. at 15-19.) This argument is baseless. Even if the United States had an interest in defending the BIA's renewal of the easement in 1995, the "United States' interest cannot suffer harm because the United States is not bound by any judgment to which it is not a party." *Davilla I*, 2016 WL 4440240, at *2; *Narragansett Tribe of Indians*, 418 F. Supp. at 811 ("In this case, the absent United States will not be prejudiced by completion of these proceedings on the merits because it will not be bound by any judgment reached herein."). Thus, Defendants' faux concern that proceeding without the United States "would impair the United States' ability to protect its interest in defending the propriety of its actions" (Defs.' Joinder Br. at 17) is groundless. And Defendants' concern about inconsistent judgments or obligations (*see id*. at 18-19) is likewise groundless. Courts have repeatedly rejected this argument as illogical. "Since the United States would be bringing a trespass action only *on behalf of plaintiffs*, if plaintiffs bring an action on their own, the United States would have no reason to bring a different or separate action that would result in multiple or inconsistent obligations for defendants." *Davilla I*, 2016 WL 4440240, at *2 (emphasis added). Indeed, the theoretical notion that the United States might later sue Defendants after this action "is virtually inconceivable in reality." *Narragansett Tribe of Indians*, 418 F. Supp. at 811. "In applying Rule 19 the courts must refrain from taking a view either too broad or too narrow in determining 'prejudicial' effect of a judgment. The watchwords of Rule 19 are 'pragmatism' and 'practicality.'" *Id.* (quoting *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970)).

Considering that the 1993 Easement was issued twenty-five years ago and expired by its own terms more than five years ago, and the United States has not yet taken any action to protect Plaintiffs' rights, Defendants' concern that it will do so now that Plaintiffs have filed their own suit is neither practical nor pragmatic.

Further still, Defendants also fail to recognize that—even if the United States has an interest in litigating whether the 1993 Easement was properly issued—this would not require dismissal of Plaintiffs' claims. Plaintiffs' trespass claims are based on two separate timeframes. Plaintiffs allege that Defendants were in trespass throughout the duration of the 1993 Easement because it was void *ab initio* for lack of allottee consent. (FAC ¶¶ 78-86, 122.) But the 1993 Easement also unquestionably expired in 2013, and Defendants have not yet removed the pipeline. Plaintiffs therefore allege that, regardless of whether the 1993 Easement was properly issued, Defendants have been in trespass since 2013. (FAC ¶¶ 87-93, 123.) Defendants' argument about the United States' interest in the issuance of the 1993 Easement applies only to the earlier timeframe. Any argument that the United States has an interest in Plaintiffs' claims for the latter timeframe is without merit, and there is no basis for arguing that the United States is a required party for those claims.

Defendants also argue that the United States is a required party because it has the "sole right and obligation to determine whether to treat a holdover possession as a trespass," and what actions to take in light of a trespass. (Defs.' Joinder Br. at 19-21.) As discussed *supra*, many courts—including the Supreme Court in *Poafpybitty*—have expressly rejected this argument.

This argument manifests a clear misunderstanding of the governing laws and regulations. Defendants confuse the United States' right to bring an action as a restriction that allows *only* the United States to bring an action. Defendants cite 25 C.F.R. § 169.410 to support their claim that

the United States is the only party that can allege a trespass as a result of a holdover.[29] (Defs.' Joinder Br. at 3, 7-10.) But this regulation merely sets out what the BIA "may" do if a "grantee remains in possession after the expiration, termination, or cancellation of a right-of-way"; in no way does it give BIA the *sole* right to allege a trespass.[30] 25 C.F.R. § 169.410. That the BIA has a right to bring an action does not mean that the individual allottees lack the same right. Indeed, such a reading of the regulation would contradict the Supreme Court's clear holding in *Poafpybitty*. 390 U.S. at 370-71 ("Nor does the existence of the Government's power to sue affect the rights of the individual Indian.").

And Defendants' ignore a subsequent BIA regulation that further cements the Indian landowners' rights to pursue their own claims, irrespective what action the BIA takes or does not take. 25 C.F.R. § 169.413 states:

> If an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. An unauthorized use within an existing right-of-way is also a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. ***The Indian landowners may pursue any available remedies under applicable law***, including applicable tribal law.

Id. (emphasis added).

Defendants cannot point to any regulation that deprives individual allottees of their right to bring claims themselves. And for good reason. Such a regulation would violate federal law.

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[29] The comments to Section 169.410 in the Federal Register when the regulation was originally proposed also make clear that "holdovers are not permitted" under this regulation, but the BIA may defer enforcement action if the trespasser is in good faith negotiations with the Indian landowners. 80 Fed. Reg. 72492-01. *If* the landowner *agrees* to renew the easement, any "holdover time" will be charged against the new term. 25 C.F.R. § 169.410. However, any grantee that remains on trust property after its right of way expires is a trespasser, plain and simple.

[30] That the regulation requires the BIA to "communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass," makes clear that the BIA does not have "sole" discretion to do anything under this regulation. 25 C.F.R. § 169.410.

See Poafpybitty, 390 U.S. at 370-71. Further, as a practical matter, the United States has never discouraged, much less prohibited, allottees from pursuing their own land claims because it has recognized that the BIA "is faced with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments." *Id.* at 374. The United States "[r]ecogniz[es] these administrative burdens and realiz[es] that the Indian's right to sue should not depend on the good judgment or zeal of a government attorney," and therefore has supported Indian allottees' right to sue without the BIA. *Id.* Defendants' suggestion that the BIA has thus far not taken action against them is much more indicative of a lack of resources or interest in this matter, rather than a purposeful decision that Defendants should be permitted to trespass by keeping their pipeline on Plaintiffs' property.

Furthermore, interpreting the applicable regulations as prohibiting individual Indians from asserting their property rights on their own behalf would likely raise serious constitutional issues. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987) (striking down escheat provisions of the Indian Land Consolidation Act as an unconstitutional taking); *see also Dolan*, 512 U.S. at 393 (The "right to exclude others" from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."). Considering that statutes and regulations are interpreted, if possible, to avoid constitutional difficulties, it is not surprising that no court has ever embraced Defendants strained interpretation of § 169.410.

In a last gasp, Defendants argue that because the United States was the grantor of the 1993 Easement, it is the only party that can bring a claim for breach of that agreement. (Defs.' Joinder Br. at 22-23.) Again, the Supreme Court rejected this very argument in *Poafpybitty*. There, individual Indians brought claims for breach of an oil and gas lease agreement, and the oil company argued that the United States should bring the action because it "has such complete

control over the lease that only [it] can institute the necessary court action." 390 U.S. at 372. The Supreme Court rejected this argument and noted that although the government was required to *approve* the lease, it "is not the lessor and [it] cannot grant the lease on [its] own authority." *Id.* So too here. Under 25 U.S.C. §§ 323-324, the Secretary may only grant rights-of-way across "lands of individual Indians" with the consent of the individual owners, or pursuant to specified exceptions that make obtaining the owners' consent impossible or impracticable. Even then, the Secretary cannot approve the right-of-way if doing so would cause "substantial injury to the land or any owner thereof." 25 U.S.C. § 324. In other words, the statutes governing issuance of rights-of-way enshrine the same principle reflected in the cases cited above—the United States does not act on its own behalf when issuing rights-of-way across allotted land; it acts on behalf of the allottees, who are equally entitled to assert and protect their land rights.

2. The United States is not an indispensable party under Rule 19(b).

Some courts have assumed, without analysis, that the United States may be a required party under Rule 19(a) for some actions related to Indian trust land. But the Eighth Circuit has expressly rejected the notion that the United States is "an indispensable party to every case involving a dispute over Indian lands." *Spirit Lake Tribe*, 262 F.3d at 747 n.6 (citing, *e.g.*, *Sokaogon Chippewa Cmty.*, 879 F.2d at 304–305). And courts have often readily concluded that the United States is *not* an indispensable party under Rule 19(b), in disputes over Indian lands. *See, e.g.*, *Narragansett*, 418 F. Supp. at 805-06 (holding that the "United States is not an indispensable party to this action [for possession of lands allegedly held in violation of the

Nonintercourse Act[31]], which the plaintiff may maintain on its own behalf"); *Seitz*, 193 F.2d at 459-60 (United States was not an indispensable party to action to recover possession of Indian land); *Bird Bear v. McLean Cnty.*, 513 F.2d 190, 191 n.6 (8th Cir. 1975) (United States was not an indispensable party to allottees' trespass action); *Puyallup Indian Tribe*, 717 F.2d at 1254 ("regardless of whether the United States is a necessary party under Rule 19(a) [for claims to quiet title to riverbed bordering reservation], it is *not* an indispensable party in whose absence litigation cannot proceed" (emphasis in original)).

This Court unequivocally rejected Defendants' Rule 19 arguments in *Houle v. Cent. Power Electric Cooperative, Inc.*, No. 4:09-cv-021, 2011 WL 1464918 (D.N.D. Mar. 24, 2011). In *Houle*, individual allottees at Fort Berthold brought claims for trespass against an electric transmission line company for installing high voltage lines that exceeded the authorized scope of the roadway easement across the allotments at issue. *Id.* at *1. The utility company contended—as Defendants contend here—that the allottees' claims should be dismissed under Rule 19 for failure to join the United States. This Court assumed that the United States was "probably" a necessary party under Rule 19(a), because of its status as trustee for the allotment, but the Court

[31] The Nonintercourse Act protects Indian tribes' interests in their land, and prevents alienation of Indian land, including through unlawful occupation, unauthorized leasing, or otherwise. *See Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1044-46 (5th Cir. 1996). Although the Nonintercourse Act does not apply to individual Indians, "the land allotment system and the Nonintercourse Act both embody and fulfill the same federal obligation to protect Indian land." *Narragansett*, 418 F. Supp. at 812; *see also Poafpybitty*, 390 U.S. at 369 ("the allotment system created interests in both the Indian and the United States").

rejected the utility company's arguments under Rule 19(b).[32] *Id*. at *23. The Court held that, "[i]n substantial part because of what the Supreme Court decided in case [*sic*] like *Poafpybitty*, ***the prevailing view in the Eighth Circuit and elsewhere is that the United States is not an indispensable party in cases where either Indian tribes or individual allottees are suing for trespass or for declaratory relief to protect their beneficial interests in trust lands from being diminished by third parties.***" *Id*. at *25 (quotation marks omitted, emphasis added).

In *Houle*, the Court quickly marched through the same arguments that Defendants have asserted in this case, disposing of each. The Court held that, even though the United States granted an easement to the defendant to use the allottees' land, it was not an indispensable party; and the United States has no potential liability because it is not bound by a decision in a case to which it is not a party. *Id.* at *27. The Court further noted that the possibility of multiple suits is not dispositive because *Poafpybitty* held that this concern is outweighed by the policy advanced in allowing allottees to be able to sue to protect their interest in their land. *Id.* Finally, the Court rejected the argument that the United States must be an indispensable party because its interest in ensuring that the plaintiff's transmission line is in place benefits the general public, because the argument "is based upon a false premise that there is no other alternative," such as "acquir[ing] a lawful easement." *Id.* at *28. Here, Defendants' arguments fail for all the same reasons.

Defendants ignore *Houle*, *Poafpybitty*, and all the other case law that is contrary to their arguments, relying instead on this Court's determination that the United States was an

[32] Because the court so readily disposed of the utility's motion under Rule 19(b), it did not seriously analyze whether the United States was in-fact a necessary party under Rule 19(a). *See id*. The court did note that the United States might have an interest in the case, *as a plaintiff* "that extends beyond the concerns of the immediate parties," including ensuring that "federal law is properly followed" with respect to issuance of rights-of-way across allotted trust land. *Id*. at *23. The court found that this interest was adequately protected by requiring the parties to give the United States notice of the suit, so that it could elect to intervene if it chose to do so. *Id*.

indispensable party in *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015)—claiming "the same result should obtain" here. (Defs.' Joinder Br. at 17, 25-26.) But *Two Shields* is easily distinguishable. The *Two Shields* allottees alleged that the United States (through the BIA) had colluded and conspired with the defendants to deprive the allottees of their rights, and had "breached its fiduciary duty by approving the leases"; each of the allottees' causes of action "allege[d] as an element that the United States [had] breached its fiduciary duty to the Indian plaintiffs"; and the allottees had even sued the United States separately in the United States Court of Federal Claims. 790 F.3d at 792-94. In these circumstances—where the defendants allegedly "share[d]" liability with the United States, and the plaintiffs had already sued the United States separately—the Eighth Circuit held that the district court did not abuse its discretion by dismissing the case under Rule 19. *Id.* at 798. But this case is not like *Two Shields* because, here, Plaintiffs have not alleged that the United States breached its fiduciary duty by colluding with Defendants, Plaintiffs do not allege that the United States "shares" liability for Defendants' trespass, nor have Plaintiffs brought any separate claim against the government. *Two Shields*, therefore, provides Defendants no cover.

Defendants also rely on *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987). (Defs.' Joinder Br. at 25-26.) But *Nichols* is likewise inapposite because there the plaintiffs were seeking to have non-trust land taken into trust, and thus to have the United States reinstated as trustee over the land, with a resumption of fiduciary responsibility. 809 F.2d at 1333. This Court, not surprisingly, held that the United States was an indispensable party because the plaintiffs were seeking to impose a legal obligation on the United States that did not otherwise exist. *Id.* Nothing like this is happening here. Rather, Plaintiffs seek only to enforce their own land rights; they do not seek to impose or create any new legal obligations for the United States. No matter how the

Court rules in this case, the United States' trust obligations remain the same. Thus, Defendants' reliance on *Nichols* is likewise misplaced.

Defendants also argue that the four interests that courts should consider in a Rule 19(b) analysis support a holding that the United States is an indispensable party. (Defs.' Joinder Br. at 26.) But Defendants are mistaken, largely for the reasons already provided, *supra*.

First, Defendants argue that dismissal would not deprive Plaintiffs of a forum for having their claims heard because the BIA could bring claims on their behalf. (Defs.' Joinder Br. at 27.) But as the Supreme Court recognized and held in *Poafpybitty*, the BIA is heavily overworked and it would be unjust to require Plaintiffs to rely on it to protect their interest.[33] 390 U.S. at 374.

Second, Defendants argue that allowing these claims to proceed would subject them to multiple litigation and inconsistent relief. (Defs.' Joinder Br. at 27.) Again, courts have routinely rejected this argument. *See* Section III(B), *supra*. Defendants also claim that they are prejudiced because they did not obtain the pipeline until 2001. (Defs.' Joinder Br. at 27.) But whether Defendants are liable for trespass prior to their acquisition of the pipeline depends on whether Defendants negotiated to assume or avoid that liability—an issue that was completely within their control when they acquired the pipeline, and which presumably factored into the price they paid. These are issues for discovery.

[33] Courts recognize that the BIA's ability to protect Indian trust interests has not improved since *Poafpybitty* was decided. *See Houle*, 2011 WL 1464918 at *24 (citing *Poafpybitty*, 390 U.S. at 373-74); *Narragansett*, 418 F. Supp. at 806 n.4 ("The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting the generous and protective spirit which the United States property feels toward its Indian wards and the high standards of fair dealing required of the United States in controlling Indian affairs are but demonstrations of a gross national hypocrisy." (internal citations and quotations marks omitted).)

Third, Defendants argue that the United States has an interest in not having its liability tried in its absence. (Defs.' Joinder Br. at 28.) But this argument is contrary to the law and it is not supported by what Plaintiffs actually seek—given that Plaintiffs bring no claims against the United States. *See* Section III(B), *supra*.

Finally, Defendants argue that the interest of the courts and the public supports dismissal. (Defs.' Joinder Br. at 28-29.) But here, again, Defendants rely on the discredited assertion that the BIA is the only proper party to bring these claims. This is simply not true. *See Poafpybitty*, 390 U.S. at 374; 25 C.F.R. § 169.413 ("Indian landowners may pursue any available remedies under applicable law" for trespass to Indian trust land).

For these reasons, there is no basis for holding that the United States is an indispensable party to this action.[34] Under clear and controlling precedent, the Court should deny Defendants' Motion to Dismiss under Rules 12(b)(7) and 19.

C. Plaintiffs Are Not Required to Await the Results of Any Administrative Process to Assert Their Own Property Rights.

Related to their argument that the United States is a necessary party, Defendants argue that Plaintiffs must exhaust administrative remedies before they can file suit. (Dkt. 77 ("Defs.' Exhaustion Br.").) But there is no such requirement. The Court should reject Defendants' failure-to-exhaust argument because it would require the Court to misread regulations and to ignore Supreme Court precedent.

[34] In *Houle*, the court determined that even though the United States was not an indispensable party, it still had an interest in the case "as an additional party plaintiff." 2011 WL 1464918, at *23. The court therefore decided to give notice to the United States of its decision to deny dismissal and an opportunity to intervene should it so choose. *Id*. at *23-24. While Plaintiffs believe such a step is unnecessary, they would not oppose a similar result.

For starters, "of paramount importance to any exhaustion inquiry is congressional intent." *Darby v. Cisneros*, 509 U.S. 137, 144-45 (1993) (quotation marks and alteration omitted). If the relevant statute or regulation contains no explicit requirement to exhaust administrative remedies before seeking judicial relief, courts have no discretion to impose an exhaustion requirement as a hurdle to judicial relief. *See id.* at 146 (holding courts can impose exhaustion requirement only when "the statute or rule clearly mandates [it]"). Here, there is no such exhaustion requirement, and imposing one would be counter to the principle that statutes and regulations affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766.

Moreover, in *Poafpybitty*, Indian landowners sued to protect their land interests under an oil-and-gas lease, and the Supreme Court recognized that individual allottees can bring their own actions to protect their land interests without having to rely on the United States to bring an action on their behalf. 390 U.S. at 370-374; Section, III(B), *supra*. In other words, the right of the United States to take action "did not diminish the Indian's right to sue on his own behalf." *Poafpybitty*, 390 U.S. at 370-71 (citing cases). Even though the United States has "supervisory authority over oil-and-gas leases" on allotted land—and power to impose and enforce restrictions on the mining that occurs on allotted land, as well as power to enforce the terms of the oil-and-gas lease—the Supreme Court found "nothing in this regulatory scheme which would preclude [individual allottees] from seeking judicial relief for an alleged violation of the lease." *Id.* at 373. That is, the Supreme Court found "nothing in the lease or regulations requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own." *Id.* Put plainly: "The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease

than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment." *Id.* at 373-74.

The same holds true here. There is nothing in the relevant regulations that requires Plaintiffs "to seek administrative action from the Government instead of instituting legal proceedings on their own." *Poafpybitty*, 390 U.S. at 373. To the extent there is any ambiguity in the statutes or regulations (which there is not), they are liberally construed to favor Plaintiffs, and all ambiguities are to be resolved in Plaintiffs' favor. *Oneida II*, 470 U.S. at 247; *Blackfeet Tribe of Indians*, 471 U.S. at 766; *Narragansett Tribe*, 481 F. Supp. at 806.

In short: there is no requirement to exhaust administrative remedies. Defendants' argument to the contrary ignores *Poafpybitty* and misconstrues the relevant regulations.[35]

Defendants also ignore Plaintiffs' status as the beneficial owners of the property, and ignore the express provisions of the regulations. Defendants claim that "no authority is provided to individual beneficial Indian landowners to pursue actions or remedies" on their own. (Defs.' Exhaustion Br. at 6.) This is flatly false. First, Plaintiffs are the beneficial owners of the land, not second class citizens. As the beneficial owners, they do not need express authority to assert their own land rights. Second, the regulations plainly recognize Plaintiffs' authority to protect their

[35] In two footnotes, Defendants contend that Plaintiffs have attempted to interfere with an ongoing administrative process by requesting that the BIA cease review of appraisals submitted by Defendants. (Defs.' Joinder Br. at 10 n.7; Defs.' Exhaustion Br. at 12 n.12.) However, by Defendants' own acknowledgement those appraisals were submitted as part of "the BIA right-of-way ***negotiation*** and renewal process" (*id*. (emphasis added)), not part of any administrative action. Given Defendants' persistent trespass and attempts to circumvent the landowners' property rights, Plaintiffs simply have no further interest in negotiating with Defendants at this point. Moreover, in the more than six years since Defendants began trespassing, the BIA has taken no action to curtail that trespass and has not instituted any administrative proceedings whatsoever. Hence, despite proclaiming that this suit seeks to usurp an administrative action, Defendants have never provided this Court (or the Court in Texas) an administrative case or proceeding number to which it may refer.

own rights, and provide that the BIA may act on their behalf if the landowners are not able to do so. The regulations state: "If an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass." 25 C.F.R. § 169.413. In such circumstances, the BIA "***may*** take action to recover possession … on behalf of the Indian landowners." *Id.* (emphasis added). But the regulations also state plainly that "***[t]he Indian landowners may pursue any available remedies under applicable law***." *Id.* (emphasis added).

To claim Plaintiffs have "no authority" to pursue this action on their own, Defendants misconstrue the meaning of Section 169.413 and misrepresent the contents of other regulations. For example, Defendants claim that 25 C.F.R. § 169.402 "expressly" delegates authority "only" to the BIA to investigate compliance with rights-of-way. (Defs.' Exhaustion Br. at 5.) Defendants claim that, if individual allottees suspect a right-of-way has been violated, they must notify the BIA—and only the BIA can investigate and "decide what to do about [the] violation." (*Id.* (citing 25 C.F.R. §§ 169.402(a)(1), 169.404).) But Section 169.402 does not say this. It says only that the BIA "**may** investigate compliance with a right-of-way," and will initiate an investigation "**[i]f** an Indian landowner notifies [the BIA] that a … violation has occurred." 25 C.F.R. § 169.402(a)(1) (emphasis added). Thus, by its plain terms—and contrary to Defendants' claims—Section 169.402 does not require individual landowners to notify the BIA of a suspected violation, nor does it delegate authority only to the BIA to investigate a violation. And Section 169.404 merely explains what the BIA will do about a violation if it gets involved—a decision that is discretionary to the BIA. 25 C.F.R. § 169.404. Contrary to Defendants' claims, Section 169.404 says nothing about the BIA having exclusive authority to decide what to do about a violation. *See id.*

Similarly, Defendants claim that individual Indian landowners cannot take legal action but can only attempt to "negotiate" remedies for a right-of-way violation. (Defs.' Exhaustion Br. at 5 (citing 25 C.F.R. § 169.403(b) (emphasis omitted)).) But Section 169.403(b) merely states that individual landowners "**may** negotiate remedies." 25 C.F.R. § 169.403(b) (emphasis added). By its plain terms—and contrary to Defendants' claims—Section 169.403(b) does nothing to limit individual landowners to negotiating remedies. *See id.* And Defendants' distorted reading of these regulations flies in the face of Section 169.413, which states plainly that—to remedy a trespass to Indian land—"Indian landowners may pursue any available remedies under applicable law."

To circumvent the directness of Section 169.413, Defendants try to set up a "contrast" between Section 169.413 and Section 169.410—attempting to convince the Court that these two regulations address mutually exclusive scenarios. (Defs.' Exhaustion Br. at 6-8.) Yet, Defendants again forget that even if there was any conflict between these various regulations, the Indian Cannon of Construction would require that conflict to be resolved in favor of the Indian-landowners. *See Oneida II*, 470 U.S. at 247.

However, Defendants' attempt to inject a conflict or ambiguity into the regulations fails based on the regulations' plain language. According to Defendants, Section 169.413 addresses only trespasses that never involved a right-of-way in the first place, whereas Section 169.410 separately addresses "holdover" trespasses like Defendants' trespass—where a right-of-way existed but has expired. (*See id.*) According to Defendants' "contrast" construction of the regulations, Section 169.413 does not apply at all to this case, and Section 169.410 grants "exclusive" authority to the BIA "to decide how to treat holdover possessors and what, if any,

actions or remedies to pursue." (*Id.* at 6-8, 14-15 & n.14.) But Defendants misconstrue and misrepresent the nature and contents of these regulations.

First, contrary to Defendants' claims, the two regulations do not work separately, in "contrast" to one another; rather, they work together and complement one another. They do not address mutually exclusive scenarios; rather, Section 169.413 addresses all "unauthorized possession[s]" of Indian land, and Section 169.410 addresses a subset of "unauthorized possession[s]" when a "grantee remains in possession after the expiration, termination, or cancellation of a right of way."[36] 25 C.F.R. § 169.410.

Contrary to Defendants' recitation, Section 169.410 says nothing about granting "exclusive" authority to the BIA to take action on holdover trespasses. On its face, Section 169.410 states only that the BIA "**may** treat the unauthorized possession as a trespass," and "**may** take action to recover possession on behalf of the Indian landowners," if the parties are not in the process of negotiating a renewal of the right-of-way. 25 C.F.R. § 169.410 (emphases added). This is not a grant of "exclusive" authority to do anything. In fact, the regulation does not even require the Government to take action—it merely permits the Government to take action on behalf of the Indian landowners. To construe this permissive language as giving the BIA "exclusive" authority to take action—where the BIA is not actually required to do anything—would be to subjugate the rights of individual Indian landowners to the whims of the BIA. Such a construction of Section 169.410 would run afoul of the Supreme Court's reasoning in *Poafpybitty*. *See* 390 U.S. at 374 (stating "the Indian's right to sue should not depend on the

[36] As discussed in footnote 29, *supra*, there is no right to "holdover" on a right of way across trust land. A "grantee that remains in possession" is a trespasser, nothing more or different, and they remain on the trust land after the right of way expires at their peril. 25 C.F.R. § 169.410; 80 FR 72492-01 ("holdovers are not permitted" under § 169.410).

good judgment or zeal of a government attorney"). As noted above, it would also raise serious constitutional concerns about taking Indian landowners' property rights. *See* Section III(B)(1), *supra*. Nevertheless, Defendants urge the Court to hold that Section 169.410 gives the BIA "exclusive" authority to take action. (*See* Defs.' Exhaustion Br. at 6-8, 14-16.) Defendants can cite no case in which any court has ever construed Section 169.410 this way.

In truth, aside from describing what the BIA "may" do if a holdover trespass occurs, Section 169.410 is silent on the question of who has authority to take action on a holdover trespass. This is where Section 169.413 comes in. Section 169.413 broadly addresses the "unauthorized possession" of Indian land, and answers the question of who has authority to take action on the "unauthorized possession" of Indian land. In short, whenever "an individual or entity" has taken "unauthorized possession" of Indian land—*i.e.*, whenever anyone possesses Indian land without a valid right-of-way—the "unauthorized possession" is a trespass and the BIA "**may** take action." 25 C.F.R. § 169.413. But Section 169.413 also provides that "[t]he Indian landowners may pursue any available remedies under applicable law." *Id.* Thus, in plain terms, Section 169.413 states that individual Indian landowners may take legal action on any unauthorized possession of Indian land.

Section 169.413 does not ask whether there was ever, at some point in time, a valid right-of-way, before stating that individual Indian landowners can take action on an unauthorized possession of Indian land. Section 169.413 simply states that "the unauthorized possession or use [of Indian land] is a trespass," and individual Indian landowners "may pursue any available remedies under applicable law." 25 C.F.R. § 169.413. On its face, this includes all trespasses—both first-time possessions that are unauthorized and holdover possessions that are unauthorized. In short, Section 169.413 is about who has authority to take action on any "unauthorized

possession" of Indian land, and it states plainly that individual landowners "may pursue any available remedies under applicable law." No exhaustion of administrative remedies is required.

Section 169.410 operates within this broad context. That is, Section 169.410 is about how a subset of unauthorized possessions—"holdover" possessions—might not be treated as trespasses, if the parties are in the process of negotiating the renewal of a preexisting right-of-way. 25 C.F.R. § 169.410. Defendants are correct in recognizing the reasons why a holdover trespass should be treated differently—in short, because a negotiated renewal of the preexisting right-of-way might be in everyone's best interest. (*See* Defs.' Exhaustion Br. at 8.) But if no renewal is being negotiated, or if negotiations have stalled or failed, then the possession remains unauthorized and individual landowners have the right to take action under Section 169.413.

Section 169.410's purpose is to tell the BIA what it "may" do in the context of a holdover possession, where negotiations for renewal might be ongoing. But Section 169.410 does not say anything about what individual landowners may do because—if they are not negotiating the renewal of the preexisting right-of-way—individual landowners are already empowered to pursue legal remedies under Section 169.413. The BIA is likewise empowered to take action on behalf of the landowners, under Section 169.413—but Section 169.410 instructs the BIA to first "communicate with the Indian landowners," before taking any action on a holdover possession, to determine whether the parties are negotiating a renewal. This is the sole reason for Section 169.410's existence.

This is the only reading of Sections 169.410 and 169.413 that comports with the plain language of the regulations and with Supreme Court precedents that recognize (a) that Plaintiffs are not required to exhaust administrative remedies unless the relevant statute or regulatory scheme explicitly mandates it (*see Darby*, 509 U.S. at 146) and (b) that individual Indians do not

have to seek or rely on administrative action to protect their interests in Indian land (*see Poafpybitty*, 390 U.S. at 374-75).

Defendants can cite no provision in the entire regulatory scheme that clearly requires Indian landowners to seek or rely on administrative action to protect their interests in Indian land—nor can Defendants cite any provision that establishes the BIA as an administrative decision-maker with authority to resolve this dispute between Plaintiffs and Defendants. Defendants pin their entire exhaustion argument on Section 169.410, claiming—falsely—that this provision gives the BIA "exclusive" authority to make determinations and take actions related to this dispute. (*See* Defs.' Exhaustion Br. at 6-8, 14-16 & n.14.) But Section 169.410 says nothing about establishing the BIA as an administrative decision-maker with jurisdiction to resolve this dispute. To the contrary, Section 169.410 states clearly that, if the BIA were to take any action in this matter, it would be "to recover possession on behalf of the Indian landowners." 25 C.F.R. § 169.410. And Section 169.410 says nothing about giving the BIA "exclusive" authority to take action. It says only that the BIA "**may** take action" if no negotiation for renewal is underway. *Id.* (emphasis added).

Defendants cite several cases from other areas of administrative law to argue that the BIA should have primary jurisdiction over this dispute. (*See* Defs.' Exhaustion Br. at 17-18.) But—tellingly—they can cite **no case**, in the 70 years since § 323 and § 324 were enacted, that supports their argument in this context; **no case** that adopts their distorted reading of Section 169.410; and no other regulatory provision that says exhaustion of administrative remedies is required when Indian landowners pursue claims against third-parties.

Under a plain reading of Sections 169.410 and 169.413, Plaintiffs "may pursue any available remedies under applicable law," if Defendants are possessing their land without a valid

right-of-way, and if negotiations to renew that right-of-way have failed. And under Supreme Court precedent, Plaintiffs are not required to rely on the BIA to act on their behalf (*Poafpybitty*, 390 U.S. at 374-75), nor are they required to first seek administrative relief unless the regulatory scheme clearly mandates it (*Darby*, 509 U.S. at 146). For these reasons, Plaintiffs are not required to exhaust any administrative remedies, and Defendants motion to dismiss on this ground should be denied.[37]

D. Defendants' Motion to Dismiss Under Rule 12(b)(6) Also Fails.

Defendants have also moved to dismiss all of Plaintiffs' claims under Rule 12(b)(6). (Dkt. 75 ("Defs.' 12(b)(6) Br.").) These arguments also fail for many of the reasons already discussed.

Defendants' arguments under Rule 12(b)(6) regarding Plaintiffs' federal common law trespass claims are redundant of their subject matter jurisdiction arguments and fail for the same reasons.

Defendants entirely fail to address the elements of Plaintiffs' claim for unjust enrichment, arguing instead that Plaintiffs' requested remedy of a constructive trust is not available. However, a constructive trust is available under both federal common law and state law to prevent Defendants from benefiting from their illegal trespass.

As to Plaintiffs' alternative claim for breach of the 1993 Easement, Defendants make the illogical argument that Plaintiffs cannot sue for breach of the easement across their own land

[37] Even if there was a requirement that the BIA conclude its administrative process, that requirement would not apply to this case because the BIA cannot renew Defendants' easement without consent from Plaintiffs, and Plaintiffs have made clear, *inter alia* by filing suit, that they do not consent to the renewal. *See Public Serv. Co.*, 2016 WL 10538199, at *3-4 (rejecting an identical administrative exhaustion defense to trespass claims brought by allottees because "any further administrative proceeding would be futile because Plaintiffs have not and will not consent to the renewal of [the utility's] right-of-way" (quotation marks omitted)).

because only the BIA can bring such a claim. This argument is directly contrary to Supreme Court precedent, and illuminates Defendants fundamental misunderstanding of the BIA's role in managing Plaintiffs' trust land. The BIA only approves easements across Plaintiffs' land ***for Plaintiffs' benefit***. Plaintiffs are, therefore, quintessential third-party beneficiaries of the 1993 Easement agreement (if it is held to be valid) and entitled to enforce it.

Finally, Defendants' arguments regarding Plaintiffs' right to recover punitive damages fails because the underlying cause of action for trespass is well-pled.

1. Legal standard for Plaintiffs Rule 12(b)(6) motion.

On a motion to dismiss under Rule 12(b)(6), the court takes "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff, and ask whether the pleadings contain enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2. Plaintiffs have unquestionably pled a claim for federal common law trespass (Count I).

Defendants arguments for dismissal of Plaintiffs' trespass claims under Rule 12(b)(6) are redundant of their subject matter jurisdiction arguments, (Defs.' 12(b)(6) Br. at 7-12), and they fail for the same reasons. *See* Section III(A)(1-3), *supra*. Plaintiffs have pled that they hold interest in trust land that continues to be subject to federal supervision and protection—not merely that they received a land grant from the United States. (FAC ¶¶ 6-54, 64, 70.) This is a fundamental distinction that separates this case from the claims related to fee land in *Taylor*, the plaintiffs in *Wolfchild*—who never received any allotments and had "no property rights upon

which to base federal common law claims for ejectment and trespass" (824 F.3d at 769)—and the other cases cited by Defendants.

Plaintiffs have also pled that Defendants lacked the requisite landowner consents to obtain the 1993 Easement, and additionally failed to obtain landowner consent or the Secretary's approval to remain on Plaintiffs' trust allotments after that easement expired, in violation of the Indian Right of Way Act and the governing regulations; and that Defendants nonetheless continue to occupy the trust allotments. (*See* FAC ¶¶ 2, 69-79, 84-85, 87-88, 122-29.) Thus, Plaintiffs have pled the essential elements of their claim for federal common law trespass.

3. Plaintiffs have the right to bring an action for breach of the 1993 Easement (Count II).

Defendants contend Plaintiffs' contract action should be dismissed because Plaintiffs are not signatories to the 1993 Easement. (Defs.' 12(b)(b) Br. at 15-16.) Defendants cite no authority dealing with Indian trust land to support this argument. None exists, because this would make a mockery of Plaintiffs' rights as the beneficial owners of the property. Not surprisingly, the Supreme Court rejected the argument that only the United States can bring an action for breach of agreements affecting Indian land in *Poafpybitty*, as discussed in Section III(B), *supra*.

Plaintiffs may also sue for breach of the 1993 Easement as third-party beneficiaries of that agreement. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056 (Fed. Cir. 2012) ("A plaintiff lacking privity of contract can nonetheless sue for damages under that contract if it qualifies as an intended third-party beneficiary."); *see also H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984) (holding that members of an irrigation district were intended third-party beneficiaries of a consent decree with the United States by virtue of their beneficial ownership of the water that was the subject of the decree).

The failure to obtain the landowners' consent is of course the reason Plaintiffs allege the 1993 Easement is invalid. (FAC ¶¶ 70-73, 79.) If the Court somehow finds the 1993 Easement was validly approved, then there is no question that Plaintiffs can bring claims for breach of the agreement that allowed Defendants to use their land.

In moving to dismiss Plaintiffs' claim for breach of the 1993 Easement, Defendants ignore the entirety of the relationship between the United States and Plaintiffs. Simply stated, the United States did not enter into the 1993 Easement on its own behalf. It did so ***on behalf of Plaintiffs*** and the other landowners, for their express benefit. As alleged in Plaintiffs' Amended Complaint, Plaintiffs are the "beneficial owners of undivided interests in trust land" and the United States, through the Department of the Interior and the BIA, is Plaintiffs' trustee. (FAC ¶¶ 1-3.) Under the Indian Right of Way Act, which was the basis for the Secretary approving the 1993 Easement (*see id*. ¶ 73), the Secretary of the Interior is only empowered to approve rights of way across land "held in trust by the United States for individual Indians" or "set aside for the use and benefit of the Indians." 25 U.S.C. § 323. The Secretary must obtain the Indian landowners' consent, or, in certain circumstances when it is impracticable to obtain that consent, the Secretary may approve a right of way if "the grant will cause no substantial injury to the land or any owner thereof." 25 U.S.C. § 324. The compensation for the easement is "received on behalf of the Indian owners …." 25 U.S.C. § 325.

The 1993 Easement was not properly granted. But, if is somehow valid, Plaintiffs are entitled to enforce its terms. Defendants' motion to dismiss Plaintiffs' alternative claim for breach of the 1993 Easement should be denied.

4. Plaintiffs have stated a claim for unjust enrichment (Count III).

Defendants also move to dismiss Plaintiffs claim for unjust enrichment, which seeks, *inter alia*, the remedy of a constructive trust on the benefits Defendants have gained through

their illegal operation of the pipeline. Defendants' arguments fail both as to Plaintiffs pleading an actionable claim for unjust enrichment under federal common law, and the remedies available.

For federal common law claims for trespass to Indian trust land, the Court "must borrow state law to the extent it comports with federal policy." *Davilla III*, 913 F.3d at 965. This generally means that the Court will borrow the elements of a state law cause of action, to the extent they do not conflict with a federal statute or policy. *See id*. at 966-67 (adopting the elements of trespass under Oklahoma law, but rejecting state law consent defenses that conflicted with the Indian Right of Way Act).

North Dakota law recognizes a claim for unjust enrichment. *See Lochthowe v. C.F. Peterson Estate*, 692 N.W.2d 120, 124 (N.D. 2005) (listing elements for action "under a theory of unjust enrichment"). Under North Dakota law, the element of an unjust enrichment claim are: "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy provided by law." *Id.*

Plaintiffs have alleged that Defendants have been "unjustly enriched" by obtaining or securing benefits—in the form of "substantial revenues and profits"—from the use of Plaintiffs' land while simultaneously "depriving Plaintiffs of compensation" and "avoiding the costs" of removing and rerouting the pipeline. (FAC ¶¶ 138-45.) Plaintiffs have also pled this claim in the alternative to their legal claim for breach of the 1993 Easement, meaning that it is pursued in the absence of the legal claim for breach of contract. Plaintiffs have therefore sufficiently alleged a claim for unjust enrichment.

Defendants contend that because Plaintiffs acknowledge the existence of the 1993 Easement and the 1993 Easement covers the subject of the dispute, Plaintiffs' action for unjust

enrichment should be dismissed. (Defs.' 12(b)(6) Br. at 4 n.6.) Defendants are correct to note that a claim for unjust enrichment is not available when there is a ***valid*** contract covering the subject of the dispute. *Lochthowe*, 692 N.W.2d at 124 ("Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another."). But Defendants fail to recognize—or choose to ignore—that Plaintiffs allege claims for unjust enrichment *and* breach of contract for good reason.

First, Plaintiffs allege unjust enrichment and breach of contract as *alternative* causes of action, depending on whether the 1993 Easement is ultimately determined to be valid. (*See* FAC ¶ 134.) There is no question Plaintiffs can "plead and argue alternative and even inconsistent theories of liability." *Campbell v. Am. Crane Corp.*, 60 F.3d 1329, 1333 n.2 (8th Cir. 1995); Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims … as it has, regardless of consistency."). If the 1993 Easement was valid, then Plaintiffs allege a breach of that agreement. (FAC ¶¶ 130-36.) But Plaintiffs also allege that the 1993 Easement was ***not valid*** in the first place. (*Id*. ¶¶ 70-71, 78-79, 84.) Defendants acknowledge this allegation. (Defs.' 12(b)(6) Br. at 5 n.8.) For the purposes of considering Defendants' motion to dismiss, Plaintiffs' allegation that the 1993 Easement was never valid is taken as true. *Twombly*, 550 U.S. at 570. If the 1993 Easement was never valid, then there was no contract covering the subject of the dispute from 1993 onward, and Plaintiffs have a claim for unjust enrichment. *Lochthowe*, 692 N.W.2d at 124. This alone defeats Defendants' motion to dismiss Plaintiffs' unjust enrichment claim .

Second, it is undisputed that—even if the 1993 Easement was valid—the easement expired in 2013 and has not been renewed. (*See* FAC ¶¶ 84-88, 96.) Thus, from 2013 to the present, there has been no contract covering the subject of the dispute. Plaintiffs therefore have a

claim for unjust enrichment based on Defendants' unauthorized possession and use of the land from 2013 to the present. (*Id*. ¶¶ 85, 96, 137-45.) This, too, defeats Defendants' motion.

Defendants additionally contend Plaintiffs' Count III should be dismissed because it alleges an action for "constructive trust," which Defendants argue is merely a "remedy" and not a distinct cause of action. (Defs.' 12(b)(6) Br. at 2, 5, 13-14.) This is a disingenuous misconstrual of Plaintiffs' complaint. Plaintiffs' Count III is labeled "***Unjust Enrichment***—Imposition of Constructive Trust"–it clearly alleges a cause of action for ***unjust enrichment***. (FAC ¶¶ 137-45 (emphasis added).) Defendants admit that Plaintiffs allege a claim for unjust enrichment when they argue that an action for unjust enrichment is not available if a valid contract covers the subject of the dispute. (*See* Defs.' 12(b)(6) Br. at 5 n.8.) Defendants' effort to misconstrue Count III as solely an action for a "constructive trust" should be rejected.

Finally, Defendants argue that the remedy of a constructive trust is not available on the facts alleged here. Defendants, again, misunderstand the federal law that governs to this case. Although the elements of a cause of action are borrowed from state law for federal common law claims, federal law—not state law—dictates the available remedies for Indian land claims. There is "a distinct need for nationwide legal standards" to ensure that Indian landowners and those holding rights-of-way across Indian land in different states are treated equally. *Davilla III*, 913 F.3d at 972 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)). The need for a "uniform federal standard" is particularly inherent when applying equitable remedies, such as the constructive trust remedy Plaintiffs seek in this case. *Id*. (holding that the district court erred by applying state law to equitable remedies in individual Indians' trespass action).

> [O]ur jurisprudence distinguishes between matters of right and matters of remedy. The Supreme Court has concluded that "State law cannot define the remedies which a federal court must give" and that "a federal court may afford an equitable remedy for a substantive right recognized by a State even though a state court

> cannot give it." Thus, the practice of borrowing state rules of decision does not apply with equal force to determining appropriate remedies, especially equitable remedies, as it does to defining actionable rights.

Id. at 972-73 (quoting *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945)); *see also Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981) ("State law does not govern the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision."); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (holding federal courts have "the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State").

It is well-established that a constructive trust may be imposed under federal common law "where compelling federal interests are at stake." *In re Magna Entm't Corp.*, 438 B.R. 380, 393 (D. Del. Bankr. 2010) (quotation marks and citation omitted); *see also United States v. McConnell*, 258 B.R. 869, 872-74 (N.D. Tex. Bankr. 2001) (holding that "federal common law generally provides a more expansive definition of an implied trust than does state law"). Moreover, under federal common law a constructive trust may be "flexibly fashioned in equity to provide relief where a balancing of interests in the context of a particular case seems to call for it." *F.T.C. v. Network Serv. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010). This includes the power to "reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder and to convey that property to the one who is truly and equitably entitled to the same." *Id*. at 1142 (quotation marks and citations omitted).

The Supreme Court has held that "Indians have a common-law right of action for an accounting of all rents, issues and profits against trespassers on their land." *Oneida II*, 470 U.S. at 235-36 (citing *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941)). Defendants do not dispute that Plaintiffs are entitled to this remedy if their federal common law claims are

successful. Allowing Plaintiffs to pursue an alternate, but similar, theory of recovery in the form of a constructive trust is consistent with the protections afforded to Indian trust land by Congress, as recognized by the Supreme Court. Indeed, without the remedies available under federal common law, Defendants have no disincentive to trespass on Indian trust land—precisely as they have been doing for at least the past 6 years, and as they continue to do today.

Imposition of a constructive trust is also consistent with general principles of law that deter intentional trespass and prevent trespassers from benefiting from their illegal conduct.[38] *See* Restatement (Second) of Torts § 929 (1979) ("[I]f the defendant is a willful trespasser, the owner is entitled to recover from him the value of any profits made by the entry."); Restatement (Third) of Restitution and Unjust Enrichment § 40 (Trespass, Conversion, and Comparable Wrongs) cmt. b (2011) ("a conscious wrongdoer will be stripped of gains from unauthorized interference with another's property …. Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment.").[39]

For all of these reasons, Plaintiffs have sufficiently alleged an action for unjust enrichment. And, particularly at this early stage, there are no grounds to hold that Plaintiffs may not pursue the equitable remedy of a constructive trust on the benefits Defendants have gained

[38] The Restatement's trespass rules are generally applied to federal common law trespass claims. *See, e.g.*, *Milner*, 583 F.3d at 1182-83.

[39] Although state remedial law does not apply to this case, North Dakota would allow imposition of a constructive trust in this situation. *See Loberg v. Alford*, 372 N.W.2d 912, 915 (N.D. 1985) ("The court imposes a constructive trust to prevent the unjust enrichment of the person wrongfully interfering with the owner's possession of the property" as distinguished from a "resulting trust" which is based on a "trust relationship result[ing] from [the] transaction").

through their illegal trespass. Defendants' motion to dismiss this action should be denied as to Count III.

5. Plaintiffs are entitled to pursue punitive damages.

Defendants' final argument under Rule 12(b)(6) is that Plaintiffs do not have a punitive damages claim because the underlying cause of action for federal common law trespass fails. (Defs.' 12(b)(6) Br. at 13.) However, as shown above, Plaintiffs' trespass claim is well-pled. Accordingly, Defendants' arguments for avoiding punitive damages at this early stage fail.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied.

Respectfully submitted this 4th day of September 2019.

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