IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

EDWARD "SULLY" DANKS, SR., and GEORGIANNA DANKS, as Land Owners Plaintiffs, v. SLAWSON EXPLORATION COMPANY, INC., and WHITE BUTTE OIL OPERATIONS, LLC, Defendants.	)	Case No. 1:18-cv-186-CSM

DEFENDANTS' CONSOLIDATED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS THIS ACTION WITHOUT PREJUDICE AND REPLY IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT

Defendants Slawson Exploration Company, Inc. ("Slawson") and White Butte Oil Operations, LLC ("White Butte," and collectively with Slawson, "Defendants"), by and through their undersigned counsel, hereby submit this consolidated: (1) Response in opposition to Plaintiffs Edward "Sully" Danks, Sr. and Georgianna Danks' (collectively, "Plaintiffs") Motion to Dismiss This Action Without Prejudice [Dkt No. 36]; and (2) Reply in support of Defendants' Amended Motion for Summary Judgment [Dkt No. 37], as the issues presented are intertwined.

INTRODUCTION

Plaintiffs have unsuccessfully litigated their claims against Defendants for more than three years, in two different forums. Now, with Defendants seeking summary judgment based on the uncontroverted evidence demonstrating that Plaintiffs have suffered no damages, Plaintiffs want to again start over in a new forum. This Court should not countenance Plaintiffs' forum shopping and attempt to avoid a decision on the merits in a case, in which Plaintiffs have

caused Defendants great expense, and in which Plaintiffs themselves have failed to participate or present a viable case. Summary Judgment should enter in Defendants' favor on all claims asserted in Plaintiffs' (Second) Amended Complaint [Dkt No. 24].

Concomitantly, Plaintiffs' purported rationale for dismissal—that there is an administrative remedy they must first pursue—is not well-taken. The Bureau of Indian Affairs ("BIA") and the governing regulations allow an appeal of a BIA action or decision with respect to rights-of-way on Indian land, but do not permit Plaintiffs to simply file a trespass Complaint seeking money damages from Defendants to be adjudicated by BIA. *See, e.g.,* 25 C.F.R. Part 2. Accordingly, the Motion to Dismiss should be denied.

Finally, even if the Court were persuaded to allow Plaintiffs to dismiss their case without prejudice, Fed. R. Civ. P. 41(a)(2) permits such a dismissal only "on terms the court considers proper," which in this case must include an Order for Plaintiffs to pay Defendants' reasonable attorneys' fees and costs accrued over three years defending claims Plaintiffs now concede were improper in the first instance.

PLAINTIFFS FAIL TO RESPOND TO STATEMENT OF UNCONTESTED MATERIAL FACTS, OR PROVIDE THEIR OWN STATEMENT OF FACTS, PURSUANT TO D.N.D. Civ. L. R. 7.1(A)(3)

It is noteworthy that Plaintiffs' Response [Dkt No. 38] to the Amended Motion for Summary Judgment does not include any response to Defendants' Statement of Uncontested Material Facts; nor does it "state the facts upon which the party opposing summary judgment relies," as required by D.N.D. Civ. L. R. 7.1(A)(3). Instead, Plaintiffs' Response raises a new, and unrelated issue: Plaintiffs' purported failure to exhaust administrative remedies with BIA.

As explained below, Plaintiff's rationale for seeking dismissal of this case after nearly three years lacks merit.

ARGUMENT

I. The Court has Jurisdiction to Enter Summary Judgment Based on Plaintiffs' Failure to Adduce Any Evidence of Damages.

The Court has previously confirmed that subject matter jurisdiction is proper, and Plaintiffs' new Complaint to BIA confirms—not alters—that conclusion. Because jurisdiction is proper, and because there is no genuine issue of material fact regarding Plaintiffs' lack of damages, summary judgment should enter in Defendants' favor.

A. Plaintiffs' New BIA Complaint Confirms that this Court has Diversity Jurisdiction, Pursuant to 28 U.S.C. § 1332.

As the Court is aware, from the outset of this dispute in Tribal Court of the Three Affiliated Tribes, continuing through Plaintiffs' attempt to maintain an action in this Court, Defendants repeatedly argued that subject matter jurisdiction was lacking (although never for the reason Plaintiffs now suggest). The Tribal Court agreed that it lacked jurisdiction due to a forum selection clause in the parties' October 2, 2012 Surface Use and Damage Agreement. *See* Tribal Court Order [Dkt. No. 9-1].

Once Plaintiffs reconstituted their claims in this forum, the Court correctly concluded that, if proven, Plaintiffs' allegations of a release resulting in property damage, might give rise to a common law claim of trespass or nuisance. Order dated October 16, 2019 [Dkt. No. 18]. Of course, the Court would not have jurisdiction to adjudicate Plaintiffs' common law claim absent some other basis for federal court jurisdiction. Accordingly, the Court ordered Plaintiffs to

provide a more definite statement in the form of a Second Amended Complaint, and to specify the basis for federal court jurisdiction. *See* January 22, 2020 Order [Dkt No. 23].

From Defendants' perspective, the only potentially viable basis for federal court jurisdiction subsequently articulated by Plaintiffs was diversity jurisdiction, pursuant to 28 USC § 1332. Because this case is clearly between citizens of different states, the only question was whether Plaintiffs could satisfy the $75,000 amount in controversy requirement. 28 USC § 1332(a). While it was unclear exactly how Plaintiffs arrived at their damages calculation, Plaintiffs and their counsel represented to the Court and Defendants that the amount in controversy was satisfied.

The recently filed BIA Complaint supports Plaintiffs' claim that the amount in controversy requirement for diversity jurisdiction is satisfied here. In that Complaint, Plaintiffs renew their assertion that they have suffered $600,000 in damages to their "land surface and subsurface caused by the oil spill." [Dkt. No. 37.1]. As set forth in the Amended Motion for Summary Judgment [Dkt. No. 37], Defendants are prepared to accept Plaintiffs' representation (for purposes of this Motion) and to therefore seek summary judgment on the merits, and not based on any jurisdictional argument.

B. <u>There is No Administrative Remedy for Plaintiffs to Exhaust that Would Divest this Court of Jurisdiction</u>.

After asserting for years that this Court was the proper venue for their claims, Plaintiffs now insist that the Court "lacks subject matter jurisdiction." [Dkt No. 36-1]. While characteristically unclear, it appears that Plaintiffs are attempting to concede that they have failed to exhaust administrative remedies with BIA. Specifically, Plaintiffs assert that they have recently filed an administrative complaint against Defendants, which asks BIA to award damages

to Plaintiffs based on property damages allegedly caused by the spill. Plaintiffs insist this unilateral action (without any action by BIA itself), divests this Court of jurisdiction, and confers exclusive jurisdiction to BIA, pursuant to:

> U.S.C. § 704 [sic]; 25 C.F.R. § 2.6, *Fort Berthold Land and Livestock Assoc. v. Anderson*, 361 F. Supp. 2d 1045, 1049 (D.N.D. 2005); *citing McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); and more recently in this Court *Tex Hall v. Tesoro High Plains Pipeline Company, LLC,* F. Supp. (D.N.D. Case No. 1:18-CV-00217, Ap 6, 2020).

Motion to Dismiss [Dkt. No. 36-1] at 1-2.

Plaintiffs' argument lacks merit and appears to be little more than a thinly-veiled pretext for avoiding an adverse judgment in this case, where they have failed to participate in discovery or meaningfully respond to the motion seeking summary judgment on the merits.

For one thing, the Complaint Plaintiffs claim to have filed with BIA, is not authorized by the governing regulations. BIA regulations related to rights-of-way on tribal *and* individual Indian owned land are set forth in 25 C.F.R. Ch. 1, Subch. H, Pt. 169 ("Part 169"). As the authorities cited by Plaintiffs reveal, BIA oversees the procedure for an applicant to obtain consent from a tribe or individual Indian landowner. *See, e.g., Tex Hall v. Tesoro High Plains Pipeline Company, LLC,* Case No. 1:18-CV-00217 (D N.D. April 6, 2020), citing 25 C.F.R. § 169.107. BIA regulations further outline the appeal process from BIA decisions regarding rights-of-way, pursuant to 25 C.F.R. Part 2. *Id.,* citing 25 C.F.R. § 169.13. Nowhere in Part 169 or Part 2, or the other authorities cited by Plaintiffs, however, is BIA empowered to hear Plaintiffs' purported Complaint against Defendants seeking monetary damages for a spill on Plaintiffs' land surface. [Dkt No. 37-1].

Because Plaintiffs allege a trespass by Defendants and do not challenge any action taken BIA, there is no administrative decision that must be appealed or made final before Plaintiffs can pursue judicial relief. The authorities cited by Plaintiffs are in accord; none requires exhaustion under these facts. *See, e.g.,* 5 U.S.C. § 704 (providing that certain agency actions are subject to judicial review); 25 C.F.R. § 2.6 (requiring appeal before agency decision is considered final and subject to judicial review); *Fort Berthold Land and Livestock Assoc. v. Anderson*, 361 F. Supp. 2d 1045, 1049 (D.N.D. 2005) (noting that exhaustion is not always required, but requiring exhaustion in that case because the grazing permit issue was awaiting a final decision by the Regional Director); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (unrelated to the BIA regulations except insofar as it is quoted in *Anderson* for the proposition that "The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking"); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (also unrelated to BIA regulations except insofar as it is quoted in *Anderson* for the proposition that "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed"); *Tex Hall v. Tesoro High Plains Pipeline Company, LLC,* Case No. 1:18-CV-00217 (D N.D. April 6, 2020) (requiring exhaustion because "insofar as the Plaintiffs are challenging the BIA's grant of the 1993 easement… the Plaintiffs have never appealed that decision with the BIA itself").

Plaintiffs' attempt to create a required administrative remedy where none exists is not well-taken and provides no basis for Plaintiffs to avoid entry of summary judgment.

C. Summary Judgment is Warranted Because Plaintiffs Have Suffered No Damages.

Considering the foregoing, the Court is empowered to decide Defendants' Amended Motion for Summary Judgment, the substance of which is uncontroverted. Plaintiffs' operative Second Amended Complaint [Dkt. No. 24] is devoid of an articulation of damages, and the record is similarly devoid of evidence to support any claimed damages. Indeed, the only record evidence is Defendants' expert report which conclusively establishes that the 2016 release that is the subject of Plaintiffs' claims resulted in no damage to Plaintiffs' surface estate and was successfully remediated. Ex. 3, Peterson Report (any soils impacted by the September 20, 2016 release were removed and the small, impacted area was successfully remediated) [Dkt No. 37-3]. Further, Plaintiffs have elected not to respond to written discovery requesting information regarding their damages. Thus, by operation of law, Plaintiffs have admitted they lack proof of damages. Fed. R. Civ. P. 36. Because Plaintiffs have failed in numerous respects to prove the essential element of damages, summary judgment is warranted.

II. Plaintiffs' Request for Dismissal Without Prejudice is Inappropriate and Should Only be Granted if Conditioned on Payment of Defendants' Attorneys' Fees and Costs.

At this point in the case, after three years in federal court and a failed Tribal Court action before that, Plaintiffs are assuredly not entitled to simply dismiss this action *without prejudice*. Because both an answer and a motion for summary judgment have been filed, dismissal at Plaintiffs' request requires a court order on terms the Court considers proper. *See* Fed. R. Civ. P. 41(a)(1), (2).

The decision whether to allow a party to voluntarily dismiss a case rests within the sound discretion of the Court. *See, e.g., Bodecker v. Local Union No. P–46*, 640 F.2d 182, 186 n. 5 (8th

Cir. 1981). In exercising its discretion, the Court should consider factors such as whether the party has presented a proper explanation for its desire to dismiss, *see, e.g., Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir.1987); whether a dismissal would result in a waste of judicial time and effort, *see, e.g., Tikkanen v. Citibank (South Dakota) N.A.*, 801 F.Supp. 270, 273–74 (D.Minn. 1992); and whether a dismissal will prejudice the defendants, *see, e.g., Metropolitan Federal Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir.1993). Likewise, a party is not permitted to dismiss merely to escape an adverse decision or to seek a more favorable forum. *See, e.g., Holmgren v. Massey–Ferguson, Inc.*, 516 F.2d 856, 857 n. 1 (8th Cir. 1975).

In this case, every factor weighs in favor of denying Plaintiffs' Motion to Dismiss. Plaintiffs attempt to dismiss in order to pursue administrative remedies is improper (as there is no such administrative remedy), an attempt at forum shopping, or both. Dismissal would also waste three years of judicial resources invested in this case, which should instead be resolved on the merits. Perhaps most importantly, Defendants have been prejudiced by Plaintiffs successive and improper attempts to sue in Tribal Court, this Court, and now perhaps in some unrecognized administrative forum. Accordingly, Plaintiffs Motion to Dismiss should be denied. Alternatively, the Court is empowered to dismiss the case *with prejudice* or to condition any dismissal *without prejudice* on Plaintiff's payment of Defendants' reasonable attorneys' fees and costs arising from three years of litigation in a forum Plaintiffs now concede was incorrect all along.

CONCLUSION

Plaintiffs' case, premised upon unsubstantiated allegation of damages arising out of a 2016 spill, is belied by the only evidence in the record, making summary judgment appropriate. Plaintiffs' attempt to dismiss their case to avoid this clear and correct result is untenable. Plaintiffs' Motion to Dismiss should be denied or, alternatively, Defendants should be awarded their reasonably attorneys' fees and costs.

Respectfully submitted this 12th day of May 2021.

s/ Jeffrey M. Lippa
Jeffrey M. Lippa
WILLIAMS WEESE PEPPLE & FERGUSON
1801 California Street, Suite 3400
Denver, CO 80202
Telephone: 303-861-2828
Email: jlippa@williamsweese.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2021, a true and correct copy of the foregoing **DEFENDANTS' CONSOLIDATED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS THIS ACTION WITHOUT PREJUDICE AND REPLY IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT** was served upon the following counsel of record:

Donald G. Bruce
BRUCE LAW OFFICE
P.O. Box 674
Belcourt, ND 58316
Telephone: (701) 477-8755
Email: michif0@yahoo.com

ATTORNEYS FOR PLAINTIFFS

s/ Jeffrey M. Lippa
Jeffrey M. Lippa