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.	§	

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

On August 7, 2019, Defendants filed their Amended Motion to Dismiss for Failure to Join Required Party ("Motion"). Doc. 73 at 6-7 (¶ 3); *see also* Am. Mem. in Supp. of Motion (Doc. 76). 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 40-53. As will be discussed below, Defendants do nothing to show the Motion should not be granted.

Plaintiffs spill much ink in the Response trying to demonstrate that Indian allottees can, as a general matter, file suit without joining the United States. But this is beside the point because Defendants have not argued that Indian allottees could ***never*** bring suit in their own behalf, or that the United States is ***always*** a required party to a suit involving Indian trust lands. Instead, what Defendants have argued is that given the particular allegations and circumstances of this case—in which Plaintiffs seek to invalidate a BIA-issued right-of-way, interfere with an ongoing BIA administrative process, and remove the subject pipeline contrary to the current approach of the BIA—the United States is, in ***this*** instance, a required and indispensable party. Not a single case Plaintiffs cite, including the allegedly "seminal" *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), provides otherwise.

Plaintiffs make no argument that the United States can somehow be joined as a party in this case. Because it cannot. Therefore, because the United States is a required and indispensable party that cannot be joined, the Court should grant the Motion and dismiss this case.

ARGUMENT

I. Contrary to What Plaintiffs Argue, Supreme Court and Other Precedent Does Not Hold That Plaintiffs Have a Right to Bring This Case in the United States' Absence.

Plaintiffs assert that "federal courts have routinely rejected the very argument Defendants are making" in the Motion. Resp. at 40. But the cases on which Plaintiffs rely, Resp. at 41-43, do not actually do this. Instead, those cases reject an argument Defendants have ***not*** made, namely, that the

United States is ***always*** a required party in a suit over Indian land simply because it is trustee and holds legal title to such land.[1]

As the Motion demonstrates, the United States' interest in this case goes far beyond just its status as trustee. Here, Plaintiffs accuse the BIA of wrongdoing and seek to invalidate an easement issued by it (the 1993 Easement). With this putative class action, Plaintiffs also seek to elbow aside the BIA—which is engaged in its own administrative process to address the situation on which Plaintiffs base their suit—and install themselves as the decision-makers for all allottees. And what Plaintiffs seek to achieve here (*e.g.*, removal of the pipeline) is very different from, and would in fact scuttle, what the BIA and numerous other allottees are trying to foster (a negotiated resolution resulting in a new right-of-way). These factors—the attack on the BIA's issuance of the 1993 Easement and the effort to undermine and displace the BIA in an ongoing administrative process undertaken in the discharge of its regulatory authority—make the United States a necessary and indispensable party here. The inapposite cases Plaintiffs cite do not say otherwise.

A. *Poafpybitty* Is Inapposite—It Provides Plaintiffs' Position No Support.

Plaintiffs rely heavily on *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), but their reliance is misplaced. In *Poafpybitty*, the Supreme Court held that allottees could bring suit for breach of an oil and gas lease against their lessee without the participation of the United States. But in so holding, the Court made no broad pronouncement that the United States would ***never*** be a required party in a suit brought by allottees. To the contrary, the *Poafpybitty* Court examined the specific regulatory

[1] *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001) (cited in Response at 41) (noting (in the course of an opinion holding that the United States ***was*** an indispensable party in the case at bar) that "[w]e reject the notion that the United States is an indispensable party to ***every*** case involving a dispute over Indian lands" (emphasis added)); *Sokaogon Chippewa Cmty. v. State of Wis., Oneida Cnty.*, 879 F.2d 300, 304 (7th Cir. 1989) (cited in Response at 41) (cautioning that "[t]he nature of the Rule 19(b) inquiry—a weighing of intangibles—limits the force of precedent and casts doubt on generalizations" such as those made by Plaintiffs here, e.g., that courts "readily" or "routinely" hold that the United States is not an indispensable party to suits over Indian lands).

scheme at issue to decide whether the suit could proceed without the United States. Significantly, the regulations examined in *Poafpybitty* (governing oil and gas leases on Indian land) differ in key respects from the right-of-way regulations that apply here. This, by itself, makes the case inapposite.

One of the key differences in the respective regulatory schemes concerns the identity of the grantor party. Specifically, the regulations in *Poafpybitty* did not install the United States as grantor of the subject oil and gas lease, a fact the Supreme Court found significant. *See id.* at 372 ("Although the approval of the Secretary is required, he is not the lessor and cannot grant the lease on his own authority."). In the present case, however, the United States is the grantor of rights-of-way, *see* 25 U.S.C. § 323, which gives the United States a greater, more direct interest in the subject matter of this suit, especially with respect to Plaintiffs' claims that the 1993 Easement "was invalid and void *ab initio*," First Am. Class Action Compl. ("FAC") (Doc. 28) at ¶ 122. Another important difference in the regulatory schemes is that the regulations examined and cited in *Poafpybitty* did not specifically provide that the United States would investigate alleged breaches of the type at issue and decide how to proceed on the allottees' behalf. In fact, with respect to the particular breach alleged in *Poafpybitty*—waste of gas—it appears the United States' only specific role was to decide, ***if requested by the lessee***, whether the waste was sanctioned by state and federal law. *See Poafpybitty*, 390 U.S. at 373.[2] Here, by contrast, the United States has a specific, regulatory role to assess and address holdover situations for the allottees. 25 C.F.R. § 169.410 (in consultation with allottees, the BIA will make a determination as to whether to treat holdover possession as a trespass, and may take action "on behalf of the Indian landowners" or pursue "any . . . remedies available under applicable law").

[2] The Court noted that "[t]he regulations do empower the Secretary to cancel a lease 'for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated." *Poafpybitty*, 390 U.S. at 374. But as the Court also noted, cancelling the lease was but one, "severe" form of relief and might not be in anyone's interest. *See Poafpybitty*, 390 U.S. at 374. The Court did not cite any lease regulations providing that the United States would consult with allottees and decide whether to pursue other forms of relief, such as damages (the object of the *Poafpybitty* suit). *See id.*

Besides the differences in regulatory schemes, there are two other reasons why *Poafpybitty* is inapposite here. ***First***, in *Poafpybitty*, there was no current effort by the United States to address the breach claims the allottees raised in their lawsuit. In fact, the BIA in *Poafpybitty* had approved the allottees' retention of legal counsel and was fully supportive of the allottees' filing suit in their own behalves. *See id.* at 366-67, 374, & 367 n.1. The BIA even allowed the attorneys to be paid out of "restricted trust funds." *Id.* at 367 n.1. Here, by contrast, the BIA has not decided to outsource the matter to Plaintiffs or their legal counsel. Instead, as detailed in the Motion and supporting memorandum, the BIA has undertaken to represent the allottees itself, and is currently engaged in the process of determining how it will proceed and what remedies, if any, it will seek on their behalf. *See* Am. Mem. in Supp. (Doc. 76) at 7-10; Sanford Aff. (Doc. 20-1) ¶ 21, Ex. N. (show-cause letter from BIA to Tesoro High Plains). Once the United States has started down this path, it has an interest in not having its decisions preempted or circumvented—and there is no room for individual Indian allottees to take matters into their own hands. Indeed, in *Heckman v. United States*, 224 U.S. 413 (1912), a case cited with approval by *Poafpybitty*, the Supreme Court stated in the context of a suit to cancel conveyances of allotted lands:

> [W]hen the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property.

Id. at 446. The same principle is equally applicable in other contexts, including the present one, where the United States has commenced an administrative process on behalf of the allottees to address the holdover situation.

Second, in *Poafpybitty*, the United States' interests were completely aligned with those of the allottees. Here, however, Plaintiffs make themselves adverse to the United States when they allege that the 1993 Easement was "improperly issued" and "void *ab initio*." Resp. at 9; FAC (Doc. 28) at ¶ 122. As will be discussed below, these allegations by themselves make the United States a required

and indispensable party to this case.[3] *Poafpybitty*, which did not involve claims that were premised on any alleged wrongdoing by the United States or that sought to invalidate a BIA-issued easement, does not hold otherwise.[4]

B. *Mottaz* Is Inapposite—It Provides Plaintiffs' Position No Support.

Plaintiffs also rely on *United States v. Mottaz*, 476 U.S. 834 (1986). But that case, too, is inapposite. In fact, *Mottaz* was not a Rule 19 case at all. Instead, the *Mottaz* Court was called on to decide whether the General Allotment Act authorized quiet title suits against the United States. *Id.* at 844-48. In the course of deciding this question, the Court simply noted in dicta that the United States would not be a proper party in "many" private disputes that relate to land claims originally granted under various allotment acts. *Id.* at 846 n.9. But again, Defendants have not contended that the United States is a necessary party in ***every*** such dispute, and this simple statement in *Mottaz* says nothing about whether the United States is a necessary party to ***this*** suit.

C. The Other Cases Plaintiffs Cite Are Also of No Help to Them.

Plaintiffs also cite a smattering of other cases, but they are similarly of no help to them. Very simply, none involve claims seeking to invalidate a government-issued easement (through allegations

[3] Plaintiffs mockingly assert that "Defendants cannot decide which side of the 'v.' the United States is required to appear on under Rule 19(a)." Resp. at 43-44. This makes no sense. If the United States could be joined, it would be as a defendant. *See* Fed. Civ. P. 19(a)(2). To the extent Plaintiffs are suggesting that in some respects their claims are claims the United States could bring on their behalves as trustee representing all allottees, while in other respects the claims put the United States squarely on the defensive (the allegations regarding the 1993 Easement), this is of no moment. As Plaintiffs elsewhere state, they make two distinct claims of trespass. *See* Resp. at 45. One claim (covering the period since 2013) is being investigated by the BIA in the holdover administrative proceeding that this lawsuit threatens to frustrate; the other (covering the period 1993-2013) will depend upon a finding that the BIA wrongfully issued the 1993 Easement. Although each does so in a different way, what matters here is that both claims render the United States a necessary and indispensable party.

[4] The Court in *Poafpybitty* stated that "[w]e merely hold that the Indian lessors have the capacity to maintain an action seeking damages for the alleged breach of the oil and gas lease." 390 U.S. at 376. This recognition of the allottees' ***capacity*** to sue does not in any way suggest that the United States will never be a required or indispensable party, even if, as here, an allottee files suit and levels accusations against the United States.

of government wrongdoing, no less), and none were in competition with an ongoing administrative process undertaken by the United States (much less did any of the lawsuits seek to destroy an asset the United States was working to preserve[5]). These cases are therefore inapposite. *See Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 457, 460 (10th Cir. 1951) (suit by tribes "to recover possession of, and establish their title to certain lands" held by private parties; suit did not involve any allegations against the United States, and "[m]ore than twenty years" had elapsed in which the United States had not taken action on tribes' behalf); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1253-56 (9th Cir. 1983) (suit by tribe against a port claiming beneficial title to exposed riverbed; the only interest the United States was claimed to have was an interest "as the trustee holding legal title to all real property owned by the Tribe"); *Agua Caliente Band of Mission Indians v. Riverside Cnty.*, 442 F.2d 1184, 1184-86 (9th Cir. 1971) (suit by tribe and allottees challenging imposition of a state tax; in the course of deciding a jurisdictional question, the court, citing *Poafpybitty*, merely noted in the abstract that an Indian can independently sue "to protect his property interests"); *Oneida Indian Nation of New York State v. Oneida County*, 434 F. Supp. 527, 532, 544-45 (N.D.N.Y. 1977) (suit by tribe against two New York counties seeking damages for alleged illegal use and occupancy of land the tribe claimed belonged to it; the only interest the United States was claimed to have was that stemming from its "fiduciary relationship" with the tribe and "the general federal interest in Indian lands"; in ruling that the United States was not indispensable, the court merely rejected "the general proposition that, whenever title to Indian land is involved, the United States is an indispensable party"); *Davilla v. Enable Midstream Partners, L.P.*, No. CIV-15-1262-M, 2016 WL 4440240 (W.D. Okla. Aug. 19, 2016) (ruling on a motion to strike an affirmative defense

[5] By pleading for injunctive relief requiring removal of the pipeline, Plaintiffs are working at cross purposes with the BIA, which is attempting to facilitate a negotiated resolution that will preserve the pipeline asset. *See* Am. Mem. in Supp. (Doc. 76) at 11-12, 19-23. Plaintiffs cite no case involving a conflict between the plaintiff and the government as exists here.

based on Rule 19 in which the defendants claimed only that the United States had an interest by virtue of its status "as the Trustee for the allotment owners"; no allegations against the United States or an ongoing competing administrative proceeding).

II. Plaintiffs Do Not Undermine Defendants' Showing That the United States Is a Required Party Under Rule 19(a).

The Motion and supporting memorandum demonstrated that Plaintiffs' claims in this case render the United States a required party under Rule 19(a). Plaintiffs' arguments to the contrary in their Response are unavailing.

A. Plaintiffs' Efforts to Invalidate the 1993 Easement and Their Related Allegations of Wrongdoing Against the BIA Make the United States a Required Party.

Plaintiffs do not dispute that their claims of trespass for the period 1993-2013 depend upon a finding that the BIA wrongfully issued the 1993 Easement, making it void *ab initio*. Instead, Plaintiffs contend these allegations do not make the United States a required party because any judgment invalidating the 1993 Easement will not be binding on the United States if this case proceeds in its absence. Resp. at 44. This is wrong for several reasons.

First, it is a "fundamental principle" that when a party seeks to invalidate a contract, the parties to that contract are both necessary and indispensable. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) ("[W]e reaffirm the fundamental principle [that] a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract"); *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1472 (10th Cir. 1987) ("It is a fundamental principle of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court."). Here, as grantor of the 1993 Easement, the United States must be present for any attack on the validity of the easement.

Second, it is well recognized that the United States has a strong interest in defending the validity of its conveyances, regardless of whether it would be bound by a judgment undermining

them. Thus, "it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *Navajo Tribe*, 809 F.2d at 1472 (quoting *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1977)). In *Navajo Tribe*, the court ruled the United States was a required and indispensable party where a tribe sought to establish title to lands by claiming, in essence, that an Executive Order restoring such lands to the public domain was "null and void." *Id.* at 1462. The court found that "[t]he Tribe's claims . . . are, in reality, challenges to the validity of the transactions by which the United States assumed title to the subject land." *Id.* at 1471. Thus, the claims could not proceed without the United States (even though, obviously, the United States would not be bound by a judgment if they did). Simply put, the United States has a right not to have its instruments voided in an action to which it is not a party. Defendants made this exact point in their opening memorandum, but Plaintiffs simply ignore it in their Response. Am. Mem. in Supp. (Doc. 76) at 17-18.

Third, "the United States has an interest even without being joined in actions which 'indirectly attack' its administrative decisions." *Two Shields v. Wilkinson*, 790 F.3d 791, 796 (8th Cir. 2015). This is so because a judgment declaring the actions of the government illegal or void, though not binding on the United States, can still have "potentially far reaching effects" that undermine the United States' interests. *See id.* Thus, in *Two Shields*, this Court found, and the Eighth Circuit affirmed, that the United States was a necessary and indispensable party to claims brought by allottees against private parties based on allegations that the BIA had ***improperly approved*** oil and gas leases on the allottees' lands. *See id.* at 792-93, 796. Here, the same result should obtain where Plaintiffs seek to visit liability on Defendants based on allegations that the BIA ***wrongfully issued*** the 1993 Easement.

Fourth, a judgment declaring that the BIA illegally issued the 1993 Easement, even though not technically binding on the United States, could readily harm the United States in any number of

ways. It could as a practical matter expose the United States to claims in the Court of Federal Claims. Am. Mem. in Supp. (Doc. 76) at 17 n.9. If the judgment expressed disapproval of a procedure or rationale used by the BIA in granting the easement, it could also cast a cloud over other easements or conveyances, and it would stand as precedent against adopting such a procedure or rationale in the future. Finally, a judgment voiding the 1993 Easement after so many years could undermine confidence in the BIA's grants or instruments, thereby causing third parties to avoid doing business in Indian country, which would be contrary to the United States' interests as trustee. By focusing only on the technicality of whether the United States will be bound by a judgment, Plaintiffs lose sight of all of these very real ways in which the United States' interests could be impaired.

Thus, while Plaintiffs dismiss Defendants' arguments regarding the 1993 Easement allegations as "faux concern" and "baseless," Resp. at 44, they are anything but. The law recognizes that the United States has an interest in defending the integrity of its easements and the propriety of its decisions, both of which Plaintiffs have placed under attack by their claims in this case.[6]

B. Plaintiffs' Efforts, in the Alternative, to Enforce the 1993 Easement Also Make the United States a Required Party.

As shown in the Motion and supporting memorandum, Plaintiffs' alternative claim for breach of the 1993 Easement also makes the United States a required (and indispensable) party, because the

[6] As another independent ground for finding that the United States is a required party, Defendants also pointed out that proceeding without the United States would subject Defendants to the risk of inconsistent obligations with respect to the 1993 Easement. Am. Mem. in Supp. (Doc. 76) at 18. Plaintiffs distort this argument, suggesting that Defendants are contending the United States might later sue Defendants to invalidate the 1993 Easement. Resp. at 44-45. But that is not Defendants' argument; rather, Defendants' point is that Plaintiffs are attempting to pull the 1993 Easement out from under them after they have fully complied with it (thus creating the risk of inconsistent obligations—having complied with the 1993 Easement that BIA still contends is valid and having to defend against this lawsuit wherein Plaintiffs contend it is invalid), and that the United States is in the best position to defend the validity of the easement it issued. Am. Mem. in Supp. (Doc. 76) at 18; *see also* Sanford Aff. (Doc. 20-1) ¶ 23, Ex. P (BIA Superintendent reiterating that the BIA approved the 1993 Easement). In addition, Defendants would also be subject to the risk of inconsistent obligations with respect to the period after the alleged expiration of the 1993 Easement if the BIA decides to treat it as a trespasser and pursue remedies. *See infra* at 15.

United States is the grantor of that easement. Am. Mem. in Supp. (Doc. 76) at 22-23. In response, Plaintiffs cite *Poafpybitty*, but as they concede, the United States was not actually a party to the lease at issue there. Resp. at 47-48. The relevant statute and regulations do make the United States a party to right-of-way agreements across Indian lands. This distinction has significance. *See McClendon*, 885 F.2d at 633 ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under Fed.R.Civ.P. 19.").

C. Plaintiffs' Efforts to Usurp the Role of the BIA and Frustrate—and in Fact Destroy—Its Ongoing Proceeding Make the United States a Required Party.

The United States also has an interest in Plaintiffs' trespass claims relating to the period after the expiration of the 1993 Easement in 2013. This interest arises from the United States' role, set out in 25 C.F.R. § 169.410, as the one that must decide how to respond to and treat a holdover situation on behalf of all affected allottees—a role the BIA is currently fulfilling in an ongoing proceeding initiated with the January 2018 show-cause letter.[7] *See* Am. Mem. in Supp. (Doc. 76) at 7-10. As discussed in the Motion and supporting memorandum, the United States is a required party here because Plaintiffs' claims, ***by which they seek to install themselves as the decision-makers on behalf of all the affected Indian allottees***, will, as a practical matter, impair or impede—and in fact destroy—the United States' ability to act for the allottees as the regulations provide, and as it currently seeking to do. *See id.* at 6-13, 19-21; *see also* FAC (Doc. 28) at ¶ 129 (seeking removal of pipeline).

1. The Regulations Make the BIA the Decision-Maker in This Instance.

In response, Plaintiffs argue that Defendants' reading of the pertinent BIA regulations is wrong. Citing 25 C.F.R. § 169.413, Plaintiffs insist that the regulations do not make the BIA the sole

[7] Plaintiffs are actually alleging holdover possession as to both the 1973 Easement and the 1993 Easement—a holdover of the 1973 Easement as a result of the BIA allegedly improperly granting renewal with the 1993 Easement, and if the 1993 Easement was not void *ab initio*, a holdover of the 1993 Easement due to it not being renewed in 2013. Thus, the interest of the United States discussed here in reference to Plaintiffs' trespass claims for the period following expiration of the 1993 Easement also applies to their trespass claims for the period 1993-2013.

decision-maker in the case of a holdover, but recognize that individual Indian allottees may sue on their own if they so choose. Resp. at 45-46. This argument is flawed. While 25 C.F.R. § 169.413 does state that "[t]he Indian landowners may pursue any available remedies under applicable law," § 169.413 does not actually apply to the instant situation, in which Defendants are alleged to be holdover possessors after expiration of an easement. Rather, § 169.413 applies to situations in which a party takes possession of or uses Indian land without ever having had a right-of-way in the first instance. In contrast, § 169.410 specifically addresses holdover situations. Section 169.410 references what the BIA will do in a holdover situation—consult with landowners to make a determination of how to proceed—and conspicuously omits any acknowledgement that Indian landowners may pursue their own remedies. The omission is telling.

Plaintiffs argue that § 169.410 merely addresses what the BIA could do in the event of a holdover, which they claim is a "subset" of the unauthorized possession or use covered by § 169.413. But the two provisions cannot be reconciled in this manner. Indeed, the first sentence of § 169.413 flatly states that "the unauthorized possession or use" that it addresses "***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.

In addition, if Plaintiffs' reading of the regulations were correct, then much of § 169.410 would be rendered surplusage. Indeed, if § 169.410 addresses a subset of what is already covered by § 169.413, then there would be no need for it 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. *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. Because § 169.410 applies to the instant situation and conspicuously omits mention of any ability for Indian landowners to sue—in contrast to the acknowledgment found in the inapplicable § 169.413—it reflects an intent that the BIA, not individual Indian allottees, will manage holdover situations. And as detailed in the Motion and supporting memorandum, that is precisely what the BIA has been doing in this instance.

2. The BIA's Role as Decision-Maker Does Not Implicate Any Constitutional Issues.

Plaintiffs argue that interpreting the regulations as making the BIA the sole decision-maker concerning holdovers would "likely" raise "serious constitutional issues." Resp. at 47. They are wrong. To confirm this, the Court need look no further than the *Poafpybitty* case on which Plaintiffs rely so heavily. In deciding whether the allottees in that instance could bring suit on their own behalf, the Supreme Court did not look to the Constitution. Instead, the Court considered whether the regulations "preclude[d] petitioners from seeking judicial relief." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968). This Court is free to do the same, and should look to 25 C.F.R. § 169.410.[8]

Contrary to what Plaintiffs suggest, a finding that the BIA has the sole authority to decide whether to sue and what remedies in this instance would not effect a taking of Plaintiffs' property

[8] Section 169.410 took effect April 21, 2016. Of course, Plaintiffs fail to acknowledge its recent promulgation when they say that "it is not surprising that no court has ever embraced Defendants strained interpretation of § 169.410." Resp. at 47.

interest. That is so because Plaintiffs own only beneficial title to the allotments, while the United States holds fee title in trust for them. That the BIA has the authority to manage holdover situations and Plaintiffs do not is a feature of this trust arrangement, not a constitutional issue.[9]

3. Even if the United States Were Not the Sole Decision-Maker, It Would Still Be a Required Party in This Instance Because It Has Undertaken to Represent the Allottees.

Even if the regulations did not make the United States the sole decision-maker in all circumstances, the United States would still be a required party ***in this instance*** because it has decided to investigate and respond to the alleged holdover on behalf of the allottees. *See* Am. Mem. in Supp. (Doc. 76) at 7-10 (describing the BIA's ongoing proceeding). Regardless of whether the regulations make the BIA the sole decision-maker, once the BIA initiates a proceeding, individual Indian allottees cannot interfere. *See supra* at 4 (discussing *Heckman v. United States*, 224 U.S. 413, 446 (1912)). But that is exactly what Plaintiffs are attempting to do here. With this putative class action, they seek to elbow out the BIA and install themselves as the decision-makers on behalf of all allottees. Moreover, their claims here, if successful, could frustrate—and in fact destroy—the BIA's work on behalf of other allottees. *See* Am. Mem. in Supp. (Doc. 76) at 11-13, 19-23; *see also* FAC (Doc. 28) at ¶ 129 (seeking removal of pipeline).

Plaintiffs suggest they should be able to ignore the BIA because it is supposedly "heavily overworked" and thus cannot be counted on to protect Indian trust interests. Resp. at 47, 52, 52 n.33. Plaintiffs, however, offer no proof to support this claim. They merely quote a few snippets from cases

[9] *See* George Bogert et al., *The Law of Trusts & Trustees* § 869 ("Although the beneficiary is adversely affected by . . . acts of a third person [with respect to trust property], no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as a representative. If the third person without justification causes harm to trust property, normally only the trustee can sue for damages in an action of trover, trespass on the case, or other form of action framed to recover the loss occasioned"); *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 162 (5th Cir. 2016) (citing *The Law of Trusts & Trustees* and recognizing "the limits of a trust beneficiary's ability to bring suit for injury to the trust or trust property").

(some of which are decades old, and none of which are current) suggesting the administrative difficulty the BIA faces in "discharge[ing] its trust obligations with respect to thousands upon thousands of scattered Indian allotments." Resp. at 47 (quoting *Poafpybitty*). But these generalized statements say nothing about whether the Fort Berthold Agency, the agency of the BIA currently taking action with respect to the issues underlying Plaintiffs' claims, is having any trouble discharging its duties in this particular situation.

Plaintiffs complain there has been "no action" by the BIA with respect to the alleged trespass. *See, e.g.*, Resp. at 1-2. In truth, however, their complaint is not that the BIA has been idle and disengaged, but that the BIA has not chosen the specific course of action they would prefer. The uncontroverted facts show that the BIA has been actively addressing the alleged holdover, commencing with the show-cause letter it sent to Tesoro High Plains. The BIA has been in repeated communication with Defendants and landowners, and is monitoring the status of negotiations. *See* Am. Mem. in Supp. (Doc. 76) at 7-10. Moreover, the BIA is currently evaluating appraisals, an activity it has said it must complete before addressing any alleged trespass. *Id.* at 10; Sanford Aff. (Doc. 20-1) Ex. T (July 30, 2018 BIA letter to landowners). Notably, rather than welcome this process, Plaintiffs recently asked the BIA to "cease any review of such appraisals and withhold any opinion as to the appraisals of the allotted tracts." Doc. 78. Thus, Plaintiffs are not actually interested in action by the BIA; their intent, rather, is to shut the BIA down.

The foregoing activity of the BIA contrasts sharply with the cases Plaintiffs cite finding that the United States was not an indispensable or required party. *See, e.g.*, *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 460 (10th Cir. 1951) ("More than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations . . . ."); *Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 811 (D.R.I. 1976) (assistance of the United States in tribe's land claim was "not forthcoming"). There is no doubt that in this instance, unlike in the

cases Plaintiffs cite, the BIA is on the case. And once it has undertaken to "investigat[e] and respond[] to allegations of trespass," Doc. 20-1, Ex. N (show-cause letter), as it has done here, the BIA has an interest in not having that process frustrated or short-circuited by individual Indian allottees making decisions for all without the BIA even being heard from. Plaintiffs cite no case to the contrary.

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

4. The Risk of Multiple Proceedings Is Real.

The United States is also a required party because of the risk that the United States might file its own lawsuit in connection with the alleged holdover by Defendants. Quoting one line from an opinion disposing of a motion to strike, Plaintiffs blithely insist this would never happen. Resp. at 44. But the distinction here, again, is that the BIA is actively engaged in a proceeding to address the alleged holdover. The BIA has not stood down in the face of Plaintiffs' lawsuit. There is thus no guarantee it will not at some point file suit.[10] Indeed, the BIA has already issued its show-cause letter, and if the BIA decides to treat the situation as a trespass, it would next be required under its regulations to determine whether to pursue action and remedies, and if so, which ones. In short, the BIA has already initiated the very process that Plaintiffs insist will never happen.

III. Plaintiffs Concede the United States Cannot Be Joined.

Because the United States is a required party, it must be joined if feasible under Rule 19. But the United States cannot be joined here, and Plaintiffs do not contend it can. Thus, the only remaining issue is for the Court to decide whether this case can, in equity and good conscience, proceed in the

[10] In *Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), another case cited by Plaintiffs, the court recognized that if the plaintiff tribe was unsuccessful in its land claim, nothing would prevent the United States from filing a second lawsuit seeking the same relief "as the tribe's guardian." *Id.* at 810 ("Unless the United States is a party to these actions, a judgment for the defendants would not be binding upon it."). The court did not appear to view a second suit by the United States as a serious possibility in that case, but that was because the United States had not shown any interest in assisting the tribe with its claim. *See id.* at 811. In any event, the court went on to consider whether the United States was an indispensable party, i.e., it had obviously concluded that the United States was at least a required party.

United States' absence (i.e., is the United States indispensable?). Fed. R. Civ. P. 19(b). As discussed below, Plaintiffs do nothing to undermine Defendants' showing that this case cannot, in equity and good conscience, proceed without the United States. Therefore, it should be dismissed.

IV. Plaintiffs Do Not Undermine Defendants' Showing That the United States Is an Indispensable Party Under Rule 19(b).

Plaintiffs contend that even when courts have recognized the United States is a required party, they "have often readily concluded that the United States is *not* an indispensable party under Rule 19(b), in disputes over Indian lands." Resp. at 48 (emphasis original). Once again, however, the cases Plaintiffs cite are inapposite, as none involve the same mix of interests at play here. Specifically, none of Plaintiffs' cases involve allegations against the government, an attempt to undo one of its conveyances, or the prospect of interference with—and destruction of—an ongoing administrative proceeding.[11] Therefore, they do not support the proposition that ***this case*** can proceed without the United States.

Plaintiffs also cite *Houle v. Central Power Elec. Co-op., Inc.*, No. 4:09-CV-021, 2011 WL 1464918, (D.N.D. Mar. 24, 2011), a trespass suit brought by allottees. But this case (which like the others did not involve a competing administrative proceeding) actually undermines Plaintiffs' position. Indeed, the *Houle* court concluded that the United States was not an indispensable party expressly because "**this action is *not* a challenge to the validity or lawfulness of a conveyance by**

[11] *See Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976) (no allegations against the government; far from representing the tribe in a proceeding, the United States had declined to provide assistance with the claim); *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 460 (10th Cir. 1951) (suit by tribes "to recover possession of, and establish their title to certain lands" held by private parties; suit did not involve any allegations against the United States, and "[m]ore than twenty years" had elapsed in which the United States had not taken action on tribes' behalf); *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975) (suit by allottees against county and township seeking compensation for use of allotment; no allegations against the federal government and no ongoing administrative proceeding on behalf of allottees); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983) (suit by tribe against a port claiming beneficial title to exposed riverbed; no allegations against the federal government and no ongoing administrative proceeding on behalf of tribe).

the United States" *Id.* at *26 (emphasis added). In a case in which it found the United States to be required and indispensable, this Court distinguished *Houle* on this very ground:

> The [*Houle*] Court found that while the United States was an interested party under Rule 19(a), it was not an indispensable party under Rule 19(b) as the case did not raise a challenge to the validity or lawfulness of the conveyance by the United States. To the contrary, the crux of the present dispute is whether the United States breached its fiduciary duties in approving the oil and gas leases in question. Unlike *Houle*, the actions of the Secretary of the Interior and the BIA are at the forefront of the present dispute.

Two Shields v. Spencer Wilkinson, Jr., No. 4:12-CV-160, 2013 WL 11320222, at *5 (D.N.D. Nov. 26, 2013) (Hovland, J.). Here, as in *Two Shields* and unlike in *Houle*, the plaintiffs ***do*** challenge the actions of the United States when they claim the BIA "improperly issued" the 1993 Easement. This case, unlike *Houle*, ***does*** challenge the "validity or lawfulness of a conveyance by the United States," as Plaintiffs contend the 1993 Easement was "invalid and void *ab initio*."

Plaintiffs also try to distinguish *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), which held that the United States was indispensable where descendants of allottees were asserting claims against private parties based on a premise that the United States had illegally issued fee patents to their ancestors. *See* Am. Mem. in Supp. (Doc. 76) at 25-26 (discussing *Nichols*). According to Plaintiffs, *Nichols* held that the United States was indispensable only because the plaintiffs were "seeking to have non-trust land taken into trust," which would "impose a legal obligation on the United States that did not otherwise exist." *See* Resp. at 51. The Eight Circuit, however, previously rejected an identical effort to narrow *Nichols* in this fashion. *Two Shields*, 790 F.3d at 796 (rejecting effort "to distinguish *Nichols* because the allottees in that case had sought return of lands to trust status").[12] As mentioned above, the *Two Shields* court held that the United States was both a required and

[12] The court also rejected the similar argument that "the United States cannot be indispensable simply because its conduct is at issue." *Two Shields*, 790 F.3d at 796. The court stated: "The potentially far reaching effects of any decision absent governmental participation show how different the interests of the United States are from those of a typical third party which claims no interest beyond contesting allegations about its own improper conduct." *Id.*

indispensable party where allottees brought claims premised, in part, on allegations that the BIA had acted improperly in merely ***approving*** oil and gas leases on their lands. *See id.* at 792-93, 796. The same result should obtain here, where Plaintiffs bring trespass claims premised on the charge that the BIA improperly ***issued*** the 1993 Easement—with the BIA, not individual Indian allottees, being the grantor under the easement.

Plaintiffs argue that *Two Shields* is "easily distinguishable" because the defendants there were alleged to have "share[d]" liability with the United States, which had also been sued separately. Resp. at 50-51. But these details do not meaningfully distinguish *Two Shields*.[13] What drove the decisions by both this Court and the Eighth Circuit in *Two Shields* were the allegations of wrongdoing against the BIA in its administrative decisions and the practical effect adjudication of those allegations could have on the United States. Here, the same considerations should lead the Court to same result. *See supra* at 8-9.

Finally, Plaintiffs make a cursory attempt to rebut Defendants' arguments as to the factors the Supreme Court has identified as relevant to a Rule 19(b) analysis. Resp. at 52-53. But Plaintiffs' arguments largely just reference the same meritless arguments discussed above. Plaintiffs also misconstrue Defendants' point about the prejudice they will suffer if the claims concerning the 1993

[13] Indeed, the Eighth Circuit concluded that the United States was required and indispensable ***despite*** the allegations of shared liability. *See* 790 F.3d at 797 (rejecting the plaintiffs' argument that a joint tortfeasor cannot be necessary or indispensable under Rule 19 because of the rule that joint tortfeasors need not all be named in a single lawsuit). And while both this Court and the Eighth Circuit recognized the defendants had an interest in not shouldering sole responsibility for a liability shared with the BIA, *see id.* at 798, 2013 WL 11320222 at *5-6, the same sort of interest applies here as well, *see* Mem. in Supp. (Doc. 76) at 27-28. With respect to the suit against the United States (pending in the Court of Federal Claims), both this Court and the Eighth Circuit mentioned it, but only as one of various facts considered in the indispensability analysis. 2013 WL 11320222 at *6; 790 F.3d at 798. It was certainly not dispositive. In any event, the Eighth Circuit viewed the Federal Claims suit simply as indication that the plaintiffs had an adequate alternate forum. *See* 790 F.3d at 798; *see also* 2013 WL 11320222 at *6 ("However, the lack of an adequate forum does not preclude dismissal."). As Defendants have shown, Plaintiffs also have alternate adequate forum, namely, the BIA. Am. Mem. in Supp. (Doc. 76) at 27; *see also* Doc. 77 at 16.

Easement proceed in the United States' absence. Resp. at 52. To clarify, that prejudice stems from the twin prospects of (i) Defendants having to defend the actions of the BIA in issuing the 1993 Easement when the BIA is better suited to do so; and (ii) Defendants potentially being penalized and forced to shoulder the burden for the BIA's actions. Am. Mem. in Supp. (Doc. 76) at 27-28. Plaintiffs have no answer for this prejudice.

Plaintiffs also contend that this case does not implicate the United States' interest in not having its "liability tried behind its back" because they "bring no claims against the United States." Resp. at 53. The court can easily dispose of this argument. The plaintiffs in *Two Shields* were also asserting no claims against the United States in that lawsuit. Nevertheless, their claims against others, premised as they were on allegations of wrongdoing by the United States, rendered the United States an indispensable party precisely because "the government's liability cannot be tried behind its back." *Two Shields*, 790 F.3d at 796 (quoting *Nichols*).

In the end, the choice is clear. "In the specific context of an immune sovereign entity that is a required party not amenable to suit, the Supreme Court has explained that the action must be dismissed if the claims of sovereign immunity are not frivolous and 'there is a potential for injury to the interests of the absent sovereign.'" *Id.* at 798 (citing and quoting *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)). Here, Plaintiffs do not dispute that the United States is immune, and the potential prejudice that Plaintiffs' claims pose for the United States, both relating to the 1993 Easement and the ongoing BIA administrative process, is manifest. Accordingly, the Court should conclude the United States is an indispensable party and dismiss this suit.

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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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