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
Case No. 1:19-cv-00143-DMT
Hon. Daniel M. Traynor

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INTRODUCTION

For over a decade, Defendants-Appellees (collectively, "Andeavor") have trespassed on Indian trust lands belonging to Plaintiffs-Appellants (the "Indian Landowners"). There is no end in sight. Andeavor never meaningfully disputes its trespass, nor that the Indian Landowners are entitled to millions in damages. Rather, it maintains that the Indian Landowners lack the capacity to assert their own claims, while simultaneously mounting a separate administrative challenge to prevent the United States from taking action. But Andeavor is wrong—the Indian Landowners are empowered to vindicate their own interests.

First, the Indian Landowners can assert a federal common law claim for trespass under *Oneida County v. Oneida Indian Nation of N.Y. State ("Oneida II")*, 470 U.S. 226 (1985). In the first appeal in this action, the Court left open this issue and indicated that the views of the United States would likely be persuasive. The United States has now weighed in firmly on the side of the Indian Landowners.

Andeavor nonetheless asserts a supposed critical distinction between tribal aboriginal title (also known as Indian title) and individual trust title, claiming that federal common law provides a cause of action only to protect the former. The Indian Landowners, however, already explained at length the many problems with that argument. So did the United States. Andeavor ignores these problems, choosing instead to bury its head in the sand.

Second, the Indian Landowners can assert a federal claim for breach of the 1993 easement agreement. On this score, Andeavor insists the United States is an indispensable party. But the United States itself disagrees. That is because the Indian Landowners' claim presents no threat to federal interests. Indeed, just the opposite, it vindicates them.

Third, the Indian Landowners can assert an unjust enrichment claim. *Oneida II* recognized that Indians can assert equitable claims in addition to a claim for trespass when non-Indians encroach on Indian lands. Andeavor's contrary arguments directly contradict *Oneida II*.

Fourth and finally, the Indian Landowners are entitled to intervene in the related administrative challenge—*Tesoro High Plains Pipeline Co. v. United States*, Case No. 1:21-cv-00090 (D.N.D. Apr. 23, 2021)—and at minimum, the two actions should be consolidated. The United States is not an adequate representative of the Indian Landowners because it possesses different interests and is subject to competing obligations. And the district court failed to even decide the consolidation issue below. The district court's judgment should be reversed.[1]

[1] That includes reinstating Count IV seeking punitive damages. Op. Br. 10-11 n.1

ARGUMENT

I. THE INDIAN LANDOWNERS MAY ASSERT A FEDERAL TRESPASS CLAIM

A. Federal Common Law Provides A Trespass Cause Of Action To Protect Federal Possessory Rights In Indian Trust Allotments

Federal law supplies a cause of action for trespass over Indian trust lands. As the Supreme Court explained in *Oneida II*, Indians' right to "exclusive possession" of their lands is "a *federal* right," and Indians can accordingly "maintain [an] action for violation of their possessory rights based on federal common law." *Oneida II*, 470 U.S. at 235, 236 (emphasis in original). Lower court decisions applying *Oneida II* have recognized that this cause of action extends to trust lands. *E.g.*, *United States v. Milner*, 583 F.3d 1174, 1180-82 (9th Cir. 2009); *Grondal v. United States*, No. 09-cv-18, 2021 WL 1962563, at *1, *7 (E.D. Wash. May 17, 2021), *aff'd*, 37 F.4th 610 (9th Cir. 2022).

The *Oneida* cause of action is available in this suit where the trespass is occurring on lands held in trust for *individual* Indians. *See Nahno-Lopez v. Houser*, 625 F.3d 1279, 1280, 1282 (10th Cir. 2010) (joined by Gorsuch, J.); *cf. Bird Bear v. McLean Cnty.*, 513 F.2d 190 (8th Cir. 1975) (not questioning individual trust allottees' ability to assert a federal common law trespass claim). Just as in *Oneida*, here "the right to possession itself is claimed to arise under federal law in the first instance." *Oneida Indian Nation of N.Y. v. Oneida County ("Oneida I")*, 414 U.S.

661, 676 (1974). That is because the United States is the fee title holder to the Indian Landowners' lands, causing the Indian Landowners' "right to the property [to] depend 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). Federal common law in turn provides the cause of action to protect the Indian Landowners' federal property rights.

The United States agrees. As it explains in its amicus brief, "[t]he [Indian Landowners'] interests are, if anything, more deeply rooted in federal law than those of the plaintiff Indian tribe in *Oneida*." U.S. Br. 16. "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.'" *Id.* (cleaned up) (quoting *Oneida I*, 414 U.S. at 674).

This considered perspective of the United States carries great weight. As this Court observed in this case's first appeal, "[t]he views of the [Bureau of Indian Affairs ('BIA')] on these legal issues are obviously … important." *Chase v. Andeavor Logistics ("Chase I")*, 12 F.4th 864, 877 (8th Cir. 2021) (noting that this "judicial controversy [is] within the BIA's area of expertise"). Indeed, this Court specifically "declin[ed] to decide" this question previously "to give the BIA a further

opportunity to address these issues." *Id.* at 874, 877. The United States has now confirmed that the Indian Landowners possess a federal trespass claim. This Court should do the same.

B. *Poafpybitty* Confirms That The Indian Landowners May Assert A Federal Trespass Claim

The Indian Landowners' right to bring a federal claim also stems from *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). Op. Br. 15-18. *Poafpybitty* recognized that "the allotment system created interests in both the Indian and the United States," and that 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." 390 U.S. at 369. Accordingly, "[a]n Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests." *Agua Caliente Band of Mission Indians v. Riverside Cnty.*, 442 F.2d 1184, 1186 (9th Cir. 1971).

The United States again agrees. Citing *Poafpybitty*, it explains that "[t]he Supreme Court has long held that tribes and individual Indians each may bring suits to enforce their own possessory interests in trust lands." U.S. Br. 1. And it underscores that "[t]his 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 *Poafpybitty*, 390 U.S. at 374).

Andeavor misreads *Poafpybitty*. Parroting the district court, it maintains that *Poafpybitty* allows concurrent actions only when the United States and individual allottees "both have claims regarding an allotment." Resp. Br. 30. But the Indian Landowners already pointed out (and Andeavor ignores) that *Poafpybitty* recognized not just Indians' ability to proceed in the absence of the United States, but also their "*capacity* to sue … with respect to [their] affairs, including [their] restricted property." Op. Br. 17 (emphasis added) (quoting *Poafpybitty*, 390 U.S. at 371); *see also, e.g.*, *Poafpybitty*, 390 U.S. at 369 ("[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." (emphasis added)).

Andeavor's effort to bolster its misreading of *Poafpybitty* with general trust principles misses the mark. Resp. Br. 32. Andeavor overstates the degree to which those principles support its position. *See* Op. Br. 30 (citing *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 243 (1983) (White, J., concurring in part)). Further, the United States has already explained that those principles do not map onto the federal-Indian trust relationship here, as it is defined largely by statute. U.S. Br. 22-23.

Nor does *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), support Andeavor's interpretation of *Poafpybitty*. Andeavor says

Blatchford proves that Indians' right to sue is narrower than the United States' ability to sue on their behalf. Resp. Br. 30-31. But *Blatchford* turned on the peculiarities of Eleventh Amendment immunity. *See* 501 U.S. at 785. And the part of *Blatchford* that Andeavor cites concerned the scope of a specific statute—28 U.S.C. § 1362—never even mentioned in *Poafpybitty*. *See Blatchford*, 501 U.S. at 784-85. *Blatchford* accordingly has nothing to do with whether *Poafpybitty* allows the individual allottees to assert a claim that "belongs to [them]." U.S. Br. 27 (emphasis omitted).

Heckman v. United States, 224 U.S. 413 (1912), is also inapposite. Andeavor casts *Heckman* as foreclosing the Indian Landowners' suit because the United States has filed a trespass counterclaim on their behalf in *Tesoro*. Resp. Br. 54-56.[2] But the Indian Landowners explained that under *Heckman*, a parallel action by the United States can at most have *preclusive* effect—*i.e.*, *Tesoro* can potentially prevent the Indian Landowners' suit *after* it reaches final judgment, but not before. Op. Br. 18; *see Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372-73 (8th Cir. 1997) (preclusion requires final judgment). Indeed, the United States itself rejects

[2] Andeavor attempts to extend this logic to the Indian Landowners' entire case. Resp. Br. 54. Yet Andeavor never explains how the United States' assertion of the *trespass* claim prevents the Indian Landowners from bringing their *breach-of-easement* and *unjust-enrichment* claims.

Andeavor's contention that it has legally required the Indian Landowners to "give way" to its suit. Resp. Br. 57; *see* U.S. Br. 23, 26-27.

Interior regulations do not help Andeavor either. Op. Br. 16-17. Andeavor argues that 25 C.F.R. § 169.410 provides the exclusive method for addressing its trespass. Resp. Br. 31, 36-37, 43. Interior, however, has rejected that interpretation of its regulation. U.S. Br. 23; *see Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (deferring to agency interpretation of regulation advanced in amicus brief).

C. The Indian Landowners Cannot Bring A State Law Claim

The existence of a federal claim for trespass on individual trust lands is confirmed by the absence of a state claim. Op. Br. 18-20. As noted, Indians' property interests in trust lands "depend[] on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'" *Wilson*, 442 U.S. at 670 (quoting *Oneida I*, 414 U.S. at 676). And when, in the Indian land context, "the substantive state law cannot apply," "federal common law" applies instead. *All Mission Indians Hous. Auth. v. Silvas*, 680 F. Supp. 330, 332 (C.D. Cal. 1987) (Tashima, J.). The trespass cause of action here thus arises from federal common law. Again, the United States agrees. U.S. Br. 12-13, 16.

Andeavor claims that a state law cause of action does exist here. It starts by asserting that the exemption from state law recognized in *Wilson v. Oneida Indian Tribe* applies only to tribal aboriginal rights, because the equitable owner of the land there happened to be a tribe possessing aboriginal title. Resp. Br. 27. But the exemption principle *Wilson* announced was not grounded in the identity of the equitable owner or the type of tribal title at issue. It applied because "*the Government[']s]* … interest in the property continue[d]." 442 U.S. at 670 (emphasis added). And here, the United States is the fee owner of the relevant property, just as in *Wilson*.

Andeavor also insists that the Indian Landowners have a state law claim because federal Public Law 280 "has given states the power to extend state law to allotments, and North Dakota has done so." Resp. Br. 33. Yet as the Indian Landowners explained in their opening brief, Public Law 280 prohibits states from "adjudicat[ing] … the ownership or right to possession of [Indian trust] property or any interest therein." 28 U.S.C. § 1360(b); *see* Op. Br. 19. Bafflingly, Andeavor says this Public Law 280 provision "does not apply to suits involving the possessory rights of individual tribal members." Resp. Br. 36. But that position is impossible to square with Public Law 280's text, which specifically forbids states from "adjudicat[ing] … the … *right to possession* … of [trust] property." 28 U.S.C. § 1360(b) (emphasis added).

Poafpybitty is not to the contrary. Andeavor suggests that the Indian Landowners can assert a state law claim because *Poafpybitty* arose in state court. Resp. Br. 34. But *Poafpybitty* concerned "rights under [a federal] oil and gas lease," not right of possession. *Id.* Like this trespass claim, that claim arose under federal law. *See* Op. Br. 26-28. But *unlike* a suit concerning the right to possess trust land, "a [federal breach-of-contract] claim can be heard in state court." U.S. Br. 24. Hence, this aspect of *Poafpybitty* has no relevance to the Indian Landowners' trespass claim.

Taking a different tack, Andeavor alternatively insists the lack of a state claim is irrelevant. Resp. Br. 32. Not so. As the United States notes, *Oneida I* expressly relied on this consideration, "observ[ing] 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.'" U.S. Br. 15 (quoting *Oneida I*, 414 U.S. at 674). *Oneida II*, in turn, confirmed that federal common law provided a trespass right of action in part because Congress had specifically exempted Indian lands from state law. 470 U.S. at 241; *see* Op. Br. 19-20. Andeavor offers no response.

D. Andeavor Fails To Support A Distinction Between Tribal Aboriginal Title And Individual Trust Title

Like the district court, Andeavor relies on a supposed "critical distinction" between tribal aboriginal title and individual trust title. Resp. Br. 18. But the Indian

Landowners and the United States explained that it makes no difference (1) whether this claim is based in aboriginal or trust title and (2) whether the equitable owner of the trust parcel is a tribe or an individual Indian. Op. Br. 20-24; U.S. Br. 16-21. To the extent trust and aboriginal title differ, trust title is the *stronger* title, because in addition to the federal privileges and protections that extend to both tribal titles, trust title is protected by the Fifth Amendment's Takings Clause, while aboriginal title is not. Op. Br. 20-21. Moreover, the interests that Congress has protected in trust lands are the same regardless of whether a tribe or an individual Indian is the equitable owner. *Id.* at 22-23. Indeed, the statutory frameworks Congress has enacted—historically and today—implicitly recognize that federal claims may be brought to protect individual trust lands. *Id.* at 23-24.

Andeavor's responses fall short. Andeavor first suggests that *Chase I* already endorsed the distinctions they draw. *See* Resp. Br. 19-22. To the contrary, *Chase I* reserved decision on whether these distinctions matter, and it emphasized the importance of the views of the United States (which has now expressly rejected Andeavor's distinctions). 12 F.4th at 874.

Andeavor's arguments on the merits fare no better. It relies principally on *Taylor v. Anderson*, 234 U.S. 74 (1914), and *Wolfchild v. Redwood County*, 824 F.3d 761 (8th Cir. 2016). Resp. Br. 18-22, 29. Yet the Indian Landowners and the United States explained that those cases "concerned allotted *fee* lands." Op. Br. 24.; *see*

U.S. Br. 16-21; *Chase I*, 12 F.4th at 874 (recognizing that *Wolfchild* "does not directly control the issue in this case because the plaintiffs in *Wolfchild* were fee simple owners"). "The federal government has not retained title to [fee] land or indicated that it is prepared to exert jurisdiction over the land." *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993). Thus, cases like *Taylor* and *Wolfchild* involving fee lands are mere applications of the general rule that "allegations of possession or ownership under a United States patent are 'normally insufficient' for federal jurisdiction." *Wolfchild*, 824 F.3d at 768 (quoting *Oneida I*, 414 U.S. at 676).

Undeterred, Andeavor maintains that this case falls within that general rule because, under *Oneida I*, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law." Resp. Br. 19 (quoting *Oneida I*, 414 U.S. at 676). *Oneida I*, however, referred to *fee* patents—that is the only reading of *Oneida I* that comports with *Wilson* and with Public Law 280's express exception of trust lands from state jurisdiction. *Supra* 8-10. And here, no fee patents have issued.

This point knocks out Andeavor's attempt to rehabilitate *Taylor* on the grounds that it concerned *restricted*-fee lands. Resp. Br. 39-40. Andeavor says that trust and restricted-fee lands are legally indistinguishable, so *Taylor*'s holding must apply here. *Id.* But to reiterate, for these purposes what matters is whether the fee patent has issued. *Oneida I*, 414 U.S. at 676. And unlike for a trust allotment, for a

restricted fee allotment, fee title *has* passed to the allottee. *See Chase I*, 12 F.4th at 874 (noting that in *Taylor*, "[i]ndividual patents had been issued"). Thus, state law provides the trespass cause of action in restricted-fee-allotment cases, while federal law supplies it in trust-allotment cases where the United States retains fee title.[3]

Andeavor also gets no mileage out of 25 U.S.C. § 357. Andeavor suggests that aboriginal title is stronger than individual trust title because Section 357 allows states to take individual trust lands for "public purpose[s]" if compensation is "paid to the allottee." 25 U.S.C. § 357; *see* Resp. Br. 38. But Section 357 simply underscores that *trust* title is the stronger right: *no* compensation is due when aboriginal title is taken. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 281, 279 (1955).

Meanwhile, Andeavor fails to explain away authorities that reject its distinctions. Andeavor takes issue with 28 U.S.C. § 2415(b) because it is a limitation only on actions brought by the United States, not on actions brought by Indians themselves. Resp. Br. 35-36. But *Oneida II* explained that the actions listed in Section 2415 are claims available to both the United States and Indians. *See* 470 U.S. at 242-44; Op. Br. 23. Andeavor refuses to engage with this aspect of *Oneida II*.

[3] To the extent *United States v. Ramsey* recognized an equivalence between trust and restricted allotments (*see* Resp. Br. 39), it limited its holding to the statutory-interpretation question before it. 271 U.S. 467, 470-71 (1926).

Andeavor also insists that cases like *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir. 1994), and *Bad River Band v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030 (W.D. Wis. 2022), are distinguishable because they are tribal aboriginal title cases, not individual trust allotment cases. Resp. Br. 38. That is false. *Pend Oreille* was "a trespass action [brought] … on behalf of the Kalispel Indian Tribe *and* individual Kalispel Indian allottees." *United States v. Pend Oreille Util. Dist. No. 1*, 926 F.2d 1502, 1504 (9th Cir. 1991) (emphasis added). *Bad River Band*, too, concerned allotted lands, not aboriginal title—the claim was brought by a tribe rather than allottees only because the tribe had reacquired the allotted lands. 626 F. Supp. 3d at 1039-40.

Other examples abound. *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976), was a claim for trespass on an individual trust allotment. *Id.* at 985. And *United States v. Colvard*, 89 F.2d 312 (4th Cir. 1937), was a trespass claim instituted on behalf of a tribe "and two members of that tribe" to protect trust lands the fee title to which "was acquired through grant from the state of North Carolina" (so there was no aboriginal title). *Id.* at 313, 314. Case law thus strongly rejects Andeavor's artificial distinctions.

E. Andeavor's Remaining Arguments Are Meritless

Andeavor's other arguments fail too. Andeavor criticizes the Indian Landowners' reliance on *Nahno-Lopez v. Houser*. It insists this Court already

rejected *Nahno-Lopez* based on *Davilla v. Enable Midstream Partners L.P. ("Davilla II")*, 913 F.3d 959 (10th Cir. 2019). *See* Resp. Br. 26 & n.7. But *Chase I* merely concluded, based on a brief footnote in *Davilla II*, that *Nahno-Lopez* did not "definitively" resolve this issue. *Chase I*, 12 F.4th at 874 n.6. That is no rejection. And as the Indian Landowners explained in their opening brief, a close examination of *Nahno-Lopez* reveals that the relevant portion of the decision was jurisdictional, making it necessary to the outcome in that case. Op. Br. 33-34. Andeavor has no answer.

Andeavor's attempt to dismiss *Bird Bear v. McLean County* similarly fails. Andeavor contends that "*Bird Bear* upheld dismissal and did not mention any federal common-law right of individual allottees." Resp. Br. 28. But *Bird Bear* found there was "jurisdiction over [an] action by Indian allottees … under § 345." *Wardle v. Nw. Inv. Co.*, 830 F.2d 118, 121 (8th Cir. 1987) (discussing *Bird Bear*). That means it determined the allottees possessed a federal trespass claim (or, alternatively, that Section 345 provides federal jurisdiction over state-law allotment trespass claims, *infra* 16-17).

Finally, Andeavor's treatment of secondary authorities misleads. Andeavor says that *Cohen's Handbook of Federal Indian Law* recognizes trust allottees may not "resort to federal courts for 'claims for damages to their lands sounding in tort or other claims that do not involve ownership issues.'" Resp. Br. 27-28 (quoting

Cohen's Handbook, § 16.03[3][c]). In truth, *Cohen's Handbook* recognizes that "[a]llottees can invoke federal court jurisdiction to enforce *both* claims to ownership *and* protection of interests in allotted land." *Cohen's Handbook of Federal Indian Law* § 16.03[3][c], at 1078 (2012) (emphases added). A trespass claim falls into that latter category, as it "protects the proprietary interest of the owner or possessor of land." *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 874 (8th Cir. 2008). That conclusion is corroborated by the *American Indian Law Deskbook*, which Andeavor avoids. *See* Op. Br. 22. As the *Deskbook* explains, "except, most importantly, the title's status as property for taking purposes under the Fifth Amendment," "[t]he rights attaching to tribal title are unaffected" by whether it is "aboriginal title" or "derived from treaties, statutes, [or] executive orders." *Am. Indian Law Deskbook*, § 3:1, Westlaw (database updated May 2023).

F. Regardless Of The Basis For The Indian Landowners' Trespass Claim, 25 U.S.C. § 345 Provides Jurisdiction

Even if the Indian Landowners' trespass claim arose under state law, federal jurisdiction would exist under 25 U.S.C. § 345. That provision applies to "suits involving the interests and rights of [an] Indian in [an] allotment or patent after [it] has [been] acquired." *United States v. Mottaz*, 476 U.S. 834, 845 (1986). "Section 345 is not specifically limited to claims under federal law." U.S. Br. 22. Thus,

federal jurisdiction exists regardless of the basis for the Indian Landowners' trespass claim.

Andeavor says this Court rejected this interpretation of Section 345 in *Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987). That is wrong. As *Chase I* observed, *Kishell* held that "when a plaintiff holds *fee title* to … land, a 'complaint seeking relief for trespass does not state a claim contemplated by § 345.'" *Chase I*, 12 F.4th at 871 n.4 (emphasis added) (quoting *Kishell*, 816 F.2d at 1275).

Andeavor's other cases are likewise off base. Resp. Br. 35 (citing *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184 (9th Cir. 1988); *Marek v. Avista Corp.*, No. CV04-493, 2006 WL 449259 (D. Idaho Feb. 23, 2006)). Those cases *rejected* the notion that "a claim falls … outside of § 345 simply because it is a tort claim." *Marek*, 2006 WL 449259, at *4. Rather, the claims in those cases fell outside of Section 345 because they did not "arise from federal regulations and statutes specifically protecting Indian allotments." *Id.* Here, by contrast, the Indian Landowners' claims *do* "arise[] from … , *inter alia*, 25 U.S.C. §§ 323-328, 345, 28 U.S.C. § 1353, and the comprehensive regulatory scheme promulgated by Interior." App. 49; R. Doc. 28, at 13. Accordingly, even if the Indian Landowners' trespass claim arose under state law, there would be federal jurisdiction under Section 345.

II. THE INDIAN LANDOWNERS MAY ASSERT A FEDERAL BREACH-OF-EASEMENT CLAIM

The Indian Landowners can bring a federal claim for breach of the 1993 easement. The arguments Andeavor asserted below are addressed first, followed by Andeavor's new indispensable-party argument.

A. Andeavor Has Waived The Breach-Of-Easement Arguments It Asserted Below, Which Were Meritless

As an initial matter, Andeavor has waived the breach-of-easement arguments it made below. Before the district court, Andeavor maintained that this claim is governed by state law and that the Indian Landowners cannot sue for breach because they are not parties to the easement. App. 75-77; R. Doc. 86, at 2-4. Now, however, Andeavor demotes those arguments to a footnote. *See* Resp. Br. 46-47 n.15. Andeavor's original breach-of-easement arguments are therefore waived. *See Koehler v. Brody*, 483 F.3d 590, 599 (8th Cir. 2007).

Even if they had been preserved, Andeavor's original breach-of-easement arguments are meritless. As to applicable law, the breach-of-easement claim arises under and is governed by federal law because it concerns a federal contract arising in an area of extensive federal regulation. Op. Br. 26-28. And as to right to sue, the Indian Landowners may assert breach of the contract twice over. They may do so under *Poafpybitty*. Op. Br. 28-29; U.S. Br. 25-26. And they may do so as third-

party beneficiaries. Op. Br. 29-34; U.S. Br. 24-25. Andeavor's original breach-of-easement arguments thus fail.

B. The United States Is Not An Indispensable Party To The Breach-of-Easement Claim

Andeavor's new indispensable-party argument also fails. The Indian Landowners begin with the standard of review. They then explain that the United States is not a necessary party; that it could be joined if it were required; and that the Rule 19(b) factors would favor allowing this case to proceed regardless.

1. The Standard of Review is De Novo

As a preliminary matter, Andeavor urges application of the abuse-of-discretion standard. Resp. Br. 16-17, 46-48. It is true that abuse-of-discretion often applies to Rule 12(b)(7) dismissals. But for two reasons, de novo review applies here.

First, the district court dismissed under Rule 12(b)(6) (failure to state a claim), not Rule 12(b)(7) (failure to join under Rule 19). App. 145; R. Doc. 139, at 33. It stated: "[T]he Allottees' breach of easement claim is dismissed pursuant to Federal Rule of Civil Procedure *12(b)(6)* because they cannot fulfill *an essential element* given … the United States is a necessary party." *Id.* (emphases added). To be sure, the district court *should* have analyzed this issue under Rule 19 (and this Court should apply the Rule 19 framework now on appeal). *See* 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1609 (3d ed. 2019) (noting that an appellate

court can raise Rule 19). But for standard-of-review purposes, what the district court did—in its own words—was dismiss "pursuant to Federal Rule of Civil Procedure 12(b)(6)." App. 145; R. Doc. 139, at 33. For such dismissals, review is de novo, as Andeavor concedes. *See* Resp. Br. 16.

Second, even under 12(b)(7), a district court enjoys discretion only to the extent it balances the Rule 19(b) factors or finds facts. *See, e.g.*, *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998) ("We review the district court's dismissal under Rule 19*(b)* for an abuse of discretion." (emphasis added)); *Two Shields v. Wilkinson*, 790 F.3d 791, 794-95 (8th Cir. 2015) ("We review de novo conclusions of law underlying a district court's Rule 19(a) determination."). Here, the district court did neither. *See* App. 144-45; R. Doc. 139, at 32-33. It merely purported to discern from this Court's cases a bright-line rule requiring dismissal. *See id.* The meaning of precedent is a question of law, so review is de novo. *Grand Canyon Trust v. Bernhardt*, 947 F.3d 94, 96-97 (D.C. Cir. 2020) (per curiam).

2. The United States Is Not A Necessary Party

Turning to the merits, the United States is not required to resolve the breach-of-easement claim. This Court and others routinely hold that claims brought to protect interests related to Indian land may proceed in the United States' absence. Op. Br. 35-37 (citing *Bird Bear* and other cases). That principle follows from

Poafpybitty, where the Supreme Court permitted individual allottees to sue for breach of a trust-land lease without the United States present. 390 U.S. at 366, 373-74; *see* Op. Br. 37-38. It also follows from the general rule that third-party beneficiaries may sue for breach of contract without all parties to the contract present (a point Andeavor never addresses). *E.g.*, 7 Wright et al. § 1613; *see* Op. Br. 39.

Andeavor's attempts to distinguish cases applying this principle are unpersuasive. Start with *Bird Bear*, which involved the same fact pattern as this case: an Indian-allottee suit concerning intrusion on trust lands without a valid easement. 513 F.2d at 190-91 & n.6. Andeavor has no substantive response to *Bird Bear*. It quibbles over who raised the indispensable-party argument in that case. Resp. Br. 50. But any party—or the trial or appellate court—can raise Rule 19, and once raised, the court can decide it, as *Bird Bear* did. *See* 7 Wright et al. § 1609; 513 F.2d at 191 n.6. *Bird Bear* is thus binding, and it alone suffices to resolve this issue in the Indian Landowners' favor.

Andeavor fares no better with other cases. Andeavor observes that *Davilla v. Enable Midstream Partners ("Davilla I")*, No. CIV-15-1262-M, 2016 WL 4440240, at *2 (W.D. Okla. Aug. 19, 2016), and *Lyon v. Gila River Indian Community*, 626 F.3d 1059 (9th Cir. 2010), involved trespass rather than contract claims, but it never articulates a reason the difference matters. *See* Resp. Br. 50-51. Indeed, *Poafpybitty*—the foundation for these cases, *see* Op. Br. 37—was a trust-*lease* case,

and it rejected any distinction between such cases and those concerning "the general power of the United States to safeguard an allotment." *See* 390 U.S. at 373-74.

Andeavor next notes that *Lyon* and *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), involved tribes rather than individual Indians. Resp. Br. 27 n.10, 50-51. But again, that distinction makes no sense given that *Poafpybitty* was brought by individual Indians. And as for *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953), Andeavor's analysis highlights why *Sims* is *on* point, for both there and in this case, "neither success nor failure would impair any governmental interest." Resp. Br. 51.

Andeavor also fails to distinguish *Poafpybitty* itself. Andeavor makes much of the regulations that govern the 1993 easement and says *Poafpybitty* did not involve a comparable "specific, regulatory role" for the United States. Resp. Br. 51-52. But to the contrary, in *Poafpybitty* "the United States ha[d] exercised its supervisory authority over [the relevant] oil and gas leases in considerable detail." 390 U.S. at 373. And examining those supervisory regulations, the Supreme Court rebuffed the very moves Andeavor tries here, such as characterizing a regulation allowing Interior to pursue *a* remedy for breach as providing "the *only* relief for all breaches of the lease terms." *Id.* at 374 (emphasis added); *cf.* Resp. Br. 45-46, 52 (maintaining that 25 C.F.R. §§ 169.402 and 169.410 prescribe the sole avenue for addressing breach of easement). *Poafpybitty* is on all fours.

As for its affirmative case, Andeavor stumbles in its effort to rehabilitate the district court's reliance on *Two Shields v. Wilkinson* and *Minnesota v. United States*, 305 U.S. 382 (1939). *See* Resp. Br. 47-48. It says those cases require the United States when a case involves administrative decisions or when the United States has a trustee interest. *Id.* But as the Indian Landowners already explained, those cases *challenged* the United States' actions or its fee title. Op. Br. 38-39. That adversarial posture toward the United States is what rendered the United States necessary. *Id.*

There is similarly no merit to the argument that Andeavor itself may be subject to inconsistent obligations if this case proceeds. Resp. Br. 49-50. As the Indian Landowners noted in their opening brief (Op. Br. 35 n.8), this Court rejected that very argument in *Bird Bear*, concluding that "the absence of the United States" would not "expose any party … to multiple lawsuits or judgments." 513 F.2d at 191 n.6. The Western District of Oklahoma has reached the same conclusion. *Davilla I*, 2016 WL 4440240, at *2.

Andeavor's reliance on *Havasupai Tribe v. Anasazi Water Co.*, 321 F.R.D. 351 (D. Ariz. 2017), is also misplaced. Resp. Br. 49. *Havasupai* recognized that the United States generally is *not* an indispensable party to a suit brought to vindicate interests connected to Indian lands. *See* 321 F.R.D at 356. True, it deemed the United States indispensable *in that instance*. But it did so because the tribe asserted claims to "thousands of square miles" of water—claims that could have impacted

the United States outside of its "role as the trustee of the Tribal interests." *Id.* This claim, by contrast, concerns "small tracts of real estate in which the United States ha[s] no potential adverse interest," so it can proceed under *Havasupai*. *Id.*

Nor is there anything to Andeavor's assertion of a "conflict with the BIA's previous determination that Andeavor must keep the pipeline in the ground." Resp. Br. 50. Even assuming the BIA can impose that requirement, *but see Chase I*, 12 F.4th at 870, the BIA vacated that administrative order years ago. Compl., Ex. E, at 5, *Tesoro* (Apr. 23, 2021), R. Doc. 1-5. Any potential conflict has therefore long disappeared.

3. The United States Can Be Joined

Although the United States is not required, if it were, it could be joined. By filing the *Tesoro* trespass counterclaim, the United States waived its immunity as to other claims arising from the same transaction of occurrence, and here, the conduct underlying the trespass and breach-of-easement claims is the same. Op. Br. 39-40. For its part, the United States never contests that it could be made a party to the breach-of-easement claim. *See generally* U.S. Br.

Andeavor nonetheless purports to assert immunity on the United States' behalf. It argues that the United States' waiver flows only to compulsory counterclaims. Resp. Br. 52. But that is no response, as a tort claim and a contract claim stemming from the same transaction or occurrence *are* sufficiently related to

satisfy the compulsory counterclaim test. *See Law Offices of Jerris Leonard, P.C. v. Mideast Systems, Ltd.*, 111 F.R.D. 359, 361 (D.D.C. 1986) (collecting authorities). The new cases that Andeavor cites, meanwhile, concerned whether *prior* suits waived immunity from *subsequent* ones. *See McClendon v. United States*, 885 F.2d 627, 628-29, 631 (9th Cir. 1989); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987). Those cases are thus far afield.

4. Equity And Good Conscience Require Allowing This Claim To Proceed

Even if the United States were required and could not be joined, equity and good conscience would compel this claim to move forward under Rule 19(b). Op. Br. 40-41. "Rule 19's guiding 'philosophy ... is to avoid dismissal whenever possible[.]'" *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1071 (D.C. Cir. 2023) (quoting 7 Wright et al. § 1604), *petition for cert. filed*, No. 23-862 (U.S. Feb. 12, 2024). Hence, the settled rule is that "in a suit by [Indians] to protect [their] interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), [the United States] is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." *Puyallup*, 717 F.2d at 1254 (emphasis in original).

Critically, the United States agrees this claim can proceed in its absence. U.S. Br. 25. That disposes of Andeavor's laundry list of considerations supposedly "unique" to this case. Resp. Br. 45. The United States, for instance, sees no threat

to its ability to "pursue remedies that in its judgment advance [allottees'] collective interest," *id.* at 46 (quoting *Chase I*, 12 F.4th at 877 n.7), because there is none. The United States is the best judge of its indispensability, and this Court should defer to its view. *See Bird Bear*, 513 F.2d at 191 n.6 (United States not indispensable when it was invited to participate as amicus and declined).

Andeavor pushes back against the cases cited in the opening brief. It says they merely reject the proposition that the United States is automatically an indispensable party in these types of cases. Resp. Br. 54. Not so. Those cases recognize the rule that in suits brought by Indians to protect their interests, the United States "is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." *Puyallup*, 717 F.2d at 1254 (emphasis in original). This Court should apply that rule and reverse the dismissal of the breach-of-contract claim.

III. THE INDIAN LANDOWNERS MAY ASSERT A FEDERAL UNJUST ENRICHMENT CLAIM

The Indian Landowners have also stated a claim for federal unjust enrichment. *Oneida II* expressly recognized that Indians can assert equitable claims in addition to a claim for trespass when non-Indians encroach on their lands. *See* 470 U.S. at 235-36 ("Indians have a common-law right of action for an accounting of 'all rents, issues and profits' against trespassers on their land." (quoting *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 344 (1941))). And here, the Indian Landowners have

pled each element of unjust enrichment. Op. Br. 41-42. The district court thus erred in dismissing this claim.

Andeavor maintains that no unjust-enrichment claim exists at federal common law, but its reasoning is flawed. Its suggestion that there is no federal unjust-enrichment claim because the elements have not been defined under federal law (Resp. Br. 43), runs directly contrary to caselaw. *See Davilla II*, 913 F.3d at 965. Its failure to understand that the claim is premised on Andeavor's *act* of trespass and not the existence of the federal *tort* of trespass (Resp. Br. 43) repeats the error of the district court. Op. Br. 42-43. Its claim that unjust enrichment is solely a remedy, not a cause of action (Resp. Br. 43-44), conflicts with *Oneida II* itself, which explained that the equitable claims available to Indians against trespassers are "*right[s] of action*." 470 U.S. at 235 (emphasis added). And its assertion that the claim is only available to tribes, not individual Indians (Resp. Br. 44), makes no more sense here than in the trespass context, *supra* 10-14, and contradicts *Oneida II* to boot, which said these equitable claims are available to "Indians" generally, not tribes specifically. 470 U.S. at 235.

Indeed, this claim is not novel. In *Bad River Band*, the tribe obtained summary judgment in its favor on an unjust enrichment claim stemming from a pipeline trespass on allotted lands. 626 F. Supp. 3d at 1049-50. In ruling in the

tribe's favor, the *Bad River Band* court rejected many of the same arguments made here. *See id.* This Court should as well.[4]

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED INTERVENTION AND FAILED TO ADDRESS CONSOLIDATION

The district court erred when it denied intervention and ignored consolidation. Mandatory intervention is addressed first; then permissive intervention; and finally consolidation.

A. The Indian Landowners Have A Right To Intervene In *Tesoro*

1. This Issue Is Preserved

The Indian Landowners preserved their right to intervene in *Tesoro*. The district court itself raised the intervention-as-of-right issue by directing the parties to brief joinder. *See Arrow v. Gambler's Supply*, 55 F.3d 407, 409 (8th Cir. 1995) (treating joinder motion as motion to intervene as of right). The Indian Landowners responded by filing a brief that "amount[ed] to a motion to intervene, filed at the direction of the Court." App. 98 n.1; R. Doc. 111, at 3 n.1. And the district court, in turn, addressed intervention as of right in its final order. App. 146-48; R. Doc. 139, at 34-36. The issue was therefore raised and decided, and is preserved for appellate review.

[4] Andeavor has waived its other arguments, which it limits to a footnote. *See* Resp. Br. 44 n.14; *Koehler*, 483 F.3d at 599.

Andeavor's contrary arguments miss the mark. It complains that the intervention motion was filed in the wrong docket. Resp. Br. 57. But Rule 24(a) requires only that "[a]n application to intervene … be made by motion in *the court* in which the action is pending." 7C Wright et al. § 1914 (emphasis added). The Indian Landowners satisfied that requirement, as both this case and *Tesoro* were assigned to the same district and the same judge. Op. Br. 6.

Nor does it actually matter whether the Indian Landowners properly raised this issue below. "An argument is not waived if the district court nevertheless addressed the merits of the issue not explicitly raised by the party," and here the district court decided the intervention-as-of-right question. *United States v. Magdirila*, 962 F.3d 1152, 1157 (9th Cir. 2010) (quotation marks omitted).

2. *The Indian Landowners Meet The Rule 24(a)(2) Criteria*

On the merits, the Indian Landowners are entitled to intervene in *Tesoro*. Their interests are clearly at stake in *Tesoro*, which concerns the same trespass that is the subject of this suit. Op. Br. 44-45. And the United States does not adequately protect their interests because, for instance, the Indian Landowners maintain their damages must be determined judicially, while the United States has twice purported to determine their damages administratively. Op. Br. 48. For its part, Andeavor never disputes that the Indian Landowners possess a qualifying interest in *Tesoro*.

Instead, it maintains that the United States is a sufficient representative, claiming a presumption of adequacy. Resp. Br. 58-60. Its arguments on that score lack merit.

To start, no presumption applies because the Indian Landowners' interests are narrower than the United States'. Op. Br. 46-47. Andeavor says that the interests are the same because the underlying trespass claim is the same in both suits. Resp. Br. 59. But just because the *claim* is the same does not mean that the United States and the Indian Landowners share the same *interests* in litigating it. *See Dine Citizens Against Ruing Our Env't v. BIA*, 932 F.3d 843, 855-56 (9th Cir. 2019). Plus, Andeavor forgets the administrative portion of *Tesoro*, which is an independent source of divergent interests. The United States has an interest in arguing that its agency has expansive authority to set a price for a trespass. The Indian Landowners maintain the BIA does *not* have that power. In such circumstances, the idea that the United States adequately represents the interests of landowners is nonsensical.

In addition, no presumption applies because the United States faces competing statutory obligations, including a competing obligation to the Three Affiliated Tribes ("Tribe"). Op. Br. 47-48. Andeavor argues that the Tribe's interests are not at stake. Resp. Br. 60. Yet the Tribe has reached an agreement with Tesoro for the continued operation of the pipeline through its lands. U.S. Br. 6-7. Thus, when the United States decides whether to ultimately pursue ejectment as a remedy in *Tesoro*, *see* Counterclaim ("*Tesoro* Counterclaim") at 30, *Tesoro* (Feb. 8, 2022), R. Doc. 28, it

will be forced to consider ejectment's impact on the tribal portion of the pipeline. That conflict renders the United States an inadequate representative of the Indian Landowners' interests.[5]

Barnett v. U.S. Department of Interior, 317 F.3d 783 (8th Cir. 2003), and *Stenehjem v. United States*, 787 F.3d 918 (8th Cir. 2015), are easily distinguished. *Barnett* involved a mere "theoretical risk" of conflict and no competing tribal interests. 317 F.3d at 786. *Stenehjem* simply held that past disputes with the United States over use of its land did not show the United States would fail to defend its ownership interest in that land. 787 F.3d at 922. Neither case concerned the types of conflicts presented here.

B. The District Court Abused Its Discretion When It Denied Permissive Intervention

The district court also reversibly erred when it denied permissive intervention. As the Supreme Court explained in *Arizona v. California*, where the United States acts as Indians' representative and can possibly bind them to a judgment, "it is obvious that the [Indians], at a minimum, satisfy the standards for permissive intervention." 460 U.S. 605, 614-15 (1983), *decision supplemented*, 466 U.S. 144 (1984). The district court offered no sound basis for deviating from that conclusion here. Op. Br. 50-51.

[5] That conflict also puts the United States at risk of a breach-of-trust suit, highlighting another competing obligation. *See* Op. Br. 49-50.

Andeavor argues that *Arizona* is not on point because the Supreme Court was not bound by the Federal Rules of Civil Procedure. Resp. Br. 62. Courts, however, frequently rely on *Arizona* when applying Rule 24(b). *E.g.*, *West Virginia v. U.S. EPA*, No. 23-cv-32, 2023 WL 3624685, at *4-5 (D.N.D. Mar. 31, 2023); *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 14 (D.D.C. 2019).

Andeavor's other arguments fare no better. It insists the Indian Landowners share no defenses at issue in *Tesoro*. Resp. Br. 62. Yet the district court has suggested just the opposite, and Andeavor fails to explain why the district court is wrong. Order Denying Intervention at 10, *Tesoro* (Aug. 8, 2023), R. Doc. 67; *see also* Intervenors' Counter-Claim at 10-11, *Tesoro* (Aug. 20, 2021), R. Doc. 17-1 (identifying defenses available to allottees). Andeavor further contends there is no overlap with *Tesoro* because the United States' counterclaim has been severed and stayed. Resp. Br. 62. But the counterclaim has not been *dismissed*. Plus, the overlap extends to the administrative portion of the case, not just the trespass claim.

Last, Andeavor maintains that *Tesoro* is ripe for decision because a motion is ready to be decided. Resp. Br. 11-12, 61-62. But that is a motion for a preliminary injunction, and it has been pending for three years. *See* Mot. for Prelim. Inj., *Tesoro* (June 11, 2021), R. Doc. 3. Intervention would thus introduce no delay.

C. The District Court Abused Its Discretion By Ignoring Consolidation

The district court also erred in denying consolidation. Both the district court itself and the Indian Landowners raised consolidation below, but the district court failed to resolve the issue. That was an abuse of discretion requiring remand. Op. Br. 52-53.

Andeavor maintains that no case remained to consolidate with *Tesoro*. Resp. Br. 63. The district court, however, erred in denying the claims on the merits. *Supra* 3-28. At minimum, then, reversal and remand are required so the district court can conduct the analysis it skipped.

V. THIS CASE SHOULD NOT BE STAYED

Despite recognizing that the Indian Landowners are entitled to litigate their claims, the United States suggests that this case should be stayed on remand. U.S. Br. 26. This astounding suggestion from the Indian Landowners' purported trustee smacks of condescension and demonstrates yet another way the United States' interests differ from the Indian Landowners'. And it is wrong three times over.

First, the United States is no substitute for the Indian Landowners. *Supra* 29-31. Our nation is well past the days when a paternalistic federal government should decide what is good for Indians instead of the Indians themselves. The very idea that that remains appropriate exemplifies the condescension and arrogance that for

over two centuries has led the United States to mismanage Indian interests in the name of "serving" them.

Second, the United States improperly injects this issue into this appeal. As *Chase I* underscored, the district court should determine whether and when to stay its proceedings. 12 F.4th at 877-78.

Third and finally, the United States' suggestion is overinclusive. The United States has asserted only trespass and ejectment claims—not the breach-of-easement and unjust enrichment claims that the Indian Landowners also bring here. *See Tesoro* Counterclaim at 27-29, ¶¶ 37-45. Those latter claims should not languish while the United States litigates other claims.

CONCLUSION

The district court's decision should be reversed, and no stay should be entered.

Respectfully submitted this 13th day of May 2024.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation established by this Court's May 7, 2024 order because it contains 8,000 words, excluding those parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and Fed. R. App. P. 32(f).

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/s/ Keith M. Harper
Keith M. Harper

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on May 13, 2024.

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/s/ Keith M. Harper
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