No. 23-3019

IN THE

United States Court of Appeals for the Eighth Circuit

JOANN CHASE, et al.,

Plaintiffs/Appellants,

v.

ANDEAVOR LOGISTICS, L.P., et al.,

Defendants/Appellees.

On Appeal from the United States District Court for the District of North Dakota
Civil Action No. 1:19-CV-00143-DMT
Hon. Daniel M. Traynor, United States District Judge

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

This case turns on whether individual Indian allottees ("**Plaintiffs**"), who are owners of beneficial interests in land held in trust by the United States and who do not claim aboriginal title, may sue Appellees (collectively, "**Andeavor**") under federal common law. Andeavor engaged in lengthy efforts to obtain consents to renew an oil pipeline right-of-way within the Fort Berthold Reservation's boundaries while in holdover status, first (successfully) with the Tribe and then (largely successfully) with the individual Indian allottees. Plaintiffs brought a putative class action lawsuit alleging the pipeline trespasses on allotted lands and breaches the right-of-way. The District Court dismissed Plaintiffs' suit based on prior decisions of this Court (including one in this case) and the Supreme Court, declining to create a new federal-common-law claim.

This case also concerns whether Plaintiffs can prosecute an action when the United States has already brought trespass claims in another case for a similar purpose on Plaintiffs' behalf related to the same property. They cannot. Also, as to whether Plaintiffs should have been allowed to intervene in or join this case with that case, the District Court properly determined they had no right to intervene and properly exercised its discretion by allowing the United States to proceed on its own.

Andeavor does not believe oral argument is necessary, but will participate if the Court desires to have oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Andeavor Logistics LLC f/ka Andeavor Logistics L.P.; Andeavor, f/k/a Tesoro Corporation; Tesoro Logistics, GP, LLC; Tesoro Companies, Inc.; and Tesoro High Plains Pipeline Company LLC state as follows:

Andeavor Logistics LLC f/k/a Andeavor Logistics LP

Andeavor Logistics LLC f/k/aAndeavor Logistics LP, a Delaware limited liability company headquartered in Findlay, OH, was formerly publicly traded on the New York Stock Exchange under the ticker symbol ANDX. On July 30, 2019, MPLX LP acquired Andeavor Logistics LP by merger and on October 16, 2023, Andeavor Logistics LP was converted to a limited liability company known as Andeavor Logistics LLC. MPLX LP is a publicly traded Delaware master limited partnership headquartered in Findlay, Ohio and traded on the New York Stock Exchange under the ticker symbol MPLX. The general partner of MPLX LP is MPLX GP LLC. The limited partner unitholders of MPLX LP are MPC Investment LLC, MPLX Logistics Holdings LLC, MPLX GP LLC, Giant Industries, Inc., each of which are affiliates of Marathon Petroleum Corporation and the public limited partner unitholders. MPLX GP LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of MPLX GP LLC is MPC Investment LLC. MPLX Logistics Holdings LLC is a Delaware limited liability

company headquartered in Findlay, OH. The sole member of MPLX Logistics Holdings LLC is MPC Investment LLC. MPC Investment LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of MPC Investment LLC is Marathon Petroleum Corporation. Marathon Petroleum Corporation is a Delaware corporation headquartered in Findlay, OH and publicly traded on the New York Stock Exchange under the ticker symbol MPC. Giant Industries, Inc. is a Delaware corporation headquartered in Findlay, OH. The sole stockholder of Giant Industries, Inc. is TTC Holdings LLC. TTC Holdings LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of TTC Holdings LLC is Western Refining, Inc. Western Refining, Inc. is a Delaware corporation headquartered in Findlay, OH. The sole shareholder of Western Refining, Inc. is Andeavor LLC. Andeavor LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of Andeavor LLC is Marathon Petroleum Corporation.

Andeavor f/k/a Tesoro Corporation

Andeavor f/k/a/ Tesoro Corporation is a predecessor to Andeavor LLC and was formerly a publicly traded company traded under the ticker symbol ANDV. On October 1, 2018, Andeavor, a Delaware corporation, merged with and into Mahi Inc., a Delaware corporation and wholly owned subsidiary of Marathon Petroleum Corporation (the "First Merger"), with Andeavor surviving the First Merger.

Immediately after the consummation of the First Merger, Andeavor merged with and into Andeavor LLC (fka Mahi LLC), a Delaware limited liability company and wholly owned subsidiary of Marathon Petroleum Corporation (the "Second Merger"), with Andeavor LLC surviving the Second Merger.

Tesoro Logistics GP, LLC

Tesoro Logistics GP, LLC is a Delaware limited liability company headquartered in Findlay, OH. The member of Tesoro Logistics GP, LLC is Giant Industries, Inc.

Tesoro Companies, Inc.

Tesoro Companies, Inc. is a Delaware corporation headquartered in Findlay, OH. The sole shareholder of Tesoro Companies, Inc. is Andeavor LLC.

Tesoro High Plains Pipeline Company LLC

Tesoro High Plains Pipeline Company LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of Tesoro High Plains Pipeline Company LLC is Tesoro Logistics Pipelines LLC. Tesoro Logistics Pipelines LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of Tesoro Logistics Pipelines LLC is Tesoro Logistics Operations LLC. Tesoro Logistics Operations LLC is a Delaware limited liability company headquartered in Findlay, OH. The sole member of Tesoro Logistics Operations LLC is Andeavor Logistics LLC.

Dated: March 28, 2024

Respectfully submitted,

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STATEMENT OF ISSUES

1. Whether the District Court properly declined to create federal-common-law causes of action for trespass and related tort(s) regarding individual allottees' allotments when Plaintiffs failed to allege aboriginal title.

   - *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661 (1974) ("***Oneida I***")
   - *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864 (8th Cir. 2021) ("***Chase I***")
   - *Wolfchild v. Redwood Cnty.*, 824 F.3d 761 (8th Cir. 2016)

2. Whether the District Court properly exercised its discretion in dismissing Plaintiffs' claim that Andeavor breached a right-of-way because the United States, as grantor of the right-of-way and title owner of the allotments, is an indispensable party who cannot be joined.

   - Fed. R. Civ. P. 19
   - *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015)
   - *Minnesota v. United States*, 305 U.S. 382 (1939)

3. Whether, since the United States has undertaken to represent the Plaintiffs in a separate case also before the District Court which Plaintiffs admit brings identical or similar claims, the judgment should be affirmed on the alternative ground that Plaintiffs are precluded from simultaneously prosecuting their own suit for a similar purpose.

   - *Heckman v. United States*, 224 U.S. 413 (1912)
   - 25 C.F.R. § 169.410

4. Whether the District Court properly denied intervention and consolidation when the United States is adequately representing Plaintiffs' interests through claims filed on their behalf, when intervention would further prolong and complicate an already prolonged case ripe for decision, and when Plaintiffs have no claims to assert and, accordingly, no case to consolidate with the United States'.

- *South Dakota ex rel. Barnett v. U.S. Dep't of the Interior*, 317 F.3d 783 (8th Cir. 2003)
- *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918 (8th Cir. 2015)
- *Enter. Bank v. Saettele*, 21 F.3d 233 (8th Cir. 1994)

STATEMENT OF THE CASE

I. Legal Framework Governing Indian Trust Lands.

A. The United States Has Long Recognized Indian *Tribes'* Aboriginal Rights.

The federal-common-law recognition of ***tribes'*** aboriginal rights to land runs back at least to the early Nineteenth Century. In *Johnson v. M'Intosh*, 21 U.S. 543 (1823), the Supreme Court addressed competing claims of ownership between the United States, States, and Indian tribes. The Court drew on the history of discovery in North America, basic legal doctrines, and generally accepted principles of international relations to hold that the United States would recognize Indian ***tribes'*** right to occupy their ***aboriginal*** lands. *Id*. at 571-86. Tribes' aboriginal title as "the nature and source of the[ir] possessory rights" has therefore been a key to their federal-common-law claims, including in "the Supreme Court's pages upon pages

of analysis regarding aboriginal title in the *Oneida* cases…." App. 133-34; R. Doc. 139, at 21-22;[1] *Oneida I*, 414 U.S. at 666-78.

B. By Contrast, Individual Indian Allotments Are Created By Statute and Issued By Patent.

Unlike aboriginal rights, the individual, beneficial interests that Plaintiffs assert—allotments to Plaintiffs' parents or grandparents[2]—are creatures of statute. The Constitution grants Congress "plenary and exclusive" powers over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Thereunder, in the late Nineteenth Century, Congress began transforming reservations into parcels assigned to individual Indians, with the goal "to extinguish tribal sovereignty, erase

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[1] Andeavor relies on the Appendix Plaintiffs filed with their opening brief and has determined that a separate appendix is not necessary. *See* 8th Cir. R. 30A(b)(3).

Separately, Andeavor, like Plaintiffs and the United States, makes reference to documents filed in *Tesoro High Plains Pipeline Co., LLC v. United States*, ("***THPP***"), No. 1:21-cv-90 (D.N.D.), that are relevant to some issues raised in this appeal but are not part of the record below. This Court may take judicial notice of these filings. *See* Fed. R. Evid. 201; *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (agency documents); *In re Indian Palms Assocs.*, 61 F.3d 197, 205 (3d Cir. 1995) ("'Judicial notice may be taken at any stage of the proceeding,' … including on appeal ….").

Andeavor is willing to provide the Court with courtesy copies of any *THPP* documents should the Court so request.

[2] App. 39; R. Doc. 28 ¶ 3 ("The United States allotted portions of the Reservation to Plaintiffs' parents and grandparents and held them in trust."); s*ee also, e.g., id.* ¶¶ 6, 7-54, 64, 86, 102-120, 117-124 (claiming individual beneficial ownership of surface interests in allotments); *id.* ¶¶ 70, 79, 87-88, 90 (distinguishing tribal interests).

reservation boundaries, and thereby compel assimilation of Indians into society at large." *Chase I*, 12 F.4th at 872.

Land is allotted in severalty to individual Indians by "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 or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located…") (emphasis added). Once allotted, the land is no longer tribal land. *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940) (holding, in case involving land allotted to individual Indians subject to alienation restriction, "[t]he land involved, being allotted in severalty, is no longer… tribal land."); *see also* 25 C.F.R. § 169.2 (BIA regulations defining "tribal land" separately from "individually owned land").

While at different times allotments have issued as fee land with restrictions on alienation or as trust land, courts have not regarded the two types of allotments as legally distinct. *United States v. Ramsey*, 271 U.S. 467, 471 (1926) ("[T]he 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. … In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same."). Congress and the BIA also treat trust and restrictive allotments as identical as it relates to the Right-of-Way Act and regulations. *E.g.*, 25 U.S.C. § 323 ("The Secretary…is empowered to grant rights-of-way for all purposes…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 C.F.R. § 169.2 (for rights-of-way, "Individually owned land" defined as "any tract in which the surface estate…is owned by…individual Indians in trust or restricted status").

C. The BIA's Statutory And Regulatory Framework.

Congress delegated authority for day-to-day administration of Indian affairs to the President or the Secretary of the Interior ("**Secretary**"). *See* 25 U.S.C. §§ 2, 9. Much of this authority has been re-delegated to the BIA. *See* 25 U.S.C. §§ 1, 1a, 2; 43 U.S.C. § 1457.

Under 25 U.S.C. §§ 323-28, the Secretary has authority to grant—generally, but not always, with Indian landowner consent—"rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes." 25 U.S.C. § 323. The Secretary may promulgate regulations for implementing and

administering rights-of-way, which the BIA has done. 25 U.S.C. § 328; 25 C.F.R. Part 169.

Subpart F of Part 169 pertains to "Compliance and Enforcement." "Section 169.410 specifically addresses grantee holdover situations" like the one alleged here. *Chase I*, 12 F.4th at 869. "And § 169.410, which the agency has described as 'exclusive,' authorizes ***the BIA*** to 'recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." *Id*. at 870 & n.2 (emphasis added) (citing Rights-of-Way on Indians Lands, 80 Fed. Reg. 72,492, 72,523 (Nov. 19, 2015) ("The final rule addresses holdovers exclusively in FR 169.410… .")).

Similarly, the Assistant Secretary—Indian Affairs for the Department of the Interior ("AS-IA"), in guidance to the BIA Regional Director, instructed with respect to Andeavor's holdover in this very case that "Section 169.410 describes the actions the BIA may lawfully take to address Tesoro's trespass." 28(j) Letter, Ex. A at 4, *Chase I*, No. 20-1747 (8th Cir. Nov. 16, 2020). "The BIA should look ***only*** to § 169.410, and any common law remedies, for its authority regarding holdover trespassers from expired rights-of-way… ." *Id*. Ex. B, at 5 (emphasis added). Moreover, the AS-IA expressly instructed that Section 169.413 "do[es] not apply to Tesoro's trespass." *Id*.; *see also* Rights-of-Way On Indian Lands, 81 Fed. Reg.

19,877, 19,877-78 (Apr. 6, 2016) (advising that only certain provisions in the right-of-way regulations apply retroactively and § 169.410 is listed but not § 169.413).

II. Factual Background And Procedural History

A. Andeavor's Pipeline Has Operated On The Reservation For Decades Under Several Renewed Rights-Of-Way.

Andeavor's pipeline system transports crude oil over 500 miles to various destinations. At issue here is a 15-mile segment of the system, which crosses the Fort Berthold Reservation ("**Reservation**") and more than 35 tracts owned by the United States in trust for more than 400 allottees, the tribe, or both. App. 56; R. Doc. 28, at 20. The pipeline was constructed more than 65 years ago pursuant to a 20-year right-of-way granted by the BIA in 1953. App. 51; R. Doc. 28, at 15. In 1973, the BIA renewed the easement for another 20-year term, which expired in 1993. App. 52; R. Doc. 28, at 16. In 1995, the BIA renewed the easement for an additional 20-year term retroactive to 1993, (the "1993 Right-of-Way")[3] extending to June 18, 2013. *Id.*

[3] Plaintiffs previously challenged the 1993 Right-of-Way, but have since "effectively acknowledge[ed] that [it] was valid." *Chase I*, 12 F.4th at 869 n.2. It is therefore "now law of the case" that claims premised on the invalidity of the 1993 Right-of-Way fail. *Id.*

B. Andeavor's Efforts To Obtain A Renewed Right-Of-Way During The Regulatorily-Permitted Holdover.

As is customary and contemplated by BIA regulations, Andeavor began the complex and time-consuming process of renewing its right-of-way by negotiating with tribal government and Indian allottees and seeking BIA approval of the right-of-way renewal while it remained in "holdover" status. In 2013, Andeavor commenced discussions with the Three Affiliated Tribes ("**Tribe**"), which culminated in a renewal agreement in 2017 made retroactively effective to 2013. *See* App. 115; R. Doc. 139, at 3.

Around the same time, Andeavor approached allottees with interests in the allotted parcels under which the pipeline ran. *Id.* Andeavor engaged a land services company, requested title status reports for the pertinent allotments, commissioned third-party appraisals and provided them to the BIA in 2014, and updated them for re-submission on several occasions, including in 2016 and 2018. R. Doc. 76, at 10.[4]

C. The BIA Commences Administrative Proceedings.

Despite these efforts, on January 30, 2018, the Superintendent of the BIA's Fort Berthold Agency, issued Andeavor a "10-Day Show-Cause" letter. App. 54; R. Doc. 28, at 18. The letter stated the Fort Berthold Agency "is responsible for

[4] Even after ceasing operations of the pipeline in December 2020, *THPP*, R. Doc. 1, at 2-3, Andeavor continued its efforts through at least August 2022 to obtain individual allottees' consents to a right-of-way renewal, which were largely successful but stymied by holdouts. R. Doc. 121, at 2.

investigating and responding to allegations of trespass, assessing penalties, and ensuring that the trespasser rehabilitates the damaged land at his expense" and that it had investigated and found Andeavor had not rehabilitated the allotments or obtained a new right-of-way, resulting in "unauthorized occupancy," due to expiration of the 1993 Right-of-Way. R. Doc. 40-1, at 33. Andeavor was given ten days to show cause "as to why the determination of trespass [is] in error." *Id.* at 34.

D. Plaintiffs File Putative Class Action Claims For Trespass, Related Tort(s), And Breach Of Contract.

Despite Andeavor's ongoing efforts to negotiate, Plaintiffs filed suit in October, 2018, in Texas. *Chase I*, 12 F.4th at 867. Plaintiffs are 48 individuals who are allegedly enrolled members of the Tribe with beneficial interests in allotments within the Reservation. App. 40-47; R. Doc. 28, at 4-11. Plaintiffs asserted trespass "[u]nder [f]ederal [c]ommon [l]aw" (Count I), breach of the 1993 Right-of-Way (Count II), unjust enrichment (Count III), and punitive damages (Count IV). App. 61-66; R. Doc. 28, at 25-30. They sought damages and an injunction requiring the pipeline's removal. App. 66-67; R. Doc. 28, at 30-31. Plaintiffs also sought to represent a class of all other owners of beneficial interests in allotted tracts the pipeline crosses, though no class was certified. App. 56-61; R. Doc. 28, at 20-25.

E. The District Court's Initial Dismissal And This Court's Reversal.

On Andeavor's motion, the Texas court transferred the case to the District of North Dakota. *Chase I*, 12 F.4th at 868. Andeavor filed an amended motion to

dismiss on several grounds: lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; failure to join a required party; and failure to exhaust administrative remedies or, alternatively, lack of primary jurisdiction. R. Doc. 73, at 3-10.

On April 6, 2020, the District Court dismissed the case for lack of exhaustion without reaching the other grounds Andeavor asserted. *Chase I*, 12 F.4th at 868. This Court reversed exhaustion and remanded with instructions to stay the case under the primary jurisdiction doctrine. *Id.* at 878. And while the Court also did not directly decide Andeavor's other dismissal arguments, it extensively discussed the key issue whether Plaintiffs could assert claims under federal common law. *Id.* at 871-74. The Court recognized that the Supreme Court's decision in *Oneida I* distinguished tribal claims based on aboriginal rights from individuals' claims based on allotments. *Id.* at 872, 874. While the Court ultimately held that it need not provide a definitive answer, it recognized that that "core issue… at some point must be resolved by a federal court." *Id.* at 871. The Court remanded with instructions to stay the case for the BIA to provide its views on that issue and others. *Id.* at 871, 877-78.

F. The BIA's Continued Administrative Actions And Andeavor's Administrative Appeal.

Meanwhile in July 2020, while *Chase I* was pending, a BIA Regional Director issued a "Notification of Trespass Determination" to Andeavor. *Id.* at 875. That

notification ordered Andeavor to "immediately cease pipeline use and pay treble damages totaling $187.2 million within thirty days." *Id.* Andeavor appealed, and the AS-IA assumed jurisdiction, vacated the notification, and remanded for issuance of "a new decision based on specified criteria." *Id.* The AS-IA indicated that the BIA might seek judicial remedies under federal common law on allottees' behalf. *Id.*

On December 15, 2020, the BIA issued a new decision that required Andeavor to cease using the pipeline, pay roughly $4 million, and leave the pipeline in the ground. *Id.* That decision was initially affirmed by the AS-IA in early 2021, and Andeavor fully complied with it by shutting the pipeline down, purging it, and paying the amount required by the BIA. *THPP*, R. Doc. 28, at 4, 20.

Despite its finality, its affirmance by the AS-IA, and Andeavor's compliance, the December 15, 2020 decision was subject to a purported vacatur in March, 2021, following a change in administration. *See id.* ¶ 7. That decision stated that all prior BIA decisions regarding the allotments were vacated. *Id.*

In April 2021, Andeavor filed suit in the District Court against the BIA, the Department of the Interior, and the United States to challenge the vacatur decision and other agency actions—a case that the District Court describes as "an already prolonged case ripe for decision." *See generally THPP*, R. Doc. 1; App. 150; R. Doc. 139, at 38. Despite Plaintiffs' erroneous contention that Andeavor's request

for preliminary injunction remains stayed and nothing is pending, Op. Br. 51, Andeavor and the United States completed briefing on Andeavor's request for a temporary injunction and it is ripe for decision. *THPP*, R. Docs. 27, 33, 48. In February 2022, all defendants answered, and the United States further asserted counterclaims for trespass and ejectment. *See generally THPP*, R. Doc. 28. The parties fully briefed THPP's motion to dismiss the United States' counterclaim. *THPP*, R. Docs. 54, 62, 66. The District Court severed and stayed the United States' counterclaims. *THPP*, R. Doc. 71. The District Court noted that the primary claims involved APA challenges to the BIA's actions, while the United States' counterclaims were "of a separate nature" and wrongly assumed the propriety of the BIA administrative proceedings that are under scrutiny in *THPP*. *Id.* at 4-5.

G. The Instant Dismissal And Appeal.

Meanwhile, on remand from *Chase I* the District Court stayed this case in conformity with *Chase I*'s mandate. R. Doc. 105. While the United States filed its counterclaim in *THPP* in September 2022, *THPP*, R. Doc. 28, it took no other actions to express its views in response to *Chase I*'s invitation. Indeed, in October 2022, in response to Andeavor's motion to dismiss the United States' counterclaim, the United States expressly declined to "make any assertion about the [Plaintiffs'] ability to raise a federal common-law trespass claim." *THPP*, R. Doc. 62, at 22 n.17. In doing so, the United States distinguished its purported authority for asserting the

counterclaim from any authority Plaintiffs may have to assert their claims. *Id*; *cf.* Op. Br., *e.g.,* 3-4 (asserting the United States has now agreed Plaintiffs' claim exists by filing the counterclaim).

Given the pendency of *THPP*, the United States' representations there, and its lack of any other action, in June, 2023 the District Court held a status conference to determine whether to continue the stay. R. Doc. 129. Thereafter, the District Court lifted the stay to consider the dismissal grounds Andeavor asserted that the District Court had not previously addressed. App. 112; R. Doc. 130, at 2. At Plaintiffs' request, the District Court also allowed additional briefing limited to whether Plaintiffs may assert a federal-common-law claim for trespass.

In a comprehensive opinion, the District Court granted in part Andeavor's Motion to Dismiss. App. 113-50; R. Doc. 139. First, the District Court dismissed Plaintiffs' claim for federal-common-law trespass because no such claim exists. After tracing the extensive jurisprudence related to such claims, including *Wolfchild* and *Chase I*, the District Court explained the Plaintiffs here failed to allege a claim for federal-common-law trespass. App. 120-38; R. Doc. 139, at 8-26. And the District Court further held it would be improper to create such a claim on Plaintiffs' behalf because federal common law can be properly developed only in narrow circumstances not present here. App. 138-42; R. Doc. 139, at 26-30.

The District Court also dismissed Plaintiffs' remaining claims. Relying on *Chase I* and additional case law, the District Court dismissed Plaintiffs' claim for breach of the 1993 Right-of-Way because the United States, as grantor of the right-of-way and signatory to the contract, is indispensable to that claim. App. 143-45; R. Doc. 139, at 31-33. And the District Court dismissed Plaintiffs' remaining tort claims and/or remedies because they were premised on Plaintiffs' federal-common-law claim for trespass. App. 145-46; R. Doc. 139, at 33-34.

Finally, the District Court rejected Plaintiffs' attempts to intervene in *THPP* or consolidate this case with that one. Plaintiffs had established no grounds to find the United States inadequate to protect their rights in *THPP*, which Plaintiffs had extensively argued was indistinguishable from their own case. App. 146-48; R. Doc. 139, at 34-36. The District Court also denied permissive intervention because Plaintiffs had expressed no significant interest in the administrative proceeding, and their participation in the United States' counterclaims would cause undue delay and prejudice. App. 149-50; R. Doc. 139, at 37-38. And there was no case left for the Court to consolidate in light of its dismissal of Plaintiffs' claims. *See* App. 149; R. Doc. 139, at 37 (Plaintiffs "seek to litigate the claim this Court has found they do not possess").

This appeal followed.

SUMMARY OF THE ARGUMENT

This case is about a group of individual Indians' refusal to accept that their rights fundamentally differ from the aboriginal rights of their Tribe, and as individual allottees, they do not have recognized federal-common-law claims against Andeavor. Ignoring critical legal distinctions, Plaintiffs have embarked on a multi-year crusade seeking create federal-common-law claims to enable them to sue a pipeline owner for millions of dollars, while simultaneously obstructing efforts to obtain a consensual right-of-way. Moreover, the United States is already litigating claims on Plaintiffs behalf against the Andeavor entity that operated the pipeline, which would foreclose Plaintiffs' claims even if the District Court had indulged Plaintiffs' positions.

The District Court properly declined to do so. Plaintiffs expressly and exclusively try to ground their tort claims in federal common law. But as the District Court held, controlling precedent creates no federal-common-law claims regarding allotments at least where such claims are not premised on aboriginal title. Moreover, Plaintiffs' additional tort claims are equally unavailable either because they were premised on a federal-common-law trespass claim, because Plaintiffs lack any such claims, or both. The District Court therefore properly dismissed them.

Regarding Plaintiffs' claim for breach of the right-of-way agreement, the District Court followed this Court's precedents and others to hold that the United

States—the grantor of the right-of-way—is an indispensable party. Through its lawsuit, Plaintiffs seek to displace the United States in its role a grantor and as trustee for the allottees who decides on behalf of ***all*** allottees within the Reservation's boundaries (including hundreds who are not plaintiffs) what to do in a holdover situation and what remedies to seek. Because the United States cannot be joined, dismissal is required under Rule 19.

Alternatively, the entire case has now become improper in light of the United States' decision to pursue counterclaims in *THPP*. Under Supreme Court precedent that has stood over 100 years, the United States' decision to act on behalf of Plaintiffs and all other affected allottees precludes Plaintiffs' own claims for a similar purpose.

Finally, the District Court did not err by denying intervention in, or consolidation with, *THPP*. Plaintiffs have no right to intervene because the United States adequately represents their interests, and Plaintiffs failed to establish otherwise in the District Court or on appeal. Nor did the District Court clearly abuse its considerable discretion in denying permissive intervention or consolidation.

For these reasons, the Court should affirm the judgment.

STANDARD OF REVIEW

This Court reviews dismissal under Rule 12(b)(6) *de novo*. *E.g.*, *Wolfchild v. Redwood Cnty.*, 824 F.3d 761, 767 (8th Cir. 2016). This Court reviews "a district court's decision to dismiss an action for failure to join an indispensable party under

the highly deferential abuse-of-discretion standard." *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 746 (8th Cir. 2001), *abrogated on other grounds by Wilkins v. United States*, 598 U.S. 152 (2023). This Court reviews a denial of intervention of right *de novo*. *South Dakota ex rel. Barnett v. U.S. Dep't of the Interior*, 317 F.3d 783, 785 (8th Cir. 2003). This Court reviews a denial of permissive intervention or consolidation "only for a clear abuse of discretion." *Id.* at 787; *EPA v. City of Green Forest*, 921 F.2d 1394, 1402 (8th Cir. 1990).

ARGUMENT

I. The District Court Properly Declined To Create Any Federal-common-law Causes Of Action On Behalf Of Allottees.

At the outset, Plaintiffs do not dispute that the creation of federal common law is normally inappropriate. As the District Court explained, courts may create federal common law only within certain "narrow" spheres. App. 139; R. Doc. 139, at 27 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981)). That is true even where federal statutes apply; unless Congress authorizes federal courts "to formulate substantive rules of decision," such courts are limited to deciding claims that Congress itself has provided. *Id.* at 641, 646.

Plaintiffs do not argue that the District Court had authority to create federal common law on their behalf. Plaintiffs' federal-common-law claims therefore stand or fall based on whether such claims already exist that they may assert on their own

behalf. As explained below, the District Court correctly held that for Indian allottees, federal-common-law claims do not exist.

A. Plaintiffs Ask This Court To Ignore Critical Distinctions This Court And The Supreme Court Have Long Emphasized.

Many precedents from the Supreme Court, this Court, and other courts establish that individual Indian allottees, in contrast to Tribes, have no federal-common-law claims for trespass.[5] The reason for this distinction lies in longstanding historical antecedents, and the law is clear and supports the judgment.

The Supreme Court, this Court (including in this case), the District Court, and numerous other Courts have consistently recognized the critical distinction between a tribe's aboriginal rights and rights of individual Indians to allotments. This Court specifically recognized and discussed this important distinction when it affirmed dismissal of federal-common-law claims asserted by individual Indians concerning "lands allocated to individual Indians, not tribal rights to lands." *Wolfchild*, 824 F.3d at 767. The Court distinguished a tribe's aboriginal right of occupancy from lands allocated to individual Indians, finding that the individual Indian allottees there (like

[5] Plaintiffs assert jurisdiction under 25 U.S.C. § 345 and 28 U.S.C. § 1331. Op. Br. 1. But the former does not apply because Plaintiffs' claims do not seek issuance of or the recovery of title to an allotment. *E.g.*, *U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987). And the latter does not apply because Plaintiffs have not asserted claims arising under federal law. *See* R. Doc. 74, 90; *Chase I*, 12 F.4th at 870-71.

Plaintiffs here) had fundamentally misinterpreted *Oneida I* and *II* in asserting claims under federal common law:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." In so holding, the Supreme Court directly distinguished cases regarding "lands allocated to ***individual*** Indians," concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. Thus, federal common law claims arise when a ***tribe*** "assert[s] a present right to possession based... on their ***aboriginal*** right of occupancy which was not terminable except by act of the United States."

Wolfchild, 824 F.3d at 767-68 (emphasis in original) (citations omitted).

The Supreme Court has long held that where the underlying right to possession of land arises under federal law, "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***." *Oneida I*, 414 U.S. at 676 (citations and internal quotations omitted) (emphasis added).

This Court has reiterated that critical distinction yet again in this very case. *Chase I*, 12 F.4th at 872 (distinguishing *Oneida I* from this case in two "significant"

respects—the Plaintiffs "are not a tribe, like the Oneida Nation," and Plaintiffs' alleged source of ownership interests was allotments); *id.* (noting *Oneida* "carefully distinguished" the Supreme Court's prior decision in *Taylor v. Anderson*, 234 U.S. 74 (1914), which held federal jurisdiction did not exist for the individual Indians' claims); *id.* at 873-74 (noting Plaintiffs' argument of a federal-common-law trespass action for individual Indians "is not clearly supported by *Oneida I* or *Oneida II*, as we expressly ruled in *Wolfchild*"; emphasizing *Wolfchild* distinguished claims asserted by a tribe to vindicate aboriginal rights from claims concerning only individual allotments); *id*. at 874 (rejecting Plaintiffs' argument that *Wolfchild* has no "direct bearing" on whether Plaintiffs have federal-common-law claims; again noting that *Oneida I* distinguished tribal claims from the individual claims in *Taylor*); *cf*. Op. Br. 10 (calling these "artificial distinctions").

Continuing their long-running strategy of "emphasiz[ing]" issues the Supreme Court's decisions "chose to overlook" and "overlook[ing]" issues the Supreme Court "opted to emphasize," *see* App. 133; R. Doc. 139, at 21, Plaintiffs' Opening Brief largely rehashes arguments the Court initially addressed with sharp skepticism in *Chase I*. Op. Br. 10-14. Remarkably, Plaintiffs do not even attempt to address the issues and concerns the Court raised in its pages-long discussion of their assertion that they have a federal-common-law claims; indeed, they refer to *Chase I* only for ancillary issues. *Cf. id.* at 10 n.1, 15, 17 n.4. And, as the District Court noted, the

few new cases they cite do not change the long-standing case law that individual Indian allottees do not have federal-common-law trespass claims. App. 138; R. Doc. 139 at 26.

This Court already noted Plaintiffs' citation to *Oneida II* as support for their position that individual Indians have a federal-common-law trespass action against trespassers, *cf.* Op. Br. 11, but explained that their "argument [wa]s not clearly supported by the Supreme Court's holding in *Oneida I* or *Oneida II*, as we expressly ruled in [*Wolfchild*]." *Chase I*, 12 F.4th at 873-74. The Court continued:

> In affirming the district court's grant of motions to dismiss, we held that under *Oneida I*, "federal common law claims arise when a ***tribe*** 'assert[s] a present right to possession based on their ***aboriginal*** right of occupancy.'" The Wolfchild plaintiffs failed to state a claim under federal common law because they did not allege "***aboriginal*** title," and the 1863 Act only concerned lands allocated to "***individual[s]***—not a tribe." The plaintiffs therefore failed to state a federal common law claim:
>
> > [T]he language of the 1863 Act directly contradicts any claim that the loyal Mdewakanton had aboriginal title to the twelve square miles.... Thus, assuming the twelve square miles were set apart for the loyal Mdewakanton, the land was for the benefit of each ***individual*** -- not a tribe. This lawsuit, therefore, concerns "lands allocated to individual Indians, not tribal rights to lands," and does not fall into the federal common law articulated in the *Oneida* progeny.
>
> We went on to conclude that the 1863 Act did not provide a private federal remedy and affirmed the dismissal.

Id. at 874 (alterations and emphasis in original) (citations omitted). In addressing Plaintiffs' assertion regarding *Wolfchild*, the Court returned to *Oneida I*, where the

Supreme court "distinguished" the Oneidas' ***tribal*** claims from the ***landowner*** claim in *Taylor* that did not raise a federal question:

> Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. In *Taylor*, the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands. Individual patents had been issued with only the right to alienation being restricted for a period of time.[6]

Id. (quoting *Oneida I*, 414 U.S. at 676). The Court then concluded that its "above-quoted reasoning has a 'direct bearing' on whether Plaintiffs have the federal-common-law rights they assert, or whether they must instead find an alternative basis for their claims under federal law." *Id.*

Importantly, in *Chase I*, Plaintiffs admitted that in *Wolfchild* "because the plaintiffs could not state a claim for ***aboriginal title***, they had established 'no property rights upon which to base federal common-law claims for ejectment and trespass.'" *Chase I*, Op. Br., 41 (emphasis added); *see Wolfchild*, 824 F.3d at 768 ("Thus, in contrast to a claim of ***aboriginal*** title," plaintiffs claimed title to restricted-fee allotments pursuant to the 1863 Act) (emphasis original); *see also id*. (excerpting the 1863 Act: "The land [being allotted to individual Indians] shall not be aliened or devised, except by the consent of the President of the United States, but shall be an

[6] The plaintiffs in *Taylor* alleged that their restricted allotments had been transferred in violation of the restriction. 234 U.S. at 75.

inheritance to said Indians and their heirs forever."). Despite admitting *Wolfchild* holding required a showing of ***aboriginal title***, they then inexplicably contend ***any*** title suffices to support federal-common-law claims. *Chase I*, Op. Br., 41. Therein lies the crux of Plaintiffs' misinterpretation.

B. The District Court Properly Rejected Plaintiffs' Attempts To Conflate Individual Allotments With Tribal Aboriginal Lands.

In light of these key principles and differences set forth in the long history of Supreme Court and Eighth Circuit jurisprudence, the District Court did not err by holding that Plaintiffs lack federal-common-law claims regarding their allotments. As the District Court noted, Plaintiffs' attempt to lump tribal land rights with individual allotments "emphasize[d] similarities the Supreme Court chose to overlook" and "overlook[ed] differences the Supreme Court opted to emphasize." App. 133; R. Doc. 139, at 21.

The District Court's extensive explanation—which Plaintiffs do not even cite—showed that federal-common-law treatment of tribal rights to aboriginal lands arises from federal courts' longstanding respect for tribal land rights and fundamental distinctions between those rights and rights associated with land allotted to individuals. *See* App. 120-24, 134-38; R. Doc. 139, 8-12, 22-26. Under *Oneida I* and cases following, tribal claims to aboriginal lands "ar[ose] under" federal law based on the unique "nature and source of the possessory rights of Indian

tribes to their aboriginal lands, particularly when confirmed by treaty." App. 122-23, 134-35; R. Doc. 139, at 10-11, 22-23 (quoting *Oneida I*, 470 U.S. at 667).

Following "pages upon pages of analysis regarding aboriginal title in the *Oneida* cases," App. 134; R. Doc. 139, at 22, the District Court did not err by treating aboriginal title as a key distinction that gives rise to federal-common-law rights. Such title has historical significance arising from the uniquely federal nature of claims by ***tribes*** asserting ***aboriginal*** land rights. App. 134-38; R. Doc. 139, at 22-26. Indeed, the entire doctrine of aboriginal title is itself a creation of federal common law, as demonstrated by *Oneida I*'s lengthy discussion of the doctrine's development through Supreme Court opinions dating back nearly to the founding of this country. Plaintiffs apparently agreed with this fundamental premise in *Chase I*, where, summarizing *Wolfchild*, they agreed that a "tribe's claim of aboriginal-title is based on federal common law, whereas individual claims of allotment-title must be based on a treaty or statute granting the allotment," and further agreed that allotments and aboriginal title were "mutually exclusive claims for title." *Chase I*, Op. Br., at 40. That a federal-common-law property right would give rise to common-law claims is plain.

By contrast, allotted lands, such as those at issue in the Plaintiffs' claims, are "relatively new" ***statutory*** creations that were intended "to separate the individual Indian from the tribe in an effort to 'weaken tribal power.'" App. 136; R. Doc. 139,

at 24 (quoting 1 Cohen's Handbook of Federal Indian Law, § 1.03 (2023) ("Cohen's Handbook")) (cleaned up). Allotments did not arise from any aboriginal ties between the allottee and the allotted lands, *id.*, and the statutes that create them indicate the federal rights allottees have, with the rest being "for the most part, matters of local property law to be vindicated in local courts." *Oneida I*, 414 U.S. at 676.

Accordingly, accepting Plaintiffs' conflation of tribal rights to aboriginal lands with individual rights to allotted lands would "cheapen the rich history of aboriginal lands and constitute a rejection of the Supreme Court's" relevant decisions "for two centuries." App. 136-38; R. Doc. 139, at 24-26 (discussing Supreme Court cases). Such a result would treat tribal land rights recognized as part of the federal government's long-running relationship to tribes as foreign nations as indistinguishable from individual rights to allotments issued by the federal government for explicitly different reasons. *Id.* And treating the two the same would leave the Supreme Court's centuries of case law "in shambles." *Id.*

C. Plaintiffs Continue To Rely Upon Inapposite Out-Of-Circuit Cases And Improperly-Altered Sources Of Purported Support.

Finding no support in the applicable Supreme Court and Eighth Circuit precedents—*Oneida I* and *II*, *Wolfchild*, and *Chase I*, among others—Plaintiffs continue to rely heavily on decisions from other circuits and district courts, all of which are distinguishable and none of which hold that individual Indian allottees

have a federal-common-law trespass claim to allotted lands. *See* Op. Br. 12-14 (discussing, *inter alia*, *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010); *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019); *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009); *Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 1161 (D.N.M. 2010)). The Court already addressed most of these cases in *Chase I*, and it need not retread that ground to reject Plaintiffs' request to create new common law. *See* 12 F.4th at 874 n.6 (noting neither the Ninth Circuit nor the Tenth Circuit has definitively resolved the issue as to individual Indians, and rejecting the application of *Davilla* and *Nahno-Lopez*).[7] And *Begay* does not help because there the court relied on *Milner* and another case involving a ***tribal*** claim, and it ultimately held that the plaintiffs failed to assert a viable claim under any law. 710 F. Supp. 2d at 1212-13 (citing, *inter alia*, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 281 (2d Cir. 2005)).

Nor can Plaintiffs hide their core legal problem behind an avalanche of case citations—many of which involve claims by tribes or the United States[8]—that are

[7] Incredibly, despite the Court already (i) rejecting the Ninth and Tenth Circuit cases urged by Plaintiffs, including *Nahno-Lopez* and *Davilla*, to support the federal-common-law claim they assert, and (ii) expressly noting that they "have not found, nor do [Plaintiffs] cite, a Ninth Circuit case holding that federal common law encompasses suits by *individual* Indian landowners," Plaintiffs ***still*** contend that these cases control, while ignoring *Chase I* entirely.

[8] *See infra* 38.

inapposite and frequently misrepresented. For example, Plaintiffs cite *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-71 (1979), to argue that individual allottees' rights are "governed exclusively by federal law." Op. Br. 12. But *Wilson* involved ***a tribe*** and dealt with "land to which the Omahas had held ***aboriginal title***," 442 U.S. at 670 (emphasis added), and the relevant discussion relied on *Oneida I*. Accordingly, the case simply does not support Plaintiffs' assertion.[9]

Plaintiffs' treatment of treatises relies on misleading quotations. They insert "Individual Landowners"[10] into a quotation that not only used the term "***tribe***" instead but did so in a chapter expressly devoted to ***tribal*** interests rather than ***individual*** ones. *Compare* Cohen's Handbook, Ch. 15 ("Tribal Property") (quoted at Op. Br. 11) *with id.* Ch. 16 ("Individual Indian Property"). Indeed, that treatise expressly notes that while "[t]ribal rights are enforceable under federal law," individual allottees ***cannot*** resort to federal courts for "claims for damages to their

[9] Nor is Plaintiffs' assertion even correct. Federal law allows states including North Dakota to extend civil laws to reservations, and North Dakota has done so. *Infra* 32-34.

[10] Plaintiffs make other similarly misleading substitutions. *Compare* Op. Br. at 11-12 *with United States v. Temple*, 2019 WL 590224, at *5 (D.S.D. Feb. 13, 2019) ("[F]or all practical purposes, ***the tribe*** owns the land.") (emphasis added); *compare* Op. Br. 40-41 *with Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) ("[I]in a suit by ***an Indian tribe*** to protect ***its*** interest in tribal lands…") (emphasis added); *compare* Op. Br. 50 *with Arizona v. California*, 460 U.S. 605, 614-15 (1983) ("[I]t is obvious that the ***Indian Tribes***, at a minimum, satisfy the standards for permissive intervention") (emphasis added).

lands sounding in tort or other claims that do not involve ownership issues." *Id.* § 16.03[3][c] (citing, *inter alia*, *Kishell*, 816 F.2d at 1275). Similarly, Plaintiffs claim that in *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975), "this Court did not question that Individual trust allotees can assert a federal common law trespass claim." Op. Br. 13. But *Bird Bear* upheld dismissal and did not mention any federal-common-law right of individual allottees. 513 F.2d at 191.

More broadly, Plaintiffs' attempt to conflate ***tribal rights to aboriginal lands*** with ***individual rights to allotments*** is fundamentally flawed. The Supreme Court recognized this distinction long ago in *Oneida I*, where it affirmed the holding in *Taylor* that suits concerning ***lands allocated to individual Indians***, as opposed to ***tribal rights*** to land, do not state claims arising under the laws of the United States. 414 U.S. at 676-77. That same distinction is reflected in other case law. *See Marek v. Avista Corp.*, 2006 WL 449259, at *3-4 (D. Idaho Feb. 23, 2006) (***individual*** claim of common law trespass on ***allotted lands*** is not based on any protection of federal law); *see also Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348-49 (N.D. Cal. 1995) (noting discussion in *Oneida I* that "the identities of the parties to an action is a significant factor in determining the federal interest… [s]ince the determination of whether federal interest exists controls the applicability of federal common law…," requiring the Court look "to whether the party is an ***Indian tribe or an individual member*** of the tribe," and holding "actions involving an ***Indian***

tribe as a party claiming a possessory right in land arising under federal law should be adjudicated by the federal courts," but "actions which involve ***individual members*** of tribes where the underlying action does not involve an ***Indian tribe's possessory rights*** should be adjudicated by state courts.") (emphasis added) (citing, *inter alia*, *Oneida I*, 414 U.S. at 676-77; *Taylor*, 234 U.S. at 74).

Indeed, in affirming dismissal of federal-common-law claims asserted by individual Indians concerning "lands allocated to individual Indians, not tribal rights to lands," *Wolfchild* specifically recognized and discussed this dispositive distinction, finding that the individual Indian allottees, like Plaintiffs here, had fundamentally misinterpreted *Oneida I* and *II* in believing individual Indians had federal-common-law rights similar to a tribe:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." In so holding, the Supreme Court directly distinguished cases regarding "lands allocated to ***individual Indians***," concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. Thus, federal common law claims arise when a ***tribe*** "assert[s] a present right to possession based... on their aboriginal right of occupancy which was not terminable except by act of the United States."

Wolfchild, 824 F.3d at 767-68 (emphasis in original) (cleaned up) (citations omitted).

D. Plaintiffs' Reliance On *Poafpybitty* Is Misplaced And It Does Not Create Or Recognize A Federal-Common-Law Trespass Claim.

Plaintiffs and the United States are wrong that *PoafpyBitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), requires the creation of any federal common law on behalf of Plaintiffs. *Cf.* Op. Br. 15-18; US Br. 22-24. At the outset, *Poafpybitty* says nothing about whether allottees have a federal-common-law claim for trespass. There the Supreme Court held that allottees in that case could bring suit for breach of an oil and gas lease against their lessee without the participation of the United States. 390 U.S. at 370-71. But in so holding, the Court made no broad pronouncement that allottees have the same causes of action as the United States acting as trustee, or that an individual allottee has any federal-common-law claim at all. Instead, as the District Court took pains to explain, *Poafpybitty* and cases following it merely held that ***if*** individual allottees ***and*** the United States both have claims regarding an allotment, ***then*** in some instances one may pursue them without needing to join the other. App. 131-32; R. Doc. 139, at 19-20 (discussing *Poafpybitty*, 390 U.S. at 365; *Narragansett Tribe of Indians v. S.R.I. Island Land Dev. Corp.*, 418 F. Supp. 798, 805-06 (D.R.I. 1976)).

Moreover, other case law shows that Indian individuals and even tribes do not have the same rights to sue as the United States has on their behalf. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Supreme Court held that an Indian tribe could not sue a state protected by Eleventh Amendment immunity even

where the United States could do so on the tribe's behalf. *Id.* at 785-86. Instead, a tribe's "access to federal court to litigate [federal-question cases]" was only "***in some respects*** as broad as that of the United States suing as the tribe's trustee." *Id.* at 784 (quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473 (1976)) (emphasis added by Court). *Blatchford* recognizes that the assumed equivalence of legal claims between individual allottees and the United States (which both Plaintiffs and the United States rely on here, Op. Br. 15; US Br. 22-23) is illusory. *Poafpybitty* therefore does nothing to establish any federal-common-law claims available to individual allottees.

Moreover, even if Plaintiffs had asserted a valid basis for a claim here (and they have not), *Poafpybitty* says nothing about whether Plaintiffs can assert a claim concurrently with the United States asserting the same claim under the applicable right-of-way holdover regulation, 25 C.F.R. § 169.410. *Poafpybitty* arose in a different context—allottees there were suing for breach of an oil and gas lease to which they were a party, so an entirely different set of regulations were involved. 390 U.S. at 366-67, 372-73. Here, the regulations specific to rights-of-way applies (specifically, 25 C.F.R. § 169.410, which exclusively deals with grantee holdovers as noted in *Chase I*), and it provides that only the BIA may bring an action on behalf of the allottees. Moreover, in *Poafpybitty*, the BIA had not taken any action. Here, the BIA has asserted a claim for trespass against Andeavor on Plaintiffs' behalf.

Nor would Plaintiffs' reading of *Poafpybitty* make sense in light of the well-established distinctions between trustees and beneficiaries. A trustee, as holder of legal title to trust property, is typically the proper party to pursue legal action relating to it. George Bogert et al., The Law of Trusts & Trustees § 869 (2023). "[T]he trustee is usually the only proper party plaintiff to sue in … trespass to try title, ejectment, or similar action brought to restore possession to the trustee," and "so, too, the trustee should bring a suit to quiet title to the trust land, or for use and occupation by a third person, … or to recover the income of the trust property by way of hire, royalties, dividends, or otherwise." *Id.*; *see also* Restatement (Third) of Trusts, § 107 (2012). And while these well-established doctrines do allow for exceptions in some circumstances, they leave no room for Plaintiffs' assertion of a categorical right for allottees (as beneficiaries) to assert claims of their own whenever the United States (as trustee) might be able to do so on their behalf.

E. Plaintiffs' And The United States' Attempt To Create Federal-Common-Law Claims Based On Assertions That Plaintiffs Have No Other Remedy Is Incorrect And Irrelevant.

Plaintiffs claim that they lack any remedy if they have no federal-common-law causes of action. As an initial matter, as the District Court correctly noted, this issue is not the relevant issue before the Court. App. 142-43; R. Doc. 139, at 30-31. Regardless, Plaintiffs assert that state law cannot apply to allotted lands and that state courts have no jurisdiction to hear such claims. Op. Br. 18-20 (citing *Bryan v. Itasca*

Cnty., 426 U.S. 373, 391 (1976) and *Alaska Dep't of Pub. Works v. Agli*, 472 F. Supp. 70 (D. Alaska 1979)). The United States relies on a similar argument. US Br. 12-13, 15, 16, 18-19. These arguments fail.

First, these arguments ignore that Congress has given states the power to extend state law to allotments, and North Dakota has done so. The Supreme Court addressed that issue in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering P.C.*, 467 U.S. 138 (1984), where it rejected a North Dakota Supreme Court's decision denying state-court jurisdiction over a claim against a contractor that had built a water supply system within the reservation. *Id.* at 141. A tribe filed tort and breach of contract claims in state court, which dismissed for lack of jurisdiction. *Id.* at 141-42, 145-46. On review from the North Dakota Supreme Court, the United States Supreme Court held that federal law was no impediment to the claim: Congress had expressly granted all states the power to extend "civil or criminal jurisdiction" over "Indian country" provided the states appropriately amended their constitutions, and North Dakota had done so. *Id.* at 143-44 (discussing, *inter alia*, 25 U.S.C. § 1324). Accordingly, "no federal law or policy required the North Dakota courts to forego" jurisdiction, *id.* at 151, and the North Dakota Supreme Court later sent the case to trial. *Three Affiliated Tribes*, 392 N.W.2d 87, 87 (N.D. 1986); *see also Organized Vill. Of Kake v. Egan*, 369 U.S. 60, 75 (1962) ("[E]ven on reservations state laws may be applied to Indians unless such

application would interfere with reservation self-government or impair a right granted or reserved by federal law.").

Indeed, Plaintiffs' own cases show that state law and state courts may hear claims regarding trust allotments. That issue was lurking in *Poafpybitty*, in which the United States reviewed a decision by ***Oklahoma state courts*** regarding allottees' rights under an oil and gas lease approved by the federal government and relating to a trust allotment. 390 U.S. at 366-68. And the Supreme Court ultimately remanded the case to Oklahoma courts for further consideration. *Id.* at 372, 376.

F. 25 U.S.C. § 345 Does Not Create A Federal-Common-Law Cause Of Action (Nor Even Jurisdiction Here).

Plaintiffs assert jurisdiction under 25 U.S.C. § 345, and the United States contends it provides jurisdiction here even if Plaintiffs lack federal-common-law claims. Op. Br., 1; US Br., 21-22. This argument also fails.

As an initial matter, 25 U.S.C. § 345 provides jurisdiction to district courts over certain limited suits involving the right to an allotment, but it does not create or provide any cause of action for federal-common-law trespass. 25 U.S.C. § 345. Indeed, the United States admits this by contending § 345 could provide federal court jurisdiction, "independent of any federal common law cause of action." US Br., 21.

Here, however, it does not even provide federal court jurisdiction. *Chase I*, 12 F.4th at 871 n.4 (reiterating *Kishell*'s holding that a "complaint seeking relief for trespass does not state a claim contemplated by § 345"). The Supreme Court in

United States v. Mottaz, 476 U.S. 834, 845 (1986), held that Section 345 extends jurisdiction only to suits involving issuance of an allotment, or suits to quiet or recover title of allotments. And this Court has expressly rejected extending *Mottaz* to cover trespass actions like the ones Plaintiffs assert here, as have other courts. In *Kishell*, this Court held that, like the present case, the complaint did not involve a challenge to the title of an allotment, making section 345 inapplicable under the second prong of *Mottaz*. 816 F.2d at 1275. Similarly, *Pinkham v. Lewiston Orchards Irrigation District*, 862 F.2d 184, 189 (9th Cir. 1988), and *Marek*, 2006 WL 449259, at *4, both involved trust allotments and, relying on *Kishell*, also held that section 345 does not support jurisdiction for a trespass claim on individual allotted lands. Neither Plaintiffs nor the United States offer any grounds to depart from these holdings.

G. Other Statutes Cited By Plaintiffs Also Do Not Create A Federal-Common-Law Cause Of Action.

Indicative of the level of desperation to create a federal-common-law claim where none exists, Plaintiffs grab at straws in the form of random statutes. None establish any federal-common-law claim for individual Indians.

For example, Plaintiffs also assert that the 28 U.S.C. § 2415(b) of the Claims Limitation Act "confirm[s] that the federal common law provides a right to protect trust lands regardless of whether a tribe or an individual Indian is the beneficial owner." Op. Br., 23. Plaintiffs' reference to and selective excerpt from the Claims

Limitations Act is disingenuous, at best, since that statute expressly covers actions brought "***by the United States***." 28 U.S.C. § 2415(b).

Plaintiffs also cite to 28 U.S.C. § 1360(b). 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 F.3d 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"). Section 1360(b) is also irrelevant for the additional reason that it does not apply to suits involving the possessory rights of individual tribal members because a federal interest in protecting Indian land is not affected or implicated in the first place. *Round Valley*, 907 F. Supp. at 1348-49.

H. 25 C.F.R. § 169.413 Also Does Not Create A Federal-Common-Law Claim For Plaintiffs

In contradiction to *Chase I* and the United States' own non-litigation guidance, Plaintiffs and the United States contend that Plaintiffs can pursue an action pursuant to 25 C.F.R. § 169.413. Op. Br., 16-17; US Br., 23. As this Court recognized, "Section 169.410 specifically addresses grantee holdover situations[.]" *Chase I*, 12 F.4th at 869. "And § 169.410, which the agency has described as 'exclusive,' authorizes ***the BIA*** to 'recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law." *Id*.

at 870 & n.2 (emphasis added) (citing 80 Fed. Reg. at 72,523 ("The final rule addresses holdovers exclusively in FR 169.410… .")).

Similarly, the AS-IA's guidance in this very case required the application of ***only*** Section 169.410; not Section 169.413. 28(j) Letter, Ex. A at 4-5, *Chase I*, No. 20-1747 (8th Cir. Nov. 16, 2020); *see supra* 5-6. And Plaintiff' own counsel, when Acting AS-IA, also issued right-of-way formal guidance that Section 169.413 does not apply to Andeavor's holdover. 81 Fed. Reg. at 19,877-78; App. 67; R. Doc. 28, at 31 (Lawrence Roberts serving as Plaintiffs' counsel); *see supra* 5-6.

Regardless, with respect to Plaintiffs' and the United States' contentions regarding Section 169.413, this Court has already found "no express private right of action in the Indian Right-of-Way Act and the Supreme Court does not look with favor on implied rights of action." *Chase I,* at 877. As the regulation makes clear, any claim (even if one existed) must be brought "under applicable law…"; it creates none. 25 C.F.R. § 169.413. In short, nothing in the Indian Right-of-Way Act creates a federal-common-law (or statutory) claim for Plaintiffs.

I. Plaintiffs' Reliance On Comparative Strength Of Title Is Unsupported And Meritless.

Plaintiffs argue that trust lands are somehow more deserving of federal-common-law protection than aboriginal title because such title is "weaker" than trust status. Op. Br. 20-24. Plaintiffs offer no real support for their supposed comparison of the "strength" of different kinds of property rights, nor do they cite any authority

based on such a comparison or otherwise indicating some comparison-of-strength analysis is relevant to the question of whether Plaintiffs have a federal-common-law claim. Indeed, if one were to conduct a comparison-of-strength analysis, allotments can be condemned; not tribal land. *See, e.g.,* 25 U.S.C. § 357 (providing "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the state or Territory where located in the same manner as land owned in fee may be condemned").

The best Plaintiffs can come up with is to assert that "[b]ecause trust title is stronger than aboriginal title, many cases have recognized that the federal common law provides a right of action for trespass ***on trust lands***." Op. Br., 22 (emphasis in original). Astonishingly, all four cases Plaintiffs cite, *Milner*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994), *Swinomish Indian Tribal Cmty. v. BNSF Railway Co*., 2023 WL 2646470 (W.D. Wash. Mar. 27, 2023), and *Bad River Band v. Enbridge Energy Co.*, 626 F. Supp.3d 1030 (W.D. Wis. 2022), involve claims brought by ***tribes*** or the ***United States for tribes***—hence implicating ***tribal aboriginal rights***. Plaintiffs assertion only proves that a tribe's aboriginal rights is key.

Plaintiffs are reduced to arguing once again that aboriginal title and allotments are indistinguishable. Op. Br. 22-23 (citing, *inter alia*, *Milner*). For all the reasons explained above, however, this argument fails.

More broadly, Plaintiffs' argument is another attempt to divine supposedly key distinctions from cases that nowhere mention them and to ignore the actual distinctions between aboriginal rights and allotments that the Supreme Court has long recognized. Plaintiffs cherry pick quotations from a smattering of treatises and inapplicable statutes referring to "Indian title," "tribal interest," "tribal title," and "trust title," apparently to argue that no real distinctions exist between them. Op. Br. 21-22 (quoting, *inter alia*, Cohen's Handbook §§ 15.04, 15.09). But as noted above, many of those same sources explicitly distinguish tribal rights from individual allottees' rights. *Supra* 27-28 (discussing Cohen's Handbook Ch. 15, 16). And in *Oneida I*, the Supreme Court has already explained why aboriginal title differs from allotments: "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts…." *Oneida I*, 414 U.S. at 676-77. The Supreme Court did not limit its discussion to ***fee*** patents, and trust allotments are issued by patent just as restricted-fee allotments.

Plaintiffs rely on *Ramsey*, 271 U.S. at 470 (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)), as support for their claim that trust allotments "possess[] all the beneficial attributes of aboriginal title," Op. Br. 20. But *Ramsey* treated trust and restricted-fee land as ***legally indistinguishable***, 217 U.S. at 471, which undercuts Plaintiffs' entire project by making Plaintiffs' trust allotments

indistinguishable from the restricted-fee allotments in *Taylor*. *See Oneida I*, 414 U.S. at 676-77.

J. To The Extent They Are Distinct From The Plaintiffs' Arguments, The United States' Additional Arguments Do Not Warrant Relief On Plaintiffs' Behalf.

Despite declining to express its views since *Chase I*'s decision in September 2021, and apparently under recent threat of suit by other allottees,[11] the United States filed an amicus brief to express its litigation position. *See generally* US Br. The United States possibly did so in close coordination with Plaintiffs. Lawrence S. Roberts, one of the attorneys who filed this lawsuit for Plaintiffs, was Acting AS-IA in 2016. *See supra* 36-37. Coordination could explain why the United States' amicus brief—filed one day after Plaintiff's brief—makes the same critical mistakes made by Plaintiffs interpreting that case law,[12] and in multiple instances is in direct contradiction to prior non-litigation guidance from the United States' agencies and Mr. Roberts himself. *Id.*

Chase I mandated a stay to provide the BIA time to address several issues: (1) whether the distinctions drawn in *Oneida I* between tribal aboriginal rights and lands allotted to individual Indians via patents ***applies to a right-of-way holdover***

[11] *See, e.g.*, Op. Br., 47-48 (asserting some other allottees have stated they intend to sue the United States for breach of trust); *see also THPP*, R. Docs. 78, 81, 82, 83.

[12] *Compare, e.g.,* Op. Br. 22 and US Br. 16-21, *with Chase I*, 12 F.4th at 873-74.

situation; (2) whether the BIA takes the position it has the ***exclusive right to seek damages on behalf of the Plaintiffs under 25 C.F.R. § 169.410***; (3) whether the BIA ***has or can develop facts*** that may be relevant to one or more legal issues, such as whether Plaintiffs' rights derive from aboriginal title as opposed to "lands allocated to individual Indians, not tribal rights to land"; and (4) whether there is a common law or statutory claim that Plaintiffs have standing to assert, and if so, ***what source of law defines whether continuing trespass is occurring and what remedies are available***. *Chase I,* 12 F.4th at 874, 876-77. The United States largely fails to address any of the issues this Court identified and instead set forth its litigation positions and erroneous case law interpretation, which deserve no deference. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (declining to grant deference to agency "litigation positions" because "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.") (quotation omitted).

As to the first issue, the United States' brief only mentions "holdover" once in a quote of *Chase I*, and otherwise confirms that Plaintiffs only claim beneficial ownership of allotments, not aboriginal rights. US Br., 6-8. As to the second issue, as discussed *supra* 36-37, this Court has already expressed skepticism of Plaintiffs' position and found no express private right of action in the Indian Right-of-Way Act, and such are not favored. *Chase I,* at 877. The United States confirms that 25 C.F.R.

§ 169.410 applies when a grantee remains in possession after expiration of a right-of-way, and the BIA may take judicial action on behalf of Plaintiffs. US Br., 5. The United States then paraphrases Section 169.413 (governing circumstances where, unlike here, an alleged trespasser never obtains any right-of-way) but does not address its application. US Br., 6, 23.

As to the third issue, the United States has not, and does not claim to have, developed any facts.

As to the fourth issue, the United States makes the same misreading of *Oneida I*, *Oneida II*, and *Wolfchild* that this Court already pointed out in *Chase I*, ignores the distinction of aboriginal title versus allotted lands, and improperly argues (with no support) federal trust title is enough. It then discusses 25 U.S.C. § 345, which is a *jurisdictional* statute that does not provide jurisdiction here, and in any event, does not create any cause of action. *Kishell*, 816 F.2d at 1275; *see* App. 66-67; R. Doc. 28, at 30-31 (Plaintiffs do not seek issuance or recovery of title to an allotment).

Accordingly, the United States' only contribution to this case arises from its legal arguments, which it makes for the first time in this Court. Its arguments are mere litigation positions, which would deserve no deference even if they were asserted by the BIA itself. *Bowen*, 488 U.S. at 212-13.

Moreover, the United States' positions are no more helpful or correct than Plaintiffs' own. As explained above, the United States offers the same arguments

that Plaintiffs make despite this Court's prior skepticism. *Supra* 36-37. Even worse, the United States' litigation position is contrary to prior guidance. *See id.*; *see also Chase I*, at 870; 80 Fed. Reg. at 72,523 ("The final rule addresses holdovers exclusively in FR 169.410….").

K. The Same Principles Support The District Court's Dismissal Of Plaintiffs' "Claim" For Unjust Enrichment.

The District Court also properly dismissed Plaintiffs' "claim" for unjust enrichment.[13] *See* App. 145-46; R. Doc. 139, at 33-34. As pled, that claim depends explicitly and exclusively on Plaintiffs' trespass claim to establish the no-justification element that Plaintiffs assert is essential. *Compare* Op. Br. 41 *with* App. 65; R. Doc. 28, at 29. Plaintiffs cannot even identify any elements of an unjust enrichment claim under federal law, and cite North Dakota law instead. Op. Br. 41-42.

Plaintiffs also fail to cite a single case where a court has a recognized federal-common-law unjust enrichment claim. They rest entirely on a passing statement from *Oneida II* that does not even reference unjust enrichment, but instead an accounting—"Indians have a common-law right of action for an accounting" against

[13] Plaintiffs did not dispute that punitive damages is a remedy rather than a cause of action, such that a "claim" for such damages cannot be maintained on its own. R. Doc. 59, at 67. To the extent Plaintiffs claim that Andeavor has "agree[d]" to anything beyond that simple principle, Op. Br. 10 n.1, Plaintiffs are wrong. *See* App. 82; R. Doc. 86, at 9.

"trespassers on their land." Op. Br. 41 (quoting *Oneida II*, 470 U.S. at 235-46, in turn quoting *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 344 (1934)). But *Oneida II* followed *Oneida I*'s holding that ***tribes asserting aboriginal rights*** could assert a federal-common-law claim for trespass. *Supra* 19-21; App. 132-33; R. Doc. 139, at 20-21; *Chase I*, 12 F.4th at 873-74. *Oneida II* therefore says nothing about whether individual allottees have federal-common-law claims of ***any*** kind regarding allotted lands, since *Oneida I* distinguished that very situation.

Moreover, the "right of action for accounting" simply referred to a *remedy* for a federal-common-law trespass claim. In *Santa Fe*—which *Oneida II* was summarizing—the Court treated an accounting as a ***remedy*** for a federal-common-law trespass claim; it says nothing about whether unjust enrichment can be asserted as a standalone claim ***even where*** aboriginal title is asserted. 314 U.S. at 344.[14] The District Court's decision to treat this "claim" similarly was therefore sound. App. 145-46; R. Doc. 139, at 33-34.

[14] The unjust enrichment claim fails for multiple additional reasons, including, under North Dakota law, (i) unjust enrichment is generally regarded as an independent remedy, not an independent cause of action, *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 154 (N.D. 1985); (ii) unjust enrichment is an element of the constructive trust remedy, not an independent cause of action, *Spagnolia v. Monasky*, 660 N.W.2d 223, 229 (N.D. 2003); (iii) a fundamental requirement for imposition of the constructive trust remedies requires fraud or a pre-existing confidential or fiduciary relationship, which is not alleged here, *id.*; (iv) the existence of the right-of-way agreement defeats unjust enrichment. *See* R. Docs. 75, 86.

II. The District Court Did Not Abuse Its Discretion By Dismissing Plaintiffs' Contract Claim For Failure To Join An Indispensable Party.

There are several unique aspects of this dispute that make Plaintiffs' injection of a breach of contract claim unsustainable. Despite not being a party to the 1993 Right-of-Way contract, Plaintiffs assert a claim for breach by Andeavor (i) in this case to which the United States, the grantor of the right-of-way and trustee, is not a party, App. 37-69; R. Doc. 28; (ii) in this multi-faceted, complex, more-than-ten-year dispute, and more-than-five-year litigation proceedings, involving not only this lawsuit but separate administrative proceedings and a lawsuit arising therefrom, *see* US Br. at 6-9; (iii) wherein the United States has trustee obligations to all of the more than 400 allottees, *id.*; (iv) wherein the United States is already pursuing a trespass claim based on the same alleged conduct at issue here, *id.*; Op. Br., 39-40, and (v) wherein some of the allottees have threatened to sue the United States for up to $187 million in relation to the right-of-way, Op. Br., 47-48; *THPP*, R. Docs. 78, 81, 82, 83.

Any breach of contract claim brought in these circumstances must involve the United States. The regulations promulgated under the Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, grant the BIA exclusive control over any investigation of potential right-of-way violations, and the BIA accordingly makes the decision about how to enforce them. *See, e.g.*, 25 C.F.R. §§ 169.402, 169.410 (prescribing investigative responsibilities only to the BIA and the tribe and enforcement

responsibility only to the BIA). As this Court noted in *Chase I*, the BIA has the responsibility to supervise the right-of-way, and "[i]t is also in the superior position, as the trustee for all Indian landowners, to pursue remedies that in its judgment advance their collective interest—especially where, as here, many of the tracts at issue are highly fractionated, and unanimous agreement may be difficult to attain." 12 F.4th at 877 n.7. However, the United States has not agreed to waive sovereign immunity here, and therefore cannot be joined. *See generally* US Br. There was no abuse of discretion in dismissing the breach of contract claim.

A. The District Court Properly Held That The United States Is Indispensable To Plaintiffs' Claim For Breach Of The 1993 Right-Of-Way Contract.

As with resolving the federal-common-law questions, the District Court relied in part on this Court's reasoning in *Chase I* that "[i]n a breach-of-contract action involving a right-of-way over individual trust allotments, the United States, as grantor, is an indispensable party." 12 F.4th at 878 (citing cases). Granting that *dicta* the "respectful consideration" it warranted, the District Court "agree[d] … that [Plaintiffs'] failure to add the United States [wa]s fatal to [their] breach of easement claim."[15] App. 144; R. Doc. 139, at 32. The United States was indispensable

[15] The breach of contract claim also fails because (i) Plaintiffs lack and have not pleaded privity to the right-of-way agreement, an essential element, and (ii) Plaintiffs lack and have not pleaded third-party beneficiary status as to agreement—their names neither appear in the agreement nor is there a clear and unequivocal expression of the contracting parties' intent to create third-party beneficiaries. *First*

because it—not Plaintiffs—was the grantor of the right-of-way contract Andeavor allegedly breached. App. 144-45; R. Doc. 139, at 32-33.

The District Court also relied on several other precedents. In *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015) (cited at App. 145; R. Doc. 139, at 33), this Court affirmed that the United States was indispensable to claims by allottees alleging that private defendants had tortiously induced them to enter mining leases. This Court reasoned that plaintiffs' claims involved allegations that the United States had breached its fiduciary duties, which issues could not be tried "behind [the United States'] back", and the claims involved indirect attacks on the administrative decisions involved in approving the leases, *id.* at 793, 796-97. It did not matter that any "potential determination about the legality" of the United States' actions would not bind it, nor that the plaintiffs sought only damages against the private defendants. *Id.* at 796.

Similarly, in *Minnesota v. United States*, 305 U.S. 382 (1939) (cited at App. 145; R. Doc. 139, at 33), the Supreme Court held that the United States was

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Fed. Sav. & Loan Ass'n of Bismarck v. Compass Investments, Inc., 342 N.W.2d 214, 218 (N.D. 1983). Even if Plaintiffs' contract claim had been properly pleaded (and it was not), a right created by the Constitution or laws of the United States is not an essential element of the claim, and therefore it arises, if at all, under state law. *Chuska Energy Co. v. Mobil Expl. & Producing N. Am.*, Inc., 854 F.2d 727, 729 (5th Cir. 1988). Accordingly, dismissal of the breach of contract claim can be affirmed on these alternative grounds. *See* R. Doc. 75, 86.

indispensable to a state's condemnation action regarding allotted lands. The Supreme Court reasoned that the United States was "necessarily interested" in the case in "its capacity as trustee" for the allottees. *Id.* at 387-88. But the Court made no mention of the allottees themselves, who were not parties to the suit. *See id.* at 383, 387-88.

The District Court did not abuse its discretion by holding that the United States is an indispensable party to the breach of contract claim. Like *Two Shields*, Plaintiffs' claim for breach involves not only a contract signed by the United States but also administrative decisions and regulations regarding the granting and policing of rights-of-way, all of which will apparently be subject to scrutiny in potential breach-of-trust suits by allottees.[16]

Accordingly, the District Court did not abuse its discretion in holding that the United States is indispensable to Plaintiffs' claims alleging a breach of the 1993 Right-of-Way contract.

[16] These Plaintiffs have also alleged the right-of-way contract was wrongfully issued by the United States. App. 63; R. Doc. 28, at 27. Although it is now law of ***this*** case that the 1993 Right-of-Way was valid, allottees have continued to allege otherwise. *See id.*; *see also THPP*, R. Docs. 16, 17, 17-1, 68, 78, 81 (multiple attempts by multiple factions of dozens of allottees seeking to intervene, including challenge to 1993 contract; motion to intervene currently pending alleging same).

B. Plaintiffs Fail To Show That The United States Is Not A Required Party.

Plaintiffs argue that this case differs from those the District Court cited because they seek only to ***enforce*** a right-of-way agreement. Op. Br. 37-39. But even if Plaintiffs' distinction were sensible, Plaintiffs ignore that the contract at issue here is not simply a private contract that the government rubber-stamped; it is a contract signed by the United States, and the BIA has responsibilities under specific federal statutes and regulations to administer the rights-of-way. *Supra* 45-48.

Absence of the United States would not only abrogate the United States' role both as a trustee and under the right-of-way regulations, but a judgment against Andeavor in the United States' absence also would leave the United States free to pursue the same relief against Andeavor based on the same underlying circumstances. For this reason, trustees are often required parties in actions brought by beneficiaries. In *Havasupai Tribe v. Anasazi Water Company, LLC*, 321 F.R.D. 351 (D. Ariz. 2017), for example, the court held that the United States' absence from a lawsuit between a tribe and a water company over water rights "prevent[ed] the [c]ourt, as a practical matter, from being able to provide complete relief to the parties" because no one even ***argued*** the "United States as trustee would be bound by the outcome." *Id.* at 354. However the case was resolved, therefore, the water company would not escape "the same or a substantially similar lawsuit again, brought by the United States on behalf of the Tribe." *Id.* at 355.

That problem is at its apex where, as here, the United States has already addressed the issue in an administrative proceeding that is also the subject of litigation. *See supra* 45-46. For example, a ruling that would require Andeavor to remove the pipeline would conflict with the BIA's previous determination that Andeavor must keep the pipeline in the ground. *See* App. 145; R. Doc. 139, at 33 (relying on *Two Shields*). *Two Shields* and *Minnesota* make clear that the United States, and not Plaintiffs, is indispensable to answering these questions.

Plaintiffs again rely on *Bird Bear* in which, they inaccurately claim, "the alleged trespassers contended that the United States was an indispensable party." Op. Br. 37. But in *Bird Bear*, it was the ***appellants***—the allottees themselves—who attempted to raise the issue in order to argue that the District Court should not have reached the merits of their claim. 513 F.2d at 191 n.6. Moreover, this Court noted that the issue had not even been properly raised in the District Court. *Id.*

Plaintiffs' other cases are inapposite. *Davilla v. Enable Midstream Partners, L.P.*, 2016 WL 4440240, at *2 (W.D. Okla. Aug. 19, 2016) (cited at Op. Br. 37), addressed only whether the United States was an indispensable party for a ***trespass*** claim and therefore did not address whether it is an indispensable party in a claim regarding a contract the United States signed. *Lyon v. Gila River Indian Community*, 626 F.3d 1059 (9th Cir. 2010), likewise involved no contract claim, and the Ninth Circuit followed its "somewhat incongruous" circuit precedent to hold that the

United States is not indispensable when an Indian "***tribe*** has filed the claim to protect its own interest" even though the United States would be indispensable if that same tribe were a defendant. *Id.* at 1069-70 (emphasis original). And in *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953), the court—after noting that the question of indispensability had not even been argued—held only that the United States was not indispensable in a claim asserting that a mineral lessee lacked the power to sublease its interests, since neither success nor failure would impair any governmental interest. *Id.* at 262.

Plaintiffs' reliance on *Poafpybitty*, Op. Br. 37-38, is misplaced. While the Supreme Court did hold that the plaintiffs in that case could maintain a claim for ***their own*** oil and gas leases without joining the United States, it nowhere held that the United States is categorically irrelevant to any contract claim asserted by allottees, particularly when, as here, the United States was the party to the contract.

To the contrary, the *Poafpybitty* Court examined the specific regulatory scheme at issue to decide whether the suit could proceed without the United States. The regulations governing the leases at issue 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* 390 U.S. at 372 ("Although the approval of the Secretary is required, he is not the lessor and cannot grant the lease on his own authority.").

By contrast, here the United States is the grantor of rights-of-way, *see* 25 U.S.C. § 323, and Plaintiffs challenge regulatory requirements allegedly applicable to the right-of-way, which gives the United States a greater, more direct interest in the subject matter of this suit. *See* App. 63-64; R. Doc. 28, at 27-28. Further, the regulations at issue in *Poafpybitty* did not specifically provide that the United States would investigate alleged breaches and decide how to proceed on the allottees' behalf. In fact, with respect to the particular breach alleged in *Poafpybitty*—wasting gas—the United States' only apparent 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. Here, by contrast, the United States has a specific, regulatory role to assess and address holdover situations for the allottees. *E.g.*, 25 C.F.R. § 169.410.

C. The United States Cannot Be Joined.

Nor can the United States be joined. It is well-established that the United States enjoys immunity from suit except where it has waived that immunity. *E.g.*, *Two Shields*, 790 F.3d at 797. And here the United States has not.

Plaintiffs cite only *United States v. Baden Plaza Associates*, 826 F. Supp. 294 (E.D. Mo. 1993) (cited at Op. Br. 39-40), to claim that the United States waived its sovereign immunity by asserting counterclaims in *THPP*. But *Baden Plaza* held only that the United States "waives its sovereign immunity as to ***compulsory counterclaims***," and it ***rejected*** the alleged waiver of sovereign immunity. *Id.* at 298

(emphasis added). Other courts have made clear that a waiver of sovereign immunity arising from filing a claim is "not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). As an example, a case initiated by an Indian tribe to cancel a lease did not waive its sovereign immunity with respect to a suit brought by a party to that lease. *Id.* (discussing *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987)).

Here, the United States has not asserted any contract claims in the separate lawsuit, *THPP*. *THPP*, R. Doc. 28, at 27-29. The United States' decision to assert counterclaims for trespass and ejectment in that lawsuit do not waive its sovereign immunity for breach in this lawsuit. *McClendon*, 885 F.2d at 630.

Tellingly, the United States itself does not admit it could be joined, nor has it waived immunity. *See* US Br. 25-26. Surely the United States would simply have agreed with Plaintiffs if it thought its immunity were already waived. Instead, it argues only that it is not a required party. *Id.* And Plaintiffs' argument that the United States must have waived its immunity because it did not oppose consolidation, Op. Br. 40, is incorrect, since consolidation would not make the United States a party to this case, as Plaintiffs themselves admitted in the District Court. App. 97; R. Doc. 111, at 2.

D. This Case Cannot Justly Continue In The United States' Absence.

Finally, Plaintiffs cite a smattering of cases they claim demonstrate the United States is not an indispensable party here, Op. Br. 40-41, but the cases merely reject a proposition Andeavor has never argued: that the United States is ***automatically*** an indispensable party to ***every*** suit involving Indian trust lands ***simply by virtue of its status as trustee***. Moreover, none involved a factual scenario similar to this case. *See supra* 45.

For the various reasons set forth above, *e.g., id.*, the United States has an interest in this lawsuit that renders it a necessary and indispensable party. The District Court did not abuse its discretion in so holding.

III. In The Alternative, Dismissal Of The Plaintiffs' Claims Should Be Affirmed Under *Heckman*, Because The United States Has Asserted A Claim For Trespass In *THPP* On Behalf Of The Allottees.

In the alternative, the District Court did not err by dismissing all of Plaintiffs' claims because their interests (and those of other allottees) are now being adequately protected by the United States acting on their behalf. The District Court noted this issue, App. 148 n.10; R. Doc. 139, at 36 n.10 (discussing *Heckman v. United States*, 224 U.S. 413 (1912)), and it offers an alternative ground to affirm the result below.[17]

[17] The District Court notes the parties did not brief *Heckman*'s instruction for the motion to dismiss. App. 148 n.10; R. Doc. 139, at 36 n.10. When Andeavor filed its motion to dismiss (R. Doc. 73), the United States had not yet filed its counterclaim, so *Heckman* was not yet implicated. *THPP*, R. Doc. 28. The later supplemental dismissal briefing allowed by the Court was limited to the issue of

In *Heckman*, the "United States, by its Attorney General, upon the recommendation of the Secretary of the Interior" bought suit to cancel conveyances executed by Indian allottees, on grounds that the conveyances were in violation of restrictions on alienation and therefore without requisite authority. *Id.* at 415. The grantors of the conveyances—the individual Indians themselves—were not made parties to the suit. *Id.* at 416, 426. In discussing whether it was appropriate for the United States to proceed on behalf of the allottees without the allottees as parties to the suits, the Supreme Court held that "there can be no more complete representation than that on the part of the United States in acting on behalf of these dependents…. Its efficacy does not depend upon the Indians' acquiescence." *Id.* at 444-45. The allottees themselves were not necessary parties, nor would they have been allowed to take contrary positions to the government in its own case. *Id.* at 445. Accordingly, "when the United States itself undertakes to represent the allottees of lands under restriction… ***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 (emphasis added).

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whether Plaintiffs may assert a federal-common-law trespass claim. App. 112; R. Doc. 130, at 2. However, Andeavor did brief *Heckman* in connection with Plaintiff's motion to intervene immediately upon the United States filing its counterclaim, R. Docs. 116, 118, and the parties have briefed it here. Op. Br. 18.

Here, Plaintiffs themselves assert that "the United States has filed in [*THPP*] a trespass claim based on the same conduct that underlies this breach-of-easement claim." Op. Br., 40. Plaintiffs also argued that the United States' counterclaims "are [m]terially [i]ndistinguishable" and raise "identical" questions of law and fact. App. 102-04; R. Doc. 115, at 1-3. While Plaintiffs claimed this identity required the District Court to consolidate the two cases or allow their intervention in *THPP*—which arguments fail, *infra* 57-64—in fact it merely provides additional, independent ground to dismiss Plaintiffs' suit. The United States has undertaken representation of ***all*** allottees, precluding prosecution of any other suit by the Plaintiffs for a similar purpose. *Heckman*, 224 U.S. at 446.

This outcome is confirmed by applicable regulations. Those regulations reserve for the BIA what decisions to make, what actions to take, and what remedies to seek regarding the the right-of-way. *See* 25 C.F.R. § 169.410 (in a holdover situation, the BIA "may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law…."). This Court has agreed. *Chase I*, 12 F.4th at 876 (The BIA "grants and administers rights-of-way over lands held in trust, and it protects those lands… from grantees that violate their right-of-way, including holdovers.") (citing 25 C.F.R. § 169.410); *see also id.* at 877 n.7 (noting the BIA is "in the superior position, as the trustee for all Indian landowners, to pursue remedies that in its judgment advance their

collective interest—especially where, as here, many of the tracts at issue are highly fractionated, and unanimous agreement may be difficult to attain.") .

Moreover, as trustee the United States is the proper party to assert claims relating to allotments. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465 (1980) (trustees are real party in interest and control litigation, beneficiaries cannot control disposition of litigation or intervene in trust affairs). Even if Plaintiffs were correct that they have their own federal-common-law causes of action (and they are not), their attempt to assert them must give way to the United States' decision to assert them on Plaintiffs' behalf and to control the litigation. *Heckman*, 224 U.S. at 445.

Under *Heckman*, the United States' decision as trustee to assert claims on behalf of ***all*** of the affected allottees precludes the assertion of those same or similar claims for a similar purpose by ***some*** allottees on their own behalf. Accordingly, even if Plaintiffs had a federal-common-law claim to bring (and they do not), they are ***now*** precluded from doing so by the United States' actions on their behalf.

IV. The District Court Did Not Abuse Its Discretion By Denying Intervention Or Consolidation.

A. The District Court Properly Denied Intervention Of Right.

As a threshold matter, Plaintiffs waived all the arguments regarding intervention of right that they now assert. Plaintiffs never filed any motion to intervene in *THPP* itself, and the "motion to intervene" they seek to litigate here, *see* Op. Br. 43, was contained in a single, conclusory footnote that did not cite any of

the cases or raise any of the points Plaintiffs now press. *See* App. 98 n.1; R. Doc. 111, at 3 n.1; *see also* App. 146 n.8; R. Doc. 139, at 34 n.8; App. 102-09; R. Doc. 115, 1-8. Accordingly, this Court need not address Plaintiffs' contentions at all. *E.g.*, *Int'l Bhd. Of Elec. Workers v. Hope Elec. Corp.*, 380 F.3d 1084, 1096-97 (8th Cir. 2004) ("We ordinarily do not address issues that a party raises for the first time on appeal and failed to raise in the district court" and limiting review to issues raised "both on appeal ***and*** before the district court") (emphasis added).

In any event, the District Court did not err in holding that Plaintiffs cannot intervene of right in *THPP*. It concluded Plaintiffs failed to prove that the United States does not adequately represent their interests, App. 147-48; R. Doc. 139, at 35-36, relying on *Heckman*'s rationale that "there can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, … Its efficacy does not depend upon the Indians' acquiescence." *Id*. at 444; *see also supra* 54-57 (discussing case). Plaintiffs failed to establish that their interests "actually differ from or conflict with the government's interests" or that the United States "engaged in some 'clear dereliction of duty," so they failed to establish any inadequacy of representation and therefore failed to establish any right to intervene in *THPP*. App. 148; R. Doc. 139, at 36 (quoting *Barnett*, 317 F.3d at 786); *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 922 (8th Cir. 2015)). The United States did not seek to join Plaintiffs' case to co-litigate the issues with

them. Moreover, the United States itself agrees that Plaintiffs cannot intervene of right, and it apparently agrees that *Heckman* controls. US Br. 26; *THPP*, R. Doc. 32.

On appeal, Plaintiffs claim that no presumption of adequacy should apply either because Plaintiffs' interests are "narrower" than the United States' or because the United States "must satisfy competing statutory requirements." Op. Br. 45-48. Yet the United States' counterclaims in *THPP* seek relief specifically for the benefit of Plaintiffs and other allottees. *THPP*, R. Doc. 28, at 22-23, 28-30. Plaintiffs extensively argued that the United States' counterclaims are asserted "on the same federal common law bases" and seek "the same remedies" as Plaintiffs' claims here. App. 148; R. Doc. 139, at 36 (citing App. 102; R. Doc. 115, at 1); *see also* App. 102-06; R. Doc. 115, at 1-5. And, the United States' trespass claim in [*THPP*] is "based on the same conduct that underlies this breach-of-easement claim." Op. Br., 40. Plaintiffs do not explain how their interests could be ***both*** "narrower" than ***and*** "identical" to the United States' counterclaims asserted on their behalf, just as they fail to explain how the District Court erred by accepting their own representations.

Second, Plaintiffs fail to explain how any "competing statutory requirements" undercut the presumption that the United States adequately represents their interests. Op. Br. 46-47. Plaintiffs assert the United States has both a "separate trust duty to the Tribe" and an "obligat[ion] to defend claims brought against itself." *Id.* But Plaintiffs nowhere explain how tribal interests are at stake, and no tribe has ever

been a party to this case or *THPP*. Plaintiffs' barely-veiled threat of a breach-of-trust suit against the United States makes explicit the United States' interest in securing the maximum possible recovery on its counterclaims asserted on their behalf. *Cf.* Op. Br. 47-48. To the extent the Court even reaches these arguments, therefore, they merely confirm that Plaintiffs' interests are adequately represented by the United States acting on their behalf.

Plaintiffs assert that the United States may not "make all of [their] arguments" and that it encouraged Plaintiffs to settle their claims in a way that would "absolve [the United States] of any potential liability for breach of trust." Op. Br. 48-49. But this Court has already held that even a "potential conflict of interest" does not suffice to render the United States an inadequate representative of Indian interests. *Barnett*, 317 F.3d at 786. The United States proposed a settlement that was ***conditioned on Plaintiffs' acceptance***.[18] And now that Plaintiffs have declined the settlement and threatened a breach-of-trust claim, the United States has all the more incentive to maximize Plaintiffs' recovery.

Nor do Plaintiffs meaningfully address this Court's own cases that the District Court held were controlling. *Compare* Op. Br. 45-49 *with* App. 148; R. Doc. 139, at 36 (citing *Barnett*, 317 F.3d at 786; *Stenehjem*, 787 F.3d at 922). In both *Barnett*

[18] *See, e.g., THPP*, R. Doc. 82, at 2-3.

and *Stenehjem*, this Court affirmed that the United States adequately represented putative intervenors' interests despite allegations that those were "narrower" or "in conflict with" the intervenors' own. No "clear dereliction of duty" arose from the United States' defense of public lands. *Compare* Op. Br. 49 *with Stenehjem*, 787 F.3d at 922.[19] The District Court did not err by denying Plaintiff's request for intervention of right.

B. The District Court Did Not Abuse Its Discretion By Denying Permissive Intervention.

Permissive intervention falls within a district court's ample discretion, and a district court may deny permissive intervention if it finds, *inter alia*, that a party to the case will adequately represent the putative intervenors' interest or that such intervention will "unduly delay or prejudice the adjudication of the original parties' rights." App. 149; R. Doc. 139, at 37 (citing *Barnett*, 317 F.3d ad 787 and quoting Fed. R. Civ. B. 24(b)(3)). And the District Court explained its reasons for denying intervention: Plaintiffs lack federal-common-law causes of action that the United States may have a "distinct" right to assert on their behalf; intervention would inject additional issues and extensive additional briefing into *THPP*, "an already prolonged

[19] In contrast to these directly-applicable cases, Plaintiffs cite only four that found the United States inadequate to protect tribal interests, and none involve a situation where the United States has brought counterclaims directly on allottees' behalf as trustee. Op. Br. 46-49. Plaintiff also did not cite these cases (or any others) in their argument to the District Court.

case ripe for decision"; *THPP* involves administrative claims that Plaintiffs "expressed minor, if any interest in"; and the United States adequately represents Plaintiffs' interests in any event. App. 149-50; R. Doc. 139, at 37-38. These considerations amply supported the denial of permissive intervention.

Plaintiffs nowhere address the inefficiencies the District Court identified, and instead argue (paradoxically) that permissive intervention ***must*** be allowed under *Arizona v. California*, 460 U.S. 605, 614-15 (1983). Op. Br. 49-51. But *Arizona* is no help, since that case involved an original proceeding in the Supreme Court in which the Federal Rules "are only a guide" and in which the Supreme Court itself would decide the question of intervention. 460 U.S. at 608, 613-15. *Arizona* therefore does not address whether a district court abuses its discretion where, as here, it is free to weigh the benefits and burdens of intervention in the first instance.

Nor do Plaintiffs' other arguments suffice to establish any abuse of discretion. They argue that even if the District Court is correct that they lack any federal-common-law claims, Plaintiffs still share a "defense" at issue in *THPP*. Op. Br. 50-51. But Plaintiffs have never identified any such defense, here or below. *Id.*; App. 97-98; R. Doc. 111, at 2-3; App. 102-05; R. Doc. 115, at 1-4. Plaintiffs note the stay of the United States' severed counterclaims in *THPP*, Op. Br. 51, but that underscores the lack of any real overlap between Plaintiffs' tort claims and the United States' defense of its administrative proceedings. *Supra* 61-62. Finally,

Plaintiffs repeat their arguments about the United States' adequacy, Op. Br. 51, which is incorrect for all the reasons Andeavor has already explained, *supra* 58-61, and which the District Court noted was only one factor supporting its decision. App. 149-50; R. Doc. 139, at 37-38.

C. The District Court Properly Denied Consolidation.

Finally, the District Court did not err by denying consolidation. Plaintiffs take the District Court to task for "refusing to address" that issue and thereby "thwart[ing] meaningful appellate review." Op. Br. 52-53. But the District Court's denial of consolidation resulted directly from the rest of its opinion. As Plaintiffs recognized below, consolidation "does not merge [two] suits into a single cause, or change the rights of th[e] parties, or make those who are parties in one suit parties in another." App. 97; R. Doc. 111, at 2 (quoting *Enter. Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994)). Accordingly, Plaintiffs' case could not be consolidated with the United States' because, as the District Court held, it failed as a matter of law. App. 143, 146; R. Doc. 139, at 31, 34. There was no case left to consolidate. Indeed, the District Court noted this problem in denying intervention. App. 149; R. Doc. 139, at 37.

Nor would consolidation make sense even were the Court to reverse any part of the District Court's dismissal. The District Court exercised its discretion to sever and stay the United States' counterclaims in *THPP* pending the outcome of the

administrative claims in that case. *THPP*, R. Doc. 71. Plaintiffs offer no grounds to consolidate their tort claims with the ongoing administrative proceeding with which they share no overlap. And to extent Plaintiffs wish to consolidate their claims with the United States' claims on their behalf, such a consolidation would be improper, including because *Heckman* forecloses Plaintiffs' claims. *Supra* 54-57.

At bottom, the District Court did not abuse its discretion by declining to combine this case with *THPP*. The United States can adequately protect Plaintiffs' interests, and Plaintiffs have never offered any substantial ground to hold otherwise.

CONCLUSION

This Court should affirm the District Court's judgment, and grant Andeavor all further relief to which it may be entitled at law or equity.

Dated: March 28, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's March 20, 2024 Order (granting leave to file a brief not in excess of 16,000 words) because this brief contains 15,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman typeface.

Dated: March 28, 2024

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CIRCUIT RULE 28A(h) CERTIFICATION

I hereby certify that I have filed electronically, pursuant to 8th Cir. R. 28A(h), a version of the brief in printed PDF format, and that the brief has been scanned for viruses and is virus-free.

Dated: March 28, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2024, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Eighth Circuit using the Court's CM/ECF system. I further certify that I served the following counsel of record for Appellants via the Court's CM/ECF system:

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