IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA (WESTERN)

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

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

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Plaintiffs' Response as it relates to subject matter jurisdiction (Doc. 85, pp. 1-40) is fundamentally flawed, including because it asserts that Plaintiffs, individual Indian allottees, enjoy broad federal common law rights (including trespass) that can be enforced in federal court under 25 U.S.C. § 345 or other statutes or regulations pled in Plaintiffs' Complaint.[1] This has been flatly rejected by the Supreme Court, the Eighth Circuit, as well as other courts addressing individual Indian allottees asserting claims of trespass on their allotted land. *See* Doc 74.

I. Plaintiffs Are Wrong to Say that Federal Common Law Rights Afforded a Tribe to Vindicate Aboriginal Rights as Discussed in *Oneida I* and *II* also Cover Individual Allottees' Common Law Claims of Trespass Pursuant to 25 U.S.C. § 345

The thrust of Plaintiffs' Response is focused on a flawed legal argument—that the Supreme Court in *Oneida I* and *II* in its ruling granting subject matter jurisdiction, including pursuant to 28 U.S.C. § 1362, to a ***tribe*** under federal common law to vindicate ***aboriginal rights***, was also by implication granting broad federal common law rights to individual Indian allottees, including federal common law trespass rights, enforceable in federal court. Resp., at 14-27 (arguing, incorrectly, that federal common law rights afforded a tribe are "indistinguishable in any material respect" from rights of individual allottees). There is no support for that argument in the *Oneida* opinions, and in fact the opposite is demonstrated by other courts that have interpreted *Oneida I* and *II* just the way Defendants urge this Court to do, including in the Eighth, Ninth, and Fifth Circuits. And to be clear, in *Oneida I* and *II*, the Oneidas brought suit to enforce tribal aboriginal rights, under 28 U.S.C § 1362 granting district courts original jurisdiction over a ***tribe***; *Oneida* did not arise under 25 U.S.C § 345 at all—which Plaintiffs admit, as they must. Resp., 23, n. 18.

Moreover, neither the Supreme Court nor Congress has ever recognized the bright line distinction Plaintiffs want this Court to create between types of allotments - trust allotments (which

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[1] Unlike plaintiffs in the *Hall* Lawsuit, Plaintiffs here have asserted only federal "arising under" jurisdiction (not diversity jurisdiction) as their basis for jurisdiction. *See* Motion, at 5, n. 10.

Plaintiffs allege they have) and restrictive fee allotments (at issue in *Taylor v. Anderson*, 234 U.S. 74 (1914)); to the contrary, they are treated the same for all material purposes by the Supreme Court, Congress, and the BIA. And, both trust and restrictive allotments are issued by "patent," thereby plainly negating Plaintiffs' primary argument for attempting to draw a distinction in *Oneida I*. Finally, the very cases Plaintiffs purport to rely on most actually prove the error of their argument—they address tribal claims as opposed to claims of individual Indian allottees.

A. The *Oneida* Court distinguished between common law claims of individual Indians related to their allotted land, on the one hand, and tribal claims related to protecting aboriginal rights, on the other.

Plaintiffs say that Defendants "misunderstand" the *Oneida I* decision. Resp., at 19. But it is Plaintiffs who "contort" the language in that case and ask this Court to broadly extend its holding to imply "arising under" jurisdiction under 25 U.S.C. § 345 on behalf of individual Indian allottees for broad federal common law trespass rights, in a way the Eighth Circuit has expressly rejected. Indeed, the *Oneida I* Court expressly based its holding that the Oneida Tribes' complaint asserted a claim "arising under" federal law on the unique "nature and source of the possessory rights of Indian **tribes to their aboriginal lands**, particularly when confirmed by treaty" holding that "it is plain that the complaint [there] asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362." *Oneida I*, 414 U.S. at 667 (emphasis added). Only after reciting pages of cases interpreting the unique nature of **tribal rights** with respect to title based on aboriginal possession, the Court concluded that "[e]nough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." *Id.* at 675. Having reached that conclusion expressly with regard to **tribal rights**, however, the Court nonetheless distinguished its holding related to claims arising from

"aboriginal title of an Indian tribe" which arise under federal law, from a "suit concern[ing] lands allocated to individual Indians, not tribal rights to lands," which does not. *Id.* at 676.[2]

Plaintiffs have no meaningful response to the Eighth Circuit and other cases cited by Defendants that follow the *Oneida* decisions exactly as Defendants say, holding that *Oneida I* and *II* apply to the specific claims of the tribe with respect to its aboriginal rights, not individual Indian allottees' common law trespass claims (which arise under state law). Motion, at 10-11. Instead, apparently hoping to ignore that this case was transferred to the Eighth Circuit,[3] Plaintiffs incredibly criticize Defendants for "spending considerable energy discussing the Eighth Circuit's decisions" that are directly on point. Resp., at 29. As for *Wolfchild v. Redwood County*, 824 F.3d 761, 767 (8th Cir.) *cert. denied,* 137 S. Ct. 447 (2016),[4] Plaintiffs are forced to concede that the court there rejected federal common law claims for ejectment and trespass brought by individual Indian allottees (loyal Mdewakanton) for the express reason that their "lawsuit…concerns 'lands

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[2] *Oneida I*, 414 U.S. at 676 ("aboriginal title of an Indian tribe [allegedly] guaranteed by treaty and protected by statute has never been extinguished"; "In *Taylo*r, the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to land"; "Insofar as the underlying right to possession is concerned, *Taylor* is more like those cases indicating that 'a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress'"; "Once patent issues, 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"). Justice Rehnquist emphasized the limited scope of the Court's holding, to make sure it is not viewed as a "passport into federal court": "the majority opinion does not disturb the long line of this Court's cases narrowly applying the principles of 28 U.S.C. § 1331… to possessory land actions brought in federal court." *Id.* at 683-84 (Rehnquist, J., concurring).

[3] In contrast, Plaintiffs' Response is nearly devoid of precedent from the Eighth Circuit or this District. Where Plaintiffs do cite such precedent, it is inapposite. For example, Plaintiffs cite to *Houle v. Cent. Power Elec. Co-op, Inc.*, No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. Mar. 24, 2011), but *Houle* found jurisdiction pursuant to 28 U.S.C. § 1331 to determine whether a tribal court exceeded its jurisdiction; and therefore, never determined jurisdiction under 25 U.S.C. § 345 for a trespass claim.

[4] *See infra* at 12-13 for a discussion of *Kishell,* the other controlling Eighth Circuit decision.

allocated to individual Indians, not tribal rights to lands.'" *Id.* at 767. Plaintiffs try to distinguish the nature of the individual allotment granted to the loyal Mdewakanton from Plaintiffs' allotments (Resp., at 31), but that is a distinction the *Wolfchild* court never made. Instead, the *Wolfchild* court could not have been more clear in expressly basing its holding on the distinction between a **tribe's** aboriginal right of occupancy and **lands allocated to individual Indians**, finding that the individual Indian allottees (like Plaintiffs here) had fundamentally misinterpreted *Oneida I* and *II* in believing they as individual Indians had federal common law rights similar to a tribe. *Wolfchild*, 824 F.3d at 767-68. *See* Motion at 10-11. Therefore, controlling Eighth Circuit authority makes clear that Plaintiffs, as individual allottees, have no federal common law rights here. Plaintiffs do not even try to distinguish the other cases cited by Defendants that are in accord with *Wolfchild*. Motion, at 10, n.19. *See Chuska Energy Co. v. Mobil Exploration & Producing N. Am, Inc*., 854 F.2d 727, 730 (5th Cir. 1988); *Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995).

Defendants did not "ignore" *Oneida II*, as Plaintiffs say (Resp., at 24), but as the *Wolfchild* court said, *Oneida II* must be read in the context of the earlier jurisdictional ruling in *Oneida I*. The Court in *Oneida II* made this point clear: "as we concluded in *Oneida I*, 'the possessory right claimed [by the Oneidas] is a federal right to the lands at issue in this case.'" *Oneida II*, 470 U.S. at 235 (quoting *Oneida I*, 414 U.S. at 671) (bracketed in original). Therefore, when the *Oneida II* Court was discussing the claimant (the "Indians") enjoying federal common law rights, it was talking about the tribe (the Oneidas), not individual allottees. *Id.* at 236 (discussing a tribe's right to bring a common law action to "vindicate their aboriginal rights"); *see* Resp., at 24-25 (arguing, incorrectly, that when the *Oneida II* Court referred to "the Indians" it was not just referring to the

Tribal actions to vindicate aboriginal rights). The court held that "the **Oneidas** can maintain this action for violation of their possessory rights based on federal common law." *Id.*[5]

B. Allotted land is not tribal land.

Plaintiffs' argument that federal common law rights attach to Plaintiffs' trespass claim does not rely on any language in the *Oneida* case holdings, but instead on the incorrect claim that allotted trust land and tribal land are "indistinguishable." Resp., at 23-24. To the contrary, courts have specifically held that once a trust allotment is granted, it is **not** tribal land. Under the General Allotment Act (under which Plaintiffs claim their allotments, Resp. at 4-5), lands were allotted "by patent" to individual Indians "in trust for the sole use and benefit of the Indian," 25 U.S.C. § 348, with each Indian allottee initially receiving a "trust patent." *See, e.g.*, *U.S. v. Newmont U.S.A.*, 504 F. Supp. 2d 1050, 1065-66 (E.D. Wash 2007). Once allotted, courts have consistently held that the land is not tribal land. *United States v. State of Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *see also Newmont*, 504 F. Supp. 2d at 1065-66 (citing *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959). Also, the BIA specifically distinguishes between "tribal land" and "individually owned land." *See, e.g.,* 25 C.F.R. § 169.2 (BIA regulations defining and distinguishing "tribal land" from "individually owned land"). It simply makes no sense to say that when the Supreme Court said a "tribe" may pursue a common law action (including under 28 U.S.C. § 1362) to vindicate aboriginal rights that it also meant by implication that individuals Indians could pursue (under 25 U.S.C. § 345) common law trespass claims with respect to

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[5] The Court's discussion of the statute of limitations for federal common law **tribal** claims is irrelevant here. Resp., at 25-26 (discussing limitations holding in *Oneida II*). Plaintiffs' reference to and selective excerpt from the Claims Limitations Act is disingenuous, at best. That statute (28 U.S.C. § 2415, "Time for commencing actions brought by the United States") by definition applies to claims ***brought by the United States*****,** and provides applicable statutes of limitations, which is the context in which it was discussed in *Oneida II.* 470 U.S. at 241. The United States is not a plaintiff here, and statute of limitations is not at issue in this Motion.

individually allotted land held in trust, including because individual allotted land held in trust by the United States is **not** tribal land.

C. The Supreme Court, Congress, and the BIA have treated trust and restricted fee allotments the same under the law; Plaintiffs attempt to create a bright line distinction between the two lacks merit.

And while courts **have** consistently recognized a stark distinction between the status of tribal land and allotted land (and did so expressly in *Oneida I*), neither the Supreme Court nor Congress recognize a distinction between the two types of allotments (trust and restrictive allotments), which is where Plaintiffs ask the Court to make a bright line distinction, claiming the difference is "dispositive" here. Resp., at 21 & n. 15, 22 (arguing that the difference between a restricted fee allotment (at issue in *Taylor*) and a trust allotment is "dispositive").[6]

The Supreme Court, in a case selectively cited by Plaintiffs, held that trust and restricted allotments have "**the same effect**" and any differences are "**not regarded as important**" under the law as it relates to Indian country. *U.S. v. Ramsey*, 271 U.S. 467, 471 (1926) ("the difference between a trust allotment and a restricted allotment, so far as that **difference** may affect the status of the allotment as Indian country, was **not regarded as important**…."; according to the Court, "[i]n practical effect, the control of Congress, until the expiration of the trust or the restricted period, **is the same**"). Importantly, Congress and the BIA also treat trust and restrictive allotments

[6] Plaintiffs try mightily to further diffuse the importance of the *Oneida* court's statement distinguishing the *Taylor* case, which involved land allocated to individual Indians as opposed to a tribe. Plaintiffs attempt to create out of whole cloth a purported basis for the *Taylor* court's decision (*i.e.*, that the allotment had allegedly passed out of restrictive status at the time of trial) that simply was not a basis the *Taylor* court cited for its decision—and certainly was not mentioned or established, much less the basis for, the *Oneida* court distinguishing *Taylor*. Resp. at 21 n. 15, 22; *Oneida I*, 414 U.S. at 676 ("In *Taylor*, the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to the individual Indians, not tribal rights to lands."). Indeed, Plaintiffs acknowledge, as they must, that the Supreme Court in *Oneida I* recognized that the allotment at issue in *Taylor* was by patent with "the right to alienation being restricted" (a restrictive fee allotment). Resp., at 21. Plaintiffs' argument here merely seeks to confuse the issue.

as identical as it relates to the Right-of-Way Act and regulations. 25 U.S.C. § 323 ("The Secretary of the Interior… is empowered to grant rights-of-way for all purposes… over and across any lands now or hereafter held **in trust by the United States for individual Indians… or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians**….."); 25 CFR § 169.2 ("**Individually owned land**" is defined in the Right-of-Way regulations as "any tract in which the surface estate…**is owned by…individual Indians in trust or restricted status**")(emphasis added).

Because the individual Indian allotment at issue in *Taylor* involved an allotment of restrictive status, Plaintiffs seek to make the unreasonable and unsupported leap that the *Oneida I* Court really meant to say that only individual Indians with restricted allotments (but not trust allotments) lacked broad federal common law rights that could be asserted in federal court. Resp., at 21. That simply does not make sense given that courts and Congress have consistently treated them the same, and have not created the distinction that the Plaintiffs ask this Court to create.

Plaintiffs rely upon *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076-77 (10th Cir. 1993) (Resp., at 4, n. 3, 22), but that case provides no support for the distinction Plaintiffs attempt to create and certainly does not overrule the Supreme Court, Congressional, and BIA precedent that treats them as the same. *Buzzard* did not involve an individual Indians' rights with respect to land allotted to him at all. Instead, *Buzzard* involved a tribe's purchase of land. The tribe's charter permitted it to purchase land in fee simple but prohibited it from disposing of the land without the approval of the Secretary of the Interior. The case simply dealt with whether the land purchased by the tribe was subject to taxation. In reaching its decision, the *Buzzard* court, which focused on the purchase of the land (as opposed to the restriction on alienation in the tribe's charter), noted

that "[t]he smokeshops thus were located on land purchased by the UKB in the same manner land purchased by any other property owner," and thus, not exempt from state tobacco taxes.

D. Plaintiffs' focus solely on the word "patent" in attempt to distinguish the holding in *Oneida I* is incorrect because both trust allotments and restrictive allotments are issued by patent.

Plaintiffs make much of the fact that the *Oneida I* Court used the word "patent" in the following quote to suggest, incorrectly, that only restrictive allotments are issued by patent when in fact both trust and restrictive allotments are issued by patent: "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 (emphasis added). Plaintiffs' argument that the word "patent" or "United States patent" must signify a restrictive allotment only is simply wrong because trust allotments, in addition to restrictive allotments, are issued by United States "patent." 25 U.S.C § 348 ("Upon the approval of the allotments provided for in this act by the Secretary of the Interior, **he shall cause patents to issue** therefor in the name of the allottees, **which patents shall be of the legal effect**, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, **in trust** for the sole use and benefit of the Indian to whom such allotment shall have been made…") (emphasis added). Plaintiffs' attempt to call out Defendants for bracketing the second redundant reference to the word "United States patent" as ["federal law"] from the quote in *Oneida I* (Resp., at 19-20) is disingenuous and a red herring; indeed, at least one other court has likewise bracketed the exact same phrase in the exact same manner as unnecessary/ redundant in an almost identical case involving a trust allotment.[7] The *Oneida* Court was quite clearly

[7] The court in *Marek v. Avista Corp.*, No. CV4-493, N EJL, 2006 WL 449259, at *2 (D. Idaho Feb. 23, 2006), a case that is virtually factually identical to the present case and involved a **trust**

distinguishing between claims of individual Indian allottees in general (restrictive or trust) and claims of a tribe, as the Court specifically explained (*see supra* at 2-4), as both trust and restrictive allotments are issued by United States patents. 25 U.S.C § 348.[8]

E. The cases Plaintiffs rely on prove the distinction between claims of individual Indians and a tribe

The cases that Plaintiffs rely on most in their response prove the fundamental flaw in their argument—those cases involve claims of a tribe, not claims of an individual allottee. For example, Plaintiffs rely on *National Farmers Union Ins. v. Crow* (Resp., at 12-13), but that case describes the unique power of the federal government over **Indian tribes** (in this case the Crow Tribe of Indians)**,** and the federal "arising under" question presented by the case was actually whether the

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allotment, likewise bracketed the word "United States patent" as "[federal law]" in the same quote as unnecessary/ redundant verbiage.

[8] Plaintiffs' suggestion that the 1906 Burke Act might support "arising under" jurisdiction here is wrong on a number of levels. Resp., at 5, 20 (citing the Burke Act and saying, incorrectly, that it says "federal law exclusively applies to trust allotments"). Plaintiffs' cited language from the Burke Act was intended solely to ensure continued federal guardianship over Native Americans in an age when they were considered wards of the nation and before Native Americans gained the right to citizenship by birth. *See* Cohen's Handbook of Federal Indian Law § 14.01[3], at 928 (Nell Jessup Newton ed., 2012), and cases cited therein including *U.S. v. Nice*, 241 U.S. 591, 600-01 (1916). The language merely affirms that allottees are "subject to" the jurisdiction of the United States (*i.e.*, as it relates to taxing and criminal prosecution, and the like), but it does not create jurisdiction in the federal courts for allottees to assert common law claims, and it does not create any federal right of action in the allottee Plaintiffs. *See, e.g., Guardianship of Prieto v. City of Palm Springs*, 328 F. Supp. 716, 718 (C.D. Cal. 1971) (holding that the Burke Act is no authority for the suit being brought in Federal court). To be clear, section 345 is the jurisdictional statute applicable to actions for individual Indian allotments (which does not cover Plaintiffs' common law tort claims here, *see infra* at 12-16), but section 349 is not. Compare the language of 25 U.S.C. § 349 ("allottees …shall be subject to the exclusive jurisdiction of the United States"), with 25 U.S.C. § 345 ("[a]ll persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land…, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled …, may commence and prosecute or defend any action, suit, or proceeding … in the proper district court of the United States; and said district courts are given jurisdiction."). By selectively removing language in a 1906 statute from its context, Plaintiffs seek to circumvent the considerable body of jurisdictional precedent that has developed over the intervening 113 years. Despite Plaintiffs' misleading reference to the Burke Act, Plaintiffs are obviously aware that it is inapplicable, given they do not assert it as a basis for jurisdiction. *See* FAC (Doc. 28).

Tribal Court has the power under federal law to issue a judgment against a non-Indian, or whether under federal law non-Indians enjoy freedom from Tribal Court interference. The court there acknowledged that "Indian **tribes** occupy a unique status under our law," and that today "the power of the Federal Government over the **Indian tribes is plenary**." Holding that a "suit arises under the law that creates the cause of action," the court found that the right which the claimant sought to assert—a right to be protected against an unlawful exercise of **Tribal** Court judicial power—has its source in federal law because federal law defines the outer boundaries of an **Indian tribe's** power. Therefore, "[t]he District Court correctly concluded that a federal court may determine under § 1331 **whether a tribal court has exceeded the lawful limits of its jurisdiction**. In other words, the case was about federal court power over a **Tribe**; it does **not** discuss or even mention **individuals** who own allotments held in restricted or trust status.

Similarly, Plaintiffs incredibly rely on *United States v. Milner*, in suggesting there is a line of cases recognizing federal common law rights of individual allottees (Resp., at 15), but *Milner* involved the claims of the **United States** on behalf of a **tribe**, not individual allottees and, as such, did not mention 25 U.S.C. § 345 or any other statutes related to individual land allotments.[9] And Plaintiffs rely on *Michigan v. Bay Mills*, 695 F.3d 406 (6th Cir. 2012) (Resp. at 37), apparently hoping the Court does not actually read it. Again, that case involves claims of a federally recognized **tribe**—Little Traverse Bay Bands of Odawa Indians against the Bay Mills Indian Community, another federally recognized **Tribe**, claiming their operation of another casino would

[9] Indeed, the *Milner* court, addressing jurisdiction of a trespass claim by the **United States**, would have had no reason to apply section 345 (Actions for Allotments). Given that the **United States** was the plaintiff on behalf of the ***tribe***, the *Milner* court only needed to look to 28 U.S.C. § 1345 for subject matter jurisdiction—which provides "district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States." *Milner*, at 1182; 28 U.S.C. § 1345.

divert their casino revenues, and asserting claims under the Indian Gaming Regulatory Act related to when a **Tribe** can conduct gaming activities. "The plaintiffs primarily plead claims under the Regulatory Act" but then held the court lacked subject matter jurisdiction under that federal statute because statutory prerequisites to a tribe filing suit under the statute were absent. Although the court did note that federal common law claims of a **tribe** did exist which would have significant impact on "federal Indian gaming law" (whether the **tribe's** casino was operated on **tribal land**), *id.* at 413, the court dismissed the case anyway due to "tribal immunity" of Bay Mills preventing the suit, which dismissal based on immunity was actually affirmed by the Supreme Court. *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782 (2014).

These are examples only. The Response is replete with case citations taken far beyond their actual context and holdings. Plaintiffs simply ignore the very distinctions the courts are making between individual allottees and the aboriginal rights of a tribe.

II. Plaintiffs Ignore the Express Limitations on Federal Court Jurisdiction under 25 U.S.C. § 345 as Described by *Mottaz* and Other Cases

Despite acknowledging in a footnote, as they must, that the aboriginal claims of a tribe at issue in *Oneida I* and *II* differ from the claims asserted by individual allottees (Resp., at 23 n. 18), Plaintiffs attempt to argue that 25 U.S.C. §345 and the Indian Right-of-Way Act still "create subject matter jurisdiction" here for their individual common law claims under 28 U.S.C. § 1331. But those statutes do not create subject matter jurisdiction here and a line of cases that Plaintiffs try unsuccessfully to discount say so specifically. As for the Right-of-Way Act, 25 U.S.C. §§ 323-328, despite the fact that Plaintiffs generally allege that they have "pled violations of the Indian Right of Way Act"[10] (Resp., at 32), Plaintiffs do not even attempt to dispute (because they cannot) that the statute creates **no private right of action** and therefore violations thereof cannot create

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[10] *See also infra* at 14-15 for discussion of *Marek,* where the court rejected a similar claim.

"arising under" subject matter jurisdiction. Motion, at 21-23 (to which Plaintiffs offer no response). *See, e.g., Wolfchild*, 824 F.3d at 768 ("Because Appellants failed to state a claim under the federal common law, Appellants' claims only survive to the extent the 1863 Act provides a private remedy," which it does not).

And Plaintiffs' faulty argument that trust allottees enjoy broad federal common law rights supporting federal "arising under" jurisdiction pursuant to 25 U.S.C § 345 (a jurisdictional statute not at issue in the *Oneida* cases) is inconsistent with the specific limits imposed by Congress under the statute, as interpreted by the Supreme Court in *United States v. Mottaz*, 476 U.S. 845 (1986), and applied by the Eighth Circuit and other courts to preclude common law trespass claims asserted by allottees (including cases involving claims of ***trust*** allottees just like Plaintiffs). Plaintiffs have no meaningful response to the express limits courts, including the Supreme Court, have placed on section 345 jurisdiction, to suits involving (1) issuance of an allotment and (2) suits involving the interests and rights in the allotment itself after it is issued (such as a suit to quiet or recover title to the allotment after it was originally acquired).

Plaintiffs say that the second prong of *Mottaz* "is directly on point" and dispositive here. Resp., at 28. However, that argument ignores that the second prong has been specifically limited to actions that challenge the holder's right to the allotment itself, such as quiet title suits (like the quiet title claim at issue in *Mottaz* whereby the government *sold* the respondent's trust allotments without telling her), and that courts have held it specifically **does not extend** to common law trespass claims.

A. Plaintiffs cannot avoid the holdings in *Kishell*, *Pinkham*, and *Marek*, each refusing to extend section 345 jurisdiction to common law trespass

Plaintiffs misleadingly try to divert the Court's attention from the Eighth Circuit's dispositive holding in *U.S. ex rel. Kishell v. Turtle Mountain Housing Auth.*, 816 F.2d 1273, 1274

(8th Cir. 1987) by incorrectly speculating that the allotment owned by Ruth Tibbets there was not a trust allotment (Resp., at 29), when in fact the Court specifically recited that it was: "Ruth M. Tibbets, now deceased, ….was the successor in title and interest to an allotment of approximately fifteen acres of land held in trust by the United States." There is simply no support in the case for Plaintiffs to speculate otherwise.[11] Indeed, the courts in both *Pinkham v. Lewiston Orchards Irrig. Dist*., 862 F.2d 184, 189 (9th Cir. 1988), and *Marek v. Avista Corp*., No. CV04-493 N EJL, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006), which both indisputably involved existing **trust allotments**, thereafter specifically relied on *Kishell*, and reached the exact **same holding** that section 345 does not support jurisdiction for a trespass claim on individual allotted land. The *Kishell*, *Pinkham*, and *Marek* courts each hold that section 345 does not afford federal court "arising under" subject matter jurisdiction to individual allottees for common law trespass, and those cases are dispositive here. *See Kishell*, 816 F.2d at 1275 (individual allottee's complaint seeking relief for trespass "does not state a claim contemplated by section 345, and that statute also cannot serve here as grounds for federal question jurisdiction."); *Pinkham*, 862 F.2d at 188-89 (relying on *Kishell* and holding "section 345, and its companion provision 28 U.S.C. § 1353, provide no subject-matter jurisdiction for such a tort [trespass] claim" made by individual trust

[11] Contrary to Plaintiffs' suggestion otherwise, when the *Kishell* court stated that "there is no claim that the property was subject to a restriction against alienation imposed by the United States," the court was establishing, as it specifically said, that "[25 U.S.C.] Section 1322(b)'s provision permitting suit [in federal court] for improper alienation of trust land is inapplicable to this case" because sale or title to the property (alienation) was not an issue. *Id.* at 1275. And there is no basis in the case to support Plaintiffs' speculation that the land was no longer an Indian trust allotment, or that the status of the allotment was case determinative under section 345. Resp., at 29, n.19 (stating, without authority, that it "appears…that" the land was no longer subject to any restrictions). To the contrary, the *Kishell* court simply clarified that, like the present case, the complaint did not involve a challenge to title of Tibbets' estate, making section 345 inapplicable under the second prong of *Mottaz*. *See Kishell*, at 1275 (because there was no challenge to Tibbets' fee title interest and the claim was in trespass, "the present suit does not seek issuance of an allotment, nor … seek to recover[] quiet title on behalf of Tibbets' estate.").

allottees); *Marek,* 2006 WL 449259, at *4 (involving a trust allotment, relying on *Kishell* and *Pinkham* and holding "the [trust allotees'] claim is not based upon a specific protection of federal law but, instead, the law of trespass which is available to any landowner. Therefore, the Court concludes that neither § 345 nor § 1353 form the basis for subject matter jurisdiction in this matter").

Plaintiffs, tellingly, have no real response to the Ninth Circuit's holding in *Pinkham*, except to misdirect the Court's attention to the Ninth Circuit's much earlier decision in *Loring v. United States,* 610 F.2d 649 (9th Cir. 1979). Resp., at 31-32. But *Loring* was decided in 1979, seven years **before** the Supreme Court's landmark decision in *Mottaz*, the case that expressly defined the limits of section 345 jurisdiction. *Pinkham*, decided two years **after** *Mottaz,* discusses *Mottaz* at length and relies on its holding to reject subject matter jurisdiction for a common law trespass claim by individual Indian allottees. *Pinkham*, 862 F.2d at 186, 189. If that alone was not enough to eviscerate Plaintiffs' reliance on *Loring*, the *Pinkham* court itself distinguished the takings claims asserted in *Loring*, stating that "the claim in *Loring* did not sound in tort" but the trespass claim in *Pinkham* did. *Pinkham*, 862 F.2d at 187.

Finally, *Marek* involved an allotment held in trust by the United States, *see* 2015 WL 8145927, and is indistinguishable from the present case. Motion, at 16-18, 20-21. Plaintiffs argue the Court should discount the case because, they say, Plaintiffs here "pled violations of the Indian Right-of-Way Act," and the *Marek* court, they say, was silent as to the Right-of-Way Act. Resp., at 32-33. Plaintiffs' argument is wrong on both accounts. First, there is no cause of action to plead under the Right-of Way-Act because, as Plaintiffs have effectively conceded, neither it nor its regulations create a private right of action. *See* Motion, at 21-23 (to which Plaintiffs offer no response). And while this explains why the *Marek* plaintiffs may not have pled a "violation" of

the Act, the *Marek* plaintiffs did argue, exactly as Plaintiffs do here, that their claims arose under federal law, in part, "because allotments are creatures of federal statute" **and** "any right-of-ways granted or not sought would have to meet the requirements of federal law [the Indian Right-of-Way Act]."[12] 2006 WL 449259, at *2. The *Marek* court rejected this argument, relying on *Oneida I* and holding that the distinction hinges on whether the claimed right of possession ***sought to be enforced*** arises from state law or federal law; for common law trespass, the claim "seeks remedies for the individuals as landowners not based on any grant, treaty or statute of federal origin," but on state law alone. *Marek*, 2006 WL 449259, at *2-3.

B. Plaintiffs rely primarily on a case of questionable (and non-binding) precedence: *Nahno-Lopez*

Essentially side-stepping controlling Eighth Circuit authority to the contrary, Plaintiffs assert that federal courts have "uniformly" held "in a long line of cases" that section 345 "unquestionably" gives rise to federal question jurisdiction. Resp., at 13, 16. The truth is Plaintiffs primarily rely on a single case, *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010) (Resp., at 13-15), a case that is (i) an outlier to the plethora of cases to the contrary as discussed *supra*; (ii) of questionable, if any, precedential value—and certainly not binding, and (iii) easily distinguishable factually and based on its unusual procedural posture. *See* Motion, at 19, n. 23. *Nahno-Lopez* involved a dispute over real property allegedly leased by the Fort Sill Apache Tribe of Oklahoma, acting through its Tribal Business Committee. *Nahno-Lopez*, 625 F.3d at 1280. It came before the Tenth Circuit on an appeal from summary judgment for defendants (officials of the Tribal Business Committee and the Manager of the Fort Sill Apache Casino), whereby below

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

plaintiffs had originally failed to respond to the motion altogether, but then were given leave to respond and nonetheless failed to controvert a single fact resulting in defendants' statement of undisputed facts being "deemed admitted."[13] The Tenth Circuit held that plaintiffs "failed to establish a genuine issue of material fact" and affirmed "solely on that basis." *Id*, at 1281. The court analyzed the case-dispositive consent defense under Oklahoma state law. *Id*, at 1284.

Importantly as it relates to jurisdictional issues, the tribal business committee officials and tribal casino manager in *Nahno-Lopez*, having obtained summary judgment in the court below, simply conceded subject matter jurisdiction existed and, therefore, **neither party briefed subject matter jurisdiction at all** before the Tenth Circuit.[14] Without the benefit of any briefing and certainly no challenge by defendants to jurisdiction, the court *sua sponte* engaged in a jurisdictional analysis, first correctly stating that section 345 does not itself create a cause of action.

But where the *Nahno-Lopez* court primarily went wrong was in its analysis of the common law trespass claim, incorrectly applying the *Oneida* case for the proposition that "Indian rights to a Congressional allotment are governed by federal—not state—law" without proper regard for the particular claim at issue[15] in *Oneida*; namely, a trespass claim asserted by a ***tribe*** as to a right of possession based on the ***tribe's aboriginal right***. Thus, the *Nahno-Lopez* court appears to have (incorrectly) assumed that a federal claim for trespass existed and that it provided jurisdiction. *Id*, 1282; *see also Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 965 n. 2 (10th Cir. 2019) ("*Nahno-Lop*ez also concerned an alleged trespass on Indian allotted land. *See* 625 F.3d at 1282. In that case, however, we affirmed summary judgment to the defendants due to a lack of evidence

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[13] *See Nahno-Lopez v. Houser*, 2009 WL 10702853, * 2 (W.D. Okla. Oct. 13, 2009).

[14] *See, e.g*., Brief of Appellee in the Tenth Circuit in *Nahno- Lopez*, published at 2010 WL 2504184, * 2 (conceding jurisdiction under section 345).

[15] And also without proper regard for the fact that Section 345 was not even addressed in *Oneida*.

to prove an essential element. *See id.* at 1283. **It is therefore unclear whether we have ever formally recognized a federal claim for trespass on an Indian allotment, or simply assumed such a claim's existence**. *Cf., e.g., Gohier v. Enright*, 186 F.3d 1216, 1220–22 (10th Cir. 1999) (disposing of a claim under federal law without deciding whether to recognize that claim).")[16] (emphasis added)). As discussed above, the Court in *Oneida I* held that federal common law governs a ***tribe's*** action to vindicate ***aboriginal*** rights, but that the rule does not apply to possessory claims regarding "lands allotted to individual Indians," a distinction that the *Nahno-Lopez* court appears to have missed, but the Eighth Circuit (*e.g.,* in *Wolfchild*) did not miss. *See Oneida II,* 470 U.S. at 229-230; *Oneida I*, 414 U.S. at 676-77; *Wolfchild*, 824 F.3d at 767.

In addition to incorrectly interpreting *Oneida*'s holding which was limited to a **tribe's right to enforce aboriginal rights**, *see supra*, the court also incorrectly relied on *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) (as Plaintiffs do, Resp., at 15), but *Milner* did not arise under section 345 and involved an action—not by individual Indian allottees—but instead by the **United States** on behalf of a **tribe**. *Milner*, at 1181. The United States in *Milner* asserted

[16] The *Davilla* court affirmed summary judgment on a trespass claim after applying Oklahoma trespass law, noting as a preliminary matter that "although no act of Congress expressly creates a right of action for trespass on Indian allotted land, ***the parties agree such a right exists***. *See*, Aplt. Br. at 16; Aple. Br. at 15," just as the parties had so agreed in *Nahno-Lopez*. *Davilla*, 913 F.3d at 965 (emphasis added). Thus, like *Nahno-Lopez*, unlike here, there was no challenge to federal question jurisdiction, and therefore, the case did not come before the court on a 12(b)(1) jurisdictional motion and the decision contains **no jurisdictional analysis**. Plaintiffs also purport to rely on *Public Serv. Co. of NY v. Approx. 15.49 Acres of Land in in McKinley Cnty.*, *NM*, No. 15 CV 501 JAP/CG, 2016 WL 10538199, *5 (D. N.M April 4, 2016), whereby the United States sought to dismiss under Rule 12(b)(1) for lack of jurisdiction, and the district court, sitting in the Tenth Circuit, purported to follow *Nahno-Lopez* to allow a federal common law trespass claim under section 345 (a claim that, as the Tenth Circuit admitted in *Davilla*, as discussed above, may have been assumed to exist (as opposed to having been formally recognized to exist) in *Nahno-Lopez*). Finally, Plaintiffs purport to rely on *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D. D.C. 1998), but that case related to beneficiaries of individual money trust accounts suing the Secretary of the Interior under 29 U.S.C. § 162a (not section 345 at all) and the federal common law of the Secretary of the Interior's trust management, neither being at issue here.

three causes of action, including trespass. *Id*. The court there, addressing jurisdiction of claims by the **United States**, would have had no reason to apply section 345 (Actions for Allotments) or its own earlier decision in *Pinkham* (discussed *supra* at 14).[17] Given that the **United States** was the plaintiff on behalf of the ***tribe***, the *Milner* court did not need to look far for a basis for subject matter jurisdiction. It simply found jurisdiction over the United States' trespass claim under 28 U.S.C. § 1345—which provides "district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States." *Milner*, at 1182; 28 U.S.C. § 1345.

The *Nahno-Lopez* court also relies on an earlier version (2005) of the Handbook of Federal Indian Law § 16.03(3)(c) for the proposition that "state courts have no jurisdiction over allotment ownership disputes... ." But the updated 2012 edition at section 16.03(3) clarifies that while certain ownership disputes may be heard in federal court, "Federal courts will generally not have jurisdiction over allottees' claims for damages to their lands sounding in tort or other claims that do not involve ownership issues," and specifically cites *Kishell* and *Pinkham*. *See* Cohen's Handbook of Federal Indian Law § 16.03(3)(c) (Nell Jessup Newton ed., 2012).

III. Plaintiffs' Breach of Contract Claim Does Not Support Federal "Arising Under" Jurisdiction Here

As an initial matter, Plaintiffs—who bear the burden—never alleged its breach of contract claim as a basis for federal question jurisdiction in the Amended Complaint (*see* Motion, at 1, n. 4 & 3, n. 7). Instead, Plaintiffs seek to assert jurisdiction based on the "federal common law of trespass on Indian lands." FAC ¶¶ 64-66.

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[17] Regardless of its flawed recognition of federal common trespass, the *Nahno-Lopez* court went on to hold that "Oklahoma trespass law provides the rule of decision for this federal claim" anyway, including the defense of consent to trespass, and based on Oklahoma law affirmed the grant of summary judgment for plaintiffs. *Id.* at 1283-84. In other words, it seems like a result-driven holding—ultimately applying Oklahoma law to dispose of plaintiffs' claims, but holding that the district court had federal subject matter jurisdiction to reach its decision to affirm on summary judgment under federal common law.

Even if they had asserted their breach of contract claim as a basis for jurisdiction, it is not a colorable claim that may independently support federal question subject matter jurisdiction here. Indeed, the breach of easement claim—asserted merely in the "alternative" (FAC ¶¶ 130-36)—is fundamentally deficient in that Plaintiffs are not parties to the contract on which they purport to sue.[18] Because this "alternative" contract claim is insubstantial and not a colorable claim, it cannot sustain federal question jurisdiction in this case. *Stanturf v. Sipes*, 335 F.2d 224, 228 (8th Cir. 1964) ("[J]urisdiction ... is wanting where the claim pleaded is plainly insubstantial.") (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (a suit may be dismissed for want of jurisdiction where the alleged federal claim "appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous")); *see Malone v. Husker Auto Group, Inc.*, 2008 WL 5273670, *4 (D. Neb. Dec. 17, 2008) (mere assertion of a deprivation of a federal right is insufficient to sustain federal jurisdiction, citing *Stanfurf*).

Even if Plaintiffs could assert a colorable claim here (they cannot), such common law breach of contract claim would arise under state law. Indeed, Plaintiffs' claim is based on an alleged breach of the easement itself. A right created by the Constitution or laws of the United States is not an essential element of the claim. *Chuska Energy Co. v. Mobil Expl. & Producing N. Am., Inc.*, 854 F.2d 727 (5th Cir. 1988) demonstrates why a breach of contract claim, even one that may indirectly involve issues requiring the construction of federal statutes and regulations as it relates to an underlying contract to which one of the litigants is not a party, like here, does not raise a federal question upon which jurisdiction may be based anyway. There, Chuska sued Mobil in state court for breach of an assignment of an underlying oil and gas lease with the Navajos. Mobil

[18] *See generally* Amended Motion to Dismiss Pursuant to Rule 12(b)(6) (Doc. 75, at 15-16) and Reply in Support of Same (Doc. 86) (demonstrating that the alternative breach of contract claim is fatally deficient and not colorable).

removed the case to federal court asserting federal question jurisdiction, and despite the fact that federal law was not an element of plaintiff's claims for breach of contract and fraud, the district court denied remand finding a substantial federal question because the underlying lease with the Navajos was required to be approved by the Secretary of the Interior. *Id.* at 729.

The *Chuska* court **reversed** with instructions to **remand** back to state court, rejecting Mobil's "substantial federal question" argument, and holding that "Chuska's cause of action sounds in common law contract; it does not arise under the laws of the United States or the Constitution." *Id.* Indeed, the *Chuska* court emphasized why federal question jurisdiction does not arise simply because resolution of purely state law claims may require application, construction, or interpretation of federal laws:

> State courts are routinely required to adjudicate suits in which there are related issues requiring the construction of federal statutes and the Constitution. There is no danger of erroneous or inconsistent construction each time a state court adjudicates those questions in common law or state statutory actions. **That Congress has legislated in a specific area, without more, does not empower a federal court to adjudicate matters requiring an interpretation of that legislation**.

Id. at 730 (emphasis added). The court concluded that Chuska's contractual claims have as little relationship to tribal possessory rights "as a tort that occurs on restricted Indian land," and "[t]he fact that authority for the Navajos to enter agreements is ultimately derived from federal law does not turn Mobil's claim into a federal question." *Id.* *Chuska* indeed supports dismissal as to breach of contract—particularly here where Plaintiffs simply allege Defendants "breached ***th[e] easement*** by failing to 'restore the land to its original condition' and to 'reclaim the land' as required ***by the easement***."[19] FAC at ¶ 134 (emphasis added); *see also infra* at section D, for discussion as to why *Chuska* also supports dismissal of unjust enrichment.

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[19] Moreover, the administrative regulation (25 CFR 169.125(c)(5)(ix)) referenced by Plaintiffs in ¶ 132 of the Complaint is simply a guideline as it relates to the BIA's (not Plaintiff allottees')

Plaintiffs' heavy reliance on *Kodiak Oil & Gas (USA) Inc. v Burr*, 932 F.3d 1125 (8th Cir. 2019) is misplaced, including because that case involved a dispute concerning an **oil and gas lease** to which the **plaintiffs were a party**, concerning a sole and direct dispute as to whether the oil and gas companies breached leases with plaintiffs regarding payment of royalties for flared of gas. Moreover, at its core *Burr* is a case filed by oil and gas operators claiming that a **tribal court** lacked jurisdiction over them in connection with claims related to breach of oil and gas leases between the companies and tribal members. The district court denied the tribal court officials' motion to dismiss for lack of jurisdiction over them and granted the oil and gas companies' motion for a preliminary injunction enjoining the tribal court from proceeding, and the Eighth Circuit affirmed. Here, by contrast, neither the right to enjoin a tribal court, nor tribal court jurisdiction as it relates to enforcement of an oil and gas lease are at issue.

In addition, the *Burr* decision focused heavily on whether the tribal officials enjoyed sovereign immunity from suit—the court holding that sovereign immunity did not apply because the issue was whether the tribal court officials exceeded their lawful authority, thus falling squarely within the *Ex parte Young* doctrine, which the Supreme Court has extended to tribal officials. *Id* at 1131 (citing *Ex parte Young*, 209 U.S. 123 (1908); *Bay Mills Indian Cmty*., 572 U.S. at 788). It was in this context, then, that the court held that the district court did not abuse its discretion in granting a preliminary injunction against them, because the oil companies were "likely to prevail on the merits," primarily because where non-tribal members are concerned, tribal court's adjudicative authority is limited to cases arising under tribal law, which the case obviously did not.

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issuance, administration, and enforcement of right-of-way easements, to which Plaintiffs are not even a party.

IV. Plaintiffs' Unjust Enrichment Claim Does Not Arise Under Federal Law

Plaintiffs say their "unjust enrichment claim protects the same interests in Indian trust land as the trespass claims, and therefore arises from federal common law as well." Resp., at 37. Because the trespass claim does not arise under federal common law, *ipso facto*, the unjust enrichment claim necessarily fails for the same reason. *See supra* at sections I, II. Moreover, Plaintiffs cite no authority (and none exists) recognizing federal "arising under" jurisdiction for common law unjust enrichment anyway, and it is not entirely clear the basis on which they do maintain that this purely state law claim supports federal subject matter jurisdiction here—a federal statute is not an essential element of the claim, nor do they claim so. Plaintiffs certainly cannot be arguing that unjust enrichment arises under 25 U.S.C § 345 as an action for an allotment. Instead, they apparently suggest that because this admittedly state law claim might implicate "issues of federal law" (Resp., at 35), that this alone gives the Court federal question jurisdiction here. But that is not the standard for arising under jurisdiction. *Gully v. First Nat'l. Bank*, 299 U.S. 109, 112 (1936) (for a case to "arise under" federal law, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action). Plaintiffs own cited authority demonstrates the fundamental flaw in their argument.[20]

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[20] Plaintiffs purport to rely primarily on *Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012) (*see* Resp., at 35-37), a case which does not address unjust enrichment at all, and emphasizes the exceedingly narrow scope and rare application of "substantial federal question" jurisdiction only when federal law is an "essential element" of a plaintiff's claim. The *Bay Mills Indian Community* case, cited in the Resp. at 37, is equally inapplicable and involved a claim by an Indian ***tribe***, is fully distinguished *supra* at 10-11.

V. 28 U.S.C. § 1360(b) Does Not Create Federal Jurisdiction or Strip State Court Jurisdiction, and Therefore by Definition Does Not Leave Plaintiffs with No Remedy

Finally, 28 U.S.C. § 1360(b) does not "leave Plaintiffs without a remedy," [21] as Plaintiffs say. Resp., at 38. That statute concerns state court jurisdiction over certain claims, and plainly creates no independent grounds for federal court jurisdiction; indeed courts hold it does **not** expand any existing limits of federal jurisdiction and is, therefore, irrelevant here. *K2 Am. Corp. v. Roland Oil & Gas*, LLC, 653 1024, 1028 (9th Cir. 2011) ("The district court correctly concluded that § 1360(b) limits the exercise of state jurisdiction; **it does not confer jurisdiction** on federal courts") (emphasis added); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 304 (S.D. N.Y. 2003) ("Both 28 U.S.C. § 1360 and 25 U.S.C. § 233 concern state court jurisdiction. Nothing in these statutes suggests that they create grounds for this Court to exercise federal question jurisdiction over this action or overrule the existing limits on federal jurisdiction."); *Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348-49 (N.D. Cal. 1995) (holding that ¶ 1360(b) **does not apply** to suits involving the possessory rights of individual tribal members because a federal interest in protecting Indian trust land is not affected or implicated in the first place). In short, section 1360(b) does not impact or affect Plaintiffs' alleged claims which arise, if at all, under state law anyway, and fell outside 25 U.S.C. § 345 federal jurisdiction in the first instance. A federal

[21] Plaintiffs are not without a remedy; instead, Plaintiffs' recourse is through the BIA. *See* Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies and Lack of Primary Jurisdiction (Doc. 77) and Reply (Doc. 87). Furthermore, with respect to their claims failing for lack of subject matter jurisdiction based on 28 U.S.C. § 1331, it is worth noting that Plaintiffs chose not to assert jurisdiction based on diversity of citizenship, as Plaintiffs in the *Hall* case did. While Plaintiffs' claims would still fail for the multiple grounds set forth in Defendants' Amended Motion to Dismiss (*see* Docs. 73-77), the Court would have subject matter jurisdiction to rule on the alternative grounds if the Plaintiffs here had pleaded and demonstrated diversity jurisdiction, which they have chosen not to do. Again, in that instance, their claims would still fail, just not on jurisdictional grounds. *See* Defendants' Amended Motion to Dismiss (*see* Docs. 73-77); *see also* Defendants' Motion to Dismiss and supporting memoranda in the *Hall* case (Docs. 20-22). Plaintiffs' remedy and recourse remains with and through the BIA.

interest was never implicated. Plaintiffs' cited cases (Resp., at 39) [22] do not hold otherwise; instead they recognize that under 1360(b) state courts may not hear certain claims, but those claims must fall within federal court jurisdiction in the first instance, which here they do not. The statute does not take away any existing remedies, or somehow leave Plaintiffs without the state remedy, if any, they had in the first place.

CONCLUSION

For all of the reasons stated in Defendants' Motion and in this Reply, the Court should dismiss this action in its entirety for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully submitted,

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[22] *See Byran v. Itaskca Cnty.*, 426 U.S. 373 (1976) (Chippewa Indian brought suit against State of Minnesota to argue county lacked authority to impose property tax on mobile home on land held in trust for tribe, and Court recognizes that 1360(b) is "simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians" and did not abolish tax immunities by implication); *State of Alaska, Dep't of Pub. Works v. Agli*, 472 F. Supp. 70, 72 (D. Alaska 1979) (quiet title suit to adjudicate claim for an allotment and to declare it invalid fell within the jurisdiction of section 345 and could not be adjudicated by state court); *All Mission Indian Hous. Auth. v. Silvas*, 680 F. Supp. 330, 331 (C.D. Cal. 1987) (suit by Indian Housing Authority against tenants who failed to pay rent on Indian tribal lands arose under federal common law); *Heffle v. State*, 633 P.2d 264 (Alaska 1981)(holding that the action required "adjudication of ownership" of an allotment and so it could not be heard in state court under 1360(b)). Here, because adjudication of ownership of the allotment is not at issue, section 1360(b) is not implicated, as it is not a provision that creates federal jurisdiction.

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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 of North Dakota, Western Division, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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