UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA (WESTERN)

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

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND LACK OF PRIMARY JURISDICTION

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INTRODUCTION

On August 7, 2019, Defendants filed their Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies and Lack of Primary Jurisdiction ("Motion"). Doc. 73 at 8-10 (¶ 4); *see also* Am. Mem. in Supp. of Motion (Doc. 77). The Motion shows that in the event the Court does not dismiss this case for failure to join a party required under Rule 19, **the Court should still dismiss this case because Plaintiffs have not exhausted their administrative remedies, or, alternatively, because the BIA has primary jurisdiction**. Plaintiffs have now filed a Consolidated Response to Defendants' Motions to Dismiss ("Response") (Doc. 85), in which they purport to address the Motion. Resp. at 53-62. As shown below, the Response fails to undermine the Motion in any way.

ARGUMENT AND AUTHORITIES

I. As This Court Has Previously Held, BIA Regulations Require Exhaustion.

Plaintiffs' claims are, in essence, a challenge to agency action. Indeed, by their claims here, Plaintiffs seek to set aside and "void" an easement issued by the BIA, and to overrule and override the BIA's current approach in the holdover proceeding. But Plaintiffs cannot subject the BIA's decisions to judicial review without first exhausting administrative remedies. It is undisputed that they have not done so.

Citing *Darby v. Cisneros*, 509 U.S. 137 (1993), Plaintiffs argue that "courts have no discretion to impose an exhaustion requirement" if "the relevant statute or regulation contains no explicit requirement to exhaust administrative remedies." Resp. at 54. But this argument is unavailing to Plaintiffs because, as this Court has recognized, **the pertinent BIA regulations do require exhaustion** (despite what Plaintiffs say). *Fort Berthold Land & Livestock Ass'n v. Anderson*, 361 F. Supp. 2d 1045, 1050 (D.N.D. 2005) (Hovland, C.J.) ("[R]egulations governing challenges to decisions of the Bureau of Indian Affairs have required an administrative appeal

from most BIA decisions before judicial review of such decisions can be obtained." (quoting *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393 (9th Cir. 1993)).

The BIA's regulations stipulate that if a decision is subject to appeal within the Department of the Interior at the time of its rendition, then it is not "considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704" (the Administrative Procedure Act). 25 C.F.R. § 2.6(a). This means that to challenge the 1993 Easement in a court action, Plaintiffs must first exhaust any administrative appeal rights they have. Only when and if they obtain a decision not subject to further administrative appeal can they seek judicial review. Significantly, there is no doubt that Plaintiffs had a right to appeal the 1993 Easement administratively. The BIA's right-of-way regulations provide that administrative appeals may be taken from "BIA decisions under this part," including decisions to grant a right-of-way. 25 C.F.R. § 169.13; *see also* 25 C.F.R. § 169.2(b) (2015) (same). Because Plaintiffs have not appealed the 1993 Easement administratively, they cannot seek to have this Court set it aside as "improperly issued" and "void."[1] *Fort Berthold Land & Livestock Ass'n*, 361 F. Supp. 2d at 1051 ("Numerous courts, including the Eighth Circuit, have declined to review BIA decisions for failure to exhaust administrative remedies.").

As for the holdover proceeding, because the BIA has not made a final determination as to whether to treat the alleged holdover as a trespass, there is no agency action to appeal administratively, much less a final action that could be subject to judicial review. When the BIA

[1] Resp. at 9 ("Plaintiffs assert that . . . the pipeline was operated under an improperly issued easement," allegedly giving rise to a trespass claim for the period 1993-2013); First Am. Class Action Compl. (Doc. 28) at ¶ 79 ("[T]he 1993 Easement was void *ab initio* as to the individually allotted trust lands . . . ."), ¶ 122 ("[T]he 1993 Easement was invalid and void *ab initio* . . . .").

does make a determination, Plaintiffs can appeal that determination administratively; only when they have exhausted that avenue can they then seek judicial review.[2]

II. Alternatively, the Court Has Discretion to Require Exhaustion.

Even if, *arguendo*, Plaintiffs' case were not considered to be an APA-style challenge to agency action—and as such subject to the BIA's exhaustion-mandating regulations—this Court could still dismiss this case for failure to exhaust as a matter of discretion. Indeed, Plaintiffs significantly overstate and misconstrue the Supreme Court's holding in *Darby*. Although the Court held there that exhaustion is necessary only if a statute or regulation requires it, that holding was expressly limited to actions brought under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* In all other cases, the Court stated, "the exhaustion doctrine continues to apply as a matter of judicial discretion." 509 U.S. at 153-54. *See also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required. ***But where Congress has not clearly required exhaustion, sound judicial discretion governs.***" (emphasis added; citations omitted)).

Even if exhaustion were a matter of discretion in this case, there is strong precedent for requiring it. In *Klaudt v. United States Dep't of Interior*, 990 F.2d 409 (8th Cir. 1993), the Eighth Circuit held "[t]here can be no clearer case for the exhaustion of administrative remedies" than was presented by the appellants' claims, which challenged the BIA's administration and enforcement of a tax on Indian trust lands. *Id.* at 412. The court stated:

> The governmental interest in exhaustion in this case includes allowing the agency to develop a factual record, to exercise its discretion, and to apply its expertise. In

[2] This does not mean Plaintiffs have no recourse in the interim. They are free to provide their input to the BIA as the BIA considers how to proceed, and indeed the pertinent regulation requires the BIA to consult with the Indian allottees in determining how to proceed. 25 C.F.R. § 169.410. Nor can the BIA indefinitely refuse to make a determination, as there is a procedure by which Plaintiffs can administratively appeal inaction of a BIA official. 25 C.F.R. § 2.8.

> addition, the agency should be given the opportunity to discover and to correct its own errors. Agency autonomy and judicial economy are also important considerations. Appellants, on the other hand, have no interest in immediate judicial review.

Id. (citation omitted). The same rationale for exhaustion exists here. The BIA should be allowed to exercise its discretion (e.g., in deciding how to respond to the holdover), apply its expertise (e.g., in choosing an approach in the best interest of ***all*** affected allottees), and discover and correct its own errors, if any (e.g., it should have the first opportunity to consider whether the 1993 Easement was "improperly issued"). Exhaustion will allow the agency to develop a factual record, including on the easement issue, as to which it possesses the relevant records. *See* Am. Mem. in Supp. of Defs.' Am. Mot. to Dismiss for Failure to Join Required Party (Doc. 76) at 18-19. Exhaustion will, moreover, promote agency autonomy and judicial economy. Meanwhile, Plaintiffs identify no reason why they cannot work with the BIA but must instead proceed immediately to court. Indeed, there is no reason.

III. Plaintiffs Misinterpret the Pertinent Regulatory Scheme.

Relying on 25 C.F.R. § 169.413, Plaintiffs argue that the BIA regulations permit them to pursue remedies on their own. Resp. at 57-62. Strictly speaking, this is irrelevant to the Motion because the exhaustion doctrine is concerned with ***when*** a plaintiff may proceed to court, not whether he or she may pursue a remedy at all. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed."). Importantly, nothing in § 169.413 exempts Plaintiffs from the exhaustion doctrine.

In any event, Plaintiffs are wrong that § 169.413 allows them to take matters into their own hands when, as here, the BIA is investigating and responding to allegations of holdover possession. Section 169.413 reads as follows:

> 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.

25 C.F.R. § 169.413. Plaintiffs place great emphasis on the last sentence of § 169.413, which they contend allows them to circumvent the BIA in this instance.[3] But Plaintiffs are wrong, because § 169.413 does not apply to this situation, where a holdover possession following expiration of an easement is being alleged. The BIA has promulgated a separate regulation to deal ***specifically with holdover possession***, 25 C.F.R. § 169.410. It reads as follows:

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

25 C.F.R. § 169.410. Section 169.410 establishes that in the case of a holdover possession, the BIA, not individual Indian allottees, will determine how to respond and what remedies, if any, to

[3] Circumventing the BIA is exactly what Plaintiffs are trying to do. For example, in this lawsuit Plaintiffs seek an injunction ordering Defendants to remove the pipeline from the allotted tracts. Given the BIA's actions to date, however, the BIA apparently prefers to allow a negotiated resolution that will include the pipeline remaining in place. As Defendants have argued, Plaintiffs, a small, self-appointed group of landowners, are attempting to substitute themselves and this Court as decision-makers in place of the agency. Plaintiffs do not deny this.

seek. Conspicuously absent from § 169.410 is any acknowledgment that individual Indian allottees may pursue remedies on their own. This omission is telling.

Because § 169.410 is problematic for them, Plaintiffs spill much ink arguing that § 169.410 merely addresses a "subset" of the unauthorized possession or use covered by § 169.413. That is, Plaintiffs argue that the holdover possession addressed in § 169.410 is included within the "unauthorized possession or use" mentioned in § 169.413. Resp. at 53-55. But the two regulations cannot be reconciled in this manner. Indeed, the first sentence of § 169.413 flatly states that "the unauthorized possession or use" that it covers "***is a trespass***." 25 C.F.R. § 169.413 (emphasis added). Section 169.410, by contrast, states that in the event of a holdover, the BIA will make a "determination whether to ***treat*** the unauthorized possession ***as a trespass***." 25 C.F.R. § 169.410 (emphasis added). This indicates that holdover possessions are ***not*** within the purview of § 169.413. If they were, there would be no need for the BIA to make a determination whether to "treat" a holdover possession "as" a trespass; the holdover would ***be*** a trespass per the plain terms of § 169.413, and the only question for the BIA would be what to do about it.

Plaintiffs contend the "sole reason" for § 169.410 is to specify that the BIA will not take action in one particular "subset" of situations Plaintiffs contend are covered by § 169.413—a holdover possession where the parties are engaged in good faith negotiations. Resp. at 59-60.[4] But if this were really the "sole" purpose of § 169.410, it could have been accomplished by adding a single sentence to § 169.413. Moreover, § 169.410 does much more than merely provide that the BIA will not take action in the event of good faith negotiations concerning a holdover; it also

[4] Plaintiffs contradict themselves about the "sole reason" of § 169.410 when they elsewhere posit that ***another*** reason for the regulation is to "provide that the BIA may act on their behalf if the landowners are not able to do so." *See* Resp. at 55-56. Of course, § 169.410 nowhere states that the BIA can or will act in the event of a holdover only if the landowners cannot do so. Plaintiffs are simply rewriting the regulations.

details the remedial options the BIA may pursue in the event of a holdover generally. If, as Plaintiffs contend, § 169.410 addresses a "subset" of what is already covered by § 169.413, then there would be no need for § 169.410 to specify what the BIA may do, because § 169.413 already speaks to that. In other words, Plaintiffs' reading renders large portions of § 169.410 entirely redundant and unnecessary; mere surplussage. *Compare* 25 C.F.R. § 169.410 ("[W]e may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action") *with* 25 C.F.R. § 169.413 ("We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law.").

In view of the foregoing, the only reasonable reading of §§ 169.410 and 169.413 is that they address mutually exclusive situations (hence the need for each to specify what the BIA may do).[5] Because § 169.410 specifically applies to the instant situation and conspicuously lacks any statement that Indian landowners may sue—a statement that ***is*** found in the inapplicable § 169.413—it reflects an intent that the BIA, not individual Indian allottees, will manage holdover situations.[6] And as detailed in the Motion and supporting memorandum, that is precisely what the BIA has been doing in this instance.[7]

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[5] Plaintiffs assert that they are entitled to a liberal construction of the regulations in the event of any ambiguities or conflicts. Resp. at 55, 57. There are no ambiguities or conflicts, however. The textual analysis above yields just one reasonable reading of the regulations that fully harmonizes §§ 169.410 and 169.413.

[6] Plaintiffs argue that Defendants have cited no cases supporting this interpretation. Resp. at 59. But § 169.410 was promulgated only recently, taking effect in 2016 as part of the new "Rights-of-Way over Indian Land" rule, 25 C.F.R. Part 169. Plaintiffs also suggest, without citation to authority, that their status as "beneficial owners of the land" gives them the right to sue even without "express authority." Resp. at 55. This is not so. *See* Reply Mem. in Supp. of Defs.' Mot. to Dismiss for Failure to Join a Required Party (filed concurrently herewith) at 12-13 & n.9.

[7] Other regulations likewise indicate that the BIA, as trustee, is ultimately the decision-maker in this context and the preferences of individual Indian allottees will not always prevail. 25 C.F.R. § 169.402, for example, states that the BIA or the tribe "may investigate" compliance with a right-

Because the BIA is the decision-maker in this instance, Plaintiffs must work with and through the BIA. If Plaintiffs are not satisfied with the BIA's ultimate determination as to how to proceed, then they will have the opportunity to appeal that decision within the agency. 25 C.F.R. §§ 2.2; 2.7(c); *see also* Sanford Aff. (Doc. 21-1) ¶ 21, Ex. N (letter from the Superintendent of the BIA Fort Berthold Agency noting that there will be an opportunity to appeal the BIA Fort Berthold Agency's final determination as to whether to treat the matter as a trespass). Once those administrative appeals are exhausted, Plaintiffs could seek judicial review; until then, however, the matter remains pending in the agency and is not considered a final agency action subject to judicial review. 25 C.F.R. § 2.6(a). Because the BIA has not made a final determination and Plaintiffs have not exhausted their administrative remedies, any court action, including the present lawsuit, is, at best, premature and should be dismissed.

IV. *Poafpybitty* Is Inapposite.

In their Response, Plaintiffs also rely on *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), as support for their position that they need not exhaust administrative remedies. Plaintiffs' reliance on *Poafpybitty* is misplaced. *Poafpybitty* arose in a different context—the allottees there were suing for breach of an oil and gas lease—and involved a different set of regulations. *Id.* at 366-67, 372-73. Significantly, *Poafpybitty* did not involve any ongoing administrative proceeding to

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of-way. Plaintiffs suggest this does not exclude individual allottees, *see* Resp. at 56, but it obviously does. Indeed, § 169.402 expressly answers the question, "Who may investigate compliance with a right-of-way?" Individual allottees are not mentioned. Plaintiffs also take issue with Defendants' citation of 25 C.F.R. § 169.403, which provides that allottees may "negotiate" remedies to be included within a right-of-way. Plaintiffs insist this does not limit their rights to pursue remedies in the event of a holdover, Resp. at 57, but the point simply is that the BIA is ultimately the decision-maker in this context. Although the BIA will attempt to "defer, to the maximum extent possible, to the Indian landowners' determination that the right-of-way is in their best interest," 25 C.F.R. § 169.124, the BIA is under no obligation to grant a right-of-way containing the remedies negotiated by allottees.

address the allegations of breach; to the contrary, the BIA had approved the allottees' hiring of a lawyer and supported their lawsuit. *See id.* at 366-67, 374, 367 n.1. *Poafpybitty* also did not involve an attempt to invalidate a BIA-issued instrument.

Moreover, in examining whether the allottees could maintain suit, the *Poafpybitty* Court did not point to any regulation requiring exhaustion of the particular claims at issue there. Nor did the Court identify any regulations comparable to § 169.410 indicating an exclusive role for the BIA or another agency in addressing the alleged breach for the allottees. Here, § 169.410 provides that the BIA—not Plaintiffs—are to determine the threshold issue of whether to treat a holdover situation as a trespass in the first instance.

In sum, *Poafpybitty* involved different claims, different circumstances, and different regulations. Simply put, it is inapposite.[8]

V. If the Court Does Not Dismiss for Failure to Exhaust, It Should Defer to the BIA, Which Is Addressing Plaintiffs' Claims, Under the Doctrine of Primary Jurisdiction.

The Motion and supporting memorandum also raised lack of primary jurisdiction as a ground for the Court to dismiss this case. Am. Mem. in Supp. (Doc. 77) at 17-20. The Response devotes but a single, short paragraph to this issue, and mainly just repeats the same flawed arguments Plaintiffs make with respect to exhaustion of remedies—that nothing in the regulations requires them to exhaust administrative remedies. Resp. at 61. But even if this demonstrated that the exhaustion doctrine does not apply, it would be unavailing to Plaintiffs on the primary

[8] There are other differences between *Poafpybitty* and the instant case. *See* Reply Mem. in Supp. of Defs.' Mot. to Dismiss for Failure to Join a Required Party (filed concurrently herewith) at 2-5. Plaintiffs also suggest there are constitutional implications to finding that the regulations exclusively empower the BIA to address holdover situations. Resp. at 59. As discussed elsewhere, that is false. *See* Reply Mem. in Supp. of Defs.' Mot. to Dismiss for Failure to Join a Required Party (filed concurrently herewith) at 12-13 & n.9.

jurisdiction issue because dismissal for lack of primary jurisdiction is an ***alternative*** to dismissal for failure to exhaust. *See* Am. Mem. in Supp. (Doc. 77) at 17.

Plaintiffs do nothing to show why the Court should not, in its discretion, defer to the primary jurisdiction of the BIA and dismiss this case while the ongoing administrative proceeding undertaken by the BIA remains pending. *See id.* at 17-20.

CONCLUSION

Plaintiffs' First Amended Class Action Complaint is premised entirely on the alleged unauthorized possession after expiration of a BIA-granted right-of-way. This very issue is presently the subject of an ongoing administrative action by the BIA pursuant to 25 C.F.R. § 169.410, by which the BIA will decide whether to treat the holdover as a trespass, and if so, what remedies to pursue on behalf of all affected Indian landowners, including Plaintiffs. Maintenance of this judicial action would undoubtedly intrude into the BIA's deliberative process, thus improperly impeding the congressionally-prescribed role and function of that agency, which has primary jurisdiction over this matter. Moreover, Plaintiffs' recourse is with the BIA. When the BIA makes a final determination how to proceed, Plaintiffs may appeal such determination within the agency. But until there is a final determination and Plaintiffs have exhausted their administrative remedies, court action is, at best, premature. For these reasons, in the unlikely event this Court were to deny Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, this Court should nevertheless dismiss this action for failure to exhaust administrative remedies or, alternatively, due to primary jurisdiction in the BIA.

Dated: October 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 2, 2019, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, District of North Dakota, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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