**No. 23-3019**

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**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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JOANN CHASE, *et al.*,
*Plaintiffs/Appellants*,

v.

ANDEAVOR LOGISTICS, L.P., *et al.*,
*Defendants/Appellees*.

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Appeal from the United States District Court
for the District of North Dakota
No. 1:19-cv-143-DMT (Hon. Daniel N. Traynor)

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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## GLOSSARY

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| App. | Appellants' Appendix (Jan. 8, 2023) |
| BIA | Bureau of Indian Affairs |
| IRA | Indian Reorganization Act |
| R. | District Court Record (ECF Document Number) |

## STATEMENT OF INTEREST

The Department of the Interior's Bureau of Indian Affairs ("BIA") is responsible for carrying out federal trust authorities with respect to reservations, allotments, and other lands that the United States holds in trust for Indian tribes or individual Indians. These authorities include approving leases and granting rights-of-way with the consent of the Indian owners. The Supreme Court has long held that tribes and individual Indians each may bring suits to enforce their own possessory interests in trust lands, including in relation to leases and use agreements approved by BIA. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). This settled rule promotes tribal sovereignty and the private property rights of individual Indians, while relieving BIA of the "almost staggering problem" of having to unilaterally enforce Indian possessory rights with respect to "thousands upon thousands" of Indian allotments. *Id.* (quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952)).

In conflict with this longstanding rule, the district court held that JoAnn Chase et al. ("Chase Allottees") could not bring their own suit for damages and injunctive relief against a private oil company that continued to operate an oil pipeline across their allotments on the Fort Berthold Indian Reservation after the company's right-of-way expired. The district court's decision misconstrued Supreme Court precedent and precedent of this Court. As this Court determined in

the first appeal in this case, the Chase Allottees' suit may be *stayed* pending the resolution of enforcement actions by the United States. *Chase v. Endeavor Logistics LP*, 12 F.4th 864, 877-78 (8th Cir. 2021) ("*Chase I*"). But the district court erred in construing *Chase I* as counseling the *dismissal* of the Chase Allottees' claims. The United States submits this amicus brief under Fed. R. App. P. 29(a)(2) in support of the Appellants' request for reversal of the district court's judgment.

## STATEMENT OF THE CASE

### A. Fort Berthold Reservation and Allotments

In 1851, the United States entered the Treaty of Fort Laramie, which broadly delineated the territories of several Indian tribes, including the Mandan, Hidatsa, and Arikara Tribes, now organized as the "Three Affiliated Tribes." *See* Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749 (1851); *see also Montana v. United States*, 450 U.S. 544, 547-48 (1981); *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 835 (8th Cir. 2023). An 1870 executive order established the Fort Berthold Reservation (the "Reservation") for the Three Affiliated Tribes. *See* 1 C. Kappler, Indian Affairs, Laws and Treaties 883 (1904). The present Reservation boundaries were established in 1891, via legislation that ratified a land cession agreement. *See* Act of Mar. 3, 1891, Art. I, 26 Stat. 1032; *see also City of New Town v. United States*, 454 F.2d 121, 122 (8th Cir. 1972).

The 1891 Act directed the Secretary of the Interior to allot Reservation lands to individual Indians for homesteading and agricultural purposes. Act of Mar. 3, 1891, Art. III-IV, 26 Stat. 1033; *see also Chase I*, 12 F.4th at 873. The allotments were to be held by the United States "for a period of twenty-five years in trust," and thereafter patented to the named beneficiary or heir in "fee," free from all encumbrances. Act of Mar. 3, 1891, Art. III, 26 Stat. 1033. In 1910, Congress authorized the Secretary to make additional allotments for agriculture and grazing. Act of June 1, 1910, c. 264, § 1, 36 Stat. 455. These allotment provisions mirrored the terms of the "Dawes Act" or General Allotment Act of 1887. *See* 25 U.S.C. § 348. The objective of these statutes was to gradually "extinguish tribal sovereignty, erase reservation boundaries, and thereby compel assimilation of Indians into society at large." *Chase I*, 12 F.4th at 872 (citing *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992)).

In 1934, however, Congress enacted the Indian Reorganization Act ("IRA"), ending the "allotment era" and returning to a policy of promoting "tribal self-determination and self-governance." *Id*. at 873. The IRA halted the allotment of reservation lands, 25 U.S.C. § 5101, and "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *Chase I*, 12 F.4th at 873 (quoting *Yakima,* 502 U.S. at 255); *see also* 25

U.S.C. §§ 5102, 5126. But the IRA did not affect land already patented in fee. *Chase I*, 12 F.4th at 873. Nor did the IRA repeal the Secretary's authority, upon the request of any allottee or heir, to lift trust restrictions on allotted lands and convert such lands to fee ownership. 25 U.S.C. § 392.

As a result, the lands within many reservations are now in "checkerboard" ownership, with variously alternating tracts of tribal trust lands (not allotted), Indian allotments (not fee patented), and fee lands. *See Chase I*, 12 F.4th at 873. Over time, due to death and inheritance, many of the allotted lands have become "highly fractionated" in ownership. *Id*. at 877 n.7. These ownership patterns complicate jurisdiction and governance in Indian country, as well as the acquisition of rights-of-way for electric transmission lines and other public utilities. *Id*. at 873.

### B. Indian Right-of-Way Act and Regulations

In 1948, Congress enacted the "Indian Right-of-Way Act" to facilitate the siting of rights-of-way across Indian lands. *Chase I*, 12 F.4th at 873. The Act authorizes the Secretary of the Interior to grant "rights-of-way for all purposes" across lands "held in trust by the United States for individual Indians or Indian tribes." 25 U.S.C. § 323. As to lands held in trust for an organized tribe, the Secretary must first acquire the consent of tribal officials. *Id*. § 324. As to lands held for individual Indians, the Secretary may grant rights-of-way without acquiring the consent of all owners, but only if specified conditions are met. *Id*.

These conditions include when a "majority of the interests" consent, or if the Secretary finds that it would be "impracticable" to obtain consent due to the large number of owners, and that the grant "will cause no substantial injury to the land or [to] any owner thereof." *Id*. The Secretary must also ensure the "payment of . . . compensation" for Indian owners that the Secretary determines "to be just." *Id*. § 325. And the Secretary may "prescribe any necessary regulations" to administer the statute. *Id*. § 328.

BIA has promulgated implementing regulations, *see* 25 C.F.R. Part 169, including rules on obtaining Indian consent, *id.* § 169.107. Any applicant seeking a right-of-way across allotted lands must notify all individual Indian landowners and obtain and document the required written consent. *Id*. §§ 169.107(b), 169.123(b).

The regulations also include provisions on "compliance and enforcement." *Id*. § 169.401 et seq. Under these rules, when a grantee "remains in possession after the expiration, termination, or cancellation of a right-of-way," BIA "may treat . . . unauthorized possession as a trespass under applicable law." *Id*. § 169.410. BIA "will communicate with the Indian landowners." *Id.* "[U]nless the parties notify" BIA, in writing, that "they are engaged in good-faith negotiations to renew or obtain a new right-of-way," BIA "may take action to recover possession" on behalf of the Indian owners and may "pursue additional remedies available under

applicable law, such as a forcible entry and detainer action." *Id*. The regulations further provide that whenever an individual or entity "takes possession or uses Indian land" without authorization, BIA may act "to recover possession" on behalf of the Indian owners and may "pursue additional remedies available under applicable law." *Id*. § 169.413.

Lastly, and importantly, the regulations specify that the "Indian landowners may pursue any available remedies under applicable law, including applicable tribal law." *Id*.

### C. Right-of-Way Grant and Expiration

In 1953, pursuant to the authority provided under the Indian Right-of-Way Act, and with the requisite consent of affected Indian owners, Interior granted a right-of-way to Andeavor's predecessor, authorizing it to construct and operate an oil pipeline across the southwest corner of the Fort Berthold Reservation for a period of twenty years, subject to conditions specified in a right-of-way agreement. *Chase I*, 12 F.4th at 867. The pipeline crosses 45 tracts of land: 10 held in trust for the Three Affiliated Tribes and 35 held as allotments by more than 400 individual Indians, including the approximately 48 Chase Allottees. *See* Defendant's Answer and Counterclaim, *Tesoro High Plains Pipeline Co. v. United States*, D.N.D. No. 1:21-cv-00090-DMT ("*Tesoro*"), ECF No. 28 at 26-27 (Feb. 8, 2022). In 1973, Interior renewed the right-of-way agreement for another twenty years. *Chase I*, 12

F.4th at 867. In 1993, the right-of-way expired without agreement on renewal, but in 1995, Interior renewed the right-of-way agreement *nunc pro tunc* for another twenty-year period starting in 1993. *Id*.

The right-of-way expired for a second time in 2013. *Id.* Andeavor reached a renewal agreement with the Three Affiliated Tribes in 2017 and thereafter sought to reach a renewal agreement with allottees. *Id.* On April 10, 2018, BIA asked the allottees to confirm that good faith negotiations were ongoing. *Id*. Many so confirmed, but Andeavor was ultimately unable to reach a renewal agreement with a sufficient number of allottees. *Id*.

### D. Prior Proceedings

#### *1. Chase Allottees' Suit*

The Chase Allottees are members of the Three Affiliated Tribes who each claim beneficial ownership of some of the Reservation allotments crossed by Andeavor's pipeline. *Chase I*, 12 F.4th at 866-67. They filed this suit on their own behalves and as putative class representatives of similarly situated allottees. *Id.* at 867. They seek damages and injunctive relief for Andeavor's trespass on allotted lands, and for Andeavor's failure to remove the pipeline and restore the affected lands upon the termination of the agreement. *Id.* Andeavor moved to dismiss, arguing that the Chase Allottees failed to state a cause of action and failed

to exhaust administrative remedies. *See id.* at 868. The district court initially granted Andeavor's motion on the latter ground. *Id.*

*2. Chase I*

On appeal, this Court reversed. *Id.* The Court held that the Chase Allottees had no obligation to exhaust administrative remedies because the Indian Right-of-Way Act and implementing regulations do not authorize BIA to grant the trespass damages and other relief that the Chase Allottees seek in this suit. *Id*. at 870. This Court observed that BIA's authority under the regulations "appear[s]" to be limited to imposing specified "administrative sanctions for a holdover grantee's trespass," such as ordering the cessation of operations, and "to seek judicial remedies on behalf of individual Indian landowners." *Id.*

This Court further observed, however, that the BIA has "primary jurisdiction" to resolve issues critical to the Chase Allottees' claims, *id.* at 870-77, and that "BIA may take the position that it has the exclusive right to seek damages on behalf of [all allottees] under 25 C.F.R. § 169.410." *Id.* at 876-77. Accordingly, this Court directed the district court to "stay" the Chase Allottees' suit "for a reasonable period of time to see what action the agency may take," and to then "lift the stay, or further suspend the judicial process depending on what action, if any, the agency takes." *Id.* at 877.

*3. BIA Action*

BIA already had taken administrative action prior to the Court's decision in *Chase I*. Specifically, the BIA Regional Director had sent a formal notice advising Andeavor that it was in trespass on the allotments and two orders directing Andeavor to pay damages. *Id.* at 875. Andeavor appealed both orders to the Interior Board of Indian Appeals. *Id*. In accordance with Interior regulations, *see* 25 C.F.R. § 2.4(c) (1989); *id.* § 2.508 (2023) (revision), the Assistant Secretary – Indian Affairs assumed jurisdiction over both appeals. *Chase I*, 12 F.4th at 875. In January 2021, the Assistant Secretary affirmed the second order, which had assessed damages of just under $4 million. *Id.* But in March 2021, the then-Acting Secretary of the Interior vacated the Assistant Secretary's order and prior related decisions and remanded for further proceedings. *Id.* at 875-76.

Andeavor sued the United States, seeking to "set aside the vacatur," *i.e*., to reinstate the roughly $4 million damages order and to enjoin BIA from taking any further action to remedy the trespass. *Id.* at 876 (citing Complaint, *Tesoro*, ECF No. 1 (Apr. 23, 2021)). That suit was assigned to the same district judge who had dismissed the Chase Allottees' suit. Shortly thereafter, this Court decided *Chase I*, reversing the district court's judgment of dismissal and directing the district court to instead hold the Chase Allottees' suit in abeyance pending further action by BIA. *Id.* at 877-78.

Consistent with this Court's opinion, BIA then elected to "seek judicial remedies on behalf of [the] individual Indian landowners." *See id.* at 870. Specifically, acting as trustee for all the individual Indian owners, the United States filed a counterclaim in *Tesoro*, asking the district court to award damages for Andeavor's trespass and to direct pipeline removal in the event Andeavor is unable to reach agreement on renewal with the affected Indian owners. *See* Defendant's Answer and Counterclaim, *Tesoro*, ECF No. 28 (Feb. 8, 2022).

*4. Decision Below*

After this Court's reversal and remand in *Chase I*, the district court issued an order directing the Chase Allottees and Andeavor to show cause why the Chase Allottees' suit should not be joined with *Tesoro*. R. Doc. 105; App. 92-95. The Chase Allottees filed a response supporting consolidation, which they stated would function like a grant of a motion by the Chase Allottees to intervene in *Tesoro*. R. Doc. 111; App. 98 n.1. Andeavor opposed consolidation and intervention. R. Doc. 112.

On August 8, 2023, the district court issued an opinion and order granting Andeavor's motion to dismiss. R. 139; App. 113, 150. Relying heavily on dicta from *Chase I* —which addressed this Court's earlier decision in *Wolfchild v. Redwood County*, 824 F.3d 761 (8th Cir. 2016)—the district court held that: (1) the Chase Allottees lack a federal common law cause of action to enforce a trespass on

the allotments, (2) the Chase Allottees may not enforce the right-of-way agreement because they are not parties to the agreement; and (3) the Chase Allottees' remaining claims are derivative and cannot stand alone. R. 139 at 8-34; App. 120-146. In addition, the district court held that the Chase Allottees may not intervene in *Tesoro* either as of right or permissively. R. 139 at 34-38; App. 146-50.

## ARGUMENT

### I. The Chase Allottees may bring a common law trespass claim in federal court to protect their possessory rights.

For three reasons, the district court erred in dismissing the Chase Allottees' trespass claim: (1) the allottees' possessory interests are governed by federal law; (2) federal common law supplies a cause of action for interference with rights to possess Indian trust land; and (3) the allottees may pursue their own trespass claims.

#### A. Federal law governs the Chase Allottees' possessory interests.

In our federal system, real property rights generally are determined by the state with territorial jurisdiction over the land. *See Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law.") However, the Property Clause "gives Congress plenary power to legislate the use of the federal land." *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). And

Congress has "plenary and exclusive" jurisdiction over Indian affairs. *Haaland v. Brackeen*, 599 U.S. 255, 272-273 (2023). Accordingly, "Indian territories" historically have been "deemed beyond the legislative and judicial jurisdiction of the state governments." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, PC*, 476 U.S. 877, 879 (1986).

This rule is reflected in the 1889 Act that enabled North Dakota statehood. *Id*. Until federal title is "extinguished by the United States," all "Indian lands" in North Dakota "shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of Feb. 22, 1889, c. 180, 25 Stat. 676, 677. Accordingly, as this Court has confirmed, Indian trust allotments within the borders of Indian reservations remain part of the reservations for purposes of tribal and federal territorial jurisdiction. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1017 (8th Cir. 2010).

Because the United States retains "absolute jurisdiction and control" over Indian allotments as to which federal title has not been extinguished, *see* Act of Feb. 22, 1889, c. 180, 25 Stat. 677, federal law—established by treaty, statutes, and common law—governs the right to possess the allotted lands. North Dakota courts have no more power to develop common-law rules to govern trespass on Indian lands than the North Dakota legislature possesses to regulate these lands by statute. *See Oneida Indian Nation of N.Y. State v. Oneida County*, 414 U.S. 661, 674

(1974) ("*Oneida I*") (noting that state statutes and state "decisional law" do not govern Indian territory in the absence of a federal statute so providing).

Accordingly, as this Court has already observed, any claim for trespass on the allotments in this case "is a claim under federal law," leaving "no serious question" about the district court's subject matter jurisdiction. *Chase I*, 12 F.4th at 871; *see also* 28 U.S.C. § 1331 (granting district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

### B. There is a federal common law cause of action for trespass on Indian trust lands.

#### *1. Oneida I and Oneida II control.*

The mere existence of federal jurisdiction does not necessarily mean that the Chase Allottees possess a cause of action for trespass. *Chase I*, 12 F.4th at 871. This is so because the "vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). Like real property law, *see Barnhill*, 503 U.S. at 398, common law generally is the province of state courts. *Texas Industries*, 451 U.S. at 640.

But this case arises in one of the "narrow areas" where "federal common law exists." *Id.* at 641. "[O]ur federal system does not permit [a] controversy to be resolved under state law, [where] the authority and duties of the United States as sovereign are intimately involved or [where] the interstate or international nature

of the controversy makes it inappropriate for state law to control." *Id*. Here, the "authority and duties of the United States as sovereign are intimately involved," *see id.*, namely, the duties owed by the United States as trustee to protect lands reserved for Tribes and individual Indians. *See Heckman v. United States*, 224 U.S. 413, 437-38 (1912). Likewise, it is "inappropriate" for state law to govern disputes over the possession of Indian trust lands, *Texas Industries*, 451 U.S. at 640, because such disputes concern an area of law—relations with Indian tribes—traditionally treated as akin to foreign relations, *see Brackeen*, 599 U.S. at 274.

This principle was confirmed by the Supreme Court's decisions in *Oneida I*, 414 U.S. 661, and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"). In those cases, an Indian tribe sued two municipalities in federal district court for damages relating to the alleged unlawful possession of the tribe's aboriginal lands. *See Oneida I*, 414 U.S. at 663-64. The tribe alleged that the land had been unlawfully acquired in 1795 in violation of the Indian Nonintercourse Act of 1790, which prohibited Indian land conveyances without Congressional consent. *Id.* at 663-64, 667-68. The municipalities argued that there was no federal question jurisdiction because trespass claims sound in state law. *See id.* at 665-66.

The Supreme Court disagreed, holding that the tribe had "asserted a current right to possession conferred by federal law" sufficient to confer federal question

jurisdiction, *id.* at 666; *see also id.* at 675, 678, because, from the Nation's founding, "federal law, treaties, and statutes protected Indian occupancy," making the "termination" of such occupancy "exclusively the province of federal law," *id.* at 670. This was so, the Supreme Court determined, even though—unlike in the western territories—the "United States never held fee title to the Indian lands in the original [thirteen] states." *Id.*

In addition, the Supreme Court observed that because "no federal statute ma[de] the statutory or decisional law of the State of New York applicable" to Indian lands within that State, "the controlling law" for trespass on such lands "remained federal law." *Id.* at 674. Accordingly, "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.*

Consistent with this view, in *Oneida II*, the Supreme Court held that the tribe had a federal common law claim in trespass based on its claim to "aboriginal title," and that the alleged "right of occupancy need not be based on treaty, statute, or other formal Government action." 470 U.S. at 236. Stated differently, the Court determined that the tribe's claim to "aboriginal title" was *sufficient* to support a federal common law trespass action, not that a claim to aboriginal title is *necessary* for a federal common law trespass action. *Id.*

The Chase Allottees' possessory interests are, if anything, more deeply rooted in federal law than those of the plaintiff Indian tribe in *Oneida I* and *II*. As explained (pp. 2-4, *supra*), prior to statehood, the United States held the public lands in North Dakota in fee; the 1851 Treaty of Fort Laramie specifically recognized the subject lands to be within the territory of the Three Affiliated Tribes; the 1891 Act created the Reservation and confirmed tribal rights over the lands; the United States granted the subject allotments to individual Indians, predecessors to the Chase Allottees; and federal title over the Reservation and subject allotments has never been extinguished. Because no federal statute has ever made the "statutory or decisional law" of the State of North Dakota applicable to the subject allotments, the "controlling law" remains "federal law," and federal courts must "fashion[]" federal common law to govern the trespass, *Oneida I*, 414 U.S. at 674; *see also Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 965-66 (10th Cir. 2019).

*2. Taylor is inapposite.*

In declining to recognize a federal common law cause of action for the Chase Allottees, the district court erroneously confined the common holding of *Oneida I* and *Oneida II*—that federal common law governs trespass on federally protected Indian land—to the specific claims in those cases, i.e., claims by a tribe for interference with aboriginal title. This is a misreading of the *Oneida* cases,

prompted by the district court's misunderstanding of *Taylor v. Anderson*, 234 U.S. 74 (1914), a case that *Oneida I* distinguished, 414 U.S. at 676-78.

*Taylor* involved a federal-court suit by individual Indians to recover possession of land that was patented to an individual Indian under a 1902 statute that had provided for the disposition of lands of the Choctaw Nation in the former Indian Territory of Oklahoma. *See Taylor v. Anderson*, 197 F. 383, 384-85 (E.D. Ok. 1911). The plaintiffs claimed title as heirs to a patent issued on September 20, 1905. *Id.* at 385. The plaintiffs alleged that they had been induced to unlawfully sell the land to the defendants, in violation of statutory restrictions on alienation, through a deed executed on July 31, 1905. *Id.*

The trial court in *Taylor* (Circuit Court for the Eastern District of Oklahoma) dismissed the individual Indians' claims, holding that federal-question jurisdiction could not be based on "the mere fact that the title of plaintiff comes from a patent or under an act of Congress," *id.* at 387, or upon an expectation that the defendants would rely on the deed issued in violation of federal law, *id.* at 387-92. The court observed that the defendants instead might "rely upon a deed of later date" made "at such time and under such circumstances as would render it valid"; might "deny that plaintiffs' ancestor was in fact the allottee of the land"; or might "rely upon a deed from some other source." *Id*. at 387. For these reasons, the court deemed the action a matter for state court. *Id.* at 388. The Supreme Court perfunctorily

affirmed, holding that the complaint had gone "beyond what was required" to state a claim, *Taylor*, 234 U.S. at 74, and that federal-question jurisdiction must be based on what "necessarily appears" in a complaint, unaided by anticipated defenses, *id.* at 75-76.

In *Oneida I*, the defendants argued that the Oneida Nation lacked a federal cause of action for the reasons stated in *Taylor*. *See Oneida I*, 414 U.S. at 676. The Supreme Court disagreed, observing that the lands in *Taylor* had been patented in fee with only a temporary restriction on alienation. *Id.* Specifically, the 1902 statute in *Taylor* dictated that the allotments would be alienable within "five years . . . from the date of the patent," *see Taylor*, 197 F. at 384 (quoting Act of July 1, 1902, c. 1362, § 16, 32 Stat. 641, 643), and the case was decided more than five years after the date of the patent under which the *Taylor* plaintiffs claimed title. *Id.* at 384-85. Accordingly, the Supreme Court had treated those Indian plaintiffs as alleged "owners in fee," akin to any private patentee. *Taylor*, 234 U.S. at 74.

As the Supreme Court explained in *Oneida I*, once the United States issues a fee patent to lands formerly part of the public domain, state law governs the "incidents of ownership," including possessory rights to the land. 414 U.S. at 676-77; *see also Barnhill*, 503 U.S. at 398; *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954) ("real property rights are determined by state law"). In contrast, where the United States "has never parted

with title and its interest in the property continues, the Indians' right to the property depends on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'" *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670 (1979) (quoting *Oneida I*, 414 U.S. at 676).

Here, unlike in *Taylor*, the allotments have never been patented in fee and remain part of Indian country. Thus, as in *Oneida I* and *II*, the Chase Allottees claim a "right to possession" that "arise[s] under federal law in the first instance," *Oneida I*, 414 U.S. at 676-77, and federal law provides a common law claim for trespass, *id.* at 674; *Oneida II*, 470 U.S. at 236.

*3. Wolfchild is inapposite.*

In *Chase I*, this Court suggested in passing that a narrow reading of *Oneida I* and *II*—confining federal common law trespass claims to the facts of those cases—might be supported by this Court's decision in *Wolfchild*, 824 F.3d 761. *See Chase I*, 12 F.4th at 871-74. But *Wolfchild* is inapposite.

*Wolfchild* concerned an 1863 statute that authorized Interior to "set apart" 80 acres of land "in severalty" to each individual member of the Mdewakanton Sioux and other Indian bands who had "exerted" themselves "in rescuing" non-Indians from a "massacre" perpetrated by several Sioux bands. *See* 824 F.3d at 768 (quoting Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 654). In 1865, Interior

approved the withdrawal of twelve square miles of land to be used for such allocations. *See Wolfchild v. United States*, 731 F.3d 1280, 1286 (Fed. Cir. 2013). But due to local opposition, no allocations were ever made, *id.*, and by 1895, all the lands had been conveyed to non-Indians. *Wolfchild*, 824 F.3d at 766. More than a century later, a group of alleged descendants of the "loyal Mdewakanton" brought a trespass claim against a municipality and other defendants that then possessed the twelve sections of land. *Wolfchild*, 824 F.3d at 768.

This Court held that the *Wolfchild* plaintiffs had failed to state a federal common law claim under "the *Oneida* progeny." *Id.* at 768. This Court noted that the *Wolfchild* plaintiffs—unlike the Oneida Nation—did not assert aboriginal title or tribal rights. *Id.* But this Court's decision did not rest on those facts alone. *Id.* at 768-69. The *Wolfchild* plaintiffs also failed to allege any other facts or legal basis that could establish a present possessory interest in the land. *See id.* at 768-69. The 1863 Act merely "permitted" allocations to individual Indians, giving no "loyal Mdewakanton" any right to any specific 80-acre tract. *Id.* at 766. And no lands were ever allocated. *Id.* at 766. This Court accordingly held that the alleged descendants of "the loyal Mdewakanton [had] *no property rights* upon which to base federal common law claims for ejectment and trespass." *Id.* at 769 (emphasis added).

Here, unlike in *Wolfchild*, there is no dispute that the Chase Allottees have alleged a valid present possessory interest in the subject allotments based on federal trust title. Because federal trust title has been sufficiently alleged here, federal common law provides a cause of action for trespass. *See Oneida*, 414 U.S. at 674.

*4. 25 U.S.C. § 345 provides federal court jurisdiction even if the trespass claim arises under state law.*

Consistent with the above, the Tenth Circuit has recognized federal common law actions by individual Indians for trespass on their allotments. *See Davilla,* 913 F.3d at 965-66; *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 & n.1 (10th Cir. 2010). Moreover, as the Tenth Circuit observed, there is another federal statute—in addition to 28 U.S.C. § 1331—that, independent of any federal common law cause of action, provides a basis for federal jurisdiction over trespass claims like those of the Chase Allottees. *See Nahno-Lopez*, 625 F.3d at 1282.

Specifically, 25 U.S.C. § 345 provides, in relevant part, that:

> All persons who are in whole or in part of Indian blood or descent . . . who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States.

*Id*. The Supreme Court held that this provision—which applies to "suits involving the interests and rights of [an] Indian in [an] allotment or patent after [it] has [been]

acquired"—does not contain a waiver of federal sovereign immunity and thus does not provide for suits against the United States. *United States v. Mottaz*, 476 U.S. 834, 845 (1986). But as the Supreme Court noted, Indian allottees have invoked Section 345 as a jurisdictional basis for trespass or ejectment claims against private parties encroaching on allottee rights. *Id.* at 846 n.9.

As the Tenth Circuit determined, because federal law governs possessory rights on trust allotments, *federal* common law (as opposed to state law) governs trespass actions on those lands. *Davilla*, 913 F.3d at 965; *see also Oneida I*, 414 U.S. at 674. But Section 345 is not specifically limited to claims under federal law. Accordingly, Section 345 provides federal district court jurisdiction over allottee trespass claims, even if such claims (per *Taylor*) are deemed to arise under state law. *See Taylor*, 197 F. at 388. *Taylor* did not address Section 345—which does "not apply" to lands of the "Five Civilized Tribes" in Oklahoma, including the Choctaw Nation, 25 U.S.C. § 345—and is also distinguishable on that ground. *See Taylor*, 234 U.S. at 74.

### C. The Chase Allottees may bring their own trespass claim.

Given the existence of a federal common law (or at least a federal court) claim for trespass on the subject allotments, the only remaining question is whether the Chase Allottees are competent to bring such claim on their own behalf. Federal and state law may restrict the ability of minors or other wards or beneficiaries to

bring suits on their own behalf. *See generally* Fed. R. Civ. P. 17. But the trust relationship between the United States and Indians is defined largely by statute. *United States v. Jicarilla Apache Tribe*, 564 U.S. 162, 173-74 (2011). Nothing in the Indian Right-of-Way Act—or any other statute or federal precedent—renders individual Indians incompetent to enforce their own allotment rights upon the expiration of a right-of-way. *See* 25 U.S.C. §§ 323-28. To the contrary, the Supreme Court has long held that individual Indians may enforce their own allotment rights against interference by third parties. *Poafpybitty*, 390 U.S. at 366-76. Indeed, as the Supreme Court explained in *Poafpybitty*, the "dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." *Id.* at 369.

BIA's implementing regulations are consistent with this view. *See* 25 C.F.R. §§ 169.410, 413. While specifying that BIA "*may*" treat continuing use of an expired easement as a "trespass," *id.* § 169.410, and "*may* take action to recover possession" or "pursue any additional remedies available under applicable law," *id.* § 169.413, the regulations do not compel BIA to take enforcement actions, nor do they assert exclusive enforcement authority. *Id.* §§ 169.410, 169.413. To the contrary, the regulations specify that "[t]he Indian landowners" also "may pursue any available remedies under applicable law." 25 C.F.R. § 169.413.

It is true that *Poafpybitty* arose in state court, 390 U.S. at 367-68, and, as the district court noted, *Poafpybitty* did not expressly address whether the Indian owners' claim arose under federal common law. R. 139 at 17-19; App. 129-31. But a breach-of-contract claim under a federally approved lease of Indian trust land is a claim under federal common law. *Cf. Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (federal common law governs rights and duties on commercial paper issued by the United States). And such a claim can be heard in state court. *See Nevada v. Hicks*, 533 U.S. 353, 366 (2001). Regardless, the issue of federal-court jurisdiction is different from whether the Chase Allottees may bring their own claim. As explained above, there is a federal common law (or other federal court) cause of action for trespass on Indian trust lands. Under *Poafpybitty*, the Indian beneficial owners may bring such a claim on their own behalf. *See* 390 U.S. at 366-76.

## II. The Chase Allottees may bring their own claim for breach of the right-of-way agreement.

*Poafpybitty* also compels the conclusion that the Chase Allottees may bring their own claim for breach of the right-of-way agreement. Although the Chase Allottees are not named parties to the agreement, they are intended beneficiaries. Under common law principles, intended third-party beneficiaries may sue to enforce their own contract rights. *See ACI Worldwide Corporation v. Churchill*

*Lane Associates, LLC*, 847 F.3d 571, 578 (8th Cir. 2017); Restatement (Second) of Contracts § 304 (1981).

Nor is the United States an indispensable party to the Chase Allottees' action to enforce the right-of-way agreement. *See* Fed. R. Civ. P. 19. The United States is an indispensable party to actions to *condemn* interests in Indian allotments because such actions impact federal title. *See Chase I*, 12 F.4th at 878 (citing *Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906, 909 (8th Cir. 1964); *Minnesota v. United States*, 305 U.S. 382, 389 (1939)). But a suit to enforce the terms of a federally approved lease or right-of-way agreement does not implicate title and may be prosecuted by the Indian landowners without naming the United States as a party. *See Poafpybitty*, 390 U.S. at 366-76.

To be sure, as this Court recognized in *Chase I*, the United States as trustee also may sue to enforce the right-of-way agreement. 12 F.4th at 878. Indeed, as explained (p. 10, *supra*), after *Chase I*, the United States brought such a suit as a counterclaim in *Tesoro*. That counterclaim includes a demand for pipeline removal per the terms of the right-of-way agreement (assuming no agreement is reached on renewal). *See* Defendant's Answer and Counterclaim, *Tesoro*, ECF No. 28 at 30. Resolution of the federal counterclaim in *Tesoro* likely will affect the Chase Allottees' ability to bring their own trespass and breach-of-contract claims. *See Chase I*, 12 F.4th at 878. But as the Supreme Court explained in

*Poafpybitty*, the United States' power "to sue upon a violation of [a] lease no more diminishes the right of the Indian to *maintain* an action to protect that lease than the general power of the United States to safeguard an allotment affect[s] the capacity of the Indian to protect that allotment." 390 U.S. at 373-74 (emphasis added).

## III. Once reinstated, the Chase Allottees' suit may be stayed pending a resolution in *Tesoro.*

The Chase Allottees' capacity to bring their own suit does not mean that parallel actions by the United States are to be disregarded. *See Chase I*, 12 F.4th at 870-78. The United States' counterclaim in *Tesoro* seeks damages and injunctive relief on behalf of all individual Indian owners for the trespass on the allotted lands that followed the expiration of Andeavor's pipeline right-of-way. The United States may prosecute that counterclaim as trustee for the Indian owners without joining them as plaintiffs. *See Heckman*, 224 U.S. at 433-35; *Cheyenne River Sioux Tribe*, 338 F.2d at 910. Moreover, under estoppel principles, resolution of the federal suit likely will impact the Chase Allottees' ability to prosecute their own suit. *See Heckman*, 224 U.S. at 435. Because BIA's actions as trustee warrant priority and may bind the Indian beneficiaries, the Chase Allottees suit would be properly stayed pending a resolution in *Tesoro*. *Cf. Chase I*, 12 F.4th at 870-78.

But instead of continuing a stay in *Chase* while hearing the claims in *Tesoro*, the district court dismissed the Chase Allottees' claims with prejudice *and* denied their motion to intervene in *Tesoro*. R. 139 at 34-38; App. 146-50. The district court reasoned that intervention would unduly delay *Tesoro* because the Chase Allottees seek to litigate a federal common law claim that, in the district court's view, "they do not possess." R. 139 at 38; App. 150. This was error. Whether prosecuted by the allottees directly or by the United States as their trustee, the suit *belongs* to the allottees. *See Omaha Indian Tribe*, 442 U.S. at 657-58 & n.1.

For reasons already explained, the Chase Allottees may prosecute their own claims, subject to any overriding actions that BIA and the United States might lawfully take as trustee. Where the United States elects to act as trustee for allottees, its representation is presumed to be adequate, and the Indian beneficiaries are not entitled to intervention *as of right* under Fed. R. Civ. P. 24(a). *See Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *see also* Fed. R. Civ. P. 24(a)(2). But the United States has no objection to the Chase Allottees' *permissive* intervention in *Tesoro* under Fed. R. Civ. P. 24(b).

## CONCLUSION

For the foregoing reasons, the district court's judgment of dismissal should be reversed, and the case should be remanded for reconsideration of the decision on permissive intervention.

Respectfully submitted,

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