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

Edward "Sully" Danks Sr, and Georgianna Danks, as land owners, Plaintiffs, vs. Slawson Exploration Company, Inc., and White Butte Oil Operations, LLC, Defendants.	)	**ORDER DENYING PLAINTIFFS' MOTION TO DISMISS, ORDER REQUIRING PLAINTIFFS TO SHOW TO CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE, AND OTHER ORDERS** Case No. 1:18-cv-186

Before the court are defendants' motion to dismiss for lack of jurisdiction or, in the alternative, for summary judgment and plaintiffs' motion to dismiss without prejudice. After filing their motion to dismiss or for summary judgment, defendants filed an "amended" motion that deleted the request for dismissal on jurisdictional grounds. However, for reasons detailed herein, the court cannot overlook the concerns raised by defendants that the court lacks jurisdiction.

I. BACKGROUND

Plaintiffs are Native Americans. They reside within the exterior boundaries of the Fort Berthold Indian Reservation, owning allotments in land held in trust by the United States. Plaintiffs commenced this action on September 12, 2018, seeking damages for alleged pollution of their land resulting from a 2016 release of oil from a well operated by defendants. (Doc. No. 1).

Previously, plaintiffs had sought redress in tribal court where they sued defendants for tortious interference with their property. The tribal court dismissed that action on June 27, 2018, based on a forum-selection clause in a 2012 agreement between the parties governing the grant of right-of-way for defendants' oil well and associated facilities ("2012 Agreement"). The forum-

selection clause provided that any dispute arising out of the 2012 agreement or its subject matter could be adjudicated only in the North Dakota state or federal courts. (Doc. Nos. 9-1; 9-3).

Defendants responded to plaintiffs' Complaint in this action by filing a motion to dismiss for failure to state a claim, arguing that the only claim asserted in the Complaint was for breach of an earlier 2010 Surface Damage, Access and Easement Agreement ("2010 Agreement"). Defendants claimed the 2010 Agreement was not in force at the time of the release of oil upon plaintiffs' land and had been replaced by the 2012 Agreement that the tribal court relied upon for its dismissal of plaintiffs' earlier action. (Doc. No. 8).

The court denied defendants' motion to dismiss. While agreeing that the 2010 Agreement had been superseded by the 2012 Agreement, the court concluded plaintiffs had pled facts that might give rise to common law claims for damage to their property under tort (similar to what had been pled in tribal court) and possibly also nuisance. The court allowed plaintiffs to file an amended complaint that more clearly set forth the claims being asserted. (Doc. No. 18). Danks v. Slawson Exploration Co., Inc., No. 1:18-cv-186, 2019 WL 5213868 (D.N.D. Oct. 12, 2019).

Plaintiffs subsequently filed an Amended Complaint that removed the earlier reference to the 2010 Agreement and added an allegation that the released oil polluted a creek used by plaintiffs to water their cattle. (Doc. No. 19). Notably, there was still no specific reference to a tort claim for damage to property or nuisance.

Plaintiffs' Amended Complaint did little to clear up what claims were being asserted. In response, defendants justifiably filed a motion for a more definite statement. (Doc No. 20). Plaintiffs responded to that motion arguing in part for the first time that they had claims under the federal Oil Pollution Act of 1990 ("OPA") as well a violation of a consent decree entered by this

court in a separate action—neither of which were asserted in the Amended Complaint. (Doc. No. 21). This presented an even more confusing situation. As a consequence, the court granted defendants' motion for a more definite statement. (Doc. No. 23). Danks v. Slawson Exploration Co., Inc., No. 1:18-cv-186, 2020 WL 365497 (D.N.D. Jan. 22, 2020).

Defendants' motion for a more definite statement did touch upon the question of the court's jurisdiction. While stating they needed more information to be able to fully respond to plaintiffs' jurisdictional allegations, they did articulate why they believed the court likely did not have jurisdiction. With respect to plaintiffs' claim of federal question jurisdiction under 28 U.S.C. § 1331, defendants contended there could not be a viable claim under the OPA because the penalties that plaintiffs appeared to be seeking cannot be recovered by private litigants. The court, however, concluded it could not then decide there was no possibility of a viable claim pursuant to the OPA, if one was properly pled, since the OPA does allow for a claim by private litigants for damages resulting from contamination of navigable waters or adjoining shorelines. Danks, 2020 WL 365497, at *2.

As for plaintiffs' claim of diversity jurisdiction under 28 U.S.C. § 1332, defendants contended that plaintiffs could not satisfy the requirement that their damages must exceed the the $75,000 threshold for diversity jurisdiction. According to defendants, this was because of the expert report they proffered, which they contended conclusively demonstrated plaintiffs had suffered no damage. The court noted, however, that the expert report on its face was by no means conclusive with respect to the question of damages. Further, the court observed that defendants had admitted there had been a release of oil upon plaintiffs' property and that, if the land had become polluted as plaintiffs claimed, it would not take much to reach the $75,000 dollars in terms of damages to

property and/or the costs of remediation. In view of this, the court suggested it may be difficult to conclude at the pleading stage with a "legal certainty" that plaintiffs had not suffered damages in excess of $75,000. Id. at **2–3.

The expert report that plaintiffs submitted with their motion for a more definite statement did state in the portion entitled "BACKGROUND" that the release of oil was limited to approximately three barrels of oil and that defendants had remediated the area impacted by the release by mowing and removing the vegetation. However, there was nothing in the report indicating that the expert had first hand knowledge of the amount of oil released or that the release of oil was limited to the area that was mown by defendants. Also, there was nothing in the report stating he conducted an investigation to ascertain these points, much less explain what that entailed. Hence, the portion of the report, which states as "background" that the area impacted was limited to that which was mowed by defendants and that only approximately three barrels of oil had been released, from all appearances was rank hearsay and otherwise not the proper subject of expert testimony.

Further, even with respect to samples that were taken from the mowed area, the report was somewhat vague in terms of the significance of what was found. It appeared the results of some of the analysis of some of the soil samples was the presence of compounds consistent with the presence of petroleum. The report stated that with respect to these samples the levels of the compounds in questions were below North Dakota Department of Health ("NDDH") action levels (whatever that might mean) and, hence, no further remediation was required.

Finally, the report was inconsistent in terms of the efforts purportedly made by defendants to remediate the limited area claimed to be impacted. At one point, the report stated the remediation

consisted of defendants mowing the vegetation in the claimed area of impact and removing it. At other points, the report talks about removal of soil. But, if soil was removed and the reference to its not being merely loose language, the report does not indicate when this was done or why.

In sum, while defendants' expert report was some evidence of lack of damage, it did not conclusively establish the absence of damage to the area admittedly impacted—even accepting defendants' interpretation of the lab results of the samples taken. Further, and even more significantly, it was no evidence with respect to the areas surrounding the well that were not mowed by defendants, including the creek that plaintiffs alleged was impacted and the wellsite itself.

Following the court's grant of defendants' motion for a more definite statement, plaintiffs filed a Second Amended Complaint, which is now the operative pleading. In the Second Amended Complaint, plaintiffs contend they are entitled to damages under the following claims for relief: (1) 33 U.S.C. § 2702 (Oil Pollution Act); (2) N.D.C.C. ch. 38-11.1; and (3) common law claims of trespass and nuisance. In addition, plaintiffs continue to allege this court has both federal question and diversity jurisdiction, claiming with respect to the latter that their damages are in excess of $75,000. (Doc. No. 24). Defendants responded this time by answering, but continued to claim in their Answer that jurisdiction was lacking. (Doc. No. 25).

After defendants answered, the court on September 8, 2020, entered a scheduling order setting deadlines for completion of various pretrial activities. Included within the court's progression order were deadlines for:

- completion of discovery and filing discovery motions (2/28/21);
- expert witness disclosures and reports (plaintiffs' disclosure 12/15/2020, defendants' disclosure/15/2001; and rebuttal disclosures 2/15/21);

- amending pleadings (9/15/20); and
- filing of dispostive motions (3/31/21).

(Doc. No. 28). In addition, the court scheduled a bench trial to be held on July 20, 2021. (Doc. No. 30).

According to defendants' most recent motion, plaintiffs thereafter conducted no discovery of their own, did not proffer an expert report, and failed to respond to any of defendants' discovery requests dated January 27, 2021, and for which responses were nominally due a few days prior to the close of discovery. According to defendants, the latter included plaintiffs' failure to respond to requests for admissions that asked plaintiffs to admit they suffered no damages as well as that any damages suffered were less than $75,000. (Doc. Nos. 37-3; 37-4).

Notably, at no time prior to the expiration of the deadlines set forth in the progression order did plaintiffs seek relief from its deadlines, nor have they since. On the other hand, however, defendants chose not to file a timely motion to compel discovery, which, together with an order to compel, are conditions precedent under Fed. R. Civ. P. 37 for the sanction of dismissal of this action for plaintiffs' failure to respond to defendants's discovery requests. See, e.g., Keefer v. Provident Life and Acc. Ins. Co., 238 F.3d 937, 940–41 (8th Cir. 2000); Wright & Miller, Federal Prac. & Proc. § 2289 (April 2021 update).

Within close proximity in time to plaintiffs failure to respond to defendants' discovery requests, plaintiffs initiated an administrative action with the United States Department of Interior acting through its Bureau of Indian Affairs ("BIA"). In the administrative complaint dated March 16, 2021 (which defendants state was filed with the BIA on April 2, 2021), plaintiffs continue to allege that they have been damaged by the 2016 release of oil from one of defendants' wells. They

also allege they have been damaged by defendants' failures to spray for noxious weeds along defendants' right-of-way and around its wellsite. While not entirely clear, this second claim for damages appears to be unrelated to the oil release that is the subject of this action. Plaintiffs request that the BIA determine the amount of compensable damages, which plaintiffs now allege to be $600,000, and that the BIA pay over the amount of damages it determines from the bond filed by defendants for their operations. (Doc. No. 37-1).

On March 31, 2021, defendants moved the court for an extension of the deadline to file dispostive motions to April 5, 2021, which the court granted. (Doc. Nos. 33 & 34). Thereafter, on April 4, 2021, defendants filed their motion to dismiss for lack of jurisdiction or, in the alternative, for summary judgment that is now before the court. (Doc. No. 35). With respect to the claim of lack of jurisdiction, defendants again argue there is no viable federal OPA claim that would provide the court with federal question jurisdiction under 28 U.S.C. § 1331. This time they point to the lack of any evidence that the released oil impacted navigable waters of the United States, much less that plaintiffs suffered damages resulting from navigable waters of the United States having been polluted.

As for plaintiffs' claim of diversity jurisdiction, defendants point to the lack of any record evidence of plaintiffs' property having suffered any damage, much less damage in excess of the $75,000 threshold. In support, they rely upon:

- the expert report discussed earlier;
- plaintiffs' failure to respond to the requests for admissions, which they contend results in plaintiffs having admitted for purposes of this action that they suffered no damages; and

- plaintiffs' failure to proffer any evidence of damages in response to their motion.

As for defendants' alternative request for summary judgment, defendants argue that plaintiffs' federal OPA claim fails for the reasons already noted. With respect to the remaining claims, defendants argue that dismissal is appropriate because of the lack of record evidence that plaintiffs suffered any damages, which they claim is an essential element of the remaining claims for relief.

Prior to responding to defendants' motion to dismiss for lack of jurisdiction or for summary judgment, plaintiffs themselves on April 21, 2021, moved to dismiss this action without prejudice. (Doc. No. 36). As grounds for the motion, plaintiffs reference the administrative complaint that they filed with the BIA and cite authority they claim stands for the proposition that this court lacks jurisdiction.

Following the filing of plaintiffs' motion to dismiss, defendants filed what they have characterized as an "amended" motion for summary judgment on April 23, 2021. (Doc. No. 37). In their amended motion, defendants state they did not become aware of the administrative action filed by plaintiffs with the BIA until after they filed their motion to dismiss for lack of jurisdiction or, in the alternative, for summary judgment. Defendants state that now they no longer wish to contest plaintiffs' allegations that they have been damaged in an amount in excess of $75,000 and seek only summary judgment on the merits. Notably, however, defendants have proffered any facts to support why what they have previously contended is the lack of any damage is no longer correct. In fact, defendants continue to rely upon their expert report, plaintiffs' failure to respond to their requests for admissions, and plaintiffs' failure to come forward with evidence of damages as supporting their argument that they are entitled to summary judgment of dismissal because of the

lack of evidence of damages.

Thereafter, plaintiffs filed their response to defendants' motion for summary judgment, contending only that the court cannot consider defendants' motion because of the purported lack of jurisdiction for the reasons cited in their motion to dismiss. (Doc. No. 40). Plaintiffs did not otherwise address the substance of defendants' motion. Why they did not do so is not clear. That is, whether plaintiffs were of the mistaken belief they did not need to because of the nature of their own motion to dismiss (*i.e.*, the court lacks jurisdiction) or whether they believed they could not successfully oppose the motion and were putting all their chips on their motion to dismiss.

II. DISCUSSION

A. Defendants' claim that the court lacks jurisdiction

Defendants have at least thrice contended the court lacks jurisdiction in this case—in their motion for a more definite statement, in their answer, and most recently in their motion that is now before the court, at least until their attempt to amend it. As noted above, plaintiffs state in their amended motion that they are no longer contesting plaintiffs' allegations that the damages in this case exceed the jurisdictional threshold for diversity jurisdiction. Without explicitly so stating, defendants presume the court will then exercise jurisdiction pursuant to plaintiffs' claim of diversity jurisdiction, since defendants continue to contend that the OPA claim (which they believe to be the only basis for federal question jurisdiction is a nonstarter.

Defendants' last-minute attempt to abandon their claim that jurisdiction is lacking is not, however, driven by some change in what defendants contend are the facts. Quite the contrary. As detailed above, one of the reasons why defendants claim they are entitled to summary judgment on the merits is because plaintiffs have suffered no damages based upon the "record evidence."

The problem with defendants "too cute by half" amended motion is that it ignores the fundamental principle that the parties cannot confer jurisdiction upon the court by stipulation, waiver, or failure to raise the issue—even as to the jurisdictional amount in the case of diversity jurisdiction. See, e.g, James Neff Kramper Family Farm Partnership v. IBP, Inc., 393 F.23d 828 (8th Cir. 2005) ("Kramper Family Farm"); In re Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir.2003); see generally Wright & Miller, Fed. Prac. & Proc. § 3702.4 (April 2021 Update). Hence, the court is not willing to simply treat as inoperative defendants' contention that diversity jurisdiction is lacking because damages could not possibly reach the jurisdictional threshold amount simply because defendants now believe it is no longer to their advantage for the court to go down that road.

As recounted above, the court earlier concluded it was not in position to rule on defendants' initial suggestion that jurisdiction may be lacking given what was then before the court, including that plaintiffs had yet to plead a viable complaint. Now, however, circumstances have changed. We are beyond the pleading stage. The parties have had the opportunity to conduct discovery relevant to the jurisdictional allegations. And, there are now serious questions with respect to whether the court has federal question jurisdiction based upon plaintiffs' OPA claim for the reasons articulated by defendants.

The same is true for plaintiffs' claim of diversity jurisdiction. While defendants' expert report by itself is not sufficient to establish that any claimed damages are below the jurisdictional threshold,[1] plaintiffs have the burden of demonstrating the court has jurisdiction and there is now

[1] Defendants continue in their most recent motion to claim that their expert evidence establishes that only three barrels, or so, of oil were released and that the only area impacted was that which was mowed by defendants following the spill. In the motion to dismiss for lack of jurisdiction or for summary judgment, defendants state:

"**Second**, the uncontroverted evidence in the record establishes that the 2016 release resulted in no

their failure to respond to defendants' requests for admissions on this issue and their failure to offer some proof of damage in response to the motion for summary judgment. The latter is particularly troubling since plaintiffs appear to still be contending in their administrative complaint that they suffered damages in excess of the jurisdictional threshold, notwithstanding their failure to respond to the requests for admissions.

If this court has to rely upon the existence of diversity jurisdiction as the sole basis for its jurisdiction, it maybe incumbent upon the court now, given what has occurred, to conduct an inquiry to determine whether plaintiffs ever had a good faith basis for claiming damages in excess of the jurisdictional threshold. This is because the court cannot at this point discount the very real possibility now this case may be similar to Kramper Family Farm, supra. On appeal in that action, the Eighth Circuit *sua sponte* raised the question of whether the amount-in-controversy exceeded the jurisdictional threshold for plaintiff's claim of trespass. After supplemental briefing, the court concluded there had not been a good faith basis in the first instance for plaintiff's claim of damages in an amount that exceeded the jurisdictional threshold (which had been relied upon by defendant

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damages and was successfully remediated. Ex. 2, Peterson report (any soils impacted by the September 20, 2016 release were removed and the small impacted area was successfully remediated)." (Doc No 35, p. 12). Then, in the purported amended motion, defendants go further:

> 16. Defendants nevertheless timely designated their expert report, in which a registered professional geologist examined the site contemporaneously with the spill, and observed that the release of "[a]pproximately three (3) barrels of fluids consisting of petroleum hydrocarbons and water sprayed from the backside of the Panzer 2-20MLH well, resulting in an area of impact approximately 50 feet offsite across an adjacent field (Figure 2). [Defendants] responded to the release by mowing the impacted off-site vegetation, collecting it, and disposing of it offsite." Exhibit 3, Expert Report of John D. Peterson ("Peterson Report").
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> 17. Defendants' expert opines that any soils impacted by the September 20, 2016 release were removed and the small impacted area was successfully remediated. *Id.*

(Doc. No. 37, p.5). However, the expert report by itself does not support all of what is being claimed for the reasons detailed earlier, and "attorney speak" is not evidence.

This is not to say that what defendants are claiming is not what occurred. It is only that the report does not by itself support it. But, to be fair, defendants' expert report was prepared prior to the commencement of this action and for another purpose. For purposes of this case, defendants may have decided it was not worth securing a report more tailored to this case or otherwise filling in the evidentiary gaps given plaintiffs' inaction—including their not have proffered any expert evidence.,

in its removal petition) and ordered the district court to remand the case to state court because of the lack of subject matter jurisdiction. 393 F.3d at 830–34.

It does appear, however, there is another basis for plaintiffs' claim of federal question jurisdiction apart from its OPA claim that has not been addressed by either party. In the Second Amended Complaint, plaintiffs for the first time made it clear they are asserting common law tort and nuisance claims. With the United States holding the land in question in trust for plaintiffs and their possessing a beneficial interest only, the common law claims for tort and nuisance arise under federal common law and thereby create the federal questions. See, e.g., Davilla v. Enable Midstream Partners, L.P., 913 F.3d 959 965 (10th Cir. 2019) (federal common law applies to claims of trespass on Indian allotted land and the court would look to state trespass law as providing the governing principles to the extent it comports with federal policy); United States v. Milner, 583 F.3d 1174–83 (9th Cir. 2009) ("federal common law governs an action for trespass on Indian lands" and that federal common law generally follows the Restatement of Torts); Houle v. Central Power Elec. Co-op, Inc., No. 4:09-cv-021, 2011 WL 1464918, at *3 n.1 (D.N.D. Mar. 5, 2011) report and recommendation adopted 2011 WL 8440490 (April 11, 2011) ("Houle") (concluding that the court would have jurisdiction under § 1331 for plaintiffs' claims of trespass on their allotted lands).

Because the court believes there is a basis for plaintiffs' claim of federal question jurisdiction, the court will not consider further whether there is diversity jurisdiction under § 1332. However, if the court is wrong about plaintiffs' common law claims giving rise to federal question jurisdiction, then it is problematic at best as to whether the court has jurisdiction.

B. Plaintiffs' motion to dismiss without prejudice

In plaintiffs' eleventh-hour motion to dismiss without prejudice, they claim the court now

lacks jurisdiction. In support, plaintiffs cryptically cite 5 U.S.C. § 704, 25 C.F.R. § 2.6, and two cases from this court: Hall v. Tesoro High Plains Pipeline Co., __ F. Supp. 3d __, 2020 WL 6193304 (D.N.D. 2020); Fort Berthold Land and Livestock Assoc. v. Anderson, 361 F. Supp. 2d 1045, 1049 (D.N.D. 2005) ("Fort Berthold Land and Livestock"). While plaintiffs offer no explanation for why this cited authority applies in this case, it appears their argument is that this court never acquired jurisdiction because plaintiffs had not yet exhausted available administrative remedies.

The precedent cited by plaintiffs, however, does not support any such argument for two reasons. First, Fort Berthold Land and Livestock and 5 U.S.C. § 704 are inapplicable because this is not an action against the United States pursuant to the Administrative Practices Act for which exhaustion of remedies leading up to a final decision of the federal agency in question is a condition precedent.

Second, this court's decision in Hall as well as the Supreme Court cases cited by plaintiff that Hall relied upon also are not applicable. In Hall, and in a couple of cases similar to it, this court has required exhaustion of the processes that the BIA has in place under 25 C.F.R. Part 169 before proceeding in this court and dismissed the actions without prejudice. See Hall, surpa; Fettig v. Fox, No. 1:19-cv-096, 2020 WL 9848691, at **16–22 & n.5 (D.N.D. Nov. 16, 2020), report and recommendation adopted 2020 WL 9848706 (Dec. 3, 2020). However, the court did so in those cases only after weighing relevant prudential considerations and concluding it was appropriate to invoke the doctrines of discretionary exhaustion or "primary jurisdiction" (which is somewhat of a misnomer). Id. Further, and more importantly here, these cases involved disputes over (1) the scope or terms of a grant of right-of-way over land held in trust by the United States for Indian allottees, or (2) claims of wrongful occupancy of allotted lands for purposes that require the grant

of a right-of-way approved by the BIA. This is important because, in those cases, the BIA had in place under 25 C.F.R. Part 169 processes to deal with the matters in dispute—all or in part. Id.

Here, plaintiffs seek damages for alleged pollution of land held in trust for them by the United States. It does not appear this is a matter within the scope of 25 C.F.R. Part 169. Further, plaintiffs in this action and in their administrative complaint seek only damages and they have not cited to any part of 25 C.F.R. Part 169 (or any other federal law or regulation for that matter) that empowers the BIA to adjudicate damages for the alleged pollution, nor is the court aware of any such authority. Finally, even putting all of that aside, the BIA has no particular expertise in terms of the issues that need to be revolved in this case, and this would broker against invoking discretionary exhaustion or primary jurisdiction.

In short, there is nothing in plaintiffs' motion that requires the court to defer to the BIA or do so on prudential grounds at this late stage, much less dismiss this action for lack of jurisdiction.[2]

This then leaves the question of whether the court should permit plaintiffs to dismiss this action without prejudice simply because they now wish to proceed before the BIA. If plaintiffs had sought to do so within a reasonable amount of time after filing this action, the court might very well have permitted it, even if it believed it likely would not be fruitful. However, this case has been pending now for almost three years and defendants have expended substantial resources in (1) addressing plaintiffs' struggles with pleading a cause of action, (2) engaging in discovery, and (3) filing a dispostive motion. Further, this case is not plaintiffs' first rodeo. As previously noted, there

[2] Neither plaintiffs nor defendants have contended this action cannot proceed because the United States is an indispensable party. Most likely, this is because of the precedent holding that Indian allottees can sue for damage to their allotment interests without the United States being a party—at least so long as the suit does not call into question the validity of a conveyance made by the United States. See, e.g., Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Houle, 2011 WL 1464918, at **24–28 (discussing relevant cases).

was their failed effort to seek essentially the same relief in tribal court, which also resulted in defendants expending resources. Finally, plaintiffs had the ability to file an administrative complaint with the BIA at least by the time that they filed this action, if not all the way back to 2016 when the release of oil took place.[3]

For all of these reasons, the court agrees with defendants that plaintiffs should not be permitted to dismiss this action unless it is with prejudice. Hence, plaintiffs' motion to dismiss without prejudice will be denied.

C. Defendants' alternative request for summary judgment of dismissal with prejudice

At this point, the court is reluctant to dismiss the case on the merits given the recent contentions by both parties that the court lacks jurisdiction. While plaintiffs' argument for lack of

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[3] In likely anticipation this would be a problem, plaintiffs' counsel offered as the second item in support of the motion to dismiss:

> 2. Plaintiffs' undersigned attorney recently learned the land at issue where the oil spilled occurred is land held in trust for Plaintiffs, by the Federal Government, through the Department of the Interior (DOI) Bureau of Indian Affairs (BIA), Fort Berthold Agency (FBA), New Town, North Dakota.

(Doc. No. 36-1). However, even if true, one of the first questions any practitioner, who is knowledgeable about Indian law, would ask is what is the status of the land at issue. Further, there are substantial reasons to doubt counsel's statement. The opening paragraph of the tribal court's order dismissing plaintiffs' tribal court action characterized plaintiffs' complaint in that case as follows:

> "The Plaintiffs filed this complaint for monetary damages alleging a tortious interference with their beneficial title to the surface estate of certain allotted trust lands on the Fort Berthold reservation. They claim that due to the Defendants' negligence an oil spill occurred on those lands and that they suffered harm that they seek monetary damages for.

(Doc. No. 9-1, p. 3). In addition, plaintiffs alleged in their Amended Complaint, dated October 19, 2020, in this action that "Plaintiffs are members of the MHA Nation, *reside on trust property* with the exterior boundaries of the Fort Berthold Indian Reservation . . . ." They then further alleged that:"Defendants are operating oil wells on the surface of Plaintiffs' lands described as NW1/4NE1/4 of Section 20, *BIA ROW No. FBOG100799*." (Doc. No. 19, p. 2) (italics added).

There are only two charitable explanations for counsel's claim that he only recently became aware the impacted property was trust land. The first is that, notwithstanding the tribal court's characterization, he was only aware of the ownership interest of the land upon which defendants' well was located and not the acreage impacted by the spill. While this scenario is not impossible given the checkerboard ownership on the Fort Berthold Reservation, its seem highly improbable. The second explanation is that plaintiffs' counsel simply forgot what he had previously known and alleged to be the case.

jurisdiction is a nonstarter, that may not be true for defendants' motion as articulated above. And, while the court believes it has federal question jurisdiction because plaintiffs' common law claims arise under federal law, this has not been explicitly argued by either party and the court believes it should first give the parties an opportunity to weigh in on the court's conclusion.

Also, there *may* be issues with defendants' arguments for dismissal on the merits—at least with respect to plaintiffs' common law claims. Arguably, proof of actual damages is not required to sustain these claims. Rather, in the absence of actual damages, the court may be able to award nominal damages, such as a dollar. And, this may be the case regardless of whether or not the court looks to state law for the governing federal common law principles. See, e.g., Uzuegbunam v. Preczewski, __ U.S. __, 141 S.Ct. 792, 798–801 (2021); Kuntz v. Leiss, 2020 ND 253, ¶¶ 5–7, 952 N.W.2d 35 (2020); N.D.C.C. § 32-03-38. Granted, there is the problem of plaintiffs' failure to respond to the requests for admission asking them to admit they did not suffer any damages. However, whether or not that fairly encompassed nominal damages need not be decided now because of what follows.

Defendants note in an affidavit by counsel submitted in support of their motion to dismiss or for summary judgment and again for their amended motion that, "[s]ince the Scheduling Conference held on September 8, 2020, Plaintiffs have not actively prosecuted or participated in this litigation." (Doc. Nos. 35-1; 37-2). While defendants have not argued for dismissal on this ground, it is within the court's inherent authority to dismiss a case for lack of prosecution, even without a motion by defendant pursuant to Fed. R. Civ. Proc. 41(b). See, e.g., Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Garrison v. International Paper, Co., 714 F.2d 757, 759–60 (8th Cir. 1983).

Here, there is reason is to conclude that plaintiffs have given up on this case. Most indicative

are plaintiffs' failure to respond to defendants' discovery and failure to substantively respond to the motion for summary judgment. There is also the fact they have not proffered any expert evidence, which likely would be required to prove actual damages, as well as their last minute motion seeking dismissal on a ground that lacks merit.

Given the unusual posture of this case, dismissal for failure to prosecute may be the most appropriate course of action. But, it is a drastic one. See, e.g., Hunt v. City of Minneapolis, Minn., 203 F.3d 524, 527–28 (8th Cir. 2000). Also, the Eighth Circuit has encouraged district courts to warn a litigant that he or she is "skating on the thin ice of dismissal" prior to dismissing on this ground—even when it may not be absolutely required. Id. (internal quotation marks omitted).

The upshot of all of this is that the court is going to require that plaintiffs show cause for why this case should not be dismissed with prejudice for failure to prosecute, particularly given that it has been pending now for almost three years and was on the eve of trial prior to the court canceling the trial because of the instant motions. The court will revisit the portion of defendants' motion for summary judgment on the merits if the court concludes that dismissal for failure to prosecute is not appropriate.[4] Finally, the court is going to issue several orders touching upon the question of the

[4] Even if the court was to conclude that dismissal for failure to prosecutes is not warranted, there would remain the problems of:

(1) Plaintiffs' failure to respond to defendants' requests for admissions that result in the matters being deemed admitted unless relief is granted (including, particularly, the admission that no damages, or at least no actual damages, have been suffered). See, e.g., Luick v. Graybar Elec. Co., Inc., 473 F.3d 1360, 1362 (8th Cir. 1972). Notably, Rule 36 is self-executing in this regard and a motion to compel is not required for the matters to be deemed admitted. See id.

(2) The failure to timely disclose expert testimony that will prohibit the introduction of any such testimony at trial unless relief is granted based on a showing of good cause. See, e.g., Petrone v Werner Enterprises, Inc., 940 F.3d 425 (8th Cir. 2019).

(3) The failure of plaintiffs to respond to defendants' merits-based arguments in the motion for summary judgment that may result in the dismissal of one or more of plaintiffs' claims. See, e.g., Ward v. Wind River Trucking, LLC, No. 1:16-cv-418, 2019 WL 7605678, at *1 (D.N.D. Octobee 29, 2019) (failure to respond to motion may be deemed an admission that the motion is well taken under D.N.D. Local Civ. R. 7.1(F)).

court's jurisdiction as well as putting this case back on the calendar for a two-day bench trial on October 28 and 29, 2021, in the event the court does not dismiss the case prior to that point.

III. ORDERS

Based on the foregoing, the court hereby **ORDERS** as follows:

1. Plaintiffs' motion to dismiss without prejudice (Doc. No. 36) is **DENIED**.
2. Plaintiffs must on or before August 25, 2021, show cause why the court should not dismiss this action *with prejudice* for lack of prosecution. Failing to show good cause will result in dismissal of the case with prejudice.
3. Plaintiffs and defendants shall have until August 25, 2021, to address whether the court has appropriately concluded that plaintiffs' common law claims arise under federal law and that, as a consequence, the court has jurisdiction under 28 U.S.C. § 1331 for this reason.
4. If either party contends this court has diversity jurisdiction under 28 U.S.C. § 1332, the party must offer evidence sufficient to show that at the time of the filing of the complaint there was a good faith basis for concluding that plaintiffs suffered damages in excess of the jurisdictional amount.
5. Defendants' motion for summary judgment will be held in abeyance until the court decides whether or not this action will be dismissed for failure to prosecute.
6. A 2-day bench trial is scheduled for October 28-29, 2021, commencing at 9:00 a.m Central Daylight Time in at the federal courthouse in Bismarck, North Dakota. At the present, this case will be second to another case the undersigned has scheduled for trial that week.

IT IS SO ORDERED.

Dated this 9th day of August, 2021.

/s/ Charles S. Miller, Jr.
Charles S. Miller, Jr., Magistrate Judge
United States District Court